



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Miscellaneous Application 441 of 2010

**ZUHURA SULEIMAN.....APPLICANT
(On behalf of the subject Mohamed Hamid Suleiman)**

VERSUS

**THE COMMISSIONER OF POLICE.....1ST RESPONDENT
THE COMMANDANT, ANTI-TERRORISM
POLICE UNIT2ND RESPONDENT
THE ATTORNEY GENERAL3RD RESPONDENT**

RULING

On 16/8/2010 the Applicant through her advocate Mr. Mbugua Mureithi came to court under **Section 389** of the **Criminal Procedure Code** and **Rule 2** of the **Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules** seeking summons to be issued against the Commissioner of Police and the Commandant of the Anti-Terrorism Police Unit (ATPU) to appear before this court in person or through their advocates together with the original of any warrant or order for the detention of the subject Mohamed Hamud Suleiman and show cause why the subject should not be released forthwith. The court issued the summons and directed the Respondents to appear on 17/8/2010. On 17/8/2010 the Respondents appeared through Mr. Okello, Mr. Obiri and Mr. Mulati, all state counsel, who requested to be allowed to file response and come on 18/8/2010 for the hearing of the application. The court allowed the request and the matter was heard on 18/8/2010.

The complaint by the Applicant was contained in her affidavit sworn on 16/8/2010. She is the wife of the Applicant and they have 4 children. The couple are citizens of Kenya who reside in a flat at Akiba Estate in Nairobi. They are Muslims. The subject is self-employed, running a business in the name of AL/MANAR HAJJ specializing in organizing and arranging trips to the Holy City of Mecca for Islamic Pilgrimages of UMRA and HAJJ. He was arrested at about 10.30 p.m on Friday 13th August 2010 in the flat by a squad of about 10 Police Officers who were heavily armed with guns but in civilian clothes. These were officers from ATPU. They took along the subject's passport and Identity Card. On 14/8/2010, the subject, using a mobile phone given to him by a good samaritan, rung his mother Zainab Hamid to say that he was being held at Kasarani Police Station and that ATPU officers had threatened him that they were going to forcibly take him to Uganda in connection with the twin terrorist bombings in Kampala on 11/7/2010. On 14/8/2010 at about 11.30 a.m the Applicant and her advocate went to Kasarani Police Station and were informed that the subject had been detained here overnight but that ATPU officers has collected him that morning at 7.55 a.m to unknown destination. The advocate went to ATPU Headquarters along Hospital

Road and found the subject had not been booked here. The advocate subsequently telephoned the ATPU Commandant Nicholas Kamwende who confirmed to him that they were holding the subject without disclosing where. Kamwende told him that they would forcibly remove the subject to Kampala in Uganda for what he termed as “associating himself with persons who had killed people”.

The Applicant swore that the subject was a lawful and God-fearing citizen who had not participated in the terrorist attack and that he had never been to Uganda. She has been advised by her advocate that whatever the offence the subject was suspected to have committed, he was entitled to be treated in accordance with the laws and Constitution of Kenya which provided for being charged within 24 hours, not being held *incommunicado* and not being taken out of jurisdiction without the conduct of extradition proceedings. These are the reasons she applied for *habeas corpus*.

The replying affidavit to the application was sworn by Inspector of Police Charles Ogeto attached to ATPU on behalf of the Respondents. He states that after the twin bombing that took place in Kampala in Uganda on 11/7/2010 following which 76 people died, both the ATPU and the Ugandan Authorities commenced investigations. In the course of the investigations they gathered credible evidence that linked the subject with the bombings. This is the reason why the ATPU arrested the subject on 13/8/2010 and on the following day, 14/8/2010, took him to Uganda where they handed him over to one Senior Commissioner of Police Elly Womanya Deputy Director CID/Crime Intelligence at CID Headquarter Kibuli. The Kenyan Officer who handed over the subject was Daniel Wachira. The Police Inspector swore that since the subject was no longer in the custody of the Respondents and was outside the jurisdiction of the court the application was misconceived and should be dismissed as the order of *habeas corpus* could not issue.

Mr. Mureithi prosecuted the application which was defended by Mr. Okello for the Respondents. The order that went out following the application by the Applicant sought the appearance of the Respondents either in person or through their advocates together with the original of any warrant or order for the detention of the subject and to show cause why the subject should not be released forthwith. It is common ground that the Respondents appeared through counsel which satisfied the first limb of the order. Mr. Mureithi submitted that the 2nd limb of the order entitled the examination of the return by Inspector Ogeto for the court to satisfy itself whether the detention of the subject was lawful. If the detention was unlawful then he should be discharged. Reference was made to HALSBURY’S LAWS OF ENGLAND, Third Edition, Volume II, at pages 43 and 44 paragraphs 83 and 84 which indicate as follows regarding the duty to return and contents of return:

“83. Duty to make return. In compliance with the mandatory directions contained in the writ, the person to whom it is directed is under the legal obligation to produce the body of the person alleged to be unlawfully detained before the court on the day specified, and to make formal return to the writ(s). The end of the writ is to return the cause of the imprisonment, so that it may be examined in court whether the party ought to be discharged or not.....

