



REPUBLIC OF KENYA



KENYA LAW
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**Olubendi v Attorney General (Civil Suit 247 of 2012)
[2023] KEHC 18533 (KLR) (Civ) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18533 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 247 OF 2012

CW MEOLI, J

MAY 25, 2023

BETWEEN

ANNE CHRISTINE AKINYI OLUBENDI PLAINTIFF

AND

THE HONORABLE ATTORNEY GENERAL DEFENDANT

JUDGMENT

1. Anne Christine Akinyi Olubendi, (hereafter the Plaintiff) sued The Honorable Attorney General (hereafter the Defendant) for general and exemplary damages for the unlawful impounding and detention of her motor vehicle registration number KAS 943Y Toyota Prado (hereafter suit motor vehicle).
2. The Plaintiff avers that on May 12, 2011 officers attached to the Kenya Traffic Police stationed at Kabete Police Station intercepted her at Kabete Area as she drove her motor vehicle along Nairobi-Kisumu Road and having impounded the suit motor vehicle continued to hold the said vehicle without any lawful reason and or excuse until December 6, 2011 when they released it to the Plaintiff without any reasonable explanation. Further that, the impounding of the suit motor vehicle in the presence of her passengers was done in a reckless, degrading, and undignified manner that had the effect of lowering her esteem in the public eye. The Plaintiff averred that by reason of the aforesaid action of the Kenya Police, she had suffered loss and damages.
3. On October 10, 2012 the Defendant filed a statement of defence denying the key averments in the plaint and averred that if the Plaintiff's vehicle was intercepted, then the act must have been done after it was established that an offence had been committed, hence necessitating the impoundment. In his reply to the defence the Plaintiff joined issues with the Defendant and reiterated the contents of the Plaint in toto. The foregoing was the state of pleadings prior to trial.



4. At the trial, the Plaintiff testified as PW1. She proceeded to adopt her witness statement filed on May 10, 2012 as her evidence in chief and produced the bundle of documents in the list of documents filed in court on March 19, 2015 as P.Exh1. It was her evidence further that on the date in question she was driving to Siaya County to attend her father's burial when stopped by police officers at a traffic stop along Nairobi-Naivasha Road, who after inspecting the engine details had informed her that the suit motor vehicle had been reported stolen in Japan. She stated that the suit vehicle was detained at Kabete Police Station as she was meanwhile required to produce her ownership documents, and she duly complied.
5. The Plaintiff further testified that to proceed with her journey, she hired a Toyota Prado registration number KBJ 555C from a car hire company that charged Kshs 10,000/- per day. That she used the said vehicle between May 18, 2011 to December 6, 2011 while her vehicle was impounded and incurred expenses in the sum of Kshs 2,030,000/- in that regard. It was her evidence that after several visits to the Directorate of Criminal Prosecution (DCI) Headquarters she was finally informed that the suit motor vehicle was not stolen, and it was subsequently released to her on December 6, 2011.
6. Under cross-examination by the defence counsel she reiterated being the owner of the suit motor vehicle and that she had had furnished police with the logbook. She maintained that she had hired an alternative vehicle while the DCI carried out investigations prior to releasing the vehicle on December 6, 2011, informing her that the same had not been stolen.
7. Mary Maina Nandeka testified as PW2. She began by identifying herself as Travel Consultant and Director of Gynn International Tours and Travels. She too adopted her witness statements dated March 19, 2015 and March 24, 2015 as part of her evidence-in-chief and produced a bundle of documents in relation to the car hire arrangements between her firm and the Plaintiff as P.Exh2. During cross-examination, she reiterated that the motor vehicle hired out to the Plaintiff was a Prado registration number KBJ 555C, and that the hire charges for the six months were settled in full.
8. On the part of the Defendant, C.I Julius Kiprotich Kenduywa testified as DW1. He identified himself as Police Officer currently serving at Directorate of Criminal Investigations (DCI), Mandera Central Sub-County, and earlier attached to Interpol in the year 2013. He adopted his witness statement filed in court on 08.04.2019 as his evidence-in-chief and produced the bundle of documents in the Defendant's list of documents filed on even date as D. Exh.1 to D. Exh.5. It was his evidence that at the material time, the DCI was dealing with reported transnational crimes; that investigations and inquiries had taken time; and hence the Plaintiff's vehicle was not unlawfully detained. Specifically, he stated that the response from Tokyo Interpol was delayed and was eventually received on November 18, 2011, following which a local clearance was issued in respect of the suit motor vehicle, and the investigating officer duly informed.
9. During cross-examination, he reiterated that the subject of investigations was a report that the suit motor vehicle had been reported stolen in Japan. He confirmed that no court order was obtained prior to the impounding of the suit motor vehicle, but that the action was taken pursuant to a report received from Interpol Japan. That the said report was in the Interpol database and indicated that the theft of the suit motor vehicle occurred in 2004. He stated that investigations commenced soon after the impoundment and it was only on November 18, 2021 that Interpol Tokyo communicated, facilitating the release of the suit motor vehicle. He asserted that on account of the transnational nature of the investigation being carried out and the risk of the vehicle being removed from the jurisdiction, the police had to impound the vehicle.
10. Upon the close of the respective parties' cases, submissions were filed as directed by the court. The Plaintiff's counsel began by reiterating the respective parties' evidence before the court and condensed



