



**Expresso Ltd & 13 others v National Transport & Safety Authority  
& 6 others (Petition E053 of 2021) [2025] KEHC 2085 (KLR)  
(Constitutional and Human Rights) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2085 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E053 OF 2021  
EC MWITA, J  
FEBRUARY 11, 2025**

**BETWEEN**

**EXPRESSO LTD ..... 1<sup>ST</sup> PETITIONER  
NAZIGI SACCO ..... 2<sup>ND</sup> PETITIONER  
NGUMO LINE SAVINGS AND CREDIT CO-OP SOCIETY  
LTD ..... 3<sup>RD</sup> PETITIONER  
SUPER METRO LTD ..... 4<sup>TH</sup> PETITIONER  
KANGEMI MATATU OWNERS SACCO ..... 5<sup>TH</sup> PETITIONER  
MARIMBA INVESTMENTS LTD ..... 6<sup>TH</sup> PETITIONER  
CO-OPERATIVE SOCIETY LIMITED ..... 7<sup>TH</sup> PETITIONER  
RUKAGINA SACCO ..... 8<sup>TH</sup> PETITIONER  
LATEMA TRAVELLERS BUS AND SAFARIS CO. LTD ..... 9<sup>TH</sup> PETITIONER  
METRO TRANS EAST AFRICA LTD ..... 10<sup>TH</sup> PETITIONER  
LA TRANS LIMITED ..... 11<sup>TH</sup> PETITIONER  
LOPHA MULTI PURPOSE SACCO ..... 12<sup>TH</sup> PETITIONER  
MANMO SACCO ..... 13<sup>TH</sup> PETITIONER  
DIGITAL LUXURY TRAVELERS LTD ..... 14<sup>TH</sup> PETITIONER**

**AND**

**THE NATIONAL TRANSPORT & SAFETY AUTHORITY ... 1<sup>ST</sup> RESPONDENT  
HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**



**THE INSPECTOR GENERAL OF NATIONAL POLICE  
SERVICE ..... 3<sup>RD</sup> RESPONDENT**

**CABINET SECRETARY OF STATE, INTERIOR & CO-ODINATION OF  
NATIONAL GOVERNMENT ..... 4<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY STATE DEPARTMNET OF TRANSPORT,  
INFRASTRUCTURE, HOUSING & URBAN DEVELOPMENT .... 5<sup>TH</sup>  
RESPONDENT**

**THE CABINET SECRETARY DEPARTMENT OF HEALTH .. 6<sup>TH</sup> RESPONDENT**

**THE CABINET SECRETARY MINISTRY OF INDUSTRIALIZATION,TRADE &  
ENTERPRISE ..... 7<sup>TH</sup> RESPONDENT**

## JUDGMENT

### Introduction

1. The petitioners are public service vehicle operators. They brought this petition on their behalf and that of their members to challenge covid 19 regulations restricting the carrying capacity of their public service vehicles. Towards the end of 2019, corona virus decease (Covid 19) broke out and by early March 2020, the decease had spread far and wide. The World Health Organisation had declared corona virus a global pandemic.
2. The first covid case was reported in Kenya on 12<sup>th</sup> March 2020 and the government, through the respondents, introduced measures to try and contain the spread of the decease. The measures included rules, protocols and guidelines directed to, among other areas, public transport, including public service vehicles. These measures would have effect on the petitioners and their members who were involved in public transport business.
3. The petitioners felt aggrieved by those measures and filed this petition on their own behalf and on behalf of public service vehicle operators against the respondents, challenging the rules, protocols and guidelines issued by the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents requiring carrying capacity of public service vehicles to be reduced by half as well as directives issued by the 1<sup>st</sup> respondent.

### Petitioners' case

4. The petitioners averred that their members were licensed to carry passengers within the City County of Nairobi on various routes as contained in their road licenses. However, in March 2020, the 1<sup>st</sup> respondent issued directives that all public service operators obtain public service transport clearance forms from the Ministries of Interior, Health and Transport before being authorized to operate. Public service vehicle operators were further required to resubmit applications after every 30 days, in default, clearances initially granted would stand revoked, a condition that did not exist in law under the [Traffic Act](#) or the National Transport Safety Authority Act. (NTSA Act).
5. The NTSA also demanded that public service vehicle operators obtain authorization letters from county commissions and county directors of public health, though these were not public service vehicle licensing officers under the [Traffic Act](#) or the NTSA Act. According to the petitioners, without amending the [Traffic Act](#) and rules, NTSA directed them to reduce seating capacity of their public service vehicles to half. For instance, a 14-seater vehicle capacity was reduced to 8 passengers while a



