**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 88 OF 1982**

**BETWEEN**

**JOCKBED MUTHONI MURIITHI ..... APPELLANT**

**V**

**DIRECTOR OF CRIMINAL INVESTIGATIONS**

**DEPARTMENT & ANOTHER.....RESPONDENT**

**RULING**

May 29, 1982, Chesoni J delivered the following Ruling.

On the 25th May, 1982 Muthoni Muriithi filed an application for a writ of *Habeas Corpus* on behalf of Mwangi Stephen Muriithi (hereafter called "the Subject"). The application was made under the provisions of section 389 and Rule 3 of the Criminal Procedure Code and Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules. There were two affidavits in support of the application which were sworn to by the wife of the subject Jockbed Muthoni Muriithi and his driver John Mwangi Ndina. Both deponents stated that the subject was collected by police officers from his residence on 22nd May at 10 am. On the same day Jockbed drove to the C.I.D. Headquarters and saw her husband's car in the compound. She asked if she could see her husband and the driver, but she was told that they had been taken away to some place and she went away. She made several return trips to the C.I.D. Headquarters that day and on the 23rd but she did not see and has since then not seen her husband. John said that he was detained at the C.I.D. Headquarters till 8.30 p.m. on the 22nd and then driven by the police to the subject's residence. Jockbed therefore asked this court to issue a *habeas corpus* summons directed at the Director of Criminal Investigations Department to have the body of Mwangi Stephen Muriithi produced before the court and the said Director to appear in person or by duly authorized agent together with the original of any warrant or order for the detention to show cause why the subject should not be forthwith released.

The *ex-parte* application was heard the same day and on that day, 25th May, the Court issued a summons as prayed. The summons which was also served on the Commissioner of Police and the Attorney-General required the Director of C.I.D. to appear before this court at 9.30 am on the 28th May, 1982 or so soon thereafter as the case can be heard to show cause why the said Mwangi Stephen Muriithi should not be forthwith produced. Rule 4 of the Habeas Corpus Rules requires that where the person detained is in public custody a duplicate of the application, of the summons and of all affidavits lodged in support thereof shall be forwarded to the Attorney-General.

On 25th May in the afternoon Khaminwa & Khanimwa, Advocates, acting for the applicant filed a bail application under Rule 7 of the Habeas Corpus Rules asking for the subject to be released on bail pending return of the summons. I then ruled that in such an application the Attorney-General must be heard. As the Attorney-General did not receive full instructions till the 28th when the Court assembled to hear the two applications Counsel for the applicants vacated the bail application.

Under the Habeas Corpus Rules (Rule 8) at the hearing of the summons, the applicant begins, then the party resisting the application is heard, and the applicant is entitled to reply. On 28th May before Mr Khaminwa started the Principal State Counsel, Mr Chunga informed the court that the subject was detained under the preservation of Public Security Act (Cap 57) and the regulations made thereudner. After Mr Khaminwa had addressed the Court Mr Chunga produced to the court a Photostat copy of a detention Order made under the said Act and Regulations, and, which he said the original had been served on the subject.

In his submission Mr Khaminwa stated that the court had the right to examine the validity of the detention order and to satisfy itself that it was valid. He further argued that the Public Security (Detained and Restricted Persons Regulations 1978 (L.N. 234 of 1978) under which Mr Muriithi was detained had no effect in law as section 85 of the Constitution of Kenya under which they were made had not been complied with. Section 85 of the Constitution provides as follows:

> "85.(1) Subject to this section, the President may at any time, by order published in the Kenya Gazette, bring into operation, generally or in any part of Kenya Part III of the Preservation of Public Security Act or any of the provisions of that Part of this Act.
>
> (2) An order made under this section shall cease to have effect on the expiration of the period of twenty-eight days commencing with the day on which the order is made, unless before the expiration of that period it has been approved by a resolution of the National Assembly; but in reckoning any period of twenty-eight days for the purposes of this sub-section no account shall be taken of any time during which Parliament is dissolved.

It was, therefore, Mr Khaminwa's contention that the Attorney-General had to satisfy the Court that the National Assembly had passed the resolution required under section 85(2) of the Constitution giving life to L.N. No 234 of 1978, and, that if these Regulations were of no legal effect, the Detention Order made under them was not valid.

