



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPLICATION NO 33 OF 2003

HUSNA ABDALLA MOHMMEDAPPLICANT

VERSUS

ATTORNEY GENERAL & 3 OTHERS.....RESPONDENT

RULING

A Chamber Summons dated and filed on the 26th May 2003 by Husna Abdalla Mohmmed (applicant) through the law firm of Ms Timamy & Co Advocates, Mombasa, has now been served on the Attorney General, the Commissioner of Police, the Provincial Police Officer (Mombasa) and Provincial CID officer (Mombasa) (all referred in this ruling as “the respondents.”

On the same 26th May 2003 I granted prayer (I) in the said summons and directed the respondents or their agents or representatives to appear in court on the 28th May 2003 to show cause why Umurumani Hudhefa should not be released from police detention forthwith. Mr Patrick Gumo, learned Principal Stated Counsel, appeared for the respondents and made his submissions to the effect that the detention of Umurumani Hudhefa by the respondents is lawful.

Mr Buti advocate has, however, made a strong submission that the arrest and subsequent detention of Umurumani Hudhefa at Port Police station is unlawful and that, either she be brought to court to be charged with an offence she is being held for if the respondents insist that her arrest and detention were and are lawful, or that she should be released forthwith from custody.

The facts deponed to by the applicant in her affidavit, which the respondents have not controverted are that: on the 19th May 2003 at about 7.30 pm five people, who introduced themselves as officers from the Kenya Power Lighting Company, went to their residence at Majengo claiming to be checking on illegal users of power in the vicinity, but left soon after they were told that Umurumani Hudhefa was not at home.

On the 23rd May 2003 at 11.30 pm the same five people and three others, making a total of eight people, went to the same residence and introduced themselves as police officers. They conducted a search of the entire house, and on finding nothing, took Umurumani Hudhefa with them, without telling her the reasons and where she was being taken to and has ever since been held *incommunicado*.

Mr Patrick Gumo has conceded that Umurumani Hudhefa was arrested during the night of 23rd May 2003 and was taken to Port police station where she is being held. Relying on an affidavit sworn by IP Obadiah Kuria of Provincial CID office, Mombasa, who is investigating the Paradise Hotel terrorist bomb attack and the attempted shooting of an Israeli aircraft on 28th November 2002, Mr Gumo submitted that,

during the course of investigations it came to light that the applicant has information which could facilitate the breakthrough in the mysterious bombing incidents. She was therefore arrested in the wake of renewed threats on a repeat of terrorist attack. Mr Gumo was not, however, to inform the Court whether Umurumani Hudhefa was arrested as a suspect to the bombing of the Paradise Hotel or the attempted bombing of the Israeli aircraft or of the threatened repeat attacks or whether she is being held as a potential witness to those incidents.

To start with the police have no lawful authority to hold in their custody persons who are only witnesses to a commission of a crime and who have been summoned to the police station or have taken themselves to the police station to record statements. Such persons should be released unconditionally from the police stations after they have recorded their statements. They can only be bonded later to attend court to give evidence.

It therefore follows that if Umurumani Hudhefa was taken to Port police station for purposes of recording her statement as a potential witness only, then that statement ought to have been recorded and she should have been released to go home. She ought not to have been detained at Port police station a minute longer.

If the Umurumani Hudhefa was arrested as a suspect to the bombing incidents or to the threatened repeat bomb attacks, then the provisions of section 21(1) of the Criminal Procedure Code and section 72(2) and (3) of the Constitution of Kenya apply. Umurumani Hudhefa ought to have been informed the reasons of her arrest in a language she understands. If she was arrested upon reasonable suspicion of her having committed or about to commit a criminal offence punishable by a term of imprisonment or fine, then she ought to have been taken to court within 24 hours, or an apprehension report ought to have been filed with the Court, and the police officers concerned could even have gone to court to seek authority to keep her in police custody a little longer. This was not done.

If Umurumani Hudhefa was arrested upon reasonable suspicion of having committed a criminal offence punishable by death, then she could be held in police custody for a maximum of fourteen days from date of her arrest. She has been held for a total of eight days now. The mandatory 14 days from 23rd May 2003 expire on 5th June 2003.

There is a legal problem here though. Mr Gumo has failed to inform the Court whether Umurumani Hudhefa is being detained as a potential witness or a suspect to the bombing of Paradise Hotel. He has failed to inform the Court so because the police officers concerned have failed to advise him accordingly. It cannot therefore be said that Umurumani Hudhefa is lawfully being held.

Mr Gumo has pleaded with the Court that the respondents be given three days to conclude their investigations so that a decisive action can be taken by them. This plea is rejected. The Court cannot give police officers authority to hold suspects unlawfully at police stations or elsewhere a minute longer, for this violates the fundamental rights and freedoms of an individual or expressly enacted in the Constitution of Kenya.

The better and legal option is for the respondents to bring Umurumani Hudhefa to court and charge her with a criminal offence and then apply for her to be remanded into their custody to enable them to complete their investigations or to release her forthwith on a police bond and then compel her to report back to the police station on a particular date and time as provided under Section 22(1) of the Police Act (cap 84) Laws of Kenya which reads:-

“22(1) A police officer may by writing under his hand require any person who he has reason to believe has information which will assist him in investigating an alleged offence to attend before him at a police station or police office in the district in which such person resides or for the time being is.”

It is trite law that a writ of *Habeas Corpus*' purpose is to require the production before the Court of a person who claims that he is unlawfully detained so as to test the validity of that detention so as to ensure his release from unlawful detention should the Court hold that he is unlawfully detained. See *Grace*

Stuart Ibingira v Uganda [1966] EA 445,450 – 451.

Terrorism is a heinous crime committed against any country and its people. However this is no excuse for violating the statutory provisions relating to arrest and detention of suspects. In my view it is because of the seriousness of terrorism that those given the authority to prevent and/or detect terrorist activities operate within the law so that terrorists do not go unpunished on grounds of flawed investigations and breaches of any Constitutional provisions.

For these reasons I grant prayer (I) in this summons and order that directions in the nature of *Habeas Corpus* do issue directed at the Attorney General, Commissioner of Police, Coast Provincial Police Officer and Coast Provincial CID Officer or their agents and/or representatives to produce Umurumani Hudhefa before the Mombasa Chief Magistrate tomorrow the 30th May 2003 at 9.00 am or to release her from police custody forthwith.

It is so ordered.

Dated and delivered at Mombasa this 29th day of May, 2003

A.G.A. ETYANG

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JUDGE