



Patel & 7 others v Chief Magistrate, Mavoko Criminal Magistrates Court & 13 others; National Transport & Safety Authority (Interested Party) (Constitutional Petition E018 of 2021) [2024] KEHC 521 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEHC 521 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CONSTITUTIONAL PETITION E018 OF 2021
FROO OLEL, J
JANUARY 31, 2024**

BETWEEN

**SHIVAM PATEL 1ST PETITIONER
FRANCIS MAINA 2ND PETITIONER
CHRISTOPHER MWELESA 3RD PETITIONER
JONATHAN MULINGE MWANGANGI 4TH PETITIONER
SIMON MUSYIMI NZIOKA 5TH PETITIONER
STEPHEN MWANGANGI NGUGI 6TH PETITIONER
PETER KARARI MUTITIKA 7TH PETITIONER
HARSHIV AUTOSPARES HARDWARE & SUPPLIES LIMITED 8TH
PETITIONER**

AND

**THE CHIEF MAGISTRATE, MAVOKO CRIMINAL MAGISTRATES
COURT 1ST RESPONDENT
KENYA NATIONAL HIGHWAYS AUTHORITY 2ND RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT
OCS, SIMBA CEMENT POLICE POST 4TH RESPONDENT
INSPECTOR GENERAL OF POLICE NATIONAL POLICE
SERVICE 5TH RESPONDENT
THE HON ATTORNEY GENERAL 6TH RESPONDENT
SAMUEL MAKUNA 7TH RESPONDENT**



ESTHER NGATI	8 TH RESPONDENT
SAUMU HAMISI	9 TH RESPONDENT
MERCY MBAKA	10 TH RESPONDENT
JONATHAN KANGOGO	11 TH RESPONDENT
JANET NYAMBU	12 TH RESPONDENT
LEKEN MICHAEL	13 TH RESPONDENT
LILIAN JAMBA	14 TH RESPONDENT

AND

NATIONAL TRANSPORT & SAFETY AUTHORITY INTERESTED PARTY

JUDGMENT

A. Introduction

1. The petition before court for determination is the one date 6th October, 2021. It is filed by the petitioners seeking various orders relating to the alleged infringement and violation of their rights by the Respondents and they seek to quash their criminal prosecution before Mavoko Law Courts and compensation on account of loss suffered. Specifically, the petitioners did pray that this court be pleased to issue the following prayers
 - a. A Declaration be and is hereby made that the Petitioners' fundamental rights of protection of its right to property, fair administrative action, reasonable cash bail and fair hearing under the Constitution have been violated, infringed and contravened by the Respondents herein.]
 - b. A Declaration be and is hereby made that the impounding of Motor Vehicles Registration Number KAX 206 Z and KCC 377 G by the Respondents employees, servant or agents is illegal and has infringed on the petitioner's constitutional rights.
 - c. A Declaration be and is hereby issued that the cash bail terms as issued by the 1st Respondent are unconstitutional and the same amounts to violation of Article 49(2) of the constitution of Kenya, 2010.
 - d. A Decalratory order do issue that the charges preferred against the Petitioner's herein Shivam Patel, Francis Maina, Cristopher Mwelesa, Simon Musyimi Nzioka, Stephen Mwangagi Ngugi And Peter Kakari Mutitika are defective and ought to be struck out.
 - e. An Order Certiorari to remove into this Honorable Court for purposes of quashing the criminal prosecution of the Petitioners in Mavoko MTCR/E823/2021, Mavoko MTCR/E824/2021, Mavoko MTCR/E825/2021, Mavoko MTCR/E826/2021 Mavoko MTCR/E120/2021, Mavoko MTCR/E121/2021, Mavoko MTCR/E122/2021, Mavoko MTCR/E123/2021, Mavoko MTCR/E123/2021, Mavoko MTCR/E124/2021 and Mavoko MTCR/E125/2021
 - f. An Order Of Prohibition be and is hereby issued prohibiting the Respondents from proceeding with the prosecution of the Petitioners in Mavoko MTCR/E823/2021, Mavoko MTCR/E824/2021, Mavoko MTCR/E825/2021, Mavoko MTCR/E826/2021, Mavoko



MTCR/E120/2021, Mavoko MTCR/E121/2021, Mavoko MTCR/E122/2021, Mavoko MTCR/E123/2021, Mavoko MTCR/E123/2021, Mavoko MTCR/E124/2021 and Mavoko MTCR/E125/2021

