



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**PETITION NO. 14 OF 2016**

**MOSES KIPKOECH ROTICH.....PETITIONER**

**VERSUS**

**KENYA NATIONAL HIGHWAYS**

**AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**HEAD OF TRAFFIC POLICE DEPARTMENT.....4<sup>RD</sup> RESPONDENT**

**KERICHO POLICE STATION.....4<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF INTERIOR**

**AND CO-ORDINATION OF NATIONAL GOVERNMENT.....5<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY,**

**MINISTRY OF TRANSPORT**

**AND INFRASTRUCTURE.....6<sup>TH</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....7<sup>TH</sup> RESPONDENT**

**INSPECTOR GENERAL.....8<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner lodged the presented petition dated 13<sup>th</sup> December, 2016 against various state entities alleging violation of his constitutional rights under Articles 47, 48, and 50 of the Constitution of Kenya 2010. The alleged violations occurred following the detention of his motor vehicle registration number KAX 304C Isuzu FVC lorry on the 3<sup>rd</sup> day of December 2016.

2. The petitioner contends that on the said date, his vehicle was on its ordinary course of business of carrying loads along the Kericho-Nakuru Highway when it was ordered to be removed from the road and detained at Kericho Police Station by the respondent's agents, one Corporal Siadi, Police Constable Rioba, Patrick and Injira on allegations of overloading. The motor vehicle had been illegally and unlawfully detained at Kericho Police Station and nobody had been charged with any offence in any court in connection with the detention.

3. The petitioner brought his claim against the Kenya National Highways Authority (KENHA) as the 1st respondent, whom he describes as an autonomous road agency, whose function, among other things, is to ensure adherence to the rules and guidelines on axle load control prescribed under the Traffic Act and any regulations under the said Act.

4. The Inspector General of Police, Head of Traffic Police Department in Kenya, the Officer Commanding Station (OCS), Kericho Police Station and the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government, and the Cabinet Secretary, Ministry of Transport and Infrastructure whose mandates, among others, include enforcement of axle load control, were joined to the proceedings as the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents respectively.

5. The Director of Public Prosecutions, whose office is constitutionally responsible for public prosecutions in Kenya, was joined to the proceedings as the 7<sup>th</sup> respondent. The record of the court indicates that all the respondents were served, but with the exception of the 1<sup>st</sup> respondent, none of the others filed a response or participated in any way in the proceedings.

6. The petitioner had filed an interlocutory application 13<sup>th</sup> December 2016 seeking the release of his motor vehicle pending the hearing and determination of the petition. Upon hearing the parties, I found that the petitioner had made a case for the grant of the interim orders that he sought. I accordingly directed the respondents to weigh the load in motor vehicle registration number KAX 304 C within seven (7) days from the date of the ruling for the purpose of ascertaining volume. They were thereafter to release the said vehicle to the petitioner on condition that the said vehicle shall be produced in court as and when required by the court.

7. Following the said orders, the petitioner filed an affidavit sworn on 16<sup>th</sup> October 2017. He deposes that the 1<sup>st</sup> respondent complied with the ruling of this court by weighing and releasing the motor-vehicle to him on 13<sup>th</sup> October 2017. The laden weight of the said motor vehicle was found to be 22.6 tonnes which weight is within the allowable limits in respect of the said motor vehicle. He annexes a certificate of compliance issued by the 1<sup>st</sup> respondent dated 13<sup>th</sup> October 2017 and marked as MKR-1. No further affidavits were filed by any of the respondents.

8. The petitioner and the 1<sup>st</sup> respondent filed written submissions in support of their respective cases pursuant to directions issued by the court.

### **The Petitioner's Case**

9. The petitioner contends that by their actions, officials of the respondents violated his rights under Articles 40, 47 and 50 of the Constitution. They had directed that he surrenders his motor vehicle registration number KAX 304C Isuzu FVZ lorry at Kericho Police Station on allegations of carrying an excess load of approximately 8000 kgs. Their unlawful actions, which included the removal of number plates from the vehicle, had brought his business to a halt.

10. The petitioner contends that his rights guaranteed under Article 40 of the Constitution to acquire and own property and also to enjoy quiet possession of such property was arbitrarily restricted on the basis of an assumption on the vehicle's weight. The 1<sup>st</sup> and 6<sup>th</sup> respondents, who are responsible for ascertaining vehicle load, failed to act diligently and responsibly. By failing to act in accordance with their mandate, they violated his right to quiet, peaceful and unrestricted use of his property.

11. The petitioner contends that detention of his motor vehicle at Kericho Police Station and failure to charge him if there was any charge to be preferred, failing to weigh the vehicle and confirm if there was indeed an overload and illegally removing the vehicles number plate without any valid cause constitutes a violation of his rights. He urges the Court to find that there was a violation of his rights and grant him the following orders:

*a. A declaration that the actions of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents are illegal, an abuse of criminal justice, unfair and in violation of the Petitioner's rights.*

*b. A declaration that the actions of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents above of detaining motor vehicle registration No. KAX 304C ISUZU FVC LORRY have out rightly violated the rights of the Petitioner under Articles 20, 21, 22 (1) , 23(1), (3), 25, 27 (1) and (2), 28, 29 (a), (b), (d) and (f), 31 (b), 39 (1), 40 (1), (2) and (3), 47, 48 of the Constitution.*

*c. An order directing the 4<sup>th</sup> Respondent to release the said motor vehicle registration number KAX 304C belonging to the Petitioner.*

*d. A declaration that the actions of the 4<sup>th</sup> Respondent are in breach of chapter 6 of the Constitution hence unfit to hold public office anywhere in Kenya.*

*e. A declaration that the 7<sup>th</sup> and 8<sup>th</sup> Respondents have abdicated their constitutional and legal roles and thereby occasioned undue infringement of the Petitioner's rights.*

*f. Damages for loss of user.*

*g. General damages.*

*h. The petitioner be paid costs of this Petition.*

12. In submissions dated 3<sup>rd</sup> November 2017 filed by his Learned Counsel, Mr. Koech, the petitioner submitted that the decision contained in the order for removal of the motor vehicle from the road and payment of over load fees was made without affording the petitioner a chance to be heard and adduce evidence in response, a requirement of Article 50 of the Constitution which requires that every accused person is accorded a fair trial. Reliance was placed on the decision in **Rumic Construction & Civil Engineering Limited vs Kenya National Highways Authority & 3 Others [2015] eKLR** for the proposition that the right to be heard is a fundamental human right which can never be curtailed or limited.

13. It was submitted further that the 1<sup>st</sup> respondent's decision contained in the order on an allegation that the truck was ferrying an approximate excess weight/load of 8,000 Kgs has never been precisely determined. He submits therefore that the vehicle ought to have been

weighed to determine precisely the amount of excess load, if any as opposed to only approximating the alleged excess load and detaining it. The petitioner relied on the case of **Margaret Miano vs Kenya National Highways Authority [2015] eKLR** in which the court was of the view that Regulation 15 (3) of...may have unwittingly constituted an authority with powers of a Kangaroo court. The court also stated that the provision may be inconsistent with and be a violation of the right to a fair trial guaranteed under Article 50 of the constitution, and to that extent therefore null and void under Article 2(4) of the Constitution.

14. It was also his submission that the 1<sup>st</sup> respondent's decision was also in contravention of Article 47 of the Constitution since the petitioner was not only condemned unheard but was also unreasonably denied use of his motor vehicle through an unprocedural and unfair mechanism imposed by the 1<sup>st</sup> respondent. It was his case that the lengthy detention of the petitioner's vehicle for over 10 months unreasonably restricted his right to use and enjoyment of property enshrined under Article 40 (2) of the Constitution. He urges the court to invoke its jurisdiction under Article 23 of the Constitution and award damages for loss of user of the motor vehicle which was being used for business purposes. The petitioner relied on the case of **Daneva Company Limited vs Kenya National Highways Authority** (upheld on appeal in **Kenya National Highways Authority vs Daneva Company Limited [2016] eKLR** in which the court awarded Kshs. 2,500,000,000/- in general damages for unlawful deprivation of the right use and enjoyment of property.

### **The Case of the 1<sup>st</sup> respondent**

15. The case of the 1<sup>st</sup> respondent is set out in an affidavit sworn on 28<sup>th</sup> February 2017 by Dennis Higen. In the said affidavit, Mr. Higen deposes that on 3<sup>rd</sup> December 2016 at around 2140 hours, the petitioner's vehicle was travelling along Nakuru-Kericho road when it was flagged down as it was suspected to be overloaded. He avers that the truck driver refused to stop in order to allow the truck to be weighed on a mobile weighing scale and instead sped off and subsequently abandoned the truck.

16. He avers further that the officers at the scene waited for 10 minutes at the place where the truck was abandoned and proceeded to estimate the excess gross weight to be 8,000 kilograms, a weight that was computed based on a method of volume and density. He further avers that a prohibition order was consequently issued and the number plates removed in accordance with the Traffic Act in order to ensure the truck was not driven overloaded.

17. Mr. Higen referred to section 55(2) of the Traffic Act which prohibits the driving of a motor vehicle which, when laden or unladen, exceeds the maximum provided for in the rules.

18. According to Mr. Higen, section 106 of the Traffic Act as read with section 62 (y) of the National Transport and Safety Authority Act provides the authority to remove vehicles from the road and gives the licensing officer or inspector power to remove the identification plates and the vehicle license and deliver them to the National Transport and Safety Authority.

19. It was deposed on behalf of the 1<sup>st</sup> respondent that a party alleging violation of rights must plead with a reasonable degree of precision which rights were violated and the manner in which they were violated. In its view, what the petitioner has done in this case was to merely list articles of the Constitution that were violated. The 1<sup>st</sup> respondent had not violated the constitutional rights of the petitioner and his allegations to the contrary are baseless as he was subjected to the due process of the law.

20. In submissions dated 19<sup>th</sup> April 2017 filed on its behalf by its Learned Counsel, Mr. Ogeto, the 1<sup>st</sup> respondent cited section 106 of the Traffic Act as well as the case of **Ndugu Transport Company Limited vs Kenya National Highways Authority [2016] eKLR** in which the said section was interpreted. Its submission is that since the driver of the petitioner's vehicle refused to stop when flagged down, the respondents were allowed to proceed as they did. They were also required by law to issue a prohibition order and remove the identification plates. The 1<sup>st</sup> respondent further submitted that vehicle's number plates were forwarded to the National Transport and Safety Authority as required under section 106 (4A) of the Act.

21. The 1<sup>st</sup> respondent reiterates the contention that the petitioner's allegations that his rights have been violated are baseless. Its position is that the petitioner was subjected to the law as is required under the Act, section 3 and 22 of the Act. That under section 22(1) (c), the 1<sup>st</sup> respondent has power to measure the weights, dimensions and capacities of vehicles using any road and provide measures to ensure compliance with rules relating to axle load control. It is their submission therefore that the 1<sup>st</sup> respondent was within the ambit of the law in the actions it took relating to the weighing of the petitioner's vehicle.

22. The 1<sup>st</sup> respondent relied on section 55 and 56 of the Act as read together with section 106(4) (A) as the provision which give authority to the respondent to remove the vehicle identification plates of the vehicle used in contravention of section 55 and 56 of the Act. It also cited the case of **Republic vs Kenya National Highways Authority Ex-parte Mary Muthoni & 25 others [2015] eKLR** for the proposition that the 1<sup>st</sup> respondent, being the body that is vested with the duty to enforce compliance cannot be prohibited from discharging its duty.

23. According to the 1<sup>st</sup> respondent, the petitioner's reliance on Article 50 of the Constitution is misplaced as the applicable provisions in this matter do not provide for arrest of the owner and or driver of the motor vehicle for purposes of arraignment in court to answer charges. Accordingly, Article 50 that addresses the right to fair trial is inapplicable.

24. With respect to allegation of other constitutional rights, the 1<sup>st</sup> respondent submits that the rights of the petitioner were not violated as alleged. A notice was properly issued and the requirement for the overload fees was clearly stated. The 1<sup>st</sup> respondent cites the case of **Blue Jay Investments Limited v Kenya National Highways Authority [2014] eKLR** in which the court observed that as the regulations do not provide for a situation where the offender is charged in a court of law and a fine imposed but rather for payment of a fee, the actions of the respondent was justified.

25. It was also the 1<sup>st</sup> respondent's submission that the allegations that the petitioner's right under Article 40 was violated was misplaced.

The protection of the right to property, according to the 1<sup>st</sup> respondent, does not entitle one to use such property as they wish without regard to the particular legal framework governing that class of property.

26. The 1<sup>st</sup> respondent further submitted that there was no violation of the provisions of Article 47 of the Constitution. The submission was that once the vehicle was found to be overloaded, the 1<sup>st</sup> respondent took action by detaining the number plates of the said vehicle in order to impound the vehicle and deter it from any further contravention.

27. Its conclusion was that the petitioner has not established sufficient grounds for the orders sought, and the petition was an abuse of the court process and should be dismissed with costs.

### **Analysis and Determination**

28. Having considered the pleadings of the petitioner and the 1<sup>st</sup> respondent, the two parties which participated in this matter, I believe that this matter raises two issues for determination:

*i. Whether the petitioner has established violation of his rights under the provisions of Articles 40, 47 and 50 of the Constitution;*

*ii. Whether the petitioner is entitled to the reliefs sought.*

### **Violation of Constitutional Rights**

29. The petitioner has alleged violation of his constitutional rights under several articles of the constitution as a result of the seizure of his motor vehicle's number plates and detention of the motor vehicle at the Kericho Police Station. From his affidavit sworn on...October 2017, it appears that the motor vehicle was released pursuant to orders of the court in this matter made on 20<sup>th</sup> September 2017. What did not emerge from the affidavit is whether the number plates had also been released. Given, however, that the orders were that the vehicle and the number plates should be released, and in the absence of a deposition to the contrary, the court will work on the basis that both the vehicle and its number plates were released as directed.

30. This is 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-see **Anarita Karimi Njeru vs Republic [1979] 1 KLR 154**.

31. 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.”*

32. It is not in dispute that the petitioner's vehicle registration number KAX 304C ISUZU FVC lorry was detained on 3<sup>rd</sup> December 2016 along the Kericho-Nakuru Highway. Its number plates were removed and it was detained at the Kericho Police Station from 3<sup>rd</sup> December 2016 to 13<sup>th</sup> October 2017 when it was weighed and released pursuant to the orders of this court issued on 21<sup>st</sup> September. From the Certificate of Compliance marked as “MKR 1” dated 13<sup>th</sup> October 2017 which is annexed to the petitioner's affidavit sworn on 16<sup>th</sup> October 2017, the laden weight of the motor vehicle was determined to be 22.6 tonnes, which is within the limits provided for the motor vehicle at issue.

33. The 1<sup>st</sup> respondent did not raise any objection to the affidavit or its annexures. Instead, it has argued in its submissions that it was never served with the petitioner's said affidavit and was therefore a stranger to the averments therein. However, the orders of this court issued on 20<sup>th</sup> September 2017 were that the respondents weigh the load in the vehicle for purposes of ascertaining the volume.

34. The 1<sup>st</sup> respondent did not file any documents to controvert the evidence presented before the court by the petitioner. In the circumstances, the only conclusion that one comes to, then, is that at the time the motor vehicle was detained and its number plates taken away, it was being operated in accordance with the law and was not overloaded as alleged by the 1<sup>st</sup> respondent.

35. The petitioner has alleged violation of his rights under the Constitution and has enumerated at the heading of his petition articles 20, 21, 22 (1), 23 (1), (3), 25, 27 (1) and (2), 28, 29 (a), (b), (d), 31 (b), 39 (1), 40 (1), (2) and (3) 47, 48 and 50. However, only Articles 27, 28, 29, 31, 47, 48 and 50 contain specific provisions on fundamental rights, as opposed to the manner of interpretation of the Bill of Rights. From the averments and submissions of the petitioner, the core of his petition is the alleged violation of Articles 40, 47 and 50 of the Constitution. No arguments have been made with regard to the alleged violation of Articles 27 (non-discrimination) 28 (right to dignity) 29 (liberty and

security of the person) 31 (privacy) and 39 (freedom of movement).

36. The question is whether the detention of his vehicle by the respondents amounted to a violation of these constitutional rights.

37. The 1<sup>st</sup> respondent has relied on sections 56 and 106 of the Traffic Act to justify its actions against the petitioner. Section 56 of the Traffic Act provides for limitation of loads on motor vehicles used on roads, while section 106 provides for removal of vehicles from roads. At section 106(4) which is relevant for present purposes, it is provided that a police officer, licensing officer or inspector who is of the opinion that any vehicle is being used in contravention of section 55 or section 56 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. It is expressed in the following terms:

***(4) 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.***

***(4A) Where a police officer, licensing officer or inspector makes an order under subsection (4) he may remove the vehicle identification plates and the vehicle licence and, if he does so, shall deliver them to the Registrar to be kept while that order remains in force.***

38. I have not heard the petitioner to challenge the exercise of powers by the 1<sup>st</sup> respondent. As I understand his case to be, he was willing to have his vehicle weighed, but the agents of the 1<sup>st</sup> respondent took away his vehicle's number plates and failed to take steps to measure the load it carried to ascertain its weight. Instead, they detained it at the Kericho Police Station until directed by the court to weigh it and release it to him.

39. The Petitioner alleged that his rights to a fair hearing as guaranteed under Article 47 and 50 of the Constitution were violated. Mr. Koech submitted that the decision requiring him to remove his vehicle from the road was made without affording the Petitioner a chance to be heard or adduce evidence in response, a requirement which is a hallmark of a fair hearing.

40. I agree with the submissions of Counsel for the petitioner on this point. Article 47 guarantees to everyone the right to fair administrative action, while Article 50 guarantees the right to a fair hearing. The 1<sup>st</sup> respondent submits that the petitioner's reliance on Article 50 of the Constitution is misplaced since the applicable provisions that it relied on do not provide for the arrest of the owner and/or driver of the motor vehicle for purposes of arraignment before the court to answer charges. Its view is that Article 50 of the Constitution that addresses fair trial is not applicable. However, Article 50(1) does apply. It provides that:

***(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.***

41. In **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR** the Court of Appeal considered a similar argument and stated as follows:

***“[68] Article 50(2) of the Constitution provides for a right to a fair trial to an accused person in criminal trials. That sub-article was not applicable in the disciplinary proceedings against the respondent which, as already noted were neither criminal proceedings nor quasi-criminal proceedings. The respondent was entitled to a right to a fair hearing as provided under Article 50(1) of the Constitution that deals with “any dispute that can be resolved by application of law.” I will address this right in two parts. First is the need for the adjudicator to be independent and impartial, and the second is the requirement for fairness in the hearing procedures adopted.”***

42. In **Disaranio Limited v Kenya National Highways Authority & Attorney General [2017] eKLR**, Nyamweya J ordered the unconditional release of a motor vehicle that had been unlawfully detained by the respondent. In making this order, the Learned Judge stated as follows:

***“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.”***

43. In this case, I am satisfied that the procedural safeguards guaranteed to all under Article 47 and the right to a fair hearing under Article 50 were violated in the decision to detain the motor vehicle belonging to the petitioner from 3<sup>rd</sup> December 2016 until 13<sup>th</sup> October 2017 on the allegation that the vehicle had been overloaded. The fact that the 1<sup>st</sup> respondent did not make any effort to weigh and release the vehicle until ordered to do so by the court compounds the violation.

44. The petitioner has alleged violation of the right to property guaranteed under Article 40 of the Constitution following the detention of his vehicle for this extended period. In his decision in **Joram Nyaga Mutegi v Kenya National Highway Authority [2017] eKLR**, Mwita J observed that:

***“38. 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."*

45. The effect of detaining the vehicle number plates in the above case was to effectively ensure that the petitioner could not utilise his vehicle, which the court found was a violation of his right to property. How much more of a violation of the right to property is the detention of the petitioner's vehicle in this case? I am satisfied that the petitioner has established a violation of his right to property by the 1<sup>st</sup> respondent.

46. Having found that the 1<sup>st</sup> 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, and if not the reliefs he seeks, the court must consider what reliefs to grant the petitioner, noting that Article 23(3) empowers the court to grant 'appropriate relief.' I have set out earlier in this judgment the reliefs that the petitioner seeks. These include an award for loss of use, an award in damages, and various declarations.

47. In **Daneva Company Limited v Kenya National Highways Authority [2014] eKLR** the court considered whether the petitioner was entitled to damages for wrongful detention of his motor vehicle and observed as follows:

*"The issue of whether a claimant is entitled to damages for unlawful detention of his motor vehicle has been dealt with by our courts before. In the case of Great Lakes Transport Co. (U) Ltd vs- Kenya Revenue Authority [2009] eKLR the Court of Appeal held that equity would not allow a wrong to be suffered without a remedy and went ahead to assess damages for illegal seizure and detention of a motor vehicle. The Court of Appeal stated as follows:*

*"In our view from the fact that general damages was pleaded in the body of the Plaint and evidence led to show that the appellant was actively using the subject vehicle it followed that it would suffer loss even if special damages were not properly proved.*

*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 appellant was entitled to an award of general damages."*

48. The Court of Appeal then went on to assess damages at Kshs. 500,000/= which was for a period of six months. The Court of Appeal assessed the damages after considering that the appellant had done nothing to mitigate the loss.

49. In this case, the petitioner's vehicle was detained for a period in excess of ten months. He cannot be faulted as he moved with speed to file the present suit. However, despite doing so, the 1<sup>st</sup> respondent maintained its intransigent position and refused to release the petitioner's vehicle until ordered to do so by the court.

50. The question is what measure of damages to award the petitioner. In the case cited above, the court of appeal made an award of Kshs 500,000 for unlawful seizure and detention of the appellant's motor vehicle. The decision was made in 2009 in a situation where the vehicle had been detained for a period of 6 months.

51. In this case, the petitioner's vehicle was detained for a period of 10 months. In his decision in **Arnacherry Limited vs Attorney General [2014] eKLR**, Lenaola J (as he then was) granted the petitioner general damages for breach of proprietary rights of Kshs 3,000,000. In my view, a sum of Kshs 3,000, 000 would also be a fair amount to award in the present circumstances as against the 1<sup>st</sup> respondent.

52. The petitioner had also sought damages for loss of use. However, no evidence was tendered to support such loss. Being in the nature of special damages, loss of use needed to be specifically pleaded and proved, and there being no evidence in support thereof, I make no order with regard to such loss.

53. An order was also sought to the effect that the 7<sup>th</sup> and 8<sup>th</sup> respondents are not fit to hold public office due to their violation of Chapter 6 of the Constitution. No evidence having been made in this regard, I make no findings on this point.

54. In the result, in light of my findings above, the orders that commend themselves to me are as follows:

*i. A declaration be and is hereby issued that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents of detaining motor vehicle registration No. KAX 304C Isuzu FVC lorry were illegal, 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. That the 1<sup>st</sup> respondent do pay to the petitioner an award in damages of Kshs 3,000,000.*

*iii. That the 1<sup>st</sup> respondent meets the costs of this petition.*

**Dated Delivered and Signed at Kericho this 1<sup>st</sup> day of November 2018**

**MUMBI NGUGI**

JUDGE