



REPUBLIC OF KENYA

IN THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 337 OF 2016

SOPHIA JUMA SWALEHPETITIONER

VERSUS

THE INSPECTOR GENERAL OF POLICE1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION2ND RESPONDENT

THE HON. ATTORNEY GENERAL3RD RESPONDENT

AND

SAFARICOM LIMITED.....INTERESTED PARTY

DIRECTIONS FOR HEARING OF PETITION FOR HABEAS CORPUS

(Pursuant to Rules 20 and 21 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.)

Introduction

1. The petition seeks principally an order of habeas corpus and an order for presumption of death and compensation for the loss of the subject should the respondents fail to produce the person or body of the subject of the habeas corpus proceedings based on the averment of facts at paragraph 7 of the Petition that he could have been abducted and disappeared by officers of the Anti-Terrorism Police Unit, as follows:

“On 1st July at about 7.00pm Abdul Karuri Mwangi herein after referred to as “Abdul” was abducted whilst on his way to Pumwani Riyadhha Mosque by two persons in civilian dress that a witness who observed the incident believes were plainclothes police officers attached to the Anti-Terrorism Police Unit (ATPU).”

2. The petitioner’s supporting Affidavit states that her belief that the subject was arrested by the ATPU was based upon a Replying Affidavit filed in previous Judicial Review proceedings JR NO. 336 of 2015 by persons elected as official of the Pumwani Riyadhha Mosque Committee (PRMC) who included Abdul the subject herein challenging the refusal by the Registrar of Societies to register them as the elected officials of the Committee. In the Replying Affidavit sworn on 3rd February 2016, Mr. Cyrus W. Ngatia – Deputy Solicitor General in the Office of the Attorney General and Department of Justice on behalf of the Registrar of Societies indicated that the said officials were under investigations by the CID and ATPU for having links with terror group Al Shabab and carrying out terror related activities.

3. The Respondents have filed Replying Affidavits sworn by an ATPU officer and an officer from Criminal Investigation Department, Shauri Moyo Office to which the incident was reported, the effect of both of which is to deny any police involvement in the arrest and disappearance of the subject.

Request for Directions

4. For the hearing of the Petition, the petitioner has sought directions for *viva voce* evidence and sought summons for named persons as well as for the production of mobile phone records for the subject's mobile phone number, which the petitioners contend may have a bearing on the disappearance or whereabouts of the subject of the habeas corpus petition. Counsel for the petitioner also sought a direction that the respondents undertake and report on investigations as to the owner of a certain mobile phone line number from which phone-line someone had issued death threats to the petitioner regarding the prosecution of the petition before the court.

5. The court heard submissions on the petitioner's request for these directions as made by Counsel for the various parties before the court – Mr. Kibe for the petitioners, Ms Mwangi for the 1 and 3 respondents, Ms. Spirah for 2nd respondent and Mr. Kiptiness for the mobile phone service provider, Safaricom Ltd., the Interested Party herein.

6. There was agreement that the petition may be heard by way of *viva voce* evidence.

7. There was also agreement that the mobile phone data records may be produced by the interested Party service provider but there was no agreement as to its production without calling its maker as a witness.

8. There was disagreement between the respondents and the petitioner as to the need to summon as a witness a Deputy Solicitor General who in the previous court proceedings JR NO. 336 of 2015 had sworn an affidavit indicating that the subject of the petition was under police (CID and ATPU) investigation.

9. There was also disagreement as to whether the Police who were already a respondent through their Inspector General would be directed to commence investigation into the matter of the threats to the petitioner issued through the named mobile-phone line number within the ambit of this petition without formal report to a police station by a complaint on alleged threats.

Determination

10. The hearing of a petition filed under Article 22 of the Constitution is regulated by Rule 20 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Rule on the hearing of petition provides that proceedings may be had by either or the other of affidavits, submissions or oral evidence, or partly of affidavit and partly by oral evidence, as the court may direct:

“20. (1) The hearing of the petition shall, unless the Court otherwise directs, be by way of—

(a) affidavits;

(b) written submissions; or

(c) oral evidence.

(2) The Court may limit the time for oral submissions by the parties.

(3) The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.”

Summons of witnesses

11. Under Rule 20 (4) and (5) Court may summon witnesses for examination and cross-examination of its own motion, as follows:

“(4) The Court may on its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence is likely to assist the court to arrive at a decision.

(5) A person summoned as a witness by the court may be cross examined by the parties to the petition.”

The court will summon the witnesses sought if it takes the view that their evidence is likely to assist the court in arriving at its decision.

Electronic Evidence

12. There is no longer any question of admissibility of electronic evidence. As declared by amendment to the Evidence Act in 2014 by Statute Law (Misc. Amendments) Act No. 19 of 2014, s. 31., electronic evidence and digital material is admissible:

“78A. Admissibility of electronic and digital evidence

(1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.

(2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.

(3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—

(a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;

(c) the manner in which the originator of the electronic and digital evidence was identified; and

(d) any other relevant factor.

(4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

13. Before the 2014 amendment proof of electronic records was solely governed by section 106 B of the Evidence Act, (itself an amendment to the Kenya Evidence Act effected in 2009 by Act No. 1 of 2009) which provides as follows:

“106B. Admissibility of electronic records

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or

electro-magnetic media produced by a computer (herein referred to as “computer output”) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.”

14. The conditions for the admission of electronic evidence are set out in section 106B (2) as follows:

“(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.”

