



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 1 OF 2020

**IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE PRINCIPLES OF
NATURAL JUSTICE, OPENNESS & FAIR HEARING**

AND

**IN THE MATTER OF: FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22, 23, 40, 47, 48, 50, 159, 165, 258 &
259 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40, 47, 48 &
50 (2) OF THE CONSTITUTION**

AND

**IN THE MATTER OF: REGULATION NUMBERS 10 & 14 (4) OF THE KENYA ROADS (KENYA NATIONAL HIGHWAYS
AUTHORITY) REGULATIONS, 2013**

AND

IN THE MATTER OF: UNLAWFUL DETENTION OF MOTOR VEHICLE REGISTRATION NUMBER KCC 824W

BETWEEN

TIMOTHY FONDO RUWA T/A RUWA CARGO CONTRACTORS.....PETITIONER

VERSUS

THE KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

JUDGMENT

1. The Petitioner is a director of Ruwa Cargo Contractors and the owner of motor vehicle registration number KCC 824W lorry.
2. The Respondent is a state corporation established as a statutory body under section 3 of the Kenya Roads Act (Cap 480) and is responsible for the management, development, rehabilitation and maintenance of national roads.
3. By a Petition dated and filed on 27/1/2020 the Petitioner seeks the following orders:
 - a. That the Respondents be restrained from impounding and detaining motor vehicle registration number KCC 824W without preferring criminal charges as contemplated under Article 50 as read together with articles 47 and 48 of the Constitution.
 - b. That the Court orders the Respondent to release and restitute the Petitioner's property motor vehicle registration number

KCC 824W which was unlawfully impounded on 13th December 2019 and is being detained by the Respondent.

c. A declaration that the action by the Respondents of levying a fee for contravention of rule 10 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

d. Damages

e. The costs of this Petition be awarded to the Petitioners.

4. The Petitioner states that on the 13/12/2019, his motor vehicle KCC 824W lorry while being driven along the Kaloleni-Mariakani road, was stopped, impounded and the driver commandeered by the Respondent's employees to the Dongo Kundu weigh bridge situated along Kipevu links road. The motor vehicle was then subjected to weight determination and a weighbridge order was issued indicating the excess axle weight at 3280 kilograms. Consequently, the Respondent recommended an offload of the excess weight or re-distribution of the excess weight.

5. The Petitioner states that he was issued with a ticket number **KNDKNBA20191200002204**, wherein it was highlighted as follows "the vehicle shall not be used until the excess load of 3280 KG is properly distributed or off-loaded as per weigh ticket number **KNDKNBA20191200002204**." Further, the Petitioner states that the Respondent proceeded to impose a handwritten fine on him in the amount of US\$ 948.25 and US\$ 186.00 without giving him audience and/or any hearing at all and without justification or issuing him with a proper print out.

6. It is the Petitioner's case that neither him nor his authorised driver were present during the weighing of the subject motor vehicle and he was denied the opportunity to have the subject motor-vehicle re-weighed and the Petitioner was always willing to comply with the recommendation of removing the excess weight but he was denied the opportunity of complying with the recommendations of the weigh bridge by the Respondent and instead the Respondent has continued to hold the subject motor vehicle without any reason.

7. The Petitioner states that the subject motor vehicle was secured via a loan from Family Bank and the subject motor vehicle is the bank's collateral as he is still servicing the loan through monthly installments of Kshs. 383,395.10/= as he uses the subject motor vehicle for commercial purposes. Therefore, the Petitioner is unable to earn income from the subject motor vehicle or even service the loan on the subject motor vehicle since it has been seized by the Respondent.

8. It is the Petitioner's case that the offences under Sections 55, 56 and 58 of the Traffic Rules have prescribed penalties and therefore, the Respondent should take appropriate steps to have the Petitioner charged in a court of law and not to unlawfully detain the subject motor vehicle.

9. The petition is supported by the affidavit of Petitioner sworn on 27/1/2020.

Response

10. The Respondent in opposing the Petition filed a Replying Affidavit sworn by **Maurice Otieno Ademba**, the Weighbridge Manager-Coastal Region, working with AEA Limited, an agent of the Respondent. It is was deposed in the said affidavit, inter alia, that on the 13/12/2019, the Respondent's Axle Load Enforcement Highway Unit while on mobile patrol, intercepted the subject motor vehicle at Mazeras whereupon its driver was lawfully directed to Dongo Kundu Weigh bridge for purposes of ascertaining the axle weight.

11. The Respondent states that contrary to the Petitioner's allegations that the vehicle was weighed in the absence of the Petitioner and/or his driver, the Petitioner's driver was present during the weighing of the subject motor vehicle, and as a customer he had an opportunity to verify the weights and in fact no formal or informal communication has been made by the Petitioner or his agent on the issue of re-weighing the subject motor vehicle.

12. The Respondent states that contrary to the allegations made by the Petitioner, it is the Petitioner who has neglected to comply with the prohibition order issued on the 13/12/2019 and/or make payments pursuant to East African Community Vehicle Load Control (Enforcement Measures) Regulation, 2016, which amount was clearly indicated on the weighbridge ticket. Further, the Respondent states that vide letter dated 23/12/2019 the OCS Dongo Kundu weighbridge Police Station dully wrote to the office of the Director of Public prosecution, proposing the prosecution of the Petitioner.

13. It is the Respondent's case that both the Traffic Act and the East African Community Vehicle Load Control Act, 2016 permit the Respondent to deal with the issue of exceeding load limit administratively and stipulate various applicable fines payable by persons found in contravention of the load guidelines, and Section 7 of the East African Community Vehicle Load Control Act, 2016 mandates the Respondent to provide for payment of overloading fees at weighing stations or such other designated location. Therefore, the Petitioner is supposed to make payment and take further remedial actions. The Respondent also states that the Petitioner's commercial interests should not override the public interest of road safety and proper usage.

14. It is the Respondent's case that the Petitioner is seeking equitable remedies with unclean hands since the petitioner has been afforded numerous opportunities that avail the Petitioner equitable remedies but he has failed to comply with the load limits guidelines. Therefore, the Petitioner does not qualify to be granted a mandatory injunction against the Respondent.

15. It is the Respondent's case that the Petition is incompetent as the Petitioner has merely pleaded violations of his constitutional rights without giving credible evidence and that the Petitioner has blatantly failed to particularise any special circumstance that necessitates

issuance of the sought orders.

16. The Petition was disposed of by way of written submissions. The Petitioner's submissions were filed on the 14/2/2020 while the Respondent's submissions were filed on the 12/3/2020. The matter came up for mention to confirm filing of submissions on the 2/6/2020.

Submissions

17. Mr. **Amadi** Learned Counsel for the Petitioner submitted that under Sections 55, 56, 57, and 58 of the Traffic Act, a penalty is payable upon conviction by a Court of law and in that regard, due process must be followed. Counsel cited the finding in **Joram Nyaga Mutegi vs. Kenya National Highway Authority [2017] eKLR**.

18. Counsel further submitted that the detaining of the subject motor vehicle is a violation of the Petitioner's right to own property guaranteed under Article 40 of the Constitution and the subject motor vehicle ought to be handed to the police and the Petitioner should be allowed to apply for its release.

19. Mr. **Amadi** referred the Court to **Moses Kipkoech Rotich vs. Kenya National Highways Authority & 7 others [2018] eKLR** in awarding damages to the Petitioner.

20. Mr. **Mbogo** Learned Counsel for the Respondent reiterated the content of the Respondent's Replying Affidavit, and submitted that the right to property guaranteed under Article 40 of the Constitution was not absolute as the same may be limited provided such limitation is reasonable and justifiable. Counsel submits that the Respondent acted reasonably and procedurally when the subjected motor vehicle was duly weighed and the driver was issued with a weighbridge ticket, which clearly indicated the excess load ferried, and a Prohibition Notice was issued pursuant to Section 106 of the Traffic Act and that the fees charged are a creation of the statute and not whimsical or haphazard.

21. Counsel further submitted that the Respondent is permitted by law to impound and/or detain the offending motor vehicle and the said motor vehicle is at the risk of the registered owner, and the role of instituting criminal proceeding falls within the mandate of the Director of Public Prosecution (D.P.P), and the Respondent performed its role of launching an official complaint to the OCS Dongo Kundu Police Station. Therefore, the detention is justified as the Petitioner has not attempted to comply with the Prohibition Notice which means that releasing the subject motor vehicle will lead to the destruction of our roads. Consequently, limitation of a right does not automatically amount to a violation

22. Mr. **Mbogo** submitted that the Petitioner has alleged violation of his constitutional rights guaranteed under Articles 40, 47, 48 and 50 of the Constitution. However, the Petitioner has failed to demonstrate the particulars of such violation, and as such, the same cannot be sustained. Further, Counsel submitted that the Respondent has acted in consonance with the Statutes and regulations thereof and the decision to impound the Petitioner's vehicle is not a violation of the Petitioner's rights.

Determination

23. My careful reading of all the issues raised in this petition leads me to the understanding that the issues can be addressed under the following headings:

- 1. Whether the Petition meets the threshold test of constitutional proof?**
- 2. Whether the Petitioner's rights to property, fair administrative action and a fair hearing have been infringed**
- 3. Whether the petitioner is entitled to the reliefs sought.**

1. Whether the Petition meets the threshold test of constitutional proof?

24. The Petitioner has alleged that the Respondent has illegally, irregularly, un-procedurally, and fraudulently seized the subject motor vehicle denying him his right to property and the Respondent has illegally, irregularly, arbitrarily imposed a fine on the Petitioner thereby denying him the right to a fair hearing. The threshold required to satisfy a constitutionality of a Petition was set in **Anarita Karimi Njeru vs. R Miscellaneous Criminal Application No 4 of 1979** the Court held as follows:

“We would, however, again stress that 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”

25. This being a constitutional Petition in which the Petitioner alleges violation of constitutional rights, the Petitioner is therefore required to set out precisely the Articles of the Constitution alleged to have been infringed, and the manner of such infringement. However, the Petitioner has cited various alleged particulars of violations infringed by the Respondent but has failed to cite the provisions of the Constitution that have been infringed.

26. Nevertheless, in **Trusted Society of Human Rights Alliance vs. Attorney General and 2 Others [2012] eKLR**, the Court re-affirmed the holding in the Anarita Karimi Njeru case and stated that:

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional

adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to 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 Petition 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 the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

27. From the foregoing, it is the finding of this Court that the Petition raises substantial issues for which this Court’s is able to fashion an appropriate remedy. Further, the Respondent has not in any way ambushed since the constitutional provisions, although not expressly stated in the Petition, can be inferred from the stated violation at paragraph 3 of the Petition.

28. It is not in dispute that the Petitioner’s vehicle registration number KCC 824W lorry was detained on 13/12/2019 along the Kaloleni-Mariakani road and commandeered to the Dongo Kundu weighbridge and subjected to weight determination, which indicated the excess group axle weight at 3280 kilograms, and a ticket number KNDKNBA20191200002204 was issued. The Respondent went ahead to impose a fine in the amount of US\$ 948.25 and US\$ 186.00 and the subject motor vehicle has since been detained at the Dongo Kundu Holding Yard to date in an apparent violation of Petitioner’s constitutional right to property.

2. Whether the Petitioner’s rights to property, fair administrative action and a fair hearing have been infringed

29. On whether the Petitioner’s right to property was violated, **Article 40** of the Constitution, 2010 that provides:

“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

30. The gist of the Petition is that the Petitioner has been deprived of their property without a hearing contrary to the requirement by the Constitution that no law shall allow for arbitrary deprivation by the State or any person of another person’s property. The Constitution requires a fair procedures and substantive due process before a person can be deprived of his or her rights to property as provided under Article 40 (3),(b),(ii) of the constitution . Fair procedures encompass adequate notice and opportunity to be heard, while the substantive due process requires that there should be established and sufficient reasons for the deprivation of the property. The only time that a person’s right

to property can be limited is under Sub-Article 3. It is not disputed that the Respondent has the mandate to ensure that roads are not damaged through overloading of trucks.

31. The Respondent on its part states that due process was followed and that the fees charged on the Petitioner are a creation of the statute and Section 7 of the East African Community Vehicle Load Control (Enforcement Measures) Regulation 2016 mandates it to provide for payment of overloading fees at the weighbridge and that the Petitioner should pay and take further remedial measures.

32. In **Disaranio Limited vs. Kenya National Highways Authority & Attorney General [2017] eKLR**, Nyamweya J while ordering the release of a motor vehicle unlawfully detained stated: -

“The normal provisions and procedural safeguards as regards seizure and arrest of motor vehicles also require to be followed, with such motor vehicles being handed over to the police who become responsible for their safeguarding, and the right accorded to the affected persons to apply for their release.”

