



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**PETITION NO. 3 OF 2013**

**DANIEL CHACHA MURIRI.....PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT**

1. The petitioner herein Daniel Chacha Muriri had filed a constitutional petition No. 41 of 2011 seeking to invoke jurisdiction under Section 84(2) and 72 of the former constitution. He sought declaratory orders against the respondent as well as damages and costs. However, the said petition was struck out for the petitioner failing to specify and demonstrating with particularity the constitutional rights which had been violated, in what manner and by whom.

2. The petitioner has now filed this petition dated 6<sup>th</sup> December, 2012 under Article 22, 165, 50(2) and 40(1)(a) and under the High Court Practice and Procedure Rules, 2006 rules 11,12,13, 14 and 16 seeking the following prayers:

- a. *The honourable court do exercise its powers of enforcement of constitutional rights of the petitioner by ordering the immediate release of the said motorcycle or payment of its current value.*
- b. *The Honourable court be pleased to make an order of declaration to the effect:-*
  - i. *That fundamental rights to property and fundamental freedoms as has always been enriched in the constitution of Kenya have been violated by agents of the state.*
  - ii. *That the defendant is liable to compensate the petitioner for the aforementioned violation of his constitutional rights and freedoms.*
  - iii. *That the defendant should after releasing the motorcycle or paying its value pay damages for loss of use, loss of earnings and profits appurtenant to such violations of constitutional rights.*

*c)The Honourable court be pleased to award damages of kshs. 110,000 incurred above.*

*d)The Honourable court be pleased to condemn the respondent to pay the costs of this petition to the petitioners.*

*e)The Honourable court to make such other or further orders as the court shall deem just.*

3. The facts giving rise to the petition are that on the 6<sup>th</sup> December, 2009, while driving his motorcycle

along Isebania Migori road, the petitioner was arrested and arraigned in court on 7<sup>th</sup> December, 2009 whereupon he was charged with the offence of driving a motorcycle on a public road without insurance cover contrary to section 4(1) of the Insurance (Motor vehicle third party Risks Act (Cap 405), driving without a driving license and riding an unregistered motorcycle on a public road. The petitioner pleaded guilty and was sentenced to a court fine which he duly paid but the police nevertheless failed to release the motorcycle.

4. The petitioner further depones that on the 8<sup>th</sup> April, 2010 police instituted criminal proceedings in Traffic Case No. 184 of 2010 at Kehancha Senior Resident Magistrate's court. The petitioner has averred that he was arrested on the 26<sup>th</sup> April, 2010 at midday and detained until the following day when taken to court in Kehancha. He was unable to take plea the following day and he was remanded until the 28<sup>th</sup> April, 2010 when he was taken to Migori court and charged and later released on a bond of Kshs.20,000.

5. The petitioner further avers that he attended court several times until 29<sup>th</sup> October, 2010 when he was found to have no case to answer under section 210 of the Criminal procedure Code. That on 15<sup>th</sup> December, 2010, the petitioner's advocate issued a notice to the police officer Isebania to release the petitioner's motorcycle to no avail. However by a letter dated 20<sup>th</sup> April, 2010, the commissioner of police directed that the motorcycle be released also to no avail.

6. The petitioner contends that in the course of the above prosecutions he incurred legal expenses amount in total of kshs. 110,000 and miscellaneous travelling expenses amounting to about kshs. 8,000. Furthermore, that his advocate M/s Kerario Marwa wrote a notice addressed to the OCS Isebania Police Station, Corporal Cynthia Chelangat and P.C. Kiptum Samson demanding the release of the said motorcycle. Also, on 10<sup>th</sup> January, 2011 his advocates also issued a statutory Notice to the Attorney General in accordance with section 13A of the Government Proceeding Act. Moreover, he also wrote a letter to the Director of Kenya anti-corruption commission.

7. Lastly, he avers that since the oppressive actions against him have been done with impunity by government officers he is entitled to compensation for the violations of his constitutional rights.

8. The respondent on his part filed a memorandum of appearance on 9<sup>th</sup> April, 2013 but did not file any replying affidavit or grounds of opposition against the above petitioner's petition.

9. When the matter came before Sitati, J on 9<sup>th</sup> April, 2014 after confirming that respondent had been served with a hearing notice it was directed among other directions that the above petition proceeds by way of written submissions to be filed and exchanged in 60 days.

10. When the matter came before me on 6<sup>th</sup> February, 2015 the petitioner had filed his written submissions.

11. From the foregoing, the issues that I am supposed to determine are the following:

1. *Whether the petitioner has locus standi to prosecute the petition as he has failed to categorize the particulars of breach to entitle him to the orders or declarations sought.*
2. *Whether the petitioner deserves the prayers in the petition*

12. With regard to the first issue, the case of **Anarita Karimi Njeru {1979} KLR 154, and {1979} KLR 162** settled the proposition that where a person is alleging a contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat.

