



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PETITION NO. 16 OF 2015

MARIUS WAHOME GITONGA PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY RESPONDENT

JUDGMENT

1. The Petitioner (**MARIUS WAHOME GITONGA**) filed this petition against **KENYA NATIONAL HIGHWAYS AUTHORITY** (Respondent) seeking: -

- a) A declaration that the respondent acted in breach of article 40 and 47 of the Constitution by arbitrarily depriving him of his property name the registration plates of the motor vehicle KBW 850A and proceeded to carry out administrative action that is not expeditious, efficient, lawful, reasonable and procedurally fair, by removing the said the motor vehicle number plates.
- b) That the notice dated 21st August 2015, issued by the respondent is unconstitutional and a nullity in so far as it seeks to exonerate the respondent, its servants, agents and officers from liability for any loss or damage incurred as a result of its issuance as the as the Constitution of Kenya, 2010 grants the remedy of compensation under article 23(3) (e) to any person whose rights are breached.
- c) That the respondent does forthwith release the motor vehicle registration number plates in good order.
- d) That the petitioner be compensated for loss of user at (25,000/= per day from 21st August, 2015 until the date the number plates are released.
- e) That petitioner be granted damages for breach of his rights under article 40 and 47 of the Constitution.

2. In a Replying Affidavit sworn by **DENNIS HIGENS CHERUIYOT**. It is deposed that Section 4(2) (d) of the Kenya Roads Act gives **KENHA** powers for the purpose of discharging its responsibility under the Act, to ensure adherence to the rules and guidelines on Axle Local Council prescribed under the Traffic Act and the Kenya Roads Kenya National Highways Authority) Regulation 2013.

He confirms that on 21.08.2015, the Respondent's officers together with Kenya Police officers attached to the mobile monitoring weigh bridge Unit intercepted the Petitioner's motor vehicle along Nakuru – Eldoret road with an intention of undertaking routine compliance check in line with the Respondents mandate.

3. Upon stopping the said motor vehicle, the motor vehicle's driver diverted off the highway onto a side road and abandoned the vehicle. So the officers measured the weight of the said motor vehicle against the dimensions and capacities of the motor vehicle in relation to the axle Load weights prescribed for such motor vehicle and found it was overloaded by 10,500kgs in contravention to Section 55 + 56 of the Traffic Act which deals with the condition of vehicle and limitation of loads respectively as read together with the Highway Regulations. Thereafter **MR OSCAR MWANGOMBE** and **SGT. THURANIRA** issued prohibition order referred to – it prohibited the petitioner's use of that motor vehicle under the overloaded conditions pursuant to Section 106 of the Traffic Act, hence the requirement for its removal from the road.

4 Subsequently **SGT. THURANIRA** removed the motor vehicle registration number plates as the motor vehicle had been left unattended on the side road – this was also a way of ensuring that the motor vehicle does not go back to operate on the road without offloading the excess weight. Such action by **SGT. THURANIRA** is said not to offend the Constitution as the same is provided for under Section 106(4A) of the Traffic Act.

5. The compliance measure's the petitioner was required to meet included;

- a) Offloading the excess weight of 10,500kgs,

b) Paying a fee of **USD 2000** or its equivalent to Kenya Shilling as prescribed under paragraph 15(3) of the Highway Regulations for failing to submit the motor vehicle to be weighed as provided under paragraph 10(1) of the Highway Regulations, of failing to submit the motor vehicle to be weighed as provided under paragraph 10(1) of the Highway Regulations,

c) Pay a fine of Kshs.200,000/- for overloading (excess weight) as prescribed under Section 58 of the Traffic Act.

6. The petition is thus described as being bad in law and it is the petitioner who violated Section 55 and 56 of the Traffic Act. That in any case the circumstances the Petitioner's agent put himself in and not allow the Petitioner be issued with a report, as the driver took off from the vehicle and the petitioner did not attempt to engage with the Respondent before filing this petition.

