



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION E318 OF 2021

OMAR GORDANA DIDA

on behalf of **OSMAN OMAR GORDANA.....APPLICANT**

VERSUS

INSPECTOR GENERAL.....1ST RESPONDENT

COMMISSIONER OF POLICE.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

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

RULING:

The applicant, **OMAR GORDANA DIDA** filed this cause by way of chamber summons dated 22.9.2021 under certificate of urgency. The applicant filed this cause on behalf of one **OSMAN OMAR GORDANA**, the subject. In the said application, the applicant has prayed for several substantive orders as follows:-

1. **THAT** directions in the nature of Habeas Corpus do issue against the 1st and 2nd respondents and their agents to have the subject produced before this Honourable court at such time as the Judge may direct.
2. **THAT** the 1st and 2nd respondents appear before this Honourable court in person or through their advocates with the original of any Warrant or Order for the detention of the subject and show cause why the subject should not be released.
3. **THAT** the Respondents be ordered to release the subject on bail on such terms and conditions as the Honourable court deems fit.
4. **THAT** the Honourable Court declares that the subject's rights under the constitution have been infringed, is entitled to the protection of this Honourable Court from the excesses of the respondents through the writ of Habeas Corpus and the declarations sought.

This cause is basically a habeas corpus application brought under Articles 51(2), 165(3)(a) and (b) of the Constitution and Section 389 of the criminal Procedure Code, and Rules 2 and 3 of the Criminal Procedure (Directions in the nature of Habeas Corpus) Rules). It is important to consider what these legal provisions stipulate.

Articles 51(2) of the Constitution relates to the rights of persons detained held in custody or imprisoned. It states:

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

Article 165(3)(a)(b) on the other hand, declares the unlimited jurisdiction of the High Court, extending to the determination of the question of whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

Section 389 of the criminal Procedure Code, Cap, 75, goes further to give directions on the orders that the High Court may issue regarding pleas for habeas corpus. To reproduce the rather long directions, the section reads:

“The High court may whenever it thinks fit direct

- That any person within the limits of Kenya be brought up before the court to be dealt with according to law.
- That any person illegally or improperly detailed in public or private custody within those limits be set at liberty.
- That any prisoner detailed in a prison situated within those limits be brought before the court to be there examined as a witness in any matter pending or to be inquired into in that court.
- Matters relating to court martial.
- That any prisoner within those limits be removed from one custody to another for the purposes of trial.
- Lastly, that the body of a defendant within whose limits be brought in on a return of *cepi corpus* to a writ of attachment.

Finally, the Criminal Procedure (Directions in the nature of Habeas corpus) Rules, also cited by the applicant, gives directions on the manner of conduct of the habeas corpus proceedings.

From the above constitutional and legal provisions, causes relating to habeas corpus ought to be commenced by way of petition the effect of which is that the court would hear the evidence of the parties who would also be subjected to cross examination. In our case, this matter was commenced by way of chamber summons. To me, this was foul procedure. However, with concurrence of the parties, the seriousness of this case and the provisions of Article 159(2)(d), this court considered that this is a procedural technicality which would be overlooked to ensure that the ends of justice are met. The court therefore called for *viva voce* evidence for both sides.

Omar Gordana Dida, the applicant gave evidence on behalf of the subject. His evidence was that he is the father of the subject. That on 13.9.2021 the subject, left Isiolo for Nairobi with 3 other people in motor vehicle Registration Number KAS 581S, Mitsubishi Lancer, with the subject being the driver. That on the same date at about 9:30pm, one Abdi Kara Tadi, a passenger in the subject's car, called him and informed him that while on the road at Blue Post, they had been blocked by a black car whose registration number was only captured as KDB. The 4 men had emerged from the vehicle, all with AK-47 rifles, and surrounded the subject's car. That the 4 men had bullet proof jackets. That it is Abdi who was asked first if he was Osman, before Osman himself said he was the one. That 4 men got the subject (Osman) out and took him to their own vehicle before driving away with him, leaving the passengers stranded. That a report was made at Thika police station, but they were referred to Gatanga police station due to jurisdiction. They duly obtained an OB number of the same.

This witness went on that the subject had told him that the vehicle belonged to one Major Oloo of GSV. That his son is a police officer. He proved various exhibits and testimonials to confirm this. To him, the fact that the men had bullet proof vests confirmed that they were police officers. He pleaded for the production of the subject or the body.

On being examined by counsel for the state, this witness stated that the 4 men were not in police uniform. He could not state whether the incident was out of the motor vehicle or from his work as a police officer.

The Respondents also called 1 witness, No. 47424, Corporal Dan Kagambo of DCI, Gatanga. The evidence of this witness was that the subject No. 894505, Sergeant Osman Gordana was formerly of GSU, Ruaraka, before being transferred to Garissa. That after the report of the abduction, as the investigating officer, he could not get much help by circulating the incomplete registration number of the vehicle used. And visits to the various police stations did not reveal any evidence that the subject had been booked at any of the police stations. Searches at the Immigration department and the Airport also bore no fruit. He otherwise established that the subject had in September 2019 been transferred to Elgeyo Marakwet, but never reported, leading to his being declared a deserter in October 2019 (DEXh – 1, 2). He summed up that the investigations into the disappearance is still on and active.

