



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL CASE NO 10 OF 2017

ABDI MURSHID IMAN..... PETITIONER

VERSUS

THE CHIEF OF KENYA DEFENCE FORCES.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

This matter was commenced by a Constitutional Petition filed herein on 21st June 2017 by the petitioner on behalf of a person who cannot act in his own name. Together with the petition was filed a Notice of Motion, which is the subject of this ruling. The Notice of Motion (application) dated 21st June 2017 seeks the following orders:-

1. That the honourable court be pleased to certify the matter as urgent.
2. That service be dispensed with and the matter be heard ex parte in the first instance on account of the urgency, nature and circumstances of the case.
3. That the honourable court be pleased to issue an order of habeas corpus directed at the respondents to immediately produce the person and or body of Abdullahi Murshid Himan before a court of law
4. That the honourable court be pleased to make any further orders as it deems fit and just.

When the application was placed before the court in chambers in 21st June 2017, the court certified it as urgent. The court declined to hear the application ex parte and ordered that it be served for interparties hearing. The hearing was fixed for 27th June 2017. This means that prayers 1 and 2 of the application have been spent.

On the 27th June 2017, Mr Nyaga appeared for the petitioner while Captain Kioko appeared for the respondents . Counsel for the respondent was not ready and the hearing was put off to Friday 30th June 2017 when counsel for both sides addressed the court.

At the hearing of the application Mr. Nyaga for the petitioner/applicant relied on the affidavits sworn by Hassan Maulid Sagat, Diriye Aden Ibrahim and Farah Abdi Hassan and stated that the application was grounded on various Constitutional Articles. Counsel maintained that the subject (Abdullahi Murshid Himan) disappeared on 18th June 2017 at 10.00 am while at his place of work at Spania bus booking

office situated at Sahafi building along Kismayu road opposite Garissa High School. According to counsel, he was picked in the presence of other colleagues and assaulted, handcuffed and blindfolded by military officers. Counsel submitted that Article 2 (1) of the Constitution provided that all persons and organs in Kenya were bound by the provisions of the Constitution. Article 3(1) required state organs to uphold and defend the Constitution. According to counsel the treatment visited on the subject was inhuman and degrading contrary to Article 25 (d) of the Constitution. The subject was also denied his right to freedom contrary to Article 29 of the Constitution. Counsel submitted that if he was arrested the subject was required to be produced in court not later than 24 hours after arrest. However though a report was later made to Garissa Police Station and entered as OB/23/18/6/17, the police denied that the subject had been handed over to them. Counsel submitted further that the work ticket for the military motor vehicle 84KA43 relied upon by the respondents showed a difference of 81 km which could not be accounted for. As such, that document could not be relied upon.

Counsel emphasized that under Article 2 (4) of the Constitution, Treaties and Conventions ratified by Kenya, formed part of the Law of Kenya, and stated that Kenya had ratified the Convention Against Torture and Other Cruel or Inhuman and Degrading Treatment on 21st February 2017, and the Universal Declaration of Human Rights on 31st July 1990 and was thus bound by the provisions of those international instruments. In addition, counsel submitted that Kenya had ratified the International Convention on Civil and Political Rights on 1st May 1972. Counsel closed by stating that the orders sought in the petition be granted, as the application had merits. Counsel relied on a number of case authorities.

Captain Kioko the learned counsel for the respondents submitted that the application had no merits and relied on the affidavit of Lt. Col. Bett. Counsel maintained that the subject was not in military custody. According to counsel, the Constitutional roles of the 1st respondent did not include arrest of civilians and if civilians were arrested by them then they would be handed over to the police together with evidence. Counsel admitted that the subject vehicle 84KA43 was a military vehicle stationed at Garissa military camp, but maintained that it was a common vehicle whose number could be seen clearly as it moved out of the military gate and in to the military gate as the gate was situated near a petrol station. According to counsel, camouflaged uniform was also not a preserve for the military.

Counsel emphasized that the applicant for habeas corpus had to prove that somebody was in custody for that person be subject to orders of habeas corpus, and denied that the KDF (military) arrested the subject or assaulted and mistreated him. He relied on the work ticket annexed to the replying affidavit and reiterated that the subject vehicle did not operate on 18th June 2017. Counsel also stated that the difference in mileage is attributed to the fact that movements within the military camp were not logged in the work ticket.

Counsel suggested that this was a matter where a criminal inquest was appropriate.

This is an application for habeas corpus filed together with a petition. The petitioners counsel relied on a number of case authorities such as Milimani Constitutional and Human Rights Petition No. 311 of 2016. Law Society of Kenya and Two Others versus Attorney General and Two Others and Mombasa High Court Petition no. 7 of 2014 Masoud Salim Hemed vs Director of Public Prosecutions and Two Others. I have perused and considered the reasoning in the court decisions.

Having considered the application, the documents filed and the submissions of counsel for the parties, I find firstly that the application was properly brought to court against the two respondents in terms of the Constitution of Kenya 2010. The procedure for bringing applications for habeas corpus was changed after the coming into effect of the Constitution of Kenya 2010. The previous procedure under the Criminal Procedure Code cap 75 was replaced. It is now required that a petition be filed.

The respondents deny that they have the subject in their possession. They deny also that they arrested or abducted him. No witness has testified or has been cross examined at this preliminary stage. It is thus not easy for this court to say that it has been established by the petitioner that the subject is in the custody of

the 1st respondent.

Though counsel of the respondents states that there should have been an inquest, in my view the petitioner has a right to come to this court the way he did. However, at this preliminary stage and since I do not have any sufficient evidence to establish that the 1st respondent detained the subject, in my view it would be inappropriate to grant orders that they produce the subject in court, through a habeas corpus order.

In my view, it is more appropriate to order that the main petition be heard before substantive orders can be made by this court, which could include order for compensation. In hearing the petition, all the deponents of affidavits that will have been filed will attend court and testify in support of their affidavits through oral evidence and be cross examined on the same, in order to assist the court in determining the facts and issuing appropriate orders.

I thus decline to issue the orders sought in the Notice of Motion application dated 21st June 2017. Instead I order that the main petition herein will be heard and determined through tendering of oral evidence by all deponents of affidavits which have been filed in the matter herein. Costs in the cause. I now proceed to fix the main petition for hearing.

Dated and delivered at Garissa on 13th day of July, 2017

George Dulu

Judge