



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CRIMINAL APPLICATION NO 36 OF 2003**

**MOHAMED ABDALLA MOHAMED ..... APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The application before the court is a Chamber Summons dated and filed the 27th May 2003 in which Khadija Shambe Ibrahim (to be referred to as “Khadija” in this ruling) on behalf of Mohamed Abdalla Mohamed (referred to in this ruling as “the Applicant”) seeks the following orders in the nature of *Habeas Corpus* to issue against the Commissioner of Police (referred to as “the Respondent”) or his agents and/or representatives in the Coast Province pursuant to the provisions of section 389 and 123 of the Criminal Procedure Code Chapter 75 Laws of Kenya, rule 2 of the Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules and sections 81, 72 and 84 of the Constitution of Kenya, namely:-

“(i) An order that directions in the nature of *Habeas Corpus* do issue directed to the Commissioner of Police or his agents and/or representatives in the Coast Province, to have the body of Mohamed Abdalla

Mohamed produced before the Honourable Court at such time as the judge may direct.

(ii) An order that the Commissioner of Police and/or his agents and/or employees in the Coast Province do appear in person or by his duly authorized agent together with the original of any warrant or Order of detention to show cause why the said Mohamed Abdalla Mohamed should not released forthwith.

(iii) That pending the hearing of this Summons *interpartes*, the Commissioner of Police and the Provincial Police Officer (PP0) Coast or any other officer in charge of the Police in the area within whose jurisdiction the applicant is being held, the officers in charge of any Police Station in the Republic of Kenya holding the applicant or any of them be ordered and directed to release the applicant on bail or such terms and conditions as the Court deems fit to grant.” Mr Khatib advocate, prosecuting this Summons, has relied on the affidavit sworn by Khadija from which the following facts have been deponed to: the applicant is Khadija’s husband who is an employee of Kenya Ports Authority working in the Finance Department, and lives with his family at Majengo area within Mombasa District. On the 23rd May 2003 at 11.00 pm some plainclothes police officers went to their residence, conducted a thorough search of the entire house, and then took the applicant away to unknown destination. Khadija then successfully sought the intervention of Councilor Ali Noor and Hon Najib Balala, MP of the area and Minister for Gender, Culture & Social Services and the applicant was released. He was however asked to report the following day to Urban Police Divisional Headquarters for interrogation. The applicant did so on 24th May 2003 and was detained and transferred to Port Police Station where he currently is being

held.

Khadija has questioned the applicant as to why he was being held. The applicant has conceded that he was merely questioned with regard to terrorist activities and that the police have taken his passport and mobile phone. However, since the time he was transferred to the Port Police Station, no detective has gone there to see him or to interrogate him. He is therefore apprehensive as to what is likely to happen to him as none of the police officers have been able to explain to him the actual reason for his detention at Port Police Station.

The applicant has again conceded that his family members have access to him but that his basic fundamental rights of freedom are being curtailed for no lawful reason, that his continued incarceration is illegal and unlawful and that the Court should make orders for his immediate production in court or for his release.

Mr Patrick Gumo, Principal State Counsel, has also conceded that indeed the applicant was arrested on 23rd May 2003, is being held at Port Police Station and has not been charged with any criminal offence. He has further conceded that the police have not advised him whether the applicant is being held as a suspect to the terrorist bombing of paradise Hotel on 28<sup>th</sup> November 2002 or as a potential witness for the prosecution, though his brief is that the police are investigating terrorist activities in this area and they believe the applicant has some very useful information. He has pleaded with the Court to give the police three more days to conclude their investigations into the terrorist activities before the applicant can be released.

Mr Patrick Gumo is, of course, relying on an affidavit sworn by IP Obadia Kuria stationed at Provincial CID Headquarters, Mombasa. He is the investigating officer into the Paradise Hotel terrorist bomb attack and the attempted shooting of the Israel aircraft on the 28th November 2002.