- 51-seater was reduced to 25 passengers. The operators were further required to have thermal guns and hand sanitizers.
6. The petitioners stated that on 6<sup>th</sup> April 2020, the 6<sup>th</sup> respondent published Legal Notice No. 50, Legislative Supplement No. 27 (Supplement No. 41) with further restrictions. Under rules 5(3), rail services, bus services, matatu services, taxicab services and e-hailing service vehicles were to carry half of their licensed capacities; motorcycles were permitted to carry only one pillion or goods; bicycles were to carry only the rider; tricycles were allowed to carry goods but were restricted to carrying one passenger; private vehicles were restricted to carrying half of their capacity. Users of public or private transport and public transport operators were further directed to wear masks.
  7. The petitioners argued that the 6<sup>th</sup> respondent created offences under rule 5(5) for violating rules 5(1), (2), (3) or (4), of the Rules. These rules, they argued, became null and void by virtue of sections 5 and 11 of the *Statutory Instruments Act* because there was no public participation and they were not laid before Parliament for adoption.
  8. The petitioners again argued that on 2<sup>nd</sup> June 2020, the 7<sup>th</sup> respondent published “Guidelines for Business Operations During vid-19.” Guideline 10 imposed the same limitation of half passenger capacity for rail, matatus, Tourist Vehicles, Taxicabs, motorcycles and tricycles, e-hiring services and air passenger service transport. Guideline 11, imposed a similar directive for airlines and trains. These guidelines were adopted by the 1<sup>st</sup> respondent and imposed on the petitioners’ operations.
  9. On 15<sup>th</sup> July 2020, the petitioners stated, the 5<sup>th</sup> respondent issued guidelines directing them to marginally increase passenger capacity. A 14- seater matatu was to carry 10 passengers and motorcycle operators were not to carry more than one pillion. In the petitioners’ view, the 5<sup>th</sup> respondent overthrew Legal Notice No. 50 of 6<sup>th</sup> April 2020.
  10. The petitioners asserted that while the legal notice by the 6<sup>th</sup> respondent merely reduced passenger carrying capacity to half, the 5<sup>th</sup> respondent irrationally and arbitrarily demanded through his guidelines that every five-seater private car and cabs would only be allowed to carry 3 passengers; seven-seater cars would only carry 5 passengers; Public service vehicles were to be fumigated after every trip and the petitioners were to ensure that passengers washed or sanitized their hands before boarding public service vehicles.
  11. The petitioners averred that on 6<sup>th</sup> July 2020, the President lifted the cessation of movement of persons directive issued in the 6<sup>th</sup> respondent’s legal notice. Public service operators operating inter county passenger services were required to obtain clearance from the Ministries of Health and Transport before resuming services. According to the petitioners, the President also directed that airlines undertaking domestic flights in Kenya resume passenger operations on 15<sup>th</sup> July 2020. In line with the President’s directive, on 10<sup>th</sup> July 2020, the 5<sup>th</sup> respondent revised the guidelines on public service operators as Protocol for Public Road Transport Operations.
  12. According to the petitioners, on 24<sup>th</sup> July 2020, the 6<sup>th</sup> respondent published *Legal Notice No. 138 of 2020*; the Public Health (Covid-19 Operation of Public Service Vehicles) Rules, 2020 which were not laid before the National Assembly as required by law (the *Statutory Instruments Act*) and were contrary to sections 17 and 100 of the *Traffic Act*.
  13. The petitioners took the view, that reducing the carrying capacity of public service vehicles was done without consultation. The directive was also discriminatory because it was not directed at Taxicabs, tourist passenger vehicles, SGR passenger trains, passenger commuter trains and boda boda passenger motorcycles. They further argued that the directive was irrational because there was no rationale for



licensed 51-seater bus to carry 30 passengers while a 45 -seater matatu was allowed to carried 33 passengers.

14. The petitioners again argued that [Legal Notice No. 138 of 2020](#) was ultra vires sections 17 and 100 of the [Traffic Act](#) and section 36(m) of the [Public Health Act](#). There was also violation of Articles 27(1) and (4) of [the Constitution](#). They maintained that as at 5<sup>th</sup> February 2021, commuter trains operated by the government had resumed carrying passengers at full capacity without observing the rules, conditions, protocols or regulations imposed by the respondents against public service vehicles, yet the petitioners' vehicles were at the time subject to the restrictions. As a result, the petitioners suffered financial loss due to the restrictions as their expenses remained constant as they were before the restrictions.
15. The petitioner dismissed the respondents' argument that the restrictions were imposed to curb the spread of Covid-19. They posited that while their vehicles' carrying capacities were reduced to half, the SGR trains were ferrying passengers at full capacity without observing social distancing. They were also not subjected to the curfew of not doing business beyond 10 pm. The government run commuter trains were also operating at full passenger capacities; international airlines carrying fare paying passengers flying between Kenya and other international destinations were not subjected to the same conditions and local airline operators within Kenya were not affected.
16. The petitioners maintained that passengers who used commuter trains were using their vehicles to commute within Nairobi daily in the course of their businesses. They therefore dismissed the respondents' claim that carrying passengers at full capacity would lead to spread of Covid-19.
17. The petitioners asserted that since the restrictions were supposed to be cross cutting measures and apply to all fare paying passenger carriers, it was discriminatory for the respondents to single out matatu operators. As a consequence, they piled up business operating loans the operators had with commercial banks and many of their members had their properties auctioned to their detriment and loss.
18. It was the petitioners' case, that many of their members relied on income from public service vehicles and as such, their families were driven to poverty. As a result of the financial losses, the petitioners were forced to reduce employees which resulted into layoffs and rising social stresses.
19. The petitioners maintained that the respondents' actions amounted to abuse of power and the restrictions on Covid-19 were being enforced with ulterior motives. There was no transparency and fairness in the application, objectivity or legality of the rules. The restrictions were never enacted under the [Statutory Instruments Act](#) and were, therefore, unenforceable. Consequently, pursuant to Article 50(1) (n) (i) of [the Constitution](#), they were not law, by reason of which neither the petitioners nor any public service vehicle operator in Kenya could be penalised for failing to observe them
20. Lack of legality also amounted to the usurpation of the mandate of Parliament under Articles 95 (4) of [the Constitution](#). The restrictions were not a condition precedent for their licensing thus, in demanding them to comply with the restrictions, the respondents violated Articles 10(2) (a) (b) and (c); 27(4); 28; 29(c); 50(1) (n)(i); 94(5); 232 (1) (a) (f) and 232(2) of [the Constitution](#).
21. Based on the above arguments, the petitioners sought the following reliefs:
  1. A declaration do issue that the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents' directives, protocols and regulations to the petitioners to halve their licensed passenger capacities for their PSVs are not legally binding instruments, and are consequently not available for legal enforcement by any entity including but not limited to the 3<sup>rd</sup> respondent's officers.
  2. A declaration do issue that the demand by 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents that the petitioners and their members' PSV licensed vehicles and other PSV operators comply with the