- g. In alternative to prayer 6 and 7 above, this Honorable Court be pleased to Order that Mavoko Magistrate's Court Criminal Case No. Mavoko MTCR/E823/2021, Mavoko MTCR/E824/2021, Mavoko MTCR/E825/2021, Mavoko MTCR/E826/2021, Mavoko MTCR/E120/2021, Mavoko MTCR/E121/2021, Mavoko MTCR/E122/2021, Mavoko MTCR/E123/2021, Mavoko MTCR/E123/2021, Mavoko MTCR/E124/2021 and Mavoko MTCR/E125/2021 be transferred to Oloitoktok Laws Courts.
- h. An Order of Mandamus directed at the Respondents and anyone acting on their behalf that the Motor Vehicles Registration Numbers KAX 206 Z and KCC 377 G impounded and kept by the Respondents, their agents be released forthwith to the Petitioner together with their consignment.
- i. This Honourable Court do call for and examine the record in Mavoko MTCR/E823/2021, Mavoko MTCR/E824/2021, Mavoko MTCR/E825/2021, Mavoko MTCR/E826/2021, Mavoko MTCR/E120/2021, Mavoko MTCR/E121/2021, Mavoko MTCR/E122/2021, Mavoko MTCR/E123/2021, Mavoko MTCR/E123/2021, Mavoko MTCR/E124/2021 and Mavoko MTCR/E125/2021 and revise, review and aside the Ruling on bail and subsequent orders issued on 12th February, 2021 and 28th September, 2021.
- j. General Damages for wrongful seizure and/or impound of Motor Vehicles Numbers KAX 206 Z and KCC 377 G.
- k. Special Damages of Kshs. 100,000 for loss of business for every day the motor vehicles remain impounded by the Respondents.
- l. An Order for exemplary and punitive damages be and is hereby issued against the 1st to 6th Respondents jointly and severally, in their individual personal and official capacities, on account of their gross violation of the Petitioners' fundamental freedoms and rights as enumerated in the Petitioners.
- m. The 1st to 14th Respondents be and are hereby directed bear the costs of this Petition.
- n. Such other orders that this Honorable Court may deem expedient to meet the ends of justice.

B. The Petition

- 2. The 1st petitioner is the managing director of the 8th petitioner's company and the employer of the 2nd – 7th petitioners who are his drivers/who drive the 8th petitioner's company's lorries. The 1st to 5th Respondents are various public bodies, offices established by law while the 8th – 14th Respondents are public officers employed by the 2nd Respondent.
- 3. The petitioner deponed that at all material times, they were the Registered owner of motor vehicles KAX 206z, KCJ 024J, KBU 378Z, KBY 255N, KAX 213Z, KBH 112V, KBV 523E and KCC 377G and were licensed by the interested party to carry out transportation business, which business was transportation of limestone along private roads located within the factory premises of Simba Cement Company Limited. On 19th December 2020, the 2nd Respondent's officers accompanied by the officers of the 4th Respondent flagged down the 8th Respondent's various motor vehicles which were within Simba Cement private property and upon refusal of the 2nd – 7th petitioners to meet their demand,



they were charged with various offences at Oloitoktok Law Courts, where the said lorry drivers denied the charges levied and were released on bond.

4. On 5th February 2021, a similar incident occurred when the 2nd Respondent's agents, accompanied by the 4th Respondent's officers stormed the premises of Simba Cement Limited and proceeded to issue tickets for overloading in respect of the 8th petitioner's motor vehicle registration Number. KBH 112, KBV 211R, KBV 523E without weighing the said motor vehicles. Later they purported that motor vehicle KBV 211R was carrying an excess of 12,000kg which was preposterous and misleading. Further the said motor vehicle could not have damaged roads and/or endangered the lives of motorists and other road users for the reasons that the said motor vehicles were impounded within the compound of Simba Cement Limited, which was located 35km away from Emali- Oloitoktok highway or any public road for that matter.
5. Subsequent to the issuances of the trumped up tickets the 1st, 4th, 5th, 6th and 7th petitioners were arraigned in Mavoko Law Courts and charged in Mavoko MTCR/E120/2021, Mavoko MTCR/E121/2021, Mavoko MTCR/E122/2021, Mavoko MTCR/E123/2021, Mavoko MTCR/E124/2021, and Mavoko MTCR/E125/2021 with the offence of using a motor vehicle on a road with a load greater than the load specified contrary to Section 56 (1) as read with Section 58 and Rules number 41 of the Traffic Act (Amendments) Rules 2008 Chapter 403 of Laws of Kenya and released on cash bail of between Kshs. 150,000/= and Kshs. 200,000/= cash. The 8th petitioner's motor vehicles were equally unlawfully impounded and it took obtaining a court order to secure the release of the said motor vehicles.
6. The petitioners' problems did not end with this arraignment in court. On 28th September 2021, the 2nd Respondent's officers accompanied by the 14 Respondent without any colour of right, justification and/or probable cause gained entry into the private property belonging to Simba Cement Company Limited and commandeered at gunpoint, the subject suit motor vehicles which were at all material times carrying the legally accepted load of 28,000kgs of limestone and proceeded to illegally issue tickets purporting that the said motor vehicle was overloaded.
7. It was the 8th petitioner's contention that the method employed by the 2nd Respondent to estimate the weight of the 8th petitioner's lorries load and proceed to issue tickets was inconsistent, punitive, vindictive and marred by malicious intention and had nothing to do with upholding the Rule of law. The 2nd and 4th Respondents officers' action thus breached Article 10 of the Constitution of Kenya, which was binding on all state organs, state officers and public officers when carrying out their work or implementing/enforcing the law.
8. Further as regards the incident of 28th September 2021, it was the petitioner's contention that their objection to the 2nd and 4th Respondents agents arbitrary acts were ignored and the 2nd Respondent's agent proceeded to issue the petitioner with ticket numbers KeNHA/WBT/275947 and ticket number KeNHA/WBT/275948 wherein it was highlighted that the subject motor vehicle would not be used until the excess load of 6,100kgs and 4,500kgs respectively is properly distributed and off-loaded as per the said weight ticket numbers.
9. The weighing of the said motor vehicle was done in the absence of the 8th petitioner's authorized drivers and/or agents and the overload weights arrived at could not be verified. The petitioners averred that despite seeking re-weighing of the said motor vehicle in their presence, their request was refused, and/or offloading of excess weight allowed. The 2nd respondents' action was unreasonable and arbitrarily denied them chance to comply with the recommendations contrary to provisions of Article 47 of the constitution.



