



REPUBLIC OF KENYA



KENYA LAW
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**Mwatha & another v OCS Sagana Police Station & 4 others (Constitutional
Petition 18 of 2020) [2025] KEHC 2294 (KLR) (18 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2294 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CONSTITUTIONAL PETITION 18 OF 2020**

J WAKIAGA, J

FEBRUARY 18, 2025

BETWEEN

JOHNSON KIHATO MWATHA 1ST PETITIONER

JOMWAK ENTERPRICES LIMITED 2ND PETITIONER

AND

OCS SAGANA POLICE STATION 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 3RD RESPONDENT

KENYA NATIONAL HIGHWAY AUTHORITY 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

Introduction

1. This petition was originally filed at the High Court Registry at Nairobi in which the petitioners sought for an order of injunction directed to the respondents to immediately release motor vehicle registration number KCR 132 J truck together with all the 400 bags of cement and a conservatory order staying Gatundu WBTR case no 50 of 2020 Republic v Johnstone Kihoto Mwatha.
2. On the 10th day of September 2020, the court gave directions thereon and directed that the same be served, upon which by a consent order dated 5th October 2020, an order was issued directed toward the respondents to immediately release the truck together with the 400 bags of cement to the petitioners pending the hearing and determination of the application.
3. In response to the petition, the 4th respondent filed grounds of opposition in which it stated that it acted under the confines of Article 157(10) of the *Constitution* and that under Article 245(4) (a) and



- (b) no person is supposed to give a direction to the Inspector -General with respect to investigations of any particular offence and that should the court grant the orders sought it will be interfering with the independence of the 4th respondent.
4. On behalf of the 5th respondent a replying affidavit was filed sworn by one Shadrack Kimanzi dated 21st October 2020 in which it was deposed that it did not maliciously detain the petitioners motor vehicle and that the same was detained in execution of the mandate of the respondent as provided for under section 3 of the [Kenya Roads Act](#) and to Sections 55,56, 57 and 58 of the [Traffic Act](#).
 5. On the 10th November 2020, this petition was transferred to this registry for trial and determination and by an application dated 12th may 2022 the petitioners were allowed to amend the petition herein in which it was pleaded that on or about the 8th day of August 2020 at sagana town while the subject motor vehicle was lawfully loaded and parked near the loading bay with a consignment of 400 bags of cement , the respondents without reasonable justification seized and detained the same on account of overloading without weighing it.
 6. That the consignment of cement was damaged due to exposure to bad weather during a period when the 2nd petitioner had been contracted by Kenya Rural Roads Authority to maintain roads, leading to a loss of business at the rate of up to kshs 200,000 per day and that despite a consent order entered thereon, the respondents failed to release the motor vehicle to as a result occasioning a loss to the tune of kshs 54,204,600

Submissions

7. Directions were issued on the disposal of the petition by way of written submissions. For the petitioners, it was contended that on 8th august 2020, the petitioners motor vehicle was at the gates of National Cereals and Produce Board go downs in sagana Town after being loaded with 400 bags of cement when a traffic police arrived at the scene and illegally broke into the same, impounded and drove it to sagana police station on an allegation that the same was overloaded on a public road, which allegation was not true .
8. The petitioner then wrote a letter of compliant to EACC and the Inspector General of Police and in retaliation the 1st and 2nd respondents in cahoots with the 3rd respondent falsified and preferred malicious charges against the 1st petitioner in criminal case no E052 of 2020 and by a ruling of the court dated 2nd march 2021, the trial court declined to admit the said charges and discharged the petitioner under section 89(5) of the [Criminal Procedure Code](#) on the basis that the charge sheet was irregular.
9. The court proceeded to state that there was no evidence that the subject motor vehicle was on a public road and that there were contradictions on the weight tickets.
10. It was submitted that the petition was properly before the court since it raises constitutional issues seeking remedies set out under the [Constitution](#) having been aggrieved by the respondent's decision to detain the subject motor vehicle without legal or probable cause and after the release had been ordered by the court.
11. It was contended that the decision by the respondents to detain and refuse to release the subject motor vehicle , was an administrative action within the meaning of section 2 of the Fair Administrative Actions Act and a violation of the petitioners rights under Article 47(1) and (2) of the [Constitution](#) as read together with Article 50 and that the petitioners had met the threshold set out in Anarita Karimi Njau v republic [1979] eKLR , Trusted Society of Human Rights Alliance v AG and 2 others [2012] e KLR and Nation Media Group ltd v AG .



