



Migori County Government & another v Migori County Transport Sacco (Civil Appeal 110 of 2017) [2021] KECA 7 (KLR) (23 September 2021) (Judgment)

Neutral citation: [2021] KECA 7 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 110 OF 2017
MSA MAKHANDIA, J MOHAMMED & S OLE KANTAI, JJA
SEPTEMBER 23, 2021**

BETWEEN

MIGORI COUNTY GOVERNMENT 1ST APPELLANT

MOSES CHAMWADA 2ND APPELLANT

AND

MIGORI COUNTY TRANSPORT SACCO RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court of Kenya at Migori (Mrima J) dated and delivered on 28th March 2017)

County Governments owed Transport Saccos a legal duty of providing them with a certificate indicating where they had been allowed to pick and drop passengers.

Reported by John Ribia

***Constitutional Law** – national values and principles – public participation - where it was alleged that a bus park was closed without the involvement of the stakeholders - whether there was public participation in the decision to close down Posta Park – Constitution of Kenya, 2010 articles 10 and 257.*

***Constitutional Law** – fundamental rights and freedoms – violation of fundamental rights and freedoms - freedom from discrimination – where a county government had withdrawn a licence to a sacco that had met all the requirements and awarded it to a rival sacco without any explanation or justification - whether the County Government of Migori owed the respondent a legal duty of providing it with a certificate indicating where it had been allowed to pick and drop passengers - whether the facilitation of the certificate to a rival Sacco and not to the respondents without any plausible reason why the respondent was not issued with the certificate was discriminatory – Constitution of Kenya, 2010 article 27; National Transport and Safety Authority Act (Act No. 33 of 2012) section 30; National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, regulation 9.*



***Constitutional Law** – constitutional petition – remedies – award of damages – guiding principles - what did the court consider before awarding damages in constitutional petitions - whether the trial court erred in awarding the respondent Kshs. 2,000,000 for violation of its fundamental rights and freedoms.*

Brief facts

The respondent sued the appellants in the High Court of Kenya at Migori in Constitutional Petition No. 3 of 2016. In the petition, the respondent which is a duly registered public transport operator under the null Cooperative Act, 1997 (Sacco) claimed that the appellants had frustrated its operations in the County by denying it crucial documents necessary for its licensing which included the certificate of picking and dropping passengers required by the National Transport and Safety Authority (NTSA) for licensing purposes and to enable it secure a log-in to the Transport Licensing Board Portal to fully digitize its operations which was part of the requirement for compliance with the law.

The respondents operated at Posta Bus Park which had been unilaterally shut down by the appellants. Subsequently, the Posta Bus Park was assigned to a rival public transporter, the Migori Awendo Classic Sacco registered and operationalized through what it termed the proxies of the County Government's County Executive Committee Member for Transport, the 2nd respondent.

The appellants had further refused to allocate the respondent any alternative operational base and directed it to operate from any of the available bus parks within the town without any regulation and or order. That failure to allocate it a distinctive place of operation had led to disruptions in its operations as the appellants kept arresting its members and charging them in court for operating in places not sanctioned by them.

At the High Court, the respondents' petition was allowed and they were awarded Kshs. 2,000,000 for violation of their fundamental rights and freedoms, among them freedom from discrimination. Aggrieved, the appellants filed the instant appeal.

Issues

- i. Whether there was public participation in the decision to close down Posta Park.
- ii. Whether the County Government of Migori owed the respondent a legal duty of providing it with a certificate indicating where it had been allowed to pick and drop passengers.
- iii. Whether the facilitation of the certificate of picking and dropping passengers required by the National Transport and Safety Authority (NTSA) to a rival Sacco(and not to the respondents, without any plausible reason) was discriminatory.
- iv. What did the court consider before issuing damages in constitutional petitions?
- v. What principles should a court consider in awarding compensatory damages for constitutional violations?
- vi. Whether the trial court erred in awarding the respondent Kshs. 2,000,000 for violation of its fundamental rights and freedoms.

Held

1. A constitutional petition ought to set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they were alleged to be infringed. A constitutional petition ought to be drafted with some reasonable degree of precision, identifying the constitutional provisions that were alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. It was not enough to merely cite constitutional provisions. There had to be some particulars of the alleged infringements to enable the respondents to respond to and/or answer the allegations or complaints. The respondent's petition stated the particular provisions of the Constitution violated and the manner of violations attributed to the appellants.
2. The 1st appellant had a constitutional mandate with regard to County Public Transport which included the regulation of traffic, parking, and picking of passengers. The mandate of regulating public transport matters in the County fell within the 1st appellant's mandate. It was not in dispute that the respondent was engaged in the business of public transport within the 1st appellant's territorial



- jurisdiction and the function was one rightly placed in the appellant's hands by law. The 1st appellant was under constitutional/statutory duty and obligation to regulate public transport such as parking and where to drop off and pick up passengers within Migori town.
3. The requirement that passengers be picked up and dropped off at a designated area was provided for in section 30 of the National Transport and Safety Authority Act, 2012. That provision was also replicated in the regulations of the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations. Under regulation 9 it was provided that every operator of a commuter service vehicle was to ensure that the driver, conductor or any other staff member employed to work in the vehicle at all times only picked up and dropped off passengers at designated bus stops. It was a requirement that anyone applying for licensing with the authority had to be armed with a document from the regulating body from where it operated that showed it had been allowed to pick up and drop passengers at a designated place. It was clear that the 1st appellant was under a duty to grant any document to the respondent showing that they had allowed its operations within the County and was mandated by the County to drop and pick up passengers at a designated place.
 4. The 2nd appellant was a person who was sued in his capacity as an employee of the 1st appellant whose mandate was to deal with transport matters within the County so that the issuance and or-non-issuance of the authorization documents to the respondent was squarely under him. In making such a decision he was bound by article 10 of the Constitution which stated that national values and principles of governance bound all state organs, state officers, public officers and all persons whenever any of them made or implemented public policy decisions.
 5. The decision by the appellants to move the respondent from Posta Bus Park and close it down was made without consulting the public or facilitating public participation. To that extent, the respondent's complaints and or allegations were justified. The action was not made for the general good of the public. There ought to have been some input from those who were likely to be affected. The contravention of the Constitution and statute could not be justified on the plea of public interest as it was settled law that public interest was best served by enforcing the Constitution and statutes. The appellants owed the respondent a legal constitutional and/or statutory duty which they were to discharge in accordance with the law.
 6. A claim alleging a breach of constitutional rights and fundamental freedoms could not only be instituted against the state or its organs but also against individual persons, natural or juridical. A party alleging the violation had the evidential burden, by a preponderance of the evidence to prove the violation.
 7. The respondent's assertions were proved to the required standard. Though the appellants denied ever receiving a letter from the respondent requesting for the certificate of picking and dropping passengers within the county, they however admitted to having received two reminders from the respondent which they never acted upon. Instead, they insisted on the original first communication for them to act. That was unreasonable demand which was calculated to frustrate the respondent in its quest for the certificate and for reasons best known to appellants. The respondent further went ahead to demonstrate how failure by the 1st appellant to act on its request caused it not to receive a Transport Licensing Board (TLB) authorization from the NTSA which had in turn resulted in the mass transfer of vehicles from its Sacco to the rival Sacco and others that were compliant.
 8. The appellant owed the respondent a legal duty of providing it with a certificate indicating where it had been allowed to pick up and drop passengers, for it could not operate from the air. The appellants failed to do and had no plausible reason for their failure to act. Yet it had facilitated the rival Sacco with the documentation which act was in itself discriminatory. The trial court did not err in finding that the appellants were under a duty to issue the certificate.
 9. Although the 1st appellant had a constitutional and statutory duty over parking and public transport within the county, the mandate had to be executed in accordance with the laid down constitutional



- and statutory norms which included the participation of the people, the respondent included integrity, transparency, and accountability amongst others. There was no public participation which was a key component of the public decision-making process when the Posta parking grounds were closed to the respondent and relocated nowhere in particular. Consultation and public participation in the decision-making process were required of the appellants.
10. The objective of involving the public in the decision-making process was that the concerns of the public were taken into account whenever decisions were being made by those in positions of authority. That promoted legitimacy and hence the greater acceptance of the decision that was arrived at.
 11. There was no public participation in the decision to close down the Posta Bus Park. The instant court could not fault the finding of the trial court that the lack of such public participation that ought to have been initiated by the appellants was a breach of the respondent's constitutional rights.
 12. Equality included the full and equal enjoyment of all rights and fundamental freedoms. The import of article 27 was that human rights and fundamental freedoms were guaranteed to all persons by virtue of being human and had to be enjoyed without limitation. The rights and fundamental freedoms that were guaranteed by the Constitution had to be enjoyed by all human beings in equal measure and to the fullest extent. For differentiation of treatment to be unconstitutional and impermissible it had to be based on any of the prohibited grounds as captured under article 27 of the Constitution.
 13. Discrimination entailed differential treatment which was simply treating equals unequally. In the instant appeal, the respondent asserted that it had been treated differently from its rival Saccos in the facilitation of the necessary documentation for licensing, unilaterally closing down Posta Bus Park Further that its rival Sacco had been made compliant with the statutory requirements by the respondent leading to many of its members' motor vehicles to move to compliant Saccos. The conduct of the appellants constituted discrimination against the respondent and also unequal treatment before the law.
 14. Any award of damages to the respondent would not be sanitizing illegality. The respondent had been operating from the bus park with the full knowledge and authority of the appellants for a long time prior. The appellant never ever suggested that the respondent's previous occupation of Posta Bus Park was illegal.
 15. The High Court had power to grant any appropriate relief in proceedings under articles 22 and 258 of the Constitution. The court was always possessed of residual inherent powers which allowed it to make any orders in the wider interest of justice. It was for the court to fashion out an appropriate remedy even in instances where the Constitution and the law were silent. A court could not just helplessly stare at a petitioner whose rights and fundamental freedoms were trampled upon or when it was ostensibly demonstrated that the Constitution was either contravened or so threatened. Unless a court rose to, and asserted its authority, chances were that it could fail the calling in article 3 of the Constitution. Even in instances where there were express provisions on specific reliefs, a court was not precluded from making any other orders under its inherent jurisdiction for the ends of justice to be met to the parties.
 16. A monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense. When exercising that constitutional jurisdiction, the court was concerned to uphold, or vindicate, the constitutional right which had been contravened. A declaration by the court would articulate the fact of the violation, but in most cases, more would be required than words. If the person wronged had suffered damage, the court had the discretion to award him compensation. The comparable common law measure of damages would often be a useful guide in assessing the amount of compensation. But that measure was no more than a guide because the award of compensation was discretionary and moreover, the violation of the constitutional right would not always be co-terminus with the cause of action at law. An award of compensation would go some distance toward vindicating the infringed constitutional right. How far it went would depend on the circumstances, but in principle, it could well not suffice. The fact that the right violated was a



