



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Misc. Crim. Appli. 6 of 1999

**THE
REPUBLIC EXPARTE**

ALI MAHFOUDH SALIM APPLICANT

AND

**1. THE FEDERAL
BUREAU OF INVESTIGATIONS
(FBI)'**

**2. THE
COMMISSIONER OF POLICE
THROUGH**

3. THE HONOURABLE THE ATTORNEY GENERAL..... RESPONDENTS

RULING

It is a matter of common notoriety, and I can therefore take Judicial Notice of it, that on 7th August 1998, the entire Nation of Kenya was stunned. It was stunned by a devastating blast in the centre of its Capital City, Nairobi, believed to have been a Bombblast. Hundreds of people died while thousands of others were injured and maimed. Property was destroyed extensively. It is also a matter of common notoriety, and I take Judicial Notice of it, that some persons suspected to have been involved in that dastardly crime are facing trial in the United States of America. How or why they ended up there would however be a matter of conjecture and beyond the scope of the matter *now before me* for consideration.

The circumstances surrounding the application relate to that momentous event.

The Applicant, ALI MAHFOUDH SALIM (Ali) is a Kenya Citizen ordinarily resident and carrying on business in Mombasa. He lawfully operates a small workshop at Majengo wherein he builds, and assembles bodies for motor vehicles and carries on welding repairs.¹ He employs several workers.

On 2.2.1999 Ali was at his workshop when some six people -three white men, one white woman and 2 Africans-went there. They said, without identifying themselves by production of ID Cards, that they were officers of the American Federal Bureau of Investigations (FBI) and were conducting investigations relating to the Nairobi Bomb, blast. They questioned workers and generally stayed in the premises from 9 a.m. to 5 p.m. ^The following day 3.2.99 they returned with other three white women, making in all 9 persons and continued to question Ali and his workers. They also took various photographs. At the end of the day, at 5 p.m. Ali was ordered to report to Makupa Police Station the following morning 4.2.99 at 9 a.m. He complied and went with his brother; FAIZ MAHFOUDH SALIM (FAIZ). Ali was taken inside the Police Station but 'Faiz was asked to stay outside. He waited until lunch hour when his brother, accompanied by the FBI Agents, left the station and headed for Ali's home. Faiz assumed that he would be let free there and did not therefore accompany them. In the evening however he was informed by Ali's son that the FBI Agents

had indeed been home but they took Ali's passport and left with him

to an unknown destination.

Faiz immediately went to Makupa Police Station to make enquiries about the whereabouts of his brother. The Officers there said they did not know him or his whereabouts. Faiz then visited all the other Police Stations in Mombasa who similarly denied knowledge of his brother or the involvement of the American FBI Agents. There were no entries made in any Daily Occurrence Book in any of the Police Stations to confirm that his brother was in lawful custody and if so, for what reason. Faiz was alarmed.

Fortunately, whilst he pondered what to do next outside Nyali Police Station, a young man at the station who seemed to be in the know, confided in Faiz that his brother was being held in that Station and had been tortured. The Police themselves at the Report Desk would not confirm Ali's presence there although they refused to deny it. His brother had been missing for more than 24 hours after being taken away by persons who said they were FBI Agents and Kenyan Police Officers,

Faiz therefore took the next logical and legal step and came to this court under Certificate of Urgency on 5.2.1999. He took out this Application and named the FBI and the Commissioner of Police through the Attorney General of Kenya, as the Respondents. Various Sections of the law were invoked:-

(i) Section 389(1) & (2) Criminal Procedure Code

(ii) Section 123 Criminal Procedure Code

(iii) Section 81, 82 and 84 of the Constitution of

Kenya. The prayers sought in the Application were these:-

"1, THAT directions in the nature of Habeas Corpus do issue directed to the Federal Bureau of Investigations and/or its agents and/or its

employees present in the Republic of Kenya, Officers Commanding Makupa Police Station, Port Police Station and or any other Police Station in the Republic of Kenya or any other authority . or any of them including their agents and, or representatives in the Coast Province and/or the Republic of Kenya to have the body of the said Applicant, Ali Mahfudh Salim, produced before the Honourable Court at such time as the Judge may direct.

