Kenya Driving Schools Association v National Transport and Safety Authority & 3 others; National Assembly & another (Interested Parties) (Petition E251 of 2020) [2022] KEHC 78 (KLR) (Constitutional and Human Rights) (27 January 2022) (Judgment)

Kenya Driving Schools Association v National Transport And Safetyy Authority & 3 others ;National Assembly & another (Interested Party) [2022] eKLR

Neutral citation: [2022] KEHC 78 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E251 OF 2020

AC MRIMA, J

JANUARY 27, 2022

BETWEEN

KENYA DRIVING SCHOOLS ASSOCIATION .... PETITIONER

AND

NATIONAL TRANSPORT AND SAFETY AUTHORITY .... 1ST RESPONDENT

MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING & URBAN DEVELOPMENT .... 2ND RESPONDENT

HON. ATTORNEY GENERAL .... 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE .... 4TH RESPONDENT

AND

NATIONAL ASSEMBLY .... INTERESTED PARTY

THE SENATE .... INTERESTED PARTY

Court suspends the Implementation of the Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020 pending fresh consideration by both Houses of Parliament.

The petitioner challenged the constitutionality of the Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020 (the impugned Rules) on grounds that they were enacted without adequate public participation and without proper scrutiny before the House of Parliament that had the mandate to deal with them. The court held that the regulation-making authority had undertaken a process of public participation that met the requisite legal threshold. The court further explained that since the transport function was a shared function between the national government and county governments, under the Fourth Schedule to the Constitution,

the impugned Rules should have been tabled for scrutiny before both Houses of Parliament but only the Senate considered the impugned Rules and approved them. However, the court held that the Senate's scrutiny of the impugned Rules did not meet the requirements of section 13 of the Statutory Instruments Act. The court explained that the Senate only considered 10 out of the 47 rules and a resolution to remove the educational requirement for a driving school manager from the impugned Rules had not been implemented but the rules were approve by the Senate. The court suspended the implementation of the impugned Rules pending a reconsideration of the Rules by both Houses of parliament.

Reported by Ribia John

Constitutional Law *– arms of government – Legislature – role of the Senate and the National Assembly when processing delegated legislations – finding that delegated legislation could only be dealt with by the House of Parliament with the mandate to deal with the parent bill or statute – whether delegated legislation relating to transport ought to have been considered by both Houses of Parliament – what were the consequences of delegated legislation which was to be considered by both Houses of Parliament but only one House considered it – what was the effect of the enactment of delegated legislation that was only partly considered by Parliament – Constitution of Kenya, 2010, articles 109(3), 110, 111, 112 and 113 & Fourth Schedule; Statutory Instruments Act No. 23 of 2013.*

Constitutional Law *– national values and principles – public participation – public participation in enactment of delegated legislation – what were the parameters to be considered – whether the relevant stakeholders ought to be involved in the enactment process of delegated legislation – whether there was effective public participation in the enactment of the Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020 – Constitution of Kenya, 2010, article 10.*

Legislation *– devolved legislation – nature and scope of legislative roles of the different Houses of parliament – whether all bills must be passed through both Houses of Parliament.*

Statutes *– interpretation of statutes – interpretation of section 13 of the Statutory Instruments Act – what was the meaning and effect of the term scrutiny as used in section 13 of the Statutory Instruments Act – Statutory Instruments Act, No. 23 of 2013, sections 13 & 17.*

Words and Phrases *– scrutiny – definition of scrutiny – a searching study, inquiry, or inspection, examination, a searching look – close watch, surveillance – Merriam Webster Dictionary.*

Words and Phrases *– scrutinize – definition of scrutinize, scrutiny and scrutineer – as a verb scrutinize meant to examine or inspect closely and thoroughly – scrutiny as a noun meant critical observation or examination – scrutineer as a noun meant a person who examined something closely and thoroughly – Concise Oxford English Dictionary, 12th Edition, Oxford University Press, page 1295.*

Brief facts

The petition challenged the Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020 (the impugned Rules) for allegedly violating articles 109(3) and 118(1)(b) of the Constitution of Kenya 2010 (the Constitution), sections 5(1) and (2), 3,10, 11, 12, 13, 17 and 18 of the Statutory Instruments Act No. 23 of 2013 as well as sections 3(1), (2) and (3), 39 and 73 of the Traffic (Amendment) Act, 2012. The petitioner also sought conservatory orders staying and suspending the implementation of the impugned Rules pending the determination of the petition.

The petitioner averred that under the Fourth Schedule to the Constitution, transport was a national government function and as such any legislative agenda on the matter was a preserve of the National Assembly. The petitioner contended that the 1st respondent did not send the impugned Rules to the National Assembly as required under the Constitution, but instead sent them to both the Senate and the National Assembly contrary to the directions given in 2018 by the National Assembly. According to the petitioner, by the provisions of article 109(3) of the Constitution, the Senate had nothing to do with the impugned Rules.

Issues

i. Which body between the Senate, the National Assembly or both had the mandate to consider the delegated legislation relating to transport.

ii. What were the consequences of delegated legislation which was to be considered by both Houses of Parliament as a legal requirement but only one House considered it?

iii. What was the legal effect of the enactment of delegated legislation which was only partly considered by Parliament meaning that it was only considered by the Senate and allegedly the Senate's scrutiny of the delegated legislation did not meet the requirements of section 13 of the Statutory Instruments Act?

iv. What were the parameters that a court considered when determining whether or not there was adequate public participation prior to enactment of a law or legislation?

v. Whether there was effective public participation in the enactment of the Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020.

vi. Whether the relevant stakeholders were involved in the enactment of the Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020.

vii. What was the meaning and effect of the term scrutiny as used in section 13 of the Statutory Instruments Act, No. 23 of 2013?

viii. Whether the Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020 offended sections 5 and section 13 of the Statutory Instruments Act, No. 23 of 2013 due to;

    1. failure by the National Transport and Safety Authority to make appropriate consultations with the relevant stakeholders;
    2. failure by either House of Parliament to properly scrutinize it;
    3. failure by either House of Parliament to consider whether the Rules aligned with the 17 parameters listed under section 13 (a) to (q) of the Statutory Instruments Act.

Held

1. Article 109(3) of the Constitution dealt with bills concerning counties and not delegated legislation. The manner in which delegated legislation was to be laid before Parliament was provided for in the Statutory Instruments Act, No. 23 of 2013. However, a consideration of article 109(3) of the Constitution was relevant in the instant matter since, once it was determined, for instance, that the impugned Rules fell under the category of matters not concerning county governments, then the Senate would not have any business considering such delegated legislation. The correct House of Parliament to consider delegated legislation could only be the one that had the mandate to deal with the parent bill or statute.
2. In ascertaining whether a bill concerned the counties, the Fourth Schedule to the Constitution was the first port of call. If the function in question was assigned to the National Government, then the bill should only have been considered by the National Assembly. If the function was a shared one, then the bill could originate from either the National Assembly or the Senate and its passage was required to be in accordance with articles 110 to 113, 122 and 123 of the Constitution and the Standing Orders of the Houses.
3. The impugned rules were on transport. Under the Fourth Schedule to the Constitution, transport was a shared function by both the national and county governments. From the provisions of paragraph 18 of part 1 and paragraph 5 of part 2 of the Fourth Schedule to the Constitution, if the impugned Rules were a Bill, then both Houses of Parliament had specific roles to play in its passage. In that case, therefore, the impugned Rules, being delegated legislation, required the consideration of both Houses of Parliament.
4. The impugned Rules concerned county governments and as such they were to be considered by the two Houses of Parliament. Since there was evidence that indeed the impugned Rules were forwarded to the two Houses of Parliament for consideration, the impugned Rules did not violate article 109(3) of the Constitution.

5. Further to the requirement that the impugned Rules were to be subjected to public participation, there was the aspect of stakeholders' engagement. Consultation or stakeholders' engagement tended to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impacted on them. That was because such key stakeholders were mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a government agency or a public officer undertaking public participation could have to consider incorporating the aspect of consultation or stakeholders' engagement.
6. Given the concurrence on the need for public engagement in coming up with the impugned Rules and from the principles discussed in the foregoing considerations and since the impugned Rules were specifically on driving schools, driving instructors and driving licenses and which licenses were only issued once a learner was trained and tested in a driving school, then, in the worst-case scenario, even stakeholders' engagement would have sufficed in the unique circumstances of the instant matter.
7. From previous superior court decisions on the nature and adequacy of public participation and stakeholders' engagement, the manner in which public participation was carried out depended on the matter at hand. There was no straight-jacket application of the principle of citizen participation. However, any mode of undertaking public participation which could be adopted by a public entity ought to factor, in the minimum, the following basic four parameters:
    1. the public had to be accorded reasonable access to the information which they were called upon to give their views on. In other words, the mode of conveying the information to the public reigned;
    2. the people ought to have been sensitized or be made to understand what they were called upon to consider and give their views on. The language used in conveying the information to the public was of paramount importance;
    3. once the public was granted reasonable access to the information and was made to understand it, the public ought to have been accorded reasonable time to interrogate the information and to come up with its views; and,
    4. there had to be a defined manner in which the public or stakeholders would tender their responses on the matter.
8. The effect of the foregoing constitutional and statutory parameters was to ensure that public participation was realistic and not illusory. Public participation should not have been a mere formality, but it ought to have accorded reasonable opportunity for people to have their say in what affected them. In that way, the dictates of the Constitution and the law would have been achieved.
9. In the instant matter, the respondents demonstrated that they carried out the public engagement. The 1st respondent first carried out a public advertisement in a newspaper on national circulation wherein it stated how and where the engagements were to be conducted. It gave the dates and venues of the meetings and also explained what was to be discussed in the meetings. The 1st respondent, as well, made provision for sign language interpreters in the meetings. The meetings covered all the 47 counties in Kenya. The 1st respondent made a further provision for those who wished to send their written memoranda. It gave an email address to that end.
10. From the 1st respondent's report on the outcome of the public participation exercise upon completion of the exercise, there was detailed information on all the issues of concern which led to the annulment of the 2018 Rules and the actions taken by the 1st respondent before undertaking public participation. It also gave the list of the meetings, dates and venues of meetings held during the exercise. It further gave the names and qualifications of the facilitators of the meetings. There was no doubt that the facilitators were senior officers of the 1st respondent and were possessed of the requisite knowledge and experience to conduct such meetings.
11. The 1st respondent, carried out a nation-wide public participation exercise on the impugned Rules. The petitioner, however, alleged that the impugned Rules were not part of the discussions in the meetings

and demanded the provision of minutes of the meetings. However, the issues were similar. There was no evidence by those who were in attendance in each of the said meetings to back the petitioner's position. There was evidence, as well, to confirm that most of the members of the petitioner had complied or were in the process of complying with the impugned Rules.

12. The contention by the petitioner that there was no adequate public participation in coming up with the impugned Rules was unsustainable. To the contrary, the 1st respondent satisfactorily demonstrated that it undertook a comprehensive public participation exercise and adduced evidence in proof.

13. The petitioner pleaded in an omnibus manner. It neither tendered arguments nor any evidence in support of the contravention of the alleged sections 3, 10, 11, 12, 17 and 18 of the Statutory Instruments Act. In that case, the court could not consider whether the impugned Rules infringed any of those provisions.

14. Section 2 of the Statutory Instruments Act defined a regulation-making authority to mean any authority authorized by an Act of Parliament to make statutory instruments. In the instant case, the regulation-making authority was the 1st respondent.

15. Section 5 of the Statutory Instruments Act required the regulation-making authority to undertake appropriate consultations with persons who were likely to be affected by the proposed instrument. The onus of carrying out the consultation was on the regulation-making authority and not on the Houses of Parliament. The role of the Houses of Parliament was captured in section 13 of the Statutory Instruments Act.

16. Some of the parameters to be considered by the regulation-making authority included notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, were likely to be affected by the proposed instrument or invitation of submissions to be made by a specified date or could invite participation in public hearings to be held concerning the proposed instrument. The 1st respondent undertook all the requirements. There was evidence that it placed a public advertisement in a local newspaper, it conducted public hearings and invited written memoranda. The 1st respondent, therefore, complied with section 5 of the Statutory Instruments Act.

17. With respect to compliance with section 13 of the Statutory Instruments Act, the Committee of the House was required to scrutinize the statutory instrument or published bill and in doing so it had to be guided by the principles of good governance and rule of law. In the course of carrying out the scrutiny, the Committee was required to consider whether the instrument aligned with the 17 parameters listed under section 13 (a) to (q) of the Statutory Instruments Act.

18. Scrutiny involved a detailed examination with careful or critical attention. Simply put, it was to examine something with great care. Scrutiny was, hence, more than the ordinary observation of something. It went further to unravel the inner state of affairs of a thing. In scrutinizing the impugned Rules, the Houses of Parliament were, by law, called upon to undertake critical and detailed examination of the same. Such scrutiny was guided by *inter alia* the parameters set out in section 13 of the Statutory Instruments Act.

19. Section 11(1) of the Statutory Instruments Act required every Cabinet Secretary responsible for a regulation-making authority to, within seven (7) sitting days, after the publication of a statutory instrument, ensure that a copy of the statutory instrument was transmitted to the responsible Clerk for tabling it before the relevant House of Parliament. In the instant case, there was evidence that the impugned Rules were gazetted on March 20, 2020 *vide* a special issue of the Kenya Gazette in Legal Notice No. 28. Vol. CXXII- No 50. There was further evidence that the Principal Secretary, State Department of Transport in the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works, transmitted the impugned Rules together with Explanatory Memorandum and Public Participation Report to the Clerk of the Senate and the Clerk of the National Assembly for approval through a letter dated March 27, 2020.

20. The Senate appeared in the instant matter upon service. The National Assembly did not. There was no averment to the effect that the National Assembly considered the impugned Rules at all. Accordingly, the impugned Rules were not considered by the National Assembly. The Statutory Instruments Act outlined what would happen if a House of Parliament failed to act on a subsidiary legislation presented to it.
21. The Senate Committee, on June 12, 2020 under MIN. NO. SEN/SCDL/092/2020, noted that it had previously considered the draft impugned Rules and proposed a more robust public participation to be undertaken by the 1st respondent. The Committee also reviewed the 2018 Rules alongside the impugned Rules and noted that the impugned Rules had made substantial changes to the 2018 Rules as directed. The Senate Committee then went through the impugned Rules and was satisfied with the new-look Rules. It, however, resolved to be availed with evidence of public participation. On June 15, 2020 the Committee approved the impugned Rules and the 1st respondent was duly informed.
22. The 2018 Rules had been annulled by the National Assembly on account of several infringements to the guaranteed rights and freedoms. Such were captured in the National Assembly Hansard of August 14, 2018. The Senate in dealing with the impugned Rules allegedly went through the 2018 Rules and satisfied itself that all the contentious areas raised were properly and fully addressed. It then approved the impugned Rules as gazetted, without any amendments.
23. The Senate Committee in dealing with the issue noted that the 2018 Rules had been amended so as to remove the educational requirement for a driving school manager. However, a cursory look at rule 8 of the Impugned Rules revealed otherwise. The prevailing position was that the educational requirements were not removed as minuted by the Senate. Therefore, the concern raised by the petitioner and the National Assembly, which the Senate allegedly stated that it was resolved in the impugned Rules, was indeed not resolved since the same educational requirements in the 2018 Rules remained intact in the approved impugned Rules.
24. The petitioner also raised issue with rule 12(4) and (5) of the impugned Rules. The minutes of the Senate Committee did not capture anything on rule 12 of the impugned Rules. A careful consideration of the minutes of the Senate Committee showed that the Committee only dealt with rules 4, 5, 6, 7, 8, 16, 24, 25, 26 and 27 of the Impugned Rules.
25. There was a total of 47 rules in the impugned Rules which were gazetted and forwarded to the two Houses of Parliament for scrutiny and only the Senate dealt with them. However, from the minutes of the Senate Committee, the Senate only dealt with 10 out of the 47 rules. Further, there was no statement in the minutes confirming that the Committee curiously examined all the 47 rules contained in the impugned Rules. Accordingly, in view of the scrutiny role imposed upon the Houses of Parliament, the Senate did not sufficiently scrutinize the impugned Rules. The Senate also failed to satisfy itself that the impugned Rules complied with section 13 of the Statutory Instruments Act
26. A crucial step in the making of a subsidiary legislation was not properly undertaken. That put the validity of the impugned Rules to serious constitutional and legality tests. The 1st respondent undertook adequate public participation on the impugned Rules in line with articles 10(2)(a) and 118(1)(b) of the Constitution. However, the Senate did not sufficiently comply with section 13 of the Statutory Instruments Act
27. Adequate public engagement on the impugned Rules was undertaken by the 1st respondent. Since it was the Houses of Parliament which failed to carry out their mandates, nullifying the impugned Rules will be a tall order and a serious waste of public resources considering the nature of the nation-wide public participation which was undertaken at the taxpayer's cost. Further, nullifying the impugned Rules would result to confusion in the sector since the entire process would have to be undertaken afresh.
28. Delegated legislation which was concerned with county governments ought to be considered by both Houses of Parliament under the Statutory Instruments Act. As the impugned Rules were on the shared

transport function under the Fourth Schedule to the Constitution, the impugned Rules concerned county governments and as such they were to be considered by the two Houses of Parliament under the Statutory Instruments Act. The 1st respondent undertook sufficient public participation on the impugned Rules. Section 13 of the Statutory Instruments Act was not sufficiently complied with by either House of Parliament.

Petition partly allowed.

Orders

i. *The implementation of the Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020 was stayed and suspended pending a reconsideration of The Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020 by the two Houses of Parliament.*

ii. *The Cabinet Secretary in the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works was directed to re-transmit a copy of the Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020 and the explanatory memorandum together with a copy of the instant judgment to the Speakers of both Houses of Parliament within 14 days of the instant court's decision.*

iii. *In view of the remainder of the terms of the Houses of Parliament, the respective Speakers of Parliament ordered to take necessary steps to ensure that the Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020 were expeditiously dealt with by the respective Houses.*

iv. *In the event that any or both of the Houses of Parliament were/was unable to finalize the dealing with the Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020 within the remainder of the current terms of the Houses of Parliament, the said Rules should be dealt with in the next term of Parliament.*

v. *Each party ordered to bear own costs.*

Citations

Cases

Kenya

1. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR) - (Explained)
2. *Council of Governors & 3 others v Senate & 53 others* Petition 381 & 430 of 2014; [2015] KEHC 6965 (KLR) - (Followed)
3. *Council of Governors v Attorney General & 7 others* Reference 2 of 2017; [2019] eKLR - (Explained)
4. *County Government of Nyeri & another v Ndungu* Civil Appeal 2 of 2015; [2015] KECA 1011 (KLR) - (Followed)
5. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2014; [2014] KESC 33 (KLR) - (Explained)
6. *Institute of Social Accountability & another v National Assembly & 4 others* Petition 71 of 2013; [2015] KEHC 6975 (KLR) - (Explained)
7. *Kaps Parking Limited & another v County Government of Nairobi & another* Petition 104 of 2020; [2021] KEHC 5819 (KLR) - (Explained)
8. *Kitheka, Simeon Kioko & 18 others v County Government of Machakos & 2 others* Petition 9 of 2018; [2018] eKLR - (Explained)
9. *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* Constitutional Petitions 305 of 2012, 34 of 2013 & 12 of 2014; [2015] eKLR (Consolidated) - (Explained)
10. *Munya, Gatirau Peter v Dickson Mwenda & 2 others* Application 5 of 2014; [2014] eKLR - (Followed)
11. *Okoiti, Okiya Omtatah v Commissioner General, Kenya Revenue Authority & 2 others* Petition 532 of 2017; [2018] KEHC 8263 (KLR) - (Explained)

12. *Okoiti, Okiya Omtatah v Communications Authority of Kenya & 8 others* Constitutional Petition 53 of 2017; [2018] KEHC 7513 (KLR) - (Explained)
13. *Okoiti, Okiya Omtatah v National Transport and Safety Authority & another* Petition 97 of 2018; [2021] eKLR - (Explained)
14. *Ramogi, William Odhiambo & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petition 159 of 2018 & Petition 201 of 2019; [2020] eKLR (Consolidated) - (Explained)
15. *Republic v Chief Magistrate's Court, Nairobi & another ex parte Chudasama* Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated) ; [2008] 2 EA 311 - (Explained)
16. *Speaker of the National Assembly of the Republic of Kenya & another v Senate of the Republic of Kenya & 12 others* Civil Appeal E084 of 2021; [2021] KECA 282 (KLR) - (Followed)
17. *Total Kenya Limited v Kenya Revenue Authority* Civil Application 135 of 2012; [2013] KECA 437 (KLR) - (Explained)

