



No. 19

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 7 OF 2014

**IN THE MATTER OF: ARTICLE 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 39, 47, 48, 50 AND 51
OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS OF
FUNDAMENTAL FREEDOMS UNDER ARTICLE 21, 24, 25, 26, 27, 28, 29,
39, 47, 48, AND 50 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

MASOUD SALIM HEMED PETITIONER/APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

INSPECTOR GENERAL 2ND RESPONDENT

KENYA POLICE SERVICE..... 3RD RESPONDENT

CONSOLIDATED WITH PETITION NO. 8 OF 2014

OKIYA OMTATAH OKOITI PETITIONER/APPLICANT

VERSUS

THE ATTORNEY GENERAL & OTHERS..... RESPONDENTS

RULING

1. I have considered the testimony of PW2 Hussein Khalid Hamisi the Executive Director of Haki Africa and I am satisfied that he has laid a basis under section 106 B(2) of the Evidence Act for the production of the CD video which he downloaded from the two websites – You-Tube and face-book of information stated to have been presented therein by media houses K24 and Citizen TV – using his HP laptop computer whose serial number he has given. Accordingly, the CD video may be produced in terms of

section 106A of the Act.

2. As regards the cross-examination detailed content and presentation and source of the still photographs and video images on the CD, the same will be considered when the court considers the cogency and weight of evidence after presentation of the CD video.
3. The request by the respondent in camera proceedings is declined on the Jeremy Bentham's principle that publicity is the very soul of justice and the public have a right to follow the proceedings, which are great public interest.
4. The interests of persons who may be suspects in Criminal Case no. 314 of 2014 are protected in that this court is not sitting in trial of their charges, which will have to be proved before the court trying the case at the hearing.
5. The police officers who may be shown in the photographs and videos are not on trial before this court. It is only sought to establish in proceedings whether the police have custody of Hemed Salim Hemed. Should any criminal proceedings be preferred against any of the officers, such criminal charges will be subject to trial in the usual manner before the appropriate court.
6. Since the content of the video is already in the public domain through the internet, it cannot be maintained that the replay of the CD will endanger the officers shown in the photographs and video images.
7. It is a constitutional requirement for open trial hearing under Article 50 of the Constitution as follows:

“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
8. Accordingly, the CD video shall be replayed in open court and witnesses may be called and recalled for cross-examination thereon in public.

Dated, signed and delivered on the 28th February 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Abubakar with Mr. Abdalla for the Petitioner/Applicant

Mr. Omutatah, Mr. Muteti with Mr. Ngari for the Respondents

Miss Linda - Court Assistant