



REPUBLIC OF KENYA



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**Wachira & another v Director - Super Metro Sacco & 10 others (Petition E538 of 2022)  
[2025] KEHC 56 (KLR) (Constitutional and Human Rights) (15 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 56 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E538 OF 2022**

**LN MUGAMBI, J**

**JANUARY 15, 2025**

**BETWEEN**

**WAIRIMU MUTHONI WACHIRA ..... 1<sup>ST</sup> PETITIONER  
CENTRE FOR RIGHTS EDUCATION AND AWARENESS  
(CREAW) ..... 2<sup>ND</sup> PETITIONER**

**AND**

**DIRECTOR - SUPER METRO SACCO ..... 1<sup>ST</sup> RESPONDENT  
EZEKIEL NJUGUNA NGURE ..... 2<sup>ND</sup> RESPONDENT  
EUNICE NJUE ..... 3<sup>RD</sup> RESPONDENT  
INSPECTOR GENERAL OF THE NATIONAL POLICE  
SERVICE ..... 4<sup>TH</sup> RESPONDENT  
DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 5<sup>TH</sup> RESPONDENT  
DIRECTOR OF PUBLIC PROSECUTIONS ..... 6<sup>TH</sup> RESPONDENT  
DIRECTOR GENERAL- NATIONAL TRANSPORT & SAFETY  
AUTHORITY ..... 7<sup>TH</sup> RESPONDENT  
REGIONAL CRIMINAL INVESTIGATIONS OFFICER NAIROBI .... 8<sup>TH</sup>  
RESPONDENT  
CABINET SECRETARY - MINISTRY OF TRANSPORT ..... 9<sup>TH</sup> RESPONDENT  
CABINET SECRETARY - MINISTRY OF INTERIOR & COORDINATION OF  
NATIONAL GOVERNMENT ..... 10<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL ..... 11<sup>TH</sup> RESPONDENT**



## JUDGMENT

### Introduction

1. The Petition dated 8<sup>th</sup> November 2022, is supported by the Petitioners affidavits in support of even date and further affidavits to the Respondents responses, all dated 2<sup>nd</sup> May 2023.
2. The Petitioners bring this Petition against the Respondents for the alleged assault meted out on the 1<sup>st</sup> Petitioner aboard the 2<sup>nd</sup> Respondent's vehicle and managed by the Super Metro Company Limited. Accordingly, the Petitioners seek the following reliefs:
  - i. A Declaration that the Respondents violated the fundamental rights of the 1<sup>st</sup> Petitioner as provided in Articles 27, 28, 29(c), 29(f), 39(1) and 46 of the Constitution.
  - ii. A Declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be held vicariously liable for the actions of violence by its driver/agent/representative against the 1<sup>st</sup> Petitioner.
  - iii. A Declaration that the failure of the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents to adequately respond to the 1<sup>st</sup> Petitioner's report of harassment, assault and robbery in a public service vehicle (PSV) by its driver/agent/representative in accordance with the required standard of due diligence was a violation of the fundamental rights and freedoms of the 1<sup>st</sup> Petitioner as provided in Articles 27, 28, 29(c) and 29(f) of the Constitution.
  - iv. A Declaration that the failure of the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents to adequately respond to the 1<sup>st</sup> Petitioner's report of harassment, assault and robbery in a public service vehicle (PSV) by its driver/agent/representative in accordance with the required standard of due diligence is a violation of the fundamental rights and freedoms of the 1<sup>st</sup> Petitioner as provided in Articles 27, 28, 29(c), 29(f), 39(1) and 46 of the Constitution.
  - v. A Declaration that the failure of the 7<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Respondents to take necessary measures to prevent violence against women in public transport by causing to be enacted legislation, policy, rules or regulations clearly highlighting the right of women to exercise their mobility rights devoid of any violence against them and the penalty to be imposed upon any person who attacks a woman using the public transport system in accordance with the required standard of due diligence is a violation of the fundamental rights and freedoms of the 1<sup>st</sup> Petitioner as provided in Articles 27, 28, 29( c ), 29(f), 39( 1) and 46 of the Constitution.
  - vi. An order compelling the 7<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Respondents to take necessary measures to prevent violence against women in public transport by causing to be enacted legislation, policy, rules or regulations clearly highlighting the right of women to exercise their mobility rights devoid of any violence against them and the penalty to be imposed upon any person who attacks a woman using the public transport system in accordance with the required standard of due diligence.
  - vii. An order compelling the Respondents to report to this Court after every 60 days on the progress made with regard to creation of the policy/legislation on women mobility rights.
  - viii. An order compelling the Respondents to facilitate awareness creation to the public transport workforce and members of the public on the right of women to freedom of movement without being subjected to violence.



- ix. An order compelling the 6<sup>th</sup> Respondent to initiate fresh and proper investigations by the 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> Respondents and to institute prosecution against the perpetrator.
- x. An order that the Respondents be held jointly and severally liable for violating the 1<sup>st</sup> Petitioner's fundamental rights and freedoms.
- xi. An order that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents compensate the 1<sup>st</sup> Petitioner for the loss she incurred on the material date, including Ksh. 80,000 stolen by their driver/agent/representative, her gold necklace estimated to cost Ksh. 40,000 stolen by driver/agent/representative and cost of medical services, together with interest accruing from the time the incident occurred.
- xii. This Court awards the 1<sup>st</sup> Petitioner Kshs 10,000,000 being general damages for the emotional and psychological pain and suffering caused by the Respondents.
- xiii. An order as to costs of the suit.
- xiv. Consequent to the grant of the prayers above the Court be pleased to issue any other or further remedy (directions and orders) that the Court shall deem fit and necessary to give effect to the foregoing orders, and/or favour the cause of justice.

### **Petitioners' Case**

3. The Petitioners depone that on 7<sup>th</sup> August 2018 the 1<sup>st</sup> Petitioner was attacked and assaulted in a bus known as Super Metro, registration no. KCH 434T. On the fateful day, the 1<sup>st</sup> Petitioner boarded the bus heading to Stima Sacco where she said was heading to make a deposit of Ksh.80, 000.
4. To her shock, she realized at Ngara area that the bus was heading towards Thika Road instead of the Westlands area. This prompted her to ask the bus conductor to stop the vehicle so that she can alight. She gave him Ksh.1000 to deduct the fare but he refused to return her change. This caused an altercation that saw the bus driver stop the bus and come into the passenger cabin.
5. The driver pushed her outside the vehicle causing her to hit her leg on the metal barrier at the vehicle's door before falling outside. He then followed her and proceeded to slap her and hit her until she bled. The two assailants thereafter threw her belongings to her before speeding off. On checking her bag, she found that the Ksh.80,000/- was missing. She also realized that the gold pendant she was wearing was missing.
6. The 1<sup>st</sup> Petitioner proceeded to report the matter to the 5<sup>th</sup> Respondent at Kiambu Road, but was referred to Pangani Police Station where she reported the incident. In the process, she was sent to Medicines Sans Frontiers (MSF) at Huruma to procure the P3 form.
7. On the same day, the 1<sup>st</sup> Petitioner also reported the matter to the Super Metro office in Nairobi CBD in particular, to the fleet supervisor, one Michael Muturi. Michael Muturi later on called her and informed her that the particular bus in question was not scheduled to be in operating on that day and that the alleged assailant driver was a squad driver.
8. The following day, he 1<sup>st</sup> Petitioner reported the matter to the 7<sup>th</sup> Respondent in view of the 1<sup>st</sup> Respondent disclosure that the assailant driver was not an official driver which is contrary to the Rules and Regulations.
9. She further avers that on the same day she spotted the said bus in Nairobi CBD and immediately reported it to the police. They in turn went to the Super Metro stage to wait for it. Unfortunately, the bus did not come to its designated stage.



