



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 144 of 2011, 205 OF 2010, 465 OF 2011 & 1 OF 2011

KENYA TRANSPORT ASSOCIATION 1ST PETITIONER
BUZEKI TRANSPORTERS ENTERPRISES LIMITED 2ND PETITIONER
ROADTAINERS MOMBASA LIMITED 3RD PETITIONER
PN MASHRU LIMITED 4TH PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT
KENYA NATIONAL HIGHWAY AUTHORITY 2ND RESPONDENT

JUDGMENT

Introduction and background

1. These consolidated petitions are brought by various transport companies and their trade association seeking certain reliefs in respect of the enforcement of the vehicle weight limits which are enforced by the Kenya National Highway Authority (KENHA). KENHA is the statutory body incorporated under **section 3(1)** of the *Kenya Roads Act (Act No. 2 of 2007)* and is the body responsible for the management, development, rehabilitation and maintenance of national roads.
2. The issue at the heart of this case concerns vehicle weight limits imposed by the *Traffic Act (Chapter 403 of the Laws of Kenya)*. Weight limits are necessary to safeguard the roads from deterioration resulting from heavy loads. In 1997, the South Africa Department of Transport issued a report titled, *“The Damaging Effects of Overloaded Heavy Vehicles on Road.”* The report noted that, *“It has been found that legally loaded heavy vehicles cause a relatively small amount of damage to road pavement structures, as opposed to overloaded heavy vehicles which are responsible for approximately 60% of the damage to the road network ...”* It further noted that, *“While damage to the road network cannot be eliminated, it is clearly in the interest of the travelling public and the road haulier that all reasonable steps be taken to minimise the deterioration of our roads and streets. Cracking and permanent deformation of the road pavement with a resultant increase in roughness, lead to increased vehicle operating costs, discomfort (decreased riding quality) and reduced safety conditions.”*
3. KENHA operates several weighbridges along the highways all over the country in order to regulate and control the weight of vehicles plying the highways. During the time material to this dispute, it brought criminal proceedings against the 1st petitioner’s members and their drivers, the 2nd, 3rd and 4th petitioners in courts all over the country. The charges were brought under **sections 55(2)** and **58(1)** of the

Traffic Act claiming that 1st petitioner's members and the other petitioners had exceeded the weight limits prescribed by the law.

4. Once the petitions were filed, the petitioners obtained interim relief restraining the respondents from impounding, detaining or bringing criminal charges or undertaking criminal prosecutions in the basis of axle load weight pending the hearing and determination of the petitions filed. The parties later agreed that the criminal proceeding be terminated to pave way for the determination of this matter.

5. In order to expedite and deal with the various matters pending in Machakos and Bungoma, I directed that the case files be brought to Nairobi. On 12th March 2012, I ordered that all the matters be consolidated and gave the necessary directions for hearing of the matter.

Relevant provisions of the Traffic Act

6. **Section 55(2)** of the **Traffic Act** provides as follows;

No motor vehicle the weight or dimensions of which laden or unladen exceeds the maximum weight or dimension provided for such vehicles by rules made under this Act shall be used on the road.

7. The rules to under **section 55(2)** are the **Traffic Rules** which have been amended from time to time. The germane rule dealing with the weight of the vehicle is contained in the **Rule 41(2)** of the **Traffic (Amendment) Rules, 2008** (the **Traffic Rules**) provides as follows;

A person who drives or uses on road a vehicle in respect of which the weights set out in paragraph 2(1), (2) or (3) of the Twelfth Schedule are exceeded, shall as respects each overload axle or any excess over the minimum permitted weights, be guilty of an offence against section 58 of the Act, and shall in respect of that offence, on conviction pay a fine not less than the appropriate fine according to"

8. The maximum weights and dimensions referred to in **section 55(2)** and **Rule 41(2)** of the **Traffic Rules** are provided in the **Twelfth Schedule** to the **Traffic Act**. The schedule provides, in part, as follows;

2. (1) The maximum weight which may be transmitted to the road in the case of a vehicle fitted with pneumatic tyres, whether laden or unladen, shall not exceed-

(a) by way of any single axle fitted with four or more wheels 10,000 kg.

(b) by way of any single steering axle, whether controlled by a drawbar or driver operated steering mechanism 8,000 kg

(c) by way of a tandem axle group having four wheels on each axle 16,000 kg

(d) by way of a triple axle group having four wheels on each axle 24,000 kg

(e) by way of a four axle group having four wheels on each axle 32,000 kg

Provided that in the case of any axle or axle group (excluding a steering axle) where one or more of the axles is fitted with only two wheels, the appropriate maximum allowable load figure given in this subparagraph shall be reduced by twenty-five per cent.

(2) Notwithstanding subparagraph (1), the maximum total weight of any vehicle or combination of vehicles fitted with pneumatic tyres, whether laden or unladen, shall not exceed the following -

(a) vehicle with two axles 18,000kg.

- (b) vehicle with three axles 24,000 kg.*
 - (c) vehicle and semi-trailer with total of three axles 28,000kg.*
 - (d) vehicle with four axles..... 28,000kg.*
 - (e) vehicle and drawbartrailer with total of four axles 34,000 kg.*
 - (f) vehicle and semi-trailer with total of four axles 36,000kg.*
 - (g) vehicle and semi-trailer with a total of five axles 42,000 kg.*
 - (h) vehicle and drawbar trailer with total of four axles 42,000kg.*
 - (i) vehicle and semi-trailer with total of six axles..... 48,000 kg.*
 - (j) vehicle and drawbar trailer with total of six axles 48,000 kg.*
- (3) The maximum total weight of a vehicle fitted with solid tyres, lawfully on a road under these Rules, shall be seventy-five per cent of the maximum weight specified for a similar type of vehicle with pneumatic tyres under subparagraph (1) and (2).*
- (4) Not more than seventy-five per cent of the laden weight of any motor vehicle (other than a motor cycle) shall be transmitted to the road by any two wheels of the vehicle.*
- (5) For the purposes of this paragraph, each person apparently over the age of sixteen years, and every two persons of or under that age, shall be deemed to weigh 65 kg. when carried on a vehicle.*
- (6) Where the application of the provisions of this paragraph result in two or more different weights being applicable to a particular vehicle, the lower or lowest weight shall be the maximum weight of that vehicle for the purposes of section 55(2) of the Act.*
- (7) The maximum number of axles which may be fitted on any vehicle shall be seven provided that the rear most axles shall be steering axles.*
- (8) No vehicles with a rigid body shall have more than three axles except for a vehicle with two steering axles and two rear axles.*

9. The penalty applicable to persons who are in breach of the provisions of **section 55(2)** as read with the **Traffic Rules** is provided for under **section 58(1) and (2)** of the **Traffic Act** which provides;

58. (1) Any person who drives or uses on a road a vehicle in contravention of the provisions of section 55 or section 56 shall be guilty of an offence and liable to a fine not exceeding four hundred thousand shillings or to imprisonment for a term not exceeding two years or to both:

Provided that rules under this Act may provide that a person who is guilty of an offence under section 55 or 56 shall be liable to pay a fine according to a prescribed scale, and different scales may be prescribed for first offenders, and for second or subsequent offenders, within a prescribed period, but so that no person shall thereby be liable to pay a fine greater than the maximum provided by this subsection; and for the avoidance of doubt it is declared that liability of a person to pay a fine on a prescribed scale shall not affect that person's liability to imprisonment under this subsection as an alternative to, in addition to, or in default of, the payment of a fine.

(2) For the purposes of subsection (1), any person who is shown to the satisfaction of the court to be responsible for the maintenance of the vehicle, and any person who is shown to the satisfaction of the court to have been responsible for the loading of the vehicle, shall be deemed to have used the vehicle

on the road.

Issues framed for determination

10. After reviewing the pleadings and hearing the parties in the matter, I framed the following issues for determination;

- a) *Whether the maximum weight of vehicles referred to in section 55(2) and section 58 of the Traffic Act (Chapter 403) refers and creates the offence of overloading on the gross vehicle weight and not the load carried on individual axel(s) of a vehicle.*
- b) *Whether the law in general and the Traffic Act (Chapter 403) in particular permit the bringing of criminal charges against a vehicle whose maximum gross weight is within the prescribed limit(s).*
- c) *If (a) and (b) are in the affirmative, whether the petitioners' rights under Article 40, 47 and 50 of the Constitution are contravened.*
- d) *If so, what relief should be given to the petitioners?*

11. The parties made written and oral submissions in respect of the issues so framed. I shall now proceed to determine the issues in light of the arguments made by the parties.

Interpretation of sections 55(2) and 58 the Traffic Act

Petitioners' submissions

12. These first two issues concern the interpretation of the provisions of **section 55(2)** and **58(1)** of the **Traffic Act** and **rule 41(2)** of the **Traffic Rules**. The gravamen of the petitioners case is that they are incapable of committing an offence defined by the Act and that charging them with the offence of "overloading" is breach of the **Article 50(2)(n)** of the Constitution. Mr Kaluma, counsel for the petitioners, argued that **Rule 41(2)** of the **Traffic Rules** prohibits the bringing of criminal charges of overloading against a vehicle where the gross vehicle weight is within statutory limits. The petitioners' case is that a charge brought under **sections 55(2)** and **58(1)** of the **Traffic Act** can only be in respect of the gross vehicle weight and not the axle load limits. In essence, the petitioners argue that the law does not create an offence in respect of axle weights and therefore **rule 41(2) of the Traffic Rules** is *ultra vires* the **Traffic Act**.

13. Mr Kaluma submitted that that the petitioners' complaint is that they were charged on claims that they overloaded on particular individual axels in the circumstances where the gross vehicle weights permitted by law are not exceeded. Counsel contended that the charges against the accused vehicle owners are said to be brought under **sections 55(2)** as read with **section 58** of the **Traffic Act** and that these provisions read together do not create the offence of overloading on the axle(s) as there must be *mens rea* or specific intent to overload.

14. Mr Kaluma further submitted that that the changes in axle load limits is within the permitted gross limits and are beyond the control of the transporters as it results from shifting of loads during transportation and is an occurrence which is not attributable to and cannot form *mens rea* on the part of transporters to overload and therefore found the basis for the criminal charges herein.

Respondents' submissions

15. The respondents have adopted a common position and argue that the provisions of **section 55(2)** and **58** of the **Traffic Act** as read with **rule 41(2)** of the **Traffic Rules** provide for the offence overloading based on the gross vehicle weight and axle load. According to them the plain and ordinary meaning of **section 55(2)** as read with the **Traffic Rules**, the law puts restriction on axle overloading and gross motor vehicle overloading.

16. Mr Odera, counsel for KENHA, submitted that a criminal offence occurs when a person contravenes the law that prescribes the limits within which the person should operate. That the **Traffic Act** creates offences of exceeding the maximum weight limit and as such a criminal charge cannot be brought against a vehicle whose gross weight is within the prescribed limits. Counsel further submitted that as to whether there is *mens rea* or not, is a matter to be determined by the trial court on the evidence available.

17. Mr Mulekyo, also counsel for KENHA, submitted that the rules provide for a fine for each degree of overloading and gross motor vehicle weight in kilograms. He further observed that the criteria used was not unique to the Kenyan situation but was the standard all over the world where overloading was controlled on the basis of both the axle weight and gross motor vehicle weight.

18. Ms Muchiri, counsel for the 1st respondent, associated herself with the submissions made by Mr Odera and Mr Mulekyo. She added that every accused person is entitled to the presumption of innocence and the State would have to prove its case in court.

Analysis and determination

19. The issue in this case, is whether **section 55(2)** of the **Traffic Act**, which categorically states, “... which laden or unladen exceeds the maximum weight or dimensions ...” permits an offence defined under the Traffic Rules can be defined by reference to the axle load. How the weight of a vehicle is measured and regulated is a matter provided for in the rules, in this case **rule 12** of the **Traffic Rules** and the **Twelfth Schedule** which I have set out above. A reading of the **Twelfth Schedule** is clear that the regulations provide for the maximum weight on the basis of the axle load and the gross vehicle weight and any vehicle falling outside these limits attracts criminal liability.

20. The rules read with the **Twelfth Schedule** prescribe the maximum weight measured either by the gross weight or axle load. There is nothing in **section 55(2)** of the **Traffic Act** that restricts the manner in which the vehicle weight is measured or calculated. I do not think that **section 55(2)** of the **Traffic Act** can be interpreted so as to exclude one mode of calculating the weight of the vehicle to the exclusion of the other.

21. **Rule 41(2)** of the **Traffic Rules** entitles the respondents to charge any person who exceeds the prescribed weights, “**as respects each overload axle or any excess over the minimum permitted weights**” [Emphasis mine] This provision is clear that a person may be charged in respect of the axle load excess weight or the gross vehicle weight where the limits are exceeded.

22. The purpose of the provisions of **sections 55** and **58** of the **Traffic Act** and **rule 41(2)** of the **Traffic Rules** is to prevent overloading which damages roads. The weight of the vehicle is transferred to the road by the two or more wheels connected to a given axle and in designing the road, due consideration is given to the axle load and vehicle. According to the report, which I cited above, the use control of vehicle weight through limiting axle load regulations is now common not only in Europe and America but also in African countries. Indeed, as pointed out by counsel for KENHA, such regulations as contained in the **Traffic Rules** and the **Twelfth Schedule** are now accepted world over.

23. I therefore find and hold that **rules 41(2)** of the **Traffic (Amendment) Rules, 2007** is consistent with **section 55(2)** of the **Traffic Act**. In the circumstances, petitioners’ constitutional rights have not been infringed by the provisions of **sections 55(2)** and **58** of the **Traffic Act** and **rule 41(2)** of the **Traffic (Amendment) Rules, 2007**.

24. The petitioners’ are dissatisfied with the manner in which the vehicle weight is calculated but the remedy lies outside any remedy this court is capable of granting absent a violation of the Constitution.

Disposition

25. Since the answer to issues (a) and (b) of the issues framed is in the negative, it is not necessary

for me to enter into a dissertation whether the petitioners' constitutional rights are infringed as no purpose will be served by such inquiry.

26. The final order is that **Nairobi Petition No. 144 of 2011, Machakos Petition No. 205 of 2010, Nairobi Petition No. 465 of 2011** and **Bungoma Petition No. 1 of 2011** are hereby dismissed but with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 3rd day of December 2012.

D.S. MAJANJA

JUDGE

Mr P. Kaluma, instructed by Lumumba Mumma and Kaluma Advocates for the petitioners.

Mr C Odera instructed by Oraro and Company Advocates for the 2nd respondent in Machakos Petition No. 205 of 2010 and Bungoma Petition No. 1 of 2011.

Mr Mulekyo instructed by Mulekyo and Company Advocates for the 2nd respondent in Nairobi Petition No. 144 of 2011.

Ms Muchiri, Litigation Counsel, instructed by the State Law Office for the 1st respondent.