



REPUBLIC OF KENYA



Ngetich v Inspector General of Police & 2 others; Kenya National Highways Authority & 2 others (Interested Parties) (Constitutional Petition E20 of 2022) [2023] KEHC 20529 (KLR) (19 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20529 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CONSTITUTIONAL PETITION E20 OF 2022
HK CHEMITEI, J
JULY 19, 2023**

BETWEEN

KIPKOECH B NGETICH PETITIONER

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

NATIONAL POLICE SERVICE 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 3RD RESPONDENT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY INTERESTED PARTY

CHIEF JUSTICE, REPUBLIC OF KENYA INTERESTED PARTY

LAW SOCIETY OF KENYA INTERESTED PARTY

JUDGMENT

1. In his Petition dated 5th September 2022 the petitioner prayed for the following reliefs;
 - (a) A declaration that arresting, detaining and charging the petitioner or any other person on the basis of exceeding 50km/hr established at Sobe and Kedowa areas violate Article 10 and 39 of the constitution of Kenya and Sections 42(3) of the Traffic Act Cap 403 hence null and void.
 - (b) A conservatory order restraining the respondents from further arresting, detaining and charging the petitioner or any other person on the basis of exceeding 50km/hr established at Sobe and Kedowa areas.



- (c) A structural interdict directing the 1st respondent to conduct investigations within 6 months across the country and ensure that there is compliance with Section 42(3) of the [Traffic Act](#) Cap 403 and Article 10 of the [constitution](#) of Kenya on the rule.
 - (d) A declaration that arresting and detaining the petitioner on the basis of exceeding 50km/hr established at Sobea and Kedowa areas violate Article 28,29 and 39 of the [constitution](#) of Kenya
 - (e) Pecuniary damages
 - (f) Exemplary damages
 - (g) General damages
 - (h) Any other relief the court may deem fit to grant; and
 - (i) An order for payment of costs of this petition by the respondents.
2. The petition is supported by the grounds thereof and the sworn affidavit of the petitioner dated 5th September 2022 in which he deponed that on 19th December 2020 he was heading to Kericho when at Mau Tea he was flagged down by the police and detained for about 2 minutes after being accused of driving above the 50km/hr limit.
 3. He further deponed that on 30th June 2022 around 7am along Nakuru –Kericho highway he was flagged down by the police and accused of driving beyond the 50km/hr limit around Sobea area.
 4. He said that the speed limit of 50km/hr only appear at Sobea area and nothing indicates where it ends. As a result, many motorists have been arrested for flouting this speed limit and it has therefore become a bribery collection point for the police officers. That those who are unable to pay the bribes are taken to court both in Molo and Kericho.
 5. In the petition, the petitioner accuses the respondents of maliciously detaining him on the two occasions for an imaginary offence as there was no evidence of the said speed limit. He went on to state that there were no road signage indicating the said limit which was contrary to section 42(3) of the [Traffic Act](#).
 6. Consequently, the petitioner claimed that detaining him for the period and occasions stated above breached his rights provided under Article 10 of the [constitution](#) as he was harassed defamed and unlawfully confined. He thus prayed for damages as indicated above.
 7. The petitioner in his supplementary affidavit sworn on 6th October 2022 has attached some evidence of newly erected road signage by the respondent indicating according to him that by the period he was detained the same were missing and that it was only after he filed this suit that the 1st Interested party took action.
 8. The respondents through the sworn replying affidavit of James Kihara dated 11th October 2022 has denied the petitioners case. He stated that there is no evidence of any injury suffered by the petitioner since flagging down and stopping by the police is their duty as they are entitled to stop any motorist for various reasons.
 9. He went on to state that the petitioner ought to have escalated his complaint to the senior officers for possible investigations so as to challenge and inquire any malpractices or abuse of office especially by EACC. He went on to state that there is no evidence that the petitioner was detained or he drove beyond the speed limit.



10. The respondents therefore accused the petitioner of not exhausting all possible avenues of complain before filing the suit and in any case his office was not instructed to prefer any charges against the petitioner. He thus prayed for the petition to be dismissed.
11. One Engineer Cornelius Kibet on behalf of the 1st Interested party swore an affidavit dated 18th November 2022 in which it denied that it failed to erect the road signage in the areas mentioned by the petitioner. He went ahead to demonstrate the same through the annexures to the affidavit. He said that the 1st respondent has always put all measures to ensure that the areas where the speed limits are restricted must always have the signs.
12. He denied that the dispute is between the petitioner and the interested party but it ought to be between him and the respondents and that is why according to him there was no prayers against the Interested party and therefore the petition be disallowed.
13. The court directed that the matter be determined by way of written submissions which both the petitioner and the 1st interested party have complied.

Petitioners submissions

14. The petitioner submitted that there were three issues for determination.
15. The first issue was whether the respondents had fulfilled their mandate as per Traffic Act namely erecting the road signs as required under the law. The petitioner submitted that the respondents failed to comply with Section 42(3) by failing to erect and maintain the traffic signs along Kedowa, Sobea and Salgaa areas. He stated that the said signage does not indicate where it begins and ends. In other words, one would assume that it has no end.
16. The petitioner relied on the cases of Calcol Amoth Sewe v Republic [2019] eKLR and David Njogu Gachanja v Republic [2015] eKLR.
17. It was his case that erecting the signage after the case was filed was an admission of liability on the part of the respondents.
18. The second issue was on damages. The petitioner prayed that having undergone anguish and tramping of his rights under the constitution he be compensated and he prayed for a sum of kshs. 5 million as general damages.
19. He also prayed for aggravated and exemplary damages of kshs 800,000 and special damages of kshs 300,000 for mental and psychological stress against him. He also prayed for costs since the respondents failed to respond to his demand notice.

1st Interested party submissions

20. The 1st Interested party identified two issues for determination. The first was whether the Interested party contravened the provisions of Section 42(3) and 70(1A) of Cap 403 and Article 10 of the constitution.
21. The Interested party denied that it contravened the above law stating *inter alia* as per the replying affidavits it had placed the signage along the areas complained of namely Kedowa and Sobea. It relied on the case of Waitbaka Mwangi v DPP [2018] eKLR.
22. It denied that the Interested party had violated Article 10 of the constitution as claimed by the petitioner as there was no evidence to that effect. The petitioner, it submitted, failed to comply with Section 107 and 109 of the Evidence Act.



23. On the second issue of damages the 1st Interested party submitted that since there was no evidence of infringements of the petitioner's right he was not entitled to any damages under whichever head as claimed in the petition. It went on to submit that the powers to arrest and charge was with the DPP and it therefore had no role to play.
24. On costs it submitted that this was at the discretion of the court and this petition being actuated with malice and being frivolous the petitioner must be condemned to pay costs and the same be dismissed.

Analysis and determination

25. Having gone through the pleadings herein including the submissions and the attendant cited authorities, what is evident for determination is whether the respondents and the Interested parties breached Section 42 (3) and 70 (1A) of the *Traffic Act* No 403 of the Laws of Kenya.
26. The petitioner claimed that during the two occasions he was flagged down by traffic police officers allegedly for breaching the speed limit he did not see where the 50km/hr stopped. He claimed that the signs had not been erected.
27. Section 42(3) states as follows;

“No person shall drive, or, being the owner or person in charge of a vehicle, cause or permit any other person to drive, any vehicle at a speed exceeding fifty kilometres per hour or any road within the boundaries of any trading centre, township, municipality or city:

Provided that the highway authority shall erect and maintain traffic signs as prescribed so as plainly to indicate to drivers entering or leaving such roads or areas where the fifty kilometre per hour speed limit restriction begins and ends.”
28. While section 70(1A) on the other hand states as hereunder;

“Without prejudice to the generality of subsection (1), a highway authority shall cause to be placed on or near a road traffic signs prescribing speed limits on the road.”
29. Clearly it is the responsibility of the 1st Interested party to erect the signs demanded above. On these particular occasions the petitioner stated that there were none. He even went ahead to swear a supplementary affidavit where he attached a set of photographs indicating that the 1st Interested party erected them after he filed this suit and the same widely reported in the media.
30. Whereas this may be the case, there is no evidence however that the petitioner was flagged down by the 1st respondent. In the two occasions the petitioner seemed to have negotiated his way out and left nothing to show that he was stopped.
31. Further if indeed he was stopped for over speeding then the logical thing was for the police to charge him with the offence prescribed in law, namely breaching the speed limit. Nothing has been exhibited including the notice of intention to be charged or any other evidence on those lines supplied by the 1st respondent.
32. At any rate the petitioner ought to have demanded that he be charged or the details of the speed gun be availed for the specific offences.
33. In the absence of such evidence it becomes the petitioner's word alone which will not help this court in determining whether Article 10 of the *constitution* was breached hence the petitioner's rights enshrined therein.



34. There is every possibility that the signage may or may not have been there at those two occasions. It is even very possible that the 1st Interested party put up the same after reading from the media about this suit. This is buttressed by annexure “CK 2” in the affidavit of Engineer Cornelius Kibet which states in part.

“We note that the road signs at Sobea are highly prone to vandalism which has affected the speed limits signs from time to time. The corridor endeavours to replace them as soon as they are vandalised or stolen.”

35. The same applies to Kedowa area as per annexure “CK4”.

36. Clearly the 1st interested party seems to be aware of the challenges it faces concerning the road signage along the two roads. It is not clear when the signage was removed and replaced again as there is no evidence of their absence for this court to pin down the said Interested party.

37. However, and as stated above in the absence of evidence that the petitioner was stopped and he wasted his precious time I find it difficult to apportion blame on any of the respondents and Interested parties.

38. The same goes for the prayer for structural interdicts requested by the petitioner. The said prayer would have been appropriate where there is sufficient evidence of non-compliance. In this case the evidence tendered by the 1st Interested party shows that it is seized of the matter and the challenges of theft and vandalism.

39. Essentially it becomes a defence just as was found in the cited authorities if the signage’s are missing in such situation where one is confronted with an offence dealing with speed limit violation. There must be cogent evidence as it becomes too burdensome for motorist to comply with the law which has not been placed before it. In short the homework to be learned in this petition by the 1st interested party is the burden it has to ensure that any road under its control in this nation clearly exhibits the necessary sign posts as regard speed and other dangers and or requirements expected to be displayed for the consumption of the motorists plying those roads and any other would be user of the same.

40. It is also incumbent upon the 1st respondent to clearly show on demand the said signage in their areas of jurisdiction and in their absence this court does not see the reasons of burdening the motorists and other road users. The beginning and the end of the speed limit must as a matter of right be clearly exhibited for all and sundry to see and therefore obey.

41. Consequently, and for the reasons stated above i do not find any violations of the petitioner’s rights envisaged under Article 10 of the constitution or any other article thereof. The prayers of damages prayed therein are therefore disallowed.

42. The same goes with costs. The matter being of a public nature demands generally that each party bears its own costs.

43. Consequently, the petition is hereby disallowed with no orders as to costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 19TH DAY OF JULY 2023.

H K CHEMITEI

JUDGE

