



**KS (Suing as a Father and Next Friend of DNS a Minor) & another v Wangusi & 5 others
(Petition E001 of 2023) [2023] KEHC 3067 (KLR) (Family) (13 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 3067 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

PETITION E001 OF 2023

EKO OGOLA, J

FEBRUARY 13, 2023

**IN THE MATTER OF THE CONTRAVENTION AND THREATENED CONTRAVENTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 20,21,22,23,24,25,
26, 27, 28, 29, 39,47, 48, 50 AND 51 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS OF FUNDAMENTAL
FREEDOMS UNDER ARTICLE 21, 24, 25, 26,27, 28,29,39,47, 48,50 AND 51 (2)**

AND

**IN THE MATTER OF DEFENCE OF THE CONSTITUTION
UNDER ARTICLE 3(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ARTICLE 51(2) AND SECTION 389 OF
CRIMINAL PROCEDURE CODE FOR “HABEUS CORPUS” ORDERS**

BETWEEN

**KS (SUING AS A FATHER AND NEXT FRIEND OF DNS A
MINOR) 1ST PETITIONER**

**BNW (SUING AS A MOTHER AND NEXT FRIEND OF DNS A
MINOR) 2ND PETITIONER**

AND

ANN WANGUSI 1ST RESPONDENT

CHRISTINE BARASA 2ND RESPONDENT

**IBRAHIM A. MOHAMMED, OFFICER COMMANDING STATION (OCS)-
KAMULU 3RD RESPONDENT**



LUCY BARASA, INVESTIGATING OFFICER (IO), KAMULU POLICE STATION 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 6TH RESPONDENT

JUDGMENT

1. In consideration that the Petition and the Application before this court both dated 3rd January, 2023 see the same orders and are based on the same pleadings, I have decided, in the interest of time, to give Judgment on the Petition.
2. The 1st Petitioner is the father, and the 2nd Petitioner is the step-mother of one DWS, the subject of this Petition, whom they allege disappeared as a result of the actions of the 1st and 2nd, 3rd and 4th Respondents.
3. The 5th Respondent is the principal legal advisor to the Government and is statutorily mandated by Article 156 (4)(b) of the Constitution to represent the National Government in court.
4. The 6th Respondent is a holder of a constitutional office established under Article 157 of the Constitution and is mandated with instituting and undertaking criminal proceedings against any person before any court in respect of any offence.
5. The Petition is supported by the separate statements of the Petitioners both dated 3rd January, 2023.
6. The petition is premised on the following Articles of the Constitution, Article 3 (1), 20, 21, 22, 23, 24,25, 26, 27, 28, 29, 39, 47,48, 50 and 51, 5(2) and section 389 of the Criminal Procedure Code.
7. The Petition prays for the following Orders;
 - a. This honorable court do issue an order of habeas corpus requiring the 1st, 2nd, 3rd and 4th respondents either by themselves or through their representatives to produce the body of the minor DWS to court immediately
 - b. An order of this honorable court directing the minor DWS be released to the 2nd Petitioner immediately to stop further violation of her rights and the rights of the father
 - c. Compensation for violation of the minor's rights
 - d. This honorable court order that costs of this petition be borne by the 1st, 2nd, 3rd and 4th Respondents
8. The 1st respondent filed a Replying Affidavit dated 16th January, 2023. The 2nd respondent did not file a response. The 3rd respondent filed a Replying Affidavit dated 2nd February, 2023 while the 4th respondent also filed a Replying Affidavit sworn on 2nd February, 2023. The 5th and 6th Respondents have not participated in this matter.

The Petitioners' case

9. The Petitioners case is that the 2nd Petitioner sent the subject child herein on an errand on the 22nd Day of December, 2022. That the child delayed in returning prompting the 2nd Petitioner to search for her when she saw the child with a boy of the road. The 2nd Petitioner returned home and waited



for the child but the child did not return home. The 2nd Petitioner claims she gathered neighbors who conducted a search and it was during the search that it was revealed that the child was at the 1st Respondent's house.

