



**Musembi v County Government of Kitui & 4 others (Civil Suit E001 of 2020) [2024] KEHC 8420 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8420 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL SUIT E001 OF 2020**

**RK LIMO, J  
JULY 10, 2024**

**BETWEEN**

**JOSEPH MUSEMBI ..... PLAINTIFF**

**AND**

**THE COUNTY GOVERNMENT OF KITUI ..... 1<sup>ST</sup> DEFENDANT**

**OFFICE OF COUNTY ADMINSTRATOR ..... 2<sup>ND</sup> DEFENDANT**

**NATHAN VUNGO ..... 3<sup>RD</sup> DEFENDANT**

**NATIONAL POLICE SERVICE ..... 4<sup>TH</sup> DEFENDANT**

**THE OFFICE OF THE ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Joseph Musembi, the Plaintiff herein has brought this suit principally against the County Government of Kitui, the 1st Defendant and the Attorney General (5<sup>th</sup> Defendant) on behalf of Kenya Police Service (4<sup>th</sup> Defendant). In the amended plaint dated 19<sup>th</sup> October 2020 the Plaintiff claims that he is the owner of that lorry Registration Number KCC xxxG and that the lorry prior to being impounded was licensed to carry and transport assorted materials and at the material time it was lawfully loaded with sand which was intended to be transported to Nairobi.
2. He further contends that he had procured all requisite licenses both at both the National and County Government to carry out transport business adding that the said lorry had outstanding credit facility with Cooperative Bank which obligated him to pay Kshs. 250,000/= P.M to the bank. He also claims that the lorry used to fetch him what he terms as a conservative sum of Kshs. 150,000/= per day as income.
3. It is the Plaintiff's case that on or about 4<sup>th</sup> December 2016 while the said lorry was parked at Kalundu opposite Oil Libya Petrol Station within Kitui town, Administration Police Officers arrested the driver



- and turn boy on allegations of impersonation and escorted them to Kitui Police Station but later the following day released them without charges being preferred against them. He avers that the said lorry remained at Kitui Police Station loaded with 30 (thirty) tons of sand and was later driven to County Government yard under direct instructions from the 3<sup>rd</sup> Defendant.
4. The Plaintiff further claims that he tried through his advocate to secure the release of the detained lorry vide Kitui Chief Magistrate's Court Misc. Criminal Case No. 2 of 2017 and High Court Misc. Case No. 13 of 2017 but all were in vain. He claims that as a result his lorry was exposed to waste on acts of vandalism, destruction and neglect. He faults the defendant for changing the location of his lorry without his express authority.
  5. He pleads that by the time the 4<sup>th</sup> Defendant released the lorry after being ordered by court, the lorry had greatly depreciated in value to a paltry value of Kshs. 2,700,000/=
  6. The Plaintiff has pleads loss and damage against the Defendants claiming the following reliefs;
    - a. General damages
    - b. Kshs. 9,545,000/= compensation for the value of the subject motor vehicle.
    - c. In the alternative that the Defendants do jointly pay him Kshs. 6,845,000/= being the value of depreciation of the motor vehicle.
    - d. Loss of business.
    - e. Interests of (b) and (c) above.
    - f. Costs of the suit
  7. In a defence and counterclaim dated 19<sup>th</sup> October 2017, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants deny the allegations levelled against them and aver that the vehicle was lawfully arrested and detained by the police as an exhibit upon establishing that the same had been used to commit offences and that its driver was latter charged. They aver that the plaintiff failed to follow the process of having the vehicle released pending hearing and determination of the criminal case involving its driver.
  8. In their counterclaim, the defendants maintain that at the time of arrest, the vehicle was being used to transport sand without requisite licenses and/or permits. That the plaintiff was advised to make payment of Kshs 145,000/= to cover for the same but he failed to do and hence the counterclaim against the plaintiff.

### **The Plaintiff's Case**

9. At the trial, Silvester Kiteme testified as PW1. In his examination in chief, the witness begun by identifying himself as a motor assessor and valuer working with Regent Automobile Assessors and valuers Limited. He stated that he prepared a valuation report of the subject vehicle all the request on the plaintiff following a technical evaluation of the vehicle on 27<sup>th</sup> September 2020. He testified that his observation of the body of the vehicle was that it was not good, and that through its mechanical condition was good, the vehicle's electrical condition was bad. He gave the reasons for the same being that the vehicle had been grounded for a long time loaded with sand. He added that the vehicle's chassis frame was not well aligned due to the weight of the load. He testified that he took pictures of the vehicle at the time of inspection and in his analysis, the vehicle had an estimated valued of Kshs 2.7 million which he referred to as the remnant value. He produced the evaluation report as P.Exh 1.



