



REPUBLIC OF KENYA



**KENYA LAW**  
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**Desert Commercial Shipping Limited & another v OCPD Changamwe Police & 2 others  
(Petition E071 of 2021) [2022] KEHC 14452 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14452 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION E071 OF 2021  
JM MATIVO, J  
OCTOBER 31, 2022**

**BETWEEN**

**DESERT COMMERCIAL SHIPPING LIMITED ..... 1<sup>ST</sup> PETITIONER**

**YAKUB KASSIM SHEBAN ..... 2<sup>ND</sup> PETITIONER**

**AND**

**OCPD CHANGAMWE POLICE (DAVID MATHEW) ..... 1<sup>ST</sup> RESPONDENT**

**DEPUTY OCS, CHANGAMWE POLICE STATION (JACOB OLE  
NAYARRA) ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The backbone of the petitioners' case is that the 1<sup>st</sup> petitioner owns the trailer registration No ZE2604, Make Elite; Model-Skeleton; chassis number Exxx3 while the 2<sup>nd</sup> petitioner is the bona fide owner of the motor vehicle registration No Kxx xxK; make- Mercedes Benz, model- 2540; chassis number-WDB 9xxxx4 which he purchased at a consideration of Kshs 1,600,000/=, and that the previous owner had lawfully purchased it at an auction. They contend that they have been using the said vehicles for their business of transporting containers, and that on November 10, 2021, the said vehicles were impounded at Nairobi pursuant to a warrant issued against them. The petitioners aver that they were required to pay escort charges to escort the vehicles from Nairobi to Changamwe Police Station, Mombasa where the 2<sup>nd</sup> petitioner was informed that the vehicles were under investigations since 2018 without disclosing details.
2. They aver that neither them nor are the vehicles have any connection with the alleged investigations and they have been unable to secure their release. As a consequence, they claim that that they have suffered loss of business, daily loss of Kshs 40,000/=; loss of income, battery loss of Kshs 60,000/=and that the vehicles are exposed to harsh environmental conditions. Additionally, they claim that the respondents'



actions are in breach of their rights under articles 40, 47, and 50 of the Constitution and section 8 of the Traffic Act.<sup>1</sup> Consequently, they pray for:-

- a. A declaration that the respondents' actions of impounding and detaining the petitioner's motor vehicle registration number Kxx xxK and trailer registration number Zxxx4 are illegal and in violation of the petitioner's fundamental rights under articles 40,47 and 50 of the Constitution.
  - b. An order compelling the respondents to unconditionally release the motor vehicle registration number Kxx xxK and trailer registration number Zxxx4 to the petitioners forthwith.
  - c. An award of special damages of Kshs 60,000/= plus daily loss of business at Kshs 40,000/= per day from November 12, 2021.
  - d. An award of general damages.
  - e. Costs of and incidental to this suit plus interests at court rates.
  - f. Any other orders this court may deem just.
3. The respondents filed a reply to the petition dated June 17, 2022 stating:- (a) the petition is misconceived, vexatious and an abuse of court process; (b) the petition does not satisfy the test in the Anarita case; (c) the petitioner is guilty of material non-disclosure for failing to disclose that there were active investigations into the un-procedural sale of the vehicle which was in police custody; (d) there are ongoing police investigations into the theft of 125 drums of bitumen; and, (e) that the orders sought are meant to defeat the ends of justice.
4. The petitioners filed a supplementary affidavit sworn by the 2<sup>nd</sup> petitioner dated March 10, 2022 annexing invoices in support of alleged income of Kshs 110,000/= per trip in its transport business.
5. In his submissions, the petitioner's counsel largely replicated the averments in the petition and argued that the actions complained of violated the petitioners' rights under articles 40(1), 47 and 50(1) of the Constitution. He relied on Ramadhan Mwinyisbee Indiya v Director, Criminal Investigations Department & another<sup>2</sup> in support of the argument that the petitioners have a legitimate ownership claim. He also cited article 47(1) of the Constitution and argued that the respondents had a duty to act in a lawful and procedurally fair manner and to give the petitioners reasons for their decisions. Counsel relied on Republic v Inspector General of police ex parte Ngeru Irungu<sup>3</sup> in support of the proposition that for the police to justify the impounding of the vehicle, they must demonstrate that they had received and booked a report on the loss of the vehicles.
6. To further fortify his submissions, the petitioners' counsel cited article 50(1) of the Constitution which guarantees every person the right to a fair hearing and the right to be heard and relied on Republic v County Director of Education, Nairobi & 4 others ex parte Abdulkadir Elmi Robleh.<sup>4</sup> Lastly, counsel cited several decisions in his bid to persuade the court that the reliefs sought are merited.

<sup>1</sup> Cap 403, Laws of Kenya.

<sup>2</sup> [2013] e KLR.

<sup>3</sup> [2016] e KLR.

<sup>4</sup> [2018]e KLR.



7. The respondents counsel cited article 245 (4) of the *Constitution*, section 24 of the *National Police Service Act*<sup>5</sup> and *Republic v Commissioner of Police & another ex parte Michael Monari & another*<sup>6</sup> in support of his argument that the police have duty to investigate crime. He also argued that the petitioner has not established a basis for the award of damages and cited *Hahn v Singh*.<sup>7</sup>
8. I start by addressing the petitioner's claim for special damages of Kshs 60,000/= plus daily loss of Kshs 40,000/= per day from November 12, 2021 and an award of general damages.
9. In several of my previous decisions among them *Hyrd Water Well (K) Limited v Nelson Mukara Sechere, Henry Nandwa Namayi and Gilbert Muthengi Wambua (Sued in their representative capacity as the officers of Chae Kenya Society)*<sup>8</sup> I had the benefit of addressing inter alia claims for profits and the burden of prove required. Inevitably, I will rehash much of what I said in the said cases. To successfully claim damages, a plaintiff must show inter alia that he suffered damage (loss) as a result of the defendant's breach. The plaintiff only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics.<sup>9</sup> A plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the defendant had acted in the manner complained of, will succeed unless the defendant can discharge the onus of proving that there was no such probability.
10. The test to be applied is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. This implies that the plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the plaintiff. the foregoing being the position, then one wonders how the petitioners expected to successfully mount a claim for breach for loss of profits in a constitutional petition which is prosecuted by affidavit evidence as opposed to a civil suit where they can do so by way of oral evidence. Loss of profits is essentially a matter of evidence. The question here is whether the petitioner attained this evidential threshold to establish the alleged loss.
11. As was held in the American case of *Griffin v Colver*<sup>10</sup> in which the New York Court of Appeals set the tone for the more modern rule of lost profits : -
 

“ It is a well-established rule of the common law that the damages to be recovered... lost profits are recoverable ...., but only if the aggrieved party proved them with certainty.”
12. Perhaps the most important consideration in any lost-profits case is how much and what type of evidence a party needs to prove the alleged lost profits. To understand the necessary quantum of evidence, it is helpful first to understand the definition of lost-profits damages. Typically, lost-profits

<sup>5</sup> Act No 11A of 2011.

<sup>6</sup> [2012] e KLR.

<sup>7</sup> [1985] KLR 716 at page 717, 721.

<sup>8</sup> Civil Suit No E212 of 2019.

<sup>9</sup> Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) 449.

<sup>10</sup> *Griffin v Colver*, 16 N.Y. 489, 491 (1858).



damages refer to the loss of net profits, rather than gross profits or revenue.<sup>11</sup> “Lost profits are damages for the loss of net income to a business and, broadly speaking, reflect income from lost business activity, less expenses that would have been attributable to that activity.”<sup>12</sup> However, courts may award gross profits when operating expenses are fixed.<sup>13</sup> After calculating net lost profits, the plaintiff (typically, but not always) must show:- (a) that the conduct upon which the claim is based caused the lost profit damages; (b) that the parties contemplated the possibility of lost profit damages or that the lost profit damages were a foreseeable consequence of the conduct; and (c) that the lost profit damages are capable of proof with reasonable certainty.<sup>14</sup> These three elements of the claim are commonly known as proximate cause, foreseeability, and reasonable certainty.

13. Except where the defendant does not dispute liability, this first element of a claim for lost profits (proximate cause) typically requires an in-depth analysis of both the applicable law and the facts. Specifically, the plaintiff must show, by a preponderance of the evidence, that the plaintiff’s alleged loss was the proximate result of the breach, the so-called “but-for test” (i.e, but for the breaching conduct, the plaintiff would have earned profit). A “proximate” cause is a cause that (a) produces a result in a natural and continuous sequence and (b) without which the result would not have occurred.<sup>15</sup> For example, in *National Controls Corp v National Semiconductor Corp*,<sup>16</sup> the court considered in detail the type and quantum of evidence needed to demonstrate proximate causation for purposes of lost-profits damages. The court described the required proof as follows: -

“... The plaintiff thus must prove that any lost profits were proximately caused by defendant’s breach, and not through some other cause. In essence, the proximate causation requirement demands that the plaintiff prove that the defendant’s breach was a substantial factor in causing some harm.”

14. The other element the plaintiff must prove is that lost profit damages are “reasonably certain and not speculative.”<sup>17</sup> I fail to see how the petitioners expected to surmount the above elements of burden of prove by simply enumerating their claim in the petition and the supporting affidavit and leave it to the court to assess instead of tendering oral evidence to substantiate the above elements. Simply put, the petitioners ought either to have approached the court by way of a plaint so that they can adduce oral evidence or in the bare minimum, they ought to have requested at the directions stage to proceed by way of oral evidence so that they can adduce evidence to surmount the standard of prove required.
15. The petitioners also pray for special damages of Kshs 60,000/=. It is trite law that special damages must not only be specifically pleaded, but must also be strictly proved with as much particularity as

<sup>11</sup> Erwin v Mendenhall, 433 P.3d 1090, 1095 (Alaska 2018).

<sup>12</sup> Ginn v Stonecreek Dental Care, 30 N.E.3d 1034, 1043 (Ohio Ct App 2015).

<sup>13</sup> 22 Am Jur 2d Damages § 57 (2019).

<sup>14</sup> Jonathan Dunitz & Nancy Fannon, *The Comprehensive Guide to Economic Damages* (5th ed, 2018); Bona Fide Conglomerate, Inc v Source America, 2017 U.S Dist LEXIS 116329, at \*13 (S.D. Cal July 24, 2017).

<sup>15</sup> *Racicky v Farmland Indus., Inc*, 328 F.3d 389, 396 (8th Cir 2003).

<sup>16</sup> *Nat’l Controls Corp v Nat’l Semiconductor Corp*, 833 F.2d 491, 496 (3d Cir 1987).

<sup>17</sup> Rubin Res, Inc v Morris, 237 W Va 370, 379 (2016); Stern Oil Co v Brown, 908 NW 2d 144, 151 (SD 2018).



circumstances permit. The court of Appeal in *Richard Okuku Oloo v South Nyanza Sugar Co Ltd*<sup>18</sup> observed that: -

“...a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of....”

