



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CONSTITUTIONAL PETITION NO.35 OF 2015

IN THE MATTER OF: AN ARTICLES 22 AND 23 OF THE CONSTITUTION

AND

IN THE MATTER OF: AN ALLEGED CONTRAVENTION FUNDAMENTAL RIGHTS

AND FREEDOM UNDER ARTICLE 40 OF THE CONSTITUTION

AND

ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

RISPA AKEYO OGINGA.....PETITIONER

VERSUS

DCIO KAMAGAMBO POLICE STATION.....1ST RESPONDENT

DEPUTY PUBLIC PROSECUTOR.....2ND RESPONDENT

JUDGMENT

1. This petition which is dated **28th July 2015** pits the Petitioner herein **RISPA AKEYO OGINGA** against the DCIO Kamagambo Police Station and the Deputy Public Prosecutor and is filed under **Articles 22, 23 and 40** of the **Constitution**.

2. The Petitioner asserts that on **24th July 2015**, the Respondents employees, servants and/or agents unlawfully impounded her motor vehicle registration number **KBG 830V** without any justifiable cause and have detained the said motor vehicle to-date thereby occasioning her loss and damage and also infringing on her constitutional rights.

The Parties

3. The Petitioner describes herself as a female adult of sound mind and disposition and the owner of motor vehicle registration No.KBG 830 V which is a public service plying the Migori-Rongo route and ferrying fare-paying passengers.

4. The 1st Respondent is the DCIO Kamagambo Police Station while the 2nd Respondent is described the Deputy Public Prosecutor in charge of Public Prosecutions.

The Petitioner's Case

5. The Petitioner through her advocate Mr. Sagwe claims that on 24th July 2015 her vehicle said vehicle was being repaired at a garage on the roadside along Rongo-Riosiri Road when the Respondents servants and/or agents impounded it for no justifiable reason that the said vehicle had been detained at the Kamagambo Police Station to-date.

6. The Petitioner adds that the unlawful seizure of her said motor vehicle has caused her loss of earnings the tune of Kshs.10,000/= per day which she claims should be recovered from the Respondents.

The Petitioner therefore prays for orders as follows:

a. A declaration be made that the impounding of motor vehicle registration No. KBG 830V by the Respondents employees, servants, or agents is illegal and has infringed on the petitioners constitution rights.

b. The motor vehicle registration No.KBG 830 V impounded and kept by the Respondent's agents, servants or employees be released forthwith as the motor vehicle has completed 5 days at police car park.

c. General damages for wrongful seizure and/or impoundment of motor vehicle registration number KBG 830v.

d. Costs of the Petition.

The Respondent's Case

7. The 1st and 2nd Respondents are represented in the petition by the Attorney General through Mr. M. Eredi, Senior Principal Litigation Counsel. The Respondents replying affidavit to the petition dated 27th August 2015 is sworn by one STEPHEN NDUNGU the Deputy Criminal Investigations Officer stationed at Rongo Township.

8. The Respondents deponent states that on **24th July 2015**, while on duty and travelling along Riosiri – Rongo road in the company of a colleague, he came across motor vehicle registration number KBG 830V parked across the road on the left side facing Riosiri direction and that the said vehicle was blocking the entire left lane and causing an obstruction to other motor vehicles.

9. He further depones that the driver of the said motor vehicle did not give a proper explanation as to why the vehicle was blocking the road whereupon he noted that the vehicle also appeared defective and he then asked the driver to drive it to the Kamagambo Police station for further investigations and necessary action.

10. He adds that no sooner had the driver reached the station than he jumped off the vehicle and abandoned it at the station's gate. He depones that the vehicle was then pushed into the police station's parking yard and an entry of its seizure entered in the Occurrence Book as **OB.24/24/7/15**.

11. He depones that later, on the same day, a lady came to the police station claiming that the subject motor vehicle was hers but she did not have any ownership documents to prove her claim and when asked to avail the driver and the documents, she went away and did not return to the station.

12. He avers that the said motor vehicle was subsequently inspected and found to be defective and an order of prohibition was slapped on the vehicle whereupon the owner of the said vehicle was to be

charged in court for the offence of allowing a defective motor vehicle on the road, but the lady owner has since then been evading arrest and she has further failed to avail the records of her driver contrary to **Section 110** as read with **Section 118** of the **Traffic Act Cap.403 Laws of Kenya**.

13. The Respondents deponent states that he has no reason for continuing to detain the subject motor vehicle and that it is the Petitioner who failed to avail her ownership documents, the details of her driver and to get the prohibition order, lifted by repairing the motor vehicle which had been lawfully detained by the police and could only be returned to her upon confirming that the vehicle is roadworthy.

14. He depones that the Petitioner was responsible for her own loss, if any, by failing to comply with all the requirements and that the police were entitled to have the vehicle driven to the station or towed at the time of the arrest.

15. The Respondents exhibited the certificate of examination and test of vehicle and the order of prohibition to use a defective vehicle as annexures to their said replying affidavit. On **10th August 2015**, the parties herein agreed to canvass the petition by way of written submissions.

16. The Petitioner filed her submissions on 11th November 2015 while the Respondents submissions were filed on **4th February 2015**.

Petitioner's Submissions

17. In her said submissions, the Petitioner has basically repeated the facts of the case and the circumstances under which her motor vehicle was allegedly impounded. The Petitioner reiterates that she is a widow and the vehicle is her main source of livelihood as she uses the proceeds therefrom to educate her children some of whom are in the university.

18. The Petitioner submits that the seizure of the said vehicle contravenes **Article 40 of the Constitution of Kenya**. The Petitioner submits that the motor vehicle may be vandalized while at the police yard, yet it still had an outstanding loan of Khs.500,000/00 from Eco Bank. For some unknown reason, the Petitioner attached some two documents to the submissions which documents are not properly on record and will not be relied on in this judgment.

Respondents' Submissions

19. In their submissions, the Respondents have repeated the circumstances under which the subject motor vehicle was impounded after it was found to be not only causing obstruction to other vehicles along the Rongo-Riosiri road, but was also unroadworthy.

20. The Respondents submit that the only issues for determination are whether the motor vehicle was lawfully seized and whether the petition raises constitutional issues capable of being determined by this court.

21. The Respondents contend that the said motor vehicle has always been available for collection by the owner subject to its being repaired and certified as being road-worthy and subject to the owners submission of ownership documents to the police.

22. The Respondents argue that the Petitioner is the author of her own misfortune in failing to comply with the lawful directives given to her by the police thereby making the vehicle lie at the police yard from the date of its seizure to the time of hearing this petition.

23. The Respondents also accuse the Petitioner of failing to avail to the police, the details of her driver if indeed her said motor vehicle was a public service vehicle contrary to the provisions of **Section 106 and 107 of the Traffic Act**.

24. It was the Respondents' submission that the petition lacks merit and should be dismissed with costs.

The Respondents relied on the decision in **Mayhard Mackenzie Dangana –vs- Commissioner of Police and Andrew Gathimba Ngure, Nairobi HCCC Pet. No.44 of 2011.**

Analysis and Determination

25. The Petitioner has filed this instant petition claiming that her rights under **Articles 22, 23 and 40** have been violated. The main issue that this court is required to deliberate upon and determine is whether the facts presented disclose a violation of the Petitioner's right and if so, whether she is entitled to the reliefs sought.

26. It is incumbent upon the Petitioner and indeed it is trite law that the Petitioner needs to demonstrate that her rights have been violated and in which manner the said violation has been effected.

27. The Petitioner's claim is based on the claim that her motor vehicle registration number KBG 830V was seized and detained by the respondents for no justifiable cause and that the Respondents have continued to detain her said motor vehicle to date. The Respondents, on the other hand, claim that they were justified to impound the vehicle because **firstly**; it was found packed on the road and was therefore obstructing other motor vehicles and road users; **secondly**, the vehicle was unroadworthy; thirdly, the petitioner failed to avail to the police her proof of ownership of the said vehicle and **lastly** the Petitioner failed to avail the particulars the driver of her vehicle.

28. According to the Respondents, the Petitioner was responsible for her own predicament because she failed, refused and/or neglected to comply with the directives and requirements of the police officers that could have enabled her to secure the release of her motor vehicle from the police station.

