

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ITEN**  
**MISC CRIMINAL APPLICATION NO.E005 OF 2025**  
**IN THE MATTER OF HABEAS CORPUS**

**AND**

**IN THE MATTER OF THE ARREST OF ABIGAIL JEPKORIR MAIYO**

**AND**

**IN THE MATTER OF ARTICLES 25 AND 51 OF THE CONSTITUTION  
OF KENYA**

**AND**

**IN THE MATTER OF SECTION OF 38 OF THE CRIMINAL  
PROCEDURE CODE**

**NEWTON**

**KIPLAGAT**

**CHEBII**

.....**APPLICANT**

**VERSUS**

**INSPECTOR GENERAL OF POLICE .....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS .....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....3<sup>RD</sup> RESPONDENT**

**OCS ARROR POLICE STATION .....4<sup>TH</sup> RESPONDENT**

**ABIGAIL JEPKORIR MAIYO .....INTERESTED PARTY**

**RULING**

1. The Applicant, **Newton Kiplagat Chebii** filed this cause by way of a Chamber Summons dated 12<sup>th</sup> February 2025. The same is brought pursuant to **Article 25(d)** and **51(2)** of the **Constitution of Kenya**, **Section 389** of the **Criminal Procedure Code** and **Rule 2 and 3 of the Criminal Procedure (Directions in the nature of Habeas Corpus) Rules**. The Applicants seeks the following orders:

- 1) Spent.

- 2) That an order in the nature of Habeas Corpus be issued and directed to the Respondents to have the body of the Interested Party, dead or alive, to be produced before the Honourable Court at such time as the Judge may direct.**
  - 3) Spent.**
  - 4) Spent.**
  - 5) That this Honorable Court be pleased to order and or directed that the Interested party be released.**
  - 6) That costs of this application be provided for.**
2. The application is supported by the grounds on the face of the said application and the Supporting affidavit of **Newton Kiplagat Chebii**, sworn on 12<sup>th</sup> February 2025.
  3. He deposed that he is the brother he is the brother to Abigail, the Interested Party herein. That on or about 7<sup>th</sup> February 2025, at midnight, three police officers from Arror Police Station went to his sister Abigail Jepkorir Maiyo's house that she and arrested her upon complaint by her landlord, one Mr. Paul Mutwol and had not been released more than 72 hours later, and to date. That the Interested Party has also not been charged in a court of law and has made no appearance at all.

4. The Applicant is apprehensive that the interested party might be subjected to torture and inhumane treatment. The Applicant further deposed that he made an appearance at Arror Police Station on 8<sup>th</sup> February 2025 and on 9<sup>th</sup> February 2025 and he was not allowed to see his sister, neither was he told where she was.
5. The Applicant contends that the Respondents have denied him access to his sister and she has been held incommunicado ever since her arrest and maintains that once a person is arrested, they ought to be arraigned before a court of law within 24 hours, failure to which such persons should be released accordingly.
6. The Applicant further deposed that upon failing to see his sister on 8<sup>th</sup> February /2025 and 9<sup>th</sup> February 2025, he made a report to Ainabtich Police Station on 9<sup>th</sup> February 2025 at 2355 hours as Arror Police Officer refused to record his complaint.
7. The Applicant urged that the 1<sup>st</sup> Respondent do produce his sister the said Abigail Jepkorir Maiyo, dead or alive to the High Court of Kenya. He added that he is undergoing mental anguish and distress as he is unable to know the state and whereabouts of his sister.

### **Replying Affidavit**

8. The Application is opposed by the Respondents vide the Replying Affidavit sworn by Chief Inspector Ezra Mworira on 25<sup>th</sup> February 2025. He deposed that he is the Commanding Officer Chesuman Police Station which is the mother station for Arror Police Post.

