



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 226 OF 2019

IN THE MATTER OF ARTICLES 22(1), 23(1) AND (3), 47, 48, AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULES 4, 11, 12, 13, 20 AND 21 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTIONS 55 AND 56 OF THE TRAFFIC ACT, LAWS OF KENYA

LIWANYA CONSTRUCTION & GENERAL SUPPLIES COMPANY LIMITED.....1ST PETITIONER

JAMES NJERU MWANIKI.....2ND PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST RESPONDENT

NATIONAL TRANSPORT AND SAFETY AUTHORITY.....2ND RESPONDENT

JUDGMENT

PETITION

1. The Petitioner through a Petition dated 6th June 2019 supported by Affidavit sworn by Agnes Nyaguthi Wanja sworn on even day seek the following reliefs:-

a. Upon hearing *ex-parte*, this Honourable Court do issue and order that the 1st and 2nd Respondents through their agents, servants, employees, proxies, and any other person claiming under them to immediately release the confiscated number plates of motor vehicle Registration number KCL 017U, Isuzu FSR, to the 1st Petitioner forthwith, pending the hearing and determination of this Application.

b. A declaration that the unlawful removal of the 1st Petitioner's vehicle number plate Registration No. KCL 017U, is in breach of the 1st and 2nd Petitioners' Constitutional rights against unlawful deprivation of their property and their economic and social rights to earn a living as enshrined in Article 43 of the Constitution of Kenya.

c. A declaration that the decision by the 1st and 2nd Respondents jointly and severally that the motor vehicle registration number KCL 017U was overloaded is a breach of the Petitioners right to a fair trial as enshrined in Article 50 of the Constitution of Kenya.

d. General damages for loss of business and earnings to the 1st and 2nd Petitioners incurred during the immobilisation of the

subject vehicle occasioned by the 1st and 2nd Respondents jointly and severally.

e. Costs of and incidental to this Petition; and

f. Any other order that this Honourable Court deems fit and just to grant in the circumstances.

RESPONDENT'S RESPONSE

2. The 2nd Respondent filed Replying Affidavit sworn by Christopher Wanjau, Director of Charge of Registration and Licensing of 2nd Respondent, the National Transport and Safety Authority dated 2nd May 2020.

3. The 1st Respondent filed response to the Petition setting out several grounds in response dated 25th November 2020.

PETITIONER'S CASE

4. The 1st Petitioner is the registered owner of the suit Motor Vehicle Registration No. KCL 017U, Isuzu FSR Lorry, used for commercial purposes to transport construction materials and which vehicle was purchased through a financial facility from a financier the Co-operative Bank of Kenya Limited. The same is registered in the joint names of the 1st Petitioner and the financier. The 2nd Petitioner is a business manager contacted to manage the suit motor vehicle, under the 1st Petitioner's, authority.

5. On the night of 18/5/2019, the Respondents' through their agents and/or officers are said to have grossly violated the Petitioners Constitutional rights by damaging and immobilising the Petitioners' motor vehicle, the subject matter of this suit, while the same motor vehicle was transporting a cargo load of sand to a construction site along an unmarked, unpaved, dirt road along the Kianyaga road within Kirinyaga county.

6. The Petitioners case is that on the said date, the Respondent's officers without any colour of right, provocation or notification, approached the suit motor vehicle from behind in an unmarked motor vehicle not containing the insignia, markings or branding of either the 1st nor the 2nd Respondents, and having only regular number plates identification vis KCT 036G, a greyish-brown Toyota Hilux Double cabin, a motor vehicle that is operational under a lease by the Respondents, and threw metal spikes on the back tyres of the suit motor vehicle, causing the suit motor vehicle's 4 rear tyres to run over the metal spikes, getting punctured by the said metal spikes, therefore immobilizing the suit motor vehicle. The Respondents Officers then removed the number plates of the suit motor vehicle and made off into the night.

