



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**CONSTITUTIONAL PETITION NO 15 OF 2012**

**MILICENT OGAYE OGUTU.....**  
**....PETITIONER**

**VERSUS**

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

**THE COMMISSIONER OF POLICE..... 2<sup>ND</sup>**  
**RESPONDENT**

**THE MINISTRY OF INTERNAL SECURITY AND PROVINCIAL ADMINISTRATION**  
**.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner has filed this petition alleging violation of her rights under Articles 27, 40(1)(a) and 47(1) of the Constitution of Kenya, Article 14 of the African Charter on Human and People’s Rights and Articles 3 and 17 of the Universal Declaration of Human Rights, and Articles 14, 22 and 28 of the African Charter on Human and People’s Rights. The petition is dated 20<sup>th</sup> January 2012 and is supported by an affidavit sworn by the petitioner on the same date and a further affidavit sworn on 11<sup>th</sup> June, 2012.
2. The violations arise allegedly as a result of the conduct of two police officers, **Police Constable Dickens Otieno** and **Police Constable Dennis Ocholla**, both stationed at the Nairobi Area Traffic Headquarters. She alleges that the two officers have been arresting her motor vehicles registration numbers KBH 565Q and KBJ 618J which she uses to operate a passenger transport business plying route 60-35, Tusker-Umoja, within Nairobi. She claims that for a period since 9<sup>th</sup> March, 2011, the two officers have been arresting the above vehicles without any justifiable grounds; that when the vehicles are arrested, the police officers insist that they be towed to the police station despite the fact that they are in a running condition; that they are then subjected to inspection and a false and doctored report alleging a number of defects is produced, and on the basis of this report, she is charged in court.

3. The petitioner alleges that the intention behind this conduct by the police officers is to expose her to financial expenses, losses and frustrations in order to drive her out of the public service business, and that they have issued threats to this effect.. She claims that her two vehicles are well maintained and fitted with speed governors as required by the law, but that the two officers continue to arrest them arbitrarily.
4. She has set out the instances in which her vehicles have been arrested since March 2011. On 29<sup>th</sup> March, 2011, her motor vehicle registration number KBJ 618J was arrested by the two officers for allegedly having oversize tyres and playing loud music, was produced in court on 30<sup>th</sup> March, 2011; that she and her driver were charged in Traffic Case No. 5997 of 2011, pleaded guilty and were fined Ksh. 15,000 and Ksh. 16,000 respectively. She submits, however, that despite their paying the fines, the two police officers detained the vehicle at the police station from 30<sup>th</sup> March, 2011 to 23<sup>rd</sup> May, 2011 without any justifiable grounds.
5. The petitioner also alleges that her motor vehicle Registration No KBJ 618J was again arrested on 23<sup>rd</sup> May, 2011; when she went to the Nairobi Area Traffic Headquarters to find out why it was arrested, she was locked in the police cells together with her one year old child and was later on taken to court and charged in Traffic Case No. 9186 of 2011, 54 days after her driver was charged with the same offence; that she pleaded guilty and was fined Ksh. 15,000 despite the fact that she was not at fault. She contends therefore that the police officers are abusing their powers, and that in effecting the arrest of her motor vehicles, they are subjecting her to harassment, coercion, arbitrary arrests and intimidation.
6. With regard to motor vehicle registration No. KBH 656Q, the petitioner submits that it is a 2002 model, it is serviced regularly, and it is therefore not possible for it to be unroadworthy as alleged by the police officer. Despite this, the said motor vehicle was arrested on 9<sup>th</sup> March, 2011 and charges were preferred in Traffic case No. 4259 of 2011; that it was again arrested on 17<sup>th</sup> October 2011 and charges preferred in Traffic Case No. 18626 of 2011. In all these cases, the petitioner submits that she pleaded guilty because she believed that the arrests were ordinary and carried out in enforcement of the law.
7. She also alleges that the same vehicle was arrested again on 28<sup>th</sup> March 2012 by PC Odhiambo Agumba, Force No. 57671 who, according to the petitioner, first called PC Dickens Ocholla on his cell phone to enquire whether it was the vehicle he wanted arrested. She claims that the vehicle was later driven to Nairobi Area Traffic Headquarters and charged in Traffic Case No. 7370 of 2012 which is currently pending before the Chief Magistrate's Court in Milimani. She avers further that the same vehicle, KBH 656Q, was again arrested on 7<sup>th</sup> May 2012 and is facing charges in Traffic Case No. 9907 of 2012, still pending in court. She states that she had been pleading guilty to the charges brought against her before as she had not known that her vehicles were being arrested and would continue to be arrested unless she bribed the police officers. She had not pleaded guilty in the subsequent cases currently pending before the traffic court.
8. The petitioner submits that the arrests, threats and intimidation meted on her and her drivers in respect of her motor vehicles violates the legal principle of legitimate expectation; that like any other business person whose only source of income is her two vehicles, she expects the police to be fair, reasonable and treat her and her public road transport vehicles in a manner that the police officers treat their own vehicles which are registered in their relatives' names; that she expects the police to act in accordance with the provisions of section 14A of the Police Act; that the police officers have carried out selective and intentional arrests on her vehicles thus violating her constitutional rights.
9. The petitioner alleges violation of her right not to be discriminated against under Article 27, to property under Article 40, violation of the rights of her child under Article 53(d), being subjected to cruel, inhuman or degrading treatment contrary to Article 25(a) of the Constitution, and denial of her right to fair administrative action under Article 47.

10. The petitioner therefore seeks, among others, a declarations that her right to property under Article 40 of the Constitution, and under Article 47 to fair administrative action were violated by the unlawful conduct of PC Dickens Otieno and PC Dennis Ocholla; a declaration that the said conduct of the two officers violated her right to equality and freedom from discrimination under Article 27 and a declaration that the arrests carried out against her motor vehicles by PC Dickens Otieno and PC Dennis Ocholla are illegal, arbitrary and unlawful. She asks the court to issue an injunction restraining the arrest of the two vehicles unless the arrests are being carried out in a lawful manner.
11. In addition, the petitioner seeks an order that as a result of the arrests, she has suffered damage, pain and suffering and is entitled to special, general and exemplary damages against the respondents jointly and/ or severally. She has quantified the special damages to include fees paid in court in form of fines between 9<sup>th</sup> March 2011 to 17<sup>th</sup> November 2011 and towing fees paid to the police officers after the arrest of her motor vehicles, a total claim of Kshs 156,000/-. She also prays for the costs of this petition and interest thereon.

### **The Respondents' Case**

12. The respondents oppose the petition and have filed grounds of opposition dated 1<sup>st</sup> March, 2012 and a replying affidavit sworn on 23<sup>rd</sup> May 2012 by Patrick Lumumba, a Senior Assistant Commissioner of Police attached to Nairobi Area Traffic Headquarters. The respondents contend that this petition is incompetent, incurably defective and bad in law and it amounts to an abuse of the court process. They argue that the actions that form the basis of the petitioner's complaint constitute legitimate obligations of the Police under the Police Act, the Traffic Act and related laws, and do not disclose any denial, violation, infringement or threat to the petitioner's fundamental rights and freedoms. The respondents further contend that in any event, the rights alleged to have been violated are subject to limitations as provided under the Constitution.
13. To the petitioner's claim that her motor vehicle registration number KBJ 618J was detained unlawfully for a long time, the respondents assert that it was arrested by Chief Inspector Abai together with PC Maiyo and PC Pembe for having over- size tyres and playing loud music; that the driver of the said motor vehicle was charged in Traffic Case No. 5997 of 2011, convicted on his own plea of guilty and fined Ksh. 16,000.00; that the vehicle was subsequently detained at Nairobi Area Traffic Headquarters while awaiting the petitioner to appear after she had been summoned to the Nairobi Area Traffic Headquarters through her driver; that when the petitioner appeared at the Police Station on 23<sup>rd</sup> May 2011 at 7.30 am, she was presented to court at 9.00 a.m to answer charges brought against her as the owner of the vehicle; that she pleaded guilty and was fined, after which the motor vehicle was released. The respondents therefore deny detaining the vehicle or any inordinate delay on their part in releasing it and submit that had the petitioner appeared earlier at Nairobi Area Traffic Headquarters, the motor vehicle would have been released earlier.
14. In response to the allegation that the petitioner's motor vehicles have been subjected to unlawful harassment, coercion and arbitrary arrests and intimidation with a view to driving her out of business, the respondents contend that the motor vehicles are arrested in a lawful manner, and that the petitioner and her driver have pleaded guilty to the charges preferred against them. They have neither challenged the authenticity of the charges that have been brought against them in respect of the motor vehicles nor the sentences passed on them; that it would be duplicitous for the petitioner to plead guilty to a charge brought against her, willingly pay the fine imposed and then turn around and claim that the process was arbitrary and amounted to intimidation; that the petitioner cannot now challenge the charges brought against her and the fines paid in respect of those charges in a constitutional petition, since this court cannot entertain an appeal against a decision passed by the Traffic Court.
15. The respondents contend that the petitioner has failed to demonstrate how her rights under the constitution with respect to property, non-discrimination, fair administrative action or the right not

to be subjected to cruel and degrading treatment have been violated. They point out that though the petitioner alleges violation of her rights and claims that her motor vehicles have been arrested by PC Dickens Otieno and Dennis Ocholla who have acted in bad faith and ultra vires their legal mandate, the petitioner has admitted that her motor vehicles have been arrested by various other police officers.

16.They submit therefore that the petitioner has failed to demonstrate how her rights have been violated; that conservatory orders cannot be issued against the respondents as the effect of such orders would be to prevent the police from executing their functions; that the special damages pleaded were incurred by the petitioner as a result of a legal, judicial process; that there was no evidence placed before the court to support the petitioner's allegations of unlawful harassment, coercion, intimidation and interference with the petitioners' business. They therefore ask the court to dismiss the petition with costs.

## **Findings**

17.The petition before me discloses two possible scenarios, depending on which interpretation of the facts presented is credible. The first is of an innocent business woman, trying to make a living from operating two public transport vehicles, who is subjected to arbitrary arrests, harassment and intimidation by two police officers with the sole aim of driving her out of business or extracting bribes from her. The other is of a zealous police force, eager to do its work and maintain order on the roads, which is confronted with a habitual law breaker who operates unroadworthy vehicles with over-size tyres, loud music, and a driver with a penchant for picking up passengers in all the wrong places in violation of traffic laws.

18. The facts, which are not much in dispute, are that the petitioner owns two public transport vehicles registration numbers KBH 565Q and KBJ 618 J. These vehicles have been arrested on several occasions from March 2011, and the driver and owner charged in court, convicted on their own pleas of guilty, and fined various amounts. The cases in which the petitioner and or her driver have been charged in court, pleaded guilty and been fined are Traffic Case numbers 5997 of 2011, 9186 of 2011, 18626 of 2011 and 4259 of 2011. Traffic Case numbers 7370 of 2012 and 9907 of 2012, in which the petitioner has pleaded not guilty, are still pending in court awaiting trial.

19.To the petitioner, these arrests have been arbitrary and illegal and intended to force her out of business, and therefore a violation of her constitutional rights. To the respondents, the arrests, charges, convictions and fines are part of the normal judicial process, just the police doing their work, as they are mandated to do, in ensuring compliance with traffic laws.

20.The duty of the court is to weigh these conflicting facts and determine whether they disclose violation of the rights of the petitioner under the provisions of the Constitution that she has relied on. The single issue for determination, therefore, is whether the facts as presented disclose a violation of the petitioner's constitutional rights under Article 40 (1), 47, 27, 25(a) and 53(1) (f) of the Constitution.

## **Violation of Article 40**

21.Article 40 of the Constitution contains the constitutional guarantee to property, and prohibits the arbitrary taking of property without compensation. The petitioner's vehicles have been arrested for allegedly breaking traffic rules, and in one incident, on the 30<sup>th</sup> of March 2011, one of them was arrested and detained for a period of 54 days. The respondents counter that the petitioner had been summoned to appear at Traffic Headquarters after her vehicle was impounded but did not, and the day she did appear, she was charged in court, pleaded guilty and paid her fine, and the vehicle was released. The petitioner disputes this, arguing that she went to get the vehicle from the police on several occasions, but it was not released to her until 23<sup>rd</sup> of May 2011 when she went to the Traffic Headquarters, was arrested and charged, pleaded guilty, paid the fine and the vehicle was

released.

22. From these conflicting versions, it is difficult to gauge where the truth lies. However, I am unable to make a finding that the petitioner's rights under Article 40 were violated. The petitioner has been charged with breach of traffic laws, and has pleaded guilty to the charges in all the cases except two. Upon her guilty plea and payment of the requisite, her motor vehicles have been released to her. I can therefore find no violation of the provisions of Article 40.

### **Violation of Article 47**

23. For the same reasons, and based on the same facts, I can find no basis for alleging a violation of the right to fair administrative action. The petitioner has been arrested and charged in court, and upon her plea of guilty, been fined. The police, in effecting the arrests, are exercising powers vested in them by statute. The exercise of such powers, provided it is exercised in accordance with the law, does not amount to a violation of the petitioner's right to fair administrative action.

