



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISC. CRIMINAL APPLICATION NO. 18 OF 2021**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 389 OF THE CRIMINAL PROCEDURE CODE**

**AND**

**IN THE MATTER OF AN APPLICATION FOR DIRECTIONS IN THE NATURE OF HABEAS CORPUS**

**AND**

**IN THE MATTER OF CRIMINAL PROCEDURE**

**(DIRECTION IN THE NATURE OF HABEAS CORPUS) RULES**

**IN RESPECT OF HANNAH ZENA BUI aka HANNA ZENA KITELE**

**PATRICK KYALO KITELE.....APPLICANT/COMPLAINANT**

**VERSUS**

**HALIMA KENGA**

**TUNE ALI ..... RESPONDENTS/SUSPECTS**

**AND**

**REPUBLIC.....INTERESTED PARTY**

**Coram: Hon. Justice R. Nyakundi**

**Albert Atancha Advocate for the applicant/Complainant**

**Jimmy Kahindi Advocate for the Respondents/Suspect**

**Mr. Mwangi for State/Interested party**

**RULING**

Through the firm of **Atancha & Co. Advocates**, the applicant filed an Originating Summons seeking an order of *habeas corpus* to issue against the O.C.S. Rabai Police Station on whose jurisdiction **Halima Kenga** and **Tune Ali** hold under unlawful custody of one **Hannah**

**Zena Kitele.** In support of the Originating Summons are the following grounds:

- (1). That the applicant is the lawful husband of Hanna Zena Bui Kitele aka Hanna Zena Bui Kitele.**
- (2). That the applicant and Hannah Zena Bui Kitele moved to South Africa where they all reside with their children.**
- (3). That the applicant and Hannah Zena Bui Kitele have been blessed with five (5) children aged between 21-3 years who all live in the Republic of South Africa.**
- (4). That on or about the month of April 2021 Hannah Zena Bui Kitele mysteriously left South Africa without the applicants knowledge nor communication and came to Kenya.**
- (5). That Hannah Zena Bui Kitele has remained incommunicado to both her husband and children up to date.**
- (6). That on diverse dates from 6<sup>th</sup> April, 2021 in the month of April the applicant has been looking for his wife in various border points e.g Malawi, Mozambique/Tanzania, Zimbabwe/South Africa, Tanzania/Kenya but could not get any links and this made him panic.**
- (7). That the applicant inquired from his wife's brother where his wife could be and later was informed by the brother in-law that Hannah Zena Bui Kitele is fine and she is safe at their aunt's home at Kokotoni area of Kaloleni.**
- (8). That the applicant followed his wife to Kenya and upon checking, he established that his wife arrived in Kenya on 18<sup>th</sup> April, 2021 through Moi International Airport from Addis Ababa, Ethiopia.**
- (9). That when the applicant visited his aunt's home at Kokotoni, he was asked to sit down only for them to call the police to arrest him.**
- (10). That the applicant was also detained by the police for at most 5 hours only for them to release him without a charge.**
- (11). That applicant then came back from South Africa the second time this month and efforts to have the Kaloleni police officers help him access and see his wife have proved futile even he has not been able to have his case recorded on the O.B.**
- (12). That the applicant is apprehensive that his wife could be undergoing a lot of torture on the hands of Halima Kenga, Tune Ali and her accomplices.**
- (13). That the applicant and the children are undergoing so much mental anguish as they are unable to know the state of their mother and wife.**

In addition, the applicant also swore an affidavit filed in Court on 25.5.2021. The interested party being the Republic filed a Preliminary Objection to the Originating Summons.

#### **Determination**

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”**

According to Section 328 (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.**

The writ of *Habeas corpus* rests in three approaches. First, is to protect individual rights, particularly from ad hoc violation by individual government actors. Second, it emphasizes and rests in large part on the belief that the writ deters state actors from violation of Constitutional rights. Third, where any person may be restrained of his or her liberty in violation of the Constitution.

Having reviewed the affidavit evidence, it raises concerns about inappropriate interference with individual liberty and dignity guaranteed under Article 28 and 29 of the Constitution. Lying at the foundation of all liberties provided in the Constitution is the great writ of freedom. Arguing against confinement the writ of *Habeas corpus* was insulated as a fundamental right and freedom that may not be limited. The constitution above all things, preserves the integrity of that hallowed instrument in all its parts, but most especially in those features of it which embraces and guarantees the liberties of the people within our borders. The Court in defending, this priceless writ of liberty is simply vindicating the authority of the people who continue to shape the debate. On fundamental rights and freedoms in the Bill of Rights.

For the purposes of this application, it's to be noted that the averments in the affidavits are not very easy to follow under which circumstances a private citizen came to detain the wife to the applicant in mysterious conditions which defeats both the Law and Societal

values and expectations. The applicant avers that the wife has remand incommunicado and there might be fears as to her safety within the canons of the right to life under Article 26 of the Constitution. The honest answer in this matter is that no one knows why the stated victim is being held by the respondents. It is even harder to understand why she is not allowed to communicate to the public at large.

In order to forestall the anticipated assault on Constitutional fundamental rights and freedoms of the detainee, one avenue is open to the Court to combat the perceived crime problem. First, is to issue a compliance declaration to the D.C.I.O Rabai to move with speed and exercise the statutory power conferred upon his office to take account of the evolving incident complained of by the applicant in his affidavit. Second, the investigation report detailing on what grounds the detainee could have been held incommunicado be presented before this Court on or before the 28.9.2021.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 15<sup>TH</sup> DAY OF SEPTEMBER 2021**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Mwangi for DPP