10. The 2nd Petitioner deposes that the 1st Respondent called her and informed her that the child was at the 1st Respondent's house; that the child had refused to go back home for fear of being scolded. The 1st Respondent requested that the child spend the night in her house and promised to return the child home the next day. The 2nd Petitioner claims that the child was not returned the next day as promised. Instead the 1st Respondent informed the 2nd Petitioner that the child had disappeared. This prompted the 2nd Petitioner to report the matter of a missing child to Joska Police station vide OB No 39/23/12/2022.
11. The 2nd Petitioner deposes that the police officers at Joska Police Station called the 1st Respondent who revealed that she had taken the child to Kamulu Police Station. The Police officers at Joska tried to have the child's case returned to Joska Police station as the matter was within their jurisdiction but the request was in vain. The story then changed to defilement; that the child had been defiled by the 1st Petitioner who is her father.
12. According to the petitioners, the Respondents violated the Bill of rights under article 51(2) of the Constitution which gives provision for persons detained or held in custody are entitled to order of habeas corpus. That the Respondents are also in violation of the child's right to freedom which is a right that cannot be limited.

1st Respondent's case

13. The 1st Respondent alleges that the child is not in her custody and so the Orders of habeas corpus cannot be sought or enforced as against her. The 1st respondent stated that the child is under the care and control of medecins Sans frontiers (MSF Kenya) which is a charitable children's institution established in accordance with provisions of the Children's Act, and runs a range of services in Kenya including support for victims of violence among other things.
14. The 1st respondent deposes that she was not the one who registered the complaint at Kamulu Police station. She states that she handed over the child to MSF Kenya as the child was in a disturbed state of mind. According to the 1st respondent, on 22nd December, 2022 at 8: 00p.m, the child who was unknown to the 1st Respondent by then knocked on her gate. The child was crying and shaking and was asking for the 1st Respondent's daughter. The 1st Respondent invited the child inside the house since it was already dark outside.
15. The 1st respondent states that upon interrogation of the child she revealed she was the 1st Respondent's daughter's classmate. The Child stated that she had ran away from her home because she was suffering; that the child's step-mother and step-sisters were mistreating her.
16. According to the 1st Respondent, she sought to get the step mother's telephone number from the child but the child did not have it. The 1st respondent made efforts and managed to trace the 2nd Petitioner's number, called her but the 2nd Petitioner said she could not go get the child from the 1st Respondent's house because she could not leave her month old baby in the house in pursuit of someone who fled from the house.
17. The 1st respondent alleges that she tried finding a safe place for the child to spend the night but she could not find. She called the 2nd Petitioner who directed that the child should spend the night at the 1st respondent's house until the next day when the 2nd Respondent would go pick the child.



18. The 1st Respondent states that the next morning when she tried taking the child home, the child she refused. That when the 1st respondent asked the child for her father's phone number, the child broke down and revealed that her father was defiling her and she had actually ran away from home when she heard that the father was returning from Somalia. The 1st Respondent states that it was at that point that she noticed that the child was distressed. The 1st respondent called the Kasarani Sub-County GBV coordinator who directed her to take the child to MSF Kenya.
19. The 1st Respondent deposed that she took the child to MSF who then took up the case from there. MSF too the child to Kamulu Police Station where she recorded a statement and later the 1st Respondent was called to Kamulu Police station to record her statement as well.
20. The 1st respondent alleges that she tried reaching the petitioners to inform them where the minor was but the 1st respondent was surprised to learn that the petitioners had reported the matter of a missing child vide OB No 31/23/12/2022 and recorded their statements.
21. According to the 1st Respondent, she was shocked to learn that the petitioners are accusing her of coaching the child on what she would say. The 1st Respondent states that she is wrongfully enjoined in this matter.