24. The petitioner alleges that she has been subjected to cruel and degrading treatment contrary to Article 25(a). Article 25 contains the fundamental rights and freedoms that cannot be subject to limitation. I believe the petition has in mind Article 29(f) which provides that no one shall be treated or punished in a cruel, degrading or inhuman manner. Does the conduct of the police amount to cruel and degrading treatment contrary to Article 29? I take the view that being subjected to a legal process such as arrest and trial is not, in and of itself, a violation of the petitioner's rights, nor does it amount to cruel and degrading treatment as contemplated under Article 29.

### **Claims for Damages**

25. The petitioner has asked the court to grant her special damages comprising of the fines and towing charges that she incurred. Having pleaded guilty and not appealed against the conviction, she cannot now turn around and claim that the fines were unlawful. She had the opportunity to raise the matters that she has raised in this petition before the court that dealt with the various traffic cases but did not.

26. The petitioner has two pending traffic cases involving the same motor vehicles, Traffic Case Nos 7370 of 2012 and 9907 of 2012. If indeed, as she alleges, the arrests are harassment and the inspection reports are false, then it is incumbent upon her to bring up those matters before the court hearing the traffic cases which is best suited to hear evidence and determine whether indeed the charges and reports are fabricated. She cannot continue to plead guilty and pay fines for offences which she asserts she has not committed.

### **Disposition**

27. The upshot of my findings above is that there are no violations of the Constitution demonstrated in this petition. There is, however, some cause for concern in the dealings of the respondents with the petitioner. The facts before me disclose that the petitioner's motor vehicles have been arrested no less than six times in the space of one year. According to the petitioner, most of these arrests have been effected by, or at the instigation of, the two police officers whom the petitioner alleges have been threatening to drive her out of business, PC **Dickens Otieno** and PC **Dennis Ocholla**.

28. I revert to the point I raised at the beginning of this analysis: either we have an innocent woman suffering some degree of harassment and intimidation from police officers with a view to obtaining bribes from her or driving her out of business, or we have police officers who are intent on doing their jobs as required under the Police Act and the Traffic Act who are dealing with a habitual law breaker.

29. I have considered the respective cases of the parties and the averments by the petitioner and the respondent in their respective affidavits. I note that there have been what seem to be inordinately

high arrests of the petitioner, and arraignment in court. Even allowing for the fact that she has pleaded guilty to the charges preferred against her, such frequent arrests give rise to the suspicion that there is some truth in her assertion that the frequent arrests that she is subjected to, while falling short of violation of constitutional rights under Articles 40, 47, 27, 29 and 53, do, at the very least, amount to harassment. They may, indeed, as she asserts be deemed to be directed at denying her an opportunity to earn a living.

30. This court is not in a position to investigate and make declarations whether indeed **PC Dickens Otieno and PC Dennis Ocholla** have been subjecting the petitioner to harassment and arbitrarily arresting her motor vehicles with a view to putting her out of business. It may well be that the petitioner did commit the traffic offences that she has been arrested for. It does, however, appear strange that the petitioner has been arrested and charged in court at least six times in one year, and she feels sufficiently harassed and her livelihood threatened to seek the court's protection.

31. The court has a duty to offer an appropriate remedy to the petitioner with a view to protecting her right to earn a livelihood without interference and harassment, if that is the actual position in this case. The constitution has established offices and mechanisms to ensure protection of the rights of citizens in their dealings with those charged with enforcing law and order. It undermines the mandate of these institutions if the officers whom the public is in daily contact with are, rightly or wrongly, perceived to be abusing their power for personal gain.

32. The remedy that commends itself to this court therefore is to refer this matter to the Independent Police Oversight Authority to investigate and, if any wrongdoing is found to have been committed by **PC Dickens Otieno and PC Dennis Ocholla**, take appropriate action if it is within its mandate to do so or refer the matter to the Inspector General of Police to take appropriate disciplinary action. The Court notes also that under Section 87 of the **National Police Service Act, Act No. 11A of 2011**, there is established an internal unit called the **Internal Affairs Unit** whose functions include, among other things, to receive and investigate complaints of misconduct against the police from members of the Service or members of the public and make recommendations for the interdiction, suspension or reprimand of a police officer. I direct that this judgment be furnished to both the Independent Police Oversight Authority and the Internal Affairs Unit in the office of the Inspector General with a view to their taking the appropriate action should any wrongdoing on the part of the two officers be established.

33. In light of my findings in this matter, the petitioner shall have the costs of this petition.

**Dated, Delivered and Signed at Nairobi this 14<sup>th</sup> day of March 2013.**

**Mumbi Ngugi**

**Judge**

**Mr. Jaoko instructed by the firm of Masika & Koros Advocates for the Petitioner**

**Ms. Makori instructed by the Director of Public Prosecutions for the Respondents**