



**Kiratu v Director of Criminal Investigation & 2 others; Mburu & another
(Interested Parties) (Petition 277 of 2018) [2023] KEHC 22357 (KLR)
(Constitutional and Human Rights) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 277 OF 2018
LN MUGAMBI, J
SEPTEMBER 22, 2023**

BETWEEN

NIXON MURATHI KIRATU PETITIONER

AND

THE DIRECTOR OF CRIMINAL INVESTIGATION 1ST RESPONDENT

INSPECTOR OF GENERAL OF POLICE 2ND RESPONDENT

HONOURABLE THE ATTORNEY GENERAL 3RD RESPONDENT

AND

MERCY NYAKIO MBURU INTERESTED PARTY

JOSEPH MWAURA NGUGI INTERESTED PARTY

JUDGMENT

1. Pursuant to a petition dated 9th August, 2018; the petitioner sought the following reliefs: -
 - (a) THAT a declaration that the Petitioner is the registered owner of motor vehicle registration number KCM 707T.
 - (b) THAT the respondents action to compel the Petitioner to hand over for detention motor vehicle registration number KCM 707T is unconstitutional, ultra vires their powers and a violation of the Petitioner's fundamental rights and freedoms and is therefore a nullity.



- (c) THAT an order of certiorari by way of Judicial Review be issued quashing the decision of the 1st and 2nd Respondents requiring the Petitioner to hand over for detention Motor Vehicle registration number KCM 707T to Thika Police Station.
- (d) THAT a conservatory order by way of injunction be issued directed to the Respondents restraining them, their agents and or servants from in any other manner interfering with the petitioners' proprietary rights to Motor Vehicle registration number KCM 707T.
- (e) THAT the cost of this petition be borne personally by the respondents.
- (f) Any other relief or order that this court may deem fit in the special circumstances of this matter

2. The petition is supported by the affidavit of the petitioner, NIXON Murathi Kiratu sworn on 9th August, 2018.

Petitioner's Case

- 3. The petitioner stated that he was desirous of buying a motor vehicle hence on 7th May, 2018, he contacted a motor vehicle dealer, one Susan Wangui Kimotho who had advertised her Toyota Passo through an on-line platform.
- 4. However, the said Susan Kimotho informed him she had sold the advertised motor vehicle already but was aware of another motor vehicle KCM 707T that was being sold in Githunguri at a price of ksh.420,000/-.
- 5. The petitioner averred that he expressed his interest and asked to view the vehicle. The said Susan Wangui Kimotho shared the number of the agent that was selling the said motor vehicle one Oscar of mobile number 0726716738.
- 6. Together with petitioner's mechanic, a Mungai, the petitioner travelled to Githunguri to view the car and met the said Oscar together with another man a Mr. Moses Gitau Mwae who Oscar introduced to the petitioner as the seller of the vehicle.
- 7. The petitioner was given ownership documents to inspect after viewing and expressing interest in the vehicle. They agreed on the price of Ksh.420,000/- as discussed earlier with M/s Susan Wangui Kimotho.
- 8. The log-book was reading the name of Mercy Nyakio Mburu (1st interested party) rather than, Moses Gitau Mwae who had been introduced to him as the seller.
- 9. The said Moses Gitau Mwae then clarified that the vehicle had been sold to him by Mercy Nyakio Mburu. He showed him the Sale Agreement dated 8th December, 2017 between him and the said Mercy Nyakio, the original log-book, a copy of Identification Card and the PIN Certificate for Mercy Nyakio Mburu as proof of the sale.
- 10. The petitioner alleged that he called a number he was told belonged to the said Mercy Nyakio and she assured him she could effect the transfer to him the following day at Thika Road Mall. On that day, she was not available because she was taking her child to school.



11. The petitioner thus paid Ksh.420,000/- in cash. He paid Ksh.10,000/- to Oscar and a further Ksh.10,000/- to M/s Susan Wangui Kimotho being agency fee. A Sale Agreement dated 7th May, 2018 was thus executed between the petitioner and the seller then, Mr. Moses Gitau Mwaes.
12. On 8th May, 2018; the petitioner tried to contact Mercy Nyakio Mburu but she was unreachable. Equally the seller, Moses Gitau Mwaewas unreachable. He thus reported the matter to Kahawa Sukari Police Station that evening vide OB 29/8/5/18.
13. After failing to trace Mercy Nyakio Mburu, the petitioner visited NTSA. On 11th May, 2018 he was advised he could swear an affidavit and have the transfer done manually. He did as advised and the transfer was effected on 30th May, 2018 to his name, hence becoming the bonafide owner.
14. Subsequent to that transfer, the DCI Thika and Regular Police officers started bothering the petitioner they sought to take possession of the vehicle in disregard of his property rights under Article 40 of *the Constitution*.
15. The petitioner averred that the demand to handover the vehicle by the respondents was without any iota of proof of wrongdoing. That he is a bona fide purchaser of value without notice and was the registered the owner pursuant to Section 8 of *Traffic Act*, Cap 403.
16. After institution of the petition he obtained interim conservatory orders on 10th August, 2018. Two interested persons; Mercy Nyakio Mburu and Joseph Mwaura Ngugi applied to the court to join as interested parties in the petition and their application dated 30th November, 2018 was allowed on 3rd December, 2018. They then, subsequently moved the court and set aside the conservatory orders that had been issued in his favour and was ordered to surrender the subject motor vehicle to Thika Police Station vide orders issued on 25th June, 2019.
17. The interested parties were allowed to file their responses to the petition within 21 days.

**** __Respondent's Case __****

18. The respondents answer to the petition was advanced through Corporal Peter Kiptoo, who swore the replying affidavit dated 29th April, 2019 on behalf of 1st and 2nd respondents.
19. He swore that he was the investigating officer in a dispute pertaining the motor vehicle that is subject of this petition and that the said investigations were in line with the mandate of the 1st and 2nd respondents under Sections 24, 28 and 35 of *National Police Service Act*, which include maintenance of law and order, detection, prevention and investigation of crime.
20. He deponed that on 24th April, 2018; Mercy Nyakio Mburu and Joseph Mwaura Ngugi (1st and 2nd interested party respectively) visited Thika Police Station and reported theft of their motor vehicle KCM 707T Toyota Passo. The complaint was registered as OB 81/28/4/2018.
21. The nature of the complaint was that the interested parties had advertised the car on the OLX on-line Platform for sale and one Hashima Abdalla contacted them and expressed interest to buy it (the relevant OB extract was annexed as ('PK1')).
22. The said Abdalla Hashima paid the interested parties with cheque for Ksh.680,000/- being purchase price. It later turned out to be fraudulent cheque but by the time of discovery, he had already disappeared with both the motor vehicle and the original log-book. Efforts to trace the said Hashima Abdalla bore no fruits.



23. A signal alert was circulated to all the police stations after the interested parties' complaint (annexture 'PK 2').
24. As the investigations were on-going, the interested parties called the deponent and notified him that one Jeremiah Otieno of Mobile No. 0722483364 had contacted her with information that one NIXON Murathi Kiratu (the petitioner herein) was selling him a motor vehicle registered No. KCM 707T. He was interested in knowing if the vehicle had any encumbrances.
25. Upon receipt of this information, the deponent contacted the petitioner, Nixon Murathi Kiratu to establish how he had acquired the vehicle KCM 707T since a signal had been circulated regarding theft of the said vehicle. He requested the petitioner to visit Thika Police Station to record a statement, but he refused and offered to meet the deponent at the DCI Headquarters.
26. The meeting took place at DCI Headquarters on 8th August, 2018 where the facts about fraudulent acquisition of the motor vehicle KCM 707T were laid bare in presence of the petitioner, his advocate plus the two interested parties.
27. The petitioner agreed to surrender the motor vehicle but subsequently ducked despite being called severally. He eventually handed over the said KCM 707T Toyota Passo Blue in colour which was booked vide OB No. 3/15/08/2018 at Thika Police Station as evidenced by OB extract 'PK 3'.
28. The investigating officer stated that the petitioner had reasonable cause to suspect the motor vehicle was stolen but nevertheless transferred it to his name as per annexture 'PK 4' without carrying out due diligence as the NTSA motor vehicle records showed that the 1st interested party was the owner. That his suspicion had led to report to Kahawa Sukari Police Station (per OB 'PK 5') yet he caused the transfer of the vehicle to himself, his own report to the police notwithstanding.
29. The investigating officer thus swore that the respondents did not in any way violate the rights of the petitioner and that the steps they had taken were intended to ascertain the truth and uphold the rights of whoever was the rightful owner – be it be the petitioner or the interested party.
30. The respondents further denied harassing the petitioner and asserted that complaint had been lodged by the petitioner with the DCIO or the Independent Policing Oversight Authority over any harassment.

