



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.28 OF 2017

SAMUEL DONG LUAK.....1ST APPLICANT

IDRI AGGREY EZBON.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicants, Samuel Dong Luak and Idri Aggrey Ezbon are South Sudanese nationals. They have been residents in Kenya for some time. According to the affidavits filed in this application, both are members of SPLM – IO, an opposition party in South Sudan. They are members of the Nuer community. The 1st Applicant is a lawyer and a human rights activist. It is not clear from the pleadings what the profession of the 2nd Applicant is. However, it was pleaded that both Applicants are duly recognized as refugees in Kenya. According to Ayah Benjamin (the wife), the wife of the 2nd Applicant on 24th January 2017, the 2nd Applicant left their home at Valley Arcade for his usual morning jog. He did not return home. He has not returned home ever since. The wife reported the 2nd Applicant's disappearance to Muthangari Police Station. She did not immediately get any positive response in regard to the whereabouts of her husband. Polit James, the brother of the 1st Applicant stated that the 1st Applicant disappeared on 23rd January 2017. According to the affidavit sworn by Chief Inspector Fidelis Ndolo, the investigating officer in the case, the 1st Applicant was last seen at Dreams Bin Restaurant on 23rd January 2017 at 8.31 p.m. The restaurant is along Kaunda Street within the Central Business District of Nairobi. Both Applicants have not been seen or heard from since their said disappearance. Their mobile phones went silent. From the phone records availed to the police by Safaricom Limited, a mobile service provider, the mobile numbers of the Applicants became inactive contemporaneous with their disappearance.

Members of the Applicants' families became concerned that despite reporting the disappearance of the Applicants to the police, no investigation seems to have been undertaken to establish the whereabouts of the Applicants. On 26th January 2017, the Applicants, through their advocate Messrs Eddy N. O. Orinda moved this court pursuant to the provisions of the Constitution and **Section 389** of the **Criminal Procedure Code** seeking this court's order of *habeas corpus*. It was alleged in the application that the Applicants' families had received information to the effect that the Applicants were in police custody pending their "**unlawful deportation back to the war torn Republic of South Sudan**". It was averred that the deportation of the Applicants was eminent. According to their advocate, such deportation would

infringe the Applicants' right as refugees in Kenya. He urged the court to issue an appropriate order to secure, firstly, the presence of the Applicants in Kenya, and secondly, to have the Applicants produced in court and appropriate orders be made as to their freedom.

The application was filed under certificate of urgency. The court directed the application to be served upon the State for hearing on the following day i.e. 27th January 2017. On that day, Ms. Aluda, acting for the State told the court that she had confirmed that the Applicants were not in the custody of the police or any other State organ. In particular, she stated that the Applicants were not in the custody of the regular police, the Criminal Investigation Directorate or the Immigration Directorate. The families of the Applicants were not satisfied with the explanation given by the State. They insisted that the court, despite the information given on behalf of the State, issues appropriate orders to secure the presence of the Applicants in Kenya and prohibit their deportation from the jurisdiction of the court. They also asked the court to direct the higher echelons of the police to take over the investigations of the disappearance of the Applicants. This court did issue the orders that the families of the Applicants sought. Further to that, it directed that the police investigate communication made through certain mobile phone numbers which the families suspected may have been connected to the disappearance of the Applicants. The court further directed the police, in particular the Nairobi County Criminal Investigation Officer, to present a report to court on the progress of investigations. The court further requested the families of the Applicants, and any other person alleged to be connected with the disappearance of the Applicants, to record statements with the police with a view to assisting in the investigations. The matter was to be mentioned before the court on 31st January 2017 to ascertain the progress of the investigations.

On 31st January 2017, it became apparent to the court that the police required more time to investigate all the leads that had emerged, particularly that which was provided by members of the families of the Applicants. It granted the police more time to conclude its investigations. More progress reports were subsequently presented to the court. On 9th February 2017, this court directed the parties to file their respective further affidavits so that the court can determine the application placed before it. The parties duly complied with this direction. The affidavits were duly filed. This court heard the application on 13th February 2017.

From the affidavits filed and the submission made before court, the following facts are not disputed:

- i) It is not disputed that the Applicants disappeared, respectively, on 23rd and 24th January 2017.
- ii) The Applicants have not since been seen or heard from.
- iii) The Applicants are members of the Nuer community of South Sudan.
- iv) There was anecdotal evidence that the Applicants were involved in the opposition politics of South Sudan, specifically with an opposition party referred to as "**SPLM – IO**".
- v) The court took judicial notice of the fact that there are currently political differences between the South Sudanese Government and the opposition. This difference, in the recent past, took a violent turn resulting in loss of life and displacement of people.
- vi) The Applicants are recognized as refugees in Kenya. Their refugees status was not challenged by the State.
- vii) Due to the existence of these political differences, there is suspicion between members of the South Sudanese Community living in Kenya which suspicion appears aligned between those supporting the

South Sudanese Government and those opposed to it.

viii) It is in this context that the court will consider this application of *habeas corpus* and the disappearance of the Applicants.

