



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO 31 OF 2015.

**IN THE MATTER OF AN APPLICATION UNDER ARTICLES 2, 19, 22(1), 23,40 AND 165(3)(b)
OF THE CONSTITUTION OF KENYA**

AND SUPERVISORY JURISDICTION AND PROTECTION OF THE

**FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL (HIGH COURT
PRACTICE AND PROCEDURE RULES 2006)**

AND

**RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE) RULES OF 2013 AND ALL
OTHER ENABLING POWERS AND PROVISIONS OF THE LAW**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 10, 40, 47 49 AND 50 OF THE CONSTITUTION REGARDING
PROTECTION OF RIGHT TO PROPERTY RELATING TO MOTOR VEHICLE
REGISTRATION NUMBER KAG 246G**

AND

**IN THE MATTER OF SECTION 55 AND 56 OF THE TRAFIC ACT AND THE REGULATION
15 OF THE KENYA ROADS (KENYA NATIONAL HIGHWAY AUTHORITY) REGULATIONS
2013**

AND

**IN THE MATTER OF ABUSE OF LEGAL POWER BY THE KENYA NATIONAL HIGHWAYS
AUTHORITY THROUGH**

DETENTION OF MOTOR VEHICLE REGISTRATION NUMBER KAG 246G

MARTIN MBATHA MUTISYA.....PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

The Petitioner is an adult male residing and working for gain in Nairobi, while the Respondent is a state corporation established under the Kenya Roads Act 2007, that is responsible for the management, development, rehabilitation and maintenance of national roads. The Petitioner and his wife Joyce Munyao-Mbithi are also the owners of land parcel registration number Machakos Ndalani Phase 1/53.

On 28th March 2015, the Petitioner hired motor vehicle registration number KAG 246G to ferry bricks from Gatunyaga in Thika to the said parcel of land, namely Machakos Ndalani Phase 1/53, and travelled along the Thika-Garissa Highway before turning at Makutano market to access his aforementioned parcel of land. While the Petitioner was offloading the said bricks, officers and/or agents of the Respondent entered the said parcel of land and alleged that that he had by passed a weighing bridge, and proceeded to impound the vehicle by taking away its registration tags.

The Respondent's officers also ordered the Petitioner to take the vehicle to Matuu Police Station and to pay a transgression fee of two thousand United States dollars or its equivalent to the Respondent. The Petitioner took the vehicle to Matuu Police station where it was detained, and due to pressure from the owner of the vehicle, he paid the Respondent a sum of Kshs 181, 400/= to secure the release of the vehicle.

The Petitioner thereupon filed this Petition. His case is detailed out in his Petition dated 10th August 2015, a supporting affidavit and further affidavit he swore on 14th July 2015 and 28th October 2016 respectively, and in submissions dated 9th January 2017 filed in Court by his Advocates, Atieno Opiyo & Co Advocates.

The Respondent's responded in a replying affidavit sworn on 1st October 2015 by Oscar Mwangome, an officer of the Respondent attached to its Mobile Weighbridge team, and submissions dated 31st January 2017 filed by its Advocates, Cyrus Maina & Co. Advocates.

The respective cases by the Petitioner and Respondent are hereby set out hereinbelow.

The Petitioner's Case

The Petitioner claims that agents and/or officers of the Respondent without any colour of right trespassed into his property alleging that he had by passed a weighing bridge, and did not accord him any opportunity to defend himself.

Further, that to the extent that the Respondent's decision to impose a penalty of Kshs 181,400/= in the form of transgression /absconding fee against the Petitioner was undertaken without giving the Petitioner an opportunity to make representations either in person or through his legal representatives, his right to fair administrative action as guaranteed by Article 47 of the Constitution has been denied, violated, infringed or is threatened. The Petitioner in addition contends that the said penalty of Kshs 181.400 /= was imposed without according him due procedural guarantees for a fair hearing in violation of Article 50 of the Constitution. That the Respondent by its aforesaid action constituted itself as a complainant, a prosecutor, a judge and the executioner all rolled into one.

It is further alleged by the Petitioner that in levying the said penalty the Respondent acted *ultra vires* by exercising judicial authority and /or function, which the people of Kenya have delegated only to courts of law and relevant quasi-judicial bodies. Further, that the Respondent has no authority or competence and cannot purport to arrogate to itself judicial functions of interpreting and declaring what the law is pursuant to articles 23 and 159 of the Constitution.

Lastly, that to the extent that the Respondent without any colour of rights or justification trespassed into the Petitioner's property namely Machakos Ndalani Phase 1/53 and proceeded to remove tags from a motor vehicle he had hired namely KAG 246G, his right to property guaranteed by Article 40 of the Constitution has been denied, violated, infringed or is threatened.

The Petitioner prays for the following relief in the Petition:

1. A declaration that to the extent that the decision of the Respondent contained in the notice dated 28th March 2015 directing the Applicant to pay transgression/absconding fees without giving the Applicant any opportunity to defend himself before any tribunal either in person or through his representatives violated the right to fair administrative action under Article 47 and Article 50 which guarantees fair hearing.
2. An order of certiorari to remove to this Court for the purpose of its being quashed the decision made by Kenya National Highway Authority on the 28th day of March 2015 in which it imposed a penalty of Kshs 181,400/= being transgression fees for bypassing a weighing bridge.
3. A declaration that the decision by the Kenya National Highway Authority was and is invalid, ultra vires, void and of no effect to the extent that the Respondent arrogated itself a judicial function contrary to Article 159 of the Constitution.
4. A declaration that the action of the Respondent's officers violated the Petitioner's protection of right to property under Article 40 of the Constitution.
5. Further or in the alternative damages arising from the matter herein and interest thereon.
6. An order compelling the Respondent to pay, the costs of this Petition.
7. Any other/further order or relief that this Honourable Court may deem fit to grant.

The Respondent's Case

The Respondent avers that the disputed actions were undertaken in the exercise of its statutory functions which are expressly stipulated, sanctioned and protected by the law, and are not administrative decisions as alleged by the Petitioner. The Respondent's version of events is that on 28th March 2015 at around 14.20 hours, while the Respondent's mobile weighbridge officers were on patrol along Thika-Garissa Highway, they saw a motor vehicle registration no. KAG 246G loaded with building stones, and slowed to intercept the said vehicle.

However, that when the motor vehicle's driver realized that the Respondents officers were ahead of him he slowed down and immediately diverted off the main road in a bid to evade the Respondents officers, which officers pursued the said motor vehicle and instructed the said driver to take it back to the road and weigh bridge for weighing before offloading. However, that the said driver declined to heed to the Respondents instructions, and abandoned the vehicle.

A police officer who was in the company of the Respondent's officers then removed the number plates of the said motor vehicle and directed the Petitioner to move it to Matuu Police Station pursuant to his powers under the Traffic Act. Further, that the Respondent also issued a prohibition order under the relevant laws requiring payment of statutory weigh bridge absconding fees and the motor vehicle be detained at Matuu Police Station pending the Petitioner's payment of the said prescribed transgression fees of 2,000 US dollars. The Respondent thereupon discharged the Petitioner's motor vehicle after payment of the prescribed weigh bridge transgression fees.

According to the Respondent, Regulation 15 of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 empowers it to enforce the regulations thereto, and particularly to undertake overload control measures and enforce the regulations by itself or seek the assistance of the Police where necessary. Further, that Regulation 15(3) of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 prescribes payment of USD 2,000 or its equivalent in Kenya Shillings for a vehicle found to have bypassed/absconded from a weigh bridge station, and the Regulation empowers the Respondent to enforce the law which includes determining, imposing, charging the said weigh bridge

absconding fees or undertake prescribed actions to recover the said fees without the assistance of the Court.

In addition that the contraventions by the Petitioner of the Kenya Road Act and the enabling provisions also constitute offences under Traffic Act that are within the power of the Police to investigate or recommend prosecution. The Respondent annexed copies of pictures of the motor vehicle Registration No. KAG 246G and the load thereof, and of the prohibition order it issued to the Petitioner.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Petitioner and Respondent. The issues raised in this petition are firstly, whether the Petitioner's constitutional rights to property, fair administrative action and fair hearing have been infringed by the Respondent; secondly, whether the Respondent in detaining the Applicant's motor vehicle, and in demanding payment of a fee acted ultra vires Article 159 of the Constitution and/or illegally; and lastly, whether the Petitioner is entitled to the relief sought.

On the violation of the Petitioner's Constitutional Rights

In this case, the Petitioner argues that the transgression notice had an adverse effect to numerous rights and fundamental freedoms guaranteed him under the Constitution. That his right to fair hearing, his protections as an accused person, and his right to property were violated by the Respondent in its implementation of regulation 15(3) of the Kenya Roads (Kenya National Highways Authority) Regulations, as he was not accorded a hearing, and the lorry he hired was detained at Matuu police station on 28th April 2015 to 8th April 2015 when he paid the Respondent the transgression fees. Further, that the consequences of absconding a weighbridge imposes a greater duty on the Respondent to ensure that fair procedure is followed before and in reaching its decision.

