



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Petition 321 of 2011

JILLO AILA HIRBO.....PETITIONER

AND

COMMISSIONER OF POLICE 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

DIME HIRBO DIME 4TH RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner claims that his motor vehicle was impounded by the police after it had been released following an investigation into an alleged theft of goods.
2. The petitioner's case is set out in the amended petition dated 19th December 2011. It is supported by the petitioner's affidavit sworn on 16th December 2011 and also an affidavit sworn on 19th December 2011 in support of an application seeking conservatory orders.
3. The petitioner, a businessman in the transport business, is the registered owner of motor vehicle registration number KBH 095H which he bought through a loan provided by NIC Bank. On 30th

November 2011, the vehicle was hired by the 4th respondent to transport assorted phones from Nairobi to Moyale. Unfortunately, the vehicle was attacked and the goods stolen while the vehicle was in Nairobi.

4. The driver and turn boy were later charged and the motor vehicle was impounded and kept in police custody. According to the petitioner, the vehicle was photographed and released but was once again impounded without lawful cause.

5. The petitioner avers that the vehicle was in police custody for 10 days as a result of which he suffered loss of about Kshs. 150,000.00 per day. The vehicle was released when this petition was filed. The petitioner avers that his right to own property under **Article 40** was violated and as a result he suffered great loss and damage and he prays for compensation.

6. In the amended petition, the petitioner seeks the following prayers;

(1) A declaration do issue that the impounding of motor vehicle KBH 095Q Mitsubishi lorry/truck by the respondents is illegal and contravenes his constitutional Rights.

(2) A declaration to issue to stop harassing, intimidating and or threatening the petitioner.

(3) An order for damages for loss incurred by the petitioner and costs.

(4) Any other relief the court may deem fit and appropriate.

7. Mr Atanda, counsel for the petitioner, submitted that the impounding of the petitioner's vehicle was arbitrary and contrary to **Article 40** of the Constitution, Counsel relied on the case of **Zakia Mogere Arunga v State Kisii HC Petition No. 48 of 2009 (Unreported)** where the court declared the impounding of a motor vehicle by the police unconstitutional and contrary to **section 75** of the former Constitution.

The Respondents' Case

8. The respondents have denied the petitioner's claim based on the affidavit of Ndumba Thangalani sworn on 22nd March 2012. Mr Thagalani is an investigator with the Criminal Investigation Department.

9. Mr Thangalani confirms that the petitioner's vehicle was the subject of theft and the turn boy and driver were duly charged at the Makadara Law Court's with offences relating to the theft of the mobile phones belonging to the 4th respondent.

10. On 6th December 2011, the 4th respondent reported the theft of the said goods and on the 8th December 2011, the driver and the turn boy were arrested in Eastleigh and the vehicle was booked at the police divisional headquarters pending collection by the petitioner as the registered owner.

11. The petitioner was thereafter severally summoned to record his statement and confirm the two suspects are his employees but he never turned up. According to Mr Thangalani, it took the intervention of the PCIO Eastern and OCPD in Moyale to summon him to appear at the DCIO Starehe to record his statement confirming that he was the registered owner of the vehicle and that the two suspects were his employees.

12. On the 21st December 2011, the petitioner and his counsel appeared at the Pangani Police Station in the company of the petitioner's son whereupon the vehicle was released to them on behalf of the petitioner.

13. The respondent therefore denies the claim of unlawful detention of the vehicle. It is the respondent's case that the petitioner failed to appear at the police station to claim and pick the vehicle as the registered owner.

14. In fact, Mr Thangalani avers that he had to make efforts through the PCIO Eastern and OCPD to summon the petitioner to come and make a statement and confirm ownership of the motor vehicle so that it can be released to him

15. The respondent's position is that the motor vehicle was impounded after a report of theft was made and in the cause of carrying out investigations. According to the respondent, the vehicle could only be released once the registered owner appeared at the police station to identify and collect the motor vehicle.

The Determination

16. The issue for determination is whether the police impounded the petitioner's motor vehicle in a manner that resulted in breach of **Article 40** of the Constitution.

17. It is not disputed that the motor vehicle was involved in an incident that gave rise to suspicion of theft. In my view, there was probable cause to impound the vehicle as it was involved in a theft and hold it for purposes of completing investigations.

18. The petitioner avers that the vehicle was photographed by the police and was impounded when preparing to go for another trip. The respondents on the other hand contend that the vehicle was impounded and held it only for purposes of releasing it to the registered owner after investigation.

19. The petitioner does not state when the vehicle was impounded the second time. It is also common ground that the motor vehicle was released on 21st December 2011 after the petition and application were served on the respondents on 20th December 2011.

20. The petitioner has not responded or denied the respondent's assertion contained in the replying affidavit that the vehicle was held for the period pending collection by the petitioner as the registered owner. I note that Bashir Mumbaha, the petitioner's own process server, in the affidavit of service sworn on 21st December 2011 states that when he went to effect service, "*The DCIO informed me that he has requested several times the owner of motor vehicle No. KBH 095Q Mitsubishi Lorry/Truck to come and collect the vehicle but upto the time of service they had not come for it.*" This statement in my view, is consistent with the fact that the vehicle was not impounded the second time.

21. The petitioner bears the burden of proving a violation of its rights and taking the evidence as a whole, I am far from satisfied that the petitioner motor vehicle was impounded a second time after it had been released by the police.

22. I am required to determine the award I would have given had I found the respondents guilty of breach of the petitioner's fundamental rights. A sum of Kshs. 50,000.00 as general damages would be appropriate to vindicate the right breached. However, the evidence necessary to determine compensation is far from sufficient to prove loss of earnings. Loss of earnings is in the nature of special damages and it must be proved. The material before the court is insufficient to make any award under this head.

Disposition

23. In the circumstances, I do not find any violation of the petitioner's rights under **Article 40** and I therefore dismiss the petitioner's case with no order as to costs

DATED and **DELIVERED** in **NAIROBI** this 19th day of June 2012

D.S. MAJANJA

JUDGE

Mr Atanda instructed by Ang'awa Atanda and Company Advocates for the Petitioner

Mr Njogu, State Counsel, instructed by the Directorate of Public Prosecutions for the 1st and 2nd respondent