



REPUBLIC OF KENYA

HIGH COURT AT KISII

CONSTITUTIONAL REFERENCE 98 OF 2008

KEPHER OMARIBA OGEA APPLICANT

VERSUS

THE HON. ATTORNEY-GENERAL 1ST RESPONDENT

THE COMMISSIONER OF POLICE 2ND RESPONDENT

THE D.C.I.O. KISII CENTRAL POLICE

DIVISION HEADQUARTERS 3RD RESPONDENT

RULING

The applicant filed an *Habeas Corpus* application and sought the following order:

“An order in the nature of *Habeas Corpus* do issue directed against the Honourable Attorney- General, Commissioner of Police and D.C.I.O, Kisii Central to have the person of Kepher Omariba Ogega produced before this Honourable Court at such time as the Judge may direct and that the said Honourable Attorney-General, Commissioner of Police and the D.C.I.O. Kisii Central, in person or by their authorized agent together with the original of any warrant or order to show cause why the said Kepher Omariba Ogega should not be released forthwith and set free.”

In an affidavit sworn by Ezekiel Ombaso Ogega, a brother to the applicant, he deposed that:

- **The applicant was arrested on 20th September, 2008 from his residence at Kisii Central District by a contingent of 15 police officers from Kisii Central Police station.**
- **That the police officers alleged that they were looking for the applicant to question him on an alleged illegal business that he was said to be carrying out between Kenya and Tanzania.**
- **That the applicant was taken to Central Police station where he was held *incommunicado*.**
- **That no charges were preferred against the applicant.**
- **That the applicants’ relatives tried to secure his release in vain.**
- **That the continued incarceration of the applicant is unconstitutional.**

The first respondent was served with the said application on 17th November, 2008. It is not clear when service was effected upon the 2nd and 3rd respondents.

After several mentions of the application, on 10th February 2009, **Mr. Kemo, Senior Principal Prosecution Counsel**, informed the court that the applicant was released from police custody on 21st September, 2008. The family members of the applicant denied that the applicant had been released and consequently the court directed the respondents to file a replying affidavit in response to the applicant's application.

Inspector Mateche Muyekho, the Officer Commanding Gesonso police station Kisii and who was the Acting O.C.S. Kisii police station on 20th September, 2008 swore an affidavit on 19th February, 2009. He deposed that on 20th September, 2008 at 13.30 hours the applicant was booked at Kisii police station by Acting Inspector Kemare (Kamau) and Police Constable Marete on suspicion of harbouring criminals. He was booked in **Occurrence Book (O.B.) No. 77** of that day. He further deposed that the applicant was booked into the cells by police Constable Sietiinei and at the time he was fit and did not have any complaint. Inspector Muyekho stated that on 21st September, 2008 at 17.30 hours he instructed Police Constable Odhiambo to release the applicant and that the applicant left the station immediately thereafter without any complaint. Copies of the Occurrence Book of 20th and 21st September 2008 were annexed to the aforesaid affidavit.

The applicant's counsel disputed the contents of the aforesaid affidavit and sought to cross-examine the maker of the same and several other police officers mentioned therein.

Acting Inspector Wycliffe Mwangi Kamau, W1, was the first witness to testify. He told the court that on 20th September, 2008, he received intelligence report that the applicant was harbouring criminals at his home in Nyamataro area. Together with a contingent of other police officers who included Police Constable Marete and Police Constable Saidi from the flying squad they went to the applicant's house at about 10.00 p.m. They forced the gate open and violently knocked at the applicant's main door. When the door was opened they went in and found the applicant with his family members and a visitor. They interrogated the applicant, searched the entire house thoroughly but recovered nothing of any importance to their investigations. The police decided to escort the applicant to Central police station where he was booked in at about 11.30 p.m. W1's shift ended at 6.00 a.m. when he went to his house leaving the applicant in the cells. The applicant was to be interrogated by the O.C.S. The witness asserted that according to entries in the occurrence book the applicant was released on 21st September 2008 at about 17.30 hours.

W1 denied a suggestion by the applicant's counsel that the applicant had a brief case which contained various documents when he was escorted from his house to the police station. The witness further clarified that he did not see the applicant again after he was booked into the police cells.

