



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 69 OF 2013

**IN THE MATTER OF: ARTICLES 22(1), 23 AND 165(3) OF THE CONSTITUTION
OF KENYA RULES 4, 10 AND 23 OF THE CONSTITUTION OF KENYA
(PROTECTION OF THE RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTISE
AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOM UNDER ARTICLES 40 AND 47 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: DETENTION OF MOTOR VEHICLE OF REGISTRATION NUMBER
KBC**

443Q

BETWEEN

MACKNON TSUMA M. MWASAHA

MARTIN.....PETITIONER

VERSUS

**THE BASE COMMANDER CHANGAMWE POLICE STATION-TRAFFIC
DEPARTMENT.....1ST RESPONDENT**

ATTORNEY

GENERAL.....2ND

RESPONDENT

JUDGMENT

THE PETITION

1. In a Petition dated 2nd December, 2013 and filed on 3rd December, 2013, the Petitioner sought the following orders:-

(a) A declaration that the arrest and detention of the motor vehicle Registration Number KBC 443Q on 21st November, 2013 by the First Respondent is in violation of the Constitution of Kenya and is therefore unconstitutional and unlawful.

(b) A mandatory order compelling the First Respondent to release the motor vehicle registration number KBC 443Q to the Petitioner.

(c) An order for payment of damages for loss of business at the rate of Kshs. 25,000/= per day as from 21st November, 2013 until the date of release of motor vehicle registration number KBC 443Q.

(d) An order of payment of exemplary damages to the Petitioner for the unlawful detention of the motor vehicle registration number KBC 443Q.

(e) Such other order as the court shall deem fit and just to grant.”

2. The Petition was accompanied by a Notice of Motion of the same date filed under a certificate of urgency seeking the unconditional release of the motor vehicle pending the hearing and determination of the petition. Muriithi J. on 9th December, 2013 ordered the release of the motor vehicle subject to proof of ownership. The vehicle was thereafter released and prayer (b) of the Petition is therefore spent. Prayers (c), (d) and (e) are dependent upon the sole question whether the detention of the Petitioner's motor vehicle was unconstitutional, even if it was unlawful. There are many actions of the Executive Branch of Government which may be termed unlawful, but could hardly meet the test of unconstitutionality. To determine whether the Respondent's actions were either unconstitutional or merely unlawful, it is necessary to set out the rival claims, **firstly** the Petitioner's and **secondly** by the Respondents.

THE PETITIONER'S CASE

3. There is no dispute that the Petitioner at the time material to the Petition, owned and operated a 14 seater PSV licensed motor vehicle, commonly known as “matatu”, registration number KBC 443Q, which plied the Mombasa-Kaloleni route. He contended that the motor vehicle earned him Kshs. 25,000/= daily.

4. However, the motor vehicle was arrested on 23rd January, 2013 together with the driver by the name Samwel Mwachanga Stephen, and five counts of charges were preferred against the driver under Mombasa CMC Traffic Case No. 378 of 2013 – Republic vs. Mwachanga. As a result the motor vehicle was detained at Changamwe police station from 23rd January, 2013 to 6th February, 2013 when it was released by orders of the court. The said Samwel Mwachanga Stephen initially pleaded guilty but later changed his plea to that of not guilty and the case went to trial until it was on 11th October, 2013 withdrawn under section 87(a) of the Criminal Procedure Code, (Cap 75, Laws of Kenya).

5. Fast-forward to 21st November, 2013, the said motor vehicle was arrested by officers from Changamwe Police Station and detained on the ground that there was a warrant of arrest issued by the court under Mombasa CMC Traffic Case No. 378 of 2013. At the time the said vehicle was being driven by another driver James Mgaza Dzuya. No charges were preferred against the said James Mgaza Dzuya.