13. However, as recent decisions have shown that the case of **Anarita Karimi Njeru(supra)** though laying an important principle must be seen in the context of section 84(1) of the Constitution of Kenya{1969-consolidated} and now repealed. That section provided:-

*“84(1) subject to subsection (6) if a person alleges that any of the provisions of section 70 to 83(inclusive) has been, is being or likely to be contravened in relation to him(or) in the case of a person who is detained, if another person alleges a contravention in relation to the detained person, then .....prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person may apply to the High Court for redress?.*

14. In contrast, the Constitution of Kenya, 2010 confers upon every person in Kenya, the obligation to respect uphold, protect, and defend the constitution of Kenya, and any attempt to establish a government otherwise than in a compliance with this constitution is unlawful (Article 3) and every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.(Articles 22(1) and 258(1) and 2). In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by persons, acting in the public interest (Article 22(2)(a) and 258(2)(a).

15. Consequently the Constitution of Kenya 2010, grants the individual much wide scope in terms of locus standi than section 84(1) of the repealed constitution. The comment in **Trusted society of Human Rights alliance vs. Ag & 2 others [2012] eKLR** regarding the decision in **Anarita Karimi Njeru** was thus:-

*‘We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of the constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as judicable controversies. However, we are of the opinion that the proper test under the new constitution is whether a petition as stated raises issues which are too insubstantial and so alternated that a court of law properly directing itself to issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged’.*

*The test does not demand mathematical precision in drawing constitutional petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the respondents in a constitutional petition are fashioned in away that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case’.*

16. In other words under the new constitution, the court is bound to inquire and determine matters on their merit and where the matter in issue could be deciphered from the pleadings, then the court is bound to determine such matter even when the particulars of breach had not been specifically pleaded.

17. Emphasizing the point, the court of appeal in **Mumo vs. Trusted Society of Human Rights Alliance & 5 others (2013) eKLR**:-

*‘Our commitment to the values of substantive justice, public participation inclusiveness, transparency, and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion or sanction an invitation to a judicial standard of locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical abstract or is an abuse of the judicial process.*

*However I must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bonafide with a view to indicating the cause of justice where a person is acting for personal gain or private profit or out of political motivation or other oblique consideration the*

*court should not allow itself to be seized at the instance of such person and must reject the application at the threshold’.*

18. In the present case, as I had indicated above, the petitioners petition had been struck out due to the reason that he had not particularized the particulars of breach of his fundamental rights in line with the decision in **Anarita Karimi Njeru (supra)**. However, I have looked at the petitioner’s petition and although he has not particularized the particulars of breach on his fundamental rights this petition in line with the authorities cited above and the new constitution 2010. Therefore it must be decided on merits and NOT on technicalities.

19. With regard to the second issue on whether the petitioner deserves the prayers in the petition specifically an award of loss of user, loss of earnings and profit appurtenant to such violations of constitutional rights, I opine as follows:-

20. On loss of user, the claim of loss of user is a claim for special damages (see **David Bagire v. Martin Bundi CCA 283/96, Nairobi**). It must be specifically pleaded and proved (See **Coast Bus Services Limited v. Sisao & others(CA 192/92 Nairobi)**). Neither of these two claims were pleaded. In **Mbaka Nguru v. James G. Rakorar (CCCCA 133/98, Nairobi)** the Court of Appeal said:-

*‘It will suffice to say that the plaintiffs who do not plead their damages properly and who do not prove the same do as at their own risk. They will not get those damages however sympathetic the court may led towards them. The rules of pleading and modes of proof must be adhered to. In absence of any pleading as to damages claimed under this head we are constrained to disallow the whole of that award and we set it aside wholly’.*

21. In the present case, the petitioner has not attached a booklet or a note where he used to record his daily earnings emanating from his motorcycle business. He has simply prayed for loss of user and profit without attaching any evidence to support his claim. Thus his prayers under this head cannot succeed as he had not attached any evidence to prove the same. However his claim of kshs. 110,000 as advocate fee stands as he has attached receipts of the same.

22. With regard to the issue of the police officers not returning the petitioner’s motorcycle, as I have indicated above, the respondent despite being served with the petition chose not to file a replying affidavit or even submissions. From the evidence adduced by the petitioner in the petition. It has been clearly established that even after paying the fine at Kehancha Law Courts for a traffic offences his motorcycle was not returned to him. Afterwards, he was charged with the similar offence in Migori Law Courts and the court after being informed that he had been charged with similar offences found him as having no case to answer under section 210 of the Criminal Procedure Code. However, his motorcycle was not returned to him and the reason for this as given by the prosecution was the fact that the issue of who owns the motorbike was in contention since another person had also claimed ownership of the said motorcycle.

23. However, in his petition, the petitioner has attached the motorcycle sale agreement between the petitioner as (buyer) and one Joseph Mwita Marwa (vendor) whereby he (petitioner) bought the motorcycle KBC 570B on 8<sup>th</sup> May, 2009 at a consideration of kshs. 80,000. Since this evidence has not been contraverted by the respondents who did not bother to oppose the petitioner’s petition, then it goes without saying that on a balance of probability, the petitioner has indeed proven that he is the only owner of Motorcycle Registration No. KBC 570B, make TVS model star chasis No. MD6256F977IN86716 Engine No. 71416553 Red in colour and the respondents should return the said motorcycle to the petitioner failure to which they should compensate the petitioner the value of the said motorcycle so that he (petitioner) can be able to purchase it back.

24. It is therefore suffice to say at this point that the retention of the petitioners motorcycle by the respondent’s (police officers) was in contravention of the petitioners rights under Article 2(5) and (6) of the Constitution 2010. In the case of R vs. Chief Immigration Officer [1976] 3AER 843 Lord Denning stated thus regarding the universal Declaration of Human Rights.

“...Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognized in the Universal Declaration of Human Rights(1948). Article 17(1) which states that everyone has the right to own property and Article 17(2) guarantees that ‘no one shall be deprived of his property”

*The contention of the state counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislative unless such intention is unequivocally manifest. When parliament is enacting a statute; the court will assume that it had regard to the universal declaration of human rights and the intended to make the enactment accord with the declaration and will interpret it accordingly?*

25. Therefore, the petitioner has proved in this petition on a balance of probability that indeed the motorcycle belonged to him and it is being unlawfully retained by the police officers.

26. Turning back to the allegation of violation of constitutional rights, at the centre of dispute is the right to property under Article 40 of the Constitution. The facts in support of the allegation have not been contested and it is by now obvious that the persons orchestrating the petitioner’s denial of his property are actually government officers. As for damages payable in constitutional petitions and with regard to the term ‘appropriate relief’ the South African case of **Ntandazeli Jose v. Minister of Safety and Security CCT 14/96 (1997) ZACC 8** held:

*...[17] In their helpful arguments, counsel for the respective parties followed substantially the same lines as in the court a quo, although much elaborated. The plaintiff’s argument can be summarised as follows. Section 7(4)(a) of the interim Constitution establishes a separate cause of action, a public law action directed against the state, based on the infringement of a fundamental right entrenched in Chapter 3. The objectives of the law of delict differ fundamentally from those of Constitutional law. The primary purpose of the former is to regulate relationships between private parties whereas the latter, to a large extent, aims at protecting the Chapter 3 rights of individuals from state intrusion. Similarly the purpose of a delictual remedy differs fundamentally from that of a Constitutional remedy. The former seeks to provide compensation for harm caused to one private party by the wrongful action of another private party whereas the latter has as its objective (a) the vindication of the fundamental right itself so as to promote the values of an open and democratic society based on freedom and equality and respect for human rights; (b) the deterrence and prevention of future infringements of fundamental rights by the legislative and executive organs of state at all levels of government; (c) the punishment of those organs of state whose officials have infringed fundamental rights in a particularly egregious fashion; and (d) compensation for harm caused to the plaintiff in consequence of the infringement of one or more of the plaintiff’s rights entrenched in Chapter 3. The common law remedies are not directed to the achievement of the first three of these objectives and the common law should not be distorted by requiring it to perform these functions and fulfill the purposes of constitutional law. Hence the necessity, so the argument concludes, for a specific and separate public law constitutional damages remedy...*

The Court went on to add that;

*[18] In essence the issues raised by the plaintiff turn on the proper construction of Section 7(4) (a) of the interim Constitution which entitles any (relevant) person “to apply to a competent court of law for appropriate relief, which may include a declaration of rights”. The interim Constitution is the supreme law. It confers rights on persons and tells them that they may look to the Courts for the protection and enforcement of such rights... [19] Appropriate relief will in essence be relief*

that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights...

As for the term “appropriate relief”, the Learned Judge stated thus;

[60] Notwithstanding these differences it seems to me that there is no reason in principle why “appropriate relief” should not include an award of damages, where such an award is necessary to protect and enforce Chapter 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the legislature’s intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the Supreme law. When it would be appropriate to do so, and what the measure of damages should be, will depend on the circumstances of each case and the particular right which has been infringed...

[68] I have considerable doubts whether, even in the case of the infringement of a right which does not cause damage to the plaintiff, an award of Constitutional damages in order to vindicate the right would be appropriate for purposes of section 7(4). The sub-section provides that a declaration of rights is included in the concept of appropriate relief and the Court may well conclude that a declaratory order combined with a suitable order as to costs would be a sufficiently appropriate remedy to vindicate a plaintiff’s right even in the absence of an award of damages... For awards to have any conceivable deterrent effect against the government they will have to be very substantial and the more substantial they are the greater the anomaly that a single plaintiff receives a windfall of such magnitude...”