South Africa

Fose v Minister of Safety and Security (CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 - (Explained)

Texts

1. Bacchini, S., (Ed) (2011), *Concise Oxford English Dictionary* New York: Oxford University Press 12th Edn p 1295
2. Barak, A., (2005), *Purposive Interpretation in Law* New Jersey: Princeton University Press
3. Crabbe, V., (Ed) (1994), *Legislative Drafting* London: Routledge-Cavendish Vol 1 pp 231-233
4. Merriam, MW., (Ed) (2004), *Merriam Webster Dictionary* Massachusettes: Merriam-Webster Mass Market

Statutes

Kenya

1. Constitution of Kenya articles 23, 93, 94(5); 96(1)(2); 109(3); 110 - 114; 118(1)(b); 122; 165(3); 259; 260; Schedule Fourth; section 5, 18; part 1, 2- (Interpreted)
2. National Transport and Safety Authority Act (cap 404) In general - (Cited)
3. Statutory Instruments Act (cap 2A) sections 3, 5(1)(2); 10 - 13; 15(2); 17; 18- (Interpreted)
4. Traffic (Amendment) Act, 2012 (cap 403) sections 3(1)(2)(3); 39; 73- (Interpreted)
5. Traffic (Driving Schools and Driving Instructors) Rules, 2014 (cap 403 Sub Leg) In general- (Cited)
6. Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020 (cap 403 Sub Leg) In general - (Cited)

Advocates

Mr Muguku for the petitioner

Miss Sirai for the 1st respondent

Miss Chiringa for the 2nd & 3rd respondents

Mr Waliaula for the 2nd interested party

JUDGMENT

1. The enactment of the *National Transport and Safety Authority Act*, No 33 of 2012 (hereinafter referred to as 'the NTSA Act') brought several changes within the transport sector in Kenya. One of such changes was in the manner driving schools were to conduct their businesses.

2. On the basis of the NTSA Act, the 1st respondent herein, the National Transport and Safety Authority (hereinafter referred to as 'the 1st respondent', 'the NTSA' or 'the Authority') enacted various Rules. The Rules were successfully challenged both in the High Court and in the National Assembly.

3. The 1st respondent thereafter came up with The *Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020* (hereinafter referred to as ('the impugned Rules'). Those are the rules which are currently challenged in this matter.

4. The Petition is opposed by all the respondents and one interested party.

The Petition:

5. The petition is dated August 18, 2020. It was supported by two affidavits sworn by one Samuel Kamau Kariuki, the Chairperson of the petitioner. They are a supporting affidavit sworn on August 18, 2020 and a supplementary affidavit sworn on January 22, 2021 respectively. The petitioner also filed written submissions dated January 26, 2021 and a List of Authorities.

6. The gist of the petition is that the impugned Rules were enacted in violation of articles 109(3) and 118(1)(b) of the *Constitution* and are also contrary to sections 5(1) and (2), 3,10, 11, 12, 13, 17 and 18 of the *Statutory Instruments Act, 2013*, as well as sections 3(1), (2) and (3), 39 and 73 of the *Traffic (Amendment) Act, 2012*, hence unconstitutional.

7. The petitioner also filed two applications together with the petition. They are an application by way of notice of motion and another application by way of a chamber summons. Both applications are also evenly dated. The notice of motion sought for conservatory orders staying and suspending the implementation of the impugned Rules pending the determination of the Petition whereas the chamber summons sought for leave that the matter be heard during the court's recess.

8. The matter was certified urgent by the Duty Court and leave granted to be heard during the then court's recess. The petitioner was directed to effect service of the pleadings and the notice of motion accordingly. The court, however, declined to issue any conservatory orders.

9. In the end, the court directed that both the notice of motion and the Petition on be heard together and by way of reliance on the pleadings, affidavit evidence and written submissions.

The Responses:

10. In opposition to the petition and the application, the 1st respondent filed a replying affidavit sworn by one George Njao, the Director–General of the NTSA, on September 7, 2020 as well as written submissions dated 1st February, 2021.

11. The 2nd, 3rd and 4th respondents were represented by the Hon Attorney General. They opposed the petition and the application by filing grounds of opposition dated October 28, 2020 and a replying affidavit sworn by one Solomon Kitungu, the Principal Secretary, State Department for Transport in the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works. The affidavit was also evenly sworn.

12. The Hon Attorney General also filed written submissions dated February 22, 2021.

13. The 1st interested party, The National Assembly, did not participate in this matter despite being enjoined by the court on July 15, 2021 and being accordingly served.

14. The 2nd interested party, The Senate, appeared in the matter. It opposed the Petition and the application by filing a replying affidavit sworn by the Clerk to the Senate one Jeremiah Nyegenye on September 23, 2021 and written submissions dated September 29, 2021.

Issues for Determination:

15. From the reading of the documents filed, the parties' submissions and the decisions referred to, the following two issues arise for determination: -

    (a) Whether the impugned Rules violate articles 109(3) and 118(1)(b) of the *Constitution*.

    (b) Whether the impugned Rules are contrary to sections 5(1) and (2), 3, 10, 11, 12, 13, 17 and 18 of the *Statutory Instruments Act, 2013* as well as sections 3(1), (2) and (3), 39 and 73 of the *Traffic (Amendment) Act, 2012* and if so, unconstitutional.

    (c) Remedies, if any.

Analysis and Determination:

16. I will deal with each issue separately.

    (a) Whether the impugned Rules violate articles 109(3) and 118(1)(b) of the *Constitution*:

17. The petitioner pleaded that under article 109(3) of the *Constitution*, any legislation, including subsidiary legislation, that is not for County Government must be considered only in the National Assembly.

18. It was further pleaded that under the Fourth Schedule of the Constitution, transport is a national Government function and as such any legislative agenda on the matter is a preserve of the National Assembly.

19. The petitioner deposed that the tussle between itself and the 1st respondent had a history. According to the petitioner, since inception, the 1st respondent has been out to unlawfully control the petitioner members' businesses by passing illegal rules.

20. It was contended that in 2014 the 1st respondent enacted the *Traffic (Driving Schools and Instructors) Rules, 2014* (hereinafter referred to as 'the 2014 Rules'). The petitioner challenged the said rules through the National Assembly. In August 2018 the National Assembly through the Justice and Legal Affairs Committee wholly rejected the 2014 Rules for various reasons. The petitioner contended that the 1st respondent was directed to relook at the 2014 Rules and revert to the National Assembly after having taken into account the issues raised.

21. According to the petitioner, the 1st respondent instead enacted various policy documents on the basis of the 2014 Rules through The *Traffic (Driving Schools and Instructors) Rules, 2014 (2017)*(hereinafter referred to as 'the 2017 Rules').

22. The 2017 Rules were challenged in Nairobi High Court Constitutional Petition No 97 of 2018 *Okiya Omtatah Okoiti v National Transport and Safety Authority & another* Judgement was rendered on November 19, 2018 where the 2017 Rules and all the policy documents made thereunder were quashed.

23. The 1st respondent, still undeterred, enacted the impugned Rules. The petitioner contended that the 1st respondent did not send the impugned Rules to the National Assembly as required under the Constitution, but instead sent them to both the Senate and the National Assembly contrary to the directions given in 2018 by the National Assembly.

24. The petitioner held to the position that the Senate had nothing to do with the impugned Rules courtesy of article 109(3) of the *Constitution*.

25. As to whether the passage of the impugned Rules complied with the requirements on public participation as required under article 118(1)(b) of the *Constitution*, the petitioner was categorical that the alleged public participation undertaken fell way below anything which would be described as reasonable.

26. The petitioner contended that publication of notices and collection of signatures were a mere ritual exercise and did not prove that any meaningful engagement took place for want of minutes for such meetings. The petitioner contended further that no meaningful engagement took place in any of the 43 Counties and that the impugned Rules were not even part of the meetings' agenda.

27. The petitioner cited several decisions on the threshold of public participation in support of its position.

28. The 1st respondent held a contrary position to that of the petitioner.

29. In its replying affidavit, NTSA traced the history of the events leading to the enactment of the impugned Rules. For ease of reference I will reproduce what was deponed: -

> 6. That before the enactment of the 2020 Rules the driving school driver training and testing are regulated by the Traffic Driving School and Instructor Rules 1971. As to be expected the Rules were outdated and unable to regulate the industry in line with the current trends that would promote professionalism and improve the efficiency of service and thus the need for new responsive rules to regulate the Training, testing and licensing of drivers.
>
> 7. That I am also advised by the Authority's advocate on record whose advise I verily believe to be true that The Traffic Act cap 403 empowers the Cabinet secretary responsible for matters relating to traffic to make rules prescribing all such matters relating to regulation of the establishment or persons engaged in teaching for gain the driving of motor vehicles as the cabinet secretary may deem necessary for the proper control of such establishments or persons, including the grant, revocation, variation of licenses and appeals relating thereto, the testing of instructors, the inspection of vehicles and premises, and the fee payable for any of the above matter.
>
> 8. That in 2016 the Authority embarked on amending the 1971 Rules. This followed a public participation process wherein the Authority requested for comments from its stakeholders through the local dallies and held consultative forum on the same. Attached and marked GN-I are copies of the notices and attendance sheet for the said public participation.
>
> 9. That before the publication of the said 2016 Rules the petitioner herein challenged the same in court through Nakuru Petition 9 of 2016 on the basis that there was no public participation where the court dismissed the petition

in our favour on 14th December, 2018. Attached and marked GN-2 is the copy of the judgement.

10. That subsequently the Rules were gazzeted and the same was presented to Select Parliamentary Committee on Delegated Legislation here after referred to as SPCDL as required by the Statutory Instrument Act where the Committee annulled the same on the basis that the Authority had not incorporated some of the views raised by the Committee.

11. That thereafter the Authority redrafted the Rules incorporating the comments raised by the SPCDL Committee and undertook another comprehensive public participation in compliance with provisions of Statutory Instruments Act resulting in substantial changes in the initial draft. Attached and marked GN-3 are documents confirming that public participation was undertaken including the notice, attendance sheets from different regions representing the forty-seven Counties. The notice was also placed on our website.

