



**Aziz v Kenya National Highways Authority & another (Petition E113 of 2021)
[2023] KEHC 17758 (KLR) (Constitutional and Human Rights) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 17758 (KLR)

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

PETITION E113 OF 2021

M THANDE, J

APRIL 28, 2023

BETWEEN

FAKRUDIN SHEIKH ABDI AZIZ PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. By a Petition dated 7.4.21 and amended on 12.5.21, the Petitioner seeks the following reliefs:
 1. Spent
 2. Spent
 3. A Declaration that the action by the 1st Respondent of levying a fee for contravention of Section 6(2) (a) and 17 of the East Africa Community Vehicle Load Control Act, 2016 without affording the Petitioner due process violated the rights of the Petitioner under Articles 40, 47 and 50 of *the Constitution* of Kenya.
 4. A Declaration that Sections 6(2) (9), 7, 9(3) 17(1) (2)(a) (b) (4)(a), (5), (6) (8) and (10), 18(2) (c), (4)(b), 22(1) (3)(d), 23(2)(a) (n) of the East Africa Community Vehicle Load Control Act, 2016 contravene Articles 40, 47 and 50 of *the Constitution* of Kenya and the decisions of the courts and thus null and void.
 5. A Declaration that enabling provisions of the law empowering the imposition of a fee for the offence of overloading or exceeding the permissible weight limits is unconstitutional as such 'fee' is unknown and/ or improper in law.



6. A Declaration that the 1st Respondent violated the Petitioner's right to property and thus denied him to benefits and lawful gains of the M/v thus be asked to pay damages for loss of revenue for the period of the vehicle's detention for thirty-five (35) days.
 7. A Declaration that the 1st Respondent's levying of parking fees amounting to USD \$50 per day for a disputed overloading 'fee' is unreasonable and thus unlawful ab initio.
 8. Punitive damages.
 9. Any other Order this Court shall deem mete and just.
 10. The costs of this Petition be awarded to the Petitioner.
2. The Petitioner is the legal owner of motor vehicle registration number KAY 018 G (the vehicle). On 2.4.21 the vehicle was transporting goods on behalf of the Petitioner and was, at around 18.44, at the Juja weighbridge, issued with a clearance certificate and weighbridge ticket. On 3.4.21 at around 1.08 pm however, the vehicle was unlawfully impounded and detained by 1st Respondent's mobile weigh bridge crew at the entrance of Gilgil- Nakuru Round A off the Gilgil- Nakuru Road. The Petitioner's case is that in impounding the vehicle, the Respondent misused and/or misinterpreted its authority by recalling it from the Gilgil weighbridge and failing to recognize that the vehicle was off road and not within the Respondent's lawful jurisdiction. He accused the 1st Respondent of acting beyond the scope of its authority and jurisdiction. He also alleged that the 1st Respondent deliberately used faulty weighing machines disregarding the weighing ticket of another weighbridge. The Petitioner further claims that the Respondent failed to grant the Petitioner a hearing contrary to the rules of natural justice. As a result of the aforesaid actions, the Respondent violated the Petitioner's rights under Articles 40, 47(1), and 50 of *the Constitution*. He further challenged the constitutionality of sections 6(2) (9), 7, 9(3) 17(1) (2) (a) (b) (4) (a), (5), (6) (8) and (10), 18(2) (c), (4) (b), 22(1) (3)(d), 23(2) (a) (n) of the East Africa Community Vehicle Load Control Act, 2016 (the Act).
 3. In its response to petition dated 24.5.21, the 1st Respondent disputed the jurisdiction of this Court on the premise that the Petition does not raise any constitutional issues for determination by this Court. The vehicle being a 6-axle truck, its legal load limited is a maximum of 47,750 Kgs on the gross vehicle weight. In the course of performance of its mandate under Section 15(1)(a), (c)-(h) the Act on the material date, the 1st Respondent weighed the vehicle at the Gilgil weighbridge and it was found to be overloaded as it was carrying 50,000 Kgs on the gross vehicle weight. As a result, the 1st Respondent levied the overload fee of Kshs. 143,036/=. The Petitioner's vehicle was detained in along the Naivasha – Nakuru road which is part of the Regional Trunk Road Network as defined in the First Schedule of the Act. In line with the said statute, a weight ticket number KNGLNKA20210400002289 (the weight ticket) showing the extent of the overload as well as the overload fees payable, was duly issued to the Petitioner who requested for a reweigh at the weighbridge on the same date. The vehicle was reweighed and a second ticket issued.
 4. The 1st Respondent averred that a weighing report was issued to the Petitioner under Section 17(1) of the Act. Under Sections 17(4)(a) and (b) of the Act, the Petitioner was still required to pay the disputed fee and thereafter lodge his appeal as provided under Section 17(4)(a) and (b). The Petitioner however failed to do so or contest the fee payable and has to date not paid the amount due on a without prejudice basis, to secure release of the vehicle, make such necessary adjustments on the load and pursue an appeal against the fees.
 5. It was further contended that the Petitioner has not exhausted all avenues of appeal provided under the Act before seeking the aid of this Court. Additionally, none of the provisions of the Act were declared



unconstitutional or null and void in Petition No. 13 of 2015 as claimed by the Petitioner. Further that all its weighing machines are calibrated and give accurate findings. It added that the provisions of the Act do not require that any person found to have overloaded be charged in court but to pay the overload fees and correct the loading levels to the permissible legal limits before being allowed to proceed with their journey. The 1st Respondent thus denied violation of the Petitioner's rights as alleged in the amended Petition and urged that the amended Petition be dismissed with costs.

6. Parties filed their written submissions which I have duly considered. The following issues arise for determination:
 - i. Whether the 1st Respondent violated the Petitioner's constitutional rights.
 - ii. Whether Sections 6(2) (9), 7, 9(3) 17(1) (2) (a) (b) (4) (a), (5), (6) (8) and (10), 18(2) (c), (4) (b), 22(1) (3)(d), 23(2) (a) (n) of the East Africa Community Vehicle Load Control Act, 2016 (the Act) are unconstitutional.

Whether the 1st Respondent violated the Petitioner's constitutional rights

7. It is the Petitioner's contention that the 1st Respondent violated his constitutional rights by the illegal impounding and detention of the vehicle for 35 days. His contention is that the vehicle was weighed at the Juja Weighbridge on 2.4.21 at 18.44. No overload was detected and a clearance certificate and weighbridge ticket were duly issued. He further contends that by impounding and detaining the vehicle and the goods therein, the 1st Respondent relied on a faulty machine. Further that it misused its authority by not following due process and did not afford the Petitioner an opportunity to be heard. Accordingly, the 1st Respondent violated his right to property under Article 40, his right to fair administrative action under Article 47(1) and right to fair hearing under Article 50(1) of *the Constitution*.
8. For the 1st Respondent, it was submitted that the weight ticket showing the extent of the overload was issued pursuant to the procedure set out in the Act and the same was not disputed. Even where a transporter disputes that his vehicle is overloaded, such transporter is still required, under Section 17 of the Act, to pay the requisite overloading fee on a without prejudice basis, to secure release of the vehicle. The 1st Respondent contended that the Petitioner did not indicate that he disputed the weighing report and failed to pay the required fee to secure the release of the vehicle. The Petitioner has not shown the extent of the illegality and breach of procedure on the part of the 1st Respondent. It is further contended that the Petitioner has approached this Court with unclean hands seeking refuge and to use the Court to enable him operate with impunity, by carrying overloads thereby causing damage to expensive public roads that are maintained from public coffers. On the parking fee, the 1st Respondent submitted that the same is payable under Section 17(6) and (7) and Regulation 13(1) and (2) of the East Africa Community Vehicle Load Control (Enforcement Measures) Regulations, 2018.
9. What is before this Court for determination is whether in impounding and detaining the Petitioner's vehicle, the 1st Respondent exercised its mandate within the law and whether that action violated the Petitioner's constitutional rights.
10. The Act was enacted by the East African Community and assented to by the Heads of the Partner States on 1.12.15. It is an Act of the Community to make provision for the control of vehicle loads, harmonized enforcement, institutional arrangements for the Regional Trunk Road Network within the Community and to provide for other related matters. Section 25 of the Act provides that the Act shall take precedence over the Partner States' laws with respect to any matter to which its provisions relate.



