

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

PETITION NO. 3 OF 2021

STANLEY MULEKANO OMULUPI.....PETITIONER

VERSUS

THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE OCS BUTERE POLICE STATION.....2ND RESPONDENT

THE BASE COMMANDER IN CHARGE OF TRAFFIC,

POLICE DEPARTMENT, BUTERE POLICE STATION.....3RD RESPONDENT

THE HON. THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. I am tasked with determining a summons in chambers dated 5th March 2021. It is brought at the instance of the petitioner herein, Stanley Mulekano Omulupi, seeking orders to restrain the State entities named herein as respondents from arresting or interfering with his liberty pending hearing and determination of the petition herein. He also seeks that a motor vehicle registration mark and number KBY 688W be released to him, and that he be admitted to anticipatory bail pending arrest. The grounds upon which the summons is founded are set out on the face of the application, while the factual background is given in the affidavit that the applicant has sworn in support of the application. The application is interlocutory, since it rides on a substantive constitutional petition, where a variety of constitutional violations are alleged.

2. The case by the petitioner is that he is the owner of motor vehicle registration mark and number KBY 688W, which he hires out to customers. On 3rd September 2020, the said vehicle was involved in a fatal accident with a pedal cyclist, while in the custody of one of the customers, who subsequently went underground. The said customer did not inform the petitioner of the occurrence, and the petitioner only came to learn of the matter from the police. He has been unable to trace the said customer, and eventually he gave his particulars to the police to assist with investigations. He complains that the police have threatened him with arrest over unspecified offences, and the police have declined to release his motor vehicle, which he alleges the police are not keeping in safe custody. He states that the detention of his motor vehicle by the police is illegal, and he has been unable to retrieve it from them. He argues that because of the continued detention of the motor vehicle his business has been grounded. It is on that basis that he seeks orders to prohibit the police from arresting him, for release of the motor vehicle to him, and for anticipatory bail.

3. The matter, in my view, is fairly straightforward. The petitioner is the owner of a motor vehicle, whose use has resulted in the death of another human being. The police have a duty to ensure safety on the roads, which is inclusive of ensuring safe use of motor vehicles on the roads. Once a road traffic accident occurs, whether fatal or not, the police have an obligation to investigate, and get to the bottom of it, to identify culpability, and, where applicable, to get justice to whoever it perceives to be the victim, of course working together with other actors such as the 1st and 4th respondents. The vehicle which caused the death belonged to the petitioner. It matters not that it was being driven by another. That other only drove it with the authority of the petitioner. Once it came to his knowledge that a fatal accident had happened, involving his vehicle, the petitioner was obliged to report to the police, as a responsible citizen, and assist the police in the discharge of its constitutional and statutory mandate.

4. From what I have read from his papers, the petitioner never went to the police at any time, yet the person that he had committed his motor vehicle to, and who had caused the death of another, had gone underground. The petitioner, by himself also staying away from the police, and demanding release of his motor vehicle from a safe distance, can be construed to have also constructively gone underground. He is not behaving like a responsible or reasonable citizen. The police cannot be expected to release the accident vehicle before the person responsible for the fatal accident or the owner of the vehicle comes forward to assist with investigations. It cannot be that someone dies as a result of the use of a motor vehicle on the road, and then the people responsible for the motor vehicle are unwilling to assist the police with investigations, and expect that the accident vehicle would be released to them without them having to report to the police station for processing, and for the law to take its usual course. The motor vehicle can only be released after the police have cleared with the person who caused the accident or the owner of the vehicle, and after the police have completed all that they need to do, by way of investigations, with the motor vehicle. The more the petitioner keeps away from the police, the more his motor vehicle may have to remain under the custody of the police.

5. Constitutional rights have to be counterbalanced against obligations to society. Rights and obligations go hand in hand. One cannot assert rights when they are unwilling to do duty. This is what coming to court with clean hands is all about.

6. In sum, I am not persuaded that the petitioner herein is entitled to the interim relief that he seeks in the summons before me, for the foregoing reasons. There is no merit in the said summons, and I do hereby dismiss the same. The temporary conservatory orders that I had

granted on 29th April 2021, pending delivery of this ruling, are hereby discharged.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17TH DAY OF SEPTEMBER 2021

W MUSYOKA

JUDGE