Mohamed & another (In Respect of Mohamed Abdulmalik - Subject) v Commissioner of Police & another (Miscellaneous Criminal Application 732 of 2007) [2007] KEHC 229 (KLR) (Crim) (21 November 2007) (Ruling)

MARIAM MOHAMED & another v COMMISSIONER OF POLICE & another [2007] eKLR

Neutral citation: [2007] KEHC 229 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

MISCELLANEOUS CRIMINAL APPLICATION 732 OF 2007

JB OJWANG, J

NOVEMBER 21, 2007

BETWEEN

MARIAM MOHAMED ..... 1ST APPLICANT

SALIM KHAMIS JUMA ..... 2ND APPLICANT

IN RESPECT OF MOHAMED ABDULMALIK - SUBJECT

AND

THE COMMISSIONER OF POLICE ..... 1ST RESPONDENT

THE HON. THE ATTORNEY-GENERAL ..... 2ND RESPONDENT

An application for habeas corpus could not be sustained in circumstances where the subject was no longer within the jurisdiction of the Kenyan courts

The High Court heard an application for a writ of Habeas corpus concerning the disappearance of Abdulmalik Rajab Mohamed. The petitioner alleged the subject had been unlawfully detained by Kenyan authorities and subsequently transferred out of jurisdiction without due process, thereby violating constitutional rights. The State opposed the application, asserting the subject was no longer in its custody. The court held that since the subject was physically absent from Kenya, a writ of Habeas corpus could not be enforced. While the court acknowledged constitutional violations, it dismissed the application as spent, advising the applicants to seek redress through a constitutional petition.

Reported by John Ribia

Constitutional Law *– habeas corpus – where the subject of a habeas corpus application was removed from the jurisdiction of Kenyan courts - whether the application for habeas corpus could be sustained in circumstances where the subject was no longer within the jurisdiction of the Kenyan courts - whether the respondents, having released*

the subject from custody, bore any further obligation to account for the subject's removal from the jurisdiction – whether the actions of State officials in removing the subject of a habeas corpus application from the jurisdiction of Kenyan courts violated the subject's constitutional rights - whether legislation regulating the executive's discretion in removing individuals from the jurisdiction was necessary to safeguard constitutional rights - Constitution of Kenya (repealed) sections 60(1) and 84(1); Criminal Procedure Code (Cap 75) section 389.

Jurisdiction *– jurisdiction of the High Court – habeas corpus jurisdiction - whether the High Court had jurisdiction to entertain additional constitutional claims within a habeas corpus application - whether the request to summon specific government officials to provide information related to the habeas corpus application was tenable in law - Constitution of Kenya (repealed) sections 60(1) and 84(1); Criminal Procedure Code (Cap 75) section 389.*

Brief facts

The petitioners filed an application for a writ of *habeas corpus* seeking the production of Abdulmalik Rajab Mohamed, whom they alleged had been unlawfully detained and later transferred out of Kenya by the State. The respondents contended that the subject was arrested and released on suspicion of criminal activity but had not been followed up after his release. The petitioners argued the transfer violated constitutional rights to due process and access to justice.

Issues

i. Whether the application for *habeas corpus* could be sustained in circumstances where the subject was no longer within the jurisdiction of the Kenyan courts.
ii. Whether the respondents, having released the subject from custody, bore any further obligation to account for the subject's removal from the jurisdiction.
iii. Whether the High Court had jurisdiction to entertain additional constitutional claims within a *habeas corpus* application.
iv. Whether the actions of State officials in removing the subject of a *harbeas corpus* application from the jurisdiction of Kenyan courts violated the subject's constitutional rights.
v. Whether the request to summon specific government officials to provide information related to the *habeas corpus* application was tenable in law.
vi. Whether legislation regulating the executive's discretion in removing individuals from the jurisdiction was necessary to safeguard constitutional rights.

Held

1. *Habeas corpus* compelled the production of a detained individual to determine the legality of their detention. However, the subject in the instant case was no longer within the jurisdiction of the High Court, rendering the writ ineffective.
2. The police confirmed the subject's arrest on February 13, 2007, and subsequent release on February 28, 2007, due to insufficient evidence to sustain a criminal case. The respondents denied any knowledge of the subject's removal from jurisdiction.
3. Since the subject was not in the custody of the respondents and was outside Kenyan jurisdiction, issuing a writ of *habeas corpus* would be futile. A court should not make orders that cannot be enforced.
4. The request to summon various government officials for information relating to the *habeas corpus* application was denied. The officials could not provide actionable information to support the issuance of the writ.
5. The removal of the subject from Kenyan jurisdiction constituted a violation of constitutional rights, as it deprived the subject of access to the safeguards provided by the Constitution, including the right to challenge their detention.
6. Violations of constitutional rights were actionable under the principle of *ubi jus ibi remedium* (where there is a right, there is a remedy). However, redress for constitutional violations must be sought through a proper constitutional application, not a *habeas corpus* application.