2. THAT the Respondents Commissioner of Police and the Federal Bureau of Investigations (FBI) through its Commanding Officer or person of similar capacity do appear before this Honourable Court together with the original of any Warrant or Order for the detention of the Applicant and show cause why the Applicant should not be produced and released forthwith.

3. THAT pending the hearing of this Summons inter-partes, the Commissioner of Police and

' the Provincial Police Officer (PPO) or any officer in "charge of the police , in the area within whose jurisdiction the Applicant is detained, the Officers in-Charge, Makupa Police Station and Nyali Police Station or any other Police Station in the Republic of Kenya

holding the Applicant or any of them be ordered to; release the Applicant on bail on such terms and conditions as the Court deems fit to make.

4. THAT the Court do declare that the Applicant's rights under the constitution have or are about to be infringed. ,r

5. THAT pending the determination of the application, the Commissioner of Police and the Federal Bureau of Investigations (FBI), either through themselves or their agents, officers and/or subordinates be restrained from deporting or removing the Applicant from the territory of the Republic of Kenya.

6. THAT for the purpose of giving effect to order 5 applied for hereinabove, a further order do issue to the Principal Immigration Officer to ensure that no one or any entity shall be allowed to remove the Applicant or his body from the territory of the Republic of Kenya through any of the exit points of the Republic".

I heard the Applicant's Counsel on 5.2.99 and I was satisfied that prayers 1, 2, 5 and 6 ought to be dealt with immediately and orders were issued and served forthwith pending the hearing of the Application inter partes after service.

Learned Senior State Counsel, Mrs. Mwangi, and learned Counsel for the Applicant, Mr. Taib, appeared before me on 9.2.99. Both Counsel confirmed that the Applicant had been set free at 2 p.m. on Saturday 6.2.99. As far as Mrs. Mwangi was concerned, the release of the Applicant answered fully the application for Habeas Corpus

and the application had been overtaken by events. Not so; for Mr. Taib.

It was crucial, in his submission, to determine the legality or Constitutionality of the activities of the Agents of the American Federal Bureau of Investigations who appeared to have invaded the Sovereign State of Kenya to harass, intimidate and torture its citizens without following the laws of this country. It was also crucial for the Respondents to make a formal return on the Habeas Corpus application instead of merely making casual remarks that the Applicant was a free man.

Ali himself swore and filed an Affidavit on 9.2.99 in support of the averments made earlier by his brother Faiz, and did, at some length, encapsulate his fears on the activities of the FBI. Those facts are best reproduced verbatim:-

"7. That at this point in time I was terrified and almost out of my wits with fear because of several reasons some of which are enumerated herein below:-(a) On Wednesday 3rd February 1999 in the morning, a group of about nine (9) FBI agents descended on me and my premises and swarmed all over the place and began arresting my employees, including Mr. Abdalla (welder) Mr. Ambrose (painter) and Mr. Kazungu (welder). The sight of all these police officers descending on my premises terrified me and my employees.

(b) On the same Wednesday evening the 3rd of February 1999, three (3) FBI agents and a CID officer returned and threatened that they would lock me up in the cells because I was not giving them the information they wanted. This alarmed me as it meant that I would have to admit to falsehoods and admit knowledge of matters I am not privy to if I was to keep out of jail.

(c) The FBI agents also told me that they would ensure that my business would be closed down unless I co-operate and gave them the information they wanted. This was also on Wednesday evening.

(d) On Thursday the 4th February 1999 the FBI agents again told me that they would lock me up unless I cooperate. I told them I did not have knowledge of the matters they queried me on and the FBI agents told me to think carefully of my family who will surely suffer if they locked me up and I should begin to cooperate if I did not want my family to suffer.

(e) On the same Thursday the 4th February 1999,

the agents further threatened to disrupt and ruin my business unless I gave them and/or admitted knowledge of the information they wanted. The said agents specifically told me that they would cause the relevant tax departments and in particular the Income Tax and Value Added Tax (VAT) departments to descend down on my business and to ensure they thoroughly crippled my business by investigating my books in detail with the sole aim of thereafter imposing, crippling and debilitating taxes to ensure the closure of my business as a punishment to me unless I cooperate.

(f) On the same Thursday sitting the said agents shoved me, roughed me up, kicked and beat me, always harshly telling me to

speaking the things they wanted. The kicking was particularly vicious and was meted out by the officer who was seated opposite me.

