



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

**MISC. CRIM APPLI. 8 OF 2006**

**1. PAUL MBURU KAMAU**

**2. JOSEPH KANG'ETHE GITAU.....APPLICANTS**

**VERSUS**

**1. THE PROVINCIAL CRIMINAL INVESTIGATION OFFICER,**

**COAST PROVINCE - MR. OBIMO**

**2. THE OFFICER COMMANDING STATION, RAILWAY**

**POLICE STATION MOMBASA.....RESPONDENT**

**RULING**

This is an application by Paul Mburu Kamau (the first Applicant) and Joseph Kangethe Gitau (the second Applicant) under section 389 of the Criminal Procedure Code (the CPC) and Rule 2 of the Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules (the Rules) for directions in the nature of habeas corpus. Section 389 (1) of the CPC in as far as it is relevant to this matter provides that:-

“389(1) The High Court may whenever it thinks fit direct –

**(a) that any person within the limits of Kenya be brought up before the court to be dealt with according to law;**

**(b) that any person illegally or improperly detained in public or private custody within those limits be set at liberty.”**

What is the nature and scope of the order of habeas corpus? The jurisdiction donated by section 389 (1) of the CPC is a special jurisdiction given to the High Court to enquire into the circumstances under which a subject, that is a citizen of Kenya, a resident, a visitor or even an illegal alien within the limits of Kenya, is detained and to secure his immediate release if his detention is found to be unlawful or unjustifiable. It is a supervisory jurisdiction given to the High Court to supervise and control the acts of state in any matter involving the liberty of a subject. The enquiry is made at the instance of an aggrieved party who, as the Rules require, applies by a chamber summons supported by the applicant's affidavit. If the applicant is not able or in a position to swear an affidavit anybody can swear it on his behalf. – See **Grace Stuart Ibingira – Vs – Uganda (1966) EA 445.**

Though grantable *ex debito justitiae* habeas corpus is not granted as a matter of course. The applicant must show cause and demonstrate that other ordinary remedies are either inapplicable or inadequate. So where cause is not shown or where there is an alternative remedy available by which the validity of the detention can be challenged the order will not issue. Being a remedy available to the meanest subject against the most powerful the order of habeas corpus is said to be of the highest constitutional importance.

With these legal principles in mind are both Applicants or either of them entitled to an order of habeas corpus directing their immediate release? To answer that question calls for the examination of the facts of this case.

From the material placed before me and the submissions made by Messrs Gikandi and Kilonzo counsel for the first and second Applicants respectively and those of Mrs. Mwangi the Assistant Deputy Director of Public prosecutions, it is not in dispute that the first Applicant was arrested on 1<sup>st</sup> January 2006 and the second Applicant on 5<sup>th</sup> January 2006 as suspects in the murder of Abdillahi Hassan Abubakar the District Criminal Investigation Officer (DCIO) Kilindini. It is also not in dispute that they have been in police custody since then. What is in dispute, however, is the legality or otherwise of their detention.

Both Messrs Gikandi and Kilonzo for the Applicants argued that under Section 72 (3) of the Constitution suspects of capital offences like

murder can only be detained for a period of upto 14 days. Thereafter they must either be released or taken to court. They said the Applicants having been in police custody for over 14 days their constitutional rights guaranteed by section 72(1) of the Constitution have been violated and their detention is therefore illegal.

Counsel poured cold water on the averments in the replying affidavit of Pascal Mweu, one of the police officers investigating the murder, that police require a further period of 14 days to complete investigations. They said that Parliament's intention is clear from section 72(3) of the Constitution that police require upto 14 days to complete investigations in capital offences. Counsel further submitted that this court has no jurisdiction to extend that period as there is no provision for that either in the Constitution itself or in any other statute. They said that the police could not have forwarded their file to the Director of Public Prosecutions (DPP) if they had not completed their investigations. They concluded that the DPP having publicly stated that there is no prosecutable case against the Applicants, they should be released.

In response Mrs. Mwangi, the Assistant Director of Public Prosecutions while admitting that Section 72(3) gives police authority to detain a capital offence suspect for upto 14 days, said that subsection (4) of that section gives the court power to extend that period. She submitted that police require more time in this case as the investigations are complex and cover a wide area. Given the seriousness of the offence, she said, if the Applicants are released they will not only jeopardize the investigations but will also most likely abscond.

Regarding the DPP's statement Mrs. Mwangi submitted that when the file was forwarded to him the investigations were on-going. Now that the DPP has directed the police to carry out further investigations, police should be given more time to complete their investigations. She said that as stated in paragraph 8 of both their affidavits the Applicants themselves recognize that time can be extended where, as in this case, there is good cause shown.

In their rejoinders counsel for the Applicants submitted that section 72(4) of the Constitution does not authorize the court to extend a suspect's detention period. Even if the court had that authority it could only extend the time if good cause is shown. They said no good case has been shown in this case. The ballistic expert and or the Government Chemist have not filed any affidavits to say why, for about a month now, they have not been able to give their reports. They said the Applicants are ready to continue cooperating with police and should, if need be, be released on such terms as this court may deem fit.

I have agonized over this matter since it first came before me. I am lost for words to properly describe the murder of the DCIO. If the media reports, which we all read, are anything to go by, then here is a conscientious police officer murdered in cold blood while in the course of performing his public duties which included the defence of other people's lives. Though no one human life is more important than those of others I find the murder of Abdillahi most heinous.

Finding myself in the unenviable position of balancing between the late Abdillahi's right to life, which he has been deprived of, and the Applicants' right to personal liberty what do I do? I have to perform my public duty of applying the law to the circumstances of this case.

I have carefully read section 72(4) of the Constitution which Mrs. Mwangi said gives the court power to extend the period the police can hold a capital suspect before taking him to court. I am unable to agree with her. In my respective view the subsection does not give the court any such power. Let us read it –

**“(4) where a person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of having committed or being about to commit an offence, he shall not be thereafter further held in custody in connection with those proceedings or that offence save upon the order of a court.”**

To appreciate the import of this subsection, it is advisable to read the whole section. Though the right to life is the most important human right, the right to personal liberty is also one of the fundamental human rights enshrined in the Bill of Rights in Chapter 5 of our Constitution. Section 72 which protects the right to personal liberty states in subsection (1) that:

**“No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases.”**

The subsection then proceeds to enumerate ten instances in which one can be deprived of one's personal liberty. It does not in any of those instances leave anything to conjecture. The instances are expressly stated. In two of those paragraphs a person can be deprived of his personal liberty.

**“(d) for the purpose of bringing him before a court in execution of the order of a court;**

**(e) upon reasonable suspicion of having committed, or being about to commit, a criminal offence under the law of Kenya.”**

In either of these two instances sub-section (3), which I have referred to earlier on in this ruling, requires such a person to be taken to court within 24 hours in the case of offences other than capital offences and within 14 days in case of capital offences. Subsection (2) requires “A person who is arrested or detained... [to] be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.” Subsection (5) requires any person charged with a non-capital offence to be admitted to bail if he cannot be tried within a reasonable time. And sub-section (6) entitles a person who is unlawfully arrested or detained to seek compensation from his gaoler.

As can be seen from this section Parliament was very particular even to the extent of providing for a suspect to be told of the reasons for his detention.

To me this section admits to no ambiguity and leaves no room for drawing any inferences. If Parliament intended to give power to court to extend the period suspects can be detained before being taken to court nothing could have been easier than expressly stating so.

Subsection (4) of Section 72 is, in my view, quite clear. It outlaws any further detention without a court order of a person who has been brought before court against his will, in fact, under arrest, pursuant to the order of a court issued in any proceedings held earlier on or upon suspicion of having committed or being about to commit a criminal offence. The "proceedings" referred to here must relate to allegations made against that person warranting his arrest for purposes of bringing him to court to answer to those allegations.

The Applicants in this application have not been brought before me pursuant to an order made in any such proceedings. Though held by police on suspicions of having committed an offence they have not been brought to court on those suspicions. To the contrary they have themselves come to court complaining that they are being unlawfully held and are seeking that this court orders their immediate release. I am satisfied that Section 72(4) of the Constitution does not authorize the court to remand in custody anybody who has come to court in circumstances such as those under which the Applicants in this case have come.

Even if Section 72(4) authorized the extension of the period a person can be held by police before being taken to court, I do not think I would grant the extension sought in this case as no good cause has been shown for doing so.

Granted the police are not bound to reveal the areas of their investigation. But from the little they have revealed in the replying affidavit I am left to wonder whether they are honest. I find it hard to believe that for about a month now the police have not been able to get a report from the firearms' examiner, who is within their ranks, on whether or not the first Applicants firearm was used in the murder of their fellow police officer. I find it equally hard to believe that they have not obtained the Government Chemist's report on whatever analysis they required him to carry out. If that is true then something is definitely wrong somewhere.

Though outraged as I am with the murder of Abdillahi I have, however, no option but to hold that the detention of the Applicants beyond the 14 days period allowed by law is illegal. I cannot extend an unlawful detention. Consequently I allow this application and direct that the Applicants shall be released forthwith unless otherwise lawfully held. In the interest of justice, however, I further order that the Applicants shall surrender their passports to police and for one week from today they shall report to the Provincial CID Officer Coast Province once every day at 11.00 a.m.

**DATED and delivered this 3<sup>rd</sup> day of February 2006.**

**D. K. MARAGA**

**JUDGE**