



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 61 OF 2017

PELICAN HAULAGE CONTRACTORS LIMITED.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

1. The plaintiff in the present instance instituted a suit against the defendant by way of plaint dated 10/08/2009 and amended one dated 14/07/2010 and sought for judgment against the defendant in the following manner:

- a. Liquidated claim of Kshs.48,189,516/=***
- b. General and exemplary damages***
- c. Costs of the suit***
- d. Interest at court rates***
- e. Any further or better relief this Honourable Court may deem fit to grant.***

2. The plaintiff pleaded in his plaint that on 2nd August 2008 while the plaintiff's lorries were transporting the cargo of scrap metal to Nairobi, the Provincial Criminal Investigation Officer North Eastern Province one John Maritim and the Provincial Police Officer North Eastern Province one Stephen Chelimo unlawfully and without any cause whatsoever arrested and detained the plaintiff lorries KBB 118F, KBB 119F, KBB 121F, KBB 122F, KBB 123F and KAG 875F at the Provincial Headquarters Garissa. The said officers further charged the plaintiff's drivers in Garissa SPM Criminal Case No.504 of 2008 under the Environmental Management Act.

3. The plaintiff further pleaded that on 6th August 2008 the plaintiff's drivers were acquitted and the police were directed by the court to release the exhibits.

4. It was also pleaded by the plaintiff that the police continued to detain the plaintiff's lorries in violation of court orders, even when the plaintiff offered to discharge the goods at the police station so that the police could continue to detain the plaintiff's lorries in an unreasonable manner, they refused to accept the offer.

5. The plaintiff further pleaded that on 6th November 2008 following an order of the High Court in Criminal Revision No.66 of 2008 the Plaintiff's lorries were finally released having been detained for a total of 98 days.

6. It was similarly pleaded in the plaint that the plaintiff has suffered serious financial loss and damage as a result of the defendant's tortuous actions. The plaintiff in paragraph 11 of the plaint listed the particulars of financial loss and special damages as follows:

- a. For the period of 3 months while the police unlawfully detained the plaintiff's 6 trucks the plaintiff was compelled to service the loan on the lorries from his own resources to avoid repossession whereas previously the lorries were able to pay the loans from the business they did. The plaintiffs paid the sum of Kshs.2,769,576/= for loan instalments which it claims from the defendant.***
- b. The plaintiff claims payment of demurrage charges amounting to Kshs.40,000/= per day totaling to Kshs.3,292,000/= for 98 days for 6 trucks.***

c. The plaintiff further claims further claims the sum of Kshs.40 million for loss of business in transporting contracts during the period its lorries were detained.

d. The plaintiff further claims Kshs.1,500,000/= in respect of allowances it had to pay to employees, security and legal costs.