(g) On the same Thursday sitting, one of the FBI

agents, whom I don't know by name but whom I can identify physically, threatened me clearly and specifically, that unless I gave them the information they wanted, they will hand me

over to the local CID police who would torture me thoroughly for them until I admitted to them matters of their interest and gave them the information they wanted. The insinuation was that the CID were well known for this kind of thing and it was intended to frighten me, which it did.

(h) The FBI agents described me as callous and insensitive and asked me why it did not bother me that over 200 people died. If I cared at all I would tell them what they wanted to know.

(i) As I was being shoved around and kicked, I was reminded constantly that I was a killer, (even though I denied this most stringently and continued to do so), and that I had killed over 200 people and I had better speak the truth for my own sake. It did not matter that I denied all their allegations and protested my innocence. My pleas fell on deaf ears.

(j) The FBI agents told me that they would also extradite me to the United States of America unless I spoke the truth and gave them the information they required. They in fact stated to me the flight number of the actual plane.

they would put me on for this purpose. (k) The FBI agents fortified their above threat of extradition by actually taking me home from the Police Station and there picking up and confiscating my passport whereupon they made it abundantly clear that unless I cooperated with them I was going to be on the next flight to the US where I would be at their mercy and far away from my family and from any help. (l) The FBI agents upon inspection of my passport said it would suffice as proof that I went to Yemen for terrorist training and they would charge me with that offence, even though that we all knew there was no substance to the said intended charge.

(m) The said FBI agents "did actually carry out their threat to lock me up and I was terrified that they would do all the other things they had threatened to do, including extraditing me. (n) On Friday 5th February 1999, the FBI agents again came to Nyali Police Station and took me out of the cells. They asked me on the verandah outside the cells to tell them the truth on the identity of the person involved in the bombing or they would lock me again in the cells. True to their word, they returned me to the cell and locked me up when I told them I knew nothing of what they queried. They went away.

(o) They gave instructions that I should not be seen by anyone, not even my family. This also terrified and isolated me and I felt absolutely alone, fearful, abandoned and forsaken.

(p) The FBI agents also said that I should not be seen by any lawyer and indeed, none of my family members or my lawyer ever had access to me at all throughout my period of incarceration.

(q) The FBI agents told me on Saturday 6th February 1999 that I should not think they are afraid of any court orders and that the court orders I had brought to them would not be of any help to me. I was not sure what was going on as I had no contact with the outside world and did not know what court orders they were talking about or referring to. I came later to find out that they were the court orders issued by the Honourable Justice Waki on 5th February 1999. They told me that in spite of the court orders, they could take me away and make me disappear without a trace as they had done to others already.

(r) The FBI agents told me on the same day that this was my last chance to talk or they would take me to Nairobi, 'when I did not volunteer any of the information they sought, primarily because I knew nothing about the issues, they removed me from Nyali Police Station and said they were taking me to Nairobi. I felt thunderstruck. Who would I turn to for help in Nairobi? What would be my fate? These were some of the questions that gnawed on my mind and tormented me as I felt so helpless and alone.

(s) They constantly kept up their threats and demanded to know even how much money I had paid my lawyer, saying that this proves I am a terrorist with financiers who had hired a lawyer for me.

(t) They forced me to write a statement on that Saturday at the Provincial Police Headquarters and made me know that they were toying with the idea of releasing me, but would only do so if I signed a document confirming that I was not beaten or tortured. I agreed to sign

because I was frightened if I did not do so I

would not be released and I desperately wanted

a chance to see any one of my family to

arrange to help me and get a lawyer to act for

me as I was now nearing the end of the road in terms of my ability to keep my sanity with me. I signed the document under duress and whilst under threat of pain and of further imprisonment and without my consent at all. I had by this time spent six (6) days under intense interrogation and three (3) days in the cells and I had had enough".

In view of those submissions and averments, Mrs. Mwangi assured the court and the Applicant that the FBI Agents were legally in this country pursuant to an existing Treaty between the two countries catering for hot pursuit of suspected criminals and their extradition for trial. The State would shortly produce a copy of such Treaty and also file an Affidavit in reply to (the matters deponed to; by the Applicant in his Affidavit filed on 9.2.99.'