- 9.** He further deposed that he on 7<sup>th</sup> February 2024, at around 2230 hours a report was made by one, Paul Mutwol at Arror Police Post that on the same day at around 1830 hours, that he had received information from one of his tenants that another tenant namely Abigail Jepkorir Maiyo had procured an abortion in the pit latrine within his rental premises located at Arror Center. That Paul Mutwol proceeded to his rental houses situated at Oasis Building and confirmed that there was something in the pit latrine that resembled a foetus and decided to report the matter at Chesuman Police Post and that the report was entered under OB 05/07/02/2025 by No. 119615 PC Boniface Amukata.
- 10.** He further deposed that on the same day at around 2240 hours, Police Officers No.119615 PC Boniface, No.222304 PC John Kotom headed to the scene at Oasis Building and upon investigations they were able to see human body parts in the pit latrine as reported by one, Paul Mutwol and that this was minuted under OB No.07/07/02/2025 and that upon arrival at around 2335hrs the suspect, Abigail Jepkorir was arrested on suspicion of committing abortion pending investigations.
- 11.** He maintained that on 8<sup>th</sup> February 2025 at around 0900 hours, the suspect Abigail Jepkorir was released from Arror Police Post under his instruction vide OB No.05/08/02/2025 upon complaining of being unwell and was advised to seek medical attention, that the suspect was released on police free bond on 8<sup>th</sup> February 2025 at around 0900 hours and was to report at Arror Police Post on 10<sup>th</sup> February 025 at 1000 hours.

12. He further deposed that upon being released, the suspect never reported back to Arror Police Post to date and that on 9<sup>th</sup> February 2025, the Police Officers from Arror Police Post with the help of fire brigade personnel were able to retrieve the body of the foetus from the pit latrine and the same was taken to Iten Mortuary awaiting DNA sampling and analysis.

13. He denied that Abigail Jepkorir was arrested and detained incommunicado at Arror Police Station Post without charging her since she was released on a Police free bond but failed to report back to Arror Police post for further investigations, he also denied that the Applicant visited Arror Police Post on 8/02/2024 and was denied a chance to see his sister.

14. He further deposed that investigations are still ongoing to trace and re-arrest the suspect who is still at large to embark the police to complete their investigations and that investigation file was compiled and forwarded to the Office of Director of Public Prosecution at Iten on 15/02/2025 for advice.

### **Further Affidavit**

15. The Applicant filed a Further Affidavit dated 20<sup>th</sup> May 2025. He deposed that as a matter of procedure, he has sued the OCS, Arror Police Station but the person swearing the Replying Affidavit is incompetent to depone to the facts in issue as he is from Chesuman Police Station and is not possesses of the factual situation at Arror Police Station. That the Affidavit of Ezra Mworira is comprised of hearsay and no factual matters have been deponed to and that paragraphs 2, 3, 5, and 6 of the said Affidavit are hearsay and are not capable of being factually deponed to.

**16.**The Applicant further deposed that it is clear that on Friday, 7<sup>th</sup> February 2025 at 2335-hour, No. 118615 PC Boniface Amkata and No.222304 PC John Kotom booked in a female prisoner aged 35 years, namely Abigael Maiyo who was suspected of procuring an abortion. That soon thereafter, the events in the Occurrence Book do not appear authentic for reasons that: under OB No.8/02/2025, there is a taking over by No. 119615 PC Boniface Amkata who took over from the outgoing No.222304 PC John Kotom.

**17.**That the OB was rubbed out such that at the taking over, it alleged there was only one prisoner, but replaced by rubbing to show two prisoners and that the use of the verb “is” shows that there was a male prisoner replaced by the letter “fe” to show that the prisoner present was female when indeed, the initial entry was “male”. The Applicant therefore contends that the alleged release of the Interested Party on bond on 8<sup>th</sup> February 2025 is not true as the prisoner in the cell then was a male prisoner and there was no female prisoner to be released.

**18.**The Applicant maintained that the duty of producing Abigael Maiyo before the Court, shall rest on PC Boniface Amkata, PC John Kotom and Bernard Tanui who admit arresting the said Abigael Maiyo, but cannot clearly state where they placed her after arrest or say what they did to her there. The Applicant added that the three officer, under the direction of the OCS, Arror Police Station should produce the said Abigael Maiyo in Court or clarify all the fishy actions evident in the OB.

### **Submissions**

19. The Application was canvassed vide written submissions. The Applicant filed submissions dated 20<sup>th</sup> May 2025 whereas the Respondents filed submissions dated 22<sup>nd</sup> September 2025. I have read both submissions and Counsel have basically reiterated the averments already herein summarized in their respective pleadings and there is no need therefore to reproduced the same.

