

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. E014 OF 2025

**IN THE MATTER OF: ARTICLES 2,3,10,19,20(1), (2), (3) & (4),
21,22(1), 22(2),23,25(A) & (D) 26,27,28,29,47(2),48,49 &
50,51(2),59(3),165(3)(A),165(3)(B),238(2)(B) 239(2),
244(C),244(D) AND 259 (1) OF THE CONSTITUTION OF KENYA,
2010**

AND

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS
UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA,2010**

AND

**IN THE MATTER OF SECTION 12 OF THE PREVENTION OF
TORTURE ACT, CAP 88 LAWS OF KENYA**

**AND IN THE MATTER OF THE ALLEGED CONTRAVENTION,
VIOLATION AND INFRINGEMENT OF SECTION 28(1) OF THE
REFUGEES ACT, CAP 173 LAWS OF KENYA**

AND

**IN THE MATTER OF ARTICLE 16 OF THE CONVENTION RELATING
TO THE STATUS OF REFUGEES**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 9 &
10 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL
RIGHTS**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTIONS OF ARTICLES
13,14 & 15 OF THE CONVENTION AGAINST TORTURE AND
OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR
PUNISHMENT**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES
2,3,4,5,6 & 7 OF THE AFRICAN CHARTER ON HUMAN AND
PEOPLES' RIGHTS**

AND

KENYA NATIONAL COMMISSION

**ON HUMAN RIGHTS.....1ST
PETITIONER/APPLICANT**

**ABAS BASHIR MOHAMED.....2ND
PETITIONER/APPLICANT**

**ABDIRASHID BASHIR MOHAMED.....3RD
PETITIONER/APPLICANT**

**YASIN BASHIR MOHAMED.....4TH
PETITIONER/APPLICANT**

VS

**INSPECTOR GENERAL OF POLICE.....1ST
RESPONDENT**

**NATIONAL POLICE.....2ND
RESPONDENT**

**DIRECTORATE OF CRIMINAL INVESTIGATION.....3RD
RESPONDENT**

**NATIONAL INTELLIGENCE SERVICE.....4TH
RESPONDENT**

**HONOURABLE ATTORNEY GENERAL.....5TH
RESPONDENT**

**GARISSA COUNTY, REGIONAL POLICE COMMANDER.....6TH
RESPONDENT**

**INA KABER.....7TH
RESPONDENT**

**AHMED GESHEN.....8TH
RESPONDENT**

**HUSSEIN ADOW.....9TH
RESPONDENT**

AND

**INDEPENDENT POLICING OVERSIGHT AUTHORITY.....1ST
INTERESTED PARTY**

**REFUGEES CONSORTIUM OF KENYA.....2ND
INTERESTED PARTY**

**LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA.....3RD
INTERESTED PARTY**

**DIRECTOR OF PUBLIC PROSECUTION.....4TH
INTERESTED PARTY**

RULING

1. The matter pending determination before me is an application by the applicants dated 05.09.2025 seeking for orders that:

- i. Spent.**
- ii. Spent.**
- iii. Pending the *inter partes* hearing and determination of this application, an order be issued in the nature of habeas corpus to the respondents either by themselves or through their representatives to have the 2nd to 4th petitioners/applicants produced before this Honourable Court immediately and within 24 hours of the order being made to be charged or informed of the reason for their detention continuing or to be released.**
- iv. Pending the *inter partes* hearing and determination of this application, this Honourable Court be pleased to issue summons to the 6th to 9th respondents to appear before this Honourable Court for purposes of**

explaining the whereabouts of the 2nd to 4th petitioners/applicants.

- v. Pending the *inter partes* hearing and determination of this application, a conservatory order be issued restraining the respondents from continuing holding the 2nd to 4th petitioners incommunicado without any due process as guaranteed under the law following their illegal abductions.**
- vi. Upon presentation in court, this court be pleased to issue an order to the respondents to release the 2nd - 4th petitioners/applicants unconditionally pending institution of any charges by the 4th interested party before a court of law.**
- vii. Costs of this application be provided for.**

2. The application is supported by the affidavit of Dr. Benard Mogesa, the C.E.O. of the 1st petitioner/applicant deponing on the mandate of the 1st petitioner as enshrined under article 59(2)(e) of the constitution. That on 22.07.2025, the Commission received a complaint from the 2nd - 4th petitioners'/applicants' family relating to their abduction.