12. It was contended that it was not disputed that the petitioner's motor vehicle was seized and detained, dispossessing them of their lawfully owned property and the issue was conclusively determined in favour of the petitioners in Criminal case no E052 of 2020 at Gatundu to the effect that the respondents did not have legal reasons to seize and detain the petitioners motor vehicle.
13. It was contended that the unlawful seizure and prolonged detention of the petitioners motor vehicle despite a consent order amounted to a violation of the petitioners fundamental rights and in particular rights under Article 40(3) the right to property without hearing and due procedure of the law in support of which reference was placed on the case of Timothy Fondo Ruwa t/a Cargo Contractors v Kenya Highway Authority [2020] eKLR where the court stated that the Constitution requires a fair procedure and substantive due process before a person can be deprived of his property.
14. This position it was submitted was stated in Jorum Nyaga Mutegi v Kenya National Highway Authority [2017] eKLR where the court stated that rights have values and must be respected and protected at all time and went further to state that the law must be followed and where there is no evidence to that effect, any purported action, is unacceptable.
15. It was submitted that the petitioners right to fair hearing and fair administrative action were violated by the respondents due to failure to afford the same a chance to be heard as was stated in Disarano limited v Kenya National Highway Authority and another [2017] eKLR where the court stated that the normal provisions and procedural safeguards as regards seizure and arrest of motor vehicles was required to be followed , with the same being handed over to the police who then become persons to apply for their release.
16. In this case it was submitted that the respondent s failed to adhere to the constitutional provisions and upon the release of the motor vehicle after 14 months , the petitioner found that the 400 bags of cement had been destroyed due to poor storage for which he is entitled to compensation .
17. On general damages, it was submitted that the petitioner is entitled to an award for grave violation of fundamental rights as was stated in Caneva Company Limited v Kenya National Highway Authority [2014] e KLR where the court held that the fact that general damages were pleaded in the body of the plaint and evidence led to show that the appellant was actively using the subject vehicle it follows that it would suffer loss even if special damages were not properly proved and that in Moses Kipkoech Rotich v Kenya National Highway Authority [2014] eKLR an award of Kenya shillings three million was awarded to the petitioner whose motor vehicle had been detained for a period of ten month. The petitioner submitted that an award of kshs 6,000,000 would be adequate.
18. On special damages it was submitted that the cost of hiring an alternative truck during the period was kshs 54,204,600 and the cost of the destroyed cement was kshs 474,000.
19. On behalf of the 3rd respondent it was submitted that whereas the constitutional prosecutorial powers of the 3rd respondent is reviewable by the court under Article 165(2) (d) the court ought to consider the doctrine of separation of powers and that the petitioners had failed to sufficiently demonstrate the manner in which the 3rd respondent violated their rights and freedoms in conducting prosecution to warrant intervention by the court as was stated in John Atelu Omilia & Another v AG & 4 others [2017] eKLR
20. It was contended that nothing links the loss suffered by the petitioners to the action of the 3rd respondent in approving the charges against the 1st petitioner and that at all material times the truck was in the custody of the 1st and 2nd respondents and that the court order for the release was not directed to the 3rd respondent and therefore cannot be faulted for disobeying the same.



21. It was submitted that the petitioner had failed to demonstrate that the process and decision to charge was tainted with irrationality or procedural impropriator as there was no obligation that the case had to end in conviction noting that the DPP is entitled to make errors within his constitutional jurisdiction as was stated in *Mutululu & Another v DPP* [2003] 4LRC at 712.
22. It was submitted that an award cannot be made where the petitioner failed to prove infringement of rights as was stated in *Karithi & Another v AG*
23. On behalf of the 4th respondent, it was submitted that its mandate is derived from Section 4(2)(d) of the Roads Act of ensuring adherence to the rules and guidelines on axle load control prescribed under *Traffic Act* and that in exercising that mandate the suit motor vehicle was weighed and found to be carry excess weight and that its officers were duly authorized to carry out the exercise as was stated in *Water Products Limited v Kenya Highways Authority* [2021] KEHC 238(KLR)
24. It was contended that the petitioner was charged with an offence disclosed in law and upon conclusion of the matter the motor vehicle was released to the petitioners. It was submitted that the 4th respondent was a complainant and that the motor vehicle became an exhibit and its detention was within the mandate of the National Police Service and therefore the 4th respondent did not violate the rights of the petitioner and that the mere acquittal of the petitioners did not demonstrate that their rights were infringed as was stated in *Robert Okere Ombaka v Central Bank of Kenya* [2015] eKLR.

