



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.230 OF 2018

IN THE MATTER OF ARTICLES 23(1) AND 165 (3) (a) (6) and (7) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED CONTRAVENTION OF ENTITLEMENTS, FUNDAMENTAL RIGHTS

AND FREEDOMS UNDER ARTICLE 10,12,27,28,29,31,38,39,40(1), 43 AND 57 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE RELEASE OF THE WRONGFULLY DETAINED PETITIONER’S IDENTITY CARD No. [.....]

-BETWEEN-

CHRISTINA GAKUHI KUBAL.....PETITIONER

VERSUS

THE DIRECTOR OF CRIMINAL

INVESTIGATIONS DEPARTMENT.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Petitioner’s Pleadings

1. The petitioner through a petition dated 19th June 2018 against the respondents brought pursuant to Articles 10,12,27,28,29,37,38,39,40(1), 43 and 57 of the Constitution of Kenya 2010 seeks the following declaration and orders:-

- a) A declaration that the Respondents have contravened the Petitioner’s rights under Articles 10, 12, 27, 28, 29, 38, 39, 40(1), 43 and 57 of the Constitution.
- b) A declaration that the illegal seizure of the Petitioner’s National Identity Card No. [.....]was illegal and unconstitutional.
- c) A declaration that the continued holding of the Petitioner’s National Identity Card is unlawful and in breach of the Petitioner’s rights under 10,12,27,28,29,38,39,40(1), 43 and 57 of the Constitution.
- d) An order for the immediate release of the Petitioner’s National Identity Card No. [.....] to the Petitioner or the Petitioner’s Advocates.
- e) An order for general damages for breach of the Petitioner’s rights under Articles 10,12,27,28,29,38,39,40(1), 43 and 57 of the Constitution of Kenya.
- f) An order that the costs of this petition be provided for.
- g) Interests at court rates on e. and f. above.
- h) Any other orders that this Honourable Court may deem fit to grant.

2. The petition submissions is supported by supporting Affidavit of Christina Gakuhi Kubai sworn on 19th June 2018 and by further affidavit of Christina Gakuhi Kubai dated 23rd April 2019.

The 1st and 3rd Respondents Pleadings

3. The 1st and 3rd Respondents filed a Replying affidavit by Isack Tenai sworn on 16th April 2019. The 2nd Respondent name was struck out from the suit following an application dated 29th March 2019 which was granted by this court on 1st April 2019.

Facts of the Petitioner's Case

4. The petitioner contend, that the 1st Respondent herein, the Director of criminal investigation is holding her National Identify Card and continues to retain the same despite criminal proceedings instituted by the 1st Respondent having been quashed by the Honourable court. The history of this dispute is a succession dispute which the petitioner had with some children of her late husband and late Fredrick Polwarth Kubai since 1996.

5. The petitioner petitioned for a grant of probate in respect of her husband's estate in High Court succession cause No. 1860 of 1996 to which grant was issued to her. The deceased children and former wives filed another cause being High Court succession Cause No. 1940 of 1996, which was confirmed on 3rd March 1998, without the knowledge of the petitioner. On discovery of the said case the petitioner applied for suspension of the certificate of confirmation through an application dated 22nd June 1998 which was allowed on 31/7/1998 and the court ordered the two succession cause be consolidated. Amongst issues for determination in the consolidated cases, was the petitioner's status as widow of her late husband and validity of the will that contained the petitioner's National Identity Card. The court upon hearing the consolidated succession causes dismissed the petition by the deceased children, allowed petitioner's petition and held her husband's will was valid.

6. The petitioner contends, that there was an application for review of the decisions in the cause which was delivered by Hon. Justice Kimaru on 4th June 2014. The applicant contended, that the will filed by the petitioner in court did not bear the identity card of the petitioner's husband and also that the petitioner had allegedly used several forged identity cards. Following a ruling by the court, the Applicant being dissatisfied with the ruling lodged a complaint with police, who, on 22nd October 2014 charged the petitioner with offences relating to alleged forgeries of the will and petitioner's National Identify Card.

7. That the petitioner applied for deferment of the plea to enable her object to the charge and to proceed to file constitutional petition **HC Petition No. 523 of 2014 Christina Gakuhi Kubai vs DPP and 2 others**. The decision in the petition was made on 11th July 2017 allowing the petitioner's petition. The **DPP** being dissatisfied with the decision filed Notice of Appeal on 25th July 2017.

8. On 28th July 2017, the petitioner appeared before the Chief Magistrate court in respect of criminal case No. 1495 of 2014 R vs. Christina Gakuhi Kubai, where her advocate applied for copy of the judgment and certified copy of the decree, release of the National identity card and refund of the cash bail of Kshs.150,000/-. The trial Chief Magistrate marked the matter as terminated and ordered the National Identity card if deposited in court and cash bail of Kshs. 150,000/- be refunded to the Depositor. The petitioner contend since the court's order her National Identity Card is yet to be released as ordered as the prosecutor informed her that it was not in his file. The petitioner similarly could not receive her Kshs.150, 000/- without producing her National Identity Card. That in spite of several letters by petitioner's Advocate to DPP seeking release of petitioner's Identity Card no response has been received by petitioner's Advocate.

9. The petitioner contends, that there is no stay of execution of the judgment and orders in place and no order has been sought for continued retention of the National Card of the petitioner No. [.....]. That due to retention of the petitioners National Identity Card the petitioner has been unable to transact any business including M-pesa transactions or travel outside her home and has been denied entry to buildings as some security installations require the production of an identity card.

The 1st and 3rd Respondents Case

10. The 1st and 2nd Respondents place reliance on a Replying affidavit dated 16th April 2019 by Isack Tenai the investigating officer of the matter herein. It is deponed the investigation herein commenced after Milimani Succession and Family Division wrote a letter dated 18th February 2014 seeking verification into some disputed documents presented in the High Court Civil Case No. 1940 of 1996; in which it was found one of the documents adopted by the High Court in the Civil Case was forged. It further established that Identity card allegedly belonging to the petitioner No. [.....] did not exist in the National Registration Bureau Database (**DK-1**). That upon completion of the investigation the petitioner was taken to court to face charges of making a document without the authority and uttering the same contrary to section 357(a) and 353 of the Penal Code to which the petitioner proceeded to obtain orders of stay of prosecution in the lower court pending the determination of the HC Petition No. 523 of 2014.

11. The Respondents urge, that there is hesitation in releasing the forged ID card as she may use it to procure services. The Respondents further contend it is in public interest and the interest of justice, that the forged ID card be retained as an exhibit to prevent the petitioner from committing further offences using the said forged identity card.

Analysis and Determination

12. I have perused the petitioners petition, the 1st and 3rd Respondents Replying affidavit, the submissions by the petitioner and Respondents, and also considered oral submissions by both counsel and from the aforesaid the issues arising for consideration, are as follows:-

a) Whether the petitioner's rights and fundamental freedoms have been breached by the Respondents?

b) Whether the petitioner's right and fundamental freedom, can be limited under Article 24 of the constitution?

c) Whether this Honourable court has jurisdiction to intervene in the Respondents' exercise of discretion to retain the petitioner's National Identity Card?

d) What relief is this Honourable Court empowered to grant for contravention of the petitioner's rights and fundamental freedoms and in intervening in the exercise of the Respondent's exercise of their discretion to retain the petitioner's National Identity Card?

A) Whether the petitioner's rights and fundamental freedoms have been breached by the Respondents?

13. In the instant petition the 1st and 2nd Respondents as state officers and public officers as defined in **Article 260 of the Constitution of Kenya**, are bound by the national values and principles of governance as set out in Article 10(2) of the Constitution of Kenya. The Respondents are required to uphold the rule of law by respecting the orders of the Honourable Court in High Court petition No. 523 of 2014 which quashed the criminal proceedings and also the order by the Chief Magistrate's Court in Milimani Chief Magistrate's Criminal Case No. 1493 of 2014 for release of the National Identity Card of the petitioner. The Respondents to date have not appealed against the court's judgment in respect of the two judgments. There is no stay of the execution nor appeal on record so far. This means the Respondents have no justification or basis not to obey and to comply with the court's orders.

