



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**  
**PETITION NO. 37 OF 2016**

SAMANTHA CHEMUTAI TANUI.....PETITIONER

VERSUS

1. THE TRAFFIC COMMANDANT

2. THE ATTORNEY GENERAL.....RESPONDENTS

**R U L I N G**

1. SAMATHA CHEMUTAI TANUI, the Petitioner has brought the Petition dated 29/7/2016 expressed to be brought pursuant to the provisions of articles 27,28,47, 48 and 50 of the Constitution and sought orders that:-

**1.27 A mandatory injunction compelling the Respondents to allow the Petitioner to undergo the requisite driving test and thereafter issue the Petitioner with the mandatory driving license upon successfully undertaking and passing the said driving test.**

**1.28 An order permanently prohibiting the Respondents, their employees, agents and/or any other persons acting for, on behalf and/or under their command from, harassing, intimidating or in any manner whatsoever discriminating against the Petitioner.**

**1.29 A declaration that the provisions of the National Transport and Safety Authority Act citing mono-eyed persons as ineligible to hold driving licenses as discriminatory and thus unconstitutional.**

**1.30 Such other and/or further relief as this Honourable Court may deem fit to grant.**

**1.31 An order that the costs of and occasioned by this Petition be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

2. The facts giving rise to the complaint in the petition are brief and clear. They are pleaded at paragraphs 1.7 to 1.16 to the effect that sometimes in July 2016, the petitioner having undergone driving course sought to undertake a driving test conducted and supervised by the 1<sup>st</sup> Respondent. When the Petitioner presented herself for the test she was never afforded the opportunity on the basis that being visually challenged she was forbidden from holding driving licence on account of an alleged Provisions of the

National Transport and Safety Authority Act. The Petitioner contests that interpretation of the statute and contends that the Act allows even the visually challenged to be licensed provided they:-

**a) Produces a certificate by a medical practitioner to the effect that the person is fit to drive the class or classes of motor vehicles in question.**

**b) Undergoes and passes a driving test**

3. It is the case of the Petitioner that she was denied the opportunity to prove herself on her ability to pass the driving test and that even after producing a medical practitioner's certificate on her fitness she was still denied the opportunity.

4. Based on those grievances the petitioner contends that her rights under Articles 27(1) & (2) 28, 29(a) (d) and (f) 47, CR 51(1) have been violated by the Refusal by the 1<sup>st</sup> Respondent to undergo a driving test. The Petition was supported by an affidavit by the petitioner which exhibited the petitioner's national identity card, a medical examination form issued by Coast General Hospital and excerpts of the law downloaded from the National Transport and Safety Authority Website giving brief description of a driving licence and the requirements for qualification to hold a driving licence.

5. That petition was opposed by the grounds of opposition dated the 29/11/2016 filed by Mr. Richard Ngeri, the litigation counsel for the Attorney General. The grounds for resisting the petition are that; the court's jurisdiction is ousted by virtue of section 31(3) of the Traffic Act, that the petition is a disguised appeal filed in the wrong forum, that the prayers sought are incapable of being granted and that the petition is directed at the wrong party.

#### **Submissions by the parties**

6. At the hearing the Counsel for the Petitioner largely reiterated the contents and averments in the Petition only adding that under sections 11(2) 21 & 25(1) b of the persons with Disability Act entitle the Petitioner to the orders sought. On section 31(3) of the Traffic Act Ms. Muthee took the view and submitted that provision was subservient to the Constitution at Article 23 which grants the court the jurisdiction to handle and determine petitions of this nature. On allegations that this was a disguised appeal filed in the wrong forum Ms. Muthee denied that allegation and submitted that her clients case was a complaint related to denial of constitutional rights. The counsel then cited the decisions in Kalpana Rawal -vs- JSC, Civil Appeal No. 1 of 2016 and submitted that the manner in which the petitioner was handled and denied the chance to attempt the test was unconstitutional for being discriminatory on account of disability. The court was then urged to allow the petition to safeguard and protect the petitioner from being discriminated.

