



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

PETITION NO. 61 OF 2018

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 ARTICLES 22 3(C), 23(1), 29(A), 31(B), 33 1(B), 33 1(A), 35 1(B), 40(3), 47(1) AND 47(2)

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT 2015 SECTIONS 4(1), (2) AND (3) (a), (b), (c), (d), (e), (f) and (g)

BETWEEN

BENSON RUIYI NJANE.....PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST RESPONDENT

DIRECTOR GENERAL KENYA HIGHWAYS AUTHORITY ENGINEER

M. MUNFINIA.....2ND RESPONDENT

JUDGMENT

1. Benson Ruiyi Njane (Njane) filed this petition seeking the following prayers:

I. The court grants an order compelling the Respondents to release to the Petitioner the number plates of motor vehicle registration number KBB 112K and in default the Petitioner be allowed to use self-made number plates or Kenya garage number plates to move and use the vehicle.

II. That the court be pleased to award the Petitioner loss of user of KShs.20,000 per day for 25 days per month from the date the number plate was taken till this petition is heard and determined.

III. A declaration that the Respondent infringed the constitutional rights of the Petitioner under Article 35 and 47 of the Kenya Constitution 2010 and Sections 4(1), (2) and (3 a-g) of the Fair Administrative Action Act 2015.

IV. It be determined and ordered that the 1st Respondent pays damages for infringement of the Petitioner's rights mentioned hereinabove.

V. That the court awards costs of the petition and damages for loss of earnings caused by the unlawful action by the 1st Respondent.

VI. Such further or other relief or orders be made as may be just.

2. Kenya National Highway Authority and Director, Kenya National Highway Authority (collectively Kenha) denied infringement of Njane's rights. Kenha pleaded that in taking the action it did it was because its officers detected a crime and therefore acted as it did. Kenha also pleaded that Njane failed to prove that he earned KSh.20,000 per day from the Lorry KBB 112K (the subject lorry).

3. It is not denied that Njane is the registered owner of the lorry. It is also not denied that on 14th September 2017 the lorry had its number plate and insurance sticker removed by Kenha's officers, in the company of police officers, while subject lorry was on Dagoretti/Karen Road.

NJANE'S CASE

4. Njane's case is that on 14th September 2017 the driver, Paul Chege, was transporting garbage to a land fill site Dagoretti, using the lorry. According to the driver he was stopped by officers who alleged that the lorry was over loaded. The driver requested the officers to weigh the subject lorry but that the officers declined and instead removed the lorry's number plates and insurance sticker. The said officers thereafter instructed the driver to drive the lorry to the near-by Karinde administration police post. The driver drove the lorry as instructed but the officers manning that police post were unaware of why the lorry was at that post, since it had not been booked there. That 4 days later Njane was called by the officers manning the police post and was requested to remove the lorry due to the pungent smell it was emitting. The lorry was removed from the police post whereupon on discharging the garbage it was cleaned and parked at Njane's compound to date. He instructed his counsel to write and make demand for the release of the number plates and insurance sticker from County Police Commander Kiambu county. The Traffic Commandant at Traffic Headquarter Ruaraka and Kenha. Those demands were made to those different officers because Njane and his driver were unaware which officers had impounded the number plates and insurance sticker. Kenha responded to the demand by its letter dated 15th January 2018. That response is in the following terms:

15th January, 2018

Kimathi & Company Advocates,

Equity Bank Building Dagoretti (MKt),

P.O. Box 245 – 00600,

NAIROBI "WIHTOUT PREJUDICE"

Dear Sir,

RE: MOTOR VEHICLE REGISTRATION NUMBER KBB 112K

Reference is made to the above and your letter dated 30th

November, 2017.

We advise that on 14th September, 2017 the driver of Motor Vehicle Registration Number KBB 112K disobeyed a lawful order by police officers to stop and have the motor vehicle weighed. The driver instead drove off, prompting a car chase and when the vehicle finally stopped, the officers confiscated the motor vehicle's number plates in accordance with the law, particulars of which are well within your client's knowledge.

In view of the foregoing, be advised in advance that any action brought against the Authority shall be strenuously defended at your own risk as to any costs attendant thereto.

Yours faithfully.

FOR: N. Odingo-Kajwang' (Ms.)

CORPORATION SECRETARY/

DEPUTY DIRECTOR, HEAD LEGAL SERVICES

5. Njane claim is that Kenha's action has caused him to suffer financial loss in refusing to release to him the number plates and the insurance sticker. That to date neither he nor his driver have been charged with a traffic offence nor was a prohibition notice issued to him as required by law.

6. Njane, by his petition, pleaded that he had been using the lorry to generate an income of KSh.20,000 per day and was using that income to service a Housing Finance Corporation Loan.

7. Njane further pleaded that his Constitutional right embodied under Article 33 (1) (a) was violated, in that Kenha denied him information on the where about his number plates. Further he pleaded that he was denied fair administrative action envisaged under Article 47 of the Constitution because the lorry was not weighed and in case his driver was the one at fault the officers should have instead confiscated his driver's license and charged him with an offence.

KENHA'S CASE

8. The replying affidavit was of **Isaac Wanjohi**, a weighing manager with **SGS Kenya**, an agent of Kenha. He deponed that Kenha as a state corporation, established pursuant to Section 3 of the Kenya Road Act No.2 of 2007 is mandated under Section 4(2) of Act No. 2 of 2007 to discharge responsibilities of constructing, upgrading, rehabilitate and maintain national roads, amongst other responsibilities. That in performing those duties its officers on 14th September 2017 along Karen/Dagoretti Road noted the lorry was carrying red soil which they suspected was overloaded. That it was stopped by police officers who were in the company of Kenha's officers but the driver failed to stop.

That the police officers chased the lorry which was driven to Karen shopping Centre and into a holding yard. That the driver of the lorry declined to have the lorry weighed by those officers and the Kenha officers proceeded to establish the weight of the lorry using scientific calculation. That calculation determined the lorry excess weight of 7,000 Kgs (7 tonnes) contrary to the prescribed legal load under the Traffic Act Cap 403. That the officers action attracted a hostile crowd and those officers fearing for their safety removed the lorry's number plates and its insurance sticker. Although in its response Kenha referred to a prohibition order issued by its officers there is no clear indication to whom the same was served, if at all. In further response Kenha stated that Njane had failed to comply with that prohibition order to date and yet the said prohibition order indicated the authority that issued it and what action it required from Njane. Kenha pleaded that Njane failed to prove the alleged damages prayed for and also failed to prove breach of constitutional provisions.

ANALYSIS AND DETERMINATION

9. The functions of Kenha are set out in Section 4, 7 and 10 of Act 2 of 2007. In Section 4 (2) (d) (h) Kenha is mandated, in maintenance of national roads, to do the following:

(2) For the purposes of discharging its responsibility under subsection (1), the Highways Authority shall have the following functions and duties—

(d) ensuring adherence to the rules and guidelines on axle load control prescribed under the Traffic Act ([Cap. 403](#)) and under any regulations under this Act;

(h) monitoring and evaluating the use of national roads;

10. Section 55 of Cap 403 forbids the use on a road a vehicle that exceeds the maximum weight or dimensions provided for such vehicle.

11. Section 56 of Cap 403 forbids the use on a road of a vehicle if it is loaded in such a manner to make it danger to other persons using the road.

12. Kenha submitted that the prohibition order of 14th September 2017 was to ensure compliance with above stated law. Indeed Section 106 (4A) of Cap 403 provides that a police officer or inspector who makes an order that a vehicle had contravened Sections 55 and 56 of Cap 403 “may remove the vehicle identification plates and the vehicle licence and, if he does so, shall deliver them to the authority to be kept while the order remains in force.”

13. The above is indeed the legal position but I think the glaring issue, which in my view Kenha conveniently avoided to address, is whether Njane or his agent the driver were notified of the prohibition order. How else was Njane expected to comply with that order if it was not brought to his attention.

14. In my humble view it was not enough for Kenha to hold on the prohibition order up and until this case was filed and then provide the prohibition order as the lawful reason it has retained the lorry's number plates. If indeed Kenha had brought to Njane's attention of the prohibition order that fact would have been highlighted in their letter, reproduced above. The main reason, in that letter, why Kenha removed the number plates was because the driver of the lorry drove off when requested to weigh the lorry. Why didn't Kenha state in that letter that Njane needed to comply with the prohibition order? Is it because it was not yet served on him. Njane in this case consistently stated he was not served with that prohibition order. One would expect in the light of that, that Kenha would respond by indicating how it was served on Njane. It is clear from the evidence of Kenha that on the day in question its officers stopped the lorry, after the car chase, then ordered the lorry to be driven to the nearest police post. Did Kenha's official attend that police post? It seems not. Then when, if at all, did they serve the prohibition order. Was it not logical if those officers feared the attendant crowd, for them to go to the police post and either serve the prohibition order on the driver there, or leave it at that police post to be served on the owner of the lorry when he arrived. It is indeed telling of Kenha's action, that the allegations made by Njane were not responded to by the officers who removed the number plates. The reason why an officer working with SGG responded to those allegations and yet he did not have first-hand knowledge on what transpired on 14th September 2017 is not clear. It does however render this court to find that Njane's allegation, that his lorry had number plates removed without a lawful reason, to be the correct position.

15. Section 4 (2) of the Fair Administrative Action Act provides that every person has the right to be given written reasons for any administrative action that has been taken against him. Njane had a right to receive the written reason (that is the prohibition order) to explain why the lorry's number plates were removed. Kenha has failed to show what legal provision permitted it to act contrary to Section 4(2) of No.4 of 2015. It is for that reason that I find Njane's rights under that Section and under Article 47 of the Constitution were indeed violated.

16. Although Njane alleged he has lost business to the value of KSh.20,000 per day, since the removal of the number plates, that claim being in the nature of special damages needed to be specifically pleaded and prove. The Court of Appeal while considering the claim under Fatal Accident Act, in the Case *Dickson Taabu Ogutu (Suing as the Legal representative of the estate of Wilberforce Ouma Wanyama v Festus Akolo & another* [2020] eKLR, had this to say on the claim for special damages:

“It is trite law that reliefs sought from court can only flow from the pleadings. As was indicated in **THETA TEA COMPANY LIMITED & ANOTHER V FLORENCE NJAU NJAMBI** [2002] eKLR;

“We may usefully start by quoting the words of Lord Goddard, C.J in **BONHAM CARTER V HYDE PARK HOTEL LTD**, (1948) 64 T.L.R 177, which were cited with approval by this Court in **KENYA BUS SERVICES & ANOTHER V FREDRICK MAYENDE** (1988-92) 2 KAR, 232. Lord Chief Justice Goddard said:

“Plaintiffs must understand that if they bring actions for damages, it is not enough to write down particulars and, so to speak, throw

them at the head of the court, saying 'this is what I have lost, I ask you to give me the damages'. They have to prove it.”

The onus was on the appellant to prove that their aged parents were indeed dependent on the deceased and the extent of loss they have suffered considering the fact at the time of the hearing the appellant, also their son, had a job at the County Governor's office.”
(Underlining mine)

17. Njane's claim for special damages therefore fails for lack of proof.

18. Njane did pray for general damages for violation of his constitutional rights, which I have found were violated. In this regard I am guided by the Court of Appeal decision in the case **GREAT LAKES TRANSPORT CO. (U) LTD v KENYA REVENUE AUTHORITY [2009] eKLR** thus;

“In our view from the fact that general damages was pleaded in the body of the plaint and evidence led to show that the appellant was actively using the subject vehicle it followed that it would suffer loss even if special damages were not properly proved.

Considering all the above and mindful of the legal position that the superior court ought to have considered that it was sitting both as a Court of law and a court of Equity, and noting that Equity would not allow a wrong to be suffered without a remedy, we hold that the appellant was entitled to an award of general damages.”

19. I am of the view that an award of KShs.1 million in damages for violation of Njane's rights will meet the interest of justice. It also follows that in view of this court's finding that there is no evidence Njane was served with the prohibition order an order will be made for the release of the number plates of the lorry.

CONCLUSION

20. In the end I find that the rights of Petitioner's rights to fair administration actions were violated and I grant judgment for the Petitioner as follows:

- a. Kenya National Highway Authority shall pay Benson Ruiyi Njane KSh.1million(ONE MILLION) in damages.
- b. Kenya National Highway Authority shall with immediate effect release to Benson Ruiyi Njane the registration number plate of the lorry KBB 112K.
- c. The costs of this petition are awarded to the Petitioner to be paid by Kenya National highway Authority.
- d. The case against the Director General Kenya Highways Authority Engineer M. Mundinia not having been proved is dismissed with no orders as to costs.

SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF MARCH 2021.

MARY KASANGO

JUDGE

18th March 2021

Before Justice Mary Kasango

C/A - Kevin

For Petitioner – Mr. Ayora

For Respondents – Ms Alogo Holding brief for Mr. Maruti

COURT

Judgment virtually delivered in their presence.

MARY KASANGO

JUDGE