



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION 22 OF 2017

IN THE MATTER OF ARTICLES 10, 19, 20, 22, 23, 157, 159, 165 & 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLES 27, 31, 40, 47 & 50 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

CHARLES GATHARA MURUTHI.....PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITYRESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....INTERESTED PARTY

JUDGEMENT

1. The Petitioner is a resident of Nakuru County and is the owner of motor vehicle KCB 615C FAW TIPPER.
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. The interested party is established under Article 157 of the Constitution, 2010 and exercise state powers of prosecution.
4. By a Petition dated 15th June, 2017 and filed on the 16th June, 2017, the Petitioner seeks the following orders:
 - a. *A declaration that the Respondent's seizure of the Petitioner's motor vehicle registration number KCB 615C FAW TIPPER, its number plates, insurance and speed governor stickers is unconstitutional.*
 - b. *A declaration that the Petitioner's rights and freedoms guaranteed under Articles 27, 31, 40, 47 and 50 of the Constitution of Kenya, 2010 have been violated.*
 - c. *An order that the respondent pays to the Petitioner general damages for the infringement of the aforesaid rights.*
 - d. *An order compelling the Respondent to release motor vehicle with registration number KCB 615C FAW TIPPER, its number plates, insurance and speed governor stickers to the Petitioner forthwith.*
 - e. *An order of prohibition to prohibit the Respondent whether acting by itself, its agents, officers, servants or whosoever from continuing to detain the number plates, insurance and speed governor stickers of motor vehicle registration number KCB 615C FAW TIPPER belonging to the Petitioner and/or from impounding and/or detaining the said motor vehicle and/or imposing a fine/fees against the Petitioner without adhering to the rules of natural justice, fair hearing and generally the due process of the law.*
 - f. *An order of certiorari to remove into this court for purposes of quashing forthwith and to quash the decision of the Respondent dated 14th June, 2017 to remove and detain the motor vehicle registration number KCB 615C FAW TIPPER*

g. Costs of the Petition.

5. The Petitioner claims that on the 14th June, 2017, his motor vehicle KCB 615C FAW TIPPER was ferrying sand along the Nakuru-Naivasha highway when it was stopped by the Respondent's officers around Kiondoo area. The driver was ordered to take it to Lanet police post on the ground that it was overloaded. That at the police post the Respondent's served him with a specific order to pay an unspecified amount for overloading by 7.9 tonnes.

6. The Petitioner avers that the Respondent's officers never weighed the vehicle and proceeded to impose an unspecified penalty without being accorded a fair hearing and has therefore being condemned unheard and that the Respondent's officer should have taken him to court before he could offload the excess load but neither he nor his driver has ever been charged in a court of law.

7. The Petitioner contends that due to the actions of the Respondent:

a. He has been discriminated against by the Respondent contrary to Article 27 of the Constitution.

b. His right to own and quietly enjoy his property has been violated by the Respondent contrary to Article 40 of the Constitution.

c. His right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair has been violated by the Respondent contrary to Article 47 of the Constitution.

d. His right to have his dispute resolved by the application of law in a fair and public hearing before a court has been violated by the Respondent contrary to Article 50 of the Constitution.

e. He has incurred and continues to incur huge legal costs.

8. The Respondent in opposing the Petition filed a Replying Affidavit sworn by Dennis Cheruyiot Higen, the Roads Inspector in the Axle load control section of the Respondent dated 28th July, 2017.

9. In various averments, Mr. Cheruyiot deponed that the Petitioner's motor vehicle KCB 615C was intercepted by the police and the Respondent's officers, who were attached to the Gilgil mobile weighbridge, along the Nakuru-Naivasha highway at around 1830hrs on suspicion of being overloaded. The motor vehicle was weighed using the mobile weighbridge and found to be weighing 25,900kg while the permissible axle load was 18,000kg and therefore was overloaded by 7,900kg. The Petitioner's driver was notified, issued with a prohibitory order and the vehicle was escorted to Lanet Police station for further action by the police officers. Mr. Cheruyiot further deposed that in finding the Petitioner's motor vehicle was overloaded, the Respondent's officers followed the laid down procedure as per the Kenya Roads (Kenya National Highway Authority) Regulations, 2013 and the Petitioner was to face charges for overloading. He further stated that Petition was a ploy by the Petitioner to circumvent criminal proceedings against him.

10. He further informed the court that the Respondent's officers had made an error in putting the wrong registration number in the prohibitory order and weighing ticket as KBC 615C instead of KCB 615 C.

11. The Interested party did not file any documents despite being granted leave to do so.

12. The Petition was disposed of by way of written submissions the Petitioner delayed in filing his submissions prompting the Respondent to first file its written submissions on the 19th October, 2017. The Petitioner filed his submissions on the 8th November, .2017 and the Respondent filed further submissions on the 5th December, 2017. The matter came up for highlighting of submissions on the 5th December, 2017.

13. Mr. Nyamwange for the Petitioner submitted that the Respondent acted arbitrarily and whimsically in seizing the Petitioner's motor vehicle negating his right under Article 40 of the Constitution to own and quietly enjoy his property. The Petitioner's right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as enshrined in Article 47 as well as his right to a fair and public hearing before a court were violated by the Respondent who has failed to prosecute or arraigned the Petitioner in court.

14. Counsel further submitted that the Respondent's actions were based on hypothetical finding and misconceived information laced with malice as the Respondent's officers never weighed the vehicle. He also stated that there were discrepancies in the registration numbers on the prohibitory order as well as the weighing ticket which indicated KBC 615C instead of the actual registration of KCB 615C and prayed that the Petition is merited and granted as prayed. He relied on **Manyota Ltd v Kenya National Highway Authority [2017] eKLR**; **R vs Kenya National Highway Authority ex-parte John Mwaniki Kiarie [2016] eKLR**; **Ndugu Transport Company Ltd v Kenya National Highway Authority [2016] eKLR** and **Joram Nyaga Mutegi v Kenya National Highway Authority [2017] eKLR**.

15. Mr. Mugambi for the Respondent submitted that the Petitioner had failed to demonstrate how his rights were infringed as the Respondent was carrying out its mandate in accordance with the Kenya Roads Act, the Traffic Act and the Kenya Roads (Kenya National Highways Authority) Regulations 2013 and more specifically Section 16 and 17 of the regulations on the weighing procedure where the Respondent's officers found the motor vehicle to be overloaded by 7,900kg. He also submitted that the Petitioner was indirectly seeking to have the court declare provision of the traffic laws and more specifically the Kenya Roads (Kenya National Highways Authority) Regulations 2013 unconstitutional albeit through the backdoor.

16. Counsel further submitted that the Petitioner ought to have appealed to the Minister pursuant to Regulation 19 of the Kenya Roads

(Kenya National Highways Authority) Regulations 2013 if he felt aggrieved before coming before the court and that therefore the Petition was unmerited, misconceived, incompetent and an abuse of the court process and ought to be dismissed with costs.

17. From my careful consideration of the Petition the affidavits and submissions of the parties, I find the issues to be:-

- a. *Whether the Petitioner's rights under Article 40, 47 and 50 of the Constitution, 2010 have been infringed on.*
- b. *Whether the Petitioner is entitled to the orders sought*

18. On whether the Petitioner's right to property was violated, **Article 40** of the Constitution, 2010 which 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.”

19. From the foregoing 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. Nonetheless the removal of a motor vehicle from the road and its detention must be done in accordance with the law.

20. In **Disaranio Limited v 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.”

21. It would appear in the present case that the normal procedure in detaining the motor vehicle was followed, the Respondent has adduced as evidence a picture of the motor vehicle KCB 615C being weighed at the mobile weighbridge as an exhibit DCH-1 and further adduced a weighing ticket showing that the motor vehicle had exceeded the required weight by 7900kgs 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.”