10. In cross-examination by the defence counsel Mr. Mwalimu, the witness indicated that the condition of the vehicle's engine and gear box needed to be ascertained as his report was based on a brief inspection. He also testified that the evaluation was done in the presence of the plaintiff at Kitui Police Station and that the police did not interfere with the inspection.
11. In further cross-examination by defence counsel, Kanini from the Attorney General's office, the witness maintained his position that the vehicle's engine and gear box needed to be ascertained. He also maintained that the estimated value of the vehicle at the time of inspection was 2.7 million and that the value of the vehicle when it was new in 2015 was 9 million. He testified that in his opinion, the vehicle which was 5 years old would have been valued at 5.2 million if the same was kept in good conditions but its value had dropped since it was impounded while loaded. It was also his opinion that repairing the lorry would too expensive.
12. He maintained that his report tendered in evidence was based on his professional assessment.
13. Joseph Musembi Muli (PW2), the Plaintiff herein testified and largely reiterated what he has pleaded in the plaint. He maintained that he was the owner of the impounded lorry and that the lorry was involved in legitimate business of transport when it was impounded. He reiterated that he obtained the lorry through a credit facility from Cooperative Bank adding that he was servicing a credit facility through monthly payment of Kshs. 250,000/=. He further stated that he depended on the transport business to service the loan and get his daily income which he stated was Kshs. 150,000/= per day.
14. He faulted the 3rd Respondent for diverting his lorry after it was released by the Police to the County yard and booking it under OB No. 01/05/2016 despite having seen the licenses the lorry had. He stated that the 3<sup>rd</sup> Respondent still demanded payments of Kshs. 150,000/= to release the lorry and refused to have the lorry released.
15. He further stated that his lorry was later driven to Kitui Police Station and detained there unlawfully without involving him. He stated that the detention of the lorry at Kitui Police Station exposed it to wanton acts of vandalism, destruction and neglect. He further claimed that the lorry at the time was loaded with 30 tons of sand and which led to further depreciation and wastage rendering the lorry a ramshackle and damaged beyond repair.
16. He claimed that he suffered loss and damage for which he now claims from the Defendants. He tendered the following documents in support of his claim;
  - i. Log book P.Exh 2
  - ii. Charges 5.12.2016 P.Exh 3
  - iii. Photos PMFI
  - iv. Application dated 9.1.2017 and 4.2.2017 P.Exh 5(a) & (b) respectively.
  - v. Bank statements P.Exh 6
17. The witness also produced another bundle of documents filed in court on 9<sup>th</sup> June 2022 and the documents were marked as follows;
  - i. Environmental impact assessment report P. Exh 7.
  - ii. Nema receipt of Kshs 10,000/- dated 10.7.2018 P. Exh 8.
  - iii. Bank offer letter P. Exh 9.



- iv. Cess payment receipts P. Exh 11 (a-j).
  - v. Letter dated 10.7.2015 from Nema P. Exh 12.
18. He also tendered assorted petty cash vouchers at page 1 – 22 as P. Exh 13.
19. In cross-examination by the defence counsel Mr. Mwalimu, the witness testified that his vehicle was impounded on 4<sup>th</sup> December 2016 while parked at Kalundu opposite Oil Libya and loaded with sand. He stated the sand had been collected from his farm on LR No. Yatta/Ndugani/2030. It was his testimony that the sand was not collected from a river but from a valley on his farm. He testified that the lorry was being driven by his driver, Nelson Ngeta Musyoka who was arrested together with the vehicle's conductor on the material day but were later released from custody the following day on 5<sup>th</sup> December 2016. He stated that his driver was later re-arrested on 18<sup>th</sup> January 2017 while he was off duty but the plaintiff did not know the details surrounding his arrest. He indicated that he however paid his driver's cash bail upon request by the driver's wife. The witness stated that he unsuccessfully made two applications for release of the vehicle one in the magistrate's court and the other in this court but he later obtained orders of its release from Kitui Police Station. He insisted that at one time, his lorry was at the County Government yard but it was later moved to Kitui Police Station. He conceded that the Nema report dated 10<sup>th</sup> July 2017 (P. Exh 12) did not contain information on sand harvesting. He also testified that he had not paid cess fees for the lorry when it was impounded because it had not reached a cess point where payment would be made. He testified that he was advised that he owed Kshs 175,000/= to the county government vide letter dated 5<sup>th</sup> December 2016 but upon lodging a complaint, he was advised to pay Kshs 145,000/=. He testified that he declined to make the payment because he had not breached the county by-laws. He also stated that he used to make around Kshs 150,000/= per day in his transport business before the vehicle was impounded but admitted that he did not have proof.
20. In further cross-examination by Kanini, the plaintiff maintained that he had a sand harvesting permit at the material time. He testified that his lorry was initially taken to the county government yard before it was returned to the police station. He stated that he inquired for reasons as to why the vehicle was being held and that the OCS informed him that it had been seized without further explanation.
21. In re-examination, the witness reiterated that the only reason why cess fees had not been paid was because the vehicle had not reached the cess points which are located at Kwa-Vonza or Kanyonyo as it was still in Kitui Town. He also maintained that he had a sand harvesting license. He also testified that he had filed two applications in court which he later withdrew due to frustration after the lorry was vandalized and began depreciating in value. He testified the penalties charged on him in addition to cess fees, was unfounded as the vehicle was parked. He stated that the penalties were contained in demand letters dated 15<sup>th</sup> December 2016. He testified that he was asked to pay cess fees of Kshs 100,000/= which to him was unreasonable as the fees was ordinarily Kshs 2,000/=
22. In his written submissions through counsel and dated 22<sup>nd</sup> January 2024, the Plaintiff seeks compensation for depreciation of his lorry Registration No. KCC xxxG. He states that the Defendants' actions in impounding and detaining his lorry were irregular, wrongful and irrational. He submits that he has established through evidence that at the time the lorry was detained, its value was Kshs. 9,545,000/= and by the time it was released, the same had depreciated and the value was Kshs. 2,700,000/=.
23. It is also submitted that the defendants were negligent and that the impoundment breached the plaintiff's right to acquire and own property provided for under article 40 (3) of the *Constitution* as well as the right to not have his property seized provided for under article 31 (b) of the *Constitution*.