14. I find as was held in the case of **George Bala vs Attorney General (2017) eKLR**, that the executor being a state organ, in making policy decisions must adhere to the national values and principles of governance and where it does not do so, it may well fall foul of Article 10 of the Constitution of Kenya 2010. I find so long as the Respondents continue to retain the petitioners ID Card without any justification, as has been established by the petitioner, are in breach of the petitioner's rights and fundamental freedoms as enshrined in the constitution.

15. The petitioner is no doubt a Kenyan citizen, and as such she is like any other citizen entitled to the rights and privileges that came with being a citizen as guaranteed under **Article 12(1) of the Constitution**, which entitles every citizen to a Kenyan passport and any document of registration or identification issued by the state to citizens.

16. In the instant petition there is no dispute, that the petitioner's National Identity Card was seized by the police officers on 22nd October 2014, when the petitioner was arrested and charged with the offence of alleged forgery of her husband's will and alleged forgery of her identity card; in Chief Magistrate's Criminal Case **No. 1495 of 2014 Republic vs Christina Gakuhi Kubai** which prosecution was quashed by virtue of the High Court petition No. 523 of 2014 **Christina Gakuhi Kubai vs DPP & others**. That the decree in the aforesaid case was presented to the Chief Magistrate's Court Criminal case **No. 1495 of 2014 Republic vs Christina Gakuhi Kubai** whereby the court marked the matter terminated and ordered the National Identity Card and cash bail of Kshs.150,000/- be returned to the petitioner. In view of the aforesaid decisions of a competent court, the Respondents do not have any reason for continuing holding of the petitioner's national identity card as there are no orders granted for stay nor has the Respondents filed an appeal against the High Court Petition **No. 523 of 2014 Christina Gakuhi Kubai vs Director of Public Prosecution**.

17. Having considered the undisputed facts in support of the petition herein, I find that the petitioner has demonstrated, that the manner in which the Respondents treated the petitioner was contrary to the provisions of Article 27(1) and (2) of the Constitution dealing with equality and freedom from discrimination The Respondents acted contrary to Article 28 and 29 of the constitution of Kenya which deals with human dignity; freedom and security of person respectively. Further the petitioners right under Article 38, thus political rights; petitioner's right under Article 39, being freedom of movement and residence and Article 40, which deals with protection to property, Article 43 which deals with Economic and social rights as well as Article 57 deals with rights of other members of society has continued to be violated by the Respondents continued retention of the petitioners identity card.

18. I find that the petitioner's rights and fundamental freedom have been greatly violated by the Respondents as the continued retention of the petitioner's National Identity Card deprive the petitioner her rights to transact any business. I find identity card; she cannot carry out any M-pesa transaction which requires a person to produce his original identity card; nor can she travel outside her home area nor gain entry in building where one is required to produce identity card nor could she take part in the National Elections held on 8th August 2017 and thereafter. She could not even take part in the recent Registration of Huduma Namba. I therefore find that by keeping the original identity card of the petitioner the Respondents have breached the petitioner's rights and fundamental freedoms as enshrined in the constitution.

19. The Respondents as per Replying affidavit by Mr. Tenai's affidavit, though aware of the existing decree, are aware of the Hon. Justice Muriithi's quashing of the criminal proceedings which led to the seizure of the petitioner's identity card but has continued to disobey the court's order averring the alleged National Identity Card is a forgery. I note, that the Respondents have not appealed against the aforesaid judgment nor have they obtained a stay of the judgment. Failure to do so is an indication, that the said judgment is not challenged and as such the allegation, that the document is a forged document remains only a mere allegation in the case. I find that once an order or decree has been issued by a court, and has not been set aside, or reviewed or appealed against, it must be obeyed in its own terms whether a party agrees with it or not. The allegation that the identity card is an exhibit in Mr. Tenai's affidavit, without disclosing in what case is a further excuse not to obey the court's decisions in which Hon. Justice Musyoka; Hon. Justice Kimaru; Hon. Justice Muchelule and Hon. Justice Muriithi have pronounced themselves on the determination when the court made respective orders or the documents the Respondents are purporting to question. I find without setting aside of the aforesaid Judges decisions on appeal the Respondents are obliged to comply with the court's decisions. I further find as a court of equal status I cannot sit on appeal on the decisions by my brothers on the subject matter.