3. He averred that upon conducting investigations, the Commission discovered that the 2nd, 3rd and 4th petitioners/applicants were refugees from Somalia aged 27, 23 and 24 years and duly registered in Kenya under individual numbers 10264607, 10264606 and 10264610 respectively then residing at Block M6, Hagadera refugee camp. It was alleged that on 13.09.2024, the

2nd - 4th petitioners/applicants were abducted from their home at gun point by known persons namely the 7th - 9th respondents.

4. That on 06.08.2025, the KNCHR wrote a letter to the 3rd respondent, Fafi Sub County Office following up on the said complaint but in vain. That on 08.08.2025, after the Commission's intervention, an officer of the 3rd respondent called the 2nd - 4th petitioners' mother Ubah Mohamed Hassan and cousin Mohammed Hanshi purporting to commence investigations. It was averred that to this date, the efforts to locate the whereabouts of the petitioners/applicants have been futile.
5. The 1st, 2nd, 3rd and 6th respondents filed a replying affidavit sworn on 12.09.2025 by James Muya, a Sergeant working with the Directorate of Criminal Investigations averring that the matter having been reported by Ubah Mohamed Hassan and Mohammed Hanshi vide OB No. 27/14/9/2024, he commenced investigations in an attempt to trace the applicants vide their mobile phones No. 0768822829 and 0706152311 belonging to Abass Bishar Mohamed and Yasin Bishar Mohamed. That from their investigation, the communication indicated that the said Numbers had been switched off with their last access being in Hagadera Block M-6.
6. That further, the Sub County Criminal Investigation Officer for Fafi, Mr. Ombasa (SCCIO) wrote a letter to the Law Enforcement Liaison Officer at Safaricom PLC requesting for the incoming/outgoing call data as from 11.09.2024 to 17.09.2024,

MSISDN/IMEI history, Geographical location, subscribers' details and any other relevant information that could help in the case and that they were yet to get any communication from Safaricom. It was averred that nobody among the alleged witnesses ever mentioned the identity of the abductors nor the registration numbers of the motor vehicles allegedly used in the abduction hence making investigation difficult. He further averred that even the letter from the 1st applicant dated 06.08.202 did not mention the names of the abductors.

7. That the 7th - 8th respondents are strangers to the police service and have only been mentioned on the pleadings for the first time. It was averred that the respondents are actively investigating the matter including establishing the whereabouts of the petitioners and further confirmed that the 2nd - 4th petitioners are not in custody nor within the jurisdiction of the respondents.
8. It was deposed that the respondents are actively investigating the matter including establishing the whereabouts of the petitioners and further confirmed that the 2nd - 4th petitioners are not in custody nor within their jurisdiction. That the application lacked merit and therefore ought to be dismissed.
9. The 2nd petitioner /applicant filed a supplementary affidavit sworn on 14.09.2025 deponing that she had not been contacted by any officer or police in regards to the matter herein despite reporting. That the 2nd - 4th petitioners were abducted at gunpoint by the 7th - 9th respondents, a fact well known to the 1st -6th respondents yet no action has been taken against them. She urged that noting

that her sons are still missing and their whereabouts unknown, a writ of habeas corpus is a non derogable right and therefore, the petition is merited. She deposed that her sons have been missing for a period of one year and ever since, no meaningful response has been offered to her by the respondents. It was her concern that despite Sgt. Muya allegedly writing to Safaricom, no evidentiary document was presented to support the allegation. She alleged that the report dated 15.09.2024 alleged to be hers is far from the truth as the same was deliberately changed in order to create a false narrative.

10. Dr. Ruth Kaguta, an officer of the 1st interested party and a senior assistant director complaints services in her affidavit of reply sworn on 12.09.2025 deponed that it was the duty of the police to investigate the matter, secure the abductees' protection and bring the alleged perpetrators to justice.
11. That vide section 26 of the IPOA Act, the 1st interested party is barred from investigating any matter that is the subject of court proceedings. In his view, the 1st interested party is restrained from initiating any investigation on the matter. That this Court notes its limited role in these proceedings and issues such directions as it may deem fit in the circumstances.
12. Mr. James Muya on behalf of the 1st ,2nd ,3rd and 6th respondents swore a supplementary replying affidavit on 16.09.2025 deponing that in all the witnesses' statements, no witness was able to provide the details of the alleged abductors. It was urged that from the investigations, it is evident that the 1st,

2nd, 3rd, 5th and 6th respondents did not play any role in the alleged disappearance of the applicants and therefore, as alleged by the applicants that the 7th -9th respondents are the ones who participated in the alleged abduction, they should be properly served and summoned to court in order to state the whereabouts of the applicants. He further annexed the investigation diary via his further supplementary affidavit sworn on 18.09.2025.