3rd Respondent's case

22. The 3rd Respondent is No 234695 C.I Ibrahim A. Mohamed, a police officer in the capacity of an OCS. The 3rd respondent stated that the child was escorted to Kamulu Police Station by MSF community health assistant by the name Josephine. The child was received by a gender and child protection Clare Bonareri who recorded the report of the minor vide OB No 31/23/12/2022.
23. According to the 3rd respondent, the minor alleged that the 1st Petitioner defiled her and the 2nd Petitioner together with her daughter by the name F mistreated the minor child to an extend of almost stabbing her. That the child was taken to hospital by MSF personnel and returned back to Kamulu Police Station.
24. The 3rd Respondent stated that PC Clare Bonareri called a police officer from Joska police station inquiring if there were reports for a missing child, and he was told that the 2nd Petitioner had reported about her missing step daughter.
25. The 3rd respondent states that the child was taken to Moyote Safe House in kamulu since the police station has no place for safe custody of children and the Petitioners were informed of the same.
26. According to the 3rd respondent, the 1st respondent was a good Samaritan and the 2nd respondent's involvement was limited to a phone call from the investigating officer long after the matter was reported and therefore the allegation of conspiracy between the 1st, 2nd, 3rd, and 4th respondents to kidnap the child as claimed by the petitioners is baseless.
27. The 3rd respondent claims that the decision to hold the minor at a safe house was in the best interest of the child. The 3rd Respondent indicated that he had no objection if the child is returned back to the petitioners but after the minor is consulted since the minor feels unsafe in the hands of the petitioners.

4th Respondent's case

28. The 4th Respondent is No 100771 Cpl/w Lucy Barasa attached to Kamulu Police Station at the Gender and Child protection desk. The 4th Respondent reiterates the depositions of the 3rd Respondent.



29. The Parties did not file submissions.

Determination

30. I have keenly read and understood the substance of this petition. From the petition and the affidavits before this Court, I adduce the following issues.

- i. The nature and scope of the right to habeas corpus
- ii. Whether the child herein was taken into custody of the respondents
- iii. Damages

The nature and scope of the right to habeas corpus

31. The right to an order of habeas corpus is one of the rights in the Bill of Rights which cannot be limited under Article 25 of our Constitution. It is listed among the other un derogable rights such as the right to freedom from torture, and cruel, inhuman or degrading treatment, freedom for slavery or servitude and the right to a fair trial, thus highlighting its important status in our jurisdiction. It is entrenched in the Bill of Rights under Article 51 (2) in the following terms:

“(2) A person who is detained or held in custody is entitled to petition for an order of habeas corpus.”

32. In the case of *Masoud Salim Hemed & another v Director of Public Prosecutions & 3 others* (2014) eKLR the court rightly so discussed the scope of the right to habeas corpus as follows:-

“33. In Philippines case of *MA. Estrelita D. Martinez v Director General and others*. GR No 153795 of 17th August 2006 the Supreme Court of the Philippines set out the object of habeas corpus as follows:

“habeas corpus generally applies to ‘all cases of illegal confinement or detention by which any person is deprived of his liberty or by which the rightful custody of any person is withheld from the person entitled thereto.

Said this Court in another case:

The ultimate purpose of the writ of habeas corpus is to relieve a person from unlawful restraint. It is devised as a speedy relief from unlawful restraint. It is a remedy intended to determine whether the person under detention is held under lawful authority. – (*Ngayaan v Balweg*, 200 SCRA 149, 154-5, August 5, 1991 per Jaris, J)’

If the respondents are neither detaining nor retraining the applicant or the person on whose behalf the petition for habeas corpus has been filed, then it should be dismissed. This Court has ruled that this remedy has one objective – to inquire into the cause of detention of a person:

The purpose of the writ is to determine whether a person is being illegally deprived of his liberty. If the inquiry reveals the detention is illegal, the court orders the release of the person. If, however,



the detention is proven lawful, then the habeas corpus proceedings terminate. The use of habeas corpus is thus very limited.- (*Alejano v Cabuay* 468 SCRA 188, 200, Aug. 25 2005 per Carpio, J.)’habeas corpus may not be used as a means of obtaining evidence on the whereabouts of a person, or as a means of finding out who has specifically abducted or caused the disappearance of a certain person. When the respondents making a return of the writ state that they have never had custody over the person who is the subject of the writ, the petition must be dismissed, in the absence of definite evidence to the contrary.”

