



No. 21

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 7 OF 2014

**IN THE MATTER OF: ARTICLE 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 39, 47, 48, 50
AND 51 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF
RIGHTS OF FUNDAMENTAL FREEDOMS UNDER ARTICLE 21, 24, 25, 26, 27, 28, 29, 39,
47, 48, AND 50 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

MASOUD SALIM HEMED PETITIONER/APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

INSPECTOR GENERAL 2ND RESPONDENT

KENYA POLICE SERVICE..... 3RD RESPONDENT

CONSOLIDATED WITH PETITION NO. 8 OF 2014

OKIYA OMTATAH OKOITI PETITIONER/APPLICANT

VERSUS

THE ATTORNEY GENERAL & OTHERS..... RESPONDENTS

RULING

0. The Petitioners have sought orders for the summoning as a witness of the Mombasa County Commander of the Police Mr. Rober Kitur to be cross-examined with regard to the whereabouts of Hemed Salim Hemed, the subject of these habeas corpus proceedings. The petitioners also seek the physical production of the vehicles, particulars of the vehicles and the logs or work tickets for the said vehicles used by the police in the operations of 2nd February 2014 during which the

- Hemed and others were arrested by the police and transported by vehicles to various police stations in the city.
0. The respondents oppose the two applications on the grounds, principally, that the said Mr Kitur was not in direct dealing with the subject and that his testimony before the court may amount only to hearsay, and that the vehicles used in the operation were many and they are in current use making their physical production inconvenient and that the only relevant vehicle was the one which allegedly ferried the said Hemed, and from which he allegedly escaped.
 0. I consider that the precondition for the grant of an application for the summoning of a witness under Rule 20 (4) of the Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 is a determination that the person sought to be summoned as witness is in possession of information or evidence which may assist the court to reach a decision in the matter. Where the information in the possession of a person may properly be said only to be hearsay or speculation, the court may not summon him as witness as such information is useful in terms of evidence in assisting the court to reach a decision.
 0. Without prejudice to the findings of fact after hearing all evidence, it would appear from both accounts of the two witnesses who have so far testified before the court and from the extracts and copies of the Occurrence Books at the relevant police stations that the said County Commander was the officer in charge of the operation of 2nd February 2014. Indeed, witness NO. 2 Inspector Evans Wesonga testified that he led the subject of the habeas corpus proceedings, Mr. Hemed Salim Hemed, outside the Mosque following his arrest and left him at the point where the county commander was briefing the press on the operation. Inspector Wesonga states that he did not observe who took charge of the subject after he left him at the point where the commander was outside the Mosque. The witness said that he expected that the subject was taken by the escort team of police officers and was only able to establish that it was witness No. 1, Police Constable Owino Okuta, who had taken over the escort of the subject from the media photographs of the incident.
 0. Witness No. 1 alleged that the subject escaped along with other at a junction along the Lumumba road Mombasa towards the Makupa Police station at traffic lights where vehicles had slowed down in heavy traffic. Photographic evidence admitted by the witnesses and presented before the court in annexures to the affidavit in support, indicate that the witness No. 1 was in a motor vehicle escorting or guarding the subject. No other photographs are availed showing the how the police dealt with the subject after the incident where he is shown in the back of the motor vehicle.
 0. In determining the credibility of the evidence of loss of physical custody of the subject was proffered by the police through witness No. 1, PC Okuta, the court would derive assistance from the information held by the County Commander of Police with regard to the handling of the subject between the point where it is shown by the testimony of Witness No. 2 Evans Wesonga that he was left the place where the commander was giving a press briefing up to the time he was transported under escort and guard of the Witness No. 1.
 0. The commander also has the peculiar knowledge of any reports that may have been made to him from any of the officers from the police units involved in the operation as the head of the security committee and overall commander of the operation, with respect to the arrest and subsequent alleged disappearance of the subject, and any surrounding circumstances. No one else has this information and the said commander is most suitable witness in that regard, and this information is crucial in determining the central question of this habeas corpus proceedings whether or not the subject who is shown by the petitioners, and admitted by the police, to have been arrested by the police on the 2nd February 2014 during the Masjid Musa operation is still in police custody, or the police have subsequently lost physical custody of the subject by reason of his escape from the transporting vehicle or otherwise.
 0. Accordingly, I find that the said county commander of Police Mr. Rober Kitur is an important witness whose evidence will help the court in reaching a decision, and Mr. Kitur will therefore be summoned to attend and testify before the court on its next hearing date.
 0. It must be pointed out here that the issue before the court is the enforcement of a habeas corpus order in relation to the subject, Hemed Salim Hemed, and that for that reason the cross-examination to be put to the said county commander must be relevant to the question of the whereabouts of the subject and not generally on the operation, which is not in directly issue in the proceedings before the court. As I have noted in the ruling relating to the request for directions as

- to photography and publication of the proceedings, where certain cross-examination on issues touching on the national security is intended and where the security of witness is involved, the court may on application hold its proceedings *in camera*.
0. As regards the motor vehicles, again the principle of relevance under section 5 of the Evidence Act, that '*no evidence shall be given in any suit or proceeding except evidence of the existence or non-existence of a fact in issue, and of any other fact declared by any provision of this Act to be relevant*' requires that only the motor vehicle which was used in transporting the subject is relevant and may be produced for physical examination and its particulars including its log or work-ticket for the particular day the 2nd February 2014 produced before the court. The work-ticket may be produced by the driver who drove the vehicle under the authority of such work-ticket.
 0. Accordingly, the court issues summons for the attendance in court and cross-examination of the Mombasa County Commander of Police Mr. Robert Kitur on the next hearing date, and further orders the Respondents to physically produce for examination the Motor Vehicle used in the transportation upon arrest of the subject of this proceedings and the work-ticket of the vehicle for the 2nd February 2014.

Dated signed and delivered on the 17th March 2014

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Mwazogo for Mr. Abubakar and Mr. Mazrui for the Petitioner/Applicant in Pet. No. 7 of

2014 and Mr. Omutatah, Petitioner/Applicant in Pet. No. 8 of 2014

Mr. Muteti with Mr. Jamii for the Respondents

Linda - Court Assistant