



Gure v Inspector of General Police & 3 others (Miscellaneous Criminal Application E007 of 2024) [2024] KEHC 8661 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
MISCELLANEOUS CRIMINAL APPLICATION E007 OF 2024**

**JN ONYIEGO, J
JULY 18, 2024**

BETWEEN

OSMAN YUSSUF GURE APPLICANT

AND

INSPECTOR OF GENERAL POLICE 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

**DIRECTOR OF CRIMINAL INVESTIGATIONS GARISSA POLICE
STATION 3RD RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS IFTIIN POLICE
STATION 4TH RESPONDENT**

RULING

1. The applicant instituted this proceeding by way of chamber summons dated 02.04.2024 pursuant to articles 25(d) and 51(2) of the [constitution](#), sections 389 of the *CPC* and rules 2 and 3 of the [Criminal Procedure Code](#) (Directions in the nature of habeas corpus) seeking for orders as follows:
 - i. Spent.
 - ii. That an order that directions in the nature of habeas corpus do issue directed to the 3rd and 4th respondents to have the body of the applicant be produced before the Honourable Court at such time as the judge may direct.
 - iii. That an order that the respondents and or their representatives do appear in person or by his duly authorized agent together with the original if any warrant or order of detention to show cause why the applicant should not be released forthwith.



- iv. That the officer commanding the DCI, Garissa Police Station and Iftiin Police Station produces the applicant in court.
 - v. That the Inspector General of Police and the Officer in Charge of DCI, Garissa Police Station or any other officer in charge of the Police in the area within jurisdiction where the applicant is held, is being held, the officer in charge of any Police Station in the republic of Kenya holding him or any of them be ordered and directed to release the applicant, or bail or on such terms and conditions as the court deems fit to grant.
 - vi. That upon hearing and determination of this application, this court orders that the applicant be released forthwith.
 - vii. That costs of this application be provided for.
2. The application is anchored on the grounds on its face and further supported with the annexed affidavit of Hindia Keisan Ali sworn on 02.04.2024 in her capacity as the wife of the applicant. That the applicant, who is currently out on bond faces Criminal Charges in Garissa Chief Magistrates Court Cr. E375/2023 and that the same is slated for further hearing on 11.04.2024. It was averred that on the night of 08.02.2024 at midnight, the respondents went to her house and picked the applicant without any justification whatsoever.
 3. That the applicant is being held illegally by the 3rd and 4th respondents. Further, that his family and advocate have been denied access to the applicant. It was therefore urged that the application be allowed as prayed.
 4. The respondents in opposing the application filed a replying affidavit sworn by No. 75925 Pc Joseph Mutonya Jonathan. He averred that sometime on 26-07-2023, he preferred criminal charges against the applicant and one Dubat Tawane Jithaye for being in possession of firearm without firearm certificate contrary to section 4(2) (a) as read with section 4(3) of the Firearm Act Cap 114 Laws of Kenya.
 5. That he presented the two accused persons before Garissa Cm's court on 26.07.2023 wherein they pleaded not guilty and subsequently admitted to a bail term of Kes. 1.5 million with one surety. He deposed that when the matter came up for hearing on 11.04.2024, the applicant's husband jumped bail thus prompting the trial court to issue a warrant of arrest.
 6. He further deposed that the allegations that the applicant was abducted by police officers is strange as that is not the true position of the facts. It was stated that the application herein is simply intended to derail the course of justice and overlook the fact that the applicant absconded court willingly. In the end, the respondents sought that this matter be dismissed for want of merit. Further, the DPP filed grounds of opposition dated 11-04-24 terming the application as unmerited; that the DPP was wrongfully enjoined and that no specific violation of the constitution had been cited.
 7. I have considered the application and the replying affidavit by the respondents together with the 2nd respondent's grounds of opposition. The main issue is whether this Honourable Court has sufficiently been persuaded to issue the orders sought.
 8. The writ of *habeas corpus* as a remedy is provided for under Article 51 (2) of the constitution. It provides that:

“A person who is detained or held in custody is entitled to petition for an order of Habeas corpus”



9. According to Section 389 (1) of the [Criminal Procedure Code](#), 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 in accordance with the Law.
 - (b). That any person illegally or improperly detained in a public or promote custody within those limits be set at liberty.
 - (c)... .
 - (d)... .
 - (e)... .
 - (f)... ..
10. Having reviewed the pleadings by the applicant, the same raise concerns about the applicant allegedly being abducted by the respondents and/or agents of the respondents.
11. The foregoing notwithstanding, it is clear that the applicant has mixed up the procedures for approaching the Court seeking for orders in the nature of habeas corpus. Previously, an order for habeas corpus could be sought by procedure as provided in the Directions in the Nature of *Habeas Corpus* under the [Criminal Procedure Code](#) Cap. 75. With the enactment of the current constitution, the enforcement of the right to habeas corpus is as stipulated under Article 51 (2) of the [constitution](#).
12. In the case of *Grace Struat Ibringira & others vs Uganda* [1966] EA 445, the Court of Appeal for Eastern Africa had the following to say regarding this writ at page 454:-

“The writ of Habeas Corpus is a writ of right granted ex debito justitiae, but it is not a writ of course and it may be refused if the circumstances are such that the writ should not issue. The purpose of the 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 the detention and so as to ensure his release from unlawful restrained should the court hold that he is unlawfully restrained. ... The writ is directed to one or more persons who are alleged to be responsible for the unlawful detention and it is a means whereby the most humble citizen ... may test the action of the executive government no matter how high the position of the person who ordered the detention.” (emphasis)
13. It therefore follows that the writ of *habeas corpus* is a faster means of approaching the court to secure the release of a detained person where one is able to demonstrate that such detention or confinement is unlawful.
14. Ordinarily, if this matter were to be filed via a petition, the same could have set out in a formal and constructive manner, the facts of the case, the question for determination, the relief being sought, among others which are now missing due to the procedure adopted by the applicant. Be that as it may, even considering substantive justice as opposed to form, the respondents in opposing the application urged that the applicant after having been charged with the offence in question, was admitted to bond terms which he jumped.
15. According to the wife of the alleged abductee, her husband was picked from their house on the 8-2-24 by police officers. The respondents have denied the allegation. There was no description given fitting the officers involved or the mv used if any or force numbers of the officers involved if at all. The



deponent did not give factual information to connect the people who picked her husband to be police officers. How will the court for sure tell that the alleged abduction was carried out by police officers?

16. I must however confess that cases of abduction with an unidentified person/s are difficult to prove. The court cannot act on a word of mouth against word of mouth without proof by further evidence. The wife to the alleged abductee does not state whether she knew the abductors or she merely suspected them to be officers. This is a serious allegation which borders on criminality hence the need for proof of the allegations.
17. As regards the joinder of the DPP, the same was pre-mature as there was no complaint filed against any perpetrator seeking the DPP to prosecute or to direct the Inspector General of police to investigate. To that extent, the objection is upheld hence the joinder of the DPP was not necessary at this stage.
18. In a nut shell, the allegation that the applicant was abducted by the police officers is not supported by any evidence. To that extent, the allegation/s that the applicant was abducted is not based on any factual foundation. Having held as above, I do not find any merit in the application hence dismiss the same with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF JULY 2024.

J. N. ONYIEGO

JUDGE

