



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Petition 77 of 2011

IN THE MATTER OF ARTICLES 20, 22, 23, 25(c), 40, and (d), 47, 48, 49(f) AND (g), 50(2)(e) AND (n)(i) AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES

40, 47, 48, 49(f)(g) AND 50(2)(e)(n)(i) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULE 54A OF THE TRAFFIC RULES

AND

IN THE MATTER OF THE TRAFFIC (AMENDMENT) RULES, 2009

BETWEEN

MODERN COAST EXPRESS

LIMITED.....PETITIONER

VERSUS

**ATTORNEY GENERAL.....1ST
RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....2ND
RESPONDENT**

**THE MINISTER FOR TRANSPORT.....3RD
RESPONDENT**

**THE POLICE COMMISSIONER.....4TH
RESPONDENT**

J U D G M E N T

Introduction

1. In the Petition dated 23rd May 2011, the Petitioner Company seeks the following Orders under **Articles 40, 47, 48, 49(f)(g) and 50(2)(e)(n) and (i) of the Constitution**;

“(a) A declaration that the decision by the Respondents to indefinitely detain the Petitioner’s motor vehicle registration number KBL 995W without preferring criminal charges violates the provisions of Articles 40, 47, 48 and 49 of the Constitution.

(b) A declaration that Rule 3 of the Traffic (Amendment) Rules, 2009 promulgated by the Minister for Transport vide Legal Notice No.173 of 2009 is ultra vires Section 119 of the Traffic Act, is unreasonable, vague, subject to subjective interpretation, null and void.

(c) A declaration that Rule 3 of the Traffic (Amendment) Rules, 2009 promulgated by the Minister for Transport vide Legal Notice No.173 of 2009 is unreasonable, vague, subject to subjective interpretation discriminatory, unconstitutional, null and void.

(d) Judicial Review Order of Certiorari bringing before the Court to be quashed Rule 3 of the Traffic (Amendment) Rules, 2009 promulgated by the minister for Transport vide Legal Notice No.173 of 2009.

(e) All monies paid to the Police in cash bail be released to the Petitioner.

(f) The Respondents be ordered to compensate the Petition for the entire period motor vehicle Reg. No.KBL 995W has been detained

(g) Costs.

(h) Any other/further order or relief that this Court may deem fit to grant.”

2. **Rule 3 of the Traffic (Amendment) Rules, 2009** as promulgated by **Legal Notice No.173 of 2009** provide as follows;

“The Principal Rules are amended by inserting the following new Rule immediately after Rule 54-

(i) Tinted motor vehicle windows.

(ii) 54A (1) a person shall not drive or operate a public service vehicle that is fitted with tinted windows or tinted windscreen.

(iii) (2) For the purposes of this rule, “tinted” means shaded, coloured or treated in a similar manner so that the persons or objects inside are not ordinarily seen clearly from outside.”

3. **Section 119 of the Traffic Act** provides that the Minister may make Rules prescribing certain matters therein set out and for avoidance of doubt, they are;

“(1) The Minister may make Rules prescribing-

(a) anything required by this Act to be prescribed;

(b) the forms to be used for any purposes of this Act;

(c) the weight of goods and passengers, the number of passengers which vehicles may carry, the method by which seating capacity is to be determined and the gross weight of vehicles;

