



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 545 & 553 of 2012

SUSAN WAMBUI KAGURU.....1<sup>ST</sup> PETITIONER

CHARLES KABUGI KARIERI KIBOI.....2<sup>ND</sup> PETITIONER

STEVEN MUKONZA MBOLONZI.....3<sup>RD</sup> PETITIONER

GEORGE MURIITHI GITHINJI.....4<sup>TH</sup> PETITIONER

ALBERT KARAKACHA MUHAVALI.....5<sup>TH</sup> PETITIONER

AND

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

MINISTER FOR TRANSPORT.....2<sup>ND</sup> RESPONDENT

CONSOLIDATED WITH

PETITION NO. 553 OF 2012

HON. FERDINAND NDUNG’U WAITITU.....1<sup>ST</sup> PETITIONER

HON. GIDEON KIOKO MBUVI SONKO.....2<sup>ND</sup> PETITIONER

BRIAN MBUTHIA GAKERE.....3<sup>RD</sup> PETITIONER

AND

THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

MINISTER OF TRANSPORT.....2<sup>ND</sup> RESPONDENT

JUDGMENT

Introduction

1. The two consolidated petitions seek to challenge several amendments to the *Traffic Act (Chapter 403 of the Laws of Kenya)* (“the Act”) introduced by the *Traffic (Amendment) Act, Act No. 37 of 2012* and *The Traffic (Amendment) (No. 2) Act, Act No. 38 of 2012* (“the Amendments”).

2. The nature and tenor of these amendments in so far as is relevant to these proceedings was to introduce new offences and increase the penalties for infraction existing offences prescribed under the **Traffic Act**.

### **Petitioners' Case**

#### ***Petition No. 545 of 2012***

3. The petitioners in **Petition No. 545 of 2012** are adult citizens and owners and drivers of motor vehicles. They aver that the amendments to the **Traffic Act** violate their rights under the Constitution.

4. They contend that the Amendments have introduced penalties that are so punitive as to place the petitioners in danger of imprisonment and fines that are not proportionate or commensurate to the offences and which violate or threaten to violate their inherent dignity and the right to have that dignity protected as provided for under **Article 28**. They further contend that these penalties violate **Article 29** by exposing them to torture, cruel and inhuman treatment and punishment. That the penalties prescribed are so punitive as to result in arbitrary deprivation or threat of deprivation of the petitioners' right to acquire and own property as protected under **Article 40**.

5. The petitioners contend that the Amendments have placed or threaten to place a large burden on them financially, socially and psychologically to deprive them of their enjoyment of their economic and social rights secured by **Article 43**.

6. The petitioners aver that, as consumers of the services of the State, they are entitled to a system of transport that is fair, efficient and well thought through and the Amendments threaten to deprive them of the protection of their consumer rights particularly the protection of their right to goods and services of reasonable quality and protection of their health, safety and economic interests provided for under **Article 46**.

7. The petitioners aver that the Amendments are arbitrary, selective and punitive and not part of an integrated transport reform programme and their implementation has deprived or threaten to deprive the petitioners of their right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as provided under **Article 47**.

8. The petitioners aver that to the extent that some of the Amendments provide for minimum sentences without a ceiling, the petitioners are deprived or are under threat of being deprived of the right to fair hearing provided for under **Article 50**.

9. As a result of the violations, the petitioners seek following declarations in the petition;

*(i) A declaration that the enactment of the Traffic (Amendment) (No. 2) Act, 2012 and The Traffic (Amendment) Act, 2012 was premature, peremptory, arbitrarily and contrary to the sovereign power and will of the people declared and protected under the Constitution of Kenya.*

*(ii) A declaration that the Traffic (Amendment) (No. 2) Act, 2012 and The Traffic (Amendment) Act, 2012 are unconstitutional for being in contravention of the Constitution of Kenya 2010 and are, therefore, null and void.*

*(iii) Conservatory order to restrain the government by itself, its officers, agents and agencies from implementing or effecting the Traffic (Amendment) No. 2) Act, 2012 and the Traffic (Amendment) Act, 2012 first pending the hearing and determination of the petition and finally and permanently upon hearing of this petition.*

*(iv) Costs of the petition.*

#### ***Petition No. 553 of 2012***

10. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners in **Petition No. 553 of 2012** were, at the time material to this suit, members of Parliament while the 3<sup>rd</sup> petitioner was a matatu driver. The petitioners claim that the Amendments violate several provision of the Constitution; **Article 28** which protect the right to dignity, legitimate expectation that **Article 10** as read with **Article 27** will be complied with and also which also protects the right to equal treatment and protection of the law, the right of free enterprise contemplated under **Articles 33, 34, 40** as well as the right to be innovative and creative.

11. They aver that the rights of Kenyans and particularly persons in Nairobi are violated by the heavy fines whose effect would be to drive drivers, touts and business owners out of business. They claim that as a consequence fare paying passengers will bear the brunt of increased fare. The resultant unemployment caused by loss of business will affect the whole economy negatively.

12. The petitioners seek the following declarations;

(i) *A declaration that the rights of the petitioners, residents of Nairobi and other Kenyans have been threatened, violated and infringed and or breached.*

(ii) *A permanent injunction restraining the respondents by themselves, their agents, servants or whosoever from implementing the amendments to the Traffic Act.*

(iii) *An order for the compensation for the damages and loss suffered by transport operator in Nairobi in particular and Kenya at large.*

(iv) *Any other order the court may deem fit and convenient in the circumstances of this case.*

(v) *A declaration, that the provisions of the Amended Traffic Act 2012 are illegal, invalid and unconstitutional for violating the basic values, principles of the Constitution.*

(vi) *Costs.*

13. The petitioners' case was supported by the supporting affidavits of Ferdinand Waititu sworn on 30<sup>th</sup> November 2012 and that of Susan Wangui Kuguru sworn on 29<sup>th</sup> November 2012. Although I directed the petitioners to file written submissions, their advocates did not file any. I heard Mr Ondieki in support of the petitions where he reiterated the contents of the petitions.

### **Respondents' Case**

14. The respondents have contested the petitioner through the replying affidavit of Dr Eng. Cyrus Njiru, the Permanent Secretary, Ministry of Transport, sworn on 13<sup>th</sup> December 2012. The gist of the response is that the petitioners have not demonstrated how their rights have been violated by passage of a law that is within the legislative competence of Parliament.

15. Eng. Njiru depones that on 19<sup>th</sup> October 2012, the Ministry of Transport held a **National Road Safety Stakeholders Conference** which had national representation and which involved the petitioners. Among the resolutions passed at the Conference was that the law needed to be amended to deal with the road safety concerns. One of the resolutions regarding the enhancement of enforcement of the **Traffic Act** and other traffic law and regulations was to, ***“Review the nature of traffic offences and legislate higher fines and penalties commensurate with the offences ....”***

16. The Permanent Secretary also depones to the fact that road accidents are a serious national issue that requires legislature intervention. He discloses that Kenya loses an average of 3000 people every year due to road accidents.

17. Mr Opondo, counsel for the respondent, submitted that the legislation was consistent with the Constitution and justified as it was intended to deal with the grave situation obtaining on Kenyan roads.

## **Determination and disposition**

18. This matter concerns the constitutionality of amendments to the **Traffic Act**. It is well established that every statute passed by the legislature enjoys a presumption of constitutionality and the court is entitled to presume that it acted in a constitutional and fair manner unless the contrary is proved by the petitioner (see also *Ndyanabo v Attorney General of Tanzania (2001) 2 EA 485*, *Joseph Kimani and Others v Attorney General and Others Mombasa Petition No. 669 of 2009 [2010] eKLR*, *Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 (Unreported)*), *Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011 (Unreported)*).

19. The amendments to the **Traffic Act**, which are forty-nine in number, introduce specific offences and penalties for each offence. The petitioners require the Court to undertake a dissertation of examining each and every of those offences and determining whether each and every amendment violates or infringes any of the rights and fundamental freedoms in the Bill of Rights alleged in the petitions. In my view this exercise amounts to a theoretical exercise without the foundation of a real or actual dispute. There is nothing justiciable at the moment and as a practical matter each and every offence and the penalty thereof shall be tested at the appropriate time on its own merits. (See *John Harun Mwau and Other v Attorney General and Others Nairobi Petition No. 65 of 2011 (Unreported) [2012] eKLR* and *Samuel Mungai Ng'ang'a v Minister for Justice, National Cohesion and Constitutional Affairs and Others Nairobi Petition No. 354 of 2012 [2013] eKLR*)

20. A substantial part of the petitioners' case dwells on whether the Amendments are appropriate or right or that the legislature could have adopted better strategies to deal with the issue of road safety. The Courts is not a super legislature to decide what is the 'appropriate', 'right' or 'wise' legislative policy to govern various matters for which the legislature is called upon to legislate. The Court's duty, in a proper case, is to ensure that the legislature acts within the constitutional limits of its power.

21. One of the arguments proffered by the petitioners' is that the Amendments were enacted and brought into force without regard to an integrated transport policy framework which includes road safety initiatives like establishing the National Transport and Safety Authority which is to be established under the **National Transport and Safety Authority Act, 2012**. The petitioners also contended that the **Traffic Act** without amendment was sufficient to maintain law and order on the roads as evidenced by the enforcement of the "Michuki Rules" in 2003 – 2004. Though these arguments are attractive, the Court cannot nullify legislation merely because it is thought that such law is in 'bad taste' or 'unconscionable' or 'inconvenient.' As Justice Lenaola stated in *Mount Kenya Bottlers Limited Others v Attorney General Others, Nairobi Petition No. 72 of 2011 (Unreported)*, the Courts cannot act as "regents" over what is done in Parliament because such an authority does not exist.

22. As regards the issue of public participation raised by the petitioners I will re-state what I said in the case of *Law Society of Kenya v Attorney General Nairobi Petition No. 318 of 2012 (Unreported)*, "[51] In order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute ..... [52] The burden of showing that there has been no public participation or that the level public participation within the process does not meet the constitutional standards is on the petitioner."

23. From the petitioners' own documents it is clear that the amendment to the **Traffic Act** have been part of the overall transport policy. The petitioners in **Petition No. 545 of 2012** refer to the **Integrated National Transport Policy** dated May 2009 and the **Sessional Paper on Integrated National Transport Policy** dated November 2010 which are available on the Ministry website. In my view, these are the kind of documents that engender public debate and enhance public participation. The Permanent Secretary, in his deposition, has also shown that the Ministry organised a conference for stakeholders to discuss road safety. The resulting legislation was built upon these initiatives. It cannot therefore be said that there was no public participation.

24. In ***Commission for the Implementation of the Constitution v Parliament of Kenya and Another Nairobi Petition No. 454 of 2012 (Unreported)***, I observed as follows, “I must state that although the Act was condemned on the basis of lack of public participation, the parties who impugned the Act on the basis did not demonstrate to the Court how the National Assembly had failed to achieve public participation within the constitutional parameters taking into account the process from the time the bill was initiated by the CIC upto its enactment. The parties did not address me on the standard to apply in order to assess the level of public participation in the legislative process. I am therefore unable to find and hold that the Act is unconstitutional for want of public participation.” The petitioners have not demonstrated what standard or whether what was done effectively undermined the value of public participation. I find no reason to impugn the legislature on this basis.

25. I am afraid that the petitioners have not made out a case warranting the annulment of ***Traffic (Amendment) Act, Act No. 37 of 2012*** and ***The Traffic (Amendment) (No. 2) Act, Act No. 38 of 2012***.

26. The petitions be and are hereby dismissed. There shall be no order as to costs.

**DATED and DELIVERED at NAIROBI** this 27<sup>th</sup> day of March 2013

**D.S. MAJANJA**  
**JUDGE**

Mr Ondieki instructed by Ondieki and Ondieki Advocates for the petitioners in Petition No. 553 of 2012.

Mr Ndegwa instructed by S.W. Ndegwa and Company Advocates for the petitioners in Petition No. 545 of 2012.

Mr Opondo, Litigation Counsel, instructed by the State Law Office for the respondents