



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

PETITION NO. 3 OF 2015

RUMIC CONSTRUCTION AND CIVIL

ENGINEERING LTD.....PETITIONER

AND

KENYA NATIONAL HIGH WAYS AUTHORITY.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

HEAD OF TRAFFIC POLICE DEPARTMENT.....3RD RESPONDENT

OCS BOMET.....4TH RESPONDENT

CABINET SECRETARY MINISTRY OF INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....5TH RESPONDENT

CABINET SECRETARY MINISTRY OF

TRANSPORT AND INFRASTRUCTURE.....6TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....7TH RESPONDENT

ATTORNEY GENERAL.....8TH RESPONDENT

JUDGMENT

1. On the 24th day of August 2015 the petitioners vehicle registration number KCA 773 Z was intercepted by Sergeant Oscar Mwangome while being driven along the Narok Bomet road on suspicion that it was overloaded with building stones.
 2. The vehicle was taken to Bomet police station where it was detained from 24th August 2015 to 19th November from 2015. It was weighed and released pursuant to a court order dated 9th November, 2015.
 3. The Petitioner filed this petition on 7th September 2015 seeking the following orders:
 - (a) A declaration that the actions of the 1st,2nd,3rd ,4th,5th and 6th Respondents are illegal, an abuse of criminal justice, unfair and in violation of the petitioners constitutional rights.
 - (b) A declaration that the actions of the 1st,2nd,3rd,4th,5th and 6th respondents of detaining motor vehicle Registration no.KCA 773Z have out rightly violated the rights of the petitioners order article 20,21,22,(1)
- 3.25,27 (1)and 21, 28, 29,(a)(b)(c)(d) and (f) 31(b)39 (1) 40(1)(2) and (3) 47,48 of the constitution.

(c) An order directing the 4th Respondent to release the said motor vehicle Registration number KCA 773 Z belonging to the petitioner.

(d) A declaration that the actions of the 4th Respondent are in breach of Chapter six of the constitution hence unfit to hold public office anywhere in Kenya.

(e) A declaration that the 7th and 8th Respondents have abdicated their constitutional and legal roles and are therefore escapist.

(f) Damages for loss of user.

(g) General damages

(h) Costs of the petition

(4) It is the petitioners contention that the 1st Respondent deprived the petitioner of his motor vehicle Registration number KCA 773 Z without any colour of right by taking it to Bomet police station for no good reason.

(5) That the 1st Respondent had in a form No.WBY 0536 annexure MARK 4 indicated that the said motor vehicle had been inspected and found to be in contradiction of S.55 and 56 of the Traffic rules and the petitioner was to be charged with overloading.

(6) That the said vehicle was taken to Bomet police station but no further action was taken until there was issuance of a court order dated 9/11/2015 when the vehicle was subsequently weighed on 19/11/2015.

(7) It is the contention by the petitioner that the 2nd Respondent did not take any appropriate action to ensure protection of its rights. The 3rd Respondent, its argued, did not engage in any action of either preferring a traffic charge and ensuring that the said vehicle was released.

(8) It is further contended that the 4th Respondent detained the vehicle in the police station for no good reason.

(9) That the 5th Respondent ignored or neglected to play his role of overseeing the work of police officers who proceed to flout provisions of the constitution.

(10) The 8th Respondent allegedly by failed in its role of enforcing axle load control by failure to take weight measurements.

(11) That the seventh Respondent did not play his role of prosecuting the petitioner.

(12) That the 8th Respondent failed in his duty of providing legal counsel to the state.

(13) The 1st Respondent relies on the replying affidavits dated 15th October to 15th December 2015 and further affidavit dated 30th June 2016.

(14) The facts as per the 1st Respondent are that on the 24th day of August 2015 the Respondents officer while in the company of his colleagues intercepted the petitioners vehicle which was being driven along Narok – Bomet road, this was in suspicion that it was overloaded beyond the statutory prescribed loads with building blocks.

(15) The driver of the vehicle in question was instructed to weigh it on the Respondent's mobile bridge scale but he declined. This necessitated the Respondents officer to take the estimated volume of building blocks measuring the dimensions of the tipper and adding to their weight, subtracting the gross weight from the permitted axle weight and arriving at an excess weight of 10,500 kgs.

(16) The driver of the tipper lorry abandoned it and the Respondents officer had to issue a prohibition order for removal of the vehicle on the road. Police officers proceeded to remove its number plates and licence so as to effect seizure. The officer issued directions that the vehicle be taken to Bomet police station pending weighing to ascertain the actual weight on a prescribed scale.

(17) It is the contention by the 1st Respondent that on 19th November 2015 the said motor vehicle was released to the petitioner pursuant to a court order issued on 6th Nov.2015.

(18) The contention by the petitioner is that its vehicle registration number KCA 773 Z make TATA was carrying a load along Narok – Bomet road when it was stopped and taken to Bomet police station on allegation of overloading.

It was retained at Bomet police station from 24th August 2015 19th November 2015 when it was weighed and released pursuant to an order of the court dated 9th November 2015. When the weighing was done, the load was found to be permissible.

(19) It is the contention by the petitioner that the actions of the Respondents were contrary to article 47 (1) of the constitution which entitles every person the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(20) It is further contended that the Respondents action violated article 10 (2) (6) of the constitution that provides for good governance, integrity, transparency and accountability in that they allegedly attempted to weigh the vehicle yet there is no weigh bridge along the Bomet-Narok highway.

(21) It is the petitioners contention that the Respondents violated article 40 (1) (2) and 3 of the constitution which guarantees the right to own property and prohibits deprivation of ones property. Further that the 1st Respondent did not confirm that the petitioner was prosecuted after removing the petitioners vehicle to Bomet police station.

The petitioners relies on the authority of the decision in the case of *Margaret Miano – V – Kenya National Highways Authority (2015) EKR* where Emukule - J) was of the view that the provisions of regulation 15 (3) of the Kenya Highways authority Act could be contrary to article 159 of the constitution by purporting to confer power to collect fees/fines without due process and that this was in violation of article 50 of the constitution and by virtue of article 2 (4) of the constitution was null and void.

(22) The 1st Respondent contends that the petitioners alleged rights are not absolute but are subject to limitations as prescribed under article 24 of the constitution and set out in the traffic Act and the Kenya roads Act and subsidiary legislation thereto. That its not in dispute that the Respondent seized and detained petitioners motor vehicle. That the confiscation was in accordance with law and in particular S.55 (1) of the traffic Act which provides:- "No vehicle shall be used on a road with a load greater than the load specified by the manufacturer of the chasis of the vehicle or than the load capacity determined by inspector under this Act.

(23) It is further contended that section 22 of the Kenya Roads Act and rule 14 of Kenha regulations provides the basis of Respondents right to levy of overloading fees in the instant case. The said rule 14 provides: (1) "Subject to regulation 13, the notification in the weighbridge report form shall form the basis for imposing fees where the vehicle is found to be overloaded in accordance with these regulations.

(2) Upon issuance of the weighbridge report form, it shall be the duty of the driver to notify the registered owner of an overload offence and the registered owner shall be required to pay the overload fees.

(3) The registered owner of the motor vehicle pulling the trailer is in breach of regulation 10, the owner of the motor vehicle shall be liable for the overload offence and shall be required to pay overload fees.

(4) In order to secure payment of fees, an overloaded vehicle shall be detained free of charge by the authority for the first three consecutive days, and subsequently, a fee of two thousand shillings shall be charged for each extra day until (24) It is the contention by the Respondent that when the driver abandoned the lorry after declining to have it weighed on the mobile weighbridge the weight was determined pursuant to S.55 of the traffic Act. That the driver had switched off the engine locked the vehicle and disappeared.

(25) It is further contended that the estimation of the weight by the Respondent was reasonable in the circumstances. That under regulation 14, a notification in the weighbridge report form forms the basis of imposing fees. Where a motor vehicle is found to be overloaded and in order to secure payment a motor vehicle is detained.

(26) That the Respondent is authorized under S.106 (4) A of the traffic act to seize number plates of the offending motor vehicle.

(27) In the present case, its not in dispute that the petitioners motor vehicle was not weighed at a weighbridge before a determination was made to the effect that it carried excess load, failure to do so is explained in the replying affidavit of Dennis Higenes Cheruiyot who depones to the effect that the driver declined to have it weighed at a mobile weighing bridge. Paragraph 4 of the 1st Respondents further affidavit it deponed that the excess load on the applicants motor vehicle was determined by way and in accordance with the provisions of the Traffic Act based on the volume of the load, the motor vehicle tare weight and the permissible axle weight limits under the traffic Act as the vehicle had been abandoned and could not be weighed at the prescribed mobile weigh bridge. It is further deponed at paragraph 13 of the replying affidavit, that the 1st Respondent issued a notification to the driver of the said motor vehicle to be charged for an offence of overloading and failure to weigh the said motor vehicle contrary to the traffic Act and rule 10 of the Kenya roads regulations, 2013 and instructed to drive the said motor vehicle to Bomet police station pending charges on the petitioner for inter alia overloading or not weighing and payment of overloading fees.

