



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISC CRIMINAL APPLICATION NO. 74 OF 2015

1. TRITEK CONSULTING LIMITED

2. COSMAS MAILU

3. BONIFACE SHERI APPLICANTS

Versus

1. INSPECTOR GENERAL OF POLICE

2. THE OCS KITENGELA

3. THE DIRECTOR OF PUBLIC PROSECUTIONS

4. THE ATTORNEY GENERAL RESPONDENTS

R U L I N G

1. This is an application, constitutional in nature brought pursuant to the provisions of **Articles 22, 23, 29, 40, 47, 49(1) (a)–(h) 51(1) (2) and (3)** of the Constitution of Kenya, and Section 123 and 389 of the Criminal Procedure Code seeking orders that:-

(a) **The court declares that the respondents actions and omissions have and continue to violate the applicants constitutional rights under Article 49 of the constitution and do issue an injunction / conservatory order against the respondents directing them to release the applicants in person and the 1st applicant motor – vehicle truck KCA 667 U and ZE 8255, and to desist from taking any further action with intent to prosecute the applicants and or their continued detention including the first applicants motor vehicle truck KCA 667 U and ZE 8255 and to stay any proceedings that may be undertaken by any magistrate’s court.**

(b) **In the alternative and without prejudice to the preceding prayer, to issue summons and / or directions in the nature of *Harbeas corpus* to the respondents whose custody the subjects (applicants) herein are improperly detained, requiring their appearance in person, or by advocate, together with the original of any warrant or order for their detention at a place and time named therein and to show cause why the persons and 1st applicant’s motor vehicle KCA 667 U and ZE 8255 so detained should not be released unconditionally at their own costs.**

(c) **The court do declare that the continued detention of the applicants in person and**

the 1st applicants motor vehicle truck KCA 667 U and ZE 8255 is and was illegal and in violation of their constitutional rights and direct the respondents to release the applicants and the 1st applicant's motor vehicle KCA 667 U unconditionally at their own costs and an order for compensation be given.

2. The application is premised on grounds that the 1st and 2nd applicants were arrested (for the 2nd applicant without a warrant of arrest) in Kitengela and booked in the Occurrence Book at Kitengela by the 1st and 2nd respondents but were not told the reason for their arrest and the offence for which they were arrested; Motorvehicle KCA 667 U owned by the 1st applicant was impounded. The 2nd applicant was its loader; the 3rd respondent was arrested for no apparent reason; the 2nd and 3rd applicants have been denied bond and have not been produced in court; this is in violation of their constitutional Rights; they have been denied the right to legal representation for which they should be compensated.

3. Nerbert Mandala, the Managing Director of the 1st applicant deponed an affidavit in support of the application where he states interalia that: they own motor-vehicle registration number KCA 667U. The 2nd and 3rd applicant are its loader and driver respectively; the arrest of the 2nd applicant was without a warrant of arrest; the following day he was informed of the reason of the arrest and advised to wait for action to be taken by the Isibania Police; the applicants were denied the right to fair administrative action; the impounded vehicle had cargo destined for Jinja Uganda but was diverted arbitrarily to an unknown place. The 2nd and 3rd respondents have been in custody for six and four (4) days respectively, and unless compelled to release them the respondents will continue holding them unlawfully.

4. The respondents responded to the application through an affidavit deponed by No. 56493 P.C. Baya Kalume who states that the motor vehicle KCA 667U was impounded and the 2nd applicant arrested on the 18th day of April 2015, for suspicion of theft of 600 bags of cement meant for export to the Republic of Tanzania in accordance with a report made to Isibania Police Station. The 2nd applicant was detained pending their collection by the police from Isibania who had communicated and were investigating the case.

5. The 3rd applicant was arrested on 20th April 2015 as plans were made to transfer them to Isibania Police Station. On 22nd April 2015 per OB No. 23/22/04/2015 the suspects and the motor vehicle were collected by officers from Isibania Police Station; namely PF No. 82026 Corporal Christopher Samoei and P. C. Peter Ngoni. Consequently criminal charges have been instituted against them in criminal case No. 209 of 2015 at Kehancha Law Courts.

6. Further, he deposed that during the arrest and detention the 2nd and 3rd applicants rights were upheld as they were promptly informed that the police at Kitengela Police Station were acting under instructions and directions of Isibania Police; that the 2nd applicant was not held incommunicado as he was given a phone that he used to communicate with the 1st applicant, his employer who availed the 3rd respondent to the police station.