Kriegler J in his judgment in this case, then emphatically stated;

“... [94] Although imperfectly drafted, the core meaning of Section 7(4) (a) is clear: violations of chapter three rights must be remedied. The provision states in the context of chapter three that persons who have standing “shall be entitled to apply to a competent court of law for appropriate relief”. The provision does not provide relief “where appropriate” but “appropriate relief” per se. We did not need Section 7(4) (a) to tell us that infringements of Constitutional rights must be remedied. Section 4(1) makes unconstitutional conduct a nullity, even before courts have pronounced it so. When Courts give relief, they attempt to synchronise the real world with the ideal construct of a Constitutional world created in the image of Section 4(1). There is nothing surprising or unusual about this notion. It merely restates the familiar principle that rights and remedies are complementary. The relationship holds true and is uncontroversial at common law. The Constitution is also a body of legal rules and we should expect to find in it the same pairing of rights and remedies ... [95] if constitutional rights have complementary remedies, the question is what these remedies should be.

He then continued as follows;

“I would suggest that the nature of a remedy is determined by its object. I agree with the contention advanced on behalf of the appellant that the object of remedies under Section 7(4) (a) differs from the object of a common law remedy... I would add that the harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violation are highly parochial.

*The rights violator not only harms a particular person, but impedes the fuller realization of our Constitutional promise... [96] Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement. Deterrence speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to “defend against encroachment or interference”. It suggests that certain harms, if not addressed, diminish our faith in the Constitution. It recognises that a Constitution has as little or as much weight as the prevailing political culture affords it. The defence of the Constitution - its vindication - is a burden imposed not exclusively, but primarily on the judiciary. In exercising our discretion to choose between appropriate forms of relief, we must carefully analyse the nature of a Constitutional infringement, and strike effectively at its source...When something is appropriate it is “specially fitted or suitable”. Suitability, in this context, is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in Chapter three. In pursuing this enquiry one should consider the nature of the infringement and the probable impact of a particular remedy. One cannot be more specific.”*

The learned Judge then concluded thus;

*“The facts surrounding a violation of rights will determine what form of relief is appropriate. [98] I have argued that “appropriate relief” vindicates the Constitution and deters further violations of it. I see no reason in principle why common law and statutory remedies can never be suitable for this purpose...”*

27. I entirely associate myself with the above holding as correctly stating the approach and the principles that one should bear in mind with regard to any award of damages that I may be inclined to grant in this particular case.

28. Turning back therefore to the petition before me I have already found that the petitioner’s right to property under Article 40 of the constitution had been violated. One of the remedies in that regard as found in Article 23(3)(e) of the constitution is an order for compensation including an award of damages. Under Article 23(3) of the Constitution it provides:

***3. In any proceedings brought under Article 22, a court may grant appropriate relief, including:***

- 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 a 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 o judicial review.*

29. In invoking the above Article of the Constitution and authorities, I am satisfied that indeed the police have been retaining the petitioners motorcycle for a period of over 4 years. In as much as the petitioner did not prove loss of user, I am still inclined to award him general damages for the past 4 years he has been unlawfully deprived of his motorcycle. I am therefore satisfied that an award of kshs. 300,000 is reasonable taking into due regard that the petitioner has not received anything under loss of user.

30. In the end judgment must and is hereby entered in favour of the petitioner against the respondent in the following terms:

1. *A declaration that the petitioner’s rights under Article 40 of the Constitution of Kenya 2010*

- relating to the protection for the right to property has been infringed by police. Thus the respondents are ordered to return back the petitioners motorcycle or alternatively give him kshs. 80,000 as the purchase price of the said motorcycle.*
- 2. Special damages under Article 23(3) of Kenya 2010 of kshs. 110,000 (one hundred and ten thousand ) being compensation for legal fees paid by the petitioner to his advocate for being charged of an offence he had already been convicted of on his own plea of guilty.*
  - 3. General damages of kshs. 300,000 under Article 23(3)(e) of the Constitution of Kenya 2010 in favour of the petitioner as against the respondent being compensation for the respondent's violation of the petitioners rights under Article 40 of the Constitution of Kenya and Articles 3, 12 and 17 of the universal declaration of Human Rights, 1948.*
  - 4. Interest on all monetary awards at court rates from the date of judgment until payment in full.*
  - 5. Costs of this petition be awarded to the petitioner.*

Dated and delivered at KISII this 27<sup>th</sup> day of March, 2015

**C.B. NAGILLAH,**

**JUDGE.**

**In the presence of:-**

Sagwe holding brief for Okoth for the petitioner

A.G. (absent) for the respondent

Edwin Mongare Court Clerk.