10. The 2nd and 4th Respondents' actions led to the suit lorries being unlawfully detained for a long period of time to the detriment of the 8th petitioner's business and the said action was unreasonable, irrational, un-procedural and devoid of any merit. The petitioners were again summoned to Mavoko Law Courts where trumped up charges were filed; being Mavoko MTCR/E823/2021, Mavoko MTCR/E824/2021, Mavoko MTCR/E825/2021 and Mavoko MTCR/E826/2021, where the petitioner was charged with the offence of using a motor vehicle on a road with a load greater than the load specified contrary to Section 56(1) as read with Section 58 and Rule number 41 of the Traffic Act (Amendments) Rules 2008, Chapter 403 Laws of Kenya.
11. It was the petitioner's further contention that, the alleged incident occurred within the jurisdiction of Oloitoktok Law Courts and they had a legitimate expectation that they would be arraigned in court within the jurisdiction where the offence is alleged to have happened. Unfortunately, and without any good reason being assigned they were again arraigned before Mavoko Law Courts, where the 1st petitioner was granted cash bail of Kshs. 400,000/= while the 2nd and 3rd petitioners were granted cash bail of Kshs. 200,000/= each. Arising from the court case filed in Mavoko in total the petitioners had paid cash bail of Kshs. 800,000/= for charges emanating from the same transaction of 28th September, 2021 and Kshs. 1,200,000/= from charges emanating from the same transactions of 5th February 2021. The bond terms imposed were harsh, excessive, unreasonable, punitive and contrary to their constitutional right to be released on reasonable bond terms.
12. The Respondent's actions to seize the subject motor vehicles was arbitrary and denied the petitioners their right to property. Further the 1st Respondent action to illegally, irregularly and arbitrarily impose punitive cash bail that is ten (10) times the fine that which would have been levied on the petitioners upon conviction was unjustified as it denying the petitioner's the right to fair hearing and constituted an abuse of the Criminal Justice System and a violation of their fundamental rights and freedom.
13. The petitioners further averred that the charges levied were defective for the simple reason that the seizure happened at a private property which was off the road and such the suit lorries were not a danger to other people. It was emphasized that roads on private property are not part of the road network under the management of the 2nd Respondent and their decision to impound the 8th petitioner's motor vehicles was therefore illegal and the court had no basis to continue with proceedings based on the said facts.
14. As a result of the continuous harassment, taunting and intimidation of the petitioners by the Respondent, the petitioners alleged that their fundamental rights had been breached as;
 - a. The institution and continuation of criminal investigation and subsequent prosecution of the petitioners without any credible evidence is a blatant violation and limitation of the petitioner's right to fair trial and was in contravention of Article 25 (c) of the Constitution of Kenya 2010.
 - b. The 2nd Respondent breached the 8th Petitioner's right to property as guaranteed by Article 40 of the Constitution by impounding the petitioners motor vehicles and goods without sufficient reason and a fair hearing too violated their right to fair administrative actions, access to justice, access to information, reasonable cash bail, a fair hearing, equal treatment and protection under the law.
15. The Respondent's actions were thus procedurally unfair, as they had exercised their powers improperly and arbitrarily. The petitioners therefore called upon this court to find that the institution and



continuation of criminal investigations and subsequent prosecution of the petitioners by the 2nd and 4th Respondents was unlawful, undignified, discriminatory and sought to have the petition allowed.

