



IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 70 OF 2014

CONSOLIDATED WITH PETITION NO. 92 OF 2014

BETWEEN

RICHARD DICKSON OGENDO1ST PETITIONER

REMINISCE SPORTS BAR LIMITED T/A

REMINISCE BAR AND GRILL.....2ND PETITIONER

KARIUKI RUTHA.....3RD PETITIONER

AND

ATTORNEY GENERAL1ST RESPONDENT

CABINET SECRETARY,

MINISTRY OF ROADS AND TRANSPORT.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS....4TH RESPONDENT

NATIONAL TRANSPORT AND

SAFETY AUTHORITY.....5TH RESPONDENT

AND

KENNETH MUGAMBI T/A

POTTERMARK ENTERPRISESINTERESTED PARTY

RULING

1. The petitioners in this matter challenge the constitutionality of the **Traffic (Breathalyser) Rules, 2011** (“the **Rules**”) which introduced a device commonly referred to as “*alco blow*” which is used to measure the proportion of alcohol in a person’s blood from a specimen of breath provided by the person.
2. The **Rules** are made by the Minister for Transport pursuant **section 119(1)** of the **Traffic Act (Chapter 403 of the Laws of Kenya)** (“the **Act**”). **Rule 3** of the **Rules** creates an offence and which provides as follows;

3(1) No person shall drive, attempt to drive or be in charge of a motor vehicle on a road or other public place if the person has consumed alcohol in such quantity that the blood alcohol concentration in his body is beyond the prescribed limit.

(2) A person contravenes sub-rule (1) commits an offence under section 44(1) and 45 of the Act.

3. The offences under **section 44(1)** and **45** of the **Act** are as follows;

Driving under influence of drink

44(1) Any person who, when driving or attempting to drive, or when in charge of a motor vehicle on a road or other public place, is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.

(2) A person convicted of an offence under this section shall, without prejudice to the power of the court to order a longer period of disqualification, be disqualified, for a period of twelve months from the date of conviction, for holding or obtaining a licence.

Prohibition of drinking when driving or in charge of public service vehicle

45(1) Any person who, when driving or in charge of, or during any period of duty in connexion with the driving of, a public service vehicle, drinks any intoxicating liquor shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.

4. The petitioners’ core argument is that the **Rules** are unconstitutional primarily on the basis that the **rule 3** creates an offence that is *ultra vires* **section 44** of the **Act** as the Minister has no authority to create an offence which prohibits a person from having a certain amount of alcohol in the blood. They argue that the authority of the Minister is limited to using the breathalyser as a tool of proof for the offence of driving under the influence of alcohol set out in **sections 44** and **45(1)** of the **Act**. The petitioner contends that the promulgation of these rules violates **Article 94** of the Constitution which vests legislative authority in Parliament particularly **Article 94(5)** which provides that, “No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.”
5. The other broad concern of the petitioners is that the manner in which the **Rules** are implemented violate a broad spectrum of fundamental rights and freedoms like the freedoms of movement and the right to dignity and privacy. The petitioners contend that other laws are violated for example, the random testing of motor vehicle drivers amounts a violation of **section 69A** of the **Act** which requires that all roadblocks be gazetted by the Inspector General. As a result of the alleged violations, the petitioners seek declarations of unconstitutionality of the **Rules**.
6. What is before the court today is a Notice of Motion dated 3rd March 2014, where the 2nd and 3rd

petitioners have sought conservatory orders as follows;

1. *That this application be certified as urgent and heard ex-parte at the first instance.*
2. *That pending hearing and determination of this petition the Honourable Court be pleased to restrain the respondents from enforcing or implementing the Traffic (Breathalyser) Rules 2011 at road blocks that have not been gazetted by the Inspector General of Police under section 69A of the Traffic Act, Cap 403.*
3. *That pending hearing and determination of this petition the Honourable Court be pleased to restrain the respondents from subjecting motorists who have not been arrested on reasonable suspicion by a police officer in uniform of having committed specific traffic offences to a breath test for the purpose of obtaining an indication of the proportion of alcohol in the person's breath carried out by a breathalyser.*
4. *That pending hearing and determination of this petition the respondents be prohibited from prosecuting motorists for the purported offence of consuming alcohol beyond the prescribed limit under Rule 3 of the Traffic (Breathalyser) Rules, 2011.*
5. *That the Honourable Court be pleased to certify that the petition herein raises substantial questions of law to warrant hearing and determination by a bench of not less than three judges, as the honourable Chief Justice may assign.*
6. *That the costs of this application be provided for.*
7. The collective effect of these orders is to stop the implementation of the **Rules** pending the hearing and determination of the petition.
8. I have heard arguments by the parties in support of and in opposition to the petition. For purposes of this application I am prepared to assume that the petitioners raise serious issues for argument. The petition is not frivolous and indeed it is one that would clarify some constitutional principles. At this stage, the Court is not required to make definitive findings of fact or law but to determine whether the *status quo* should be maintained or disrupted by the conservatory order pending hearing and determination of the petition.
9. I am entitled to presume that the legislation and legislative acts sought to be impugned are constitutionally valid unless set aside by the Court (See ***Kizito Mark Ngaywa v The Minister of Stat for Internal Security and Provincial Administration and Another Msa Petition No. 4 of 2011 [2011]eKLR***). Although the **Rules** in this matter under challenge are subsidiary legislation, I do not think the **Article 94(5)** of the Constitution denies Parliament the right to delegate legislative authority. In this case the **Rules** are promulgated under the clear authority of **section 119(1)** of the **Traffic Act**. Whether they are *ultra vires* or in any other way deficient is a matter to be examined in detail at the hearing of the petition. For now, the presumption of constitutionality still applies as the Minister had the requisite statutory authority to perform the legislative act that led to promulgation of the **Rules**.
10. The issue then is whether the interests of the 2nd and 3rd petitioners in seeking the conservatory orders outweigh the public interest in enforcing the **Rules**. The **Rules** were promulgated for the purpose of preventing accidents caused by the drunk driving. This is a legitimate public policy aim of the State and, as the respondents' point out, is a fulfilment of the duty of the State and its entities to protect life. The applicants' business is that of selling alcoholic drinks. They complain that enforcement of the **Rules** in a manner that contravenes the Constitution has affected the business negatively.
11. The **Rules** have been in force since 2011 and there is no reason to stop their implementation at this stage by a conservatory order. The petitioners have not proved that substantial hardship will result if the conservatory orders are not granted that far outweighs the State responsibility to protect life and limb of the citizen arising from traffic accidents caused by drunk driving.
12. This matter has now been fixed for hearing within the next two weeks where all parties will ventilate their issues and the Court will authoritatively state the law. The petitioners have waited

for at least one and half years to challenge the **Rules**. They can wait for the Court's final decision.

13.I decline to grant conservatory orders. The 2nd and 3rd petitioners' Notice of Motion dated 3rd March 2014 is dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 27th March 2014.

D.S. MAJANJA

JUDGE

Mr Mungai instructed by Kinoti and Kibe Advocates for the 2nd and 3rd petitioners.

Mr Njoroge with him Ms Ndirangu instructed by the State Law Office for the 1st and 2nd respondents.

Mr Okello instructed by the Directorate of Public Prosecutions for the 3rd respondent.

Mr Agwara instructed by Prof. Albert Mumma and Company Advocates for the 5th respondent.

Mr Sifuma instructed by Nyachae and Ashitiva Advocates for the interested party.