directives , protocols and regulations to halve their PSV vehicles’ licensed passenger capacities prior to, or as a condition precedent to their being issued with Road Service Licenses by the 1<sup>st</sup> respondent NTSA is unconstitutional, and a violation of, and a breach of the principle of rule of law under Article 10(2) (a) of *the Constitution*.

3. A declaration do issue that the non-enforcement of the directive of His excellency the President of the Republic of Kenya current at the lodging of this Petition, that all passenger airlines (whether locally or internationally based) adhere to the 5<sup>th</sup> respondent’s Minister for Health “Covid-19” Health Protocols imposing social distancing conditions for the stated airlines passengers while at the same time demanding the enforcement of the same Health Protocols under directives, protocols and regulations to the petitioners to halve their licensed passenger capacities for their PSVs in enforcement of such social distancing Health protocols constitutes unlawful discrimination against the petitioners and a breach of article 27(4) of *the Constitution* of Kenya.
4. A declaration do issues that the NTSA is bound by Part III of the *Traffic Act* and specifically section 100 thereof, on the Licensing of PSVs and cannot without amending the said provisions unilaterally effect the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents’ directives, protocols and regulations to the petitioners to halve their licensed passenger capacities for their PSVs in enforcement of such social distancing Health Protocols.
5. A declaration do issue that the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents not being PSV licensing Officers under section 17 of the *Traffic Act* Cap 403 of the Laws of Kenya are barred from imposing conditions, directives and/ or protocols not prescribed under section 31 of the *Traffic Act*, Cap 403 of the Laws of Kenya for the licensing of PSVs such as are operated by the petitioners herein.
6. An order do issue prohibiting the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents, by themselves, their servants, agents, employees, or by any person acting at their behest or direction from demanding of the petitioners compliance with the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents directives, protocols and regulations to the petitioners to halve their licensed passenger capacities for their PSVs in enforcement of such social distancing Health Protocols in the operation of the petitioners’ and their members PSV licensed vehicles.
7. An order of prohibition in Judicial Review do issue prohibiting the NTSA, 1<sup>st</sup> respondent, from effecting the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents directives, protocols and regulations to the petitioners to halve their licensed passenger capacities for their PSVs enforcement of such social distancing Health Protocols when processing the Road Service PSV licenses for the petitioners’ members’ Road Service Applications.
8. An order of certiorari in Judicial Review do issue, to remove to this Honourable Court for purposes of being quashed, and to quash *Legal Notice No. 138 of 2020- Public Health Act* (Covid-19 Operation of Public Service Vehicles) Rules, 2020 for lacking public participation in its purported enactment and for having never complied with the mandatory provisions of section 5 and 11 of the *Statutory Instruments Act*.
9. An order of certiorari in judicial review do issue, to remove into this Honourable Court for purposes of being quashed, and to quash Legal Notice No. 50 Legislative supplement No. 27 vide Gazette Notice supplement No. 41, and in particular Rule 5 thereof.
10. An order of certiorari in Judicial review do issue, to remove to this Honourable Court for purposes of being quashed, and to quash;



- a. the 1<sup>st</sup> respondents NTSA directives to the PSV operators on the monthly licensing of their PSVs under authority of County Commissioners.
  - b. the 5<sup>th</sup> respondent's Protocol for Public Road Transport Operations, released in July 2020 under his hand;
  - c. Part /paragraph 10 of the 7<sup>th</sup> respondent's Guidelines for Businesses Operations During Covid-19, dated 22<sup>nd</sup> June 2020.
11. An order of damages do issue against the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents to compensate the petitioners and such of their members for the loses occasioned by the petitioners and such of their members by the demand of the said respondents directives, protocols and regulations to the petitioners to halve their licensed passenger capacities for their PSVs in enforcement of such social distancing Health Protocols.
  12. Costs of this petition.
  13. Any other relief as may be ordered.
22. The 1<sup>st</sup> respondent did not file a response to the petition and did not take part in the proceedings.

### **2<sup>nd</sup> to 7<sup>th</sup> respondents' case**

23. The 2<sup>nd</sup> to 7<sup>th</sup> respondents, (herein the respondents), opposed the petition through grounds of opposition. They contended that the petitioners have no authority to sue on behalf of others; that the impugned restrictions were issued within *the Constitution* (Articles 42 and 46(1) (c)) and section 36 (c) and (m) of the *Public Health Act* (Cap 242). The restrictions also complied with section 5A of the *Statutory Instruments Act*.
24. The respondents asserted that the rules set out the modes of transportation covered and since most people mainly use public transport, it was important to secure passengers' health and that of the crew by ensuring cleanliness and safety of the vehicles. The respondents maintained that local and international airline operators fall under the Kenya Civil Aviation Authority which was not made a party to this petition. According to the respondents, enforcement of the rules was not discriminatory since consequences for their breach were not a secret.
25. The respondents contended that the rules, protocols and guidelines were issued under section 36(m) of the *Public Health Act* as delegated by Article 94(5) of *the Constitution* to deal with an infectious disease, namely, Covid 19. The rules, protocols and guidelines were thus, issued in public interest and in furtherance of a constitutional mandate under Article 46 of *the Constitution*.
26. The respondents asserted that under Article 131 of *the Constitution*, the President has a duty to address any issue of national concern as he did, leading to the publication of the rules. They argued that Covid-19 was a threat to the right to life guaranteed by Article 26(1) of *the Constitution* which necessitated putting in place rules, protocols and directives to protect that right. They urged the court to take judicial notice that the government rolled out a massive vaccination campaign and later withdrew the restrictions on carrying capacity of public service vehicles in August 2021.
27. The respondents took issue with the electronic evidence attached to the supporting affidavit, arguing that the evidence did not conform with section 106B of the *Evidence Act*.

### **Submissions**

28. This petition was disposed of through written submissions with oral highlights.



## Petitioners' submissions

29. Mr. Kinyanjui, learned counsel for the petitioners, submitted that the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents did not have mandate to license or deregister public service vehicles which is the mandate of a gazetted officer under section 17 of the *Traffic Act*. Learned counsel argued that no statutory demand was issued under section 96 of the *Traffic Act* circumscribing licensing of public service vehicles. There were no conditions precedent to licensing pegged on compliance with the restrictions issued by the respondents.
30. It was Mr. Kinyanjui's submission, that neither the *Traffic Act* nor NTSA Act empowered the 5<sup>th</sup> respondent to issue protocols governing operations or passenger carrying capacities of public service vehicles. Moreover, the restrictions were not extended to airlines and government run trains. The restrictions were thus, ultra vires the *Traffic Act* and the NTSA Act. They also contravened Article 27 of *the Constitution* on equal treatment before the law; legitimate expectation and caused loss of disposable income due to repossession of vehicles for default in repayment of loans or breach of hire purchase agreements.
31. Mr. Kinyanjui maintained that the restrictions issued by the 5<sup>th</sup> respondent and directives issued by the 6<sup>th</sup> and 7<sup>th</sup> respondents were issued outside the NTSA and Traffic Acts thus, constituted abuse of ministerial powers and bad governance in violation of Article 259 (1) (d) of *the Constitution*. He relied on the decisions in Nyarangi & 3 others v Attorney General [2008] eKLR; John Harun Mwau v Independent Electoral and Boundaries Commission & Another [2013] eKLR; Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR and Josephat Musila Mutua & 9 others v Attorney General & 3 others [2018] eKLR.
32. Learned counsel further argued that Legal Notice No. 50 (Legislative Supplement No. 27) was not subjected to public participation in a violation of Articles 10 and 174 of *the Constitution*. He relied on Communications Commission of Kenya & 5 others v Royal Media Service & 5 others [2014] eKLR; SDV Transami Kenya Limited and 19 others v attorney General & 2 others & another [2016] eKLR and Speaker of Senate & another v Attorney General & 4 others [2013] eKLR.
33. Mr. Kinyanjui again argued that the rules were a nullity because they were not tabled before Parliament as required by sections 11 of the *Statutory Instruments Act*. They further violated Articles 24 (1) of *the Constitution*. Counsel placed reliance on Article 94(5) of *the Constitution* and the decision in Youngstown & Company v Sawyer 343 US 579, for the position that the rules, protocols and directives issued by the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents were not legally enforceable. There was no explanation why the *Statutory Instruments Act* was not complied with to enable a legislation that was legally binding and in tandem with the provisions of Article 94 of *the Constitution*.
34. Mr. Kinyanjui submitted that the respondents did not controvert the fact that petitioners were being punished and fined for breach of the rules, protocols and directives. He relied on Republic v Cabinet Secretary for transport & Infrastructure Principal Secretary & 5 others Exparte Kenya Country Bus Owners Association & 8 others [2014] eKLR.
35. According to learned counsel, by virtue of rule 86 of the Traffic Rules, there was arbitrariness in interfering with the carrying capacity of the petitioners' public service vehicles since they were not set and determined by a certifying officer during inspection of the vehicle. The 1<sup>st</sup> respondent also acted on the impugned directives and protocols to limit road service licenses to 30 days in breach of rule 2 of the Traffic (Vehicle Licenses) (Duration) Rules, 2012. He relied on Minister of Health & others v Treatment Action campaign & others [2002] 5 LRC 216; Jared Juma v Kenya Broadcasting Corporation & 3 others [2014] eKLR; Associated Provincial Picture Houses v



Wednesbury Corporation [1948] 1 KB 223 and Frederick Gitau Kimani v Attorney General & 2 others [2012] eKLR that the court should grant an appropriate relief.

36. Mr. Kinyanjui again relied on Ericson Kenya Limited v Attorney General & 3 others [2014] eKLR and Lucas Omoto Wamari & 2 others [2017] eKLR and urged that the petition be allowed with costs.

### **Respondents' submissions**

37. Mr. Terrell, learned counsel for the respondents, submitted that the restrictions were lawful and necessary for safeguarding peoples' health by preventing the spread of Covid-19 within the territory of Kenya. He relied on Hillary Mutyambai Inspector General National Police Service & 4 others; Kenya National Commission on Human Rights & 3 others [2020] eKLR and Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (Interested Parties) [2020] eKLR.
38. Learned counsel again cited Article 24(1) of *the Constitution* and the decision in Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (Interested Parties) [2020] eKLR, to argue that the limitations placed on the petitioners' commercial interests were meant to safeguard the public who use public transport. This was a greater public interest which outweighed the petitioners' commercial interests. He relied on the decision in R v Big M. Drug Mart Ltd [1985] 1 S.C.R. 295 to support his argument.
39. According to learned counsel, *Legal Notice No. 138 of 2020* fell within the meaning of other measures as contemplated under Article 42 of *the Constitution*, and was enacted pursuant to sections 36(m) of the *Public Health Act*. The measures were meant to safeguard peoples' health and lives due to the rapid and indiscriminate infections that were prevalent at that time. He relied on Law Society of Kenya v Attorney General & another, National Commission for Human Rights & another (Interested Parties) (supra)
40. Relying on Article 46(1) (c) of *the Constitution*, Mr. Terrell argued that consumers have a right to have their health, safety and economic interests protected and the impugned measures were taken in furtherance of a constitutional objective. By requiring that public service vehicles be fumigated and sanitized after every trip, the legal notice was laying a threshold under which public service vehicles' crew would ensure a clean and safe environment for themselves and their customers while still able to pursue their economic interests. He relied on the decision in Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR.
41. Learned Counsel maintained that it was also important to secure passengers' health and that of the crew by demanding cleanliness and safety in the vehicles. He relied on Republic v Ministry of Transport & 3 others Exparte Kennedy Amdany Langat & 27 others [2018] eKLR.
42. According to learned counsel, although public service vehicles were privately owned, the owners had a duty of care towards their customers. The legal notice prescribed measures for proposes of safeguarding people's health and lives. Under section 36 (m) of the *Public Health Act*, he argued, there was no ambiguity as to the legal notices and their application. The legal notices were therefore lawful.
43. On the alleged discrimination, Mr. Terrell maintained that enforcement of the rules was not discriminatory. Crews manning public service vehicles came into contact with the highest number of people daily which justified the regulations and protocols. The protocols were introduced within the law (Articles 42 and 46 of *the Constitution* and section 36(m) of the *Public Health Act*) thus, had the force of law.



44. Counsel maintained that enforcement of the protocols by police was to ensure adherence to lawful directives put in place to safeguard public health. The government rolled out vaccination drive after which restrictions on carrying capacity in public service vehicles were withdrawn. The protocols are therefore no longer in force thus, the petition is non-justiciable. He relied on the decisions in *Mboya v Attorney General; National Employment Authority (Interested Party)* [2024] KEHC 2240 (KLR) and urged the court to dismiss the petition.

### Determination

45. I have considered the pleadings, arguments by parties and the decisions relied on. The issues for determination are whether the rules and protocols were lawful; whether the petitioners were discriminated against and whether they suffered losses and should they be compensated. If the answer to the last issue is in the affirmative, what is the quantum.

### Rules and protocols

46. The petitioners argued that the rules, directives and protocols issued in March 2020 and subsequent months, by the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents requiring carrying capacity of public service vehicles to be reduced by half were not lawfully made. Similarly, the petitioners challenged the lawfulness of the directives by the 1<sup>st</sup> respondent that public service vehicles operators obtain public service transport clearance forms from the Ministries of Interior, Health and Transport before being authorized to operate and to resubmit the applications every month. The petitioners again faulted the directive that operators obtain authorisation letters from county commissioners and county directors of public health, conditions they argued, did not exist under the Traffic or NTSA Acts.
47. The petitioners maintained that the directive to reduce seating capacity of their vehicles was ultra vires the *Traffic Act* and NTSA Act; that Legal Notice No. 50, (Legislative Supplement No. 27) of 6<sup>th</sup> April 2020 by the 6<sup>th</sup> respondent containing further restrictions and rule 5(3) thereof requiring, among others; rail services, bus services, matatu services and taxicab services to carry half of their licensed capacity and the direction that users of public or private transport and public transport operators to wear masks were unlawful.
48. The petitioners similarly faulted the 6<sup>th</sup> respondent's decision to create an offence under rule 5(5) if anyone breached rules 5(1), (2), (3) or (4) of the Rules. According to the petitioners, the rules became null and void by virtue of sections 5 and 11 of the *Statutory Instruments Act* because there was no public participation and the rules were not laid before Parliament.
49. The respondents maintained that the rules were properly enacted under section 36(c) and (m) of the *Public Health Act* to deal with an infectious disease, corona virus (Covid 19). The rules were made in public interest and set out the modes of transport affected. Since most people use public transport, it was necessary to secure peoples' health and that of the crew. Any limitation was necessary under Article 24(1) of *the Constitution* given the threat of the spread of Covid-19.
50. It was the respondents' position that the rules and protocols derived the force of law from section 36(m) of the *Public Health Act* whose application was to deal with infectious diseases such as corona virus. The rules and protocols were issued in furtherance of a constitutional mandate under Article 46 of *the Constitution* and parliamentary delegated authority under Article 94(5) of *the Constitution*. The respondents also argued that the rules complied with section 5A of the *Statutory Instruments Act* and their enforcement in managing public service transport was not discriminatory.