**** 1st and 2nd interested parties case ****

31. The reply to the petition by the interested parties was done through the replying affidavit of Mercy Nyakio Mburu sworn on 19th December, 2018.
32. Mercy Nyakio Mburu confirmed that she is the original owner of motor vehicle KCM 707T as per the copy of log-book dated 28th August, 2017 –'MNM1'.
33. She gave the history of how she acquired the vehicle indicating that it was imported from Be Forward Co. Ltd in Japan per agreement MNM2 and received in Mombasa on 8th July, 2017.
34. It was received in Mombasa on her behalf by Stanmor Holding Ltd on 8th July, 2017 per documents 'MNM 3' and cleared by Belta Express per 'MNM 4'.
35. The 2nd interested party – Joseph Mwaura Ngugi (her husband) had paid the entry purchase price to Be Forward Company Ltd through Co-operative Bank RTGS Invoice Number S1-17 – 018988 DATED 26TH AUGUST, 2017 MNM 5 while she paid clearance charges at the port of Mombasa to KPA per Equity Bank receipts of 23rd August, 2017 and 24th August, 2017 MNM 6 and MNM 7 respectively.



36. She asserted that the vehicle had been in use as their family car until 26th April, 2018. On that day, she entered into a sale agreement with one Hashim Abdalla Kabucho who had indicated interest in buying the car. He provided her with copy of Identity Card (MNM 9) and paid for the price of the car using a Bankers Cheque drawn on First Community Bank (MNM10).
37. When they discovered that, the Bankers Cheque could not clear. They tried to contact Hashim Abdalla Kabucho but it was in vain. Her husband reported the matter to the police as evidenced by the OB extract MNM 11.
38. She vehemently denied transacting or entering into any sale agreement with Moses Gitau via an agreement dated 8th December, 2017 as alleged by the petitioner. In any case, she stated that she had been having possession of the said motor vehicle all along until 26th April, 2018.
39. She insisted that she is still the genuine registered owner of motor vehicle KCM 707T as she did transfer it to any other person. That any transfer therefore is illegal and fraudulent, and she does not know the petitioner.
40. She thus prayed that the court do issue a preservation order as she is the legitimate owner of motor vehicle KCM 707T, Toyota Passo.

___ ****Petitioner's Submissions**** ___

41. The Petitioner through his advocate, Kamuti Waweru and Co. Advocates submitted on three issues, namely: -
 - a. Whether or not petitioner is the bonafide purchaser of value without notice of motor vehicle registration number KCM 707T.
 - b. Whether or not the petitioner's constitutional rights have been violated by the respondents.
 - c. And finally, whether the petitioner is entitled to the reliefs sought.
42. In submitting on the 1st issue counsel for petitioner relied on Section 8 of the *Traffic Act* which states that a person in whose name a vehicle is registered, shall unless the contrary is proved, be deemed to be the owner of the vehicle. He also relied on the case of Francis Nzioka Ngao Vs Silas Thiani Nkunga (1998) eKLR to buttress this point.
43. The petitioner insisted that todate, he remains the registered owner.
44. The petitioner insisted that he is the bonafide purchase for value without notice and relied on the case of Weston Gitonga & 10 Others Vs Peter Rugu Gikanga & Another (2017) eKLR and Katende Vs Haridar & Company Ltd [2008] 2EA 173.
45. The petitioner contended that he had done due diligence by carrying out a search of the motor vehicle and had also made follow ups with the registered owner through the phone.
46. On whether or not the petitioner's constitutional rights were violated, the petitioner submitted that the violation is hinged on the actions that the respondents have so far taken against him.
47. He claimed that shortly after registering the said vehicle, harassment began culminating into the said vehicle being repossessed and placed in the respondent's custody and that has caused him to lose possession of his property.



48. The petitioner argued that the state violated his rights by not protecting his right to property and relied on the cases of Association of Victims of Post Electoral Violence and interights Vs Cameroon [19] and the case of Multiple Hauliers East Africa Limited Vs Attorney General and 10 Others (2013) eKLR.
49. The petitioner thus submitted that had ably demonstrated that his constitutional rights were violated and was thus entitled to the reliefs sought.

___ ****Respondents' Submissions**** ___

50. The respondent submitted that although the petitioner had alleged that the respondents had irregularly and illegally detained his motor vehicle KCM 707T; he was well aware that a complaint had been lodged with the respondents concerning the motor vehicle pursuant to OB.81/28/14/2018 that was filed by the interested party who was the vehicle's registered original owner.
51. The respondent thus submitted that upon seizure, the vehicle was booked in OB No. 3/15/08/2018 at Thika Police Station for purposes of carrying out further investigations.
52. The respondents further argued that despite the petitioner harboring doubts about the alleged sale of the vehicle to him, the petitioner went ahead and caused it to be transferred to himself without conducting proper due diligence.
53. The respondents through M/s Mwita Robi litigation counsel contended that the petitioner's allegation of violation of property right, does not precisely set out the articles of constitution alleged to have been infringed and the manner of such violation which was against the guiding principle in Annarita Karimi Njeru Vs Republic (1979) IKLR 154 and in the Trusted Society of Human rights Vs Attorney General & 2 Others (2012) eKLR, where it was held thus: -

“ ... a person claiming constitutional infringement must give sufficient notice of violations to allow the adverse party adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new constitution is whether a petitioner as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to inability to concretely fathom the constitution violation alleged...

The test is a substantive one and inquires whether the complaints against the respondents in a constitution petition are fashioned in a way that given proper notice to the respondents about the nature of claim, being made so that they can adequately pursue their case...”

54. Counsel contended that the instant petition does not meet the test of a constitutional petition as the petitioner has not demonstrated to the required threshold how his individual rights were violated, infringed or threatened and did also not adduce evidence of alleged violation.
55. M/s Robi submitted that the office of Inspector General of Police is established under Article 249 of the Constitution and no evidence had been adduced to show that he had that acted ultra-vires.
56. It was counsel's submission that the decision to detain the motor vehicle in question was not illegal or ultra-vires the law as it was based on a complaint made and the intention was to facilitate investigations.
57. Finally, M/s Robi submitted that the main issue raised by the petitioner was not even detention but boiled down to ownership which is not the province of a constitutional petition but civil claim. She relied on the case of John Harun Mwau Vs Peter Gastrow & 3 others (2014) eKLR and Uhuru Muigai Kenyatta Vs Nairobi Law Publication Ltd (2013) eKLR in which it was held that courts will not



normally consider a constitutional question unless the existence of a remedy depends on it; that is, if a remedy can be granted/obtained without invoking *the constitution*, then a party should pursue that other remedy.

****Interested Parties Submissions****

58. The interested parties filed written submissions dated 1st February, 2022 through the firm of Kanyi Kiruchi & Co. Advocates.
59. The interested party rehearsed the facts in this case and proceeded to submit on seven (7) issues that counsel identified, namely;
 - a. Who is the original owner of the vehicle?
 - b. How did the interested parties lose possession of the vehicle?
 - c. Can Mr. Hashim be said to have a good title that he could pass?
 - d. How did Mr. Moses come into possession of the suit vehicle?
 - e. What legally is the petitioner's petition to this Honourable court as far as interested parties are concerned?
 - f. Whether due diligence was conducted by the petitioner.
 - g. Whether there was fraud or illegality on the part of the petitioner?
60. In my view, issues No. 1, 2 and 3 are not in contention.
61. I found the submissions of the interested party in this petition, having mainly relied on facts and pleadings to be matters that can be considered alongside my analysis.

