



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NO. 1214 OF 2004**

**CHARLES KANYINGI KARINA ..... APPLICANT**

**VERSUS**

**TRANSPORT LICENSING BOARD ..... RESPONDENT**

**JUDGMENT**

This is a Notice of Motion seeking an order of *certiorari* to bring into this court and quash the decision of the Transport Licensing Board suspending the applicant's licence for three months in respect of the use and operation of the Motor vehicle Registration Number KAQ 642N as a *matatu* (a small public service vehicle) and an order of *mandamus* that the applicant be allowed to operate the said vehicle as a *matatu* in accordance with the provisions of law.

The brief facts are that on 19th August 2004 while the applicant's vehicle was being driven on Thika Road approaching Nairobi the representative of the Transport Licensing Board found or alleged that the speed governor fitted in the applicant's vehicle was faulty or was otherwise interfered with. That as a result the Transport Licensing Board published a notice in the *Daily Nation* of 3rd September, 2004 suspending the use and operation of the applicant's vehicle among others for a period of three months from that date. During his submissions the learned counsel for the applicant Mr Ombete submitted that the TLB's representative and/or the police used a speed gun to detect the speed and this is what they used to ascertain if the vehicle had exceeded the speed limit of 80 kph and according to the official reading of the speed governor the speed exceeded 80 kph. Under the newly formulated Traffic Transport Regulations it is an offence to tamper with a speed governor.

The applicant claims that three days after his car was alleged to have exceeded the limit he the owner personally drove the vehicle and ascertained that it could not exceed the speed limit of 80 kph. At the time of detection by the TLB officials and the police the vehicle was not being driven by the owner but was driven by a hired driver. The owner applicant was not in the vehicle. The applicant claims that he was not given an opportunity to explain what had happened and that the governor could have been mechanically faulty (and that he was not to blame) instead of it having been tampered with. The applicant also claims that the police recording machine could have been faulty. And that three weeks after the incident, on 15th September, 2004 he secured a certificate from motor vehicle inspectors that the speed governor was functioning correctly and that there was and has not been any interference.

Although the respondents were not represented and did not file any affidavit in reply, it is clear to the Court that the initial Speed Governor Certificate of Compliance was in respect of speed governor Type Cenco serial No 98108 dated 2nd February 2004 exhibited as CKK II. A motor vehicle inspection report CKK III was issued on 3rd February 2004. Subsequent to this another dealer issued another certificate of

compliance on 16th March 2004 which was in respect of serial No 104061. It is in respect of this compliance certificate that a motor vehicle inspector report relied on and marked CKK VI was issued. This second certificate was issued long after the incident and against the background that the life span of the governor as expressed in the certificate of compliance was 12 months. The installation of the second governor has not been explained to the court and the reasonable inference is that this was done after the incident. The evidential value of the second motor vehicle inspection report is therefore shaky and dubious.

However what is important for the purpose of this case is the applicant's contention that in the circumstances outlined above he was entitled to be heard before the suspension of his licence and that without being heard the respondents had contravened the rules of natural justice.

Turning to the material facts a speed governor could be faulty on its own just like any other mechanical device or it could be tampered with. For road use purposes the common denominator is that the device should work in such a way that the speed limit of 80 kph in the case of Kenya roads is not exceeded and that the vehicle should not be operational without the device or when it is faulty. Whether tampered with or not the main purpose of the legislation backing suspension is that the offending vehicle should not be on the road when the device is faulty. The motor vehicle driver and/or owner has a responsibility to ensure that the device is as stipulated in the law and adhere to the rules made thereunder at any given time. It is no excuse that the device could have been faulty without blame on the part of the driver or owner. It is also common knowledge that the police carry out impromptu inspections including using speed guns to detect the public service vehicles which exceed the stipulated speed of 80 kph. The detection is invariably automatic including the recording.

The question is, is it reasonable for the drivers/owners to expect to be heard after detection. The answer in the opinion of the Court is a clear "No". There cannot be a legitimate expectation of a hearing. It is also clear to the court that the relevant law on suspension does not stipulate the right of hearing. If this right was to be legitimately expected it would defeat the purpose of the law which is to ensure road safety, road discipline and the giving of a human face to the use of the Kenyan roads especially by this class of road users commonly known as "*matatu*" operators. There was therefore need for strict liability and imposition of sanctions on the spot. Hearings would be likely sources of corruption and lengthy court hearings thereby removing the sting from the new sanctions and denying the new law its efficacy and effectiveness.

The two aspects of the rules of natural justice include

1. The *Nemo Judex* rule – no man should be a judge in his own case
2. The *Audi Alteram Partem* rule – the right to a fair hearing.

The Court is concerned with the second aspect. Is it in every case that a person is entitled to an oral hearing? The answer to this is again a clear "No" – see the case of *R v Criminal Injuries Compensation Board, ex p Dickson* CA 1996.

As so ably expressed by Lord Bridge in *Lloyd v McMahon* (HL) 1987

"what the requirement of fairness demand ... depends on the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates."

In the famous case of *Ridge v Baldwin* (HL 1964) Judicial Review jurisdiction was extended by the court to executive or administrative capacities or acts although it was hitherto generally confined to judicial excess of power.

In the now leading case of *CCSU v Minister for the Civil Service* (HL 1984) Lord Scarman indicated that there was an implied duty of fairness attached to all administrative acts. In *Doody v The Home Secretary* (HL 1993) Lord Mustill observed that where an Act of Parliament confers an administrative power there

is a presumption that it will be exercised in a manner which is fair.

In the current case there is no challenge that there could be anything unfair about a speed guns recording of the speed or a successful challenge on the process used in arriving at the decision to suspend. A subsequent inspection of what appears to be a different device cannot fault the initial recording several days earlier.

The right to a fair hearing also does carry with it a duty to give reasons in support of a decision but as held in the English case of *R v Higher Education Funding Council ex parte Institute of Surgery* (CA 1994) there is no general duty to give reasons but it depended on the individual circumstances. As to whether such a duty would be implied the relevant factors are:

- a) Where the decision involved an interest which was highly regarded in law such as personal liberty
- b) Where the nature of the process required reasons to be given
- c) From the circumstances of the individual case

In the present case none of the above factors are in existence the decision to suspend having been based on the automatic recording of speed and the related process and it is a situation that cannot be explained by the applicant except on the grounds of the device being faulty or having been tampered with and in both situations there could not have been any excuse for his having or driving the vehicle on the road at the material time.

I therefore find that the decision cannot be challenged at all on grounds of irrationality of the decision. Lord Diplock has defined irrationality as follows

“It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

The decision of the TLB cannot be brought within the above definition. On the contrary it is a sensible way of instilling sense to these category of public service vehicle users who know no discipline and who have over the years been the source of senseless accidents in Kenya’s roads and who had prior to the introduction of the measures complained of had developed a culture of road madness impunity and invisibility to law enforcement agencies. There is therefore no “Wednesbury” unreasonableness in the decision under challenge.

In *R v Minister of Defence ex p Smith* (CA 1996) Sir Thomas Bingham MR came up with the following holding.

“The Court may not interfere with the exercise of an administrative discretion on substantive grounds save where the Court is satisfied that the decision is

unreasonable in the sense that it is beyond the range of responses open to a reasonable decision maker.”

Finally this court is of the view that even if there was a violation warranting the grant of the order of *certiorari*, and such reasons are not in existence for the reasons given above, it would still decline to give or grant the order of *certiorari* firstly because the relief is still discretionary and secondly because of the wider public interest based on the principle of proportionality.

Proportionality is concerned with balance and whether the means justify the ends. The principle has been defined in Europe as follows:

“An appropriate balance must be maintained between the adverse effects which an administrative authority decision may have on the rights, liberties or interests of the person concerned and the purpose which the authority is seeking to pursue.”

Put on this scale the suspension of the operation of the vehicle for three months for contravening the transport regulations does not certainly outweigh the greater public good and purpose which TLB is trying to achieve by enforcing the rules that is the greater good of restoring a safe public transport system and a disciplined system that is safe to all road users including passengers and the reduction of road accidents on Kenyans roads. What TLB is doing is in the public interest and on the principle of proportionality outlined above I would also dismiss this application as well. The fact that the applicant would cease to earn some income from the use of the vehicle is in the opinion of this court a lesser value than the value intended to be achieved by TLB in enforcing the rules. Seeking an order of *mandamus* was misconceived because there has not been any failure by TLB to perform a statutory duty.

The upshot of the above is that there was no automatic right of hearing or the duty to give reasons in the circumstances outlined above. In addition on the principle of proportionality this application is dismissed as well. In view of the respondent's absence I give no order as to costs.

**Dated and Delivered at Nairobi this 22nd day of October 2004.**

**J.G.NYAMU**

**JUDGE**