



**Juma v Inspector General of Police & another; Director of Public Prosecutions
& 2 others (Interested Parties) (Miscellaneous Criminal Application
E054 of 2023) [2025] KEHC 2711 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2711 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E054 OF 2023
MS SHARIFF, J
FEBRUARY 27, 2025**

BETWEEN

FRANCIS JUMA APPLICANT

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

OCS KONDELE POLICE STATION 2ND RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS INTERESTED PARTY

KENYA SCOUTS ASSOCIATION INTERESTED PARTY

KENYA SCOUTS COUNCIL INTERESTED PARTY

RULING

1. The applicant, Francis Juma, filed this cause by way of Notice of Motion dated 21st September 2023, pursuant to the provisions of; Section 268 & 275 and Articles 25 a& 165 (6) & (7) of the Constitution of Kenya, 2010. He is seeking an order of habeas corpus to issue against the OCS Kondele Police Station on whose jurisdiction hold under unlawful custody Jeffrey Ayuka and Victor Radidio hold. In support of the Originating Summons are the following grounds:
 - a. That the Applicant is a life member of the Kenya scout association and formerly an assistant chief commissioner in ranks of the association and fully committed to the scout loyalty.
 - b. That on the 7th of August 2023, the Applicant notice two motor bikes in Kisumu operating as boda boda and belonging to the Kenya Scouts Association which had disappeared in a mysterious circumstance without the knowledge of the association.



- c. That through co-ordination with OCS parliament police station and officers from Kondele police station, one of the motor bikes bearing registration number KMFC 609G was recovered on the 9th August 2023, in Kisumu and the suspect arrested.
 - d. That on the same day, 9th August 2023 in the night under unknown circumstances the accomplice, Victor Radidi, visited the Kondele police station and compromised the OCS securing the release of the duo in breach of the rights of the Applicant.
 - e. That it is in the interest of justice and fairness to have the said OCS Kondele police station compelled to have the suspects arraigned in Court.
2. The application is supported by the affidavit of the even date sworn by Francis Juma, the Applicant reiterating the grounds a presented on the face of the Motion application.
 3. Opposing the application, the 3rd Respondent filed its grounds of opposition noting that the Applicant’s application dated 21st September 2023, is premature as against the 3rd Respondent as they have not received the investigation file from the 1st and 2nd Respondent.
 4. Vide a Replying Affidavit sworn on 14th March 2024, by Moses Ochieng Danda, the national executive commissioner to the 2nd Interested Party and Victor Radido, the chief commissioner of the 2nd Interested Party and council member at the 3rd Interested Party, they averred that the Applicant’s application is incurably defective, lacks merit and is tantamount to an abuse of Court process. According to them, the Applicant has flawed the procedure for obtaining an order of habeas corpus as the same can only be sought vide a petition under the 2013 rules for enforcement of the rights to habeas corpus. Also, he flawed the Applicant for seeking an order of habeas corpus for individuals who are not even in the custody of the police. They averred that the Applicant failed to prove the nexus of relationship to the two mentioned individuals and that the contents of his application and Supporting Affidavit are false as the individuals named have not been detained or arrested in the first place.
 5. This cause is basically a habeas corpus application brought under Articles 51(2), 165(3)(a) and (b) 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.
 6. Articles 51(2) of the *Constitution* relates to the rights of persons detained 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.”
 7. Article 165(3)(a)(b) 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.
 8. 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 harbeas corpus. To reproduce the rather long directions, the section reads:

“The High court may whenever it thinks fit direct

- That any person within the limits of Kenya be brought up before the court to be dealt with according to law.



- That any person illegally or improperly detailed in public or private custody within those limits be set at liberty.
- That any prisoner detailed 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.
- Matters relating to court martial.
- That any prisoner within those limits be removed from one custody to another for the purposed of trial.
- Lastly, that the body of a defendant within whose limits be brought in on a return of cepi corpus to a writ of attachment.”

