



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 319 OF 2019

IN THE MATTER OF ARTICLES 22(1) & (2) (c), 48, 50(1), AND 258(1) & (2) (c) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENSHRINED IN ARTICLES 1(1); 2(1), (2) 7 (3); 3(1); 10(2); 24, 73(1)(b), 129, 153(4), 232(1),(b), (c), (d), (e) & (f); AND 259 (1) & (3) OF THE CONSTITUTION

IN THE MATTER OF THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 40, 43, & 47 OF THE CONSTITUTION

IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 3, 4, & 5 OF THE FAIR ADMINISTRATIVE ACTION ACT

IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE DECISION BY THE NATIONAL TRANSPORT SAFETY AUTHORITY TO DEFY BOTH THE COURT AND THE NATIONAL ASSEMBLY

IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE REVOCATION OF DRIVING SCHOOLS LICENCES

IN THE MATTER OF THE ABUSE OF DELEGATED LEGISLATION BY THE EXECUTIVE AND THE REGULATORY BURDEN IMPOSED ON THE PEOPLE OF KENYA

IN THE MATTER OF THE DOCTRINES OF LEGITIMATE EXPECTATION, AND VOID AB INITIO

BETWEEN

OKIYA OMTATAH OKOITIPETITIONER

VERSUS

THE NATIONAL TRANSPORT AND

SAFETY AUTHORITY.....1ST RESPONDENT

THE MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING 7 URBAN DEVELOPMENT.....2ND RESPONDENT

JUDGEMENT

PETITION

1. The Petitioner filed a Petition and Supporting affidavit both dated 13th August 2019 in which he seeks the following reliefs from the Court:-

- i. A Declaration that the revocation of driving school licences is unconstitutional and, therefore, invalid, null and void.**
- ii. An order:**

- a) *Quashing the revocation of driving school licences*
 - b) *Compelling the 1st Respondent to compensate all the affected driving schools for the business they have lost*
 - c) *That the 1st Respondent pays the costs of this suit.*
- iii. *Any other relief the court may deem just to grant.*

PETITIONER'S CASE

2. The Petitioner alleges that the 1st Respondent has acted *ultra vires* by implementing the yet to be gazetted **Traffic (Driving Schools and Instructors) Rules 2014 (2017)** and other policy documents developed thereunder when it closed down some 51 driving schools. The Petitioner asserts that the rules had not been enacted at the time and were invalidated by this Court (Chaha Mwita J.) on 19th November 2018 in the case of **Petition No. 97 of 2018, Okiya Omtatah Okoiti v The National Transport and Safety Authority & the Ministry of Transport, Infrastructure, Housing & Urban Development**. Furthermore, the Petitioner avers that the National Assembly on 15th August 2018 had voided/annulled the **Traffic (Driving Schools and Instructors) Rules 2018**.

3. The 2nd Respondent is being sued for disregard of duty by allowing the NTSA to implement draft statutory instruments that are not yet law in Kenya. The Petitioner argues that the 2nd Respondent has failed in its oversight mandate by not taking any measures to reign in the 1st Respondent.

4. The Petitioner avers that he has filed a contempt of Court application **Petition No. 97 of 2018** on the issue of disobedience of the final decree of this court by Mr Francis Meja who is the Director of the 1st Respondent herein.

5. The Petitioner asserts that the 1st Respondent has acted contrary to the high standards of professional ethics contrary to **Article 232 (1) (a) of the Constitution of Kenya** as read with **Section 5 of the Public Service (Values and Principles) No. 1A of 2015**. Additionally, it is alleged that the 1st Respondent has acted contrary to **Article 73 (1) (b) of the Constitution**, and **Sections 3, 4, 5 of the Fair Administrative Action Act**.

6. It is further contended that the Respondents by implementing a void law (or draft statutory instrument that is not yet law) have contravened **Article 4 (2), 10 (2), and 47 (1) of the Constitution** as their administrative actions are not anchored in law. Furthermore, it is claimed that the affected parties did not have an opportunity to defend themselves thus violating **Article 47(1) of the Constitution**.