51. The issue here is whether the rules and protocols were properly enacted and were lawful. The petitioners argued that they were not while the respondent maintained that they were lawful and were issued in public interest under section 36(c) and (m) of the *Public Health Act* to safeguard public health.
52. Section 36 of the *Public Health Act* under subhead “C—Special Provisions Regarding Formidable Epidemic, Endemic or Infectious Diseases” provides, (where necessary), that “Whenever any part of Kenya appears to be threatened by any formidable epidemic, endemic or infectious disease, the Minister (now Cabinet Secretary) may make rules for all or any of the following purposes, namely—
- (c) the provision of medical aid and accommodation, the promotion of cleansing, ventilation and disinfection and guarding against the spread of disease;
  - (m) any other purpose, whether of the same kind or nature as foregoing or not, having for its object the prevention, control or the suppression of infectious diseases.
- The section adds that the Cabinet Secretary “may by order declare all or any of the rules so made to be in force within any area specified in the order, and such area shall be deemed an infected area, and to apply to any vessels, whether on inland waters or on arms or parts of the sea within the territorial jurisdiction of Kenya.”
53. I have considered respective parties’ arguments on this issue and perused the petitioners’ affidavit and annexures thereto. One of the annexures, Legal Notice 50 (Legislative Supplement No. 27) headed Public Health (Covid Restriction of Movement of persons and Related Measures) Rules, 2020 was issued by the Cabinet Secretary for Health under the *Public Health Act*. Under rule 5, those rules applied to all public transport services, including passenger rail services, bus services, matatus services Taxicab services, motorcycle services. Rule 5(5) created an offence for anyone who violated sub rules (1), (2)(3) or (4).
54. Subrule (1) prohibited movement by public service transport out of or into infected areas. Subrule (2) prohibited private vehicles movement; subrule (3) public and private transport could operate within an infected area subject to reduced carrying capacity as directed in that sub rule. Subrule (4) required users of public or private transport and operators to wear proper masks.
55. Other rules, Public Health (Covid 19 Restriction of Movement of Persons and Related Measures) Rules, 2020 were published on 6<sup>th</sup> April 2020 with similar restrictions. Similarly, on 2<sup>nd</sup> June 2020, the Ministry of Industrialization Trade and Enterprises Development published Guidelines for Business Operations During Covid 19.
56. The Cabinet Secretary for Health again published The Public Health (Covid 19 Operation of Public Service Vehicles) Rules 2020 under section 36(m). Rule 5 thereof provided for crew of the public service vehicles to wear masks; sanitization of passengers; proper ventilation for vehicles; prohibited hawking, preaching or begging in vehicles; provided for modalities on disembarking of passengers and disinfection of vehicles after every trip. Rule 5(2) provided that breach of the rule was an offence. Rule 6, further provided for hand washing before boarding public service vehicles. The restrictions were however later relaxed around August 2021, with a phased reopening of the Covid 19 lockdown.
57. Article 94(5) provides that only Parliament has power to make provision having the force of law in Kenya except under authority conferred by *the Constitution* or by legislation. Article 94(6) provides that an Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law as contemplated in clause (5), should expressly specify the purpose and objectives for which that authority is conferred, limits of the authority, the



- nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.
58. Section 36 of the *Public Health Act* grants the Cabinet Secretary authority to make rules for purposes of guarding against the spread of disease(s). The Cabinet Secretary may also declare the rules to be in force within the territory of Kenya, any part of Kenya, area or vessel.
  59. The authority to make rules is granted by statute, namely; the *Public Health Act* for, among other purposes, to guard against the spread of disease(s). According to the section, the object of the rules should be for “prevention, control or the suppression of infectious diseases.” Covid-19 was an infectious disease. The rules were thus, formulated to guard against its spread and to prevent, control or suppress that disease. The rules and protocols clearly stated their purpose and objective, that is, to prevent the spread of corona virus among the population within the affected areas in Kenya.
  60. The petitioners’ argument that the rules did not have the force of law cannot, therefore, be correct, having been made pursuant to powers granted by statute for purposes of guarding against the spread of Covid 19 and to prevent, control and or suppress that disease. The authority to make rules is also recognised by Article 94(5) and (6) of *the Constitution*.
  61. Although the *Public Health Act* was enacted before the 2010 Constitution, section 7 of the Sixth Schedule to *the Constitution* requires that all law in force immediately before the effective date continues in force and be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with *the Constitution*. The provisions of the *Public Health Act* must, therefore, be read and construed in conformity with *the Constitution*, so that section 36 provides for both the purpose and object of the rules to be made by the Cabinet Secretary as envisioned by Article 94(5) and (6) of *the Constitution*.
  62. The petitioners argued that the rules and protocols were ultra vires the Traffic and the NTSA Acts because they reduced the licensed carrying capacities of public service vehicles to half. According to the petitioners, in coming up with the rules and protocols requiring public service vehicles to carry half their licensed passenger capacities, the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents, not being licensing officers, usurped the mandate of licensing officers under the *Traffic Act* and the NTSA Act.
  63. I do not agree with the petitioners’ argument that the rules and or protocols were ultra vires, or that their formulation usurped the powers and mandate of licensing officers under both the *Traffic Act* and NTSA Act. Section 36 of the *Public Health Act* is clear that the Cabinet Secretary may declare all or any of the rules to be in force within any area specified in the order, and “such area shall be deemed an infected area, and to apply to any vessels, whether on inland waters or on arms or parts of the sea within the territorial jurisdiction of Kenya.”
  64. Ordinarily, laws, rules and regulations are enacted to address particular situations. All laws, rules and regulations, however, complement each other in order to achieve one objective, namely; to serve the people. In other words, the government may enact a complementary legislation to supplement other legislation(s) to enhance mutual strengths and or public understanding of the laws.
  65. There can be no argument that Covid 19 was a pandemic of unprecedented magnitude which affected the whole world. It was spreading faster than it could be controlled and countries the world over were struggling to contain its lethal effect in terms of associated deaths. The impugned rules, protocols and guidelines were therefore introduced to manage public transport, a widely used mode of transport, for the benefit of the people and the crew who were also not spared by the pandemic.
  66. The rules, protocols and guidelines also affected use of private or personal vehicles. The whole purpose of reducing the carrying capacity was not only to prevent the disease from fast spreading, but also



to prevent, control or suppress new infections. Any subsequent rules and protocols were intended to complement the law for effective application and enforcement to prevent the spread of the disease and bring it under control. Without the rules and protocols, there would have been greater public harm from the disease.

67. The petitioners impugned rule 5 for creating offences that were neither in the *Traffic Act* nor the NTSA Act. As already alluded to, Legal Notice 50 (Legislative Supplement No. 27) Public Health (Covid Restriction of Movement of persons and Related Measures) Rules, 2020, was issued under the *Public Health Act*. Rule 5 thereof, stated that the rules would apply to all public transport services, including passenger rail services, bus services, matatus services Taxicab services, motorcycle services. Rule 5(5) provided that anyone who violated sub rules (1), (2)(3) or (4) would have committed an offence. The subrules provided for what was to be done or not to be done.
68. Further, the Public Health (Covid 19 Operation of Public Service Vehicles) Rules, 2020 also formulated under section 36(m), had rule 5 which provided that the crew of the public service vehicles were to wear masks; sanitization of passengers; proper ventilation for vehicles; prohibited hawking, preaching or begging in vehicles; provided modalities on boarding and disembarking of passengers and disinfection of vehicles after every trip. Rule 5(2) provided that breach of the rule was an offence.
69. An offence is one created by law and must be clear and unambiguous so that the public know and understand what is prohibited and the consequences for breach. The offences creation under rule 5 were clear and unambiguous. There was no suggestion by the petitioners that the rule was ambiguous or overbroad to be void. In that regard, the offences created were clear as they were intended for maximum enforcement and compliance with the rules. Without penal sanctions, compliance with the rules and protocols would have been difficult and suppressing or preventing the spread of Covid 19 almost impossible.
70. In that respect, I take the view, that the steps taken by the respondents to make rules and issue protocols and guidelines were well intended-to protect public interest. Creation of offences under the rules was to assist in implementing the rules for the good of the country and her people during that difficult period.

### *Statutory Instruments Act*

71. The petitioners again argued that the making of the rules did not comply with sections 5 and 11 of the *Statutory Instruments Act* in that there was no public participation and the rules were not laid before Parliament thus, became null and void. The respondents maintained that the rules complied with section 5A of the *Statutory Instruments Act* given the situation prevailing at the time.
  - a. Section 5 of the *Statutory Instruments Act* provides that (1) before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—
    - (a) have a direct, or a substantial indirect effect on business; or (b) restrict competition;the regulation-making authority has to make appropriate consultations with persons who are likely to be affected by the proposed instrument.

Subsection (2) states that in determining whether any consultation undertaken was appropriate, the regulation making authority must have regard to any relevant matter, including the extent to which the consultation—

    - (a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and (b) ensured that persons likely to be affected by the proposed



statutory instrument had an adequate opportunity to comment on its proposed content.

Subsection (3) states that without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation should—

- (a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or (b) invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