16. Our decisional law is quite clear that one consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation is permitted. A natural corollary of this has been that the courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury or produce documents to support his claim. (see *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited*;<sup>19</sup> *Zacharia Waweru Thumbi v Samuel Njoroge Thuku*.<sup>20</sup> As authorities suggest, a claim for special damages must not only be pleaded, it must be strictly proved. It cannot suffice to enumerate figures in a petition or refer to alleged breach of contract or illegal detention of a vehicle. Again, to achieve this standard of prove to qualify for the award of special damages, the petitioners ought to have not only pleaded specifically the special damages suffered, but also prove by evidence that they incurred the loss. This could have best been done by oral evidence and supporting documents which could have best been done in a civil suit as opposed to a petition. The petitioners attempt to attach invoices to their supplementary affidavit cannot discharge the required standard of prove required when it comes to special damages. One must demonstrate that the expenditure was actually incurred.
17. The party with the obligation of persuasion-what Wigmore termed the risk of non-persuasion-is said to bear the burden of proof.<sup>21</sup> The effect of non-persuasion on a party with the burden of proof is that the particular issue at stake in the litigation will be decided against the party. “Burden of proof” is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or “standard” in order to prove their claim. If a party fails to meet their burden of proof, their claim will fail.
18. By now it is clear that a claim for special damages and loss of earnings must be proved strictly. Such standard of prove requires at best oral evidence as opposed to affidavit evidence preferred by the petitioner in this case. It’s not enough to annex copies of invoices to a supplementary affidavit. To surmount the evidential burden, one needs to table cogent evidence, demonstrate the nature of business, daily earnings, expenses and net profits. To me, this can best be done by way of a plaint in a normal suit as opposed to a constitutional petition. Courts abhor the practice of parties converting every issue in to a constitutional question and filing suits disguised as constitutional petitions when in fact they do not fall anywhere close to violation to constitutional rights.
19. I now turn to the crux of the petition, which is the alleged violation of articles 40, 47 and 50 of the *Constitution* and section 8 of the *Traffic Act*. Article 245 (4) of the *Constitution* provides that no person may give a direction to the Inspector General of Police with respect to— (a) the investigation of any particular offence or offences; (b) the enforcement of the law against any particular person or persons;

<sup>18</sup> {2013} e KLR.

<sup>19</sup> {2015} e KLR.

<sup>20</sup> {2006} eKLR

<sup>21</sup> F James & G Hazard, Civil Procedure § 76, at 314 (3d ed 1985); C McCormick, Evidence § 336, at 947-48 (1984); 9J Wigmore, Evidence § 2485, at 285 (J Chadbourne rev 1981).



or... These provisions are meant to guarantee the independence of the National Police Service in the performance of its functions.

20. Notably, the functions of the National Police Service are itemized in section 24 of the *National Police Service Act*.<sup>22</sup> They include: - (e) investigation of crimes; (g) prevention and detection of crime; (h) apprehension of offenders; (i) enforcement of all laws and regulations with which it is charged; and (j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.
21. Section 35 of the NPS Act provides the functions of the Directorate of Criminal Investigation to include—undertaking investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others; maintaining law and order; detecting and preventing crime; apprehend offenders; and performing any other function conferred on it by any other written law.
22. Undeniably, the police are rightfully obligated, as soon as they witness or are informed of a crime, to probe the offence. The task of the police service is to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. These responsibilities arise from the *Constitution* and are affirmed by the *National Police Service Act*. Investigation of crime is a solemn duty imposed by law on the police. I have stated in several of my previous decisions that a police man’s position is different from that of ordinary citizen in that they cannot simply walk away from a criminal offence that has been reported to them or has been brought to their attention. As was held in *S v Williams and others*:<sup>23</sup>

“ Although mere failure to report the crime to the authorities would not render a member of the public guilty of being an accessory after the fact of that crime ... a police officer is in a different position as it is his legal duty to bring criminals to book.”
23. I had the benefit of addressing a similar issue in several of my previous decisions among them *Republic v Director of Criminal Investigations & 2 others and Resilient Investments Limited & 3 others (interested parties) ex parte Pearl Beach Hotels Limited*.<sup>24</sup> In the said decision, I stated that the legislative intent is that the investigating officer records statements of persons acquainted with the facts of the case promptly to preserve the best evidence and to check any manipulation on the part of witnesses. Therefore, the investigating officers are required to record statements of persons acquainted with the facts promptly, procure and preserve exhibits. Failure to do so is a dereliction of duty.
24. In the above case, I stated that it is the duty of the investigating officer to take into possession any document or exhibit which has a bearing on the case. The reason for such a necessity is that such document or exhibit may have effect on the culpability or innocence of the accused. There is no argument before me that the police broke the law or are about to break the law in undertaking the investigations or that they acted outside their powers by undertaking the investigations. In fact, they are legally obligated to investigate the offence. A review of the material presented before me does not suggest that the police exceeded their mandate or they are about to do so.
25. For this court to block or halt police investigations, there must be sufficient evidence to show that the investigation is inherently unfounded, malicious and without foundation and or the same is being

<sup>22</sup> Act No 11A of 2011.