20. In **Rai vs Rai, Civil Application NAI 307 of 2003**, the Court of Appeal, in declining to certify an appeal to the Supreme Court, held that public policy demanded that there be an end of litigation and the doctrine of finality is a doctrine which enables the court to say litigation must end at a certain point regardless of what the party thinks of the decision which has been handed down.

B) Whether the petitioner's right and fundamental freedom, can be limited under Article 24 of the constitution?

21. The petitioner submitted that between August 2017 and September 2017 her Advocate wrote numerous letters pertaining to her National Identity Card to the Respondents which were not responded to until 7th September; in which reply the 1st Respondent stated as follows:-

"We are holding the original identity card No. [.....] in the names of Christina Gakuhi Kubai pending the outcome of the High Court appeal process as you are aware of:-

The Director of Public Prosecution being dissatisfied with the entire judgment and orders delivered on 12th July, 2017 appealed before the Court of Appeal against the whole decision made on Petition No. 523 of 2014 and the outcome still at abeyance."

22. The petitioner is cognizance of the fact, that the rights guaranteed under the Bill of Rights including her said right under Article 12(1) (b) of the Constitution are not absolute but can be limited under Article 24 of the Constitution. However this limitation should be reasonable and justifiable in an open and democratic society.

23. In **Randu Nzai Ruwa & 2 others vs Internal Security Minister & another [2012] eKLR** in interpreting the provisions of Article 24(1), cited with approval the decision by the Constitutional Court of South Africa in **Samuel Manamela & Another vs The Director General of Justice, Cct 25/99**, where the court stated:-

"It should be noted that the five factors expressly itemized in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected."

It further on stated as follows:-

"..... Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of this legislative and social setting."

24. The Respondents in seeking to justify a particular limitation should demonstrate to the court that the provisions of Article 24 of the constitution has been satisfied. The Respondents reasons are given by the 1st Respondent in their letter dated 7th September 2017 pertaining to retention of petitioner's National Identity Card. Upon considering the contents of the letter of 7th September 2019 and reasons given for retention of the National Identity Card of the petitioner; I am not satisfied, that the same are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom especially when there is an order for the release of the national identity card and where the civil proceedings were quashed and where the succession cause related to the criminal matter has already been determined. It should further be noted that the Respondents have not demonstrated there exists being an order of stay of the release of the National Identity Card or an existence of an Appeal in which the subject matter is the national identity card with an order of stay of the proceedings. I find that the Respondents have for no good reason chosen to violate the petitioner's right and disobey the court's orders. Article 10 of the constitution on national values and principles of governance binds all state organs, state officers, public officers and all persons whenever any of them to respect, protect, promote and fulfil the rights in the Bill of Rights. I find that the Respondents are not exempted as regards respecting, protecting, promoting and fulfilling the rights enshrined in the Bill of Rights.

C) Whether this Honourable court has jurisdiction to intervene in the Respondents' exercise of discretion to retain the petitioner's National Identity Card?

25. This petition concerns violation of petitioner's right and fundamental freedoms as is envisaged in the Constitution of Kenya 2010. **Article 165(3), (b) (d) (i) (ii) (iii) (iv) (e)** provides:-

"(3) Subject to clause (5), the High Court shall have—

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) The question whether any law is inconsistent with or in contravention of this Constitution;

(ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to

the constitutional relationship between the levels of government; and

(iv) A question relating to conflict of laws under Article 191; and

(e) Any other jurisdiction, original or appellate, conferred on it by legislation."

26. Further under Article 22 of the Constitution of Kenya 2010 empowers a person to institute court proceedings where his rights or fundamental freedoms have been contravened.

27. Article 23 of the Constitution deals with authority of court to uphold and enforce the Bill of Rights. It provides thus:-

"(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) A declaration of rights;

(b) An injunction;

(c) A conservatory order;

(d) A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) An order for compensation; and

(f) An order of judicial review."

