



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 PROSECUTION1ST RESPONDENT

INSPECTOR GENERAL2ND RESPONDENT

KENYA POLICE SERVICE3RD RESPONDENT

CONSOLIDATED WITH PETITION NO. 8 OF 2014

OKIYA OMTATAH OKOITIPETITIONER/APPLICANT

VERSUS

THE ATTORNEY GENERAL & OTHERSRESPONDENTS

JUDGMENT

Background

1. The background of this *habeas corpus* proceeding has been captured in a commentary entitled **Kenya at the Precipice: The Al-Shabaab and Coast Crisis** by Jeremy Prestholdt published in the *Saturday Nation* newspaper of July 19, 2014 as follows:

“In Mombasa and elsewhere, radicals have embraced a muscular union of religion and politics, one that aspires to a larger platform. As a result, some radicals have begun to vie for the control of symbolically important mosques. This has magnified the political cleavages within the Muslim Community and led to clashes with security forces. The police raid of Mombasa’s Masjid Musa in February brought these tensions to the fore. Yet, in this as in many other cases, the use of excessive force by the authorities only fortified radical voices.... **A clear-eyed review of current circumstances suggests that any plan of action to address the multifaceted crisis at the Coast – a crisis that is neither entirely of the region’s own making nor can be resolved locally – must heed popular demands for protection, dignity, equity and redress.**”

2. The court is constitutionally mandated to administer judicial redress and cherishes all opportunity to resolve and remedy through the application of law all disputes which arise between the individuals inter se and between them and the State, as in this case, in the interests of upholding human rights, rule of law and good governance among other principles and values of governance set out in Article 10 of the Constitution for the promotion of constitutional democracy in Kenya.

The Petitions

3. The consolidated petitions before the court are applications for an order of habeas corpus with respect to one **Hemed Salim Hemed**, respectively filed by a brother to the Subject of the habeas corpus proceedings and on behalf of the Subject by a human rights activist on instructions by a local political leader, Mombasa Senator Emma Gertrude Mbura, MP, both pursuant to the liberalised standing rules under Article 22 of the Constitution of Kenya 2010. The Subject had been arrested by Police on the 2nd February 2014 during a raid by the police on an alleged jihadist convention held at Masjid Musa Mosque. During the raid a large number of youth, 129 by police records, were arrested from inside the Mosque; some were later released upon investigations without charge while others were after charge released by the court. One of the police officers involved in the raid as well as some youths had been killed in the ensuing fighting as the police sought to ‘flush out the jihadists’. The Subject of the habeas corpus proceedings had not been produced in court within 24 hours after arrest as prescribed under the Constitution and the Occurrence Book records at all police stations involved in the exercise did not show the Subject as having been taken to any of the police stations. The petitioners also alleged that searches in various mortuaries in the region had been fruitless. Hence the applications for habeas corpus.
4. Though expressed differently as shown below, the two petitions Nos. 7 and 8 of 2014 principally sought habeas corpus orders for the release of the Subject **Hemed Salim Hemed** alleged to be in police custody.

Petition No. 7 of 2014 by the Subject’s brother sued the Director of Public Prosecution, Inspector General [of Police] and the Kenya Police Service and prayed for:

- i. This Honourable Court do issue directions in the nature of habeas corpus or for an order of habeas corpus requiring the 1st and 2nd and 3rd respondents either by themselves or through their representatives to produce the body of **Hemed Salim Hemed** to court immediately,
- ii. The 1st, 2nd and 3rd Respondents do pay the costs of this application.
- iii. Any other relief that this honourable court may deem just to grant.

Petition No. 8 of 2014 by Okoiti Omtatah Okiti sued the Hon. Attorney-General and the Inspector General of Police and prayed:

- a. That a declaration be issued to declare that the rights and fundamental freedoms protected in the Bill of Rights of the Constitution of Kenya, 2010, are unassailable.
- b. That a declaration be issued to declare that the rights under Article 25 cannot be limited.
- c. That a mandatory order be issued ordering the 2nd Respondent to immediately and within 24 hours of the order being made, to produce Mr. Hemed Salim in the honourable Court, to be charged or informed of the reason for his detention continuing or to be released.

- d. That the Honourable Court do issue any other declarations and/or order that serve the cause of justice.
- e. That the costs of this petition be borne by the Respondents.

Both petitions had Motions for habeas corpus in the same terms as the petitions.

5. Upon hearing the Notice of Motion dated 14th February 2014 in Petition no. 7 of 2014 before the consolidation with the Petition No. 8 of 2014 the Court was satisfied of the merits of the application and ruled that:

“In accordance with Article 25 [of the Constitution] the right to an order of habeas corpus cannot be limited. Having seen the photographs of the arrest of the applicant’s brother and upon reading the affidavit of the applicant and taking note that it is more than 24 hours since the applicant's brother was arrested and he has not been brought before the court on a charge or released from custody, I grant the applicant an order of habeas corpus for the police to produce the person the subject of this proceeding on Monday the 17th February 2014 at 10.00am when he shall be dealt with in accordance with the law.”

