



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**MISCALLENEOUS CRIMINAL APPLICATION NO. 6 OF 2019**

**FARYUN FARRAH SHARIFF.....APPLICANT**

**VERSUS**

**INSPECTOR GENERAL OF THE POLICE.....RESPONDENT**

**RULING**

1. **Faryun Farrah Shariff**, the applicant herein, has moved the court by way of Notice of Motion dated 25<sup>th</sup> February, 2019 under Section 389 of the Criminal Procedure Code and Articles 51 (2) & 159 (2) (d) of the Constitution of Kenya, 2010. She is seeking orders as follows:

a) That this matter be certified be certified urgent and be heard on a priority basis.

b) That an order of Habeas Corpus does issue against the Inspector General of Police, and or all those officers under him, and or in particular the D.C.I.O Busia, calling upon him to produce before court, one Abdillahi Ibrahim Madey, a male adult of Somali ethnicity, and or his body in Court before the Honourable Judge on the 27.2.2019, at 9.00 a.m., for further directions.

c) That the D.C.I.O Busia, and or O.C.S. Busia to comply.

2. The application was supported by a sworn affidavit of the applicant and was premised on the following grounds:

a) That the aforesaid Abdillahi Ibrahim Madey was abducted on 1.2.2019, from outside Bismillahi Hotel, within the Central Business District, Busia Town.

b) That Abdillahi Ibrahim Madey was abducted by machine gun totting men, who had police radio calls.

c) That the men were in a Toyota RAV 4 motor vehicle popularly used by Police officers within the County.

d) That the abductors identified themselves as Police officers and displayed National Police Service, identity cards.

e) That immediately after the Police officers had taken Abdillahi Ibrahim Madey away, his friends and family members went to Busia Police Station and made a report.

f) That the D.C.O and the P.O.I.O have been duly informed, and several meetings made between the family members of Abdillahi Ibrahim Madey and these officers.

g) That many promises have come from the regional C.I.D head at Kakamega and the D.C.I.O about progressive efforts to trace the whereabouts is of Abdillahi Ibrahim Madey.

h) That witnesses had made statements to the Police in line with requests for the same from the Police Officers.

i) That it is the duty of the police to make a spirited effort to trace and avail Abdillahi Ibrahim Madey who is a Kenyan citizen, and entitled to; protection of his self, and property.

j) That it is in the interest of justice that the respondent be called upon to avail Abdillahi Ibrahim Madey in person, Court on the 27.2.2019 and or produce before Court his body.

3. The office of the Directorate of Criminal Investigations Busia, was served but no response was filed. At the time of the hearing of the

application Samuel Agutu assistant Superintendent of the police responded orally as follows:

- a) That the said Abdillahi Ibrahim Madey was not abducted by police officers.
- b) That the police are not holding the said Abdillahi Ibrahim Madey.

4. The right to an order for habeas corpus is absolute and cannot be limited. Article 25 (d) of the constitution provides:

**Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—**

**(d) the right to an order of *habeas corpus*.**

This will be therefore our starting point. The requirement before the order is issued is the prove that the subject of the application is in custody. The issue of custody is very crucial before the order of habeas corpus is issued. In **Mariam Mohamed & Another vs. Commissioner of Police & 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 this Court. This Court, within the concept of habeas corpus, will be unable to make orders for the production of the subject, because such an order would be in vain. It is a fundamental principle applicable in the judicial settlement of disputes, that a court of law is not to make an order in vain. Courts' orders are focussed, 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.**

5. The applicant in her affidavit does not depone that she was present at the time of the abduction of her husband. The address from the bar by her counsel confirms that she was not present. She ought to have disclosed the source of her information or alternatively to ask those who were with the subject to swear an affidavit. She has sworn on oath issues she cannot personally vouch for. Secondly and very importantly, those who were present during the abduction ought to have sworn an affidavit so as to shed more light on the identity of the abductors. Not anybody wielding a walkie-talkie is a police officer. It is common knowledge that we have many criminals who impersonate police officers when committing crimes such as abduction. This does not make them police officers.

6. In the instant application, it would appear that the people who were with the subject at the time of abduction believed he was abducted. That is why they went to make a report of abduction at the police station. Had they believed that he was in police custody, their mission would have been an enquiry of his whereabouts.

7. I therefore find that the order of habeas corpus is not available in the instant application. The same is dismissed.

**DELIVERED and SIGNED at BUSIA this 7<sup>th</sup> day of March, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE**