



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
PETITION NO 13 OF 2015.
IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE PRINCIPLES OF NATURAL JUSTICE, OPENNESS & FAIRNESS HEARING

AND

IN THE MATTER OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22,23,40,47,48,50,159,165,258 & 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE CONTRAVENTION AND THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40,47,48,50(2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF REGULATION NUMBER 10 AND 14(4) OF THE KENYA ROADS(KENYA NATIONAL HIGHWAYS AUTHORITY) REGULATIONS,2013

AND

IN THE MATTER OF UNLAWFUL DETENTION OF MOTOR VEHICLE REGISTRATION NUMBER KBW 133T

DISARANIO LIMITED.....PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

The Petitioner is a company incorporated under the Companies Act Cap 486 of the Laws of Kenya. The 1st Respondent is a statutory body established under section 3 of the Kenya Roads Act (Cap 480 of the Laws of Kenya) and which is responsible for the management, development, rehabilitation and maintenance of national roads. The 2nd Respondent is the Kenya Government's principal legal adviser.

On or about 27th February 2015, the Petitioner's motor vehicle registration number KBW 133T was impounded by the 1st Respondent's Mobile Weigh Bridge crew at the entrance of Savanna Cement Ltd off the Athi River-Kitengela Road, while transporting clinker. The 1st Respondent informed the Petitioner that it had been charged with the offence of overloading by exceeding the allowed gross weight of the vehicle, whereupon the Petitioner filed this Petition and argues as follows.

The Petitioner's Case

The Petitioner's case was initially detailed out in its Petition, and in a supporting affidavit sworn on 8th April 2015 by Kiarie Kariuki, its Director, and in submissions dated 18th September 2015 filed in Court by Robsons Harris and Company, the Petitioner's Advocates,. The Court reserved the Petition for judgment on 15th February 2016, and after perusing the said Petition, supporting affidavit and submissions, gave directions on 15th February 2016 that the Petitioner file a Further Affidavit attaching evidence of its ownership of the subject motor vehicle. The Petitioner subsequently filed a supplementary affidavit sworn on 26th June 2016 and a further affidavit sworn on 26th August 2016, both by Gad Ouma, the Petitioner's Advocate. The Petitioner's Advocates also filed supplementary submissions dated 26th August 2016.

The Petitioner claims that they are the beneficial owners and legal operator of motor vehicle registration number KBW 133T, having leased it from the registered owner, one Allan Owuor. They attached a copy of the said motor vehicle registration particulars, and also referred to a lease agreement dated 14th October 2014 entered between Allan Owuor Owiti and the Petitioner, which was attached to the Petition. The Petitioner avers that the Respondents have unlawfully detained the said motor vehicle when the vehicle was off the road and not within the lawful jurisdiction of the Respondents, and by failing to grant the Petitioner a hearing contrary to the rules of natural justice.

Further, that the Respondents have conditioned the release of the vehicle upon payment of a 'fee' of Kshs. 150,000/=, which amount was levied without affording the Petitioner a hearing, without due process and contrary to the doctrine of separation of powers. Furthermore, that the Respondents also detained the driving licence belonging to Joseph Rotich, an employee of the Petitioner.

The Petitioner contended that the purported fee levied pursuant to the charge of overloading is a fine imposed as a penalty for contravening regulation 10 of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013, and therefore criminal in nature. The Petitioner also contested the jurisdiction of the 1st Respondent, and deponed that it was their legitimate expectation that the Respondents would afford them a fair hearing as envisioned under Article 50 of the Constitution, and would also follow the due process. It was contended that the impounding and detention of the driving licence lacked basis and was improper and unlawful.

The Petitioner prays for the following final orders in the Petition:

1. That the Respondents be restrained from impounding and detaining motor vehicle registration number KBW 133T without preferring criminal charges as contemplated under Article 50 as read together with Articles 47 and 48 of the Constitution
2. That the Court orders the Respondents to release and restitute the Petitioner's property motor vehicle registration number KBW 133T which was unlawfully impounded on 27th February 2015 and is being detained by the Respondents.

3. That the court orders the release and restitution of the driving licence belonging to the Petitioner's employee which was unlawfully impounded and detained on 27th February 2015.

4. A declaration that the action by the Respondents of levying a fee for contravention of rule 10 of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 without affording the Petitioner due process violated the rights of the Petitioner under articles 40,47 and 50 of the Constitution of Kenya.

5. A declaration that Regulations 10 and 14(4) of the Kenya Roads Kenya National Highways Authority) Regulations, 2013 contravenes Articles 40, 47 and 50 of the Constitution of Kenya.

6. A declaration that the enabling provisions of the law empowering the imposition of a fee for the offence of overloading or exceeding the permissible weight limits are unconstitutional as such 'fee' is unknown and improper in law.

The relief sought are premised on grounds that, first, the Respondents had subjected the petitioner to a dubious and opaque process which was unlawful, unreasonable and procedurally unfair. Further, that the Respondents had deliberately failed to inform the Petitioner of the amount due from him under the alleged weighbridge ticket. Secondly, that it was constitutionally incumbent upon the Respondents to avail the Petitioner a fair hearing guaranteed under Article 50 of the Constitution. Lastly, that regulations in sections 22(2)(d) and 46 of the Kenya Roads Act offend the doctrine of separation of powers enshrined in the Constitution, since the offence and penalty were criminal in nature, and therefore the proper institution with the constitutional authority to make the determinations on the matter was the Judiciary.

The Respondents' Case

The Respondents case was initially set out in a replying affidavit sworn on 12th August 2015 by Eng. Isaiah Onsongo, the 1st Respondent's axle load control manager and submissions dated 24th August 2015 filed by Ogola Okello & Co Advocates, the 1st Respondent's Advocates. The Respondents were also granted leave to file further pleadings and submissions after the Court directed the Petitioner to adduce evidence of ownership of the subject motor vehicle. The 1st Respondent accordingly filed a supplementary affidavit sworn on 21st September 2016 by Dennis C. Higen, an officer attached to its Axle Load Control section, and the 1st Respondent's Advocates also filed supplementary submissions dated 19th September 2016.

The 1st Respondent avers that the Petitioner is said to be the registered owner of KBW 133T in the lease agreement dated 15th October 2014, however that the motor vehicle search dated 28th June 2016 does not show who was the registered owner of the said motor vehicle on 27th February 2015 when the alleged violation occurred. Therefore, that the ownership of the said motor vehicle is in doubt as the documents filed by the Petitioner are contradictory.

Further, that the Petitioner as a body corporate was not a legal person under the law as is defined in Article 258 of the Constitution, and is not a 'citizen' who can seek enforcement of certain fundamental rights. It was argued that the 1st Respondent's actions were guided by the provisions of section 56 as read with section 106 of the Traffic Act Cap 403 whereby its officer may order for the prohibition of use of a motor vehicle carrying goods exceeding the permitted weights until compliance with the rules relating to weights.

The 1st Respondent affirmed that it had jurisdiction as regards the said motor vehicle, and that it was reweighed on 7/5/2015 where it was found to be carrying excess weight, and the Petitioner had paid Kshs. 306,000/= to secure its release. Documentation was attached in proof of the aforesaid. In addition, that the vehicle was carrying a load greater than the allowed load capacity, and it was on this basis that a prohibition Order was issued and the vehicle detained.

The 1st Respondent further stated that the Petitioner was a road user and could only have got to Savannah Cement using the road network under the management of the Authority. Further, that due process was followed and that fundamental rights were not absolute. It was contended that the grant of the orders sought would be unsuitable to a party who had breached the law.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Petitioner and Respondents. This Court directed that the Petition be heard by way of written submissions which were duly filed by the parties, and parties also made oral submissions during the hearing of the Petition on 31st August 2016. The issues raised in this petition are therefore firstly, whether the Petitioner's rights to property, fair administrative action and a fair hearing have been infringed, and secondly, whether section 22(2)(d) and 46 of the Roads Act and the Kenya Roads (Kenya National Highway Authority) Regulations, 2013 are unconstitutional.

On the violation of the Petitioner's rights to property, fair administrative action and a hearing

The Petitioner submitted that its rights and fundamental freedoms had been violated by the illegal detention of its motor vehicle registration number KBW 133T. Further, that the 1st Respondent had misused and/or misinterpreted its authority by impounding the said motor vehicle from the entrance of Savannah Cement Ltd premises and failing to recognize that the vehicle was off road and not within its lawful jurisdiction.

It was also submitted that the 1st Respondent had breached the Petitioner's right to property as guaranteed by Article 40 of the Constitution by impounding the Petitioner's motor vehicle and goods without granting it a fair hearing, and also thereby violated their right to fair administrative action. According to the Petitioner it is not alleging violations rights of a juristic person under articles 33, 34 and 35(1) as argued by the 1st Respondent, but a violation of the right to property and the fact that it was not accorded a fair hearing.

Further, that its case should therefore be distinguished from that in **Nairobi Law Monthly Company Ltd vs Kenya Electricity Generating Company Ltd & 2 Others, (2013) eKLR** that was relied on by the 1st Respondent, and reliance was placed on the decision in **Famy Care Limited vs Public Procurement Administrative Service Board & Another, Petition No 43 of 2012** for the position that every person, whether a body corporate or natural person has the rights enshrined in the Constitution save for restrictions based on the right to access to information to citizens only.

It was also submitted that the Petitioner had a legitimate expectation in fair operation and performance of the 1st Respondent which were violated. Reliance was placed on the decision in **Diana Kethi Kilonzo & Another V The Independent Electoral & Boundaries Commission (IEBC) & 2 Others. 2014 (eKLR)** in this regard.

As regards the infringement of the Petitioner's right to property, the 1st Respondent submitted that it acted in accordance to the law and that the Petitioner had not established precisely how its right to property had been violated, as it had not shown any direct ownership of the subject motor vehicle. Reference was made to the case in **East African Breweries Ltd V Attorney General & 2 Others (2013) eKLR** in this regard.

It was further argued that the Petitioner being a juristic person was not entitled to seek enforcement of the Bill of Rights. They referred to the decision in **Nairobi Law Monthly Company Ltd V Kenya Electricity Generating Company & 2 Others (2013) eKLR**. They added that the constitution is to be looked at as a whole so as to give it purpose. They urged the court to dismiss the petition.

The Respondent also submitted that the public interest outweighs the Petitioner's rights and that the 1st Respondent manages public roads that are maintained by taxpayers monies, and that anyone who violates

the rules established attracts the actions provided in the Regulations.

This Court is mindful of Article 40 of the Constitution which provides as follows with respect to the right to property:

“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

Property as defined under the Interpretation of General Provisions Act includes money, goods, choses in action, land and every description of property, whether movable or immovable; and also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as herein defined. This definition in my view covers any beneficial interest in property and is not confined to direct ownership as argued by the Respondent.

I am also persuaded in this regard by the opinion in **The Bill of Rights Handbook by Iain Currie & Johan de Waal, Fifth Edition, (2005)** at page 537-538, wherein the authors stated as follows as to what property meant in the context of similar provisions in section 25 of the South African Constitution:

“Property in other words is something recognized as property in existing law. This means that property in section 25 probably has the meaning... property as rights..... If property means property rights and not simply property itself, it seems clear that one must take the clause to

be protecting more than the right to ownership and more than simply ownership of corporeal things. Certainly real rights other than ownership part of which private law understands to be property are likely to be protected by by the clause. Property then encompasses at least the real rights recognized by the law of property such as ownership, mortgage, lease, servitude, mineral rights, liens. It encompasses as least some of the component rights making up what is termed the bundle of rights that constitutes plenary ownership: the right to use a thing, to exclude others from it, to receive income from it and to transfer it to others on mutually agreeable terms.”

Property therefore has a wider meaning than the right of physical ownership, and includes any rights in property whether real, contractual or intellectual, that have an economic value. The only limitation is that such right should have vested in the sense that it has accrued to the claimant in accordance with the applicable laws, and should not be merely an expectation.

The Petitioners in this respect provided details of the registered owner of motor vehicle registration number KBW 133T as at June 2016 issued by the National Transport and Safety Authority, showing the name of the owner to be Allan Owuor, which was annexed as Annexure “WA-1” to the Supplementary affidavit sworn on 27th June 2016 by Wilberforce Akello. They had earlier on annexed to the Petition a lease entered into with the said Allan Owuor as evidence of their beneficial interest in motor vehicle registration number KBW 133T. In addition the Respondent do not dispute that the said motor vehicle was in the Petitioner’s possession and use at the time it was impounded. It is therefore my finding that the Petitioner had a right to property in motor vehicle registration number KBW 133T.

The right to property is accorded to every person either individually or in association with others. Article 260 of the Constitution in this respect defines person as used in the Constitution to include a company, association or other body of persons whether incorporated or unincorporated. This puts to rest the arguments by the Respondent that the right to property is not accorded to juristic persons. In addition it ought to be clarified that the decision in in **Nairobi Law Monthly Company Ltd V Kenya Electricity Generating Company & 2 Others, (2013) eKLR** relied on by the 1st Respondent was on infringement of Article 35 of the Constitution on access to information, which right is accorded to every “citizen” as opposed to every “person” as is provided in Article 40.

As to whether the Petitioner’s right to property has been infringed, the main argument put forward by the Petition is that they have been deprived of their property without a hearing. The imposition of the requirement by the Constitution that no law shall allow for arbitrary deprivation by the State or any person of another person’s property, the Constitution requires fair procedures and substantive due process before a person can be deprived of his or her rights to property. Fair procedures encompass adequate notice and opportunity to be heard, while the substantive due process require that there should be established and sufficient reasons for the deprivation of the property.

In the present Petition, the documentation provided by the Respondent as evidence of procedural and substantive due process having been followed, was a weighbridge ticket which was annexed as Exhibit “A” to the replying affidavit by Engineer Isaiah Onsongo sworn on 12th August 2015, and which showed that on 7th May 2015 motor vehicle registration number KBW 133T was weighed at Athi River Weighbridge and found to have an overload, and was required to offload 640 kilograms.

The Petitioner’s vehicle was thereupon impounded, and the 1st Respondent in this respect averred that they were guided by section 56 as read with section 106 of the Traffic Act which allows an officer to order for prohibition of use of a motor vehicle until compliance with the rules relating to weight, and that it is on the basis of the overloading that the 1st Respondent issued a prohibition order pursuant to which the motor vehicle was detained.

The said prohibition order was not produced as evidence by the 1st Respondent, nor was any evidence of any notification to the Petitioner or proceedings as to the overloading and prohibition provided. According to the 1st Respondent, due process was followed by reweighing the vehicle, and they admitted

that that after being found to carry excess weight, the Petitioner subsequently paid Kshs 306,000/= into a joint interest account to secure the release of the motor-vehicle.

In my view there can be no procedure more arbitrary than one where a person whose property is at risk of being confiscated is not given any opportunity to respond to charges being made against him with respect to the said property, and it is my finding that the procedure employed by the Petitioner amounted to arbitrary deprivation of property. A number of regulations that applied to the Petitioner are illustrative in this regard. Regulation 14(1) of the Kenya Roads (Kenya National Highway Authority) Regulations of 2013 provides that the notification in the weighbridge report form shall form the basis for imposing fees where the vehicle is found to be overloaded in accordance with these Regulations.

Regulation 14(4) further provides that in order to secure payment of fees, an overloaded vehicle shall be detained free of charge by the Authority for the first three consecutive days, and subsequently, a fee of two thousand shillings shall be charged for each extra day until proof of payment is produced. Lastly, Regulation 15(5) provides that if the fee provided in the regulation which is the fee of two thousand United States dollars or its equivalent in Kenya Shillings charged for bypassing or absconding from a weighbridge station, in addition to any overloading fee, is not paid within ninety days from the date of imposition, the Authority shall issue a notice of sale by auction of the vehicle and the cargo.

Therefore a person who is merely notified of having committed an offence may suffer the penalty of paying a fee, having his property confiscated, and the property possibly eventually sold under these provisions without ever being given an opportunity to be heard. In the present Petition, the Petitioner's vehicle was only released upon a consent recorded on 5th May 2015 and filed in Court, whereupon the Petitioner deposited a sum of 2,000 US Dollars and Kshs 114,000/= storage fee in a joint interest earning account in the name of the Petitioner's and Respondent's advocate.

This Court will further deal with the due process required to be followed when addressing the issue of the right to fair administrative action and right to hearing.

The above findings also apply to the issues of violation of the Petitioner's rights to fair administrative action and a fair hearing. It was submitted by the Petitioner in this respect that the 1st Respondent went against the rule of natural justice, a fair hearing and fair administrative action enshrined under Articles 50 and 47 of the Constitution by condemning them unheard. In that regard the Petitioner cited the decisions in **Hon. Mr. Justice Joseph Mbalu Mutava vs The Attorney General & Another, 2014 (eKLR)** and also **Onyango Oloo V Attorney General ,(1986-1989) EA 456.**

The right to fair administrative action is now provided for in Article 47 of the Constitution as follows;

“(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.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

The Court of Appeal in **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** defined fair administrative action as follows:

“Fair administrative action on the other hand refers broadly to administrative justice in

public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law.”

As to the elements of fair administrative action, section 4(3) of the **Fair Administrative Action Act, 2015** now provides as follows:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

Odunga J. recently expounded on the requirements of procedural fairness in his decision in **R vs Kenya National Highways Authority ex.parte John Mwaniki Kiarie**, Nairobi J.R Application No 437 of 2015 as follows:

52. “A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in **Baker vs. Canada (Minister of Citizenship & Immigration)** 2 S.C.R. 817 6 where it was held:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

53. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. 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.”

It has already been noted that in the present Petition the nature of the decision made by the Respondent was one that would result either in the loss of a motor vehicle or of a substantial sum of money paid as a fee, which are both onerous penalties and affect the rights of persons involved, and therefore would definitely attract the requirements of procedural fairness detailed out in the foregoing.

As regards the right to hearing, Article 50 (1) of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The Court of Appeal in **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** held that the right to a fair hearing as employed in Article 50(1) of the Constitution is a term of art, which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. In addition, that by Article 25 that right cannot be limited by law or otherwise. Indeed the application of this right and its scope can only be in the context of a judicial or quasi-judicial hearing.

The issue then before the Court is whether the powers given to the Kenya National Highway Authority were exercised lawfully and constitutionally in impounding the Petitioner's motor vehicle registration and imposing a fee for its release. As noted in the foregoing the Respondent made a decision in the process of implementing regulations that adversely affected the rights to property of the Petitioner, without undertaking any procedures or hearing to determine the Petitioner's liability. The proceedings that took place were beyond mere administrative proceedings, as the Petitioner's motor vehicle was not merely being weighed, but in addition the Petitioner was found culpable of an offence and penalized for it by its vehicle being impounded and being asked to pay a fee.

Therefore, both Article 47 and Article 50 of the Constitution are applicable as both administrative and quasi-judicial procedures were employed by the Respondent, who did not provide any evidence of compliance with the provisions of the Constitution in this regard. The requirements of both Article 47 and 50 in this regard required that notice and the relevant information be given, as well as a hearing be accorded to the Petitioner, who had the right to present evidence and argument in response to the Respondent's allegations or findings.

Before leaving this issue I would like to address the arguments by the 1st Respondent that the public interest outweighs the Petitioner's rights. Article 24 of the Constitution has generally set the restrictions or limitations to fundamental rights and freedoms as follows:

"24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including -

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purposes and whether there are less restrictive means to achieve the purpose."

It is my view that there is definitely a public interest element in the control of vehicle overloading, owing to its notable impact on road conditions, road safety and road transportation costs, and that there is need for regulation in this regard. Road transport plays a fundamental role in the social and economic development of many countries. Overloaded goods vehicles do considerable damage to the country's road infrastructure as it not only significantly accelerates the rate of deterioration of road pavements which contributes significantly to poor road conditions and high transportation costs. In addition, an overloaded vehicle is unsafe and is more likely to be involved in serious accidents. The aim of overloading control is therefore also to ensure that safety regulations are not contravened.

I would also like to clarify in this respect that contrary to the Petitioner's arguments that its motor-vehicle

was off the main road on a private road when it was impounded, and was not therefore within the statutory mandate and jurisdiction of the 1st Respondent which is to manage and maintain national roads. The relevant compliance in this respect in my view is whether or not a motor vehicle has followed the required processes in enforcing the regulations as to overloading, and not where a motor vehicle suspected to have violated the regulations is apprehended. Just like in any other offence, a motor vehicle that is suspected to have committed an offence as regards overloading requirements can be apprehended anywhere in the country. This apprehension however has to be subjected to fair and due process as found in the foregoing.

Coming back to the argument that the Petitioner's rights therefore need to be limited in light of this public interest, the first aspect to be considered is whether the conditions set out in Article 24 (2) have been met by the limiting legislation. The conditions are as follows:

“(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.”

These conditions generally restate and enforce the principle of legal policy against doubtful penalization which requires that a person should not be penalized except under clear law. Therefore property or other economic interests of a person should not be taken impaired or endangered except under clear authority of the law, and likewise the rights of a person in relation to law and legal proceedings should not be removed or impaired except under clear authority of the law. The Constitution in addition under Article 24(2) emphasizes that in relation to rights guaranteed under the Constitution, any legislation enacted after the effective date of the Constitution is required to expressly state any specific rights which are being limited by the legislation.

Legislation is defined in **Black's Law Dictionary, Ninth Edition** at page 982 as “the whole body of enacted laws” and therefore includes both the primary legislation passed by Parliament and any subordinate legislation made thereunder, as is also defined in Article 260 of the Constitution. In this respect the Regulations that provide the offences for overloading and penalties thereof are the Kenya Roads (Kenya National Highway Authority) Regulations of 2013 which are enacted pursuant to sections 22 and 46 of the Kenya Roads Act. While the commencement date of the Kenya Roads Act is 7th September 2007, the Kenya Roads (Kenya National Highway Authority) Regulations of 2013 were made on 5th April 2013 and published in Legal Notice No 86 of 2013.

The effective date of the Constitution is the date the Constitution came into force after its promulgation on 27th August 2010. Therefore, the Regulations having been made and published after the effective date of the Constitution ought to have clearly and expressly indicated that they limit the rights to property, fair administrative action and hearing as guaranteed by the Constitution, if that was the intention and effect of the regulations. As there is no such express limitation, the same cannot be relied upon by the 1st Respondent to limit and violate the rights of the Petitioner.

Secondly, Article 25 expressly provides that certain rights may not be limited as follows:

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;**
- (b) freedom from slavery or servitude;**
- (c) the right to a fair trial; and**
- (d) the right to an order of *habeas corpus*.”**

The right to fair trial is provided in Article 50(2) of the Constitution in relation to every accused person, which includes the right to be informed of the charge with sufficient detail to answer it, to have adequate time and facilities to prepare a defence, and to a public trial before a Court established under the Constitution. An accused person under Article 50 is any person charged with an offence.

Section 46(3) of the Kenya Roads Act in this respect provides that the regulations made under section 46 (1) may prescribe, in respect of any contravention of any provision thereof, a fine not exceeding one hundred thousand shillings or imprisonment for a term not exceeding one year or both, and may also prescribe, in the case of continuing offences, an additional penalty in respect of each day in which the offence continues.

The Kenya Roads (Kenya National Highway Authority) Regulations of 2013 made pursuant to the said section accordingly provide for various offences. Regulation 10 for an overload offence as follows:

“10. (1) A person who being the driver of a motor vehicle or in charge of a motor vehicle, disobeys a direction on a road sign created pursuant to the provision of regulation 9, or when required to submit the motor vehicle to be weighed on a weighbridge by an authorized officer, fails to submit the motor vehicle to being weighed on a weighbridge or be tested by a device, commits an overload offence.

(2) A person shall not, unless in accordance with a valid special permit granted by the Authority, drive or use, or cause to be driven or used on any public road in Kenya any motor vehicle whose gross vehicle mass exceeds the weight specified in relation to a vehicle of such description except where –

- (a) such gross vehicle mass is distributed on axles in the manner specified in the Traffic Act;**
- (b) the overall dimensions of motor vehicle and trailer including when laden does not exceed the legal height limit.**

(3) A person who-

- (a) drives or uses or causes or permit to be driven or used any motor vehicle or trailer on any road in contravention of any provisions of these regulations;**
- (b) in any matter, fails to comply with a condition for issuance of a special permit issued by the Authority; or**
- (c) who with intent to deceive or defraud, alters, varies, defaces, forges or in any manner interferes with the permit, commits an offence.**

Regulation 9 in this respect allows the Authority to install static weighbridges or other devices for detection to on roads and erection of road signs which shall require any category of motor vehicles to be weighed.

Additional offences are found in Regulations 14 and 15 which provides for notification of the overloading and payment of the overload fee, and procedures to control overload respectively as follows:

“14. (1) Subject to regulation 13, the notification in the weighbridge report form shall form the basis for imposing fees where the vehicle is found to be overloaded in accordance with these Regulations.

(2) Upon issuance of the weighbridge report form, it shall be the duty of the driver to notify the registered owner of an overload offence and the registered owner shall be required to pay the overload fee.

(3) The registered owner of the motor vehicle pulling the trailer is in breach of regulation 10, the owner of the motor vehicle shall be liable for the overload offence and shall be required to pay overload fees.

(4) In order to secure payment of fees, an overloaded vehicle shall be detained free of charge by the Authority for the first three consecutive days, and subsequently, a fee of two thousand shillings shall be charged for each extra day until proof of payment is produced.

(5) Subject to the provisions of this regulation detained vehicles shall be held under the owner's responsibility and payment of fees prescribed in Part I E of the Schedule shall be made either by cash or irrevocable bankers' cheque in United States dollars or its equivalent in Kenya Shillings.

15. (1) Where a vehicle is overloaded or is in contravention of these Regulations, an authorized officer shall undertake overload control measures and enforce these regulations.

(2) Subject to sub-regulation (1), the driver shall follow all the instructions issued by an authorised officer so that road safety and overload control procedures can be adhered to.

(3) Where a vehicle is found to have bypassed or absconded from a weighbridge station, whether overloaded or not, the registered owner shall be liable to pay a bypassing or absconding fee of two thousand United States dollars or its equivalent in Kenya Shillings, and subject to the provisions of these Regulations if the vehicle is found to be overloaded, the overloading fee and charging procedures provided in these Regulations shall be instituted in addition to the absconding fee.

(4) Failure to adhere to the instructions of the Authority or the police shall constitute an offence, punishable by detention of the vehicle and cargo at the expense and risk of the registered owner.

(5) If the fee provided in this regulation is not paid within ninety days from the date of imposition, the Authority shall issue a notice of sale by auction of the vehicle and the cargo.

(6) Subject to sub-regulation (5), before the cargo is disposed of, the Authority shall publish a notice in the Gazette and in two newspapers of national circulation within fourteen days after the motor vehicle or trailer has been impounded requiring the owner to claim for the goods failure to which the goods will be disposed off.

(7) The proceeds of any such sale shall cover the charges occasioned by sale and may include, the cost of the advertisement and removal of the vehicle or trailer while the remaining proceeds, if any shall be payable to the registered owner, or where the owner fails to claim within six months of the sale, the proceeds shall be deposited to the Authority.

(8) For security reasons the Authority shall notify the nearest police station within twenty four hours concerning a vehicle detained at the weigh bridge station.”

It evident that these regulations expressly create offences, and if a person is alleged to have committed an offence under any of the above-cited regulations, the Constitution requires that person to be charged, be informed of the charges, and the trial be held in public before a Court of law established under the

Constitution. Therefore a notification of the weighbridge report cannot constitutionally form the basis for imposing fees where a vehicle is found to be overloaded, and can only be the initiation document as regards the bringing of charges against anyone alleged to have committed the offence, which offence must be proved before any fee or penalty is imposed.

Furthermore, the Constitution expressly states that the right to a fair trial cannot be limited or derogated from even in the name of the public interest. To the extent therefore the public interest cannot be used by the 1st Respondent as an excuse to deny the Petitioner's their right to a fair trial. This Court will return to the issue of the fees levies for these offences and whether they are penal in nature, when addressing the constitutionality of these provisions later on in this judgment.

Lastly, the question that needs to be answered, even if the limitations of rights by the provisions of the Kenya Roads Act and Kenya Roads (Kenya National Highway Authority) Regulations of 2013 was permissible, is whether they provide a reasonable and justifiable limitation to the right to property, fair administrative action and hearing. My brief and short finding in this respect is the negative, as while the limitations may be justifiable, they are certainly not reasonable as they are arbitrary in nature and do not afford any due process as explained in the foregoing.

Reasonable is defined as being "fair, proper or moderate under the circumstances" in **Black's Law Dictionary, Ninth Edition** at page 1379. The general tenets of unreasonableness in the context of delegated legislation were also set out in **Kruse vs Johnson (1898) 2 Q.B 91** where it was held that the delegated legislation in that case, which were by laws made by a local authority, would be held unreasonable if they were found to be impartial and unequal in their operation between classes; they were manifestly unjust; disclosed bad faith; and if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men.

The impugned regulations in this Petition aptly fall in the class and description of being manifestly unjust, and involving oppressive and gratuitous interference with the Petitioner's rights as shown in the foregoing, and are therefore unreasonable.

On the constitutionality of section 22(2)(d) and 46 of the Roads Act and the Kenya Roads (Kenya National Highway Authority) Regulations of 2013,

The Petitioner submitted that the Regulations and sections 22(2)(d) and section 46 of the Kenya Roads Act and the Kenya Roads (Kenya National Highway Authority) Regulations of 2013 made thereunder were unconstitutional as the impounding and detention of their motor vehicle on the alleged grounds of overloading connotes and creates an offence, and that the financial charges leviable by these sections though ostensibly denoted as a fee are in actual sense a penalty. Therefore, that the proper institution with the Constitutional authority to make a determination on these issues is the Judiciary and not the 1st Respondent.

Furthermore, that in line with the doctrine of separation of powers, the 1st Respondent should not levy, interpret its own laws and further issue sanctions to the accused persons within the purview of the law. In that regard reference was made to the decisions in **Trusted Society of Human Rights Alliance vs The Attorney General and Others Nairobi, Petition No. 243 of 2011 (2012) eKLR** and in **Minister of Health and Others vs Treatment Action Campaign and Others, (2002) 5 LRC 216**.

In particular, the Petitioner in their supplementary submissions took issue with Regulations 10 and 14(4) of the Kenya Roads (Kenya National Highway Authority) Regulations, 2013 which empower the 1st Respondent to impose fees for the offence of overloading, which it was submitted are in fact fines imposed as a penalty for contravention of the said regulations and are therefore criminal in nature. Further, that the said fees being penal in nature, can only be imposed in a criminal process after following due process. Reliance in this respect was placed on the decision of Emukule J. in **Margeret Miano vs Kenya National Highways Authority, (2015) eKLR**

The 1st Respondent on its part argued that the Petitioner was charged as per regulation 15(3) of Legal Notice 86 of 2013, whereby when a vehicle is found to be overloaded, the overloading fee and charging procedures provided in the regulations shall be instituted, in addition to the absconding fee. It was noted that the regulations do not provide for situation where the offender is charged in a court of law and a fine imposed. Reliance was placed on the decision in **Republic vs Kenya National Highway Authority & 7 Others Exparte Kenya Transporters Association & 8 Others, (2013) eKLR** in this regard.

Further reliance was placed on the decisions in **Buzeki Enterprises Limited vs Kenya National Highways Authority, (2014) e KLR** and **Blue Jay Investment Ltd vs Kenya National Highway Authority, (2014) e KLR**, for the position that Regulation 15 provides for the payment of a fee and not a fine, and did not provide for a person to be taken to Court for a penalty to be levied, hence there was no contravention of the Constitution.

This Court is on this issue guided by the principles that apply in determining whether a statute is constitutional, which are that the Court must determine the object and purpose of the impugned statute, for it is important to discern the intention expressed in the Act itself (see **Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others, Nairobi Petition No. 3 of 2011 [2011]eKLR,**) Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect.

The purpose of the Kenya Roads Act is to provide for the establishment of the Kenya National Highways Authority, the Kenya Urban Roads Authority and the Kenya Rural Roads Authority, and to provide for the powers and functions of the authorities and for connected purposes. Section 22(2)(d) of the Kenya Roads Act provides that the powers conferred by subsection (1) of the said section shall include with the approval of the Minister, the powers to determine, impose and levy rates, tolls, charges, dues or fees for any of its services or for the use by any person of its facilities. Section 22(1) provides for the powers of the Authorities as follows:

- (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; and**
- (d) to provide such amenities or facilities for persons making use of the services or facilities provided by the Authority as may appear to the Authority necessary or desirable.**

Section 46 on the other hand gives the Authority power to make regulations and states as follows:

- (1) An Authority may with the approval of the Minister make regulations for the better performance of its functions under this Act.**
- (2) Without prejudice to the generality of subsection (1), an Authority may make regulations**
 - (a) relating to the use, safety or maintenance of the roads falling within its responsibility;**
 - (b) relating to the erection of structures on, near, over or under the roads falling within its responsibility;**
 - (c) for the drainage of streets, lands, compounds and buildings adjacent to the road;**

(d) respecting the level, width and construction of roads and streets;

(e) for the removal, demolition or alteration of any projection, structure or thing obstructing a road or likely to cause damage or inconvenience to road users; and

(f) prescribing the fees payable for services provided by the Authority.

(3) Rules or regulations made under subsection (1) may prescribe, in respect of any contravention of any provision thereof, a fine not exceeding one hundred thousand shillings or imprisonment for a term not exceeding one year or both, and may also prescribe, in the case of continuing offences, an additional penalty in respect of each day in which the offence continues.

(4) The provisions of section 34 of the Interpretation and General Provisions Act (Cap. 2) shall not apply to regulations made under this Act.”

The Authority referred to in the section is either the Kenya National Highways Authority, the Rural Roads Authority or the Urban Roads Authority. In the present petition the relevant Authority is the Kenya National Highways Authority.

The Kenya Roads (Kenya National Highway Authority) Regulations, 2013 were made by the Kenya National Highway Authority with the approval of the Minister of Roads pursuant to powers conferred by section 22 (2) (d) and 46 of the Kenya Roads Act. The legality of provisions of law that give power to administrative authorities to make regulations, that *inter alia* impose fees and sanctions by way of delegated legislation is recognized by the Constitution under Article 260, which defines legislation as follows;

(a) an Act of Parliament, or a law made under authority conferred by an Act of Parliament; or

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

Therefore, it cannot be argued that that section 22(2)(d) and section 46 of the Kenya Roads Act and Regulations 10 of the Kenya Roads (Kenya National Highway Authority) Regulations, 2013 are unconstitutional only for the reason that they give power to the Kenya National Highways Authority to make regulations that provide for offences, fees and sanctions, or only for reasons of setting out the said offences, fees and sanctions. This finding notwithstanding, the exercise of the powers so delegated, must not be *ultra vires* and/or unconstitutional.

The rule on *ultra vires* requires that the regulations so made should not be beyond the scope of power, jurisdiction or authority granted or permitted by the parent Act. In addition, the general provisions with respect to power to make subsidiary legislation in section 31 of the Interpretation and General Provisions Act require that no subsidiary legislation shall be inconsistent with the provisions of an Act;

This Court at the outset notes that that Regulation 15(5) of Kenya Roads (Kenya National Highway Authority) Regulations, 2013 is substantively *ultra vires* for reasons that it provides for fines that are not allowed by, and are beyond the powers given by the parent Act. In this respect, section 46(2) of the Kenya Roads Act provides that fees may be prescribed for services provided by the Authority. Section 46 (2) further provides that the regulations made under the section may prescribe, in respect of any contravention of any provision thereof, a fine not exceeding one hundred thousand shillings or imprisonment for a term not exceeding one year or both, and may also prescribe, in the case of continuing offences, an additional penalty in respect of each day in which the offence continues.

Regulation 15(5) on the other hand provides that where a vehicle is found to have bypassed or absconded from a weighbridge station, whether overloaded or not, the registered owner shall be liable to pay a bypassing or absconding fee of two thousand United States dollars or its equivalent in Kenya Shillings, and subject to the provisions of these Regulations if the vehicle is found to be overloaded, the overloading

fee and charging procedures provided in these Regulations shall be instituted in addition to the absconding fee.

The Petitioner has submitted that the fee charged in this and other regulations are penal in nature, while the 1st Respondent has argued that the amount imposed is a fee not fine. I find that as regards regulation 15 as well as regulation 14 of the Kenya Roads (Kenya National Highway Authority) Regulations, 2013, the fees being charged by these regulations are not for any service that is being provided by the Authority, but on the contrary are penalties for the offences which are expressly stated in those regulations of overloading, and bypassing and absconding from a weighbridge station

This finding is for the reasons that “service” is defined in **Black’s Law Dictionary, Ninth Edition** at page 1491 as “the act of doing something useful for a person or company usually for a fee”. A fee is also defined at page 690 as “a charge for labour or services, especially professional services”. No services as so defined are presented in regulation 14 and 15 to attract the payment of fees set out in the regulations.

In addition, what is meant by penal or a penalty in the context of the principle against doubtful penalisation is explained as follows in the text on **Statutory Interpretation, 3rd Edition** by F.A.R. Bennion, at paragraph 276 pages 637-638:

“... the term penal has been treated as term of art, and yet given different meanings. This is misconceived, because a law that inflicts hardship or deprivation of any kind is in essence penal. There are degrees of penalisation but the concept of detriment inflicted through the state’s coercive power pervades them all...”

The detriment that was suffered by the Petitioner has been demonstrated and admitted by the 1st Respondent in terms of payment of Kshs. 306,000/= for the release of the Petitioner’s motor vehicle registration number KBW 133T impounded by the 1st Respondent, which is yet another detriment the Petitioner’s suffered. No services provided by the 1st Respondent were demonstrated for the payment of this money, who on the contrary have admitted that it was imposed because the Petitioner was culpable for offences provided in the regulations.

Lastly, the services that can be offered by the Kenya National Highways Authority must be in relation to its function as set out in section 4 of the Kenya Roads Act, which is the management, development, rehabilitation and maintenance of national roads. In addition Part II of the Kenya Roads (Kenya National Highway Authority) Regulations, 2013 details out the rates and fees payable to the said Authority for the use of its facilities. As regards imposition of fines for offences created in the regulations, this is not a service within the meaning set out in the foregoing, and this Court has already found that the applicable procedure to be followed must be one set out in Article 50(2) of the Constitution before any penalty can be imposed by a court of law.

Lastly, I am on this issue in support of the position expressed by Emukule J. in in **Margaret Miano vs. Kenya National Highway Authority Mombasa High Court Petition No. 23 of 2015** as follows:

“There is in law a difference between a fee and a penalty. A fee is a price or cost exacted for any special privilege, for example a driver’s licence, a transport licence, and the like fees referred to in Regulation 6 and prescribed in Part A of the Schedule to the said Regulations. So a licensing statute will prescribe a fee payable for the grant of a licence. The licensing statute or regulation will also prescribe a penalty for carrying out an activity subject to a licence, for example driving a motor vehicle without such a licence. The penalty is a fine, punishment, suffering or loss imposed for breach of a law, a disadvantage imposed upon a person who fails to obey the rules for example of a game such as penalty in football for fouling an opponent within the penalty area. By its very language Regulation 15(3) is not a licensing provision. It is a penal provision, and like all penal provisions it must be construed strictly. Because it is euphemistically called a fee does not change its intrinsic character that it is a fine or penalty for the offence of bypassing a weighbridge or absconding therefrom. The offence is subject to proof.

Finally, the Kenya Roads (Kenya National Highway Authority) Regulations, 2013 are also required to be constitutional in the sense that they must be consistent with the provision and principles set out in the Constitution. Article 2(4) of the Constitution in this respect provides that any law that is inconsistent with the Constitution is void to the extent of the inconsistency.

It has been noted and found by this Court in the foregoing that Regulations 14 and 15 of the Kenya Roads (Kenya National Highway Authority) Regulations, 2013 offend key provisions of the Constitution, as they give powers to the officers of the Kenya National Highways Authority to impose penalties without due process and a hearing being given to the affected parties.

In addition and more fundamentally in this respect, while this Court has held that Parliament and administrative authorities can determine and impose crimes and offences through primary and delegated legislation, and also provide criminal sanctions for such offences, there is a constitutional requirement as to the adjudicating of such violations, which cannot be within the jurisdiction of an administrative agency. The law in this respect cannot delegate to executive officers the power to prescribe a criminal penalty or to define the scope of its application, which in essence was the effect of regulations 14 and 15 of the Kenya Roads (Kenya National Highway Authority) Regulations, 2013. These powers are left to judges, judicial officers and tribunals appointed under the authority of the Constitution by Article 159(1) which states as follows:

“Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution’.

The reason why the judicial function is given to members of courts and tribunals, and no other agency, was explained by B.O Nwabueze in his text on Constitutionalism in Emergent States, C. Hurst & Co Publishers, 1973 at pages 12 to 13 as follows:

“It cannot, however, be much questioned that the functions of government are differentiable according to their distinctive features. Three categories are easily recognisable, viz. Execution or measure-taking (which comprises ‘political’ direction and pure administration), law-making, and law interpretation/adjudication.....

Not even the sternest critics of the doctrine of separation of powers deny its necessity as regards the judicial function. For the rule of law as an element of constitutionalism depends more upon how and by what procedure it is interpreted and enforced. The limitations which the law imposes upon executive and legislative action cannot have much meaning or efficacy unless there is a separate procedure comprising a separate agency and personnel for an authoritative interpretation and enforcement of them. The necessity for a procedure to interpret the law with finality is underlined by the fact that both the executive and the legislature have also to interpret the law in the course of carrying out their primary functions.....

There is thus clearly an incontrovertible necessity for a procedure separate, in terms both of structure and personnel, from, and independent of, that for execution and legislation, which would enable the administrator’s or the legislature’s view of what the law means to be reviewed with finality. This separate procedure is normally provided by the ordinary courts. The unique virtue of the separate procedure of the courts is that, being unaffected by the self-interest and consequent bias of the legislature or the executive in upholding their action, it can be expected to apply to the interpretation of the constitution or a statute an impartiality of mind which inhibits any inclination to vary the law to suit the whims or personal interests of either the judge or a party to a dispute, thus ensuring ‘that stability and predictability of the rules which is the core of constitutionalism...’

This constitutional position was also aptly explained by Emukule J. in Margaret Miano vs. Kenya National Highway Authority, (supra) where the learned Judge held as follows:

“The judicial function under Articles 23 and 159 of the Constitution as delegated by the people of Kenya to the Judiciary and relevant tribunals is to interpret and declare what the law is. It is not, again with profound respect, and we take great exception to the suggestion by the Respondent’s Engineer in paragraphs 16, 17 and 18 of his Replying Affidavit, to protect and shield any litigant who is alleged to have violated axle load or other regulations by bypassing or absconding from a weighbridge. All that the litigant seeks in this case, is to establish the legitimacy of the fee collected at the Mtwapa and other Weighbridges in the country. The inquiry into that legitimacy is what is called due process...The Kenya National Highways Authority is however not any of the tribunals established under the Constitution for resolution of disputes. The provisions of Regulation 15(3) may have unwittingly and therefore unlawfully constituted an Authority with powers of a Kangaroo court, that is to say, an improperly constituted body, a tribunal before which a fair trial is impossible. The provisions of Regulation 15(3) may also be contrary to Article 159 of the Constitution by purporting to confer upon the Kenya National Highways Authority power to collect fee/fines without due process by donating to such fines the euphemism of a “fee”. The provision may therefore be inconsistent with, and be a violation of the right to fair trial guaranteed under Article 50 of the Constitution, and to that extent therefore null and void under Article 2(4) of the Constitution.”

Odunga J. was also in agreement with the holding by Emukule J. in the judgment delivered in **R vs Kenya National Highways Authority ex.parte John Mwaniki Kiarie**, (supra) and the learned judge held as follows therein:

“ I therefore agree with Emukule, J that to the extent that aforesaid Regulation 15 tends to place the roles of the complainant, witness, investigator, prosecutor and judge in one entity, regulation 15 clearly violates Article 50 of the Constitution and pursuant to Article 2(4) of the Constitution, is null and void. In my view, the only institutions legally mandated to impose penalties are the Courts and independent Tribunals established pursuant to constitutional provisions and whose powers meet the constitutional threshold. “

This Court in this respect also notes that the 1st Respondent relied on sections 56 and 106 of the Traffic Act as the basis of its actions in addition to Regulation 15 of the Kenya Roads (Kenya National Highway Authority) Regulations, 2013. Section 56 of the Traffic Act provides limitation of loads on motor vehicles used on roads, while section 106 provides for removal of vehicles from roads, and the relevant part is section 106(4) which provides that a police officer, licensing officer or inspector who is of the opinion that any vehicle is being used in contravention of section 55 or section 56 may by order prohibit the use of such vehicle, under such conditions and for such purposes as he may consider necessary for the safety of the public or to ensure that such vehicle does comply with the provisions of section 55 or 56.

The penalties for overloading under the Traffic Act are stated in section 58 of the Act and it is clear for the said provisions that a person who is alleged to have contravened the section must be charged and tried in a court of law before being found guilty. Section 58 of the Traffic Act provides as follows:

“ (1) Any person who drives or uses on a road a vehicle in contravention of the provisions of section 55 or section 56 shall be guilty of an offence and liable to a fine not exceeding four hundred thousand or to imprisonment for a term not exceeding two years or to both:

Provided that rules under this Act may provide that a person who is guilty of an offence under section 55 or 56 shall be liable to pay a fine according to a prescribed scale, and different scales may be prescribed for first offenders, and for second or subsequent offenders, within a prescribed period, but so that no

person shall thereby be liable to pay a fine greater than the maximum provided by this subsection; and for the avoidance of doubt it is declared that liability of a person to pay a fine on a prescribed scale shall not affect that person’s liability to imprisonment under this subsection as an alternative to, in addition to, or in default of, the payment of a fine.

(2) For the purposes of subsection (1), any person who is shown to the satisfaction of the court to be responsible for the maintenance of the vehicle, and any person who is shown to the satisfaction of the court to have been responsible for the loading of the vehicle, shall be deemed to have used the vehicle on the road.

(a) In any case where a motor vehicle or trailer is twice or more times, in a period of twelve months, the subject of a successful prosecution under any of the provisions of sections 55 and 56, the court shall, unless for special reasons to be recorded it decides otherwise, order the Authority to suspend the licence of such vehicle for a period of two years.

(b) The Authority shall thereupon suspend the licence of the vehicle for such period, and the owner of the vehicle shall return the licence of the vehicle to the Authority, who in no case shall issue another licence in respect of such vehicle until the termination of the period of suspension.

(c) No vehicle licence shall be returned or new licence granted in respect of a vehicle whose licence has been so suspended unless an inspector certifies that the vehicle is fit in all respects for use upon the road.

The same or similar procedures were required to be followed if regulation 10, 14 or 15 of the Kenya Roads (Kenya National Highway Authority) Regulations of 2013 were alleged to have been contravened, in that the driver and possibly the operator of the motor vehicle involved should be charged with the applicable offence in a court of law, all relevant information obtained and documentation completed in full, and availed to the person charged with the offence to enable his or her defence. The normal provisions and procedural safeguards as regards seizure and arrest of motor vehicles also require to be followed, with such motor vehicles being handed over to the police who become responsible for their safeguarding, and the right accorded to the affected persons to apply for their release.

The Petitioner's petition is therefore found to have merits for the foregoing reasons and it is hereby ordered as follows:

1. The Respondents be and are hereby restrained from impounding and detaining motor vehicle registration number KBW 133T without preferring criminal charges against the Petitioner as contemplated under Article 50 as read together with Articles 47 and 48 of the Constitution
2. The Respondents are hereby ordered to unconditionally release the Petitioner's property motor vehicle registration number KBW 133T which was unlawfully impounded on 27th February 2015, and any fees paid in furtherance of such seizure shall be returned to the Petitioner forthwith.
3. The Respondents are hereby ordered to unconditionally release the driving licence belonging to the Petitioner's employee which was impounded and detained on 27th February 2015.
4. It is hereby declared that the action by the Respondents of levying a fee for contravention of regulations 15(5) of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 without affording the Petitioner due process violated the rights of the Petitioner under Articles 40, 47 and 50 of the Constitution of Kenya.
5. It is hereby declared that Regulations 14 and 15 of the Kenya Roads Kenya National Highways Authority) Regulations, 2013 contravene Articles 40, 47, 50 and 159(1) of the Constitution of Kenya and are hereby found to be unconstitutional and are declared null and void.
6. It is hereby declared that Regulations 15(5) of the Kenya Roads Kenya National Highways Authority) Regulations, 2013 is in addition found to be substantively *ultra vires* for contravening section 46(2) of the Kenya Roads Act, and is declared null and void.

Orders accordingly.

Dated, Signed, and Delivered at Machakos this 30th day of January 2017

P. NYAMWEYA

JUDGE