In support of this submission, the Plaintiff has placed reliance on the case of Republic vs Inspector General of Police ex-parte Kennedy Ngeru Irungu (2016) eKLR, where the ex-parte applicant's vehicle was impounded by the police on allegations that it was a stolen vehicle. The court found that the police had the duty of proving that a report had been made at the police station pertaining to the vehicle and it being stolen. This did not happen and the court held that police are not justified to impound property and detain it without cause as they did in that case and proceeded to order for its release.

24. On the issue of general damages, the plaintiff prays for an award of Kshs 6,845,000/= being damages for depreciation of the lorry. Counsel has placed reliance on the case of John Mbaabu & Anor vs Kenya Revenue Authority (2020) eKLR where the court found that the seizure of the petitioners' vehicle without proper notice and without being afforded an opportunity to be heard was a contravention of their rights under Articles 25, 31(b), 47 and 50 of the Constitution. The court awarded the two petitioners general damages of Kshs 2,000,000/= and Kshs 800,000/= respectively.
25. On loss of business, it is submitted that the plaintiff was earning Kshs 150,000/= per day from his transport business which he carried out using the lorry. To further demonstrate this, it has been submitted that the plaintiff was using income from the transport business to service a loan taken from Co-operative Bank Kenya Limited and the plaintiff placed reliance on a repayment schedule attached to his bundle of documents.

#### **Defence Case**

26. The Defendants as observed above have contested the Plaintiff's claiming that they were not responsible to blame and instead laid blame on the Plaintiff's failure to obtain the necessary licenses to transport sand.
27. On the part of the defendants, Nathan Vungo testified as DW1 and told this court that he was a chief officer working at the 1<sup>st</sup> defendant's office and that he was previously the county's town administrator. He tendered two letters dated 5<sup>th</sup> December 2016 as D. Exh.1 and D. Exh.2 showing charges the Plaintiff was required to pay. It was his evidence that the plaintiff's vehicle was impounded by the police on 4<sup>th</sup> December 2016 at 11.00pm and not by county officers. Further, that the police informed county officials that the vehicle had been impounded loaded with sand with no documents. He stated that he went to the police station where a charge sheet was prepared for failure to pay cess fees. He averred that he raised a claim of Kshs 175,000/= as charges but the plaintiff went to the Ministry of Finance and the Minister who waived some of the penalties. The witness testified that the impounded vehicle attracted a levy of Kshs 2,000/= per day which amount was meant to discourage vehicle owners from leaving their impounded vehicles for too long in the yard. He stated that the plaintiff was charged a total amount was Kshs 20,000/= which charges was for a period of 10 days. He testified that the total penalties were Kshs 145,000/= after waiver of interests. He stated that the plaintiff's license to transport sand was valid for the period between 28<sup>th</sup> September 2015 and 30<sup>th</sup> December 2015 and was only for transporting sand from Kiambera to Thika and not within Kitui County. He however conceded that there were no site gazetted for sand harvesting within Plaintiff's home area. He testified that charges levelled against the plaintiff's driver were withdrawn by the prosecution.
28. On cross examination by the Counsel Kanini, the witness testified that the vehicle was held because it was an exhibit in criminal proceedings relating to the plaintiff's driver. He stated that he did not know whether the lorry was released or whether the driver was ever charged. His testimony was that he did not instruct the police to detain the vehicle.
29. On cross-examination by plaintiff's counsel Mr. Musaviru, the witness testified that he wrote the demand on the morning of 5<sup>th</sup> December 2016. He also stated that the OB 24/5/12/2016 indicated