his submissions into two (2) cogent issues for consideration. Addressing the court on whether the suit motor vehicle was lawfully detained, counsel called to aid the decisions in *Paris Mutwiri John v Base Commander Maua Traffic Base & Another* [2021] eKLR, *Disarano Limited v Kenya National Highway Authority & The A.G* [2017] eKLR and *Patrick Kamotho Kingori v Inspector General of Police & 4 Others; Alice Chesang (Interested Party)* [2019] eKLR to contend that from the evidence tendered before the court, there was no reasonable and probable cause which justified the Defendant's actions of impounding the Plaintiff's motor vehicle.

11. He asserted that it was the duty of the Defendant to prove that the motor vehicle was lawfully detained, pointing out that no investigations were conducted prior to impounding the Plaintiff's motor vehicle on allegations that it was stolen. And that subsequent investigations revealed that the suit motor vehicle was not stolen. He submitted that the Plaintiff's constitutional right to property was violated due to the unlawful impounding of her motor vehicle by the Kenyan Traffic Police, who as law enforcement agents, ought to have gathered cogent evidence before depriving the Plaintiff of her property.
12. In conclusion, it was submitted that the Plaintiff was denied the right to be heard before her vehicle was impounded thereby infringing upon her constitutional rights under Article 31(b), 40(3) and 50 of *the Constitution* and the court should arrive at the inescapable conclusion that the Defendant unlawfully impounded the Plaintiff's motor vehicle.
13. Concerning special damages, counsel relied on the decisions in *China Overseas Engineering Company Limited v Issac Kichwen Kijo* [2019] eKLR and *Moses Kipkoech Rotich v Kenya National Highways Authority & 7 Others* [2018] eKLR to submit that the Plaintiff specifically pleaded and proved that as a result of the unlawful impounding and detention of the suit motor vehicle for more than six (6) months, she had incurred expenses to the tune of Kshs 2,030,000/- in alternative motor vehicle hiring charges.
14. On the award of general damages, he urged the court to award Kshs 5,000,000/- citing the case of *Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority* [2009] eKLR and the Ugandan case of *Dr Willy Kaberuka v Attorney General Kampala* HCCS No 160 of 1993. Further, citing the decisions in *Godfrey Julius Ndumba Mbogori & Another v Nairobi City Council* [2018] eKLR and *John Mbaabu & Another v Kenya Revenue Authority* [2020] eKLR counsel urged the court to award exemplary damages in the tune of Kshs 5,000,000/- as the Defendant's conduct was oppressive, arbitrary, and unconstitutional. Counsel concluded by stating that judgment ought to be entered as prayed in the plaint.
15. Counsel for the Defendant submitted two (2) issues with respect to liability for unlawful impoundment or detention of the Plaintiff's motor vehicle and the awardable damages. Submitting the first issue, counsel began by restating DW1's evidence that the impoundment or detention of the Plaintiff's motor vehicle was lawful.
16. Citing the provisions of Section 57 (2) of the *National Police Service Act*, the decisions in *Crywan Enterprises Ltd v Kenya Revenue Authority* [2013] eKLR, *Rhumba Kinuthia v Inspector General of Police & Another* [2014] eKLR and *James Karuga Kiiru v Joseph Mwamburi & 2 Others* Civil Appeal No 171 of 2000 as cited in *David Mungai Kinyanjui & 2 Others v Attorney General* [2012] eKLR, he argued that the police were exercising their statutory duties of maintaining law and order when they impounded and detained the Plaintiff's motor vehicle and that the action was based on a on reasonable cause and belief that the vehicle was stolen.
17. That in accordance with the statutory duty imposed on the police, the police impounded the Plaintiff's vehicle based on an international intelligence report and subsequent reasonable steps were taken by the police thereafter in due cognizance of the Plaintiff's rights as well as the state obligations under