22. The Respondent's officer proceeded to issue a prohibition order and have the motor vehicle detained at the Lanet Police Station 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.”

23. The Respondent then proceeded to inform the Petitioner that he would be required to offload the excess load once he and his driver were charged in court. From the Respondents' own admission they had not preferred any charges at the time of hearing the Petition.

24. The Petitioner on the other hand has denied that the motor vehicle was weighed. However, there was no affidavit sworn by the driver who was in control of the vehicle at the time it was caught and weighed making the assertion hearsay evidence. He has further averred that neither he nor his driver has been charged. In **Joram Nyaga Mutegi v Kenya National Highway Authority [2017] eKLR**, Mwita J observed that:-

“Rights have values and must be respected and protected at all times. The Petitioner has a right to do business and earn a living, and continued retention of his vehicle's registration plate is a violation of this right given the circumstances of this case. The law is to be followed and where there is no evidence, any purported action of retaining the vehicle registration plate is unacceptable.”

The continued detention of the motor vehicle by the Respondent without taking any further action to charge the Petitioner and his driver denied the Petitioner an opportunity to do business and earn a living clearly contravening his right to property.

25. I find that while the Respondent followed due procedure in detaining the motor vehicle for having been overloaded at the time it was weighed, however, the Respondent has failed to take any legal action against the Petitioner since the motor vehicle was detained in clear contravention of Article 40 (3)(b)(ii). The Respondent only released the motor vehicle after 1 month on reaching a consent recorded in court after the Petitioner filed an application seeking the release. The Respondent in failing to charge the Petitioner and his driver and its continuous detention of the motor vehicle clearly contravened and breached the Petitioner's right to property enshrined under Article 40. The Respondents may have had a good case against the Petitioner. However, they did not have the luxury of detaining the Petitioner's vehicle for one month without pressing charges.

26. On the Petitioner's right to a fair administrative action and hearing Article 47 of the Constitution provides:-

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

27. **Section 4** of the **Fair Administration Action Act No. 4 of 2015** provides:-

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

a. prior and adequate notice of the nature and reasons for the proposed administrative action

b. an opportunity to be heard and to make representations in that regard

c. notice of a right to a review or internal appeal against an administrative decision, where applicable

d. a statement of reasons pursuant to [section 6](#)

e. notice of the right to legal representation, where applicable;

f. notice of the right to cross-examine or where applicable; or

g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to—

a. attend proceedings, in person or in the company of an expert of his choice

b. be heard

c. cross-examine persons who give adverse evidence against him; and

d. cross-examine persons who give adverse evidence against him; and

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

28. In **R vs Kenya National Highways Authority ex.parte John Mwaniki Kiarie**, Nairobi J.R Application No 437 of 2015 Odunga J expressed himself as follows:-

“A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6 where it was held:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

29. The right to fair administration action requires that a statutory body, such as the Respondent, in carrying out its mandate under statute acts in an expeditious and efficient manner. As earlier stated above the Respondent has failed to take any action against the Petitioner despite claiming that the said motor vehicle was overloaded and proceeded to detain it at Lanet Police Station for over a month in clear contravention of the Petitioner’s right to fair administrative action.

30. On the Petitioner’s right to a fair hearing, **Article 50** of the Constitution provides:-

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

a.

b.

c.

d. to a public trial before a court established under this Constitution

e. to have the trial begin and conclude without unreasonable delay.”

31. In establishing the right to fair hearing, the Court of Appeal in **Judicial Service Commission v Mbalu Mutava & another** [2015] eKLR it held that:-

“It is clear that fair hearing as employed in Article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By Article 25 that right cannot be limited by law or otherwise.”