7. The High Court has unlimited jurisdiction in constitutional matters. However, the *habeas corpus* application in the instant case could not proceed, as the subject's physical absence from Kenyan jurisdiction made the writ unviable.
8. There was need for legislation to regulate the executive's discretion in matters involving the removal of individuals from Kenyan jurisdiction to avoid similar constitutional breaches.

Application dismissed.

Orders

i. *The habeas corpus application of October 18, 2007, was declared spent and not subject to further hearing.*
ii. *The applicants were directed to pursue suitable constitutional remedies in the High Court.*

Citations

Statutes

None referred to

Advocates

Mr. Nyaundi for the Applicants; Mr. Makura for Applicants:

RULING

1. On Tuesday, 30th October, 2007 learned counsel Mr. Ndubi, holding brief for learned counsel Mr. Nyaundi, appeared before me in relation to an application by Chamber Summons, dated and filed on 18th October, 2007. The State was represented on that occasion, by learned counsel Mr. Makura of the Attorney-General's Chambers. Mr. Ndubi's purpose was not to argue the substantive prayer, which is an application in the nature of Habeas corpus, as provided for in s.389 of the Criminal Procedure Code (Cap.75).

2. Habeas corpus is a writ by which the Court commands someone who has detained another, to produce, the detained person, and to show cause why that person may not forthwith be set at liberty.

3. It is obvious that the applicants herein, as they sought to prosecute their Habeas corpus application, came to realize that, even if the respondents knew about, or had had anything to do with the detention of the subject, the basis for issue of a writ of Habeas corpus had been taken away by the physical absence of the subject, within the jurisdiction of the High Court. So, rather than urge, at the start, the case stated in the application, learned counsel Mr. Ndubi asked this Court to make orders, requiring certain officers of Government to be present in Court on the date when the application itself will be argued.

4. The applicant seeks orders compelling the Chief Inspector of Police attached to the Anti-Terrorism Police Unit in Nairobi, Ancent Kaloki, to be present in Court, because this is the one officer of the Government who, after service of the application was effected upon both the Attorney-General and the Commissioner of Police, on 19th October, 2007 and 23rd October, 2007 respectively, swore, filed and served a replying affidavit.

5. Chief Inspector Kaloki depones that he has read the affidavit in support of the application, sworn by the 1st applicant on behalf of the Subject, and he has fully understood the facts deponed in that affidavit.

6. For the relevant part, so far as this preliminary Ruling requires, Chief Inspector Kaloki avers as follows. The subject's arrest was as a result of "his being suspected for being involved in criminal activities in the country." He avers that investigations were conducted on the Subject's activities, but "there was no substantial evidence gathered, to establish a prima facie case against the subject, and he was released on

28th February, 2007." The deponent attaches to his affidavit the relevant Occurrence Book extract of Spring Valley Police Station – OB No.34/28/02/2007 at 19.51 hrs, and this reads:

7. Prisoner Released: Now Ci Ancent Kaloki from Police Headquarters now to station and releases one Abdulmalik Rajab Mohamed from custody. No further police action.

Signed by C.I. Kaloki."

8. Chief Inspector Kaloki depones that "after the release of the Subject herein the Police did not follow up on his whereabouts."

9. Chief Inspector Kaloki's replying affidavit was served the very same day the applicants' application came up before me, on 30th October, 2007; and it may be said to be the signal that triggered an interim application, before the substantive Habeas corpus application could be heard.

10 Mr. Ndubi submitted that Chief Inspector Kaloki's affidavit was a curious response, especially because of its muteness, on claims of violations of the Subject's constitutional rights, and especially on the claim that the Subject had been secretively removed to a different country, away from the jurisdiction of the Kenyan Courts. In the applicants' supporting affidavit (that of Mariam Mohamed dated 17th October, 2007) it is thus stated:

13. That after 24th February, 2007 nobody else spoke to the [Subject].

"14. That on March 26th, 2007, the U.S. Department of Defence issued a press release in which it admitted having custody of the [Subject] (Annexure MM11).