12. That draft was subsequently published through Legal Notice 28 of 2020 on March 10, 2020. We forwarded the Explanatory Memorandum to the Cabinet Secretary Ministry of Transport, Infrastructure, Housing, Urban Development and Public works for their onward forwarding to the speakers of both houses. Attached and marked GN-4 is our letter forwarding the Explanatory Memorandum to the Cabinet Secretary.

13. That the published rules were presented to the Delegated Legislation committees of both houses of Parliament as per the Statutory Instruments Act. (Attached and marked GN-5 are copies of letters forwarding the Rules to the speakers of the both houses.)

14. That I am advised by Authority's advocate on record which advice I verily believe to be true that the assertions that the petitioner was only aware of the gazette rules on July 31, 2020 does not hold water as the same was gazetted on the 10th of March, 2020 and ignorance of the law is not a defence.

15. That I am advised by the Authority Advocate on record which advice I verily believe to be true that in the said Rules at section 46 is the Transitional clause where the Rules were to come in to operation within six months after being gazetted.

16. That the petitioner has referred to our letter dated July 31, 2020. We did the letter to prepare the driving schools of the impending commencement of the Rules and not the implementation date of the Rules.

17. That in response to paragraph 13 of the Petition I am advised by our Advocate on record whose advice I verily believe to be true that the Petitioner cannot rely on a letter which is not signed and not on letter head. That is petitioner's annexture (SSK5)

18. That in response to paragraph 16 to 24 of the Petition I am advised by the Advocate on record whose advice I verily believe to be true is Parliament is not a

party to this Petition so we are unable to respond as to whether the Parliament complied with provisions of article 118(1)(b).

19. That in response to paragraph 23 of the petition I am also advised by the Authority Advocate on record which advice I verily believe to be true that transport is a shared function by the two levels of the Government as per the 4th Schedule of the Constitution and therefore the Rules were rightly placed before both houses of parliament.

20. That in response to paragraph 25 of the Petition, the fee of 30,000 is not factual. From the Rule 2020 application and renewal fee for instructors licence is one thousand (l ,000). (Annexed and marked GN-6 is a copy of the fees schedule from the Rules) Infact annexture (SKK14) fees paid for was 375

21. That I am also advised by the Authority Advocate on record which advice I very believe to be true that he who comes to equity must come with clean hands. The petitioner's members did participate in the public participation in different regions.

22. That we note that the petitioners resolution of the meeting held on August 11, 2020 signed by Secretary Joseph M Nderi and chairperson Samuel Kariuki officials driving schools also participated in the public participation. The undersigned Chairman's driving school being Kericho driving school was represented during the public participation. Other official's schools that participated include Ndovu Driving School belonging to Joseph Magara, Real Driving School belonging to Joseph Nderi, Style up Driving School belonging to Eunice Mwendwa among other officials.

23. That there are over five hundred registered Driving school in the Republic of Kenya. Attached and Marked GN- 7 is the list of all registered driving schools in Kenya.

24. That as from the time of filing the current petitions the driving schools' portal are up and running even the ones whose licenses have since expired are still operational.

25. That I also confirm that a number of driving schools have already submitted their documents in compliance with the stated gazetted Rules. Attached and marked GN-8 are lists of driving schools that have started complying with the Rules including schools belonging to some of the officials.

26. That I have been advised by the Authority's Advocate on record which advice I verily believe it is true that the petition is incompetent as the petitioner has not demonstrated the specific manner in which the 1st respondent has violated provisions of articles of Constitution.

27. That in the response of the relief sought by the petitioner I am advised by the Authority's advocate on record which advise I verily belief to be true that the petition dated August 19, 2020 is not a proper Constitutional petition in respect of which honorable court can exercise its jurisdiction under article 65(3) of the *Constitution*.

28. That the orders sought by the petitioner will occasion grave injustices to not only the respondents herein but the public at large.

29. That stopping the implementation of the Rules will cause great prejudice to the 1st respondent.

30. That I swear this affidavit in opposition to the petition and the Notice of motion dated August 18, 2020.

30. The 1st respondent expounded on the foregoing disposition in its submissions. It also referred to several decisions in buttressing the arguments.

31. The Hon Attorney General also re-emphasized the position taken by the 1st respondent. Through the replying affidavit sworn by Solomon Kitungu, it reiterated the steps taken by the respondents in ensuring that adequate public participation was undertaken. Several decisions in support of the position that there was reasonable public engagement were referred to in the submissions.

32. The Senate, as well, posited that indeed satisfactory public participation was carried out. The Clerk of the Senate deponed as follows: -

5. That I am advised by Mr Wambulwa, Advocate and which advice I verily believe to be sound in law that under articles 1, 94, 95, 96 and 109 of the Constitution, the legislative authority of the Republic of Kenya, is at the national level, vested in and exercised by the Parliament and that the said rules were approved in accordance with the Senate Standing Orders, the Statutory Instruments Act and the Constitution.

6. That further, article 94(5) of the *Constitution* provides that:

5. No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

7. That article 96(1) and (2) of the *Constitution* provides for the role of the Senate as follows:

96. (1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.

(2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in articles 109 to 113.

8. That section 11 of the Statutory Instruments Act requires that every Cabinet Secretary responsible for a regulation making authority to ensure that within seven sitting days after publication of a statutory instrument to transmit to the responsible Clerk of Parliament for tabling before the relevant House of Parliament.

9. That article 93 of the Constitution establishes Parliament consisting of the National Assembly and the Senate.

10. That accordingly, the Senate being one of the Houses of Parliament is required to approve any statutory instrument transmitted to it by the responsible Cabinet Secretary in accordance with section Il of the Statutory Instruments Act. The assertions that the *Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020* were not supposed to be tabled before the Senate are unfounded.

11. That I am advised by Mr Wambulwa, Advocate and which advice I verily believe to be sound in law that contrary to the allegations by the Petitioner that the Rules were to be tabled in the National Assembly and not the Senate, transport is both a national and county function as provided under the Fourth Schedule to the Constitution hence thesaid Rules were properly considered by the Senate as the representative and protector of the interests of counties and their governments.

12. That *vide* a letter dated March 27, 2020 from the Principal Secretary, State Department of Transport in the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works, transmitted the said rules having been published *vide* legal notice Vol CXXII-No 50 dated March 20, 2020, together Explanatory Memorandum and Public Participation Report to the Clerk of the Senate and the Clerk of the National Assembly for approval. Annexed hereto and marked as "JN I" is a true copy of the letter from the Permanent Secretary, State Department of Transport addressed to Clerk of the Senate and Clerk of the National Assembly dated March 27, 2020.

13. That the *Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020* were laid before the Senate on May 19, 2020 and referred to the Sessional

Committee on Delegated Legislation for consideration and approval.

14. That the Senate Sessional Committee on Delegated Legislation considered the Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020 and on June 15, 2020 approved the said Rules. Annexed hereto and marked as "JN2 ab" are true copies of minutes of the Sessional Committee on Delegated Legislation dated 12th and June 15, 2020 respectively.

15. That I am advised by Mr Wambulwa, Advocate and which advice I verily believe to be sound in law that contrary to the allegations by the petitioner that there was no public participation in the Senate in violation of article 118(1)(b) of the *Constitution* and section 5(1)(a) and (b) of the *Statutory Instruments Act, 2013*, there is no requirement for Parliament to carry out public participation in relation to approval of statutory instruments.

16. That in accordance with Part IV of the Statutory Instrument Act, the role of Parliament is to scrutinize a statutory instrument to ensure compliance with the delegated authority and the law and to either approve or reject it.

17. That in particular, section 13 of the *Statutory Instruments Act* requires the relevant Committee of Parliament, in carrying out its scrutiny of any statutory instrument or published Bill be guided by the principles of good governance, rule of law and shall in particular consider whether the statutory instrument meets the requirements set out in section 13 of the Act which provides:

> 13. The Committee shall, in carrying out its scrutiny of any statutory instrument or published Bill be guided by the principles of good governance, rule of law and shall in particular

consider whether the statutory instrument-

a. is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other written law;

b. infringes on fundamental rights and freedoms of the public;

c. contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament;

d. contains imposition of taxation;

e. directly or indirectly

bars the jurisdiction of the courts;

f. gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;

g. involves expenditure from the Consolidated Fund or other public revenues;

h. is defective in its drafting or for any reason the form or purport of the statutory instrument calls for

any elucidation;

i. appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;

j. appears to have had unjustifiable delay in its publication or laying before Parliament;

k. makes rights, liberties or obligations unduly dependent upon non-reviewable decisions;

l. makes rights, liberties or

obligations unduly dependent insufficiently defined administrative powers;

m. inappropriately delegates legislative powers;

n. imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;

o. appears for any reason to infringe on the rule of law;

p. inadequately subjects the exercise of legislative power to parliamentary scrutiny; and

q. accords to any other reason that the Committee considers fit to examine.

18. That section 5 of the *Statutory Instruments Act* requires that before a regulation making authority makes a statutory instrument that have a direct, or a substantial indirect effect on business or restrict competition, the regulation making authority makes appropriate consultations with persons who are likely to be affected by the proposed instrument.

19. That in consideration for approval of the said Rules, the Sessional Committee on Delegated Legislation in ensuring compliance with the provisions of section 5 of the *Statutory Instruments Act* which requires that the regulation-making authority makes appropriate consultations with persons who are likely to be affected by the proposed instrument, requested for prove that there was consultation with relevant stakeholders before gazettement of the rules.

20. That the National Transport and Safety Authority through the State Department of Transport in the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works forwarded to the Committee the attendance registers for the public participation for Driving School and Instructor Rules and Highway Code held in various regions. Annexed hereto and marked as "JN 3" are copies of the attendance registers forwarded to the Committee by the National Transport and Safety Authority.

21. That from the attendance registers, the National Transport and Safety Authority indicated it had carried out public

participation covering forty-three (43) counties which the Sessional Committee on Delegated Legislation considered as sufficient in accordance with the provisions of section 5 of the Statutory Instruments Act.

22. That having been satisfied that the Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020 were made and gazetted in accordance with the enabling statutes, the Sessional Committee on Delegated Legislation considered and approved the said Rules at its 18th Sitting held on June 15, 2020. Refer to annexure marked as "JN 2" in paragraph 14 herein above.

