



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CONSTITUTIONAL PETITION NO.8 OF 2018

KIPKOECH B. NG'ETICHPETITIONER

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF TRANSPORT AND

INFRASTRUCTURE DEVELOPMENT.....2ND RESPONDENT

NATIONAL TRANSPORT AND SAFETY AUTHORITY.....RD RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY(KENHA).....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

AND

LAW SOCIETY OF KENYA.....INTERESTED PARTY

JUDGMENT

1. Before me is a petition dated 31st August 2018 brought by Kipkoech B. Ng'etich alleging violation of his constitutional rights and asking this court to issue the following orders –

- a. An order that the speed gun operation areas in Kenya be clearly marked within a time to be prescribed by the court.
- b. The Kenya National Highway Authority (KENHA) be ordered to supply a list of actual sign posts in Kenya to the Petitioner and the same be gazetted within the time prescribed by the court.
- c. A declaration that section 42 and 43 of the Traffic Act are unconstitutional.
- d. General damages.
- e. An order directing KENHA to ensure that no trucks and/or lorries are parked in the highway all over Kenya and a report on implementation supplied within 60 days.
- f. Any other relief the court may deem fit to grant; and
- g. An order for payment of costs of this petition by the respondents.

2. The petition was filed with a supporting affidavit sworn on 31st August 2018 by the petitioner annexing copy of proceedings in Kericho Magistrates Traffic Case No.2181 of 2016, the proceedings and ruling in Kericho High Court Criminal Revision No.12 of 2016, and page 1 and 2 of the ruling in Kericho Magistrates Criminal Case No.2426 of 2016.

3. The petition is opposed. Though counsel for the petitioner has stated that no appearance was entered for the 1st and 2nd respondents, that is not the position as a Memorandum of Appearance filed by the Attorney General on 7th September 2018 is for the 1st, 2nd and 5th

respondents.

4. The 3rd respondent (NTSA) filed a replying affidavit sworn by Judith Opili – Sirai its Legal Officer on 15th January 2019 in which it was averred that they complied with the law in execution of their mandate and that Traffic rules were made by the Cabinet Secretary, that it was not in charge of speed governors, and that the speed gadgets could only be produced, if required, in the traffic case.

5. The Attorney – General (5th respondent) who also appeared for the 1st and 2nd respondents filed grounds of opposition on 12th March 2019 contending that the petition was misconceived as it sought that the court scraps the functions of the Legislature an independent arm of government, that section 42 and 43 of the Traffic Act were lawful, that the petition was vague and laid no basis or violation which could give rise to a claim for general damages, and that such claim if any could be pursued by ordinary suit. It was also contended that the alleged violation herein was academic and not justifiable as the petitioner was neither penalized beyond the prescribed rules nor was he threatened to be so penalized.

6. The 4th respondent (KENHA) in response filed a replying affidavit sworn on 25th October 2018 by Muita Ngatia its Deputy Director, in which it was deponed that the 4th respondent had, on the national trunk roads under its purview, installed visible road signposts, that the petitioner had not particularized his petition with precision but only given general allegations on the issue of signposts, that the issue of speed limits on national trunk – roads was a matter of law under the Traffic Act with no discretion bestowed on the 4th respondent, that the 4th respondent was not responsible for signposts on rural and urban roads, and that the issue of devolution of roads had been dealt with by the court in **Council of County Governors – vs – Attorney – General & 4 Others [2015]eKLR**, that since provision of signposts was a continuous function, it was impracticable for the 4th respondent to supply the petitioner with a list of all signposts, that there was no requirement in law for publication of signposts by the 4th respondent, that the provision and regulation of road parking was a mandate of County Governments as provided for under section 5(c) of Part Two of the Constitution of Kenya, and that the petitioner wrongly relied on the provisions of the Kenya Roads Act which was enacted in 2007 – three years before the promulgation of the Constitution in 2010.

7. It was further deponed by the 4th respondent that it was a function of County Governments to provide appropriate parking on trunk roads on highways all over Kenya, and that as such County Governments should have been enjoined herein as a party by the petitioner, that the issue of trucks parking on the national road highways was a traffic function which should be pursued with the National Police Service and National Transport and Safety Authority as these were the entities with the mandate to regulate such parking, and that the court should not act in vain as the 4th respondent merely depended on financing from the Exchequer and development partners and that such financing was tied to development of specific projects only and could not be spent on anything else.

8. The Interested Party – the Law Society of Kenya in response filed a replying affidavit sworn by Mercy Wambua its Chief Executive Officer which was not dated though filed on 13th February 2019.

9. It was deponed therein that the petitioner alleged contravention of his rights under the Bill of Rights, and was asking the court to uphold the Bill of Rights under Article 23 of the Constitution, and deponed further that the increasing numbers of road accidents was a major concern of government and all stakeholders and that the Government of Kenya had been keen to reduce the road carnage and established the 3rd respondent under section 3 of the enabling Act to, among other functions, register motor vehicles, conducts motor vehicle inspections, regularities public service vehicles, and implement road safety strategies.