7. The defendant entered appearance upon service of summons and filed its statement of defence on 3rd December, 2009 to deny the allegations brought out in the plaint.
8. At the hearing, the plaintiff summoned three (3) witness while the 1st defendant called one (1) witness to testify.
9. A.K Somo (PW1) adopted his signed witness statement as evidence and stated that he is a scrap metal dealer, he was based in Elwak and sell the metal in Nairobi and that on 2nd August 2008 his 9 lorries were impounded and detained by police for 98 days.
10. It is PW1's testimony that he sued the defendant and was awarded judgment in H.C.C.C 496 of 2009 and the scrap metals and lorries were eventually released.
11. In cross examination, PW1 stated that he had hired each motor vehicle at Kshs.120,000/= and that there were allegations that the lorries were seized because they were carrying explosives.
12. It is PW1's testimony that the drivers were charged for transporting scrap metals without a licence of which the police sought for more time to inspect the said vehicles but were later on issued an order to release the motor vehicles and scrap metals.
13. In re-examination, PW1 stated that no order was obtained for attachment of the lorries but the police kept harassing them and that no mistake was found on the lorries.
14. Jaspel Singh (PW2) adopted his signed witness statement as evidence and stated he is the managing director of the plaintiff's transportation company and has been in the industry since 1980.
15. It is PW2's testimony that he had a contract with the World Food Program to transport food, but he also got a customer who wanted to transport scrap metals, but the lorries were detained for more than three months despite having all the legal paperwork, and he lost the contract with the World Food Program and other organizations as a result.
16. PW2 testified that he is claiming a total sum of Kshs.63,865,076/= and that there was no lawful reason for detaining the vehicles and none of drivers and employees were convicted as they were released.
17. In cross-examination, PW2 stated that he could not pay a bank loan that they had been issued and were paying in installments' but were unable to do so since there was no money from the lorries, and that he is seeking Kshs.40,000/= per day for the 98 days that the lorries were detained. That he does not have a letter confirming the cancellation of the contracts, but that no cargo has been delivered since the incident.
18. It is PW2's testimony that he had hired security to look after his trucks, which were stacked outside the Provincial Headquarters in Garrisa, and that is why he engaged security to look after the lorries.
19. Gideon Gakundi Mwalimu (PW3) adopted his signed witness statement as evidence and stated that he was the transport manager of the plaintiff in 2008 and also produced the bundle of receipts dated 27th June 2014 as PEXH.C.
20. It is PW3's testimony that some of the lorries were purchased on credit, and they were required to repay the monthly loan for the newly acquired lorries through the Barclays bank every month. Mr. Maritim and Mr.Chelimo were among the Senior Officers who tormented them.
21. On cross-examination, PW3 stated that he didn't have a schedule indicating each lorry earned Kshs.40,000/= and that they took out a Kshs.40 million loan and hadn't failed on repayment.
22. On re- examination, PW2 stated that when the lorries were kept at Garrissa Police Station, they were not told when the same was to be released and that they took steps to take care of the lorries to avoid theft and breakage thus making the plaintiff suffer loss and at the same they were asked to pay Kshs.50,000/= per vehicle so as to release the vehicles.
23. Stephen Chelimo who was DW1 adopted his signed witness statement as evidence and produced the defendant's list and bundle of documents as exhibits and stated that he is a retired police officer and was the Garissa Provincial Officer in July 2008.
24. The witness stated that he obtained a Security Intelligence report regarding scrap metal trafficking and employed advanced security detective equipment on the six lorries, they stopped after seeking counsel from an environment official and being ordered to charge them with transporting dangerous scrap metal without a license.
25. The witness further stated that the vehicles were kept because Mr. Martim had not concluded his investigations even after the court ordered that they be freed since there was evidence that the lorries were transporting scrap metals including explosives.
26. The witness stated that the plaintiff did not need to hire private security because the police were responsible for providing protection to

watch the lorries, and that the plaintiff did not need to hire private security as alleged.

27. On cross examination, DW1 stated that he did participate in case of Abdi Kher Somo Isaak case Mr. Somo indicated that he issued licenses, but that the police had no role to play under the National Environmental Act of 1999. However, it was determined that the OCS issued licenses on November 3rd, 2021.

28. The witness stated after they impounded the vehicles, they sought the District Environmental Officer, and the court discharged the drivers, arguing that the NEMA Act did not apply.

29. The witness further stated that according to the Provincial Intelligence Committee, the motor vehicles were held to allow investigations to take place, and he was unaware that the owner of the three other lorries paid Kshs.50,000/= to the police to get their lorries released.

30. In re- examination, DW1 stated that the licenses purportedly issued by him were forged, that the OCS had no part in giving licenses, and that investigations had been completed with no explosives found. He went on to say that the plaintiff's vehicles were being held under a court order and that they were being held properly.

31. At the close of the hearing, this court called upon the parties to file and exchange written submissions.

32. The plaintiff on his part gave brief facts of the matter and identified three issues for determination as follows:

a. Whether the Police had any reasonable ground to arrest/detain the plaintiff's vehicles?

b. Whether the Police had acted in excess of their powers in continued detention of the plaintiff's vehicles?

c. As a consequence of the actions by the police, is the plaintiff entitled to damages, and if so, what quantum of damages will ensue?