13. Ubah Mohamed Hassan further filed a supplementary affidavit sworn on 17.09.2025 stating that despite the court granting the 3rd respondent an opportunity to avail the investigation report, the investigating diary and a certified copy of the OB, the same were not. That the inquiry into the case herein was conducted on three occasions. She averred that from 17.09.2024, it took an inquiry from the 1st petitioner for the 2nd respondents to summon her on 08.08.2025 to record a statement. It was her case that 11 months have since lapsed after the report of abductions of the 2nd - 4th petitioners were made to the police and that the respondents have not indicated any further steps taken including forwarding the investigation file to the 4th interested party for review or processing of applicable charges if any.

14. It was also averred that there is no evidence of any follow up or response to the letter sent to Safaricom on 17.09.2024 thus rendering the action futile. That the respondents have provided no evidence of any attempt to locate or contact the key witness Mr. Ali Achane through any available channel. She decried the

respondents' inaction for over almost a year, coupled with attempt to falsify evidence.

15. The application was canvassed by way of written submissions.

16. The applicants in their written submissions dated 20.09.2025 submitted on the following issues:

- i. Whether the 2nd, 3rd and 4th petitioners were abducted and are being unlawfully detained or restrained.**
- ii. Whether the abduction and detention of the 2nd, 3rd and 4th petitioners violated their constitutional rights under the constitution.**
- iii. Whether a thorough, effective and meaningful investigations into the abduction of 2nd, 3rd and 4th petitioners were conducted by the 2nd and 3rd respondents.**
- iv. Whether the applicant is entitled to an order of habeas corpus.**

17. On the first issue, the petitioners urged that it is undisputed that the 2nd, 3rd and 4th petitioners were abducted at gun point from their home at block M-16 in Hagadera refugee camp. That the foregoing has been corroborated by the evidence of Ubah Mohammed. It was submitted that the abductors were clearly identified by witnesses as the 7th, 8th and 9th respondents and that they are well known within the Hagadera Refugee Camp as the National Police Reservists. That the individuals were armed and

clad in jungle green combat gear identical to that worn by National Police Reservists.

18. The petitioners urged that the description of the alleged abductors having been vividly proved, the respondents cannot feign ignorance of the identity of the said abductors. That despite the report being made by Ubah Mohamed, the mother to the 2nd, 3rd and 4th petitioners, no meaningful investigations have been carried out and nor any reasons given for the same. It was urged that in the absence of any plausible explanation from the respondents and given their constitutional duty to protect life and liberty, it is the 1st petitioner's contention that the 2nd, 3rd and 4th petitioners be released from the custody of the respondents.

19. On whether the abduction and detention of the 2nd, 3rd and 4th petitioners violate their constitutional rights, the petitioners submitted inter alia that, article 49(1) and (g) entitle any arrested person to be informed of reasons for the arrest and to be brought before a court of law as soon as reasonably possible and in any event, within 24 hours. That under article 20(3) of the constitution, the court ought to develop the law to give effect to a right or fundamental freedom, and therefore, that mandate, coupled with article 2(5) - (6) which incorporates ratified treaties into domestic laws, means that Kenya's refugees treaties are part of domestic law.

20. Learned counsel contended that the abduction and disappearance of the 2nd, 3rd and 4th petitioners violated the petitioners' constitutionally guaranteed rights as the state has a

duty to not only protect them from such acts like abduction but also investigate all incidences of human rights violations against them and offer appropriate remedies. That the failure of the 2nd and 3rd respondents' to fully investigate the alleged abduction of the 2nd, 3rd and 4th petitioners makes them complicit.

21. On whether a thorough effective and meaningful investigations into the abduction of the 2nd, 3rd and 4th petitioners were conducted by the 2nd and 3rd respondents, the petitioners urged that the 2nd and 3rd respondents are duty bound under sections 24 and 35 of the national police service Act to discharge their duties effectively as required of them under Article 244 (c) and (d) of the constitution.

22. Additionally, that the certified copy of the OB extract - marked as JM-1 on the respondents supplementary replying affidavit, the 2nd and 3rd respondents made visits to block M-6 within Hagadera refugee camp in relation to the reported issue. That no reference is made to the original report of abductions made to the 1st and 3rd respondents on 14.09.2024. It was stated that there was no case reported to the station on 09.09.2025 and even if there was, no such OB extract was provided as directed by this court.

