REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO. 155 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS, & PROHIBITION

AND

IN THE MATTER OF THE NATIONAL TRANSPORT AND AUTHORITY ACT, (ACT NO.33 OF 2012)

AND

IN THE MATTER OF A JUDICIAL REVIEW APPLICATION

BETWEEN

REPUBLIC……..APPLICANT

VERSUS

THE NATIONAL TRANSPORT& SAFETY AUTHORITY…1ST RESPONDENT

THE TRAFFIC COMMANDANT…….....….2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL..... ...3RD RESPONDENT

AND

RENGCOM COMMUNICATIONS LTD….....E X PARTE APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 6th April, 2016, the *ex parte* applicant herein, **Rengcom Communications Ltd,** seeks the following orders:

> **1) THAT by way of Judicial Review an order of Certiorari do issue to remove to this Honourable Court for purposes of being quashed, and to forthwith quash the 1st Respondent's decision made on 24th March 2016 as expressed in the letter signed by the 1st**

Respondent's Director General, Francis Meja in relation to the Ex Parte Applicant's PSV vehicles.

2) THAT by way of Judicial Review an Order of prohibition do issue, prohibiting the 2nd Respondent or any person acting under their behest, direction, and authority, from demanding compliance with, or taking any proceedings of whatever nature based upon, or arising from the 1st Respondent's decision made on 24th March 2016 as expressed in the letter of even date signed by the 1st Respondent's Director General, in respect of the 1st Ex Parte Applicant's members' specified in the exhibit marked *"NA 3"* annexed to the Verifying Affidavit of NAFTALI ALENGA GIBERA sworn on 1st April 2016 Verifying the claim herein.

3) THAT the costs be to the Applicant in any event.

Ex Parte Applicant's Case

2. According to the Applicant, its membership constitutes of members who all are the registered proprietors of Public Service Vehicles duly licensed by the 1st Respondent as such to so operate their said PSV vehicles and between Nairobi County, to Busia, via Kisumu County, Nakuru County, and others in between.

3. What provoked these proceedings, according to the applicant was the drastic suspension of its 69 member's night travel Road Service Vehicle licenses (hereinafter simply referred to as "night travel RSL licenses") by the 1st Respondent through a letter dated 24th March 2016, which decision had not been communicated to the individual members of the Ex Parte Applicant holders of the affected RSL licenses.

4. According to the applicant, the Road Service License issuance system of the 1st Respondent is online based, meaning that the applicant's members have to rely on the company to procure their night and day service RSL licenses. However, in the late afternoon of March 24th 2016 the applicant received a copy of the letter from an emissary of the 1st Respondent by which the 1st Respondent, suspended the operations of the Ex Parte Applicant's said members' PSVs night travel. It was averred that in the said letter the 2nd Respondent was directed to ensure that all the applicant's buses that travel at night were henceforth impounded.

5. The applicant averred that it is only an umbrella society of Public Service Vehicle Bus owners duly licensed as such within Kenya, and its core of the Ex Parte Applicant is the operation of licensed Public Service Vehicles carrying fare paying passengers as authorized by the 1st Respondent NTSA. It was explained that the applicant's individual members associated themselves to form the Ex Parte Applicant as a consequence of the relevant statutory body authorizing the formation of SACCOS, companies, and such associations for PSV operators to ease registration and that they own their PSV vehicles registered with the 1st Ex Parte Applicant. However, all the Ex Parte Applicants' members' vehicles are licensed to operate along the Nairobi – Nakuru – Busia route by day and night, by the 1st Respondent. Accordingly, the applicant lodged this suit in its representative capacity and for the benefit of its members, in defence of their (public service vehicle operators') legal and Constitutional rights to fair, just, and lawful administrative actions in respect to their stated business as averred in these proceedings in particular reference to the impugned decision as declared by the 1st Respondent through the letter dated 24th March 2016 to arbitrarily, and unilaterally suspend its 69 vehicles' RSL night travel licences.

6. It was disclosed that the 1st Respondent purported to unilaterally and unlawfully suspend the night travel Road service Licenses of 69 Public Service Vehicles of the Ex Parte Applicant's members buses solely on the allegation that one bus had caused an accident. However, the applicant had not been notified prior to the making of this decision in order to establish the bases of the said action, but was only made aware of that fact after the decision had been made when it was asked to collect the said letter.

7. To the applicant, its members' constitutional rights to operate PSVs at night have been gravely infringed, as no reasons in writing have been given for the said action by the 1st Respondent to these specific vehicle owners other than the 1 vehicle, KBX 994R yet the issuance of reasons in writing for such administrative action is a Constitutional imperative. The applicant however was of the view that even if this 1 PSV member of the Ex Parte Applicant owner of KBX 994R was said to be offending the law, there is no lawful justification to mete collective punishment on the rest of the 69 Ex Parte Applicant PSV vehicles whose RSL for night travel have been unlawfully suspended, and who stand innocent of the said allegations.

8. It was disclosed that when the 1st Respondent levelled its accusations on the 1 specific vehicles KBX 994R, the applicant carried out its investigations on the matter after upon receipt of the demand from the 1st Respondent and responded to the same answering the same and complaining that it was wrong for an entire fleet to be condemned unheard merely because of 1 vehicle KBX 994R. It was subsequent to this that the applicant instructed a law firm to lodge the proceedings and after the applicant served the NTSA with the proceedings the latter proposed a settlement. The applicant then withdrew the same, only to be told in no uncertain terms on April 1st 2016 that all the vehicles had to be re-inspected.

9. The applicant contended that notwithstanding its elaborate response, the 1st proceeded to suspend all of our 69 members' RSL night travel licenses in a drastic manner, yet these vehicles were fully compliant without considering that the applicant's members had financial obligations and were gravely affected by such a blanket decision.

10. It was the applicant's case that this draconian act amounted to a violation of Article 47(2) of the Constitution, and that no provision in the ***National Transport & Safety Authority Act*** or indeed any other Statute, Treaty, Principle of International Law, Constitution, or Norm empowers the 1st Respondent to impose or exact collective punishment on the Ex Parte Applicant's innocent members as it did. The applicant averred that any decision relating to the suspension of the RSL licenses (if justified) is, and ought to be directed at the 1 specific vehicle KBX 994R and not the entire 69 members of the company more so as only the said vehicle had been the subject of the 1st Respondent's demand as per its letter dated 24th March 2016, and hence the final decision of the 1st Respondent impugned herein was uncalled for.

11. The applicant asserted that the collective punishment to which the its members were subjected to by the impugned decision of the 1st Respondent is outlawed as a crime, under Article 33 of the Fourth Geneva Convention, to which Kenya has been (and remains) a signatory, since 1966. The said Article, according to the applicant provides that "*no general penalty, pecuniary or otherwise, shall be inflicted on the general population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible***."** The applicant further contended that such treatment violates Article 29(f) of the Constitution which prohibits the treatment or punishment of any person in a cruel, inhuman, or degrading manner. In the applicant's view, innocent individuals totally unconnected with the alleged crimes the 1st Respondent cited as the basis of its said decision to collectively punish our 69 PSV vehicles and 1,500 employees who are lawfully employed to operate these vehicles have been injured and may sue the Ex Parte Applicant for relief.

12. The applicant therefore took the position that this conduct is abhorrent and a violation of the Principle of Rule of Law espoused under Article 10(2)(b) of the Constitution as well as Article 27(4) of the Constitution in the 1st Respondent's act to mete "collective punishment" to the Ex Parte Applicant's members of the 69 PSV vehicles in order to solve matters that relate with 1 vehicle only, KBX 994R. In addition, it is discriminatory of the rest of the members of the Ex Parte Applicant, innocent of committing the alleged crimes as they are to be dragged into the arbitrary action to affect the 69 vehicles. It was therefore asserted that the Ex Parte Applicant's members' owners of the 69 PSV vehicles whose night travel RSL licenses have been unlawfully suspended right to equality before the law was thus been violated.

13. To the applicant, the 1st Respondent has no power in law to oust, overthrow, or overlook the Principle of Presumption of Innocence stated in Article 50(2)(a) of the Constitution, in effecting any decision under the ***National Transport & Safety Authority Act*** in regard to the Ex Parte Applicant's 69 vehicles licensed under the said legal regime. The applicant reiterated that it is merely an association of PSV owners-operators, hence the alleged criminal act of one employee of an association involved in a traffic offence such as KBX 994R cannot be visited upon the entire membership or the 69 PSV vehicles totally unconnected with such an employee.

14. It the applicant's opinion, Parliament, in enacting section 34(3) of the ***National Transport & Safety Authority Act***, envisaged a scenario such as has emerged with allegations of infractions of the law being directed to a specific vehicle among a fleet, and the said provision expressly directs the 1st Respondent to remove that one offending vehicle from the night travel RSL list and not condemn the entire fleet as has now happened. The 1st Respondent was therefore accused of having acted, and continued to act blind to this statutory direction, and its impugned decision is arbitrary and contrary to the applicant's legitimate expectation that the law will be upheld. To the applicant, the harshness of the impugned decision is apparent as both the Kenya Constitution and the Criminal process system of Kenya recognizes individual criminal responsibility and liability based on proven culpability.

15. It was contended for the 1st Respondent's impugned act to have been made without according the Ex Parte Applicant and more specifically the 69 PSV owners affected night travel RSL license holders) a hearing has converted the 1st Respondent and rolled into one the role of complainant, judge, and executioner of the alleged acts of the 1 vehicle KBX 994R without regard to the solutions to the matter proffered to the 1st Respondent by the ex Parte Applicant.

16. To the applicant, the 1st Respondent has failed to accord regard to the Ex Parte Applicant's response to the allegations made against it, and in the result it arrived at a decision that totally ousts a hearing or any form of hearing at all prior to the making of its drastic, draconian, and sorely oppressive act of indefinitely suspending the night travel Road Service Licenses (R.S. L) of the said Ex Parte Applicants and the 69 vehicles of the Ex Parte Applicant's members, absent compliance with the harsh demands communicated to the Ex Parte Applicant contrary to the legal position and policy that no person is condemned unheard. It was disclosed that the 1st Respondent aggravated this by alleging that it conducted its own "investigations" into the alleged incident without even summoning the owners of the 69 vehicles to show how the 1 affected vehicle KBX 994R implicates their operations. It was averred that to date no summons, no investigator, no letter of request of information or other request made to the Ex Parte Applicant about these "investigations" affecting the said 69 vehicles or the without RSL.

17. It was therefore the applicant's position that the 1st Respondent acted unlawfully by turning to mete out harsh, draconian, and grossly injurious unlawful "judgement" of suspending the Ex Parte Applicants' members' 69 PSV vehicles from further operations until equally harsh, arbitrary, and impossible demands are complied with. To the applicant, since the RSL licenses confirm the holders thereof are individuals, by reason of the 1st Respondent's default in furnishing each of the Ex Parte Applicant's affected members with the formal communication of the decision it made on 24th March 2016 of the suspension of their individual RSL licences, they have been deprived of the full protection of the provision of section 34(2) of the ***National Transport & Safety Authority Act***. Accordingly, the Ex Parte Applicant and its members over the 69 vehicles so affected were thus denied their natural justice right to be heard as by law envisaged.

18. By purporting to direct the 2nd Respondent, the Traffic Commandant to forthwith remove the Ex Parte Applicants' members from operating their 69 duly licensed PSV vehicles (and possibly arrest them), the applicant believed that the 1st Respondent by that act denied the Ex Parte Applicant and its members their right to object to an oppressive and unlawful administrative action.

19. It was the applicant's case that no mechanical default of whatever nature having arisen in the circumstances, it was irrational to demand of the owners to subject them to additional expense,

inconvenience and hardship to re inspect them merely to meet the 1st Respondent's irrational demand. This act, it was contended, amounts to collective punishment. Irrationally, instead of complying with the provisions of section 34(2) of the ***National Transport & Safety Authority Act*** to inform in writing each of the individual members of the 69 vehicles of the Ex Parte Applicant's members of the specific infractions of the law alleged against their PSV vehicles and to accord them a hearing in their defence.

