REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISC. CRIMINAL APPLICATION NO.142 OF 2015

IN THE MATTER OF SECTION 2, 3, 19, 20, 22 AND 258 OF THE CONSTITTUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 25, 26, 27, 28, 29, 32, 33, 49 AND 50 OF THE CONSTITUION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

ABDI KHALIF ABDULLAHI…….APPLICANT

VERSUS

REPUBLIC……..RESPONDENT

RULING

Having heard the rival arguments in support of, and opposition to the request to transfer the file to the Human Rights and Constitutional Division, I take the following view:-

In the ruling in the **Misc. Cr. Application No.732 of 2007 (Nairobi) – Mariam Mohamed & Another – Vs- The Commissioner of Police & Attorney General,**the application for Habeas Corpus became spent because the subject was produced before the 14 days provided under the old Constitution for incarceration in custody had expired. This fact notwithstanding, counsel for the applicant insisted that the application would proceed so that the police could explain the circumstances surrounding the incarceration of the subject. The view of the counsel was that the subject's Constitutional rights had been violated, particularly bearing in mind that he had been taken out of the jurisdiction of the court (to wit out of country). It is important to note that in that application there were no other prayers other than that of Habeas Corpus.

In dismissing the request by counsel for the appellant, the court said that, the Constitutional question which the facts showed to be the one brought before the court was significantly different in nature from the Habeas Corpus application. That further the respondents had placed themselves in a position which it was no longer within their power to produce the subject before the court because he was not in their

control. The emphasis was that there would be no answer the officials would be able to provide in the application as they did not have the subject in custody. The court did also acknowledge fundamental infringement of the subject's Constitutional rights by removing him from the jurisdiction of the court. In this respect, the court ruled that, the question, of abuse of the subject's Constitutional rights were not placed before it and could not therefore adequately deal with it.

In **Petition No.7 of 2014 (Mombasa) MashodSalimHemed –Vs- D.P.P. & 2 Others** consolidated with **Petition No.8 of 2014 – OkiyaOmtatahOKoiti –Vs- A.G. & Others,** which sought the production of HemedSalim in the form of an application for Habeas Corpus the respondents averred that they were not in a position to produce the subject because he was not in their lawful custody. They admitted the police had arrested him but they lost him when he, together with others, escaped from custody while on transit to the police station. The court recognized the fact that an application for Habeas Corpus lies where it is demonstrated that the Respondent(s) is in the physical custody of the subject. This fact was not conclusively decided and the application was held in abeyance pending the hearing of oral evidence from persons the court thought had crucial material evidence that would enable it dispose of the application.

The facts of this case quite compare with those in the **Misc. Cr. Application No.732 of 2007,** save that in the present case, it was not established that the respondent had the lawful custody of the subject. He went missing while giving religious classes in a mosque and thereafter resurfaced. It was not disclosed where he resurfaced from and where he had been for the days he went missing. (Upon his appearance, the application (prayer) for Habeas Corpus became spent and was accordingly withdrawn. Substantively, that was the only prayer sought in this application. For avoidance of doubts, I duplicate the entire prayers sought in the Notice of Motion dated 30th April, 2015 as follows:-

1. **That this application be certified urgent and be heard ex-parte in the first instance.**
2. **That an order in the nature of habeas Corpus do issue directing the 1st, 2nd and 3rd respondents to produce in court Sheikh KhalifAbdullahiMadhobe or show cause why he should not be released forthwith.**

Substantively, the application was couched only under the prayer for habeas corpus, and having been withdraw, the entire application became spent. The court cannot then invite itself to entertain prayers than were sought. I am at a loss and do not fathom what reminder prayers the learned counsel for the applicant intended be heard by the Human Rights and Constitutional Division.

Be that as it may, let me acknowledge that this court, by virtue of **Article 23** of the Constitution has jurisdiction to entertain a petition that seeks redress for infringement, violation, threat or denial of fundamental rights and freedoms. Had a prayer of this nature also been sought,I would have addressed myself accordingly. However, the subject having resurfaced becomes a prospective petitioner if he is of the opinion that his fundamental rights and freedoms have been infringed, violated, threatened or denied.

In the end, I have no alternative but to find and hold that there is no further material for consideration before me. The entire application herein is marked as withdrawn.

DATED and **DELIVERED** at **NAIROBI** this 25th day of **MAY**, 2015.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

Mr. Njoroge holding brief for Imanyara for applicant

Ms. Aluda for respondent