There were certain facts which were disputed:

i) It was disputed by the State that the Applicants were in their custody.

ii) According to the State, the Applicants' case is that of the disappeared or at worst, abduction.

iii) The Applicants' families insist that the Applicants are in the custody of the National Intelligence Service. In that regard, they requested the court to order the Director General of the Intelligence Service to be summoned before the court to give an appropriate explanation as to the whereabouts of the Applicants.

iv) There was allegation made by the Applicants' families that one John Top Lam was involved in the disappearance of the Applicants. It was not clear from their affidavits how the families came to this conclusion. It was however apparent that after the disappearance of the Applicants, telephone conversations were made between the brother of the 1st Applicant and the said John Top Lam regarding the disappearance. The conversations were taped. In the transcripts availed to court, the said John Top Lam appears to insinuate that he knew the whereabouts of the Applicants and would avail information if he was facilitated with the sum of USD 10,000. This court directed the police to investigate the said John Top Lam. He co-operated with the police. He recorded a statement. He has sworn an affidavit denying the allegations made by the Applicants' families to the effect that he had any knowledge of the whereabouts of the Applicants.

v) The investigating officer, Chief Inspector Fidelis Ndolo swore an affidavit and explained that upon conducting investigations, he was unable, for the time being, to link the said John Top Lam with the disappearance of the Applicants. He stated that the statement of one Michael Kuajien seems to indicate that the Applicants are no longer within the jurisdiction of this court. This lead has, however, not been exhaustively investigated. The investigating officer was frustrated that members of the families of the Applicants who appeared, in his view, reluctant to give all the relevant information that would aid the police in the discovery of the whereabouts of the Applicants. This assertion has vehemently been disputed by the families of the Applicants.

This court's evaluation of the rival facts placed before it and the applicable law leads it to the following determination:

The application before the court is that of *habeas corpus*. As was held by Ngenye-Macharia J in **Abdinasir Ahmed Mohammed –Vs- Republic [2015] eKLR**:

“A writ of Habeas Corpus shall be enforced when the applicant demonstrates that the subject is in the unlawful custody of the respondent. See Grace Stuart Ibingira and Others –Vs- Uganda (1966) EA 445 as cited in Mombasa H.C. Petition No.7 of 2014 Masoud Salim Hemed –Vs- D.P.P. and 2 Others in which the East African Court of Appeal sitting in Uganda delivered itself as follows:

“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 so as to test the validity of the detention and so as to ensure his release from unlawful restraint should the court hold that he is unlawfully restrained. It is a writ which is open not only to citizens of Uganda but also to others within Uganda and under the protection of the state. The object of the writ is not to punish but to ensure release from unlawful detention; therefore it is not available after the person has in fact been released. 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 in Uganda may test the action of the executive government no matter how high the position of the person who ordered the detention. If the writ is not obeyed then it is enforced by the attachment for contempt of all persons who are responsible for the disobedience of the writ.”

In Masoud Salim Hemed & another –Vs- Director of Public Prosecution & 3 others [2014] eKLR Mureithi J held as follows:

“The True Scope of Habeas Corpus

33. In the Philippines case of MA. Estrelita D. Martinez v. Director General and Ors. GR No.153795 of 17th 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 1489, 154-5, August 5, 1991 per Jaris, J.)’

If the respondents are neither detaining nor restraining 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:

‘The purpose of the writ is to determine whether a person is being illegally deprived of his liberty. If the inquiry reveals the detention is illegal, the court orders the release of the person. If, however, the detention is proven lawful, then the habeas corpus proceedings terminate. The use of habeas corpus is thus very limited. – (Alejano v. Cabuay 468 SCRA 188, 200, August 25 2005per Carpio, J.)’

When the respondents making a return of the writ state that they have never had custody over the person who is the subject of the writ, the petition must be dismissed, in the absence of definite evidence to the contrary.”’

In the present application, for writ of habeas corpus to issue, it was required to be established on behalf of the Applicants, that the Applicants were being unlawfully detained by the police or by a government agency. It has not been established to the satisfaction of this court that the Applicants are in custody of or are being detained by the police or any other government agency. It was alleged that the Applicants

could be in the custody of the National Intelligence Service. No cogent evidence was placed before this court to support this allegation. This court considers such assertion to be merely speculative and devoid of any truth. This court is satisfied that the State has placed evidence before it that the Applicants are not in its custody. There was no reason put forward by the families of the Applicants which would lead this court to the conclusion that the State was holding the Applicants in its custody. What is clear, however, is that the Applicants' disappearance may be connected with the fluid political situation in South Sudan particularly in relation to the South Sudanese current political difference between the leading political players. The police should investigate this angle.

Having carefully evaluated the facts of this case, this court concludes that the Applicants' disappearance is as a result of foul play by persons for the time being unknown. The Applicants' disappearance is a criminal act of abduction which the police should thoroughly investigate. There is no evidence placed before this court that the government of Kenya or its security agents had anything to do with the disappearance of the Applicants. The government of Kenya, on the face of it, has nothing to gain from the Applicants' disappearance. In fact, since it was served, the government of Kenya, and specifically the police has complied with the directions issued by the court in regard to the investigations of the disappearance of the Applicants.

In the premises therefore, this court reach the determination that the application of habeas corpus cannot in the circumstances of this application be granted. The Applicants are not in the custody of the police or any government agency in Kenya. The Applicants' disappearance can only be as a result of a criminal act of abduction by persons for the time being unknown which the police should investigate. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2017

L. KIMARU

JUDGE



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