



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

PETITION NO. 23 OF 2015

IN THE MATTER OF: ARTICLE 22, 23 & 40 OF THE CONSTITUTION OF
KENYA AND SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL (HIGH
COURT PRACTISE AND PROCEDURE RULES 2006)

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 10, 40, 47 AND 50 OF THE
CONSTITUTION REGARDING PROTECTION OF RIGHT TO PROPERTY
RELATING TO MOTOR VEHICLE REGISTRTRIONNO. KAH 589R

AND

IN THE MATTER OF: ABUSE OF LEGAL POWER BY THE KENYA
NATIONAL HIGHWAYS AUTHORITY INT EH CAPRICIOUS MANNER IN
WHICH THEY HAVE DETAINED MOTOR VEHICLE REGISTRATION
NUMBER KAH 589R

BETWEEN

MARGARET MIANO.....PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITYRESPONDENT

RULING

1. The Applicant's motor vehicle Mitsubishi Canter Registration Number KAH 589R was detained by the Respondent's officers on 13th April, 2015 and its driver/owner was required to pay or deposit a sum of US\$2,000=00 or the equivalent in Kenya shillings. The Applicant subsequently came to this court, by an Application dated 16th April, 2015, and was granted orders staying the Respondent's decision to fine the Applicant the said sum of \$2,000=00 without due process.
2. When the matter came up for hearing on 5th May, 2015 counsel for the Applicant made submissions based upon the Respondent's core values, and functions, which included:-

- quality service,
- good corporate governance – efficiency,
- effectiveness,
- transparency and timeliness,
- equality and fairness,
- ensuring adherence to the rules and guidelines on axle load control prescribed under the Traffic Act and any regulations.

3. Counsel for the Applicant submitted that these core values, mission and vision are meaningless, null and void, if the Respondent does not adhere to process of law, and asked the court to find so, and order for the release of her motor vehicle, as its continued detention is a violation of her constitutional rights to property.

4. The Respondent opposed the application, and in the Replying Affidavit of Engineer Isaiah J. Onsongo says that they acted under the provisions of Regulation 15 of the Kenya Roads (Kenya National Highways Authority) Regulations 2013 which says:-

“Where a vehicle is found to have bypassed or absconded from the weighbridge station, whether overloaded or not, the registered owner shall be liable to pay a bypassing or absconding fee of two thousand United States Dollars or its equivalent Kenya Shilling.....”

5. The Respondent’s Engineer depones that on 26th November, 2014, the subject motor vehicle bypassed the Mtwapa Weighbridge in Kilifi County, and that where a motor vehicle by-passed from a weighbridge, such by-passing is tagged into the Respondent’s electronic system, and that the vehicle was therefore detected on 13th April, 2015 and detained.

6. The issue to be determined here is whether the Respondent had lawful cause to detain the Applicant’s motor vehicle, and to demand a fee of US \$2,000=00 without due process.

7. The Respondent depones in paragraph 16 of the Engineer’s Replying Affidavit that Regulation 15 does not envisage a criminal trial or process, and that the Regulation only envisages that any motor vehicle that absconds or bypasses a weighbridge shall pay a fee in the sum prescribed.

8. With tremendous respect I do not agree. There is in law a difference between a fee and a penalty. A fee is a price or cost exacted for any special privilege, for example a driver’s licence, a transport licence, and the like fees referred to in Regulation 6 and prescribed in Part A of the Schedule to the said Regulations. So a licensing statute will prescribe a fee payable for the grant of a licence. The licensing statute or regulation will also prescribe a penalty for carrying out an activity subject to a licence, for example driving a motor vehicle without such a licence. The penalty is a fine, punishment, suffering or loss imposed for breach of a law, a disadvantage imposed upon a person who fails to obey the rules for example of a game such as penalty in football for fouling an opponent within the penalty area.

9. By its very language Regulation 15(3) is not a licensing provision. It is a penal provision, and like all penal provisions it must be construed strictly. Because it is euphemistically called a fee does not change its intrinsic character that it is a fine or penalty for the offence of bypassing a weighbridge or absconding therefrom. The offence is subject to proof. The registered owner, like the Police, is required to be informed within twenty four hours of the fact of bypassing or absconding from the weighbridge. There is no presumption in law, or presumption in the Regulations that the driver or person who bypasses the weighbridge is automatically guilty. That is why the **“Tag”** itself says:-

“DIVERTED BY CC AROUND 15 HOURS ON 26/11/2014 BUT REFUSED TO STOP. THEREFORE TRANSGRESSED AND SHOULD BE CHARGED ACCORDINGLY.”

10. It is therefore not correct as Engineer Isaiah depones, that Regulation 15(3) does not envisage a trial or court process. The tag itself expressly states that a transgression offence by violating the law had been committed and required a charge or due process to punish the offender or transgressor.

11. For the authorized officer or deponent to suggest that Regulation 15(3) does not envisage a judicial process is to make the Respondent, Judge, Jury and Executioner, rolled into the Kenya National Highways Authority. That would be a monstrous situation, and a violation of Article 50 of the Constitution which guarantees a right to fair trial –

- **to be presumed innocent until the contrary is proved;**
- **to be informed of the charge with sufficient detail to answer it;**
- **to have adequate time and facilities to prepare a defence;**
- **to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.**
- **to a public trial before a court of law established under the Constitution.**
- **to have the trial begin and conclude without unreasonable delay.**

12. This court and indeed the Judiciary is well aware of the efforts made by the Kenya National Highways Authority among other onerous functions, to ensuring adherence to the rules and guidelines on axle load control prescribed under the Traffic Act and other regulations made under that Act, and the Kenya Roads Act 2012 (Chapter 408/Revised Edition 2012 (2007)). This function must however be subject to due process, as prescribed by the Constitution.

13. The judicial function under Articles 23 and 159 of the Constitution as delegated by the people of Kenya to the Judiciary and relevant tribunals is to interpret and declare what the law is. **It is not**, again with profound respect, and we take great exception to the suggestion by the Respondent’s Engineer in paragraphs 16, 17 and 18 of his Replying Affidavit, **to protect and shield any litigant** who is alleged to have violated axle load or other regulations by bypassing or absconding from a weighbridge. All that the litigant seeks in this case, is to establish the legitimacy of the fee collected at the Mtwapa and other Weighbridges in the country. The inquiry into that legitimacy is what is called due process.

14. The functions and important role of the Respondent are well summarized in paragraphs 4, 5 and 6 of the Engineer’s Replying Affidavit. The Kenya National Highways Authority is however not any of the tribunals established under the Constitution for resolution of disputes. The provisions of Regulation 15(3) may have unwittingly and therefore unlawfully constituted an Authority with powers of a **Kangaroo court**, that is to say, an improperly constituted body, a tribunal before which a fair trial is impossible. The provisions of Regulation 15(3) may also be contrary to Article 159 of the Constitution by purporting to confer upon the Kenya National Highways Authority power to collect **fee/fines** without due process by donating to such **fines** the euphemism of a **“fee”**. The provision may therefore be inconsistent with, and be a violation of the right to fair trial guaranteed under Article 50 of the Constitution, and to that extent therefore null and void under Article 2(4) of the Constitution.

15. For those reasons, and pending the hearing and final determination of the Petition herein, I direct

that the Applicant's motor vehicle Registration Number KAH 589R be released forthwith to the Applicant.

Dated, Signed and Delivered in Mombasa this 8th day of May, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Ms. Ombat for Applicant

No Appearance for Respondent

Court Assistant Kaunda