



**Ngure v County Government of Uasin Gishu (Civil Appeal
088 of 2021) [2023] KEHC 1552 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1552 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 088 OF 2021
RN NYAKUNDI, J
MARCH 1, 2023**

BETWEEN

WILFRED PETER NGURE APPELLANT

AND

COUNTY GOVERNMENT OF UASIN GISHU RESPONDENT

JUDGMENT

Coram: Before Hon. Justice R. Nyakundi

Wambua Kigamwa & Co. Advocates

Kenneth. Kimutai, Advocates

1. The appeal herein arises from the judgement and decree of Hon. Christine Menya in Civil case no. 224 of 219 where the appellant had instituted a claim for general and special damages. The cause of action was based on the alleged harassment of the appellant between 4th February 2018 and 6th February 2018, on which dates he stated he was fined Kshs. 6,000/- without trial contrary to section 25 of *the Constitution* of Kenya.
2. Upon considering the pleadings, evidence and testimonies of the witnesses, the trial court dismissed the case with no orders as to costs. Being aggrieved by the judgement, the appellant instituted the present appeal vide a memorandum of appeal dated 30th July 2021. The appeal is premised on the grounds that;
 1. The Honourable magistrate erred in law and in fact in finding the plaintiff guilty.
 2. The Honourable magistrate erred in law and in fact in failing to consider the evidence on record, the submissions and principles applicable in decision making.
 3. The Honourable magistrate erred in law and in fact in determining the plaintiff's case.



3. The parties prosecuted the appeal by way of written submissions.

Appellant's Case

4. The appellant submitted that he was harassed by the respondent by being ordered to take his taxi cab to the respondent's traffic yard. That when he asked why he was informed it was because he had caused an obstruction and had committed a crime chargeable in a court of law. It was his case that he was extorted and further, that he even asked the respondent to take him to court but he ignored. He urged that during cross examination the respondent had no evidence to support its claim that he had committed obstruction.
5. The appellant referred the court to section 107(2) of the *Evidence act* which provides that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist and submitted that he produced a 'fine' receipt which he was asked to pay for a wrong he never committed and; before he was proved guilty of an offence, which was a violation of his rights. He urged the court substitute the trial courts judgement with a dismissal of the defence with costs.

Respondent's Case

6. The respondent opposed the appeal, submitting that the County Enforcement Officers acted within their mandate and parking laws. The County Attorney referred the court to section 32(1) of the Uasin Gishu County Transport Act 2015 and stated that it was the evidence of witness 1 that the appellant had contravened said position by causing obstruction. Further, that he was issued with a legal receipt from the revenue department as provided by the Uasin Gishu County Act Finance Act 2014 which was due to contravening section 29 of the Uasin Gishu County Transport Act. Due process was followed when impounding the vehicle, towing it and imposing the fine. Counsel urged that the appeal be dismissed for lack of merit with costs to the respondent.

Analysis & Determination

7. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

8. The guiding yard stick on exercise of jurisdiction by a Superior Court over an inferior tribunal or court below is clearly set out in *Mbogo –vs Shah* 1968EA 95 where the court held as follows:-
That

“ the court will not interfere with the exercise of its of its discretion by an inferior unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision. It will be wrong for the court to interfere



with the exercise of the trial courts directions merely because the court's decision would have been different.”

9. In addition to the justification of the rule are the principles enshrined in *Samken Ltd and another v Mercedes Sanches Rau Tussel*, Civil Application Nairobi number 21 of 1999 (Gicheru, Omolo and Owuor, JJA on 19 July 1999)
 - a. Discretion must be exercised on reasons and not caprice and the exercise must not be arbitrary or oppressive even if unfettered.
 - b. The burden of proving that a single judge in exercising unfettered discretion conferred by rule 4 of the Court of Appeal Rules has exercised his discretion improperly lies on the person challenging the same.
 - c. Where on material placed before the court it is impossible to go on either side it is not open to the tribunal reviewing the exercise of discretion to upset the discretion simply because it would have gone the other way.
10. To this end, the basic structure on how the High Court was about dealing with challenges of discretion by the Lower Court is laid bare in the above principles
 1. Whether the trial magistrate erred in dismissing the claim
 2. Costs

Whether the trial magistrate erred in dismissing the claim

11. The crux of the appellant's claim was that the respondent's officers condemned him unheard. This was premised on the fact that he was fined before being given an opportunity to prove that he was innocent. It is not lost on this court that it is a constitutional right to be accorded a fair hearing. However, there exist laws that govern the counties and the same are empowered by *the constitution* to ensure that there is law and order at every level. In this regard I stand guided by the provisions of section 29 of the Uasin Gishu County Transport Act which state as follows;

No person shall park or permit a vehicle to be parked on a public road contrary to a traffic sign or in a manner that impedes the flow of traffic.

Section 32(1) of the Act provides;

Any vehicle parked contrary to the provisions of this act or any national laws in force may be towed away at the owner's expense.

12. I have perused the record of appeal and the Kshs. 6,100/- was not a fine and is clearly described as an impounding charge in the receipt. The respondent justified this charge by stating that it was as a result of the appellant's vehicle having been towed. It is a discretionary on the part of the trial magistrate exercised upon giving the Appellant an opportunity to be heard with regard to the circumstances of the claim. In the absence of any evidence to the contrary that the trial court did not appreciate the evidence and the law this court has no entry point to review or vary the orders issued against the Appellant.
13. I note that after being towed and impounded there was no prosecution of the appellant on the offence of obstruction. Had the appellant been fined or penalized for the offence of obstruction, he would have had a stronger case for being condemned unheard. As he was



charged fees for towing and never fined for the obstruction, it cannot be deemed that he was condemned unheard. In the premises, the appeal lacks merit and is dismissed.

14. It is trite law that costs follow the event. However, given the nature of the matter and that costs are discretionary, it is my considered view that it would be in the interests of justice that each party bear its own costs. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 1ST DAY OF MARCH 2023

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R.NYAKUNDI

JUDGE