23. On whether the applicant is entitled to an order of habeas corpus, it was submitted that the same should issue considering that no plausible explanation has been offered explaining the whereabouts of the abductees. It was submitted that from the affidavits of Sgt. Muya, the respondents have not denied

knowledge of the 9th respondent whom the petitioners indicated was working for the National Police Reservist alongside the 7th - 8th respondents.

24. This court was urged that it is troubling that beyond a mere denial of knowledge of the 7th, 8th and 9th respondents, the 2nd and 3rd respondents have neither undertaken thorough investigations into their involvement nor recorded statements from them regarding the reported abduction. That such inaction is wholly unsatisfactory and amounts to abdication of the 2nd and 3rd respondents' primary duty to apprehend suspects involved in serious crimes.

25. To support the foregoing, reliance was placed on the case of **Law Society of Kenya & 3 Others vs Inspector General of Police & 4 Others [2025] KEHC 236 (KLR)** where the court held that if a person has been abducted, the court must determine whether a respondent 'has or had custody' of the person. If so, a writ must issue to produce the detained person or have the state justify the detention. Alternatively, that even if the person is held by non-state actors, the court ought to order state authorities to secure the person's liberty by retrieving him. In the end, this court was urged to allow the application as prayed.

26. The 1st, 2nd, 3rd, 5th and 6th respondents via their written submissions dated 19.09.2025 submitted that the applicants must act in terms of article 51(2) of the constitution as well as section 389 of the Criminal Procedure Code and that the

applicant must prove that the subjects, thus the 2nd - 4th petitioners are held in custody, detained or imprisoned.

27. It was urged that the claim that the alleged abductors were armed and clad in police gear while using mvs with hidden registration numbers does not automatically confirm that they were police officers. It was contended that even criminals may also take advantage of such situation and hide their identity.

28. This court was urged that the respondents have for the first time mentioned Ina Kaber, Ahmed Geshin and Hussein Adow as the 7th - 9th respondents through the court pleadings and nowhere in their witnesses' statements or OB. Additionally, that the 1st petitioner's letter to Fafi Sub County Criminal Investigation Office dated 06.08.2025 did not in any way mention the 7th -9th respondents to facilitate the 3rd respondents with investigations. That the same was just an afterthought.

29. It was their contention that the 7th - 9th respondents are persons unknown to them nor did they act on behalf of the police nor on instructions or direction of the respondents. That it raises eyebrows that the petitioners all along knew the alleged abductors but deliberately failed to disclose that critical information to the police to assist the police with investigations. Further, that the petitioners did not adduce evidence to show that the police are holding the 2nd - 4th petitioners. To that end, reliance was placed on the case of **Omar Gordana Dida on behalf of Osman Omar Gordana vs Insepector of Police and 3 Others, Miscellaneous Criminal Application No.**

E318 of 2021 where the court held that the applicant must in terms of article 51(2) of the constitution and section 389 of the Criminal Procedure Code, show that the subject is held in custody, detained or imprisoned.

30. Similarly, reliance was further placed on the case of **Juma vs Inspector of Police & Another, Miscellaneous Criminal Application No. E054 of 2023** where the court held that the general burden in a habeas corpus application must pursuant to section 107 of the Evidence Act remain with the petitioner. That the petitioner must establish by competent and convincing evidence that the missing person on whose behalf the petition is filed is under the custody of the respondent. Accordingly, this court was urged to dismiss the suit for want of merit.

31. I have considered the application herein and the response thereof together with parties' submissions. The issue for determination therefore is whether the writ of habeas corpus ought to issue.

32. Article 25 of the constitution provides that:

“despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited-

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and (d) the right to an order of habeas corpus.”

33. Additionally, the Constitution of Kenya at Article 51(2) guarantees the right to a writ of habeas corpus to persons detained or held in custody. The same provides that:

(1) ...

(2) A person who is detained or held in custody is entitled to petition for an order of habeas corpus.

34. Similar spirit is espoused under Section 389 of the Criminal Procedure Code which stipulates as follows:

Power to issue directions of the nature of habeas corpus

(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) that any prisoner detained in a prison situated within those limits be brought before the court to be there examined as a witness in any matter pending or to be inquired into in that court;

(d) that any prisoner so detained be brought before a court martial or commissioners acting under the authority of a commission from the

President for trial to be examined touching any matter pending before the court martial or commissioners respectively;

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

(f) that the body of a defendant within those limits be brought in on a return of *cepi corpus* to a writ of attachment.