Analysis and Determination

62. I have reviewed the pleadings, the affidavit evidence relied on and the rival submissions and it is my considered view that the following are the only issues for determination: -
 - i. Whether the petition as drawn meets the constitutional threshold of a constitutional petition.
 - ii. If the petitioner has proved the violation of his rights to property in respect of subject motor vehicle KCM 707T in view of the facts of this case.
 - iii. If the petitioner is entitled to the reliefs sought.
 - iv. Who pays the costs of this petition?
63. On the 1st issue, if the petition meets the threshold required of a constitutional petition, the locus classicus case on the manner of drawing a constitutional petition is the celebrated case of Annarita Karimi Njeru Vs Republic (1979) I KLR 154, where the court stated: -

“if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains,



the provisions said to be infringed, and the manner in which they are alleged to be infringed.”(emphasis mine)

64. Besides case law; *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013 – otherwise known as Mutunga Rules provide for how a constitutional petition ought to be framed., which in my view complies with the holding in the above case. In Rule 10(1), it states: -

“Form of petition

10.

(1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

(a) the petitioner’s name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

65. In the submissions by M/s Mwise Robi for the respondents, she contended that the petition does not meet the constitutional threshold of a constitutional petition.

66. I have looked at the petition. Although it does not contain the sub-headings; it has met the threshold of a constitutional petition.

67. It has for instance disclosed the facts which it relies upon.

68. The petition also indicates the constitutional articles allegedly violated and sets out the nature of injury inflicted, namely, depriving him possession and detaining his vehicle in violation of his right under Article 40 without reasonable cause/proof.

69. I thus find the submissions that that present petition fails to meet the threshold of a constitutional petition to be unmeritorious.

70. In any case, the petition as framed is clear and in my view gives sufficient notice as to the nature of claim the respondents are to meet, which is all that matters.

71. The next issue is to determine if the right of the petitioner to property under Article 40 of *the Constitution* was violated by the respondents act of seizing and detaining motor vehicle KCM 707T.

72. This question cannot be answered without first examining the mandate given to the respondents in connection with investigation of crimes. That is necessary in order to determine whether the action was in line with respondents mandate given the facts of this case.



73. The respondent is a creation of *the constitution*. Article 243 of *the constitution* establishes the National Police Service. At Article 243 (4) provides that: -

“Parliament shall enact legislation to give full effect to this article.”

74. The relevant statutory instrument enacted pursuant to Article 243(4) is the *National Police Service Act* No. 11A of 2011. Under Section 24 of the said Act, the functions of the National Police Service are provided for and include investigations, detection and prevention of crimes among others.

75. The next question becomes, what powers do police have in connection with property that is subject of an investigation?

76. Under Section 26 of the Criminal Procedure Code, the police are empowered to detain, search Aircraft, vessel, vehicles and persons where there is reason to suspect the aircraft, vessel or vehicle has been used or employed in commission or to facilitate the commission of an offence.

77. Nevertheless, the most suitable mode of seizure of such property/items is by way of application for a warrant under Section 118 of the Criminal Procedure Code, which requires that after seizure it should be taken before a court having jurisdiction to deal with it under the law.

78. Where police move in without a warrant, it should only be in special cases where the police officer has reasonable grounds to believe that that delay occasioned in obtaining a warrant under Section 118 is likely to substantially prejudice an investigation. This is what Section 60 of the *National Police Service Act* No. 11A envisages. It states: -

1. When a police officer in charge of a police station, or a police officer investigating an alleged offence, has reasonable grounds to believe that something was used in the commission of a crime, is likely to be found in any place and that the delay occasioned by obtaining a search warrant under Section 118 of the Criminal Procedure Code (Cap. 75) will in his opinion substantially prejudice such investigation, he may, after recording in writing the grounds of his belief and such description as is available to him of the thing for which search is to be made, without such warrant, enter any premises in or on which he or she suspects the thing to be and search or cause search to be made for, and take possession of such thing.