9. 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.
10. From the above constitutional and legal provisions, causes relating to habeas corpus ought to be commenced by way of petition the effect of which is that the Court would hear the evidence of the parties who would also be subjected to cross examination. In our case, this matter was commenced by way of Notice of Motion. To me, this was foul procedure. However, with concurrence of the parties, the seriousness of this case and the provisions of Article 159(2)(d), this Court considered that this is a procedural technicality which would be overlooked to ensure that the ends of justice are met. The Court therefore called for viva voce evidence for both sides.
11. The Applicant’s counsel stated that Jeffrey Ayuka Aand Victor Radido were arrested by the Kondele Police officers but instead of them preferring charges of stealing against them the OCS Kondele was compromised and he released them. The 2 motorcycles that the Applicant spotted them with were stolen and the investigations by the Applicant proved that they were apprehended.
12. The 1st Interested party’s counsel relying on the sworn Replying Affidavit sworn on 3rd June 2024, told the Court that the ODPP are not in receipt of any file/report from the 1st Respondent. The apparent absence of any concluded investigations prevented the ODPP from making any determination on whether to institute criminal charges against the alleged 2 suspects detained. She insisted that the application lacked factual and legal basis thus no evidence to justify the issuance of writs of habeas corpus.
13. Mr. Ouma for the 2nd & 3rd Interested Parties stated that the Applicant’s application is guilty of misrepresentation of facts as Victor Radido who swore a Replying Affidavit on 14th March 2024, averred that he was never arrested and has never recorded a statement. He told the Court that Jeffery Ayuka and Victor Radido are free citizens and that the 1st interested party has never made any report with regards to theft of any of its property.
14. Parties were directed to file and exchange their submissions. All parties complied.
15. I have considered the evidence of both the Applicant, and the Interested Parties sides and also the submissions made by their respective counsels. To me, the issue for determination in this matter is whether or not an order of habeas corpus can issue herein.
16. The *Constitution* of Kenya at Article 51(2), seen above, guarantees the right to a writ of habeas corpus to persons detained or held in custody. To me, this presupposes that for the writ to issue, the Applicant must show that the subject is held in custody, detained or imprisoned. In effect therefore, the first



burden on the Applicant is to prove by way of evidence that indeed the subject is held in custody or detained or imprisoned.

17. And it is the same spirit that is espoused under Section 389 of the *Criminal Procedure Code* (seen above). That the subject must be within the local limits of Kenya, or detained in Public or private custody, or prison.
18. Anew, from the above the elements of detention (unlawful) and the custodian of the subject are clearly of utmost importance in habeas corpus pleas. It is therefore mandatory that the Applicant proves unlawful detention and in whose custody for the order to issue.
19. The old case of *Grace Straut Ibingira and others v Uganda* (1966) EA 447(CA) at 454, gives a general view of the writ of habeas corpus, where the Court held;

“The writ of habeas corpus is a writ of right grante ex debito justacine, 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 so as to ensure his release from custody (unlawful) 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 most humble citizen may test the action of the executive government no matter how high the position of the person who ordered the detention.”

20. And in the more recent case of *Masoud Salim Hemed and another v DPP and 3 others* (2014) eKLR, the Court held;

“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”

21. I fully align myself with these findings. And for the obvious reason that it would be in vain to issue the writ of habeas corpus wherein the subject is not in any detention or unlawful detention. It would equally be in vain to issue the writ against a Respondent or body who is not in custody of the subject.
22. A classic case is the finding of the Hon. Justice E. Muriithi, in *LSK v Brian Nzenze and others* (2018) eKLR, that;

“Custody is very critical so that when an order for habeas corpus is made, it should not be in vain.”

23. From the foregoing, I am not convinced that the Applicant has shown sufficient proof that the subject is in the custody of the Respondents or any police station or government facility as to enable this Court issue the orders prayed for in this application. Failure to prove these 2 keys elements renders this application of the Applicant dated 21st September 2023, unmeritorious. I dismiss the same wholly.

Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF FEBRUARY 2025.

M.S.SHARIFF

JUDGE

