



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. 217 OF 2019

MOSES MACHARIA KIGO.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....4TH RESPONDENT

MUSA YEGO.....5TH RESPONDENT

RULING

1. This ruling is in respect of the Petitioner’s notice of motion application dated 27th November, 2019 in which he seeks orders as follows:-

“a. This application be certified urgent and heard *ex parte* in the first instance and further directions as to hearing and determination be made.

b. That there be an order directed to the 3rd, 4th and 5th Respondents directing them to forthwith and without delay release to the Applicant his motor Vehicle Registration No. KAK 825b, 10 Tonner Fuso lorry now being held at CID Headquarters by them or at their orders.”

2. The application is based on the grounds on its face and the supporting affidavit sworn on the date of the application by Moses Macharia Kigo, the Applicant/Petitioner.

3. The Director of Public Prosecutions, the Inspector General of Police, the Director of Criminal Investigations and Musa Yego being the respective 2nd, 3rd, 4th and 5th respondents opposed the application through a replying affidavit sworn by one of the investigating officers Mike Muia, an Assistant Superintendent of Police, on 11th December, 2020.

4. Ms Wawira for the Attorney General, the 1st Respondent, indicated to the court on 11th December, 2019 that the 1st Respondent would only participate in the petition and not the application.

5. Through his pleadings the Applicant discloses that he is the accused person in Nyahururu Chief Magistrate Court Criminal Case No. 1424 of 2018. At the time of filing the petition and the instant application, the trial was ongoing. According to the Applicant, he was acquitted under Section 210 of the Criminal Procedure Code in respect of some of the counts he had been charged with. Following the acquittal, the trial court ordered the release of his goods being sugar, rice, green grams and packaging materials.

6. The Applicant averred that the DCIO, Nyandarua North and the investigating officer declined to release the goods and were even cited and found guilty for contempt of the court order. They sought a review of the Magistrate’s decision in **Nyahururu H. C. Criminal Revision No. 11 of 2019, Republic v Moses Macharia Kigo** but their application failed. It is the Applicant’s case that after the application for review by the DCIO and the investigating officer was dismissed by the High Court at Nyahururu, the goods were taken back to the trial court.

7. On 27th May, 2019, the goods were released to the Applicant but as he was transporting them to his business premises in two lorries they were intercepted by officers from the Flying Squad Unit led by the 5th Respondent who informed him that they were not going to allow the release of food unfit for human consumption. The Applicant averred that his drivers were directed to drive the lorries to the CID Headquarters in Nairobi where the goods were once again impounded and the drivers placed in custody until the next day when they were released without any charges being preferred against them.
8. It was the Applicant's deposition that all his attempts to have his lorry released had hit a brick wall making it necessary for him to file the instant application. According to the Applicant, there is no basis or any reasonable or justifiable grounds for continuing to hold his motor vehicle.
9. Assistant Superintendent of Police Mike Muia opposed the application. He averred that sometime in June 2018 a multiagency team impounded a consignment of sugar and other goods from the Applicant who trades as Mugo Wholesale and Supermarket in Nyahururu within Laikipia County. His averment was that when the sugar was subjected to testing and analysis by the Kenya Bureau of Standards it was found to be unfit for human consumption.
10. Assistant Superintendent Mike Muia deposed that after investigations the Applicant was charged with several offences under the Standards Act in Nyahururu Chief Magistrate Court Criminal Case No. 1424 of 2018. Further, that on 19th December, 2018 the trial court put the Applicant on his defence in respect of three of the seven counts and acquitted him of the others. The trial court also directed that the sugar be released to the Applicant.
11. Assistant Superintendent Mike Muia averred that the sugar was indeed released to the Applicant in compliance with the court order on 27th May, 2019 but the consignment was impounded by the 4th Respondent for purposes of conducting further investigations to establish whether the sugar met the safety standards before it could be released to the Applicant and subsequently for consumption by members of the public. He deposed that at the time of impounding the sugar it was being transported in motor KAK 825B, Fuso lorry.
12. The evidence of Assistant Superintendent Mike Muia was that he supervised the team that conducted investigations. According to him, the investigators established that the consignment of sugar did not meet the required food safety parameters and would cause grievous harm to the consumers if released to the market.
13. It was the averment of Assistant Superintendent Mike Muia that statements were recorded from the driver and conductor of the lorry registration number KAK 825B. However, the Applicant has never attended the 4th Respondent's offices to either record a statement or claim the lorry and the goods therein.
14. Assistant Superintendent Mike Muia averred that he had looked for the Applicant to record a statement, including travelling to Nyahururu twice, but he had not succeeded. Further, that investigations had established that the Applicant had contravened several provisions of the law and the file had been sent to the Director of Public Prosecutions with recommendations that he be charged with several criminal offences. It was his averment that the lorry and the sugar will be used as exhibits in the criminal case. He further stated that the Applicant had not exhibited any documents to show that he is the owner of the lorry. He clarified that the matter under investigation is not related to the trial before the Chief Magistrate Court at Nyahururu. He prayed for the dismissal of the application.
15. The only issue for the determination of the court in this ruling is whether the Applicant has established sufficient grounds to warrant the issuance of an order directing the respondents to release lorry registration No. KAK 825B to him.
16. The Applicant's case is that there was no basis for holding the lorry and the affidavit sworn in an attempt to justify the detention actually contradicts an earlier affidavit sworn by the same ASP Mike Muia.
17. Counsel for the Applicant dismissed the claim that the lorry is being held in respect of offences that are different from those proceeding for trial at Nyahururu. According to counsel, the replying affidavit does not explain what the fresh investigation relates to, the offences that may have been committed and the basis in law for the investigation. It is the submission of counsel for the Applicant that there is gross impunity on the part of the respondents as the application is not opposed on any reasonable grounds.
18. On her part, counsel for the 2nd to 5th respondents opposed the application on the ground that as disclosed in the replying affidavit, the lorry is being held as an exhibit pursuant to ongoing investigations and the investigations file is already before the 2nd Respondent awaiting directions on the charges to be preferred. According to counsel, it would therefore be premature to release the exhibit.
19. Counsel for the 2nd to 5th respondents also submitted that the lorry was seized pursuant to the police powers found under Section 57(2) of the National Police Service Act and there is nothing irregular or illegal in the exercise of the police powers.
20. Another point taken up by the respondents in opposition to the application is that the ownership of the lorry is not clear as no ownership documents have been annexed to the application. Counsel cited the decision in **Alex Murithi Kiambi v Republic & another [2019] eKLR** and submitted that in that case the court declined to release the exhibit saying that there was no proof of ownership and it was therefore premature to release the exhibit. Also cited is the case of **Elijah Nyakebondo Onsongo v Republic [2017] eKLR** where the court also held that it would be premature to release the exhibit.
21. In a brief response counsel for the Applicant submitted that it is not in dispute that the lorry was detained because it was carrying exhibits that the police wanted to detain. Further, that the police cannot conduct investigations without any reasonable basis and that the offence being investigated should be disclosed. The Applicant's counsel urged the court to find that the authorities cited by counsel for the 2nd to 5th respondents are not relevant to this case.