that the vehicle was released on 5<sup>th</sup> December 2016 at 10:26 hrs and escorted to Kitui yard. He stated that the same was not true. His position was that the vehicle did not leave the police station and that the OB was inaccurate. He also testified that he did not issue any release order for the vehicle. With regards to the charges, the witness testified that they were with regards to evading payment of cess which attracted a penalty of Kshs 100,000/= . He proceeded that the plaintiff had the obligation of having the sand collection site gazetted and an officer would then have been sent to the site to collect cess. That the payable cess charges were Kshs 5,000/= but the penalty for evading payment was Kshs 100,000/= provided for under the County Tax Act 2016. The witness testified that the charges contained in his letter of 5<sup>th</sup> December 2016, indicated that impounding and confinement charges totaled to Kshs 5000/= for two days but that the plaintiff disappeared for ten days which brought the total to Kshs 20,000/= . He testified that the county also charges impoundment done by the police but that the county is not responsible for the safety of impounded vehicles. He also confirmed that the lorry was impounded when the plaintiff's NEMA license was still in force. He also testified that he had seen the approval to transport sand in the plaintiff's bundle but proceeded to state that the county officials did not have documents in their records. He admitted that the plaintiff was charged when there was no register for registered vehicles.

30. On further cross-examination by counsel Kanini, the witness conceded that the charges against the lorry driver was initiated by the county and that the police were helping them. He maintained that the county's main interest was payment of levies.
31. On re-examination by his counsel Mr. Mwalimu, the witness maintained that the county had nothing to do with the traffic case against the plaintiff's driver and that the license issued to the plaintiff did not authorize him to transport sand from Kitui.
32. The 4<sup>th</sup> and 5<sup>th</sup> Defendant through Chief Inspector of Police Linus Kimoboi (DW2), the OCS Kitui Police Station, confirmed that the Plaintiff's driver and turn boy were arrested on the night of 4<sup>th</sup> December 2016 and escorted to Kitui Police Station at around 2.00am. He stated that the two arrested persons were released at 10.00am together with the lorry in question Registration No. KCC xxxG. According to him, the lorry and the two arrested persons were released unconditionally since there was no criminal charge to be preferred against them and gave the details of the release as OB No. 24/5/12/2016. He tendered a Police covering letter as D Exhibit 1 and OB extract detailing what transpired on 5<sup>th</sup> May 2016 in respect to the driver, turn boy as D exhibit 2.
33. He further tendered a charge sheet from the 1st and 2nd Defendants as D exhibit 3 and criminal court proceedings in that regard as D exhibit 4.
34. The OCS further clarified that the lorry and the driver were arrested by Administration Police and escorted to the Police Station where they were re-arrested and placed in custody. He stated that the police escorted the lorry to Kitui County enforcement yard because the police had no case against the driver, the turn boy or the lorry. He further stated that the lorry as far as the police were concerned was not an exhibit and denies the allegations made that the lorry was taken back to the Police Station from County enforcement yard. He however could not explain how the lorry found its way back to the station stating that it was later discovered that the lorry was parked at the Police Station with no records because it was not booked when it was driven back still loaded with sand.
35. He could not also state the officer who escorted the lorry from the Police Station to County yard.
36. He testified that the driver was later presented to court on 18<sup>th</sup> January 2017 by the State through the ODPP adding that the County Government was not mentioned in the proceedings. He stated that the charges against the driver were later withdrawn adding that the nature of the charges were;



