



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 18 OF 2013

DANEVA COMPANY LIMITED.....PLAINTIFF

-V E R S U S-

KENYA NATIONAL HIGHWAYS AUTHORITY..... DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff is the registered owner of motor vehicle registration number KAY 240S (“**the motor vehicle**”). The Plaintiff's case is that the motor vehicle was, on 18/2/2013, wrongfully and without justifiable cause arrested and detained by the Defendant's officers and/or employees at Webuye Weigh Bridge on allegation that the motor vehicle was overloaded contrary to the provisions of the Traffic Act, Cap. 403, Laws of Kenya. The Plaintiff claims that the motor vehicle was not overloaded at the time of arrest and detention and that due to the Defendant's action, the Plaintiff has suffered damages.
2. The Plaintiff called one witness, PW1 CHRISTOPHER BOSSA, who was the driver of the motor vehicle at the time it was impounded. He testified that the motor vehicle left Mombasa on 16/2/2013 while loaded with wheat destined for Kampala, Uganda. That the motor vehicle was weighed at Mariakani, Athi River Mai Mahiu, Gil Gil and Webuye weigh bridges in that order and found to be within permitted weight limits except at Mai Mahiu weigh bridge where it was allegedly found to be overloaded.
3. PW1 testified that upon being informed that the motor vehicle was overloaded at Mai Mahiu, he requested for re-weighing. That while he parked the motor vehicle, awaiting re-weighing, a person wearing a jacket similar to those worn by weigh bridge officers approached him and indicated that he should proceed with the journey and so he proceeded knowing that he had been cleared. PW1 testified that the ticket that he was given at Mai Mahiu weigh bridge was for motor vehicle registration number KAU 240S and not the Plaintiff's motor vehicle registration KAY 240S. According to the witness therefore, the vehicle that was overloaded was not the Plaintiff's motor vehicle but KAU 240S.
4. The Plaintiff stated that the motor vehicle proceeded and was weighed at the next weigh bridge, Gilgil, where it was cleared to proceed. However, on reaching Webuye weigh bridge, the vehicle was stopped and impounded on ground that it had been found to have exceeded permissible weight limits at Mai Mahiu weigh bridge where it was alleged to have escaped arrest.

5. The Defendant denies the Plaintiff's claim and asserts that the motor vehicle was rightfully impounded because it was weighed and found to have exceeded the permitted limits. That the Plaintiff's driver had escaped arrest at Mai Mahiu weigh bridge and was subsequently arrested on arrival at Webuye weigh bridge. That it is on the basis of the overloading that the Defendant issued a Prohibition Order pursuant to which the motor vehicle was detained.
6. The Defendant's defence is that it is not the right party to sue since the Defendant's role ended with the issuance with the Prohibition Order and thereafter it is the police who detained the vehicle. As such, the Defendant submits, it is the Director of Public Prosecutions that ought to be sued.

THE ISSUES

7. In my opinion, the issues for determination are as follows:
 - i. Whether the Plaintiff's motor vehicle was lawfully detained.
 - ii. Whether the Defendant is rightfully sued.
 - iii. Whether the Plaintiff is entitled to damages.

ANALYSIS

Whether Detention was lawful

8. It is not in dispute that the motor vehicle was impounded at Webuye weigh bridge on 18/2/2013. It is also not in dispute that the motor vehicle was weighed in other weigh bridges, to wit, Mariakani, Athi River, Gilgil and Webuye and found to be compliant with stipulated weight limits. Both parties tendered similar weigh bridge tickets for those stations to confirm that position.
9. The bone of contention is in respect to what transpired at Mai Mahiu weigh bridge. Both parties agree that PW1 had requested for the motor vehicle to be re-weighed. However, while the Plaintiff claims that he was cleared to proceed by an officer of the Defendant's, the Defendant claims that PW1 left without authority from the Defendant's officers prompting his arrest at Webuye weigh bridge.
10. A question that begs answer is, if PW1 had taken off from Mai Mahiu

weigh bridge without authority of the Defendant's officers, why was the vehicle not impounded at the next weigh bridge which is Gilgil? DW1, the Defendant's witness was asked this question in his examination in chief and this is what he stated in response:

“The vehicle should have been detained at Gilgil. It was not detained. I don't know what happened...”

11. The standard of proof in civil cases is on a balance of probabilities.

The power to detain the motor vehicle (or at least to initiate the process of detention for that matter) in the circumstances of this case rested squarely with the Defendant's officers. DW1 was the officer in charge at Mai Mahiu weigh bridge. My expectation was that immediately he discovered that the driver had taken off, which discovery he says to have made after one hour, he should have communicated with Gilgil weigh bridge officers to seize the motor vehicle. He did not explain whether he so communicated or why the vehicle was not arrested at the immediate next weigh bridge at all. Nobody was better placed to offer such explanation but DW1. His failure to give explanation tilts the balance in favour of the explanation given by PW1. I therefore find the explanation given by PW1, that he was told to proceed by an officer of the Defendant's, more credible in the absence of an explanation from the Defendant.