28. In Dr. Christopher Ndarathi H Murungaru vs Kenya Anti-Corruption Commission and Another [2006] 1 KLR 77, the law was stated as follows of the role of this Honourable Court in determining the petition before it,

"We recognize and we are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the Courts, sometimes even to the annoyance of the public and the only institution charged with the duty to interpret the provisions is the High Court and where permissible, with an appeal to the Court of Appeal. Since the Kenyan nation has chosen the path of democracy rather than dictatorship, the Courts must stick to the rule of law even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the court's decisions since occasionally those who have been mighty and powerful are the ones who run and seek the protection of the courts when circumstances have changed The courts must continue to give justice to all and sundry irrespective of their status or former status."

29. Under Article 165(6) and (7) of the Constitution the court is empowered to exercise its supervisory jurisdiction over any person exercising a judicial or quasi-judicial function such as the Respondents herein. Article 165 (6) and (7) of the constitution provides thus:-

"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

30. In Republic vs Minister for Home Affairs ex parte Sitamze [2008] 2 EA 323, this Honourable Court held, that it would only intervene with the decision by the Minister for Home Affairs, in the following circumstances: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision maker is irrational and unreasonable.

31. Further in Keroche Breweries Limited and 6 others vs Attorney General and 10 others [2016] eKLR, this Honourable Court held that impugned decisions which were allegedly made in public interest cannot hold in the light of blatant violation of the constitutional and statutory provisions. The court stated the law as follows;

"156. An argument that the impugned decisions were made in public interest cannot, in the light of blatant violation of the constitutional and statutory provisions, hold. As was held in Republic vs County Government of Mombasa Ex-parte – Outdoor Advertising Association of Kenya [2014] eKLR:

"There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi-judicial decision."

32. This Honourable Court in **Bungoma Petition No. 2 and 2A of 2014; John Mining Temoi and another vs The Governor of Bungoma County**, had this to say of the supremacy of the Constitution and the national values and principles of governance as covered in Articles 2 and 10 of the Constitution;

"However, for the avoidance of doubt, this court reiterates that no person, state officer or state organ is above the Constitution or the law. All organs created by the constitution are subordinate to it. Further, Article 10 (1) binds all state organs, state officers, public offices and all the persons while applying, interpreting the Constitution or the law or public policy. Therefore when any of these organs, including the County Executive, County Assembly and Speakers of either Parliament or County Assemblies act in breach of the Constitution or outside their areas of operation, this court will not hesitate to intervene and reverse those actions. The Constitution is supreme and its dictates are to be jealously protected by this court. That is what Article 165 of the Constitution decrees."

33. Having considered the submissions herein and authorities relied upon as well as the facts of this case, I reiterate that the Respondents herein may be holding important offices but such offices responsibility are very high and the Respondents should be reminded, that none of them is above the constitution or the law and the law applies to each and every one of them just as it does to ordinary citizen. It is like a double edged swords which cuts either way. This means if any state organ or state officer and public officer act in breach of the constitution or outside their area of operation or mandate, this court is empowered to intervene and reverse those actions which go against the constitution or the law. The court has power to interfere where the Respondent's abuse of the discretion is established in declining to comply with a clear order of the court and in breach of any Bill of Rights.

D) What relief is this Honourable Court empowered to grant for contravention of the petitioner's rights and fundamental freedoms and in intervening in the exercise of the Respondents exercise of their discretion to retain the petitioner's National Identity Card?

34. The relief which the court dealing with a petition of this nature is empowered to issue are well spelt out under **Article 23 of the Constitution of Kenya 2010**.

35. In **Florence Wamukanda and another vs Attorney General and 2 others [2016] eKLR**, a five Judge bench of this Honourable Court stated there is need to remedy where there have been violations of constitutional rights and fundamental freedoms as follows:-

"It is now an established principle that violations of fundamental human rights must be remedied Kriegler J. properly captured this in the Constitutional Court of South Africa case of Ntanda Zeli Fose vs The Minister of Safety and Security [39] where he expressed himself that:

".....our object in remedying these kinds of harms should, at least be to vindicate the constitution, and to deter its further infringement. Defense speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to "defend against encroachment or interference." It suggests that certain harms, if not addressed, diminish our faith in the constitution. It recognizes that a constitution has as little or as much weight as the prevailing political culture affords it. The defense of the constitution – its vindication is a burden imposed not exclusively, but primarily on the judiciary. In exercise of our discretion to choose between appropriate forms of relief, we must carefully analyses the nature of a constitutional infringement and strike effectively at its source...."

