



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO 369 OF 2017**

**JORAM NYAGA MUTEGI.....PETITIONER**

**VERSUS**

**KENYA NATIONAL HIGHWA AUTHORITY.....RESPONDENT**

**JUDGMENT**

1. The Petitioner, Joram Nyaga Mutegi, is the registered owner of Motor Vehicle Registration No KCC 102 P Isuzu Truck which is used for commercial transport business. The motor vehicle was purchased through a financial facility from Kenya Commercial Bank and is registered in the joint names of the petitioner and the financier, Kenya Commercial Bank Ltd.

2. On 3<sup>rd</sup> June 2017 the motor vehicle while being driven along Thika -Makutano Road carrying goods, was stopped by Kenya National Highway Authority, the respondent's officers who removed front registration plate for allegedly overloading and upon the driver declining to have the truck weighed despite the fact that the officers had a mobile weigh bridge. No charges were preferred against the driver for any offence either.

3. The petitioner went to Juja weigh bridge and pleaded for release of the vehicle's registration plate to no avail. The petitioner maintains that the motor vehicle was carrying goods within its load limit and had not committed a traffic offence. It is the petitioner's case that the removal of the registration plate and continued detention of the same is unlawful arbitrary and without justification. This he asserts, has rendered the motor vehicle un roadworthy besides ruining its economic value which has also affected the petitioner's right to property and prospect of earning a living.

4. Based on the above facts, the petitioner filed a petition dated 27<sup>th</sup> July 2017 and sought the following orders.

***1. A declaration that the seizure of the petitioner's Motor Vehicle Registration No. KCC 102 P, the unlawful removal of the vehicle number plate is in breach of the petitioners' Constitutional rights against unlawful deprivation of his property and his economic and social rights to earn a living as enshrined in Article 50 of the Constitution.***

***2. A declaration that the decision by the respondent that the petitioner was overloaded(sic) and declaring the same unroad worthy makes the respondent to be complainant, prosecution jury Judge and executioner all in one which is in breach of the Petitioner's right to a fair trial as enshrined in article 50 of the Constitution.***

### **3. Damages.**

**4. An order that the respondents 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents (sic) jointly and severally to bear the costs of these proceedings**

### **5. Any other relief.**

5. The petition is opposed. The respondent filed a replying affidavit sworn by **Jocyline Kirambu**, the cluster Manager at SGS Ltd based at Athi- River and filed in court on 14<sup>th</sup> July 2017.

6. **M/s Kirambu** deposes that on 3<sup>rd</sup> July 2017 at about 10 .a.m, the respondent's officers manning Juja Weigh Bridge intercepted the subject truck Registration No. KCC 102P which was carrying building stones and was suspected of overloading. They signaled it to be weighed but the driver ignored instructions and sped off. Police Officers in uniform at the weigh bridge gave chase and blocked the truck. They demanded that it be weighed on a mobile weigh bridge but the driver declined.

7. It was deposed that the officers removed the front registration plate to secure an arrest and ensure that the truck did not go back on the road since it would pose danger to other road users. The driver was also issued with a prohibition order requiring that the motor vehicle be taken to Juja weighbridge for weight determination. The officer's attempt to remove the rear registration plate was thwarted when the driver once again drove off.

8. Ms Kirambu further deposed that having failed to have the truck weighed, the officers exercised their powers under the Traffic Act and determined the weight of the load the truck was carrying and issued a ticket which was attached to the affidavit as "JK 3"

9. According to the deponent, the registration plate was later sent to the respondent as the law requires for it to determine appropriate action to be taken against the owner of the vehicle. It was contended that the petitioner was notified of the reason for detention of the registration plate and the fine payable but has not complied. The petitioner has been blamed for initiating these proceedings with unclean hands and of bad faith.

### **Submission**

10. **Miss Wachira**, learned Counsel for the petitioner, submitted that when the driver was stopped at the Weigh Bridge, the officers demanded a bribe which the driver declined to give. This promoted the officers to remove the truck's front registration plate but did not weigh the truck. Counsel submitted that the driver drove the motor vehicle to the petitioner's home and parked it. Counsel further submitted that although the petitioner went for the registration plate, it was not given to him and no explanation was given why the plate was removed in the first place and why it was being detained. Counsel submitted that the officers' action violated the petitioner's rights since the vehicle was his only means of livelihood.

11. **Miss Ndirangu**, Learned Counsel for the respondent, on her part submitted that Articles 43 and 49 of the Constitution do not apply to this case. Counsel submitted with regard to fair hearing under Article 50 of the constitution, that the petitioner has never presented the motor vehicle for weighing despite the fact that a prohibition order was issued against the truck and given to the driver. Counsel contended that the petitioner is aware why the registration plate for the vehicle was removed and is being held. According to counsel, once the vehicle is presented for weighing, the plates will be released immediately.