23. That through a letter dated June 19, 2020, the Clerk of the Senate notified the Principal Secretary, State Department for Transport, Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works of the Senate Sessional Committee on Delegated Legislation's approval of the Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020.

24. That I am advised by Mr Wambulwa, Advocate and which advice I verily believe to be sound in law that section 15(2) of the *Statutory Instruments Act* provides that where the relevant Committee of Parliament where a statutory instrument is referred does not consider the statutory instrument and make the report to Parliament containing its resolution within twenty eight sitting days after the date of referral of the statutory instrument to the Committee or such other period as the House may, by resolution approve, the statutory instrument shall be deemed to have fully met the relevant considerations.

25. That while this court has jurisdiction under article 165(3)(d)(ii) of the *Constitution*, to "determine the question whether anything said to be done under the authority ofthe Constitution or of any law is

inconsistent with, or in contravention of, this Constitution ", it is apparent that in order for this honourable court to invoke its jurisdiction to inquire into acts of the Senate pursuant to its powers and obligations under the Constitution, the petitioner must establish that there is a violation or threatened violation of the Constitution and/or its fundamental rights and freedoms. In the circumstances of this case, the petitioner has not demonstrated that any of its rights and fundamental freedoms has been violated.

26. That I indeed confirm that the Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020 were approved by the Senate in accordance with the Constitution, the Statutory Instruments Act and the Senate Standing Orders and therefore constitutional.

27. That from the foregoing, it is clear that the Petition herein is bad in law, baseless and an abuse of the court process and should be dismissed with costs to the 2nd Interested Party.

33. In its submissions, the Senate rebutted the petitioner's argument that the impugned Rules were unconstitutional as the Senate did not carry out public participation contrary to the provisions of article 118(1)(b) of the *Constitution* and section 5(1)(a) and (b) of the *Statutory Instruments Act, 2013*. It submitted that contrary to the above allegations, there is no requirement for either House of Parliament to carry out public participation in relation to approval of statutory instruments.

34. The Senate, however, submitted that it asked the 1st respondent to avail evidence of public participation and that NTSA forwarded to the Senate copies of Attendance registers for the public participation for Driving School and Instructor Rules and Highway Code held in various regions. The Senate was satisfied that indeed adequate public consultation had been undertaken.

35. Having captured the parties' cases and submissions on the issue, I will now deal further. The issue at hand raises two sub-issues. The sub-issues are: -

    (i) Whether the impugned Rules contravene article 109(3) of the *Constitution*, and,

    (ii) Whether there was adequate public participation in the process of enacting the impugned Rules.

36. As the issue rests on the manner in which this court ought to interpret the Constitution, I will, in the first instance, look at that aspect.

37. On 19th day of November, 2021, the Court of Appeal at Nairobi delivered a Judgment in Civil Appeal No E084 of 2021 *The Speaker of the National Assembly of the Republic of Kenya & another v The Senate of the Republic of Kenya & 12 others* (2021) eKLR wherein the court dealt with the manner in which the Constitution ought to be interpreted. The learned judges expressed themselves thus: -

> 42. Our starting point in this regard is article 259 of the *Constitution*, which obligates us to interpret the Constitution in a manner that—
>
> (a) promotes its purposes, values and principles;
>
> (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
>
> (c) permits the development of the law; and
>
> (d) contributes to good governance."
>
> 43. It is notable in this respect that constitutional interpretation includes both interpretation and construction. As explained by Vincent Crabbe in his text *Legislative Drafting*: Volume 1 at pages 231 to 233, interpretation entails discovering the meaning of words used in a statutory or other written document, and is of various types. Authentic interpretation is used when the meaning of a word is expressly provided for in the document; usual or customary interpretation when based on accepted usages of the word; doctrinal, when it is based on the grammatical arrangement of the words in a sentence; and logical, when based on the intention of Parliament. Crabbe also pointed out that logical interpretation can be liberal or strict.
>
> 44. Construction of a legal provision on the other hand is wider in scope than interpretation, and is directed at the legal effect or consequences of the provision in question. Interpretation must of necessity come before construction, and having ascertained the meaning of the words, one construes them to determine how they fit into the scheme of the law or legal document in question. Crabbe in this respect opines that a Constitution is in this respect different from an Act of Parliament, and describes it as a living organism capable of growth and development. In his words "a constitution is a mechanism under which laws are made, and not a mere Act which declares what the law should be". Therefore, that the construction of a Constitution demands a broad and liberal approach, and must be beneficial.
>
> 45. We are persuaded by this explanation, and indeed the approach suggested therein has been adopted by the Kenyan courts. A holistic and purposive interpretation of the Constitution that calls for the investigation of the historical, economic, social, cultural and political background of the provision in question has been consistently affirmed by the courts. The Supreme Court in this respect explained the approach in constitutional interpretation in *Council of Governors v Attorney General and 7 Others* [2019] eKLR as follows:
>
> > "[42] Under article 2(1), the Constitution is the Supreme law of the land. Article 259 of the Constitution then gives the approach to be adopted in interpreting the Constitution, basically in a manner

that promotes its purposes, values and principles. Suffice it to say that in interpreting the Constitution, the starting point is always to look at article 259 for it provides the matrix, or guiding principles on how it is to be interpreted and then article 260 where specific words and phrases are interpreted. It is imperative to note that while article 259 deals with construing of the Constitution and outlines the principles that underpin that act; article 260 deals with interpretation, that is, it is explicit in assigning meaning to the words and phrases it addresses. Hence the opening words in that article are: "In this Constitution, unless the context requires otherwise-".

[43] Consequently, in search of the meaning assigned to some words and phrases as used in the Constitution, one needs to consult article 260 to find out if that particular term or phrase has already been defined. It is only where the same has not been defined that the court will embark on seeking a meaning by employing the various principles of constitutional interpretation….."

46. The various principles of constitutional interpretation have also been the subject of different decisions of this court and the Supreme Court. In *Re the Matter of Kenya National Commission on Human Rights* [2014] eKLR, the Supreme Court considered the meaning of a holistic interpretation of the Constitution, and stated:

"[26] But what is meant by a 'holistic interpretation of the Constitution'? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."

47. This view was also expressed by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, [2015] eKLR, that "the Constitution should be interpreted in a holistic manner, within its context, and in its spirit."

48. A purposive interpretation on the other hand acknowledges that the meaning of language is imprecise, and measures words against contextual, schematic, and purposive considerations. Aharon Barak in the text "*Purposive Interpretation in Law*"

"According to purposive interpretation, the purpose of a text is a normative concept. It is a legal construction that helps the interpreter understand a legal text. The author of the text created the text. The purpose of the text is not part of the text itself. The judge formulates the purpose based on information about the intention of the text's author (subjective purpose) and the "intention" of the legal system (objective purpose)."

49. As such, the purposive interpretation avoids the shortcomings of the literal approach, namely absurd interpretations or those that appear to run counter to the purpose and functioning of the legislative regime. The Supreme Court of Kenya in the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others*, [2014] eKLR, confirmed that a purposive interpretation should be given to statutes so as to reveal their true intention. The court observed as follows:

> "In *Pepper v Hart* [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the court is not to be held captive to such phraseology. Where the court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted'."

50. The persuasive decision of this court in the case of *County Government of Nyeri & another v Cecilia Wangechi Ndungu* [2015] eKLR is also illuminating, and it was held therein that:

> "Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors."

51. The Constitution in this respect provides the purposes that should guide the courts in interpreting it in article 259, including the purpose of the specific provisions, and broader rule of law and good governance objectives.

38. It is with these principles in mind that we shall proceed to consider the issues raised in this appeal. The above principles will aid this court in consideration of the two sub-issues.

39. The first sub-issue is whether the impugned Rules contravene article 109(3) of the Constitution. The provision states as follows: -

> A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with article 122 and the Standing Orders of the Assembly.

40. Article 110 of the Constitution addresses the issue of Bills concerning County Governments. The article is tailored as follows: -

> (1) In this Constitution, "a Bill concerning county government" means-
>
> (a) a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;
>
> (b) a Bill relating to the election of members of a county assembly or a county executive; and
>
> (c) a Bill referred to in Chapter Twelve affecting the finances of county governments.
>
> (2) A Bill concerning county governments is-
>
> (a) a special Bill, which shall be considered under article 111, if it-
>
> (i) relates to the election of members of a county assembly or a county executive; or
>
> (ii) is the annual County Allocation of Revenue Bill referred to in article 218; or
>
> (b) an ordinary Bill, which shall be considered under article 112, in any other case.
>
> (3) Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill.
>
> (4) When any Bill concerning county government has been passed by one House of Parliament, the Speaker of that House shall refer it to the Speaker of the other House.
>
> (5) If both Houses pass the Bill in the same form, the Speaker of the House in which the Bill originated shall, within seven days, refer the Bill to the President for assent.

41. In dealing with this sub-issue, this court remains alive to the fact that article 109(3) of the *Constitution* deals with Bills concerning counties and not delegated legislations. The manner in which delegated legislations are to be laid before Parliament is provided for in the Statutory Instruments Act, No 23 of 2013. However, a consideration of article 109(3) of the *Constitution* is relevant in this matter since, once it is determined, for instance, that the impugned Rules fall under the category of matters

not concerning county governments, then the Senate would not have any business considering such delegated legislation. In other words, the correct House of Parliament to consider a delegated legislation can only be the one having mandate to deal with the parent Bill or statute.

42. The Court of Appeal in the *Speaker of the National Assembly of the Republic of Kenya & another v Senate of the Republic of Kenya & 12 others* case (*supra*) comprehensively dealt with the nature of the Bills envisaged by articles 109 to 114 of the *Constitution*. These provisions deal with the manner in which Bills are to be dealt with by the two Houses of Parliament.

43. In re-emphasizing the position that not all Bills originating from the National Assembly must also be considered by the Senate, the learned judgesheld as follows: -

> 79. Therefore, in light of the context and purpose of the provisions of article 110(3) of the Constitution as regards the concurrence process therein, it is the finding of this court that the Bills referred to in article 110(3) can only be interpreted and construed to mean Bills concerning County Government as defined by article 110(1) and interpreted in this judgment, and not every or any Bills that originate from the National Assembly. To reiterate, this is for the reasons that a holistic, contextual and purposive interpretation of article 110(3) limits the law making powers of Senate in this regard. This interpretation does not in any way derogate from the purpose for which the Senate exists, and its limited legislative powers must in this regard be interpreted holistically in relation to other constitutional provisions on its purpose, and its non-legislative powers of representation and oversight that are set out in articles 93, 94 and 96 of the Constitution. Read as a whole, these provisions serve to reinforce and augment Senate's role in protecting the counties and devolution.