7. The Petitioner avers that the decision to close down the schools without meeting the threshold of **Article 24 of the Constitution** has violated the affected parties' right to property under **Article 40**, and their economic and social rights protected under **Article 43 of the Constitution**.

1ST RESPONDENT'S RESPONSE

8. The 1st Respondent filed an un-dated Reply to the Petition and asserts that the purpose of the impugned vetting exercise was to ensure compliance with the requirements and conditions of licensing as stipulated in the **Traffic (Driving Schools) Rules, 1971**.

9. The 1st Respondent confirms that the Rules in force that regulate that activities of driving schools and their licensing are the **Traffic (Driving School) Rules, 1971**. Therefore the vetting exercise was conducted within the ambit of, and used the criteria guided by the **1971 rules** and not the annulled **Traffic (Driving School and Instructors) Rules 2017** as alleged by the Petitioner. It is clarified that the exercise was conducted by an interagency task force comprising of NTSA, Traffic Police and the Ministry of Transport, Infrastructure, Housing & Urban Development.

10. Furthermore, the 1st Respondent asserts that the suspended schools were given an opportunity to apply for reinstatement of their school licenses upon meeting the stipulated conditions.

11. The Respondent indicates that the Petitioner has admitted that he has filed a similar claim in Petition No. 97 of 2018, in the High Court Nairobi seeking similar orders and the matter is coming up for hearing before Honourable Justice Korir. The Respondent contends that the Petitioner has failed to establish a prima facie case to warrant the issue of the prayers sought.

12. The 1st Respondent contends that the Petition lacks merit as the revalidation exercise was conducted under the Traffic (Driving School) Rules, 1971 and not the 2018 Rules as alleged.

THE 2ND RESPONDENT'S RESPONSE

13. The 2nd Respondent filed Ground of Opposition dated 11th May 2020 asserting that the Petitioner has failed to demonstrate how the Respondents have violated his Constitutional Rights. The 2nd Respondent avers that the Petitioner has failed to meet the requirements laid out in **Anarita Karimi Njeri v R (1976-1980) KLR 1272**, and has not supported his claims with any evidence.

14. The 2nd Respondent also claims that the Petitioner has not proven any particulars of loss suffered to substantiate the prayer for

compensation. Furthermore, it is asserted that the 2nd Respondent is not the proper line Ministry to be sued as the functions of registration and licensing of motor vehicles, motor vehicle inspections and certification, national transport safety, national road safety management and regulation of Public Service Vehicles was transferred to the State Department of Interior.

ANALYSIS AND DETERMINATION

15. I have very carefully considered the Petition, affidavit in support; the Respondents Replying Affidavit and grounds of opposition as well as parties rival submissions and from the above the following issues arise for determination:-

- a) *Whether the 1st Respondent undertook the revaluation exercise of driving schools under the Traffic (Driving Schools, Driving instructor and Driving Licenses) Rules 2018 or the Traffic (Driving Schools) Rules, 1971?*
- b) *Whether the closure of the 322 schools amounted to a violation of Article 47 of the Constitution of Kenya, 2010 and whether the constitution was violated whether court can intervene?*
- c) *Whether the Petitioner's legitimate expectation was violated?*
- d) *Whether the 2nd Respondent is properly sued in this matter?*
- e) *Whether prayers sought in the Petition should be granted?*

A) WHETHER THE 1ST RESPONDENT UNDERTOOK THE REVALUATION EXERCISE OF DRIVING SCHOOLS UNDER THE TRAFFIC (DRIVING SCHOOLS, DRIVING INSTRUCTOR AND DRIVING LICENSES) RULES 2018 OR THE TRAFFIC (DRIVING SCHOOLS) RULES, 1971?

16. The Petitioner contend that on 30th April 2019, the 1st Respondent initiated the impugned revalidation exercise by publishing a public notice in the press and posting it in other media including on its website. The notice, a print out of which is annexed to the Petition bundle at page 34 of exhibit 000-1, required all operators of driving schools to download the Driving School Revalidation Forum from its website and submit the duly completed form to the nearest NTSA offices within 14 days from the date of the notice; failure to which their licenses would be revoked.