10. It was further deponed that the petitioner sought for relevant information but the respondents had refused to release such information to him in violation of his rights guaranteed under Article 35 of the Constitution which guaranteed access to information and Article 33(1) which provided for freedom of expression, that the 3rd respondent was required under Article 35(1)(a) of the constitution to provide such information to any Kenyan citizen unless it could show a legitimate reasons for not providing such information, and that in line with section 9 of the Access to Information 2012 such information was to be provided within 21 days of request.

11. It was also deponed that though a letter dated 22nd December 2017 was delivered to the 3rd respondent requesting for such information, no such information was provided thus contravening the constitutional principles of accountability, responsiveness and openness provided in the Constitution, as well as Article 9 (1) of the African Charter on Human and People’s Rights ratified in Kenya by virtue of Article 2(5) of the Constitution.

12. By consent of counsel for the parties, the petition proceeded by way of filing written submissions

13. The petitioners counsel filed written submissions on 27th June 2019 giving a summary of the circumstances of the case, the prayers sought and the issues for determination. Counsel relied upon a number of decided cases.

14. The Attorney-General the 5th respondent filed written submissions on 26th September 2019 contending that it was not the role of courts to make laws, as that was a function of the Legislature. According to the Attorney-General, the petitioner herein was asking the court to make laws, which was wrong. The Attorney-General stated further that all the prayers sought were not grantable under the provisions of the Constitution and the written law, especially the prayers sought against the 4th respondent Kenya National Highways Authority (KENHA) whose role was merely to manage, rehabilitate and maintain national roads in Kenya.

15. Though 1st and 2nd respondents the Inspector General of Police and the Cabinet Secretary of Transport and Infrastructure were not specifically covered in the Attorney-General’s submissions, the Attorney-General entered appearance for them and stated that the submissions were for the defendants. I take it that the submissions of the Attorney-General cover the 1st and 2nd respondents.

16. The 3rd respondent who also filed a further affidavit sworn on 25th September 2019 by Tom Abuga its Legal Officer, filed their written submissions on 26th September 2019 through counsel M/s Robson Harris, in which they contended that the request for information by the petitioner was vague and not specific and that under the Constitution and the law, the prayers sought by the petitioner were not grantable.
17. The 4th respondent Kenya National Highways Authority (KENHA) filed their written submissions through counsel Mahmoud Gitau Jillo on 20th September 2019 in which they contended that the request for information was not addressed to it, that the management and operation of speed guns did not fall within its mandate, that parking regulations were the mandate of County Governments who were not parties herein, and that section 42 and 43 of the Traffic Act were not unconstitutional.
18. The interested party, the Law Society of Kenya filed their written submissions through counsel M/s Orina & Company Advocates on 26th September 2019 in which they contended that it was wrongly joined as an interested party by the petitioner as it had no partisan interest. In the alternative, it contended that if the court found that it should be a party, then it should be converted to an amicus curiae and argued that the petitioner satisfied the threshold for a constitutional petition, but that the petitioner failed to demonstrate the illegalities and violations of his rights. They urged this court to strike out the Law Society of Kenya if the court found that they were improperly enjoined in the proceedings.
19. I have considered the pleadings and documents filed herein, as well as the written submissions. I will proceed to deal with this matter under the issues I have identified as hereunder.
20. The 1st issue is whether the Interested Party – The Law Society of Kenya was improperly joined as a party in the proceedings. The Law Society of Kenya say that they were improperly enjoined as Interested Parties and thus they should be struck out, or in the alternative they be joined as amicus curiae. An Interested Party is defined in Black’s Law Dictionary (12th Edition) as a party who has a recognizable stake (and therefore standing) in a matter. A number of judicial decisions in Kenya have dealt with the definition and circumstances in which a party can be joined as an Interested Party in court proceedings. The case of **Judicial Service Commission – Vs – Speaker of the National Assembly & 8 Others (2014)eKLR** dealt with this subject. In the later case of **Francis Karioko Muruatetu & Another – vs – Republic and 5 Others (2016)eKLR** the Supreme Court had the occasion to deal with the distinction between an amicus curiae on the one hand and an interested party on the other.
21. From the thread of legal reasoning, an amicus curiae is a neutral party who will assist the court in arriving at a just decision. For an interested party, the interest must be clearly identifiable and it has to be demonstrated that prejudice would be suffered by the interested party in case of non-joinder, and the application for such joinder, must set out the case the interested party intends to make before the court. From the foregoing requirements, in my view the petitioner did not have a basis to join the Law Society of Kenya as an interested party, as they did not meet any of the above three requirements. The court was thus misled to recognize the Law Society of Kenya as an interested party, as in addition to the above non compliance with the legal requirements by the petitioner, the interested party even presently maintains that it has no such interest and should be struck out.
22. As for the request by the Law Society of Kenya to be recognized it as amicus curiae, in my view such cannot be sought in written submissions. Allowing such will deny other parties the right to give their views to this court on the whether the Law Society of Kenya should be joined in these proceedings as amicus curiae. I decline that request and strike out the Law Society of Kenya as an Interested Party in these proceedings.
23. The 2nd issue is whether the petitioner’s constitutional rights were violated by failure of the respondents to provide him with information regarding the list of signposts and speed gun points on highways in Kenya. Indeed Article 35 of the Constitution of Kenya provides for the right of access to information in the hands of public officials to Kenya citizens. In addition, Section 5 of the Access to Information Act of 2012 provides that a public entity should facilitate such access to information held by it. Section 8 provides that a citizen who wants to access such information should request for the same in writing, while section 9 provides that the decision on the request for information should be communicated within 21 days.
24. I have seen a copy of a letter which is undated signed by Gordon Ogola advocate filed with the petition. The letter is not addressed to any institution. Though it was signed by an advocate, the advocate’s letter head and address are not on the letter. It seeks supply of information on speed guns, a list of pre-qualified suppliers of speed guns on our roads, a list of prequalified contractors for service for speed guns, training manuals of speed guns handlers, and a list of trained speed gun handlers.
25. In my view, this letter does not meet the above requirements for the supply of information as it is not addressed to any particular public institution or public official and does not give the address for the supply of such information. As such it cannot be said that any public institution or official was required to provide such information and to whom and at what address.
26. The third issue is whether section 42 and section 43 of the Traffic Act are unconstitutional. In my understanding the contention of the petitioner is that, as the penalty under the provisions of the Act is higher than that contained in the subsidiary legislation made thereunder, the two sections of the Act are thus unconstitutional, as the variance denied the petitioner a fair trial.
27. In this regard, I note that section 117(1)(a) of the Traffic Act provides as follows–