6. On the 17th February 2014 the respondents sought for time to put in a replying affidavit to the petition no. 7 of 2014 and the matter was adjourned to the 20th February 2014 for hearing. On the 20th February 2014, the respondent filed a replying affidavit sworn by Police Inspector Evans Wesonga of the Criminal Investigations Directorate, Mombasa to the effect that the subject may have escaped from custody while being transported upon arrest at the Masjid Musa Mosque to the Makupa Police Station based on a statement recorded by a police officer, Constable Owino Okuto who had escorted the Subject after arrest. With the Petition No. 8 of 2014 then before the court, the two habeas corpus motions in the petitions were heard together and ruling reserved for the 21st February 2014.
7. By its ruling of 21st February 2014, the Court directed further proceedings before decision on the issues before the court which it identified as follows:

13. 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.”*

8. The Court ruled that:

“19. 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 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 the 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.

20. 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.”

THE FACTS OF THE CASE

9. The case of the petitioners is that the police arrested **Hemed Salim Hemed**, the subject of these habeas corpus proceedings, from the Masjid Musa mosque on 2nd February 2014, and had not produced him before the Court within 24 hours as required by the Constitution, or at all, in contravention of the Subject’s rights and fundamental freedoms including right to life, right to dignity, right to equal protection of law, freedom of movement, freedom and security of his person, rights to fair administrative action, access to justice, fair trial and right to habeas corpus, among others contained in the Bill of Rights.
10. The respondents’ answer to the petition is simply that the subject was arrested at the Mosque but he escaped from police custody while being transported to the holding station at Makupa Police station, Mombasa, and having lost the physical custody of the Subject they could not comply with the order of habeas corpus.
11. When a person is alleged to be in police custody with the police admitting arrest but alleging subsequent loss of the suspect, or escape from custody, in circumstances where the suspects restraint at the time of arrest does not permit easy escape, no stone ought to be left standing and unturned in the quest not to discover the whereabouts of the person, which is an investigative function of the police and other specialised agencies, but to establish the *bona fides* of the escape theory and therefore justify the defence of loss of physical custody which would then excuse the non-compliance with the order of production. In default, the respondent would be in contempt of court for failing to produce the subject. That must be the practical meaning of unlimited right to habeas corpus – that all shall be done to give effect to the order of habeas corpus the right to which the person in custody is guaranteed by the Constitution of Kenya.
12. The proceedings in this case subsequent to issue of the order of habeas corpus were designed to determine the *bona fides* of the police defence of escape of the prisoner to establish whether the police were in contempt of court in failing to produce the body of the subject of habeas corpus, see **Grace Stuart Ibingira and Ors. v. Uganda** (1966) EA 445. For that reason, the court in its ruling of 20th February 2014 considered that further proceedings were necessary to determine whether or not the respondents have the subject of the habeas corpus proceedings in custody, as shown above.
13. Pursuant to Rule 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (hereinafter ‘the Mutunga Rules’) the Court, partly on its own motion and upon request by the parties, summoned witnesses who it was persuaded had information that could assist the court in reaching a fair decision in the matter.
14. The court also allowed, after compliance with section 106 B of the Evidence Act, the production and playback of a Video DVD recorded by an official of the Non-Governmental Organization **Haki Africa**, Mr. Hussein Khalid, and who testified as to the process of recording the DVD containing video footage and photographs from You-tube and some TV media houses on the incidents that took place at the Masjid Musa mosque raid by the Police on 2nd February 2014. The relevant witnesses were cross-examined on the contents of the DVD by the petitioner in petition no. 8 of 2014 and counsel for the other parties.
15. The court also allowed, at the request of the petitioners, the respondents to demonstrate how they had carried the suspects in the police vehicle. In accordance with the decision of the court of appeal for eastern Africa in **Mohamedali Premji Samji Boghani v. Rex** (1951) 18 EACA 152 on the procedure at visit by court to locus, after the demonstration the court called the police driver as a witness as to what he did at locus and the result of his observations and the advocates for the petitioners had opportunity of putting questions to the witness both at the locus and in Court.
16. The said witnesses testified on oath before the court as court witnesses and were cross examined by the petitioner in no. 8 of 2014 and counsel for the other parties in the consolidated suits. The summary of the testimony of the said witnesses is as follows:
17. **Witness No. 1, PC Owino Okuta**

He was one of the 5 escort officers who allegedly escorted the Subject in a group of about 20 suspects in a

Land Cruiser police vehicle. He stated that he had handcuffed the suspect from the back as he ushered him into the vehicle but later removed the handcuffs when the suspect was settled in the vehicle. On the way to the Makupa Police station at King'orani junction where there are traffic lights, about ten of the suspects jumped out of the vehicle and ran away. The police officers were not able to pursue the escaping suspects as they feared losing the remaining 10 suspects. He could not tell with certainty that Hemed was one of the escaping 10 suspects as he did not know Hemed. He stated that they never made any report of the escape due to an oversight.

18. Witness No. 2 Hussein Khalid Hamisi

He is the executive Director of Haki Africa, an organization that works for promotion of Human Rights in Kenya. He testified before the Court to lay a basis for the admission of a CD/DVD that he had prepared from media recordings of events from You-tube, facebook and from media houses. The CD/DVD which contained video footage and still photographs was then played in Court with the witness PW2 taking the court through the events recorded at various stages of the CD and the source of the footage/photographs at the particular time on the CD, and the various witnesses were cross-examined on its contents.

19. Witness No. 3 Inspector Evans Wesonga

The Deputy Criminal Investigations Officer, Mombasa testified that having received intelligence that there were youths who were assembling at Masjid Musa Mosque at Majengo with the intent of organising Jihad, he was in town trying to gather intelligence to pass on to the police officers who were raiding the mosque. He was then summoned by his boss, the County Criminal Investigations Officer to go to the Mosque and assist in preserving the scene. He confirmed that he had escorted the subject upon his arrest from the mosque as depicted in the Video footage but added that there were other persons being escorted at the same time and not just the subject as shown on video. He said that he left the subject outside the Mosque where the County Police Commander was briefing the press on the operation. The witness said:

“Inside the mosque a gun was recovered. The officers were commanding the people to squat and thereafter being escorted outside. At that time, the man [the subject] was outside the mosque. I was among the officers escorting him and I remember what I saw in the video. I confirm that I was present there. Immediately I reached outside the mosque where the County Commander was I saw one officer who recovered the gun from inside the mosque hand over the gun to the commander.”

The video footage showed the witness escorting the subject through a barrage of hostile police officers who were pointing at the subject as the one who had taken the gun of the police officer who had been killed during the raid. The witness was shown warding off approaches by the police officers as they hit the subject and was heard saying “*achana na mimi*”, Kiswahili for ‘leave me alone.’ The witness confirmed as shown in the video CD that he had to prevent the police officers from hitting the subject. On cross-examination on the CD by Mr. Abubakar, counsel for the petitioner in Petition no. 7 of 2014, the witness said:

“At 2.37 – 2.39 minutes [on the CD], the picture shows police officer pointing a pistol at the suspect. I am the one holding the suspect. The pistol is directed to Hemed and me. I am holding Hemed. I do not know who was holding it; it was a police officer. It is a uniformed police officer. From the picture, there is a police officer who aimed at Hemed. It was not necessary to aim at Hemed when there were many police officers. I cannot say whether it was related to the commotion where I said ‘*achana na mimi*’ (leave me alone).”

The witness confirmed that there had been Occurrence Book entries on the Makupa OB on a report of escape from hospital of one Hassan Ali who had along with 6 other prisoners been taken to Coast General hospital for treatment.

20. Witness No. 4 Abdi Aden Administration Police Officer, Tononoka

Driver of Land Rover GKA 840Q which was presented for examination and demonstration in court. The driver's testimony was primarily that he had not observed the loading of suspects and he was not aware of any escape save that he stopped for a minute at the traffic lights on the way to Makupa Police station on one of the three trips that he delivered suspects. He said:

"I do not know how many suspects were loaded. On the first trip, I went to Makupa and the main gate was closed and I reversed the vehicle to the gate so that the suspects could be off-loaded. It was the same for the 3 trips. On one of the trips there was jam. I used the railway road to Kingorani. From Musa Mosque I went towards railway. All the vehicles were using the railway route, Lumumba road. On one trip there was traffic jam at traffic lights at King'orani towards Makupa at Saba Saba. I stopped there for one minute. I do not know what happened. I stopped then drove on. It was about 2 or 3 trips. I do not know how many officers were involved in my vehicle. They were from many units and even from my unit they were from many camps. No one told me who I was to work with. I do not know how many officers were in the vehicle."

On demonstration, the court formed an opinion that the Land Rover presented as the one which carried the subject in a load of about 20 prisoners could not have carried the said number with police hanging on the back as the vehicle's pick up metal frame broke during the demonstration in court when the vehicle at the same speed (20-30 Kph), according to the driver, as he drove during the material day. The court also noted extreme difficulty in ten of the persons in the vehicle disembarking from the vehicle as alleged.

21. Witness No. 5 Robert Kitur, County Police Commander

He testified as to his role in the matter as follows:

"I was at Masjid Musa from 1-6pm. I was present at any particular time between 1.00 – 6.00pm. at Masjid Musa. I am the one who ordered the police to go into Masjid Musa to flush out the people there. It was I who ordered the police to arrest the persons in the Mosque. A number of the people were arrested from the mosque. The men arrested were not brought to me outside the mosque. They were taken to police stations. One officer was fatally injured and he lost his G3 rifle. It was later discovered inside the mosque. The G3 rifle was brought to me when it was recovered. It was not taken to Makupa Police station. I was not informed by the person who recovered the G3 rifle. The receipt of the G3 rifle is the last action at Masjid Musa. There was a last batch of suspects with 5-6 suspects. When I received the G3 rifle, there were more than 3 suspects. There was no time when only one suspect was brought to me. There were more than 3 suspects in the last batch. They about 3-5. I do not know who brought them from the mosque.