44. In answering the question as to what bills do not concern counties, the Court of Appeal had the following to say at paragraph 118: -

> Having set the basis for establishing the nature of the impugned Acts, we turn to the Constitution to identify the nature of bills provided for under articles 109 to 114, and the House to which responsibility is assigned for passing of the bills. Part 4 of the Constitution deals with the enactment of legislation by the Houses of Parliament. We begin with the bills specified, under article 109(3) of the *Constitution* as "A Bill not concerning county government". By implication these would be national government bills or any other bill not categorised as concerning counties and which are not money Bills. These bills are "... considered only in the National Assembly, and passed in accordance with article 122 and the Standing Orders of the Assembly." By virtue of article 186 of the Constitution, Part 1 of the Fourth Schedule would require to be applied to such bills to ascertain whether the function in question was assigned to the national government. If so, then the bill was one that should be passed by the National Assembly.

45. Still on the same question, the court stated as follows in paragraph 132 that: -

> These are the third category of bills specified under article 109(4) of the Constitution. They are referred to as, "A Bill concerning county government..." Such bills may originate in the National Assembly or the Senate. Their passage requires to be in accordance with articles 110 to 113, 122 and 123 of the Constitution and the Standing Orders of the Houses. Article 110(1) of the Constitution defines bills concerning county governments as a bill

containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule; a Bill relating to the election of members of a county assembly or a county executive; and a Bill referred to in Chapter Twelve that affects the finances of county governments. A Bill concerning county governments may comprise a special Bill, which shall be considered under Article 111, if it relates to the election of members of a county assembly or a county executive; or is the annual County Allocation of Revenue Bill referred to in article 218. In any other case, a bill is considered to be an ordinary bill under article 112. As concerns the powers and functions of counties, these are to be found in Part 2 of the Fourth Schedule.

46. The position is, therefore, that in ascertaining whether a Bill concerns counties the Fourth Schedule of the Constitution is the first port of call. If the function in question was assigned to the National Government, then the bill should only be considered by the National Assembly. If the function is a shared one, then the bill may originate from either the National Assembly or the Senate and its passage requires to be in accordance with articles 110 to 113, 122 and 123 of the *Constitution* and the Standing Orders of the Houses.

47. Returning to the case at hand, the impugned Rules are on transport. Under the Fourth Schedule of the Constitution, transport is a shared function by both the National and County Governments.

48. The role of the National Government relating to transport is provided for in section 18 of Part 1 of the Fourth Schedule as follows: -

18. Transport and communication ......

(a) road traffic

(b) the construction and operation of national trunk roads;

(c) standards for the construction and maintenance of other roads by counties;

(d) railways;

(e) pipelines;

(f) marine navigation;

(g) civil aviation;

(h) space travel;

(i) postal services;

(j) telecommunications; and

(k) radio and television broadcasting.

49. On the other hand, section 5 of part2 of the Fourth Schedule provide for the transport role of a County Government as under: -

5. County transport, including-

(a) county roads;

(b) street lighting;

(c) traffic and parking;

(d) public road transport; and

(e) ferries and harbours, excluding the regulation of international and national shipping and matters related thereto.

50. Drawing from the foregoing, if the impugned Rules were a Bill, then both Houses of Parliament would have specific roles to play in its passage. In this case, therefore, the impugned Rules, being delegated legislation, would also require the consideration of both Houses of Parliament.

51. Whereas the aspect of consideration by both Houses of Parliament will be dealt with under the next main issue, this court hereby finds and hold that the impugned Rules concerned County Governments and as such they were to be considered by the two Houses of Parliament. Since there is evidence that indeed the impugned Rules were forwarded to the two Houses of Parliament for consideration, this court further finds and hold that the impugned Rules do not violate article 109(3) of the *Constitution*. The first sub-issue is, hence, answered in the negative.

52. I will now deal with the second sub-issue on public participation.

53. The parties herein have made dispositions and submissions on this sub-issue in quite some detail. This court has greatly benefitted from such. I will not, therefore, belabor the settled and agreed position that indeed the impugned Rules were to be subject to public participation. I will, however, add that further to the issue of public participation, there is also the aspect of stakeholders' engagement.

54. In Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 *William Odhiambo Ramogi & others v Attorney General & 4 others; Muslims for Human Rights & 2 others* [2020] eKLR the 5-Judge Bench dealt with the issue of public participation and stakeholders' engagement. This is what the court stated about stakeholders' engagement.

> 119. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR quoted with approval Ngcobo J in *Matatiele Municipality & others v President of the Republic of South Africa & others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) as follows: -
>
> > ......The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say....
>
> 120. In a Three-Judge bench the High Court in consolidated Constitutional Petition Nos 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR the court addressed the concept of consultation in the following manner: -
>
> > .... A public participation programme, must...show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation

programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

(emphasis added)

121. Consultation or stakeholders' engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a Government agency or a public officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.

55. Given the concurrence on the need for public engagement in coming up with the impugned Rules and from the principles discussed in the foregoing considerations, this court finds that since the impugned Rules were specifically on Driving Schools, Driving Instructors and Driving Licenses and which licenses are only issued once a learner is trained and tested in a Driving School, then, in the worst case scenario, even stakeholders' engagement would have sufficed in the unique circumstances of this matter.

56. The petitioner's main concern is the nature and adequacy of the stakeholders' engagement. As said, the petitioner contended that no adequate engagement was undertaken.

57. The nature and adequacy of public participation and stakeholders' engagement was discussed in Petition No 104 of 2020 *Kaps Parking Limited & another v County Government of Nairobi & another* (2021) eKLR by this court. This is what the court rendered: -

137. The manner in which public participation is carried out depends on the matter at hand. There is no straight-jacket application of the principle of citizen participation. However, any mode of undertaking public participation which may be adopted by a public entity must factor, in the minimum, the following basic four parameters. First, the public be accorded reasonable access to the information which they are called upon to give their views on. In other words, the mode of conveying the information to the public reigns. Second, the people be sensitized or be made to understand what they are called upon to consider and give their views on. In this case, the language used in conveying the information to the public becomes of paramount importance. For instance, if those affected by the intended decisions or the legislation are mostly illiterate, then such realities must be factored in deciding the mode and manner of conveying the information. Third, once the public is granted reasonable access to the information and is made to understand it, the public must then be accorded reasonable time to interrogate the information and to come up with its views. Fourth, there must be a defined manner in which the public or stakeholders will tender their responses on the matter.

138. The effect of the above constitutional and statutory parameters is to ensure that public participation is realistic and not illusory. Public participation should not be a mere formality, but must accord reasonable opportunity for people to have their say in what affects them. In that way, the dictates of the Constitution and the law will be achieved. (See *Robert M Gakuru's* case (*supra*) among others).

58. In Petition Nos 532 of 2013 & 12, 35, 36, 42 & 72 of 2014 and in Judicial Review Miscellaneous Application 61 of 2014 (Consolidated), the adequacy of public participation was discussed as follows: -

> …. Whereas the magnitude of the publicity required may depend from one action to another a one-day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation. As was held in *Doctors for Life International v Speaker of the National Assembly & others (supra): -*
>
>> Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process. Thus, Parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the opportunities for participation that are available. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens….[the Assembly] should create conditions that are conducive to the effective exercise of the right to participate in the law-making process. This can be realised in various ways, including through road shows, regional workshops, radio programs and publications aimed at educating and informing the public about ways to influence Parliament, to mention a few……It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the lawmaking process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process……….In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate

public involvement, the court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this court considering whether what Parliament does in each case is reasonable.

59. In this case, the respondents have demonstrated how they carried out the public engagement. The 1st respondent first carried out a public advertisement in a newspaper on national circulation wherein it stated how and where the engagements were to be conducted. It gave the dates and venues of the meetings and also explained what was to be discussed in the meetings. The 1st respondent, as well, made provision for sign language interpreters in the meetings.

60. The meetings were to begin from October 29, 2018 to November 30, 2018. The meetings covered all the 43 counties in Kenya.

61. The 1st respondent made a further provision for those who wished to send their written memoranda. It gave an email address to that end.

62. Evidence was tendered to prove that indeed the said meetings were conducted. Copies of Attendance Registers and Sheets for each meeting were annexed. The 1st respondent prepared a Report on the outcome of the public participation exercise upon completion of the exercise. The Report was produced in evidence.

63. The Report was comprehensive. It detailed all the issues of concern which led to the annulment of the 2018 Rules and the actions taken by the 1st respondent before undertaking public participation. It also gave the list of the meetings, dates and venues of meetings held during the exercise. It further gave the names and qualifications of the facilitators of the meetings. There is no doubt that the facilitators were senior officers of the 1st respondent and were possessed of the requisite knowledge and experience to conduct such meetings.

64. The Report also captured all the views raised by the participants in each meeting. Lastly, the Report set out the actions taken by the 1st respondent after conducting the public participation. It confirmed that all the issues raised in the meetings were considered and remedial actions taken prior to the gazettement of the impugned Rules.

65. The 1st respondent, therefore, carried out a nation-wide public participation exercise on the impugned Rules. The petitioner, however, alleged that the impugned Rules were not part of the discussions in the meetings and demanded the provision of minutes of the meetings.

66. The 1st respondent captured the issues raised in each meeting in the report. There is no evidence by those who were in attendance in each of the said meetings to back the petitioner's position. Further, the hearing of the Petition was by way of reliance on the pleadings and affidavit evidence. The petitioner did not seek to cross-examine any witness on the contents of their dispositions.

67. I have further carefully considered the issues which were recorded as having been raised during the meetings and the petitioner's averments in this Petition. I find that the issues are similar. There is evidence, as well, to confirm that most of the members of the petitioner have complied or are in the process of complying with the impugned Rules.

68. On evaluation of the evidence at hand, this court finds that the contention by the petitioner that there was no adequate public participation in coming up with the impugned Rules to be unsustainable. To the contrary, the court is satisfied that the 1st respondent undertook a comprehensive public participation exercise and adduced evidence before court in such proof.

69. In the end, the second sub-issue is also answered in the negative.

70. In sum, this court returns a finding that the first main issue is wholly answered in the negative and is for rejection.

