



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MISC. APPLICATION NO. 18 OF 2011

ABDULLAHI ADAN.....APPLICANT

VERSUS

THE DIRECTOR, KENYA WILDLIFE SERVICES.....RESPONDENT

RULING

The application before me is in the nature of *Habeas Corpus*. It seeks to have the Director of the Kenya Wildlife Services produce before this court, the body of the subject, ABDULLAHI ADAN.

The application is supported by the affidavit of Ashford Gerrard Riungu, an advocate of this Honourable Court.

Mr. Riungu deponed that the subject phoned him on 15th August 2011, notifying him that he had been arrested by officers from the Kenya Wildlife Services. The said officers are said to have picked up the subject from his home.

According to Mr. Riungu, the subject's phone went mute before the subject could finish telling him whatever he wanted to say. Thereafter, Mr. Riungu was completely unable to reach the subject on his phone.

On 29th August 2011, Mr. Riungu accompanied about 10 members of the subject's family to Nanyuki Police Station. Whilst at the police station, the DCIO Laikipia District, Mr. Shadrack Juma, informed them that the Kenya Wildlife Services personnel arrested the subject.

They then asked the DCIO to provide them with an office where they could interrogate the subject.

After the KWS personnel had interrogated the subject, they told the DCIO that they were taking away the said subject for further interrogation at their camp.

According to the DCIO, the KWS personnel had failed to secure a confession from the subject, concerning his alleged ownership of a firearm and also his alleged involvement in poaching.

Since 15th August 2011, the subject had not been seen by his family. As a result, the family lodged a report with Nanyuki Police Station concerning the disappearance of the subject.

On 5th September 2011, the family of the subject filed the current application. Two days later, Lesiit

J. granted an order requiring the Director of Kenya Wildlife Services to appear before the court on 12th September 2011, to produce the body of the subject or to show cause why the said subject should not be released.

On 12th September 2011, the respondent was represented in court by Miss Bosire advocate. She informed the court that the respondent had only been served with the application on 9th September 2011. As that day was a Friday, the respondent was unable to comply with the orders made on 7th September 2011.

At the request of the respondent, the court allowed them one more day, to enable them comply with the order.

On 13th September 2011, the respondent did not produce the subject in court. Instead, a Senior Investigation Officer, Mr. Ignatius Ipapo, filed a Replying Affidavit.

By that affidavit, the respondent stated, inter alia, that;

“On 15th August 2011 at around 11.00a.m. the Applicant was arrested within Nanyuki Town, and was taken to Nanyuki Police Station for interrogation; and he was later taken by KWS personnel under the command of Mr. Tanui, attached to Aberdare National Park, for further questioning.”

However, Mr. Ipapo insisted that the subject was set free at about 5.00p.m., in Nanyuki town.

On his part, Mr. William Tanui, the Company Commander of D Company, Aberdare National Park, swore an affidavit, stating, *inter alia*, as follows;

“5. THAT the subject was never released to me by the police but the truth of the matter is that he was set free by the police due to lack of enough evidence to connect him with the alleged intended offence. 6. THAT upon his release by the police, I never re-arrested him at all, but I only walked from the police station with him and parted ways as explained.”

Clearly, therefore, the respondent’s position on the matter is not clear. On the one hand Mr. Ipapo says that the subject was released to Mr. William Tanui for further questioning; but on the other hand, the said William Tanui denies that subject was released to him.

Mr. Ipapo swore his affidavit after he had carried out the necessary inquiries into the matter. Those inquiries revealed that the subject was taken by some KWS personnel who were operating under the command of Mr. Tanui.

The reason why the KWS personnel took away the subject after he had been interrogated at the Nanyuki Police Station, was for further questioning.

Now, whereas Mr. Ipapo has told the court that he did carry out inquiries before deriving therefrom his conclusions, Mr. William Tanui told the court about matters which he dealt with personally.

One might be tempted to argue that what Mr. Tanui told the court about ought to be preferred to that which Mr. Ipapo said because Mr. Tanui was talking from first-hand experience. However, I do not think that that is necessarily the case, when everything is put within context.

It must be recalled that the subject had not been seen by his family since 15th August 2011. Both Mr. Ipapo and Mr. Tanui have conceded that the subject was last seen in the company of Mr. Tanui. Therefore, I hold the considered view that Mr. Tanui may have had reason to try and put some distance between him and the subject, as he obviously knew that he would have to answer questions regarding the whereabouts of the subject.

On the other hand, Mr. Ipapo had no motive at all, for making the conclusion he arrived at after he

had conducted inquiries.

The applicant's advocate, Mr. Ashford G. Riungu, invited the court to demand from the respondent, proof that the subject was alive. Alternatively, the court was asked to make a finding that the subject was dead.

In the event that the court held that the subject was dead, the applicant asked that I should direct that Mr. William Tanui be charged with the offence of murder. It was the applicant's contention that that was the only remedy available, in law.

I understand the applicant to be asking the court to invoke the legal presumption of death, because the subject had not been seen for over 2 months.

Section 118 A of the Evidence Act states as follows;

“Where it is proved that a person had not been heard of for seven years by those who might be expected to have heard of him if he were alive, there shall be a rebuttable presumption that he is dead.”

Therefore, although I do appreciate the anxiety of the family of the subject, it is way too early for the court to invoke the legal presumption of death.

But even if the said legal presumption were to be invoked, it would not be the function of this court to direct that William Tanui or anybody else be charged with the offence of murder.

There is a process through which the Director of Public Prosecution determines whether or not a suspect ought to be charged with a criminal offence. I must therefore allow the Director of Public Prosecution to undertake such actions as he may deem appropriate.

If criminal charges are preferred against any person, the courts of law shall undertake the role of an independent arbiter. It is for that reason that I cannot give directions that any person be charged with criminal offences, in relation to the matters in issue before me.

That brings me to the question regarding the suitability of an advocate swearing an affidavit to support an application such as the one before me.

Mr. Mithega, the learned advocate for the respondent, submitted that an advocate ought not to place himself in a situation wherein he swears an affidavit on factual issues.

It is true that Mr. Riungu advocate swore the affidavit in support of the application. In the said affidavit, Mr. Riungu stated, *inter alia*, that the subject called him on phone, and informed him that he had been arrested from his home, by KWS askaris. Mr. Riungu also said that before the subject finished saying whatever he wanted to say, the phone went mute.

To that extent, Mr. Riungu was talking about what transpired between him and his client.

That Mr. Riungu tried to reach his client on phone, albeit unsuccessfully, is also a fact about which the advocate was entitled to depone.

Thereafter, the advocate visited the Nanyuki Police Station, in the company of the subject's relatives. What he was told by the DCIO, Laikipia District is reported speech. So also is the information which the relatives of the subject gave him concerning their efforts to trace the subject.

The most appropriate persons, to have sworn affidavits concerning their efforts to trace the subject, were those relatives who searched for him.

Similarly, it is the DCIO, Laikipia District who should have sworn an affidavit spelling out the events that took place between him and the KWS personnel.

By swearing an affidavit, touching on matters which he was not involved in first-hand, and which may become contentious, (as did happen in this case), the advocate was putting himself in the un-enviable position, where he may conceivably be called to the witness-box.

It is advisable that an advocate should strive to avoid personal involvement in the affairs of his client, if he is to continue to give objective legal advice and representation.

If an advocate permits himself to be involved in the affairs of his client, there is a real risk that his objectivity may be compromised.

For now, the respondent insists that it does not have the subject in its custody. Therefore, if the court were to order KWS or any of its officers to produce the subject, the court would have acted in vain.

In **MARIAM MOHAMED & ANOTHER Vs THE COMMISSIONER OF POLICE & ANOTHER, Misc. CRIMINAL APPLICATION No. 732 of 2007**, Ojwang J. (as he then was), emphasized the following point;

“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 focused, clear, enforceable, and are 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.”

In that case, the subject was, apparently, removed from the jurisdiction of the courts in Kenya.

In the case before me, the respondent has denied knowledge of the subject’s whereabouts. They say that the subject was set free on 15th August 2011.

Although it is not clear whether or not that is factually correct, and if so, the circumstances in which the subject was freed, there is nothing to convince me that the subject is being held by the respondent. I cannot therefore order them to produce the subject before the court.

Accordingly, I find that the respondent has shown cause why this court ought not to order them to produce the subject, dead or alive.

Nonetheless, I do direct the Commissioner of Police to carry out urgent and indepth investigations, with a view to establishing;

- (a) the whereabouts of the subject, ABDULLAHI ADAN; and**
- (b) whether or not any of the persons who were in contact with him on 15th August 2011 or soon thereafter, did commit any offence;**
- (c) if any person should be held accountable for the disappearance of the subject.**

Finally, I order each party to bear his own costs.

Dated, Signed and Delivered at Nairobi, this 26th day of October, 2011

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FRED A. OCHIENG
JUDGE