



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

JUDICIAL REVIEW CASE NO. 29 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT , CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 4 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF ORDERS 53 OF THE CIVIL PROCEDURE RULES 2010

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

OFFICER COMMANDING POLICE DIVISION (OCPD) TALA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

EX PARTE: DENNIS KILONZO.....1ST APPLICANT

BERNABUS MUTISO.....2ND APPLICANT

DANIEL MAKAU.....3RD APPLICANT

LAZARUS NDUVA.....4TH APPLICANT

MARTIN MUASYA.....5TH APPLICANT

LEONARD MUSYOKA.....6TH APPLICANT

CHRIS KIOKO.....7TH APPLICANT

JUDGMENT

Introduction

The 1st to 7th *ex parte* Applicants in this matter are registered owners of various motorcycles namely KMCE 658 V, KMDB 141Q, KMDM 582Q, KMCR 805V, KMDP 969L, KMDN 704C, and KMCU 667L respectively. The 1st Respondent is the Officer Commanding the Tala Police Station, while the 2nd Respondent is the Attorney General.

The *ex parte* Applicants (hereinafter “the Applicants”), filed an application under certificate of urgency by way of a Chamber Summons dated 4th February 2016, seeking leave to apply for judicial review orders of mandamus and compensation. The Applicants’ application was heard *ex parte* by this Court on 8th February 2016, and the said orders sought by the Applicants were granted. The Applicants were further directed to file their substantive Notice of Motion within 14 days.

The Applicants subsequently filed the substantive Notice of Motion dated 9th February 2016 seeking the following orders:

- (a) An order of mandamus compelling the 1st Respondent to unconditionally release the motorcycles in his possession belonging to the Applicants.
- (b) Compensation under section 11(1)(j) of the Fair Administrative Action Act.
- (c) Costs of the application and Interest be provided for
- (d) Any other and further relief that this Court may deem fit and just to grant under the circumstances.

A summary of the pleadings and submissions made by the parties with respect to the said prayers now follows.

The Applicants’ Case

The Applicants claim is set out in the statutory statement and verifying affidavit sworn by the 1st Applicant which were both filed in Court on 4th February 2016. The Applicants’ learned counsel was also directed and given opportunity to file written submissions in Court, but did not do so.

The Applicants allege that on 27th January 2016 while they were in the course of conducting their lawful business of ferrying passengers, the 1st Respondent’s officers acting on the command and authority of the 1st Respondent, confiscated motorcycles belonging to Applicants. Further, that the decision and actions by the 1st Respondent was arbitrary, illegal and amounted to an abuse of discretion.

It is the Applicant’s case that their efforts to secure the release of the motor cycles has not borne fruit, and they attached a copy of a demand letter by their Advocates addressed to the 1st Respondent. They also claim that the continued detention of the motorcycles is to their detriment as they have been deprived of their means of livelihood, and as some of the motorcycles were servicing loans.

The Response

The Respondents’ response is in a replying affidavit sworn by Joseph Chesire, the Officer Commanding Matungulu Police Division in Machakos County, who is the 1st Respondent herein, The 1st Respondent stated that on 27th January 2016, there was a demonstration at Tala Market along the Nairobi-Kangundo Road, whereby motorcyclists used their motorcycles to block the said highway. Further, that he had not been notified of any such demonstration and that he commanded police officers to disperse the

demonstrators and open up the highway for public use. However, that the demonstrators then became unruly and started blocking the road and harassing passengers, whereby they were dispersed by use of teargas, and their ringleaders arrested and charged for taking part in an unlawful assembly contrary to section 79 of the Penal Code.

Further, that the rest of the demonstrators ran away leaving ten motorcycles at the middle of the road, which the 1st Respondent impounded at the Tala Police station, awaiting the owners to come and claim them, so that they could be arrested and charged with the traffic offence of obstruction and taking part in an unlawful demonstration. They also did a search in the Registrar of Motor Vehicles to ascertain the ownership of the said motor cycles and attached the search results. Lastly, it was averred that the Applicants have never demanded for their property, and that the 1st Respondent has not refused to release the motorcycles.