7. The Respondent is willing to release the said motor vehicle plates as long as the petitioner complies with the prohibition order issued and pays the fees set out in the earlier part of the pleadings.

Further, that the Petitioner is not entitled to any form of damages as compensation, since the prohibition order was lawful.

8. However the Petitioner's driver **EDWARD KARANJA WANYOIKE** in a Supplementary Affidavit maintains that he had parked the motor vehicle on the road side after it developed mechanical problem and was in the process of repairing it when the Respondent's officers approached him alleging that motor vehicle was overloaded, and they proceeded to remove the number plates. He denies running away, saying he was never instructed to drive the motor vehicle to the police station.

9. The background to this matter is that the petitioner is the registered owner of the aforementioned motor vehicle which he had put in use for transport business. On 21st August 2015, along Eldoret – Nakuru Road, while the motor vehicle was, being driven thereon, the respondent officer/agents and/or servants removed the motor vehicle number plates and issued a document readily.

“Order to resume vehicle from road or public place to offload excess weight, or to effect repairs NO.WBY 0527 dated 21st, August, 2015.”

10. That by the terms of the document it alleged;

a) The motor vehicle had been inspected and found to be in use contrary to Section 55 and 56 of the Traffic Rules in respect of loading and construction which provision is not – existent,

b) It ordered that the motor vehicle should no longer be used until its load is properly distributed, the excess load of 10,500kg off-loaded and necessarily repairs carried out,

c) That the petitioner was to pay for the over-load and refusing to weigh,

d) The vehicle was to be removed to Eldoret Police Station and detained until the order was complied with,

e) The order sought to exclude liability for loss or damage incurred as a consequence of its actions.

11. The petitioner was aggrieved by all these actions saying he was arbitrary deprived of his property without being given an opportunity to be heard yet the motor vehicle had not been weighed in his presence or that of his duly appointed agent. The Respondent is accused of acting beyond and contrary to its statutory and constitutional mandate, and the court is urged to adopt the approach by *Odunga (J) in REAL HIGHWAYS AUTHORITY and NOR [2015] eKLR pg 67* which he observed that;

“...where a statute denotes powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers. Outside the statute under which it purports to exercise its authority...”

12. Further that the Respondent is yet to comply with the provisions of Section 106 (4A) of the Traffic Act which provides that;

Where a police officer, licensing officer or inspector makes an order under subsection (4) he may remove the vehicle identification plates and the vehicle license and, if he does so, shall deliver them to the Authority to be kept while that order remains in force.

It is on account of this that the petitioner insists that the removal of the number plates was unlawful as the only persons entitled to do so are;

: -a police officer,

: -a licensing officer,

: -an inspector.

As far as the petitioner is concerned, the deponent of the Replying Affidavit was not at the scene so as to depone to what took place.

13. In a Supporting Affidavit sworn by **EDWARD KARANJA WANYOIKE** who claims to have been the driver of the said motor vehicle,

the motor vehicle had developed a mechanical problem and broken down on the side of the road, so it was not possible for the Respondent to weigh it. That infact the Respondents did not have a weighing gadget at the scene and there was no basis for concluding that it had overloaded. He denies running away from the scene, saying if that had happened then how was he served with the prohibition order. The Respondents attempt to justify their activities under the **KENHA** Regulations 2013 is faulted on grounds that the Respondents acted in a high – handed manner and in breach of the Bill of Rights. Further that **KENHA** is neither a tribunal nor a court to justify imposing criminal sanctions. In this regard reference is made to the views expressed by **Emukule (J)** in **MARGARET MIANO Vs KENHA** that **KENHA** is not any of the tribunals established under the Constitution for resolution of disputes and the provisions in the regulations may have unwittingly and improperly constituted the authority with powers of Kangaroo court.