If it is true as alleged above that the driver was instructed to drive the vehicle to Bomet police station, how can it be contended at the same breath that he switched off the engine and locked the vehicle and abandoned it? If he indeed did so how was the vehicle driven to Bomet police station?

The second question. The weigh bridge in question was a mobile one. This vehicle was driven to Bomet police station. Why was it not weighed by this mobile weigh bridge either on the way or at the station?

It is not in dispute that the vehicle was detained at Bomet police station from 24th August 2015 to 19th November 2015 when it was weighed and released. This was after the court had made an order on the 9th November 2015. When the vehicle was weighed the load was found to be permissible. Had there been prompt and proper weighing of the vehicle, there would have been no reason for detention of the petitioners motor vehicle.

A notification had been issued to the driver of the motor vehicle by the 1st Respondent that he was to be charged for the offence of overloading. There is no evidence to the effect that he was charged in a court of law. There is no evidence to the effect that the petitioner was charged or ordered to pay a by passing or absconding fee of two thousand dollars as per regulation 15 (3) (4) (5) of the Kenya Roads Act.

S.22 of the Kenya Roads Act and rule 14 (4) of the regulations provides (4) in order to secure payment of fees, an overloaded vehicle shall be

detained free of charge by the authority for the first three consecutive days and subsequently a fee of two thousand shillings shall be charged for each extra day until proof of payment is produced.

In the present case there was no order for payment of fees and therefore there was no reason for detention of the vehicle, ostensibly under the Kenya Roads Act. The driver was not charged with the offence of overloading yet the vehicle continued to be detained at Bomet police station till an application was made before the court.

Even if there was an order for payment of fees, that order would be suspect.

I am in agreement with ***Justice Emukule*** who when confronted with a similar case or situation in the case of ***Margaret Miano – vs- Kenya National Highway Authority MSA High court Petition no. 23 of 2015*** had this to observe, “For the authorized officer or deponent to suggest that Regulation 15 (3) does not envisage a judicial process is to make the Respondent Judge Jury and executioner rolled into one. That would be a monstrous situation and a violation of article 50 of the constitution which guarantees a right to a fair trial.

He proceeded to opine that “the provisions of regulation 15 (3) may also be contrary to article 159 of the constitution by purporting to confer upon the Kenya National Highways Authority to collect fee/fines without due process by donating to such fines the euphemism of a “fee” – The provision may therefore be inconsistent with and a violation of the right to a fair Trial guaranteed by article 50 of the constitution and to that extent null and void under article 2 (4) of the constitution.”

Under article 25 (c) of the constitution “the right to a fair trial is not one of the rights that can be limited”.

Article 47 of the constitution provides for the expeditious efficient, lawful, reasonable and procedurally fair administrative action by state officials.

The petitioners vehicle was detained at Bomet police station from 24th August 2015 to November 2015. No action had been taken by the 1st and 2nd Respondent in either releasing the vehicle after weighing it or charging the driver or the petitioner with any relevant charges. This was only done after the intervention of the court. It cannot be said by any stretch of imagination that the petitioner was afforded an expeditious efficient lawful and fair administrative action by the state officials especially the 1st and 2nd Respondents.

Article 23 (3) of the constitution provides for remedies and or reliefs for breach of bill of rights thus:- 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 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 for judicial review

In this petition the petitioner seeks several declarations including damages for loss of user.

I am satisfied that the 1st 2nd and 3rd Respondents violated the petitioners rights as prayed in this petition, and do issue declarations in terms of prayer (a) and (b) of the petition.

Prayer (c) has already been overtaken by events and is therefore spent.

I decline to grant prayer (d) (4) as they have not been proved as against the Respondents.

Compensation

The petitioners motor vehicle was detained from 24/8/2015 to 19/11/2015. A period of close to three months I find a sum of Ksh.400,000/= as reasonable compensation. Compensation is granted in the sum of Ksh.400,000/= this is as against the 1st 2nd and 3rd Respondents plus costs of this petition.

Judgment delivered dated and signed in open court this 31st March 2017 in the presence of learned counsel for the petitioner Mrs Kirui learned counsel for the Respondent Miss Koina for the 7th Respondent. Court assistant Mr Rotich.

Miss Koina holding brief Letero for the 1st Respondent. He is asking for stay of execution for 30 days. Mrs Kirui – No objection

Court – Stay of execution granted for 30 days. Counsels to be supplied with copy of the judgment.

M. MUYA

JUDGE

31/3/2017