12. The Defendant admits that the Plaintiff's motor vehicle passed the

weight test in all the weigh bridges except at Mai Mahiu weigh bridge. At Mahi Mahiu, the weight of the lorry is submitted by the Defendant to have exceeded the authorised limit by 3630 kilogrammes.

13. The Defendant claims that as a result of the overloading, the

Defendant prepared a Production Order pursuant to which the motor vehicle was detained. The Defendant produced in evidence the Mai Mahiu weigh bridge ticket dated 17/2/2013 (**D. Exh 3**) and the Production Order (Order to Resume Vehicle from Road) dated 17/2/2013 (**D. Exh. 6**) to demonstrate that the motor vehicle was overloaded and that the impounding was lawful. However, the two documents relate to motor vehicle registration number KAU 240S and not the subject motor vehicle. When asked to explain the discrepancy in the registration number of the motor vehicle, DW1 stated as follows on cross-examination:

“The vehicle weighed at Mariakani was KAY 240S. At Athi River was KAY 240S. At Mai Mahiu was KAU 240S. At Gilgil was KAY 240S. At Webuye was KAY 240S. The vehicle that (we) sought to be detained was KAU 240S. That was the vehicle I ordered to be detained. I signed Exh No. 6. The vehicle detained at Webuye is KAY 240S. There is no valid detention order for KAY 240S.”

14. Clearly, from the documents produced in court and going by the

Defendant's witness' own admission above, the motor vehicle that was supposed to be detained was **KAU 240S** and not **KAY 240S**. The Defendant attempted to explain the discrepancy by producing the Plaintiff's Delivery Note dated 16/2/2013 (D. Exh 7) stating that the “Y” in the said Delivery Note may have been misread as “U”. This explanation, in my view, is not plausible because motor vehicles are usually physically present during the weighing exercise. I expect the weighing officers to have been reading registration numbers of vehicles directly from the number plates at the time of weighing. Even if the officers rely on documentation such as the delivery note, where there is doubt or confusion like in this case, the officers must verify the registration number with the motor vehicle number plate. Further, the Defendant did not call any officer who was physically present during the actual weighing to show court that the mix-up in the vehicle numbers was a result of genuine oversight. The person who testified admitted that he was not present when the motor vehicle was actually being weighed.

15. The registration number of a vehicle is a very material aspect when it

comes to identifying that particular motor vehicle. The identity of the motor vehicle that was supposed to be detained is a very material issue and the Defendant cannot just wish the same away by arguing that it was an error due to misreading of the Delivery Note. The motor vehicle was physically present for verification but that was done. In any event, the Defendant's own witness admitted that the vehicle that he had ordered to be detained was KAU 240S and NOT KAY 240S. The documents produced by the Defendant confirm that it was KAU 240S to be detained. The court, in my view cannot go against that admission. The only logical conclusion to arrive at is that the Plaintiff's motor vehicle was detained wrongfully.

Whether the Defendant is rightfully sued

16. The Defendant's case is that its role ended with preparation of the

Production Order. That the moment the Production Order was made, the motor vehicle was handed over to the police to prefer appropriate criminal charges. The Defendant's case therefore, if I hear it correctly, is that it does not have custody and control over the motor vehicle.

17. The Defendant rightly pointed out that its mandate to weigh the motor

vehicle and issue the Production Order was derived from **Section 22 (1) (e)** and **Section 22 (2) (e) (i)** of the Kenya Roads Act, Cap. 408 of the Laws of Kenya. Section 22 (1) (c) thereof provides as follows:

“An Authority shall have power—

(a)...

(b)...

(c) to measure and assess the weights, dimensions and capacities of vehicles using any road and provide measures to ensure compliance with rules relating to axle load control, other provisions of the

Traffic Act (Cap. 403) and any regulations under this Act.”

Section 22 (2) (e) (i) on the other hand provides that:

“Subject to this Act, the powers conferred by, subsection (1) shall include all such powers as are necessary or appropriate and proper for the purposes of the Authority and in particular, but without prejudice to the generality of the foregoing, shall include powers—

(a)...

(b)...

(c)...

(d)...

(e) to prohibit, control or regulate—

i. ...

(ii)the usage of any vehicle on any road or on any premises occupied by the Authority.”

18.The Defendant therefore had powers under the above cited provisions

to measure and assess the weights of vehicles and to prohibit, control or regulate the usage of the same on any road. In my view, these powers are directly donated to the Defendant and the same cannot be delegated to any person or authority. If the usage of any motor vehicle on the road is withdrawn pursuant to these provisions then such a withdrawal is directly attributable to the Defendant and the Defendant cannot shift liability to another person.