10. The 1<sup>st</sup> Petitioner states that a few days later she was invited for an identification parade by the investigating officer in the matter but the assailant driver was not among the persons paraded. She asserts that the investigating officer undertook to continue with investigations. Afterwards, the said investigations officer stopped picking her calls. This prompted the Petitioner to report the matter to Kenya Police Headquarters and requested to be assigned a new investigating officer.
11. Thereafter, the owner of the said bus who is the 2<sup>nd</sup> Respondent herein was summoned by the police. A meeting was held on 2<sup>nd</sup> September 2018 and was attended by the OCS Pangani Police Station, the investigating officer, the 2<sup>nd</sup> Respondent, Michael Muturi and the 1<sup>st</sup> Petitioner.
12. In that meeting, 1<sup>st</sup> Petitioner states that the 2<sup>nd</sup> Respondent refused to compensate the 1<sup>st</sup> Petitioner for the loss incurred during the incident maintaining that his bus was not scheduled to operate on that day. The police decided to proceed with the Court case at Makadara Law Courts on 7<sup>th</sup> September 2018.
13. The 1<sup>st</sup> Petitioner states that the accused person who was presented in court was not the alleged assailant driver and that the charge sheet did not adequately address the particulars of the offence. She informed the Magistrate and the Prosecution of the same. In effect, the matter was withdrawn under Section 87(a) of the *Criminal Procedure Code*.
14. On requesting for fresh investigations by the police, the matter was transferred to the 5<sup>th</sup> Respondent but the 5<sup>th</sup> Respondent did not inform her of the next steps to be taken in the matter.
15. Frustrated, the 1<sup>st</sup> Petitioner voiced her concerns on the 7<sup>th</sup> Respondent's X account. As a result, they summoned her for a meeting on 17<sup>th</sup> October 2018. It is claimed that at the meeting the Super Metro personnel undertook to compensate her for the loss but did not do so.
16. The matter was also picked up by a reporter working at Nation Media who sought to interview her. Her story was published on the 11<sup>th</sup> August 2019 Saturday Nation and Pulse Live Kenya YouTube Channel on 28<sup>th</sup> January 2020.
17. In addition to this, the 1<sup>st</sup> Petitioner wrote a letter to the 4<sup>th</sup> Respondent on 3<sup>rd</sup> October 2019. In response, she was advised to address the same to the 5<sup>th</sup> Respondent. Later on in 2020, her case was assigned to the 3<sup>rd</sup> Respondent by the 8<sup>th</sup> Respondent. In like manner, a meeting was held by the 3<sup>rd</sup> Respondent and the Super Metro personnel. They maintained that they would settle the matter but in the second meeting they refused to compensate her resiling from their original position.
18. It is asserted that the ensuing events consisted of a push and pull by the Respondents with promises of action being taken but all was futile.
19. It is the Petitioners position that this situation is not unique to the 1<sup>st</sup> Petitioner but highlights the violence women face in the form of harassment, assault, rape and murder whilst in public transportation
20. For this reason, the Petitioners bring the instant Petition against the Respondents for violation of Articles 27, 28, 29(c), 29(f), 39(1) and 46 of the *Constitution*, their failure to take action in this matter and failure to create protective policies concerning women in relation to public transport.

### **1<sup>st</sup> Respondents' Case**

21. In response, the 1<sup>st</sup> Respondent through its Chairman, Nelson Mwangi Nduki, filed a Replying Affidavit sworn on 20<sup>th</sup> March 2023. He informs that the 1<sup>st</sup> Respondent is a Transport Fleet and



Management Company Operating in Nairobi with over 200 individual and corporate members who operate under their name at a fee.

22. This means that the 1<sup>st</sup> Respondent and its directors do not interfere with the daily operations of any of the franchisees including the persons hired as drivers and conductors. As such, the 1<sup>st</sup> Respondent does not also have control over the driver and conductor of the vehicles. The 1<sup>st</sup> Respondent only employs support staff such as fleet supervisors to carry out its administrative work.
23. Accordingly, he depones that the alleged assailant driver was not an employee of the 1<sup>st</sup> Respondent for it to be held liable. He asserts that this is evidenced by the fact that the Police did not apportion any criminal liability on the 1<sup>st</sup> Respondent and its staff.
24. In fact, he notes that one its fleet manager, Michael Muturi was one of the prosecution witness set to testify in view of the 1<sup>st</sup> Petitioner's case. Moreover, that Michael Muturi made sure to assist the Petitioner throughout. Considering this, he contends that the 1<sup>st</sup> Respondent has been cooperative and aided in the process to enable the 1<sup>st</sup> Petitioner access justice.
25. He further avers that the numerous fleet of vehicles operating under its name carry women on a daily basis and that the 1<sup>st</sup> Respondent has never received such complaints or circumstances that cause their commute unsafe amounting to violation of their rights.
26. For these reasons, he contends that the instant Petition as pertains to the 1<sup>st</sup> Respondent has an ulterior motive motivated by monetary reasons. This is since the 1<sup>st</sup> Petitioner has never taken any step to ask the 1<sup>st</sup> Respondent to take account for any acts or omissions ascribable to its staff. To conclude, he states that the Petition does not specify the provisions of the Constitution infringed by the 1<sup>st</sup> Respondent to enable it be vicariously liable.

### **2<sup>nd</sup> Respondent's Case**

27. The 2<sup>nd</sup> Respondent filed his Replying Affidavit sworn on 17<sup>th</sup> April 2023. On the onset, he avers that the Petition does not raise any cause of action against the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents. This is because they are officers mandated by the law to carry out investigations into criminal complaints and prosecute accused persons. He points out thus that this Court does not have jurisdiction to compel these Respondents' to carry out their mandate.
28. He depones that the impugned vehicle which he owns, was not operating and on the road on 7<sup>th</sup> August 2018 as alleged. The vehicle had been grounded on account of a mechanical problem and so had been in the yard the whole day. In view of this, he argues that he cannot be held vicariously liable for the alleged action. He further claims that contrary to the 1<sup>st</sup> Petitioner's allegation, he has never undertaken to settle her complaint outside Court.
29. It is further argued that the 1<sup>st</sup> Petitioner has failed to give clear information and details surrounding this incident. Be that as it may, he argues that the 1<sup>st</sup> Petitioner has failed to substantiate her claims and met the constitutional threshold set out in Anarita Karimi Njeru v Republic (1976-1980) KLR 1272. He in light of this urges the Court to dismiss the Petition with costs to the Respondents.

### **3<sup>rd</sup>, 5<sup>th</sup> and 8<sup>th</sup> Respondents' Case**

30. These Respondents through the 3<sup>rd</sup> Respondent filed their Replying Affidavit sworn on 17<sup>th</sup> April 2023.



