



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISC. CRIMINAL APPLICATION NO.86 OF 2015**  
**IN THE MATTER OF CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 389 OF THE CRIMINAL PROCEDURE CODE**

**AND**

**IN THE MATTER OF AN APPLICATION FOR DIRECTIONS IN THE**  
**NATURE OF HABEAS CORPUS**  
**AND IN THE MATTER OF CRIMINAL PROCEDURE (DIRECTION IN**  
**THE NATURE OF HABEAS CORPUS RULES)**

**BETWEEN**

**MARTIN NDUNGU WAMBUI.....APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE .....2<sup>ND</sup> RESPONDENT**

**O.C.S (BURU BURU).....3<sup>RD</sup> RESPONDENT**

**RULING**

By Chamber Summons dated 6<sup>th</sup> March, 2015, Esther Wambui Kimani the applicant herein, prays that an order of summons be issued directed to the Inspector General of Police in whose custody Martin Ndungu Wambui is for his production before the court or his immediate release.

The same is supported by the affidavit of the applicant herein sworn on 27<sup>th</sup> February, 2015. The gist of the Supporting Affidavit is that the subject Martin Ndungu was arrested on 17<sup>th</sup> October, 2014 and placed into custody of Buru Buru Police Station. On enquiry at Buru Buru Police Station about the detention of the subject, the applicant was informed by the O.C.S. that the subject had been taken ill and was rushed to

Mama Lucy Hospital for treatment. She then proceeded to Mama Lucy Hospital but did not trace the subject who was her son. She also checked at the hospital mortuary without success.

Since the matter commenced, the court has conducted an inquiry and has heard both the O.C.S. and Deputy O.C.S. of Buru Buru Police Station, namely Chief Inspector Johnston Matoke and Inspector Mohammed Abdi respectively. The information they have availed to court discloses that there is no dispute that the subject was booked into Buru Buru Police Station on 17<sup>th</sup> October, 2014 for the offence of being drunk and disorderly. In the night, he fell sick and in the company of three police officers namely Senior Sargent David Kitivo, Police Constable Eric Njogu and Police Constable Woman Carolyn he was escorted to Mama Lucy Hospital in a police vehicle being driven by Police Constable Manyengo. Upon being checked into the hospital, the subject was released from the police custody. All this information is borne out in Occurrence Book (O.B.) No.14 of 17<sup>th</sup> October, 2014, No.9 of 18<sup>th</sup> October, 2014 and No.74 of 18<sup>th</sup> October, 2014.

The police learnt that the subject was no longer at the hospital when the applicant returned to the police station to enquire of his whereabouts. Police visited Mama Lucy Hospital whereupon they learnt that the subject had been transferred to Kenyatta National Hospital after his condition deteriorated. And that it is at Kenyatta National Hospital that he passed on and the body was lying at the hospital's mortuary. Armed with this information, the police requested the applicant to help in establishing whether the body that was lying at the K.N.H. was that of the subject. Towards this end, she was requested to avail body samples for purposes of conducting a D.N.A. test analysis. When this matter began the court was informed by Inspector Mohammed Abdi that the applicant had refused to co-operate for purposes of conducting the D.N.A. The same was to be done in view of the fact that, according to the police, the subject had been booked at Mama Lucy Hospital and Kenyatta National Hospital as an unknown male. The police also asserted that the applicant had also refused to go to the mortuary to confirm whether that body belonged to her son. However, as at 1<sup>st</sup> July, 2015, the court was informed by Chief Inspector Johnston Matoke that the applicant is currently cooperating with the police with a view to having the D.N.A. test conducted. He informed the court that samples for that purpose were taken about two weeks ago and the police expected results in a fortnight.

The concern of this court is to see to the liberty or the production of the subject. This can only be achieved if it is demonstrated that the subject is under the unlawful custody of the respondents. The circumstances of this case are such that that cannot be achieved before it has fully been established that the body of the 'unknown male' lying at the Kenyatta National Hospital mortuary is or is not of Martin Ndungu Wambui. For that reason, I am not in a position to make a final finding on the issues before the court. The same shall be done once the D.N.A. results have been released. I accordingly direct that this matter be mentioned on 23rd July, 2015 on which date the O.C.S. Buru Buru Police Station through the office of the D.P.P. shall inform the court on the results of the D.N.A. test. The court shall thereafter give directions on the way forward. The order herein shall be served on the O.C.S. Buru Buru Police Station one Chief Inspector Johnston Matoke with directions to serve the results of the D.N.A. upon the office of the D.P.P.

It is so ordered.

**DATED and DELIVERED at NAIROBI this 2<sup>nd</sup> day of JULY, 2015.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:-**

1. No appearance for the applicant

2. M/S Aluda for the respondent