11. The 1st Respondent is established under Section 3 of the [Kenya Roads Act](#). Its mandate as set out in Section 4 of that Act includes inter alia to ensure adherence to the rules and guidelines on axle load control prescribed under the [Traffic Act](#) (Cap. 403) and under any regulations thereunder. The 1st Respondent being the national roads authority of the Partner State of Kenya under the Act, is responsible for the trunk roads of the Partner State of Kenya, forming part of the Regional Trunk Road Network.
12. Section 3 of the Act provides that the Act shall apply to the implementation of vehicle load control along the regional trunk road network as set out in the First Schedule. Section 2 defines “regional trunk road network” as the network of roads set out in the First Schedule, which lists the regional trunk roads network. Relevant to the matter herein is the Northern Corridor on which the Petitioner’s vehicle was impounded and detained.
13. The regional trunk road network is protected from damage by overloaded vehicles. Section 4 provides for the legal load limit for vehicles using the regional trunk road network as follows:
 - (1) The axle load of any vehicle using the Regional Trunk Road Network shall not exceed the maximum permissible weight limits for such vehicle, set out in the Second Schedule.
 - (2) The gross vehicle weight of any vehicle using the Regional Trunk Road Network shall not exceed the maximum permissible gross vehicle weight specified in the Third Schedule.
14. The Second Schedule to the Act sets out the axle load limits while the Third Schedule specifies the gross vehicle weight limits.
15. Part II of the Act provides for the legal load limits and overloading fees. Section 4 provides that the axle load of any vehicle using the Regional Trunk Road Network shall not exceed the maximum permissible weight limits for such vehicle, set out in the Second Schedule. Further that the gross vehicle weight of any vehicle using the said road network shall not exceed the maximum permissible gross vehicle weight specified in the Third Schedule.
16. Section 6 provides for liability for overloading fees and other costs. It provides in part:
 1. A person shall not drive, use, cause or permit to be driven or used, any vehicle on the Regional Trunk Road Network while overloaded.
 2. Any person who drives, uses, causes or permits to be driven or used, any vehicle on the Regional Trunk Road Network while overloaded shall be liable to pay overloading fees to the national roads authority or any institution designated by a Partner State where the overloading is detected, such overloading fees as may be from time to time be prescribed and published in the Gazette by the Council.
 3. The liability under sub section (2) shall be on the transporter.
 4. A vehicle is said to be overloaded when used on any part of the Regional Trunk Road Network in contravention of the weight limits set out in the Second and Third Schedules.
 5. ...
17. Flowing from the above provision, it is clear that an overloaded vehicle shall not be permitted on the Regional Trunk Road Network. Where a vehicle is found to be overloaded while on the on the Regional Trunk Road Network, the transporter shall be liable to pay overloading fees to the national roads authority of the country where the overloading is detected. In the case of the Partner State of Kenya, the overloading fees shall be paid to the 1st Respondent.



18. Section 6(9) provides:

Where it is established while a journey is being undertaken, that a vehicle is carrying a load in excess of the legal load limit, the vehicle in question shall not continue with its journey unless the overloading fees is paid and the excess load is offloaded or redistributed and the vehicle upon being re-weighed conforms to the load limit.

19. In a bid to protect the road network, where a vehicle is found to be overloaded, it shall not be permitted to continue with its journey. Such vehicle may only resume its journey upon payment of overloading fees and offloading or redistribution of the excess load so that the vehicle conforms to prescribed load limit.

20. The 1st Respondent is required to be vigilant in protection roads in the network from destruction by overloaded vehicles. Section 15 of the Act stipulates the enforcement mechanisms and the procedure to be followed by authorized officers in that regard as follows:

1. An authorised officer shall have the power to—
 - a. require the driver of a vehicle to stop the vehicle for the purposes of weighing and inspecting the vehicle;
 - b. in accordance with relevant laws, enter the vehicle and inspect any record relating to any load carried in or on the vehicle;
 - c. direct a driver to proceed to a weighing station for the purposes of weighing the vehicle;
 - d. weigh the vehicle and any load being carried in or on the vehicle
 - e. verify the weight of all axles or axle units on a vehicle or combination of vehicles in accordance with this Act;
 - f. issue a weighing certificate for the vehicle providing required particulars;
 - g. in consultation with relevant implementing agencies, cause the offloading of a vehicle at a designated place or the adjustment of the load to ensure that the vehicle is loaded within limits;
 - h. detain a vehicle until such time as an overloading fee has been paid or proof, in the manner prescribed has been provided that payment has been made;
 - i. ...

21. The 1st Respondent is therefore authorized to inter alia weigh a vehicle and its load and verify the weight on all axles and thereafter issue a weighing certificate containing the required particulars. In the event a vehicle is found to be overloaded, the 1st Respondent has powers to require the offloading of a vehicle or adjustment of the load to ensure the same is within the set limits. Additionally, the 1st Respondent shall detain the vehicle until the overloading fee levied, is paid.

22. Section 17 of the Act provides as follows:

1. When an authorized officer determines that a vehicle is carrying a load in excess of the legal load limit under this Act, he or she shall issue a weighing report setting out the overload particulars and the amount of overload fees payable.



2. Where an authorized officer, while a journey is being undertaken, determines that a vehicle is carrying a load in excess of the legal load limit, the authorized officer shall in consultation with relevant implementing agencies, not allow the vehicle in question to continue its journey, unless the load is redistributed and the vehicle is, upon being reweighed, found to be within the legal load limit, or the vehicle is offloaded to lower its weight to the legal load limit and—
 - (a) any amounts due under subsection (1) have been paid to the national roads authority or its duly appointed agent; or
 - (b) a guarantee in the prescribed format is provided by the transporter that such amounts shall be paid.
23. It is evident from the foregoing, that 2 conditions must be met before an overloaded vehicle is released. First, the excess weight is offloaded or redistributed so that the vehicle is within the legal load limit upon being reweighed. Second, the overloading fee must be paid or a guarantee in respect of the amount due, is provided.
24. Section 17(4) provides that even where the transporter disputes the fact of overloading, the authorized officer shall indicate such dispute in the weighing report, and a copy of the disputed report shall be issued to the transporter. Once this happens, the transporter has 2 options. The transporter may pay the overloading fee demanded on a without prejudice basis to secure the release of the vehicle, make such necessary adjustment on the load as may be directed by the authorized officer and lodge an appeal against the fees as provided for under the regulations. The transporter may also choose not to pay the fee required and appeal against the same. During this appeal period, the vehicle shall remain detained at such designated place, at the cost of the transporter.
25. In the present case, It is not disputed that the vehicle was weighed at the Gilgil weighbridge on 3.4.21. The 1st Respondent asserts that the vehicle was found to be overloaded upon weighing and reweighing, at the request of the Petitioner. The 1st Respondent further submitted that the Petitioner did not pay the amount of overload fees demanded nor did he dispute and appeal against the same resulting in the detention of the vehicle. The Petitioner has not demonstrated that he invoked the regulations and disputed or appealed against the sum demanded.
26. The contention by the 1st Respondent is disputed by the Petitioner who maintains that when the vehicle was weighed at the Juja weighbridge on 2.4.21, it was found to be within the weight limit. That may well be true. However, Section 8(1) of the Act makes it mandatory for every vehicle of a gross vehicle weight of 3,500 kgs or more, to be weighed at every weighing station situated along the Regional Trunk Road Network traversed by such vehicle. When, the vehicle was weighed on 3.4.21 at the Gilgil weighbridge, it was found to be over loaded even upon being reweighed at the request of the Petitioner. A weight ticket was issued showing the extent of overload of 2,270 kgs as well as the overload fees payable. In line with the Second and Third Schedules of the Act, an overloading fee of Kshs. 143,036/= was charged and the Petitioner was required to offload or adjust the overload. The Petitioner's did not place any proof before Court to support his allegation that the 1st Respondent's weighing machine in Gilgil were faulty.
27. The Petitioner has accused the 1st Respondent of violating his right to property under Article 40, his right to fair administrative action under Article 47(1) and right to fair hearing under Article 50(1) of *the Constitution*. From the record, it can be seen the 1st Respondent followed the procedure laid out in Section 15 of the Act. The vehicle having been found to be overloaded could only be released upon payment of the amount demanded or issuance of a guarantee in the prescribed form, to the



- 1st Respondent. Without payment of the amount demanded, the detention of the vehicle was legally justified.
28. Article 40 of *the Constitution* guarantees to every person the right, to acquire and own property of any description. Clause 2(a) provides that Parliament shall not enact a law that permits the State or any person to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description.
29. The right to property is a hallowed right under *the Constitution*. This right may however be limited by law. Such law must however be reasonable and justifiable in an open and democratic society. Article 24 of *the Constitution* provides for limitation of rights and fundamental freedoms. Article 24(1) provides:
- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including--
- a. the nature of the right or fundamental freedom;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
 - e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
30. In the case of SDV Transami Kenya Limited and 19 Others v Attorney General & 2 Others & another [2016] eKLR, Muriithi, J. addressed his mind to the limitation of the right to property and stated:
- [60] In other words, a limiting legislation must expressly state intention to limit a right and the nature and extent of limitation, be clear and specific about the right affected, and the nature and extent of limitation, and the limitation must not go as far as to wholly destroy the essential content of the right, emphasis being on limit rather than derogate. For instance, in respect to the right of protection of property, a law may express intention to limit the property right by limiting the user of the property for a specified area or period of time, but it may not take away or grab the property so as to wholly take away the right to use the property at all, which is at the core of the right to property, without paying compensation for compulsory acquisition which is a permitted appendage of the right to property.
31. The learned Judge went on to state:
- (84) As I understand it, the ratio in Murangá Bar Owners Association case is not that there cannot be any violation of the right to property by licencing or other regulatory law, but that where the licensing law or Regulations are made pursuant to a control mechanism which is necessary [and I daresay, in the words of *the Constitution* itself, reasonable and justifiable], the law or Regulations will not be construed as violating *the Constitution*. That is plain, and the question then becomes whether the Regulations herein are a necessary control mechanism and or reasonably justifiable, and that is the province of Article 24 limitation of rights and fundamental freedoms!
32. The levying of the overload fee, the requirement for load adjustment as well as detention of a vehicle for non-payment of any amount required, is a control mechanism, which in my view is reasonable and justifiable. As has been demonstrated, the impounding and detention of the vehicle was not done



arbitrarily but in accordance with the law. To begin with, the vehicle was found to be overloaded contrary to the requirements of Section 6 of the Act. Further, the Petitioner failed to pay the overload fees payable resulting in his vehicle being detained. The law thus limited the Petitioner's right to property by detaining his vehicle for a specified period of time, namely, until payment of overload fees. Had the Petitioner complied with the legal load limits in the first place or paid the penalty imposed as required under Sections 6 and 17 of the Act, the vehicle would have been released to him. The impounding and detention of the vehicle was done within the confines of the law. Having failed to comply with the law, the Petitioner cannot come to Court to claim that his right to property, fair administrative action and fair trial were violated by the 1st Respondent.

33. To buttress his case, the Petitioner relied on the case of *Chania Genesis Limited v Kenya National Highways Authority (KeNHA); National Transport & Safety Authority (Interested Party)* [2021] eKLR where Ogola, J stated:

The Petitioner was deprived of the use of his property without being accorded a hearing. The weighing ticket and prohibition order served upon the Petitioner's driver did not amount to explanation as to why the vehicle was being seized.

34. The Petitioner also relied on the case of *Margaret Miano v Kenya National Highways Authority* [2015] eKLR where Emukule, J. stated:

The Kenya National Highways Authority is however not any of the tribunals established under *the Constitution* for resolution of disputes. The provisions of Regulation 15(3) may have unwittingly and therefore unlawfully constituted an Authority with powers of a Kangaroo court, that is to say, an improperly constituted body, a tribunal before which a fair trial is impossible. The provisions of Regulation 15(3) may also be contrary to Article 159 of *the Constitution* by purporting to confer upon the Kenya National Highways Authority power to collect fee/fines without due process by donating to such fines the euphemism of a "fee". The provision may therefore be inconsistent with, and be a violation of the right to fair trial guaranteed under Article 50 of *the Constitution*, and to that extent therefore null and void under Article 2(4) of *the Constitution*.

35. I have considered the 2 authorities which are from courts of concurrent jurisdiction. I am however more persuaded by the holding in the case of *Kenya Transporters Association v Kenya Revenue Authority & 2 others* [2013] eKLR, where Ngugi, J. (as she then was) considered a matter in which the petitioner challenged the powers of the respondents to seize its members' vehicles for carrying local goods in trucks licensed to carry transit goods in alleged breach of regulations governing the transport of transit goods. The learned Judge stated and I fully concur:

In such circumstances, where a party has violated laws or regulations that are binding, there can be no basis for alleging violation of either the provisions of Article 40 which protects the right to property, or Article 47 on the right to fair administrative action. It was therefore perfectly lawful for the respondents to impound the truck carrying local goods in violation of the EACCMA and the EACCM Regulations. In addition, Siginon was fully aware of the conditions under which its truck was licenced to carry transit goods, and what it was required to do if it wished to carry local goods in its truck.

36. As a transporter, the Petitioner was no doubt aware of the vehicle load limits relating to of the Regional Trunk Road Network. As long as there was violation of the law by the Petitioner, and the 1st Respondent acted within the law in impounding the vehicle, the Petitioner cannot be heard to allege violation of his rights. The impounding and detention of the Petitioner's vehicle for overloading and



failure to pay the overload fee as provided for in the Act is in my view reasonable and justifiable in a democratic and open society for purposes of protecting the Regional Trunk Road Network, which is built and maintained using public funds.

37. The Petitioner has further accused the 1st Respondent of violating his right to fair administrative action as guaranteed under Articles 47(1), which provides:

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

38. He further alleges violation of his right to a fair hearing as guaranteed by Article 50(1) as follows:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

39. The allegation of violation of his rights to fair administrative action and fair hearing is also anchored on the imposition of the overload fee and impounding of his vehicle by the 1st Respondent. The record shows that upon the vehicle being weighed and found to be overloaded, the Petitioner was issued with a ticket as required by law. The vehicle was reweighed on his request and again found to be overloaded. He was given an opportunity to pay the overload fee but failed to do so. Having found as I have that the 1st Respondent acted within the law in the situation, it cannot be said to have violated the Petitioner's rights. He is indeed the author of his own misfortune for failure to comply with the law. I therefore find and hold that no evidence was tendered to demonstrate that the 1st Respondent violated the Petitioner's constitutional rights as alleged.

Whether the section 6(2) (9), 7, 9(3) 17(1) (2) (a) (b) (4) (a), (5), (6) (8) and (10), 18(2) (c), (4) (b), 22(1) (3)(d), 23(2) (a) (n) of the East Africa Community Vehicle Load Control Act, 2016 are unconstitutional

40. The Petitioner submitted that the following provisions of the Act are unconstitutional:

Section 6(2) and (9) of the Act provide for liability for overloading fees and other costs as hereunder:

- (2) Any person who drives, uses, causes or permits to be driven or used, any vehicle on the Regional Trunk Road Network while overloaded shall be liable to pay overloading fees to the national roads authority or any institution designated by a Partner State where the overloading is detected, such overloading fees as may be from time to time be prescribed and published in the Gazette by the Council.
- (9) Where it is established while a journey is being undertaken, that a vehicle is carrying a load in excess of the legal load limit, the vehicle in question shall not continue with its journey unless the overloading fees is paid and the excess load is offloaded or redistributed and the vehicle upon being re-weighed conforms to the load limit.

41. Section 7 provides:

A national roads authority or any other institution designated by a Partner State shall provide for payment of overloading fees at weighing stations or such other designated locations.



42. Section 9 provides for instances of special categories of vehicles loads. Subsection (3) provides:
- A vehicle carrying any of the loads specified in sub-section (1) without a special permit shall be stopped and detained by an authorized officer or directed to proceed to such place as may be necessary, taking into account safety, health or security, and the transporter of such vehicle shall be liable for such fine or other penalty as the national laws of the relevant Partner State shall prescribe.
43. Section 17 stipulates the Procedures in case of vehicle overloading and has been reproduced elsewhere in this judgment, while Section 18 provides for the demerit point system. Section 22 provides for compounding of penalties.
44. The Petitioner has also cited the following sections as unconstitutional:
- 23(1) The National Road Authority, where it is satisfied that any person has committed an offence under paragraphs (a), (b), (c), (e), (f) and (g) of subsection (1) of Section 20 , may compound the offence and may order such person to pay a sum of money, as the National Road Authority may deem fit not exceeding the amount of the fine to which the person would have been liable if the person had been prosecuted and convicted for the offence.
- 23(3)Where the National Road Authority makes any order under this section—
- (d) the person shall not be liable to any further prosecution in respect of the offence upon payment of the fine;
- 23 Without prejudice to the generality of the provisions of sub-section (1), the Council may make regulations providing for—
- (a) overloading fees and other penalties to be imposed under this Act and the methods of payment of the fees or penalties;
- (n)compounding of penalties.
45. It is the Petitioner’s case that the impounding and detention of the vehicle on the alleged grounds of overloading is the creation of an offence. Further, the financial charges leviable by virtue of these Sections and arising out of the offence as stated above, though ostensibly denoted as a fee in the said Sections of the Act are in actual sense, a penalty. The offence and penalty being criminal in nature, the proper institution with the constitutional authority to make determination is the Judiciary and not the 1st Respondent. He submitted that the said sections offend the doctrine of separation of powers. Relying on the case of *Trusted Society of Human Rights Alliance v The Attorney General and others* Nairobi Petition No. 243 of 2011 [2012] eKLR he argued that the 1st Respondent being in the executive arm of government should not levy, interpret its own laws and issue sanctions to accused persons within the purview of the aforesaid laws.
46. The Petitioner further contended that the 1st Respondent has failed to avail evidence to the effect that the Act takes precedence over all other laws with respect to any matter to which its provisions relates. Additionally, that in dealing with the Petitioner, the 1st Respondent went against the clear and express provisions of Section 17 of the Act. The 1st Respondent ought to have prepared a report under Section 17(1) and not just a ticket and also ought to have given him the options available under Section 17(2) (a) and (b).
47. It is the Petitioner’s further case that the impugned provisions mirror the Roads (Kenya National Highways Authority) Regulations, 2013 (the 2013 Regulations) regarding the imposition of fines



which were conveniently drafted as fees, were declared unconstitutional in *Disarano Limited v Kenya National Highways Authority & Attorney General* [2017] eKLR. He further submitted that in the case of *Erastus Gituma t/a Muchui Builders & Timber Suppliers vs Kenya National Highways Authority* [2015] eKLR Onguto, J. embraced the reasoning of Emukule, J. on reference to fees as fines in the case of *Margaret Miano vs Kenya National Highway Authority Mombasa High Court Petition No. 23 of 2015*.

48. While the Petitioner appreciates the 1st Respondent's role of ensuring compliance with the rules and guidelines on axle load control prescribed under the impugned regulations, he states that the role must be subjected to due process as prescribed by *the Constitution*. To him, the legitimacy of the fees levied can only be achieved through judicial function created under Articles 23 and 159 of *the Constitution* as delegated by the people of Kenya to the Judiciary and relevant tribunals.
49. The 1st Respondent countered the Petitioner's contention by submitting that the Court in the case of *Disarano Limited v Kenya National Highways Authority & Attorney General* [2017] eKLR did not render the Act unconstitutional and that if the Petitioner wishes to challenge the same, he should approach the East African Court of Justice. Further that no court of law has declared the Act or any of its provisions unconstitutional and in addition there is no pending matter in any court challenging the same.
50. A careful reading of the decision in the *Disarano Limited* case (*supra*) will show that the matter under consideration was the constitutionality of Sections 22(2)(d) and 46 of the Roads Act and the 2013 Regulations. Nyamweya J. (as she then was) found that Sections 22 (2)(d) and 46 of that Act were not unconstitutional but proceeded to find that Regulations 14 and 15 of the 2013 Regulations contravened Articles 40, 47, 50 and 159 (1) of *the Constitution* of Kenya and were therefore unconstitutional. She further found that Regulation 15(5) of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 was substantively *ultravires* for contravening Section 46(2) of the *Kenya Roads Act* and therefore declared null and void.
51. The basis for such a finding as can be deduced from the said decision was that the said Regulations did not observe the right to fair administrative action and the right to fair hearing. They further imposed a fee which she stated was in the literal sense a fine that was only supposed to be imposed by the tribunals and the courts. This therefore amounted to an arbitrary action against the petitioner therein without affording him a hearing and giving reasons for imposition of such a fee and further an affront to the doctrine of separation of powers.
52. It is quite evident that the *Disarano Limited* case (*supra*) did not challenge the constitutionality of the East Africa Community Vehicle Load Control Act but the constitutionality of 2013 Regulations. Nyamweya, J. (as she then was) stated:

The legality of provisions of law that give power to administrative authorities to make regulations, that *inter alia* impose fees and sanctions by way of delegated legislation is recognized by *the Constitution* under Article 260, which defines legislation as follows;

- (a) an Act of Parliament, or a law made under authority conferred by an Act of Parliament; or
- (b) a law made by an assembly of a county government, or under authority conferred by such a law;

Therefore, it cannot be argued that that section 22(2)(d) and section 46 of the *Kenya Roads Act* and Regulations 10 of the Kenya Roads (Kenya National Highway Authority) Regulations, 2013 are unconstitutional only for the reason that they give power to the



Kenya National Highways Authority to make regulations that provide for offences, fees and sanctions, or only for reasons of setting out the said offences, fees and sanctions.

53. By parity of reasoning, it cannot be said, that the impugned provisions of the Act are unconstitutional only for the reason that they provide for infractions and penalties for the said infractions and further that the penalties are to be paid to the 1st Respondent.
54. The Petitioner complains that the imposition of fees by the 1st Respondent, an agency within the Executive arm of government, offends the doctrine of separation of powers. To the Petitioner, the offence of overloading and penalty being criminal in nature, the proper institution with the constitutional authority to make determination is the Judiciary and not the 1st Respondent.
55. The doctrine of separation of powers requires each of the 3 arms of government, namely the Executive, Legislature and Judiciary, to stick to its lane. In *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae)* (Petition 229 of 2012) [2012] KEHC 2480 (KLR) (Constitutional and Human Rights) (20 September 2012) (Judgment) a 3-judge bench of this Court considered the doctrine of separation of powers and observed as follows:
63. In answering these constitutional questions, it is imperative that we begin by re-stating that the doctrine of separation of powers is alive and well in Kenya. Among other pragmatic manifestations of the doctrine, it means that when a matter is textually committed to one of the coordinate arms of government, the Courts must defer to the decisions made by those other coordinate branches of government. Like many modern democratic Constitutions, the New Kenyan Constitution consciously distributes power among the three co-equal branches of government to ensure that power is not concentrated in a single branch. This design is fundamental to our system of government. It ensures that none of the three branches of government usurps the authority and functions of the others.
56. The Court went on to say:
64. Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuan influence is palpable throughout the foundational document, *the Constitution*, regarding the necessity of separating the governmental functions. *The Constitution* consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two. We readily agree with the Respondents that this must mean that the Courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent.
57. The impugned Sections generally provide for liability to pay overloading fees to the 1st Respondent at weighing stations or other designated locations. The provisions also provide for the consequences of not paying the overloading fees, which include impounding and detaining of an overloaded vehicle and discontinuation with its journey. The question to be addressed by this Court therefore, is whether by determining that a vehicle is overloaded and imposing overload fees, the 1st Respondent being part of the Executive arm of government has usurped the authority and mandate of the Judiciary. My view



is that the penalties are an expeditious way of dealing with transporters whose vehicles are found to be overloaded, without recourse to the courts. This no doubt, is a resource saving mechanism in terms of time and money. My further view is that a transporter would be more inconvenienced by the attendant delays, costs and complexities associated with the court system than by diminution of legal rights that would occur where this mechanism is employed. It cannot therefore be said that the 1st Respondent has, in the exercise of its mandate under the Act, encroached on the authority of the Judiciary.

58. In the case of Republic v Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development & another Ex-parte Kenya National Union of Co-operatives Staff [2018] eKLR, Mativo, J. (as he then was) considered the constitutionality of instant fines for traffic offences, which is quite similar to the overload fees in question, and stated:

Considering the foregoing reasoning, and the rationale behind instant fines, I find that the ex parte applicant has carefully avoided addressing the question whether or not the Rules can pass the Article 24 analysis test. It has not been shown that instant fines are unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. I may add that road safety and the need to restore sanity in our roads is a matter of grave public interest which the Court cannot ignore.

59. I concur with the learned Judge and find that the Petitioner has not shown that the penalties under the Act are unreasonable and unjustifiable in an open and democratic society. Further, the protection of our roads which are built at great cost to the tax payer is a matter of great public interest that this Court must be alive to. I also agree with the learned Judge that the reasonableness and convenience of overloading fees levied to a transporter whose vehicle has been found to be overloaded cannot be gainsaid. This in my view saves time to both the state and the offender and is a less restrictive means which satisfies the Article 24 analysis test. Further a transporter who disputes an overload finding by the 1st Respondent is free under Section 17 of the Act to appeal the decision. I therefore find and hold that the Petitioner has not demonstrated to the satisfaction of the Court, that the impugned provisions of the Act are unconstitutional.

60. For the above reasons I can find no merit in this Petition dated 7.4.21 and amended on 12.5.21. The same is hereby dismissed with costs to the Respondents.

DATED AND DELIVERED IN NAIROBI THIS 28TH DAY OF APRIL 2023

.....

M. THANDE

JUDGE

In the presence of: -

..... for the Petitioner

..... for the 1st Respondent

..... for the 2nd Respondent

..... Court Assistant