12. Counsel also referred on the averments in the replying affidavit and the annexures thereto intended to prove that the vehicle was overloaded and also to show that the petitioner was aware why the registration plate is being held. Counsel contended that the plate was lawfully removed and that the respondent acted according to its mandate derived from the Kenya Roads Act, 2007. Counsel prayed that the petition be dismissed.

### **Determination**

13. I have considered this petition, the response thereto and submissions by counsel. The main issue in this petition is whether the removal of the registration plate from the petitioner's vehicle and subsequent detention thereof is a breach of the petitioner's constitutional rights.

14. The facts of this petition are largely agreed. The truck was being driven along Thika -Makutano road on 3<sup>rd</sup> July 2017. It was stopped at a weigh bridge in Juja while ferrying goods at the time but was not weighed. The reason for not being weighed is however disputed. Whereas the petitioner contends the officers demanded a bribe, the respondent says the driver declined to have the truck weighed and sped off. It is however agreed by both sides that the front registration plate for the truck was removed and has not been released to date.

15. The respondent has maintained that the truck was overloaded while the petitioner contends it was not. Unfortunately neither the driver who was driving the truck at the time nor a police officer who was at the scene and who witnessed what transpired have sworn affidavits in this petition. The Court has therefore to make do with what the material on record.

16. The respondent is established under **Section 3 of the Kenya Roads Act (No 2) of 2007**. One of the respondent's functions is management, development, rehabilitation and maintenance of National Roads. According to the Act, National Roads are those roads classified as such in the First Schedule; that is class A, B and C roads.

17. Section 62 of the Act provides that regulations made under the Act may provide for detention of vehicles to secure compliance with the Act or any regulations made there under. Section 56 of the Traffic Act prohibits overloading on the roads. The section provides as follows;

***“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.”***

18. Section 58 of the Act provides;

***“ 58. (1) Any person who drives or uses on a road a vehicle in contravention of the provisions of section 55 or section 56 shall be guilty of an offence and liable to a fine not exceeding four hundred thousand shillings or to imprisonment for a term not exceeding two years or to both:***

***Provided that rules under this Act may provide that a person who is guilty of an offence under section 55 or 56 shall be liable to pay a fine according to a prescribed scale, and different scales may be prescribed for first offenders, and for second or subsequent offenders, within a prescribed period, but so that no person shall thereby be liable to pay a fine greater than the maximum provided by this subsection; and for the avoidance of doubt it is declared that liability of a person to pay a fine on a prescribed scale shall not affect that person's liability to imprisonment under this subsection as an alternative to, in addition to, or in default of, the payment of a fine.***

***(2) For the purposes of subsection (1), any person who is shown to the satisfaction of the court to be responsible for the maintenance of the vehicle, and any person who is shown to the satisfaction of the court to have been responsible for the loading of the vehicle, shall be deemed to have used the vehicle on the road.***

(3) (a) In any case where a motor vehicle or trailer is twice or more times, in a period of twelve months, the subject of a successful prosecution under any of the provisions of sections 55 and 56, the court shall, unless for special reasons to be recorded it decides otherwise, order the Registrar to suspend the licence of such vehicle for a period of two years.

(b) The Registrar shall thereupon suspend the licence of the vehicle for such period, and the owner of the vehicle shall return the licence of the vehicle to the Registrar, who in no case shall issue another licence in respect of such vehicle until the termination of the period of suspension.

(c) No vehicle licence shall be returned or new licence granted in respect of a vehicle whose licence has been so suspended unless an inspector certifies that the vehicle is fit in all respects for use upon the road.

(4) When a vehicle licence has been suspended under subsection (3) no refund of licence fee shall be made.

19. Section 56 prohibits use of loaded vehicles on the road while section 58 prescribed penalty for offences committed under sections 55 and 56 of the Act. Counsel for the respondent has relied **on section 106 of the Act** to justify the removal of the licence plate from the vehicle. Section 106 which is headed at the marginal note “**Removal of vehicle from road**”, provides as follows:

**Section 106. “(1) Where any vehicle is found in use on a road in contravention of the provisions of this Act, or where any vehicle has been left on any road or other public place in such circumstances as to make it appear that such vehicle has been abandoned or should be removed to a place of safety, or where any vehicle has been left on a road in a position which causes or is likely to cause danger to other road users and the owner or driver cannot readily be found, it shall be lawful for any police officer or any inspector to take the vehicle or cause it to be taken to a police station or other place of safety by such method, route and under such conditions as he may consider necessary, having regard to all the circumstances of the case.**