14. The response to these submissions is the Regulation 10 of the Kenya Roads (**KENHA**) Regulations 2013 creates an offence of overloading where Regulation allows **KENHA** to install static weighbridges or other devices for detection on roads and erection of road signs. Where there is over-loading Regulation 14 & 15 provide for notification and payment of fees for overloading, as well as the procedures to control overloading respectively and that they acted within the law in discharging their duty as custodians of road safety.

15. It is argued that the removal of the vehicles number plates was supported by law under Regulation 4 of **KENHA** Regulations and the offending motor vehicle must remain off the road until compliance of the requirements set is met.

16. There is no dispute that **Section 4(2) (d)** of the Kenya Roads Act gives **KENHA** power to discharge its responsibilities which inter alia includes adherence to the Axle Load Control as prescribed under the Kenya Roads Act, the Traffic Act and Kenya Roads (The National Highways Authority)

Regulations: However in so exercising its powers it must do so within the four corners of the law as observed in **REAL DEALS LTD & 3 OTHERS VS KENYA NATIONAL HIGHWAYS AUTHORITY & ANOR [2015] eKLR** that:

“...Where a statute denotes powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute...”

Did the Respondent act outside the scope of its powers and create an offence which does not exist under the cited law?

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

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).

I think without belaboring the point, that puts to rest the question as to whether the offence alleged exist in law.

Were the number plates improperly removed? The petitioner argues that the Respondents acted out of the scope of their mandate by removing the number plates as they are not among the officers so authorized to do under **Section 106** of the Traffic Act. Draw from the case of **Republic V Cabinet Secretary for Transport and Infrastructure, Principal Secretary & 5 others ex-parte Kenya Country Bus** which held that only a police officer, licensing officer or inspector has authority to remove the motor vehicle number plates, if he is of the opinion that the motor vehicle being used is contravening **Section 55 and 56** of the **Traffic Act** by ordering prohibition of use of the offending motor vehicle.

The word is if the officer is of the opinion [emphasis mine]

17. Section 106 of the Traffic Act provides that;

“Any police officer, licensing officer or inspector, if he is of the opinion that any vehicle is being used in contravention to Section 55 and 56 of the Traffic Act or in contravention of any rules relating to construction, use and equipment of vehicles, may by order prohibit the use of such vehicle, order such conditions and for such purposes as he may consider necessary for the safety of the public or to ensure that such vehicle complies with the provisions of Section 55 and 56.”

18. So what constitutes violation in this instance? I note that even the said driver (**EDWARD**) was not specific in his supplementary affidavit as to who removed the plates. The Respondent maintains its officers were in company of police officers, who are the ones who removed the plates.

19. Even if the petitioner is to be believed that his driver did not run away, then the question remains – what was so high handed? Does the Traffic Act and **KENHA** Act and Regulations provide for a situation where parties must have regulations with **KENHA** officials? I think that would be extremely dangerous – especially in a country where integrity and capitalizing or loopholes to compromise the law is an open secret.

20. This places the case on all fours with the decision in **MOSES KIPKOECH ROTICH V KENYA NATIONAL HIGHWAYS AUTHORITY & 7 OTHERS [2018] KLR**, that after forming an opinion that the motor vehicle was in excess of its weight, what was expeditious, efficient, lawful, reasonable and procedurally fair was to have the motor vehicle weighed then have the plates released to him. But that could only realistically have happened if the law which the Respondents were relying on had been repealed – so that for them the condition placed before release of the vehicle was within what the law at Section 106 allowed then. This is where I distinguish the prevailing scenario from the **MOSES KIPKOECH ROTICH** are as in that case.

21. This takes us back to **1st October 2015** to where **Kimondo (J)** observed that there was nothing to confirm that the truck's contents had been weighed and he in fact gave a conditional conservatory order requiring that the motor vehicle be submitted for inspection of loading and contestation of the motor vehicle then have the number plates released to the petitioner.

The basis for this was that nothing had been presented to the court to confirm that the motor vehicle had been subjected to any weights being measured.