C. The 2nd Respondent's Response

16. The 2nd Respondent opposed this petition through the Replying Affidavit of Saumu Muttah who deponed that she road inspector, employed by the 2nd Respondent and was familiar with the facts raised herein. she stated that this petition was premature, bad in law as the process leading to the establishment of the weight of the motor vehicles to determine if they were overloaded and subsequent issuance of a weight ticket were carried out in conformity with the Kenya Roads Act, 2007 and the Traffic Act, Cap 403 Laws of Kenya and this ensured that they acted equitably and with fairness in discharging their mandate as set out under Section 4 (2) of the said Kenya Roads Act, 2007, which was to amongst other obligations to ensure adherence to the Rules and guidelines on axle load control presented under the Traffic Act and Regulations under the Kenya Roads Act.
17. That in performance of their mandate as set out under the law on 19th December 2020, their officers intercepted the 8th petitioner's motor vehicles KBY 255N, KBV 378N, KAX 213Z and KCY 024A along Emali-Oloitoktok road on suspicion of carrying loads in excess of the permissible weight limit and on weighing the said lorries;
 - a. KBY 255N make Tata driven by Wambugu Kariuki Lawrence was overloaded by 9,600kgs (weigh bridge Ticket No. ELO 00754 issued).
 - b. KBV 255N make Tata driven by Nicholas Muriuki was overloaded by 8,300kgs (weigh bridge Ticket No. 00755 issued).
 - c. KAX 213Z make FAW driven by Philip Kioko was overloaded by 6,200kgs (weigh bridge Ticket No. JJA 6685 issued).
 - d. KCJ 024A make Tata driven by Musimu Mweu was overloaded by 6,500kgs (weigh bridge Ticket No. JJA 66851 issued).
18. The intercepted suit lorries were 3 axle trucks, which had a legal load limit of 26,000kgs (maximum) on gross weight, whereas at the time of detention they were carrying 35,600kgs, 34,300kgs, 32,500kgs and 32,500kgs respectively on the gross vehicle weight hence overloaded and as a result the said petitioners were arraigned in court on 23rd December, 20220 to answer charges raised as against them.
19. On 5th February 2021 the 8th Respondent's motor vehicles KBH 112V, KBV 211R and KBV 523E were again intercepted along Emali – Oloitoktok road on suspicion of carrying loads in excess of the permissible weight limits upon the said motor vehicle being weighed, it was established that;
 - a. Motor vehicle KBH 112V make Tata driven by Jonathan Mulinge Mwangangi was issued with weighbridge ticket No. KeNHA/WBT/31657.
 - b. Motor vehicle KBV 211R make Tata driven by Simon Musyimi Nzioki was issued with weighbridge ticket No. KeNHA/WBT/31658.
 - c. Motor vehicle KBV 523E make Tata driven by Stephen Mwangi Ngugi was issued with weighbridge ticket No. KeNHA/WBT/31659. All the aforestated motor vehicles with a legal load limit of 26,000kgs (maximum) on gross weight whereas at the time of their detention they were carrying 35,600kgs, 34,300kgs and 32,500kgs respectively on gross vehicle weight.
20. The 2nd Respondent therefore denied that their agents in any manner contravened any law and/or violated the rights of the petitioners as alleged. The 8th petitioner's motor vehicles were properly



weighed while using Emali-Oloitoktok road and they were right to detain the said motor vehicles as they were overloaded. The issues thus raised in the petition were not constitutional, the petition was based on speculation, conjecture and baseless/vexatious assertions and which petition ought to be dismissed with costs.