31. It is stated that the 1<sup>st</sup> Petitioner visited the 8<sup>th</sup> Respondent's office after a referral by the OCS Pangani Police Station concerning her case Makadara Criminal Case No.2094 of 2018. She states that in the matter, the 1<sup>st</sup> Petitioner did not testify as she averred that the person who had assaulted her was not in Court. As a consequence, the criminal matter was withdrawn.
32. She depones that when the 1<sup>st</sup> Petitioner came to the 8<sup>th</sup> Respondent's office, she requested for a fresh investigation of the matter. From her interrogation she was able to pick out that the 1<sup>st</sup> Petitioner did not know the name, whereabouts and description of the alleged assailant driver.
33. She informs that she reached out to the investigation officer, PC Peter Mwangangagi who recorded a Statement on the status of the investigations. Further he informed that the criminal matter had been withdrawn as the 1<sup>st</sup> Petitioner maintained that she wanted the 1<sup>st</sup> Respondent charged not the driver of the cited vehicle. She also recorded the statements of Michael Muturi, the 2<sup>nd</sup> respondent and Simon Nyaga, the official driver.
34. Thereafter, she called for a meeting between the 1<sup>st</sup> Petitioner and these persons in an attempt to resolve the dispute. She depones that the 1<sup>st</sup> Respondent in an effort to resolve the issue, indicated that they were willing to come to a settlement agreement. Unfortunately the negotiations broke down as the 1<sup>st</sup> Petitioner insisted on a sum more than Ksh.200,000/-.
35. Following the break down, the 1<sup>st</sup> Petitioner made known that she would institute court proceedings and left. On the other hand, she requested that the 1<sup>st</sup> Respondent offer more information on the matter so as to be able to identify the alleged assailant driver. It is indicated that following that, she did not hear from the 1<sup>st</sup> Petitioner again.
36. She emphasizes that they carried out their investigations as per the legal procedure and information issued by the 1<sup>st</sup> Petitioner. She asserts thus that the claims against these Respondents are unsupported and that there is no evidence of their failure to carry out their mandate or violation of the 1<sup>st</sup> Petitioner's rights.

#### **4<sup>th</sup> Respondent's Case**

37. In like manner, the 4<sup>th</sup> Respondent filed his response through CPL Peter Mwangangi, the investigating Officer, sworn on 20<sup>th</sup> April 2023.
38. He depones that on 8<sup>th</sup> August 2018, the 1<sup>st</sup> Petitioner filed her complaint at Pangani Police Station on the alleged assault herein and the loss of Ksh.80,000 and necklace worth Ksh.40,000.
39. He informs that by the time he took over the investigation, the said vehicle had been impounded and was at Pangani Police Station. The driver of the vehicle, Simon Nyagah Kinyua was arraigned and charged at Makadara Law Courts.
40. He depones that when the matter came up for plea taking on 7<sup>th</sup> September, the 1<sup>st</sup> Petitioner informed the Magistrate, Hon. Emily Ominde that Simon Nyagah Kinyua was not the right person. She proceeded to state that he was not the alleged assailant and that it was the Directors of Super Metro Limited who ought to be charged instead.
41. He alleges that the 1<sup>st</sup> Petitioner's pronouncements in Court were contradictory as at the police station she had identified Simon Nyagah as the alleged assailant driver. As a result, the criminal matter was withdrawn.



42. In view of the foregoing, he avers that the 1<sup>st</sup> Petitioner's investigation was handled in a professional manner and in line with the *Police Service Standing Orders*. The investigations also relied on the evidence adduced by the 1<sup>st</sup> Petitioner. It is noted that the 1<sup>st</sup> Petitioner neglected to avail any further information that would have enabled the Police make a different arrest other than the one they made.
43. Consequently, he argues that the claims made against the 4<sup>th</sup> Respondent are unfounded and no violation of the 1<sup>st</sup> Petitioner's rights has been established.

#### **6<sup>th</sup> Respondent's Case**

44. In rejoinder, the 6<sup>th</sup> Respondent filed Grounds of Opposition dated 17<sup>th</sup> April 2022 on the premise that:
- i. The Prayers sought by the petitioners are unconstitutional as they seek to direct the Director of Public Prosecutions in exercise of his mandate as provided under Article 157 of the *Constitution*. The prayers if granted would result to a greater injustice in the criminal justice system and public interest.
  - ii. Under Article 157(10) of the *Constitution* and Section 6 of the *Office of The Director of Public Prosecution Act* (2013), the 6<sup>th</sup> respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the powers or functions, shall not be under the direction or control of any person or authority.
  - iii. The Petitioners have not proven to this court with certainty that the 6<sup>th</sup> Respondent was ever informed of the 1<sup>st</sup> Petitioner's plight and that the 6<sup>th</sup> Respondent had a legal duty to protect her rights.
  - iv. The mandate of the 6<sup>th</sup> Respondent is very clear under article 157 of the *Constitution* and does not include investigation of the petitioners' plight.
  - v. Therefore the petition is premature, irrelevant and an abuse of the court process.
  - vi. The Application is without merit and should be dismissed with cost to the 1<sup>st</sup> Respondent.

#### **7<sup>th</sup> Respondent's Case**

45. In response, the 7<sup>th</sup> Respondent's Deputy Director, Cosmas Ngeso filed a Replying Affidavit sworn on 17<sup>th</sup> April 2023.
46. He depones that the 7<sup>th</sup> Respondent became aware of the 1<sup>st</sup> Petitioner's case on 8<sup>th</sup> August 2018. The 1<sup>st</sup> Petitioner was then issued with the contact details of the cited vehicle's owner.
47. In addition, the then Deputy Director in Charge of Licensing, Wilson Tuigong called for a meeting on 17<sup>th</sup> October 2018 with the 1<sup>st</sup> Respondent's Fleet Supervisor and 7<sup>th</sup> Respondent's employees. He states that it was agreed that the matter be settled by the 1<sup>st</sup> Respondent through compensation of the 1<sup>st</sup> Petitioner. He makes known however that the 7<sup>th</sup> Respondent was not informed that this agreement was not honoured so as to take further action.
48. It is averred that the 1<sup>st</sup> Petitioner has not stated with specificity and demonstrated the manner in which the 7<sup>th</sup> Respondent violated her constitutional rights. He adds that the 1<sup>st</sup> Petitioner is not entitled to compensation by the 7<sup>th</sup> Respondent as carried out its duty and also did not neglect to take the necessary action.



### 9<sup>th</sup> Respondent's Case

49. Equally, the 9<sup>th</sup> Respondent through the Principal Secretary, Mohammed Daghar, filed its response in the Replying Affidavit sworn on 17<sup>th</sup> April 2023.
50. Answering the Petitioners' concerns on a lack of policy on women's mobility rights, he notes that the same would be contrary to Article 27 of the Constitution. Be that as it may, he informs that there is already in place Sessional Paper No.2 of 2012 on Integrated National Transport Policy that addresses challenges facing transport safety and security.
51. It is further stated that the 9<sup>th</sup> Respondent does not have authority to legislate neither investigate nor prosecute matters. Accordingly, he posits that the 9<sup>th</sup> Respondent has not violated the 1<sup>st</sup> Petitioner's rights as alleged and that no evidence was been adduced to support the said allegation.

### 11<sup>th</sup> Respondent's Case

52. The 11<sup>th</sup> Respondent filed Grounds of Opposition dated 15<sup>th</sup> April 2023 on the grounds that:
  - i. The Petitioners herein have not demonstrated before this Court how the 11<sup>th</sup> Respondent has violated their Constitutional rights.
  - ii. The prayers sought in the Petition are in violation of Article 245(4)(a) and (b) which gives the 4<sup>th</sup> Respondent independence in the conduct of investigations.
  - iii. The 1<sup>st</sup> Petitioner has failed to plead with specificity, justification for the Kshs.10,000,000/- sought as general damages.
  - iv. The 1<sup>st</sup> Petitioner has failed to adduce any evidence to support her claim that she was in possession of the Kshs.80,000/- and the gold necklace alleged to have been stolen.
  - v. The 1<sup>st</sup> Petitioner has failed to adduce any documentary evidence to support her claim of owning a gold necklace as well as to support its alleged value of Kshs.40,000.
  - vi. The Petitioners have failed to adduce any evidence in support of their allegation that the 7<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Respondents have failed to protect women against violence in Public Transport. There is already in place a policy namely, Sessional Paper on Integrated National Transport Policy of 2012 that addresses challenges facing transport safety and security for all persons, gender notwithstanding.
  - vii. The petition is defective in substance and is therefore unmerited and brought in bad faith.
  - viii. It is in the public interest and in the interest of justice that the current petition be dismissed with costs as the same is an abuse of court process.

