



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**(CORAM: OJWANG, J)**

**MISC. CRIMINAL APPLICATION NO. 749 OF 2007**

**IN THE MATTER OF AN APPLICATION BY JANET WANJIKU ON BEHALF OF ALLAN KAMAU**

**-AND-**

**IN THE MATTER OF AN APPLICATION FOR *HABEAS CORPUS* UNDER RULE 3 & SECTION 389 OF THE CRIMINAL PROCEDURE CODE (CAP. 75, LAWS OF KENYA)**

**-BETWEEN-**

**JANET WANJIKU**

**(on behalf of ALLAN KAMAU) .....APPLICANT**

**-AND-**

**THE HON. THE ATTORNEY-GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF POLICE.....2<sup>ND</sup> RESPONDENT**

**COMMANDANT, ADMINISTRATION POLICE.....3<sup>RD</sup> RESPONDENT**

**RULING ON A PRELIMINARY POINT**

By the amended Chamber application of 29<sup>th</sup> February, 2008, the applicant made prayer that –

“an order in the nature of *Habeas corpus* do issue directed at the Commissioner of Police and the Director of Criminal Investigation to have the person of **Allan Kamau** produced before this Honourable Court at such time as the Judge may direct, and that the said Commissioner of Police and Director of Criminal Investigation do appear in person or by their authorised agent together with the original of any warrant or order to show why the said **Allan Kamau** should not be released forthwith and set free.”

The application is founded on stated general grounds, and supported by the applicant’s affidavit sworn on 24<sup>th</sup> October,2007.

In the said grounds, it is stated that the applicant's son, **Allan Kamau**, aged 22, who was originally held at Karuri Police Station on 22<sup>nd</sup> July, 2007, is now detained at an unknown location and has not been released, or brought before any Court. It is stated that the said **Allan Kamau** had been handcuffed, and driven off to Karuri Police Station aforesaid, in a State motor vehicle, Reg. No. GK A 440E. Between 23<sup>rd</sup> July, 2007 and 18<sup>th</sup> September, 2007, it is stated, the applicant, in the company of officers from the Kenya National Commission on Human Rights, made visits to all Police stations in Nairobi, and in the neighbourhood of Karuri, in search of the subject, the said **Allan Kamau**. The applicant also visited the Police headquarters in Nairobi, as well as Naivasha Police Station on 7<sup>th</sup> September, 2007; she had been advised to visit the station by the OCS, Karuri Police Station; this same OCS had also advised the applicant to visit Kileleshwa Police Station on 10<sup>th</sup> September, 2007, Kilimani Police Station on 11<sup>th</sup> September, 2007 and Naivasha Prison on 18<sup>th</sup> September, 2007.

The applicant states that the subject is being held incommunicado at an undisclosed location and has been so held for well in excess of 90 days. It is contended that the detention of the subject is illegal and a violation of his fundamental rights as safeguarded under s. 72 of the Constitution.

Learned counsel **Mr. Kamau** appeared for the applicant, and presented the evidentiary material contained in the supporting affidavit. He stated that the subject was arrested from home by Police officers, on 22<sup>nd</sup> July, 2007 at 12.30pm; one of the arresting Police officers was one **Macharia**, who is known to the applicant as an Administration Police officer attached to Kiambaa District Officer's office; the explanation given for the arrest was that the subject "was found playing with his mobile phone at the roadside"; the subject was put in Government motor vehicle Reg. No. G.K. A 440E, and driven away, and since then, the applicant has not seen him; when the applicant visited Karuri Police Station on the same evening, she was told the subject was to be arraigned before a Court on 23<sup>rd</sup> July, 2007; but the subject was subsequently not brought before the Court as had been indicated; the applicant was thereafter advised at Karuri Police Station that she should go and check for the subject in several different Police stations; the applicant was unable to find the subject anywhere, and it was her belief the Police knew where the subject was held; hence the *Habeas corpus* application.

Appearing for the respondents was learned counsel **Mr. Warui** who opposed the application, and invoked replying affidavits – one by the Chief Inspector of Police (Operations) at Police Headquarters, **Mr. Lazarus Wambua**, dated 27<sup>th</sup> November, 2007; and the other by Senior Superintendent of Administration Police, **Mr. Moses Mureithi**, dated 26<sup>th</sup> September, 2008.

**Mr. Warui** submitted that a writ of *Habeas corpus* was inappropriate, for it would have to be directed at the person detaining the subject, whereas his deponents deny having arrested the subject.

**Mr. Warui** submitted that the applicant had placed no material before the Court which identifies the person with custody over the subject; and he appeared to attach significance to the fact that the application had first been filed on 24<sup>th</sup> October, 2007, some *three months* since the alleged arrest of the subject on 22<sup>nd</sup> July, 2007; in learned counsel's words: "The delay of three months makes it difficult on the part of the respondent to tell whether the subject was [indeed] arrested. [The application for a] writ of *habeas corpus* should have been filed immediately after the subject was arrested".