7. In his oral submissions, counsel for the applicant Mr. Mulama argued that the applicants were arrested and held in custody by the respondents for more than 24 hours. Relying on the case of **Ann Njogu & 5 others vs Republic Misc. Criminal Appeal No. 551 of 2007** he argued that the prosecution being undertaken offend the constitution therefore should be quashed for being null and void. Alluding to the replying affidavit, he stated that no explanation was given why they were not released on bond.

8. Mr. Shijenje counsel for the respondents relied on the affidavit sworn in reply and added that the arrest was effected on weekend of 18th April 2014 and the 2nd applicant was not held incommunicado. He was given an opportunity to contact his employer. The motor vehicle had to be collected by the police from Isibania as it carried cement destined for Tanzania. The matter, a subject of a court case **Criminal Case No. 209/2015** and if there is any issue the same should be raised there. The applicants having been collected on the 22nd April 2015 by the police from Isibania the application was overtaken by events.

9. It has not been denied that the 2nd and 3rd applicants and the 1st applicant's motor vehicle that they were in control of were collected from Kitengela Police Station on the 22nd April 2015 in order to be arraigned before the Kehancha Law Courts for an offence they were believed to have committed. The application herein was filed in court on 23rd April 2015.

10. According to **Article 49** of the constitution, it is the constitutional right of an accused person to be informed promptly the reason of his arrest and to be allowed to communicate with an advocate or any person whose assistance is necessary (vide **Article 49(1)(a)(i)(c)** of the Constitution). It is alleged these rights were violated in respect of the 1st applicant. Affidavit evidence however discloses a fact not contradicted that the 1st applicant his employer learnt of his arrest after he was allowed to communicate with him on phone. Further it is stated that the 3rd applicant was availed and arrested after the 2nd applicant communicated with the 1st applicant. This is an implication that the 2nd respondent did not contravene the provisions of the law.

11. **Article 40(2)** of the constitution provides:-

“Parliament shall not enact a law that permits state or any person;-

- a. **To arbitrarily deprive a person of property of any description; or**
- b. **To limit or in any way restrict the enjoyment of any right under the Article on the basis of any of the grounds specified or contemplated in Article 27(4).**

12. The genesis of this matter is that the 2nd and 3rd applicants were arrested following a complaint lodged against them. The 1st applicant's motor vehicle that they were in possession of as his agents was carrying goods alleged to have been stolen. They were to be investigated. Subsequently they were formally charged in a court of law. The alleged stolen items and the motor vehicle that was being used to convey them must have been treated as exhibits. Taking of the motor vehicle to present it in court as an exhibit cannot be viewed as an arbitrarily deprivation of the owner of the same.

13. According to **Article 49(1)(f)** an arrested person has the right to be brought before court as soon as reasonable possible but not later than twenty four (24) hours after arrest. It is the contention of the applicants that the law was contravened. They were neither granted bail nor produced in court. The same Article provides that if the twenty four (24) hours ends outside ordinary court hours then the person should be produced on the next court day. (See Article 49(1) f(ii)).

14. In this case the 2nd applicant was arrested on Saturday, the 18th April 2015 a non-court day. The 3rd applicant was arrested two (2) days later. They were then collected by the police and escorted to Isibania. If they sought for an explanation, the police had plausible reasons of holding them. The explanation would have been acceptable. The case alluded to of Ann Njogu v Republic, as correctly submitted by a learned counsel for the state is distinguishable. The circumstances neither lead to a declaration that the criminal charges preferred are null and void or that the applicants be compensated. The right to *Habeas corpus* cannot be limited in this country following the provisions of Article 25 (d) of the constitution. I have been asked to command the respondents to produce the applicants. It is on record that at the time of filing this application they had been produced in a court of law and charged with a criminal case. This relief was overtaken by events. Infact, it should have been withdrawn.

15. The applicants were arrested following allegations that they had stolen 600 bags of cement that they were carrying. Other than the allegation that the goods were destined for Jinja Uganda, there was no annexure of any documents to establish the averments. Therefore the offence having been theft which is a cognizable one the police had the authority of making the arrest without a warrant.

16. From the foregoing it is apparent that the respondents did not contravene the applicants' rights. In the result the application fails. The same is dismissed with costs to the respondent.

17. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of JULY, 2015.

L. N. MUTENDE

JUDGE