### Parties Submissions

#### Petitioners' Submissions

53. On 22<sup>nd</sup> January 2024, Counsel Winfred Odali for the Petitioners filed submissions where the issues for argument were identified as: Whether the Respondents violated the 1<sup>st</sup> Petitioner's rights; whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are vicariously liable for the unlawful act of violence committed by their driver, agent, employee or representative in the course of duty against the 1<sup>st</sup> Petitioner and whether the Petitioners are entitled to the prayers sought.



54. On the first issue, Counsel answered in the affirmative. It was submitted that the Respondents had not only violated the 1<sup>st</sup> Petitioner's rights but also for women in Kenya who are harassed and abused in public transport and associated spaces including violation of the right to equality and non-discrimination, right to dignity, freedom of movement, freedom and security of the person, which includes the right not to be subjected to any form of violence from either public or private sources and the right to be free from cruel, inhuman and degrading treatment, and consumer rights.
55. Counsel stressed that as a general rule, state responsibility is based on acts or omissions committed either by State actors or by actors whose actions are attributable to the State such as the case herein. Counsel relied in the [\*Human Rights Committee \(HRC\), General Comment 31: Nature of the General Legal Obligation Imposed on States Parties\*](#) where it is stated as follows:
- “The positive obligations on States Parties to ensure rights will only be fully discharged if individuals are protected by the State, not just against violations of rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure rights ... would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”
56. In light of this, Counsel submitted that despite the various reports such as the one conducted by Generation Equality recommending that the State develop gender-specific legislation and policies on women mobility rights, the 7<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Respondents have failed to take necessary measures to cause to be enacted legislation, policies, rules or regulations clearly highlighting the right of women to exercise their mobility rights devoid of any violence against them.
57. Additionally that with regard to this case, the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and Respondents failed to conduct proper investigations in the first instance and after the case was dismissed by the trial court. As such Counsel argued that the State has failed in its due diligence obligation to conduct proper investigations and prosecution in the case of violence in public transport as reported by the 1<sup>st</sup> Petitioner and so ought to be held liable.
58. On discrimination Counsel cited the case of [\*P.O. v Board of Trustees, A F & 2 others\*](#) [2014] eKLR where the Court held that:

“The International Labour Organization [ILO] in Working Paper 3/2011 titled '*Gender-Based Violence in the World of Work: Overview and Annotated Bibliography*' by Adrienne Cruz and Sabine Klinger characterizes gender-based violence as "the most prevalent human rights violation in the world. Of the varied ways in which sex discrimination manifests across the globe, such violence is exceptionally dehumanizing, pervasive and oppressive. No other form of sex discrimination violates so many fundamental human rights as articulated in the 1948 United Nations Universal Declaration of Human Rights. These include Article 1 [All Human beings are born free and equal in dignity and rights]; Article 3 [Everyone has the right to life, liberty and Security of the Person]; and Article 5 [No one shall be subjected to torture or to cruel, inhuman and degrading treatment or punishment]." The Authors state that gender-based violence reflects and reinforces inequalities between men and women. At least one in three women in the world, according to this paper, is estimated to have been... physically beaten and/or otherwise abused in her lifetime. This form of violence not only



causes pain and suffering but also devastates families, undermines workplace productivity, diminishes national competitiveness and stalls development."

59. In this regard, Counsel rehashing the Petitioners' averments in their affidavits submitted that the actions of the Respondents outlined in this matter amount to a violation of the right to equality and freedom from discrimination of the 1<sup>st</sup> Petitioner including the right to human dignity, right to be free from cruel, inhuman or degrading treatment and consumer rights.
60. Counsel for this reason submitted that the Petitioners having established violation of their fundamental rights were entitled to the relief sought in the Petition. On the damages sought, Counsel relied in *M W K v another v Attorney General & 3 others* [2017] eKLR where it was held that:

"It is well settled that award of compensation is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the *Constitution*. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion. The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the Courts. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights; such claim is distinct from, and in addition to remedy in private law for damages for tort."

### 1<sup>st</sup> Respondent's Submissions

61. Mwenje and Karanja Company Advocates for the 1<sup>st</sup> Respondent filed submissions dated 4<sup>th</sup> June 2023. The issues for determination were highlighted as: whether the 1<sup>st</sup> Respondent is a necessary party in this Petition; whether or not the Petition meets the threshold and whether ought to be determined by a Constitutional Court; whether or not the 1<sup>st</sup> Respondent is liable for any damages as alleged in the Petition and whether or not the Petition is an abuse of the Court Process.
62. To commence with, Counsel relying on the averments in the 1<sup>st</sup> Respondent's response, submitted that the 1<sup>st</sup> Respondent was not a necessary party in this proceedings. The 1<sup>st</sup> Petitioner was accused of seeking to expand the 1<sup>st</sup> Respondent's scope of liability in relation to the unfortunate incident. Moreover that the 1<sup>st</sup> Petitioner had not proved any culpability on the 1<sup>st</sup> Respondent's part.
63. As such Counsel submitted that the Petition does not disclose a cause of action against the 1<sup>st</sup> Respondent and hence not a necessary party in this suit. Reliance was placed in *Carton Manufacturers Limited v Prudential Printers Limited* [2013] eKLR where it was held that:
- "An act on the part of the Defendant which gives the Plaintiff his cause of complaint."
64. Additional dependence was placed in *Jonathan Munene v Attorney General & 2 others; Kenya Judges Welfare Association (Interested Party)* [2021] eKLR and *Jane Wairumu Turanta v Gitbae John Vickery & 2 others* [2013] eKLR.
65. Turning to the second issue, Counsel relying in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR submitted that the 1<sup>st</sup> Petitioner had not satisfied the constitutional threshold for such petitions. It was argued that the 1<sup>st</sup> Petitioner only cited the alleged violated provisions but failed to demonstrated how these provisions had been violated by the 1<sup>st</sup> Respondent.



66. Counsel further took the view in the third issue that the issues raised herein should not be determined by the constitutional court. This is because the substratum of the issues raised revolves around criminal law. For this reason, Counsel submitted that the Petitioners are abusing the Court process as seek to have this Court conduct an investigation and determine the criminal liability of the parties mentioned herein.
67. Reliance was placed in *Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)* [2021] eKLR where it was held that:
- “...The institution which is vested with the mandate to carry out investigations is the National Police Service. Articles 243 to 245 of the *Constitution* provide for the establishment of, the objects and functions and the command of the National Police Service. The legislation contemplated under Article 243(4) of the *Constitution* is the now *National Police Service Act*, No. 11A of 2011...”
68. Comparable dependence was placed in *Republic V. Commissioner of Police & Another Ex-Parte Michael Monari & another* [2012] eKLR.
69. Counsel was certain therefore in the next issue that the prayers seeking compensation against the 1<sup>st</sup> Respondent were untenable and unmerited. This is because the Petitioners failed to prove their case against the 1<sup>st</sup> Respondent.
70. Additionally, Counsel asserted that the claim for general damages is not anchored in a constitutional action but tort law. Equally relying in *Gitobu Imanyara & 2 others v Attorney General* [2016]eKLR Counsel submitted that special damages are supposed to be specifically pleaded which the 1<sup>st</sup> Petitioner omitted to do.
71. Flowing from these arguments, Counsel submitted finally that the instant Petition is indeed an abuse of the Court process.