Winnie Cheruiyot, a litigation counsel in the office of the Attorney General, filed written submissions dated 4th March 2016 in behalf of the Respondents. She reiterated therein relying on section 54 of the National Police Service Act that the 1st Respondent was within its rightful mandate in detaining the motorcycles and had not acted illegally or breached any law, but acted reasonably to discharge a duty imposed upon him by law. Reliance was also placed on the decision in **Kenya National Examination Council vs Republic ex parte Geoffrey Gathenji Njoroge & 9 Others (1997) e KLR** for the position that if the Court were to issue the orders of mandamus, it would be usurping the mandate of the 1st Respondent, and impeding the attempts to successfully arrest the suspects. It was further urged that the release of the motorcycles should be left to the discretion of the 1st Respondent who is willing to release them after he has recommended charges against the suspects.

The Issues and Determination

I have considered the pleadings and submissions made by the Applicants and Respondents. The issues that require to be determined are firstly, whether the 1st Respondent is under a legal duty to release the Applicant's motorcycles, and secondly whether the Applicants are entitled to compensation.

In determining the first issue, this Court **will be guided by the principles that apply to the issue of the order of mandamus as stated in the Court of Appeal decision in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** in which the said Court held *inter alia* as follows:

“...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of

prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter...”

The Respondents have in this respect relied on section 54 of the National Police Service Act as the law which gives them the power to hold the Applicants’ motorcycles and which provides as follows:

“(1) The Kenya Police Service shall—

(a) regulate and control traffic and keep order and prevent obstructions in public places; and

(b) prevent unnecessary obstruction during assemblies, meetings and processions on public roads and streets, or in the neighbourhood of places of worship during the time of worship therein.

(2) A person who disobeys any lawful order given by a police officer under subsection (1) commits an offence, and may be arrested without a warrant unless he gives his name and address and satisfies the police officer that he shall duly answer any summons or other proceedings which may be taken against him.”

This section evidently does not give the 1st Respondent any powers to seize property or vehicles that obstruct roads, and cannot therefore be used to explain or justify the impounding of the Applicants’ motorcycles. However, section 106(1) of the Traffic Act does provide as follows in this regard:

“(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”

In addition, section 107 of the Traffic Act is specific as to the powers of the police in this regard as follows:

“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.”

The above provisions therefore demonstrate that the 1st Respondent was lawfully carrying out its duties in the confiscation and impounding of the motorcycles, and the judicial review remedy of *mandamus* is thus not available to the Applicants in the circumstances.

On the second issue, the Applicants are seeking compensation under section 11(1)(j) of the Fair Administrative Action Act which provides as follows:

“(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order-

.....(j) for the award of costs or other pecuniary compensation in appropriate cases.”

Legally, compensation is the action or payment made by a person responsible for injury or loss suffered by another person, or for the deprivation of something that person is entitled to, which are meant to restore the injured person to his or her former position. The Applicants attached sale receipts and agreements to show that the said motorcycles did belong to them, and the Respondents have admitted that they did in fact impound the said motorcycles at Tala Police Station. However, the Applicants did not bring any evidence of the loss they allege to have incurred since the said confiscation of the motorcycles, or any other evidence that this Court can use as a basis for working out what would be fair compensation.

In addition, as justifiable cause has been shown by the Respondents as to why the said motor cycles were impounded, which reasons were not controverted by the Applicants, I am of the view that compensation would also not be an appropriate or just and fair remedy in the circumstances.

In the premises, the Applicant's Notice of Motion dated 9th February 2016 is found not to have merit, and is dismissed, and each party shall meet their costs of the application.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 31ST DAY OF AUGUST 2016

P. NYAMWEYA

JUDGE