7. For the Respondents, Mr. Ngare relied on the grounds of opposition and the decision in CACA No. 266 of 1996. He submitted that parties are bound by their pleadings and that as presented there was no disclosure when the petitioner presented herself to undertake the test and further that under section 39(3) no person is permitted to undergo a driving test unless he was paid, the prescribed fees hence the lack of evidence that the fees was paid was a failure on the part of the petitioner to prove her case.

8. Mr. Ngare then cited the provisions of section 3 Traffic Act and Section 3 of the National Transport and Safety Authority Act for the submissions that the petitioner has sued the wrong person against whom no orders should issue as the right Respondent ought to have been the Authority. In his opinion under Section 3 of the Traffic Act it is the National Transport and Safety Authority entrusted with the duty to license drivers and keeping of records.

9. In addition Mr. Ngare pointed out that the petition at paragraphs 1.7, 1.8 and 1.9 did not identify the particular offer or representative of the Respondent, accused of the alleged discrimination and to him the petition cannot succeed for lacking in particulars in keeping with the now established principles for pleading a constitutional petition as enunciated in the decision of *Amarifa Kirimi Njeru vs Republic [1979] KLR 154* that Constitutional petitions be pleaded with precision.

10. Lastly Mr. Ngare submitted that section 31(3) of the Traffic Act mandates that any person aggrieved by a decision declining to issue a license shall appeal the decision to the subordinate court. The court of Appeal decision in *Kenya National Examination Council vs Republic Exparte Geoffrey Gathinji Njoroge (supra)* was then cited by Mr. Ngare for the proposition that where a statute imposes a general duty and leaves the discretion of its performance in the hands of a person, then mandamus cannot issue to command the carrying out of a specific duty. He therefore urged the court to disallow the petition with cost.

11. In her reply to the Respondents submissions, Ms Muthee contended that the Respondent had the obligation to issue driving licences; that the petitioner doesn't seek an order of mandamus and that without being accorded an opportunity to undertake the test the petition had no chance of ever acquiring a driving licence.

### **Issues for determination**

12. My appreciation of the dispute between the parties is that the petitioner faults the Respondent for violation of her rights to equal treatment before the law and her freedom never to be discriminated on account of her disability. On the other side the Respondent, without denying the alleged discrimination and violation asserts that the court lacks jurisdiction on account of provisions of the traffic and further that the orders are sought against the wrong party.

13. To determine that dispute the following issues emerge as availing themselves for determination by the court:-

- i) Does the court here the requisite jurisdiction to entertain the matter?**
- ii) Does the fact of being visually impaired IPSO facto disentitle the petitioner to attempt a driving license test?**
- iii) Is the dispute about a refusal by a licensing officer to grant a driving license?**
- iv) Is the 1<sup>st</sup> Respondent the right party to be sued?**
- v) What order should be made on costs?**

### **Jurisdiction of the Court**

14. The jurisdiction of this court to entertain and determine petitions alleging violence denial or threat to violation or denial of any of the Constitutional rights and fundamental freedom is vested by the constitutional and not any statute. Article 23 as read with article 165 are unequivocal on this points and need no novel interpretation. It is only the subordinate courts that the constitution say may be vested with jurisdiction by an act of parliament.

15. To that extent it is not correct to say that section 31(3) of the traffic act ousts or limits the jurisdiction of this court to handle the matter. It would be a different matter if the allegation was that the petitioner was accorded an opportunity to undertake the test but the licensing officer refused to grant a license. In this case it is the denial of the chance to undertake the test on account of the disability that the petitioner challenges to be contrary to and violates her right under Article 27(1) 2, 4 & (5).

16. Article 27 provides:-

17.

- i) Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

ii) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

iii) Women and men have the right to equal treatment, including the right to equal opportunities in political economic, cultural and social spheres.

iv) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

v) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

vi) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

vii) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

viii) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

18. It is important to note that although the petitioner has made the allegations on oath and detailed her complaint, the respondent did not deem it necessary to swear any affidavit to controvert the facts with the consequence that the facts alleging denial and violation have remained unchallenged.