7. The Petitioners further aver that the Petitioner's driver who was driving the suit motor vehicle at the time of these occurrences was not alerted nor notified by the Respondents' officers of their intentions or their reasons as to what necessitated their actions of immobilizing the suit motor vehicle, nor did the same officers identify themselves to him, and in light of these observations or lack thereof, the Petitioners driver disembarked from the vehicle and fled to a nearby thicket, believing that what was transpiring was a robbery in progress. The Respondents officers thereafter removed and confiscated the suit motor vehicle's number plates and left the scene without issuing any pronouncement, order or documentation as to the details of the confiscation of that suit vehicle's number plates.

8. The Petitioners' driver proceeded to contact the 2nd Petitioner and updated him on what had transpired, and it is then that the 2nd Petitioner drove from Embu Town towards the scene where the suit motor vehicle had been immobilised. On his way towards the scene at, an area known as Mbiri, in Kirinyaga County, at the Njuku-ini forest, past the Kenya Forest Service gate at P1, the 2nd Petitioner met the Respondents' leased motor vehicle KCT 036G, a greyish-brown Toyota Hilux Double Cabin, as they made their way back to the main Embu-Kianyaga High Way.

9. The Petitioners case is further that on 19/05/2019, the 2nd Petitioner notified the 1st Petitioner's Director, Agnes Nyaguthii Wanja of what had transpired on the night of 18/05/2019, and also made inquiries as to the whereabouts of the suit motor vehicle's number plates, inquiries of which led him to the Juja weighbridge where a confirmation of the confiscated number plates was verbally affirmed to him by the officer in charge of the station. The Respondents leased motor vehicle KCT 036G, a greyish-brown Toyota Hilux Double Cabin, was also present at the Juja Weighbridge, though as of the date of filing these submissions, the vehicle still under lease by the Respondents, is currently stationed at the Mlolongo or Isinya weighbridges.

10. The Petitioner's thereafter proceeded to tow the suit motor vehicle back to Embu and packed it in the 2nd Petitioner's homestead as without its number plates, and it being a commercial vehicle, the same could not be used on any road for any economic or personal use.

11. The 2nd Respondent filed a Replying affidavit and states that the 2nd Respondent is a State Corporation established under the **National Transport and Safety Authority Act No. 33 of 2012** with the key mandates of, inter alia, planning, managing and regulating the road transport system, and implementing policies relating to road transport and safety, and with authority to also register motor vehicles, conduct motor vehicle inspections and certifications, regulate public service vehicles, develop and implement road safety strategies, conduct research and audit of road safety among others. Further that the authority is the chief custodian of all number plates of all registration numbers and plates in the Republic of Kenya.

12. The 2nd Respondent contend that in view of the above the Authority receives number plates from Kenya National Highway Authority for safe custody after the 1st Respondent has removed the numbers from vehicles which are overloaded at the various weighbridges in the Republic of Kenya. The 2nd Respondent argued that on 4/June/2019 it received a letter from the 1st Respondent forwarding removed number plates to it and indeed KCL 017U was among them. It conceded that it is in custody of the said number plates. Annexed and marked as CW-1 is a copy of the letter from the 1st Respondent.

13. The 2nd Respondent further aver that to date it has not received any instructions to the contrary from the 1st Respondent to release the number plates. It added that as and when the 1st Respondent or this Court directs it to release the number plate, it shall have no problem in releasing the same.

14. The 2nd Respondent contend that it is not privy to the happenings of the 8th May, 2019 as its mandate is not extended to weighbridges. Further the 2nd Respondent contend that its agent did not in any way confiscate the number plates neither the 2nd Respondent nor its Agent did not in any way confiscate the number plates neither did it wilfully act in unprocedural and unwarranted manner in exercising its authority in ascertaining the subject motor vehicle's disputed weight, actions of which resulted into the damage and immobilization of the said motor vehicle. It is further averred by the 2nd Respondent that the issue to do with the weight at the weighbridge is the mandate of the 1st Respondent and not the 2nd Respondent as alluded by the Petitioners in the Petition. It is further their contention that the numbers were removed by the 1st Respondent and not the 2nd Respondent or both as alleged by the Petitioners. As to whether the right procedure was followed before the number plates were removed it is averred that can adequately be addressed by the 1st Respondent. The 2nd Respondent aver that it has not breached any provisions of **Articles 22, 23, 47, 48 and 50 of the Constitution** as alleged by the Petitioners.