33. On the first issue, the plaintiff submitted that the state agency's initial and subsequent detention of the plaintiff's vehicle was malicious, unlawful, and based on corrupt practices, and that DW1 claims that there was intelligence data from the Provincial Security Committee on explosives movement, but no single charge was preferred against the plaintiff.

34. The plaintiff further submitted that when the court ordered the police to search the trucks for explosive materials, they chose to have NEMA personnel inspect the vehicles rather than terrorist experts. The fact that the police did not conduct adequate investigations demonstrates that they were acting with malice. On this the plaintiff relied on the case of **Disaraino Limited v Kenya National Highways Authority & Attorney General (2017) eKLR** Nyamweya J (as she was then) ordered the unconditional release of a motor vehicle that had been unlawfully detained by the respondent. the court stated as follows;

“The normal provisions and procedural safeguards as regards seizure and arrest of motor vehicles also require to be followed, with such motor vehicles being handed over to the police who become responsible for their safeguarding, and the right accorded to the affected persons to apply for their release.”

35. The plaintiff contends that as result of the detention of their trucks, they suffered a loss in their business in transporting contracts. On this the plaintiff relied on the case of **Joram Nyaga Mutegi v Kenya National Highway Authority (2017) eKLR** Mwita J observed that;

“Rights have values and must be respected and protected at all times. The petitioner has a right to do business and earn a living, and continued retention of his vehicle's registration plate is a violation of this right given the circumstances of this case. The law is to be followed and where there is no evidence, any purported action of retaining the vehicle registration plate is unacceptable.”

36. It is the plaintiff's submissions that it's entitled to damages for the unlawful detention of its vehicle but the question is to determine the quantum. The plaintiff relied on the case **Arnacherry Limited v Attorney General (2014) eKLR** Lenaola j (as he was then) granted the petitioner general damages for breach of proprietary rights of Kshs.3,000,000/=

37. The plaintiff proposed the sum of Kshs.3,000,000/= for general damages would be also fair amount to award in the present circumstances as against the defendant.

38. In reply, the defendant gave brief facts of the matter and identified three (3) issues for determination;

i. Whether the arrest and detention of the plaintiff's lorries was unlawful and whether he is entitled to damages as a result of the same

ii. Should the court find that the detention of the lorries was unlawful, what damages should be awarded to the plaintiff.

iii. Whether the plaintiff is entitled to costs of the suit.

39. On the first issue, the defendant argued that the police's arrest and detention of the lorries was legal, and that they were simply carrying out their duty to maintain law and order when they made the decision to arrest and detain the lorries.

40. The defendant urged the court to rule that the arrest and detention of the nine people suspected of transporting scrap metal was legal, based on the fact that the police arrested the nine people suspected of transporting scrap metal, who then used advanced detecting equipment to discover that the metal was emitting carbon that came into contact with explosives, and that the police had reasonable cause to arrest and detain the lorries and goods.

41. On this the defendant relied on the case of **Crywan Enterprises Limited v Kenya Revenue Authority (2013) eKLR; Nairobi High Court Petition Case No.322 of 2011**, the Court observed as follows;

“it must be accepted that where a statute grants a power to a body, the court will not interfere with its exercise unless it is exercised without the necessary statutory basis or it is being exercised oppressively. What I am required to be satisfied is that the commissioner’s action of seizing the petitioner’s consignment was reasonable in the circumstances”

42. The defendant contends that the plaintiff seeks compensation for 98 days from the time the lower court ordered the release of the lorries on August 4, 2008 to November 6, 2008, when the orders were set aside and the lorries were released, and that the court order was valid and the duration was 64 days, not 98 days as claimed by the plaintiff, and that the court order was valid

43. The defendant further contends that plaintiff should prove its case on a balance of probabilities and the court should calculate the damages payable to the plaintiff based on 64 days and not 98 days. On this argument the defendant relied on the case of **Abdi Kher Somo Isaak t/a Somo Scrap Metal Dealers v Attorney General (2018) eKLR**. The court stated as follows;

“the blanket claim of general damages without any guide as to the loss he incurred may not be sufficient to make a clear award”

44. The defendant submitted the plaintiff's director informed the court that despite the lorries being impounded, the company was able to repay the monthly loan installment, and the plaintiff did not tender any evidence to show that the bank sent the plaintiff's company with a demand letter seeking to recover loan arrears.

