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Court:	High Court at Mombasa
Case Action:	Ruling
Judge:	Anne Apondi Ong'injo
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Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Mombasa
Docket Number:	-
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Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CRIMINAL APPLICATION NO. 91 OF 2018

MUSLIMS FOR HUMAN RIGHTS.....1ST APPLICANT

MOHAMED AVUKAME HARON.....2ND APPLICANT

-VERSUS-

INSPECTOR GENERAL OF POLICE AND ANOTHER.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

RULING

Application

1. By an application dated 5th July 2018, the Applicants sought pursuant to Articles 25 (d) and 51 (2) of the Constitution of Kenya, Section 389 of the Criminal Procedure Code and Rules 2 and 3 of C.P.C (Directions on the nature of *Habeas Corpus*) rules that:

1) The court do issue directions of the nature of *Habeas Corpus* directed at the Respondents witness by themselves or their agents or their representatives to have the person and the body of Mohammed Avukane Haron produced before the court within 24 hours of the order being made.

2) That the applicant be released on bail as shall be determined by the court.

2. The application was supported by grounds on the face of application and affidavits of Hassan Abdi Abdille, Salim Wampy, Fatma Abubakar and Bwanaheri Avukame Haruni. The grounds of application were that the 2nd Applicant had been illegally held in custody for more than ten months since being arrested on the 23rd day of August 2017 outside the MUHURI Legal Aid Office adjacent to the Mombasa Law Courts by agents or representatives of the Respondents. That the 2nd Applicant had not been charged and yet he had been denied the chance to talk to his relatives while in detention. That there was no reasonable excuse for continued detention and 2nd Applicant was being held contrary to the provisions of the constitution on the right to fair trial and habeas corpus.

3. Hassan Abdi Abdille in affidavit sworn on 5th July 2018 averred that he was Executive Director of 1st Applicant, a Legal Aid Clinic where the events subject of this application occurred. He averred that 2nd applicant who hailed from Lamu was a prominent person within the coastal community and a vocal activist for fair practice in adjudication of land issues and was an applicant who sought for leave to institute Judicial Review Proceedings in Malindi ELC Misc. Civil Application No. 13 of 2016. That the 2nd Applicant had several campaigns agitating against Land grabbing culture by prominent persons in the County and National Government and as a result made several complaints about his life being in danger. That on 23rd August 2017 on or about 12.30 pm the 2nd Applicant was arrested at the premises of the MUHURI Legal Aid Office next to Mombasa Law Court in the presence of all and sundry. That he was handcuffed and bundled into a Toyota Prado Registration KBQ 152U by persons who identified themselves as Police Officers and yet charges had not been brought against him neither had he been arraigned before any court to take plea of any alleged criminal activity. Hassan Abdi Abdille swore that 2nd Applicant was Central Police Station under OB No. 5/23/8/17. The rest of Salim Wampy's Affidavit reiterated what Hassan Abdi Abdille averred in his affidavit.

4. Fatma Abubakar averred that the 2nd Applicant had accompanied him to 1st Applicants Offices to make a complaint against the

husband who had taken custody of their children. That as she was crossing the road to go where the 2nd Applicant was, she saw 4 people next to a Motor Vehicle Prado, dark grey in colour Registration KBQ 152U approach the 2nd Applicant and one person with handcuffs arrested him and handcuffed him and when he resisted, they wiped out pistols and asked if he wanted to go or not and he told them he would go but sought to being held unlawfully and illegally by agents of the Respondents and direct contraventions of the provisions of the constitution that requires all state organs, state offices and all persons to be guided and bound by the provisions of the constitution and the rule of law.

5. Salim Wampy in affidavit sworn on 5th July 2018, averred that the 2nd Applicant had accompanied Fatma Abubakar to 1st Applicants offices where she was to be interviewed when 2nd Applicant was arrested by persons who identified themselves as Police Officers and he was bundled into a Toyota Prado Registration KBQ 152U. That attempts by family to trace the 2nd Applicant were futile and a report was made at the Mombasa know what the problem was to no avail and he was threatened with guns and dared to resist. That when he tried to hand to the deponent some books and papers as well as reading glasses, the arresting officers' said "those are the things we want" and they took them from his possession.

6. That when she decided to go with him in the car 2nd Applicant told her not to as he would be okay. He instructed her to follow him in a waiting taxi. She said that they followed with taxi into town but lost signal due to traffic and despite looking all over the police stations, she was unable to trace the said Motor vehicle nor the 2nd Applicant's whereabouts. She made a report at Central Police Station vide OB No 5/23/8/2017. Fatma averred that arrest was witnessed by Salim Wampy of MUHURI and a Court Process Server namely Rashid.

