

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 295 OF 2012

LENINA SHAKAI1ST
PETITIONER

NORMEGARI SHAKAI.....2ND
PETITIONER

JOICE SHAKAI.....3RD
PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST
RESPONDENT

THE COMMISSIONER OF POLICE.....2ND
RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....3RD
RESPONDENT

JUDGMENT

Petitioners' case

1. The petitioners filed petition amended on 21st January 2013 seeking an order of habeas corpus, declarations, general damages and costs. The 1st and 2nd petitioners are parents of Moses Kursas Shakai (the subject) while the 3rd petitioner is wife of the subject. They brought this petition on behalf of the subject, on their own behalf and other members of the family.

2. The subject was a police officer attached to the General Service Unit (GSU). Around 27th February 2006, the family lost contact with the subject and sought intervention from senior GSU officials at GSU Headquarters and Osueni Camp in Meru the station the subject was last posted.

3. The petitioners conducted inquiries from which they learnt that the subject was last seen at the camp on 27th February 2006. Officers in charge of the camp promised to update the family on the whereabouts of the subject but they did not do so.
4. The petitioners' advocate wrote a letter dated 24th June 2021 to the 2nd respondent demanding information regarding the whereabouts of the subject. The letter was also copied to the 1st respondent and the District Commissioner of Loita District, the families' home district.
5. On 7th July 2011 the Commandant of GSU replied to the letter stating that the subject was last seen in the camp on 26th January 2006; that the subject left the camp without permission and that GSU

Headquarters was informed about his absence after 24 hours as required and on 15th February 2006, the subject was declared a deserter. The Officer Commanding Station (OCS) Muthaiga police, station was subsequently detailed to open a case file and obtain a warrant of arrest against the subject. The OCS Narok police station visited the subject's home and the local chief (Milton Karkar) but the 1st petitioner denied knowledge of the subject's whereabouts. The family was also informed that GSU Headquarters was treating the subject as deserter.

6. The petitioners carried out further inquiries in Narok and established that the allegations of desertion were false because the subject hailed from Olmesutie Location, in Loita Division whose Chief was Samuel Ole Masarie and the Assistant chief was

David Mondet contrary to the information the respondents gave regarding where the OCS Narok went. According to the petitioners, the subject did not hail from Ilkerin location whose chief was Mr. Milton Karkar. The subject was on leave during the period when GSU officers alleged the subject left the camp without permission and GSU officers at the subject's camp had confirmed that the subject reported at the camp after leave and was last seen on 27th February 2006.

7. The petitioners asserted therefore that the 2nd respondent was up to some mischief in attributing the subject's disappearance to desertion. They averred that the subject's disappearance had caused the family trauma, anguish and suffering.

8. The petitioners maintained that under articles 35 and 47 of the Constitution, the respondents have a duty to furnish them with accurate information in relation to the subject's whereabouts. They therefore urged the court to compel the respondents to discharge this duty.

Oral evidence

9. During hearing, Samson Leshuka Shakai (Mr. Leshuka), adopted his witness statement as his evidence before court. In the statement, Mr. Leshuka, the subject's elder brother, stated that the subject was on leave in mid-February 2006 at his rural home in Loita Division of Narok District and left home on 18th February 2006 to return to work. On 28th February 2006 Mr. Leshuka tried to reach the

subject several times on phone without success. Mr. Lesuka informed the 3rd petitioners (Joice Shakai) the subject's wife who also tried calling the subject in vain. Mr. Leshuka then contacted Councillor Lawrence Shama to assist them locate the subject.

10. Councillor Shama went to Osueni camp in Meru where the subject was stationed to check if the subject was at the camp but was informed by colleagues and superiors of the subject that they last saw the subject on 27th February 2006 and did not know where he had gone. The officers promised to contact the family as soon as they traced the subject, but did not so.

