



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J

CRIMINAL REVISION NO. E002 OF 2020

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (ODPP).....APPLICANT

-VERSUS-

JUMA CHEMOMENYU BATULI.....RESPONDENT

(Being an application for revision and stay of the decision of Hon. M. Mutua (RM) made on 16th November, 2020)

JUDGMENT

1. The Defendant in the lower court (Respondent herein) was driving vehicle KCG 571T on 9th November, 2020 which was found to be overloaded by 1640 kilograms at the Gilgil Weigh bridge. He was arrested and bonded and the vehicle detained. He was required to pay an overloading fee of Kshs 122,366/= to (Kenya National Highway Authority) KENHA. The lower court on 16th November, 2020 ordered that the defendant be charged and prosecuted under the Traffic Act within 24 hours failing which the vehicle would be released.
2. The DPP rushed to court on 17th November, 2020 under certificate of urgency seeking a stay of execution of the court's orders of 16th November, 2020; and also sought review and setting aside of the lower court's said order.
3. In the application the DPP asserts that the law governing the incident is the **East Africa Community Vehicle Load Control Act** (EACVeLCA) and it does not involve prosecution. This court granted temporary stay of the said orders on the same day. The DPP was also directed to and did serve the application on the Respondent. Upon appearance in court on 18th November, 2020 the parties were directed to dispose of the application by way of written submissions, which they did.
4. The basis of the Applicant's position and action is that under the **East Africa Community Vehicle Load Control Act** (EACVeLCA), which they argue is applicable in Kenya by virtue of being a ratified statute in Kenya roads are categorized to include Regional Trunk Road Network, and vehicle weights, for vehicles on those roads are measurable under the **East Africa Community Vehicle Load Control Act** (EACVeLCA); that if a vehicle is weighed and found to be overloaded, a fee is chargeable as against the owner and driver of the subject vehicle; that the said vehicle may be detained under the EACVeLCA until payment of the fee surcharge; and that a dispute on the overload should be resolved under the provision of the EACVeLCA.
5. The Respondent in his Replying Affidavit filed on 18th November, 2020 takes the position that: he was lawfully transporting forest produce from Bungoma to Nairobi under a movement permit; that on his vehicle being weighed it was alleged to be overloaded by 1,640 kilograms; that he denied the allegation; that he disputed the fee of Kshs 122,366 slapped on him for the overload as he had not been arraigned in court; that he was issued with a Notice to attend Court which was later withdrawn; that the EACVeLCA can only apply after gazettement; that under **Section 17** of the **East Africa Community Vehicle Load Control Act** the weighing authority is not mandated to detain a vehicle where overloading is not disputed; that the detention of his lorry amounts to a violation of his constitutional right to property and that it should be unconditionally released.

Parties' Submissions

6. The applicant submitted that the EACVeLCA is a special law in this regard and is the applicable statute pursuant to the EAC treaty; That the date of assent of the EACVeLCA was 1st December 2015; that the said Act has provision for control of vehicle loads, harmonized enforcement and institutional arrangements for the Regional Truck Road Network within the East Africa Community which, pursuant to Section 25, take precedence over parties states' law in that regard; that Regional Truck Road Network excludes the application of the Traffic Act as defined under the First Scheduled to EACVeLCA which defines the road passing Gilgil where the respondent's vehicle was weighed at Gilgil Weighbridge.
7. Further, the applicant argues that the EACVeLCA decriminalizes overloading and prosecution in court and instead requires offloading or,

re-distribution of cargo and payment of an overload fee; that the respondent's vehicle was weighed and found to be overloaded; that respondent properly requested re-weighing and the overload was confirmed; that the vehicle was detained; that these procedures are contained in **Section 2, 6 (9), 8(1) and 17 (1) and (2)** of the **East Africa Community Vehicle Load Control Act**; and that **Section 17 (3) to (9)** provide for situations where the fact of overloading is not disputed, or is disputed and the steps to be taken thereafter. Thus the EACVeLCA and the Regulations under it should be applied fastidiously.