SUBMISSIONS

15. The Petitioners filed submissions in support of the Petition dated 6th August 2020; whereas the 1st Respondent filed submission in opposition of the Petition dated 25th November 2020. The 2nd Respondent did not file any submissions.

ANALYSIS AND DETERMINATION

16. I have carefully considered the Petition; the Respondents responses as well as rival submission and from the aforesaid the following issues arise for consideration:-

- a. Whether the Petitioners have established violations of their rights under the Constitutional provisions.**
- b. Whether the Petitions have contravened Section 55 and Section 56 of the Traffic Act, Cap 403 laws of Kenya**
- c. What reliefs are available to the Petitioners.**

A. WHETHER THE PETITIONERS HAVE ESTABLISHED VIOLATIONS OF THEIR RIGHTS UNDER THE CONSTITUTIONAL PROVISIONS.

17. The Petitioners contended that their rights as enshrined under the **Constitution of Kenya 2010** were grossly abused when the Respondents without any right as to the procedure and process damaged Petitioners' motor vehicle, Reg No. KCL 017U, an Isuzu FSR Lorry, on unfounded allegations of the said vehicle being overloaded and thus exceeding the required national highway, weight limit.

18. The Petitioners contend that the Respondents callously caused damage to the Petitioners motor vehicle by puncturing the rear tyres of the said motor vehicle by use of metal spikes without identifying themselves nor their intentions, and thereafter removing and confiscating the said motor vehicle's number plates, disabling the said motor vehicle's movement. It is the Petitioners contention that they were summarily condemned unheard. It is Petitioners averments that the Respondents by so doing were in clear violation of **Article 47 of the Constitution** and violated Petitioners' rights to fair administrative action and Petitioners rights to be heard in a just and fair manner, as well as to enjoy the rights to property, as enshrined under **Article 40 of the Constitution**, which requires that no one should arbitrarily be deprived of property of any description or of any interest or right or any property of any description or be restricted in enjoyment of any right under **Article 40 of the Constitution** on the basis of any grounds specified or contemplated in **Article 27(4) of the Constitution**.

19. **Article 40(3) of the Constitution** states that the state shall not deprive a person of property of any description or any interest in or right over, property of any description. The said **Article 40 (3) of the Constitution** provides:-

“Article 40(3)

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—30 Constitution of Kenya, 2010

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.”

20. The 1st Respondent has not filed Replying Affidavit to controvert the Petitioners averments whereas the 2nd Respondent has distanced itself from the incident and averred that it did not take part in the incident and that it has nothing to do with the issue to do with the weight at the weighbridge as that is the mandate of the 1st Respondent. It is further urged by 2nd Respondent that as to whether the right procedure was followed or not before the number plates were removed, that can only be undeniably be addressed by the 1st Respondent, as the 2nd Respondent was not privy to the happenings of 8th May 2018 and further as its mandate is not extended to weighbridges.

21. From clear perusal of the pleadings and proceedings in this matter, the 1st Respondent is yet to present pleadings controverting the alleged violations, the Petitioner perceived to have been committed by the Respondents nor have the Respondent denied the actions averred in Petitioners' Petition through filing and serving a Replying Affidavit.

22. The 1st Respondent in its submissions deny the stated violations and contended that it did not maliciously cause the detention of the Petitioner's motor vehicle No. KCL 017U (Isuzu FSR Lorry Truck) (hereinafter "the Vehicle") on the 18th day of May, 2019 along the national truck road network within Kirinyaga County or as alleged but rather it's officers have always acted in execution of its legally defined mandate as provided for under **Section 3 of the Kenya Roads Act, 2007**, being the responsibility of managing, developing, rehabilitating, and maintaining national roads. It is further urged that the 1st Respondent being a body corporate, it is permitted under the Act to do or perform all or any legal acts for the proper performance of its functions as may lawfully be done or performed by a body corporate which act, include contracting other bodies to help it achieve various mandates as stipulated by the law.