(b) Whether the impugned Rules are contrary to sections 5(1) and (2), 3, 10, 11, 12, 13, 17 and 18 of the Statutory Instruments Act, 2013 as well as sections 3(1), (2) and (3), 39 and 73 of the Traffic (Amendment) Act, 2012 and if so, unconstitutional:

71. The petitioner pleaded that the Statutory Instruments Act, No 23 of 2013 (hereinafter referred to as 'the Instruments Act') gave a clear road map on how any subsidiary legislation must be dealt with. Section 5 calls for consultation with the affected persons or entities.

72. In its submissions, the petitioner contended that the impugned Rules did not also comply with section 13 of the Instruments Act. It further contended the 1st respondent failed to take into account the directives by the National Assembly on how to re-align the impugned Rules with the Constitution and the law.

73. Resulting from the foregoing, the petitioner averred that as a result of the failure on the part of the respondents and the Senate, the impugned Rules variously infringed several articles of the Constitution, hence they are unconstitutional. I will have a detailed look at the articles of the Constitution allegedly contravened in the later part of this issue.

74. The decisions in *In Re Okiya Omtatah Okoiti v Commissioner General Kenya Revenue Authority & 2 others* [2018] eKLR and *Re Okiya Omtatah Okoiti v Communication Authority of Kenya* [2018] eKLR were cited in support of the petitioner's position.

75. The 1st respondent posited that it took into account all what had been raised by the National Assembly in the former Rules and subjected it to public engagement. The result was the impugned Rules. To the 1st respondent, the impugned Rues did not contravene any of the alleged provisions of the law.

76. The Hon Attorney General posited that the 2nd respondent complied with the law and forwarded all the relevant documents to the two Houses of Parliament as so provided under the Instruments Act.

77. The Senate also opposed the petitioner's contention.

78. It pleaded that in accordance with Part IV of the Instruments Act, the role of Parliament is to scrutinize a statutory instrument to ensure compliance with the delegated authority and the law and to either approve or reject it.

79. It further pleaded that section 13 of the Instruments Act requires the relevant Committee of Parliament, in carrying out its scrutiny of any statutory instrument or published Bill be guided by the principles of good governance, rule of law and shall in particular consider whether the statutory instrument meets the requirements set out in section 13 of the said Act.

80. The Senate argued that the burden of ensuring that public participation had been carried out is placed on a regulation making authority and not on Parliament. On its part, Parliament is to satisfy itself that adequate participation was carried out.

81. It was posited for the Senate that the 1st respondent through the State Department of Transport in the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works forwarded to the Senate's Committee the attendance registers for the public participation for Driving School and Instructor Rules and Highway Code held in various regions. From the attendance registers, NTSA indicated that it had carried out public participation covering forty-three (43) counties which

the Sessional Committee on Delegated Legislation considered as sufficient in accordance with the provisions of section 5 of the Instruments Act.

82. In its submissions, the Senate argued that under articles 1, 94, 95, 96 and 109 of the *Constitution*, the legislative authority of the Republic of Kenya, is at the national level, vested in and exercised by the Parliament. Further, article 93 of the *Constitution* establishes Parliament consisting of the National Assembly and the Senate.

83. It further submitted that approval of statutory instruments just like any other legislative function of Parliament, is a shared function between the National Assembly and the Senate. It argued that section 11 of the Statutory Instruments Act require that every Cabinet Secretary responsible for a regulation making authority to ensure that within seven sitting days after publication of a statutory instrument to transmit to the responsible Clerk of Parliament for tabling before the relevant House of Parliament We submit that in accordance to section 11 of the Statutory Instruments Act requires that every Cabinet Secretary responsible for a regulation making authority is to ensure that within seven sitting days after publication of a statutory instrument to transmit to the responsible Clerk of Parliament for tabling before the relevant House of Parliament.

84. The Senate accordingly submitted that being one of the Houses of Parliament it is required to approve any Statutory instrument transmitted to it by the responsible Cabinet Secretary in accordance with section 11 of the Instruments Act. The assertions that the impugned Rules were not supposed to be tabled before the Senate are unfounded

85. The Senate also submitted that section 15(2) of the Instruments Act requires that where the relevant Committee of Parliament where a statutory instrument is referred does not consider the statutory instrument and make the report to Parliament containing its resolution within twenty eight sitting days after the date of referral of the statutory instrument to the Committee or such other period as the House may, by resolution approve, the statutory instrument shall be deemed to have fully met the relevant considerations.

86. It was further submitted that the Senate's Sessional Committee on Delegated Legislation acted within the law by scrutinizing, considering the approving the impugned Rules.

87. On the import of section 5 of the *Instruments Act*, it was submitted that contrary to the Petitioner's position, there is no requirement for either House of Parliament to carry out public participation in relation to approval of statutory instruments. Instead, the role of Parliament is to scrutinize a statutory instrument to ensure compliance with the delegated authority and the law and to either approve or reject it.

88. In particular, section 13 of the Instruments Act requires the relevant Committee of Parliament, in carrying out its scrutiny of any statutory instrument or published Bill be guided by the principles of good governance, rule of law and shall in particular consider whether the statutory instrument meets the requirements set out in section 13 of the Instruments Act.

89. The Senate reiterated that the burden of ensuring public participation has been carried out is placed on a regulation making authority. Indeed, section 5 of the Instruments Act requires that before a regulation making authority makes a statutory instrument that have a direct, or a substantial indirect effect on business or restrict competition, the regulation making authority makes appropriate consultations with persons who are likely to be affected by the proposed instrument.

90. On whether the impugned Rules are unconstitutional, the Senate submitted that it is trite law that every legislation and every decision of Parliament is presumed constitutional and where a person allege

that an Act of Parliament or any decision of Parliament is unconstitutional, the burden lies on that person to prove the unconstitutionality of the same.

91. In this case, it was submitted that the petitioner had not discharged the burden of proof by demonstrating to this honorable court the manner in which the impugned Rules were made, gazetted or approved or any of the or any of the provisions therein violate the Constitution.

92. The Senate argued that jurisprudence is replete with cases that every law has in its favor the presumption of constitutionality, and to justify its nullification, there must be a clear and unequivocal breach of the Constitution, not a doubtful and argumentative one. A statute or a part thereof will be sustained unless it is plainly, obviously, palpably and manifestly in conflict with some provision(s) of the fundamental law.

93. It was submitted that the test for establishing constitutionality of a statute, was exhaustively set out by the High Court in *Institute of Social Accountability & another v National Assembly & 4 others* High Court Petition No 71 of 2014 [2015] eKLR, and followed by the same court in *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR and in *Commission for Implementation of the Constitution – Parliament of Kenya & another.*

94. The Senate summed up its submissions in that the petitioner had neither demonstrated to this Honorable court nor had it discharged the burden of proof to establish the unconstitutionality of the impugned Rules and as such, there are no grounds presented to this honorable court to enable the court to declare the Rules unconstitutional.

95. As a starting point, the petitioner prayed that this court finds that the impugned Rules contravened sections 5(1) and (2), 3, 10, 11, 12, 13, 17 and 18 of the *Instruments Act* as well as sections 3(1), (2) and (3), 39 and 73 of the *Traffic (Amendment) Act, 2012*. However, apart from dealing with Sections 5 and 13 of the Instruments Act and sections 3(1), (2) and (3), 39 and 73 of the Traffic (Amendment) Act, the petitioner did nothing in relation to the rest of the sections it pleaded on.

96. The petitioner, therefore, pleaded in an omnibus manner. It neither tendered arguments nor any evidence in support of the contravention of the alleged sections 3, 10, 11, 12, 17 and 18 of the Instruments Act. In that case, this court will not consider whether the impugned Rules infringe any of those provisions.

97. This court will now consider whether the impugned Rules infringed sections 5 and 13 of the Instruments Act and sections 3(1), (2) and (3), 39 and 73 of the *Traffic (Amendment) Act* and if so, void, and by extension, whether they are unconstitutional.

98. I will first deal with sections 5 and 13 of the Instruments Act. For ease of reference herein, I will reproduce the said sections. Section 5 of the Instruments Act provide as follows: -

> (1) Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—
>
> > (a) have a direct, or a substantial indirect effect on business; or
> >
> > (b) restrict competition; the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument

(2) In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—

(a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and

(b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.

(3) Without limiting by implication, the form that consultation referred to in subsection (1) might take, the consultation shall —

(a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or

(b) invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

99. Section 13 provides as follows: -

The Committee shall, in carrying out its scrutiny of any statutory instrument or published Bill be guided by the principles of good governance, rule of law and shall in particular consider whether the statutory instrument-

(a) is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other written law;

infringes on fundamental rights and freedoms of the public;

(b) contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament;

(c) contains imposition of taxation;

(e) directly or indirectly bars the jurisdiction of the Courts;

(f) gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;

(g) involves expenditure from the Consolidated Fund or other public revenues;

(h) is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation;

(i) appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;

(j) appears to have had unjustifiable delay in its publication or laying before Parliament;

(k) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(l) makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers;

(m) inappropriately delegates legislative powers;

(n) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;

(o) appears for any reason to infringe on the rule of law;

(p) inadequately subjects the exercise of legislative power to parliamentary scrutiny; and

(q) accords to any other reason that the Committee considers fit to examine.

100. Section 2 of the *Instruments Act* defines a "regulation-making authority" to mean any authority authorized by an Act of Parliament to make statutory instruments. In this case, the "regulation-making authority" is the 1st respondent.

101. Section 5 of the Instruments Act require the regulation-making authority to make appropriate consultations with persons who are likely to be affected by the proposed instrument. On this, I agree with the respondents and the Senate that the onus of carrying out the consultation is on the regulation-making authority and not on the Houses of Parliament. The role of the Houses of Parliament is captured in section 13 of the Instruments Act, which I will shortly revert to.

102. Some of the parameters to be considered by the regulation-making authority include notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument or invitation of submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

103. The 1st respondent undertook all the requirements. There is evidence that it placed a public advertisement in a local newspaper, it conducted public hearings and invited written memoranda. The 1st respondent, therefore, fully complied with section 5 of the Instruments Act.

104. On whether there was compliance with section 13 of the Instruments Act, the Committee of the House is required to scrutinize the statutory instrument or published Bill and in doing so it be guided by the principles of good governance and rule of law.