8. The Applicant finally argues that it is only after exhaustion of the procedures under the EACVeLCA that the court's power can be invoked. To elaborate on the doctrine of exhaustion the applicant cited the cases of **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR**; **Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others [2018] eKLR** and **Republic v National Environment Management Authority [2011] eKLR**.

9. The Respondent, opposing the motion for review of the lower court's decision, argued: that the EACVeLCA came into force on 18th October, 2016; that the EACVeLCA [Enforcement Measures) Regulations 2018 at **Regulation 4 (i)** empowers the Council to set locations of weighbridges following a gazette notice; that no gazette notice was issued setting up Gilgil Weighbridge; that fees payable at the weighbridge should be certified by an authorized officer defined in **Section 2** of the **East Africa Community Vehicle Load Control Act** yet no authorized officers are gazetted under **Section 14** of the **East Africa Community Vehicle Load Control Act**.

10. Accordingly, the Respondent asserts that the Gilgil Weighbridge is not lawfully authorized to execute the mandate of the **East Africa Community Vehicle Load Control Act** for the lack of compliance.

Issues

11. The issues for determination in my view, are only two, namely:

- a) Whether the EACVeLCA act is fully operational in accordance with the law.
- b) Whether the procedures for enforcement under the EACVeLCA were duly complied with.

Whether the EACVeLCA is fully operational

12. Although the Respondent initially questioned whether the EACVeLCA was applicable in Kenya, he later appears to have revised his position and adopted a perspective that recognizes parts of that Act as applicable if operationalised. Thus, it is not in dispute that the EACVeLCA is the proper statute governing enforcement of vehicle road load measures in respect of Regional Trunk Road Network. The Act at **Section 3** clearly identifies the Regional Trunk Road Networks to which it applies as those in the **First Schedule** to the Act.

13. The First Schedule of EACVeLCA sets out the Regional Trunk Road Networks in Kenya to include those in the Northern Corridor and its links, inter alia as follows:

“Athi River - Nairobi - Uplands - Kimende - Naivasha - Nakuru - Timboroa - Eldoret - Webuye - Bungoma - Malaba - 467 kilometres.”

The Second Schedule of the Act sets the permissible maximum axle load limits; and the Third Schedule sets out the Gross Vehicle Weight limits.

14. The Act was assented to by all the East Africa Community Heads of State on different dates between 1st August, 2013 and 1st December 2015. A signed version is easily accessible on the East Africa Legislative Assembly website and specifically eala.org/uploads/scans_20160921. Having been assented to the Act is fully operational pursuant to the East Africa Community Treaty ratified by Kenya. Further, **Article 2(6)** of the **Constitution** of Kenya provides that:

“Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

There is therefore no doubt that the EACVeLCA constitutes part of Kenya Law.

15. In addition to the Act constituting an integral part of Kenyan Law by ratification, **Section 25** of the **EACVeLCA** provides that it has precedence over the national laws of the Partner States. **Section 25** provides that:

“This Act shall take precedence over the Partner States' laws with respect to any matter to which its provisions relate.”
(Emphasis added)

So that, effectively, the Traffic Act of Kenya has lesser precedence than the EACVeLCA in respect of matters for which EACVeLCA makes provision. The Act came into force on 1st October 2016 pursuant to **Legal Notice No. EAC/94/2016** of the **East Africa Community Gazette**. Various provisions of the Act have been integrated into the **Traffic Act, Cap 403**, vide **Act No. 18 of 2018 (State Law (Miscellaneous Amendments) Act)**.

16. That said, the Respondent raised pertinent issues as to whether that Act has been fully operationalized in terms of effectuation of its various provisions. Specifically, the niggling questions raised by the Respondent are:

1) Whether the Gilgil Weighbridge is duly gazetted under the Act.

2) Whether Authorised Officers as defined under Section 2 are duly approved under **Section 14** of the Act.

17. The answers to the above two questions will enable the court to determine Issue No. 2 in the issues for determination herein.

Gilgil Weighbridge

18. The Respondent submits, in essence, that unless the Gilgil Weighbridge is duly gazetted in accordance with the provisions of **Regulation 4 (1)**, it is not a duly authorized weighbridge. That provision emanates from and is underpinned by **Section 12 (1)** of the EACVeLCA which provides as follows:

“12 (1) The Council shall determine the regional network of weighbridges and the locations of weighbridges and weighing stations along the Regional Trunk Road Network.

(2) Each national roads authority shall establish the weighbridges determined by the Council and shall-

(a) cause weighing stations or other devices for measurement of weights to be installed along the Regional Trunk Road Network within the Partner States;

(b) determine weighing devices that may be fixed or portable; and

(c) provide guidelines for proper use of weighing devices by transporters at a weighing station or weighbridge.”

19. The Council is defined in **Section 2** as the Council of Ministers of the East Africa Community. Under **Section 23**, the Act provides for the making of regulations in the following terms:

“(1) The Council may make regulations for giving effect to the provisions of this Act.

(2) Without prejudice to the generality of the provisions of sub-section (1), the Council may make regulations providing for-

(a) overloading fees and other penalties to be imposed under this Act and the methods of payment of the fees or penalties;

(b) vehicle dimensions, axles load configurations and vehicle combinations

(c) regional weigh station and weighbridge operations and procedures.”

20. Pursuant to the power to make regulations, the **East African Community Vehicle Load Control (Enforcement Measures) Regulations 2018**, exhibited by the respondent, were made. **Regulation 4 (1)**, referred to by the Respondent, provides as follows:

“4(1) The Council shall by notice in the Gazette and pursuant to Section 12 (1) of the Act set the location of weighbridges for the regional network.”

21. No Gazette Notice has been availed to me by any of the parties establishing the location of weighbridges and in particular, the Gilgil Weighbridge. However, **Regulation 21** of the Regulations is relevant in this respect as it provides as follows for weighbridges along the Regional Trunk Road Network:

“21(1) All weighbridges in operation along the Regional Trunk Road Network at the coming into force of the Regulations shall be deemed to be approved under these Regulations.” (Emphasis added)

22. It is not disputed that the Gilgil Weighbridge is and has been, in existence for a long time. Accordingly, that weighbridge was given imprimatur as an approved or established weighbridge under the EACVeLCA pursuant to Regulation 21 (1). I so find and hold.

23. The next issue is whether there are any authorized officers properly appointed under the EACVeLCA for purposes of the enforcement of its provisions.

Authorised Officers

24. As urged by the Respondent, **Section 14 (1)** of the Act and **Regulation 3 (1)** of the EACVeLCA (**Enforcement Measures Regulations 2018**) provide that “*Authorised Officers*” must be gazetted for the purposes of the Act. **Section 14 (1)** provides:

“(1) The Partner States shall by notice in the national gazette appoint authorized officers for the purposes of this Act and notify the Secretary General.”

Regulation 3 (1) of the Regulation then provides:

“(1) Pursuant to Section 14 (1) of the Act, the Minister shall by notice in the national gazette, in the form specified in the First Schedule, appoint an authorised officer for the purposes of enforcing vehicle load control measures.”

25. The respondent submitted that in absence of the gazette of authorised officers, the applicant could not determine and certify the fees payable at or via the weighbridge. The First Schedule to the Regulations provides a standard “*Form of Notice of Appointment of Authorised Officer*”.

26. However, as with the case of the weighbridge, no gazette notice was availed covering the appointment of “*authorized officer*” or “*authorized officers*” as defined under the Act. Nevertheless, the transitional provisions in the Regulations made by the Council go further to provide for transitional provisions as follows at **Regulations 21 (2) & (3)**:

“(2) The Partner States shall gazette the appointed authorized officers within six (6) months of the coming into force of these Regulations and notify the Secretary General.

(3) Officers in the Partner States carrying out functions of authorized officers under the Act shall continue in office until the operationalization of sub-regulation (2)” (Emphasis added)

The overall effect is that, existing national authorized officers continue in office as such under EACVeLCA until operationalization of **Regulation 21 (2)**.

27. I have already adverted to the fact that after the commencement of the EACVeLCA, Kenyan Law and in particular the Traffic Act, was amended pursuant to the **Statute Law (Miscellaneous Amendments) Act No. 18 of 2018**. Specifically, **Section 3** of the **Traffic Act** was amended by **Act No. 15 of 2018** by adding **sub-sections (3) and (4)** thereto. The new **Section 3 (4)** of the **Traffic Act** provides:

“The Authority may designate any of its officers to be authorized officers for purposes of this Act.” (Emphasis added)

28. What is the ‘Authority’ referred to in **Section 3 (4)** of the **Traffic Act**? “*Authority*” under **Section 2** of the **Traffic Act** means the National Transport and Safety Authority (NTSA) established under the National Transport and Safety Authority Act No. 33 of 2012. Further, under **Section 4 (1) (e)** of the **National Transport and Safety Authority Act**, the functions of the Authority are stated to include the following:

“4 (1) The functions of the Authority shall be to-

(a)

(e) Administer the Act of Parliament set out in the First Schedule and any other written law.”

The First Schedule aforesaid contains the Traffic Act, Cap 403.

29. Significantly, therefore, the NTSA is empowered to administer the Traffic Act “*and any other written law.*” I would read this to include any other written law in relation to transport, safety and traffic matters.

30. I have perused both the **National Transport and Safety Authority Act** and **Traffic Act**. There is no requirement under the National Transport and Safety Authority or under the Traffic Act to gazette an “*authorised officer*” or “*authorised officers*” officers. All that is required during the transitional period is for the Authority, viz the National Transport Safety Authority, to “designate” any of its officers to be authorized officers for purposes of the Traffic Act which it statutorily administers.

31. Where does this leave matters in relation to the enforcement provisions of the EACVeLCA?

32. The applicant, through the Supporting Affidavit of Maurice Ademba deponed on 17th November, 2020, asserts that the Kenya National Highways Authority (KENHA), a state corporation established by **Section 3** of the **Kenya Roads Act**, is responsible for the management, development, rehabilitation and maintenance of National roads. That **Section 4 (2)** of the **Kenya Roads Act** obligates the Kenya National Highway Authority (KENHA) to ensure adherence to the rules and guidelines on axle load control, and is so doing it applies the Traffic Act as well as EACVeLCA.

33. **Sections 4(2) and 22 (1)** of the **Kenya Roads Act** are of relevance to the subject matter of vehicle load control measures. **Section 4 (2) (d)** of the **Kenya Roads Act** provides:-

“4(2) For purposes of discharging its responsibility under sub-section 4 (1), the Highway Authority shall have the following functions and duties in:

(a)

(d) ensuring adherence to the rules and guidelines on axle load control prescribed under the Traffic Act and under regulations

under this Act.” (Emphasis added)

Section 22(1) of the Kenya Roads Act provides:-

“(1) An Authority shall have power—

(a) to maintain, operate, improve and manage the roads under its jurisdiction;

(b) to construct new roads;

(c) to measure and assess the weights, dimensions and capacities of vehicles using any road and provide measures to ensure compliance with rules relating to axle load control, other provisions of the Traffic Act (Cap.403) and any regulations under this Act.” (Emphasis added)

34. Finally, under Section 56 of the Traffic Act the provision on limitations of loads of the EACVeLCA are brought under the ambit of the Traffic Act. The all-important Section 56 of the Traffic Act provides as follows:

“56 (1) No vehicle shall be used on a road with a load greater than the load specified by the manufacture of the chassis of the vehicle or than the load capacity determined by an inspector under this Act or as provided for under the East African Community Vehicle Load Control Act, 2013.” (Emphasis added)

35. Clearly, therefore, the EACVeLCA and national statutes provide for local players to be statutorily empowered to manage issues with regard to Regional Trunk Road Network under the EACVeLCA. These are both the National Transport and Safety Authority under the National Transport Safety Authority Act, and the Kenya National Highway Authority under the Kenya Roads Act. Actions taken by officers authorized or designated under any of these authorities would, in my view, be lawful actions under or for purposes of the EACVeLCA.

36. Indeed, this view is buttressed by the provisions of the **East African Community Vehicle Load Control (Enforcement Measures) Regulations** which provide for the extensive involvement and engagement of the “national roads authority” (NRA) by way of delegation in the minutiae of administration of the vehicle load control measures under the Act. See for example in **Regulations**:

- 3 (3) – power of NRA to outsource vehicle load control operators;
- 4 (3) – power to publish regional networks of weighbridges in NRA websites;
- 4(5) – power of NRA to set up mobile weighbridge and surveillance technology along Regional Trunk Road Network;
- 5(3) – power of NRA to maintain register of approved weighbridges;
- 6(1) – power of NRA to ensure weighbridges are calibrated every three months;
- 8(1) – power of NRA to audit weighbridge and mobile weighbridge;
- 10(4) – power of NRA to admit a regional weighbridge certificate;
- 12(3) – obligates NRA to provide convenient facilities and means of payment of overloading fees; etc.

37. A “national roads authority” is defined under **Regulation 2** of the Regulations and also under **Section 2** of the Act as follows:

“ ‘national roads authority’ means for a Partner State, the authority or agency responsible for the trunk roads of the Partner State forming part of the Regional Trunk Road Network.”

In other words, the Partner States are given leeway under EACVeLCA to establish or identify agencies that manage Regional Trunk Road Networks.

Conclusions

38. Based on the foregoing discussion, I find that the actions of the NTSA or KENHA in relation to the Gilgil Weighbridge and vehicle axle load control measures taken in respect of the respondent’s vehicle have lawful underpinning in the EACVeLCA and the Regulations thereunder.

39. There is however one unauthorized action that was taken by the national roads authority in this case. This was the issuance of a Notice to Attend Court on 12th November, 2020, exhibited as “JMB 4” in the Replying Affidavit of the respondent. The respondent averred, however, that the Notice was withdrawn and he was instead ordered to pay the overloading fees. The Notice was improper as the EACVeLCA does not provide for criminal actions for overloading but instead provides for a system of payment of fees. Nothing arises from the issuance of the said Notice as it was, correctly in my view, promptly withdrawn.

40. In summary, some relevant key findings flowing from this matter are as follows:

- a. The **East Africa Community Vehicle Load Control Act (EACVeLCA)** is an East African Community statute that was duly ratified and made an integral part of Kenyan law pursuant to **Article 2(6)** of the **Constitution**;
- b. The EACVeLCA takes precedence over other Kenyan laws or statutes in respect of matters to which its provisions relate;
- c. The EACVeLCA allows for the administration and enforcement of its provisions through national roads authorities or other institution designated by Partner States and officers authorized thereunder;
- d. The First Second and Third Schedules to the EACVeLCA establish the Regional Trunk Road Networks; set out the permissible maximum axle load limits; and the gross vehicle weight limits;
- e. All weighbridges in operation along the Regional Trunk Road Network at the time of coming into force of the **East African Community Vehicle Load Control (Enforcement Measures) Regulations, 2018** were deemed automatically to be approved weighbridges under the Regulations;
- f. Breaches of the EACVeLCA by way of overloading, identified and assessed at an approved weighbridge on a Regional Trunk Road Network, are remediable by way of a fee surcharge determined under the provisions of the Act; and court action may only be resorted to where expert determination of an assessment has been disputed;
- g. It is permissible under the EACVeLCA for a vehicle to be detained pending payment of an overloading fee.

Disposition

41. In this case, the applicant's application for review sought stay of execution of the orders of Hon. M Mutua made on 16th November, 2020, and the setting aside of the said orders.

42. In light of my findings herein, I hereby set aside the said orders of Hon. M Mutua, and substitute therefor an order as follows:

- a. that the respondent shall comply with the applicable provisions of the EACVeLCA; and
- b. that the respondent shall pay the requisite overloading fees payable to the national roads authority or in accordance with **Section 6(2)** of the **EACVeLCA**; and
- c. in the event that the assessment of the overloading fees is disputed, the assessment shall be subjected to independent expert determination, or if further disputed, to the national court for determination pursuant to **Section 6 (7) & (8)** of the **EACVeLCA**.

Administrative directions

43. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

44. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

45. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 17th Day of December, 2020.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the Applicant
2. Mr. Mburu for the Respondent
3. Court Assistant- Quinter Ogutu