Determination

25. From the amended petition, the responses filed, the applications thereto and the rulings thereon, the following facts are not disputed; that the petitioner motor vehicle was detained by the agents of the 4th respondent who handed it over to the 1st respondent and subsequently the 3rd respondent prosecuted the petitioner for an offence of using the motor vehicle on the road with a load greater than the specified contrary to Section 56(1) of *Traffic Act*.
26. The 1st petitioner pleaded not guilty and on 14th October 2021 was acquitted under the provisions of section 215 of The CPC on the ground that there was no evidence that the said motor vehicle was on a designated road and that there was contradiction on the alleged weight .
27. It is this acquittal which lead to the filling of the petition herein in which according to the amended petition, the petitioner alleged that his right to property under Article 40(3) and right to fair Administrative Action under Article 47(1) of the *Constitution* were violated and sought for a declaration that the seizure and detention of the motor vehicle was unlawful and violation of constitutional right and an award of General and Special damages to be assessed by the court.
28. The issue for determination, therefore is whether the petitioners have proved any violation of their constitutional rights and loss as a result thereof ?
29. Proof of violation of constitutional rights is a matter of facts based upon the pleadings on record. In this petition, save for the allegations that that the petitioner was denied the right to property and fair Administrative of action, as supported by the affidavit in support of the petition, the content of which were controverted by the respondents, the petitioners tendered no evidence before this court in support of the alleged violations, noting that the same was duly charged before a court of law with an offence known in law and the fact that the same was acquitted does not means that his rights were violated.
30. The law requires a party making an allegation to support the same either with admissible documents or oral evidence, as was stated by the Court of Appeal in *Peter Ngari Kaguma and others v Attorney General* [2016] KECA 442(KLR) and *Priscilla Mwara Kimani v Attorney General* [2019] e KLR



where the Court of Appeal stated that the issue of violation of constitutional rights could not be proven based on mere allegations and that the appellants had a burden to prove them as provided for under Sections 107 and 109 of the *Evidence Act*.

31. From the proceedings the petitioner was charged and there is no evidence tender to prove that the said charging and prosecution were unlawful and malicious. The supreme Court of Kenya in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR stated that the standard of proof on a constitutional petition assumes a higher level in regards to constitutional safeguards than in the case of ordinary civil claim balance of probability. That the explanation for this is that virtually all constitutional rights safeguards bear generalities or qualifications, which call for scrupulous individual appraisal for each case.
32. I have looked at the cases presented by the petitioners in support of the petition and note that the same are distinguishable from this petition, in that in all those cases the petitioners motor vehicles had been detained yet the petitioners had not been charged before a court of law unlike in the case herein where the motor vehicle was detained following the charging of the petitioner at the traffic court.
33. I therefore find and hold that the petitioners failed to prove any violation of their constitutional rights as alleged in the amended petition.
34. Having so held the issue of damages payable can therefore not arise. Had the petitioners proved violation, then on special damages, the petitioners only attached documents to their supporting affidavits alleging that the same had been awarded some tender. No evidence was presented before the court to prove that the said tenders were executed and that he petitioners incurred the loss as claimed in the amended petition. Further the petitioner did not tender in evidence to show how he mitigated his alleged loss and therefore find and hold that special damages as pleaded was not proven.
35. On general damages, the petitioner alleged that his motor vehicle was detained despite a court order for its release. There is the ruling of this court on the application for contempt which was not appealed against and or reviewed, to the effect that there was no evidence that the said order was served upon the respondent. Had the petitioner proved that the said order was served, I would have awarded the same a sum of Kshs 3,000,000 in general damages for unlawful detention of the said motor vehicle from the date of the consent to the date of release against 5th respondent on behalf of the 1st and the 2nd respondent.
36. In the final analysis I find and hold that the petitioners failed to prove their case as required against the respondent and therefore dismiss the petition.
37. On the issue of cost, since the petition was in respect of protection of rights, each party shall bear their own cost and it is ordered.

SIGNED DATED AND DELIVERED AT VIRTUALLY THIS 18th DAY OF FEBRUARY 2025.

J.WAKIAGA

JUDGE

In the presence of

Mr. Mungai for the petitioner

No appearance for the respondent

