



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 ON DIRECTIONS ON PHOTOGRAPHY IN COURT

1. The Respondents have made an application for directions from the court regarding the protection of the witnesses testifying before the court. The application was provoked by the police officer Witness No. 2 who said that he feared that he may be exposed to danger because some members of the audience were taking pictures of him while he testified in court while others were taking

- notes of the proceedings. Counsel for the Respondents urged the court to direct that the audience should not be permitted take photographs or take notes of the proceedings consistently with the dignity of the court and protection of persons appearing before the court.
2. The petitioners have opposed the application urging the need for accountability of the police officers and the public interest in the case of the habeas corpus application with respect to Hemed Salim Hemed, the subject of the application. The issue before the court therefore is whether the court will give directions as to photography and recording of the proceedings in court by persons other than the press.
 3. As I have observed before, Jeremy Bentham's principle that publicity is the very soul of justice quoted in *Scott v. Scott* (1913) AC 417 dictates as a general principle for the open court trial. The Constitution of Kenya under Article 50 also provides for fair hearing in public, save in circumstances justified under Article 50 (8) of the Constitution.
 4. While parties, their counsel or audience may take notes of proceedings before the court, it is the Court that maintains the official record of the proceedings, and the public may obtain certified copies of proceedings if that need arises, and it is constitutionally protected in the case of an accused under Article 50 (5) (b) of the Constitution. Indeed, the Public may not understand that certain statements made in court may not be admissible for being irrelevant or hearsay
 5. Individual photography in court is not only disruptive and therefore disrespectful of the court proceedings, it is also open to abuse and risky for the witnesses and persons appearing before the court as the photographs may be used to identify such persons for targeted reprisals for their participation in court or in acts and omissions, or relation to the subject of the court proceedings.
 6. Indeed, it is a criminal offence under section 121 of the Penal Code to interfere with witnesses in any way whether before or after testifying in court. In material parts section 121 of the Penal Code provides that:

121 (1) Any person who-

(d) while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceedings or capable of prejudicing any person in favour of or against any parties to such proceedings, or calculated to lower the authority of any person before whom such proceeding is being had or taken; or

(f) attempts wrongfully to interfere with or influence a witness in a judicial proceedings, either before or after he has given evidence, in connexion with such evidence; or

(i) commits any other act of international disrespect to any other judicial proceedings, or to any person before whom such proceeding is being had or taken, is guilty of an offence and is liable to imprisonment for three (3) years.

7. Photography by the Press which follows professional code of operation minimises the risks of such abuse, and the court has discretion in granting press right to photography in the course of court proceedings.
8. When a witness feels intimidated by the taking of pictures of him and recording of the proceedings by unknown persons in court, his freedom to testify may be affected leading to inaccurate testimony or outright withholding of evidence. Although, the witnesses before the court in this proceedings are not accused in the technical sense and therefore are not entitled to the right to silence, the fact is that they are summoned on the basis of their connection with the subject of habeas corpus and they may on that account be subject of subsequent proceedings of a criminal nature as the DPP may in his wisdom determine.
9. The right to trial in public is subject to the interests of national security and security of the individuals participating in the trial. Article 50 (8) of the Constitution is in the following terms:

“(8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.”

It is a matter of proper balance of the rights of the parties before the court or parties interested in the proceedings to see that the holding of proceedings in public may not adversely affect the public interest in the protection of, in this case witnesses, public order or national security.

10. Accordingly, the court makes the following directions as regards the further proceedings in this matter:
1. During court proceedings, there shall no photography in court by the parties or counsel or the general audience in court, whether in still photographs or video, using cameras, mobile phones or other communication gadgets;
 2. Members of the Press accredited with the Deputy Registrar of the Court may take photographic still and video record of the court proceedings;
 3. The audience in court shall not take notes or otherwise record the proceedings of the court or in any other manner threaten witnesses and other persons appearing before the court;
 4. The official record of the proceedings is the court record and reports on the proceedings published by the Press in print or electronic media is subject to correction by the Court in protection of the right of any person to accurate information pursuant to Article 35 (2) of the Constitution of Kenya:

‘(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

11. The parties shall be at liberty to apply for an *in camera* proceeding of any part of the hearing that they consider may not in the light of the public interest protections by provisions of the Article 50 (8) of the Constitution be suitable for hearing in public. In this regard, as part of case management, the court directs the parties to exchange before-hand the general nature of questions and the thematic areas on which they intend to cross-examine the witnesses so that the other parties may consider in advance whether to make an application for in camera proceedings on the hearing date.

Dated, Signed and Delivered on the 17th March 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Mwazogo for Mr. Abubakar and Mazrui for the Petitioner/Applicant in Pet. No. 7 of 2014

Mr. Omutaah, Petitioner in Pet. No. 8 of 2014

Mr. Muteti with Mr. Jami for the Respondents

Linda - Court Assistant