Upon cross-examination on the video CD he said:

"The suspect was brought out in my background as I addressed the parents. I was outside on the road outside Masjid Musa. We recovered other things and evidence from the mosque. We were trying to assemble the evidence. I confirm that Wesonga was part of the officers. The rifle was given to me by OCPD Mr. Kipkemboi Rop. The group of officers came out of the mosque with suspects. OCPD gave me the rifle and the suspects were taken to police stations. I heard one officer saying the suspect was found with the rifle. The officers were telling me that the suspect had been found with the rifle.... From the clip, apart from me there were no other senior officers. I was the senior officer. I think the officer in Maroon uniform is one who said '*Huyu ndiye alikuwa na bunduki*' (this is the one who had the gun). I said that while I was outside I was made aware that the suspect is the suspect who had been found with the G3 rifle. I had also been informed that the police officer had been fatally injured. There are no orders which are given to an officer investigating a case. I did not give any order as regards the suspect."

ISSUES FOR DETERMINATION

22. The Counsel for the Petitioner in petition no. 7 of 2014, Mr Abubakar, and the petitioner in petition no. 8 of 2014, Mr. Omtatah, and the counsel for the respondents Mr. Muteti and Mr. Ngari, made submissions and ruling was reserved. The court also takes note of submissions made before the ruling of 20th February 2014, aforesaid.
23. The issues that presented themselves for determination from the pleadings, evidence and submissions of the parties, and which were deferred by the court ruling of 20th February 2014 are broadly in terms as follows:
- Whether it has been established that the subject was or was not in police custody.**
 - Whether further orders relating to violations of the Subject's rights and fundamental freedoms may be made in these proceedings for habeas corpus.**
 - What orders are to be made in the circumstances of this case.**

WHETHER IT HAS BEEN ESTABLISHED THAT THE SUBJECT WAS OR WAS NOT IN POLICE CUSTODY.

The Burden of Proof in Habeas Corpus application

24. The general burden in a habeas corpus application must pursuant to section 107 of the Evidence Act remain with the petitioner. As stated in the case of *MA. Estrelita D. Martinez v. Director General & Ors.*, supra, "the petitioner must establish any competent and convincing evidence that the missing person, on whose behalf the petition was filed, is under the custody of the respondents." In this case the petitioners were able to establish, and this was admitted by the respondents, the arrest of the subject by the police and the question is on whether the police had custody of the Subject at the time of the habeas proceedings.
25. Where detention of an applicant is established, the burden of proving the legality of detention rests with the State, see *Archbold Criminal Pleading Evidence and Practice 2012* at p. 1767 paragraph 16-55. To place the burden on an applicant to prove illegality of the detention is to require the applicant to prove a negative.
26. *This matter did not call for the respondents to prove legality of detention as the continued detention of the Subject was denied and explained by the Subject's alleged escape. However, in these circumstances, the respondents have a special burden of proof on the point of alleged escape, in accordance with the provisions of section 109 of the Evidence act which provides as follows:*

"109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

Where therefore the respondent claims not to have custody of the subject of habeas corpus application, as a result the subject's escape from custody, the respondent must prove the escape.

The Findings on The Evidence

27. The situation that has been unravelled by the evidence led in this Petition is as follows:
- Hemed Salim Hemed was arrested by the police during the raid at Masjid Musa mosque on the 2nd February 2014.*
 - Hemed had not been found any time after the arrest by the police at the mosque and the suspect's family had searched for him in all police stations, hospitals and morgues in the region without success.*
 - Several police officers in the video were pointing at the suspect with their guns menacingly accusing him of having been the one who was found with the gun belonging to the police officer who was killed in the raid, and it is not inconceivable that as contended by the petitioners that he could have been killed by the same police officers, and the matter covered up.*
 - The police explanation that the suspect escaped was not supported by evidence and empirical re-enactment of the alleged escape, when the metal framework in the rear of the*

pick-up Land Rover was broken as the vehicle was test driven in court compound; it became clear that the vehicle could not have carried 20 suspects and 5 police officers armed with their guns; moreover, maneuverability within the vehicle laden as alleged to facilitate escape was demonstrated to be hampered and slow, making it improbable that there was such an abrupt escape of ten suspects as alleged.