- (d) the weight and size of vehicles which may be permitted on any class of road and the manner in which, if at all, vehicles whose weight or size is in excess of the prescribed maximum weight or size may be allowed to use any road;**
- (e) the construction of, equipment to be carried by, any class of vehicle, and in particular the type of tyres, lights and warning instruments to be carried by any class of vehicle, and any restriction in the carrying or use of lights and warning instruments;**
- (f) the carrying on any class of vehicle of any special identification plates, and the fees to be charged for such plates;**
- (g) all matters relating to the inspection, registration, licensing, regulation and control of vehicles and to the conditions which may be imposed in regard thereto;**
- (h) the regulation of the conduct of drivers and conductors of public service vehicles, and the wearing by them of special badges and uniforms, and the fees to be paid for any badges provided by an authority.**
- (i) conditions of service and hours of work for persons employed by owners of public service and commercial vehicles;**
- (j) the regulation of the carriage of luggage and goods on public service vehicles;**
- (k) the rules of the road, and the signals to be given and obeyed by the drivers of vehicles;**
- (l) the procedure to be adopted and the conditions to be observed in connection with the issue of documents necessary for international travel, and the use of such documents in Kenya;**
- (m) the conditions on which motor vehicles licensed outside Kenya may be used within Kenya and on which persons holding driving licences or permits issued outside Kenya may be allowed to drive within Kenya;**
- (n) measures for controlling or prohibiting the movement of which vehicles of any specified class or description between the hours of 6.45 p.m. and 6.15 a.m.;**
- (o) measures for controlling or prohibiting the use of vehicles of any specified class or description on any sea beach or foreshore or other place to which the public have access;**
- (p) measures for generally restricting or regulating the use of vehicles in such manner as the circumstances and safety on the roads may appear to him to require, and for the further, better or more convenient carrying out of any provisions of this Act;**
- (q) the penalties which may be imposed for the breach of such rules not exceeding-**
 - (i) in the case of a first conviction, a fine not exceeding ten thousand shillings or imprisonment for a term not exceeding six months or both;**
 - (ii) in the case of a second or subsequent conviction, a fine not exceeding twenty thousand shillings or imprisonment for a term not exceeding one year or both.**
- (2) ...”**

4. I will return to the import of the above provisions later in this Judgment.

5. **Petitioner’s Case**

It is the case for the Petitioner that on 13th May 2011, Police officers stopped and impounded motor-vehicle registration number KBL 995W, Scania Bus and detained it at Traffic headquarters Ruaraka, Nairobi and on 18th May 2011, the said motor-vehicle was inspected and it was found to be in perfect condition save that it was alleged to have been “*fitted with tinted material*” contrary to **Rule 3** aforesaid. The driver of the bus, one, Nzombo Chirunga Nsombo was then bonded to appear in Court on 19th May 2011 and he was required to plead to charges of driving a defective motor-vehicle. He attended Court as required but no charge was laid against him and the vehicle was detained until 27th May 2011 when Musinga, J. ordered its release.

6. It is also the case for the Petitioner that the continued detention of the bus occasioned it loss of Kshs.150,000/- a day and loss of reputation in the transport business and its rights under **Articles 49(f)** and **50(e)** of the **Constitution** have been violated.

7. That the Orders sought are therefore necessary to protect it from the unlawful actions of the Kenya Police.

8. **Respondent’s Case**

The Respondents, by a Replying Affidavit sworn on 10th June 2011 by one, Cpl. Julius Songah, have argued that whereas the bus aforesaid was impounded on 13th May 2011, the driver failed to take it for inspection until 18th May 2011 and the same was then found to be “*defective having been fitted with tinted windows contrary to Rule 54A of [the] Traffic Rules.*” The driver was then given a cash bail of Kshs.5,000/- to appear in Court on 19th May 2011 but he failed to appear with “*an official or agent of the company*” to face joint charges. No plea was thus taken and later, an official of the company appeared in the company of his lawyer but disappeared before he could be bonded.

9. The deponent denied that **Rule 3** was *ultra-vires* **Section 119** of the **Traffic Act** and has argued that the Rule was promulgated to ensure the safety of passengers in view of several cases of hijacking of public service motor-vehicles and there was no discrimination exhibited towards the Petitioner.

10. **Opinion on issues for Determination**

The first issue to address is whether tinting of motor-vehicle windows renders it defective. “**Tint**” is defined by the “**Concise English Dictionary**”, as “**shade or variety of colour**”; “**a trace of something**”; “**colour slightly**”. The origin of the word is the Italian word, “**tint**” meaning “**to colour**”, or the Latin word, “**tinctus**” meaning “**dyeing**”.

“**Defect**” is defined by the same Dictionary as “**a shortcoming, imperfection or lack**”. The origin of it is the Latin word “**defectus**”.

