



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.104 OF 2018

IN THE MATTER OF ARTICLES 2(1), 3(1), 27(1), (2), 29, 39(2), 40, 47, 50, 156, 157, 258

AND 35(1) (a) and (b) OF THE CONSTITUTION OF KENYA

AND

**IN RH MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 10,20,28,41,47,48,50,73,232 AND 236 OF THE CONSTITUTION OF KENYA**

IN THE MATTER OF THE ENFORCEMENT OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 5,6,7,8 & 10 OF PUBLIC SERVICE

(VALUES AND PRINCIPLES) ACT NO. 1A OF 2015

AND

IN THE MATTER OF SECTIONS 9, 10, 11 & 12 OF PUBLIC OFFICER ETHICS ACT, CAP 183 OF 2013

AND

IN THE MATTER OF SECTIONS 4, 6,7,8,9 & 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

AND

**IN THE MATTER OF RULES 4, 6,7,8,9,11,22,23 AND 24 OF THE CONSTITUTION OF
KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

CHARLES OUMA OLANG.....PETITIONER

-VS-

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

THE INSPECTOR-GENERAL OF POLICE.....2ND RESPONDENT

THE NATIONAL POLICE SERVICE COMMISSION.....3RD RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....4TH RESPONDENT

JUDGMENT**Petitioner's Petition**

1. The petitioner Charles Ouma Olang through a petition dated 20th March 2018 and filed on 22nd March 2018 supported by affidavit of the petitioner dated 20th March 2018 sought several declarations running from (a) – (i) on the face of the petition. The brief background of the petition is, that the petitioner herein purchased a motor vehicle Registration Number KCF 982R, the subject matter of the petition at a purchase price of Kshs.700,000 from one Ali Hanath Hamisi, who was acting on behalf of Esther Wahinya Njunge being a registered owner of the said motor vehicle. That upon the seller receiving the purchase price in cash and signing the agreement, Mr. A.H. Hamisi handed over the original log book, original car keys and two spare keys of the aforesaid motor vehicle to the petitioner and subsequently he avers the transfer was duly effected in his name.
2. The Petitioner avers that on about 18th January 2018, when the transfer of the said vehicle had been effected, he received a call from one Mr. Kandie, who identified himself as a police officer from Gigiri police station requiring him to take the said vehicle to the police station for having been a subject of another investigation. The Petitioner did not comply with the request urging he did not know the caller or his intention. The petitioner avers, that he thereafter received another call from one Mr. Ekirepa, who identified himself as, OCS Gigiri police station, ordering him to take the motor vehicle to the nearest police station. He once again declined as there was no court order requiring him to do so.
3. It is petitioner's further contention, that on or about 12th March 2018, the police officers under the instructions of DCIO Siaya, stormed his offices in Siaya town and later his residence at Banana Estate within Siaya County, demanding for the motor vehicle and the log book without any lawful court order. The police officers further informed him, that he was under arrest but did not tell him the reasons but later retreated when he informed them that he was nursing a fractured leg. The petitioner's vehicle was eventually seized and upon inquiring from Siaya Police Station; the petitioner was informed, that his vehicle had been impounded by CID Offices in Nairobi. The petitioner now believes, that his vehicle is wasting away in the police station without any justification. He contends the Respondents action in seizing his motor vehicle, denying him its use, have violated his constitutional rights and he has suffered financial loss as he is forced to pay a loan on a vehicle the police have seized unlawfully.

