



No. 15

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 HEMEDPETITIONER/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

0. The High Court is by the provisions of Article 23 of the Constitution duty-bound to uphold the Bill of Rights incorporating the fundamental human rights and freedoms by redressing any denial, violation, infringement or threat to a right or fundamental freedom. The court also accepts the exhortation by the petitioners that in the implementation of the constitutional order established by

the Constitution of Kenya 2010, the court must lead in the transformation of the State from past dictatorship model into a constitutional democracy based on national values and principles of governance including respect for the rule of law, human rights and human dignity as set out in Article 10 of the Constitution. (See the Declaration of the Republic in Article 4 of the Constitution of Kenya 2010 and the decisions of **Dr. Christopher Ndarathi Murungaru v. Kenya Anti-Corruption Commission and Anor** CA Civil Application NO. Nai 43 of 2006 and **Centre for Rights Education and Awareness (CREAW) and 8 Ors.v A.G and Anor.** (2012) eKLR).

0. The matter before the court relates to habeas corpus proceedings filed on behalf of Mr. Hemed Salim Hemed, the person the subject of the proceedings, in two separate petitions – Petition No 7 of 2014 filed against the Director of Public Prosecution, The Inspector General of Police and The National Police Service by the brother to the said Hemed Salim Hemed in Mombasa on the 14th February 2014 and Petition No. 8 of 2014, filed against the Attorney General and Inspector General of Police by Okiya Omtatah Okoiti who described himself as ‘tax-paying, public spirited citizen and human rights defender’ filed on the 13th February 2014 as Petition No. 63 of 2014 at Nairobi and later transferred to Mombasa. The two petitions were consolidated at the return date of habeas corpus order obtained in Petition No. 7 of 2014 for purposes of hearing and disposal. Both petitions sought, in similar terms, an order for habeas corpus for the production of the said Hemed Salim Hemed before the court to be dealt with in accordance with the law and for any other relief the court may, in the interest of justice, deem fit to issue.
0. This court expresses sympathy with the family and friends of the said Hemed Salim Hemed, whose whereabouts to date, three weeks after he was arrested by the police, are unknown.
0. Briefly, the undisputed facts of the case are that the said Hemed Salim Hemed was arrested by the Police on the 2nd February 2014 together with over 128 other persons who were allegedly attending a jihad convention of the Al-Shabaab terrorist group at the Masjid Musa Mosque in Majengo, Mombasa. The arrest was documented in photographs by the Media, and the Petitioner in Petition no. 7 of 2014 has produced some of them showing the said Hemed upon arrest, under escort and handcuffed, and finally lying on his back at the back of a police vehicle with three armed police officers on guard. Some of the persons arrested on 2nd February 2014 were released without charge, while others were on 12th February 2014 charged with the offence of being members of a terrorist group namely Al-Shabaab contrary to section 24 of the Prevention of Terrorism Act 2012. The said Hemed Salim Hemed was not among either group of those released or charged before the court. The arrest of Hemed was also not booked in any of the relevant police stations. The Petitioner in Petition No. 7 of 2014 also deposed that he had visited all the hospitals and Mortuaries in Mombasa and he had not found his brother.
0. Upon hearing ex parte of a Notice of Motion dated 14 February 2014 in Petition No. 7 of 2014, this court granted an order of habeas corpus with a return date of 17th February 2014. On the 17th February, 2014, the state represented by the Assistant Deputy Director of Public Prosecution Mr. Muteti, requested for more time upto the 20th February 2014 to respond appropriately to the allegations in the petition. With the consent of the counsel for the petitioner, the matter was stood over to the 20th February 2014.
0. On the 18th February 2014, the Petitioner in petition no. 8 of 2014 (formerly 63 of 2014 at Nairobi) appeared before the court and the court after hearing the petitioner in person and counsel for the Respondents, Mr Eredi, directed that the matter be heard alongside Petition No. 7 of 2014 on 20th February 2014. The two petitions were, as noted earlier, subsequently consolidated for hearing.
0. During the hearing counsel for the Respondents in petition no. 8 of 2014 indicated that save for his grounds of opposition filed in the petition, the factual response to the petition would be as given by the Director of Public Prosecution in Petition No. 7 of 2014. The ground of opposition to the petitioner's Notice of Motion for habeas corpus in Petition No. 8 of 2014 was that the application was overtaken by events, the order of habeas corpus having already been made in Petition No. 7 of 2014 in respect of the same person.
0. The respondents’ case in response to substantive claim in the two petitions is set out in the replying affidavit of 20th February 2014 sworn by Inspector of Police Evans Wesonga of the Directorate of Criminal Investigations, Urban Mombasa who states that he is the lead investigation