17. On 7th May 2019, the 1st Respondent issued another press release where it stated that operators of driving schools who did not download and submit duly completed forms on the due date would have their licenses revoked. Another press release was issued on 13th June 2019.

18. The 1st and 2nd Respondents aver that revalidation of driving schools was conducted in a fair and reasonable manner and under the Traffic (Driving School) Rules, 1971 and not the Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules 2018 as alleged by the Petitioner.

19. The 1st Respondent contend that it inherited the functions of the Registrar of Motor Vehicles as outlined in **Section 62 of the National Transport and Safety Authority Act**; therefore the word "**Registrar**" referred to in the **Traffic (Driving Schools) Rules, 1971 Rules**, means the "**National Transport and Safety Authority**". Further it is contended **Rule 15(2) of the Traffic (Driving Schools) Rules, 1971** outlines the duty of the Registrar to review driving school licenses. **Rule 15(2) of the Traffic (Driving Schools) Rules, 1971** provides that a School License shall be reviewed by the Registrar upon application duly made in form 7 and upon payment of the appropriate fee.

20. The 1st Respondent urge that revalidation exercise was conducted by an Interagency Taskforce comprising of the National Transport and Safety Authority, National Police Service and the Ministry of Transport, Infrastructure, Housing & Urban Development in line with their various roles.

21. It is asserted by the 1st Respondent criteria used for revalidation of driving schools was guided by **Traffic (Driving Schools) Rules, 1971** which is claimed was inter alia:-

- i. *Whether the driving school has a valid school license as required by Rule 10(1) of the Traffic (Driving School) Rules, 1971.*
- ii. *Whether the driving school has a training facility as required by Rule 10(3) of the Traffic (Driving School) Rules, 1971.*
- iii. *Whether the instructors in the driving school are trained, tested and licensed to train learners on specified driving categories as required by Rule 3(1) of the Traffic (Driving School) Rules, 1971*
- iv. *Whether the driving school vehicles are fit for purpose as required by Rules 16(1) – (9).*
- v. *Whether the driving schools meet their statutory obligations i.e. tax compliance.*

22. The Petitioner refers to **Traffic (Driving Schools) Rules, 197** which the Respondents claim they applied in revalidation of driving schools and urge that, if that was then, the case, there is absolutely no way the schools could have been closed down based on the 1971 Rules. The rules though they predate **Article 47 of the Constitution of Kenya 2010**, were carefully crafted and ensures fair administrative action **Rule 14(1) of the Traffic (Driving Schools) Rules, 1971** provided on revalidation on variation of schools license provides thus:-

“14. Revocation or variation of school licence-

(1) The Commissioner may revoke a school licence, or may vary any of the terms or conditions thereof, if he is satisfied that –

a) any motor vehicle being used for any of the purposes of the licence is not suitable for that purpose; or

b) the standard or nature or duration of instruction given is insufficient or unsatisfactory; or

c) the proprietor has, within any one period of three years, been twice convicted of offences under these Rules.

(2) Before exercising any of the powers conferred by paragraph (1), the Commissioner shall give reasonable and full opportunity to the proprietor to make representations concerning the proposed exercise and shall then hear and consider any such representations.

23. The **Traffic (Driving Schools) Rules, 1971** require a mandatory physical examination of the premises and facilities, however the 1st Respondent opted to act online by requiring the parties to self-assess. I find that the Parliament in its wisdom never intended that the regulation facilitates the regulation to self-assess online. The 1st Respondent was duty bound to discharge its responsibility through visiting each of the schools so as to be satisfied with respective compliance with the rules as set out under **Rule 14(1) of the Traffic (Driving Schools) Rules, 1971**.

24. I find that the 332 schools said to have been closed down for not downloading and submitting the duly filled forms to have been disproportioned, and the 1st Respondent's acts to have been oppressive, unreasonable, and unlawful and therefore null and void ab initio. This was wrong as the decision was arrived at without conducting a physical examination of the premises to ascertain that the schools did not qualify to be licenced. It was on the other hand unreasonable on part of the 1st Respondent to assume that those who downloaded and submitted the duly filled forms, were compliant under the law.