6. Besides the Petitioner's Supporting Affidavit sworn on 2nd December, 2013, and annexed to the Petition, the Petition was also supported by the Affidavit of the said James Mgaza Dzuya, admitting that

he was the driver on the material day, 21st November, 2013 of the subject motor vehicle, and was driving it along the Mombasa-Nairobi Highway at about 5.45 p.m. ferrying passengers when he was stopped by a traffic officer from Changamwe Police Station. Though not shown a copy of the arrest warrant, he was informed that he was arrested under an order of court since its previous driver had on several occasions failed to attend court. James Nzaga Dzuya depones that he was ordered to park the motor vehicle at the Police Station. He called and informed the owner of the motor vehicle, the Petitioner herein, before being finally told to leave the Station at around 6.30 p.m. without the motor vehicle.

THE RESPONDENTS CASE

7. The Respondent, through the Replying Affidavit of one Leonard Masika SWORN ON 1ST October, 2014 opposed the Petition and denied that the Petitioner's constitutional rights have been violated. He admits that the motor vehicle was indeed arrested on 23rd January, 2013 and its driver, one Samwel Mwachanga Stephen was arraigned in court on 24th January, 2013 where he admitted the charges, and the motor vehicle was detained while awaiting collection either by the owner or the driver, but none of them turned up.

8. Unknown to them, that the case had been withdrawn, yet there was an outstanding warrant of arrest which led to the arrest on 21st November, 2013, and later discovered that the driver arrested was one James Mgaza Dzuya, and not Samwel Mwachanga Stephen for whom the warrant of arrest had been issued. The second driver, James Mgaza Dzuya was released but opted to leave the vehicle at the station for the owner to come and collect it, but neither the driver nor the owner came to collect it. They had neither interest nor malice in detaining the motor vehicle. He in fact wrote to the Prosecution Branch seeking clarification on the detention of the motor vehicle.

9. The Petitioner however challenged this version of events, and cited an earlier communication from the Base Commander, Changamwe addressed to the Petitioner's Advocates explaining that the driver had been arrested for various offences, and had upon arrival at the Police Station ran away, and was suspected of having absconded court, and warrants had been issued on 1st July, 2013 for his arrest, though it was not established that the warrants had been lifted, and advised counsel for the Petitioner to have the vehicle collected upon identification. As already noted however the vehicle was released by order of court made on 9th December, 2013.

THE SUBMISSIONS

10. Counsel for the Petitioner, and the Respondents both filed written submissions. The submissions of counsel for the Petitioner are dated and were filed on 2nd March, 2015, while those of counsel for the Respondents are dated 11th March, 2015 and were filed on 16th March, 2015. As expected, counsel for the Petitioner argued that the Petitioner's rights were violated, his motor vehicle was detained, he lost earnings to the extent of Kshs. 25,000/= per day, that he is entitled to exemplary damages, and to costs of the Petition.

11. On her part counsel for the Respondents argued that the arrest and detention of the Petitioner's vehicle was lawful, that no constitutional right of the Petitioner was violated, and the Petition should be dismissed with costs.

DETERMINATION

12. I have considered the Petition herein, along with the Petitioner's Supporting and Further Affidavit, together also with the submissions of counsel for the Petitioner. I have likewise considered the Replying Affidavit of the Respondents as sworn by Leonard Masika, as well as submissions by counsel for the Respondents. There is only one issue for my determination and that is, **whether any of the Petitioner's Fundamental Rights and Freedoms were violated by the arrest of driver James Mgaza Dzuya and the subsequent detention of motor vehicle KBC 443Q.**

13. The Petitioner founds his Petition on Articles 40 and 47 of the Constitution. I will commence with Article 47 of the Constitution of Kenya 2010 (the Constitution). It provides:-

“47(1) Every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair;

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action, the person has a right to be given written reasons for the action;

(3) Parliament shall enact legislation to give effect to the rights in Clause (1) and that legislation shall:

(a) provide for the review of administrative action by a court, or if appropriate, an independent and impartial tribunal;

And

(b) promote efficient administration;”

14. The genesis of the Petition is the arrest of Samwel Mwachanga Stephen the original driver of the subject motor vehicle and his prosecution on four counts under the Traffic Act (Cap. 403, Laws of Kenya). Though he pleaded guilty when the plea was taken and was granted the bail on the next day, on 25th January, 2013, the said James Mwachanga changed his mind, the charges were read afresh, and the said driver pleaded not guilty to all the four counts. The matter was fixed for hearing on 20th March, 2013.