45. The defendant states that the plaintiff claimed they lost Kshs.40,000,000/= in transporting contracts during the time the lorries were detained, but the plaintiff failed to prove that they did indeed lose the contracts as a result of the detention of the motor vehicles, and that there was no letter addressed to the plaintiff company by its customers rescinding any contract awarded to the plaintiff after the lorries were detained.

46. On the issue of allowances paid to employees, security and legal costs, the defendant submitted that the plaintiff's witness testified that Kshs.1, 500,000/= was incurred as a result of allowances to the drivers for their upkeep and security, that the vehicles were detained in the provincial headquarters and that the place was secured, and that plaintiff had no need to instruct its drivers to safeguard the lorries in any way.

47. The defendant submits that there was no need of pay them allowances since they were no longer working at the time the vehicles were detained and that this claim should fall.

48. I have considered the evidence tendered alongside the contending submissions and authorities relied upon. The following are the issues arising for determination:

i. Whether the arrest and detention of the plaintiff's lorries was unlawful.

ii. Whether the police had acted in excess of their powers in continued detention of the plaintiff vehicles.

iii. Whether the plaintiff is entitled to damages and if so what quantum of damages should be awarded.

iv. Who should be made to bear the costs of the suit?

49. On the first issue the plaintiff submitted that detention of the vehicles was malicious, unlawful and further stated that the allegations by DW1 that there was an intelligence data from the provincial security committee and other alleged terrorism related material but no single charge was preferred against the plaintiff or its drivers in relation to the allegations.

50. On the other hand the defendant one witness Mr. Stephen Chelimo informed the court that the Committee directed the security agencies in North Eastern province should launch investigations to find out whether the scrap metal being transported were hazardous.

51. It is clear that the police chose to have NEMA officials inspect the vehicles rather than terrorism experts, which is how they came to sort the advice of District Environmental Officer Garrissa Mr. Aden Bile on what constitutes scrap metal; he advised that the scrap metal was waste and only needed a special license before being transported. Furthermore, I believe the police's failure to conduct adequate investigations demonstrates that they were motivated by malice.

52. The burden was on the defendant to prove that they had reasonable cause for suspecting that the plaintiff had committed an offence. It is clear that the police did not carry out the investigations properly before detaining the lorries but only relied on the evidence by the NEMA expert and general principles which underlie the approach to investigations and the police must at all times uphold the rule of law and avoid wrongful discrimination. The defendant was, therefore had no reasonable ground to arrest /detain the plaintiff's vehicles.

53. In the case of **Kioko Mwakavi Makali vs. Attorney General & another [2019] eKLR**, stated, with regard to malice in criminal prosecutions:

“Neglect to make a reasonable use of the sources of information available before instituting proceedings may therefore be evidence of malice and hence abuse of discretion and power. In the absence of any evidence as to the facts and circumstances upon which the 1st Respondent arrived at the decision to charge the Appellant, the court can only conclude that there was no probable and reasonable cause for charging the plaintiff and that constitutes malice for the purposes of the tort of malicious prosecution.... Therefore, the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words, the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect.”

54. On the second issue, the plaintiff submitted that the police continued to detain the vehicles even after there was a court order to release the said vehicles and despite having all the legal paperwork there detained for more than three months.

55. The plaintiff contend that as a result of the detention of the plaintiff's trucks which made them to suffer a loss in their business in transporting contacts. The plaintiff relied on the case of **Joram Nyaga Mutegi v Kenya National Highway Authority (2017)eKLR**

“Rights have values and must be respected and protected at all times. The petitioner has a right to do business and earn a living, and continued retention of his vehicle's registration plate is a violation of this right given the circumstances of this case. The law is to be followed and where there is no evidence, any purported action of retaining the vehicle registration plate is unacceptable.”