21. The other Respondents to this petition despite being served did not participate in these proceedings.

D. Parties written Submissions.

i. Petitioner's Submissions

22. It was the petitioner's contention that at the heart of this petition was their concerns over systemic abuse of power by the Respondents whom accumulative actions have led to the violation of the petitioner's rights as guaranteed under Articles 10, 28, 29, 40, 47, 48 and 50 of *the Constitution* of Kenya 2010. On diverse dates in the year 2019 and 2020, the Respondents unlawfully detained several of the 8th petitioners commercial motor vehicles and further failed to follow the due process in weighing and detaining the said motor vehicles, thereby unlawfully depriving the petitions of use of the said motor vehicles and without according them a hearing.
23. The Respondents were also faulted for proceeding to charge the 1st to 7th Appellants in Mavoko court which is 160 km away from Emali-Loitoktok, yet there was Loitoktok court operating within the area where the incident is alleged to have occurred. The change of locus or seeking for hearing at a court way out of the jurisdiction where the incident occurred was done without any legal justification and was an organized play to impose higher cash bail terms and also meant to deny the petitioners access to justice. The 1st Respondent too was duty bound to reject any charge due to lack of jurisdiction but failed to do so. Reliance was placed on Misc. Application No. 639 of 2005 Boniface Waweru Mbiyu v Mary Njeri & another, Rep. v Inspector General of police and 2 others Exparte Boniface Nginyo Mwaura [2019] eKLR and Maina Kinyatta v Republic [1984] eKLR.
24. The final issue raised in the petitioner's submissions was that the motor vehicles attached were commercial vehicles and were unlawfully impounded & detained for accumulative period of three months causing the 8th petitioner to loss approximately Kshs 100,000/= per day as loss of business. Equity would not allow a wrong to be suffered without a remedy and thus the petitioner was justified in demanding for both special and general damages. Reliance was placed on Daneva Company Limited -v- Kenya National Highways Authority [2014]eKLR and Arnacherry Limited -vs- Attorney General [2014]eKLR.

ii. 2nd Respondent Submissions

25. The 2nd Respondent submitted that the decision to issue weighing tickets and prohibition orders with respect to the suit motor vehicles was within its power and consistent with its statutory mandate under the *Kenya Roads Act* as read with the *Traffic Act* Cap 403. The 2nd Respondent had the mandate under the said *Kenya Roads Act* to ensure that all motor vehicles adhered to the rules and guidelines that were applicable to axle load control prescribed under the *Traffic Act*, which included preventing the use of vehicles that were loaded in such a manner that poses danger to other road users' vehicles. This was undertaken for public good and ensuring the safety of other road users as well as persons travelling in motor vehicles.
26. As to whether the 8th petitioner's motor vehicles were within Simba Cement premises or roads within their factory parcel of land, the same did not matter as the meaning of "a Road" as contemplated under the *Traffic Act* not only limited roads to public roads, but also "any other road or way, wharf, car park,



footpath or bridle – path” all of which implied that the 2nd respondent could exercise its a mandate in any geographic jurisdiction which the public had access. The petitioner had not demonstrated in any manner in which the 2nd Respondent had acted outside its lawful statutory power and thus the prohibition order sought could not be granted. Reliance was placed on AAA Investments (Pty) Ltd. v Micro Finance Regulatory Council and Another.

27. The 2nd Respondent further did submit that its conduct at all times, was within the law and did not amount to violation of the petitioner’s rights to property nor did any their action amount to a unlawful limitation of the right to property within the constitutional constrains of limitation of rights and fundamental freedom. The petitioners had also not demonstrated that their right to fair administrative action had been infringed. The petitioners were further faulted for not seeking and/or making any formal request to be issued with information detailing reasons for which administrative actions was taken against them and in absence of such a request, there was a rebuttable presumption that the actions by the 2nd Respondent was taken with good reason and within their lawful mandate.
28. On the issue as to whether the petitioner was accorded a fair hearing, the 2nd Respondent reiterated that they acted within the law to weigh the 8th petitioner’s motor vehicles and also to issue the said motor vehicles with weighing tickets and prohibition orders after weighing them on the mobile weighbridge. This action was taken in compliance of Section 106(2) of the [Traffic Act](#) as read together with the [Kenya Roads Act](#).
29. The said law allowed them to prohibit use of overloaded motor vehicles, under such conditions and for such purposes as the officer considered necessary for the safety of the public. The law did not anticipate that there would be a hearing that precedes the issuance of a prohibitory order for a motor vehicle found to be used in contravention of Section 56 of the [Traffic Act](#). To the contrary the [Traffic Act](#) anticipated that such orders shall be preceded by the exercise of discretion by a police officer and the same shall remain in force until such a time that there had been compliance. Reliance was placed in Chief Constable Pietermaritzburg v Shim 1908 29 NLR 338 341, and Constitutional Petition No. 14 of 2015: Morris Mwavuo Ngonyo v Kenya National Highways Authority (unreported) AND Marius Wahome Gitonga v Kenya National Highways Authority [2019]eKLR.
30. The petitioner too was not entitled to special damages of Kshs. 100,000/= per day from the date of detention of the suit motor vehicles as this was not specifically pleaded or proved. Reliance was placed on Nyamogo & Nyamogo Advocates v Barclays Bank of Kenya CA 69 OF 2005 and David Irungu Mwangi v Attorney General [2018]eKLR.
31. The 2nd Respondent prayed that this petition be dismissed with costs.

Analysis and Determination

32. I considered the entire petition as filed, the evidence on record and written submissions made by counsels for the petitioner’s and the 2nd respondent. I have also considered the authorities relied on by both parties and find that the issues which arise for determination are ;
 - a. Whether the 2nd Respondent has acted in a manner which is ultra vires to its mandate and whether they have violated the petitioner’s rights as alleged.
 - b. Whether the 1st Respondent has jurisdiction to hear the cases in issue/ whether it is legal and correct to proceed with trial in Mavoko law court.
 - c. Whether the petitioners should be awarded General and Special damages for wrongful seizure and loss of business.



d. Who should bear costs of the suit.

I. Whether the 2nd Respondent has acted in a manner which is ultra vires to its mandate and whether they have violated the petitioner's rights as alleged.

33. The 2nd Respondent no doubt in law has the statutory mandate to issue weighing tickets and prohibitory orders with respect to motor vehicles' which are carrying weight which exceed their axel load. This is provided for under Section 4(1), (2) of the [Kenya Roads Act](#) No 2 of 2007, which provides inter alia that;

4(1) The highways Authority shall be responsible for the management, development, rehabilitation and maintenance of national roads.

(2) For the purposes of discharging its responsibility under section (1), the highways Authority shall have the following functions and duties-

- (a) constructing, upgrading, rehabilitating and maintaining roads under its control;
- (b) controlling national roads and road reserves and access to roadside developments;
- (c) implementing road polices in relation to national roads;
- (d) ensuring adherence to the rules and guidelines on axle load control prescribed under the [Traffic Act](#) (Cap 403) and under any regulations under this Act.

34. The aforesated section 4(1) & (2) of the [Kenya Roads Act](#) No 2 of 2007, should be read together with Sections 55 (2) and 56 of the [Traffic Act](#), which broadly provide that;

55(2) No motor vehicle the weight or dimension of which laden or unladen exceeds the maximum weight or dimension provided for such vehicles by rules made under this Act shall be used on a road.

35. With regard to limitation of loads, Section 56 of the [Traffic Act](#) provides inter alia that;

56 Limitation of loads

- 1. No vehicle shall be used on a road with a greater load than the load specified by the manufacturer of the chassis of the vehicle or than the load capacity determined by an inspector under this Act or as provided for under the East African community vehicle control Act, 2013.
- 2. No vehicle shall be used on a road if it is loaded in such a manner as to make it a danger to other persons using the road or to persons travelling on the vehicle; and should any load or part of a load fall from any vehicle on to a road such fact shall be prima facie evidence that the vehicle was loaded in a dangerous manner until the contrary is proved to the satisfaction of the court.

36. There is no doubt that Section 4(2),(d) of the Kenya Roads gives KENHA the power to discharge its responsibility which inter alia includes adherence to the Axle load control as prescribed under the [Kenya Roads Act](#), the [Traffic Act](#), and Kenya Roads (The National Highways Authority) regulations. However, in so exercising its powers it must do so within the four corners of the law as observed in



Real Deals Ltd & 3 others Vs Kenya National Highways Authority & Another (2015) eklr where it was held that:

“..... where a statute denotes powers that it exercises are within the four corners of the statute and ought not to extend its power outside the statute.....”

37. The petitioners did allege that on several occasions which were enumerated in the pleadings, the respondent’s unlawfully and without justification impounded its various suit lorries mentioned herein, while operating on private roads/property of Simba cement factory and proceeded to weigh/surcharge them for excess weights while in reality those were not the real tonnage the lorries were carrying. They also alleged that in most instances the weighing process was carried out un-procedurally and done in the absence of their employee’s or agents. The respondents were thus acting capriciously, unlawfully and illegally in discharging their mandate which acts the petitioners wanted this court to declare as a nullity.
38. The 2nd respondent on the other hand vehemently denied the petitioner’s allegations and stated that they carried out their duties as stipulated under the law and within the four corners of the [Kenya Roads Act](#) and the [Traffic Act](#) without varying or stepping out of their field of operation entrusted to it. Their officers carrying out their duties were authorized to do so and therefore were right to weigh the petitioners motor vehicles using the method provided in law and subsequently issued of the prohibitory orders. Further the issuance of the prohibitory orders was done to ensure compliance of the law and ensure the safety of other road users.
39. The facts made in support of the petition are strongly controverted by the 2nd respondent and prima facie from the cold print of affidavits filed, and without benefit of hearing the witnesses, it is not possible to hold which party is saying the truth and the matters raised are best left for the trial court to determine. If indeed it is proved at trial that the respondents acted in a capricious manner and the pending traffic cases before the court are dismissed, then it will still be open for the petitioners to file a suit seeking damages for loss suffered.
40. With respect to violation of right to property, contrary to provisions of Article 40 of [the constitution](#) of Kenya 2010. I do note, that Motor vehicles registration Number KCJ 024 J, KBU 378L, KBY 255N and KAX 213Z were impounded on 19.12. 2020 and released by a court order on 23.12.2020. On 05.02.2021 motor vehicles KBH 112V, KBV 211R were impounded and released by a court order on 12.02.2021 and finally in on 28.09.2021 motor vehicles KAX 206Z and Motor vehicle Registration Number KCC 377G, were impounded and again released by a court order dated 22nd November 2021.
41. As submitted by the 2nd respondent, the right to property could be lawfully limited by law ([Traffic Act](#)) as read together with Article 24(2) of [the constitution](#) of Kenya 2010 and where the limitation was reasonable and justifiable the same could not be said to have infringed on the rights of the petitioner. The action to impound the suit property thus cannot be said to be unlawful per se, the subsequent facts as relates to “order to resume vehicle from the road or public place, to offload excess weight or to effect repairs awaiting further instructions” remain in contention and have to be resolved at trial before it can be conclusively determined if the detention was lawful or not.
42. Similarly, as regards the right to fair administrative Action, Article 47 of [the constitution](#) 2010, does provide that;
 1. “Every person has a right to administrative action that expeditious, efficient, lawful, reasonable and procedurally fair.”
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action.