23. The 1st Respondent similarly denies the contents of the Application and the Petition and avers that, for the purposes of discharging its responsibility, it is bestowed with the following duties and functions:-

- a. Constructing, upgrading, rehabilitating and maintaining roads under its control;
- b. Controlling national roads and road reserves and access to roadside developments;
- c. Implementing road policies in relation to national roads;
- d. Ensuring adherence to the rules and guidelines on axle load control prescribed under the Traffic act and under any regulations under the Kenya Roads Act.
- e. Ensuring that the quality of road works is in accordance with such standards as maybe prescribed by the Minister;
- f. In collaboration with the Ministry responsible for transport and the Police Department, overseeing the management of traffic and road safety on national roads;
- g. Collecting and collating all such data related to the use of national roads as may be necessary for efficient forward planning under the Kenya Roads Act;
- h. Monitoring and evaluating the use of national roads;
- i. Planning the development and maintenance of national roads;
- j. Advising the Minister on all issues relating to national roads;
- k. Preparing the road works programmes for all national roads;
- l. Liaising and coordinating with other road authorities in planning and on operations in respect of roads and
- m. Performing such other functions related to the implementation of this Act as maybe directed by the Minister.

24. It is 1st Respondents case that the **Traffic Act** and **the East African Community Vehicle Load Control Act, 2016** permits it to deal with issues of exceeding load limits administratively and stipulates the various applicable fines payable by persons found contravening the load limit guidelines. It further argued that contrary to the averments by the Petitioners herein, the processes leading up to the establishment of the weight of the vehicle, determining the overload and the issuance of a Prohibition Order were carried out in conformity with the Kenya Roads Act, Traffic Act and Standards Operating procedures set out to ensure equality, equity and fairness in the discharge of the Authority's mandate.

25. The 1st Respondent therefore invites the Court to consider that the damage to the Roads affects the general public at large, the roads being an expensive national treasure which ought to be jealously safeguarded. In addition the 1st Respondent averred that in no way has it or its officers hindered or infringed any of the Petitioner's rights as alleged. To the contrary, it is stated the 1st Respondent's officers detected a crime and took lawful action to enable charging of the offenders. It is further stated by the 1st Respondent, the fees as charged on Petitioners are creation of the statute and the same are within the statutory range for the contravention of load limits as indicated herein and more specifically **Section 7 of the East African Community Vehicle Load Control Act, 2016** which mandates the 1st Respondent to provide for payment of overloading fees at weighing stations or such other designated locations.

26. The 1st Respondent as pointed out in this case and from the pleadings herein it has not filed Replying Affidavit controverting the

averments raised in the Petitioners Petition and supporting affidavit, but the 1st Respondent filed only response to the Petition, which cannot be relied as to converting the contents of an affidavit deponed upon by Petitioners. In view where I am satisfied that the Petitioners averments is drawn and filed in the supportive affidavit remains uncontroverted by the Respondents.

27. I find as alluded to in the Petition and supporting affidavit, the Petitioners have demonstrated that the Petitioners constitutional rights were violated by the 1st Respondent's agents and officers. The 1st Respondent's acts of damaging, immobilising the suit motor vehicle and confiscating its number plate, without ascertaining that it was overload or had exceeded the limit weight, deprived the Petitioners and continues on the same trajectory to deny the Petitioners of their right to the protection of their interest and right to property as guaranteed under **Article 40, 47, 48 and 50 of the Constitution**.

28. I find from the pleaded facts of the Petition that **Article 47 on Fair Administrative Action** was violated by 1st Respondent. The said Article provides:-

“47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is Constitution of Kenya, 2010 33 likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

29. The Petitioners right to administrative action that is, expeditious, efficient, lawful, reasonable and procedurally fair was violated by the 1st Respondent. Further **Article 48** on Access to Justice was also violated. The same provides:-