constitutional right added an extra dimension to the wrong. An additional award, not necessarily of substantial size, could be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and defer further breaches.

17. The duty and task to assess damages was discretionary and once exercised properly, valid reasons had to be proffered to justify interference by the appellate court. An appellate court would however only interfere with an award where an appellant demonstrated that the award was too high or so low as to represent an entirely erroneous estimate. It had to be shown that the court proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The instant court was satisfied with the reasons given by the trial court in awarding Kshs. 2,000,000/- to the respondent as damages. The award was neither erroneously high nor excessive as to call for the court's intervention.

Appeal dismissed with costs to the appellant.

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic No 1* (1976 – 1980) KLR 1272; [1976] KLR 154 — (Followed)
2. *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982 – 1988) KAR 5 — Explained
3. *Federation of Women Lawyers (Fida) Kenya & 5 others v Attorney General & another* Petition No 102 of 2011; [2016] eKLR— (Followed)
4. *Gitobu, Imanyara & 2 others v Attorney General* Civil Appeal No 98 of 2014; [2016] eKLR — (Explained)
5. *Kenya Pipeline Company Limited v Glencore Energy (UK) Limited* Civil Appeal No 67 of 2014; [2015] eKLR — (Explained)
6. *Mambo, Rose Wangui & 2 others v Limuru Country Club & 17 others* Constitutional Petition No 160 of 2013; [2014] eKLR — Explained
7. *Mumo, Matemo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No 290 of 2012; [2013] eKLR— (Followed)
8. *Okiya, Omtata Okoiti v Commissioner General, Kenya Revenue Authority(KRA) & others* Petition No 532 of 2017; [2018] eKLR— (Explained)
9. *Oyugi, Edward Akong'o & 2 others v Attorney General* Constitutional Petition 441 of 2015; [2019] eKLR— (Explained)
10. *PIL Kenya Ltd v Joseph Oppong* Civil Case No 102 of 2007; [2009] eKLR— (Followed)
11. *Republic v County Government of Mombasa ex-parte Outdoor Advertising Association of Kenya* Judicial Review No 63 of 2013; [2014] eKLR— (Explained)
12. *Total Kenya Limited v Kenya Revenue Authority* Civil Case No 676 of 1998; [1998] eKLR— (Explained)

South Africa

1. *Doctors for Life International v Speaker of the National Assembly and Others* (2006) ZACC 11 (2006) (12) BCLR 1399; 2006 (6) SA 416 - (Explained)
2. *Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others* [2010] ZACC 5; 2010 (6) BCLR 520 - (Explained)

Trinidad and Tobago

Siewchard Ramanoop v Attorney General of Trinidad and Tobago T & F PC Appeal No 13 of 2004 - (Explained)

Statutes

Kenya;



1. Constitution of Kenya, 2010 articles 3(1);10; 19; 20(1); 22; 27; 50; 73(1); 75(1); 159; 186; 232(1); 255; 258; Chapter 6; Schedule 4 section 18 - (Interpreted)
2. Cooperative Societies Act,1997 (Act No 12 of 1997) In general – (Cited)
3. Leadership and Integrity Act, 2012 (Act No 19 of 2012) In general – (Cited)
4. National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2013 (Act No 33 of 2012 Sub Leg) regulation 9 - (Interpreted)
5. National Transport and Safety Authority Act, 2012 (Act No 33 of 2012) section 30 - (Interpreted)

Advocates

Mr Okongo Wandago for the appellants

JUDGMENT

- 1 The appeal arises from the judgment and decree of the High Court (AC Mrima J) dated 28th March 2017.
- 2 The facts leading to the current appeal are that the respondent sued the appellants in the High Court of Kenya at Migori in Constitutional Petition No 3 of 2016. In the petition, the respondent which is a duly registered public transport operator under the null *Cooperative Act,1997* (Sacco) claimed that the appellants had frustrated its operations in the County by denying it crucial documents necessary for its licensing which included the certificate of picking and dropping passengers required by the National Transport and Safety Authority (NTSA) for licensing purposes and to enable it secure a log-in to the Transport Licensing Board Portal to fully digitize its operations which is part of the requirement for compliance with the law.
- 3 Further, despite the appellants' failure to provide the aforesaid documents, the appellants had it from its original place of operation commonly known as Posta bus park which it unilaterally closed down but subsequently it assigned the same to a rival public transporter, the Migori Awendo Classic Sacco registered and operationalized through what it termed "the proxies of the County Government's County Executive Committee Member for Transport, the second respondent.
- 4 The appellants had further refused to allocate the respondent any alternative operational base and directed it to operate from any of the available bus parks within the town without any regulation and or order. That failure to allocate it a distinctive place of operation had led to disruptions in its operations as the appellants kept arresting its members and charging them in court for operating in places not sanctioned by them.
- 5 It was the appellant's contention that due to the aforesaid frustrations; it had lost many of its members who had opted to join other compliant Saccos including Migori Awendo Classic Sacco and by extension bringing huge losses and operational costs. The respondent claimed that the appellants' actions had breached and contravened various articles of the *Constitution of Kenya,2010* and in particular article 73(1) of the *Constitutions* which required the appellants to act in accordance with the public Trust entrusted to them, article 232 which bound the appellants to specific values and principles that guide people exercising authority in the interest of public, the whole chapter on the Bill of Rights under the Constitution which confers the right of all citizens of Kenya including the respondent to have their basic needs and welfare met. That the appellants also contravened article 75(1) of the *Constitution* in so far as conflict of interest is concerned as despite taking oath to serve the Public as a public officer, the 2nd appellant proceeded to make unethical choice between public obligation to serve and his private interest business of operating a rival transport Sacco and ensuring preferential treatment to it.



- 6 The respondent further accused the appellants for breaching the provisions of Chapter 6 of the Constitution on Leadership and integrity and the *Leadership and Integrity Act* of 2012 by the appellants failing to serve all the citizens, the respondent included, equally and taking decisions based on personal interest.
- 7 The respondent thus pleaded with the court to consider the losses it had incurred which included office expenses amounting to Kshs 500,016 inclusive of rent, water and electricity, telephone, security, cleaning services, and personal/human resource expense of Kshs 8, 240,000 The respondent in the ultimate prayed that: -
- a) Declaratory judgment that the defendant's actions prohibiting a legally registered Sacco (plaintiff) to operate transport business in Migori County is in conflict with the law and violates the rights of the respondent to operate.
 - b) Declaratory judgment that the respondent is subject to appellants' business letter of authority regime and shall operate business in the county without fear or intimidation from any individual and/or individuals or body or organization.
 - c) Appellants refusal to allow the respondent to operate as a business is in actual and substantial injury to the respondent as tabulated here. However, the second respondent is directly answerable to the first respondent, and in this regard the respondent is imploring a declaration from this Honorable court to impose complete, speedy and adequate compensation from the first appellant to the respondent as tabulated above and/or as the Honorable court deems necessary.
 - d) Order to the costs. (*sic*)
 - e) Any such additional relief as this honorable court deems just and equitable.
- 7 The appellants opposed the petition through the affidavit of Christopher Odhiambo Lusana, the County Secretary of the 1st appellant. The appellants deposed that they had never received an application from the respondent for the certificate of operation and as such they could not issue the same. That they had issued a licence to the respondent to trade within Migori County and there was no need to designate a specific place of operation as the respondent's vehicles ply designated routes within the County and therefore could operate within the provided bus parks in the County. That there was no constitutional, statutory or legal requirements that the appellants give the certificate as alleged and further that there was no discrimination in allocation of dropping and picking stages of passengers between the respondent and the rival Sacco aforesaid. The appellants maintained that there was no unlawful, unethical or conflict of interest, at all between the appellants and the rival Sacco. The appellants denied any violations of the respondent's constitutional rights and the claim for damages.
- 8 The petition was canvassed by way of written submissions. The trial court after assessing and analyzing the pleadings, evidence, rivals submissions and the law, concluded that there had been violations of the respondent's constitutional rights by the appellants and entered judgment in favour of the respondent in terms that: -
- a) A declaration be and is hereby issued that the unilateral decision taken by the appellant to permanently close the Posta Bus Park without giving the petitioner an opportunity to be heard and the failure by the appellants to justly relocate the respondent to another operational base prior to closing the Posta Bus Park is unconstitutional, null and void *ab initio*:



- b) That the respondent and its members would, in the meantime continue to operate from their traditional bay at the former Posta Bus Park pending any possible relocation to a designated bus park by the appellants
- c) The appellants shall in coming up with the decision to possibly relocate the respondent and its members adhere to the constitution of Kenya and any other attendant law.
- d) The appellants shall compensate the respondent in the sum of Kshs. 2,000,000/-
- e) The appellant shall bear the costs of the petition.

9 The appellants being aggrieved by the judgment and decree are now before this court on a first appeal. The appellants had initially raised a total of twelve grounds but in their written submissions through Mr Okongo Wandago, learned counsel, the appellants collapsed them into three to wit, that the trial court erred in law and fact when it: -

- 1. Failed to hold that the respondent had failed to prove its claim against the appellants and was thus not entitled to compensation.
- 2. Awarded to the respondent Kshs 2,000,000 as damages without proof or basis at all and which amount was manifestly excessive, unreasonable and unjust.
- 3. Ignored the appellants evidence that the respondent had been authorized to operate public transport business from all designated bus parks throughout the county.

These are therefore the only grounds that we shall address in this appeal.

10 On ground one, it is the appellants' submissions that the petition was not proved by the respondent to the standard required. The allegation that the appellants were the main impediment to the compliance by the respondent with the requirements of NTSA were not proved as the appellants provided all the necessary information and documentation. That it was the fault of the respondent who had not availed some of its vehicles for inspection. Further, that no evidence of intimidation and/or threats by the 2nd appellant as alleged was tendered. It was submitted that no evidence of breach of the statutory and or administrative duties by the appellants was adduced before the trial court but the trial court proceeded to so hold. Nor did the respondent lead any evidence from which the trial court could have concluded that the respondent had applied for a certificate of picking and dropping passengers which had been denied. The appellants went on to submit that there was no proof of any infringement if any and extent thereof of the respondents' constitutional rights and fundamental freedoms. There was no injury suffered by the respondent's members consequent to any violation denial and/or infringement of any constitutional rights. The appellant submitted further that the Posta Bus Park had been closed to all the Public Transport Providers with a view to organizing and managing public transport better and not to the respondent alone as was held by the trial court and this closure did not render the respondent inoperational. In any event the operation from the said bus stage was not authorized by the appellant and was thus illegal and the court in awarding compensation for the reason of closure was in itself sanitizing an illegality as was held in the case of *Kenya Pipeline Company Limited v Glencore Energy (UK) Limited* [2015] eKLR.

11 On the question of public interest, the trial court was accused of failing to take into account the public interests and good public administration which dictates that the respondent just like other public transport operators in the County must comply with the law that guides operation of public transport in the County. The appellant submitted that the trial court by the judgment granted preferential treatment to the respondent as no other Sacco that operate similar business have such a certificate issued. On damages it was submitted that the award of Kshs 2,000,000 had no basis and the amount



was in any event manifestly excessive, unreasonable and unjust The appellant relied on the following authorities for that proposition *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR and *Edward Akong'o Oyugi & 2 others v Attorney General* [2019] eKLR. In the ultimate the appellants urged us to allow the appeal.

- 12 In its submissions in opposition to the appeal the respondent reiterated the averments in the petition. It maintained that the trial court did not err when it stated that the appellants ought to have considered Public Interest and good public administration which mandated the 2nd appellant not to interfere with Public Transport operations whilst being vested with personal interests that resulted in disorder.
- 13 That if any preferential treatment existed, the same was by the appellants towards the rival Sacco to the extent of arresting and confining rival transport operators in total disregard of existing law. That the court rightly held that the Constitution devolved some aspects of transport functions to the County Government thus the 1st appellant was under the legal obligation to come up with county legislations to provide necessary framework for the public transport industry.
- 14 The respondent further submitted that the appellants were not truthful to court when they stated that Posta Bus Park had closed as it was subsequently assigned to their rival Sacco which operates therefrom. That the trial court was alive to articles 50, 159 and 258 of the *Constitution* and thus there is no error in the trial court's finding that the respondent had been treated with discrimination when it was forcefully moved out of the bus park and without being given an alternative venue. Further, that the trial court's award of Kshs 2,000,000 was far too low from what had been prayed for by the appellants of Kshs 10,282,000 That the impugned judgment was well reasoned and should not be disturbed. The respondent thus urged us to dismiss the appeal.
- 15 We have considered the record in its entirety, the rival submissions and the law. This being a first appeal this court's mandate is as was restated and reaffirmed in the case of *PIL Kenya Ltd v Oppong* [2009] KLR 442 thus: -

“It is the duty of the court of appeal as a first appellate court to analyze and evaluate the evidence on record a fresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanor and giving allowance for that”.

- 16 With the above in mind, we discern the issues that fall for our determination to be: -
 - a) Whether the respondent proved its case against the appellants.
 - b) If the above is in the affirmative, whether the damages awarded were justified.
- 17 With regard to the first issue it is necessary to consider whether the petition satisfied the threshold set out in the cases of *Anarita Karimi Njeru v The Republic* [1979] eKLR *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. In both cases it was stated that a Constitutional petition should set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they were infringed. Thus for a constitutional petition to be sustainable, the petition must at a minimum satisfy this basic threshold. That is, it must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. We do not suppose it is enough to merely cite constitutional provisions. There has to be some particulars of the alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints.



- 18 We have read the petition as filed by the respondent which we note was drawn in person and without assistance of counsel. However, what comes out clearly is that this was a dispute between the respondent and the appellant hinging on the infringement and violations of the rights guaranteed by the Constitution to the respondent. The respondent was able in the petition to state the particular provisions of the Constitution violated and the manner of violations attributed to the appellants.
- 19 As to whether the appellants owed a constitutional and/or statutory duty to the respondent, the appellants submitted that the respondent had failed to prove its case on violation of any law and particularly the Constitution. The respondent cited several articles of the Constitution that were violated. The main violations being failure by the appellants to facilitate the respondent to obtain the necessary documents as required by NTSA, discrimination and failure to conduct public participation when a decision was made to close down Posta Bus Park. This in turn denied the respondents the right to property as the business was considered as property. It is imperative at this juncture to investigate whether the 1st appellant has the mandate to regulate the operations of the respondent within the designated area of the County. article 186 of the Constitution provides for the exercise of the various powers and functions by both County and National Government. It provides *inter alia*: -
1. Except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule.
 2. A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.
 3. A function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government.
 4. For greater certainty, Parliament may legislate for the Republic on any matter.
- 20 As to the role of the National Government, section 18 of part one of the Fourth Schedule to the Constitution outlines its functions to include: - Transport and communications, including in particular: -
- a) Road Traffic
 - b) The construction and operation of National Trunk roads
 - c) Standards for the construction and maintenance of other roads by counties.
- 21 As for County Governments, section 5 of part two thereof provides its functions to: -
- County Transport including: -
- a) County Roads
 - b) Street lighting
 - c) Traffic & parking
 - d) Public Road transport and
 - e) Ferris and harbor, excluding the regulation of international and national shipping and matters related thereto.
- 22 From the foregoing, it is clear beyond any peradventure that the 1st appellant had constitutional mandate with regard to County Public Transport which includes the regulation of traffic, parking



and picking of passengers. Based on this, we have no doubt in our minds that the mandate of regulating public transport matters in the County fell within the 1st appellant's mandate. It is not in dispute that the respondent was and is engaged in the business of public transport within the 1st appellant's territorial jurisdiction and as per the above provisions, the function is one rightly placed in the appellant's hands by law. The 1st appellant was therefore under constitutional, statutory duty and obligation to regulate public transport such as parking and where to drop and pick passengers within Migori town.

23 The respondent's complaints have been adumbrated in our summary above but the key complaints were denial by the appellants to grant it the picking and dropping of passengers' certificate, its eviction from Posta bus park and acting discriminately and in favour of its rival Sacco by removing it from Posta Bus Park.

24 The requirement that passengers be picked and dropped at designated area is provided for in section 30 of *National Transport and Safety Authority Act, 2012* in these terms:

3. subject to the provisions of this Act, the Authority may attach to a road service license such conditions as it may consider fit to the purpose of ensuring that: -

- a) The fares imposed for the carrying of passengers are reasonable and ensure fair competition within the transport industry.
- b) Copies of the timetable and fare timetable are carried and available for inspection; and
- c) The safety of passengers and in particular, which they alight and are picked from such area as may be designated for that purpose.

25 This provision is also replicated in the regulations of *National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations*. Under regulation 9 it is provided that: -

Every operator of a commuter service vehicle shall ensure that driver, conductor or any other staff member employed to work in the vehicle: -

- a) At all times only picks up and drops off passengers at designated bus stops.

26 From our reading of the above provisions of the law, it is a requirement that anyone applying for licensing with the authority must be armed with a document from the regulating body from where it operates that shows it has been allowed to pick and drop passengers at a designated place. It is therefore clear that the 1st appellant was under duty to grant any document to the respondent showing that had allowed its operations within the County and is mandated by the County to drop and pick passengers at a designated place.

27 The 2nd appellant is a person who was sued in his capacity as an employee of the 1st appellant whose mandate was to deal with transport matters within the County so that the issuance and or-non-issuance of the authorization documents to the respondent was squarely under him. In making such decision he was bound by article 10 of the *Constitution* which clearly states that National values and principles of governance in this article bind all state organs, state officers, public officers and all persons whenever any of them makes or implements public policy decisions.

28 The decision by the appellants to move the respondent from Posta Bus Park and close it down was made without consulting the public or public participation among them the respondent. To that extent the respondent's complaints and or allegations are justified. The appellant alleges that the action was made for the general good of the public. However, we do not share the same view. There ought to have been



some input from those who were likely to be affected. The contravention of the Constitution and Statute cannot be justified on the plea of public interest as it is now settled law that public interest is best served by enforcing the Constitution and Statutes. In *Republic v County Government of Mombasa ex-parte Outdoor Advertising Association of Kenya* [2014] eKLR it was held thus: -

“There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the constitution and the law as the rule of law is one of the national values of the constitution under article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the *ex-parte* applicant members were granted an opportunity to be heard. There cannot be public consistently with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision.”

- 29 Having said so, we therefore answer the first issue in the affirmative that the appellants owed the respondent a legal constitutional and/or statutory duty which they were to discharge in accordance with the law as correctly held by the trial court.
- 30 Did the appellants breach the respondent's constitutional and/or statutory rights? The trial court so found.
- 31 It is trite that a claim alleging breach of constitutional rights and fundamental freedoms may not only be instituted against the state or its organs, but also against individual persons, natural or juridical. See article 3(1) 19 and 20(1) of the *Constitution* and the case of; *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others* [2014] eKLR. Further, a party alleging the violation has the evidential burden, by a preponderance of the evidence to prove the violation— see *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others, (supra)*. From the petition itself and from what we can make from the record as well as the decision of the trial court, the respondent was complaining of having been denied the certificate which was rightly to be issued by the appellants upon satisfaction of certain requirements and further being treated unfairly when it was sent away from his original place of operation, the Posta bus park without involving it in the deliberations and final decision. The appellants then allowed a competitor to use the same bus park thus subjecting the respondent to discriminatory and unfair treatment.
- 32 These assertions were proved to the required standard. Though the appellants denied ever receiving a letter from the respondent requesting for the certificate of picking and dropping passengers within the County, they however admitted to having received two reminders from the respondent which they never acted upon. Instead, they insisted on the original first communication for them to act. Obviously, this was unreasonable demand which was calculated to frustrate the respondent in its quest for the certificate and for reasons best known to appellants. The respondent further went ahead to demonstrate how failure by the 1st appellant to act on its request caused it not to receive a TLB authorization from the NTSA which had in turn resulted in mass transfer of vehicles from its Sacco to the rival Sacco and others that were compliant.
- 33 The appellant owed the respondent a legal duty of providing it with a certificate indicating where it had been allowed to pick and drop passengers, for it could not to operate from the air. This the appellants failed to do and had no plausible reason for their failure to act. Yet it had facilitated the rival Sacco with the said documentation which act was in itself discriminatory. We are satisfied that the trial court did not err in finding that the appellants were under a duty to issue the certificate.
- 34 Then comes the question of the appellants unilaterally removing the respondent from its usual place of operation, that is, Posta bus park grounds by closing it down without the involvement of members



of the public or in consultation with the respondent. All this was in flagrant disregard of the provision of the Laws as already demonstrated. We are therefore in agreement with the finding of the trial court that although the 1st appellant has a Constitutional and Statutory duty over parking and public transport within the County, the mandate has to be executed in accordance with the laid down constitutional and statutory norms which include participation of people, the respondent included, integrity, transparency, and accountability amongst others. There was no public participation which is a key component of public decision-making process when the Posta parking grounds were closed to the respondent and relocated nowhere in particular. What we are emphasizing here is consultation and public participation in the decision-making process, for that is what the Constitution required of the appellants. Also central to the issue under consideration are the values and principles of public service prescribed in article 232(1) of the Constitution which include involvement of the people in the process of policy making and accountability for administrative acts

35 In *Okiya Omtata Okoiti v Commissioner General, KRA & others* Pet 532 of 2017 the High Court observed that:

“Kenyan’s were very clear in their intentions when they entrenched article 10 in the Constitution. (See-*Trusted Society of Human Rights Alliance v Attorney General & 2 others*, Petition No 229 of 2012) They were singularly desirous of insisting on certain minimum values and principles to be met in constitutional, legal and policy framework and therefore intended that article 10 be enforced in the spirit in which they included it in the Constitution. It follows, therefore, that all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions must adhere to article 10 of the Constitution. In order to justify their exclusion in matters falling under article 10, the burden is indeed heavy on the person desiring to do so considering that article 10 is one of the provisions protected under article 255 of the Constitution whose amendment can only be achieved by way of a referendum.”

36 The essence of public participation was also powerfully enunciated [please indicate which court] in the case of *Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others*, CCT 86/08 [2010] ZACC 5 in the following terms: -

“...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.”

37 It is now widely accepted that the objective in involving the public in the decision-making process is that the concerns of the public are taken into account whenever decisions are being made by those in positions of authority. This promotes the legitimacy and hence the greater acceptance of the decision that is arrived at. See the case of *Doctors for Life International v Speaker of the National Assembly & others* (CCT12/05(2006) ZACC 11(2006) (12) BCLR 1399(CC); 2006 (6) SA 416(CC): -

38 From the record and as already stated we discern that there was no public participation in the decision to close down the Posta Bus Park with the consequence that we cannot fault the finding of the trial court that lack of such public participation that ought to have been initiated by the appellants was a breach of the respondent’s constitutional rights.

39 Turning to the issue of whether or not petitioners’ rights to equality under article 27, of the Constitution were violated, the respondent contended that they were being treated differently from



similar Saccos operating same business. Article 27 of the Constitution embodies the principle of equality and non-discrimination thus:

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law...

(4) 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.”

40 Needless to say, equality includes the full and equal enjoyment of all rights and fundamental freedoms. The import of article 27 is that human rights and fundamental freedoms are guaranteed to all persons by virtue of being human and must be enjoyed without limitation. That is to say that the rights and fundamental freedoms that are guaranteed by the Constitution must be enjoyed by all human beings in equal measure and to the fullest extent.

41 The proper position is that for a differentiation of treatment to be unconstitutional and impermissible it has to be based on any of the prohibited grounds as captured in article 27 of the Constitution;

“27 (4) 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, color, age, disability, religion, conscience, belief, culture, dress, language or birth.

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

42 A three-judge bench of the High Court (Mwera, Warsame & Mwilu, JJ as they then were) articulated well the difference between mere differentiation and differentiation or unequal treatment that is constitutionally proscribed when they expressed themselves thus in the persuasive authority of *Federation of Women Lawyers Fida Kenya & 5 others vs Attorney General & anor* [2011] eKLR;

“In our view, mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases”.