1st Respondent's Response

4. The 1st Respondent in response to the petition filed a Replying Affidavit by No. 99418 P.C. George Mwangi sworn on 6th April 2018, who is an investigator, in the matter attached to the Directorate of criminal investigation Nairobi County Headquarters and an investigator in this matter. He deponed that he was investigating a case of stealing of motor vehicle contrary to section 278(A) of the Penal Code vide OB No. 2/5/2018 of the County DCI Headquarters Nairobi Area. He deponed that on 10/01/2018 the complainant Charles Kamotho Gichuhi advertised sale of his motor vehicle registration No. KCF 892R Toyota Axio Saloon via OLX online marketing platform having bought the same from the registered owner Esther Wahinya Njung'e vide a sale agreement dated 31st January 2017.
5. P.C. George Mwangi, further deponed, that the seller received a call from a prospective buyer one Benson Kibe who expressed interest in making the purchase and Kshs.800,000/- was agreed upon as the purchase price. That on 11/11/2018, the vendor received a confirmation, that his account had been credited with Kshs. 800,000 leading him to subsequently release the motor vehicle to the buyer together with the original log book, copy of the National Identity Card, copy of KRA Pin and a duly signed transfer form in the name of Esther Wahinya Njug'e upon signing of the sale agreement. The vendor later received a message, that his account failed to be credited with Kshs. 800,000/- as the banker's cheque drawer's account was dormant and reported the matter at Gigiri Police Station, after efforts to reach the buyer were rendered futile. He even went to the extent of requesting for a restriction/prohibition on the motor vehicle transfer from **NTSA** through his Advocates.
6. That upon conducting a search, he discovered, that the motor vehicle had already been sold to another person, the petitioner herein. That on further enquiries, he depones, that the said Esther Wahinya Njung'e confirmed selling the vehicle to Charles Kamotho Gichuhi but denies ever meeting the petitioner herein on or having anybody by the name Ali Hawath Hamisi as her agent. Accordingly, **NTSA**, never contacted Esther Wahinya Njung'e to authorize the transfer as is the procedure and on 12th March 2018 the vehicle was impounded at Siaya County and vide a court order of 13th March 2018, the vehicle was collected from Siaya Police Station and transferred to Kilimani Police Station yard pending completion of the investigations.
7. PC George Mwangi, further avers, that the 1st Respondent has had no intention of arresting the petitioner but instead told him to assist them with the investigations but he was not cooperative. He further averred that the police acted in good faith and urges the court to compel the petitioner to produce the person who sold the motor vehicle to him.

The 3rd Respondent's Response

8. The 3rd Respondent in response to the petition herein filed grounds of opposition dated 25th May 2018 and filed on 28th May 2018. The 3rd Respondent contend, that the petition as framed against the 3rd Respondent is premised on clear misapprehension of the constitution as the powers and functions of the 3rd Respondent articulated in **Article 246 of the Constitution** do not extend to seizing and detaining vehicles but the same is a preserve of the National Police Service. Accordingly, it is contended, that the petition as framed against the 3rd Respondent is misconceived and bad in law since it seeks to sue a party for action outside its mandate and committed by persons not within its immediate command and direction.

The 3rd, 4th and 5th Respondents Response

9. The 3rd, 4th and 5th Respondents similarly filed grounds of opposition dated 13th April 2018. It is contended for 3rd, 4th and 5th Respondents, that there are no constitutional violations of the petitioner's fundamental rights and freedoms by the Respondents; contending further, that the petitioner has not demonstrated how his constitutional rights has been violated by the 5th Respondent but state, that the 3rd and 4th Respondents actions are well within the provisions of **Article 244 of the Constitution**. It is the Respondents contention, that the petition has no legal basis therefore incompetent and bad in law and ought to be dismissed.

Parties Submissions

a) Petitioner's Submissions

10. The Petitioner submitted his right to property was infringed by the Respondents' clandestine acts of illegally and unlawfully confiscating his motor vehicle. He relied on the case of Multiple Hauliers East Africa Limited vs- Attorney General & 10 others (2013) eKLR for the proposition that private property is protected and may not be taken arbitrarily without due process. He also relied on the case of Anarita Karimi Njeru vs- Republic (1979) eKLR which was reaffirmed by the Court of Appeal in Mumo Matemu vs- Trsuted Society of Human Rights Alliance & 5 Others (2013) eKLR whereby the court stated that where a person seeks redress from the High Court in a matter involving reference to the constitution, he should set out with a reasonable degree of precision that which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.

