



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**MILIMANI LAW COURTS**  
**PETITION NO 311 OF 2016**

**LAW SOCIETY OF KENYA .....1<sup>ST</sup> PETITIONER**  
**BRIAN NZENZE.....2<sup>ND</sup> PETITIONER**  
**ERICKSON ALUDA MAMBO ..... 3<sup>RD</sup> PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**  
**DIRECTOR OF PUBLIC PROSECTION.....2<sup>ND</sup> RESPONDENT**  
**INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**

**RULING**

[1] By a petition dated 21<sup>st</sup> July 2016, the Petitioners principally sought an order of habeas corpus directed at the respondents to persons or bodies of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners and for an order for compensation for violation of the said petitioners’ fundamental rights guaranteed by the constitution as follows:

- (a) A declaration that the right to petition for an order of habeas corpus is guaranteed under article 25(d) and cannot be limited.*
- (b) An order of habeas corpus directed at the respondents to immediately produce the persons and/or bodies of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners before a court of law.*
- (c) An order of compensation and reparation for the violation of the fundamental rights of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners as provided for and guaranteed under the constitution.*
- (d) Costs of the petition.”*

[2] The Cause of action was simply put in the petition that:

*“On the 1<sup>st</sup> day of June 2016 while the 2<sup>nd</sup> petitioner was a pillion passenger on the 3<sup>rd</sup>*

*petitioner's motorcycle, they were stopped by two Administrative Police Officers who arrested the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners and roughly bundled them in a waiting motor vehicle Land Cruiser Registration number GKA 875X and whisked away to an unknown destination.”*

[3] Simultaneously with the Petition, by a Chamber Summons dated 21<sup>st</sup> July 2016 the petitioners sought interim relief –

*“That pending the hearing and determination of this petition, this Honourable court be pleased to issue an order of Habeas Corpus for the urgent production of the 2<sup>nd</sup> petitioner and 3<sup>rd</sup> petitioner before a court of law.”*

[4] The factual basis of the interlocutory application is expressed in the Chamber Summons follows:

*1. That on 1<sup>st</sup> June 2016 at around 4.00p.m. at Mlango Soko 46 opposite Mbuja Flats, the 2<sup>nd</sup> petitioner being a pillion passenger on the 3<sup>rd</sup> petitioner's motorcycle, were stopped by three Administration Police officers;*

*2. That the three officers were Simon Mbau Mureithi, Benson Simiyu Makhokha a.k.a 'Kichwa' and one Njoroge a.k.a 'Njoro' all attached to Kawangware Chief's Camp.*

*3. That the 2<sup>nd</sup> petitioner had boarded the 3<sup>rd</sup> petitioner's motorbike which was apparently being followed/pursued by a motor vehicle that was carrying the Administration Police Officers.*

*4. That without being informed as to the reasons, the 3<sup>rd</sup> petitioner first and later on the surprised and dumbfounded 2<sup>nd</sup> petitioner were arrested, beaten up and roughly bundled-up into a motor vehicle land cruiser registration number GKA 875X and driven off to an unknown destination;*

*5. That despite the fact that the destination to which the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners were driven was unknown, onlookers and passers-by witnessed the above mentioned motor vehicle along with the motorcycle being ridden being it by one of the arresting officers, Njoroge, heading in the direction of Kawangware Chief's camp.*

*6. That attempts to search and locate the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners via enquiries at Kawangware Chief's Camp Riruta Satellite, Muthangari, Kabete, Kilimani, Kileleshwa and Kinoo Police stations and also at hospitals and mortuaries yielded no clues as to the whereabouts of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners;*

*7. That the 1<sup>st</sup> petitioner is reasonably apprehensive that in light of the manner of the disappearance of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners their safety and security is at risk and the application herein deserve to be dealt with urgently.”*

[5] The application was supported by the affidavit of Mercy Wambua, the Chief Executive Officer (CEO) of the Law Society of Kenya sworn on 21<sup>st</sup> July 2016. The affidavit is expressed to be made in pursuit of the 1<sup>st</sup> petitioner's mandate under section 4 of the Law Society Act to uphold public interest and it contains matters of information and belief with the said CEO deponing that *“the parents of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners have disclosed to me the circumstances under which the two persons disappeared and I reasonably believe that they are being held unlawfully by Administrative Officers, who are servants of the 3<sup>rd</sup> Respondent.”*

[6] The respondents filed three Replying Affidavits by Inspector of Police Daniel Miruka, Administration Police Officer Benson Simiyu Makokha and Administration Police Officer James Kahari, the substance of which is to deny ever arresting and detaining the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners on the 1<sup>st</sup> June 2016 as alleged by the petitioners or at all, and that they had only got the information about the matter on 21<sup>st</sup> July 2016

from media reports that the petitioners had filed a petition in the High Court. Upon request by the counsel for the petitioners, the deponents of the three replying affidavits were cross-examined before the court on their contents.

## **DETERMINATION**

### ***Question before the court***

[7] The primary question for determination in both the Chamber Summons application and the Petition is whether the dispute before the court is a case of abduction and or disappearance, which are matters that ought to be investigated and prosecuted if a criminal offence is disclosed, or arrest and illegal detention for which an order of *habeas corpus* would apply. See *Masoud Salim Hemed & another v Director of Public Prosecution & 3 Others* [2014] eKLR, and cases cited there.