3.
43. Similarly Section 6 of the *Fair Administrative Action Act* provides that;
6. Request for Reasons for administrative Action
- (1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as maybe necessary to facilitate his or her application for an appeal or review in accordance with section 5
 - (2) The information referred to in subsection (1), may include: -
 - (a) The reasons for which the action was taken; and
 - (b) any relevant document's relating to the matter.
 - (3) The administrator to whom a request is made under subsection (1) shall, within thirty days after receiving the request, furnish the applicant, in writing, the reasons for the administrative action
 - (4) Subject to sub section (5), if an administrator fails to furnish the applicant with the reasons for the administrative action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.
 - (5) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and shall inform the person making the request of such departure.
44. The petitioners did submit that they were not afforded an opportunity to be heard before the subject motor vehicles were removed from the road and detained and this offended their right to fair hearing. Section 106(2) of the *Traffic Act* provide that;
- “(4) Any police officer, licensing officer or inspector, if he is of the opinion that any vehicle is being used in contravention of section 55 or section 56 or in contravention of any rules relating to the construction, use and equipment of vehicles, may by order prohibit the use of such motor vehicle, under such conditions and for such purpose as he may consider necessary for the safety of the public or to ensure that such vehicle does comply with the provisions of section 55 or 56; and any such order shall remain in force until the repairs specified therein have been satisfactorily completed and the vehicle has been certified as complying with the rules relating to construction, use, equipment and weight.”
45. In chief constable Pietermaritzburg v shim 1908 29 NLR 338 341 it was held that;
- “it is a principle of common law that no man shall be condemned unheard and it would require very clear words in the statute to deprive a man of that right. To the applicant, this court’s decision shows that the audi alteram partem rule would only be excluded if parliament intended its exclusion, irrespective of whether or not the rights of individuals are affected. The audi alteram partem rule ensures a free and impartial administrative process, within which decisions and cognizance of facts and circumstances, occur altogether openly.”



46. It is apparent that in exercise of the powers conferred under section 55 and 56 as read together with section 106(2) of the Traffic Act, the 2nd respondents' agents are allowed in law to issue weighing tickets and prohibition orders after weighing the suit motor vehicles if they are found to be operating in contravention of the law. section 106(2) of the said Traffic Act does not anticipate that there shall be a hearing that precedes the issuance of a prohibitory order and as noted above, where there is a statutory provision relating to process allowing for such action, it cannot be said that the party affected was condemned unheard.
47. In any event, in all instances where the 8th respondent's lorries were weighed and impounded, the 2nd respondent did issue probation orders detailing why the suit lorries were impounded and subsequently the 1st to 7th respondents were charged in court. Without doubt the charge sheet did contain all information needed by the petitioners to know, why they were charged.
48. Finally, if indeed the petitioners did not have adequate information as to why the suit lorries were detained, they needed to have requested for further and better particulars as to what information they lacked from the 2nd respondent as anticipated under Section 6(3) of the Fair administrative Action Act. No such request for information was made and in absence of such a request, there is a rebuttable presumption that the action by the 2nd respondent was taken with good reason.