### **Determination**

20. This cause is basically a habeas corpus application brought under **Articles 25(d) and 51(2)** of the **Constitution** and **Section 389** of the **Criminal Procedure Code**, and **Rules 2 and 3** of the **Criminal Procedure (Directions in the nature of Habeas Corpus) Rules**. It is important to consider what these legal provisions stipulate.

21. **Article 25(d)** of the **Constitution** provides for the “**right to an order of habeas corpus**”.

22. **Article 51(2)** of the **Constitution** relates to the rights of persons detained or held in custody or imprisoned. It states:

**“A person who is detained or held in custody is entitled to petition for an order of habeas corpus.”**

23. **Article 165(3)(a)(b)** of the **Constitution** on the other hand, declares the unlimited jurisdiction of the High Court, extending to the determination of the question of whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

**24.**In *Secretary of State for Home Affairs v O’Brien*, (1923) AC 603, 609), the court had this to say about the writ:

**The writ of *habeas corpus*, by which the legal authority under which a person may be detained can be challenged, is of immemorial antiquity. After a checkered career in which it was involved in the struggles between the common law courts and the Courts of Chancery and the Star Chamber, as well as in the conflicts between Parliament and the crown, the protection of the writ was firmly written into English law by the Habeas Corpus Act of 1679. Today, it is said to be ‘perhaps the most important writ known to the constitutional law of England...’**

**25.**Section 389 of the *Criminal Procedure Code, Cap 75*, goes further to give directions on the orders that the High Court may issue regarding pleas for habeas corpus. To reproduce the rather long directions, the section reads:

- 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.

26. Finally, the **Criminal Procedure (Directions in the nature of Habeas corpus) Rules**, also cited by the Applicant, gives directions on the manner of conduct of the habeas corpus proceedings.

27. In the case of **Grace Struat Ibringira & others v Uganda [1966] EA 445**, the Court of Appeal for Eastern Africa had the following to say regarding this writ at page 454: -

**The writ of Habeas Corpus is a writ of right granted ex debito justitiae, but it is not a writ of course and it may be refused if the circumstances are such that the writ should not issue. The purpose of the writ is to require the production before the court of**

a person who claims that he is unlawfully detained to test the validity of the detention and to ensure his release from unlawful restraint should the court hold that he is unlawfully restrained. ... The writ is directed to one or more persons who are alleged to be responsible for the unlawful detention and it is a means whereby the humblest citizen ... may test the action of the executive government no matters how high the position of the person who ordered the detention.”

28. This finding was echoed in the case of **Masoud Salim Hemed & another v Director of Public Prosecutions & 3 others (2014) eKLR** wherein the court discussed the scope of the right to habeas corpus as follows:-

“33. In Philippines case of *MA. Estrelita D. Martinez v Director General and others*. GR No 153795 of 17<sup>th</sup> August 2006 the Supreme Court of the Philippines set out the object of habeas corpus as follows:

“habeas corpus generally applies to ‘all cases of illegal confinement or detention by which any person is deprived of his liberty or by which the rightful custody of any person is withheld from the person entitled thereto.

Said this Court in another case:

The ultimate purpose of the writ of habeas corpus is to relieve a person from unlawful restraint. It is devised as a speedy relief

from unlawful restraint. It is a remedy intended to determine whether the person under detention is held under lawful authority. – (*Ngaya-an v Balweg*, 200 SCRA 149, 154-5, August 5, 1991 per Jaris, J)’

If the respondents are neither detaining nor retraining the applicant or the person on whose behalf the petition for habeas corpus has been filed, then it should be dismissed. This Court has ruled that this remedy has one objective – to inquire into the cause of detention of a person:

29. Custody is crucial in a case of habeas corpus, and even where physical custody is lost by the voluntary act of the respondents the right to habeas corpus will be affected. In **Mariam Mohamed and another Commissioner of Police and another (2007) eKLR**, Ojwang’ J. (as he then was) considered an application for habeas corpus in which the subject was admittedly taken out of jurisdiction of the Kenyan courts and held:

“It is evident that, voluntarily or involuntarily, the respondents have placed themselves in a position in which it is no longer within their power to produce the subject before Court. This Court, within the concept of habeas corpus, will be unable to make orders for the production of the subject, because such that a court of law is not to make an order in vain. Courts’ orders are focused, clear, enforceable, and capable of being secured by applying the law of contempt, against those who disobey. From the facts placed before this Court, the respondents are, at this moment, not in

**control of the physical custody of the subject, and so they would not be in a factual position to comply with a writ of habeas corpus. It follows that the applicants’ Chamber Summons of 18<sup>th</sup> October, 2007 is either overtaken by events, or would have to remain in abeyance, until the subject is physically in the custody of the respondents.”**

**30.**It is clear from the above that an order of habeas corpus can only be enforced when it is proved to the satisfaction of the court that a victim is in the legal or otherwise custody of the State or State agencies. In the event the issue of custody is not firmly established then any such application shall fail.

**31.**The general burden in a habeas corpus application must be pursuant to **Section 107** of the **Evidence Act** and it remains with the Applicant. It is therefore incumbent upon the Applicant to demonstrate by adducing evidence that should adequately satisfy the court that the missing person, the Interested Party, on whose behalf the Application is filed, is under the custody of the Respondents, or an identifiable person or persons whom the Respondents can lawfully be compelled to retrieve the missing person from their illegal custody.

**32.**In the instant case, the Respondent has stated that the Interested Party was in their custody having been arrested for an allegation of infanticide. That she was subsequently released on free bond on 8<sup>th</sup> February 2025 under form P52 to report back to the Police Station on 10<sup>th</sup> February 2025 but she never did. That the Respondents then raised the issue with the ODPP by way of letter dated 15<sup>th</sup> February 2025 seeking directions on the way forward. The

relevant OB excerpts and the Letter to the ODPP were annexed to the Replying Affidavit of CIP Ezra Mworira as EM1, EM2, EM3, EM4 and EM5 and I have perused them.

**33.**Counsel for the Applicant on his part maintained that CIP Mworira who described himself as the OCS Chesuman which is the mother station of Arror Police Post where the Interested Party was booked in had no capacity to swear the Affidavit for reasons that he was not at the locus in quo when the alleged disappearance of the Interested Party occurred and he is also not the Officer sued. Counsel also argued that the OB extracts produced had been doctored as already summarized.

**34.**I have considered the explanation given by the Counsel for the State on why the Affidavit was signed by this deponent and I am satisfied by the said explanation. Secondly, I have considered the assertion that the documents produced by the OCS were doctored, the court takes note of the fact that the record of the court shows that this Officer who was present in court was ordered to produce in court the originals of the OB as well as the cell register in court for examination by the Counsel for the Applicant. The Officer did avail the documents on 6<sup>th</sup> March 2025 and the court gave the Counsel and the Officer time to go through all these documents together.

**35.**At the end of the process, Counsel did not raise any issue on any discrepancies that he may have noted with the court, for the record of the court. He also did not seek to cross examine the Officer on the said documents and/or on any discrepancies that he may have noted if at all. Instead, he stated that he had inspected the documents and was now ready to file his further Affidavit, which he did, and it is in the said Affidavit that he

now raised the issue of the discrepancies and the conclusion that the documents were therefore doctored.

**36.**In considering these assertions by Counsel against this backdrop, and having also perused and considered the said documents, I find that these assertions have not been sufficiently proved to warrant a finding by the court that indeed the documents availed to court by the OCS had been tampered with and as such the court ought not to rely on them. Counsel had all the time to demonstrate that which he alleges by cross examining the Officer on the original documents so as to enable the court gauge the truthfulness or otherwise of the depositions of the Officer as against the said documents but he did not.

**37.**For the above reasons, I am satisfied with the explanation given by the Respondent that the Interested Party is no longer in their custody. In this regard, as has been held in the above cited cases, in such circumstances, the application for *habeas corpus* must therefore be dismissed. Accordingly, I now hereby find that the Application by the Applicant that the Interested Party is in the custody of the Respondents has not been proved. The Application is therefore is now hereby dismissed.

**Read dated and Signed at ITEN on 5<sup>th</sup> March 2026**

**E. OMINDE**  
**JUDGE**