11. Their family advocate wrote a letter to the 2nd respondent and the response received was that the

subject had deserted duty which caused the family trauma, anguish and suffering due to the unexplained disappearance of their kin.

12. Mr. Leshuka stated maintained Councillor Sham went to inquire about the subject's whereabouts and it was then that he was informed that the subject had disappeared and was directed to go to the GSU Headquarters where the councillor learnt of the allegation that police officers had come to their area which was not true.

13. Joice Shakai (Ms. Shakai), wife to the subject, also adopted her witness statement as her evidence in court. Ms. Shakai stated that the subject was on leave in mid-February 2006 at their rural home in Loita Division of Narok District. The subject left home on 18th February 2006 to return to work and

that was the last time she saw him. On 28th February 2006 Ms. Shakai was informed by Mr. Leshuka that he had not been able to reach the subject. Ms. Shakai tried to reach the subject in vain. The family sought assistance from senior officials at GSU Headquarters and at the camp where the subject was stationed and learnt that the subject was last seen at the camp on 27th February 2006. Officers at the camp promised to look into the matter and update the family which they did not do.

14. On 24th June 2011 the family advocate wrote a letter to the 2nd respondent only to receive a response to the effect that the subject had deserted duty which they believe was false. This had caused the family trauma, anguish and suffering. Ms. Shakai maintained that the subject left home and

went to his station at Osueni camp in Meru but she had not been told what happened to him. Councillor Shama went to look for him at the camp but did not find him.

Respondents' case

15. The respondents opposed the petition through grounds of opposition and a replying affidavit by Joseph M. Mutiria (Mr. Mutiria) a Chief Inspector of police in GSU.

Grounds of opposition

16. In the grounds of opposition, the respondents contended that the petition contravenes articles 23(3) and 51 (1) (2) of the Constitution and section 389 (1) of the Criminal Procedure Code; an order of

habeas corpus cannot be issued in the circumstances of this case because the subject is not in their custody; the petition does not meet the threshold of a constitutional petition and it is an abuse of the court process.

Replying affidavit

17. In the replying affidavit, the respondents asserted through Mr. Mutiria, that the petitioners were the last people to see the subject long after he had been declared a deserter; the subject left his duty station without permission on 26th January 2006 to unknown destination and this act was communicated to the petitioners and the subsequent legal actions taken as required by law.

This information was later given to the petitioners' advocates on 7th July 2011.

18. The respondents maintained that the subject hails from Narok District, Osupuko Division, Loita Location, Oikiloriti sublocation, Olesoit pus village and his Area Chief was David Montet; Assistance Chief was David Montet while his village elder was Ole Kotie, information contained in the subject's bio data he gave when he was joining service. The subject was not on official leave at the time the petitioners alleged because he had already been declared a deserter and removed from service.

19. According to the respondents, the subject was last granted twenty days leave on 11th October 2005 which expired on 8th November 2005 and he resumed duty on 9th November 2005. It was the

respondents' position that an officer who absents oneself from duty without leave or permission for more than 24 hours, he is deemed to have deliberately absented himself from duty and communication to that effect is made to the relevant authorities in the chain of command.

20. The subject was declared a deserter on 15th February 2006 after expiry of 21 days permitted by law. A casualty returns of subordinate officers who had deserted service was sent to police Headquarters including the name of the subject's name. In the circumstances, the respondents maintained, an order of habeas corpus cannot issue because the subject is not in their custody. The prayers sought in the amended petition cannot also be granted because there is no cause of action against them (respondents).

21. The respondents did not call witnesses.

Submissions

22. Parties filed written submissions in support of their respective positions.

Petitioners' submissions

23. The petitioners submitted that they had made a compelling case to demonstrate that the subject went missing while on duty after reporting from leave as shown by the letter dated 7th July 2011 in which the GSU Commandant stated that the subject was last seen in at the camp on 26th January 2006. However, the family lost contact with the subject on 27th February 2006 and thereafter after sought intervention of GSU officials at the camp and Headquarters. Following inquiries, the

family learnt that the subject was last seen on the 27th February 2006 long after being declared a deserter.