I made an order that a copy of the Treaty be filed and that a response be made by way of Replying Affidavits to the various averments made in the Application. It seemed to me, and I so found, that the matter before me went beyond a mere application for Habeas Corpus and it involved human and constitutional rights of a citizen of this country which he alleged had been violated by foreign agents and the Kenya Police. Intertwined with that was the wider aspect of State Security. On any view, it is a matter of colossal magnitude.

The Attorney General did not comply with the order within the 14 - day period given. On application, and there being no objection from the applicant's Counsel, I granted an indefinite extension of time to facilitate compliance, with liberty to either party to apply.

The parties returned to court on 31.5.99 when it became apparent that the Attorney General had no intention of complying with the earlier order. Learned State Counsel, Mr. Ngeno, then appearing for the Respondents, confessed that there was no Treaty as earlier purported between Kenya and the United States of America. He also confessed that there was no one either from the FBI or the Police Force who was willing to swear any Affidavit in reply to the matters of fact deponed to by the Applicant. He merely offered an explanation that the FBI Agents may have been operating under the auspices of the International Police Organisation (INTERPOL), but he gave no further details.

In my brief Ruling I found such confessions a shameless about-face considering the seriousness of the issues submitted for determination. There was a non-compliance with a court order and the Attorney General could not be heard to make oral denials of

Facts stated on oath by the applicant. Those matters of fact remain uncontroverted. I gave liberty to the attorney general to respond to any issues of law that may arise in the course of the prosecution of the application. The application was then fully argued and is the subject matter of this ruling

Section 389(1) of the criminal procedure code (cap 75) laws of Kenya as far as is relevant states

389 (1) The High Court may whenever it thinks, fit direct -

(a) that any person within the limits of Kenya be brought up before the court to be dealt with according to law;

(b) that any person illegally or improperly detained in, public or private custody within those limits be set at liberty;

(c)

(d)

(e) that any prisoner within those limits be removed from one custody to another for the purpose of trial; and

(f) "

It is a codification of an ancient jurisdiction in common law for protecting the liberty of the subject by speedy and summary interposition by the court. An effective means of immediate release from unlawful or unjustifiable detention pending inquiry into the cause of his imprisonment. That this court has the jurisdiction to issue directions in the nature of Habeas Corpus ad Subjiciendum is not therefore in doubt.

As stated above I granted prayers 1, 2, 5, & 6 of this Application ex parte on the briefs the Affidavit evidence laid before me. The matter was due for hearing Inter parties on 9.2.99 and the orders were in the meantime served on all affected parties.

As stated earlier the Respondent attended, court on 9,2,99 through the Attorney General and stated from the bar that the Applicant was already a free man he had been released three days before the hearing of the Application,

Learned Counsel for the Applicant has however submitted vehemently that, that was not legal compliance with the directions issued by the court and served on the Respondents. There must, he submitted, be a Return filed showing the cause of the applicant's detention with sufficient particularity, The Applicant, he submitted, was not released due to some act of charity on the part of the Respondents but as consequence of court orders having been served on the Respondents. The filing of a return is therefore mandatory.

For this proposition, Mr. Taib cited Halsburys Laws of England Vol.11 3rd Edition at Page 43 and 44. I have perused the passage cited and I am persuaded that it is a mandatory requirement of law that a person against whom directions are issued for production of the body of the person allegedly unlawfully detained should file a Return clearly showing the cause of the detention, for the court to examine and decide on the Applicant's discharge or otherwise. As stated in Halsburys para 87:-

"If it is impossible for the person to whom the writ is directed to produce the body of the person alleged to be in his custody by reason of his having parted with the custody of that person before the service of the writ, he must nevertheless make a return setting out the facts unequivocally and distinctly and showing the reason why he is unable to obey the writ. Such a return will constitute a good and sufficient return; for the object of the writ is not punitive, but remedial. The fact that a prisoner whose production has been ordered has been discharged from custody before the return should be stated on the return, and in that event the cause of taking and detainer need not appear on the return".

In this case the Applicant was not discharged before service of the writ but as a consequence of it. Failure to file a return would mean that the applicant was detained for no sufficient reason and therefore an order for his discharge must formally issue. I so order. That would dispose of the matter of Habeas Corpus.

