



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 223 OF 2014

BETWEEN

WAITHERA KAMAUPETITIONER

AND

HON ATTORNEY GENERAL 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

POLICE COMMANDANT –

NAIROBI COUNTY 3RD RESPONDENT

THE OCS RUNDA POLICE STATION 4TH RESPONDENT

THE DIRECTOR OF

PUBLIC PROSECUTIONS 5TH RESPONDENT

JUDGMENT

1. By a petition dated 12th May 2014, the petitioner moved the court for the following reliefs.
 1. A declaration that the seizure and detention of Motor vehicle KBA 559G Isuzu Lorry is in derogation of the petitioner's right to property.
 2. A declaration that the seizure of the subject motor vehicle is a blunt violation of the petitioner's right to fair administration action, the right to due process and protection of the law.
 3. A declaration that the seizure of the petitioner's subject motor vehicle is a deprivation of her right to earn a living.
 4. An order that the respondent do compensate the petitioner for the violation of her rights.
 5. An order that the respondents do make good to the petitioner not less than Kshs,40,000/= per day from 26th April 2014 till the date of final release of the motor vehicle being special loss occasioned by the illegal detention thereof.
 6. An order that the petitioner's motor vehicle KBA 559G Isuzu Lorry be released to the petitioner

forthwith and unconditional.

7. *That the Honourable Court do make such further or other orders as will restore, safeguard and protect the petitioner's right to protection of the law and sanctity of the property.*
 8. *Costs of this petition be met by the respondents.*
2. It is not in dispute that the petitioner is the registered proprietor of an Isuzu lorry registration KBA 559G. On 26th April 2014, while being driven by her son, Stephen Kihonge, it was impounded and detained at Runda Police Station. When the petitioner filed this petition, he also filed an interlocutory application seeking release of the vehicle. On 16th May 2014, when the parties appeared before Lenaola J., they agreed that the lorry be released to the petitioner subject to the petitioner assisting the police with investigation.
 3. The parties agreed to call oral evidence to determine whether the vehicle was legally impounded and whether the petitioner was entitled to damages. Since it was the respondents' burden to justify the impounding, it called the Investigating Officer, Corporal Patrick Wanyugi (DW 1) testified first.
 4. DW 1 testified that on 16th November 2013, Shadrack Koome and Kevin Mwiti hired the vehicle from Bomet to Dandora to transport 120 bags of beans valued at Ksh720,000/= Upon reaching Narok, Shadrack opted to alight leaving Kevin, the driver and turnboy. At Ruiru/Ruaraka bypass, they stopped so that Kevin could relieve himself. When he came back, the lorry had left with the beans. He made inquiries nearby and was told that the lorry had gone towards Ruiru. He went to a police roadblock and was advised to report the matter at Runda Police Station. Upon this incident being reported, investigations commenced and some people were arrested and taken to **Kiambu Court – Criminal Case No, 2861/2013**. DW 1 stated that some of the people arrested were caught with the beans but the driver and conductor remained at large. As a result the registration number of the lorry was circulated.
 5. On 26th April 2014, the lorry was intercepted along Limuru Road by GSU officers guarding the Canadian Embassy after being informed by the complainant. DW 1 stated that owner of the lorry, the petitioner, appeared at the police station on 8th May 2014. He requested her to bring the ownership documents and the driver who was driving the lorry on 16th November 2013 or his particulars. He stated that she never came back until he was attended court when the petition was filed.
 6. The petitioner and her son also testified. The petitioner recalled that between 15th and 16th November 2013, the lorry was carrying a consignment of wheat from Kijabe Limited to Unga Limited in Nairobi. She produced a receipt from Unga Limited confirming that on 16th November 2013, it delivered a consignment of wheat. She denied that the lorry was ever in Bomet carrying beans and that it was driven by anyone else other than her son.
 7. She further testified that her son, Stephen Kihonge, called her on 26th April 2014 to inform her that her lorry had been impounded and he was under arrest at Runda Police Station. He requested her to come on Monday as 26th was a Saturday. On Monday, the Investigation Officer was not there but she saw the OCS and gave him the documents to prove ownership of the lorry. When she finally got to see the Investigating officer, he refused to believe her. He did not release the lorry. The petitioner testified that as a result of the impounding of the lorry she lost business amounting to about Kshs. 40,000 per day which she used to earn and which she claimed as loss of business for the time the lorry was impounded.
 8. Stephen Kihonge testified that he has been the sole driver of the lorry for the last three years and he has never given it to anyone else. He testified that on 14th November 2013, he was at Kijabe Limited which is at Ndabibi, Naivasha loading wheat for delivery to Unga Limited, Nairobi. He confirmed that the weighbridge ticket issued by Unga Limited shows that he was delivering wheat on the date the lorry is said to have been ferrying beans from Bomet. He recalled that the lorry was

intercepted on 26th April 2014 at about 2.00 pm. He was informed that it was required at the police station as it had been involved in a theft. He confirmed that he called his mother and requested her to come with the details of the vehicle. He states that he went to the police station about five times yet he has not been charged on any issue regarding the theft. He testified that the lorry was used to conduct business and upon every assignment he prepared a delivery note which was signed by the customer and which showed how much was paid. He stated that he was in custody of the original delivery note book.

9. The petitioner's case is that her right to property protected under **Article 40** of the Constitution was violated by the action taken by the police. The petitioner contends that the police had to seek court sanction to impound the lorry hence such failure was a violation of the Constitution and the law. Counsel for the petitioner submitted that there was no evidence pointing to the petitioner or her son having been involved in the theft of beans from Bomet.
10. The issue for determination is whether the police had reasonable grounds to impound the lorry and hold it until the date it was released by the court order. I must state from the outset that the police are entitled to investigate any legitimate complaint lodged by any person. It is not in the province of the court to determine the veracity of the claims by the third party complainant, who has not been heard before this court, or the guilt or otherwise of any person in respect of these offences for which they are charged or which are being investigated.
11. DW 1 explained how the lorry came to be intercepted and impounded. I have no reason to believe that there were no grounds for intercepting the vehicle and impounding it upon suspicion that it was involved in an offence which was being investigated. The reason I do not infer malice or bad faith is that the lorry was intercepted by other officers other than the investigating officer. Its registration had been circulated and there is no evidence that the officer knew the petitioner or her son prior to the incident. I therefore do not find the explanation given unreasonable or capricious. That it may turn out to be untrue, is a matter for the investigator to conclude after examining all the evidence. In determining whether there is reasonable cause, the court looks at the evidence that was available at the time the lorry was impounded and not at the subsequent evidence that came to light.
12. **Section 26** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* ("the *CPC*") provides as follows;

26(1) A police officer, or other person authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain—

- a. *any aircraft, vessel or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found; or*
- b. *any aircraft, vessel or vehicle which there is reason to suspect has been used or employed in the commission or to facilitate the commission of an offence under the provisions of Chapters XXVI, XXVIII and XXIX of the Penal Code ; or*
- c. *any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.*

(2) No person shall be entitled to damages or compensation for loss or damage suffered by him in respect of the detention under this section of an aircraft, vessel or vehicle.

(3) For the purposes of this section, "aircraft", "vessel" and "vehicle", respectively, include everything contained in, being on or attached to an aircraft, vessel or vehicle, as the case may be, which, in the opinion of the court, forms part of the equipment of the aircraft, vessel or vehicle.

13. **Section 26** of the *CPC* empowers the police to detain a motor vehicle which is suspected of being

used in the commission of an offence. The question then is whether the limitation to the right under **Article 40** of the Constitution enacted in **section 26** of the **CPC** is consistent with **Article 24** of the Constitution. **Article 24** provides that such a limitation must be by law and is only valid to the extent that it is reasonable and justifiable in an open and democratic society based in human dignity, equality and freedom and taking into account relevant factor including the following; the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation and the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.

14. The limitation is grounded on the public need for the police to investigate crime to protect the life and property of other persons. There is no requirement to obtain a court order to sanction the impounding as long as there is reasonable suspicion of commission of an offence. When exercising their lawful authority the police are immunized from a claim for damages under **section 26(2)** of the **CPC**. In the absence of bad faith or malice, I do not think a claim for damages can be made against the respondents and such a claim is precluded by **section 26(2)** of the **Criminal Procedure Code** I have cited above.

15. I therefore find and hold that the impounding of vehicle based on reasonable suspicion that it has been involved in the commission of an offence is a reasonable limitation on the right to property based on the law. The remedy contemplated and which has already been issued is for the court to order release of such a vehicle that has been detained.

16. For the reasons I have outlined, I dismiss the petition. However, in light of the fact that the petitioner had to file suit to have the lorry released to her, I award her costs of the petition.

SIGNED BY

D.S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 9th June 2014.

MUMBI NGUGI

JUDGE

Mr Njuguna instructed by Kiarie Njuguna and Company Advocates for the petitioner.

Ms Nyamweya, Prosecution Counsel, instructed by the Office of the Director of Public Prosecution for the 2nd, 3rd, 4th and 5th respondents.