



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CONSTITUTIONAL PETITION NO. 3 OF 2017

IN THE MATTER OF AN APPLICATION FOR CONSTITUTIONAL REVIEW UNDER CHAPTER 4 AND 10 OF CONSTITUTION OF KENYA AND IN THE ALLEGED VIOLATION OF FUNDAMENTAL FREEDOMS UNDER THE CONSTITUTION OF KENYA 2010.

BETWEEN

SAMPER TOURS AND TRAVEL LTD.....1ST PETITIONER

AMOS WACHIRA2ND PETITIONER

FESTUS WAMBUA3RD PETITIONER

AND

NATIONAL TRANSPORT AND

SAFETY AUTHORITY.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION2ND RESPONDENT

INSPECTOR GENERAL OF POLICE3RD RESPONDENT

JUDGMENT

1. The 2nd Petitioner was presented before the Limuru Senior

Principal Magistrate's Court charged with two counts as follows:

a. COUNT I: Driving a motor vehicle on a public road without a Road Service Licence contrary to section 4(1)(b) as read with section 7 of Chapter 404 of the Laws of Kenya.

The particulars are that on the 3rd day of August, 2016, the 2nd Petitioner drove Motor Vehicle Registration Number KCG 062E of the make Toyota Voxy along the Nairobi-Naivasha Road within Kiambu District without a Road Service Licence.

b. COUNT II: Driving a Motor Vehicle on a Public Road without a Yellow Band contrary to Rule 70(i) as read with Rule 72(b) of the Traffic Rules.

The particulars are that on the 3rd day of August, 2016, at about 12:00pm, along the Nairobi-Naivasha Road within Kiambu County, being a driver of Motor Vehicle Registration Number KCG 062E of the

make Toyota Voxy, drove the said motor vehicle on the said public road without a yellow band as required.

2. The 3rd Petitioner was, on his part, arraigned before the same Limuru Court facing the following two counts:

a. COUNT I: Operating a Public Service Vehicle on a public road without a Road Service Licence contrary to section 41 of the National Transport and Safety Authority, Act No. 33 of 2012.

The particulars are that the 3rd Petitioner, on the 1st day of September, 2016, at about 10:12am, along Nairobi-Mai Mahiu Road within Kiambu County, being a driver of a Motor Vehicle Registration No. KCH 446A of the make Toyota Wish, did drive the said vehicle on the said public road without a service licence authorizing the driving of the said vehicle on the said road.

b. COUNT II: Driving a Motor Vehicle on a public road without a speed governor compliance certificate contrary to Rule 41A(b)(ii) as read with Rule 69 of the Traffic Rules.

The particulars are that on the 1st day of September, 2016 at about 10:12am, along Nairobi-Mai Mahiu Road within Kiambu County, being a driver of a Motor Vehicle Registration No. KCH 446A of the make Toyota Wish, drove the said vehicle on the said public road without a speed governor compliance certificate thus the vehicle speed limit could not be ascertained.

3. The 2nd and 3rd Petitioners pleaded not guilty to those charges at the Magistrate's Court. They then unsuccessfully sought to get the Learned Trial Magistrate to dismiss the charges as defective. This Petition, in which they are joined by their employer and owner of the two vehicles they were driving – the 1st Petitioner – was their next port of call.

4. The Petitioners' prayers are for the Court:

a) To grant permanent injunctory orders against the respondents especially the 1st Respondents prohibit them from arresting and preferring charges against the 1st Petitioner drivers of its branded motor vehicles used for corporate and private hire for alleged contravention of yellow line marking requirements.

b) Permanent injunctory orders against the respondents especially the 1st prohibiting them from arresting and preferring charges against the 1st petitioners driver of his/leased motors vehicles whose tare weight is less than 3048 kg for alleged contravention Transport Licensed Board (TLB) Road Service Licence (RSL) which requirements are not provided for in the relevant statute.

c) Declaration that branded corporate hire motor vehicles that have complied with other National Transport Safety Authority requirement are exempt from being marked with yellow line and charges preferred against the 1st petitioners driver on that basis are illegal.

d) Declaration that speed governors and Road Services Licence (RSL) Transport Licensing Board License (TLB) are not applicable where the motor vehicles has a tare weight below 3048 kg and charges preferred against the 1st Petitioners driver on that basis are illegal and inconsistent with the provisions of section 26(i) if NTSA Act as well assertion 41A* of the Traffic Act 403 Laws of Kenya.

e) Order for compensation for economic losses suffered, pain and suffering as a result of the 1st Respondents harassments, oppression and unlawful, unjustified interference of his business operations and violations of their fundamental rights and freedoms provided for in the Constitution.

f) Costs of this suit be provided for to the Petitioners.

5. The Petition is opposed. Both the 1st and 2nd Respondents filed replies and written submissions.

6. In brief, the Petitioners' case is as follows. The Petitioners submit that the two motor vehicles which are subject of the traffic cases (hereinafter "Subject Motor Vehicles") have a tare weight of less than 3048 kgs. They have attached log books of the Subject Motor Vehicles to evidence this. They also submit that these vehicles have a carrying capacity of 7 passengers each and are insured to carry fare paying passengers. The Petitioners further submit that since the two Subject Motor Vehicles have a tare weight of less than 3048 kgs, they are not subject to the requirement that they should be fitted with speed governors under section 41A of the Traffic Rules.

7. The Petitioners argue that it would be absurd to require vehicles which have a tare weight of less than 3048 kgs to be fitted with speed governors since all modern vehicles below that tare weight have a turbo gadget (a fan in the engine of a car that improves its performance by using exhaust gases to blow fuel vapour into the engine) which would be damaged if a speed governor is installed on the engine. Parliament, argues the Petitioners, legislated with this full information and therefore it could not have intended that speed governors be fitted on any vehicles below the tare weight of 3048kgs.

8. As regarding the requirement that the Subject Motor Vehicles have Road Service Licences, the Petitioners argue that the section of the law should not be read in isolation. Instead, the Petitioners argue that given the number of passengers the Subject Motor Vehicles are permitted to carry, the Subject Motor Vehicles fall under the definition of public service vehicle and as such require no further licence to operate.

9. The Petitioners argue that the Court should note that the Subject Motor Vehicles were all inspected and certificates issued by the 1st Respondent hence qualifying them to offer public passengers transportation services. Further, that the Subject Motor Vehicles are all insured to carry fare-paying passengers and none of the drivers were arrested for speeding or any other traffic offence.

10. It is worth noting that the Petitioners attached, in their affidavits, a number of rulings by various magistrates across the country where charges such as the present one were dropped reportedly after similar arguments as the ones advanced here were made by Accused Persons in those cases.

11. This is a straightforward case of the application of statutes and subsidiary legislation to the facts of the case.

12. First, the 2nd Petitioner's first count is expressed to be predicated under section 4(1)(b) as read together with section 7 of of Chapter 404 of the Laws of Kenya. Chapter 404 of the Laws of Kenya was entitled the Transport Licencing Act. It was repealed by section 55 of The National Transport and Safety Authority Act, No. 33 of 2012. That section expressly announced: The Transport Licencing Act (Cap. 404) is hereby repealed.

13. It follows that any charge predicated on a repealed law is definitionally defective and cannot support lawful trial process. There is no need to belabour this point.

14. I will next turn to the second count the 2nd Petitioner faces. It is expressed as "driving a Motor Vehicle on a Public Road without a Yellow Band contrary to Rule 70(i) as read with Rule 72(b) of the Traffic Rules."

15. Rule 70(i) of the Traffic Rules reads as follows:

(1) With effect from 1st January, 2004, every taxicab shall have painted on both sides and on the rear a continuous horizontal yellow band having a width of 150 millimetres and of a consistency sufficient to enable such band to be clearly visible by day at a distance of not less than 275 metres.

16. It is readily obvious that this Rule applies to taxicabs only. All parties agree that the Subject Motor Vehicles are not taxicabs. It follows that the application of this Rule to the Subject Motor Vehicles appears to be, at best, arbitrary and oppressive. I noted that none of the Respondents attempted to defend the charging under this Rule.

17. Next, I will turn to the two counts which the 3rd Petitioner faces.

They are as follows:

a. COUNT I: Operating a Public Service Vehicle on a public road without a Road Service Licence contrary to section 41 of the National Transport and Safety Authority, Act No. 33 of 2012.

b. COUNT II: Driving a Motor Vehicle on a public road without a speed governor compliance certificate contrary to Rule 41A(b)(ii) as read with Rule 69 of the Traffic Rules.

18. I will deal with these two together because both counts depend on determination of the same issues. The twin issues are:

a. Whether the Subject Motor Vehicles are Public Service Vehicles; and

b. Whether the law requires public service vehicles whose tare weight is below 3048 kgs to obtain Road Service Licences

19. The Petitioners concede that the Subject Motor Vehicles are Public Service Vehicles. However, they deny that even though they are Public Service Vehicles they are subject to the requirement that they obtain Road Service Licence by the 1st Respondent or be fitted with a speed governor.

20. Section 2 of the NTSA Act states that “public service vehicle” has the meaning assigned to it under the Traffic Act. On the other hand, the Traffic Act gives the following meaning:

“public service vehicle” means any motor vehicle which—

(a) is licensed under Part XI to carry passengers for hire or reward; or

(b) plies for hire or reward or is let out for hire or reward; or

(c) is carrying passengers for hire or reward.

21. The other relevant definition is “private hire vehicle” which is defined in section 2 of the Traffic Act to mean any public service vehicle constructed or adapted to carry not more than seven passengers, exclusive of the driver, such vehicle not being a taxicab or *matatu*.

22. From these definitions, it appears obvious that all “private hire vehicles” are, in the first place, “Public Service Vehicles.” Since the Petitioners, at the very least admit that the Subject Motor Vehicles are “private hire vehicles”, it follows that they are Public Service Vehicles.

23. The next question is whether the Subject Motor Vehicles are subject to the requirement that they obtain Road Service Licenses and be fitted with speed governors.

24. The Petitioners claim that vehicles whose tare weight is less than 3048 kgs do not need to be licenced and do not require to be fitted with a speed governor. They base their argument on their reading of section 26 of the NTSA Act and section 41A of the Traffic Rules.

25. The Petitioners were right until 22/12/2014. Until that day, section 26 of the NTSA Act read as follows:

26. Licensing of motor vehicles

(1) A person shall not operate a motor vehicle whose tare weight exceeds three thousand and forty eight kilogrammes for the carriage of goods or passengers for hire or reward unless the vehicle is licensed by the Authority in accordance with this Part and in such manner as the Cabinet Secretary

may prescribe.

(2) A registered owner, driver, or a person in possession of a motor vehicle used for the carriage of goods shall, for the purpose of this Part, be deemed to be the person by whom the vehicle is being used.

(3) Where at any time goods are carried in a motor vehicle which has been let on hire by the person who at the time of the carriage of the goods, is within the meaning of this Act, the user of the motor vehicle, the goods shall be deemed to be carried by that person for hire or reward.

26. As is clear from this section, motor vehicles whose tare weight was below 3048 kgs did not need to be licenced by this version of section 26 of the NTSA Act.

27. However, on 22/12/2014, this section of the NTSA Act was amended by section 44 of Act No. 19 of 2014. The current version reads as follows:

26. Licensing of Motor Vehicles

(1) A person shall not –

(a) operate any class of vehicle including private vehicles as public vehicles; or

(b) operate a commercial service vehicle whose tare weight exceeds three thousand and forty eight kilograms, unless the vehicle is licensed by the Authority.

28. As is textually clear from this section, the version of section 26 of the NTSA Act requires all Motor Vehicles which are operated as Public Service Vehicles – whether their tare weight is above 3048 kgs – to be licenced by the NTSA.

29. Section 41 of the NTSA Act, on the other hand, provides that:

Contravention of Conditions of a Licence

A person who drives or uses a motor vehicle in contravention of any of the provisions of this Act, or being the owner of such vehicle, allows a person to so use it, and any driver or other person in charge of any vehicle in respect of which a licence has been granted under this Act who drives or uses such vehicle in contravention of any condition of such licence, or being the owner of such vehicle, allows a person to so use it, commits an offence and shall be liable, on conviction, to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding one year.

30. Consequently, failure to adhere to the requirements of section 26 NTSA Act makes one liable under section 41 of the NTSA Act.

31. I find the text of the NTSA Act plain and requiring no interpretation at all. If the Subject Motor Vehicles are Public Service Vehicles as the Petitioners seem to admit, then they were subject to section 26 of the NTSA Act. There is nothing oppressive, illegal or irregular in being charged with an offence based on failure to adhere to that section of the statute.

32. What about section 41A of the Traffic Rules? The Petitioners seemed to suggest that 1st Respondent is relying on an older version of the Traffic Rules, 1953. However, I have not been able to find any newer version of section 41A of the Traffic Rules except the one that provides in plain terms as follows:

41A. Fitting of speed governors

(1) The engine of—

(a) Every public service vehicle, except taxi cabs;

(b) Every commercial vehicle whose tare weight exceeds 3048 kg.

shall be fitted with a speed governor which—

(i) conforms to such specifications as the Minister may by notice in the Gazette prescribe;

(ii) Is adjusted so that all times, and in any load condition, the vehicle cannot exceed the speed of 80 kph.

(2) Every vehicle to which this rule applies shall have exhibited on it a certificate issued by a certifying officer to the effect that it is fitted with the speed governor complying with the prescribed specifications

33. Again, the text of this section of the subsidiary legislation is clear: every Public Service Vehicle except taxi cabs must be fitted with a speed governor which conforms to such specifications as the Minister may by Notice prescribe. As I held above, the Subject Motor Vehicles are Public Service Vehicles. *Ergo*, the law requires that they be fitted with speed governors. There is nothing illegal, irregular or oppressive about prosecuting the Petitioners for failure to abide by this section of the law.³⁴ In my view, this analysis disposes the questions presented by the Petition. To recap, I have found the following:

a. Count I in the 2nd Petitioner's charge sheet in Limuru Traffic Case No. 876 of 2016 which charges the 2nd Petitioner with driving a motor vehicle on a public road without a Road Service Licence contrary to section 4(1) (b) as read with section 7 of Chapter 404 of the Laws of Kenya is defective since it is predicated on a non-existing law. As such, continued prosecution of the 2nd Petitioner of this count as predicated on this law is oppressive and unlawful.

b. Count II in the 2nd Petitioner's charge sheet in Limuru Traffic Case No. 1009 of 2016 which charges the 2nd Petitioner with driving a Motor Vehicle on a Public Road without a Yellow Band contrary to Rule 70(i) as read with Rule 72(b) of the Traffic Rules is patently oppressive and arbitrary since the requirement that a Motor Vehicle be painted with yellow band applies only to taxicabs and the Subject Motor Vehicles are not taxi cabs.

c. There is nothing oppressive, irregular or illegal in prosecuting the 3rd Petitioner with Count I as expressed in the charge sheet in Limuru Traffic Case No. 1009 of 2016. That count charges the 3rd Petitioner with operating a Public Service Vehicle on a public road without a Road Service Licence contrary to section 41 of the National Transport and Safety Authority, Act No. 33 of 2012. The Motor Vehicle in question is a Public Service Vehicle to which the relevant section of the law applies.

d. There is also nothing oppressive, irregular or illegal in prosecuting the 3rd Petitioner with Count II as expressed in the charged sheet in Limuru Traffic Case No. 1009 of 2016. That count charges the 3rd Petitioner with driving a Motor Vehicle on a public road without a speed governor compliance certificate contrary to Rule 41A(b)(ii) as read with Rule 69 of the Traffic Rules. Section 41A (b) (ii) of the Traffic Rules applies to all Public Service Vehicles of which the Subject Motor Vehicle is one

35. Consequently, other than the beneficial declarations given in 34(a) and (b), for the reasons given above, all the other prayers in the Petition are hereby declined.

36. Since the Petitioners have succeeded in part, each party will bear its own costs.

37. Orders accordingly.

Dated and delivered at Kiambu this 23rd day of November, 2017.

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JOEL NGUGI

JUDGE