Gichana v Attorney General & 2 others (Civil Appeal 72 of 2019)
[2024] KECA 1680 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KECA 1680 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 72 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 22, 2024

BETWEEN

JAPHET OGAMBA GICHANA ..... APPELLANT

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

BASE COMMANDER KERIKA POLICE STATION ..... 2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE ..... 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nyamira (C. B. Nagillah, J.) dated 11th December 2017 in Petition No. 4 of 2016)

JUDGMENT

1. The appellant filed a petition in the High Court dated 27th November 2015 seeking the following orders:
    i. An order that motor vehicle registration number KAQ 215 M, Toyota Shark be released to the appellant.
    ii. A declaration that the 2nd and 3rd respondents breached the appellant's constitutional rights to use and enjoy said motor vehicle.
    iii. Adequate compensation occasioned by the contravention of the petitioner's right to property.
    iv. Costs.
2. The background to his claim was that on 20th September 2015 his motor vehicle registration KAQ 215M Toyota Shark, was parked on the verge of the road within Metamaywa Shopping Centre of Nyamira County, as it had broken down, and was being attended to. Police who were manning a

roadblock along the nearby highway approached and demanded for the removal of the vehicle from its position. Shortly thereafter, police officers from Keroka Police Traffic Base pounced on it and towed it away to the Police Station. Apparently, no charges were preferred, neither was the reason for impounding the vehicle made known to him; nor was he served with notice to attend court; and that despite making several visits to the 1st respondent, he refused to release the motor vehicle or charge him.

3. The appellant lamented that as a consequence of the illegal detention he was deprived of the enjoyment and use of the subject motor vehicle, and the said detention constituted a fundamental breach of his constitutional rights.

4. The base commander, Charles Kases, the 3rd respondent filed a replying affidavit sworn 16th March, 2016 contending that when the vehicle was stopped by traffic police officers on patrol along the Keroka-Sotik road, the driver, who was the petitioner's employee fled; and, upon inspection, it became apparent that the vehicle, a passenger service vehicle, had no inspection sticker as required by law. Consequently, the police were compelled to obtain break-down services and tow the abandoned motor vehicle for inspection to Keroka Police Station yard. The police thus impounded the vehicle; made an entry to the occurrence book No. 2/20/19/2015, on 20th September, 2015 at around 15. 00hrs; and detained the said vehicle for failing to have an inspection sticker, and also failing to maintain the motor vehicle part.

5. On 6th October 2015 at 1220hrs Southern Nyanza Motor Vehicle Inspectors based at Kisii, carried out an inspection on the said motor vehicle; and by an inspection report VT A No.784747, the motor vehicle was found un-roadworthy; and a prohibition order No. 955834 of use of defective vehicle was issued. Since detention of the said motor vehicle neither the driver nor the owner of the motor vehicle showed up to the police station to be informed of the charges and reasons for detention of the motor vehicle.

6. The Attorney General, the 1st respondent, on behalf of the other two respondents filed a replying affidavit, but failed to attend court despite being served, and the matter proceeded ex parte on 21st March 2017.

7. The trial court on perusal of the petition and response thereto formulated 3 issues for determination;

    i. Whether the detention of motor vehicle KAQ 215 M was lawful.

    ii. Whether the appellant suffered any damages and if so, what was the quantum.

    iii. Who is to bear costs.

8. The trial Judge noted that the main petition did not cite the constitutional provisions it relied on.

9. With regards to the replying affidavit by the 3rd respondent, it is admitted that the motor vehicle in question was impounded and detained by police on 20th February, 2015 and the reasons thereto were:

    i. Contravention of insurance.

    ii. Being without an inspection sticker.

    iii. Failure to maintain the motor vehicle parts.

10. The respondent avers that the driver of said motor vehicle disappeared upon being flagged down by police on patrol on the material day and that the police towed the abandoned motor vehicle to Keroka Police station for inspection where it was at the time the petition had been filed. On 6th October 2015 the motor vehicle was inspected and found un-roadworthy, a report made and consequently

prohibition No.955834 was issued. The respondent contends that since the detention of the said motor vehicle neither the driver nor the owner visited the police station.

11. *Vide* a judgment dated 11th December 2017, the trial court having carefully considered the parties' pleadings, testimony, and evidence on record held that the detention was lawful; that it was the failure of the driver and/or the owner to present themselves at the police station for fear of being charged with a traffic offence that caused the continued detention of the motor vehicle in question.

12. While recognizing that the appellant had suffered damages for non- use of the motor vehicle, the learned judge held that this was a self-inflicted problem caused by the appellant in permitting the use of an un-roadworthy vehicle to ply the road, thus leading to its detention. The trial judge observed that although the appellant asked for Kshs.2,000,000/-, the sum of Kshs.800,000/- would have been more appropriate; and that as to loss of profit, it behooved the appellant to mitigate the said loss which could not accrue *ad infinitum*. The court also pointed out that the subject motor vehicle had been in the past the subject of similar litigation in case No. 213 of 2009 and seemed to be a pattern created by the petitioner.

13. The appellant aggrieved by the decision of the trial court filed his memorandum of appeal challenging the judgment of the Superior Court on 7 grounds of appeal as follows:

    i. The learned trial Judge erred in not holding that the appellant had set out with reasonable degree of precision the infringed rights under the Bill of Rights guaranteed by the constitution.

    ii. The learned judge misdirected himself fundamentally in dismissing the petition for want of relevant constitutional provisions.

    iii. The learned judge failed to take into account the provisions of Article 159(2) (d) of the *Constitution* of Kenya 2010 which mandates the court to administer justice without due regard to procedural technicalities.

    iv. The learned judge erred in law and misdirected himself fundamentally in failing to address specific constitutional provisions submitted to the court at the hearing.

    v. The learned Judge erred in law and misdirected himself fundamentally in not holding that the police are not entitled to impound the motor vehicle arbitrarily or for unreasonable period and/ or with improper motive.

    vi. The learned judge erred in law in dismissing the petition with cost on the same breath partially allowing the petition.

    vii. The learned judge erred in law and in fact in making a find against the weight of evidence on record.

    The appellant thus prays that the appeal be allowed, the petition be allowed with the costs of this appeal and in the High Court awarded to him.

14. This being a first appeal, as has been reiterated in several decisions of this Court, it is this Court's primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per rule 31(1)(a) of the *Court of Appeal Rules.* This duty has been reiterated in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.

15. The main issues in this Court's view are threefold, as determined by the trial judge:

    i. Was the detention of the motor vehicle lawful?

ii. Did the appellant suffer damages and if so, the quantum thereof.

iii. Costs.

16. On the first ground, the appellant contends that he had set out with reasonable degree of precision the infringed rights under the Bill of Rights and proceeds to rehash the situation giving rise to the petition, as set out in the pleadings. The appellant argues that although the petition did not cite the provisions of the constitution said to have been violated, the same was referred to in the written submissions as well as during the highlighting of submissions, and the failure was not fatal.

17. In urging us to defer to substance over form, the petitioner refers us to the case of *Trusted Society of Human Rights Alliance v Attorney General and 2 Others* [2012] eKLR which reaffirmed 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 started 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 identifying the specific constitutional provisions which have alleged to have been violated. The test is a substantive one and inquires whether the complaints are against the respondents in a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the of claims being made so that they can adequately prepare their case."

18. Drawing from provisions under section 105(1) of the *Traffic Act* regarding inspection vehicles and section 116(1) of the *Traffic Act* which addresses the required statutory notice to attend court, the appellant argues that there was absolutely no legitimate reason to continue to hold the motor vehicle endlessly without taking any steps to show the intention to prosecute or have the driver or the appellant appear before court to answer to any charges. The detention of the vehicle is thus described as arbitrary and a violation to his right to property.

19. On the issue of loss suffered, the appellant argues that the court erred in dismissing the petition and with costs to the appellant, yet assessing costs at Kshs.800,000/=, in essence partially allowing the petition.

20. The respondents did not file any submissions.

21. The first issue of concern springs from the remarks the learned Judge made in the analysis where he stated that:

> "The main petition on the face of it does not cite the constitutional provisions that it relies on. All petitions must cite the articles of the constitution on which they intend to rely on, the breach of which they claim reparations. All the cases cited as authorities cited some sort

of provisions of the constitutions they wish to rely on. The petitioner must labour within his pleadings pleaded."