- e. *It is unconvincing that the police who had handcuffed Hemed from the back obviously as a dangerous high value suspect accused of killing a police officer and taking his gun could have had his restraint removed in the motor vehicle during his transportation to the police station thereby facilitating his escape.*
- f. *Hemed must be presumed dead because from the circumstances of his arrest as shown in the video DVD on his arrest with police officers viciously assaulting him and accusing him of having taken a gun from, and therefore being the presumed killer of, the police officer who was killed during the raid and his gun stolen, coupled with the improbable explanation removal of handcuffs and his subsequent escape from a moving Land Rover on transit to Makupa Police Station, there are reasonable grounds for the belief that the subject must have been killed by the police and the fact covered up by theories of escape which could not be positively proved.*
- g. *There was also evidence through the video CD played before the court that the police may have used excessive force in dealing with the suspects at the Masjid Musa mosque raid.*
- h. *In these circumstances it must be concluded that the suspect was **a missing person believed dead** within the meaning of section 386 (d) of the CPC.*

The evidence of the witnesses was not conclusive in determining whether the subject of the habeas corpus proceedings was in police custody or he had escaped as alleged by the police, or dead as urged by the petitioners. The evidence presented by the petitioners placed the subject in the hands of the police at arrest but further investigation would be necessary to disclose whether in fact the subject escaped from custody or what became of him upon arrest. While the court finds reasonable grounds for believing, as contended by the petitioners, that the subject may have been killed, because of the criminal nature of such an act and the serious implications of such a finding it cannot be made without cogent evidence on the criminal standard of beyond reasonable doubt.

28. The Court must therefore return a verdict that the Subject of these habeas corpus proceedings, Mr. Hemed Salim Hemed, ‘*is missing and believed to be dead*’ within the meaning of section 386 of the Criminal Procedure Code. Accordingly, the court must find that the respondents’ custody of the Subject at the time of this ruling is not proved; it is also not proved that respondents lost custody of the Subject after the arrest, which is admitted; and the case must further be investigated to determine the correct factual position. Accordingly, the order of ***habeas corpus*** must accordingly be held in abeyance until it is established that the respondents have custody or have regained custody of the subject, as the case may be.

29. Even where the court finds a prima facie case that the subject of habeas corpus has been murdered, the court nonetheless orders police investigation to determine the perpetrators. See the case of ***Sebastian M. Hongray v. Union of India & Ors.*** of 23rd April 1984 where the court said:

“Further adjourning the matter to enable the respondents to trace and locate the two missing persons is to shut the eyes to the reality and to [pursue] a mirage. The two officers have not met their tragic end in an encounter as is usually claimed and the only possible inference that can be drawn from the circumstances of the case is that both of them must have met an unnatural death. Prima facie, it would be an offence of murder. Who is individually or collectively the perpetrator of the crime or is responsible for their disappearance will have to be determined by a proper, thorough and responsible police investigation. It is not necessary to start casting a doubt on anyone or any particular person. But prima facie there is material on record to reach an affirmative conclusion that both Shri. C Daniel and Shri C. Paul are not alive and have met their unnatural death. And the Union of India cannot disown the responsibility in this behalf.”

In the present case, I am not able to find without further investigations that there is a prima facie case that

the subject of the habeas corpus application is not alive and has met an unnatural death.

WHETHER FURTHER ORDERS ON THE VIOLATIONS OF THE SUBJECT’S RIGHTS AND FUNDAMENTAL FREEDOMS MAY BE MADE IN THE HABEAS CORPUS PROCEEDINGS.

The Nature of the Right to Habeas Corpus

30. The right to an order of **Habeas Corpus** is one of the rights in the Bill of Rights which cannot be limited. The other rights that cannot be limited are set out in Article 25 of the Constitution of Kenya 2010 are the right to freedom from torture, and cruel, inhuman or degrading treatment, freedom for slavery or servitude and the right to a fair trial. The heightened status of these rights as against other constitutional rights and freedoms in the Bill of Rights is emphasized by this protection from any limitation.
31. The premium upon which the people of Kenya places on the right to *habeas corpus* is also emphasized by the fact that until the promulgation of the Constitution of Kenya 2010, the right to *habeas corpus* was guaranteed only by statutory provisions under section 389 of the Criminal Procedure Code on directions in the nature of *habeas corpus*. Under the new Constitution, the right to *habeas corpus* is entrenched in the Bill of Rights under Article 51 (2) in the following terms:

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

32. The importance of the order of habeas corpus is emphasized by the Indian decision of **Gulam Sarwar v. Union of India & Ors.** (1967) AIR 1335 of 15th December 1966 where the Supreme Court of India observed the position as agreed by English, American and Indian Courts that the principle of **res judicata** is not applicable to a writ of **habeas corpus**. In Kenya, in addition to our obligation under section 3 of the Judicature Act to be persuaded by decisions of the Common Law world, the provisions of Article 25 of the Constitution puts the matter beyond doubt by declaring the right as one of the only four (4) rights and fundamental freedoms in the Bill of Rights that cannot be limited.

The True Scope of Habeas Corpus

33. In the Philippines case of **MA. Estrelita D. Martinez v. Director General and Ors.** GR No. 153795 of 17th August 2006 the Supreme Court of the Philippines set out the object of habeas corpus as follows:

“Habeas corpus generally applies to ‘all cases of illegal confinement or detention by which any person is deprived of his liberty or by which the rightful custody of any person is withheld from the person entitled thereto.