“Article 48: The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

30. From the affidavit evidence by the Petitioners, it is depilated that the Respondents on the night of 18/5/2019, the Petitioners suit motor vehicle, was confiscating by 1st Respondents officers, who removed the said vehicle's number plate, which has prejudiced the Petitioners rights to fair administrative action, access to justice and a right to fair hearing all encapsulated in one gross violation. The Petitioners were not told why the vehicle was being immobilised and were not given an opportunity to be heard nor was the procedure applied by Respondent, procedurally fair nor have the Petitioners been given written reasons for the 1st Respondent's action. I find from the foregoing that the Petitioners were not only condemned unheard but have also been unreasonably denied use of their motor vehicle through unprocedural and unfair actions, as the same has not been contested by the Respondents through affidavit evidence, who sought to rely on written submissions as the Replying Affidavit, as written submissions which are unsupported by affidavit or facts cannot in law suffice.

31. The Petitioners contended that length detention of the Petitioners vehicle for over 19 months without due cause or evidence of the same amounts to unreasonable restriction of the Petitioners right to use and enjoy their property. The 1st Respondent, however noted that the Petitioners took the vehicle to the 1st Respondent home, where they had opportunity to repair and use the same. Indeed Petitioners right of use of the vehicle cannot be attributed to the Petitioners but on 1st Respondents action who removed and detained the number plate of Petitioners vehicle. This Court is aware that no vehicle can be used in Kenyan roads without number plates. I find the non-user of the vehicle is solely attributable to the 1st Respondent's unlawful acts of depriving the Petitioners the number plates of their vehicle and failed to return the same hence violation of the Petitioners constitutional rights to property.

B. WHETHER THE PETITIONS HAVE CONTRAVENED SECTION 55 AND SECTION 56 OF THE TRAFFIC ACT, CAP 403 LAWS OF KENYA

32. In the instant Petition there is no dispute that the Petitioners vehicle's number plates were removed on the night of 18/5/2019 under unclear circumstances as there has been no records or statements presented to this Honourable Court by the Respondents to justify their actions of removing and detaining the said motor vehicle's number plates, more so, as the 1st Respondent has not filed Replying Affidavit controverting the facts raised in the Petition and supporting affidavit. I find as such the 1st Respondent has not adduced any evidence whatsoever to show that their actions as against the Petitioners' motor vehicle was and continues to remain justifiable. **Section 55 of the Traffic Act, Cap 403, Laws of Kenya** deals with the condition of vehicles and provides that:-

“55 (1) No vehicle shall be used on a road unless such vehicle and all parts and equipment thereof, including lights and tyres, comply with the requirements of this Act, and such parts and equipment shall at all times be maintained in such a condition that the driving of the vehicle is not likely to be a danger to other users of the road or to persons travelling on the vehicle.

(2) No motor vehicle the weight or dimensions of which laden or unladen exceeds the maximum weight or dimensions provided for such vehicles by rules made under this Act shall be used on a road.”

33. The 1st Respondent asserted that the Authority has its mandate stipulated under **Section 4 of the Kenya Roads Act, No.2 of 2007**. That mandate, as per **Section 4(2)(d)** extends to ensuring adherence to the rules and guidelines on axle load control prescribed under the **Traffic Act, Cap. 403** and under any regulations under the **Kenya Roads Act, No. 2 of 2007**.

Section 4(1) of the Kenya Roads Act, Act No.2 of 2007 provides inter alia that:

4(1) The Highways Authority shall be responsible for the management, development, rehabilitation and maintenance of national roads.

(2) For the purposes of discharging its responsibility under subsection (1), the high ways authority shall have the following functions and duties-

(a) constructing, upgrading, rehabilitating and maintaining roads under its control;

(b)controlling national roads and road reserves and access to roadside developments;

(c) Implementing road polices in relation to national roads;

(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 (Emphasis added)”

34. The 1st Respondent places reliance on *Section 55(2) of the Traffic Act* which provides:-

“55 (2) No motor vehicle the weight or dimensions of which laden or unladen exceeds the maximum weight or dimensions provided for such vehicles by rules made under this Act shall be used on a road.”

35. Further *Section 56 of the Traffic Act, Cap 403, Laws of Kenya* deals with limitations of loads on motor vehicles on national roads and states:

“56.(1) No vehicle shall be used on a road with a load greater than the load specified by the manufacturer of the chassis of the vehicle or than the load capacity determined by an inspector under this Act.

