



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 256 OF 2013**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF THE**

**NATIONAL POLICE ..... 2<sup>ND</sup> RESPONDENT**

**THE INDEPENDENT POLICING**

**OVERSIGHT AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**COMMUNICATIONS COMMISSION OF**

**KENYA ..... 4<sup>TH</sup> RESPONDENT**

**THE COMMISSION FOR IMPLEMENTATION OF**

**THE CONSTITUTION ..... 5<sup>TH</sup> RESPONDENT**

**ESSAR TELECOM**

**KENYA LTD (YUMOBILE) ..... 6<sup>TH</sup> RESPONDENT**

**ORANGE TELKOM KENYA ..... 7<sup>TH</sup> RESPONDENT**

**AIRTEL NETWORKS KENYA LTD ..... 8<sup>TH</sup> RESPONDENT**

**SAFARICOM LTD ..... 9<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner’s case is that respondents have failed to provide an efficient and effective toll free

emergency response number. The petitioner's case is grounded on the State's responsibility to, inter alia, protect the security of the person under **Article 29** of the Constitution. **Article 29** of the Constitution provides as follows;

29. *Every person has the right to freedom and security of the person, which includes the right not to be—*

*(a) deprived of freedom arbitrarily or without just cause;*

*(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;*

*(c) subjected to any form of violence from either public or private sources;*

*(d) subjected to torture in any manner, whether physical or psychological;*

*(e) subjected to corporal punishment; or*

*(f) treated or punished in a cruel, inhuman or degrading manner.*

2. The State also has the responsibility and duty to protect the right to life under **Article 26(1)** of the Constitution. Apart from ensuring that the every person enjoys the right to life to the fullest extent, the right to life imposes a positive duty on the State to protect the right to life by enacting laws that protect life which are backed by an effective law enforcement machinery for the prevention, suppression and sanctioning of breaches of such laws (see **Zeitun Juma Hassan (suing on behalf of Abdul Ramadhan Biringe (deceased) v Attorney general and 4 Others Nairobi Petition No. 57 of 2011 [2014]eKLR**).
3. Under **Article 21(1)** of the Constitution, the State and each of its organs has the fundamental duty to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights hence its duty to put in place a mechanisms for the protection of the individual from all forms of violence. The petitioner avers that the respondents have a responsibility therefore to provide emergency services which are essential for the security for all Kenyans as part of this duty. The petitioner also states the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents have an obligation to provide the toll free emergency response number as part of their corporate social responsibility.
4. The petitioner moved the court by a petition dated 15<sup>th</sup> May 2013 for the following reliefs;
  - a. *?A declaration that the Police have a duty to set up and operate an efficient and effective a toll free emergency response number.*
  - b. *A declaration that the 6<sup>th</sup> 7<sup>th</sup> , 8<sup>th</sup> and 9<sup>th</sup> Respondents have a duty under the doctrine of corporate social responsibility to provide toll free services for the police emergency response number 999, by installing or running systems which support the toll free 999 service.*
  - c. *A mandatory order to the 6<sup>th</sup>, 7<sup>th</sup> , 8<sup>th</sup> and 9<sup>th</sup> Respondents to install or run systems which support the toll free 199 service within thirty (30) days upon issuance of the orders.*
  - d. *A declaration that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup>, 6<sup>th</sup> 7<sup>th</sup> , 8<sup>th</sup> and 9<sup>th</sup> Respondents should provide a toll free police emergency response number.*
  - e. *A mandatory order to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup>, 6<sup>th</sup> 7<sup>th</sup> , 8<sup>th</sup> and 9<sup>th</sup> Respondents to provide a toll free police emergency response number with the 2nd Respondent establishing and running a fully-fledged modern call centre to support the service within thirty (30) days upon issuance of the orders.*
  - f. *A mandatory order to the 2nd Respondent to install systems which will facilitate storage of call history including police recordings of all calls made to and received at the centre to check on both the efficiency and effectiveness of the system, and also track possible abuse of the facility.*
  - g. *That this Honourable Court gives any other orders required to advance the cause of justice in this*