36. In considering whether the damages are payable for every right or giving a lump sum for all infringed rights, this Honourable Court in **Dominic Amolo Arony vs the Attorney General, High Court Misc Civil App. No. 494 of 2002** stated as follows;

"For our part, we have two options both of which are attractive and reasonable in our view. The first is an award of a lump sum for all the breaches cited elsewhere and posit that, because the breaches happened almost within a defined period and within the defined area of E Block at Kamiti Prison, it would be a fair proposition to award such lump sum figure in damages. A further reason to be advanced in support of this position is that the breaches happened contemporaneously with each other and it would be difficult, impossible to separate each of them and give a fair and reasonable award in respect of each... We must as we hereby do, come to the firm conclusion that a lump sum figure in damages would be the better, the fairer and the more reasonable approach to take in this matter."

37. In **Abubakar Shariff Abubakar vs Attorney General and another (2014) eKLR**, in a similar case to this, Honourable Court made the following orders, among others, (a) a declaration that the failure by the police to make and file a return in the Chief Magistrate's Mombasa, Misc Appl. 168 of 2011 and their failure to produce the seized articles before the court was a contravention of section 121 of the Criminal Procedure Code and was therefore unlawful and for the above violation, the Petitioner was awarded general damages in the sum of Kshs.400,000/- and special damages in the amount of Kshs.270,000/- plus interest at court rates from the date of delivery of judgment until payment in full."

38. The petitioner contend she is entitled to aggravated damages in light of the treatment of the Respondents as she has been without her National Identity Card for the past 4 years and despite an order being made for immediate release of it, it has not been released.

39. In **Obongo and Another vs Municipal Council of Kisumu [1971] EA 91**, the Court of Appeal held that exemplary damages will be

awarded where the state has behaved in an outrageous and unconstitutional manner. At pages 96 – 97, Justice Law stated the law as follows;

"The House of Lords decision is to the effect that exemplary damages are appropriate in two classes of cases: oppressive, arbitrary and unconstitutional action by the servants of government."

40. In the instant petition it has been demonstrated, that the Respondents have acted towards the petitioner in an oppressive, arbitrary and unconstitutional manner and in view of their refusal to release her National Identity Card, she has greatly been deprived her rights and it is only exemplary damages that will compel the Respondents to act appropriately.

41. I find the petitioner's petition to be meritorious and to that extent I make the following orders:-

a) A declaration be and is HEREBY issued that the Respondents have contravened the Petitioner's rights under Articles 10, 12, 27, 28, 29, 38, 39, 40(1), 43 and 57 of the Constitution.

b) A declaration be and is HEREBY issued that the seizure of the Petitioner's National Identity Card No. [.....] was illegal and unconstitutional.

c) A declaration be and is HEREBY issued that the continued holding of the Petitioner's National Identity Card is unlawful and in breach of the Petitioner's rights under 10,12,27,28,29,38,39,40(1), 43 and 57 of the Constitution.

d) An order be and is HEREBY issued for the immediate release of the Petitioner's National Identity Card No. [.....] to the Petitioner or the Petitioner's Advocates.

e) Kshs. 5,000,000/- awarded as General damages for breach of the Petitioner's rights under Articles 10,12,27,28,29,38,39,40(1), 43 and 57 of the Constitution of Kenya.

f) Kshs. 2,000,000/- awarded as aggravated/exemplary damages for oppressive, arbitrary and unconstitutional action by the Respondents.

g) Costs to the Petitioner.

h) Interest on (e) and (f) at court rate from the date of this judgment.

Dated, signed and delivered at Nairobi this 24th day of October, 2019.

J .A. MAKAU

JUDGE