11. He further submitted that he was a *bonafide* purchaser for value and there has been no proof of fraud on his part and at the time of seizing the motor vehicle, the motor vehicle had already been lawfully transferred in his name giving rise to a binding contract which can only be set aside on grounds established by the law of contract or in the alternative, compensation pursuant to Article 40(3) of the constitution. Counsel further submitted that the court in Florence Amunga Omukanda & Anor vs- Attorney General & 2 Others (2016) eKLR held that respect for the rights imposes on the state the negative obligation of doing nothing to violate the said rights.

12. On whether the Petitioner is entitled to the prayers sought, the Petitioner submitted that by the Respondents failing to observe the constitution, they violated his inalienable legitimate expectation to enjoy the use of his property. Counsel further submitted that Section 8 of the Traffic Act is to the effect that a person whose name a motor vehicle is registered shall be deemed the owner unless the contrary is proved. He further submitted that facts surrounding a violation of rights will determine the appropriate relief as was held in the case of Arnacherry Limited vs- Attorney General (2014) eKLR which cited with approval the South African Case of Ntandazeli Fose vs- Minsiter of Saftey and Security CCT 14/96 (1997) ZACC 6. He therefore urged the court to allow the Petition.

b) 1st and 4th Respondent's Submissions

13. The 1st and 4th Respondents on the other hand submitted that the Petitioner has not demonstrated how he was harassed by the police by being asked to record a statement in order to shed light on how the motor vehicle, subject matter of this suit, came into his possession. They submitted that the police are mandated to investigate and stop commission of crimes and therefore acted within their mandate in the instant case. They further submitted that the circumstances how the Applicant acquired the motor vehicle is tainted with an illegality and in granting the orders sought will be akin to aiding an illegality.

14. They further submitted that the right to property is not an absolute right if the property is found to have been illegally acquired as was held in the case of Charles Maimba Kamau vs- Alphonse Odhiambo Owino & 4 Others (2016) eKLR. They further submitted that the petitioner is not entitled to any compensation as the police were simply acting within their mandate and the ambit of the law. They therefore urged court to dismiss the Petition.

b) The 3rd and 5th Respondent's Submissions

15. The 3rd and 5th Respondents submitted that the burden of proving constitutional violations and infringement rests with the Petitioner as was set out in the Anarita Karimi case (*supra*). A similar position was taken by the court in Meme vs- Republic & Anor (2004) eKLR and Republic vs- Truth Justice and Reconciliation Commission and another Ex-parte Augustine Kathungu & 9 Others (2011) eKLR. Accordingly, they submitted that the present petition does not meet the principles espoused in the above cases.

16. On whether the Petitioner is entitled to compensation, they submitted that courts have held that what amounts to appropriate relief depends on the nature and circumstances of each case as was held in the case of Nancy Makokha Baraza vs- Judicial service Commission & 9 others (2012) eKLR and Bidco Oil Refineries Ltd vs- Attorney General & 3 Others (2012) eKLR. Further, the motor vehicle the Petitioner seeks to have released is being used as an exhibit of proceed of crime and therefore cannot be released. They therefore urged court not to allow the Petition.

Analysis and Determination

17. I have very carefully considered the petition herein, the Replying affidavit, the grounds of opposition and the responses thereto, the counsel rival submissions for both parties and authorities relied upon in support of rival submissions. Considering all the above I am of the view, that two main issues arise for consideration and determination being as follows:-

a) Whether the petitioner's constitutional rights have been violated by the Respondents?

b) Whether the petitioner is entitled to the prayers sought in the petition?

A) Whether the petitioner's constitutional rights have been violated by the Respondents?

18. The burden of proving constitutional violations and infringement lies with the petitioner. This is trite law as was enunciated by the principles in **Anarita Karimi Njeru vs Republic (1979) eKLR** in which the Honourable Judges held that:-

“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.”

19. The above-mentioned principles were applied in the case of **Meme vs Republic & Another (2004) eKLR** where the court stated as follows:-

"Where a person is seeking redress from the High Court on a matter which involves reference to the constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provision said to have been infringed and the manner in which they are alleged to have been infringed and that the Applicant's instant application had not fully complied with the basic tests of constitutional references; it was founded on generalized complaints without any focus on fact, law or constitution. Hence it had nothing to do with constitutional rights of the appellant."

