



**Macharia & 27 others v Attorney General & 3 others (Petition E170 of 2018)  
[2022] KEHC 3356 (KLR) (Constitutional and Human Rights) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 3356 (KLR)

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

**PETITION E170 OF 2018**

**HI ONG'UDI, J**

**MAY 31, 2022**

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS  
UNDER ARTICLE 19, 20, 21, 23, 27 AND 165 OF THE CONSTITUTION  
AND SECTION 19 OF THE 14TH SCHEDULE OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION  
OF ARTICLES 27, 40, 43 AND 47 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE TRAFFIC ACT CAP 403 AND  
THE TRAFFIC (AMENDMENT) ACT NO. 26 OF 2017**

**AND**

**IN THE MATTER OF PRIVATE SCHOOL TRANSPORT**

**BETWEEN**

**PENINAH WANJIRU MACHARIA ..... 1<sup>ST</sup> PETITIONER**  
**JOSEPH MATHEKA NDAMBUKI ..... 2<sup>ND</sup> PETITIONER**  
**JOSEPH MATHEKA NDAMBUKI ..... 3<sup>RD</sup> PETITIONER**  
**LAURA NJERI NDEGWA ..... 4<sup>TH</sup> PETITIONER**  
**BERNARD OUNGA OTIENO ..... 5<sup>TH</sup> PETITIONER**  
**NANCY WANJIKU KAGOTHO ..... 6<sup>TH</sup> PETITIONER**  
**MOSES KANYI KAHIA ..... 7<sup>TH</sup> PETITIONER**  
**EMMANUEL KANG'ETHE THUO ..... 8<sup>TH</sup> PETITIONER**  
**ASHA OMAR HAJI ..... 9<sup>TH</sup> PETITIONER**



|  |                             |
|--|-----------------------------|
| JAMES MINJIRE MUTHANI .....                | 10 <sup>TH</sup> PETITIONER |
| SALOME WAMBUI KARIUKI .....                | 11 <sup>TH</sup> PETITIONER |
| IDAH KANINI MACHARIA .....                 | 12 <sup>TH</sup> PETITIONER |
| RACHEL MBOO WAHIU .....                    | 13 <sup>TH</sup> PETITIONER |
| JAMES MWAURA KAREKEI .....                 | 14 <sup>TH</sup> PETITIONER |
| DAVID NJUGUNA KARIUKI .....                | 15 <sup>TH</sup> PETITIONER |
| MERCY WANJIRA MBURU .....                  | 16 <sup>TH</sup> PETITIONER |
| GRACE OUKO .....                           | 17 <sup>TH</sup> PETITIONER |
| IRENE MUTHONI MATHENGE .....               | 18 <sup>TH</sup> PETITIONER |
| PHILIP GICHUHI THIONGO .....               | 19 <sup>TH</sup> PETITIONER |
| DIPIKA VIJAY BHAGANI .....                 | 20 <sup>TH</sup> PETITIONER |
| GEOFFREY NJENGA .....                      | 21 <sup>ST</sup> PETITIONER |
| WILKISTER NYANGWESO .....                  | 22 <sup>ND</sup> PETITIONER |
| WASHINGTON J AMUHANDA .....                | 23 <sup>RD</sup> PETITIONER |
| JOHN MAINGI KIMANO .....                   | 24 <sup>TH</sup> PETITIONER |
| PHILIP INDUSTRIES & GENERAL SERVICES ..... | 25 <sup>TH</sup> PETITIONER |
| JOYCE MUMBI GATHECA .....                  | 26 <sup>TH</sup> PETITIONER |
| ROBERT AKULIA ODHIAMBO .....               | 27 <sup>TH</sup> PETITIONER |
| JOHN MUHIA .....                           | 28 <sup>TH</sup> PETITIONER |

**AND**

|  |                               |
|--|-------------------------------|
| ATTORNEY GENERAL .....   | 1 <sup>ST</sup> RESPONDENT    |
| CABINET SECRETARY INTERNAL SECURITY AND COORDINATION OF<br>NATIONAL GOVERNMENT ..... | 2 <sup>ND</sup> RESPONDENT    |
| CABINET SECRETARY OF EDUCATION .....   | 3 <sup>RD</sup> RESPONDENT    |
| CABINET SECRETARY OF TRANSPORT AND INFRASTRUCTURE ....                               | 4 <sup>TH</sup><br>RESPONDENT |

**JUDGMENT**

1. The petitioner filed this petition challenging the amendment of the *Traffic Act* by introduction of Section 105B. They claim that the amendment was done without any consultations and/or deliberations with the stakeholders in the transport industry. The petitioners are part of the stakeholders, who own fleets of about 75 vehicles involved in ferrying of children to school among others.
2. They therefore filed this suit seeking the following orders:-



- (i) A declaration that the Traffic (Amendment) Act no. 26 of 2017 by the Respondent is illegal, irregular, unprocedural and contrary to Article 27(2) (4) & (6) Article 40, Article 43 and Article 47 of the Constitution of the Republic of Kenya and is therefore null and void.
- (ii) A declaration that Traffic (Amendment) Act No. 26 of 2017 in particular Section 105B thereof violates the rights of the Petitioners. In the alternative an interpretation to what extent the section affects petitioners and private school transporters.
- (iii) An order restraining any arrest and charging by the agents of the respondents against the petitioners.
- (iv) A declaration that the petitioners herein are entitled to the full protection from discrimination and are entitled to the full enjoyment of the right to economic and social rights that are about to be violated and or already violated
- (v) Costs of this petition.
- (vi) Or that such other orders as this Honorable court shall deem just.

### **The petitioners' case**

3. The petition is supported by the affidavit of Peninah Wanjiru Macharia (1<sup>st</sup> Petitioner) dated 2<sup>nd</sup> May 2018. She swore the affidavit with the authority of the rest of the petitioners. The signed authority was annexed. She depones that the petitioners offer transport services to individuals, corporate bodies and organizations. They are contracted on short term basis for a period running from one month to six months to ferry children to schools etc.
4. She further deponed giving a list of the vehicles owned by the petitioners (EXB2). The said vehicles were acquired by way of loans and personal savings and any interference with this business would render them destitute. She avers that the 2<sup>nd</sup> respondent in his capacity as the 2<sup>nd</sup> and 3<sup>rd</sup> respondent issued directives which led to an amendment in the Traffic Act. The said amendment introduced Section 105B in the Act.
5. She deponed that the amendment was done without any consultations / deliberations with the stakeholders. That the literal interpretation of the said amendment is to the effect that the petitioners would be required to paint all their vehicles despite them only being in use by students eight months in a year for few hours a day. The rest of their clients use it throughout the year.
6. She averred that compliance with this directive would result in loss of business from their other clients who equally contribute to their income generating projects. Further that pulling out of the contracts would expose them to a lot of litigation while the pupils and students right to education would be interrupted and violated.
7. They at the same time fear arrest and charges if they don't paint their vehicles "yellow". She therefore called for repeal of the provision or a broader interpretation of the same. It is her averment that the amendment is a violation of various of their constitutional rights.
8. The 1<sup>st</sup> respondent filed grounds of opposition dated 16<sup>th</sup> May 2018 by learned counsel Mr. Marwa. They are as follows:-
  - (i) That the amendment to the Traffic Act No. 26 of 2017 was well within the law having followed all the necessary steps;



- (ii) That no evidence has been adduced by the petitioners demonstrating lack of public participation during the process of Amendment of the Traffic Act;
  - (iii) That all Acts of Parliament are presumed to be constitutional unless otherwise as was captured in the case of *Council of County Governors v. Inspector General of National Police Service & 3 others [2015]* eKLR. Where the High Court held that:
 

“Having so found, I must at this stage, point out, as Courts have always done that in interpreting a legislation, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise.”
  - (iv) That the Amendment to the Traffic Act No. 26 of 2017 was effected in the interest of the greater public as was held in the case of *Kenya National Highway Authority v Shalien Masood Mughai & 5 others [2017]* eKLR where the Court of Appeal held that:
 