117(1) The Minister may prescribe -

(a)A schedule of minor traffic offences (in this section referred to as “the schedule of minor offences”) which may be dealt with and prosecuted in accordance with the provisions of this section, and may for the purposes of this section prescribe a statutory maximum penalty, which shall not exceed the penalty prescribed for such offence by this Act, for any of the scheduled minor offences to be

dealt with and prosecuted.

28. Under the above provisions of section 117, the Traffic (Minor Offences) Rules 2016 were made by the Cabinet Secretary providing for lesser penalties to the offences under section 42 and 43 of the Traffic Act.

29. In my view, it cannot be said that section 42 and 43 of the Traffic Act are unconstitutional as there is no allegation that the said provisions contravene or are inconsistent with any provision of the Constitution. They were enacted by Parliament and are not inconsistent with the Constitution. The only matter that could be challenged are the Rules of 2016 which provide a lesser penalty. Such challenge cannot be sustained however, because section 117 of the Traffic Act confers on the Cabinet Secretary power to prescribe such lesser penalties, and the Cabinet Secretary (minister) has exercised that power, which is not ultra vires. I find that section 42 and 43 of the Traffic Act are not unconstitutional.

30. The 4th issue is whether this court should direct KENHA to ensure that no trucks and/or lorries are parked on highways in Kenya and report the implementation to this court within 60 days. In my view, this prayer is not grantable firstly because no factual or statutory basis has been laid for it in this court by the petitioner. It has to be borne in mind that as a court of law, this court can only order a party to do what the party has responsibility to do. Since I have not been told what specific statutory obligations for the prayer sought falls within the mandate of KENHA, I cannot issue orders in vain, nor orders that will create an illegality.

31. The second reason why this prayer cannot be granted is that granting the prayer will convert this court to the implementer of and supervisor of traffic operations which will violate the principle of separation of power, and in addition this court has no capacity to do so. This prayer will thus fail.

32. The 5th issue is whether damages can be awarded in this case. In my view no damages are awardable as the petitioner has not particularized the specific provisions of the Constitution that have been violated against him. Merely being charged in court, does not constitute a violation of constitutional rights. Secondly, the complaint of the petitioner herein with respect of being charged and recharged in the Traffic Court, would have involved the Director of Public Prosecutions who made the decision to charge him, and the Director of Public Prosecutions is not a party herein to defend themselves. In those circumstances, I am of the view that damages, even if it were for malicious prosecution, cannot be awarded herein with the facts placed before this court. The cases relied upon by the petitioner such as the case of **Jamlik Muchangi Minao – vs – Attorney – General [2017]eKLR** are distinguishable. I dismiss this claim.

33. With regard to costs, the petitioner has not succeeded in these proceedings. I would thus have ordered that he bears the costs of the proceedings, but this being a public interest matter I will order parties to bear their respective costs.

34. Consequently, I find that the petition herein lacks merits. I dismiss the petition. Parties will however bear their respective costs.

Dated this 23rd day of April 2020.

GEORGE DULU

JUDGE

Delivered through video conferencing in the presence of Mr. Langat Court Assistant, Mr. Musyoka ICT Officer, Mr. Langat for petitioner and Mr. Orina for Law Society of Kenya.