On being cross-examined, this witness confirmed that many criminals use bullet proof jackets. He mentioned the witness statements already taken during the investigations, including that of Sergeant Fred Oloo, a former colleague of the subject. But that a search at the NTSA of motor vehicle KAS 581X did not reveal its registered owner (DEXh-3). And that the subjects phone call data is still undergoing analysis.

Whereas the respondent chose not to tender any submissions, the applicant's counsel had duly filed submissions in court.

In the submissions of the applicant, the issues for determination herein are as follows:-

- i) *Whether the subject was or was not in police custody.*
- ii) *Whether further orders relating to violations of the subjects rights and fundamentals freedoms may be made in these proceedings of habeas corpus.*
- iii) *What orders are to be in the circumstances of this case.*

On the 1st issue above, counsel submitted that this was a case of abduction and or disappearance, and that a conclusion may be reached that the subject was abducted or arrested by unknown people then the application before the court fails. In the submissions, counsel maintained that the subject was lured and abducted and is being detained by assailants known to the prosecution only as multi-agency security arm of the police that the assailants were clothed as security officers with bullet proof jackets and matching machines guns. That only state machinery machines guns. That only state machinery has such resource and ability.

Further submissions were made regarding violations of fundamental rights and freedoms of the subject and on the possible orders that the

court can make in the circumstances.

I have considered the evidence of both the applicant and respondent's sides and also the submissions made by counsel for the applicant. To me, the issue for determination in this matter is whether or not an order of habeas corpus can issue herein.

The Constitution of Kenya at Article 51(2), seen above, guarantees the right to a writ of habeas corpus to persons detained or held in custody. To me, this presupposes 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.

And it is the same spirit that is espoused under section 389 of the Criminal Procedure Code (seen above). That the subject must be within the local limits of Kenya, or detained in Public or private custody, or prison.

In Wikipedia, habeas corpus, literally means, "let you have the body." A recourse in law through which a person can report an unlawful detention or imprisonment, to a court and request that the court order the custodian of that person, to bring the prisoner to court to determine whether the detention is lawful. If the court then finds that the custodian is acting beyond their authority, then the prisoner must be released.

Again from the above the elements of detention (unlawful) and the custodian of the subject are clearly of utmost importance in habeas corpus pleas. It is therefore mandatory that the applicant is unlawful detention and in whose custody for the order to issue.

The old case of *Grace Straut Ibingira and Others Versus Uganda (1966)EA 447(CA)* at 454, gives a general view of the writ of habeas corpus, where the court held;

"The writ of habeas corpus is a writ of right grante ex debito justacine, 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 ensure his release from custody (unlawful) 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."

And in the more recent case of *Masoud Salim Hemed and Another Versus DPP and 3 others (2014)eKLR*, the court held;

"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"

I fully align myself with these findings. And for the obvious reason that it would be in vain to issue the writ of habeas corpus wherein the subject is not in any detention or unlawful detention. It would equally be in vain to issue the writ against a respondent or body who is not in custody of the subject.

A classic case is the finding of the Hon. Justice E. Muriithi, in *LSK Versis Brian Nzenze and others (2018)eKLR*, that;

"Custody is very critical so that when an order for habeas corpus is made, it should not be in vain."

A number of factors stick out for consideration of whether the writ can properly issue herein. The witnesses to this incident did not identify the 4 men who apparently abducted the subject. The identity and full registration number of the motor vehicle used by the abductors remain unknown. The ownership of the motor vehicle KAS 581X from where the subject was abducted remains unknown since the search done at the NTSA has brought a nil return. There is no evidence that upon the abduction, the subject was booked or placed in any police custody. The relevant motor vehicle used by the abductors has neither been identified nor been recovered. From the evidence given by the Respondent's side investigations into this matter are on going. Witness statements have been taken. And the results of the analysis of the subject's mobile phone are not out. The 4 men were also not in police uniform.

On the other hand, it is the applicant's case that the abduction was by state agents based on the fact that the 4 men all had AK 47 guns and wore bullet proof jackets. Could be sufficient proof that the 4 men were state agents? It was the evidence of the witness for the Respondents that even criminals put on bullet proof vests, a fact I am persuaded is a possibility.

Considering all these factors together, I find and hold that the applicant has fallen short of proving that the 4 men who apparently abducted the subject were agents of the state or 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 or any police station or government facility as to enable this court issue the orders prayed for in this application. Failure to prove these 2 keys elements renders this application of the applicant dated 22.9.2021 unmeritorious. I dismiss the same wholly. Orders accordingly.

D. O. OGEMBO

JUDGE

9.12.2021.

Court:

Ruling read out in court (on line) in the presence of Mr. Makori for the applicant and Ms. Kibathi for the Respondents.

D. O. OGEMBO

JUDGE

9.12.2021.