29. The Respondents contends that the Petitioner was in breach of **Sections 51(1)** as read with **Section 58** and **Section 110** as read with **Section 118(1)** of the **Traffic Act Cap. 403 Laws of Kenya**. The Respondents' case was that they acted lawfully and within the confines of the law in impounding and detaining the Petitioner's said motor vehicle. The Respondents have attached a certificate of examination and test of vehicle to their replying affidavit to demonstrate that the said motor vehicle was indeed defective. The Petitioner herself concedes that the motor vehicle was under repair and in the custody of her mechanic at the time it was impounded and so, the claim by the Respondents that the motor vehicle was defective cannot be disregarded as having been made up by the Respondents to pre-empt the outcome of this petition.

30. What is in dispute however, is the circumstances under which the said motor vehicle was impounded. I note that the Petitioner has not rebutted the very strong allegations contained in the Respondents' replying affidavit regarding the circumstances of the seizure of the vehicle, its condition and the requirement that she complies with the **Traffic Act** and the Respondents' directives as a condition for its release.

31. The Applicant has also not shown how her said vehicle moved from the alleged garage to the police station if indeed it had a problem with the starter.

32. I further note that the Petitioner has not shown that she has in any way attempted to comply with the legal requirements preceding the release of her vehicle even after being made aware of the same through the Respondents' replying affidavit filed in court so as to mitigate the loss she claim that she was incurring daily as a result of her motor vehicle's continued detention at the police station.

33. The Respondents have claimed that they intend to charge the Petitioner with a raft of Traffic offences as follows:

- a. **Allowing a defective motor vehicle on a public road contrary to Section 55(1) as read with Section 58 of the Traffic Act Cap.403 Laws of Kenya.**
- b. **Failing to keep the records of the driver as provided for by Section 110 as read with Section**

118 (1) of the Traffic Act.

34. The Respondents' claim that the Petitioner has been evading arrest. Whether or not the above intended charges will succeed is for the traffic court to determine at the end of the case and in the event of an acquittal, the Petitioner will be liberty to sue for damages for her loss and malicious prosecution.

35. I find that in this case, there have been accusations and counter accusations from both sides to the extent that it would not be possible to know where the truth lies unless the witnesses' statements filed in court have been tested through cross-examination. However, one thing that is for sure and that cannot be ignored because it has not been rebutted by the Petitioner, is that the subject motor vehicle was found to be defective and therefore unroadworthy. **Sections 107 and 108** of the **Traffic Act** provides as follows:

“107 It shall be lawful for any police officer to detain at a police station or other place of safety any vehicle which has been removed from a road or other public place under Section 106 until such inquiries have been made by the police as they may think necessary in the circumstances of the case.

108 (1) If in any proceedings under this Act any question arises as to whether a vehicle does or does not comply with any provisions of this Act, the certificate of an inspector to the effect that he has examined the vehicle and as to the result of his examination may be read as evidence although the inspector is not called as a witness.

(2) The court, if it thinks fit, may summon and examine the inspector as to the subject matter of his certificate.”

36. Under the above circumstances, I find that the Respondents are holding the Petitioner's said motor vehicle lawfully and there is therefore no basis for arguing that there was a violation of any of the rights of the Petitioner under the Constitution. The Petitioner has not produced another inspection report to counter the one produced by the Respondent in order to prove that her motor vehicle is road-worthy so as to justify her prayer for a declaration order that the vehicle be released to her.

37. The Petitioner should not come to court under the guise of a Constitutional Petition in order to circumvent the requirements that she complies with the provisions of the Traffic Act and puts her vehicle in a road worthy state.

38. Needless to say this court takes judicial notice of the fact that most accidents that take place on our roads occur as a result of the unroadworthy state of most of the vehicles especially the public service vehicles. This court cannot therefore interfere with the police in the lawful execution of their duties as to do so will be a sure recipe for chaos on our roads.

39. I further find that the Petitioner has not provided, by way of any documentary evidence, proof that the vehicle fetched her a daily income of Kshs.10,000/00 or at all. I therefore make no orders for compensation in damages.

40. The upshot of my ruling is that I find no merit in the application and the same is hereby dismissed. In view of the nature of this case, I make no orders as to costs.

Dated, signed and delivered in open court this 16th day of February 2016

HON. W. OKWANY

JUDGE

In the presence of:

- Omwenga holding brief for Sagwe for the Petitioner
- Eredi for the Respondents
- Omwoyo: court clerk