Inspector Mateche Muyekho, W2, was the Acting O.C.S. Central police station at the material time. He testified that he saw the applicant on the morning of 21st September, 2008. The applicant was in sound condition. Later in the day this witness consulted with the District Criminal Investigation Officer, **Jacob Muchai, W6**, and it was agreed that there was no basis of continuing to hold the applicant in the cells. W2 therefore ordered release of the applicant at about 5.30 p.m. W2 said that he saw the applicant carrying a brief case as he left the police station. However, there was no police record indicating that the applicant had any brief case at the time he was being booked in. The only items that were recorded as belonging to the applicant before he was put in the cells were Kshs. 1,300/=, mobile phones Nokia 1200 and Nokia 1680. The witness further denied a suggestion by the defence counsel that on 21st September, 2008 at about 6.00 p.m. the applicant was bundled into the boot of a police vehicle registration number KAM 803 C, Peugeot 504 by make (station wagon) and driven to an unknown destination.

Police Constable Julius Sitiinei, W3, was the cells sentry on 20th September 2008 from 4.00 p.m. to midnight. When the applicant was handed over to W3, he searched him before placing him in the cells.

Police Constable Simon Odhiambo, W4, was at Kisii central police station on 21st September, 2008

at about 5.30 p.m. He was at the report office although it was during his free time. He was not in-charge of the report office but was instructed by the O.C.S. to release the applicant from the cells. At the time, **police Constable Kones** was in charge of the report office. It is **PC Odhiambo** who wrote in the Occurrence Book No. 77 of 21st September, 2008 that:

“Prisoner released under the instructions of the OCS Kisii Central police station IP Mateche. I, PC Odhiambo do release one

male prisoner namely KEPHER OMARIBAOGEGA and leaves station without any

complain. Signed.”

When this witness was making the above entry in the day’s occurrence book, the applicant was still in the cells and the witness was candid that he never saw the applicant walking out of the cells. He further stated that he could not tell whether the applicant was indeed released.

In cross examination, the witness denied that motor vehicle Reg. No. KAM 803 C was parked outside the police station at the material time. Asked by the applicant’s counsel why he made the aforesaid entry in the occurrence book yet he had not witnessed the applicant’s release from the cells the witness answered:

“I did not see Kephher leaving the cells. I just made the entry. I happened to have been at the report office and the O.C.S. told me to make that entry. I believed he would be released immediately after I wrote at the OB entry at 17.30 hours.”

On his part, **PC Duncan Kones, W5**, testified that on 20th September, 2008, he was in charge of the report office when the applicant was escorted to the police station and he did not see him having any brief case. The only items that he recorded were cash Kshs. 1,300/= and the two mobile phones aforesaid. He denied that he was on duty on 21st September, 2008 at 5.30 p.m. because he had worked until 3.30 p.m. At the time of leaving the station, the applicant was still in the cells. He said that on 21st September, 2008, at about 5.30 p.m. the cell register was signed by **Police Constable Kasembeli** to signify that the applicant had left the cells. The said PC Kasembeli was in charge of the report office at the material time.

With regard to the entry that was made by PC Odhiambo, W5 said that a police officer cannot just make an entry that a suspect has been let out of the cells if indeed the officer had not actually seen the suspect leave the cells. It was PC Kasembeli who was supposed to make the entry in the occurrence book relating to the release of the applicant. Thereafter an entry would have been made in the cell register.

Chief Inspector Muchai, W6, who was the D.C.I.O. Kisii Central said that he was not made aware that the applicant had been arrested, all he was told by Acting Inspector Kamau was that several suspects had been arrested in connection with some robberies that had taken place within Kisii around that time. He said that he had not given anyone instructions regarding the applicant.

Later on he met relatives of the applicant who were complaining that the applicant had gone missing after his arrest by police officers from Kisii Central Police station. He asked them to record a statement to that effect but they did not do so.

As regards motor vehicle Reg. No. KAM 803 C, the witness admitted that this was the registration number of a police vehicle but he was not in a position to tell which officers were in charge of the same on 21st September, 2008 between 5.30 p.m. and 6.00 p.m.

In answer to questions during re-examination by the court, the witness said that he could not remember being told about the applicant by Acting Inspector Kamau. He insisted that they discussed about the arrest of several suspects with Inspector Mateche Muyekho. However the witness seemed to change his testimony and stated:

“After the arrest of Ogega, we did not get anything of relevance from him. I think Inspector Kamau talked to me about Ogega

before he was released.”

Mr. Achola for the applicant urged the court to allow his client’s witnesses to testify in relation to the evidence that was adduced by the aforesaid police officers. The court granted the said application.