- i. Transporting sand without permit.
  - ii. Impersonation and
  - iii. Resisting arrest.
37. He stated that the lorry was driven to the Police yard and when it was detected that there was no claim, the Police gave notice to auction it. He stated that when the order to release the lorry was served on them, they released it after four years at the Police Station. He acknowledged that the lorry had been vandalized and damaged but denied the police involvement. He confirmed that the lorry was parked loaded with sand for the four years it was at their yard.
38. The 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants in their written submissions dated 13<sup>th</sup> March 2024 contend that the lorry was impounded and detained because it had failed to pay requisite fees for transport. They deny their involvement in the detention of the lorry or liability for the loss and damage occasioned.
39. It is also submitted that the plaintiff did not have requisite approval to ferry sand from Kitui county. They contend that the plaintiff had not paid cess fees which is paid at the source of harvesting sand. According to 1<sup>st</sup> to 3<sup>rd</sup> defendants, the plaintiff was the author of his own misfortune.
40. The 4<sup>th</sup> and 5<sup>th</sup> Defendants on their part have also denied liability vide their written submissions dated 21<sup>st</sup> March 2024. The state admits that the plaintiff's driver, turn boy and lorry were arrested on 4<sup>th</sup> December 2016 but contend that they were all released from custody on 5<sup>th</sup> December 2016 unconditionally as no charges were preferred against them. The allegation by the 3<sup>rd</sup> defendant that they were rearrested on the same day of their release has been denied by the Attorney General who submits that there is no OB evidencing the re-arrest. It is submitted that there is no evidence tendered proving that the 4<sup>th</sup> defendant impounded the lorry four years. Instead, it is submitted that it was the 3<sup>rd</sup> defendant who could issue as release as indicated in his letters dated 5<sup>th</sup> December 2016. The allegation that the lorry was to be used as an exhibit has also been denied and state counsel submits that there was no evidence tendered indicating that the lorry was to be used in traffic case number 50 of 2017. It is also submitted that charges in the traffic case were brought about by the county and not the police and that the charges were to compel the plaintiff to pay their charges. Counsel submits that DW1 testified that he was the one who prepared the charge sheet before taking it to the OCS for endorsement.
41. It is also submitted that OB number 24/5/12/2016 allegedly opened for booking of the lorry for second time at the police station was false as evidence from the 4<sup>th</sup> defendant witness was to the effect that the first OB number of the day is made for opening the occurrence book and not for recording of complaints. Counsel submits that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants have made several admissions of guilt in their submissions and that the 4<sup>th</sup> and 5<sup>th</sup> defendants are not liable for the damage occasioned to the lorry.
42. This court has laid out both the Plaintiff's case as well as the Defendants' case. There is no dispute that the Plaintiff's lorry was impounded and escorted to Kitui Police Station on 5<sup>th</sup> December 2016. It is also not contested that the lorry was detained and remained at the Police Station yard loaded with 30 tons of sand for four years from 5<sup>th</sup> December 2016 to 24<sup>th</sup> December 2020 when it was released by the police following a court order issued by this court.
43. The Plaintiff seeks compensation following the depreciation of the lorry and loss of income as a result of the detention of the lorry. It is not in contention that the lorry was impounded while parked at Kalundu, opposite Oil Libya, which is at the outskirts of Kitui town. The driver and turn boy and the



lorry were detained at the Kitui Police Station on 5<sup>th</sup> December 2016 and later the driver and the turn boy were released from custody without any charges being preferred.

44. What is in contention, is the person who was behind the re-arrest and escorting the lorry to County yard before returning it back to the Police Station where it remained for four (4) years. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have denied responsibility of the re-arrest and the police on the other hand have also distanced themselves and instead pointed fingers at the County Government.
45. The issues for determination are;
  - i. Whether the Plaintiff's motor vehicle was detained lawfully for good reason and by whom.
  - ii. Whether the Plaintiff suffered loss as a result of detention of his lorry.