25. I find that on examination of the Driving Schools Revalidation Form, it is not possible to know how its contents could have been generated using **Rule 14, and 15 of the Traffic (Driving Schools) Rules, 1971**. It is further noted that the revalidation form makes no reference to convictions, contrary to **Rule 14 (1) (c) of Traffic (Driving Schools) Rules, 1971** which expressly requires it.

26. **Rule 14(2) of the Traffic (Driving Schools) Rules, 1971** is clear that it is a mirror image of **Article 47 of the Constitution**, which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Rule herein is an absolute bar to the arbitrary closure of the 332 schools. I find that before any action could have been taken the schools were required to be given reasonable and full opportunity to make their representations concerning the proposed exercise of powers conferred upon the 1st Respondent by **Rule 14(1) of the Traffic (Driving Schools) Rules, 1971** by hearing each of the schools and consider any such representations. The 1st Respondent choose to ignore **Rule 14(2) of the Traffic (Driving Schools) Rules, 1971** which provides:-

“Before exercising any of the powers conferred by paragraph (1), the Authority shall give reasonable and full opportunity to the proprietor to make representations concerning the proposed exercise and shall then hear and consider any such representations.”

27. It is submitted by the Petitioner, that it is a matter of public record that, under the rules when the police were in charge, as standard practice, the regulator inspected each school and an inspection report showing areas of non-compliance was shared with the affected schools, which were then given time to comply. At the lapse of the time given, the schools were re-inspected. It was only then that those which did not comply were closed down. Even then, the closed schools were given time to appeal the decision to close them down.

28. It is contended by the Petitioner that revalidation form makes no reference to conviction, contrary to **Rule 14(1) (c)**. It is urged as regards the Driving School Revalidation Form thus:-

“(i) The Driving Schools Revalidation Form is largely a replica of the Driving Schools Vetting Form (a printout of which is annexed to the Petition bundle at pages 9 – 12 of Exhibit 000-1), which this Court quashed in its decree (see pages 13 – 15 of Exhibit 000-1) in Petition No. 97 of 2018, Okiya Omtatah Okoiti vs. The National Transport and Safety Authority & The Ministry of Transport, Infrastructure, Housing & Urban Development.

ii) Requirements for compliance with statutory obligations such as tax, NHIF and NSSF compliance not directly related to the training of drivers were anchored in the void 2018 Rules.

iii) The same applies to the requirement for schemes of work and lesson plans for instructors, and copies of curriculum vitae for management of the driving schools (managers, supervisors, secretaries, accountants).

iv) The revalidation was based on the curriculum the 1st Respondent imposed on the driving schools, but which both the Court and the national Assembly voided.

29. The 1st Respondent set five grounds or criteria relied upon to undertake revalidation exercise of driving schools under the Traffic (Driving Schools) Rules, 1971. The criteria is contrary to conditions set out under **Rule 14(1) of the Traffic (Driving Schools) Rules, 1971**. The 1st Respondent has not disclosed which rule guided it in arriving at the five listed grounds for revalidation. The 1st Respondent obviously relied on extraneous and irrelevant consideration, which was beyond what is provided for in law and the relevant **Rule 14 of the Traffic**

(Driving Schools) Rules, 1971 in proceeding to close down the schools.

30. As regards a body taking into account of irrelevant matters the Court clearly stated as follows in the case of *Zacharia Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR* the Court held that:-

“Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by

- (i) an outright refusal to consider the relevant matter;**
- (ii) a misdirection on a point of law;**
- (iii) taking into account some wholly irrelevant or extraneous consideration; and**
- (iv) wholly omitting to take into account a relevant consideration.”**

31. Having considered parties rival submissions on this issue, I find that the 1st Respondent’s decision to revalidate and close down the schools was unjustified and gross violation of the law. It was in my view ultra vires, therefore, unconstitutional, null and void ab initio. I find that it is clear that the law does not donate any powers to the 1st Respondent to revalidate and close down schools contrary to the law in force. I find that the *Traffic (Driving Schools) Rules, 1971* have no provision for revalidation, but only provide for inspection of schools to determine compliance, and to only revoke licences based on the ground given in *Rule 14(1)(a) to (c) of the Traffic (Driving Schools) Rules, 1971*.

32. It should clearly be noted that where statute does not expressly confer a power on an entity or body, the entity or the body cannot assume to have such powers nor purport to exercise such non-existing powers.

33. In supporting the above proposition the Petitioner sought reliance from the case of *Choitram vs. Mystery Model Hair Salon [1972] EA 525. Mandan J.* (as he then was) stated that powers must be expressly conferred, they cannot be a matter of implication.

34. Mutatis Mutandis, it was in appreciation of the foregoing position that the Court in *Exparte Mayfair Bakeries Limited vs. Rest Restriction Tribunal and Kirit R (Kirit) Raval Nairobi HCMCC No. 246 of 1981* held that:

“...in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal such as Rent Control Board, the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication and that a Tribunal is a creature of statute and has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for tint hat case the words of the statute speak the intention of the legislature.

Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration.” (Emphasis mine)

35. Having considered the rival submission and evidence from parties’ affidavits and grounds of opposition, I find that the 1st Respondent undertook the revalidation exercise of driving schools under the *Traffic (Driving Schools, Driving Instructor and Driving Licences) Rules 2018 and not the Traffic (Driving Schools) Rules, 1971*. The 1st Respondent therefore closed the 332 driving schools using the void 2018 Rules and not the 1971 Rules.

B) WHETHER THE CLOSURE OF THE 322 SCHOOLS AMOUNTED TO A VIOLATION OF ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010 AND WHETHER THE CONSTITUTION WAS VIOLATED AND WHETHER COURT CAN INTERVENE?

36. The Petitioner urges based on the evidence on record and relevant law the court should intervene since the Respondent failed to adhere to the requirements in law for inspecting driving schools. The Petitioner rely on the decision in the case of *Republic v. Kenya National Examination Council, Miscellaneous Civil Application No. 328 of 2015* where the Court held that:-

“That the Court can interfere where there is improper exercise of discretion is now trite. As was held by Warsame, J (as he then was) in *Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003*, where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matter. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public body’s through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by

- (i) an outright refusal to consider the relevant matter;**
- (ii) a misdirection on a point of law;**
- (iii) taking into account some wholly irrelevant or extraneous consideration...”**

37. The 2nd Respondent aver that the Petitioner did not frame his case with “**reasonable precision**” in accordance with the established principle that a party who seeks redress for infringement of his/her fundamental rights is bound to demonstrate to the court in clearest way possible the manner in which the rights have been violated as was held in *Anaritta Njeru vs. Republic (1976 – 1980) KLR 1272*.

38. The 2nd Respondent contend that the Petition has merely quoted omnibus provisions of the Constitution which are alleged to have been contravened without stating which specific provisions have been contravened and how they have been contravened. The 2nd Respondent further states the Petition is vexatious and deserves rejection.

39. I have very carefully perused the Petition herein. The Petition has indeed quoted various constitutional provisions under paragraph 27 tilted constitutional and statutory provisions violated, and proceeded under paragraph 28 to 36 of the Petition to set out the provisions of the Constitution which are alleged to have been violated and stated specifically how the same have been contravened. From the reading of the Petition, I am satisfied that the Petitioner has framed his case with reasonable precision and has demonstrated to this Court in the clearest way possible the manner in which the rights have been violated. I therefore do not find that the Petition is vexatious. The same cannot therefore be dismissed on the ground raised by the 2nd Respondent herein.