"15. That it would appear that the Government of Kenya secretly, unprocedurally, illegitimately and illegally handed over a citizen of Kenya to a foreign country.

"16. That to my knowledge, the [Subject] has not engaged in acts of terrorism or any other hostile activities against the State or any of its citizens or indeed any person or at all.

"17. That the [Subject] has not been charged with any wrong-doing, has not been permitted to consult with counsel, or provided with access to any Court or tribunal.

"18. That to my knowledge, the [Subject] has not been informed of any charges against him and has not been permitted [to exercise] his right to appear before a Court, to plead his innocence.

"19. That the [Subject] has been illegally detained for the last nine months."

11. The foregoing averments, Mr. Ndubi submitted, boiled down to a statement that the respondents had breached the Constitution, by expelling a subject out of jurisdiction, and had so removed the subject without according the subject due process of law.

12. Now to address the specific prayer for a writ of Habeas corpus, learned counsel urged that Chief Inspector Kaloki be required to be present in Court. But counsel asked the Court to require the presence of yet other Government officials; for there would be need for minutes,memoranda and records taken in the course of investigations on the activities of the Subject. Such documents would explain the nature of the discussions that would have taken place at different levels of Government, and which authorized the removal of the Subject from the jurisdiction of the Kenyan Courts.

13. In this regard, learned counsel asked for orders for summons to issue to (i) the Commissioner of Police (in person); (ii) Mr. Nicholas Kamwende, the Commandant of the Anti-Terrorism Police Unit (in person); (iii) Chief Inspector Ancent Kaloki; (iv) The O.C.S. Spring Valley Police Station (in person);

(v) Police Officers who arrested the Subject on 13th February, 2007; (vi) the Minister in charge of State Security, the Hon. John Njoroge Michuki (in person).

14. It was learned counsel's contention that, as the tasks of the Anti-Terrorism Police Unit were bound to involve co-ordination and collaboration with foreign security systems, liaison at inter-governmental levels could only happen at the highest echelons of security agents; and hence the State officials now sought to be summoned, were the right persons to provide the information that was material to the applicants' Habeas corpus application. The need for such information, it was urged, had been underlined by the inadequacy of the facts supplied in the replying affidavit of Chief Inspector Ancent Kaloki, an officer who, by his station in the security set-up, could not very well know the interactions between the Kenyan and American security agencies. The state of affairs prevailing in relation to the Subject, it was urged, touched on the constitutional freedoms of the individual, and on the legal limits to the actions of Police authorities.

15. Learned State Counsel, Mr. Makura contested the submissions made for the applicant. He urged that Chief Inspector Ancent Kaloki's replying affidavit gave all the answers such as may be legitimately required by the applicants.

16. Mr. Makura focused his submissions on the juristic obstacle to the applicants' claim, in a Habeas corpus application such as that contained in the Chamber Summons of 18th October, 2007. He urged that the Habeas corpus application itself was misplaced – because the Subject, who was arrested on 13th February, 2007 on suspicion of capital crime, had been released on 28th February, 2007, having been held only for a maximum of 14 days as provided by law. Learned counsel's exoneration of the Police authorities, on charges of violation of the subject's rights, is dramatically expressed:

> [The Subject] is no longer in Police custody. Upon release, the Police had no further responsibility for follow-up on the subject...Counsel for the applicants says the Subject was removed from jurisdiction. That is not known to the respondent. The Court has no jurisdiction over those not in the country. This is an application for Habeas corpus. So, a proper application should be made before the relevant Constitutional Court, since violations of constitutional rights are alleged."

17. Mr. Makura contested the plea that certain Government and Police officials be summoned to Court, during the prosecution of the applicants' application of 18th October, 2007. Such proposed summons, it was urged, falls outside the scope of the writ of Habeas corpus, and is "laden with politics." In Mr. Makura's submission, the applicants' application was redundant, because the Subject is not in the custody of the Police, and, on this account, it is unnecessary to summon any State officials to appear before the Court. Counsel urged this Court to find that the Habeas corpus application was spent, and not capable of being pursued any further.

18. In his response, Mr. Ndubi submitted that Chief Inspector Kaloki's replying affidavit only stated that, when arrested on 13th February, 2007 the Subject was suspected of having committed criminal acts, not acts of capital crime as now contended by the State Counsel; and, therefore, it was a violation of the Subject's constitutional rights to detain him for as long as 14 days.