officer for the criminal case No. 314 of 2014 in which persons arrested at the incident of 2nd February 2014 were charged. It is simply averred in the affidavit that the police or any other lawful authority do not have in their custody Hemed Salim Hemed and they therefore could not produce him before the court as directed by the habeas corpus order of 14th February 2014. The Police admitted having arrested the said Hemed but claimed to have lost his custody when he, together with others, escaped from custody while on transit to the police station upon arrest. The said affidavit is, for the material part, in these terms:

9. ***THAT I have established that Hemed Salim Hemed was not amongst the names booked in any of the Police Stations (annexed hereto are certified copies of the relevant OB entries of Makupa, Port Police and Changamwe marked “EW1”, “EW2” and “EW3” respectively). The Police stations where all the suspects were booked.***
 10. ***THAT it is not disputed that the officers captured in the photos appearing on annexure MSH1 are officers of the National Police Service.***
 11. ***THAT I have further established that the civilian appearing on the said photos was indeed arrested during the said operation.***
 12. ***THAT I am informed that there were many others who were also arrested during the operation some of who escaped in the course of being moved to Makupa Police Station which was the Central point where all arrested persons were assembled. (Annexed hereto is a copy of the statement of PC Owino Okuto - marked EW4 – who is also captured in the annexure MSHI).***
0. The deponent of the Respondents’ replying affidavit, Mr. Evans Wesonga, relied on a statement of one of the police officers, PC Owino Okuta, shown in the photographs with the arrested Hemed averring to Hemed’s likely escape as follows:

“NO. 51739 PC OWINO OKUTO

I wish to state that I personally did not know the suspects we arrested and escorted to Makupa. I also state that while we were escorting the suspects to Makupa several of them escaped on the way while others mingled by a huge crowd of their families and members of public who had gathered all along Lumumba Road to Makupa police station. My attention has been drawn to pictures whereby I was captured while escorting a suspect who had been arrested at the mosque . The pictures indicating I was escorting the suspect to a police vehicle. The picture to me shows when I ushered the suspect in the vehicle and had just handcuffed him. Later I removed the handcuff to allow the prisoner be put in the vehicle. The handcuff was only used to subdue him initially. After the motor vehicle was full with prisoners it drove to Makupa and several prisoners escaped. They jumped from the motor vehicle as we could leave [not] the others and pursue them. Even on arrival others also disappeared in the crowd. I wish to state that I can only account for the suspects who were eventually booked at Makupa police station.

The picture of the missing suspect as claimed by the media is very usefully as may assist police in tracing the suspect. I had not seen him properly but having seen his picture, I now believe it may be easy to assist police investigators get the fugitive who is among those who escaped the dragnet during the operations.”

0. The parties then made their respective oral submissions and, in view of the urgency of the matter, ruling was reserved to the following day, the 21st February 2014 at 2.30pm. For the petitioners, the Counsel for the Petitioner in petition No. 7 of 2014 and the Petitioner in Petition No. 8 of 2014 urged the court to find that the respondents had failed to produce the body of Hemed Salim Hemed as directed by the order of Habeas Corpus of 14th February 2014 and that they had, in the circumstances of the case, infringed on the subject’s fundamental human rights under the Constitution including rights and freedoms relating to life, liberty, equal protection of law, fair administrative action and access to justice, fair trial and rights of arrested persons and rights of detained person to habeas corpus. Consequently, and on the presumption that the said Hemed Salim Hemed must have been killed by the police, the petitioners prayed as additional reliefs

under the general prayer of the petitions, orders of the court for the arrest, and charge with murder of the said Hemed Salim Hemed, of the police officers shown to have arrested the subject and for compensation of the family of the said Hemed Salim Hemed.