Ogega Patrick, W7, testified that on 20th September, 2008 at about 8.00 p.m. or thereabout, together with the applicant and several other family members, were having dinner in the house of the applicant. A contingent of about 20 police officers forced open the applicant’s gate and ordered the door to the applicant’s house to be opened. The police officers had a motor vehicle Reg. No. GK A 903 D, a Land cruiser by make. The police officers assaulted him and the applicant and proceeded to conduct a search in the house. They were asking the applicant to surrender a gun which they had been told he was keeping in the house. They also demanded that he shows them gangsters whom they alleged he was housing therein. The police did a thorough search for nearly two hours but they recovered nothing. The applicant had fully identified himself. The applicant was a former District Officer who was at the time a businessman and had contested for a parliamentary seat in respect of Bobasi Constituency during the 2007 parliamentary elections.

The applicant showed the police officers all the relevant identification documents that he had in his possession including title deeds, registration books of various vehicles and ATM cards of the Co-operative and Equity Banks. He put all those documents in a black brief case and was escorted to the police vehicle. The witness said that the applicant carried with him the said brief case.

On the following day at about 8.00 a.m. W7 visited the applicant at the police station. Thereafter he telephoned several family members and informed them about the arrest of the applicant. The applicant asked W7 to enquire from the police as to why he had been arrested. When he did so the police did not give him any proper explanation. All they said was that the applicant was a gangster. W7 left the police station at about 5.30 p.m. By that time the applicant was still in the cells but some of his family members were waiting at the police station.

Janes Bochere Karanja, W8, is the applicant’s Aunt. On 21st September, 2008, at about 11.00 a.m. she went to visit the applicant but was not allowed to see him. She went away and returned at about 5.00 p.m. when she was allowed to see the applicant. She gave him a bottle of soda and a loaf of bread but she was not allowed to talk to him. She went outside the station and while standing near the gate at about 6.00 p.m. she saw motor vehicle Reg. No. KAM 803 C driving into the police station. It was parked in reverse and the applicant was bundled into it. The said vehicle was driven at a high speed in the direction of Kisii District Hospital. The applicant was not seen again.

W8 did not report to any authority what she had seen but she told the applicant’s brother, **Ezekiel Ombaso Ogega, W9**. On the following day W8 returned to the police station to inquire about the applicant but was informed that the applicant had been released. W9 confirmed that on 22nd September, 2008, W7 gave him the aforesaid information in a telephone conversation. He however did not state that in his affidavit.

The above is a summary of the evidence that was adduced in this *Habeas Corpus* application. What is an *Habeas Corpus* application and what is the scope of an order made in such an application?

According to **HALSBURY’S LAWS OF ENGLAND**, 4th Edition, Volume 11 at Page 768, this is “**a prerogative process for securing the liberty of the subject by affording him an effective means of immediate release from unlawful or unjustifiable detention whether in prison or private custody.**”

By it, a judge, at the instance of the aggrieved subject, commands the production of that subject and inquires into the cause of his imprisonment. If there is no legal justification for the detention, the subject is ordered to be released. Such release is not an acquittal and cannot be used as a means of appeal. At

Page 771 of the aforesaid text, the learned authors state that an order of *Habeas Corpus* is not applicable if the illegal detention has ceased before the application for the order is made.

But the court has a responsibility to examine whether indeed the subject has been released as may be alleged. The learned authors continue to state that:

“Where, however, a counterfeited release has taken place, and a pretended ignorance of the place of custody or of the identity of the custodian is insisted on, a court may, and should, inquire into the facts, because the detention is in fact being continued by

someone who is really the agent of the original wrongdoer.”

In this matter, a contingent of about 15 to 20 police officers went to the applicant’s residence sometimes between 8.00 and 10.00 p.m. and forced their way through the house gate. When they got into the applicant’s house, they searched not only the applicant but also his house. They did not recover any illegal item therein. **Section 76 (I)** of the **Constitution of Kenya** states that:

“Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by

others on his premises.”

The police had neither a search warrant nor consent of the applicant to enter into his premises and conduct a search of his person and premises. Although the applicant fully identified himself and provided to the police relevant documents to support his identity, for example, title deeds, motor vehicle log books and A.T.M. cards, the police were not satisfied and decided to arrest and escort him to central police station for further interrogation.

That further interrogation was not done. **Inspector Mateche Muyekho**, who was the acting O.C.S. central police station, said that he consulted with the D.C.I.O.; Jacob Muchai, and he was authorized to release the applicant. Chief Inspector Muchai seemed to be non committal as to whether he knew about the arrest of the applicant or his release. I found his evidence to be unconvincing. I believe he was well aware of the applicant’s arrest, the issue of his suspected involvement in criminal activities having been raised in a District Security Committee meeting. Infact Acting Chief Inspector Kamau told the court that a police informer had given that report to the D.C.I.O.; Chief Inspector Muchai.