[8] In other words, where does the truth lie between the petitioners' case of cover-up that the police officers arrested and detained the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners and covered it up, and the respondents' case that they never arrested the petitioners and it could have been a case of abduction by private persons. If it is the latter, investigations will be the suitable remedy to have the culprits identified and dealt with in accordance with the law. If the former is true, an order for habeas corpus should issue against the Respondents to produce the illegally detained petitioners.

[9] The current state of the law of physics and chemistry does not accept that the body mass of a person can vanish and disappear into the thin air, without external factors. While the persons who cause the disappearance need not be state actors, the court should not lightly dismiss request by an aggrieved applicant to determine whether the circumstances of the disappearance is part of a transaction involving illegal arrest and detention.

[10] The human person takes perhaps the greatest premium of all the earthly beings and corresponding judicial time and resources must be brought to bear to establishing the whereabouts of a missing human being. Accordingly, the court must minutely and intensively scrutinize all available evidence that may assist the court in its determination of the whereabouts of the subject and consequent order for habeas corpus or otherwise.

[11] Moreover, I consider that the alleged disappearance of a human being is a serious matter which ought to be examined by the court notwithstanding that the facts of the case are deponed to on basis of information and belief rather than personal knowledge as required for originating (as distinguished from interlocutory applications) process in ordinary civil cases (see Order 19 Rule 3 of the Civil Procedure Rules). Indeed, Article 22 of the Constitution gives *locus standi* to a person making the application on behalf of another and under its sub-article (3) emphasizes substance over form, providing that the rules of procedure made thereunder by the Chief Justice for enforcement of the Bill of Rights must satisfy the criteria that–

*“(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation”.*

In the Rules made by the Chief Justice, THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013, a Petition may or may not be supported by affidavit – see Rule 11 thereof.

[12] At this stage of the proceedings, I am not able to conclude that the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners were arrested and detained by the Administrative Police Officers so as to justify an order of habeas corpus against the 3<sup>rd</sup> Respondent. Moreover, I think that the matter should be disposed of by way of full hearing on the basis of the main petition rather than an interlocutory application by chamber summons in the Petition.

[13] It would appear the petitioners mixed up the procedures for approaching the Court before and after the promulgation of the new Constitution of Kenya 2010. While an order for habeas corpus was previously sought by procedure for **Directions in the Nature of Habeas Corpus** under the Criminal Procedure Code cap. 75, the procedure under the new Constitution is for a petition under the 2013 Rules aforesaid for the enforcement of the Right to ***habeas corpus*** under Article 51 (2) of the new Constitution which provides as follows:

*“(2) A person who is detained or held in custody is entitled to petition for an order of **habeas corpus**.”*

[14] Upon considering the chamber summons application and the evidence presented by the parties upon supporting affidavit and replying affidavits together with cross-examination thereon, and without detailed discussion thereof in order not to prejudice hearing of the main petition, I find that a case has been established to warrant the further examination of the matter by the court and that there are serious questions to be determined upon the full trial of the petition including the cancellations and over-writings on the Daily Deployment Roster for the police officers and the Firearms Register.

[15] On the hearing of a petition, Rule 20 of THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 provides as follows:

*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.*

*(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.*

[16] In accordance with the substantial justice Article 159 of the Constitution, I consider that the matter should proceed to full hearing of the petition whereupon the Court shall after hearing such witnesses as the parties may wish to put forward in accordance with the discretion of the court to allow oral evidence or cross-examination under Rule 20 of the 2013 Rules, make a final decision as to the question before the court whether the 3<sup>rd</sup> respondent's officers arrested and illegally detained the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners to warrant an order for ***habeas corpus***.

### **Orders**

[17] The court considers that the evidence of the petitioners' mothers who reported their disappearances to the police; that of the Officer Commanding Police Division OCPD, Kabete and Administration Police Superintendent, Kabete both having dealt with this matter before the petition was filed in court; and that of the alleged eye witness named Antony is crucial and likely to assist the court to arrive at a decision in the matter.

[18] Accordingly, pursuant to Rule 20 (4) of THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013, the Court will examine the said two police officers to whom summons will consequently issue, and the said eye witness if presented by the petitioners upon addressing his fears for his life with the Witness Protection Agency.

[19] For the same purpose, the court finds merit in the request by the petitioners for the production of the mobile phone records of the named police officers, and an order for the production of the same shall issue to the relevant mobile service providers to be executed by the 3<sup>rd</sup> Respondent. The request for CCTV records was not specific to the geographic area in question and an order for production of the same may be made when full particulars of the relevant area are given by the petitioners.

[20] In accordance with Rule 20 (3) of THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 and in view of the gravity of the matter, the Court further directs that the petition shall be heard by oral evidence and the parties are, accordingly, at liberty to call *viva voce* evidence in addition to affidavits already filed.

[21] Reports of any investigations so far undertaken by the Respondents in response to the missing person reports made by the mothers to the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners on 3<sup>rd</sup> June 2016 shall also be produced at the hearing. The petition shall be fixed for hearing on priority basis on a date convenient to the court and counsel for the parties.

[22] There shall be no order as to costs.

***Order accordingly.***

**DATED AND DELIVERED THIS 9<sup>TH</sup> DAY OF AUGUST, 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

M/S Amol & Company, Advocates for the Petitioners.

Ms. Kamande & Ms. Mwangi for Attorney General for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

Mr. Kazungu - Court Assistant.