22. On the issue of failure of the appellant to cite the relevant provisions alleged to have been violated, we are keenly aware of the position set out in *Anarita Karimi Njeru v Republic* (1976- 1980) KLR 1272 (the Anarita Karimi Case) guiding courts to be vigilant in examining constitutional petitions with a view to ensuring that they are drafted with a reasonable degree of precision in the following terms:

> " We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

23. Rule 4(1) of the *Constitution* of Kenya *(Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (the "Mutunga Rules") provides that:

> Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

24. Rule 10 of the *Mutunga Rules* governs the form that a constitution should take. Rule 10(2) of the same Rules specifically provide as follows:

The petition shall disclose the following:

i. the petitioner's name and address;

ii. the facts relied upon;

iii. the constitutional provision violated;

iv. the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

v. details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

vi. the petition shall be signed by the petitioner or the advocate of the petitioner; and

vii. the relief sought by the petitioner.

25. Our perusal of the petition clearly reveals that the threshold set out in Rule 10 was sufficiently pleaded in terms of the nature of injury suffered, the details thereto, and the relief sought. Would the fact that the petitioner failed to specify the article in the constitution addressing the purported violation, render the petition incompetent? We think that a purposive interpretation of the term constitutional provision as cited in the Anarita Karimi case, and reiterated in the Mutunga rules refers to the actual fundamental right as opposed to citing the numerical order of the article in the constitution. In *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* (2013) eKLR (the Mumo Matemu Case), this Court observed that the precision requirement in the Anarita Karimi Case is not to be mistaken for exactitude, rather, its application is proper definition of the issues in a constitutional petition, so that the Court can apply its mind to the real issues at hand, thereby saving on judicial resources. We thus hold that the appellant pleaded his case with a high degree of specificity as to the

nature of violation, and the learned judge did not apply the correct principles of law in his finding on this limb.

26. We also observe that courts have also been keen in paying fidelity to the doctrine of constitutional avoidance, that where a dispute can be determined through another forum without necessarily raising a constitutional issue, this alternative forum ought to be pursued. Obviously constitutional litigation is not open for every claim which may be properly dealt with under existing mechanisms for legal redress [See for instance this court's decisions in *Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority and Another* (2016) eKLR & *National Assembly v James Njenga Karume* [1992] eKLR]. Having considered the arguments presented, we hold the view that it was possible to pursue this petition, and decide it without reference to a constitutional petition. Our position is informed by the fact that the nature of the damage and the acts that caused the damage, are very capable of being specifically pleaded and proved. The nature of the damage and the acts that caused the damage were also very capable of being specifically pleaded and proved. In addition, these damages were capable of being assessed with certainty, indeed, if the vehicle was being used for business, daily returns and/or amount/ and or profit made was easily available; and could be substantiated by the appellant. We hold that the *Civil Procedure Act* is a statute which provides for remedies for claims such as that of the appellant.

27. On the issue of whether the detention was lawful, it is not disputed that the subject motor vehicle was parked on the 'verge' of the road. The question this Court must answer is whether the detention was lawful. The appellant submits that there was no difficulty in the police driving the motor vehicle to the station. We note that the appellant did not file a supplementary affidavit to help him contest what the respondent deposed.

28. It is our view that the appellant should have shown effort that he had visited the station and the vehicle was not released, especially if the vehicle was used for business purposes, to mitigate any losses. Right now, as it stands it is a 'he said' situation. The appellant also denies the prohibition report; it would have helped his case if he had, by way of a supplementary affidavit, introduced the current in insurance, as well as the inspection report in order to nullify the prohibition report. Little wonder then, that the trial judge drew a reasonable inference that the only reason the appellant and his driver failed to go to the police station was informed by a fear of being charged for a traffic offence.

29. On the issue of damages, as the appellate court, given our finding, it is our considered view that we do not need to address the question of damages. However, for purposes of clarity it is this Court's view that the assessment of Kshs.800,000/= by the learned Judge was a speculative obiter that if the claim had been proved, the quantum of damages the court would have awarded would have been Kshs.800,000/-. We find that this was not an award pronounced so as to render the claim partially successful.

30. The upshot is that the appeal lacks merit, and is dismissed. This being a petition begged to the bill of rights, we hold that each party shall bear its own costs.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF NOVEMBER, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR