



Patiala Distillers (K) Ltd v Inspector General of Police (Petition E007 of 2023) [2024] KEHC 116 (KLR) (17 January 2024) (Judgment)

Neutral citation: [2024] KEHC 116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
PETITION E007 OF 2023**

FROO OLEL, J

JANUARY 17, 2024

**IN THE MATTER OF ENFORCEMENT OF ARTICLES 1,2,10,19,22,23(3),
29, 165(3), 258(1) AND 259(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 25(C), 27(1),
(2), 47, 48, 49 & 50 OF THR CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF VIOLATION OF THE RIGHT TO LIBERTY

AND

IN THE MATTER OF THE STANDARDS ACT, CHAPTER 496 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF CONTINUED HARASSMENT,
INTIMIDATION AND SABAOTAGE BY THE POLICE**

BETWEEN

PATIALA DISTILLERS (K) LTD PETITIONER

AND

INSPECTOR GENERAL OF POLICE RESPONDENT

JUDGMENT

Introduction

1. The petitioner in this petition seeking several orders namely that ;



- a) A declaration be and is hereby issued that the actions of the Respondent of Arbitrarily arresting and intimidating the petitioner's employees under the pretext of confiscation of counterfeit goods are unconstitutional, unlawful, irregular and unfair.
- b) An order of prohibition be and is hereby granted prohibiting the respondent, whether by himself, his agents, privies and servants, acting for and on his behalf whether jointly or severally from harassing in any manner whatsoever and intimidating, causing the arrest, threatening to arrest or prefer criminal charges and/or interfering , with the petitioner's employee and/or servants fundamental rights and freedoms in respect to any matters which fall within the mandate of Kenya Revenue Authority, Kenya Bureau of standards and the Anti counterfeit Authority or further interfering in the petitioner's enjoyment of the fundamental rights as guaranteed by *the constitution*.
- c) An order of prohibition be and is hereby granted prohibiting the respondent, whether by himself, his agents, privies and servants acting for and his behalf whether jointly or severally from causing the arrest, impounding, detention and/or confiscation of the petitioners motor vehicles' namely [particulars withheld] and/or confiscating any alcoholic beverages in the said motor vehicles in respect to any matters which falls within the mandate of the Kenya Revenue authority, Kenya Bureau of Standards and the Anti-counterfeit Authority.
- d) Costs of the petition to be provided for.

Petitioner's Case

2. The petitioner averred that it was a duly incorporated company carrying on the business of manufacturing, selling and distributing excisable and dutiable alcoholic beverage across the Republic of Kenya and held Alcoholic drink license No [particulars withheld] issued by the Nairobi city county Government. Further pursuant to section 10 of the *standards Act* it was authorized to use various standardization marks for its various alcoholic products to wit;
 - a) Mark No [particulars withheld] for Gin
 - b) Mark No [particulars withheld] for Vodka
 - c) Mark No [particulars withheld] for Diamond Ice
 - d) Mark No [particulars withheld] for Blended Brandy (Best)
 - e) Mark No [particulars withheld] for Blended Gin (Best)
 - f) Mark No [particulars withheld] for Blended Brandy (Flying horse)
 - g) Mark No [particulars withheld] for Blended Gin (Flying horse)
 - h) Mark No [particulars withheld] for Blended vodka (Blue ice coconut) and
 - i) Mark No [particulars withheld] for Blended Vodka (Blue ice)
3. According to the petitioner, the said brands were analyzed by the Government chemist and pursuant to a report dated 17th March 2023 were certified to be compliant with EAS 109.2023, the East African community standards for portable spirits. Additionally, they had obtained importation certification of the said various brands from Kenya Revenue Authority and were tax compliant having ensured that all Value added Tax (V.A.T) and Excise duty are duly remitted to the said Authority. It was thus their



- legitimate expectation that having obtained all the relevant licences and permits, they would be able to carry on their business without any interference from any quotas.
4. Despite ensuring that its house was in order in terms of compliance with all legal and regulatory requirements, its employees had on various occasions been victims of harassment and intimidation by police officers who had arbitrarily arrested its employees, detained them as well as detained the company motor vehicles on spurious allegations that they were carrying counterfeit goods. The respondent's officers' action were targeted, discriminatory, malicious and constituted abuse of power as none of its product's seized allegedly for being counterfeit were ever handed over to the counterfeit authority and/or Kenya Bureau of standards for inspection and confirmed to be so.
 5. The respondent's officers' action were thus selfish, reeked of impunity and were meant to sabotage its lawful business, while advancing the interest of the petitioner's competitor's. Further the said illegal acts were an affront to the tenants of administration of justice, violated the dignity of the petitioner's employees were an affront to provisions of Article 10, 21(1), 27, 29, 47 and 48 of *the constitution* of Kenya 2010. The petitioner thus urged this court to intervene and grant the orders sought.
 6. The Respondent was served on 10th May 2023 and a return of service dated 12th May 2023 filed in court. The respondent did not file any document in opposition to this petition.

Petitioner's Submissions

7. The petitioner submitted that they had moved court under Article 22 and 258(1) of *the constitution* of Kenya 2010, which allowed them to institute court proceedings to protect their rights to fair hearing, right to equality, liberty, freed from torture, not to be discriminated against and also right to fair admirative action as sanctioned under Article 25, 27, 29, 47, 48 and 49 of *the constitution* respectively.
8. Section 24 of the *National police service Act* did place an obligation on the respondent and his agents to maintain law and order, preserve peace and protect the life and property of citizens. Further Section 244 of the said Act also did further provide that the respondents officers must strive to maintain the highest standard of professionalism and discipline, promote the practise of transparency and accountability, comply with constitutional standards of human rights and fundamental freedoms and were also expected to foster and promote good relationships with the broader society.
9. The respondent's employees had overstepped their mandate and were harassing and intimidating the petitioner's employees by arbitrarily arresting and detaining them as well as their motor vehicles on spurious allegations that they were dealing with counterfeit goods, when the same had not been proved. The respondent was also faulted for overstepping their mandate as , they ought to involve counterfeit Agency in their operations but that was never the case.
10. The attached OB extracts and cash bail receipts attached was ample evidence to show that indeed the harassment and intimidation unless stemmed would go on unabated and had to be curtailed. Reliance was placed in the case of Republic v Makadara chief Magistrate & 3 others Ex parte Wilberforce Nyamboga Mariaria (2017) eKLR Where Justice G.V Odunga cited Nakusu v Tororei & 2 others (No 2) Nairobi HCEP No 4 of 2023 (2008) 2 KLR (EP) 565.
11. The petitioner further submitted that no complaint had been raised by either Kenya Bureau of standards, the Anti counterfeit Agency or Kenya revenue Authority with respect to the quality of the goods it manufactured nor has any of its good seized declared by the said agencies to be counterfeit products/goods. The respondent's employees thus did not have a carte blanc to act beyond their mandate and/or in violation of *the constitution*. Reliance was placed on Esther Gathoni Mwangi v Director of Public Prosecution & 2 others; William Charles Fryda & 3 others (interested parties) (2022)



eKLR Where A.C Miria J cited Nairobi High court Miscellaneous Application No 1769 of 2023 Republic v Ministry of planning & Another ex parte Professor Mwangi Kaimenyi and Githunguri v Republic KLR 3090.

12. The petitioners thus urged this court to find that indeed the respondent's officers had acted in a manner that is ultra-vires and in bad faith and the court thus had the basis intervene by granting the orders sought. Reliance was placed on Mohammed Feisal & 19 others v Henry Kandie, chief Inspector of police, OCS Ongata Rongai police station & 7 others; National police service commission & another (interested party) 2018 eKLR.

Determination

13. I have considered all the pleadings filed herein and submissions made by the petitioner and do reiterate that the fact that this petition is unopposed. But be that as it may, the court will still proceed to consider the issues arise for determination and the same can be summarized as follows.
 - a) Whether the petitioner has proved that the respondent had consistently violated their rights as pleaded and if the orders sought ought to be granted.
 - b) Costs of this petition.
14. By virtue of rule 15(1) of *the constitution* of Kenya (protection of rights and fundamental freedoms) practice and procedure rules 2013, the respondent had fourteen (14) days after service to file their responses. As noted above, they were served but did not do so. The court by virtue of rule 16(1) of the said rules is at liberty to proceed and determine this petition.
15. The legal burden of proof normally rests upon the party desiring the court to take action; thus, a petitioner must satisfy the court or tribunal that the conditions which entitle them to an award have been satisfied in respect of a particular allegation, this burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.
16. The petitioners did prove that they are a duly registered company and had complied with all relevant certification standards as set out by different statutory bodies tasked with ensuring that it operated within the law. The petitioner further did annex various OB extracts and cash bail receipts proving that indeed on several occasions their employees had been constantly harassed, arrested and their motor vehicle impounded on the basis that they were carrying counterfeit alcohol. These allegations were not controverted especially the fact that in all these incidents the police officers were acting arbitrarily without involving the Kenya Anti counterfeit Authority and/or Kenya Bureau of standards and to that extent implied that the respondents were not exercising their power in a lawful manner.
17. Section 24 of the *National police service Act* imposes a negative obligation on the part of the government in general and the police in particular not to violate the rights and fundamental freedoms of an individual, but also imposes a positive obligation on the part of the state agencies to protect the people from threats of violation of the said fundamental rights and freedoms. To this extent the state is liable for violations of fundamental rights and freedoms by its agents and also by private and/or third parties where its omission/commission as relevant is proved.
18. In a constitutional democracy like our own, its imperative for citizens to have confidence and trust in the institutions established to safeguard the rule of law. In this regard the citizens expect the police officers in going about their duties to be fair, transparent and accountable in executing duties on behalf of the state. This means that chapter four of *the constitution* of Kenya should at every juncture be the



guiding light when effecting arrest and detention of suspects alleged to have committed cognizable offences.

19. In the case of *Republic v Dakes* 1986 1SCR 103 the Supreme Court of Canada laid down the constitutionality threshold of the law when it comes to arrest. The court recognized the following key elements:

“First, the offence must be materially connected to its objective and not to be arbitrary, unfair or based on irrational considerations. Secondly, the offence, even if rationally connected to the objective, should impair as little as possible the right or freedom in question; and Thirdly there must be proportionality between the effects of the offence which are responsible for limiting the right or freedom and the objective which has been identified as of sufficient importance to warrant overriding of a constitutionally protected right.”

20. In establishing the same framework our courts in the case of *Keroche Industries Ltd v Kenya Revenue Authority and 5 others* 2007 2 KLR the court held as follows.

“One of the ingredients of the rule of law is certainty of law. Surely the most focused deprivations of individual interest in life, liberty or property must be accompanied by sufficient procedural safeguards that ensure certainty and regularity of law. This is a vision and a value recognized by our constitution and it’s an important pillar of the rule of law. Enforcing the law and maintaining public order must always be compatible with respect for the human person. Under article 73(a) and (b) of *the constitution* its provided that authority assigned to a state officer is a public trust to be exercised in a manner that is consistent with the purposes and objects of *the constitution*, demonstrates respect for the people, brings honour to the nation and dignity to the office, promotes public confidence in the integrity of the office and vests in the state office the responsibility to serve the people, rather than the power to rule them.”

21. Also In the case of *Antony Njenga Mbuli and 5 others v Attorney General* held inter alia on this legal position as follows:

“That the conduct by law enforcement officers profiling suspects on mere suspicion, arresting and detaining them with no evidence of crime committed is arbitrary and discriminatory guaranteed in our constitution.”

22. In sum this is the yardstick that police officers are meant to achieve in exercising their powers under the *National police service Act* and the criminal procedure code. To arrest, detain or investigate must be carried out within constitutionally permissible parameters of reasonableness and rationality. Further the decision to arrest where deprivation of individual liberty of a person is concerned should be consistent with the constitutional and international standards set in upholding the rights of the individual.

23. Therefore, any system of law which keeps in mind the constitutional provisions must ask the fundamental question whether in order to fight crime its necessary to derogate from the bill of rights entitlements by denying a suspect of misdemeanours right to liberty, freedom, dignity, equality, degrading and inhuman treatment and in the context of this petition arbitrarily arresting and charging the petitioners employee with carrying out counterfeit business, when no such claim had been established by the relevant statutory bodies.



24. Thus, while the respondent's agents no doubt in the cause of their duty have the right to arrest where there is probable cause. What is at stake is their failure to demonstrate that they acted in good faith and took proportionate measures to ensure compliance with the supreme law, thus not infringing on the petitioner's rights. They have failed to do so and I do find that indeed the petitioner's facts as pleaded do show a consistent pattern, where their employees are arrested in various counties over unproved allegations that they are ferrying counterfeit alcohol, yet in reality the petitioners are operating within the law and have all certification standards required to conduct their business.

Disposition

25. To the extent of my findings, I do find that this petition is meritorious and I proceed to enter judgment in favour of the petitioner as against the Respondent as follows;

- a) A declaration is hereby issued that the actions of the Respondent of Arbitrarily arresting and intimidating the petitioner's employees under the pretext of confiscation of counterfeit goods are unconstitutional, unlawful, irregular and unfair.
- b) An order of prohibition is hereby granted prohibiting the respondent, whether by himself, his agents, privies and servants, acting for and on his behalf whether jointly or severally from harassing in any manner whatsoever and intimidating, causing the arrest, threatening to arrest or prefer criminal charges and/or interfering, with the petitioner's employee and/or servants fundamental rights and freedoms in respect to any matters which fall within the mandate of Kenya Revenue Authority, Kenya Bureau of standards and the Anti counterfeit Authority unless the same is done in conformity with the law.
- c) An order of prohibition is hereby granted prohibiting the respondent, whether by himself, his agents, privies and servants acting for and his behalf whether jointly or severally from causing the arrest, impounding, detention and/or confiscation of the petitioners motor vehicles' namely [particulars withheld] and/or confiscating any alcoholic beverages in the said motor vehicles in respect to any matters which falls within the mandate of the Kenya Revenue authority, Kenya Bureau of Standards and the Anti-counterfeit Authority.
- d) The petitioner is awarded costs of this petition which is assessed at Kshs 300,000/= all inclusive.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF JANUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 17TH DAY OF JANUARY, 2024.

In the Presence of: -

Mr. Mutunga for Petitioner

No appearance for Inspector General of Police