(2) no vehicle shall be used on a road if it is loaded in such a manner as to make it a danger to other persons using the road or to persons travelling on the vehicle; and should any load or part of a load fall from any vehicle on to a road such fact shall be prima facie evidence that the vehicle was loaded in a dangerous manner until the contrary is proved to the satisfaction of the court.

(3) for the purpose of this section, persons travelling on a vehicle shall be deemed to be part of the load.”

36. It is trite that overload can be determined by weight of the vehicle as prescribed by *Section 56 of the Traffic Act*. In the case at hand, the 1st Respondent was in the course of discharging its mandate pursuant to the *Kenya Roads Act, No.2 of 2007 and the Traffic Act*. The 1st Respondent urged that it acted within its powers and discharged a lawful mandate which resulted in the apprehension of the Petitioner’s motor vehicle on the material day. It is contended that the officers carrying out duties on behalf of the 1st Respondent were, duly authorized to carry out the duties that resulted in the weighing of the motor vehicle using a method provided in law, issuance of prohibition order and removal of the vehicle’s number plate. However it is noted that no results of the alleged weight has been exhibited in this pattern.

37. It is further averred by the 1st Respondent that the objection of issuance of the Prohibition Order and the removal of the number plates to the motor vehicle on the material date, was to ensure compliance of the law and more so effect the Prohibition Order in accordance to the law.

38. Upon consideration of the 1st Respondent’s submissions and considering the pleadings I find no basis has been laid down for the Court to accept such submissions as the 1st Respondent did not bother to file Replying Affidavit as submitted nor exhibited the overweight found at the material time. A party to any proceedings is bound by his pleadings and in absence of such pleadings a party cannot introduce facts in support of its case through innovation through submissions. I find that there being no proof whatsoever of the Petitioners having contravened *Section 55 and 56 of the Traffic Act, Cap 403, Laws of Kenya*, it is only just and fair to conclude that the Petitioners did not contravene the said referenced Section. It is noted from the 2nd Respondent’s Replying Affidavit, that they are not aware of what happened on 18/5/2018 as they were not at the scene but only admitted to having custody of the Petitioners’ motor vehicle registration number plate which they received from the 1st Respondent.

39. The Petitioners contention that non-failure to file Replying Affidavit is fatal to a Respondents’ case is placed in the case of *Moses Kipkoech Rotich v Kenya National Highways Authority & 7 others [2018] eKLR* where the Court stated that:

“34. The 1st Respondent did not file any documents to controvert the evidence presented before the Court by the Petitioner. In the circumstances, the only conclusion that hone comes to, then, is that at the time the motor vehicle was detained and its number plates taken away, it was being operated in accordance with the law and was not overloaded as alleged by the 1st Respondent.”

40. Clear perusal of the 2nd Respondent’s affidavit while attempting to incriminate the Petitioners as having overloaded their vehicle, turns out, that there is no evidence, that was provided to ascertain this allegation of the Petitioners vehicle being overloaded or in any way having violated *Section 55 and Section 56 of the Traffic Act, Cap 403, Laws of Kenya* or any other governing laws for that matter. This allegation has only been used arbitrarily to try and force the Petitioners to succumb to a tramped up penalty of some sort. Indeed it is noted the 2nd Respondent has clearly deponed that:-

“10. That the Authority is not privy to the happenings of the 8th May, 2019 as our mandate is not extended to weighbridges.”

41. In view whereof I find that the allegation remains unproven and is used arbitrary to try and force the Petitioners to succumb to a tramped up penalty of some sort. To buttress this proposition the Petitioners placed reliance in the case of *Joram Nyaga Mutegi v Kenya National Highway Authority [2017] eKLR* where the learned Judge pointed as a matter of fact that:-

“24. Whether or not the truck was over loaded is a question of fact. The Respondent’s officers did not weigh the truck and cannot therefore state with certainty that it was over loaded. An assumption per se cannot, in law, be a basis for determining one’s culpability in a traffic offence. There was no evidence therefore that the truck was overloaded and what police officers did was to assume that the vehicle was over loaded and proceeded as though the driver was guilty. The documents attached to the replying affidavit are not of any evidential value in the Respondent’s attempt to show that the vehicle was overloaded contrary to law given the circumstances of this case.”