84. Contents of return. The return to the writ must contain a copy of all the causes of the prisoner’s

detainer endorsed on or annexed to the writ. It should state the facts relied on as constituting a valid and sufficient ground for detention of the person alleged to be illegally detained. These facts must be set forth clearly and directly and with sufficient particularity. The return must be unambiguous.”

There is no dispute that when chamber summons was served the subject had already been handed over to the Police in Uganda. It was the contention of Mr. Okello that it was impossible for the Respondents to produce the body of the subject who has left jurisdiction and therefore the return was sufficient and the application must be left to rest as it had been overtaken by events. Mr. Mureithi submitted that it was still incumbent upon the Respondents to provide in the return reasons for the detention of the subject and to show that they had legally handed over the subject to Ugandan Police. In this regard, it was submitted, no basis has been provided to link the subject with the bombings and that the removal of the subject from Kenya to Uganda had not accorded with the provisions of **section 81 (3)(f) of the Constitution** and the extradition requirements under **Police Standing Orders (Cap 58) and The Extradition (Commonwealth Countries) Act (Cap 77)**.

It should be noted that, as stated in HALSBURY’S (above) at paragraph 87, even where it is impossible for the Respondents to produce the body of the subject because he had already been removed to Uganda they were still under a duty to make a return setting out the facts unequivocally and distinctly and showing the reasons why they were unable to obey the order. In this case, however, the Respondents are not saying that they discharged the subject before service of the order before but that they removed him to Uganda before the service of order. It was incumbent upon the Respondents to state the reasons why in the first place they had arrested the subject and to show they had lawfully handed him over to Uganda authorities. Basically, Mr. Okello’s submission was that the Respondents had made a good return and that they had discharged the burden placed upon them by the order of court.

Since the terrorist attacks during 9/11, the USA Embassy attacks in Nairobi and Dar es salaam on 7/8/1998 and the Kikambala attack on 28/11/2002, all of which were blamed on AL QAEDA elements, terrorism has been both a challenge and a nightmare to law enforcement agencies in Kenya and the entire World. Terrorism is a complex and ever-changing phenomenon that has left vicious consequences both to lives and to property. Many countries, Kenya included, do not want to try terrorism suspects for fear of attacks. This is the environment that the ATPU may have found themselves in when, following the Kampala bombings, they arrested the subject. They quickly, within a few hours of arrest, handed him over to Uganda. Inspector Ogeto’s affidavit is silent on the nature of evidence the police held regarding the subject’s connection in the bombings to be able to hand him over. The subject was arrested at 10.30 p.m on Friday and on the following day, a Saturday, he was in Uganda being handed over. He had been collected from Kasarani Police Station, where he had slept, at 7.55 a.m. There was certainly no opportunity afforded for him to apply to the Kenyan Courts for release, for instance. There

was no formal communication with his family or information that he was being taken out of jurisdiction. He is a Kenyan citizen who had immunity against expulsion. There was no formal request by the Ugandan authorities for him. There was no warrant issued by a court in Uganda seeking his arrest. All extradition provisions were disobeyed in his connection. In short, all the evidence indicates he was illegally arrested, detained and removed from Kenya.

Whether one is a terror suspect or an ordinary suspect, he is not exempted from the ordinary protection of the law. Whatever the security considerations that the Police had in this case, the recognition and preservation of the liberties of this subject was the only way to reinforce this country's commitment to the rule of law and human rights. Police must have the capacity to battle terrorism and enforce human rights at the same time as the two are not, and should not, be incompatible.

MR. MUREITHI referred the court to the case in **Njuguna S/O Kimani and Others – Vs- Reginam 21 Eaca 316, 324** in which the then Court of Appeal for Eastern Africa stated as follows:

“It is a matter of great concern if criminals go unpunished: it is a matter of equally great concern that the courts should administer justice according to law. The implications of this case are indeed grave, suggesting as they do, the danger that the Police Force in Kenya is tending to become a law into itself. The court will fail in their duty if they ignore or pretend not to see the danger when it is apparent on the evidence before them”.

This was said in 1954 in a case in which the appellants had been convicted for being “Mau Mau” terrorists who had brutally murdered a European and his wife both living on an estate at which they had been arrested and detained without charge for nearly three months during which confessions had been extracted from them. Their convictions were quashed. During this State of Emergency era the court found the conduct of the Police unacceptable.

I find that no exceptional circumstances, whether state of war or terrorist actions, can be invoked to justify the treatment handed down to the subject herein by the Respondents. I find that the return made by Inspector Ogeto was not sufficient and that the arrest, detention and removal of the subject from Kenya to Uganda were illegal and transgressed his fundamental rights and liberties. Since he is out jurisdiction, however, I make no further orders.

DATED AND DELIVERED AT NAIROBI

THIS 30TH DAY OF SEPTEMBER, 2010.

**A. O. MUCHELULE
JUDGE**