The Petitioner submitted that the Respondent's action constituted an administrative decision that this court can undertake judicial review of and determine whether the judicial review remedies sought by the Petitioner can be granted. He urged the court to look at the process rather than the decision reached by the Respondent and relied on the decisions in the case of **Ericsson Kenya Limited vs Attorney General and Others [2013] eKLR** and **R vs Judicial Service Commission, Misc. Civil Application No. 1025 of 2003.**

The Respondent on its part submitted that it is not in contention that the Respondent confiscated the subject motor vehicle. However, that the Petitioner's motor vehicle was seized and detained consequent of the Petitioner's failure to comply with the lawful instruction by the Respondent while executing its public duty. Furthermore,, that the said confiscation was done in observance of the law more particularly pursuant to fees recovery enforcement measures under regulation 15 of the Kenya Roads (Kenya National Highways Authority) Regulations and was not penal punishment as purported by the Petitioner.

The Respondent averred that it had the authority, power and mandate to issue the weigh bridge ticket requiring payment of the absconding fee of Ksh. 181,400/=, and to detain the vehicle in order to secure payments of fees. Therefore that the Respondent did not violate the law and or the Petitioner's rights, and that it is the Petitioner who is culpable of violating the law and preventing the Petitioner from performing a public duty.

Further, that the Petitioner's alleged rights are not absolute but subject to limitations prescribed by the Article 24 of the Constitution and set out in the Traffic Act, the Kenya Roads Act and subsidiary legislation thereto, including but not limited to the Traffic Act Regulations and Kenya Roads Act (Kenya National Highways Authority) Regulations 2013 which provide limitations on the Petitioner's rights and freedoms in respect of the use of public roads, to ensure that the Petitioner does not prejudice the rights of others to safe and well maintained roads.

The Respondent submitted that in the instant case, the limitation on axle load control and measures as set out under the Kenya Roads Act, the Traffic Act and the Regulations thereto are measures undertaken in public interest to protect the roads, and are reasonable, justifiable and satisfy the threshold set out under Article 24 of the Constitution.

The applicable principles of law is that the burden of proving the existence of, and violation of a right or fundamental freedom guaranteed by the Constitution lies on the person alleging such a violation on a balance of probabilities, before the burden moves to the State or respondent to show that the violation was saved by the constitution, as held in **Githunguri Dairy Farmers Co-operative Society vs The A.G. & 2 Others (2016) eKLR** . It was in addition I agree with the holding by Onguto J. in the said case that the general rule is that a Constitution and especially the Bill of rights must be given a generous and purposive construction to give individuals the full measure of the guaranteed rights and freedoms. Any law which limits fundamental individual rights ought to be strictly construed in order to protect those rights:

I have considered the arguments made on the infringement of the Petitioner's right to property, and note that the main argument put forward by the Petitioner is that he has been deprived of his property without due process. The Respondent's response is that the subject motor vehicle was seized and detained pursuant and in accordance with the law, and relied on the decision in the case of **Mtana Lewa vs Kahindi Ngala Mwagandi,(2015) eKLR** on limitation of fundamental rights and that the right to property is not one of the rights that can be limited.

Article 40 of the Constitution in this regard 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.

The Petitioner in this respect did not provide any evidence of its ownership of motor vehicle registration number KAG 246G, or a lease agreement to show that they had hired the said vehicle and hence had a beneficial interest therein. This Court cannot therefore make a finding as to the Petitioner’s proprietary interest in the motor vehicle or of breach of any property rights in the said motor vehicle.

However, and this finding notwithstanding, the Respondent does not dispute that it confiscated and detained the said motor vehicle and only released it to the Petitioner after the Petitioner had paid an absconding fee of Ksh. 181,400/= . The Constitution in this regard provides that no law shall allow for arbitrary deprivation by the State or any person of another person’s property, and therefore 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, were photographs of motor vehicle registration number KAG 246G with its load of building stones, and a prohibition order dated 28th March 2015 requiring payment of transgression fees and the said motor vehicle be detained at Matuu Police Station pending payment of the said fees pursuant to the Traffic Act. The said evidence was annexed as Exhibits “OM1” and “OM2” respectively to the replying affidavit by Oscar Mwangome on 1st October 2015.