19. In the petition, the petitioner has asserted that the reason for the denial of a chance to undertake the test is that of being visually impaired under section 31(2) of the Traffic Act. It is important to reproduce that provision here for ease of clarity and better understanding. The provision reads:-

**SECTION 31: “If it appears to a licensing officer that there is reason to believe that an applicant for any driving licence is suffering from disease or physical disability likely to cause the driving by him of a motor vehicle, of the class or classes in respect of which the application for a licence is made, to be a source of danger to the public, he may refuse to grant such application unless the applicant-**

**a) produces a certificate from a medical practitioner, stating that in the opinion of such medical practitioner the applicant is physically fit to drive the class or classes of motor vehicle in question; and**

**b) undergoes and passes a driving test”.**

20. The question this court must ask and answer is whether section 31 is a bar to a disabled person from undergoing a test with a view to b being licensed to be a driver of a motor vehicle.

21. In my understanding of that provision there is no such prohibition, what that provisions says in very plain, clear and unambiguous words is that a licensing officer may only refuse to grant a license if he forms the opinion that due to the disability of a person, it would pose a danger to the public and only where the applicant fails to avail a certificate by a medical practitioner as to his ability and fitness or where the person undertakes a test and fails. To this court where the licensing officer firms the opinion that an applicant may be unfit to be issued with a driving license it is not his opinion that is final, he then has the option to either let the applicant be examined by a doctor to ascertain fitness and then he is obliged to administer a test for the applicant to prove his ability.

22. Alternatively and without a medical report administers the test and find himself if the applicant is able to drive. It is not therefore a foregone conclusion that the licensing officer's preliminary opinion is final. It is not. His prior to attest, can only be an opinion and belief.

23. If one was to say that the belief by the licensing officer is final then such would be an outright misapprehension of the statute and a clear license to arbitrarily violate the right against discrimination under article 27 (4) & (5) of the Constitution. For this case, I find that the failure by the licensing officer to afford to the petitioner the opportunity to undergo a driving test on account of her disability was an affront and violation of her rights and fundamental freedoms under the constitution. It is a decision that cannot be encouraged or countenanced before the law.

24. It matters not, even if the ultimate mandate to issue the license rested with another body and not a particular officer. However, is it true that it is the National Transport and Safety Authority to issue and keep record of licensed drivers ? Section 3 of the Traffic Act gives the answer to this question as follows:-

**“The authority shall appoint such licensing officers as may be necessary for the carrying out of the provisions of this Act”.**

25. I understand the provision to mean that the duty to appoint licensing officers is on the authority but the duty to administer tests and issuance of licenses is that of the officers as the authority can only act through natural persons. As the petitioner says that it was the first Respondent who denied her the chance to undertake the test despite medical proof that she is able to drive and there being no material to controvert that assertion on a balance of probabilities. I am prepared to accept that the first Respondent was the licensing officer and the person who committed the violation against the petitioner. If it was the duty of the Authority to issue licenses then nothing would have been easier for parliament to provide that as part of the authority's duty under Section 4.

26. Having so found the only remaining task for the court is to determine whether the petitioner is entitled to the reliefs sought or any of them. There being the finding of a violation and denial of a fundamental freedom, I now issue the following orders:-

**a) Let the 1<sup>st</sup> Respondent and any Licensing Officer under him avail to the Petitioner the chance to undergo a driving test like any other Kenyan and to give her the equal treatment like any other person seeking to undertake the test.**

**b) As the denial of the chance to undertake the test was overtly wrong and unconstitutional, the petitioner is entitled to damages for denial of freedom for discrimination, I award to the petitioner damages in the sum of Kshs.200,000/= for such violation.**

**c) In order to give effect to the order (a) above and to protect against possible repetition I grant to the petitioner a permanent injunction directed at the Respondent jointly and severally and restraining them from discriminating against the petitioner on account of her disability.**

**d) As the actions by the Respondent was clearly wrong and even outlawed by the provisions of section 26 of Act No. 14 of 2003, Persons With Disability Act, I award to the petitioner the cost of the petition.**

Dated and delivered at **Mombasa** this **10<sup>th</sup>** day of **March 2017**.

**HON. P.J.O. OTIENO**

**JUDGE**