20. Further in the case of **Republic vs Truth Justice and Reconciliation Commission and Another ex-parte Augustine Kathungu and 9 others (2011) eKLR** the court pronounced itself as follows:-

".....Article 22 in conjunction with Article 258 of the current Constitution which gives every person has a right to institute court proceedings when the Constitution has been contravened. That in our view obliges an ex parte applicant to clearly set out the acts and/or omissions that, in his view contravene the Constitution and also specify the provisions of the Constitution that those act or omissions contravene and the prayers or reliefs he or she seeks....."

21. The 3rd and 4th Respondents submissions are, that the petitioner before this Honourable court does not meet the principles espoused in **Anarita Karimi Njeru vs Republic (supra)**. I have considered the petition herein in regard of the submissions raised by the 3rd and 5th Respondents to find out whether the petitioner has 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. Upon perusal of the petition, I find, that the petitioner has set out with a reasonable degree of precision that what he complains of under sub-headings, legal foundation of the petition; facts of the petition; the violation of the constitution and fundamental rights and freedoms (*Nature of the injury caused or likely to be caused to the petitioner and the public*). The provisions said to be infringed are not only set out in the face of the petition but under various paragraphs in the petition and also the manner in which they are alleged to be infringed. I therefore find and hold, that the petition before this court meet the principles espoused in **Anarita Karimi Njeru vs Republic (1979) eKLR** and find no basis in the submissions by 3rd and 5th Respondents that the petition is not competent.

B) Whether the petitioner is entitled to the prayers sought in the petition?

22. The petitioner in the petition seeks declarations, orders of injunction and payment of compensation and any other and further relief, that the court may deem fit and just to grant. I purpose to deal with each relief sought on its own meritS.

23. **Articles 3, 5 and 14 of the African Charter on Human and Peoples Rights** enacted under the auspices of the Organization of African Unity (OAU) now African (AU) Charter and as read with **Article 1 of the AU Charter and the AU** constituting instrument places responsibility on a state party to protect and enact legislation, that secures equal protection of its citizens before the law, secures dignity or security of the person and the right to property.

24. This has been realized through **Article 40 of the Constitution** which provides that, 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 an 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."

25. The petitioner seeks for a declaration that the decision to seize his motor vehicle Registration number KCF 892 R by the 1st, 2nd and 3rd Respondents is opaque, egregious, clandestine, capricious, whimsical and contrary to Articles 10, 27, 28, 31, 40, 47 & 50 of the Constitution of Kenya 2010, therefore unconstitutional and consequently null and void. It is petitioner's contention, that under **Article 40 of the constitution**, that he has right to acquire and own property and, that a private property is protected and may not be taken arbitrary without exercise of due process.

26. In the instant petition, it has been urged on behalf of the petitioner, that he is a *bonafide* purchaser for value consideration after entering into an binding contract with Esther Wahinya Njung'e, the registered owner of the **KCF 892R**. The petition further urges the Respondents have neither alleged nor proved, that the transfer of the motor vehicle was not completed in his form and in such circumstances shrouded with fraud.

27. The burden of proving constitutional violations and infringement vests with the petitioner. The petitioner on alleging he is a *bonafide* purchaser for value, has to produce evidence to that effect. In the instant petition, the petitioner has not attached or produced or provided an agreement to demonstrate indeed there existed a contract between himself and the owner of the motor vehicle. The sale of the motor vehicle is not in itself enough.

28. **Section 8 of the Traffic Act (Cap 403)** provides:-

"The person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the vehicle."

I am in agreement that a certificate of search from Registrar of motor vehicle, showing the owner of the motor-vehicle is a *prima facie* evidence that the person so registered is the owner, however that is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved.

29. In this suit, there is uncontroverted evidence that Esther Wahinya recorded statement with police denying ever meeting the petitioner or entering into any agreement with the petitioner in person or through her agent. The process through which the transfer was entered is not fully explained and is suspected to have been tainted with an illegality and due to such glaring and unexplained issues and following complaint by the seller of the vehicle to Esther Wahinya Njung'e the police swung into investigation of the matter and are still doing so in order to find out the person(s) who are out to defraud the owner of the motor vehicle. The decision to seize the motor vehicle herein was made pursuant to a complaint, that was made to the police and also for failure of the petitioner to co-operate with police upon being called severally to appear at Gigiri Police Station. The investigating officer, P.C.G. Mwangi in his affidavit dated 6th April 2018 deponed that the motor vehicle in question, was detained pursuant to a court order dated 13th March 2018 issued by Milimani Chief Magistrate Court in miscellaneous Application No. 799/2018 to have the motor vehicle collected from Siaya Police Station yard and have it detained at Kilimani Police Station yard pending completion of the investigation into the matter. In view of the aforesaid, I find the allegation by the petitioner, that the seizure was done in egregious, clandestine, capricious, and whimsical manner to be without any legal and evidentiary support. The petitioner I find has only stated his rights has been violated without demonstrating how the 1st and 4th Respondents have violated Article 10, 27, 28, 31, 40, 47, 50 and 232 of the Constitution of Kenya 2010. As regards violation of the petitioner's rights by 1st, 2nd and 3rd Respondents, their functions are well stated in the constitution and it is well within their constitutional mandate to investigate crime, and that was the main reason why the questioned vehicle was detained and is still detained at the police station as or an intended exhibit of proceed of crime.

30. On prayer for a permanent injunction to restrain the Respondents from charging, prosecuting, arresting, continued harassment, questioning, intimidating, apprehending the petitioner on account of any investigations relating to the alleged transfer and ownership of the said motor vehicle, the petitioner herein was called by police to report at the police station but did not, however police traced him at Siaya and requested him to record a statement to shed light on how the motor came into his possession. It was upon the petitioner to demonstrate to the court how by being asked to record statement, he was being harassed. The police officers investigating a matter are within their mandate to request for statements from both suspects and witness and in doing so they cannot be said to be harassing potential witnesses or suspects. I find if this court would proceed to grant this prayer it would not only be basically stopping any investigation by the 1st Respondent and 4th Respondent into the matter but would be interfering with their mandate and more so, when there is a complainant who claims to have been defrauded of her vehicle. The police are as per our constitution mandated to investigate and stop commission of crime. The continued detention of the subject motor vehicle is pursuant to an order of the court as per *annexture G11* as per P.C. George Mwangi's affidavit sworn on 6th April 2018.

31. In the case of **Ramba Kinuthia vs Inspector General of Police & another (2014) eKLR** Justice Odunga held:-

"That the word "investigate" is defined in the Black's Law Dictionary 9th Edition as: "To inquire into a matter systematically; to make an official inquiry." And "In order to perform it said functions section 57 of the said Act provides that: "A police officer may stop, search and detain any vehicle or vessel which the police officer has reasonable cause to suspect is being used in the commission of, or to facilitate the commission of, an offence."

32. Having very carefully considered the petitioner's petition and P.C. George Mwangi's affidavit dated 6th April 2018, and counsel

respective submissions, and the constitution, I have no doubt, that the police were acting within their statutory mandate when they proceeded to court, obtained an order and proceeded to detain the motor vehicle following a complaint by the complainant in this matter, as the vehicle was suspected to being used to facilitate the Commission of an offence; to wit theft and fraud.

33. In this suit, there is clear evidence, that the investigation is not complete. I therefore find the prayer herein above, is premature as the investigation is ongoing and is yet to be completed and a decision on the way forward made. The petitioner in seeking the prayers herein, is seeking to stop the jurisdiction of the 4th Respondent as provided under **Article 157 of the Constitution** which provides:-

"(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) Subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b)."

34. The 4th Respondent should as provided by the constitution be afforded an opportunity to receive and review the duplicate police file for necessary action and advice. The petitioner's petition is intended to pre-empt the outcome of the investigations. It is true, that once the investigations are complete, the 4th Respondent, will be in a position to determine whether the petitioner could be a material witness or not but this conclusion can only be reached once police carries out full investigations for the DPP to review the file thereafter and determine whether any offences have been committed and whether anyone should be charged.