“That will be another day but in this case we must decide in favour of the public interest.”
  - (v) That the Traffic (Amendment) Act is legally recognized as a legitimate Act of Parliament and must be respected in terms of what it stipulates. The Petitioners must follow and adhere to the requirements provided under Section 105B of the Traffic Amendment Act No. 26 of 2017. In the case of *Speaker of the National Assembly v James Njenga Karume [1992]* eKLR. The Court of Appeal held that; “In view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”
  - (vi) That petitioner has failed to demonstrate with precision how the respondents violated their constitutional rights and the harm they have suffered as a result of the violation.
  - (vii) That petition is otherwise incompetent, misconceived, misplaced and is an abuse of the process of this honorable court as the petitioner’s rights and fundamental freedoms have not been breached and the same ought to be dismissed.
9. A replying affidavit was filed by the 4<sup>th</sup> respondent through Mr. Solomon Kitungu the Principal Secretary state department for transport – Ministry of transport, Infrastructure, Housing, Urban development and Public Works. He averred that the amendment was necessitated by the many fatal accidents involving school children due to reckless driving. A report showing that over two thousand children had died as a result of road accidents in a span of five (5) years (see SK 2 – Gertrude’s Children Hospital press release dated 3<sup>rd</sup> March 2015).
  10. He deponed that the amendment touches on inter alia, the speed limits around school premises, safety measures around those premises, and safety of school going children in school buses. He also refers to the departmental committee on Transport, Public Works and Housing Report on consideration of the Traffic (Amendment) Bill, 2014 – dated February 2015. He further averred that a robust public stakeholder forum of the Traffic Amendment Bill 2014 was conducted. Consultations to engage the public in the amendment process of the Traffic Act ensued and their deliberations were considered (‘SK4’ – which is the public stakeholders attendance list.)
  11. A press release was issued further on the State counsel’s advice. This led to the holding of a public participation forum on Thursday 29<sup>th</sup> January 2015 at Sarova Pan Afric Hotel Nairobi conducted by



the Kenya Alliance of Residents Association in collaboration with the Center for Sustainable Urban Development, Columbia University (see SK 5 – dated 28<sup>th</sup> January 2015).

12. He referred to the report dated February 2015 by the Departmental Committee on Transport Public Works and Housing on the consideration of the Traffic (Amendment) Bill, 2014 (SK6). He added that whatever was done was for the good of the school going children. He denies that the amendment would interfere with the petitioners' businesses. That the vehicles can be used in other businesses during the school holidays. Further that the amendment does not restrict the use of the vehicles by other clientele as its only concerned with safety of those buses ferrying school going children. He denied that the amendment violated the petitioners' rights to earn a livelihood, human dignity and freedom from discrimination, social economic security rights as claimed by the petitioners.

### **Interested party's case**

13. The interested party did not file any response to the petition. It is however noted that it supports the petition.

### **Parties submissions**

14. The petitioners' submissions are dated 5<sup>th</sup> November 2018 and field by Mbutia Kinyanjui & co. Advocates. Counsel submits that following the amendment the petitioners were forced to paint the private vans yellow and they cannot operate past the stipulated hours. They are therefore unable to serve their other clients. This is despite the fact that the due process was not followed during the enactment of the amendment in terms of public participation. Referring to Article's 1(1)(2) & (3) & (10) he submits that democracy as well as being an end in itself plays an instrumental role in giving people a voice and a constructive role in shaping roles, values and norms.
15. In support he cited the case of *Communications Commission of Kenya & 5 others v. Royal Media Services Ltd & 5 others [2014]* eKLR where the Supreme Court of Kenya stated:-

“Sustainable development is associated with the transformative potential of social, economic, political and cultural rights. This vision is in part linked to Amartya Sen's work which embraces the view that long-term sustainable development requires an autonomous, active, and participatory democratic citizenship, endowed with minimum levels of social economic welfare best articulated in the form of rights...”

16. On the working of parliament and its conduct of businesses he refers to Article 118 of the *Constitution* which provides:-

“ 118.

- (1) Parliament shall—
  - (a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and
  - (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.
- (2) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.



17. He places emphasis on the word ‘Shall’. He contends that as guided by the Supreme Court in the case of *In the matter of the Interim Independent Electoral Commission* [2011] eKLR provisions of the Constitution must be given a holistic interpretation. See also

i) *In the matter of Kenya National Commission on Human Rights* [2014] eKLR

ii) *Speaker of the Senate and another v. Attorney General & 4 others* [2013] eKLR

He considers the meaning of the word Shall and refers to the case *Henry N. Gichuru v. The Minister for Health, The Kenyatta National Hospital Board* [2002] eKLR where Kuloba J observed that the word “shall” does not necessarily bestow an obligation but goes ahead to say that no word is to be interpreted out of its proper context and divorced from its general environment and indeed in some cases, a mandatory obligation is intended to apply. He also refers to the case of *Katiba Institute vs. Attorney General & 6 others* [2018] eKLR. Relying on these cases counsel submits that parliament is obligated to ensure public participation in its process of law making.