15. On 4th January, 2013, counsel for the accused (the driver), (and not the Petitioner) at that stage, successfully applied for the release of the motor vehicle after taking photographs thereof. The release order was made on 5th February, 2013, and was issued on 5th February, 2013 when the motor vehicle was released. It continued its operations until 21st November, 2013 when it was arrested by the police on the grounds that the driver thereof had absconded court, that is to say, jumped bail. After taking the driver to the station, they discovered he was not Samwel Mwachanga Stephen, the original driver subject to the charges in court. He was released. Perhaps being upset, he left the vehicle at the Station and called the owner and informed him of what had happened.

16. In the meantime, the hearing of the case against **Mwachanga** did not proceed on 20th March, 2013. There were no witnesses, all being Police Officers from Changamwe Police Station and probably engaged on their routine duties. The matter was fixed for hearing on priority and granted 30th May, 2013 as the new hearing date. On that date, **Mwachanga**, the accused did not attend court. This prompted the prosecution to apply for an order for issue of a Warrant of Arrest; and forfeiture of cash bail. However, both the orders for issue of a warrant of arrest and forfeiture of cash bail were lifted at 2.30 p.m. on the same day, upon the application of counsel for the said **“Mwachanga”**; and the matter was fixed for hearing on 2nd August, 2013, when the accused, **“Mwachanga”** was present in court; but again the Police witnesses were not available. The prosecution was granted a last adjournment for hearing on 11th October, 2013.

17. On 11th October, 2013, the prosecution informed the court that they did not have the Police file and could not therefore proceed with hearing and having been given a last adjournment for that date it withdrew the case under Section 87(a) of the Criminal Procedure Code, and the court ordered for refund of the cash bail to the accused. That ended the prosecution of **“Mwachanga”**.

18. The communication on lifting up of the warrant of arrests appears to have remained in the minds of the Traffic Officers at Changamwe Police Station, and when they saw the motor said motor vehicle KBC

443Q on 21st November, 2013, they pounced on it, and had James Mgaza Dzuya hauled to the Police Station along with his motor vehicle. However, when they established they had the wrong man, they released him. He however chose to leave the motor vehicle at the Station until the owner collected it.

19. The Respondents, through the Affidavit of Leonard Masika sworn on 1st October, 2014 and filed on 2nd October, 2014 depone that they did not detain the motor vehicle, but one officer says the driver “**ran away**” or abandoned the vehicle, at the Station.

20. I have considered the Police version of what happened and the record of proceedings in court. There is of course a mismatch here. It is unclear why there was no, or only, partial communication of events in court, between the Prosecuting Officer, and the Base Commander as clearly indicated in the letter dated 29th November, 2013, and attached to the Replying Affidavit of Leonard Masika the Officer-in-Charge Patrols and Operations within Mombasa and also the Investigating Officer. Whereas the court record shows that the warrant of arrest was lifted almost the same day, and the cash bail reinstated, that bit of the proceedings or orders was not communicated to the Officer(s) on patrol, who still believed that the driver of motor vehicle KBC 443Q, was still at large, and needs to be hauled into court.

21. The question therefore which needs to be answered is whether that mis-match, and partial communication amounted to lack of an expeditious, efficient, lawful, reasonable and procedural unfairness and therefore unconstitutional.

22. Looked at in isolation the incident of the arrest of the James Mgaza Dzuya sounds very unfair, unreasonable, and malicious. However, looked at from the point of view of the prosecution of Samwel Mwahanga Stephen the arrest of the second driver, James Mgaza Dzuya along with the vehicle was in line with the mandate of the officers of the first Respondent.