19. Learned counsel contested the respondents' position, that once the Subject was released following Police investigations, the Police had no further interest in him; for the Police should know how he was removed from the jurisdiction. In counsel's words:

> The Police must uphold Kenya's sovereignty, and endeavour to find out if the Subject was kidnapped. [In view of the respondents' stand] it is likely that the Police co-operated with the external authorities."

20. Mr. Ndubi contested the State's position, that there is some other Court before which the instant application should have been brought. Counsel urged that the Habeas corpus question, which very properly belongs in this Criminal Court, is not a stand-alone avenue to redress; it must be read together with the Constitution; and if it is not thus read, then no constitutional obligations would be left resting on Government. Counsel urged that, on the facts of this case, the Court should exercise its original jurisdiction granted under s.60 of the Constitution; take account of the facts; and make appropriate orders. Counsel urged that where a violation of the Constitution comes to the attention of the Court, the Court cannot surrender its constitutional mandate to any other authority. Mr. Ndubi questioned the contention made for the respondents, that the High Court when properly constituted to hear a Habeas corpus application, would be under obligation to yield its constitutional mandate to a Constitutional Court set up as such. Learned counsel submitted that the inherent constitutional authority entrusted to a High Court Judge is not at any time, in law, qualified, and it is to be understood that a Constitutional Court designated as such, is only an administrative arrangement in the manner in which the same High Court sometimes hears justiciable claims. In the words of learned counsel:

> The High Court is a constitutional Court in every sense, and there is a constitutional jurisdiction vesting in all Judges."

21. Mr. Ndubi urged that it was proper to summon the various State officials named, to appear before the Court, because the Police, by law, must be held subject to the principle of accountability; and the Minister in charge of national security, too, had a duty to uphold the Constitution, and so, summoning him to appear in Court was a legal, and not a political question. Since the Minister holds executive authority, learned counsel urged, he must be held accountable under the Constitution, through the Judicial Branch of State.

22. Learned counsel appeared to recognize that the main application herein, for being grounded on the writ of Habeas corpus, faced practical impediments if, as is acknowledged to be the case herein, the Subject was physically outside the jurisdiction of the Kenyan Courts of law. Thus, counsel maintained, the vital principle to guide the Court in this instance, is the imperative of fidelity to the Constitution; and if the application, as it seeks that end, be viewed as "activist" (as was contended by learned counsel, Mr. Makura), "then there should be no apology." Mr. Ndubi urged that "the actions that led to the removal of the Subject from jurisdiction, ought to be examined by the Court." Counsel asked the Court to declare that the Subject had been removed from Kenya unlawfully, and to order those who suffered the said removal to take place, to "bring the Subject back." That a State official would take the Subject out of jurisdiction, and then plead inability to return the Subject, it was urged, "[suggests] that an individual can abuse the Constitution and [hold himself] unaccountable [where he has removed] the subject from the jurisdiction"; and this would be strange, counsel urged, considering that even where the death of an individual has occurred, "there would be accountability for the manner in which the death has occurred."

23. Given the facts upon which this application is founded, the submissions of counsel, and the analytic scenarios emerging, this Ruling is bound to address pertinent issues not limited within the confines of

a Habeas corpus application. As already stated, this Criminal Court deals, as a matter of routine, with Habeas corpus applications. But the application of 18th October, 2007 has touched on dimensions of constitutional claim which, I think, have not had to be dealt with in our Courts, within the framework of a Habeas corpus application.

24. Firstly, learned counsel Mr. Ndubi has urged that the inclusion of additional constitutional claims within a Habeas corpus application would not take away the jurisdiction of this Court. On this point, this Court is in agreement, as has already been stated in other decisions given earlier. My appreciation of the law is set out, for instance, in Ravinder Singh v. Attorney-General & Another, Misc. Crim. Application No. 668 of 2007:

25. From past experience, questions properly belonging in the field of the Court's criminal jurisdiction have come before me, which, however, also contain constitutionalassertions here and there. This also happens when the High Court is exercising its jurisdiction in the resolution of other kinds of cases, such as civil cases.

> "The Court, when determining a substantive claim in a normal sphere of legal disputes, does not abdicate its full and unlimited jurisdiction, just because the Constitution has been referred to.
>
> "The Constitution as the fundamental law, is the medium within which all Judges of the High Court exercise their jurisdiction, regardless of the domain of law involved – probate and administration; commercial cases; torts; contracts, etc."