The Applicant goes further and seeks a declaration under prayer 4 that his Constitutional rights have been violated. There is Constitutional provision under Chapter V of the Constitution of Kenya for the Protection of, Fundamental Rights and freedoms of the individual. Section 81 protects the freedom of movement throughout Kenya, the right to enter and leave Kenya and immunity from expulsion from Kenya. Other rights and freedoms are enumerated under Section 72 to 83 of the Constitution and there is provision under Section 84 for enforcement of those provisions. It is common

ground that the High Court has original jurisdiction to determine

such applications. But how does the High

such jurisdiction?

Considerable heat has been generated in the p

"the right to apply to the High Court for redress conferred by article 19(1) (this article is, in all material respects, similar to Section 84(1) of the Constitution of Kenya) was expressed to be subject to paragraph (6) of that article and since neither the Parliament nor the rule-making authority of the Supreme Court had exercised their power under article 19(6) to make provision with respect to practice and procedure the method was unqualified and the right wide enough to cover application by any form of procedure by which the High Court could be approached to invoke its power, and an originating motion was one of the ways by which that could, be done". (words in brackets are mine). Chesoni C.J. quoting Warrington J. In Re MEISTER, LUCIUS AND

BRINING LTD [19141 31 TLR 28] also held:

"where the Act (sic Constitution) merely provides for an application and does not say in what form that application is to be made, as a matter of procedure it may be made in anyway in which the court can be approached".

and: '

" anyone who wishes to invoke the courts

jurisdiction for protection of the fundamental rights and freedoms guaranteed under Section 70 - 83 (inclusive) can do so by plaint, Order 53 of the Civil Procedure Rules or Originating Motion".

The application before me is a Chamber Summons and not any of the three modes referred to in that authority. Is the application therefore incompetent? I think not.

The reason is that the main thrust of the Application was to seek directions on Habeas Corpus and that procedure is prescribed under the law. The Applicant has had access to the court in a manner sanctioned by the law for seeking one remedy, and he would not, in my view, lose his right to address the same court on another prayer simply because the procedure required thereunder would be different. It is for the court to decide in such event, in exercise of its inherent powers, whether to consider the substance of the application or insist on a different mode of trial. Considering that the Respondents have not raised any objections to the procedure adopted and that on any view, the manner of making the prayer causes no prejudice to the Respondents, I shall consider the substance of the prayer, the defect in procedure notwithstanding. All that is sought in the application is a Declaration, and nothing more.

I have found, in the absence of the benefit of a "Return" that the applicant was detained on insufficient grounds. The rights and freedoms of the individual under the Constitution are qualified under the same Constitution and it is incumbent on the person or persons against whom complaints are made to bring themselves under those qualifications. The qualifications include violations for which the law provides in the interests of defence, public safety, public order, public morality, or other circumstances spelt out in the Constitution. There is cold silence from the Respondents in this matter about what laws, if any, they were operating under in seeking information and interrogating the Applicant. There is indeed a concession that the FBI has no legal basis for operating in this country. That is in stark contrast to the vivid chronicle of human rights violations perpetrated on the Applicant which remain uncontroverted and must therefore be presumed to be truthful. I am not, as a court of law, entitled to imagine that the Respondents had good and valid reasons for their actions. The Kenya Police is at liberty and has the Constitutional mandate to investigate crime and to bring criminals to book. But there are clear Laws governing this country and they must be shown to be complied with; particularly by all law enforcement agencies of whatever description. I say with the Court of Appeal for Eastern Africa in *Njuguna s/o Kimani & Others V Rejinam* (1954) XXI EACA 316: "The notion that the police can keep a suspect in unlawful - custody and prolong their questioning of him by refraining from formally charging him is so repugnant to the traditions and practice of English Law that we find difficulty in speaking of it with restraint. It must be recognised that once a police officer has made up his mind to charge any person, it is his duty to inform that person as soon as practicable and thereafter to produce him before a Magistrate as required by Section 32 or Section 35 of the Criminal Procedure Code". The Constitution of Kenya does not permit the police, or any other law enforcement agency for that matter, to break the law in order to detect crime". I am in no doubt in this case, and in my judgment, that a citizen's right to his personal liberty was interfered with in a manner unauthorized by law. Accordingly I grant prayer 4 of the application as prayed against the Respondents jointly and severally. The Applicant shall have costs of this application on the higher scale.

Dated at Mombasa this 14th day of June 1999

P.N.Waki

JUDGE