20. It was the applicant's case that it is irrational that the 1st Respondent would, given the very weight, grave, and far reaching act of suspending the 69 night travel RSL for these individuals instead announce its decision in the manner it did, without inviting or notifying any of the 69 vehicle owners.

21. It was disclosed that, although this decision was made on March 24th 2016, there was no information about it to the individual affected Ex Parte Applicant's members, or even we, the officials of the applicant. In the applicant's view, in this, the principle of proportionality itself was overridden, as the action was totally disproportionate to the alleged infractions of the law.

22. The applicant however averred that neither itself nor its individual members do condone any form of assault, criminal conduct, or lawlessness among its members and employees, and no conspiracy of whatever degree exists or existed between the Ex Parte Applicant and the alleged acts involving the 1 vehicle KBX 994R, giving rise to the drastic action of the 1st Respondent against the Ex Parte Applicant. Accordingly, the 1st Respondent was wrong to impute criminal conduct on all 69 PSV vehicles of the Ex Parte Applicant's members, without proof of criminal liability of each of the said PSVs. It was therefore contended that based on this default, there was a violation of the principle of Good Governance and Accountability on the part of the 1st Respondent, as envisaged in the Constitution of Kenya and that based on legal instruments the impugned ban on 69 vehicles and the suspension of already issued night travel RSL licenses had no legal basis and was manifestly unsustainable; and utterly arbitrary. It was indiscriminate without consideration even to the operations of the Ex Parte applicant and the loss it would occasion to even innocent commuters.

23. The applicant contended that it had no other means of resolving this matter save by the Court's urgent intervention as the 1st Respondent had closed all doors to reasonable understanding of the application of section 34 of the ***NTSA Act***, necessitating these proceedings as sought. Since the process was flawed, it was contended that there was no basis for an appeal.

Determination

24. The Respondent, on its part did not respond to the application. Accordingly, the factual averments made by the applicant were wholly uncontroverted.

25. Section 34 of the ***National Transport and Safety Act*** (hereinafter referred to as "the Act), which provides for the power to suspend or revoke licenses states as follows:

> ***(1) The Authority may revoke or suspend a licence issued under this Act where the licensee fails to—***
>
> ***(a) comply with a condition for the issuance of the licence; or***
>
> ***(b) fails to operate the motor vehicle with respect to which the licence is issued for a period of three months during the period for which the licence is issued.***
>
> ***(2) The Authority shall, where it revokes or suspends a licence and at the request of the licensee inform the licensee in writing, the reasons for such revocation or suspension.***
>
> ***(3) The Authority may, in lieu of revoking or suspending a carrier's licence, direct that any one or more of the motor vehicles specified in the licence be expunged from the licence, or that the maximum number of motor vehicles or of trailers specified in the licence be reduced.***

(4) Where the Authority directs that a motor vehicle specified in a licence be removed from the licence, the motor vehicle shall cease to be a licenced vehicle under this Act.

26. According to the 1st Respondent's letter dated 24th March, 2016, the applicant's night travel licence was withdrawn pursuant to the provisions of section 34 of the said Act. The reason for the said withdrawal was an accident on 11th March, 2016 in which a motor vehicle Reg. No. KBX 994, belonging to the applicant's fleet was involved in an accident in which one life was lost. According to the said letter report from the Motor Vehicle Inspection Unit indicated that the said vehicle was operating on a defective speed limiter and had no valid inspection sticker at the time of the said accident.

27. It is therefore clear that the failure to comply with a condition for the issuance of the licence is a valid ground for suspension or cancellation of a licence. In this case, it was contended that a report from the Motor Vehicle Inspection Unit indicated that the said vehicle was operating on a defective speed limiter and had no valid inspection sticker at the time of the said accident. It cannot be doubted, and this Court must take judicial notice of the fact that some of the conditions for licensing a public service vehicle to operate in this country is the fitting of an approved and working speed limiter as well as compliance with the rules and regulations guiding the regular inspection of such vehicles.

28. It therefore cannot be doubted that the 1st Respondent had the power and authority to suspend or revoke the applicant's licence. It is however now well settled that:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."**

See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.**

29. In this case, it is important to revisit the Court's judicial review jurisdiction. Article 47 of the Constitution is emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

30. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the Judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private

law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

31. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

32. Whereas the general position is that in judicial review, the Court is only concerned with the process through which the decision is arrived at rather than the merits of the decision itself, in practice, the distinction between the two is rather blurred. That this is so was appreciated by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR,** where the Court expressed itself at paras 55-58 as hereunder:

> **55. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, *Section 7 (2) (l)* of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in *Article 24 (1) (b)* and *(e)* of the *Constitution to wit* that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.**
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> **56. Analysis of *Article 47* of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. *Section 7 (2) (f)* of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; *Section 7 (2) (j)* identifies abuse of discretion as a ground for review while *Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i)* and *(iv)* deals with**

rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

57. In Mbogo & another -v- Shah (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in Mbogo -v- Shah *(supra)* and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

58. The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act,* there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e)* and *(h)* of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.

33. What then constitute procedural impropriety for the purposes of the rules of natural justice? Article 47 of the same Constitution provides:

(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.

34. Pursuant to Article 47(3) Parliament enacted the ***Fair Administrative Action Act***. Section 4(1), (2) and (3) thereof provides:

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

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(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.

35. Under section 2 of the said Act "administrative action" is expressed to include:

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

36. It is therefore my view that before the 1st Respondent can suspend a licence of a PSV licensee, it is duty bound to make all the necessary inquiries to satisfy itself that the circumstances warrant the taking of such adverse action and once it is so satisfied, it has to give the person concerned the reasons therefor in writing.

37. Since it is a requirement that an administrative action must be fair, it follows that the rules of natural justice will be presumed to apply. In other words, the process must be procedurally fair and the person concerned should have had a reasonable opportunity of presenting his case. As was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

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

38. Similarly, in **Hoffmann-La Roche (F) & Co. AG vs. Secretary of State for Trade and Industry [1975] AC 295, 368D-E** it was held that the commissioners:

"…must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely."

39. It is stated by **Michael Fordham** in ***Judicial Review Handbook***; 4thEdn. at page 1007:

"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".

40. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."

41. From the foregoing it is clear that the general rule is that a person whose activities are being investigated ought to be given a reasonable opportunity to put forward facts and arguments in justification of his conduct of the activities under investigations before the investigator reaches a conclusion which may adversely affect him. It is however appreciated that in exceptional circumstances, a prior notice and a hearing may defeat the purpose for which the law was enacted and this was appreciated in **R vs. Aga Khan Education Services *ex parte* Ali Sele& 20 Others High Court Misc. Application No. 12 of 2002**, where it was held *inter alia* as follows:

"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each scale must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition indecision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

42. It was therefore appreciated in **R vs. Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531, 560-G**, **Lord Mustill** that:

"Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf *either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both*." [Emphasis added].

43. Therefore as was appreciated in **Russel vs. Duke of Norfork [1949] 1 All ER at 118**:

"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."

44. Where such an opportunity is availed the caution in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009** ought to be taken. In that case it was held that:

"The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."

45. It follows that as was held in **Pearlberg vs. Varty (Inspector of Taxes) [1972] 1 WLR 534**:

"Fairness does not necessarily require a plurality of hearings or representations and counter representations. If there were too much elaboration of procedural safeguards nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too easily sacrificed."

46. This, in my view was what informed the decision of **Sergon, J** in **Republic vs. The Chairman Transport Licensing Board Mombasa HCMA No. 418 of 2006** where the Learned Judge held that the existence of a right of appeal is only a factor to be taken into account but not a bar to the application for judicial review and that the ***Transport Licensing Act*** did not contemplate that a party must be heard before an action is taken but empowered the Transport Licensing Board to act in the best interest of the public under section 7 of the ***Transport Licensing Act***. The Learned Judge, while appreciating that there was a legitimate expectation that a party should be heard even when an action has been taken, found, and rightly so in my respectful view, that if the party was to be heard first then it would defeat the purpose the Act was intended to serve.

47. In this case however, the applicant contends that the decision was without it being afforded an opportunity of being heard. According to the 1st Respondent, the decision was based on a report from the Motor Vehicle Inspection Unit indicated that the said vehicle was operating on a defective speed limiter and had no valid inspection sticker at the time of the said accident. It was clear that there was some sort of investigation carried out by the Motor Vehicle Inspection as a result of which the 1st Respondent formed the view that there was a need for documented explanation on measures to be put in place to ensure safety of passengers and the vehicles in the applicant's fleet.

48. From the tone of the said letter it is clear that the 1st Respondent had arrived at its decision that the applicant had failed to comply with a condition for the issuance of the licence. Whereas the 1st Respondent could well have been entitled to take preservatory orders pending compliance with the rules of natural justice, it could not make a final decision without affording the applicant an opportunity of being heard. This seems to be what the 1st Respondent did.

49. The situation before us is not so dissimilar to the one described by **Nyamuchonco, J** in **Salongo vs. Allibhai's Garage Ltd and Others [1973] EA 409** where the learned Judge stated that:

> **"In this case, according to the secretary of the second defendant, the second defendant is a corporate body, registered under the Co-operative Societies Act, 1970. It is composed of 100 members and it is the only body which can be issued with a taxi cab operator's licence. For this reason, any person who desires to operate a taxi service becomes a member of the company. The company itself owns no vehicles of its own, but members' vehicles are registered in its name. Licences are issued not to individual members, but to the company. After a licence has been issued, the company hands over the licence and the vehicle to its member to operate the taxi service. The company retains no control over the member, and does not share in the member's earnings."**

50. The Applicant however contended that the impugned decision amounted to collective punishment. First, it was alleged that each of the applicant's members ought to have been heard. However it is clear from the applicant's own version that the subject license was issued in the name of the applicant. In my view, subject to compliance with the law, there is no bar to the 1st Respondent cancelling a licence with the effect that the whole fleet operating under the same licence would thereby e adversely affected. By accepting to operate their vehicles under an umbrella of a particular society, motor vehicles operators are deemed to cede some of their powers respecting the operation of their vehicles to the particular society to which they belong. This in my view is what informed the decision in **Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** where the High Court expressed itself as follows:

> **"Whereas the rules of natural justice are not engraved on tablets of stones, fairness demand that when a body has to make a decision which would affect a right of an individual it has to consider any statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on a body the power to make decision affecting individuals, the courts will only require the procedure prescribed to be introduced and followed by way of additional safeguards as that will ensure the attainment of fairness. In essence natural justice requires that the procedure before any decision making authority**

which is acting judicially shall be fair in all circumstances. The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. *The hearing may be given individually or collectively, depending upon the facts of each situation.* A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence…Although the courts have for a long time supplemented the procedure that had been laid down in a legislation where they have found that to be necessary for that purpose, before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of legislation. Additional procedural safeguards will only ensure the attainment of justice in instances where the statute in question is inadequate or does not provide for the observance of the rules of natural justice."

51. The second contention was that by cancelling the applicant's licence the applicant's members were subjected to punishment for no wrong doing of theirs. Whereas, this may be an attractive argument, it is important to keep in mind the rationale behind the requirement that public service vehicle operators do so under registered societies. In my view that requirement was meant to inculcate some measure of discipline on our roads as the death toll arising from road accidents had reached an alarming rate and continue to increase unabated. This Court sends a strong message to the SACCOs that the whole idea behind PSVs being operated under SACCO was to ensure that the PSVs complied with the laws relating to road traffic. Those SACCOs which are unable to control members within their stable and their members' drivers are put on notice that that unless they reign in on errant members and their employees, all their members are bound to suffer with the result that the compliant members will move to those SCCOs that are properly organised. The owners of PSVs must also be vigilant in their choice of SACCCOs and should only opt for those SACCOs that are properly and efficiently managed otherwise they risk losing business and income as a result of joining poorly managed SACCOs.

52. The Courts will not allow themselves to be safe havens for those PSV's operators that do not comply with the law and are out to maximise profits at the expense of the lives, limbs and properties of innocent Kenyans. Whereas collective punishment is generally frowned upon by the law, recklessness by PSV owners may well disentitle PSVs operators from favourable exercise of the Court's discretionary remedy of judicial review orders where such conduct is found to be grossly contumelious.

53. However, the decision whether or not to grant judicial review must necessarily on case to case basis depending on the circumstances of each case.

54. Although there was no response to the application, this Court is duty bound to consider the competency of the application in light of the provisions of section 38 of the Act. The said section provides as follows:

(1) A person who—

(a) being an applicant for the grant or variation of a licence, is aggrieved by the decision of the Authority on the application;

(b) having made an objection to any such application as aforesaid, being an objection which the Authority is bound to take into consideration, is aggrieved by the decision of the Authority thereon; or

(c) being the licensee, is aggrieved by the revocation or suspension thereof, may within the time

and in the manner prescribed appeal to the Appeals Board established under section 39.

55. It I therefore clear that there is a right of appeal provided under the said section. However, the right of appeal presupposes that a hearing has taken place in the sense that the applicant has been afforded an opportunity of being heard and is aggrieved by the decision arising therefrom. In my view where a person has not been heard at all as the applicant contends herein, which contention is not controverted, an appellate route would not be efficacious. An appeal in my view deals with the merits of the decision. Therefore, whereas the availability of an alternative remedy is a factor to be taken into consideration, the Court cannot deny an otherwise deserved remedy on the basis of an alternative remedy where such alternative remedy is a mere mirage or is less convenient, effective and beneficial.

56. In arriving at my decision I appreciate that strict measures ought to be taken to curb unnecessary loss of property, limb and life on our roads arising from rampant disregard of traffic rules. However, the blame must fall both on the operators of motor vehicles and law enforcement officers who too often look the other way when traffic rules are being violated with impunity daily on our roads.

57. That said the Court of Appeal in **Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another Civil Application No. Nai. 43 of 2006 [2006] 1 KLR 77** expressed itself as follows:

> **"We recognize and we are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the Courts, sometimes even to the annoyance of the public and the only institution charged with the duty to interpret the provisions is the High Court and where permissible, with an appeal to the Court of Appeal. Since the Kenyan nation has chosen the path of democracy rather than dictatorship, the Courts must stick to the rule of law even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the Court's decisions since occasionally those who have been mighty and powerful are the ones who would run and seek the protection of the Courts when circumstances have changed...The courts must continue to give justice to all and sundry irrespective of their status or former status."**

58. When a country opts to follow the path the democracy it must be prepared not only to enjoy the fruits therefor but must also be prepared to pay the cost of doing so. As the Court of Appeal appreciated in **Judicial Commission of Inquiry Into the Goldenberg Affair & 3 Others vs. Job Kilach Civil Application No. Nai. 77 of 2003 [2003] KLR 249**:

> **"Democracy is normally a messy, and often times, a very frustrating, way of governance. In this respect, dictatorships are more efficient."**

59. We have made a bed and we must lie on it however some people may feel uncomfortable with it. This is the message in Article 2(1) of the Constitution where it is provided that:

> ***This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.***

60. It is therefore my view that the 1st Respondent's decision was tainted with procedural impropriety.

Order

61. In the premises an order of Judicial Review in the nature of Certiorari is hereby issued removing into this Court for purposes of being quashed, the 1st Respondent's decision made on 24th March 2016 expressed in the 1st Respondent's letter in relation to the Ex Parte Applicant's PSV vehicles which decision is hereby quashed. In the circumstances it is nolonger necessary to issue an order of prohibition as the decision whose implementation is sought to be prohibited nolonger exists.

62. The applicant will have the costs of these proceedings to be borne by the 1st Respondent.

63. Orders accordingly.

Dated at Nairobi this 30th day of January, 2017

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Mwangi