Although the rules under which the present application is made are to be found in the Criminal Procedure Code, a *habeas corpus* application is in reality a civic matter. What gives it the criminal touch is that by and large where the subject is in public custody the restraint of his liberty resembles criminal detention. Furthermore the Constitutional Provision in question and the Part of the Preservation of Public Security Act referred to and the Regulations in question are all civil.

It is trite law that with exception of criminal proceedings and unless the statute says so in other proceedings, he who alleges a fact must bear the burden of proving it. Mr Khaminwa alleged that the Regulation made under L.N No 234 of 1978 had no force of law. It was not for the Attorney- General to prove the opposite of Mr Khaminwa's allegation. Secondly, a Court of law can and must only adjudicate upon the matter before it, and no more no less. The matter before me was that the Director of C.I.D. appears before me and produce the body of Mwangi Stephen Muriithi and show cause why Mr Muriithi should not be forthwith released. If the Director appeared as he did and satisfied me that he had a lawful cause why he could not produce the body of Mr Muriithi and why Mr Muriithi could not be forthwith released, that ended the matter as far as Muthoni's application was concerned. I cannot and must not go further, for that was her prayer. Thirdly, if it is intended to challenge the validity of the Public Security (Detained and Restricted Persons) Regulations, 1978, that has to be done properly upon application for an appropriate declaration. There was not such application before me. This was, therefore, not the right forum for testing the validity of those Regulations. In conclusion on this point I must say that all the authorities from India and the Uganda case of *Grace Stuart Ibingira and Others v Uganda* [1966] E.A. 455, and the English authorities cited by Mr Khaminwa were not applicable to the application before me.

At any rate he never compared the provisions of law and Constitutions of those countries with our specific provisions of law to see whether there was any similarities. It is not enough to say that we are all common law countries. On this matter we have brief but adequate rules, the habeas corpus Rules which prescribe the procedure to be followed and there is, in my view, so far, no gap to be filled by foreign procedure.

Rule 3 of the Habeas Corpus Rules reads:

> "3. If the application is not dismissed, the judge shall order a summons to issue directed to the person in whose custody the person alleged to be improperly detained is said to be, requiring his appearance in person or by advocate, together with the original of any warrant or order for the detention, at a place and time name therein, to show cause why the person so detained should not be forthwith released."

Today when the hearing resumed I required that the Court be shown the original Order of Detention of Mr Muriithi in compliance with that Rule. The Court adjourned and at the resumed hearing the Deputy Public Prosecutor Mr Sharad Rao, who then appeared assisted by Mr Chunga produced before the Court the original order duly signed by the Minister, together with the original of the statement to be served on detained and restricted persons, both of which had been served on the subject and the service has been acknowledged. I may mention here that Regulation 10 of the Public Security (Detained and Restricted Persons) Regulations actually requires that a copy and not the original order be served on the detained person. This order is an instrument and section 8(1) of the Preservation of Public Security Act provides that:

> "8.(1) Every document purporting to be an instrument made or issued by the President or by any Minister or other authority or person in pursuance of any provision contained in, or having effect under, this Act, and purporting to be signed by or on behalf of the President, or the said Minister, authority or person, shall be received in evidence and shall, until the contrary is proved, be deemed to be an instrument made or issued by the President, or by that Minister, authority or person."

The order produced by the Deputy Public Prosecutor was shown to Mr.Khaminwa. I examined and satisfied myself and I make a specific finding that it is a Detention Order Signed by the Minister of State in the President's office in charge of Internal Security matter. The Deputy Public Prosecutor produced in court Circular No 1 of 1982 which showed that the said Minister is in charge of Internal Security.

Regulations 6(2) of the Public Security (Detained and Restricted Persons) Regulations, 1978, provides as follows:

> "6(2). Where a detention order has been made in respect of any person, that person shall be detained in a place of detention in accordance with these Regulations, for as long as the detention order is in force, and, while so detained, shall be deemed to be in lawful custody."

The Director of C.I.D. has answered to the court summons and he has satisfactorily shown that he is unable to produce Mwangi Stephen Muriithi and that the subject cannot be forthwith released because he is detained under the Preservation of Public Security Act and Regulations. He has shown that the subject is deemed to be in lawful custody. He has discharged that which he was called upon to do so. The application for *habeas corpus* fails and is dismissed.

Order accordingly.

**May 29, 1982**

**CHESONI J.**