56. On the other hand the defendant, stated that there was a reasonable basis for arresting and detaining the lorries was based on suspicions that there were nine people selling scrap metal and that the police were conducting investigations because the said metals were suspected of emitting carbon that could have come into contact with explosives, and that the police had reasonable cause to arrest and detain the lorries and the goods based on that fact.

57. During the cross examination of DW1 he stated said the court had given them orders to detain the vehicles for investigations, but he couldn't say whether the investigations were completed, and that there had been orders made for the release of the lorries and scrap metals to the plaintiff, but the police had failed to follow the instructions.

58. From the above it is clear that there were court orders to release the plaintiff cars, the police had acted beyond their authority in continuing to detain them, and it was unclear whether the investigations had been conducted or not.

59. On the third issue, it has been said time and again that equity cannot suffer a loss without a remedy. Article 23 (3) of the Constitution of Kenya sets out the type of reliefs that a Court confronted with a matter touching on violation of rights may grant. These include among others, (e) an order for compensation.

60. The Plaintiff claims a total of Kshs.48, 189,576 in financial and special damages. He claims he used the Lorries for his transport company, which he says has contracts with the World Food Program and other organizations. The plaintiff claims that as a result of the detaining the said lorries, he was obliged to cancel some of his customers, resulting in a loss of business for the transportation firm. As a result, he demands Kshs.48,189,516./= in monetary and special damages.

61. The plaintiff stated that he had been paying loan installments, the plaintiff's loan being for the purchase of the lorries, and that the detention of his six vehicles at the police station had made it more difficult for him to pay the loan. Despite the lorries being impounded, the defendant claims that the corporation was able to pay the monthly installments.

62. It is clear that the defendant justified his trucks' detention at the police station by claiming that the plaintiff did not fight to repay the debt. Furthermore, it does not imply that the company did not struggle to repay and, on top of that, they were repaying a loan on which they were not receiving returns because the trucks were not available or, rather, detained rather than doing transportation business in order to make it easier for the plaintiff to repay his loan and pay his expenses.

63. On the issue loss of business in transporting contracts, the plaintiff avers that he lost to a tune of Kshs.40,000,000/= in transport contracts .The defendant avers that the plaintiff ought to have prove that indeed he lost the contracts as result of the detention.

64. A perusal of the plaintiff's supplementary list of documents dated 18th November 2017 pages 8-19 showed the contracts with companies that had contracts with the plaintiff but lost business once the lorries were detained.

65. On the issue of allowances paid to the employees, security and legal costs, according to the plaintiff, they had to provide security for its trucks for both security and breakage reasons. The defendant, on the other hand, maintains that the location was secure, and that the plaintiff did not need to direct its drivers to protect the vehicles in any way. The fact that the trucks were at the provincial headquarters does not guarantee their protection, and the plaintiff has the right to arrange security for his property. It was also stated that some police personnel were demanding Kshs.50,000/= for the release of some vehicles. It is obvious that the trucks would not be safe in the environment.

66. Exemplary damages are punitive in nature in that, they are given as a way of punishing the defendant or as a deterrent, and are not limited to compensating the plaintiff for the defendants act. In my view, this is a fit case for award of exemplary damages. In the case of **Rookes**

Vs. Barnard (1964) I ALL ER 367, the court held that exemplary damages may be awarded in two classes of cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government and secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial at the expense of the plaintiff.

67. The award of exemplary damages is at the discretion of the court depending on the circumstances of the case. The defendant in this case unlawfully and without any cause arrested and detained the plaintiff lorries at the Provincial headquarters for a period of three months which led to the financial loss.

68. In my opinion, a sum of Kshs.2 million in exemplary damages should be fair in the circumstances.

69. Accordingly, I enter judgment in favour of the plaintiff against the defendant for the following: -

i. Liquidated claim - Kshs.48,189,516/=

ii. General damages - Kshs.3,000,000/=

iii. Exemplary damages - Kshs.2,000,000/=

Total - Kshs.53,189,516/=

iv. I award costs to the plaintiff and interest.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF APRIL, 2022.

.....

J. K. SERGON

JUDGE

IN THE PRESENCE OF:

.....**FOR THE PLAINTIFF**

..... **FOR THE DEFENDANT**