2. ...

(3) For purposes of conducting a search under this section—

(a) ...

(b) if anything is seized under subsection (1), the police officer shall immediately make a record describing anything so seized, and without undue delay take or cause it to be taken before a magistrate within whose jurisdiction the thing was found, to be dealt with according to the law.”

79. It is thus clear that property can legally be seized by officers of the respondent in order to facilitate investigations into an offence. Depending on circumstances, it can either be upon issuance of warrant of search and seizure or by police officer without a warrant in special cases where it might not



be prudent to go through the process of a warrant especially if there is potential to jeopardize an investigation.

80. In the present case, were there reasonable grounds for the seizure and detention of the vehicle KCM 707T by the officers of the respondents?
81. It is not in dispute that the respondents' officers had received a complaint relating to theft/fraud from the original registered owner concerning motor vehicle KCM 707T. That complaint was captured in OB 81/28/4/2018 that was lodged by the motor vehicle's original owner, Mercy Nyakio Mburu. She was categorical in the replying affidavit, she never transferred her motor vehicle to any person, let alone the petitioner. The petitioner did not get his transfer from her. The petitioner did not buy the vehicle from her, but from one Moses Gitau Mwae who the original owner stated she never met or knew. Instead, she had met one Hashimu Abdalla who conned her into parting with possession but not ownership of the vehicle, as she never transferred the vehicle to the alleged fraudster.
82. The petitioner allegedly bought the vehicle on 7th May, 2018, about two weeks after the original owner had made a report of theft of the car to the police.
83. The persons who sold the vehicle to the petitioner had represented that Mercy Nyakio Mburu had sold the vehicle to the said seller a fact that Mercy Nyakio denies. That was the last time the petitioner heard or saw those people who sold to him as they disappeared without trace.
84. The petitioner alarmed at the turn of events reported to Kahawa Sukari Police Station on 8th May, 2018 vide OB No. 29/8/5/18.
85. On 11th May, 2018, three days after lodging his own complaint and after failing to trace Mercy Nyakio Mburu who was still the registered owner the petitioner went to NTSA where he says he was advised to swear an affidavit and the vehicle was transferred manually to him. There was no input or participation of the original registered owner, Mercy Nyakio.
86. Why did the petitioner decide to transfer this vehicle to himself unilaterally amidst all those red flags is difficult to understand. Yet, this is the title that he now wants this court to protect and declare that his rights to property under Article 40 of *the Constitution* were violated by the respondents who seized the motor vehicle so as to facilitate investigations.
87. Although *the constitution* in Article 40 protects the right to property, it also has an exception under Article 40(6) which provides: -

“40(b) the rights under this article do not extend to any property that has been found to have been unlawfully acquired.”
88. In view of the competing claims that have emerged in regard to the viability of title/logbook that the petitioner holds; it is only prudent that the process of investigation be allowed to run full cycle. The claim of ownership/proprietary rights over this motor vehicle is not certain at the moment. The claim that his rights to property were violated in respect of the said motor vehicle seized by the officers of the respondents to facilitate investigations is unsustainable.
89. The remarks by Justice Mumbi Ngugi in *Kipoki Oreu Tasur vs. Inspector General of Police & 5 Ors* (2014) eKLR, are relevant in this case. Justice Ngugi observed: -

“The criminal justice system is a critical pillar of our society. It is underpinned by *the Constitution*, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society,



that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated”.

90. My humble view is that the petitioner has failed to demonstrate that the respondents have acted unreasonably in the exercise of their constitutional and statutory mandate. It is the petitioner who is keen on stopping a bona fide investigation using this litigation to impede it.

91. I find no merit in this petition which I hereby dismiss with costs to the respondents.

Dated, signed and delivered at Nairobi this 22nd *day of September, 2023.*

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L N MUGAMBI

JUDGE

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