**Alew (Suing on his behalf and that of Issack Ibrahim) v Inspector General of Police & 3 others (Revision Case E021 of 2024) [2024] KEHC 12339 (KLR) (15 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12339 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT GARISSA**

**REVISION CASE E021 OF 2024**

**JN ONYIEGO, J**

**OCTOBER 15, 2024**

**BETWEEN**

**HSSEIN IBRAHIM ALEW (SUING ON HIS BEHALF AND THAT OF ISSACK IBRAHIM) ..... APPLICANT**

**AND**

**INSPECTOR GENERAL OF POLICE ..... 1ST RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2ND RESPONDENT**

**HON ATTORNEY GENERAL ..... 3RD RESPONDENT**

**OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS ..... 4TH RESPONDENT**

**RULING**

1. The applicant instituted this suit by way of a chamber summons amended on 03.07.2024 and brought pursuant to articles 25, 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 this court does order a summon to issue directed against the respondents in whose custody is Isaack Ibrahim to produce the body of the said Isaack Ibrahim before this court together with the original of any warrant or order for detention on a date to be given.

    iii. That the said Isaack Ibrahim be forthwith released and set at liberty.

2. The application is anchored on the grounds set out on its face and further supported with an annexed affidavit of the applicant sworn on 03.07.2024. It was deposed that the applicant is the brother to one Isaack Ibrahim (herein after the subject). That on 02.05.2024 at about 0100hrs, the said subject was kidnapped/abducted from his matrimonial house in Bulla Afya location by disguised individuals who

were wearing combat police uniforms and driving three land cruisers under the guise of effecting an arrest.

3. That hitherto, the whereabouts of the subject remains unknown and unaccounted for hence reasonable fear that he was abducted by officers attached to the respondents who have refused to either allow his family to visit him in custody and/or refused to present him before a court of law to answer to any charge if any. This court was therefore urged to intervene and compel the respondents to produce the subject before this court or any other court with requisite jurisdiction.

4. The 4th respondent via a replying affidavit sworn on 11.06.2024 by Bidan Kihara, a prosecution counsel deponed that as a matter of procedure, once a suspect is arrested and charges preferred against him, the police file is forwarded to the office of the 4th respondent for directions to either charge or take other necessary actions. That the office of the 4th respondent was not furnished with any information in regards to the alleged arrest of the said subject. It was contended that the allegations of abduction/ kidnapping are strange as the applicant did not specifically plead on how the 4th respondent was involved in the said abduction/kidnapping.

5. Despite service, the other respondents did not bother to respond to the application.

6. The application was canvassed orally wherein the applicant reiterated the particulars of the application thus urging the court to allow the prayers sought. The 4th respondent on the other contended that the application should be dismissed for the reason that it did not meet the threshold of seeking for the writ of habeas corpus. That the same violated the provisions of article 51 of *the constitution*. Counsel opined that the applicant did not demonstrate that the people who allegedly abducted/kidnapped the subject herein were police officers. That there was no proof of abduction presented before the court. This court was therefore urged to dismiss the application as the same was devoid of any merit.

7. In rebuttal, Mr. Wambui for the applicant urged the court to look at the substance rather than the form. This court was therefore implored to allow the application as prayed.

8. I have considered the application herein, the replying affidavit by the 4th respondent and oral submissions by both parties. The only issue for determination is whether this Honourable Court can issue the orders sought.

9. The writ of habeas corpus as a remedy is provided for under Article 51 (2) of *the Constitution* which provides that:

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

10. 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 private custody within those limits be set at liberty.

    (c ...

11. Having reviewed the pleadings by the applicant, the same raise concerns about the subject's alleged abduction by the respondents and/or agents of the respondents.

12. 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. However, with the enactment of the 2010 constitution, the enforcement of the right to habeas corpus is as stipulated under Article 51 (2) of *the Constitution*.

13. Ordinarily, an application for habeas corpus ought to be filed by way of a petition. However, under Article 159 (2) (d) of *the constitution*, courts are encouraged to dispense justice or administer justice without undue regard to technicalities. I will therefore treat the requirement of approaching the court via a petition as a mere procedural technicality revolving on want of form rather than substance.

14. It is trite that the right to an order of habeas corpus is not limited pursuant to article 25 (d) of *the constitution*. In seeking guidance from the case of Grace Stuart Ibingira & 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 restraint should the court hold that he is unlawfully restrained. It is a writ which is open not only to citizens of Uganda but also to others within Uganda and under the protection of the state. The object of the writ is not to punish but to ensure release from unlawful detention; therefore it is not available after the person has in fact been released. 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 in Uganda may test the action of the executive government no matter how high the position of the person who ordered the detention. If the writ is not obeyed then it is enforced by the attachment for contempt of all persons who are responsible for the disobedience of the writ."

15. Clearly, the writ of habeas corpus being a faster means of approaching the court to secure the release of a detained person, it is incumbent upon the applicant to demonstrate that such detention or confinement is unlawful.

16. It therefore follows that for the writ to issue, the applicant must show that the subject is held in custody, detained or imprisoned. In effect therefore, the first burden on the applicant is to prove by way of evidence that indeed the subject is held in custody or detained or imprisoned. This was well espoused in the case of Masoud Salim Hemed and Another vs DPP and 3 others (2014) eKLR, where the court held that;

> " The general burden in a habeas corpus application must, pursuant to section 107 of the *Evidence Act*, remain with the petitioner. The petitioner must establish by competent and convincing evidence that the missing person on whose behalf the petition was filed is under the custody of the respondents"

17. In my considered view, the holdings above are not only sound but also legal as it would be in vain to issue the writ of habeas corpus where the subject is not in any detention or unlawful detention. It therefore falls upon the applicant to demonstrate that indeed, his facts and evidence support the prayers sought. It would be in vain to issue a writ against a respondent or anybody who is not holding the subject. [ See the case of LSK vs Brian Nzenze and others (2018) eKLR].

18. Having reviewed the pleadings herein in totality, a number of factors stick out for consideration before the writ can properly issue. This is so for the reason that in as much as it was deponed that the abductors were dressed in combat police uniform, the same in my view is not conclusive. I say so for the reason that it is not strange to see criminals or any other persons wear combat clothes. [ See Omar Gordana Dida on Behalf of Osman Omar Gordana v Inspector General & 3 others [2021] eKLR].

19. Further to the foregoing, I noted that the identities of the said abductors were not given. Further still, the registration numbers of the alleged land cruisers that were used by the alleged abductors during the occurrence of the incident were not specified. In the same breadth, in as much as an OB number was annexed herein to allegedly show that the incident was reported to Elwak Police station, that was just but a formal report which has no proof as to who were the abductors.

20. Considering all these factors together, I find and hold that the applicant has fallen short of proving that the alleged abductors were agents of the Respondents. I am also not convinced that the applicant has shown sufficient proof that the subject is in the custody of the respondents to enable this court issue the prayers sought. The fact that the application was not opposed by the 1st to the 3rd respondents is not a guarantee that the application must automatically succeed. The court is duty bound to determine the same on merit. See Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & others (2018) e KLR.

21. As a consequence of the above holding, it is my finding that the applicant is undeserving of the prayers sought and therefore, the order that I find commendable is that of dismissing the application which I hereby do.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 15TH DAY OF OCTOBER 2024**

**J. N. ONYIEGO**

**JUDGE**