23. The first driver had been charged with four counts:

“(1) Driving a defective motor vehicle on the public road contrary to Section 55(1) as read with 58(1) of the Traffic Act (Cap 403 Laws of Kenya).

(2) Driving a motor vehicle by playing loud music contrary to Section 103(1) as read with Section 104 of the Traffic Act (Cap 403 Laws of Kenya).

(3) Driving a motor vehicle on the public road while fitted with reflective material contrary to Rule 30(2) as read with Rule 69 of the Traffic Rules (Cap. 403 Laws of Kenya).

(4) Failing to display photographs contrary to Rule 71(a) (b) as read with Rule 72(a) (b) of the Traffic (Amendment) Rules 2003 (Cap 403 Laws of Kenya).”

24. In **R VS. COMMISSION FOR RACIAL EQUALITY ex parte Hillingdon LBC [1982] AC 779**, Lord D’block said:-

“Where an Act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards these persons who would be affected by their decisions.”

25. The administration of and enforcement of the Traffic Act and the Rules thereunder is largely entrusted to the members of the National Police Service, in accord with their various formations. The Traffic Police Officer is the most visible, he/she is everywhere on our roads. They carried out their duty. The Prosecution Branch represented by the Office of the Director of Police Prosecutions, acted in accord with the circumstances of the case, and had the charges withdrawn against the Petitioner’s first driver Samwel Mwahanga Stephen. It cannot be said that the 1st Respondent acted either unfairly or

unreasonably in the context of Article 47 of the Constitution in relation to the charges against the first driver.

26. Likewise, I am unable to say that the first Respondent acted unfairly or unreasonably in relation to the second driver, and arrest of the vehicle. The second driver himself admits on oath in his Affidavit that he was released. He instead chose to call the owner of the vehicle to collect the vehicle. There is no suggestion that the motor vehicle was detained by the first Respondent. There seems to be no plausible reason why the Petitioner failed to collect his motor vehicle the next morning, and had to seek a court order to do so. Even if the court were to attribute some wrong-doing upon the first Respondent Officer's not every wrong-doing or error on the part of the Police or a public body automatically gives rise to a violation of the Constitution. In this regard, I adopt and endorse the decision of Lenaola J, in **UHURU MUIGAI KENYATTA VS. NAIROBI STAR PUBLICATIONS, [2013] eKLR** where the learned Judge in striking out the Petition said:-

“Where there is a civil remedy in civil law, a party should pursue that remedy, and I say so well aware of the decision in HACO INDUSTRIES where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract constitutional sanction and as stated in AG VS. S. K. DUTAMBALA (Cr. Appeal No. 37 of 1991) Tanzania Court of Appeal) such sanctions should be reserved for appropriate and really serious occasions.”

“It is important to recognize that even if a case does raise, a constitutional issue the assessment whether the case should be heard by this court rests instead with the additional requirement that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

27. In this case, a claim for loss of profit is subject to proper pleading and specifically proved. That is a matter for the civil, and not constitutional court exercising its special jurisdiction under the Bill of Rights.

28. As to alleged violation of Article 40 of the Constitution, there was not even a threat to confiscate the Petitioner's motor vehicle. Once the first Respondent's officers established that they had the wrong driver, they let him go, and he deliberately left the vehicle at the Police Station and so did the Petitioner. The principles of a taking of a property without compensation under Article 40, are absent in this Petition. There is no constitutional issue raised, and the entire Petition is an abuse of this court's jurisdiction on Fundamental Rights and Freedoms.

29. The Petition dated 2nd December, 2013 and filed on 3rd December, 2013 is therefore dismissed with costs against the Petitioner.

30. It is so ordered.

Dated, Signed and Delivered in Mombasa this 10th day of April, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Mwangulya holding brief Mr. Jumbale for Petitioner

No Appearance for Respondents

Mutisya Court Assistant