The respondent has, through learned Principal State Counsel Mr Gumo, put on record the reasons for holding the applicant in detention at Port Police Station. From the facts Mr. Gumo has placed on record the applicant is being held either as a suspect or a potential witness for the prosecution.

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 been taken to the police station to record statements. Persons who have been taken to the police station by the police for purposes of recording statements or who take themselves to the police stations either to make reports or to record statements ought not to be locked up in the police cells or detained at all at the police stations. Their statements should be recorded or their reports booked in the occurrence book and then released forthwith.

It follows that if the applicant was taken to Port Police Station for purposes of recording statements or to assist the police in their investigations as a potential witness then he ought to have had his statement recorded or assisted in whatever manner he was able to and then released. There is therefore no lawful reason to have kept the applicant, an alleged potential witness to terrorist activities in Mombasa, a day longer in police custody.

If the applicant is held as a suspect, then the provisions of section 21(1) of the Criminal Procedure Code Cap 75 and section 72(2) and (3) of the Constitution of Kenya apply ie when arresting the applicant he ought to have been informed in a language he understands, the reasons for his arrest and/or detention as soon as reasonably practicable. Thereafter he was to be treated in a manner provided for in s 72(3)(b) of the Constitution of Kenya, which reads:-

“3. A person who is arrested or detained-

(a) .....

(b) Upon reasonable suspicion of his having committed or about to commit, a criminal offence, and who

is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as reasonable practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

Mr Gumo has not been of any assistance to the court on the issue of what offence the applicant has been and is being held for at Port Police Station.

The reason for his failure to assist the court is that the police officers who arrested the applicant and are holding him have failed to advise him accordingly.

The incident of 28th November 2002 when Paradise Hotel was bombed, allegedly by terrorists, has assumed notoriety. It is within the knowledge of the Court. Indeed the Court knows that persons died in that incident.

The police are now investigating it to establish the authors of that crime. If this is why the applicant is being held for, then all the police officers concerned had to do was to inform him and to bring him to court should there be sufficient evidence against him. This has not been done. Therefore on the facts placed before me, the arrest and subsequent detention of the applicant at Port Police Station has not been shown by the respondent to be lawful.

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

The better and legal option is for the respondent to bring the applicant to court and then to apply for him to be remanded into their custody to enable them to complete their investigations. Or to release him on a police bond and then to compel him, pursuant to the provisions of section 22 of the Police Act Cap 84 Laws of Kenya, to report back to the Police Station on a designated date and at a particular time. For avoidance of doubt section 22 of the Police Act 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* is a writ of right granted *ex debito justitiae*, but it is not a writ of course. It may be refused if the circumstances are such that the writ should not issue. The purpose of this writ 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 his detention and so as to ensure his release from unlawful detention should the Court hold that he is unlawfully detained. This was held in *Grace Stuart Ibingira v Uganda* [1966] EA 445, at page 450-451 and followed in my ruling Mombasa High Court Cr Application No 33 of 2003 *Husna Abdlla Mohamed v Republic* (Ex-parte).

Terrorism is a heinous crime committed against any country and its peoples. It is for this that those given the authority to prevent 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.

I have re-visited the prayers in this Summons. Prayer (ii) therein is now spent because the respondent, through Mr Gumo, has appeared in court.

Prayer (iii) is also spent because the hearing of this Summons is not pending any more but is now concluded. On the other hand, orders in terms of prayer (i) are available to the applicant.

For the above reasons I grant prayer (i) in this Summons and do order that directions in the nature of *Habeas Corpus* do issue directed to the Commissioner of Police or his agents and/or Representatives in the Coast Province to produce the applicant before the Chief Magistrate Mombasa on the 30th May 2003 at 9.00 am or thereabouts; or to release him from his custody forthwith or before then.

It is so ordered.

Dated and delivered at Mombasa this 29<sup>th</sup> day of May, 2003

**A.G.A ETYANG**

.....

**JUDGE**