



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. CRIMINAL APPLICATION 380 OF 2021**

**ROSE WAHITO MUNUHE.....APPLICANT**

**VERSUS**

**CANOPY OF HOPE COUNSELLING**

**AND TREATMENT CENTRE.....1<sup>ST</sup> RESPONDENT**

**LUCY MUTHONI MUNUHE.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a chamber summons application dated; 27<sup>th</sup> October, 2021, brought under the provisions of; articles 2, 3, 10, 19, 20, 21, 22, 23, 24, 25(d), 28, 29, 48, 50, 59(1), 159, 165, 238, 239 and 240 of the Constitution of Kenya, the International Convention on Civil and Political Rights, the International Convention for the Protection of all persons from Enforced Disappearances, the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, Universal Declaration of Human Rights, Section 10 of the National Police Service Act, Section 389 of the Criminal Procedure Code and Rules 2, 3 and 7 of the Criminal Procedure (Directions in the nature of Habeas Corpus) Rules 1948). The applicant is seeking for the following orders:

- a. That the Honourable Court be pleased to issue an order in the nature of Habeas Corpus directing the Respondents, whether acting by themselves, their agents, and or their representatives to have the person by the name of ROSE WAHITO MUNUHE produced before the Honourable Court within 24 hours of the order being made or such the duration as the Honourable Court deems just and expedient.
- b. That pending hearing and determination of this application, an order be issued restraining the Respondents whether acting by themselves, their agents and/or their representatives from arbitrarily, holding, detaining the applicant herein in any undisclosed location;
- c. That the Honourable Court be pleased to issue an order restraining the Respondents whether acting by themselves, their agents or their or their representatives from arbitrarily, holding and/or detaining the 1<sup>st</sup> Applicant herein without following the due process of the law,
- d. That the applicants be released forthwith as shall be determined by this Honourable Court, with the assistance of the Officer Commanding Mwhoko Police Station.
- e. That the costs of this application be provided for.
- f. Any other order and/or direction as this Honourable Court deems fit and just to grant.

2. The application is supported by the grounds thereto, and an affidavit sworn by one; Mercy Wanjiru Kibe, described as a friend of the applicant. It is averred that, the applicant is a Kenyan citizen detained by the 2<sup>nd</sup> Respondent at the 1<sup>st</sup> Respondent's institution, on the ground of the applicant's alcohol abuse.

3. That, on 1<sup>st</sup> September, 2021, the applicant was taken away by the 1<sup>st</sup> Respondent to unknown place and no one, including the applicant's family members, friends, acquaintances, lawyers and/or any other person knows of her whereabouts.

4. Further, due process of the law was not followed in detaining the applicant. Additionally, despite numerous demands, the applicant has

not been produced and neither have the Respondents rendered plausible explanations.

5. It is further averred that, the continuous detention of the applicant is in violation of her constitutional right to; liberty, fair administrative action, due process of law, and freedom from torture, and inhuman treatment.

6. That the actions of the Respondents smack of; impropriety, illegality, arbitrariness, injustice, impunity, oppression and frustration. Finally, due to the aforesaid the court should issue the orders sought.

7. On 28<sup>th</sup> October, 2021, when the matter was first dealt with by the court, the applicant was directed to serve the application for further orders on the 29<sup>th</sup> October, 2021. On that date, none of the parties were in court and the matter was stood over to 2<sup>nd</sup> November, 2021. However, on that particular date, the matter was stood over to 4<sup>th</sup> November 2021, as there was no evidence that, the Respondents had been served.

8. On 4<sup>th</sup> November 2021, the court was informed that, the Respondents had been informed of the matter and had allegedly said that, they would not attend court without a court order. The application was canvassed by the applicant without the participation of the Respondents.

9. I have considered the application in the light of the materials placed before the court, and a letter written by the applicant's counsel to the 1<sup>st</sup> Respondent and annexed to the affidavit in support of the application. I note that, the application has been brought under various provisions of the law, notably, the Constitutional Provisions for Enforcement of Human Rights.

10. Be that as it may, the power of the court to grant an order of *habeas corpus* is provided for under; **article 51(2) of the Constitution of Kenya, 2010, which states that as follows:**

“A person who is detained or held in custody is entitled to petition for an order of Habeas Corpus” (emphasis added).

**11. Pursuant thereto, section 328(1) of the Criminal Procedure Code (cap 75) Laws of Kenya, provides that: -**

**(1) 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 according to law;**

**(b) that any person illegally or improperly detained in public or private custody within those limits be set at liberty;**

**(c) that any prisoner detained 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;**

**(d) that any prisoner so detained be brought before a court martial or commissioners acting under the authority of a commission from the President for trial to be examined touching any matter pending before the court martial or commissioners respectively;**

**(e) that any prisoner within those limits be removed from one custody to another for the purpose of trial; and,**

**(f) that the body of a defendant within those limits be brought in on a return of; *cepi corpus*, to a writ of attachment.”**

12. In furtherance of the aforesaid provisions, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provide under; Rule, 4. (1) that: -

“Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules”.

13. In addition, Rule 10 of the aforesaid Rules states that:

“(1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

(a) the petitioner's name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has

instituted the suit; or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.

14. It is clear from the aforesaid provisions that, an application for enforcement of constitutional human rights should be instituted in the form of a petition, not by a chamber summons application. Indeed, the only other exception to the Rule (1) (30), which states that, subject to Rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation, which discloses denial, violation, infringement or threat to a right or fundamental freedom. However, that is not applicable herein.

15. Be that as it were, the applicant has sought for restraining orders as stated in the prayers. It is not quite clear whether these orders are different from the order for habeas corpus. The provisions that deal with the other orders are provided for under Rule 23 and 24, which states as follows:

“(1) Despite any provision to the contrary, a Judge before whom a petition under rule 4, is presented shall hear and determine an application for conservatory or interim orders.

(2) Service of the application in sub rule (1) may be dispensed with, with leave of the Court.

(3) The orders issued in sub rule (1) shall be personally served on the respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the Court.

24. (1) An application under rule 23 may be made by way of notice of motion or by informal documentation.

(2) Where an oral application is made under rule 23, the Court shall reduce it in writing

16. In the instant matter there is no express prayer for conservatory order nor interim relief. Thus the provisions of Rule 23 do not apply.

17. The upshot of the aforesaid, is that, the application herein is defective and/or not procedural. It is in the interest of justice that; the court does not go to the merits of the matter to allow the matter be heard on merit.

18. I therefore decline to grant any of the prayers sought and order that the applicant files the matter properly and procedurally for expeditious hearing and determination.

It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 2<sup>ND</sup> DAY OF DECEMBER, 2021**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Mr Gakuria for the applicant

No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Edwin Ombuna - the Court Assistant