- regional and international treaties on security. That in the duration of impoundment of the vehicle, investigations were carried out; that email correspondences were exchanged between local authorities and Interpol; and that the actions by the police were carried out in good faith and in accordance with the law. Counsel asserted that the foregoing conduct met the test of reasonableness, as the material known to the police at the time of impounding would have satisfied a prudent and cautious man that the motor vehicle in question was probably stolen.
18. A raft of decisions were called to aid in respect of the foregoing submission, including the English decision in *Taylor v Taylor* (1875) 1 Ch. D 426; 45 LJ Ch. 373; *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR; *Kagane & Others v Attorney General & Another* [1969] 1 EA 643; *Republic v OCS, Nairobi Central Police Station & 2 Others Ex Parte Sixtus Gitonga Mugo* [2020] eKLR; *Ebrahim Odhiambo Okore v Kenya Revenue Authority & 2 Others* [2017] eKLR; and *Waithera Kamau v Attorney General & 4 Others* [2014] eKLR.
 19. On special damages sought by the Plaintiff, counsel submitted that these should have been specifically pleaded and proved. Further, counsel reiterated that because the actions of the police were legal and consistent with their duty of maintaining law and order in line with regional and international efforts to trace and fight theft of motor vehicles, there was no basis for finding them liable. Hence, the court was urged to decline to award damages and to dismiss the suit with costs.
 20. The court has considered the pleadings, evidence at the trial as well as the submissions filed in respect of the matter. There is no dispute that on December 5, 2011, traffic police intercepted the Plaintiff as she drove along Nairobi/Naivasha road and impounded her vehicle on the ground that it had been reported stolen in Japan, and it was not until December 6, 2011 that the vehicle was restored to the Plaintiff's possession.
 21. It is the court's view that the sole issue for its determination, and upon which the entire case turns, is whether the Plaintiff has established on a balance of probabilities that the detention or impoundment of her motor vehicle was unlawful and without reasonable or probable cause. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

“ [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”
 22. The burden of proving that the actions by the police constituted unlawful impounding and detention of the Toyota Land Cruiser KAS 943Y Chassis Number KZY950007866 rested on the Plaintiff. *Black's Law Dictionary*, 11th Edition defines the term “unlawful” as “Not authorized by law; illegal”.
 23. There is no dispute regarding the statutory mandate of the National Police Service in maintaining the rule of law and the duty of the state to co-operate with other states, through organizations such as Interpol in combatting transnational crime. On the other hand, under Article 40 of *the Constitution* guarantees the right of every person to acquire and own property and not to be arbitrarily deprived of property of any description or of any interest in, or right over, any property of any description.
 24. The mandate of the national police under Section 24 of the *National Police Service Act* includes: -
 - “(a) provision of assistance to the public when in need;