- case.
- h. *That the costs of this Petition be borne jointly and severally by the Respondents.* [Emphasis Mine]
  5. The petition is supported by the petitioner's own affidavit sworn on 15<sup>th</sup> May 2013. The application is opposed by the respondents. The 9<sup>th</sup> respondent case is supported by the affidavit of Stephen Chege, Head of Regulatory and Public Policy, sworn on 11<sup>th</sup> June 2013. The 6<sup>th</sup> respondent's case is set out in the replying affidavit of Rita Mwangi, Head of Legal, sworn on 12<sup>th</sup> June 2013. Andrew Kemosi, the Deputy Chief Technical and Information Officer, has sworn an affidavit in response. The 4<sup>th</sup> respondent's response is contained in the replying affidavit sworn by Perminus Karungu, Assistant Director, Standard and Type Approval, sworn on 5<sup>th</sup> August 2013. The parties have filed written submissions which were supplemented by oral submissions.
  6. The tenor of the respondents' responses is that they do not contest the State responsibility to protect the people of Kenya through the provision of an emergency toll free system. I agree with the petitioner's case the provision of a toll free emergency number and response system is part of the measures taken by the State to, "*observe, respect, protect, promote and fulfil*" the panoply of rights that include the right to life and protection of the security of the person among others. What is in issue is whether this obligation has been fulfilled and the respective duty or role of each of the respondents.
  7. Given the nature of the matter, on 23<sup>rd</sup> May 2013, I directed the parties as follows, "*In light of the provisions of Article 159 and in order to promote resolution of the matter herein, I direct the 5<sup>th</sup> respondent, the Communication Commission of Kenya to initiate dialogue with stakeholders particularly the phone companies and the police for the provision of a toll free telephone facility.*"
  8. Following my direction and under the guidance of the Communication Commission of Kenya ("CCK"), a meeting of stakeholders was convened to deal with the issues at hand. The results of the meetings are set out in the affidavit of Perminus Karungu who deponed that the stakeholders committee held two meetings; one on 19<sup>th</sup> March 2013 and another on 19<sup>th</sup> July 2013. During the first meeting the stakeholders appraised an earlier initiative launched in 2005 which resulted in the *Report of the Taskforce on the establishment of Emergency Command and Control Centres, 2005*. The stakeholders included the Kenya Police Service and major telecommunication operators including the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents and the CCK.
  9. The Committee formed under the auspices of the CCK evaluated the findings contained in the *Report of the Taskforce on the establishment of Emergency Command and Control Centres, 2005*. The Committee appointed a sub-committee to, *inter alia*, study the recommendation of the 2005 Taskforce, identify the current problems with the current system of providing emergency services, propose short term and long term measures aimed at improving the current emergency response system and propose concrete models of financing short and long term emergency services in the country.
  10. The Technical sub-committee held four meetings which deliberated among other issues, the technical design of the emergency communication system taking into account the recommendations of the previous work contained in the 2005 report. At the meeting of 19<sup>th</sup> July 2013, the sub-committee presented its report which was adopted. The sub-committee made the following recommendations;

## **2.2. Suggested (some effected) Short Term Solutions**

(a) *Operators to reconfigure the routing of 999/112 calls. All the mobile operators reconfigured, tested and operationalized the circuits to police control center via the Telkom Kenya Lines.*

(b) *After a visit to the Nairobi Police Control Center by the Committee an improvement on*

answered calls was noted. However, the number of emergency call operators is dismally inadequate and the working conditions pathetic. There is need to increase the number of permanent operators and improve their working conditions (shifts and restrooms with teas is proposed).

(c) Telkom Kenya lines (20) assigned to the police emergency center in Nairobi (999/112) were tested and currently in good working conditions. However four (4) were still out of order and TKL is working on them. Tests are still going in the counties and TKL has been requested to increase the lines to at least four (4) in the counties most of which have only one emergency line.

(d) Mobile operators have mapped their BTS's to the nearest Police Emergency Call Center and Regional Headquarters (previous provincial police headquarters). Therefore, emergency calls are localized to the nearest emergency incident as possible. Tests are still going on.

(e) Communication from the Police Control Center to other Emergency providers such as Fire Brigade and Ambulance Services be provided through toll free telephone lines and/or radio links. The Commission was requested to waive frequency fees for VHF /HF channels used for this service while the radios will be procured by the police.

(f) All existing bills on current Telkom Kenya Lines for the Police Control Centers be waived since this is a public service. The Committee further suggested that the all lines except one be programmed to allow only incoming calls to eliminate misuse. All interconnection charges associated with the emergency calls MUST be removed. The Commission to enforce that through a directive to the operators.

(g) Due to the rampant abuse of the emergency communication by members of the public there is urgent need for public education through SIM Card Registration.

(h) Police Emergency Control Operators should be trained on customer care and trauma -related emergency call handling.

(i) The Current Police Communication System is old and not very effective for emergency communication where messages need to be relayed or escalated urgently. An overhaul is proposed.

### **2.3 Suggested Long-term Solution**

(a) Installation of IP PABXs in all the 41 counties with capacity for 8 E1's and 4,000 numbers, and 20 operator consoles.

(b) The PABXs should be equipped with GSM E1 interface cards to enable direct interconnection with each operator. This is to eliminate interconnect charges.

(c) Hunting capability to be enabled on all the lines.

(d) Set up of National Emergency Response Unit (NERU) within the police with both technical and operational capabilities for rapid response.

(e) Set up a fully-fledged unit within the Police force to handle emergency services in every County (47 of them) or configure a cluster of counties to be under one Region to reduce costs.

(f) Other technical and operational features to include proposals of the 2005 Report.

(g) Incorporate as many emergency stakeholders as possible including Red Cross, in the development of emergency handling strategies.

### 3. Financing of the Emergency Services

#### 3.1 Short Term Financing

- Stakeholder contributions (in cash and kind)
- Police Budget
- National Government ~ Donor Funding
- County Governments
- Waiver on bills and frequency fees

#### 3.2. Long Term Financing

- Annual Government Budget
- Universal Service Fund
- Any other source(s)

11. Despite the efforts of the parties, they were not able to reach any settlement in the matter for reasons that will be clear. The matter was fixed for hearing on 31<sup>st</sup> March 2014 the parties highlighted their written submissions. The matter was then adjourned to 4<sup>th</sup> April 2014 to enable counsel for the CCK to make his submissions.

12. On 4<sup>th</sup> April 2014, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, Mr Awino, informed the court that he wished to withdraw his submissions on account of the fact that he had been informed that the Kenya Police Service emergency line number 999 was working. In the circumstances, I directed that the 1<sup>st</sup> and 2<sup>nd</sup> respondents file and serve affidavits demonstrating that the emergency line was working. I adjourned the matter for mention on 8<sup>th</sup> May 2014.

13. On 8<sup>th</sup> May 2014, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed an affidavit sworn by Zipporah Mboroki, the Kenya Police Service Spokesperson, who stated as follows;

*[3] THAT in reply to paragraphs 5,6,7,8,9 and 10 of the supporting affidavit, I wish to state that the 999 and 112 toll free emergency numbers are available, accessible and are in operation.(Annexed and marked ZM 1 is a sample data from callers who have accessed the toll free numbers)*

*[4] THAT The Emergency Response system has always and will be able to receive voice calls from landlines and mobile phones and other means of communication from members of the public.*

*[5] THAT I have looked at the data and I verily believe that the toll free emergency response numbers are efficient and effective in the day-to-day administration and operations of the Kenya Police Service.*

14. I thereafter adjourned the matter to enable the petitioner confirm the 1<sup>st</sup> and 2<sup>nd</sup> respondents' assertions and make a response to the affidavit. In his further replying affidavit sworn on 16<sup>th</sup> May 2014. At paragraph 3 of the affidavit he depones as follows, "THAT as instructed by the Honourable Court, I test dialled, and also asked my colleagues across the Republic to test dial the roll free 999 police emergency response number, and I now confirm that it restored, though it worked for about 90% of the times dialled."

15. The petitioner conceded that the respondents operated the toll free 999 emergency number which disposes of prayers (c) and (d) of the petition. The petitioner avers that the restored analogue toll-free police emergency number is a partial fulfilment of the prayers (e) and (f) of the petition. The

petitioner states that the partially restored system does not meet his reasonable and legitimate expectations of the high professional standards expected of the National Police Service by dint of **Article 244** of the Constitution which sets out the objects of the National Police Service as follows;

*(a) strive for the highest standards of professionalism and discipline among its members;*

*(b) prevent corruption and promote and practice transparency and accountability;*

*(c) comply with constitutional standards of human rights and fundamental freedoms;*

*(d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and*

*(e) foster and promote relationships with the broader society.*

16. The petitioner avers that having no facilities for storing call history including voice recordings of all calls made and received by the police emergency, to check on both efficiency and effectiveness of the system and track possible abuse of the systems do not meet or promote the national values and principles of governance in **Article 10(2)(c)** of the Constitution like good governance, integrity, transparency and accountability, the rights of consumers under **Article 46(1)** and the right to fair administrative action protected under **Article 47** of the Constitution.

17. I appreciate the efforts made by the stakeholders in the communication industry in identifying the problems and proposing solutions which I have outlined above. It is my hope that the State and its entities will take the recommendations I have set out in paragraph 10 above. Before I deal with the issue whether I should grant prayers (e) and (f) of the petition, I will examine the role of the respondents in providing toll free emergency access to their networks. Counsel for the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents argued that telecommunication companies had provided networks accessibility to the 2<sup>nd</sup> respondent's 999 emergency number. They submitted that the companies had complied with their statutory obligations and hence they court could not grant the reliefs sought against them.

18. The 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents ("the licencees") are telecommunication providers and are licenced by the CCK on certain terms and conditions which include adherence to rules and regulations passed promulgated under the **Kenya Information and Communication Act**. CCK is a statutory corporation established under **section 5** of the Act to, "*licence and regulate telecommunication, radio-communication and postal services in accordance with the provisions of this Act.*" As regards emergency service, **section 23(1)** of the Act provides that, "*The Commission shall, so far as is reasonably practicable, ensure there are provided throughout Kenya, such telecommunication services and in particular, emergency, public payphone and directory information services, as are reasonably necessary to satisfy the public demand thereof.*"

19. Under **Regulation 4** of the **Kenya Information and Communications (Numbering) Regulations, 2010**, the CCK is required to establish a National Communication Numbering and Address Plan and control all numbers in order to ensure fairness and efficiency. **Regulation 8** provides that the National Communication Numbering and Address Plan shall include communication numbers and addresses used to identify, *inter alia*, emergency and inquiry calls. All licencees must comply with this plan which includes designating specific emergency numbers mapped to the 999 number within their respective network tolls free. According to the Telecommunication Numbering Plan for Kenya developed by CCK, 999 and 112 are designated as national emergency numbers for the National Police Service. These numbers are supplemented by toll-free short codes and numbers for public information and other emergency services. There are also toll free helplines by public and private services providers mapped out in the plan.

20. I have reviewed the depositions and I find and hold that all the licencees have complied with the regulations of establishing emergency numbers connected to the 2<sup>nd</sup> respondent's 999 emergency line. In the event they have not done or failed to do so, the CCK retains overall authority to ensure compliance with the terms of the licence and the regulations.
21. The tenor of the affidavits and material before me is that the problem lies with the 2<sup>nd</sup> respondent to ensure that all police stations and offices countrywide have systems that are technically capable of connecting to the licencees networks to complete emergency calls emanating from the respective networks. The sub-committee report I have cited above alludes to the lack of this capacity on the part of the 2<sup>nd</sup> respondent hence it recommended a total overhaul of the current police communication system.
22. The 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents are subject to the jurisdiction of the regulator, CCK, for the manner in which they comply with their statutory duty to provide emergency toll free emergency access to their networks. No complaint has been raised by the petitioner against the licencees in this respect. I therefore find and hold that the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents having complied with their statutory obligations have no mandate to provide security and emergency response services or ensure that the 1<sup>st</sup> and 2<sup>nd</sup> respondents and or any other State organs set up, staff, operate emergency response centres around the country.
23. The petitioner agitates its case against the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents on the basis of corporate social responsibility. In light of the statutory provisions and the duty of respondents, I am unable to locate anything in the Constitution or in any statute that imposes upon the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents a duty to do more than is necessary to comply with legal provisions in the circumstances of this case. No basis has been established for the grant of prayer (b) of the petition.
24. The CCK's statutory mandate under the numbering plan is clear and it does not deal with operational aspects of toll free emergency lines controlled by the police. It is the responsibility of the CCK to ensure that licencees provide the services up to the requisite standards. It has also fulfilled its statutory obligation under **section 23(1)** of the ***Kenya Information and Communication Act*** by providing a detailed numbering plan which includes provision for emergency services. In the absence on a statutory basis for making a mandatory order as prayed, I decline to issue prayers (e) and (f) against CCK.
25. This leaves the question whether I should grant mandatory order in accordance with prayers (e) and (f) of the petition. The grant of appropriate relief under **Article 23** of the Constitution is predicated on the specific finding of a violation of any of the fundamental rights and freedoms under the Bill of Rights. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have shown that the emergency number 999 line is working and the petitioner has confirmed that the lines are working.
26. The responsibility thrust on the State by the Bill of Rights is to take such measures as are necessary to protect the life and security of the people. The State has a wide latitude how it achieves this objective. This Court cannot prescribe how this is to be achieved in deference to the other State organs under the doctrine of separation of powers. Writing in the context of the constitutional obligations of the providers of rail services to protect the safety of commuters, O'Regan J., in ***Rail Commuters Action Group v Transnet Ltd t/a Metrorail (CCT 56/03) [2004] ZACC 20; 2005 (2) SA 359 (CC)*** observed, "[T]he Court requires the bearer of constitutional obligations to perform them in a manner which is reasonable. This standard strikes an appropriate balance between the need to ensure that constitutional obligations are met, on the one hand, and recognition for the fact that the bearers of those obligations should be given appropriate leeway to determine the best way to meet the obligations in all the circumstances."
27. That there is a working system, at the very minimum is a step in the right direction. Whether the system should be improved and on what terms must be left to the broad discretion of the 1<sup>st</sup> and

2<sup>nd</sup> respondents.

28. The court cannot issue a mandatory order directed at the 2<sup>nd</sup> respondent to establish and run a fully-fledged modern call Centre to support the emergency response service within thirty (30) days would call upon the court to look and examine budgets, human resources, technology capacity and such issues which are outside the court's capacity to supervise. Likewise a mandatory order directed at the 2<sup>nd</sup> respondent to install systems which will facilitate storage of call history including police recordings of all calls made to and received at the centre to check on both the efficiency and effectiveness of the system, and also track possible abuse of the facility would thrust the Court in the seat of the Executive arm of the State. The 2<sup>nd</sup> respondent is entitled to explore what means are available to meet the objective of protecting life and property.

29. In view of what I have stated aforesaid I decline to grant prayer (e) and (f) of the petition. I thank all the parties and their counsel for the efforts they made in ensuring that the issue of the toll free telephone emergency service are articulated. Mr Okoiti's effort is laudable as it ensured that the 2<sup>nd</sup> respondent ensures that its emergency response system up and running. However, the Court must deal with cases on the basis of established legal principles hence the conclusions I have reached.

30. In conclusion I declare that the provision of an emergency toll free telephone emergency service is part of the measures taken by the State and its entities to observe, respect, protect, promote and fulfil fundamental rights and freedoms. I decline to grant prayers (a), (b), (c), (d), (e) and (f) of the petition.

31. I thank all counsel who participated for their submissions in this matter and if I did not deal with all the arguments and cite all the authorities, it is not that they were not useful.

32. Each party shall shoulder its costs.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of May 2014.**

**D.S. MAJANJA**

**JUDGE**

Mr Nguring'a instructed by the Ismael and Company Advocates for the petitioner.

Mr Awino, Litigation Counsel, instructed by the State Law Office for the 1<sup>st</sup> and 2<sup>nd</sup> respondent.

Mr Mwiti instructed by Muthoga Gaturu and Company Advocates for the 4<sup>th</sup> respondent.

Ms Arwa instructed by Arwa and Associates Advocates for the 6<sup>th</sup> respondent.

Ms Mbabu instructed by P. K. Mbabu and Compnay Advocates for the 7<sup>th</sup> respondent.

Mr Ojiambo instructed by Ojiambo and Company Advocates for the 8<sup>th</sup> respondent.

Mr Kiptiness instructed by Kiptiness and Odhiambo Associates Advocates for the 9<sup>th</sup> respondent.