Can colouring of windows or dyeing of the same be said to be a defect or an imperfection? *Prima facie* certainly not. To say otherwise would imply that any painting or colouring of a motor-vehicle would be an imperfection but it is obviously not. However, **Rule 54** of the **Traffic Rules** provides as follows;

“(1) Every motor omnibus or matatu registered in Kenya shall be fitted with adequate window space.

“(2) Every such space shall be capable of being closed, but only by glass of adequate strength or canvas.

“(3) Where such window spaces are closed with glass, every alternate window in the sides of the omnibus or matatu shall be capable of being opened.”

11. **Rule 54A** which was relied on by the Respondents provides *inter alia* as follows;

The Principal Rules are amended by inserting the following new Rule immediately after Rule 54-

“ (i) ...

(ii) (1) ***a person shall not drive or operate a public service vehicle that is fitted with tinted windows or tinted windscreen.***

(iii) (2) ***For the purposes of this rule, “tinted” means shaded, coloured or treated in a similar manner so that the persons or objects inside are not ordinarily seen clearly from outside.”***

12. I have elsewhere above reproduced **Section 119** of the **Act** and the question is, **can it be argued that although tinting does not make a vehicle defective then Rule 3 contravenes Section 119?** I think not. To have attempted to charge Nzombo aforesaid with driving a defective motor-vehicle would have been unlawful but he was not charged and so the point is moot. But reading **Section 119**, the Minister is *inter alia* permitted by the **Act** to promulgate rules to create measures for generally restricting or regulating the use of vehicles in such manner as the circumstances and safety on the roads may appear to him require, and for the further better of any provisions of [the] **Act**.

“measures for generally restricting or regulating the use of vehicles in such manner as the circumstances and safety on the roads may appear to him to require, and for the further, better or more convenient carrying out of any provisions of this Act”

13. Safety is a prime consideration for any public vehicle owner and both the Minister and other organs of State have a general obligation to ensure the safety of passengers and if tinting of windows compromises that security, then promulgation of Law to restrict it cannot either be *ultra vires* **Section 119** of the **Act** or any other Law. It is a matter of common notoriety that with terrorist threats abounding, public service vehicles are an attractive target and **Rule 3** aforesaid was enacted to ensure that Law enforcers can see through public service vehicle windows and the minor inconvenience complained by the Petitioner cannot override the Law and the wider interests of public safety and security.

Further, it is my understanding that the **Traffic Act** was enacted to ensure the general safety of the populace and that is why for example, regarding how windows should be designed and constructed, **Rule 30** of the **Traffic Rules** provide that the design of windows should be such that the driver has a full view of the road and traffic ahead; that his view is not impeded and material with reflective properties should be avoided – see David Gichuki Kariuki vs Commissioner of Police (2008) eKLR. The reason for the enactment is obvious as is the reason for denying public service motor-vehicle owners the comfort of tinted windows on their motor-vehicles.

14. Having so held, it follows that Prayers (b), (c) and (d) of the Petition must be dismissed. As to Prayer (a), I have already stated that Musinga, J. ordered released of motor-vehicle Reg. No.KBL 995W and so the Prayer has been overtaken by events and is struck off.

15. I have held that the driver of the bus was never charged with any offence and is entitled as a matter of course to refund of his cash bail and so Prayer (e) is granted.

16. Regarding Prayer (f), no evidence whatsoever was tabled before this Court to show how much loss was suffered by the Petitioner for the period the bus was detained and so the prayer is dismissed.

17. In conclusion, save for the Order that the Petitioner is entitled to Kshs.5,000/- refund of cash bail the Petition is dismissed.

18. Let each party bear its own costs.

19. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 16TH DAY OF MARCH, 2012

ISAAC LENAOLA

JUDGE
CORAM

ISAAC LENAOLA – JUDGE

Miron – Court Clerk

Mr. Miyaere for Petitioners

No appearance for Respondents

ORDER

Judgment duly read.

ISAAC LENAOLA
JUDGE

FURTHER ORDER

Leave to appeal is granted.

Certified copies of the proceedings to be supplied on payment of the requisite fee.

ISAAC LENAOLA
JUDGE
16/3/2012