**(i) Whether the Plaintiff's lorry was detained lawfully or without probable cause and by whom**

46. As observed above, the question of impounding of Plaintiff's lorry Registration Number KCC xxxG on 5<sup>th</sup> December 2016 is uncontested. The question is who was responsible.
47. All the defendants have denied having a hand in the impoundment of the plaintiff's vehicle. They all allege that they did not have any interest in the vehicle. The police i.e. 4<sup>th</sup> and 5<sup>th</sup> defendants defended their position stating that the plaintiff's driver and vehicle were released unconditionally by the police on 5<sup>th</sup> December 2016.
48. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants' on the other hand takes the position is that the initial arrests were carried out by the national police officers on 4<sup>th</sup> December 2016 because the plaintiff's agents failed to produce evidence showing that it had had paid levies due to the County Government of Kitui in accordance to the Kitui County Finance Act 2015 in respect to sand harvesting and transportation. DW1, who is the 3<sup>rd</sup> Defendants testified in court and admitted that the plaintiff's lorry was arrested by the police on 4<sup>th</sup> December 2016 but it was released on the morning of 5<sup>th</sup> December 2016. His testimony was that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were not behind the re-arrest that occurred on 5<sup>th</sup> December 2016. That they had no interest in the lorry or the plaintiff's driver. His evidence was that the lorry did not leave the police station. This was despite production of exhibits by the 4<sup>th</sup> and 5<sup>th</sup> defendants, which are the police covering letter and investigation diary which indicate that the police released the plaintiff's driver and lorry on 5<sup>th</sup> December 2016. DW1's position on this is that information contained in the covering letter was false.
49. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have vehemently denied their involvement but despite the denial, the evidence tendered in this court shows that they had a hand on the same.
50. Firstly, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants tendered two letters dated 5<sup>th</sup> December 2016 signed by the 3<sup>rd</sup> defendant as D exhibits 1 and 2. The letters contained details of the nature of penalties against the plaintiff and also reads in part that: "...Note, once the owner settles the above amount in full, he should bring the receipt to Kitui Town Administration for a release order."
51. The letters clearly stated that the motor vehicle was to be released by the 3<sup>rd</sup> defendant upon the Plaintiff settling the amounts indicated therein. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' offices were charging impoundment and confinement fees. This answers the question as to who impounded the vehicle. It was the 2<sup>nd</sup> Defendant's office acting with the help of the police.
52. Secondly, the 3<sup>rd</sup> defendant who testified as DW1 admitted in this court that he did not issue any instructions to anyone to release the lorry because their revenue remained unpaid. DW1 also admitted that the County Government has an enforcement department and that they charged the plaintiff's



driver. His testimony was that “... the County Government through the ministry of environment charged the driver for violating environmental law...” This testimony is supported by the charge sheet tendered by 4<sup>th</sup> and 5<sup>th</sup> defendants as D exhibit 3. A perusal of the same shows that emanate from the 1<sup>st</sup> defendant specifically, the county ministry of Environment, Energy and Minerals investment development and its titled, Charge Sheet, Enforcement Section for case No. 50 of 2017. A copy of proceedings tendered by DW2 as D Exhibit 4 shows Plaintiff’s driver as the accused and is in reference to case No. 50 of 2017. In light of the above, the contention by 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendant’s contention that it was the police that impounded and kept the lorry as an exhibit in a criminal case does not add up.

53. There is no way the 1<sup>st</sup> and 2<sup>nd</sup> Defendants can deny involvement on one hand and on the other claim that they were charging fees for impoundment and detention of the lorry for ten days. What was the charge of 25,000/= meant for? Nathan Vungo (DW1) in his evidence Clearly stated that the County charged Kshs. 2,000/= per day to discourage people for leaving their impounded vehicles in the yard for too long. The witness (DW 1) tendered two exhibits D exhibit 1 and D exhibit 2 and he explained that he raised the fee not as per D exhibit 2 before Minister of Finance with the County Government revised the charges as per D exhibit 2. A close look at D exhibit 2 shows that the 1st Defendant was charging the Plaintiff a total of Kshs. 25,000/= for impoundment and confinements and it is clearly indicated that the lorry was confined for ten days.
54. Going by their own documents tendered by the 3<sup>rd</sup> Defendant, it is clear that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were central in the whole saga of detention of the lorry. It is quite clear that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant cannot escape blame for the detention of the lorry. They played a big part in the detention.
55. This court also finds that the 4<sup>th</sup> Defendant cannot escape liability, because it is quite apparent from the evidence tendered that the lorry was later driven from the county yard to the Police Station without notifying the owner. There is no way the Police can claim that they were not aware of who took the lorry there. The lorry was not a small vehicle not to be noticed. It is a huge lorry as per D exhibit 1 and was reported to be carrying thirty (30) tons of sand. It was obviously quite conspicuous at the Police Station and there is no way any Police Officer at Kitui Police Station can claim ignorance of the same being parked at that station.

By detaining the lorry in their yard or allowing the County to detain the lorry at the Police Station, the 4<sup>th</sup> Defendant assumed responsibility for the security of the lorry. The 4<sup>th</sup> Defendant is under an obligation to ensure that there is security to the vehicles detained in their yard. The owners of such vehicles have legitimate expectation that their detained vehicles are secured and if the owner suffers loss due to vandalism of the detained vehicle then the Police should be held liable. They cannot escape liability otherwise how else would someone organize security of his detained vehicles at a Police Station yard? If such was to happen, there would be chaos and insecurity at Police Station with each owner organizing for his/her own security of their detained vehicles. The Kenya Police Service must therefore style up and live up to their mandate under the *Constitution* & *National Police Service Act* by securing the properties of the people and particularly those they have detained for whatever reason.