18. Counsel further submits that parliament has the duty to facilitate public participation. In the case of *Mui Coal Basi Local Community & 15 others vs. Permanent Secretary Ministry of Energy & 17 other* [2015] eKLR a three judge bench cited the following as principles of public participation:-

a) Accords with the nature of the subject matter

b) Calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth;

c) Must include access to and dissemination of relevant information;

d) Does not dictate that everyone must give their views but must, however, show intentional inclusivity and diversity;

e) Does not guarantee that each individual’s views will be taken as controlling but there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received; and

f) Is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

19. He contends that the amendment was assented to on 21<sup>st</sup> July 2017. There was no gazette notice issued inviting the public to the same nor any invitation to the public through the then National Transport and Authority website. Thereafter a circular dated 25<sup>th</sup> January 2018 gave direction on the color code specifications giving the last date of adherence as end of March 2018. There was even no direction on the costs for the exercise.

20. Counsel submits that the amendment was done arbitrarily and disregarded the rule of law. That the amendment in question operated as a blanket provision covering each and every individual or institution in the business of transporting children to or from school, or for any non-school related activity when they (children) are in a group. That the amendment curtailed the operating hours of the yellow coloured vehicles. This has limited their ability to provide service to their ability to provide services to their other clients. This is therefore an issue touching on economic freedom in a constitutional democracy.

21. Counsel dismissed the argument that the amendment was made to protect public interest. He argues that there can never be public interest without adherence to the law. He has referred to the case of



*Republic v. Cabinet Secretary for Transport Infrastructure, Housing and Urban Development & Another Ex-parte Kenya National Union of Co-operatives Staff [2018]* eKLR where Mativo J stated:-

It is trite that Rules must conform to the Constitution and the statute in terms of both their content and the manner in which they are adopted. Failure to comply with manner and form requirements in enacting Rules, Regulation or policy guidelines renders the same invalid. Courts have the power to declare such Rules, Regulations or policy guidelines invalid...”

### **The Interested party’s submissions**

22. These submissions dated 23<sup>rd</sup> August 2019 were filed by Kangethe & Co. advocates. He submitted on the interpretation of the constitution under Article 259 which was well covered by counsel for the petitioners. Among the values and principles in this petition he singled out public participation, inclusiveness and non-discrimination. Besides what the petitioner has submitted on this he cited *Republic v. the Attorney General (JR Misc. Appln No. 374 of 2012)* where the court stated:-

“...participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them...”

23. Also see (i) *Kiambu County Government & 3 others v. Robert N. Gakuru & others [2017]* eKLR among others.

24. He argues that the new law has made parents and pupils to incur resultant fee increments to cater for the colouring of the buses. This is a burden they were never consulted on as there was no public participation. Public participation is significant in governance and cannot be underestimated. See *Keroche Breweries Limited and others v. The Attorney general & others Petition No. 295 of 2015*.

25. It is counsel’s submission that the amendment violated Article 27 of the Constitution. The reason being that it does not cut across all institutions of learning. Further that the law selectively guards certain citizen’s rights. To him colour does not promote safety and the costs of painting buses are economically burdening. Thus the right to equality was violated. To support this he relied on *Josephat Musila Mutual & 9 others vs. Attorney General & 3 others [2018]* eKLR and (ii) *John Kakui Mwai & 3 others [2011]* eKLR. Its his contention that the amendment has limited the extent of use of school transport beyond just transporting pupils and also limited the schools’ ability to use any other transport vehicles in the event of an emergency.

26. He further submits that the use of the yellow colour has limited their right and freedom for artistic creativity to have an identity, belief, opinion and to brand its private property. That by implementing the new law the interested party will not be able to use its long-term trademarks and brandings. In effect its rights under Articles 31, 32, 33(1) & 40 of the constitution have been infringed. He therefore argues that the respondent blatantly failed to give the public the relevant information to enable them comply with the impugned law.

27. To support this submission he cited *Katiba Institute v. President’s delivery Unit & 3 others [2017]* eKLR where the court held:-

“The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance. For instance, successful and effective public participation in governance largely depend on the citizen’s ability to access information held by public authorities.