**(2) Where under subsection (1) it is considered necessary to have a vehicle towed, transported, driven or otherwise removed, or where it is considered necessary to carry out emergency repairs or to adjust or off-load any part of the load of such vehicle, any expense incurred thereby shall be payable by the owner of the vehicle, and no such vehicle shall be released from the police station or other place of safety until either -**

**(a) such expenses have been paid to the person to whom they are due; or**

**(b) such person certifies in writing that he is willing to allow the vehicle to be removed before he receives such expenses due to him.**

**(3) A police officer or inspector who orders the removal of a vehicle under this section shall not be held liable for any damage to or loss of any item from such vehicle during its removal to or detention at a police station or other place of safety.**

**(4) Any police officer, licensing officer or inspector, if he is of the opinion that any vehicle is being used in contravention of section 55 or section 56 or in contravention of any rules relating to the construction, use and equipment of vehicles, may by order prohibit the use of such vehicle, under such conditions and for such purposes as he may consider necessary for the safety of the public or to ensure that such vehicle does comply with the provisions of section 55 or 56; and any such order shall remain in force until the repairs specified therein have been satisfactorily completed and the vehicle has been certified as complying with the rules relating to construction, use, equipment and weight.**

**(4A) Where a police officer, licensing officer or inspector makes an order under subsection (4) he may remove the vehicle identification plates and the vehicle licence and, if he does so, shall**

**deliver them to the Registrar to be kept while that order remains in force.**

***(5) Any person who permits the use of, or drives, any vehicle in respect of which any prohibition or restriction is in force other than in conformity with any conditions or for such purpose as may have been specified shall be guilty of an offence and liable to a fine not exceeding four thousand shillings or to imprisonment for a term not exceeding twelve months or to both.***

***(6) Any order issued under this section shall be in writing.***

***(7) Where any vehicle is required to be examined and tested for the purpose of being certified as complying with the provisions of this Act, the fee, if any, shall be paid by the owner of the vehicle.***

**(8) Any person who fails to comply with any instruction or order given under this section shall be guilty of an offence and liable to a fine not exceeding one thousand shillings.” ( emphasis)**

20. Section 106 (1) allows police officers to remove a motor vehicle from the road if it is left on the road under circumstances that in the officer’s opinion may endanger other road users. There is protection for police officers who take certain actions in relation to motor vehicles left on the road, and which is intended to make road safe.

21. The provisions to section 106 generally deal with situations that are for ensuring safety of other road users, and the police are authorized to take certain actions as required by the Act for this purpose. In the present case as facts show, the vehicle was not weighed. The petitioner has denied that the driver declined to have the vehicle weighed while the respondent has maintained that he did. What is agreed, however, is that the front registration plate was removed by police officers and has been detained to date.

22. The respondent’s assertion is that the driver of the motor vehicle drove off and after a brief chase he was forced to stopped, after the vehicle was blocked. He was requested to have the vehicle weighed but he again declined. The officers removed the front registration plate and an attempt to remove the rear plate was thwarted because the driver once again sped off.

23. I have processed the documents attached to the replying affidavit. The prohibition order states that the vehicle was over loaded. The weighing ticket ‘JK 3’ also states that the vehicle was overloaded. In the replying affidavit, Ms **Kirumba** states that the officers used some scientific method to determine that the vehicle was overloaded and the extent of the overload.

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.

25. Second, the driver is said to have disobeyed a lawful order to have the vehicle weighed which means he may have committed an offence in the eyes of the law, but which the officers did not find necessary to pursue. In her deposition, MS Kirumba stated that police officers had pursued the driver after he failed to have the vehicle weighed at the first instance, and blocked it. If it be true that the truck was blocked, how did it speed off again? This leaves many questions unanswered.

26. Third, Counsel for the respondent submitted that the petitioner was asked to present the truck for weighing but declined and that is why the registration plate is still being withheld. This raises the question whether the truck is also still loaded. If the truck off- loaded its cargo how will it be weighed and a determination made on whether or not it was overloaded on 3<sup>rd</sup> July 2017? These are legitimate questions that the respondent did not address in its response to the petition to justify the demand that the truck be

taken for weighing before the registration plate is released.

27. I have examined **annexture “JK4”**, the document that forwarded registration plates to the Director General, National Transport and Safety Authority (NTSA). The registration plates for 42 vehicles were removed during the months of May and June 2017. The registration plates include that of the subject vehicle in this petition. The covering information is that the vehicles were suspected to have been overloaded, and when they were flagged down for purposes of weighing, the drivers parked the vehicles on the road and took off which forced the officers to removed registration plates in accordance with section 106(4A) in order to effect arrests.

28. The explanation given in the document why registration plates were removed from those vehicles was that the vehicles were abandoned on the road after drivers ran away. That does not appear to have been the case with the petitioner’s motor vehicle. In the present case, the driver disobeyed the order to have the truck weighed and drove off but not before the officers had removed the front registration plate.