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. The Regulations that the Respondent claims the Petitioner contravened 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 an alleged 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 vehicle that was detained by the Respondent was only released upon the Petitioner paying to the Respondent a sum of Kshs 181,400/=. The Petitioner in this regard attached a copy of the bankers cheque with an acknowledgement by the Respondent of the said sum.

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.

On the 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 violated their right to a fair hearing and fair administrative action enshrined under Articles 50 and 47 of the Constitution by condemning them unheard.

The Petitioner relied on Article 47 of the Constitution and the Fair Administrative Action Act 2015 (Act No.4 of 2015) in his submissions on the violation of his right to fair administrative action. Reliance was further placed on the definition of administrative action and requirements of fair administrative action as laid out in section 4(3) of the Fair Administrative Action Act, 2015, and the decision of Majanja J. in **Moses Kiarie Kairuri & 4 others v Attorney General & 3 others, [2014] e KLR** that the right to fair administrative action is aimed at instilling discipline to administrative action so that the values and principles of the Constitution are infused in matters of public administration.

The Respondent denied that Petitioner's rights were violated as alleged or at all and it was submitted that the Petitioner was pursued and instructed to return the motor vehicle to the Highway for weighing on the mobile weigh bridge but declined. That the failure to adhere to the Respondent's instruction was a breach of Regulation 15(2) of Kenya Roads (Kenya National Highway Authority) Regulations of 2013 which require the driver to follow lawful instructions issued by the Respondent so that road safety and overload control procedures are adhered to.

Therefore, that following contravention of the Regulations and/or lawful instruction, the Petitioner's driver was issued with a notification to be charged with an offence of bypassing or absconding a weighbridge and thus given reasons for the detention. According to the Respondent, the purported breach of Article 47 of the Constitution is therefore an afterthought.

The right to fair administrative action is 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 resulted in the loss of a substantial sum of money paid as a fee of Kshs 181,400/=, which affected his right to property, and would therefore definitely attract the requirements of procedural fairness detailed out in the foregoing. To the extent that no the Respondent did not provide any evidence that any such procedures were followed, and in particular that the Petitioner was given the chance to defend himself before payment of the alleged fee, I find that the Petitioner’s right to fair administrative action was violated.

As regards the violation of his right to hearing, the Petitioner urged that the procedure contemplated under regulation 15(3) of the Kenya Roads (Kenya National Highways Authority) Regulations does not guarantee the procedural safeguards provided for under Article 50(1) of the Constitution, and that the Petitioner was not accorded any opportunity to respond to the transgression notice, challenge the allegations of the police officers and was not accorded any opportunity to prepare a defence.

The Respondent on its part relied on the decisions in **Blue Jay Investment Ltd vs Kenya National Highway Authority**, (2014) e KLR, and **Buzeki Enterprises Limited vs Kenya National Highways Authority**, (2014) e KLR for the position that Regulation 15 Kenya Roads (Kenya National Highway

Authority) Regulations, 2013 in this regard provides for the payment of a fee and not a fine, and did not provide for a person to be taken to Court to answer charges for a penalty to be levied, hence there was no contravention of the Constitution.

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. Article 50(2) further provides for a number of procedural guarantees which the petitioner ought to enjoy in the event that he has committed an offence that is likely to attract a penalty which includes the right to adduce and challenge evidence.

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 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.

The Respondent have justified their actions as being sanctioned by the Kenya Roads (Kenya National Highway Authority) Regulations of 2013 and in particular Regulations 15 provide thereof which provides for procedures to control overload as follows:

“(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 this regulation expressly create an offence, and if a person is alleged to have committed an offence under the said regulation, the Constitution under Article 50 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. The offence must therefore be tried and proved according to the said constitutional provisions before any fee or penalty is imposed, irrespective of the fact that regulation 15 of the Kenya Roads (Kenya National Highway Authority) Regulations of 2013 not providing for the procedure of doing so. In addition, the said regulations are subject to the Constitution.

I find that Article 50 of the Constitution was applicable in this case and was not observed for reasons that a quasi-judicial procedure was employed by the Respondent, as the Petitioner was not merely notified of an offence, as the prohibition order dated 28th March 2015 issued by the Respondent found the Petitioner culpable of an offence and penalized him by detaining the subject motor vehicle subject to the payment of a fee. The Respondent in addition did not provide any evidence of compliance with the provisions of the Constitution in this regard.