22. I have considered the pleadings and submissions of the parties in this matter. I agree with counsel for the Applicant that the decision in **Alex Murithi Kiambi** (supra) is not relevant to the circumstances of this case. In that particular case, the applicant's lorry was impounded while transporting forest produce. The driver and a passenger in the lorry escaped. The respondents therein told the court that the lorry was being held as an exhibit and was subject to forfeiture under Section 68(1)(c) of the Forest Conservation and Management Act. In agreeing with the respondents, the learned Judge noted that the movement permit for the forest produce was issued in respect of grevillea, blue gum and acrocarpus timber and not the camphor and meru oak timber allegedly found in the lorry by the respondents. It is apparent that the crimes allegedly committed and the possibility of the lorry being forfeited were disclosed in that case.

23. The facts in **Elijah Nyakebondo Onsongo** (supra) were similar to the facts in the **Alex Murithi Kiambi** case. The lorry was impounded while transporting forest produce. The driver escaped from the scene. The Judge in declining an application for the release of the lorry also observed that the lorry was subject to forfeiture under the law.

24. In the case before me, the lorry was released to the Applicant through a court order. The respondents declined to release the lorry as directed resulting in contempt proceedings being taken against the officers of the 3rd and 4th respondents. The respondents then purported to comply with the court order by releasing the Applicant's goods. As the Applicant was taking away the goods from the court premises, the respondents impounded the two lorries that were transporting the goods.

25. The goods were impounded on 27th May, 2020 and over six months later when ASP Mike Muia, swore a replying affidavit to the application, the investigations had not been completed. The offences being investigated are unknown and neither have they been disclosed to the court.

26. Counsel for the 2nd to 5th respondents stated that the lorry was impounded pursuant to Section 57(2) of the National Police Service Act. She, however, failed to appreciate that a basis must be established for the exercise of statutory powers. A public officer does not exercise statutory powers because they exist. A public officer should be able to explain the basis for exercising statutory power. This has not been done in this case.

27. In the circumstances of this case it is very difficult to disagree with the assertion by counsel for the Applicant that the respondents are acting with impunity. The police officers may have had reasons for seizing the goods that were being transported by the lorry but they have not placed any scintilla of evidence before the court to connect the lorry with any crime. Counsel for the 2nd to 5th respondents has not, unlike in the cases she cited, demonstrated that the Applicant is being investigated for crimes which may result in the forfeiture of the lorry.

28. The claim that the Applicant has not adduced evidence to establish ownership of the lorry is without merit. The ownership of the lorry is not in dispute in this case.

29. My finding is that the instant application has merit. If the respondents are genuine that there could indeed be criminal offences connected to the lorry, they can take photographs for use in any contemplated trial. I will further give them the benefit of doubt by directing the Applicant not to dispose of the lorry pending the hearing and determination of the petition.

30. Otherwise, motor vehicle registration number KAK 825B Fuso lorry shall forthwith be released to the Applicant. The Applicant is awarded costs for the application against the 2nd, 3rd, 4th and 5th respondents.

Dated, signed and delivered through email at Nairobi this 30th day of April, 2020.

W. Korir,

Judge of the High Court