42. I find the question of whether the lorry was overloaded or not is a question of fact. In this Petition there is clear admission that 1st Respondent’s officers did not weigh the lorry at the weighbridge or at all and it cannot certainly be said that the lorry was indeed overloaded as attested to by the 1st Respondent. This I find is a mere allegation and I hold that mere assumption per se cannot, in law, be a basis of taking steps as was done in this case by the 1st Respondent’s officers, on Petitioners lorry on main road. Further there is no Replying Affidavit with annexed documents in support of the allegations of overloading. I find in the instant Petition, the 1st Respondent, has failed and declined to file documents whatsoever, in opposing the Petitioners’ Petition, as filed. The 2nd Respondent while acknowledging having custody of the Petitioners’ motor vehicle, number plates, the 2nd Respondent failed to give any factual evidence of the Petitioners having violated the provision of the law that authenticates their actions, which I find to be unprocedural and unfair.

43. I find from the foregoing that the 1st Respondent has not demonstrated that the Petitioners contravened *Section 55 and Section 56 of the Traffic Act*. I also find on the other hand the Petitioners have demonstrated through affidavits evidence that the Petitioners did not breach *Section 55 and 56 of the Traffic Act* and have further shown that the 1st Respondents actions were in total violation of *Section 55 and 56 of the Traffic Act*, which actions were in breach of procedure and legal process as the Petitioners motor vehicle was never weighed as required or at all.

C. WHAT RELIEFS ARE AVAILABLE FOR THE PETITIONERS.

44. The 1st Respondent contention is that the Petitioners have approached Court with unclean hands and material non-disclosure of facts that the Petitioners have not disputed the fact that upon their driver being politely flagged down and requested to facilitate weighing of the motor vehicle, he refused and did not comply with the direction issued. In view of this, it is urged the Authority’s officers proceeded to establish the weight of the truck using scientific calculations as provided in *Article 106 of the Traffic Act*. It is further contended that the Petitioner failed to inform the Court that he had been issued with a Prohibition Order emanating from a determination that his motor vehicle was overloaded. The Respondents referred the Court to the holding in *Kiambu Civil Appeal No. 5 of 2018 Abdi Ghafow Hilowle vs. the Director General, Kenya national Highways Authority (2020, unreported)*, wherein the learned Judge Hon. C. Meoli, held that:-

“A party who shows scant respect of the rule of law cannot expect the Court to exercise its discretion in his favour.”

45. It is urged by the 1st Respondent that it has the mandate of ensuring quality and adequate National Trunk Roads. In furtherance of this enormous mandate, it is contended that the Respondent officials often face near death experiences in ensuring that Kenyans enjoy this quality resource. The Respondents invited the Court to have a look at the holding of the Learned Judge, Hon. Justice Hellen Omondi who eloquently stated in *Marius Wahome Gitonga v Kenya National Highways Authority [2019] eKLR* that;

“Our roads and road users must be guarded – it would be immoral to allow road users especially heavy transport vehicles to run rough and move about on the basis that a reason has to be given in writing before any action can be taken. Additionally, it would be a cookery of all sensibleness to penalize the Respondents for their actions in imposing” when they acted within what the law provides albeit the fat that such action may be.”

46. The 1st Respondent further submitted that the prayer by the Petitioners seeking release of the plates, should be evaluated based on the Prohibition order issued by the 1st Respondent, which the Petitioner has failed to comply with to date.

47. The Petitioners urged that they are entitled to the reliefs sought in the Petition. It is Petitioners contention that the Petitioners bought the suit motor vehicle for the sole purpose of benefiting from it commercially, seeing that the proceeds made from that venture would earn them a living as well as service the loan amounts used to purchase the motor vehicle. However, it is urged that due to the Respondents unwarranted acts as captured in the Petition, the Petitioners are still forced to make loan repayments every month from their own savings on the motor vehicle seeing that it was purchased through a loan facility, and these loan repayments have greatly negated the Petitioners livelihoods and income, as the same need to be repaid notwithstanding the motor vehicle is operational or not, all of which were caused vindictively by the Respondents without any colour of right or justification whatsoever.