0. In opposing the claim for relief by the Petitioners, counsel for the Respondents in the two petitions, respectively, Mr. Muteti in Petition NO. 7 of 2014 and Mr. Eredi in Petition No. 8 of 2014, were united in the submission that the respondents had demonstrated that the said Hemed Salim Hemed was not in police custody and the habeas corpus order could not be complied with. and that the further relief sought by the petitioners could not be granted as they had not been specifically prayed for in the Petition. The decision of the Court in ***Mariam Mohamed and Another vs Commissioner of Police & Another [2007] eKLR (Mohamed Abdulmalik case)*** per Ojwang J., as he then was, was cited to support the proposition that an order of habeas corpus could not be granted where the police had voluntarily or involuntarily lost the physical custody of subject. Mr. Muteti further urged that having established that the said Hemed was missing and believed by the petitioners to be dead the matter should proceed on the basis of an inquiry, with, if necessary, adequate oversight by police and related administrative organs, under section 386 (1) of the Criminal Procedure Code, which provides as follows:

“**386.** (1) The officer in charge of a police station, or any other officer specially empowered by the Minister in that behalf, on receiving information that a person -

(a) has committed suicide; or

(b) has been killed by another or by an accident; or

(c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence; or

(d) ***is missing and believed to be dead;***

shall immediately give information thereof to the nearest magistrate empowered to hold inquests, and, unless otherwise directed by any rule made by the Minister, shall proceed to the place where the body of the deceased person is, ***and shall there make an investigation and draw up a report on the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), the marks appear to have been inflicted; and the report shall in the case of paragraph (a), (b) or (c); be forwarded forthwith to the nearest magistrate empowered to hold inquests; and in the case of paragraph (d) shall immediately send to the Director of Public Prosecutions through the Commissioner of Police as full a report as possible together with details of all supporting evidence relating to the circumstances surrounding the disappearance and the grounds upon which the death of that person is presumed to have taken place.***”
[emphasis added]

0. In reply, the Counsel for the petitioner in Petition NO. 7 of 2014 and the Petitioner in Petition NO. 8 of 2014, distinguished the facts of the ***Mohamed Abdulmalik*** case on the basis that in that case the subject was known to have been taken out of jurisdiction of Kenya courts and therefore an order of habeas corpus would have been, as the learned judge found, in vain. [Indeed the ruling is entitled Nationals Out of Jurisdiction, and the Law of Habeas Corpus: a Ruling on a Preliminary Point]. On the submission for police investigations, it was urged that the police as suspects in the matter could not be trusted to conduct honest investigation in the matter and it would only afford them an opportunity for cover-up and the court was urged to carry out the inquiry itself.
0. The issues before the court in the consolidated petitions are therefore:
- a. **Whether it has been established that the said Hemed Salim Hemed is out of the physical custody of the respondents;**
 - b. If the said Hemed Salim Hemed is not in respondents’ custody, and otherwise, what further orders or directions ought to be given; and

- c. Whether the additional reliefs sought by the petitioners will be granted.

Whether it has been established that the said Hemed Salim Hemed is not in physical custody of the respondents

0. In habeas corpus proceedings, the burden of proving the legality of detention rests with the State as noted in *Archibold Criminal Pleading Evidence & Practice*, 60th Edition 2012 at p. 1767, para. 16-55. In the case of a claim that the subject is not in the custody of the State, the burden would lie with the state against whom the order of habeas corpus is made or sought. The question therefor is have the respondents demonstrated that the subject of these proceedings is not in their custody? The response by the State is that the subject may have escaped from police custody. There is no positive averment that the said Hemed Salim Hemed indeed escaped from custody and is therefore out of police control. The affidavit in reply, although asserting that the subject is not in the custody of the police or other lawful authority, is only speculative that he may have escaped with others as they were being escorted to the police station. The statement by the police officer who surmises that the subject may have escaped is not made on oath despite the grave moment of the application for the enforcement of the fundamental rights to life and liberty in Petitions.
0. In these circumstances, the court does not consider that the State has discharged the burden imposed by law to demonstrate that it has either legally detained the subject of habeas corpus or that, as claimed in this case, that he is not in its physical custody. The matter does not therefore mature into an enquiry as to whether an inquiry should be conducted by the police under section 386 of the Criminal Procedure Code with or without independent oversight by relevant state organs and or others. Indeed, the antecedent of section 386 in the circumstances of this case that there be information that a person is **‘missing and believed dead’** has not been met and the section cannot properly be invoked. Furthermore in the absence of a decision as to whether the said Hemed Salim Hemed is in the custody of the police, the consideration as to what directions, orders or other reliefs may be made as identified in issues (b) and (c) above is premature.
0. As held in the leading case in East Africa, the Ugandan case of *Grace Stuart Ibingira and Ors v. Uganda* (1966) EA 445, the nature of habeas corpus may attract contempt proceedings for enforcement and it must be determined whether or not the respondents have the subject in custody or not. At pp. 450-1, Sir Charles Newbold, P. delivering the judgement of the court observed as follows:

“The writ of habeas corpus is a writ of right granted ex debito justitiae, but it is not a writ of course and it may be refused if the circumstances are such that the writ should not issue. The purpose of the writ is to require the production before the court of a person who claims that he is unlawfully detained so as to test the validity of the detention and so as to ensure his release from unlawful restraint should the court hold that he is unlawfully restrained. It is a writ which is open not only to citizens of Uganda but also to others within Uganda and under the protection of the State. The object of the writ is not to punish but to ensure release from unlawful detention; therefore it is not available after the person has in fact been released. The writ is directed to one or more persons who are alleged to be responsible for the unlawful detention and it is a means whereby the most humble citizen in Uganda may test the action of the executive government no matter how high the position of the person who ordered the detention. If the writ is not obeyed then it is enforced by the attachment for contempt of all persons who are responsible for the disobedience of the writ.”

0. Moreover, where as in this case a claim is made against state officers, and the court is asked to make an adverse inference against them, such of them who have sworn affidavits should be served with a notice requiring them to attend the court for cross-examination. At p. 452, Newbold, P. in *Ibingira v. Uganda*, *ibid.* said:

“It is true that it would be possible to draw from the facts an inference of bad faith, but if it is desired to ask a court to draw an inference of that nature, then the persons, for example, the Permanent Secretary to the Minister of Internal Affairs, who swore affidavits

giving the reasons for the action taken by the authorities, should have been served with notice requiring their attendance for cross-examination so that the allegations of bad faith could have been put to them and their answers made. It is not proper that allegations of bad faith on the part of persons who have sworn affidavits should be made without any attempt whatsoever to cross-examine them on those imputations.”

0. In addition, Rule 20 of **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, [so called the Mutunga Rules 2013 which replaced the Gicheru Rules of 2006] have provision for the calling of oral evidence in constitutional applications for enforcement of fundamental human rights and freedoms and for the cross-examination of such witnesses by the parties before a decision is reached in a petition. Rule 20 is in the following terms:

“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 this evidence is likely to assist the court to arrive at a decision.

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

0. I consider that the deponent of the replying affidavit for the respondents, Inspector Evans Wesonga and the author of the hand-written unsworn statement relied on by the deponent, Police Constable Owino Okuta, are likely to assist the court in arriving at a conclusive decision whether the said Hemed Salim Hemed is in the physical custody of the police or not, which decision will inform the court's further intervention as appropriate, in accordance with the law. Accordingly, in accordance with Rule 20 (4) of **The Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, I direct that Inspector Evans Wesonga, the deponent of the replying affidavit of 20th February 2014, and the Police Constable Owino Okuta who wrote the statement attached to the replying affidavit, on the arrest and alleged subsequent escape of Hemed Salim Hemed, the subject of these proceedings, be summoned to attend court - considering the urgency of the matter - on **Tuesday the 25th February 2014** for examination and cross-examination by the parties.
0. In view of this direction, I make no finding on the issues before the court and ruling thereon is deferred until the court has heard the said witnesses in examination and cross-examination.

Dated signed and delivered on the 21st February 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Balala for Mr. Abubakar for the Petitioner/Applicant

Mr. Eredi, Mr. Muteti and Miss Mwaura for the Respondents

Ms Linda - Court Assistant