



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CRIMINAL APPLICATION NO.181 OF 2015

AND

IN THE MATTER OF SEC. 389 OF THE CRIMINAL PROCEDURE CODE

AND

IN THE MATTER OF AN APPLICATION FOR DIRECTIONS

IN THE NATURE OF HABEAS CORPUS

IN THE MATTER OF THE CRIMINAL PROCEDURE (DIRECTIONS IN

THE NATURE OF HABEAS CORPUS) RULES

IN RESPECT OF

ABDINASIR AHMED MOHAMED.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

By an Amended Notice of Motion amended on 2th June, 2015, the applicant prays that the court issues summons directed at the 2nd to 8th respondents either jointly or severally in whose custody Abdinasir Ahmed Mohamed is, to appear before the court to produce the said **Abdinasir Ahmed Mohamed**, that the 7th and 8th respondents by their agents or representatives be restrained, stopped and/or prohibited from torturing, hurting and/or mistreating and/or causing injuries to the said Abdinasir Ahmed Mohamed pending his release and appearance in court, and that the doctor in charge of Mandera District Hospital be directed to produce treatment notes and a Medical Report on the condition of the said Abdinasir Ahmed Mohamed.

The application is premised on the grounds that the applicant who is also the subject herein was arrested on 20th May, 2015 at 3.30 p.m. and has not been charged in court or informed as to why he is being held, that he has been tortured and as a result suffered a fractured left arm and other injuries, that as at 12th June, 2015, he was being held at a staff house within Mandera Police Station which is not a gazette police cell, that his Constitutional fundamental rights have been violated by his continuous incarceration in custody and that his family has been denied access to him and is therefore worried about his safety.

The application is further supported by the affidavit of Abdirizak Mohamed Abdille sworn on 12th June, 2015. He deposes that he is an uncle to the subject and that it had been confirmed that the subject was arrested on 20th May, 2015 by officers from Anti-Terrorism Police Unit specifically a corporal Hassan of telephone No.0722827360 and Inspector Okoth of 0727631635 who held him at Military Police Cell. Upon his incarceration he was tortured and he suffered a fractured left hand amongst other injuries. He was treated at Mandera District Hospital but was still nursing the injuries at a staff house at the Mandera Police Station. It is deposed that the applicant is asthmatic and is suffering at the hands of the police. It is therefore requested that the respondent should produce him in a court of law and have any charges preferred against him.

The application is opposed. On behalf of the 1st, 3rd to 8th respondents a Replying Affidavit has been sworn by Chief Inspector Richard Siele, the O.C.S. Mandera Police Station on 3rd June, 2015. The gist of the Replying Affidavit is that the police at Mandera Police Station have never arrested the applicant nor taken him into lawful custody for the period mentioned in the application and are therefore not in a position to have him produced in court.

On 28th May, 2015, Learned Counsel for the applicant Mr. Nyamberi informed the court that the applicant was being held by police from Mandera Police Station but was detained at a military camp, being Mandera Military Base. On 11th June, 2015, Mr. Nyamberi told the court that the applicant was at that time being held by Anti-Terrorism Police Unit and was detained in a police officer's house at Mandera Police Station. He stated that the applicant had been tortured and suffered fractures. Miss Nyauncho for the 1st, 3rd to 8th respondents informed the court that she needed some days to get in touch with Anti-Terrorism Police Unit so that she could respond to the issues raised by the counsel for the applicant. That is what gave rise to the amended application. The initial application was a Chamber Summons dated 26th May, 2015 which gave an indication that the applicant was being held incommunicado at a military camp in Mandera.

On 18th June, 2015 while relying on the Replying Affidavit by Chief Inspector Richard Siele, Miss Nyauncho submitted that the applicant has never been booked into or held in Mandera Police Station. In that respect, the O.C.S. denied being aware of his arrest by any of the police officers in the station. She submitted that in the application, it was admitted that the subject was being held in the military camp and therefore the O.C.S. Mandera Police Station could not be compelled to produce somebody who was not in his custody.

In response, Mr. Nyamberi agreed with Miss Nyauncho that the O.C.S. could not be compelled to produce somebody who was not in his custody. He submitted that the subject was being held in a government house being a military camp which does not have gazetted police cells. He submitted that a few days prior to the 18th June, 2015, the subject was being detained in staff houses of police officers who have not denied that fact. He further submitted that the applicant having been tortured it was only fair that the court orders for his release or production in court so as to avoid any further infringement of his fundamental rights.

The Black's Law Dictionary, 9th Edition, at page 778 defines ***Habeas corpus*** as a Latin word meaning "that you have the body". It explains that it is "a writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal. In addition to being used to test the legality of an arrest or commitment, the writ may be used to retain juridical review of:-

- i. **The regularity of extradition process.**
- ii. **The right to or amount of bail, or**
- iii. **The jurisdiction of a court that has imposed a criminal process."**

A writ of ***Habeas Corpus*** shall be enforced when the applicant demonstrates that the subject is in the unlawful custody of the respondent. See **Grace Stuart Ibingira and Others –Vs- Uganda (1966) EA**

445 as cited in Mombasa H.C.Petition No.7 of 2014 MasoudSalimHemedVs D.P.P. and 2 Others in which the East African Court of Appeal sitting in Uganda delivered itself as follows:-

“The writ of habeas corpus is a writ of right granted ex debitojustitiae, 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 test the validity of the detention and so as to ensure his release from unlawful restraint should the court hold that he is unlawfully restrained. It is a writ which is open not only to citizens of Uganda but also to others within Uganda and under the protection of the state. The object of the writ is not to punish but to ensure release from unlawful detention; therefore it is not available after the person has in fact been released. 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 in Uganda may test the action of the executive government no matter how high the position of the person who ordered the detention. If the writ is not obeyed then it is enforced by the attachment for contempt of all persons who are responsible for the disobedience of the writ.”

In the present case, the application is brought on account that the subject who was allegedly arrested on 20th May, 2015 has not been released from custody. The twist in the matter is that as at the last date the matter was before court, that is on 18th June, 2015, the court was informed by counsel for the applicant that the subject Abdinasir Ahmed Mohamed was being held at the Mandera Military Camp. Earlier on, it was submitted that he was being held at police staff houses within Mandera Police Station. On behalf of the 1st, 3rd to 8th respondents the O.C.S. of Mandera Police Station who swore the Replying Affidavit denied himself or his officers ever arresting the subject. He also denied that the subject was being detained at Mandera Police Station or has ever been held at the said police station. Having regard to the last information that the applicant had of the whereabouts of the subject which is at Mandera Military Camp, it is my view that an enquiry ought to have been sought to interrogate the persons in charge of the said Military Camp. It is common knowledge that the military falls under the Ministry of Defence. Respectively, that ministry ought to have been enjoined as a party to the proceedings. Be that as it may, although the Attorney General is the 2nd respondent, it was important that the Ministry of Defence be also enjoined to the proceedings. From the onset, there was no indication from counsel for the applicant that he intended to interrogate the Minister for Defence or her representative or for that matter the Attorney General who legally acts for the Minister.

Further, there was also no indication from the applicant that he wished to interrogate the 7th and 8th respondents who allegedly arrested the subject, consequence wherefore their names were struck out from the proceedings. From the scanty information availed to this court, it was submitted that at one time the subject was being held in houses of some police officers within Mandera Police Station. The occupiers of those houses were not disclosed to the court. This meant that the court could not summon any police officer at random for purposes of production of the subject. In any case, the said police officers fall under the O.C.S. Mandera Police Station who has already denied the custody of the subject. As I said earlier, a party in a ***habeas corpus*** application cannot be compelled to produce the subject unless it is demonstrated that the subject is in his unlawful custody. In my view then, the court was provided with very sketchy information that could not aid it in conclusively deciding the application. My take is that the applicant has not done sufficient homework to enable him ascertain the exact locality of the subject. He also appears not quite certain who may have arrested him on the 20th May, 2015 as both the 7th and 8th respondents are no longer parties to the application. But this does not stop him (applicant) from cross-examining any person he thinks handled the subject, including the expunged respondents. He requires to further explore avenues to interrogate particular individuals who he thinks may have the knowledge of the whereabouts of the subject. I say so because having indicated to the court that the subject was allegedly arrested by policeofficers and has been detained at different institutions, draws an inference of bad faith on the part of the persons who may have handled him. Those are the persons who need to be interrogated so that they state what they know or do not know about the matter.

Having come to my attention the fact that the 1st, 3rd to 6th respondents are not currently holding the

subject, I think it is most prudent that I strike out their names from the proceedings which I hereby do. It has also been brought to my attention that the subject may be in the custody of the military who are not party to the proceedings. In that case, it is only prudent that the applicant amends the application so that he can enjoin the party or parties who have been adversely mentioned. He may alternatively withdraw this application and file a fresh one so as to bring the right parties on board. The concern of this court is solely the liberty of the subject and I may not be in a position to give a conclusive verdict to the application before the adversely mentioned parties have been brought on board and they have given their side of the story. In the result, I make no finding on the issues before the court and a final ruling shall be delivered after all the parties who have been adversely mentioned have given their side of the story. The applicant is granted two weeks to abide by the directions herein. The matter shall be mentioned on 16th July, 2015 for further directions upon compliance with the orders herein.

It is so ordered.

DATED and DELIVERED at NAIROBI this 2nd day of JULY, 2015.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

1. Mr. Nyamberi for the applicant
2. M/S Aluda for the respondent