48. It is Petitioners submissions that the Petitioners had to endure loans repayments for the vehicle for last 17 months and counting while the same vehicle was deteriorated in value and has become un-roadworthy due to inactivity of purpose for which it was meant for, all due to the actions of the Respondents severally and jointly. It is averred that the income that was being recouped from the operation of the said motor vehicle in its course of duty before the Respondents grounded it on insubstantial allegations. The Petitioners urges that they deserve to be compensated for their losses incurred all through the proceeding of this matter, as the same has negatively affected their lives, in particular during this period of uncertainty of income generation caused by the ongoing worldwide pandemic of Covid -19. Every shillings counts and a denial of the same from baseless accusations especially from the same government institutions that are mandated to uphold and protect the rights of its citizens is unjustified.

49. The Petitioners on issue of appropriate award has sought reliance in the case *Daneva Company Limited v Kenya National Highways Authority [2014] eKLR*:-

“22. The Plaintiff has prayed for general damages for wrongful detention of its motor vehicle. The Plaintiff has not pleaded any special damages. I therefore do not agree with the Defendant that the Plaintiff ought to have pleaded the particular aspects of damages in the Plaint and strictly proved the same. That only applies if special damages are pleaded and not for general damages.

23. The plaintiff’s motor vehicle was being used for business and income generation. The motor vehicle has been in custody since 18/5/2019 for actions directly attributable to the Defendant’s negligence. The Plaintiffs is entitled to compensation.”

50. The Petitioner urged this Court to allow the application and Petition with costs to the Petitioner, for the rights which were so grossly violated by the Respondents whose offices are legally commanded to uphold and adhere to provisions of law and not to oppress the public.

51. This is a constitutional Petition clearly governed by provision of the Constitution as regards the reliefs which this Court can grant. Under **Article 23 of the Constitution** this Court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of rights.

52. Further a Petition brought to Court under **Article 23(3)** and under **Article 22** this Court may grant appropriate reliefs as provided thereto thus:-

“23(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.”

53. I have already found that the Petitioners rights as enshrined under **Article 40**, on Protection of right to property were arbitrary infringed and the Petitioners were also deprived of the property contrary to **Article 40**, that **Article 47** dealing with fair administrative action, Article 48 dealing with access to justice and **Article 50** dealing with fair hearing were also violated. This Court therefore is obligated under **Article 23(3)** to grant appropriate reliefs including compensation amongst other reliefs set out thereto. I therefore find that the submission relied upon by the Respondents’ inapplicable in view of clear pronouncements under **Article 23(3) of the Constitution** as regards the reliefs which a Court can grant in a Constitutional Petition.

54. The upshot is that the Petitioners Petition is meritorious and I proceed to enter judgment as follows:-

a. Prayer (a) spent.

b. A declaration be and is HEREBY issued that the unlawful removal of the 1st Petitioner’s vehicle number plate Registration No. KCL 017U, is in breach of the 1st and 2nd Petitioner’s Constitutional rights against unlawful deprivation of their property and their economic and social rights to earn a living as enshrined in Article 43 of the Constitution of Kenya.

c. A declaration be and is hereby issued that the decision by the 1st and 2nd Respondents jointly and severally that the motor vehicle registration number KCL 017U was overloaded is a breach of the Petitioners right to a fair trial as enshrined in Article 50 of the Constitution of Kenya.

d. Kshs.2,000,000 as compensation for loss of user, business and earnings to the 1st and 2nd Petitioners incurred during the immobilisation of the subject vehicle occasioned by the 1st and 2nd Respondents jointly and severally.

e. Costs of the Petition to be borne by the 1st Respondent only.

f. The 2nd Respondent to release promptly the number plate in respect of motor vehicle Registration No. KCL 017U to the Petitioner upon delivery of this Judgment and without unreasonable delay.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF JULY, 2021

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA