



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 278 OF 2014

In the matter of the Detention of Motor Vehicle KBN 969 Toyota Fielder Station at Kabete Police Station

and

In the matter of the contravention of Fundamental Rights and Freedoms under Articles 19, 20, 21, 22, 23, 31, 40, 47 and 50 of the Constitution of Kenya, 2010

and

In the matter of the contravention of Articles 2, 3, 10, 157, 238 and 244 of the Constitution of Kenya, 2010

and

In the matter of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013

BETWEEN

Sisto Muhiato Karonji.....Petitioner

versus

The Hon. Attorney General.....1stRespondent

The Inspector General of Police.....2ndRespondent

The Director of Public Prosecutions.....3rdRespondent

JUDGMENT

The Petitioners case

1. The Petitioner who is the registered owner of the motor vehicle KBN 956 L, Toyota Fielder Station Wagon states that on 1st February 2013, he entered into an agreement with Sandriche Africa Safaris at a

monthly fee of Ksh. 75,000. On 30th August 2013, Sandriche Africa Safaris rented the said motor vehicle to a one Cleophas Musembi Kavita for private use for three days, returnable on 1st September 2013.

2. He avers that on 1st September 2013, while the said vehicle was in the possession of the said Cleophas Musembi Kavita and two other persons, they were arrested by police officers from Kabete Police Station and charged at the Kibera Chief Magistrates Court vide CMCR No. 2988 of 2013 with the offence of Bank breaking and committing a felony contrary to section **306 (a)** as read with Section **306 (b)** of the Penal Code.^[1] The motor vehicle was detained at the Police Station. The police declined to release it on grounds that it was an exhibit and could only be released on production of a court order.

3. He avers that his advocates application to the magistrate to release the vehicle was unsuccessful. The Petitioner claims his rights to property, dignity, freedom have been violated. He also states the DPP acted contrary to article 157 (11) of the Constitution.

Respondents grounds of objections

4. The Respondent filed grounds of objections on 6th March 2015 stating that:- **(i)** the Petition does not raise any violation of Petitioner's Rights; **(ii)** that the Petitioner ought to have appealed against the decision of the trial magistrate if he was aggrieved; **(iii)** the Petition is incompetent, incurably defective and bad in law.

Respondents' Replying Affidavit

5. On record is the Replying Affidavit of **Lucas O. Onyina**, Senor Principal Magistrate at the Chief Magistrates' Court at Kibera in which he avers *inter alia* that the motor vehicle has never been produced as an exhibit in court, hence, it has never been under the custody or control of the court.

6. He avers that on 11th April 2014, Mr Githinji, claiming to be appearing for the Petitioner who was not a party in the criminal case sought to raise the issue based on an affidavit he had filed in court relating to the vehicle, but owing to a tight court schedule he asked the advocate to come back on 15th April 2015. On the said date, Mr. Githinji was not in court and the prosecution was not ready and the matter was adjourned to 5th May 2014. On the said date the court heard the prosecution witnesses' before hearing Mr. Githinji's application. However, the counsel exhibited hostility prompting the magistrate to ask him to have a word with him in chambers, but he declined and walked away and stated that the allegations made against the court are untrue. Copies of the court proceedings have been annexed.

Issues

I find that the following issues fall for determination, *(a) whether this Petition raises constitutional issues; (b) Whether the petitioner has proved his case; (c) whether the Petitioner is entitled to damages*

(a) Whether this petition raises constitutional issues

7. The Petitioners vehicle was impounded by the Police after the occupants were implicated in a criminal offence. The occupants were charged in court and a copy of the charge sheet is annexed to the Petitioners affidavit. The vehicle was detained as an exhibit by the Police. As at the time of filing this Petition, the exhibit had not been produced in court, hence it was still in the hands of the police.

8. The Petitioner confirms that he was informed that the vehicle was held as an exhibit. It's common knowledge that an exhibit to be used in a criminal trial is held by the police until it is produced in court in evidence. The prosecution have a legal duty and an obligation to preserve evidence which includes exhibits. To expect otherwise, would in my view be legal dishonesty. Once produced in court, it can only be released with the courts' permission.

9. The Petitioners counsel claims that he unsuccessfully sought to have the vehicle released. However, the

Replying affidavit by the Magistrate and the court proceedings give a totally different account of what happened. I have no reason to doubt to the Magistrates account.