7. Bwanaheri Avukame Haruni the brother to 2nd Applicant received a call from Fatma Abubakar who informed him about the arrest of 2nd Applicant. He averred that the documents that were taken from 2nd Applicant were in respect to Manda Settlement Scheme which was in contention of which he wanted the 1st Applicant to take up. Bwanaheri averred that 2nd Applicant had filed ELC No 13 of 2013 at Malindi which he lost. He was also aware that 2nd Applicants 2 friends Emmanuel Kaingu Karisa and Swaleh Obo did file Miscellaneous Suit No. 4 of 2014 by way of Judicial Review which an amorphous group calling itself Manda Surveying Project were not happy with and they alleged 2nd Applicant was behind it. Bwanaheri averred that his brother confided in him that his life was in danger prior to his abduction as he was under pressure to convince applicants in Miscellaneous Application No. 4 of 2014 to withdraw it. That 2nd Applicant declined an offer of a huge sum of money to influence the parties in Miscellaneous Application No. 4 of 2014.

8. The application herein was heard by way of *viva voce* evidence as per directions taken on 30th September 2019.

9. Fatma Abubakar Mohammed Khatib was the 1st witness for the Applicants and she reiterated what she averred in her affidavit. She said she suspected that the people who arrested the 2nd Respondent were Police Officers as they had handcuffs and pistols. She said a process Server known as Rashid who witnessed that abductions/arrest drove the taxi they used to follow the suspect Motor vehicle but they lost sight at the Governors round about. She said she reported matter at Central Police Station and she was told to come the following day. That the following day when she returned to the station, she was told that Police do not use such vehicles as prado. The next time they went to Police Station they were told Police knew nothing about the arrest as they had not received a report. She said the 2nd Applicant was house agent at Malindi and she did not inquire what he came to do at MUHURI Offices. She said she was not sure if it is Police who abducted her uncle but they had pistols and it is only Police who normally handle pistols. She said she did not know what the work of Director of Public Prosecutions were.

10. PW2 Bwanaheri also testified and reiterated his averments in the affidavit. In cross-examination he said he did not see the 2nd Applicant being abducted. He said the 2nd Applicant was a contractor and he had land in Manda Island-Lamu. He said the 2nd Applicant did not disclose who threatened him. He said Emmanuel Kaingu Karisa and Swaleh Obo were residents of Manda Island. He said a group known as Manda Surveying Project were not happy when Judicial Review Case No. 4 of 2014 was filed. PW2 said that PW1 called and told him when uncle was being arrested. That she was in company of an employee of MUHURI when the 2nd Applicant was abducted and they went and reported at Central Police Station. He admitted that the 2nd Respondent does not arrest people and did not give directions for arrest of 2nd Applicant.

11. The Applicants Counsel was never able to avail any other witness and the Applicants case was closed. That Respondents also closed their case without availing any witness.

Response

12. The 1st Respondent's grounds of opposition dated 11th October 2019 were filed on 14.10.2019 whereas 2nd Respondent's grounds of opposition dated 23rd August 2018 were filed grounds of opposition on 24th October 2019.

13. The 1st Respondent opposed the Chamber Summons application by stating that the Applicants have not demonstrated to the court that Mohamed Avukame Haron was indeed arrested by the 1st Respondent's officers and that he is in the custody of the 1st Respondent as alleged. That if the Applicants have any evidence on disappearance of Mohamed Avukame Haron, then it should be brought to the 1st Respondent's for assistance in tracing them and or investigations on their whereabouts and not to join the 1st Respondent's in the Proceedings. That in accordance with the Chamber Summons and Supporting Affidavit of the Applicant's, the Applicants have not confirmed that the alleged arresting individuals were police officers, they were never in uniform or numbers, they had a private car. That the Applicants have also not demonstrated that Mohamed Avukame Haron was booked in any police station and when the report was made at Central Police Station, the Applicants have not indicated that Mohamed Haron was found at the station. That the Applicants have mentioned several interest parties in their Affidavits, it is therefore not justified how they are the 1st Respondent to be the only one who could be knowing the whereabouts of Mohamed Avukame Haron yet there are other parties who could be knowing his whereabouts.

