



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 431 OF 2015

ANDREW MUIYA MBITHI.....PETITIONER

VERSUS

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

**DIRECTOR GENERAL, KENYA NATIONAL HIGHWAY AUTHORITY.....2ND
RESPONDENT**

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

RULING

1. The contest herein is over the Petitioner's automobile registered as KCD 368R. It is a FAW Lorry. It is currently detained by the 2nd Respondent, the Kenya National Highway Authority. It has been detained since 30th September 2015. The 2nd Respondent does not dispute the ownership. Neither does the 2nd Respondent dispute the detention.
2. The Petitioner has asked this court to order the release of the automobile pending the hearing of the Petition. The Respondents contest this request which was made via a Notice of Motion filed on 8th October 2015.
3. The Petitioner's case is that the continued detention of the automobile is arbitrary, illegitimate, illegal and without any basis at all. The Petitioner further contends that such detention is contrary to the Constitution and violates the Petitioner's rights as guaranteed under Article 40(1) of the Constitution. The Petitioner adds that it would be appropriate to release the said automobile to prevent it from further wastage.
4. The 2nd Respondent on the other hand states the Petitioner's Application is premature as the detention of the automobile is permitted by the law. Further the 2nd Respondent states that the detention is in public interest as the Petitioner was in breach of the law. The 2nd Respondent, in particular, stresses that the Petitioner absconded a weigh bridge and that the Petitioner's automobile was intercepted on or about 30th September 2015 on the suspicion that it was overloaded contrary to the provisions of Section 55 and 59 of the Traffic Act. This was along Mombasa road. When the Petitioner was instructed to head to the weighbridge the Petitioner's driver feigned or caused an accident. The automobile was driven into a ditch. The 2nd Respondent submits that the Petitioner having failed to pay the weigh bridge absconding fees meant that the automobile could be detained.

5. Arguments were orally advanced before the court on 26th October 2015.

6. Mr. Owalla, for the Respondent, was clear that the Petitioner's automobile was being detained by the 2nd Respondent. He stated that there was no evidence that the automobile by-passed or absconded a weighbridge. He however admits that the automobile was involved in an accident which led to the automobile ultimately not being taken to the weighbridge. He further stated that the evidence on the cause of the accident has never been challenged. He stated further that it was evident through the continued detention of the automobile that the Petitioner's constitutional rights under Articles 31, 40, 47 and 50 were being violated.

7. Mr. Litoro for the 2nd Respondent held a contrary view.

8. He submitted that the automobile was being legally withheld as provided for under the Kenya Roads (Kenya National Highways Authority) Regulations, 2013. In particular Mr. Litoro referred the court to Regulation 15. Counsel further stated that the Petitioner was served through his driver, with an order requiring the Petitioner to pay the amount of USD 2000. That amount is the prescribed fees for absconding a weighbridge.

9. The kernel of the 2nd Respondent's case and arguments was that the Petitioner, through servant, had committed an offence which was punishable through payment of an amount of USD 2000. The 2nd Respondent asserts that the law allows the 2nd Respondent to detain the Petitioner's property with the consequent result that no breach or violation of the Constitution. It is the Petitioner converse contention that the 2nd Respondent is acting contrary to the law and in violation of the Constitution in not affording the Petitioner the right to a fair administrative action or fair trial under Articles 47 and 50 of the Constitution respectively.

10. At this stage of the proceedings and as I consider the intermediary application for conservatory orders, I need not make any specific and definitive findings of fact or of the law. The Petitioner only need establish a prima facie case with a likelihood of success and also demonstrate the prejudice he is likely to suffer in the absence of a conservatory order.

11. The Petitioner also need to show that the Petition will be rendered nugatory in the absence of a conservatory order and further that Constitutional values and principles dictate that the conservatory order be granted.

12. I hasten to add too that the conservatory intermediary order sought by the Petitioner is mandatory in nature and, while this court has the jurisdiction to grant the same, adequate caution ought to be exercised prior to exercising that jurisdiction. The court needs to be clear that it is likely to be vindicated at trial. The circumstances too need be special. It needs to be clear that it is more likely that if a trial was held now and on the basis of the facts before the court, the mandatory order would issue.

13. The 2nd Respondents case is pegged, as already stated on Regulation 15 of the Kenya Roads (Kenya National Highway Authority) Regulations, 2013. The regulation reads as follows

15. Procedure to control overload

(1) Where a vehicle is overloaded or is in contravention of these Regulations, an authorised officer shall undertake overload control measures and enforce these regulations.

(2) Subject to sub-regulation (1), the driver shall follow all the instructions issued by an authorised officer so that road safety and overload control procedures can be adhered to.

(3) Where a vehicle is found to have bypassed or absconded from a 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 in Kenya Shillings,

and subject to the provisions of these Regulations if the vehicle is found to be overloaded, the overloading fee and charging procedures provided in these Regulations shall be instituted in addition to the absconding fee.

(4) Failure to adhere to the instructions of the Authority or the police shall constitute an offence, punishable by detention of the vehicle and cargo at the expense and risk of the registered owner.

(5) If the fee provided in this regulation is not paid within ninety days from the date of imposition, the Authority shall issue a notice of sale by auction of the vehicle and the cargo.

(6) Subject to sub-regulation (5), before the cargo is disposed of, the Authority shall publish a notice in the Gazette and in two newspapers of national circulation within fourteen days after the motor vehicle or trailer has been impounded requiring the owner to claim for the goods failure to which the goods will be disposed off.

(7) The proceeds of any such sale shall cover the charges occasioned by sale and may include, the cost of the advertisement and removal of the vehicle or trailer while the remaining proceeds, if any shall be payable to the registered owner, or where the owner fails to claim within six months of the sale, the proceeds shall be deposited to the Authority.

(8) For security reasons the Authority shall notify the nearest police station within twenty four hours concerning a vehicle detained at the weigh bridge station.

14. It is clear that a finding must be made that an automobile has bypassed or absconded from a weigh bridge prior to the fees of USD 2000 being levied. It is however unclear who makes this finding. It is to be noted that the result of such a finding is penal to the owner of the motor vehicle in the form of a fine or fees of USD 2000. The finding is also a matter of fact to be discerned and determined when all circumstances are taken together. It is not made out of simple speculation. The founder of fact is enjoined to put together all the facts leading to when the automobile is impounded.

15. In the instant case the 2nd Respondent states that the USD 2000 had not been paid hence the continued detention of the automobile. The 2nd Respondent does not however avail any evidence that the Petitioner through servant by-passed or absconded from a weighbridge. Indeed the 2nd Respondent's Replying Affidavit at paragraphs 8 and 9 states as follows:

***“[8] THAT on or about 30th September 2015, the 1st and 2nd Respondents officers intercepted a motor vehicle Registration No. KCD 368R (herein after motor vehicle) along Mombasa- Nairobi Highway on suspicion that the said motor vehicle was overloaded beyond the statutory prescribed loads on its axle contrary to sections 55 and 59 of the Traffic Act and Rule 2(1) of the 12th Schedule to the Traffic Act and rule 10 of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013.*”**

[9] THAT the 2nd Respondent's officers instructed the driver of the said motor vehicle to drive the motor vehicle to the weighbridge to be weighed using the static scale to ensure the motor vehicle was indeed overloaded but he declined and instead deliberately drove the motor vehicle into a ditch in an attempt to stage-manage an accident and avoid getting through the weighbridge as directed.” (emphasis).

16. There is no evidence that the Petitioner either by-passed or absconded from a weighbridge. Even the suspicion that led the 2nd Respondent's officer's to board the automobile were pegged to it being overloaded and not to it having bypassed or absconded from a weighbridge. There is indeed no evidence that the automobile was overloaded, contrary to the provisions of the Traffic Act. The automobile was apparently never taken to a static scale.

17. It was for the 2nd Respondent to avail to me clear evidence of the Petitioner's culpability under Regulation 15. This has not happened.

18. On the basis of the affidavit evidence availed I am not satisfied that the 2nd Respondent's authorized officers had and have any basis to detain the subject automobile.

19. It was alleged during oral arguments that there was suspicion of the Petitioner having bypassed a weighbridge but even the basis of that suspicion was not laid. This could have been easily done through serialization of the facts leading to the point where the automobile was intercepted. The suspicion too could have been lent more credence if the automobile was weighed and an overload verdict returned. As it were none was done. The unbridled decision made by the 2nd Respondent to impound the automobile may have some grounding in law but is not supported by facts as Regulation 15 demands. The two, law and fact, must go hand in hand.

20. In the circumstances, I am satisfied that on the basis of the affidavit evidence, the Petitioner has shown and established a prima facie case with a likelihood of success. The circumstances appeared exceptional especially that the Petitioner's automobile also ended up being involved in a self-involving accident.

21. I note that the Petitioner had admitted to being served with a notice of intended prosecution. No prosecution has however been preferred thus far. In my view nothing stops the Respondents, either through public or private prosecution, from pursuing the Petitioner proving that an offence has been committed and having the court levy the appropriate fine once proof is rendered. The Petitioner will also then be obliged to pay the USD 2000.

22. The upshot is that, I find that the Petitioner is entitled to the orders sought. I will allow the application dated 8th October 2015. It is allowed in terms of prayer number two (2).

23. The costs of the application will abide the outcome of the Petition.

Dated, signed and delivered at Nairobi this 10th day November, 2015

J.L.ONGUTO

JUDGE