24. The petitioners argued that they were not informed about the subject's disappearance; they only learnt of the disappearance much later after inquiries and that the promise that they would be contacted after establishing the subject's whereabouts, was not fulfilled. The petitioners maintained that the respondents owed the family a duty to furnish them with accurate information on the disappearance of the subject.

25. The petitioners argued that the respondents' culpability in the disappearance of the subject was demonstrated by the fact that even the GSU

Commandant claimed that the subject left the camp without permission yet the subject's colleagues stated that they last saw him in the camp on 27th February 2006. They urged the court to allow their petition as prayed.

The 1st and 2nd respondents' submissions

26. The 1st and 2nd respondents argued that prayers in the petition cannot be granted and for an order of habeas corpus to issue, it must be established that the subject is in the respondents' custody which was not demonstrated.

27. The 1st and 2nd respondents submitted that the subject deserted duty without official leave and was declared a deserter after due process was followed

after the mandatory 21 days. They relied on the decision in *Milen Halefom Mezgebo v Attorney General & 2 others* [2012] eKLR.

28. The 1st and 2nd respondents again argued that information regarding the subject was communicated to the petitioners' advocate through letter dated 7th July 2011 and therefore the petitioners had not demonstrated how the right to information or human dignity was contravened. They relied on the decision in *Julius Meme v Republic & another* [2004] eKLR.

29. The 1st and 2nd respondents maintained that they complied with article 47 of the Constitution; several attempts were made to trace the subject and that the petitioners were the last people who were with

the subject before his disappearance and have a duty to tell where he went. They urged the court to dismiss the petition with costs.

3rd respondent's submissions

30. The 3rd respondent submitted in support of the 1st and 2nd respondents that for an order of habeas corpus to issue the petitioners had to show that the subject is in the custody of their respondents which was not demonstrated to be the case. The 3rd respondent relied on the decisions in *Grace Stuart Ibingira and Others v Uganda* (1966) EA 445 and *Mariam Mohamed & another v Commissioner of Police & another* [2007] eKLR for the position that habeas corpus compels the production of a detained individual to determine the legality of their

detention. It must be shown that the subject is in the custody of the respondents otherwise the court's order would be ineffective.

31. The 3rd respondent argued that declaring the subject a deserter was in accordance with the law and granting the prayers sought would interfere with an administrative decision because the petitioners have not demonstrated that the action was in excess of powers; was unreasonable or contravened rules of natural justice.

32. The 3rd respondent submitted that the petition does not meet the constitutional threshold in *Anarita Karimi Njeru v Republic* [1979] eKLR; petitioners cited constitutional provisions without particularizing

violation thereof and the subject's rights were not violated.

33. The 3rd respondent argued that the petitioners were apprised on the position of the subject's disappearance hence there was no constitutional violation as alleged. The 3rd respondent urged the court to dismiss the petition with costs.

Determination

34. I have considered the pleadings, arguments by parties and the decisions relied on. The issue for determination is whether the petitioners have established grounds for granting the reliefs sought in this petition.

35. Before embarking on determining the petition, there is the argument by the respondents that the petition does not meet the threshold set in the *Anarita Karimi case*. The applicability of the *Anarita Karimi case* post the 2010 Constitution was revisited by the Court of Appeal in *Anti Counterfeit Authority v Francis John Wanyange & 4 others* (Civil Appeal 473 of 2019) [2025] KECA 1540 (KLR) where the Court of Appeal reiterated that while *Anarita Karimi Njeru* remains good law, the standard has been recalibrated under the 2010 Constitution. The Court of Appeal Revisited the position taken in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, thus:

The principle in Anarita Karimi Njeru (supra) is not a technical requirement of form. It is a substantive requirement intended to ensure

that parties understand the case they have to meet and the court is properly guided. What is required is reasonable precision in framing complaints, not perfect particularity. A petition should disclose the specific constitutional provisions alleged to be infringed, the manner of infringement, and the nature of the redress sought. The test is one of substance, not of formula....We cannot look at Article 22 in isolation. We agree with the High Court that precision is not coterminous with exactitude. It is not a ritualistic requirement. The principle in Anarita Karimi Njeru that requires reasonable precision in framing issues is to ensure that the Respondent has adequate notice and that the court is able to fashion an appropriate

remedy. The standard is one of reasonable specificity, not mechanical nicety.