<sup>23</sup> 1998 (2) SACR 191 (SCA), citing *Booyesen*, Justice, in *S v Barnes and Another* 1990 (2) SACR 485 (N).

<sup>24</sup> Judicial Review Application No E037 of 2021.



done in gross abuse of the law. The power to stop or quash police investigations on a suspected offender must be exercised sparingly and with circumspection and in the rarest of rare cases and the court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the court do not confer an arbitrary jurisdiction on the court to act according to its whims or caprice. The power to stop investigations is immense since it amounts to exonerating a suspect before a decision is made whether or not to prosecute him. Such power must be exercised with extreme care and caution. It is a power, which the court exercises only in exceptional cases where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount the prosecution.

26. This court can only prohibit criminal investigations where the prohibition is necessary to protect the integrity of the criminal justice system, this is where the court considers that the investigation is manifestly unwarranted and or it is being undertaken in total disregard of the law and fundamental rights. Cases where it will be unfair to investigate a suspect will include, and are not confined to those cases where there has been bad faith, unlawfulness or gross misconduct by the investigators/police. In such cases the touchstone is the integrity of the criminal justice system. An applicant seeking orders whose effect is to prohibit or quash police investigations must prove the breach or omission complained of and also demonstrate the prejudice to be suffered. It will not suffice to merely list articles of the Constitution.
27. The petitioners cite violation of article 40 of the Constitution. Article 40 rights are not absolute. Investigation of crime is itself a lawful process and provided it is done in conformity of the law, the claim for breach of article 40 rights cannot succeed. In any event, while enacting the provisions of article 245 (4) of the Constitution, the drafters of the Constitution were not writing on a clean slate in the sense of taking an unprecedented step. On the contrary, they had before them a cognate article governing the sanctity of private property, which is article 40.
28. The petitioner has cited violation of articles 47 and 50 of the Constitution. There is a clear distinction between right to a fair administrative action under article 47 of the Constitution and the right to a fair hearing under article 50 of the Constitution. As the Court of Appeal stated in JSC v Mbalu Mutava,<sup>25</sup> the right to a fair administrative action under article 47 is a distinct right from the right to a fair hearing under article 50(1) (2) of the Constitution. It held: - first, fair administrative action broadly refers to administrative justice in public administration. Second, it is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. Third, the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.<sup>26</sup> Fourth, fair hearing under article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies. With the above distinction in mind, it is manifestly clear that the attempt to cite article 50 rights in this case is misguided.
29. As for article 47 rights, there is no dispute that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. Every person has the right to be given written reasons for any administrative action that is taken against him. However, it is not enough for cite an article of the Constitution. One needs to go further and demonstrate how the right was violated. The petitioners aver that the vehicles were impounded by the police. A reading of the petition leaves no doubt that they are aware that the police were investigating an alleged un procedural sale of the vehicle.

<sup>25</sup> {2015}eKLR

<sup>26</sup> Ibid.



They cannot make such an averment and turn round to pretend that they do not know what the police were investigating. They claim that the vehicles were escorted to Changamwe Police Station. At least they are aware where the vehicles were taken and why. I find nothing to suggest that the respondents acted in a procedurally unfair manner. The attempt to plead breach of article 47 rights collapses. The attempt to cite section 8 of the *Traffic Act* does not help. The said section only creates a rebuttable presumption of ownership. It cannot be a shield to the investigations complained about or into the manner the ownership was acquired.

30. Flowing from my discussion on the issues discussed above and conclusions arrived at, I find and hold that the petitioners' petition dated December 17, 2021 is totally unmerited. I dismiss it with no orders as to costs.

Orders accordingly

**SIGNED AND DATE AT MOMBASA THIS 25<sup>TH</sup> DAY OF OCTOBER 2022.**

**John Mativo**

**Judge**

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31<sup>ST</sup> DAY OF OCTOBER 2022.

OLGA SEWE

JUDGE