43 With the above in our minds, we take the position that discrimination entails differential treatment which is simply treating equals unequally. In the present appeal, the respondent asserted that it had been treated differently from its rival Saccos in facilitation of the necessary documentation for licensing, unilaterally closing down Posta Bus Park Further that its rival Sacco had been made compliant with the statutory requirements by the respondent leading to many of its members’ motor vehicles to move to compliant Saccos. In the circumstances, we find just like the trial court that the conduct of the appellants constituted discrimination against the respondent and also unequal treatment before the law.

44 We now turn to consider whether the award of Kshs 2,000,000 to the respondent as damages was justified. The appellants have submitted that the damages were awarded without proof or legal basis and were in any event manifestly excessive, and unreasonable. The appellants submitted that any



award of damages to the respondent would be sanitizing an illegality as the respondent had been utilizing Posta bus park unlawfully and illegally. The appellant relied on the case of *Kenya Pipeline Company Limited v Glencore Energy (UK) Limited* [2015] eKLR for the proposition that allowing such a payment would be legalizing and sanitizing an illegality. However, we note that the facts of the above case are clearly distinguishable with those prevailing herein. In the above case, the appellant had elaborate schemes hatched and executed by itself while using a name traitor as a front, cover and cloak so as to enter the Kenya Oil Market without a license, a flagrant illegality. There was outright breach of statutory provisions and it was on that basis that the court unanimously held that those who breach, violate or defeat the law cannot turn to courts to seek the court's aid. This is quite different from this case as the respondent had been operating from the bus park with the full knowledge and authority of the appellants for a long time prior. The appellant never ever suggested that the respondent's previous occupation of the Posta Bus Park was illegal. We therefore reject that argument.

45 The appellant further relied on the case of *Gitobu Imanyara & 2 others vs Attorney General* [2016] eKLR where this court held that: -

Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law within the discretion of a trial court, however, the courts discretion for award for damages in constitutional violations cases though is limited by what is "appropriate and just" according to the facts and circumstances of a particular case....

The primary purpose of a constitutional remedy is not compensating for punitive but is to vindicate the rights violated to prevent or defer any future infringements. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration...."

46 The respondent in its petition, sought among other prayers that:

The defendant refusal to allow plaintiff to operate a business is an actual and substantial injury to the plaintiff's as tabulated here above. However, the 2nd respondent is directly answerable to the first respondent. In this regard the plaintiff is imploring a declaration from this honorable court to impose complete, speedy and adequate compensation from the first respondent to the plaintiff as tabulated above and as the honorable court deems fit.

47 This answers the complaint by the appellants that the trial court granted prayers that had not been asked for and had not pleaded damages. No doubt the High Court has powers to grant any appropriate relief in proceedings under articles 22 and 258 of the *Constitution*. We may add that the court is always possessed of residual inherent powers which allows it to

make any orders in the wider interest of justice. It is for the court to fashion out an appropriate remedy even in instances where the Constitution and the law are silent. A court cannot just helplessly stare at a petitioner whose rights and fundamental freedoms are trampled upon or when it is ostensibly demonstrated that the Constitution is either contravened or so threatened.

Unless a court rises to, and asserts its authority, chances are that it may fail the calling in article 3 of the *Constitution*.



48 This court in *Total Kenya Limited v Kenya Revenue Authority* [2013] eKLR held that even in instances where there are express provisions on specific reliefs a court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties.

49 From the above, we are satisfied that the prayer for compensation was properly before the trial court. On whether the trial court acted on wrong principles in awarding damages to the tune aforesaid, the relevant principles applicable to award of damages following constitutional violation was explained exhaustively by the Privy Council in the famous cases of *Siewchard Ramanoop v The AG of T & F*, PC Appeal No 13 of 2004 where it was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

Per Lord Nicholls at paragraph 18 & 19

“When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases, more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and moreover, the violation of the constitutional right will not always be co-terminus with the cause of action at law. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and defer further breaches...”

50 We have already found and held that the respondent’s constitutional rights were violated as rightly held by the trial judge. Further the respondent continued to suffer as a result of actions by the appellants which caused it to lose business and trade not clear name following the exit of several of its members to other rival transport Saccos.

51 It remains the law that the duty and task to assess damages is discretionary and once exercised properly, valid reasons must be proffered to justify interference by the appellate court. An appellate court will however only interfere with an award where an appellant demonstrates that the award is too high or so low as to represent an entirely erroneous estimate.

52 This court, in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR 5 stated:

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...”

53 We are satisfied with the reasons given by the trial court in awarding Kshs 2,000,000 to the respondent as damages. The award is neither erroneous high or excessive as to call for our intervention.

54 It is for all these reasons that we dismiss this appeal with costs to the respondent.

DATED & DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

ASIKE-MAKHANDIA



.....
JUDGE OF APPEAL

J. MOHAMMED

.....
JUDGE OF APPEAL

S. ole KANTAI

.....
JUDGE OF APPEAL

I certify that this is a
true copy of the original.

Signed

DEPUTY REGISTRAR