Where they don't know what is happening in their government and or if actions of those in government are hidden from them, they may not be able to take meaningful part in their country's governance. In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow. And for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country.”

28. Finally he submits that the respondents have failed to show that there was any public participation before the enactment of the impugned law. He has cited the case of *Kenya Human Rights Commission vs. Attorney General and another [2018]* eKLR where the Court held that:-

“Once a petitioner attacks the legislative process on ground that the law making process did not meet the constitutional standard of public participation, the respondent is under a legal obligation to demonstrate that the legislative process did meet the constitutional standards of public participation. And because it is the constitutional duty of parliament to ensure that there is public participation, the Attorney General as the respondent, has the legal burden to disprove this contention. This is so because it is a constitutional requirement that the National Assembly conducts its affairs in compliance with the constitution.”

#### **The 1<sup>st</sup> to 4<sup>th</sup> respondents' submissions**

29. On the issue on whether due process was followed during the enactment of the amendment in turns of public participation, counsel submits in the affirmative. He adds that Article 118 of the Constitution must be read holistically and/or harmoniously, with other Articles to find an amicable solution. Referring to Article 1(2) of the Constitution and the case of *Nairobi Metropolitan Principal Secretary vs. Saccos Union Limited and 25 others vs. County Government of Nairobi & 3 others [2014]* he submits that the petitioners have failed to demonstrate how the amendment process did not adhere to the principles of the constitution. Further that they have failed to demonstrate how section 105B as amended is unconstitutional and which provision of the constitution it has offended and the harm suffered.
30. Its his argument that Section 105B is constitutional and it advances a compelling state interest to mandate transportation of school going children to and from school. In the case of *Federation of Women Lawyers Kenya (FIDA) vs. Attorney General and another [2018]* eKLR where the High Court held:-

“Admittedly, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise. [58] (The court should start by assuming that the Act in question is constitutional). Discussing the presumption of Constitutionality of a statute, the Supreme Court of India [59] stated that:- “in examining the Constitutionality of a statute it must be assumed that the legislature understand and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment.”

31. He submits that the petitioners have not shown whether Section 105B of the Traffic (Amendment) Act is unambiguous and if from that provision the legislative intent is not clear. On this counsel relies



on the case of *Council of Country Governors vs. Attorney General and another [2017]* eKLR where the High Court held:-

“My reading of the challenged section does not in any manner reveal any infringement of the provisions of the constitution. The challenged provisions are clear and precise, and unambiguous. However, if at all any limitations are imposed on the rights of the petitioners, then in my view such a limitation is proportionate considering the purpose of the law in question. In my view, the challenged provision is necessary in a democratic society to ensure proper preparation and management of the electoral process.”

32. It is counsel’s submission that all persons must adhere to the rule of law as per Article 2(1) of the *Constitution*. Therefore the petitioners have a duty to comply with the amendment law which protects the interest of the school going children in line with Article 53 (d) of the *Constitution*. That any means of transport that puts the life of a school going child in danger or which does not conform to the legal requirements set out under Section 105B of the Traffic Act, contravenes this provision of the constitution.

33. It’s counsel’s submission that the amendment went through the three known stages of legislative process and no procedure was left out. In support he cited the case of *Were Samuel & 14 others [2017]* eKLR where it was held:-

“Complying with the requirement to Public Participation does not mean every affected person, group of persons or segment of the society be contacted and heard individually. It would simply be impossible to hear everybody who claims to be affected by a given legislation. However, it suffices if the public including those to be affected were made aware of the impending legislative process and accorded an opportunity to participate. Failure to participate despite the opportunity given, cannot invalidate the amendments for lack of Public Participation.”

34. Relying on the above authority counsel submits that parliament having complied with the constitutional law for the law making process, the only issue remaining is compliance with Section 105B of the Traffic (Amendment) Act. He therefore prays for the dismissal of the petition.

### **Analysis and determination**

35. I have carefully considered the pleadings, written and oral submissions, cited cases and the law and I find the issues falling for determination to be:-

- i) The constitutionality of Section 105B of the Traffic (Amendment) Act.
  - ii) Whether there was public participation prior to the enactment of the impugned amendment.
  - iii) Whether the traffic (Amendment), is ambiguous and overboard.
  - iv) Whether the petitioners are entitled to the orders sought.
  - v) Who shall bear the costs of the petition.
- Issues no. (i) and (ii).
- i. The constitutionality of Section 105B of the Traffic (Amendment) Act.
  - ii) Whether there was public participation prior to the enactment of the impugned amendment.