33. This Court finds that the normal procedure in detaining the motor vehicle was followed, as the Respondent has adduced as evidence a weighing ticket showing that the motor vehicle had exceeded the required weight by 10,500kgs in contravention of **Section 56** of the **Traffic Act (Cap 403)** which provides: -

“No vehicle shall be used on a road with a load greater than the load specified by the manufacturer of the chassis of the vehicle or than the load capacity determined by an inspector under this Act.”

34. The Respondent’s officer proceeded to issue a prohibition order and had the motor vehicle detained at the Dongo Kundu holding yard in accordance with **Section 106 (4)** of the Traffic Act which provides: -

“Any police officer, licensing officer or inspector, if he is of the opinion that any vehicle is being used in contravention of [section 55](#) or [section 56](#) or in contravention of any rules relating to the construction, use and equipment of vehicles, may by order prohibit the use of such vehicle, under such conditions and for such purposes as he may consider necessary for the safety of the public or to ensure that such vehicle does comply with the provisions of [section 55](#) or 56; and any such order shall remain in force until the repairs specified therein have been satisfactorily completed and the vehicle has been certified as complying with the rules relating to construction, use, equipment and weight.”

35. The Petitioner alleges that he has not been given an opportunity to comply with the prohibition order issued pursuant to the provisions of Section 106(4) of the Traffic Act, Cap 403 and that his request for re-weighing of the subject motor vehicle has been denied by the Respondent. In response, the Respondent stated that it is the Petitioner that has failed, declined, ignored and/or neglected to comply with the prohibition order issued on the 13/12/2019 or make payment of the fine. It is clear that the Petitioner has not provided any evidence to demonstrate his attempt to comply with the prohibition order and he has also not provided any evidence to show that he had requested for re-weighing of the subject motor vehicle. The Petitioner always had an option: either to comply with the Prohibition Order or Appeal the order. This Petition is not an Appeal against the Prohibition Order. As long as the Prohibition Order is in place, the Petitioner is bound to comply. There is no demonstration that the Petitioner sought to pay the fine. What was the Respondent expected to do with the suit motor vehicle when the Petitioner has not made any attempt to claim the vehicle? Clearly, and it is the finding hereof, that the Petitioner has failed to discharge his burden of proof as required under Section 107(1) of the **Evidence Act**, Cap 80 Laws of Kenya, which provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

36. Therefore, the Petitioner’s right to a fair administrative action and hearing Article 47 of the Constitution does not arise since the Petitioner has not been denied the right to the suit motor vehicle. It is the finding of this Court that the Petitioner’s rights under the Constitution cannot arise as a result of the Petitioner’s willful disobedience of the law. The Petitioner’s rights can only be infringed if the Petitioner proves that his attempt to comply with the Prohibitory Order has been resisted by the Respondent.

37. The Petitioner alleges that he was not accorded fair administrative rights under Article 47, and that the vehicle was weighed in his absence. The question to ask is this; how would a fair administrative process be given under these circumstances? In my view, this is a situation in which the administrative remedy is required to be spent instantly. Therefore, in my view, the Chief Executive Officer (C.E.O) of the offending motor vehicle is the driver. Once the weighing is done in the presence of the driver that satisfies the requirement for administrative justice. This is so because the Respondent’s officers will not go out of their way to look for the owner of the offending motor vehicle to be present during the weighing. In this matter, weighing was done in the presence of the driver, and applicable statutory fines meted for the overload. The Petitioner denies that his driver was present during the weighing, but the Petitioner does not say where the driver was. I have no evidence before me to show that indeed the driver was not present. Else, how did the Petitioner get the Prohibitory Order?

38. Further, the Petitioner avers that his request to verify the weight was not allowed. However, there is no evidence that the Petitioner made any request to verify the weight. There is indeed not a single communication in writing between the Petitioner and the Respondent in this matter. Therefore, the allegation that the Petitioner was not given a fair hearing is not proved. Besides, the penalties which were meted out are statutory remedies. So in the absence of proof that the process of arriving at those remedies was not fair, the remedies stand good, and the process unimpugned.

39. From the foregoing, I find and hold that the Petition before the Court lacks merit. The only order I can make is that the Petitioner shall be given the possession and custody of the suit motor vehicle upon the Petitioner complying with the Prohibitory Order aforesaid, or upon successfully challenging the order in a process found in law.

Orders accordingly.

Dated, Signed & Delivered at Mombasa this 13th day of July 2020.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

No Appearance for both parties

Mr. Kaunda Court Assistant