



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL APPLICATION CASE NO. 64 OF 2003

IN THE MATTER OF: AN APPLICATION BY KHADIJA SALMIN
ON BEHALF OF SALIMIN MOHAMED
KHAMIS
AND
IN THE MATTER OF: CRIMINAL PROCEDURE (DIRECTIONS IN
THE NATURE OF HABEAS CORPUS
RULES)
AND
IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF
HABEAS AND SUBJICIENDUM
BETWEEN

THE REPUBLIC EX-PARTE

**SALMIN MOHAMED
HAMISI.....APPELLANT**

-VERSUS

THE COMMISSIONER OF POLICE through

**THE HON. THE ATTORNEY
GENERAL.....RESPONDENT**

R U L I N G

By a chamber summons dated 23rd June 2003, Khadija Salmin, on behalf of Salmin Mohammed Khamis sought for three substantive orders to issue against the Commissioner of Police or his agents and or representatives in the Coast Province pursuant to the provisions of sections 389 and 123 of the criminal Procedure Code, Cap. 75 of the laws of Kenya and Rule 2 of the Criminal Procedure (Directions in the matter of Habeas Corpus) Rules and Sections 72, 81, 82 and 84 of the Constitution of Kenya, namely:

- (a) An order that Directions in the nature of Habeas Corpus do issue directed to the Commissioner of Police or his agents and or representative in the Coast Province to have the body of one Salmin Mohammed Khamis produced before the Honourable Court at such time as the Judge may direct.
- (b) An order that the Commissioner of Police and or his agents or employees in the Coast Province do appear in person or by his duly authorised agent together with the original of any warrant or order of Detention to show cause why the said Salim Mohammed Khamis should not be released forthwith.

(c) That pending the hearing of this summons interpartes, the commissioner of Police and the Provincial Police officer (PPO) 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 on such terms and conditions as the court deems fit to grant.

(d) That the court do declare that the applicant's rights under the constitution have been or are about to be infringed and or violated.

(e) That costs of this application be provided for.

The application was supported by the affidavit of Khadija Salmin, an aunt to the applicant. The application was prosecuted by Mr. Khatib who successfully obtained *ex parte* when the A.G. though having being served failed to attend court prayers No. (a) and (b) above. The order was then served and the application was listed for hearing and further orders on 4th July, 2003.

On the 4th day of July 2003, the A.G. appeared through Miss Mwaniki who informed this court that she was appearing in court pursuant to the court orders served upon the A.G. Her submission was that she was unable to have the applicant released because he was being held for questioning on suspicion of involvement in the 7th August 1998 and 28th November 2002 terrorist bombing incidences allegedly to have been master-minded by the Alqueida network. The learned State Counsel also conceded that the applicant was being held beyond the constitutionally allowed period of 14 days in capital offences. She sought for another seven (7) days to hold the applicant to enable the Police complete their investigations and record statements. It was her view that the matters being investigated against the applicant touch on state security hence the Commissioner of Police should be allowed a free hand to hold the suspect beyond the constitutional period.

Mr. Khatib, for the applicant strongly protested in the manner the A.G.'s representative was handling the matter. It was Mr. Khatib's view that the A.G. had breached court orders when he failed to come with the applicant to court despite being directed by an express court order. The applicant's Counsel further submitted that the court should not perpetrate an illegality by granting the respondent more time to unconstitutionally hold a suspect.

It is clear from the submission of both learned Counsels that it is not disputed that the applicant was arrested on 16th June 2003 and he is still in Police custody and that no criminal charges have so far been preferred against the applicant. The learned State Counsel conceded that the Police or security agents are holding the applicant unconstitutionally and unlawfully and she belatedly sought for leave to continue holding the applicant for another seven (7) days. Of course, the application does not deserve consideration in the first place, because the respondent has not made a formal request. Secondly, the court will be acting *ultra vires* the constitution if such an application was granted. There are better ways of handling matters touching on State Security than the way it is being portrayed in this case. The Respondent seems to think that State Security is more important than personal freedom. To me, State Security and personal freedom and liberty are equal in the eyes of the constitution. Consequently the plea to hold the applicant further is rejected.

The purpose of a writ of Habeas Corpus 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.

I am convinced that the applicant, Salmin Mohammed Khamis is being held unlawfully and unconstitutionally. His fundamental rights and freedoms as an individual have been violated. No good reasons have been advanced as to why the Police should continue holding him. In the circumstances therefore the Commissioner of Police or his agents and or his representatives within whose jurisdiction the applicant is being held is or are directed to release the applicant unconditionally without further delay unless lawfully held.

However before I delivered this ruling, the learned State Counsel served the court with a fax copy of a charge sheet which shows that the applicant has been charged with 15 offences of murder contrary to section 203 as read with section 204 of the penal code Chapter 63 Laws of Kenya. It means that the applicant is no longer in Police custody unless otherwise directed by the trial court. However that does not change or alter my findings that before the applicant was charged he was unlawfully held. It should be noted that the Commissioner of Police or his agents or Representatives were prompted to charge the applicant in court when this application was pending for ruling. Of course the respondents will inform this court that the application has been overtaken by events in that the applicant is now the property of the court. I hope the respondent is not hiding behind the shield of a charge of a capital offence before a court of Law because that may amount to abuse of office and or abuse of the court process which should be discouraged. Consequently the directive to release the applicant is spent save for the fact that the applicant was unlawfully held by the security agents after the period provided for by the Constitution lapsed. I have already made my findings and it is upon the applicant's representatives to pursue the available remedies in law.

Read and delivered this.....8...day of...July.....2003.

In the presence

.....for the applicant.

.....for the Respondent.

J.K. SERGON

J U D G E

8/7/2003