105. In the course of carrying out the scrutiny, the Committee is required to consider whether the instrument aligns with the 17 parameters.

106. The said parameters are listed in section 13 of the Instruments Act as (a) to (q).

107. The *Merriam Webster Dictionary* defines the word 'scrutiny' to mean: -

1. a searching study, inquiry, or inspection: Examination 2. a searching look

3. close watch : Surveillance

108. The *Concise Oxford English Dictionary*, 12th Edition, Oxford University Press at page 1295 defines the words 'scrutinize', 'scrutiny' and 'scrutineer' as follows: -

i. 'scrutinize' as a verb to mean 'examine or inspect closely and thoroughly'.

ii 'scrutiny' as a noun to mean 'critical observation or examination'

iii. 'scrutineer' as a noun to mean 'a person who examines something closely and thoroughly'

108. It can, therefore, be summed up that scrutiny involves a detailed examination with careful or critical attention. Simply put, it is to examine something with great care. Scrutiny is, hence, more than the ordinary observation of something. It goes further to unravel the inner state of affairs of a thing.

109. In scrutinizing the impugned Rules, the Houses of Parliament were, by law, called upon to undertake critical and detailed examination of the same. Such scrutiny is guided by inter alia the parameters set out in section 13 of the Instruments Act

110. Section 11(1) of the Instruments Act requires every Cabinet Secretary responsible for a regulation-making authority to, within seven (7) sitting days, after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before the relevant House of Parliament.

111. In this case, there is evidence that the impugned Rules were gazetted on March 20, 2020 vide a Special Issue of the Kenya Gazette in Legal Notice No 28 Vol CXXII- No 50. There is further evidence that the Principal Secretary, State Department of Transport in the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works, transmitted the impugned Rules together with Explanatory Memorandum and Public Participation Report to the Clerk of the Senate and the Clerk of the National Assembly for approval. That was through a letter dated March 27, 2020.

112. The Senate appeared in this matter upon service. The National Assembly did not. There was no averment to the effect that the National Assembly considered the impugned Rules or at all. This court, therefore, finds that the impugned Rules were not considered by the National Assembly. The Instruments Act provides for what happens if a House of Parliament fails to deal with a subsidiary legislation placed before it.

113. The Senate deposed that the impugned Rules were laid before the Senate on May 19, 2020 and that the Rules were referred to the Sessional Committee on Delegated Legislation for consideration and approval. That, the Senate Sessional Committee on Delegated Legislation considered the impugned Rules and on June 15, 2020 approved them. Minutes of the proceedings before the Sessional Committee on Delegated Legislation dated 12th and June 15, 2020 respectively were availed in support.

114. I have perused copies of the said minutes. On June 12, 2020 the Senate Committee under Min No SEN/SCDL/092/2020 noted that it had previously considered the draft impugned Rules and proposed a more robust public participation to be undertaken by the 1st respondent. The Committee also reviewed the 2018 Rules alongside the impugned Rules and noted that the impugned Rules had made substantial changes to the 2018 Rules as directed.

115. The Committee then went through the impugned Rules and was satisfied with the new-look impugned Rules. It, however, resolved to be availed with evidence of public participation.

116. On June 15, 2020 the Committee approved the impugned Rules and the 1st respondent was duly informed.

117. The 2018 Rules had been annulled by the National Assembly on account of several infringements to the guaranteed rights and freedoms. Such were captured in the National Assembly Hansard of August 14, 2018 which a copy thereof was availed by the petitioner.

118. The Senate in dealing with the impugned Rules allegedly went through the 2018 Rules and satisfied itself that all the contentious areas raised before were properly and fully addressed. It then approved the impugned Rules as gazetted, that is without any amendments.

119. The petitioner, however, contended that the analysis undertaken by the Senate was not comprehensive enough in that the Senate did not consider some aspects of the impugned Rules which are unconstitutional. I will consider some of those issues.

120. The petitioner contended that rule 8(2)(a) and (c) of the impugned Rules retained the mandatory literacy qualifications for drivers, which issue had been flagged out in the 2018 Rules by the petitioner and the National Assembly.

121. Rule 8(2)(a) and (c) of the impugned Rules states as follows:

> 2. A head driving instructor shall possess-
>
> (a) a valid instructor's license;
>
> (b) ......
>
> (c) at least a certificate in computer studies or an equivalent qualification.

122. The Senate Committee in dealing with the issue noted that the 2018 Rules had been amended so as to remove the educational requirement for a driving school manager. It stated as follows under Min No SEN/SCDL/092/2020 part (e) thereof: -

> (d) The removal of the educational requirement for a driving school manager under rule 8(2)(a);

123. A casual look at rule 8 of the impugned Rules, however, reveal otherwise. The prevailing position is that the educational requirements were not removed as minuted by the Senate. Therefore, the concern raised by the petitioner and the National Assembly, which the Senate allegedly stated that it was resolved in the impugned Rules, was indeed not resolved since the same educational requirements in the 2018 Rules remained intact in the approved impugned Rules.

124. The petitioner also raised issue with rule 12(4) and (5) of the impugned Rules. The minutes of the Senate Committee did not capture anything on rule 12 of the impugned Rules.

125. A careful consideration of the minutes of the Senate Committee shows that the Committee only dealt with part of the impugned Rules. From the minutes, the Committee dealt with rules 4, 5, 6, 7, 8, 16, 24, 25, 26 and 27.

126. There were a total of 47 rules in the impugned Rules which were gazetted and forwarded to the two Houses of Parliament for scrutiny. As said, it was only the Senate which dealt with them. The Senate, however, only dealt with 10 out of the 47 rules. I say so because the Committee minutes so indicate and further there is no statement in the minutes confirming that the Committee curiously examined all the 47 rules contained in the impugned Rules.

127. Given the above state of affairs and in view of the scrutiny role imposed upon the Houses of Parliament, this court finds and hold that the Senate did not sufficiently scrutinize the impugned Rules. The Senate also failed to satisfy itself that the impugned Rules were in compliance with section 13 of the Instruments Act.

128. The upshot is, therefore, that a crucial step in the making of a subsidiary legislation was not properly so undertaken. That puts the validity of the impugned Rules to serious constitutional and legality tests.

129. In the end, this court finds and hold that the 1st respondent undertook adequate public participation on the impugned Rules in line with articles 10(2)(a) and 118(1)(b) of the *Constitution*. The court further finds and hold that the Senate did not sufficiently comply with section 13 of the Instruments Act.

(c) Remedies, if any:

130. The petitioner prayed for the declaration of unconstitutionality and invalidity of the impugned Rules in their entirety.

131. This court has been informed by the 1st respondent that the impugned Rules are being implemented and infact most of the petitioner's members have complied with some of the requirements in the rules. The court was urged not to annul the impugned Rules.

132. In such a scenario, this court ought to take into account the rival positions and submissions. It has to avail what is regarded to as appropriate remedies.

133. The Court of Appeal in *Total Kenya Limited vs 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. The High Court in *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others* [2018] eKLR held that article 23 of the Constitution does not expressly bar the court from granting conservatory orders where a challenge is taken on the constitutionality of legislation.

134. In *Republic ex parte Chudasama v Chief Magistrate's Court, Nairobi & another* Nairobi HCCC No 473 of 2006, [2008] 2 EA 311, Rawal, J (as she then was) stated that: -

> While protecting fundamental rights, the court has power to fashion new remedies as there is no limitation on what the court can do. Any limitation of its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal. See *Gaily v Attorney-General* [2001] 2 RC 671; *Ramanoop v Attorney General* [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago); *Wanjuguna v Republic* [2004] KLR 520...The court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many facetted jurisdiction and discretionary powers of the High Court. See *The Judicial Review Handbook* (3rd Edn) by Michael Fordham at 361.

135. The Constitutional Court of South Africa in *Fose v Minister of Safety & Security* [1997] ZACC 6 emphasized the foregoing as follows: -

> Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.

136. In this case, there is no doubt that adequate public engagement on the impugned Rules was undertaken by the 1st respondent. Since it is the Houses of Parliament which failed to carry out their mandates, nullifying the impugned Rules will be a tall order and a serious waste of public resources considering the nature of the nation-wide public participation which was undertaken at the taxpayers cost. Further, nullifying the impugned Rules will result to confusion in the sector since the entire process will have to be undertaken afresh.

137. This court will consider staying the implementation of the impugned Rules as it looks for other suitable remedies.

Conclusion:

138. The Petition has partly succeeded. The petitioner has failed to challenge the impugned Rules on the basis of public participation. However, it has succeeded to demonstrate that the impugned Rules did not comply with section 13 of the *Instruments Act.*

139. Arising therefrom, this court hereby makes the following findings: -

(a) A delegated legislation which is concerned with County Governments must be considered by both Houses of Parliament under the Statutory Instruments Act.

(b) As the impugned Rules are on the shared transport function under the Fourth Schedule of the Constitution, the impugned Rules concern County Governments and as such they were to be considered by the two Houses of Parliament under the Statutory Instruments Act.

(c) The 1st respondent undertook sufficient public participation on the impugned Rules.

(d) Section 13 of the *Statutory Instruments Act* was not sufficiently complied with by either House of Parliament.

Disposition:

140. In the end, the following orders do hereby issue: -

(i) The implementation of the *Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020* be and is hereby stayed and suspended pending a reconsideration of The *Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020* by the two Houses of Parliament.

(ii) The Cabinet Secretary in the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works shall re-transmit a copy of the *Traffic*

(Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020 and the explanatory memorandum together with a copy of this judgment to the Speakers of both Houses of Parliament. That shall be in the next 14 days.

(iii) In view of the remainder of the terms of the Houses of Parliament, the respective Speakers of Parliament shall take steps to ensure that The *Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020* are expeditiously dealt with by the respective Houses.

(iv) In the event that any or both of the Houses of Parliament are/is unable to finalize the dealing with the *Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules, 2020* within the remainder of the current terms of the Houses of Parliament, the said Rules shall be dealt with in the next term of Parliament.

(v) Each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JANUARY, 2022.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Muguku, Learned Counsel for the Petitioner.

Miss. Sirai, Learned Counsel for the 1st Respondent.

Miss. Chiringa, Learned Counsel for the 2nd and 3rd Respondents.

No appearance for the National Assembly.

Mr. Waliaula, Learned Counsel for the Senate.

Elizabeth Wanjohi – Court Assistant