There is nothing to suggest that to date the number plates have not been released to the petitioner, otherwise I am certain they would have moved to cite the respondents for contempt.

22. In my view, once the officers formed the opinion that the motor vehicle was carrying excess weight and took action to disable it, then they ought to have moved with speed to have it weighed and at most after the orders made by Kimondo 'J' on 1st October 2015, I would expect to see data showing the weight, found. None has been presented un constitutional. There was no provision that such officers had to be taken to court for plea – of course the lived reality is that the long distance trucks plying our highways would be so inconvenienced and suffer huge economic loss if a requirement was cultivated that each offender must be taken to court for plea. May be it was that realization that had earlier on resulted in the mobile traffic court which be positioned along the highway.

I am thus inclined to the **Mutende (J)** approach, that although the imposition of a fine has been declared unconstitutional, in so far as it remained in the statute broken, it would be a fallacy to decline the Respondents action illegal or even impose a sanction as damages against them.

(2) There can be no basis for declaring that **KENHA** acted in violation of **Art 40 and 47** of the Constitution, they were acting within provision of **Section 55, 56 and 106 (4A)** of the **Traffic Act**.

I think this case can easily be distinguished from the case of **MOSES KIPKOECH ROTICH V KENYA NATIONAL HIGHWAYS [2018] Eklr** because in that case, the 1st Respondent did not make any effort to weigh and release the vehicle until ordered to do so. In this instance the Respondent has explained the basis of arriving at the given weight using the formula of load over dimension. The petitioner has not contested that the load was over the required quantity, preferring to simply argue that no measurements were taken.

23. 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 a fine, when they acted within what the law provides albeit the fact that such action may be.

24. Was it high handed for the Respondent to impose sanctions on the petitioner. The petitioner has referred to a list of past decisions to support the argument that imposing a penalty was illegal and unconstitutional – beginning from the decisions by **Nyamweya (J) in Matha Mbaha Mutsyi V KENHA**.

Kenya National Highway Authority [2017] Eklr while agreeing with **Emukule (J)** in the Margaret Miano case observed that;

“...The law... cannot delegate to executive officers the power to prescribe a crucial penalty, or to define the scope of the application, which in essence is the effect of regulation 15 of the Kenya Roads (Kenya National Highway Authority) Regulations 2013. These powers are left to judges, judicial officers and tribunals appointed under the authority of the Constitution by Art 159 (1) which states as follows:

“Judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.”

Yet there is another view, expressed by **Mutende (J) in BLUE JAY INVESTMENT LTD V KENYA NATIONAL HIGHWAYS AUTHORITY [2014] eKLR** that, the regulations do not provide for a situation where the offender is charged in a court of law and a fine imposed.

What is provided for is the payment of a fee, which in her view was justified [**See also Buzeki V Kenha [2014] eKLR**].

This fee is what Emukule (J) in the Miano case (supra) referred to as a euphemism for a fine and held the view that it was unconstitutional.

25. The Respondent's actions may have been unconstitutional to the extent that the law directed to them what amounts to give in exercise of judicial authority **BUT** it was not illegal, because they were acting within the provisions of the existing law. I think what is required is a harmonization of these provisions so as to be in line with the constitution being a legislative amendment to either require that such offenders be charged in court of course the converse is that it will only be over burdening on already groaning judiciary with more cases.

26. Consequently the orders issued are:

- a) The Respondent acted within the law in taking away the registration plates, and then return of the same until the court gave an order was in the honest belief that they were covered by the law,
- b) The Notice requiring payment of fees was unconstitutional but not illegal – the law needs to be amended to bring it into harmony with the Constitution,

c) I decline to award any compensation claimed either for loss of use or damages.

e) Each party shall bear its own costs.

DELIVERED, SIGNED AND DATED THIS 27TH DAY OF JUNE 2019

H. A. OMONDI

JUDGE