14. The 2nd Respondent opposed the application on grounds that the mandate of the Director of Public Prosecutions in relation to the 1st Respondent is spelt out under Article 15 (4) of the Constitution of Kenya 2010 as enabled and elaborated at Section 5 of the Office of the Director of Public Prosecutions Act No. 2 of 2013 and it does not include investigations, arrest and detention. That the DPP pursuant to its constitutional mandate under Article 157(4) has issued directions in writing to the 1st Respondent to cause speedy and thorough investigations to be conducted into the alleged disappearance and awaits a report for his necessary action in accordance with the law. That the Petition is not in compliance with the Chief Justice Rules under Section 389(2) Criminal Procedure Code- Criminal Procedure (Directions in the nature of Habeas Corpus Rules, 1948 (Cap 27 (1948) Sub. Leg. L.N 474/1963) and therefore is incompetent.

Analysis and Determination

15. From the grounds in support of the Application and the 4 affidavits Supporting the application as well as *viva voce* evidence weighed against the ground of oppositions, the issue for determination is whether the Applicants have proved to the satisfaction of the court that the Respondents were liable for the unlawful and illegal detention of the 2nd Applicant.

16. **Section 389 (1) Criminal Procedure Code** provides that:-

“(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.”

17. In the case of *Masoud Salim Hemed v AG, Petitions No. 7 and 8 of 2014*, the burden of proof in *habeas corpus* petitions lies with the petitioner until he proves detention by the respondent, upon which the respondent must prove the lawfulness of detention:

24. The general burden in a habeas corpus application must pursuant to section 107 of the Evidence Act remain with the petitioner. As stated in the case of MA. Estrelita D. Martinez v Director General & Ors., supra, “the petitioner must

establish any competent and convincing evidence that the missing person, on whose behalf the petition was filed, is under the custody of the respondents.” In this case the petitioners were able to establish, and this was admitted by the respondents, the arrest of the subject by the police and the question is on whether the police had custody of the Subject at the time of the habeas proceedings.

25. Where detention of an applicant is established, the burden of proving the legality of detention rests with the State, see *Archbold Criminal Pleading Evidence and Practice 2012* at p. 1767 paragraph 16-55. To place the burden on an applicant to prove illegality of the detention is to require the applicant to prove a negative.

18. A writ of *habeas corpus* shall only issue where it is demonstrated that the disappeared subject is in the unlawful custody of the Respondent. The rationale to this is simple; the Respondent and in this case the police cannot be compelled to produce what is not in their custody. I refer to this court’s holding in *Abdinasir Ahmed Mohammed v Republic [2015] eKLR* thus:

“A writ of Habeas Corpus shall be enforced when the Applicant demonstrates that the subject is in the unlawful custody of the respondent. In *Grace Stuart Ibingira and Others v Uganda (1966) EA 445* as cited in *Mombasa H.C. Petition No. 7 of 2014 Masoud Salim Hemed v D.P.P and 2 others* in which the then 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 of 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.”

19. The 1st Witness Fatma Abubakar Mohammed Khatib was present when the 2nd Applicant was allegedly arrested and/or abducted. She suspected those who abducted/arrested the subject were Police Officers because they had pistols and handcuffs. She however did not say she could remember their identities. She did not know their names and the vehicle that she said they were using. Search was not conducted to establish ownership.

20. PW2 claimed that 2nd Applicant had received threats from a group known as Manda Surveying Project. He did not give names of the alleged members and he was not present when the 2nd Applicant was arrested and he could not tell if the alleged members were among those who executed the arrest/abductions. Whether the 2nd Applicant was arrested on account of Judicial Review matter in Environment and Land Court filed by Emmanuel Kaingu and Swaleh Obo on family other reason was not established.

21. Although there is overwhelming evidence that the 2nd Applicant was abducted, the identity of the people who abducted him has not been established and the fact that the unidentified people were armed with pistols and handcuffs and were suspected to be Police Officers is merely speculative and cannot be used against the 1st Respondent.

22. In conclusion, this court finds that it has not been established to the required standards that the 2nd Respondent arrested and detained the subject and the cause against the 2nd Respondent cannot be sustained. This court will however issue an order to the DCI Central Police Station Mombasa to conduct an inquest into the disappearance or otherwise of the 2nd Applicant and come up with conclusive information as to what exactly happened. In that respect the witnesses herein and any others should record statements with the DCI and assist with further and proper investigations to unearth what happened to 2nd Applicant. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 13TH DAY OF JANUARY 2022

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

No appearance for Ms. Ezekiel for the Applicants

Ms. Kambaga holding brief for Mr. Mulamula for the Respondent

Ruling to be transmitted to the 1st Applicant's Offices

HON. LADY JUSTICE A. ONG'INJO

JUDGE



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