40. I find that the Respondents in carrying out their duties, they have an obligation to be transparent, accountable and exercise other principles of good governance. **Article 47 of the Constitution** on Fair Administrative Action clearly binds the Respondents as it provides that:-

“47. Fair administrative action –

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

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

41. I find that **Article 47 of the Constitution** is breached when the Respondents’ actions are contrary to the law, unreasonable, procedurally unfair and based on extraneous matters. The Respondents in the instant case acted without due regard to the Driving Schools rights to be heard and violated the rules of natural justice. In the case of *Republic v. Kenya Power & lighting Co. Ltd & another (2013) eKLR* the Court held:-

“I think the words of Lord Greene, M.R. at page 229 in the *Wednesbury Corporation case (supra)* will make good closing remarks in this case. He observed that:-

“It is true the discretion must be exercised reasonably. Now what does that mean” lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretion often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from this consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority... In another sense it is taking into consideration extraneous matter. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.” (Emphasis added)

42. Further the Court in the case of *Republic v. National Police Service Commission ex parte Daniel Chacha (2016) eKLR* the Court defined the scope of the rights under **Article 47 of the Constitution** as follows:

“In *Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR, Civil Appeal 52 of 2014* in which the Court of Appeal held that:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative action of public officers, state organs and other administrative bodies are not subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

The judge went further ahead to hold:

“...In the South African Case of *President of the Republic of South Africa and others vs. South African Rugby Football Union and others (CCT 16/98) 2000 (1) SA 1*, it was held:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of

Section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administrative affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...

The judges concluded:

“In order to determine the degree of procedural fairness owed in a given case, the court set out five factors to be considered:

- (1) The nature of the decision being made and the process followed in making it;**
- (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates;**
- (3) The importance of the decision to the affected person**
- (4) The presence of any legitimate expectations; and**
- (5) The choice of procedure made by the decision-maker.”**

43. The court of Appeal when dealing with the scope of rights under **Article 47 of the Constitution** in the case of **Dr. Christopher Nderathi Murungaru v. AG and another Civil Application No. Nai 41 of 2006 (24/2006)** ruled that:

“...the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public. The only institution charged with the duty to interpret the provisions of the Constitution and to enforce those provisions is the High Court and where it is permissible, with an appeal to the Court of Appeal. We have said before and we will repeat it. The Kenyan Nation has chosen the path of democracy; our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times messy system. A dictatorship, on the other hand, might be quite efficient and less messy. In dictatorship, we could simply round up all these persons we suspect to be involved in corruption and economic crimes and simply lock them up without much ado. That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implied due process. The courts must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the court’s decision.”
(Emphasis added)

44. In the instant Petition, I find although the Respondents gave notice of its proposed administrative actions and although the schools were given time to comply with the notice, this does not in itself mean that the schools were given an opportunity to be heard and make representation in that regard as provided for under **Rule 14(2) of the Traffic (Driving Schools) Rules, 1971**. The Respondents notice was not sufficient evidence of the reasons as to why it carried out on administrative action contrary to **Article 47 of the Constitution**.

45. I find from the evidence on record the administrative action taken by the Respondents was not expeditious, efficient, lawful, reasonable and procedurally fair. The Respondents’ administrative action violated the Constitution and the statutes.

46. I therefore find the closure of the 322 schools amounted to a violation of **Article 47 of the Constitution of Kenya, 2010**.

C) WHETHER THE PETITIONER’S LEGITIMATE EXPECTATION WAS VIOLATED?

47. The Petitioner contend that his legitimate expectation as a Kenyan was violated by the Respondents, a public organ, expected to conduct its functions and/or mandate within the law and in particular uphold the principles and values outlined in **Article 10 of the Constitution**. **Article 10(1) (2) of the Constitution** provides:-

10. National values and principles of governance –

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

48. The Petitioner's expectation that the Respondents would conduct their affairs in complete compliance with the law, was violated when the 1st Respondent decided to revalidate driving schools under the **Traffic (Driving Schools) Rules, 2018** that were invalidated on 19th November 2018 instead of **Traffic (Driving Schools) Rules, 1971**. The legitimate expectation by the Petitioner that the 2nd Respondent would advise and/or oversee the functions of the NTSA was violated when despite being involved in the revalidation process as clearly admitted by the 1st Respondent, it decided to misadvise and/or chose not to intervene and ensure that it performed its mandate of overseeing the functions of the 1st Respondent.