56. This court finds that the Plaintiff has proved the required standard that all the Defendants were responsible and therefore liable for the detention of the lorry.
57. The next question is whether there was justifiable or probable cause for them to detain the lorry. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants stated in their defence that the lorry was used to transport sand without requisite license and was held as an exhibit but the 4<sup>th</sup> and 5<sup>th</sup> Defendant have denied that stating that the lorry, the driver and the turn boy were released on 5<sup>th</sup> December 2016 because there was no cognizable offence committed.



58. It is also evident from the criminal proceedings (D exhibit 4) that the case against the driver of the lorry were later terminated on 15<sup>th</sup> April 2019. There was no basis therefore to continue detaining the lorry which was after all not produced in court when the plea was taken on 18<sup>th</sup> January 2017. It is apparent therefore that the detention of the lorry had no nexus with the Criminal Case No. 50 of 2017 because if it was, the trial court could have been notified for the detention order to be given. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's claim that the lorry was an exhibit flies in the face of the evidence tendered in this court.
59. The other reason given by 1<sup>st</sup> to 3<sup>rd</sup> Defendant for the detention of the lorry was that there were some levies or charges/penalties which were required to be paid. The 3<sup>rd</sup> Defendant was adamant in his evidence that there were levies and penalties which required to be paid and relied on D exhibit 1 to justify the same. The 1<sup>st</sup> to 3<sup>rd</sup> Defendant however failed to pin point the provision in the Kitui Finance Act or any other County Legislation that provides for the charges.
60. In his testimony in court, the 3<sup>rd</sup> Defendant stated that in respect to cess fees;
- “I had stated that the charges was in respect to uncollected cess or sand. The cess is collected at gazetted sites. We cannot control the routes to be used. There are two points at Kwa Vonza and Kanyonyo. We have check points there. One is required to pay at the site he collects the sand.”
61. According to the 3<sup>rd</sup> Defendant therefore the cess collection designated point was either at Kwa Vonza cess point or Kanyonyoo cess point. So if that is where the Plaintiff's lorry was required to pay then obviously it had not reached either the two designated points for the cess to be payable. His assertion that the Plaintiff was required to have a designated officer at the collection point in order to collect less charges was not supported by evidence or any cited provision of the County Legislation.
62. On none registration of the vehicle, the 3<sup>rd</sup> defendant admitted that they did not have a register for vehicles so it is not possible to determine how he knew that the plaintiff's vehicle was unregistered as indicated in his letter. I have noted that evidence tendered was a permit to transport sand from Kiambere dam to Thika-Nairobi counties using the Kiambere dam-Mbondooni-Thika-Nairobi route. The Environmental Impact Assessment License tendered by the plaintiff also speaks to approval to sand harvesting along Twanda stream along his land. This notwithstanding, the defendants did not tender evidence to prove that the plaintiff was required to have his vehicle registered under Kitui County by-laws.
63. The penalty for impoundment and confinement was charged is strange given that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants insist that they did not impound the vehicle.
64. This court finds that the defence case on reasons for impounding the lorry is contradictory because while on one hand they deny impounding the lorry and detaining it, on the other hand the claim is that the Plaintiff was required to pay charges and penalties which interestingly includes fees for “impounding” and “confinement.”
65. This court finds the Defendants jointly and severally impounded the Plaintiff's lorry on 5<sup>th</sup> December 2016 and detained it without any justifiable or probable cause. The movement of the lorry from Kitui Police Station to Kitui enforcement yard and back to the Police Station was irregular and illegal because the lorry was detained at the Police Station without following the laid down procedures like booking it on the Occurrence Book (OB) as it is the practice. The Defendants have failed to give justifiable cause for doing that and the attempt by Police auction the lorry was an attempt to conceal illegality and impropriety. The Plaintiff was kept in the dark on reasons why his lorry was being detained for four years at Kitui Police Station. The 4<sup>th</sup> and 5<sup>th</sup> Defendant cannot lay blame on 1<sup>st</sup> to 3<sup>rd</sup> Defendant



because there was an omission on their part. They should not have allowed the 1st to 3<sup>rd</sup> Defendant to use them for an improper purpose.

**(ii) Whether the Plaintiff suffered loss as a result of detention of his lorry.**

66. There is no dispute that the Plaintiff's lorry Registration No. KCC xxxG was impounded and detained by the Defendant on or about 5<sup>th</sup> December 2016 and was only released on 24<sup>th</sup> September 2020 after an order of this court and after the OCS was summoned by this court to explain circumstances or reasons for detention. The OCS came to court on 24<sup>th</sup> September 2020 and stated that there had no reasons to detain the lorry or reasons why they had not released the lorry to the owner.