32. The right to a fair hearing requires that any accused person has to be charged formally in court and should be done expeditiously without any delay. Any person who has been found to be in contravention of the provisions of the Traffic Act and the Kenya Roads (Kenya National Highways Authority) Regulations 2013 should be arraigned before a court of law as held in the case of **Disarano Limited (supra)** where Nyamweya J stated:-

“It is evident that these regulations expressly create offences, and if a person is alleged to have committed an offence under any of the above-cited regulations, the Constitution requires that person to be charged, be informed of the charges, and the trial be held in public before a Court of law established under the Constitution. Therefore a notification of the weighbridge report cannot

constitutionally form the basis for imposing fees where a vehicle is found to be overloaded, and can only be the initiation document as regards the bringing of charges against anyone alleged to have committed the offence, which offence must be proved before any fee or penalty is imposed....

The penalties for overloading under the Traffic Act are stated in section 58 of the Act and it is clear for the said provisions that a person who is alleged to have contravened the section must be charged and tried in a court of law before being found guilty....The same or similar procedures were required to be followed if regulation 10, 14 or 15 of the Kenya Roads (Kenya National Highway Authority) Regulations of 2013 were alleged to have been contravened, in that the driver and possibly the operator of the motor vehicle involved should be charged with the applicable offence in a court of law, all relevant information obtained and documentation completed in full, and availed to the person charged with the offence to enable his or her defence.”

33. In view of the above I find that the Respondent’s failure to charge the Petitioner and the continued holding of his motor vehicle for a period of one month was a breach of the Petitioner’s right to a fair hearing as enshrined in Article 50 of the Constitution.

34. Having found that the Respondent violated the Petitioner’s rights under Articles 40, 47 and 50 of the Constitution, the next question to consider is whether the Petitioner is entitled to the reliefs that he seeks as set out above.

35. In addressing the prayer for damages for wrongful detention of a motor vehicle, it is trite that a wrong cannot go unpunished. This was the position held by the Court of Appeal in *Great Lakes Transport Co. (U) Ltd vs- Kenya Revenue Authority [2009] eKLR* where it pronounced itself as:-

“Considering all the above and mindful of the legal position that the superior court ought to have considered that it was sitting both as a Court of law and a court of Equity, and noting that Equity would not allow a wrong to be suffered without a remedy, we hold that the appellants were entitled to an award of general damages.”

The Court of Appeal went on to assess damages for illegal seizure and detention at KSh.500,000/- for 6 months. Where the Petitioner did nothing to mitigate the loss. See also *Daneva Company Limited v Kenya National Highways Authority [2014] eKLR*, and *Moses Kipkoech Rotich v Kenya National Highways Authority & 7 others [2018] eKLR*.

36. In this case it is clear that the motor vehicle may have been rightly detained for being overloaded. However, it was incumbent on the Respondent to expeditiously charge the Petitioner and his driver. The failure to take any action therefore made the detention for 1 month of the said motor vehicle unlawful and in contravention of the Petitioner’s right to property. In view of the foregoing, I find the sum of Kenya Shillings fifty thousand only (Ksh.50,000/=) adequate compensation to the Petitioner.

37. In the end, I find the Petition merited and enter judgement in the following terms:-

i. A declaration be and is hereby issued that the detention by Respondents of motor vehicle registration No. KCB 615C FAW TIPPER was unlawful, an abuse of the criminal justice system and in violation of the Petitioner’s rights under Articles 40, 47 and 50 of the Constitution.

ii. The Respondents be and are hereby restrained from impounding and detaining motor vehicle registration number KCB 615C without preferring criminal charges against the Petitioner as contemplated under Article 50 as read together with Articles 47 and 48 of the Constitution.

iii. The Petitioner is awarded damages of Kenya Shillings fifty thousand only (Ksh.50,000/=).

iv. The Petitioner is awarded costs of the suit.

Orders accordingly.

Judgement signed

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R.LAGAT KORIR

JUDGE

Judgment delivered, dated and signed at Nakuru This 12th day of February, 2019

.....

JANET MULWA

JUDGE

In the presence of:

.....**Court Assistant**

.....**For the Applicants**

.....**For the Respondents**