49. I find that the Petitioner herein has established, that indeed he had a reasonable legitimate expectation, which is lawful and anchored within the provisions of the law and for the Respondents to purport to deny such position and/or to withdraw such expectation they needed to comply with the guidelines set out in the case of **R. Vs. Devon County Council ex parte P. Baker (1955) 1 ALL ER** in which it was held:-

“...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decisions.”

50. Further in the case of **Republic vs. Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO [2019] eKLR** it was stated:-

“17. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims the court follows a two step approach. Firstly it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, that is enforce the legitimate expectation. The first step in the analysis has both an objective and a subjective dimension. It is firstly asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. Once a reasonable expectation exists the administrator is required to act in accordance with that expectation, except if there are public interest considerations which outweighs the individual's expectation.”

51. Similarly in the case of **Republic v Non-Governmental Organisations Co-ordinations Board Ex Parte Okiya Omtatah Okoiti & 2 others [2017] eKLR** it was stated that:-

35. Whereas, the decision may well be justified on merits, once it is found to violate the rules of natural justice it cannot be permitted to stand. This was the position in Onyango Oloo vs. Attorney General [1986-1989] EA 456 where the Court of Appeal expressed itself as follows:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...” (Emphasis added)

52. In the instant Petition it has been demonstrated that the decision reached by the Respondents was in breach of the rules of natural justice, in that the Driving Schools were not given reasonable and full opportunity to make representations concerning the proposed exercise, nor were they heard and their representations considered as provided for under **Rule 14(2) of the Traffic (Driving Schools) Rules, 1971**.

53. I further find that not only did the Petitioner herein have a legitimate expectation that the respondents would follow the procedure provided under the relevant rules for revalidation of schools but there also existed a legitimate expectation that the 1st Respondent would not act contrary to the decree in **Petition No. 97 of 2013 Okiya Omtatah Okoiti vs. The National Transport and Safety Authority & the Ministry of Transport, Infrastructure, Housing & Urban Development (2018) eKLR**.

D) WHETHER THE 2ND RESPONDENT IS PROPERLY SUED IN THIS MATTER?

54. The 2nd Respondent contend that it is not the proper line Ministry to be sued in this matter, since the functions of registration and licensing of motor vehicles, motor vehicles inspection and certification, national transport safely, national road safety management and regulations of public service vehicles was transferred to the state Department of Interior vide **Execution Order No. 2 of 2019; Management and Co-ordination of National Transport and Safety**.

55. The 2nd Respondent therefore contend that the subject matter do not fall in its oversight mandate because vide the Executive Order, the 1st Respondent, National Transport and Safety Authority is under the Ministry of Interior and Co-ordination of National Government.

56. The Petitioner to the contrary, urge that it was the mandate of the 2nd Respondent to oversee the functions of the 1st Respondent and

restraining it from over stepping its mandate. It avers that the assertion by the 2nd Respondent that it is not the proper line Ministry to sue in this matter is misconceived.

57. It is the Petitioner's position that the **Executive Order No. 2 of 2019** relied upon by the 2nd Respondent is indeed in conflict with the Traffic Rules and the Court herein ruled including in the case of **Kenya Country Bus owners' Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 others v. Cabinet Secretary for Transport & Infrastructure & 5 others [2014] eKLR at page 114** where the court stated that:-

“according to principles of construction if the provisions of a later legislation are so inconsistent with or repugnant to those of an earlier legislation that the two cannot stand together, with earlier legislation stands.”

58. I find that the impugned **Executive Order No. 2 of 2019** ranks lower and subordinate to the principle Act, that is the **Traffic Act** and therefore it cannot be the basis to enable the 2nd Respondent to sneak out from its mandate in regard to transport and infrastructure. **Section 24(2) of the Statutory instruments Act** clearly provides that:-

“A statutory instrument shall not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument shall be void to the extent of the inconsistency. The same position is supported by Section 31(b) of the Interpretation and General Provisions Act, Cap 2 which provides that where an Act confers power on an authority to make subsidiary legislation, no subsidiary legislation shall be inconsistent with the provisions of an Act.”

59. From the above I find that the 2nd Respondent is the responsible Ministry in-charge of transport and that the 1st Respondent reports to it. The 1st Respondent is established under **Section 3 of the National Transport and Safety Authority Act No. 33 of 2012** with the statutory functions inter alia to:-

“Advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety, implement policies relating to road transport and safety. In addition, the Authority has the mandate to plan, manage and regulate the road transport system, ensure the provision of safe, reliable and efficient road transport services and to administer the Traffic Act Chapter 403 of the Laws of Kenya.”

60. The Cabinet Secretary referred to in the above in the **NTSA Act** is Cabinet Secretary responsible for matters relating to transport. This therefore goes without saying that the 2nd Respondent is properly sued as having the mandate of overseeing the revalidation exercise conducted under the **Traffic Rules**. It is noted that the 1st Respondent in its submissions dated 20th September 2018, it admits that the revalidation exercise was conducted by an **Interagency Taskforce** comprising the **Ministry of Transport, Infrastructure, and Housing and Urban Development** among others. I find that to that end, it cannot be stated otherwise; other than that the 2nd Respondent was under a duty but failed to advise the 1st Respondent on the appropriate laws and procedure to be upheld. The Respondents action were unreasonable and incomplete disregard of the relevant law.

61. The Petitioner herein seek various reliefs in this Petition, including compelling the 1st Respondent to compensate all the affected driving schools for business they have lost. In the Petition herein the list of the said 332 Driving Schools is not provided nor are they enjoined as Interested Parties or joint Petitioners.

62. The Petitioner herein has not pleaded the particulars of damages or loss that has been suffered or is likely to be suffered by the driving schools to warrant compensation. There is no evidence of any damage suffered as a result of the alleged violation that was tendered by the Petitioner. The said driving schools are not parties to this Petition and none of them has tendered any evidence in relation to claim for damages. It is trite law that particulars for claim for damages ought to be pleaded and the same be proved by way of material evidence. A party who seeks damages has the burden of proof.

63. The Driving Schools have not given any indication that they suffered any damages nor have they sought to be enjoined in this Petition as Interested Parties. I find the claim for damages on behalf of the driving schools by the Petitioner far-fetched and not proved. This Court cannot purport to determine compensation on behalf of driving schools, who are not parties to the Petition and who can if they have any claim, file appropriate suits for determination. I therefore find that the claim for damages having not been pleaded and proved cannot be granted.

64. On the other reliefs in this Petition, I am satisfied that the Petitioner has made his case and is entitled to other prayers sought in the Petition. I find that pursuant to **Article 2(4) of the Constitution** and **Article 165(3) (d)(II) of the Constitution** this Court has jurisdiction to quash any acts or omissions which are in violation to the Constitution.

65. On the issue of costs I note that this Petition is between a private citizen and the state. He urges the Court not to award costs to the state should the Petition not be successful but seeks costs if the Petition succeeds. The Petitioner relies on the ratio decidendi in the South Africa case of **Biowatch case cited as CCT 80/2008 or 2009 ZA CC 14** at paragraph 21 thereof (**Justice Saccs**) held:

[21] In Affordable Medicines this Court held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs. In that matter a body representing medical practitioners challenged certain aspects of a licensing scheme introduced by the government to control the dispensing of medicines. Ngcobo J said the following:

“The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that

must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and the circumstances of the case. In Motsepe v Commissioner for Inland Revenue this Court articulated the rule as follows:

‘[O]ne should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly, where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or “chilling” effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access. This can neither be in the interest of the administration of justice nor fair to those who are forced to oppose such attacks.’”

66. Having come to the conclusion that I have, I am satisfied that the Petition herein is meritorious. I proceed to allow the Petition as follows:-

- a) A declaration be and is **HEREBY** issued that the revocation of Driving School Licences is unconstitutional and therefore, invalid, null and void.
- b) An order quashing the revalidation of driving school Licenses be and is **HEREBY** issued.
- c) An Order compelling the 1st Respondent to compensate all the affected driving schools for business they have lost is not proved and is accordingly denied.
- d) The Petitioner is awarded costs of the Petition to be borne by the 1st Respondent.

Dated, Signed and Delivered at Nairobi on this 29th day of October, 2020.

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J. A. MAKAU

JUDGE