35. In the case of **Gitonga Mwangi Muriithi & Another (Suing as the legal representative of the estate of Mwangi Stephen Muriithi) vs Hon. Daniel Toroitich arap Moi & another, Petition No. 41 of 2018**, the Supreme Court held that:

[60] The essence of a writ or order of habeas corpus is to secure the production of a person in a court of law by the State so as to facilitate a judicial inquiry into the reasons for his/her incarceration. The application for such an order, is usually directed at an agency of the State, where the applicant has reason to believe that the missing person, is in the custody of the former.

36. From the above provisions and case law, it is clear that for an applicant to seek for a writ of habeas corpus, he or she must establish the elements of unlawful detention, the custody of the subject and by who.

37. In the case of **Masoud Salim Hemed and another vs DPP and 3 others (2014) eKLR**, the court held that:

“The general burden in a habeas corpus application must, pursuant to section 107 of the Evidence Act, remain with the petitioner. The petitioner must establish by competent and convincing evidence that the missing person on whose behalf the petition was filed is under the custody of the respondents”

[Also see the case of **Grace Straut Ibingira and others vs Uganda (1966) EA 447(CA) at 454**].

38. In the instant case, the applicant urged that it's the duty of the state to guarantee the freedom and security of every person, and further, that the respondents did not deny that the report on abduction was made. Further, that due to lack of evidence of any meaningful investigations carried out, it was logical that the respondents ought to produce the abductees before this court. Additionally, that it had been proven that the 2nd, 3rd and 4th petitioners had been abducted by the 7th, 8th and 9th respondents.

39. As a response, the 1st, 2nd, 3rd, 5th and 6th respondents urged that the 7th - 9th respondents were persons unknown to them and further, that they did not act on behalf of the police or on instructions or direction of the respondents. That it raised eyebrows that the petitioners all along knew the alleged abductors but deliberately failed to disclose that critical information to the police to assist the police with investigations

and further, failed to serve them directly. It was further contended that the petitioners did not adduce evidence to show that the police are holding the 2nd - 4th petitioners.

40. Having already stated elsewhere in this ruling that the burden of proof rested with the applicant to prove its allegations, this court finds noteworthy the Court of Appeal decision in the case of **Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, where the said court held that:

“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

41. It therefore follows that it was incumbent upon the applicants to adduce evidence linking the alleged well known 7th - 9th respondents police reservists to the 1st, 2nd, 3rd, 5th and 6th respondents. This was important more so after the 1st, 2nd, 3rd, 5th and 6th respondents denied either knowing the 7th - 9th respondents or instructing them to act on their behalf.

42. On the allegation that the alleged abductors were clad in jungle green combat gear identical to that worn by National Police Reservists, it is not to be denied that persons including thieves

have previously been spotted wearing such clothes. In fact, our markets are flooded with such kind of clads and therefore, it would be in vain for this court to issue an order based on clads. It is noteworthy that the 1st, 2nd, 3rd, 5th and 6th respondents urged that the allegation that the alleged abductors were wearing police uniforms and armed with guns doesn't per se confirm that they were police officers.

43. It is my view that the onus rested on the applicants to prove to this court that indeed, the 7th - 9th respondents were police officers or acted on behalf of the respondents. [See the case of **Omar Gordana Dida on Behalf of Osman Omar Gordana vs Inspector General & 3 others [2021] eKLR**; **Alew (Suing on his behalf and that of Issack Ibrahim) v Inspector General of Police & 3 others [2024] KEHC 12339 (KLR)**].

44. Further to the above, the motion also falls by the wayside due to the fact that the applicant failed to demonstrate that the alleged vehicle used in abducting the petitioners belonged to the respondents. It was not enough to claim that the Toyota Alto, being the vehicle that was used had hidden registration numbers. It is not to be denied that the laws of this country makes provisions on how ownership of m/vehicles can be determined. Finally, no tangible evidence was presented before this court to demonstrate that the petitioners were in the custody of the respondents herein.

45. It is worth noting that none of the people who witnessed the alleged abduction ever swore an affidavit confirming that the 7th

-9th respondents were responsible and involved and that they were known as police reservists. There was no indication anywhere that upon reporting the incident the abductors' names were given. All that is before court is hearsay information or evidence that it was the 7th -9th respondents who abducted the three.

46. In the absence of such solid evidence, it calls upon this court to further interrogate this matter/petition through viva voce evidence.

47. In a nutshell, it is my holding that the petitioners have failed to establish to the required degree for an order of habeas corpus to issue. Accordingly, this court finds that the application herein is destitute of any merit and is thus dismissed with no order as to costs.

Dated, signed and delivered virtually this 24th day of October 2025

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J. N. ONYIEGO
JUDGE