## **2<sup>nd</sup> Respondent’s Submissions**

72. On 26<sup>th</sup> May 2023, Musungu Pekke and Company Advocates filed submissions for the 2<sup>nd</sup> Respondent. Counsel outlined the issues for determination as: whether the Petition raised any constitutional issues; whether the Petitioners have proved their case against the 2<sup>nd</sup> Respondent and whether the Petition merits the reliefs sought.
73. Counsel in the first issue submitted that the Petition does not raise any constitutional issue as fails to prove with precision the fundamental rights alleged to have been violated by the 2<sup>nd</sup> Respondent. Reliance was placed in *North Bar Owners Welfare Association & 6 others v County Commissioner Nyandarua & 4 other* (Constitutional Petition No. 5 of 2018) where it was held that:
- “If a person is seeking redress form the High Court on a matter which involves a reference to the *Constitution*, it is important that he should set out with precision that which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”
74. Moreover, Counsel submitted that the Petitioners had not proved their case against the 2<sup>nd</sup> Respondent since they did not discharge the burden of proof. In that, the 1<sup>st</sup> Petitioner did not disclose who the alleged assailant driver was and the allegations outlined in the Petition.



75. Reliance was placed in *John Gitbinji Wangonde & 6 Others v Nyeri South Sub-County Co-operative Officer & 3 Others*, Petition No. 21 of 2014 where it was held that:

“In my view the reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether the particular event had actually taken place or not. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim.”

76. Considering this, Counsel in the final issue submitted that the Petitioners were not entitled to the reliefs sought in the Petition.

### **2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> Respondents’ Submissions**

77. Counsel, Jackline Kiramana filed submissions for these Respondents dated 25<sup>th</sup> May 2023. Counsel highlighted the issues for consideration as: whether the Petitioners claim against these Respondents is justified and whether the Petitioners are entitled to the prayers sought in the Petition.

78. Counsel stated that the Petitioners had claimed violation of numerous constitutional rights however with reference to these Respondents highlighted the right to equality and freedom from discrimination and dignity.

79. Counsel with regard to Article 27 of the *Constitution* pointed out that this was raised with reference to the 1<sup>st</sup> Petitioner’s gender. Considering this, it was argued that there is no policy to protect women against violence especially in public transportation.

80. Counsel submitted that the facts of this case make it clear that these Respondents carried out their constitutional mandate by investigating and instituting prosecution. However the 1<sup>st</sup> Petitioner protested against the said prosecution alleging that the said driver was not the one.

81. Counsel reasoned that the decision to charge the official driver was anchored on the fact that he was vicariously liable if he had given the motor vehicle to a squad driver. It was then incumbent on him to indicate who the alleged assailant driver was.

82. Additionally the 3<sup>rd</sup> Respondent went on to conduct further investigations after the criminal matter had been withdrawn and came to the same conclusion as the investigating officer.

83. In view of this Counsel noted that Courts have defined discrimination on numerous occasions. Reliance was placed in *Peter K. Waweru v Republic* [2006] eKLR where it was held that:

“Discrimination is affording different treatment to different persons attributable wholly or mainly to their description.”

84. Like dependence was placed in *Nyarangi & 3 Others v Attorney General* [2008] eKLR.

85. Accordingly, Counsel submitted that the Petitioners had not proved the allegation for discrimination based on gender. In like manner, Counsel submitted that as detailed in these Respondents case, the 1<sup>st</sup> Petitioner’s case had been handled as provided in law despite the 1<sup>st</sup> Petitioner’s dissatisfaction.

86. Considering this it was submitted that these Respondents had at all material times taken the necessary steps to ensure that the Petitioners’ rights are protected including the right to dignity.



## 6<sup>th</sup> Respondent's Submissions

87. Senior Principal Prosecution Counsel, Achochi Henry Nyabuto filed submissions dated 24<sup>th</sup> October 2023. The key points for discussion were outlined as:

“Whether the 6<sup>th</sup> Respondent violated the right of the 1<sup>st</sup> Petitioner by failing to adequately respond to her harassment, assault and robbery report; whether the 6<sup>th</sup> Respondent and all other respondents can report to this Court after every 60 days on the progress made with regard to creation of the policy/ legislation on women mobility; whether the 6<sup>th</sup> Respondent has a constitutional obligation to bring awareness in the public transport sector and among members of the public on the right of women to freedom of movement free of violence; whether this Court can issue an order to compel the 6<sup>th</sup> Respondent to direct the 4<sup>th</sup>, 5<sup>th</sup>, and 8<sup>th</sup> Respondents to carry proper investigations and subsequently institute prosecution against the perpetrator; whether the 6<sup>th</sup> Respondent is liable for violating the fundamental rights of the 1<sup>st</sup> Petitioner and whether the 6<sup>th</sup> Respondent is liable to pay the damages of Kshs.10,000,000 to the 1<sup>st</sup> Petitioner for her emotional, physical and psychological pain and suffering.”

88. Counsel submitted in the first issue that the 1<sup>st</sup> Petitioner did not lodge any complaint with 6<sup>th</sup> Respondent so as to act on it. It is noted that the 6<sup>th</sup> Respondent under Article 157(4) of the *Constitution* has the power to direct the 4<sup>th</sup> Respondent to conduct investigation. Be that as it may, it was submitted that investigations were carried out in the matter and that the 6<sup>th</sup> Respondent discharged its mandate accordingly.

89. Counsel emphasized in the second issue that, the Court has no mandate to direct the Parliament and State Agencies to enact policies and legislation. Moreover that, such orders would be in vain as they cannot be supervised by this Court. Counsel relied in *Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* [2019]eKLR where it was held that:

“A court of law cannot give orders in vain, it can only give orders capable of being enforced”.

90. Counsel in the next issue submitted that the 6<sup>th</sup> Respondent's mandate as stipulated under Article 157(4) & (6) of the *Constitution* does not obligate bringing awareness in the public transport sector on the right to women in view of freedom of movement free of violence.

91. Similarly in the next issue, Counsel submitted that the Court cannot compel the 6<sup>th</sup> Respondent in light of Article 157 (10) of the *Constitution*, to direct the 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> Respondents to carry out investigations. Reliance was placed in *Communications Commission of Kenya v Office of the Director of Public Prosecutions & another* [2018]eKLR where it was held that:

“When dealing with the decision as to whether or not to prosecute the office of DPP exercises independent judgment and the court cannot interfere unless it is shown that the exercise is contrary to the *Constitution*, in bad faith or amounts to an abuse of process”.

92. In view of the foregoing, Counsel in the fifth and sixth issue submitted that it was evident that the 6<sup>th</sup> Respondent had not violated the Petitioners rights as alleged and thus they are not entitled to the relief sought.



## 7<sup>th</sup> Respondent's Case

93. Counsel, Judith Opili- Sirai filed submissions dated 30<sup>th</sup> May 2023 and stated that issues for discussion were: whether the 1<sup>st</sup> Petitioner's rights and freedoms were violated and if so whether entitled to compensation.
94. Counsel in the first issue submitted that contrary to the 1<sup>st</sup> Petitioner's allegation, the 7<sup>th</sup> Respondent did not violate her rights. It was posited further that the 1<sup>st</sup> Petitioner had not demonstrated with precision how the said rights had been violated by the 7<sup>th</sup> Respondent as stressed in *Anarita Karimi Njeru* (*supra*) and rehashed in *Republic v. Truth Justice and Reconciliation Commission ex parte Augustine Kathangu* (2011) eKLR.
95. Correspondingly, Counsel relying on the 7<sup>th</sup> Respondent's replying affidavit, submitted that the Petitioners are not entitled to compensation more especially as against the 7<sup>th</sup> Respondent. This is because it was apparent that the 7<sup>th</sup> Respondent had taken action in the matter but unfortunately was not informed that action was not executed by the said Respondents to take further action. For these reasons, Counsel asserted that the Petitioners case against the 7<sup>th</sup> Respondent was baseless, misconceived and devoid of merit and thus the orders ought not to issue.