This Court had occasion to interrogate the averments by the Respondent that what was imposed and paid by the Petitioner was a fee and not a penalty in **Disaranio Limited v Kenya National Highways Authority & Attorney General [2017] eKLR** which involved similar circumstances as the present case. I shall quote verbatim the finding of this Court in this regard for their full effect:

“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 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."

Of the various authorities cited by the parties on this issue, I am in support of the position expressed by Emukule J. in in Margaret Miano vs. Kenya National Highway Authority, (2015) e KLR 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.

Before leaving this issue I would like to address the arguments by the 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. As to whether the Petitioner's rights therefore needed 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.

This position was also emphasized by the Court of Appeal in the decision relied upon by the Respondent in Mtana Lewa vs Kahindi Ngala Mwagandi,(2015) eKLR as follows:

“Chapter 4 of the Constitution of Kenya contains the Bill of Rights, which is a collection of fundamental rights and freedoms sought to be protected including the right to life (Article 26), human dignity (Article 28), freedom of movement and residence (Article 39), right to property (Article 40), fair administrative action (Article 47), access to justice (Article 48) and fair hearing (Article 50). The bill of rights are to be applied so as to develop the law where there is a gap in giving effect to a right or fundamental freedom as per Article 20 (3) (b). These rights are however not absolute, but subject to limitations in so far as such limitations are reasonable and justifiable taking into account the factors set out in Article 24 including the nature, importance, purpose and extent of the right vis a vis the limitations as well as prejudice to the rights and freedoms of others. The Constitution further dictates in Article 24 (2) that any statute limiting a right or fundamental freedom should be clear about the right or freedom being curtailed and specifically express such intention as well as the nature and extent of the limitation for it to be valid. For the avoidance of doubt, the framers of the Constitution included a list of rights and freedoms which may not be limited notwithstanding any provisions of the Constitution. These absolute rights are set out in Article 25. It is instructive that the right to property is not one of them. This then leaves the protection of the right to property within the precincts of allowable limitations by the statute.”

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*.”

It is instructive that 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.

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 in 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. In this respect I agree with the holding in **Republic -vs- County Government of Mombasa Ex-Parte- Outdoor Advertising Association, (2014) eKLR** that the defence of public interest must be in accordance with the provisions of the Constitution on affording an affected party the opportunity to be heard.

Whether the Respondent in detaining the Applicant's motor vehicle, and in demanding payment of a fee acted ultra vires and/or illegally.

The Petitioner submitted on this issue that the Respondent *acted ultra vires* the Constitution and powers and authority granted to it under the Kenya Roads Act, for reasons that the Respondent had no authority to impose a penalty in the name of fees or any other term against the Petitioner through extra-judicial processes. Further, that by doing so, the Respondent arrogated to itself judicial authority and thereby violated Articles 2, 47, 49, 50 and 159 of the Constitution.

The Petitioner in this respect relied on the decision in **Margaret Miano v Kenya National Highways Authority, (2015) e KLR** for the position that the Respondent has no authority to impose a penalty. The Petitioner also relied on Article 159 of the Constitution and the decision in **Re matter of the Interim Independent Electoral Commission, S.C Constitutional Application No 2 of 2011 (2011) e KLR**, for the position that 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.

It was thus submitted that the Respondent does not have any judicial powers under both the Constitution and the Kenya Roads Act that created it; and that consequently, any attempt to exercise such power as was the case in the instant case is acting outside the scope of the Constitution and Act that created it and is *ultra vires* and illegal on both constitutional and administrative law grounds. The decision in **Republic v Kenya National Examinations Council, Ex Parte Ian Mwamuli, (2013) eKLR** was cited by the Petitioner, for the position that illegality occurs when a decision-making authority commits an error of law in the process of making the decision complained of; or acts without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles.

The Respondent on its part submitted that that the statutory power to charge for commission of any offence under the Traffic Act is in the exclusive power of the Director of Public Prosecutions under Article 157 of the Constitution. Further, that the Respondent has no statutory power to investigate and or charge for offences arising from the facts in this case and cannot thus be blamed for non- prosecution of the Petitioner. The Respondent submitted that its power is limited and stipulated under the Kenya Roads Act and Regulations thereto, and that it acted within its powers and mandate and also within the law.

The Respondent further submitted that the provisions of the Kenya Roads Act and the Regulations thereto are very clear and elaborately expressing the intention of Parliament., and nothing would have prevented the Parliament from expressly providing for a Court process before collecting the absconding

fees.

This Court in deciding the issue whether the actions of the Respondent were ultra vires and /or illegal is mindful of the applicable principles that apply in determining whether a statute is constitutional or ultra vires, as the Respondents have relied on certain statutes for their actions. These are firstly, when examining whether a particular statutory provision is unconstitutional, 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 as held in **Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others, [2011] e KLR.**

Further, the court must have regard not only to the purpose but also the effect of the statute. Secondly the rule on *ultra vires* on the other hand requires that the regulations so made should not be beyond the scope of power, jurisdiction or authority granted or permitted by the parent Act.

The Respondent has relied on sections 22 and 46 of the Kenya Roads Act and the regulations made thereunder as having given them power to make the decision it made in the instant case. 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(1) of the Act provides for the powers of the above mentioned 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 22(2)(d) of the Kenya Roads Act provides that the powers conferred by subsection (1) 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 46 of the Act 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 purpose and effect of the Kenya Roads Act and the Kenya Roads (Kenya National Highway Authority) Regulations, 2013 made thereunder was considered and discussed at great length by this Court in **Disaranio Limited v Kenya National Highways Authority & Attorney General [2017] eKLR**, wherein it was found 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 as illustrated in the foregoing.

Regulation 15(5) of Kenya Roads (Kenya National Highway Authority) Regulations, 2013 was also found in the cited case to be 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.

Lastly, while it is the legal position as argued by the Respondent 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, and that the Office of the Director of Public Prosecutions is the one mandated to prosecute any offences so created by law, 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 is the effect of regulation 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’.

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. “

Therefore, the upshot of the foregoing is that the acts of the Respondent of demanding payment of an absconding fee of Kshs 181,400/= for the release of the motor vehicle carrying the Petitioners goods on account of contravention of the Kenya Roads (Kenya National Highway Authority) Regulations, 2013 were illegal, to the extent that the provisions of the laws that the Respondent relied upon have been found to be unconstitutional and *ultra vires*.

Whether the Petitioner is entitled to the reliefs sought.

Article 22 (1) of the Constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 23(1) specifically gives jurisdiction to the High Court in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

The relief that can be availed by this Court in such a constitutional petition is provided for in Article 23(3) of the Constitution as follows:

“(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.”

Orders of judicial review, including that sought by the Petitioner of *certiorari* can therefore be granted by this Court if it is found that a Petitioner's constitutional rights have been denied, infringed or violated

The scope of the judicial review remedy of *certiorari* was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** in which the said Court held *inter alia* as follows:

“...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

Likewise, in **Captain Geoffrey Kujoga Murungi vs Attorney General, Misc. App No. 293 of 1993** it was held as follows:

"Certiorari deals with decisions already made – so that when issued an order brings up into this Court a decision of an inferior court, tribunal or of a public authority to be quashed. Such an order (*certiorari*) can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice; or contrary to law."

The Petitioner and Respondent have brought evidence of the prohibition order requiring them to pay Kshs 181,400/= as an absconding fee which is sought to be quashed. This Court has also found that this decision violated various constitutional rights of the Petitioners, and was unconstitutional and *ultra vires*. The Petitioner is therefore entitled to remedial orders.

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

1. It is hereby declared that the that the decision of the Respondent contained in the notice dated 28th March 2015 directing the Applicant to pay transgression/absconding fees without giving the Applicant any opportunity to defend himself violated the rights of the Petitioner under Articles 40, 47 and 50 of the Constitution of Kenya
- 2.,It is hereby declared that that the decision made by Kenya National Highway Authority on the 28th day of March 2015 in which it imposed a penalty of Kshs 181,400/= being transgression fees for bypassing a weighing bridge. was and is invalid, *ultra vires*, void and of no effect to the extent that the Respondent arrogated itself a judicial function contrary to Article 159 of the Constitution and to the extent that 15 of the Kenya Roads Kenya National Highways Authority) Regulations, 2013 which provides for the imposition of the said fee contravene Articles 40, 47, 50 and 159(1) of the Constitution of Kenya and is hereby found to be unconstitutional
3. An order of *certiorari* be and is hereby issued to remove to this Court for the purpose of its being quashed the decision made by Kenya National Highway Authority on the 28th day of March 2015 in which it imposed a penalty of Kshs 181,400/= being transgression fees for bypassing a weighing bridge.
4. The Respondent is consequently hereby ordered to unconditionally return to the Petitioner the Kshs 181,400/= he paid as transgression fees forthwith.
5. The Respondent shall pay the Petitioner the costs of this Petition.

Orders accordingly.

Dated, Signed, and Delivered at Machakos this 2nd day of August 2017

P. NYAMWEYA

JUDGE