67. The Plaintiff claims that the lorry depreciated in value during the four (4) years it was detained due to vandalism and damaged occasioned by being grounded for a long time. The Plaintiff availed an expert in motor vehicles assessment named Silvester Kitema (PW 1) who told this court that the lorry was grounded for long while loaded and estimated the value of lorry as at 8<sup>th</sup> October 2020 when he valued to be Kshs. 2,700,000/=. He stated that the value of the lorry as at 2015 when new was Kshs. 9 million. The lorry as per his report (P exhibit 1) was registered on 20<sup>th</sup> February 2015. It therefore means that the lorry was fairly new when it was impounded on 4<sup>th</sup> December 2016. The log book (P Exhibit 2) indicates that the year of manufacture of the lorry was 2014.

68. This court finds that the Plaintiff has proved to the required standard that he suffered the damages in terms of depreciation of his lorry as follows;

- i. Approximate cost of the lorry when it was impounded Kshs. 9,000,000/=
  - ii. Value of the remnant Kshs. 2,700,000/=
- Depreciated value Kshs. 6,300,000/=

69. On loss of business the Plaintiff claims that he used to earn an income of Kshs. 150,000/= per day for unspecified period of loss of business. The Plaintiff was required to not only plead the loss but specifically prove it because it is categorized as a special damage.

70. In the case of *Moses Kipkoech Rotich v Kenya National Highways Authority & 7 others* [2018] eKLR Mumbi Ngugi J. held as follows: -

- “ 52. The petitioner had also sought damages for loss of use. However, no evidence was tendered to support such loss. Being in the nature of special damages, loss of use needed to be specifically pleaded and proved, and there being no evidence in support thereof, I make no order with regard to such loss.”

71. The plaintiff attached various delivery notes and petty cash vouchers for the months of October and November 2016. This bundle of documents containing petty cash vouchers and delivery notes in my view is proof that the plaintiff utilized his lorry for transport business but they do not proof that he earned Kshs. 150,000/= per day. First, the vouchers contain different figures for various days and contain different products and figures i.e. the first three petty cash voucher are all dated 1<sup>st</sup> October 2016 and indicate ballast 4 lorries...@ Kshs. 360,000/=, 4 lorries ballast, 120 tones ballast. It is not possible to tell how much was paid for transport and what was paid for the product. Secondly, it is difficult to tell whether the plaintiff was paid only for provision of transport or it was inclusive of the goods delivered because his position was that the vehicle was mainly used in transport business. Without a clear distinction of what was paid for what item, it is difficult to ascertain the actual business lost when the vehicle was grounded. The Plaintiff has failed to prove the claim to the required standard.



72. This court however finds that the Plaintiff suffered as a result of wrongful acts of the Defendants and since there can never be a wrong without a remedy, this court finds that a global sum in general damages will provide remedy to the Plaintiff who has established that he suffered loss due to irregular acts of impunity by the Defendants. There are comparative decisions from various courts that this court finds guiding in this regard.
- a. In the case of *Patrick Kamotho King'ori v Inspector General of Police & 4 Others; Alice Chesang (Interested Party)* [2019] eKLR Matheka, J awarded the Petitioner damages of Kshs. 2,000,000/= where his vehicle had been impounded for about 10 months.
  - b. In the case of *Moses Kipkoech Rotich v Kenya National Highways Authority & others* [2018] eKLR Mumbi Ngugi J awarded the Petitioner damages of Kshs 3,000,000/= where his vehicle had been impounded for 10 months.
  - c. In the case of *Daneva Company Limited v Kenya National Highways Authority* [2014] eKLR Kasango J awarded of Kshs 2,500,000/= for unlawful detention and seizure of a motor vehicle. The award for general damages for illegal seizure of the vehicle was upheld by the Court of Appeal.
  - d. In the case of *Great Lakes Transport Co. (U) Ltd -vs- Kenya Revenue Authority* [2009] eKLR the Court of Appeal awarded damages of Kshs. 500,000/= to an Appellant whose vehicle had been impounded for 6 months after considering the fact that the Appellant had done nothing to mitigate loss.
73. In this instance, the Plaintiff's lorry was wrongly detained for 4 years depriving the Plaintiff or its use and utility. My considered view is that an award of Kshs. 6,000,000/= will be just and fair.
74. In sum, this court finds that the Plaintiff has proved his case against the Defendants jointly and severally on a balance of probability and judgement is hereby entered against 1st, 2nd, 4th and 5th Defendant jointly and severally as follows;
- i. General damages Kshs. 6,000,000/=
  - ii. Depreciated value of the lorry Kshs. 6,300,000/=
  - iii. Total Kshs. 12,300,000/=
75. The Plaintiff will set costs and interests of the above amount from the date of filing this suit.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 10<sup>TH</sup> DAY OF JULY, 2024.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**