On that basis, learned counsel, though acknowledging that "the law does not provide any period during which the applicant is to [move the Court]," contended that the instant case is not one for *Habeas Corpus*, but was a case of "a missing person". That reasoning led **Mr. Warui** to urge as follows:

"[This matter] can only be dealt with by instituting comprehensive investigations. Statements [should] be recorded from anybody who has information on the custody of the subject."

He urged that the applicant's prayer for a writ of *Habeas corpus* be dismissed at this preliminary stage.

Learned counsel **Mr. Kamau** contested the foregoing preliminary submissions. He urged that all steps

taken by the applicant, as from the material date, had illuminated a trail which showed the involvement of Police officers in the movements of the subject; the applicant, in her search, had at all times involved the Police, and the Police had advised her on which Police stations to visit; the applicant had known all along that her son (the subject) was in Police custody; specifically, the applicant had dealt with the OCS, Karuri Police Station; the applicant had witnessed the role of an Administration Police Officer, one **Macharia**, in the arrest of the subject; it was inconceivable that the Police officers after being seen to be involved in the arrest and taking away of the subject, could stave off the responsibility by merely saying, the subject “has gone missing”. Counsel submitted that the Police is a statutory person, and it has the physical custody of the subject in this case. In these circumstances, it was urged, it was impractical for the applicant to expressly name the physical person with custody. Counsel urged that *if* no solution could in the circumstances be arrived at, unless the applicant did name the individual custodian, this would negate the entire panoply of human-rights safeguards, where the same came into conflict with the activities of Police officers. It was necessary in the instant case, counsel urged, that the Commissioner of Police who oversees the operations of Police officers, and the Commandant of the Administration Police, should account for the whereabouts of the subject.

Learned counsel urged that the responsibility of the Police, in relation to the whereabouts of the subject, be declared, in the light of the evidence, and in view of the fact that the motor vehicle which had taken the subject away from his home, had been identified as a Government motor vehicle used by the Police.

From the foundation of evidence which pointed more to the Police than to any other detaining entity, learned counsel asked for a taking of *oral testimony* from certain witnesses who had seen the subject being arrested, on the material date. Counsel for the respondent would also be at liberty to call any witnesses to adduce evidence in support of their case.

The canvassing of the basic issues by counsel on both sides led the Court to give directions, which may be set out here, as they consolidate the foundation upon which today’s decision rests. Such points had been set out as follows:

**“This is a complex matter in which an application is made in respect of a man whose whereabouts have not been traced. Members of the subject’s family believe the Police have arrested the subject, but won’t disclose his whereabouts. So the applicant seeks a writ of *Habeas Corpus* requiring the Police to produce the subject.**

**“Senior officers of the Police deny ever having arrested the subject; and learned counsel representing the Attorney-General represents that this is an inappropriate application which ought to be dismissed. If it is dismissed, then the applicant will have no forum in this country for dispute settlement, [on the relevant question].**

**“The matter has been placed before the High Court; and so the Court must consider the question on the *merits*.**

**“At this stage, the evidence before the Court is lodged in affidavits; but the applicant’s counsel requests that *viva voce* evidence be taken from certain key persons in the whole scenario, as a basis for determining whether or not a writ of *Habeas corpus* is to issue.”**

My perceptions in the foregoing directions are confirmed, upon reading the application documents and the affidavits, and upon considering the submissions of counsel.

Counsel for the applicant has made a *prima facie* case, founded on human rights principles, which dictates that a closer hearing be given, in consideration of the prayer for the issuance of a writ of *Habeas corpus*. Upon examining the two replying affidavits, I have found them to amount to a rather bare *denial* of the statements in the supporting affidavit, not shedding much new light on the events surrounding the failure to trace the subject. As an example, Chief Inspector **Lazarus Wambua**, in his affidavit depones: “That to the best of my knowledge, the said subject, **Mr. Allan Kamau** has never been detained at Karuri Police Station during the time I was the OCS.” That deponent also states: “That the

Commissioner of Police is not in a position to produce the subject before this Honourable Court since he is not and has never been in the custody of the Police.” Although the deponent denies any knowledge of the motor vehicle allegedly used to take the subject away, namely Reg. No. GK A 440E, Senior Superintendent **Moses Mureithi**, in his affidavit, admits that the motor vehicle bearing that registration was among “many Government vehicles....attached to the Kiambaa Divisional Office....”

It is clear to me, in the circumstances, that the true facts which should lead to a proper judicial decision on the application, have *not* emerged from the totality of the documentations on file. The Court must, however, determine the question placed before it, and with assurance and finality.

In aid of that object, it is now ordered as follows:

- (1) The applicant’s application shall be determined on the basis of *viva voce* evidence.**
- (2) On the occasion of the taking of *viva voce* evidence, counsel on each side shall lead his or her witness or witnesses through the evidence-in-chief, to be followed by cross-examination and re-examination in the usual manner.**
- (3) The final ruling of the Court shall be made on the basis of such *viva voce* evidence, and of the documentation on file and the submissions of counsel.**
- (4) The Registry shall list the application for the hearing on the basis of priority.**

**DATED and DELIVERED at Nairobi this 6<sup>th</sup> day of November, 2008.**

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Huka**

**For the Applicant: Mr. Kamau**

**For the Respondents: Mr. Warui**