- (b) maintenance of law and order;
- (c) preservation of peace;
- (d) protection of life and property;
- (e) investigation of crimes;
- (f) collection of criminal intelligence;
- (g) prevention and detection of crime;
- (h)
- (i)
- (j)"

25. Under Section 35 of the Act the functions of the Directorate of Criminal Investigations are *inter alia* to:-

- “(a) collect and provide criminal intelligence;
- (b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;
- (c) maintain law and order;
- (d) detect and prevent crime;
- (e) apprehend offenders;
- (f) maintain criminal records;
- (g) conduct forensic analysis;
- (h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution;
- (i) co-ordinate country Interpol Affairs;
- (j) investigate any matter that may be referred to it by the Independent Police Oversight Authority; and
- (k) perform any other function conferred on it by any other written law.”

26. Section 57 (1) & (2) of the Act, (as well as section 26 of the Criminal Procedure Code) empowers police officers to enter premises and to stop vehicles, conduct searches, to detain vehicles without warrants, by providing that:-

- “(1) Subject to the Constitution, if a police officer has reasonable cause to believe—
- (a) that anything necessary to the investigation of an alleged offence is in any premises and that the delay caused by obtaining a warrant to enter and search those premises would be likely to imperil the success of the investigation; or



(b) that any person in respect of whom a warrant of arrest is in force, or who is reasonably suspected of having committed a cognizable offence, is in any premises, the police officer may demand that the person residing in or in charge of such premises allow him free entry thereto and afford him all reasonable facilities for a search of the premises, and if, after notification of his authority and purpose, entry cannot without unreasonable delay be so obtained, the officer may enter such premises without warrant and conduct the search, and may, if necessary in order to effect entry, break open any outer or inner door or window or other part of such premises.

(2) A police officer may stop, search and detain any vehicle or vessel which the police officer has reasonable cause to suspect is being used in the commission of, or to facilitate the commission of, an offence.

(3)

(4)

(5) A police officer who exercises the powers conferred under this section shall—

(a) identify himself beforehand;

(b) record the action;

(c) record the items taken;

(d) make a report regarding such exercise and make it available for the superior.”

27. Thus, while the Plaintiff’s right to own and enjoy use of her vehicle without being unlawfully deprived of the same is undisputed, where there was reasonable and probable belief by police that the Plaintiff’s vehicle was in some manner connected to an offence, the police could properly stop, search and detain the vehicle. In such a case, an officer would have been persuaded based on available information that delay could “imperil the success of the investigation”. There is no requirement, and such requirement would defeat the very objects of the empowering provisions of law above, that the police first complete investigations in such a situation before acting, as proposed in the Plaintiff’s submission. The concerned police officer must act on the basis of information available at the time, the test being whether there was reasonable and probable cause for the action taken. It matters not that subsequent investigations disclose no offence.

28. According to *Halsbury’s Laws of England*, 4th Edition - Reissue, Vol. 45 (2):-

“[R]easonable and probable cause has been said to be an honest belief in the guilt of the accused person based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonable lead any ordinary prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime”



29. In *Murunga v Attorney General* [1979] KLR 138 the court applied the test spelt out by Rudd J (as he then was) in *Kagane & Others v Attorney General* (1969) EA 643, namely that: -

“Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which assuming them to be true, would lead to an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed...If and insofar as the material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true. ..”

30. The Plaintiff's case herein appears premised on the fact that the vehicle was eventually cleared of the allegations of theft. The police were acting on information contained in the Interpol database which was subsequently confirmed through emails sent by Interpol Japan. The Plaintiff offered no evidence to controvert the Defendant's evidence that at the time of detaining the vehicle, the police had reasonable and probable cause to believe that an offence of theft had been committed in relation to the vehicle.