Custody is crucial in habeas corpus case, and even where physical custody is lost by voluntary act of the respondents the right to habeas corpus will be affected. In *Mariam Mohamed and another Commissioner of Police and another* (2007) eKLR, Ojwang’ J. (as he then was) considered an application for habeas corpus in which the subject was admittedly taken out of jurisdiction of the Kenyan courts and held:

“It is evident that, voluntarily or involuntarily, the respondents have placed themselves in a position in which it is no longer within their power to produce the subject before Court. This Court, within the concept of habeas corpus, will be unable to make orders for the production of the subject, because such that a court of law is not to make an order in vain. Courts’ orders are focused, clear, enforceable, and capable of being secured by applying the law of contempt, against those who disobey. From the facts placed before this Court, the respondents are, at this moment, not in control of the physical custody of the subject, and so they would not be in a factual position to comply with a writ of habeas corpus. It follows that the applicants’ Chamber Summons of 18th October, 2007 is either overtaken by events, or would have to remain in abeyance, until the subject is physically in the custody of the respondents.”

35. However, as argued in the Article ‘The “Custody” Requirement for habeas corpus – *Allen v United States, Martin v Virginia*’, (1966) Vol. 26 Maryland Law Review 79, an order of habeas corpus is available for persons in custody, even though it be legal – including parole and bail – as opposed to physical custody.”
33. It is clear from the above that an order of habeas corpus can only be enforced when it is proved that a victim is in the legal or otherwise custody of the State or State agencies, and that in the event the issue of custody is not firmly established then the matter falls under another realm; either on further police investigations or inquest proceedings. It deals with the production of a person who is proved to be in the custody of the police or any State agency and does not deal with matters of compensation or reparation for the violation of any fundamental rights resulting from the illegal incarceration, the latter lies in separate legal proceedings.



Whether the child herein was taken into custody of the respondents

34. The general burden in a habeas corpus application must be pursuant to section 107 of the *Evidence Act*. As stated in the case of *MA. Estrelita D. Martinez v Director General & others* “the petitioner must establish any competent and convincing evidence that the missing person, on whose behalf the petition was filed, is under the custody of the respondents. Where detention of an applicant is established, the burden of proving the legality of detention rests with the State.
35. In the instant case, the burden was on the Petitioners to prove that the child was in the custody of the respondents. The 1st Respondent cannot be said to be in custody of the child since the child went to the 1st respondent’s house and the 1st Respondent did all she could to help the child. The Child ended up in the custody of MSF then the Police. The 2nd respondent also did not have the custody of the child in this whole matter. Therefore the prayer for habeas corpus does not apply to the 1st and the 2nd respondents.
36. The Petitioners herein have stated that the child is in the custody of the police officers at Kamulu Police station and that the officers have refused to produce the child or agree to transfer the matter to Joska Police Station. The Police officers at Kamulu police station that is, the 3rd and the 4th respondents have not denied that the child was in their custody but since the police station did not have a safe keeping place for custody of children, the child was taken to Moyote safe house for safe keeping. habeas corpus is granted if someone is or was unlawfully detained.
37. From the circumstances surrounding this case, the 3rd and 4th respondents had a good reason to keep the child in custody. The child was distressed and stated that she was not feeling safe at home. The issues raised by the child have to be investigated before the child can be taken back to the Petitioners. habeas corpus orders are granted when someone is unlawfully detained. What the 3rd and 4th Respondent did was to protect the child and it does not amount to unlawful custody to warrant an order for habeas corpus.

Remedies

38. Since I have already established that there is no ground for granting habeas corpus order, no remedy lies to the Petitioners. The petitioners have been informed where the child is kept. The petitioners also know why the child ran away from home. Those reasons should first be investigated before the minor child is returned to the Petitioners
39. The upshot is that the Petition is not proved, lacks merit and is dismissed with no orders on costs. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2023.

E.K. OGOLA

JUDGE

Judgment read and delivered online in the presence of:

Mr. Ondieki for the Petitioners

M/s. Wangusi for the 1st Respondent

Ms. Gisiele Court Assistant