II. Whether the 1st Respondent has jurisdiction to hear the cases in issue/ whether it is legal and correct to proceed with trial in Mavoko law court

49. The 2nd Respondent did cause various charge sheets to be filed as against the 1st to 7th petitioner's at Mavoko law courts, which is about 160km away from where the offence is alleged to have been committed along Email- Oloitoktok road. The nearest magistrate court within the jurisdiction of where the alleged offences is said to have occurred was the Oloitoktok Law Courts and the petitioner's submitted that had a legitimate expectation that they would be arraigned in court within the jurisdiction where the offence is alleged to have happened.
50. No good reason or legal justification was given for filing the charges at Mavoko law court save to cause hardship and punishment to the petitioners, which action fell foul of provisions of section 67,72 and 73 of the criminal procedure Act as well as provisions of Articles 10,47, 48 and 50 of the constitution of Kenya 2010. The respondent's choice of seat of justice was thus illegal, unfounded as all witnesses resided in loitoktok and the local court too had jurisdiction to determine the criminal charges as filed.
51. In Republic v Inspector General of police & 2 others ex parte Boniface Nginyo Mwaura [2019] eKLR
 "venue is an essential element of jurisdiction in criminal cases. It determines not only the place where the criminal action is to be instituted but also the court that has the jurisdiction to try and hear the case. The reason for this rule is twofold. First, the jurisdiction of the trial courts is limited to well defined territories such that a trial court can only hear and try cases involving crimes committed within its territorial jurisdiction. Second, layering the venue in the locus criminis is grounded on the necessity and justice of having an accused on trial in the municipality of province where witnesses and other facilities for his defence are available."
52. The 2nd respondent tactfully did not submit on this issue and it is obvious that their action to file traffic cases as against the petitioners in Movoko was malafide and there is no excuse or justification for Movoko court receive case files MTCR E 120 OF 2021, Mavoko MTCR E121 of 2021 , Mavoko MTCR E122 of 2021, Mavoko MTCR E123 of 2021, Mavoko MTCR E124 of 2021, Mavoko MTCR E125 of 2021, Mavoko E823 of 2021, Mavoko MTCR E824 of 2021, Mavoko MTCR E825 of 2021



and Mavoko MTCR 826 of 2021. Further the 1st respondent obviously lacked jurisdiction to hear and determine the said Traffic cases. See *People Vs Werblow* 241 N.Y55, 148 N.E. 786(1925), where it was held that jurisdiction is to be exercised where a significant level of criminal activity had occurred.

III. Whether the petitioners should be awarded General and Special damages for wrongful seizure and loss of business."

53. The petitioners did submit that the seized motor vehicles were commercial vehicles and they were impounded in the cause of business and they therefore suffered financial loss. The last two motor vehicles KAX 206Z and Motor vehicle Registration Number KCC 377G, were impounded on 28th September 2021 and released on 22 November 2021. Accumulatively they were detained for three months. The petitioners thus prayed to be awarded damages of Kshs 100,000/= per day as loss of business as this loss was caused by the 2nd respondents' intransigent position and refusal to release the lorries.
54. The 2nd respondent on the other hand did submit that the detention of the suit lorries was made pursuant to a valid prohibition order and it was for the petitioners to show court that indeed they had complied with the said order issued before the suit lorries could be released. This was expressly provided for under Section 106(4) of the *Traffic Act*.
55. The court has held herein above that some of the issues raised in this petition are not "ripe for determination" by this court as they are contested. Such issues must go for trial before the Magistrates court and a determination made as to which set of facts is correct before a claim for damages can arise. I do reiterate that from the cold print of the affidavits filed herein and their contested nature, the issue of where the lorries were confiscated, the exact weight of each lorry and subsequent action or not taken to lift the prohibition order must go for trial, parties cross examined before an appropriate cogent finding is made the basis upon which damages can be claimed.

Determination

56. Having considered all the fact and the relevant law I do find that the petition as filed is partially successful and do issue the following orders;
 - a. That a declaration be and is hereby issued that the Respondents decision to charge the petitioner's in Mavoko law court instead of Oloitoktok law court is void abinitio, unconstitutional and infringes on the Petitioner's constitutional rights.
 - b. An order of certiorari is hereby issued quashing Movoko court MTCR E 120 of 2021, Mavoko MTCR E121 of 2021, Mavoko MTCR E122 of 2021, Mavoko MTCR E123 of 2021, Mavoko MTCR E124 of 2021, Mavoko MTCR E125 of 2021, Mavoko E823 of 2021, Mavoko MTCR E824 of 2021, Mavoko MTCR E825 of 2021 and Mavoko MTCR 826 of 2021, and all the cash bail imposed thereon will be returned to the Petitioner's
 - c. The 2nd Respondent will be at liberty to institute fresh charges based on the same facts at Oloitoktok Law court if they so wish.
 - d. All the other prayers in the petition are dismissed.
 - e. Each party to bear their own costs.
57. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 31ST DAY OF JANUARY 2024.



FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 31st day of JANAUARY, 2024.

In the presence of;

Ms Maureen Nasimiyu for Petitioner

No appearance for 1st Respondent

Sam - Court Assistant