26. While, on that principle I do agree with the submission made by learned counsel for the applicants, I would note that the constitutional question which the facts show to be the one brought before this Court, is significantly different in nature from a Habeas corpus application. It is evident that, voluntarily or involuntarily, the respondents have placed themselves in a position in which it is no longer within their power to produce the Subject before this Court. This Court, within the concept of Habeas corpus, will be unable to make orders for the production of the Subject, because such an order would be in vain. 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 focussed, clear, enforceable, and 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.

27. It follows that the applicants' Chamber Summons of 18th October, 2007 is either overtaken by events, or would have to remain in abeyance, until the Subject is physically in the custody of the respondents.

28. And just as the Court cannot, in the circumstances, ultimately issue a writ of Habeas corpus, so would it serve no practical purpose to summon the several State officials proposed by the applicants, in connection with a Habeas corpus application. There is no answer which the said officials would be able to provide before this Court, which supports issuance of a writ of Habeas corpus – because they do not have the Subject in their custody.

29. The foregoing analysis disposes of the preliminary point raised by the applicants. But this Court should conclude its Ruling by considering the larger issue of fidelity to the Constitution, which has been raised by the applicants. Learned counsel, Mr. Ndubi has stated a constitutional point which, with respect, is a truism, and a valid statement of the law: that the authority of every High Court Judge to interpret, and to apply the Constitution of Kenya whenever it is meet, and without any self-abnegation, is embedded in the Constitution itself and, in particular, in s.60(1) thereof which declares that the High Court "shall be a superior Court of record...and shall have unlimited original jurisdiction in civil and criminal

matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."

30. The question raised by the applicants herein, therefore, is a logical one: is it not a violation of the Subject's constitutional rights, that someone in State authority would have him taken out of this Court's jurisdiction, so that he no longer can benefit from the High Court's writ of Habeas corpus? So that the Subject can no longer exercise his fundamental rights, as specified in Chapter V of the Constitution of Kenya?

31. Clearly, by taking the Subject out of the jurisdiction of the Kenyan Courts, the foundation for his enjoyment of constitutional rights had, in a formal sense, been taken away; for those rights are enforced by the Courts which only have jurisdiction in Kenyan territory.

32. That the Subject should always have access to the safeguards of the Constitution of Kenya, is a right; and so the person who made it impossible for the Subject to enjoy those rights, committed a constitutional and legal wrong against him. Legal wrongs are always actionable, in any common law system such as that which applies in this country. Justiciability at common law is well expressed in the eternal maxim of civilized, law-based governance: ubi jus ibi remedium, meaning, where there is a right, there is a remedy: Ashby v. White (1703) 2 Ld. Raym. 955. This principle has been re-enacted and reinforced in Kenya's fundamental law of individual rights. Section 84(1) of the Constitution provides, subject to well defined exceptions (which, so far as I can see, would not include the circumstances applicable to the Subject herein), that "if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him..., then, without prejudice to any other action with respect to the same matter which is lawfully available, that person...may apply to the High Court for redress."

33. A wrong, therefore, has been committed against the Subject herein, both in terms of the general law (i.e., the common law), and of the specific provisions of the Constitution.

34. This, however, is not the question which has been placed before this Court, by the Habeas corpus application of 18th October, 2007; and it is for that reason, that a different application would have to be made before the High Court. Even if the Court were to be moved in a different way, though, the High Court's possible redress orders would probably fall short of restoring the Subject to the Kenyan jurisdiction, as there are no unfailing instruments for retrieving him from those now having his physical custody. To deal more effectively with a plight such as that now facing the Subject, it will be essential to complement the principles regulating extradition in international law, with the enactment of legislation to regulate the exercise of executive discretion to take Kenyan subjects away from the jurisdiction of local Courts.

35. The logical outcome of this Ruling is that I will make orders as follows:

    (1) The application for orders summoning certain officers of Government, to provide information in relation to the Habeas corpus application of 18th October, 2007 is refused.

    (2) The Habeas corpus application itself, dated and filed on 18th October, 2007 is hereby declared spent, and is not to be heard any further.

    (3) The applicants may make a suitable constitutional application in the High Court.

    Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2007.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicants: Mr. Ndubi holding brief for Mr. Nyaundi

For the Respondents: Mr. Makura