



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Misc Crim Appli 37 of 2003

**IN THE MATTER OF: AN APPLICATION BY OMAR AHMED ALI ON
BEHALF OF ALI ISALAM ALI AND MOHAMED**

ISLAM ALI

**IN THE MATTER OF: THE CRIMINAL RPOCEDURE (DIRECTIONS IN
THE NATURE OF HABEAS CORPUS RULES**

AND

**IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF HABEAS
AD SUBJICIENDUM**

BETWEEN

THE REPUBLIC APPLICANT

- VERSUS -

1. THE COMMISSIONER OF POLICE through

2. THE HONOURABLE THE ATTORNEY GENERAL.....RESPONDENTS

Ex parte

1. ALI ISLAM ALI

2. MOHAMED ISLAM ALI

J U D G E M E N T

In this case the Applicant's Ali Islam Ali and Mohamed Islam Ali the suit was commenced by originating summons under Section 389(2) and 123 criminal Procedure Code together with provisions of Section 81,82 & 84 of Constitution of Kenya seeking answers to the issues listed in the application and numbered 1- 5 inclusive. The application is supported by affidavit of one Ahmed Ali, a businessman and cousin brother of the applicants.

Under C/S of the same date several prayers were made under Criminal procedure (Directions in the nature of Habeaus Corpus). provisions

These prayers were dealt with by the court and the issues outstanding are prayer No. 4 and 7 namely-

“4. That the court do declare that the applicants rights under the constitution have been or about to be infringed” and “7. That the costs of this application be provided for.”

Counsel for the applicants argued that from Wednesday the 28.5.03 at 9.30 a.m. applicants were arrested by 3 police officers and booked under OB number 28 of that day at the police station (Port police). The applicants were not brought before the court within 24 hours after arrest. Counsel relied on authority of **MISC.APP. 6/99** between **Republic,**

Ali Mahfoudh Salim and

1. **The Federal Bureau of Investigation (FBI)**
2. **Commissioner of Police**
3. **The Attorney General as respondents.**

In that case the applicants were detained by the respondents and only after court orders were they released by the respondents. Similarly as in present case a prayer was made for a declaration that the constitutional rights of the applicants were infringed. I have perused the very well reasoned judgment of Waki J as he then was. He found that as no return was filed by respondents explaining the circumstances under which the applicant were arrested and detained the conclusion to be reached is that the applicant was unlawfully detained and deprived of that liberty. At page 20 of the judgment the learned judge said “

I am not as a court of law, entitled to imagine that the respondent had valid reasons for their actions. The Kenya Police is at liberty and has the constitutional mandate to investigate crime to bring criminals to book’ The Constitution of Kenya does not permit the police or any other law enforcement agency for that matter, to break the law in order to detect crime”.

The judge proceeded to make the declaration sought. The facts in the present case are similar. The applicants were released only after the court orders were issued. The respondents failed to file answer to explain under what circumstances the applicants were held. Following the decision of the High Court in that case (though of persuasive nature) I am persuaded that the fundamental rights of the applicants as guaranteed under the constitution were infringed. The State Counsel raised the issue of the form in which the application was made. In reply it appears to me that the whole application was raised as per rules set out for direction for Habeas Corpus which was the substantive application. The issue of infringement of constitutional right was a consequence of the act of the detention and it was properly raised in this application. The respondents have not been prejudiced in any event having nothing to say in reply to the applicants' complaint.

I, therefore, allow the application and grant the orders sought under prayer 4 and the prayer number 7

the costs are awarded to the applicant.

Dated this 21st day of October. 2004.

J. KHAMINWA

JUDGE

21.10.04

Khaminwa – Judge

Cege – Court Clerk

Mr. Ademba – State Counsel

Non appearance – Notice given

Judgement read in their presence.

J. KHAMINWA

JUDGE