## Analysis and Determination

96. Taking into account the pleadings and the submissions of the Petitioners and the Respondents; it is my considered view that the following are the issues for determination in this Petition:
- i. Whether this Petition is barred by the doctrine of Constitutional avoidance on the basis the liability issues raised should have been resolved under the criminal law and the law of torts.
  - ii. Whether the 3<sup>rd</sup> to 10<sup>th</sup> Respondent failed to discharge their due diligence obligation in ensuring observance of human rights: in relation to the 1<sup>st</sup> Petitioner by failing to conduct effective investigation and; in relation to women generally, the failure to enact legislation and policies on women mobility rights to protect them from gender-based violence
  - iii. Whether the Petitioners rights under Articles 27, 28, 29(c), 29(f), 39(1) and 46 of the *Constitution* were violated and by who?
  - iv. Finally, whether the Petitioners are entitled to the relief sought.

## **Whether this Petition is barred by the doctrine of Constitutional avoidance on the basis the liability issues raised should have been resolved under the criminal law and the law of torts and not the *Constitution***

97. This was the first issue to be raised the 1<sup>st</sup> Respondent's Advocate, Mwenje and Karanja and also by the 2<sup>nd</sup> Respondent's Advocate, Musungu Pekke and Company Advocates. They urged the Court to address the question of whether the instant Petition raises Constitutional issues.
98. They argued that the issues raised herein are not suitable matters for determination by the Constitutional court given that the substratum of this Petition revolves around conduct of criminal nature that can be dealt with under the criminal law and incase of general damages, compensation can equally be claimed under the law of torts.
99. The doctrine of Constitutional Avoidance requires the Court not to invoke the *Constitution* in disputes which that can be resolved by any other legal basis other than the *Constitution*. The Court



emphasized the importance of this doctrine in *Ibrahim Wakhanyanga & 2 others v Chief Magistrate's Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega (Interested party)* [2022] eKLR where it observed that it was one of the ways in which the Constitutional Court declines to exercise jurisdiction. The Court stated:

“17. One of the instances in which a constitutional court loses jurisdiction is through the doctrine of constitutional avoidance. Thus, where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain such a dispute. A party seeking relief in a matter that can be addressed through interpretation of statutes and rules made thereunder must seek relief through an ordinary suit as opposed to a constitutional petition. In that regard, the Court of Appeal stated in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR as follows:

“... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in *Communications Commission case (supra)*.

(17) In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ....

18. Similarly, the same court stated in *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR thus:

“Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation....

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.”

100. Likewise, in *COD & another v Nairobi City Water & Sewerage Co. Ltd* (2015) eKLR the Court noted as follows:

“11. Similarly, in *Papinder Kaur Atwal v Manjit Singh Amrit* Nairobi Petition No. 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:

“All the authorities above would point to the fact that the Constitution is a solemn document, and should not be a substitute



for remedying emotional personal questions or mere control of excesses within administrative processes..... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.”

12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, *in Re Application by Bahadur*[1986] LRC (Const) the Court expressed itself as follows at page 307:

“The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under the *Constitution*. This case highlights the un-wisdom of ignoring that advice.... the *Constitution* sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of the *Constitution* might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, “a general substitute for the normal procedures for invoking judicial control of administrative action.” (See *Harrikissoon v A-G* [1979] 3 WLR 62).

13. It was further observed in the case of *Minister of Home Affairs v Bickle & Others* (1985) LRC Const(per (Georges C.J);

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

101. Correspondingly, in *Council of County Governors v Attorney General & 12 others* (2018) eKLR the Court expressed itself as follows:

- “59. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (*supra*) (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.
60. In the South African case of *S v Mhlungu*, [1995] (3) SA 867 (CC), Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is



possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. And in *Ashwander v Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)), the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of.”

102. In the instant matter, the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent argue that the matter before the Court should be resolved under the criminal and civil jurisdiction and not before the Constitutional Court. Nevertheless, reading the Petition, the Petitioner does not only seek reliefs for the personal transgressions allegedly visited on her but the reliefs are wide enough to include action on gender-violence polices meaning that even though the Petition highlights her personal complaints arising from the specific incident complained of, it also pleaded to transcend this particular incident in terms of observance fundamental rights and freedoms of women generally . This includes his right to dignity under Articles 28, his right against discrimination under 27, Article 29 on freedom from cruelty, violence or degrading treatment, and Article 46 (1) among others that this Court is called being called upon to determine through this Petition as pertains women. This cannot be done under the very restricted principles of criminal liability or the law of torts.
103. Although there are some elements of the claim that relate to the Petitioner as a person, the scope of the Petition is not limited to her only but expands to pin-point the State’s failure to enact policies to protect the category of persons the Petitioners considers susceptible to abuse in public transportation generally, namely women. Though the Petition may or may not succeed on this ground, it is wide enough and does not therefore limit it to personal remedies.
104. The violations complained of directly relate to rights and fundamental freedoms protected under the Bill of Rights. This Court is empowered under Article 165 (3) (b) “to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened” not only as against the Petitioner but also in relation to the other class of persons on whose behalf the petitioners allege the rights are being violated due to the Respondents’ inaction to take appropriate measures to protect them.
105. I therefore find that from the reading the pleadings, the instant Petition is beyond the narrow application of the criminal and the law of torts principles as was urged by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. This contention by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the doctrine of Constitutional avoidance applies on the basis of the aforesaid argument therefore collapses.

**Whether the 3<sup>rd</sup> to 10<sup>th</sup> Respondent failed to discharge their due diligence obligation in ensuring observance of human rights: in relation to the 1<sup>st</sup> Petitioner by failing to conduct effective investigation and; in relation to women generally, the failure to enact legislation and policies on women mobility rights.**

106. The Petitioners assailed the State Actors, 3<sup>rd</sup> to 6<sup>th</sup> Respondents stating that despite the 1<sup>st</sup> Petitioner lodging her complaint that involved gross abuse of her rights, they had failed to properly investigate the matter and bring the culprit to book and hence failed in discharging their due diligence obligation to protect the rights and fundamental rights of the 1<sup>st</sup> Petitioner.
107. Further, that despite reports and recommendations to concerned State actors, (7<sup>th</sup> to 11<sup>th</sup> Respondents); such as the one developed by Generation Equality urging formulation of gender specific legislation and policies on women mobility rights, the said State Agencies have failed to take the necessary measures to develop those policies.



108. Article 21 of the *Constitution* broadly defines the obligation vested on the State in the protection of rights and fundamental freedoms by stating thus:

1. It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
2. The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.
3. All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.
4. The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

109. Article 21 embodies positive and negative obligations of the State in observance of human rights. Positive obligations are those that require the State to take specific measures that will guarantee observance of human rights by all others hence the words protect, promote and fulfil. The negative obligations are those that require the State itself to refrain from doing anything that may be considered injurious human rights hence the words respect and observe.

110. The Court in *Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (Amicus Curiae)* [2020] eKLR held thus:

“ 110. According to the Human Rights Committee’s General Comment No. 31 on the ICCPR at paragraph 8:

“The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However, the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”

111. From the above excerpt, it is clear that the State does indeed have an obligation to prevent violations by State actors and non-State actors. In other words, the State must protect citizens from threats to their rights. I therefore find myself



in agreement with the holding in *Florence Amunga Omukanda & another v Attorney General & 2 others* [2016] eKLR that:

“ 60 ... the State has a legal duty and a positive obligation to protect each of its citizen’s rights to security of their person and their property by securing peace through the maintenance of law and order...”