10. The Replying affidavit by the police show that the police consented to the release of the vehicle after this petition was filed. That does not change the legal position, that is, the vehicle was lawfully held by the police after they arrested the occupants. The police could not arrest the occupants and abandon the vehicle along the street. At this early investigation stage, the Police acted reasonably as is expected of them.

11. This constitutional Petition premised on such facts and circumstances is in my view totally ill founded and raised no constitutional issues at all.

12. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.^[2] I am not satisfied that the issues herein raise a constitutional question at all. As stated above, an offence was committed, the persons implicated were in the vehicle and the police acting within their powers arrested the occupants and the detained the vehicle. At this point in time the question of who owned the vehicle had not arisen nor has it been shown that it was brought to the attention of the Police.

13. Impounding of the vehicle is a lawful act. One does not require to go to the constitution to construe such a clear position. The refusal by the Magistrate could be challenged by way of a revision even though the court record and the magistrates affidavit give a clear picture o what transpired.

14. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.^[3]

15. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others*^[4] in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak*^[5] notes that:-

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”^[6]

16. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation.^[7] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organise an analysis of the nature of constitutional matters arising from the cases before the Court.

17. The Petition before me does not raise any constitutional questions at all. It is admitted that some persons were arrested for a cognizable offence while in the vehicle. The Police had a duty to preserve the evidence at their disposal to mount the prosecution. There is nothing to show that they acted outside their powers.

18. This court abhors the practice of parties converting every issue in to a constitutional question and filing suits disguised as constitutional Petitions when in fact they do not fall anywhere close to violation to constitutional Rights.

(b) Whether the petitioner has proved his case.

19. The Petitioners' counsel submits that since the Respondents consented to the release of the vehicle, then the question of liability was resolved and what remains is quantum of damages. With respect, that is not true and cannot be true. The consent recorded in this Petition only allows the release of the vehicle to the Petitioner. It did not address the question of the legality or otherwise of the decision by the Police to impound the vehicle nor does it in any manner admit liability for damages.

20. The assertion that the Respondents admitted liability is a total misapprehension of the law and is not supported by the order recorded in court. As stated earlier, the vehicle was legally impounded for purposes of preserving evidence for the criminal trial. There is nothing illegal in impounding the vehicle. It was incumbent upon the police to act within the law as they did and to mount evidence to sustain the criminal case. In fact, it could have been totally illegal and unacceptable had the Police acted otherwise.

21. The fact that it turned out the vehicle though found in the hands of the suspects belonged to the Petitioner does not in any manner help in establishing illegal conduct on behalf of the Police. I cannot see how liability would lie against the Respondents under such circumstances.

(c) Whether the Petitioner is entitled to damages

22. I have already found that the police did not act illegally, hence, the question of finding them liable does not arise. On this ground alone the claim for damages must fail.

23. Secondly, a party who claims damages has a burden of proving the same. It is not sufficient for the Petitioner to claim he incurred a loss. He has the burden of proving liability and also prove the loss. Liability having not been established, it follows that there is no basis for the court to award the amount claimed.

24. All cases are decided on the legal burden of proof being discharged (or not). The Petitioner was under an obligation to establish liability, that is, the impounding of the vehicle was illegal. He did not do so, nor is there a basis for finding the Respondents liable since as stated above, the vehicle was lawfully held as an exhibit.

Determination

25. I find that this petition does not raise constitutional issues at all, and that the evidence tendered by the Petitioner does not establish liability against the Respondents nor is there a basis to award the damages. The Petitioner ought to direct his claim (if any) against the persons who were arrested with his vehicle.

26. In conclusion, I find that the petitioner has failed to prove his case against any of the Respondents. This Petition has no merits at all and the same is frivolous and premised on pure misapprehension of the law. The upshot is that this petition fails. Accordingly, I dismiss this petition with costs to the Respondents.

Orders accordingly

Signed, Dated and Delivered at Nairobi this **20th** day of **November** 2017

John M. Mativo

Judge

[1] Cap 63, Law s of Kenya

[2]<http://www.yourdictionary.com/constitutional-question>

[3]Justice Langa in Minister of Safety & Security v Luiters, {2007} 28 ILJ 133 (CC)

[4] {2002} 23 ILJ 81 (CC)

[5] {2001} (1) SA 912 (CC)

[6] 2001 (1) SA 912 (CC)

[7] Supra note 5 at paragraph 23