Applying the above principle to this petition, the court is satisfied that this petition was pleaded in the manner required and meets the threshold in Anarita Karimi case.

36. Turning to the substance of this petition, some facts in this petition are undisputed while other facts are in dispute. The agreed facts are that the subject was a police officer attached to GSU and was based at Osueni camp in Meru County. The subject disappeared and had not been seen at the time of filings this petition.

37. The following facts are however disputed. The petitioners argued that the subject was on leave and left in mid-February 2006 to go to his place of work and was last seen at the camp on 27th February 2006. Thereafter, the family lost contact with the subject and it was after they made inquiries that they were informed that the subject had deserted duty.

38. The respondents on their part maintained that the subject was last granted twenty days leave on 11th October 2005 which expired on 8th November 2005 and he resumed duty on 9th November 2005. The subject left the camp without permission on 26th January 2006 to an unknown destination and did not return. The respondents maintained that an officer who absents oneself from duty without leave or permission for more than 24 hours, is deemed to

have deliberately absented himself from duty and communication to that effect is made to the relevant authorities in the chain of command.

39. The family was informed of this fact and the same information was later given to the family advocate in a letter of 7th July 2011. The family of the subject was also informed about the desertion and the subsequent legal action that was taken as required by law. The respondents maintained that the petitioners were the last people to see the subject long after he had been declared a deserter.

40. Parties also disagreed on the subject's home area especially the Division, Location, and village. Names of Area Chief and Assistance Chief were also disputed. When the subject was on official leave is also in dispute.

41. I have considered parties' evidence and arguments on their respective positions. The petitioners maintained that the subject left home in mid -February 2006 and went to his duty station in Meru and that he was last seen at the camp on 27th February 2006. The subject disappeared thereafter and the family did not know where he went. It was after the family's effort to contact the subject failed that they made inquiries at the comp and learnt that the subject had disappeared. The explanation by the subject's superiors that he had deserted duty surprised the family and they felt it was a fabrication.

42. The respondents maintained that the subject left his duty station without permission or leave and was

declared a deserter in compliance with the law. The family was also informed about the desertion.

Desertion

43. The petitioners' argument is that the subject disappeared while on duty but the respondents maintained that the subject deserted duty. The petitioner's assertion that the subject was on leave and returned to his duty station in mid-February 2006 must have been based on what the subject may have told them. That did not make the subject's presence at home, if at all, official leave or absence with permission since the respondents maintained that the subject was last on official leave of twenty days between 11th October 2005 and 8th November 2005 and resumed duty on 9th November 2005. It is the employer who keeps records and therefore only the employer can tell when an employee is on

official leave and when he is not. The respondents attached leave application forms the subject had filled to show when the subject was on official leave.

44. In that respect, the petitioners' argument that the subject was on leave and went back to his duty station in mid-February 2006 was not based on any official records that can reasonably be believed given that the respondents denied that the subject was on leave at the time. The respondents asserted that the subject left the camp without permission on 26th January 2006 to and did not return a fact the petitioners could not deny.

45. The petitioners' claim that the subject left home for the camp in mid -February 2006 and was last seen at the camp on 27th February 2006 contradicts

the respondents' position who would easily access the employer's official records over the issue. The petitioners' assertion was also based on information given to them by people said to be officers at the camp who last saw the subject at the station. The petitioners did not give any names of the officers who gave them that information which was at best hearsay. The claim that the subject was seen at the station on 27th February 2006 was not verifiable evidence and did not mean the subject could not have left his duty station without permission or could not have deserted duty.