29. I have perused **section 58** of the Traffic Act which provides penalty on overloaded vehicles. The penalty is payable upon the person being convicted by a Court of law. In that regard, the section is clear that there must be due process. Section 106 on the other hand provides circumstances, under which a motor vehicle may be removed from the road or towed away to a safer place. **Section 106(4)** permits an authorized officer who has reason to believe that a motor vehicle is being used on a road in contravention of section 55 or 56 of the Act, or rules to order prohibition of the vehicle from being on the road until the specified repairs are completed.

30. Section 106(4A) in particular, allows an authorized officer who has made an order under section 106(4) to remove the vehicle identification plates and the road licence and deliver them to the register to be kept while the order remains in force.

31. Section 106(5) provides sanctions against a person who drives a motor vehicle in respect of which a prohibition order has been issued. The section is clear that such a person commits an offence and is liable to a fine, imprisonment or both. Section 106(8) further provides that where a person fails to comply with the prohibition order, such a person commits an offence for which a penalty is provided.

32. I have deliberately referred to these provisions because the petitioner is alleged to have failed to take the vehicle for weighing while the driver drove the vehicle away with a prohibition order in place in contravention of the law. Despite clear provisions of the law, the respondent or police officers have not found it necessary to take action against the driver or the petitioner. Instead they decided to keep the license plate while waiting for the vehicle to be taken for weighing.

33. I have carefully considered this matter and as observed earlier, the evidence and circumstances of this case leave a lot to be desired. The prohibition order was also issues under unclear circumstances, and without concrete evidence that the vehicle was overloaded. There is also uncontroverted evidence that the petitioner who is the owner of the vehicle went to the officers manning the weigh bridge to demand release of the registration plate but no action was taken against him. There does not seem to be any intention to take action against him or the driver.

34. The decision to remove registration plate may have been well intended to force the driver take the vehicle for weighing, but continued retention of the plate gives a wrong perception of the matter. The law should be used to regulate human actions but not to molest or punish one over disagreements that he may have had with law enforcement officers. The respondent or its officers cannot use the law capriciously, arbitrarily or whimsically to threaten or force people into submission.

35. Where a person has committed a traffic offence under the Act, like the driver of the vehicle in question is alleged to have done, the law should be applied as appropriate. However, the decision to remove the registration plate and retain it even when there is no evidence that the vehicle was overloaded, was unreasonable and unjustifiable. The respondent’s agents having removed the petitioner’s vehicle plate and retained them, it was under duty to show that it was lawfully retaining the plates. However the

documents produced by the respondent do not support the evidence by the respondent that the vehicle was overloaded and that the registration plate is being held lawfully.

36. In the circumstances of this case, the inescapable conclusion one comes to is that the law was used unreasonably and unjustifiably. There was no evidence then and there is none even now that the vehicle was overloaded. To issue a prohibition order, the officer must have a basis to do so, but not to misuse the law. For how long will the respondent continue holding the petitioners' vehicle plate now that the vehicle has not been taken for weighing yet no action is contemplated against the petitioner or his driver if indeed they were at fault?

37. To my mind this is a classic example where the law has been used to trample upon a citizen's rights. The vehicle can neither go back to the road nor be used in any other way. Meanwhile the respondent continues to retain its registration plate with no indication if the plate will ever be released. This state of affairs cannot be allowed in law.

38. Rights have values and must be respected and protected at all times. The petitioner has a right to do business and earn a living, and continued retention of his vehicle's registration plate is a violation of this right given the circumstances of this case. The law is to be followed and where there is no evidence, any purported action of retaining the vehicle registration plate is unacceptable.

39. The petitioner has also prayed for damages. Having considered the circumstances of this case I do not think damages are justified. The driver is said to have driven the truck against a lawful order. The moment he realized that the plate had been removed he should have taken the vehicle for weighing if it still had its cargo and if he had nothing to fear. He may not be blameless. An award of damages is not deserved in the circumstances.

40. The upshot is that the petition dated 27<sup>th</sup> July 2017 is allowed as follows;

***1. A declaration is hereby issued that the seizure and removal of the registration plate for the petitioner's Motor Vehicle Registration No. KCC 102 P, and continued retention thereof is unlawful and amounts to a violation of the petitioners' Constitutional rights to property under Article 40 of the Constitution.***

***2. An order is hereby issued directing the respondent Kenya National Highways Authority to immediately release to the petitioner the front registration plate for Motor vehicle registration number KCC 102 P.***

***3. Costs to the petitioner.***

**Dated Signed and Delivered at Nairobi this 13<sup>th</sup> Day of October 2017**

**E C MWITA**

**JUDGE**