



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutuma Kinyua Robin (Trading as Danros (Kenya) Limited) v  
Kenya National Highways Authority (Constitutional Petition  
6 of 2016) [2023] KEHC 4135 (KLR) (5 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4135 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MOMBASA**  
**CONSTITUTIONAL PETITION 6 OF 2016**  
**OA SEWE, J**  
**MAY 5, 2023**  
**IN THE MATTER OF ARTICLES 22 AND 23 OF THE**  
**CONSTITUTION OF KENYA, 2010**  
**AND**  
**IN THE MATTER OF ALLEGED CONTRAVENTION OF**  
**FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES**  
**10, 40, 47 AND 50 OF THE CONSTITUTION REGARDING THE**  
**RIGHT TO PROPERTY**  
**AND**  
**IN THE MATTER OF ABUSE OF POWERS BY THE KENYA**  
**NATIONAL HIGHWAYS AUTHORITY IN THE CAPRICIOUS**  
**MANNER IN WHICH THEY HAVE DETAINED MOTOR VEHICLE**  
**REGISTRATION NO. KAU 026X ZC 2080**  
**BETWEEN**  
**BETWEEN**  
**MUTUMA KINYUA ROBIN ..... PETITIONER**  
**TRADING AS DANROS (KENYA) LIMITED**  
**AND**  
**KENYA NATIONAL HIGHWAYS AUTHORITY ..... RESPONDENT**



## JUDGMENT

- (1) The petitioner, Mutuma Kinyua Robin t/a Danros (Kenya) Limited, filed this Petition against the respondent, Kenya National Highways Authority (KeNHA) praying for the following reliefs:
  - (a) An order that the respondent be restrained by way of an injunction from interfering with Motor Vehicle Registration No. KAU 026X – ZC 20180, Mercedes Benz Actros.
  - (b) An order to compel the respondent to release the said Motor Vehicle Registration No. KAU 026X – ZC 2080 Mercedes Benz Actros to the petitioner forthwith and unconditionally.
  - (c) An order for compensation for the losses suffered as a result of the respondent’s wrongful actions as set out in the body of the Petition.
  - (d) Costs of the Petition.
- (2) In support of the aforesaid prayers, the petitioner averred that he is the owner of Motor Vehicle Registration No. KAU 026X – ZC 2080 which he was using for commercial purposes; and that on the March 4, 2016, the respondent unlawfully detained the said motor vehicle at Mariakani Weigh Bridge on the allegation that the driver of the said motor vehicle had disobeyed instructions of the respondent on February 26, 2016. The petitioner further averred that, to that end, the respondent unlawfully condemned him to pay a fine of USD 2,000/=; failing which the motor vehicle would remain detained.
- (3) The petitioner further contended that in condemning him without a hearing, the respondent violated his fundamental rights as well as the rules of natural justice. In addition, he averred that the motor vehicle was being used by him for commercial purpose from which he was earning an average of Kshs. 452,000/= per month; and that the motor vehicle was deployed to transport highly perishable goods in addition to other goods between Nairobi and Mombasa; and that at the time of its detention, it was loaded with perishable goods. Thus, the petitioner claimed compensation from the respondent as follows:
  - (a) Kshs. 16,000/= per day from March 4, 2016 until date of release of the subject motor vehicle;
  - (b) General damages for inconvenience and the emotional distress suffered as a result of the respondent’s unlawful action.
- (4) In its replying affidavit, sworn on April 25, 2016 by the Manager of the respondent in charge of the Mariakani Weighbridge, Mr. Antone Awendo, the respondent contended that the Petition is bad in law and is otherwise an abuse of the process of the court; and should therefore be dismissed or struck out with costs. Mr. Awendo explained that one of the functions of the respondent is to ensure adherence to the rules and guidelines on axle load control as prescribed under the *Traffic Act*, Chapter 403 of the Laws of Kenya. He added that the respondent has been authorized under the *The Kenya Roads (Kenya National Highways Authority) Regulations* 2013 published as Legal Notice No. 86 dated May 10, 2013, to install weighbridges and to erect road signs requiring any category of motor vehicles to be weighed.
- (5) It was further the contention of the respondent that, a person who, being the driver of a motor vehicle disobeys a direction on the road, or when required to submit the motor vehicle to be weighed fails to do so, commits an offence under Regulation 10 of the aforementioned Regulations and is liable to a fine of USD 2,000 or its equivalent in Kenya Shillings. He explained that, when a motor vehicle is found



to have bypassed or absconded from a weighbridge station, whether overloaded or not, the registered owner is liable to pay the bypassing or absconding fee of USD 2,000 under Regulation 15. On the other hand, failure to adhere to the instructions of the Authority or the Police constitutes an offence punishable by detention of the motor vehicle and the cargo at the expense and risk of the registered owner.

- (6) Mr. Awendo conceded that the petitioner's Motor Vehicle Registration No. KAU 026X was detained at Mariakani for refusal to divert to the weighbridge contrary to Regulation 15(3) of The *Kenya Roads (Kenya National Highways Authority) Regulations*, 2013; and that charges for holding the vehicle were clearly spelt out to the driver through a Prohibition Order (Annexure "KNHA 1"). He averred that the truck was electronically tagged for bypassing the weighbridge and the transporter was called upon to pay for the weighbridge avoidance fee. Hence, according to him, the petitioner was involved in a criminal offence and ought not to be allowed to frustrate law enforcement. He added that, if he genuinely was aggrieved by the action taken by the respondent, the petitioner ought to have appealed to the Minister as provided for under Regulation 19 of The *Kenya Roads (Kenya National Highways Authority) Regulations*. He consequently prayed that the Petition be dismissed with costs.
- (7) Concomitantly, the petitioner filed a Notice of Motion with his Petition, seeking the immediate release of the Motor Vehicle Registration No. KAU 026X on the ground that it was carrying perishable goods, to wit, wheat flour. The application was presented before Hon. Emukule, J. and was allowed on March 11, 2016. Thus, the motor vehicle was released, subject to an undertaking by the Board of Danros (Kenya) Ltd to furnish a Bank Guarantee to the respondent in the sum of USD 2,000 or its equivalent in Kenya Shillings. Directions were thereafter given that the Petition be canvassed by way of written submissions; which submissions were duly filed. Although the matter was thereafter reserved for judgment May 17, 2017 by Hon. Ongeru, J., the same was not delivered for reasons that are discernible from the record.
- (8) A perusal of the proceedings herein shows that, while this Petition was pending, a similar Petition filed before the High Court at Machakos, namely, Machakos High Court Petition No. 13 of 2015: Disarano Limited v Kenya National Highways Authority & Another, was determined on January 30, 2017. The court found as a fact that:

“...as regards regulation 15 as well as regulation 14 of the Kenya Roads (Kenya National Highway Authority) Regulations, 2013, the fees being charged by these regulations are not for any service that is being provided by the Authority, but on the contrary are penalties for the offences which are expressly stated in those regulations of overloading, and bypassing and absconding from a weighbridge station...It has been noted and found by this court in the foregoing that Regulations 14 and 15 of the Kenya Roads (Kenya National Highway Authority) Regulations, 2013 offend key provisions of the *Constitution*, as they give powers to the officers of the Kenya National Highways Authority to impose penalties without due process and a hearing being given to the affected parties.”

- (9) The court further observed that, in the event of contravention, the offender ought to be charged and subjected to due process to enable him present his defence for consideration. The court reasoned that:

“...there is a constitutional requirement as to the adjudicating of such violations, which cannot be within the jurisdiction of an administrative agency. The law in this respect cannot delegate to executive officers the power to prescribe a criminal penalty or to define the scope of its application, which in essence was the effect of regulations 14 and 15 of the Kenya



Roads (Kenya National Highway Authority) Regulations, 2013. These powers are left to judges, judicial officers and tribunals appointed under the authority of the Constitution by article 159(1)...”

- (10) Thus, the court proceeded to grant reliefs as follows, in addition to other remedies:
- (a) A declaration that the action by the respondents of levying a fee for contravention of Regulation 15(5) of The Kenya Roads (Kenya National Highways Authority) Regulations, 2013 without affording the petitioner due process violated the rights of the petitioner under articles 40, 47 and 50 of the Constitution of Kenya.
  - (b) A declaration that Regulations 14 and 15 of The Kenya Roads (Kenya National Highways Authority) Regulations contravene articles 40, 47 and 50 of the Constitution of Kenya.
  - (c) A declaration that Regulation 15(5) of The Kenya Roads (Kenya National Highways Authority) Regulations is ultra vires for contravening section 46(2) of The Kenya Roads Act and is declared null and void.
- (11) It is plain then that the entire edifice upon which the defence of respondent was mounted has since crumbled. In Otieno & another v Council of Legal Education (Civil Appeal 38 of 2018) [2021] KECA 349 (KLR) (17 December 2021) (Judgment), the Court of Appeal relied on the South African case of Sias Moise v Transitional Local Council of Greater Germiston, Case CCT 54/00, where it was held:
- “If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution.
- Because the Order of the High Court declaring the section invalid as well as the confirmatory order of this court were silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date.”
- (12) The Court of Appeal then proceeded to hold thus at paragraph 47 of its judgment:
- “Consequently, it is explicit that a court having declared a piece of legislation or a section of an act to be unconstitutional, that act or law becomes a nullity from the date of inception or enactment and not from the date of the judgment. But it will not be applicable to actions already crystallised whilst the expunged law was in force.”
- (13) In the premises, since this action had not crystallised by the date of the applicable provisions were declared null and void, the inevitable result is that there exists no justification whatsoever for failure by the respondent to promptly charge the petitioner in accordance with the regulations to enable him defend himself before a court of law in respect of the alleged offences. In the same vein, the detention of the petitioner’s motor vehicle for seven (7) days between March 4, 2016 and March 11, 2016, when a release order was made by the court, was utterly unwarranted and therefore an affront to articles 40, 47 and 50 of the Constitution.



- (14) The subject motor vehicle having been released, the only issue to consider is the quantum of damages payable for the violations aforementioned. In this regard, other than bold statements at paragraphs 8 and 9 that the subject motor vehicle was being used for commercial purposes; and that the petitioner would earn Kshs. 16,000/= per day, no evidence was presented by him in proof thereof. I note that claim is in the nature of special damages and therefore ought to have been specifically proved. However, guided by *Great Lakes Transport Co (U) Ltd v Kenya Revenue Authority* [2009] eKLR, the petitioner is nevertheless entitled to some compensation for the violation occasioned by the unlawful detention of his motor vehicle for 7 days. The Court of Appeal held therein that:

The upshot of all the above is that the appellant did not strictly prove special damages as relates to the prayers set out in the plaint. But, in our view that could not be end of the matter. The learned Judge, having found that the special damages were not proved, dismissed the case “as there was no claim for general damages.” This court has, in several decisions made it clear that a court has no power to grant a relief a party has not specifically prayed for – see the case of *Malindi Air Services and another v Halima A Hassan*, Civil Appeal No 69 of 2000. However, in this case the position is to an extent different. General damages was pleaded at paragraph 8 of the amended plaint and specifically denied at paragraph 8A of the amended defence as we have indicated above. It was unfortunately not made one of the prayers, but clearly the appellant in raising evidence on its losses which were special damages was sending in effect one main message which was not disputed at any stage, that his vehicle was in active business...”

- (15) The Court of Appeal then proceeded to assess damages for illegal seizure and detention for 6 months at Kshs. 500,000/=. And, in *Charles Gathara Muruthi v Kenya National Highways Authority; Director of Public Prosecutions (Interested Party)* [2019] eKLR, in which the petitioner’s motor vehicle was detained for one month, an award of Kshs. 50,000/= was considered adequate compensation. Accordingly, I would, in this instance, consider an award of Kshs. 20,000/= to be sufficient compensation to the petitioner in the circumstances; granted that the subject motor vehicle was released on March 11, 2016 by an order of the court.
- (16) In the result, judgment is hereby entered in favour of the petitioner against the respondent as hereunder:
- (a) The petitioner be and is hereby awarded damages of Kshs. 20,000/= for the unlawful detention by the respondent of his Motor Vehicle Registration No. KAU 026X – ZC 2080.
  - (b) Costs of the Petition be borne by the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5<sup>TH</sup> DAY OF MAY 2023**

**OLGA SEWE**

**JUDGE**