46. In the circumstances, and based on the facts of this case, the petitioners did not demonstrate that the subject did not desert duty as the respondents asserted.

Information

47. The petitioners again argued that they are entitled to true and accurate information on the whereabouts of the subject but the respondents had not given them information. The respondents maintained that the petitioners were informed about that the subject was missing through various means, including officers visiting the subject's home and by letter to the petitioners' advocate.

48. The petitioners denied that government officials visited the home of the subject as alleged on the basis of the names given with regard to locations, sublocations and Chiefs and Assistant chiefs. The fact of this disagreement notwithstanding, the respondents stated that information was given to

the petitioner's advocate, a fact the petitioners did not dispute. Regarding visiting the subject's home and where it is, the respondents stated that they relied on the Bio Data the subject gave at the time he joined service. The petitioners' argument that government officials did not visit the area is not based on any official records different from what the employer had.

49. In the circumstances, and although it is painful for a family to lose their kin in a situation like the petitioners find themselves in, this court is unable to agree with the petitioners that the family of the subject was not informed about the subject's disappearance from his duty station since the letter from their own advocate was responded to with clear information even if government officials may

not have visited the home of the subject which is difficult to accept.

Habeas corpus

50. The petitioners urged the court to issue an order of habeas corpus commanding the respondents to produce the subject or his body in court on a date the court would direct. The respondents maintained that an order of habeas corpus cannot issued because the petitioners had not demonstrated that the subject was in their custody.

51. Habeas corpus is an order issued by a court directed at the state or its functionaries to produce the body of a subject to enable the court determine whether the subject's detention is valid in law. In other words, an order of habeas corpus is intended to be an inquiry to determine whether the person

held by the state is still alive or dead especially where the person is no longer being lawfully held. More often than not, an order of habeas corpus is issued to protect rights and fundamental freedoms of a subject pending the hearing of the matter.

52. I have considered the evidence and arguments by parties on this issue. The petitioners' position is that the subject was last seen on 27th February 2006 at the camp he was stationed but was not seen thereafter and therefore the subject was under the command of his superiors. The respondents took a different position arguing that the subject was last seen in the station on 26th January 2006 but left the duty station without permission and never returned. He was thereafter declared a deserter.

53. There is not averment and or evidence that the subject was being held by police or the respondents' agents or persons acting on the respondents' behalf to shift the burden to the respondents to explain the whereabouts of the subject. The petitioners did not see the subject at the camp but say they were informed by colleagues of the subject that the subject was last at the camp on 27th February 2006 a fact the respondents denied stating that the subject had by then been declared a deserter. In other words, the respondents denied that the subject was in their custody.

54. The respondents further stated that a report was made regarding the subject's disappearance from the station without official leave and after investigations and in compliance with the law, the subject was declared a deserter. Flowing from what

is stated above and based on the facts on record, it is difficult to conclude that the respondents or their agents took the subject into custody or were holding the subject to justify granting the order of habeas corpus sought.

Conclusion

55. Having considered the pleadings, evidence and arguments made on behalf of the parties, the conclusion the court comes to, is that the petitioners did not demonstrate that the respondents were in anyway responsible for the disappearance and or desertion of the subject from duty. There is no evidence that the subject left the station to attend to official duties outside the station which would have placed responsibility on his superiors to account for

his movement and what might have happened to him while on duty outside the station.

56. The petitioners did not also show that the subject was declared a deserter in violation of the constitution and the law or that the respondents' actions violated the rights and fundamental freedoms of the subject or those of the petitioners.

57. Consequently, and for the reasons stated herein above, this petition fails and is dismissed. Each party will bear their own costs.

Dated and delivered at Nairobi this 14th Day of November 2025

**E C MWITA
JUDGE**