According to the police, the applicant was held at central police station from about 11.30 p.m. (23.30 hours) on 20th September, 2008 and was released on 21st September, 2008 at 5.30 p.m. (17.30 hours). That is what the Occurrence Book (O.B.) shows.

However, the family members of the applicant denied that he was released as alleged. The applicant’s aunt, Janes Bochere Karanja, said that on 21st September, 2008 at about 6.00 p.m., she was standing outside the police station when she saw her nephew being bundled into the boot of a police vehicle registration number KAM 803 C, a Peugeot 504, station wagon. The vehicle sped off towards the direction of Kisii District Hospital. Since then the applicant has never been seen again. So, where does the truth lie?

The circumstances surrounding the applicant’s arrest and his alleged release are not very clear. Apart from the alleged report by an undisclosed police informer that the applicant was harbouring criminals in his house, the police admitted that they found no evidence to that effect. According to **Ogega Patrick**, witness No. 7, the applicant put several documents, including title deeds, log books, A.T.M. cards, in a black brief case which he took with him to the police station. The police officers who arrested him denied that he had such a briefcase. **P.C. Kones, Witness No.5**, who was incharge of the report office said that he never saw the brief case when the applicant was taken to the station.

But Inspector Mateche Muyekho said that he saw the applicant carrying a brief case when he was

leaving the police station. The brief case had been kept at the station but there was no record to that effect.

Muyekho, as the O.C.S., is the one who ordered the release of the applicant. On the day of the alleged release, P.C. Kones left the report office at 15.50 hours and handed over to P.C. Kasembeli and P.C. Ole Nkele. These two police officers were not called to testify. According to P.C. Kones, it was P.C. Kasembeli who signed the cell Register to signify that the applicant had left the cells on 21st September, 2008 at 17.30 hours.

However, **P.C. Simon Odhiambo**, who was off duty at the material time, testified that the O.C.S. told him to make the entry in the occurrence book to the effect that the applicant had been released. It is not clear why that entry could not be made by the police officer who was incharge of the report office at the material time. P.C. Odhiambo conceded that he recorded the report in good faith as instructed, believing that the applicant would be released as indicated. At the time the applicant was still in the cells.

The evidence of P.C. Odhiambo cannot be relied upon to say that the applicant left the police station on 21st September, 2008 at 17.30 hours. The witness said that he did not see the applicant leaving the station and if he did, he could not tell the time he left.

P.C. Kones, commenting on the evidence of P.C. Odhiambo, told the court that it is wrong for a police officer to make an entry in the occurrence book that a suspect has been released out of the cells if that officer had not actually seen the suspect leave. He added that it was P.C. Kasembeli who was supposed to enter the information in the occurrence book and not P.C. Odhiambo.

From the foregoing, the entry in O.B. Ref. No. 77 made on 21st September, 2008 by P.C. Odhiambo regarding release of the applicant is of no value and is unreliable.

The evidence by **Janes Bochere Karanja, witness No. 8**, was that on 21st September, 2008 at about 6.00 p.m. she saw the applicant being bundled into the boot of a vehicle reg. No. KAM 803 C. It was admitted by several police officers that this was a police vehicle which was being used by the flying squad unit. The witness did not know that it was a police vehicle. She merely took its registration number because she had seen her nephew being entered therein. She was emphatic that she saw the applicant clearly, he even beckoned her. She was closely cross examined but she was consistent and unshaken in her testimony. The demeanour of the witness was impressive. I believed her evidence.

So what happened to the applicant if he has never been seen by his family members after the aforesaid incident? Ordinarily once a person is released from police custody he goes back to his home. I find it difficult to agree with Chief Inspector Muchai that after his release, the applicant decided to go at large. Why would he do so if indeed the police had found no evidence to connect him with any criminal activity and decided to release him?

In the circumstances, the police should do everything within their power to trace the applicant and produce him before this court, assuming he is not in their custody. Being dissatisfied with the police explanation as aforesaid, I hereby make an order of **Habeas Corpus** directed to the second and third respondents to produce the applicant before this court within 10 days from the date hereof.

DATED, SIGNED AND DELIVERED AT KISII THIS 9TH DAY OF SEPTEMBER, 2009.

D. MUSINGA

JUDGE.

9/9/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Kemo for the Respondents

Mr. Acholla for the Applicant

Court: Ruling delivered in open court on 9th September, 2009.

D. MUSINGA

JUDGE.