



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
PETITION NO.34 OF 2014

*In the Matter of Contravention of Fundamental Rights and Freedoms Enshrined in Articles
25,27,31,47 and 50 of the Constitution of Kenya*

BETWEEN

GERALD KIREMA MUGAMBI.....PETITIONER

AND

THE O.C.S TIMAU POLICE STATION.....1ST RESPONDENT

THE TRAFFIC BASE COMMANDER, MERU.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

[1] Before me is a Constitutional Petition which is expressed to be brought under Articles 25,27,31,47 and 50 of the Constitution of Kenya. In the Petition, the Petitioner seeks the following orders:

1. **A declaration that fundamental rights and freedoms of the Petitioner as enshrined in the Constitution have been breached.**
2. **An order for the release of motor vehicle registration number KAM 985T Isuzu Canter.**
3. **Costs of the Petition.**
4. **Such other or better orders the court deem fit and expedient.**

THE PETITIONERS CASE:

Averments

[2] The Petitioners contended that he is the owner of motor vehicle registration number KAM 985T Isuzu Canter which he uses to transport his merchandise and sometimes hires it out. That on 15th September 2014, the said motor vehicle was lawfully being driven along Meru-Nanyuki road by one Simon Gitonga Ngeera when it was seized by the police and towed to Timau police station ostensibly for the offence of obstruction. At the time of filing this Petition, the said vehicle was still detained (or retained) at the aforesaid station and yet there is no charge that has been preferred against the driver whatsoever or an allegation that the motor vehicle was used in the commission of a crime for which a court of law can order seizure of the vehicle. Despite all efforts, the Respondents have failed to release the said vehicle, hence, this Petition. The Petitioner further contended that the seizure of his vehicle in the manner described is in contravention of the Rights of the Petitioner especially but not limited to Article

31 (b) of the Constitution.

Submissions

[3] In his submissions, the Petitioner argued that the motor vehicle herein is in custody of the police illegally because he had supplied the particulars of the driver to the police as required under section 110 of the Traffic Act. Second, the Petitioner stated that he and the driver had already been charged. Therefore, the action by the state is and must be declared to be unconstitutional, unlawful, wrongful and high handed to pave way for a claim of damages.

THE RESPONDENTS CASE

Averments

[4] The 2nd Respondent filed a Replying Affidavit on 17th November 2014 in opposition to the instant Petition. It was the Respondents case that the Petitioner's motor vehicle had broken down in the middle of the road where it was being repaired and that the driver had not taken any precautions as required. The Respondents further contended that on 15th September 2014 at about 7:40PM while the vehicle was still at the road 10 hours after it had broken down, two motor vehicles, a pickup from Nanyuki direction and a Nissan *matatu* from Meru direction collided on the outer lane next to the broken down stationery canter as a result of which 4 people died on the spot. The scene was visited by police officers who found that the cause of the accident was the broken down canter (Petitioner's vehicle). On this basis, the three vehicles were towed to Timau police station whereupon they were inspected by the inspector of motor vehicles and the Petitioner's vehicle was found to be defective and un-roadworthy by the inspector of motor vehicles. He further contended that the registered owner of the motor vehicle (the Petitioner) visited Meru Police Station on 25th September 2014 when investigations officer served him with P32 form which requires the owner of motor vehicle to produce the driver within 7 days but that the Petitioner never turned back to the station as required; has neither produced nor explained his inability to trace the driver. It was further deposed that the failure to produce the driver as ordered led to confiscation of the vehicle. Consequently, the Respondents asserted that they cannot release the motor vehicle unless the two (Petitioner and driver) appear in person at the police station or they get arrested and charged for the accident.

Submissions

[5] The Respondents termed the Petitioner's allegations that his rights were violated by the police in detaining his motor vehicle to be untrue as the Petitioner had allowed his defective vehicle to be used on the roads thus causing the death of four innocent Kenyans. Again, it was submitted for the Respondents that that they did not violate any of the Petitioner's fundamental rights as the Petitioner and his driver were charged vide Meru Traffic Case No. 2583 and Meru Traffic Case No. 1571 of 2014 respectively, where they were fined Kshs 100,000. They were, therefore, guilty of a traffic offence. In those circumstances, the Petitioner violated the law which he ought to have adhered to and also rights of innocent citizens, thus he cannot allege violation of any of his fundamental rights. They emphasized the fact that innocent people died as a result of the negligent act and omissions of the Petitioner and his driver. According to the Respondents, the vehicle was legally detained since his driver had flouted traffic laws and he could not be left to walk scot free. They urged the court to find that there was no violation of the Petitioner's rights as alleged and dismiss the Petition with costs to the Respondents.

DETERMINATION

[6] I see three significant issues for determination:

- (1) Whether the Petitioner's Fundamental Rights and Freedoms have been Violated or Breached**
- (2) Whether the Petitioner's motor vehicle registration number KAM 985t**

should be released; and

(3) Who pays costs?

Alleged violation of right and freedom

[7] The big question that the court seeks to answer in such proceedings is:

(1) Whether the Petitioner's Fundamental Rights and Freedoms have been Violated or Breached

And in determining this broad issue, the court cannot avoid to be told the particular acts which constitute a violation. Hence, courts have insisted that the acts which constitute the alleged violation of a right or freedom must be set out in sheer and concise clarity. I wish to first contrast these averments by the Petitioner that: on 15th September 2014 his motor vehicle was lawfully being driven along Meru-Nanyuki road when it was seized by police and towed to Timau Police Station ostensibly for the offence of obstruction and that at the time of filing this Petition the same was still being detained and that there had been no charge preferred against the preferred driver whatsoever: with his submissions that the driver had since been charged, convicted and sentenced for a traffic offence. I wish also to fathom the Respondent's contention that the Petitioner's motor vehicle had broken down in the middle of the road where it was being repaired and that the driver had not taken any precautions despite the vehicle having broken down in the middle of the road. The Respondents further contended that on 15th September 2014 at about 7:40PM while the vehicle was still at the road 10 hours after it had broken down, two motor vehicles, a pickup from Nanyuki direction and a Nissan *matatu* from Meru direction collided on the outer lane next to the broken down stationery canter as a result of which 4 people died on the spot. All these allegations by the Respondents remained uncontroverted. Given these facts, the Petitioner's stated facts are not entirely correct.

[8] Besides the above, despite broad allegations by the Petitioner that his rights were violated, he did not specify which rights were violated or breached or show the manner in which the said rights were violated. The Petition left allegations therein at very high level of generalization- which will not suffice the threshold of the law in constitutional petitions. A scan through the Petition will bear witness. I stated this earlier, and it bears repeating that a Petitioner who sets out to succeed in a Constitutional Petition must state with reasonable precision the rights being violated and the manner in which they have been violated. Otherwise, how else will a court of law find a violation and vindicate the rights of the Petitioner? I do not think the principle in the case of **Anarita Karimi Njeru vs. AG (1979) KLR 54** and as it has been applied subsequently in cases such as **High Court Miscellaneous Application No.666 of 1990, Kenneth Stanley Njindo Matiba vs. the Attorney – General (unreported)** and others on this threshold has dissipated or worn out. I am alive to the fact these cases were decided prior to the enactment of the Constitution of Kenya, 2010. But, more recent cases have applied the test; for instance, the case of **Mumo Matemu vs. Trusted Society Of Human Rights Alliance & 5 Others (2013) eKLR**, the Court of Appeal held inter alia that the Petition as brought before the High Court referred to Articles 1,2,3,4,10,19 20 and 73 of the Constitution in its title but provided little or no particulars as to the allegations and the manner of the alleged infringements and hence did not meet the principle in Anarita's case (supra) which requires that Constitutional Petitions to plead with reasonable precision the rights which are alleged to be, and the manner they are infringed. The principle therein is therefore good jurisprudence even under the Constitution of Kenya, 2010. That is the applicable test.

[9] Consequently, applying this test to the circumstances of this case, the Petitioner has failed to demonstrate the Constitutional rights that were violated and the manner in which they were violated as required by law.

[10] What about the release of Motor Vehicle registration KAM 958T? From the material before the court, it is apparent that the Respondents detained the Petitioner's motor vehicle because he had not honoured P32 form which required him to produce the driver within seven (7) days lest his vehicle should be confiscated. It also emerged that after the filing of this petition; the Petitioner and his driver were

charged in Meru Traffic Case No.2583 of 2014 and Meru Traffic Case No. 1571 of 2014 for the offences of allowing a defective motor vehicle to be on the road and obstruction respectively and were fined Kshs 100,000 each. These subsequent events completely changed the whole situation and there will be no justification whatsoever to continue detaining the Petitioner's motor vehicle. I have not also been shown any seizure orders which would lawfully hold the vehicle in the police station. Consequently, I order and direct the Respondents to forthwith release the Petitioner's motor vehicle registration number KAM 958T.

Who pays costs?

[11] Costs follow the event. The term event is a technical one and connotes that a party has been successful party in his litigation and should be recompensed for expenses incurred in the litigation. Such conclusion is drawn from the entire litigation and circumstances of the case. The court also takes in to account the conduct of parties in awarding or refusing to award costs. From the circumstances and the nature of this Petition, the most desirable order is that each party bears its own costs. It is so ordered.

Dated, signed and delivered in court at Meru this 3rd December 2015

F. GIKONYO

JUDGE

In the presence of:

Mutwiri for petitioner

Attorney General for the Respondents

F. GIKONYO

JUDGE