15. Once admissibility of electronic evidence is admitted, the only question that remains is on the proof or production before the court of such evidence which is conditioned upon existence of the facts set out in section 106B(2) of the Evidence Act.

Findings of the Court

16. Upon considering the petition herein, I find that the petition may suitably be heard partly by affidavit evidence for those matters of technical, formal nature such as records of the mobile phone company generated in the ordinary course of its business, and oral evidence for disputed matters of fact such as the investigation or otherwise, and consequently, the abduction and or arrest and detention or holding of the subject of the petition by the Police through its Criminal Investigation Directorate or, specifically, the Anti-terrorism Police Unit.

17. As the evidence of mobile-phone data records is of a formal nature generated in the ordinary course of the Interested Party’s operations, the same may, subject to compliance therein with section 106B (2) of the Evidence Act properly be produced by affidavit evidence, without proof of the original in terms of section 78A (4) of the Act. Accordingly, the evidence on Mobile phone data records will be produced by affidavit by a proper person authorized by the Safaricom mobile phone provider.

18. Having perused the Replying Affidavit of Cyrus Ngatia in JR No. 336 of 2015, particularly paragraphs 11-14 set out herein below, I considered that the person whose evidence in the matter may assist the court arrive at a decision in the petition is the Director of Criminal Investigation or his deputed officer who has information on the matter of the investigations referred to in the affidavit of Cyrus Ngatia, at paragraphs 13 and 14 thereof.

“Paragraphs 11-14 of Replying Affidavit of Cyrus W. Ngatia”

“11. That I further wish to state that the respondents did not approve and confirm the elections of the ex parte applicant as per the elections conducted on 21st August 2015. The reasons for declining to confirm those elections is as a result of several complaints received from members of Pumwani Riyadhha Mosque and members of the public regarding the current officials who comprise of some of the ex parte applicants who have been implicated in terror related crimes. Terrorism is a serious issue and threat to national security of the republic as whole and this deeply concerned the respondents.

12. That consequently the respondent was informed by a group of interested parties of Pumwani Riyadhha Mosque led by one Athman M. Mponda vide a letter dated 26th May, 2015 that the Chairman, Hamad Munyi Muriithi alias “Fundi” has been accused and charged with funding terrorism and having connections with a terror group known as Al Shabaab and the 1st ex parte Applicant herein, Abdulmajid Kariuki alias “Kabody” has also been accused and charged with attempting to bomb Parliament buildings and association with the terror related group known as Al Shabaab. The letter dated 26th May 2015 is annexed hereto and marked CWN “3”.

13. That having received such crucial and sensitive information touching on matters of national security, the Respondents launched an investigation into the activities of all the officials of Pumwani Riyadhha Mosque including the 1st, 3rd, 5th and 6th ex parte applicants. Consequently the respondents requested the Director of Criminal Investigation to assist in the investigation of the activities of the said officials who have been accused of having links to terror group Al Shabaab and of carrying out terror related activities.

14. That the respondents wish to state that the investigations are on-going and the Director of Criminal Investigations is required to forward a report on its findings to the 1st respondent after concluding investigations. The respondent is yet to receive the report and has been informed that investigations are still on-going and will take some time as the Anti-Terror Police Unit have to be involved in those investigations.

19. Accordingly, in addition to the deponents of the two replying affidavits herein, whose availability as their own witnesses the Respondents have confirmed, the Court will on its motion in terms of Rule 20 (4) of the Constitution of Kenya (Protection of Rights and Fundamental freedoms) Practice and Procedure Rules, 2013 summon the Director of Criminal Investigations to attend Court in person or by suitable representative who has knowledge of the conduct and outcome of the investigations referred to in the replying affidavit of Cyrus Ngatia in JR NO. 336 of 2015.

20. Summons to the witness to be identified by the petitioner as the proprietor or operator of the Mpambe Dishes Hotel where Abdul was allegedly last seen being bundled into a black motor vehicle will be summoned to give evidence in the matter.

Report of allegations of death threats

21. For purposes of a formal launch of investigations into the alleged death threats and to enable the recording of the complaint and statements as to the circumstances of the threat, the petitioner will file a formal complaint at the responsible police station. The police will undertake investigations and report to court as part of the hearing of the petition on the scheduled date.

Directions

22. Accordingly for the reasons set out above, the court makes the following directions for the hearing of the petition herein:

1. The hearing of the petition will proceed in accordance with Rule 20 (3) of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules,

2013, partly by affidavit evidence and partly by oral evidence.

2. The Interested Party shall file an affidavit on the mobile phone data records requested by the petitioners.

3. In accordance with Rule 20 (4) Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the Court of its own motion summons the Director of Criminal Investigation to attend court in person or by suitable representative to give evidence on investigations referred to in the Replying Affidavit of Cyrus W. Ngatia in JR No. 336 of 2015.

4. On application of the petitioners, summons will issue to the proprietor or operator of the Mpambe Dishes Hotel, Nairobi to give evidence before the court.

5. Parties are at liberty to call oral evidence, subject to exchange in good time before trial, of relevant witness statements for those witnesses who have not filed affidavits in the petition.

6. Hearing is confirmed for the 13th September 2016 and 20th September 2016 beginning at 10.00am on both dates.

23. Costs in the cause

DATED AND DELIVERED THIS 18TH DAY OF AUGUST, 2016.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Kinoti & Kibe Advocates for the Petitioners.

Office of Attorney General for Respondents.

Mr. Kazungu - Court Assistant.