

9.

HABEAS CORPUS

INTRODUCTION

The writ of *habeas corpus* consists of a mandatory order by the court or judge directed to any person who is alleged to have another person unlawfully in his custody, requiring him to have the body of such person before the court or judge immediately after receipt of the writ together with the day and cause of his being taken and detained, to undergo and receive all such things as the court may order.

TYPES

10

- Habeas corpus ad subjiciendum – secures liberty
- Habeas corpus ad testificandum – secures attendance of a prisoner in custody under civil process to give evidence before any court, tribunal, commission, etc
- Habeas corpus ad respondendum – secures attendance of a prisoner in custody under serving prison sentence to give evidence before any court, tribunal, commission, etc.
- Habeas corpus ad deliberandum – removal of prisoners from one custody to another (now obsolete).
- Habeas corpus ad satisfaciendum – obsolete
- Habeas corpus ad prosequendum – obsolete
- Habeas corpus ad faciendum et recipiendum also known as Habeas corpus cum causa - obsolete

OBJECTIVES

- Secure liberty of the subject. It is a remedy for wrongful ~~depreciation~~ ^{deprivation} of liberty
- An effective means of immediate release from unlawful and unjustifiable deprivation of liberty.
- The High Court commands the production of the subject and inquires into the cause of deprivation of liberty imprisonment
- Lack of lawful reason for detention will lead the court to order release of the subject.
- The remedy exists both at common law and statute.
- Remedy available in criminal and civil cases.

CONSTITUTIONAL PROVISION

- The right to liberty is secured under Section 72 of the Constitution of Kenya.
- The exceptions to that right are spelled out in the Constitution and basically consist of deprivation of liberty authorized by law.
- Suspects of criminal offences attracting capital punishment must be taken before a court as soon as is reasonably practicable but in any event within 14 days from the date of arrest. [See Section 72 (3)(b)].
- Suspects of all other criminal offences (other than capital offences) must be taken before a court as soon as is reasonably practicable but in any event within 24 hours from the date of arrest. [See Section 72 (3) (b)].
- In cases where suspects have not been taken to court within the stipulated time and the police or prosecuting authorities do not prove that they have taken suspects to court within a reasonably practicable time as stipulated in the Constitution, the Court of Appeal has held such violations to be unacceptable and capable of violating the right to be tried within a reasonable time. As a consequence of such violation, the Court of Appeal has quashed convictions on the basis of such violations alone irrespective of the evidence available and the gravity of the crime. (See cases of: -)

contd...

- (i) Albanus Mwasia Mutua vs Republic Criminal Appeal No. 120 of 2004 (CA).
- (ii) Gerald Macharia Githuku vs Republic Criminal Appeal No. 119 of 2004 (CA).
- (iii) Ronald Manyonge Chepkui vs Republic Criminal Appeal No. 87 of 2006 (HC).

- In a more interesting development of jurisprudence, the High Court has terminated prosecution and ordered release of suspects whose rights to be taken to court within the stipulated time have been violated. (See the cases of: -)

- (i) Republic vs James Njuguna Nyaga Criminal Case No. 40 of 2007 (HC).
- (ii) Ann Njogu & 5 others vs Republic Misc. Cr. App. No. 551 of 2007 (HC).

- These developments indicate the preparedness of the courts to offer supplemental remedies to the old writ of *Habeas Corpus*.
- It is now a matter for legal practitioners to elect what remedy to pursue in the event that their clients' liberty is deprived or threatened with deprivation. Every set of circumstances will dictate the most efficacious remedy.

PROCEDURE

Criminal Procedure Code

- Section 389 gives the statutory authority for issuance of various types of *Habeas Corpus*.
- The Chief Justice has made rules of court to regulate procedure.
- The Rules are known as the Criminal Procedure (Directions in the nature of *Habeas Corpus*) Rules.
- Applications are brought under Chamber Summons (in triplicate) and made to a judge in chambers *ex-parte*. The Chamber Summons are supported by affidavit(s).
- At the *ex-parte* stage, court issues summons to the authority detaining the subject and that authority is required to show cause why detainee should not be released forthwith.
- Pending return of summons, detainee may be released on bail by the court.
- *Habeas Corpus ad testificandum* provided for under Rule 10 and the procedure is the same as where a subject is deprived of liberty.
- *Habeas corpus ad deliberandum* provided for under Rule 11.
- The application for the writ of *habeas corpus* can be brought by the subject or his relation or friend.