19.To make this clearer perhaps, we should ask ourselves, if the

Defendant had not issued the alleged Production Order, would the police have detained the motor vehicle? And, had the Defendant rescinded its decision to withdraw the usage of the motor vehicle from the road, would the police continue holding it to date? The answer to these questions is both in the negative.

20.Clearly, the motor vehicle is presently in custody of the police on

instructions of the Defendant. The genesis of detention of the motor vehicle is with the Defendant. It is the Defendant who first issued the Production Order which the police acted on. If the

Defendant had not issued the order, the police would not have seized the motor vehicle and they would not be holding it to date. The police were under no legal obligation to establish whether the order was lawful or not. Theirs was to act. Any question as to legality or otherwise of the Production Order can only be answered by the Defendant who must then be held liable if it is established that the order issued was unlawful. The police, in my view, cannot be faulted for unlawful actions of the Defendant.

21.I therefore do not agree with the Defendant that the Director of Public

Prosecution (DPP) should have been sued in this case instead of the Defendant. Probably the DPP would have been made a party if criminal charges had been preferred and the motor vehicle was in custody for purposes of the criminal case. In this case there are no criminal charges. The Defendant is rightfully sued.

Whether the Plaintiff is entitled to damages.

22.The Plaintiff has prayed for general damages for wrongful detention

of its motor vehicle. The Plaintiff has not pleaded any special damages. I therefore do not agree with the Defendant that the Plaintiff ought to have pleaded the particular aspects of damages in the Plaintiff and strictly proved the same. That only applies if special damages are pleaded and not for general damages.

23.The Plaintiff's motor vehicle was being used for business and income

generation. The motor vehicle has been in custody since 18/2/2013 for actions directly attributable to the Defendant's negligence. The Plaintiff is entitled to compensation.

24.The issue of whether a claimant is entitled to damages for unlawful

detention of his motor vehicle has been dealt with by our courts before. In the case of **Great Lakes Transport Co. (U) Ltd –Vs- Kenya Revenue Authority [2009] eKLR** the Court of Appeal held that equity would not allow a wrong to be suffered without a remedy and went ahead to assess damages for illegal seizure and detention of a motor vehicle. The Court of Appeal stated as follows:

“In our view from the fact that general damages was pleaded in the body of the Plaintiff and evidence led to show that the appellant was actively using the subject vehicle it followed that it would suffer loss even if special damages were not properly proved.

Considering all the above and mindful of the legal position that the superior court ought to have considered that it was sitting both as a Court of law and a court of equity, and noting that equity would allow a wrong to be suffered without a remedy, we hold that the appellant was entitled to an award of general damages.”

25.The Court of Appeal then went on to assess damages at Kshs.

500,000/= which was for a period of six months. The Court of Appeal assessed the damages after considering that the Appellant had done nothing to mitigate the loss.

26.In the instant case, the Plaintiff cannot be faulted because it moved

with reasonable expediency to file this suit. The court should also bear in mind that DW1, the Defendant's officer who issued the Production Order was absolutely negligent. He admitted that the vehicle that was supposed to be detained was not the Plaintiff's yet he did nothing to rectify the mistake. He should have released the motor vehicle at the soonest opportunity. In my opinion, this

is a case in which DW1 should have been held personally liable to serve as an example to other negligent public officers. However, the Defendant as a public authority should not escape liability because it failed, even in the face of glaring error committed by its officer, to admit liability and admonish the errant officer. Instead, the Defendant completely denied liability and even attempted to shift the blame to another entity, the DPP. The Defendant should thus be held liable and DW1 admonished accordingly.

27. Guided by the above cited case in which the Court of Appeal assessed

damages for unlawful seizure and detention of motor vehicle at Kshs. 500,000/=, I am of the view that damages of Kshs. 2,500,000/= would be adequate to compensate the Plaintiff herein. I opine so after bearing in mind the following factors: that the said Court of Appeal decision was made way back in 2009; that the period of loss in the instant case is ten (10) months unlike in the above cited case where the period was 6 months; that the Plaintiff moved with reasonable expediency to file this case unlike in the above cited case where the claimant had stayed for over one year before moving to court; that in the above cited case, the claimant had done nothing to mitigate his loss unlike in the instant case where the Plaintiff moved the court without much delay; and finally that the Defendant admitted having detained the wrong vehicle yet continued with such detention.

28. In the end there shall be judgment-

- a. **For the Plaintiff for Kshs. 2,500,000/- plus interest at Court rate from the date of this judgment until payment in full.**
- b. **For mandatory injunction compelling the Defendant to release with immediate effect motor vehicle Registration No. KAY 240S.**
- c. **The Plaintiff is awarded costs of the suit.**

DATED and DELIVERED at MOMBASA this 20TH day of MARCH, 2014.

MARY KASANGO

JUDGE