31. DW1 testified that the detention of the suit motor vehicle was on the backdrop of an operation dubbed Umoja 1V targeting stolen motor vehicles amongst other organized transnational crimes within the region. The source of the reasonable and probable cause appears to have been information stored on the Interpol database and used to conduct the operation. See D.Exh.1 being the report on the operation. The database appears to have been aggregated from information obtained from various Interpol Stations or affiliate countries. In the said database, the Plaintiff's motor vehicle had been flagged by Interpol as having been stolen in Japan in 2004.

32. The Defendant through oral and documentary evidence tendered by DW1 detailed investigative and follow up steps taken after the detention of the vehicle, mainly involving correspondence between Interpol Kenya and Interpol Japan, the latter who were the primary investigative agency. See for instance, the emails from Interpol Japan to Interpol Kenya dated June 9, 2011 and July 25, 2011 in which the vehicle bearing the same chassis number as the Plaintiff's vehicle, namely, KZJ 950007866, is listed as one subject to investigations by police in Japan for theft. The former email at item 12 contains remarks that:

“ This case handling Police Station: Hachioji Police Station, In Tokyo.

Date of theft: May 31, 2004.” (sic)

33. The Kenyan police continued through several correspondence to request Interpol Japan to furnish them with information on the outcome of investigations and the pertinent information was finally relayed back on November 18, 2011 from Interpol Japan. In my view, the Kenyan Police took reasonable steps after impounding the vehicle to confirm the outcome of investigations by their Japanese counterparts. Despite the Defendant's delay of 18 days in releasing the vehicle upon receipt of the outcome from Japan, it is the court's finding that based on the facts of the case and the statutory duties of the police the Plaintiff has not demonstrated on a balance of probabilities that the impounding of her vehicle was unlawful.
34. The case of *James Karuga Kiiru v Joseph Mwamburi & 2 Others* Civil Appeal No 171 of 2000 though relating to a claim of unlawful arrest offers useful analogy to the instant matter. In that case, the Court of Appeal held that so long as the police took reasonable measures after the arrest, their role was key to the administration of justice and are not to be faulted. It was further held that while the appellant



therein may have been innocent all the time, there was no reason for making a police officer liable when he had only done his duty in investigating an offence reported through a genuine complaint.

35. Further that, whether an arrest was lawful or unlawful depended on the circumstances of the arrest. The Court of Appeal was of the view that when a police officer has arrested a person suspected of an offence, he can do what is reasonable to investigate the matter to see whether the suspicion is supported or not by further evidence. The court found that so long as the measures taken by the police during the investigative period are reasonable and are an important adjunct to the administration of justice, a claim for false imprisonment could not lie.
36. Similarly in this case, the Kenyan police in impounding the Plaintiff's vehicle were carrying out their statutory duty, based on intelligence reports by Interpol Japan that the vehicle had been stolen in Japan in 2004. The Defendant has shown through evidence that on the information possessed by the police as of May 12, 2011 and pursuant to their statutory duty, police were entitled to stop, impound, and detain the Plaintiff's vehicle and that they took reasonable steps in following up on their Interpol counterparts who were actively investigating the matter in Japan. In the circumstances the claim of unlawful impounding cannot lie.
37. The above finding should dispose of the matter. However, as a final word, the Court further agrees with the Defendant's submission that the special damages sought by the Plaintiff through her evidence and submissions regarding loss of user were not pleaded in her plaint and could not be awarded even if the Plaintiff had succeeded in proving liability against the Defendant. The court dismisses the Plaintiff's suit but will order that the parties bear their own costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 25TH DAY OF MAY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Ms. Wambua h/b for Mr. Opiyo

For the Defendant: Mr. Hassan

C/A: Carol