111. The South African Court in *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6 affirming the positive and negative obligations placed on the State opined as follows:

“ 189. The obligations in these Conventions are clear and they are unequivocal. They impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere. In understanding how it does so, the starting point is section 7(2), which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court has held that in some circumstances this provision imposes a positive obligation on the state and its organs “to provide appropriate protection to everyone through laws and structures designed to afford such protection.”<sup>173</sup> Implicit in section 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective...”

112. The instant case, the 1<sup>st</sup> Petitioner’s complaint is that the Respondents 3<sup>rd</sup> to 6<sup>th</sup> failed to carry proper investigations into her complaint and hence to date, leading to abortive prosecution and to date, no prosecution has ever been done relating to the said complaint.

113. It is necessary to examine in detail the response by the 3<sup>rd</sup> to 6<sup>th</sup> Respondents in respect of the 1<sup>st</sup> Petitioner’s complaint in order to determine if there was lack of due diligence to take effective measures to protect the rights of the 1<sup>st</sup> Petitioner.

114. I will begin with the 4<sup>th</sup> Respondent to which the complaint was first reported.

115. CPL Peter Mwanagagi who deponed the affidavit on behalf of the 4<sup>th</sup> Respondent testimony was that on 8<sup>th</sup> August 2018, the 1<sup>st</sup> Petitioner filed her complaint at Pangani Police Station on the alleged assault herein and the loss of Ksh.80, 000 and necklace worth Ksh.40,000. He was the investigation officer. At the time, vehicle had been impounded and was at Pangani Police Station. Subsequently, the driver Simon Nyagah Kinyua was arraigned and charged at Makadara Law Courts.

116. However, when the matter came up for plea taking on 7<sup>th</sup> September, in Makadara Criminal Case No. 2094 of 2018; the 1<sup>st</sup> Petitioner informed the Magistrate, Hon. Emily Ominde that Simon Nyagah Kinyua was not the person who assaulted her. The 1<sup>st</sup> Petitioner insisted it is the Directors of Super Metro Limited who ought to have been charged instead. He swore that the 1<sup>st</sup> Petitioner’s pronouncements in Court were contradictory as at the Police Station she had identified Simon Nyagah as the driver who had been involved in assaulting her. As a result, the criminal matter was withdrawn. He stated that the 1<sup>st</sup> Petitioner did not avail any further information that would have enabled the police to make a different arrest other than the one they had made.



117. On behalf of the 3<sup>rd</sup> Respondent, it was deponed that the 1<sup>st</sup> Petitioner visited the office on 8<sup>th</sup> April, 2023 following the withdrawal of Makadara Criminal Case No. 2094 of 2018 seeking fresh investigations. From her interrogation she could neither pick out the name, whereabouts nor the description of the alleged assailant driver. The original Investigation officer, PC Peter Mwangangagi was asked to record a Statement on the status of the investigations who confirmed that the criminal case had been withdrawn since the 1<sup>st</sup> Petitioner maintained that she wanted the 1<sup>st</sup> Respondent charged and not the driver of the cited vehicle. She also recorded the statements of Michael Muturi, the 2<sup>nd</sup> respondent and Simon Nyaga, the official driver.
118. Thereafter, she called for a meeting between the 1<sup>st</sup> Petitioner and these persons in an attempt to resolve the dispute. She depones that the 1<sup>st</sup> Respondent in an effort to resolve the issue, indicated that they were willing to come to a settlement agreement. Unfortunately, the negotiations broke down as the 1<sup>st</sup> Petitioner insisted on a sum more than Ksh.200,000.
119. Following the break down, the 1<sup>st</sup> Petitioner made known that she would institute court proceedings and left. She did not hear from the 1<sup>st</sup> Petitioner again.
120. The 6<sup>th</sup> Respondent insisted that the 1<sup>st</sup> Petitioner did not lodge any complaint with 6<sup>th</sup> Respondent so as to act on it. It acknowledged that the 6<sup>th</sup> Respondent under Article 157(4) of the *Constitution* has the power to direct the 4<sup>th</sup> Respondent to conduct investigation but such issue was not brought to its attention. It nevertheless observed that the investigations were carried out in the matter.
121. In the instant matter, it is apparent from the foregoing that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents acted swiftly and impounded the public transport vehicle that was the scene of the alleged assault of the 1<sup>st</sup> petitioner. Additionally, it apprehended the driver and even preferred charges after initial identification was done by the 1<sup>st</sup> petitioner but in Court, the Petitioner denied that the said driver was the assailant. The 1<sup>st</sup> petitioner is said to have provided insufficient details on the description of her assailants to enable them be identified and apprehended for prosecution. The initial investigation officer asserted that the 1<sup>st</sup> petitioner had in fact identified the driver before the charges were preferred but in Court, she refused to have the criminal case proceed insisting of prosecution of the Directors of the Sacco instead.
122. In my view, I am unable to ascribe negligence or omission on the part of the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondent to undertake steps towards the prosecution of the culprits in the alleged assault in view of the above turn of events. It is apparent that steps were taken and the respondents were willing to do more had not been paucity of information that could lead to identification of the real culprits that the 1st Petitioner's insists assaulted her and her indecisiveness and inconsistency as well as her attempts to direct the course of the investigations.
123. On the invitation to this Court to compel State Actors to legislate or develop policies to protect women mobility rights in line with various recommendations that have made, an example being a report such the one by an organization called the Generation Equality; this Court wishes affirm the need for deference in separation of roles between organs of government to ensure the integrity and functionality government. The Court's duty is limited to checking unconstitutional laws and policies. It cannot force the legislature or the executive to specifically pass a particular law or policy in a matter which the two have discretion unless such direction is specifically required under legislation or by the *Constitution*. If the matter is discretionally, the Court would be overstepping its mandate to compel other state actors to pass specific legislation or policy.



124. A 3- Judge bench in *Kiriwo Wa Ngugi & 19 others v Attorney General & 2 others* (2020) eKLR discussing the scope of intervention in such matters cautioned thus:

“

“97. A Court must satisfy itself that the case before it is not caught up by the bar of non-justiciability. The concept of non-justiciability is comprised of three doctrines: Firstly, the Political Question Doctrine; secondly, the Constitutional-Avoidance Doctrine; and, thirdly, the Ripeness Doctrine...  
98. We shall commence with the political question doctrine. *Black’s Law Dictionary*, 10<sup>th</sup> Edition, Thomson Reuters Publishers, at page 1346 defines it as:

The judicial principle that a court should refuse to decide an issue involving the discretionary power by the executive or legislative branch of government.

99. The political question doctrine focuses on the limitations upon adjudication by Courts of matters generally within the area of responsibility of other arms of Government....”

Consequently, the Court concluded:

100. According to the political question doctrine, certain sets of issues categorized as political questions, even though they may include legal issues, are considered to be external to the Judiciary as an arm of Government. Such issues are handed over to other branches of Government for adjudication. The political question doctrine therefore focuses on limiting of adjudication of disputes by courts in favour of the legislative and the executive interventions. It is underpinned by the concept of separation of powers. All that the Courts are doing in such situations is assigning discretion on the issue to another branch of Government.”

125. I am of the view compelling the legislative arm or executive branch to develop a specific policy on women mobility rights when there is no particular provision in legislation or the *Constitution* that specifically and explicitly requires the formulation of this policy specifically will be an act of judicial overreach.

126. I am emboldened in this resolve by the decision of the Court in *Kenya National Examination Council v Republic ex-parte Geoffrey Gathenji Njoroge* [1996] eKLR where it was observed:

“Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way. What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”



**Whether the Petitioners rights under Articles 27, 28, 29(c), 29(f), 39(1) and 46 of the Constitution were violated and by who?**

127. On whether the Petitioners' constitutional rights were violated, the threshold for pleading constitutional violations was set in Anarita Karimi Njeru (*supra*) and later on reaffirmed by the Supreme Court and the Court of Appeal. The Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014) eKLR guided as follows:

“(349) ... Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

128. Correspondingly, the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR affirmed that:

“If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

129. Further, it not enough to plead, the allegations must also be proved by whoever alleges through presentation of evidence. This is a requirement of Evidence Act Cap 80 which provides:

107. Burden of proof

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.



130. Expounding on the provision of the *Evidence Act*, the Supreme Court in *Gwer & 5 others v Kenya Medical Research Institute & 3 others* (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment) guided as follows:

“(49) Section 108 of the *Evidence Act* provides that,

“the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

50. This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

131. Equally, in *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* (2015)eKLR it was held that:

“15. ... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya)...

16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the *Act* as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

132. Similarly, in *Edward Akong'o Oyugi & 2 others v Attorney General* (2019)eKLR it was noted that:

“73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd v Smith & Associates Far East Ltd* [38] :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would



trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

133. In the instant case, the 1<sup>st</sup> Petitioner in her affidavit narrated how she was assaulted on 7<sup>th</sup> August, 2018 in a bus KCT 434T belonging to the 2<sup>nd</sup> Respondent but managed by the 1<sup>st</sup> Respondent’s Super Metro Sacco by a driver and conductor of the said bus. She explained differences arose when the bus changed course and she demanded to alight and the conductor refused to give back the change after paying fare using a 1000/- shilling note.
134. That driver stopped the bus, came to the passenger cabin and joined the conductor in pushing from the bus causing her to fall outside the bus after being trapped by the metal bar at the exit door. They followed her outside where slapping continued until she started bleeding.
135. The two assailants threw her belonging to her as they sped off which on checking she found that the Ksh.80,000/- was missing. She also realized that the gold pendant she was wearing was missing.
136. On the same day, the 1<sup>st</sup> Petitioner also reported the matter to the Super Metro office in Nairobi CBD in particular, the fleet supervisor, one Michael Muturi. Michael Muturi later on called her and informed her that the particular bus in question was not scheduled to be in transit that day and that the alleged assailant driver was a squad driver.
137. The 1<sup>st</sup> Respondent denies any wrongdoing in relation to this incident. Through its Chairman, Nelson Mwangi Nduki, the 1<sup>st</sup> Respondent swore an affidavit on 20<sup>th</sup> March 2023 stating that the 1<sup>st</sup> Respondent is a Transport Fleet and Management Company Operating in Nairobi with over 200 individual and corporate members who operate under their name at a fee and the 1<sup>st</sup> Respondent and its directors do not interfere with the daily operations of any of the franchisees including the persons hired as drivers and conductors. As such, the 1<sup>st</sup> Respondent does not also have control over the driver and conductor of the vehicles. The 1<sup>st</sup> Respondent only employs support staff such as fleet supervisors to carry out its administrative work. Accordingly, the alleged assailant driver was not an employee of the 1<sup>st</sup> Respondent for it to be held liable. That in fact, the 1<sup>st</sup> Respondent’s fleet manager, Michael Muturi was one of the prosecution witnesses set to testify in the 1<sup>st</sup> Petitioner’s case and that Michael Muturi made sure to assist the Petitioner throughout.
138. On his part, the 2<sup>nd</sup> Respondent admitted that he owned the bus in question in his affidavit dated 17<sup>th</sup> April, 2023 but denied that it was operating on this particular day of 7<sup>th</sup> August, 2018 insisting that the vehicle had been grounded due to mechanical problem and so had been in the yard the whole day. He also denied having ever entered into any out of Court negotiations with the Petitioner over this matter.
139. The denial by the 2<sup>nd</sup> Respondent that the bus was not operating on this day is not candid. The 1<sup>st</sup> Respondent which was managing the fleet, in the affidavit of the Chairman of the 1<sup>st</sup> Respondent, asserts that its fleet supervisor, one Michael Muturi, was set to support the 1<sup>st</sup> Petitioner’s case in the resultant prosecution meaning the bus was actually on the road that day.
140. I thus find the claim that the 2<sup>nd</sup> Respondent’s bus was not operating on this particular day to be untruthful and I reject his line of defence having been displaced by both the Petitioner and 1<sup>st</sup> Respondent’s evidence on record.
141. In this case, the 2<sup>nd</sup> Respondent merely denied that the bus was not operating that day, (an allegation that the Court has found to be untrue). He did not specifically deny knowledge of the persons that



were operating the bus that day and assaulted the 1<sup>st</sup> petitioner. In any case, there was no report lodged anywhere that the bus had been hijacked and operated by strangers. The only reasonable inference to make therefore is that the persons who were operating the bus that day were doing so under his ostensible authority.

142. As for the 1<sup>st</sup> Respondent, the bus was carrying out business under its fleet management. I find it to be utter negligence and absolute lack of due diligence that the management of a fleet of public service buses would find it unnecessary to ensure that the vehicles placed under their management are in control of professional, disciplined and legally compliant persons identifiable and known to them at any given time as it is its brand which is at stake. To say that that is the duty of the owner who hands the vehicle to the Sacco for the day to day management is deceptive and unconvincing.
143. If the explanation by the 1<sup>st</sup> Respondent is allowed, it would defeat the very essence of why fleet management for public service vehicles was introduced in this Country and will be a gross injustice to the consumers of those services. Matatu Saccos were introduced to ensure accountability to the public and the Sacco must take responsibility for the poor service and harassment of the members of the public by crew under their management. They must and will be held accountable for the misconduct or indiscipline of persons operating under their management and cannot run away from that mandate.
144. I would thus hold that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent are vicariously liable for the indignity and violence meted on the 1<sup>st</sup> Petitioner by the agents who worked in the bus affiliated to the Sacco on the 7<sup>th</sup> of August, 2018. The forceful ejection from the bus for a service she had duly paid for and the act of tossing out her belongings from the speeding bus violated her inherent dignity under Article 28. Violently slapping her repeatedly to the extent that she bled violated her freedom and security of the person contrary to Article 29 (c) of the *Constitution*. The loss of cash of Kshs.80,000/-; the refusal to give back her change after paying the fare using 1000/- note as well as stealing her gold pendant violated her right to property contrary to Article 40 of the *Constitution*.

#### **Whether the Petitioners are entitled to the relief sought.**

145. Having found that the 1<sup>st</sup> Petitioner's rights were violated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, it is now the duty of this Court to determine the extent of liability to the 1<sup>st</sup> Petitioner. This brings into focus the issue of remedies in Constitutional Petitions.
146. In my view, the most appropriate remedy in the circumstances of the present case would be compensation. In that case, I shall be guided by the following dicta from the Supreme Court in the case of *Charles Muturi Macharia & 6 Others v Standard-Group & 4 Others* (SC Petition No.13 (E015) of 2022) which opined as follows:

“(94) To answer directly the question posed by this issue, under common law principles, it is settled that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, like in tortious claims. In situations like those, compensation for personal loss depends on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in Article 23. While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In deserving cases, the redress may be in the form of an award of damages to



compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.

- (95) In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim's constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim.

....

Therefore, once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present evidence of any loss or damage suffered as a result of the violation. For these reasons, it can be said that the approach in awarding damages or compensation in constitutional rights violation cases is different from that in tortious claims....”

147. In the instant case, considering the indignity the Petitioner was subjected to, being thrown forcefully from the bus, losing her property, being repeatedly slapped in public until she bled; It is my considered view that compensation to the tune of Kshs. 420,000/- is fair and reasonable in the circumstances of this case.
148. The same is apportioned equally as between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent so that each shall pay Kshs. 210,000/- to the 1<sup>st</sup> Petitioner.
149. I also award the costs of this Petition.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF JANUARY, 2025.**

**L N MUGAMBI**

**JUDGE**