Said this Court in another case:

‘The ultimate purpose of the writ of habeas corpus is to relieve a person from unlawful restraint. It is devised as a speedy relief from unlawful restraint. It is a remedy intended to determine whether the person under detention is held under lawful authority. – (Ngaya-an v. Balweg, 200 SCRA 149, 154-5, August 5, 1991 per Jaris, J.)’

If the respondents are neither detaining nor retraining the applicant or the person on whose behalf the petition for habeas corpus has been filed, then it should be dismissed. This Court has ruled that this remedy has one objective – to inquire into the cause of detention of a person:

‘The purpose of the writ is to determine whether a person is being

illegally deprived of his liberty. If the inquiry reveals the detention is illegal, the court orders the release of the person. If, however, the detention is proven lawful, then the habeas corpus proceedings terminate. The use of habeas corpus is thus very limited. - (*Alejano v. Cabuay* 468 SCRA 188, 200, August 25 2005 per Carpio, J.)'

Habeas corpus may not be used as a means of obtaining evidence on the whereabouts of a person, or as a means of finding out who has specifically abducted or caused the disappearance of a certain person.. When the respondents making a return of the writ state that they have never had custody over the person who is the subject of the writ, the petition must be dismissed, in the absence of definite evidence to the contrary."

34. Custody is crucial in habeas corpus case, and even where physical custody is lost by voluntary act of the respondents the right to habeas corpus will be affected. In ***Mariam Mohamed and Anor. Commissioner of Police and Anor.*** (2007) eKLR, Ojwang' J. (as he then was) considered an application for habeas corpus in which the subject was admittedly taken out of jurisdiction of the Kenyan courts and held:

"It is evident that, voluntarily or involuntarily, the respondents have placed themselves in a position in which it is no longer within their power to produce the subject before this Court. This Court, within the concept of habeas corpus, will be unable to make orders for the production of the subject, because such an order would be in vain. It is a fundamental principle applicable in the judicial settlement of disputes, that a court of law is not to make an order in vain. Courts' orders are focussed, clear, enforceable, and capable of being secured by applying the law of contempt, against those who disobey. From the facts placed before this Court, the respondents are, at this moment, not in control of the physical custody of the subject, and so they would not be in a factual position to comply with a writ of habeas corpus. It follows that the applicants' Chamber Summons of 18th October 2007 is either overtaken by events, or would have to remain in abeyance, until the Subject is physically in the custody of the respondents."

35. However, as argued in the Article '***The "Custody" Requirement for Habeas Corpus – Allen v. United states, Martin v. Virginia***', (1966) Vol. 26 Maryland Law Review 79, an order of habeas corpus is available for persons in custody, even though it be legal – including parole and bail - as opposed to physical custody.

WHETHER CONSTITUTIONAL REMEDIES FOR BREACH OF RIGHTS AND FUNDAMENTAL FREEDOMS OF THE SUBJECT OF THE HABEAS CORPUS APPLICATION MAY BE MADE IN THESE PROCEEDINGS.

36. There is precedent in ***Githunguri v. Attorney-General*** (1986) KLR 1 that, in the interest of justice, the court can deem the proceedings before the court as amended in order to give appropriate relief. However, where, as here, the facts upon which relief maybe sought have not been fully established seeing that in this case the matter of the death and cause of death have not been determined, the correct procedure would be to file fresh proceedings in that behalf. The inchoate nature of the cause of action, and since there is no statute of limitation with respect constitutional claims, dictate separate proceedings for particularized reliefs under the Bill of Rights other than the habeas corpus proceedings already before the court.

37. In upholding the right to constitutional relief for protection and enforcement of rights and fundamental freedoms, Ojwang' J. (as he then was) in the ***Mariam Mohamed*** case, supra, held:

"That the Subject should always have access to the safeguards of the Constitution of Kenya, is a *right*, and so the person who made it impossible for the subject to enjoy those rights, committed a *constitutional and legal* wrong against him. Legal wrongs

are always actionable, in any *common law* system such as that which applies in this country. Justiciability at common law is well expressed in the eternal maxim of civilized, law-based governance: ***ubi jus ibi remedium***, meaning, where there is a right, there is a remedy: ***Ashby v. White*** (1703) 2 Ld. Raym. 955. This principle has been re-enacted and reinforced in Kenya's fundamental law of individual rights. Section 84 (1) of the Constitution provides, subject to well defined exceptions (which so far as I can see, would not include the circumstances applicable to the Subject herein), that '*if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him..., then , without prejudice to any other action with respect to the same matter which is lawfully available , that person... may apply to the High Court for redress.*' A wrong, therefore, has been committed against the Subject herein, both in terms of the general law (i.e. the common law), and the specific provisions of the Constitution. ***This, however, is not the question which has been placed before this Court, by the Habeas Corpus application of 18th October 2007; and it is for that reason, that a different application would have to be made before the High Court.***"

[Emphasis added]

38.To pursue the reliefs under the Bill of Rights for any violations thereof with respect to the subject of these habeas corpus proceedings, the family of the subject are at liberty to file suitable proceedings as and when appropriate, as they may be advised by their legal advisors. The decisions of Supreme Court of India in ***Sube Singh v. State of Haryana & Ors.*** of 3rd February 2006, Smt Nilabati Behera v. State of Orissa (1993) AIR 1960, Gauhati High Court in ***Budheswar Bora v. State of Assam and Ors.*** of 39th August 2006, and other cited in the Submissions by Petitioner in Petition No. 8 of 2014 relating to compensation for violations of fundamental human rights will fall to be considered in such proceedings as may be filed for that purpose.

WHAT ORDERS SHOULD BE MADE IN THE CIRCUMSTANCES OF THIS CASE.

Is Habeas Corpus available in Disappearance Cases?

39.Distinguishing the case of illegal detention for *habeas corpus* is available and the disappearance of a person for which it is not, the court in the ***Martinez*** case, supra, further held that forcible taking and disappearances were the proper subject of criminal investigations and not habeas corpus:

*"When forcible taking and disappearance – not arrest and detention – have been alleged, the proper remedy is not habeas corpus proceedings, but **criminal** investigations and proceedings.*

*Abduction or kidnapping is a crime punishable by law. Investigations with regard to crimes are first and foremost the duty of the Philippine National Police (PNP) and the National Bureau of Investigation (NBI), not the courts. There are instances when members of the PNP – the agency tasked with investigating crimes – are suspected of being responsible for the disappearance of a person, who is the subject of habeas corpus proceedings. This fact will not convert the courts into – or authorise them through habeas corpus proceedings to be – forefront investigators, prosecutors, judges and executioners all at the same time. Much as this court would want to resolve these disappearances speedily – as in the present case, when it is interested in determining who is responsible for the disappearance and detention of Michael (if, indeed, he is being detained) – it would not want to step beyond its reach and encroach on the duties of other duly established agencies. Instead of rendering justice **to all**, it may render injustice if it resorts to shortcuts through habeas corpus proceedings. In fine, this proceeding for habeas corpus cannot be used as a substitute for a thorough criminal investigation."*

40. The reasoning of the court is powerful bearing in mind the separation of powers of the court and the investigative and prosecutorial agencies, and I agree with it. In similar circumstances of alleged kidnapping, the Supreme Court of India in the case of ***Alsia Pardi v State of Madhya Pradesh & Ors*** Criminal Appeal No. 2048 of 2013 of 6th December 2013, also approved the method of investigation by the Central Bureau of Investigation of India in case where a girl had disappearance subsequent to arrest by forest officials. I consider that in the unresolved circumstances of the disappearance of the subject, there is still scope for the carrying out of further investigations to determine the circumstances of the disappearance from police custody or death, in police custody or otherwise, or, if the subject is living, his whereabouts to facilitate his being retaken into custody of the Police to enable the compliance with the habeas corpus order.

WHAT ORDERS SHOULD BE MADE IN THE CIRCUMSTANCES OF THIS CASE

41. It has now been established as a matter of best practice jurisdictional point that where the constitution or statute makes provision for a specific procedure for redressing certain grievances, that special procedure should be strictly followed. See the long line of cases restating the position including ***The Speaker of The National Assembly v The Hon James Njenga Karume***, Civil Application No 92 of 1992 (Unreported); ***Kipkalya Kiprono Kones v Republic & Another ex-parte Kimani Wanyoike & 4 Others***, (2008) 3 KLR (EP) 291; and ***Wanyoike vs Electoral Commission of Kenya*** (No. 2) (2008) 2 KLR (EP) 43. In the ***Karume*** case, the Court of Appeal stated that:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

42. From the findings of the court above, it must be considered that the subject of these habeas corpus proceedings is a **‘missing person believed dead’** within the meaning of section 386 of the Criminal Procedure Code (CPC). The CPC provides for an Inquest into missing persons believed dead 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 Attorney-General 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..”***

43. It is mandatory under section 387 of the Criminal Procedure Code for a magistrate's court in a case of a person missing and presumed dead to hold an inquiry into the cause of death, either instead of or in addition to an investigation by the police or prison officer. Section 387 of the CPC is in the following words:

387. (1) When a person dies while in the custody of the police, or of a prison officer, or in a prison, the nearest magistrate empowered to hold inquests shall, and in any other case mentioned in section 386 (1) a magistrate so empowered may, but shall in the case of a missing person believed to be dead, hold an inquiry into the cause of death, either instead of or in addition to the investigation held by the police or prison officer, and if he does so he shall have all the powers in conducting it which he would have in holding an inquiry into an offence.

(2) Whenever the magistrate considers it expedient to make an examination of the dead body of a person who has been already interred, in order to discover the cause of his death, the magistrate may cause the body to be disinterred and examined.

(3) If before or at the termination of the inquiry the magistrate is of the opinion that the commission by some known person or persons of an offence has been disclosed, he shall issue a summons or warrant for his or their arrest, or take such other steps as may be necessary to secure his or their attendance to answer the charge; and on the attendance of the person or persons the magistrate shall commence the inquiry de novo and shall proceed as if he had taken cognizance of an offence.

(4) If at the termination of the inquiry the magistrate is of the opinion that an offence has been committed by some person or persons unknown, he shall record his opinion and shall forthwith send a copy thereof to the Attorney-General.

(5) If at the termination of the inquiry the magistrate is of the opinion that no offence has been committed, he shall record his opinion accordingly.

(6) In the case of an inquiry relating to a missing person believed to be dead the magistrate shall at the termination of the inquiry report the case together with his findings to the Attorney-General and shall make recommendations as to whether or not the period regarding the presumption of death provided for by section 118A of the Evidence Act should be reduced and if so what lesser period should, in the circumstances of the death, be substituted for the period of seven years.

44. Under section 388 of the CPC the Attorney General [DPP] is empowered to direct a competent magistrate's court to conduct an inquest into the matter of a missing person presumed dead as follows:

388. (1) The Attorney-General may at any time direct a magistrate to hold an inquiry, in accordance with section 387, into the cause of a particular death to which the provisions of that section apply and shall in the case of missing person believed to be dead give such directions as he deems fit.

ORDERS

45. For the reasons set out above, the Court makes the following further orders in the Petitions Nos. 7 and 8 of 2014:

1. **The Chief Magistrate's Court Mombasa as a court empowered to conduct inquests shall forthwith carry out in accordance with section 387 of the Criminal Procedure Code an inquiry into the circumstances of the death of the subject this proceedings on the basis that he is now designated 'a missing person presumed dead' within the meaning of the section.**

2. As section 387 of the Criminal Procedure Code (CPC) contemplates contemporaneous investigations by the police *in addition* to the inquiry by the Magistrate's Court, this court directs the Criminal Investigations Directorate of the Police to further investigate the circumstances surrounding the disappearance and or death of the subject of these habeas corpus proceedings.
 3. To address the concerns by the applicants that being themselves suspected of involvement in the disappearance and probable death of the subject, the police are unsuitable to carry out investigations into the matter, the court will of its own motion pursuant to Rule 6 (c) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, (the Mutunga Rules), invite as amicus curiae (friend of the Court) the Kenya National Human Rights Commission (KNHRC), which is constitutionally mandated to investigate all cases of human rights violations, to conduct investigations in the matter and jointly with the Criminal Investigations Directorate to prepare a report for the Inquest and this Court. [Rule 6 (c) of the Mutunga Rules provides that "The Court may on its own motion request a person with expertise to appear as a friend of the Court in proceedings before it."]
 4. The KNHRC / Police investigations report will be filed with the Chief Magistrate's Court conducting the inquest into the death and with this Court to enable final orders and closure of the proceedings. Should the investigations reveal that the subject is alive at a known place, the subject may be retaken into the custody of the police upon which the order for habeas corpus will be implemented. If the subject is revealed to have died, the circumstance of the death will be certified to the Inquiry by the Magistrate and this Court so that the Inquest and this proceedings for habeas corpus will be terminated with such orders as to prosecution of any persons who may have committed an offence(s), as may be necessary in the circumstances.
 5. The petitioners may also file complaints with the Independent Police Oversight Authority should the police fail to faithfully perform their duties of investigations in accordance with section 386 of the Criminal Procedure Code and as directed by this court.
 6. Keeping hope alive that the subject will upon the investigations be found and taken into custody by the Police, further consideration of the petitions for habeas corpus herein is stood over generally.
 7. For compensation in damages for violations of rights and fundamental freedoms of the subject and or loss of dependency, as appropriate, the family of the subject may file proceedings in that behalf, as they may be advised by their legal advisors, this habeas corpus proceedings being confined to redressing wrongful or illegal confinement.
46. The Costs of the consolidated Petitions Nos. 7 and 8 of 2014 will abide the final outcome of the matter.

CONCLUSION

47. The Court thanks counsel for the Petitioner in Petition No. 7 of 2014 and Petitioner in Petition No. 8 of 2014 and the counsel for the Respondents for their research and submissions on the law; and the Subject's family and their supporters for their patience and consideration as the court heard and deliberated on this important matter. For the resolution of the crisis in the Coast, alluded to by Jeremy Prestholdt in the *Saturday Nation* column quoted at the beginning of this Judgment, which led to the events of 2nd February 2014 resulting in the disappearance of the Subject of the proceedings herein, it is incumbent upon the Government to provide security for all and to take lawful measures necessary to fight against terrorism and to uphold social justice, thereby cutting the roots that support radicalisation of the Kenyan youth of different religious, social or political persuasion.

Dated, signed and delivered this 8th day of August, 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Abubakar for the Petitioner/Applicant in Pet. No. 7 of 2014

Mr. Omtatah the Petitioner/Applicant in Pet. No. 8 of 2014

Mr. Ngari for the Attorney General

Miss Ochola holding brief for Mr. Muteti for the DPP

Miss Linda - Court Assistant