36. Counsel for the petitioners and the interested party submitted that the impugned amendment is unconstitutional for the reason of failure by parliament to follow the due process of enacting a law. They claim that there was no public participation, as enshrined in Article 118 of the Constitution. The petitioners have contended that the impugned amendment violates their right to earn a livelihood, human dignity, equality and freedom from discrimination, social economic security and fair administrative rights.
37. The respondents have on the other hand argued that there was public participation and there is no unconstitutionality in the impugned amendment. Article 118 of the *Constitution* provides:-
- “(1) Parliament shall—
- (a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and
- (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.
- (2) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.”
38. Article 119 further provides:-
- “(1) Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.
- (2) Parliament shall make provision for the procedure for the exercise of this right.
39. In interpreting the constitution the court is guided by the provisions of Articles 20(3) & (4) and Article 259 of the *Constitution*. See
- (i) Uganda Tinyefuza vs. Attorney General Constitutional Petition No. 1 of 1996 (1997 UGCC 3)
- (ii) Centre for Human Rights & Awareness v. John Harun Mwau & 6 others (2012) eKLR
- (iii) Interim Independent Election Commission [2011] eKLR
40. I have considered the rival submissions in light of the constitutional principles and cases cited and I find that Article 118 does not give a definition of the word “public participation? The Constitution of Kenya 2010 provides that parliament shall not bar anyone from participating on any grounds such as age, race, colour, gender or political affiliation. It is further noted that national values and principles of governance include public participation as underscored in Article 10 of the *Constitution*.
41. The Facts Sheet from the National Assembly of Kenya reveals the mechanisms of public participation to include the following:-
- i) Inviting submission of memoranda
- ii) Holding public hearings
- iii) Consulting relevant stakeholders
- iv) Consulting experts on technical subjects.



39. The said document defines public participation as:-

“The process of interacting between an organization and the public with an aim of making an acceptable and better decision. The process involves informing, listening, dialogue, debate and analysis as well as implantation of agreed solutions.”

39. In the case of *Moses Munyendo & 908 others vs. The Attorney General and Minister for Agriculture [2013]eKLR* the Court stated:-

“The National Assembly and public institutions have a broad measure of discretion in how they achieve the object of public participation. How it is affected will vary from case to case but it must be clear that a reasonable level of participation has been offered to the public”

42. The principles of what would constitute meaningful public participation were settled by the supreme Court of Kenya in the case of *British American Tobacco Kenya PLC v. Cabinet Secretary for the Ministry of Health and others [2019] eKLR* where the court stated as follows:-

“(96) From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court’s mandate under Section 3 of the Supreme Court Act, we would like to delimit the following framework for public participation:

#### Guiding Principles for public participation

- (i) As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.
- (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- (v) Public participation is not an abstract notion; it must be purposive and meaningful.
- (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.



- (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
  - (ix) Components of meaningful public participation include the following:
    - a. clarity of the subject matter for the public to understand;
    - b. structures and processes (medium of engagement) of participation that are clear and simple;
    - c. opportunity for balanced influence from the public in general;
    - d. commitment to the process;
    - e. inclusive and effective representation;
    - f. integrity and transparency of the process;
    - g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.”
43. It’s upon the above parameters that I shall determine whether any steps were taken before the enactment of the impugned amendment and if so whether the same satisfied the above guidelines.
44. The respondents in response to the petition filed grounds of opposition plus a replying affidavit. Annexed to the replying affidavit are several documents namely:-
- i) A fact sheet document in respect of the Traffic (Amendment) Bill 2014 – SK 1 (August 2014).
  - ii) Gertrude’s Children Hospital Press release dated 3<sup>rd</sup> March 2015 (SK 2).
  - iii) Daily Nation – 3<sup>rd</sup> March 2015 – Articles on the Traffic (Amendment) Bill 2014. (Part of SK 2).
  - iv) Report of departmental committee on transport, Public Works and Housing. It shows the M.Ps present and those absent on 16<sup>th</sup> February 2015 (SK 4).
  - v) Report of the same team on 28<sup>th</sup> October 2015
  - vi) Report of the meeting on 30<sup>th</sup> October 2014 at Media Centre.
  - vii) Attendant list for 28<sup>th</sup> January 2015 (SK 5) involving stakeholders (128 participants).
  - viii) Report of the committee (SK 6) dated 17<sup>th</sup> February 2015.
45. Besides these reports SK1 – SK 6 were the parliament readings and presentation reports by the Committee Chair. In this case it was Hon. Maina Kamanda. Despite having been served with the replying affidavit and all this documentary proof of the steps taken to enlighten the members of the public, the petitioners never responded and never rebutted any of these reports.
46. The respondents through the replying affidavit averred to several facts. The petitioners never sought leave to file a supplementary affidavit to counter these averments. I find that these facts are considered unrebutted and I take them to be true. See *Peter O. Nyakundi & 68 others v. Principal Secretary, Ministry of Devolution & Planning and anor [2016]* eKLR; *Kennedy Otieno Odiyo & 12 others v.*



*Kenya Electricity Generating Company Ltd [2010]* eKLR; *Philip Tirop Kitur vs. Attorney General [2018]* eKLR.

47. The Traffic (Amendment) Act No. 26 of 2017 amended Sections 42, 43, and inserted a new Section 105B. The Petitioners do not seem to have a problem with the amendments of Sections 42 & 43. Their problem is Section 105B which they claim has interfered with their livelihood as they are unable to attend to their other clients. Is the issue therefore about the process or the unfairness of Section 105B of the Act?
48. The only issue the petitioners have tried to explain is about Section 105B (2)(d) which limits the operation hours. My understanding of this provision is that the vehicles transporting the different groups of school going children and parents have to operate between 5.00am – 10.00pm. This does not bar the petitioners from doing any other legal and lawful transport business outside the stated hours. Therefore the claim that they have lost business with their other clients is unfounded. I am sure that this has come out clearly with the operation of the yellow vehicles for the last (4) almost five (5) years.
49. Upon analysis of the material before this court I find that discussions on what was happening in the transport industry with special reference to school going children started way back in the year 2014. Participation may not have involved all the stakeholders but there was public participation. The documents (SK1 – 6) which were not challenged by the petitioners speak to this. This court does not lose sight of Article 1(2) of the *Constitution* which provides:-

“(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.”

50. Parliament may through this provision exercise exercise a legislative function as a representative of the people. As seen from the annexures from the respondents these amendments were discussed severally by the parliamentary committee besides the public before being presented in parliament. Furthermore the parliamentary debates are streamed live. Anyone who is aggrieved by any act of parliament is by virtue of Article 119 of the *Constitution* entitled to petition parliament on the same.

51. In the case of *Were Samuel & 14 others vs. Attorney General & 2 others* [2017] eKLR Mwita J held thus:-

“Complying with the requirement to Public Participation does not mean every affected person, group of persons or segment of the society be contacted and heard individually. It would simply be impossible to hear everybody who claims to be affected by a given legislation. However, it suffices if the public including those to be affected were made aware of the impending legislative process and accorded an opportunity to participate. Failure to participate despite the opportunity given, cannot invalidate the amendments for lack of Public Participation.”

Also see *Nairobi Metropolitan Principal Secretary vs. Saccos Union Ltd & 25 others vs. County Government of Nairobi* (Supra).

52. I find that the amendment of the Traffic Act was well intended, its operation does not infringe on the rights of the Petitioners who still have space to transport their other clients. There is no provision restricting the yellow coloured vans/buses/vehicles to only transporting school going children and their teachers/parents. I also find that public participation took place.
53. Every Act of parliament is presumed to be constitutional. See *Federation of Women Lawyers Kenya (FIDA) vs. Attorney General & another* [2018] eKLR. Anybody claiming its unconstitutionality must demonstrate the same. I find that the petitioners have failed to demonstrate the unconstitutionality



of the impugned amendments. They have also failed to demonstrate any violations of their rights as a result of the amendment.

54. The result is that the petition lacks merit and is dismissed with costs.

Orders accordingly.

**DELIVERED VIRTUALLY, SIGNED AND DATED THIS 31<sup>ST</sup> DAY OF MAY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.**

**H. I. ONG'UDI**

**JUDGE OF THE HIGH COURT**

