



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA**

Miscellaneous Application 27 of 2008

**IN THE MATTER OF AN APPLICATION BY PHYLIS TEMWAI KIPTEYO FOR LEAVE TO APPLY FOR
AN ORDER OF HABEOUS CORPUS ON BEHALF OF PATRICK KIPTEYO SEWUI**

AND

**IN THE MATTER OF SECTION 389 (2) OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF
KENYA**

AND

IN THE MATTER OF THE COMMISSIONER OF POLICE MAJOR GENERAL MOHAMMED ALI

AND

IN THE MATTER OF CHIEF GENERAL STAFF MAJOR GENERAL KIANG'A

AND

IN THE MATTER OF ADMINISTRATION POLICE COMMANDANT KINUTHIA

AND

**IN THE MATTER OF HONOURABLE ATTORNEY GENERAL AMOS WAKO
EX-PARTE CHAMBER SUMMONS (Under rules made pursuant to section 389 (2) of the Criminal Procedure
Code Cap.75 Laws of Kenya)**

RULING

This is a ruling on the application dated 31/7/2008 seeking for orders of *habeus corpus* against the Respondents to show cause why one Patrick Kipteyo Sewui should not be released from the custody of the Respondents. The Applicant Phylis Temnai Kipteyo names the Commissioner of Police, the Chief of General Staff, the Administration Police Commandant and the Attorney General as the Respondents. Mr. Rono represented the Applicant while Mr. Onderi, Senior Principal State Counsel represented the four (4) Respondents.

The Applicant's husband Patrick Kipteyo Sewui who is the subject of these proceedings worked as a Senior Assistant Chief of Chebwek Sub-location in Mt Elgon District having been appointed in 1997. He was arrested from his home on 25/4/2008 around 11.00 p.m by security men and taken to Chepkube Army Base. This was during the security

operations in the district in 2008. The officers searched the house and carried some documents. The Applicant was instructed to search for a list of criminals in the district in the house and surrender the same to the officers at the camp. She found the list around 2.00 a.m the same night and took it to the army base. At the base, the Applicant saw her husband being tortured as he lay on the floor with officers surrounding him. The list was snatched from her by an officer. She was immediately ordered to leave the base. That was the last time she saw her husband. She has since then made frantic efforts to look for her husband but in vain. This has caused her a lot of mental anguish.

The State Counsel on behalf of the Respondents denied all the allegations made by the Applicant. He relied on his replying affidavit sworn on the 4th August 2009. The respondents admit that Mr. Kipteyo was working for the Government as a Senior Assistant Chief. The alleged arrest, detention and torture was categorically denied. At the material time, there was a breakdown of law and order in Mt. Elgon District due to the disturbances caused by the Sabot Land Defence Force (SLDF) who were a rag-tag army who caused the deaths of many people in the district. The State submitted that it is not possible for the Respondent to comply with an order of *habeus corpus* since they do not have the person in their custody. The whereabouts of the victim are not known.

The application seeks to have the Respondents appear before the court and produce the said Patrick Kipteyo Sewui or to show cause why he should not be produced. The application is brought under section 389 (1) of the Criminal Procedure Code. For a court to grant the orders sought, the Applicant must satisfy the court that the victim is in the public or private custody of the Respondents or that the Respondents know the whereabouts of the victim or where he may be illegally or improperly detained with their instructions.

The affidavit of the Applicant explains the way he was arrested allegedly by the military personnel working on security operations at Mt. Elgon on 25/4/2008. He was taken to the Army Base where he was held. The Applicant alleges that she went to the Army Base a short while later where she found her husband being tortured by army officers. She was immediately chased away from the base. Thereafter efforts to trace her husband did not bear fruit leading to the filing of this application. The Respondents through the state counsel's affidavit deny knowledge of the whereabouts of the victim. It is admitted that the victim worked as a Senior Assistant Chief of Chebwek Sub-location in Mt. Elgon District but avers that they would not have any reason to arrest and detain a government servant. The identities of the officer were not provided by the Applicant supposedly because she did not have them. The court is left with the word of the Applicant and the denial by the Respondents. Without any specific identities, it becomes difficult to establish which security men arrested and detained the victim. The situation in Mt. Elgon District as described by the Respondents was such that there was a breakdown of law and order in the district. There was a self-declared force calling itself Sabot Land Defence Force (SPLF) which went on the rampage threatening security and claiming to defend the land rights of their community. There is a possibility that the said self-styled army men were uniformed. The Government sent military officers to restore law and order in the district. In this quagmire there was a security lapse in the district which the

Government had to deal with. Unfortunately, it is in the process of the government security forces operation that the victim was arrested and subsequently disappeared and never returned to his home. The people who took him away from his home have not been specifically identified. And in the ensuing denial by the Respondents, it may be an exercise in futility to order the Respondents to produce the victim in court as prayed by the Applicant. A court shall not issue orders in vain.

All the same, the life of the victim and the interests of the family are protected by the constitution and the statutes. The State through the Respondents herein are responsible for security of citizens in this country. It is the duty of the State to inquire into any crime or suspected crime affecting any of its subjects. It is the duty of the State to investigate the disappearance of the victim herein who was its subject and its employee. The family of the victim is entitled to know where the victim is and his current status in regard to his life, health and security. The right to life is a fundamental one which this court has a duty to safeguard.

For the foregoing reasons I decline to grant the orders sought. However, I hereby direct that the Attorney General, the Chief of General Staff and the Commissioner of Police do initiate an inquest into the disappearance of the said Patrick Kipteyo Sewui with a view of bringing to book any culprits who may be involved. The inquest shall commence within 30 days and a report to be filed in this court within 90 days of the date of commencement. I hereby so declare and decree.

The orders to be served on the Respondents by the Bungoma State Law Office.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed this 24th day of March, 2010

In the presence of Mr. Rono for the Applicant and Mr. Onderi for the Respondents.