35. The owner of the motor vehicle denies knowing the petitioner or having entered into contract with him. The petitioner claims he bought the vehicle through an agent of the owner of the vehicle but has not produced any agreement or an affidavit sworn by the purported agent of the owner of the vehicle. The petitioner explanation on how he acquired the vehicle is challenged. It appears the acquisition of the vehicle did not have sanction of the owner and raises the issue of lawful acquisition or rather the acquisition is tainted with illegality. I find granting orders sought herein, notwithstanding the perpetrators are yet to be arrested would amount to aiding an illegality. The petitioner has not demonstrated how he acquired the vehicle by producing sale agreement duly executed by the owner of the vehicle or her purported agent. It has not been demonstrated how the Respondents have acted in excess of their power to justify intervention of the court. I find granting the orders as sought would not only result to a greater injustice in the criminal justice system and the public interest; but would amount to insulating not only the petitioner but the perpetrators of the crime herein, from any further criminal liability in this matter if any evidence is to be found or discovered, that the petitioner, was involved in the fraud. I further find the prayer may not be sustainable, because the motor vehicle, the petitioner is seeking to have released to him is still subject of the investigation and the petitioner on having the vehicle he may hinder investigation as he had initially shown disinclination to co-operate with police officers and may abscond with the vehicle or dispose the same to stop further investigation.

36. The petitioner seeks a permanent injunction to restrain the Respondent's from interfering with his fundamental rights and freedom in respect to the matter concerning the motor vehicle relying on **Article 40 of the Constitution of Kenya**. Thus right to acquire property. The petitioner has not shown that the Respondents intention is to deprive him of his right to property but not to carry out investigations based on the complaint, that had been lodged to them as per *annexture G1* in the affidavit of P.C. George Mungai dated 6th April 2018. **Article 40(6) of the Constitution of Kenya** provides:-

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

In view of the above, it is clear, that the right to property is not an absolute right and such right is clear can be restricted in accordance with the provisions of the constitution and any other Act of parliament. The right to property does not therefore extend to any property that is found to have been unlawfully acquired.

In the case of **Charles Mamba Kamau vs Alphonce Odhiambo Owino & 4 others [2016] eKLR** Justice Emukule as he then was, held:-

"It is the function of the Kenya Police Service or its officers, upon receipt of any complaints relating to commission of crime to carry out investigations and for the purpose, may take and detain any item, including a motor vehicle, the subject of investigation. Such actions cannot be regarded as confiscation of property or contravention of Article 40 of the Constitution of Kenya 2010."

37. This court considering the rights of the petitioners to the property, it should not be blind of the rights of the victims whose property has been unlawfully taken or who are unlawfully deprived of their lawfully acquired properties as provided by the same constitution. The victim of a fraud, being a complainant, also has a legitimate expectation that perpetrators of the crime are arrested, charged and prosecuted and for justice to be done to all irrespective of their status as per Article 159(2) (a) of the Constitution of Kenya 2010. In this matter the police in Replying affidavit of 6th April 2018 under paragraph 57 have indicated that the police had no intention whatsoever of arresting the petitioner and only required him to record a statement to assist the investigating team in establishing the alleged stealing of the motor vehicle from the complainant by the fraudsters who in turn posed as the genuine owners of the motor vehicle and sold it to the petitioner. I find, that the fact, that the police summoned him and when they found him they did not arrest him, is a clear manifestation of good faith as the alleged harassment did not take place.

38. The petitioner contention is that the Respondents violated his rights for being denied right to be heard before the motor vehicle was

seized.

39. The upshot is that I find no merit in the petition and proceed to make the following orders:

a) I find no merit in prayers (a), (b), (c), (d), (e), (f), (g) and (h) as sought by the petitioner and I disallow the same.

b) The police are allowed to carry out investigation over the subject matter of vehicle Registration No. KCF 892R to its logical conclusion.

c) No orders as to costs.

Dated, signed and delivered at Nairobi this 9th day of May, 2019.

.....

J .A. MAKAU

JUDGE