72. On the other hand, section 11(1) provides that every Cabinet Secretary responsible for a regulation-making authority should within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before the relevant House of Parliament.
73. Subsection (2) provides that notwithstanding subsection (1) and pursuant to the legislative powers conferred on the National Assembly under Article 109 of *the Constitution*, all regulation making authorities should submit copies of all statutory instruments for tabling before the National Assembly. Subsection (3) requires the responsible Clerk to register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying in the House. Subsection (4) provides that if a copy of a statutory instrument that is required to be laid before the relevant House of Parliament is not so laid in accordance with the section, “the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.”
74. Section 5 requires consultation and public participation before making of regulations (including rules). Under section 11, the regulations have to be laid before the relevant House of Parliament within seven (7) sitting days from the date they were published. If the regulations are not laid before the House of Parliament within the stipulated period, the statutory instrument ceases to have effect immediately on the expiry of the time allowed.
75. The petitioners argued that the provisions of section 5 were not complied with in that there was no public participation. Further, that the rules were not laid before the relevant Houses of Parliament as required by section 11 of the Act. On their part, the respondents argued that there was compliance with section 5A of the Act. The respondents further argued that the rules and protocols were enacted as part of the measures contemplated by Articles 42 and 46 of *the Constitution* due to the prevailing circumstances and the exigencies occasioned by the Covid 19 pandemic. The rules were published to the general public for safeguarding public interest pursuant to section 5A of the Act.
76. The respondents did not argue that the Cabinet Secretaries complied with public consultation and participation as required by section 5. Their argument was that there was compliance with section 5A of the Act. Section 5A (1) provides that every statutory instrument should be accompanied by an explanatory memorandum which should contain—(a) a statement on the proof and demonstration that sufficient public consultation was conducted as required under Articles 10 and 118 of *the Constitution*.
77. The instrument should also contain (b) a brief statement of all the consultations undertaken before the statutory instrument was made; (c) a brief statement of the way the consultation was carried;
- (d) an outline of the results of the consultation; and (e) a brief explanation of any changes made to the legislation as a result of the consultation.



78. Subsection (2) states that where no such consultations are undertaken as contemplated in subsection (1), the regulation-making authority should “explain why no such consultation was undertaken.” Under subsection (3), the explanatory memorandum should contain such other information in the manner specified in the Schedule and may be accompanied by the regulatory impact statement prepared for the statutory instrument.
79. The respondents did not place before the court evidence to show that the rules and protocols were laid before the relevant House(s) of Parliament. Without sending copy or copies to the Clerk of the relevant House of Parliament, there could not have been an explanation to the House of Parliament concerned why no such consultation was undertaken.
80. Before this court, the respondents argued that the rules were made under difficult times to safeguard peoples’ health and lives. The fact that section 5 may have not been complied with must be looked at from the context of the prevailing circumstances then. According to the respondents, the first case of corona virus infection was reported in Kenya on 12<sup>th</sup> March 2020, a time when the whole world was in panic. Each country was scrambling to craft its own measures to try and contain the Covid 19 pandemic from ravaging its population following the declaration by the World Health Organisation (WHO) that corona virus was a public health emergence.
81. This country was staring at a health crisis just like any other country in the world. Section 36 of the [Public Health Act](#) allows the Cabinet Secretary to formulate rules for purposes of controlling and preventing the spread of infectious deceases. It cannot be denied that corona virus was an infectious decease of unprecedented magnitude. The measures taken were to slow down operations in all sectors of the economy countrywide eventually leading to a complete lock down. Both public and private businesses closed down with time as people observed the measures introduced to slow down and prevent the spread of the decease.
82. The rules and protocols were thus, formulated under an emergence situation. Peoples’ health and lives were paramount and the government was under obligation to protect the health and lives of her people, including those using both public and private transport since Article 46(c) confers on every consumer the right to health, safety and economic interests. The rules and protocols were issued during extra ordinary times as opposed to normal times of legislative business. In such unprecedented situation, I would agree with the respondents that it was important to focus on slowing down the spread of the decease and protect peoples’ health and lives than trying to comply with procedures when it was not feasible to conduct public consultation and participation at the time.
83. In the circumstances, I am unable to agree with the petitioners that failure to comply with section 5 of the [Statutory Instruments Act](#) in the circumstances of this case, was so grave as to amount to an infraction that should have rendered the rules and protocols invalid.

### **Discrimination**

84. The petitioners again argued that the rules, protocols and guidelines were applied in a discriminatory manner. They asserted that the directives that public service vehicles carry half their licensed passenger capacities did not apply to trains and air travels which were allowed to carry passengers at full capacities. In the petitioners’ view, this was discrimination against public service vehicle operators. The respondents denied that there was discrimination. They maintained that majority of the population use public service vehicles for transport and the government had to focus on that particular mode of transport for the benefit of both passengers and the crew.



85. Article 27 (1) of *the Constitution* guarantees everyone equality before the law and the right to equal protection and equal benefit of the law. Equality here includes the full and equal enjoyment of all rights and fundamental freedoms.
86. Article 27(4) prohibits the State from direct or indirect discrimination on any grounds, including race, sex, pregnancy, mental status, health status, ethnic or social origin, among others. Article 27(5) further prohibits any person from directly or indirectly discriminating against another on any ground, including those listed in Article 27(4). *The Constitution* uses the word, “including” which means the prohibited grounds of discrimination are inconclusive. *The Constitution* thus, abhors all forms of discrimination and prohibits both the State and any other person from subjecting anyone to both direct and indirect discrimination on any grounds.
87. In *peter K Waweru v attorney General* [2006] eKLR, the Court defined discrimination to mean:  
[A]ffording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
88. In *Jacqueline Okeyo Manani & 5 others v Attorney General & another* [2018] eKLR, the Court added that:  
[28]. [D]iscrimination...is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based on such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups.  
Discrimination is thus, the unjust or prejudicial treatment of different categories of people, based on the prohibited grounds of, among others, ethnicity, age, sex and disability.
89. The petitioners’ argument was that the rules and protocols were applied in a discriminatory manner in that they were not applied to other passenger operators such as trains operated by the government and airlines. The respondents denied that there was discrimination in the application of the rules and protocols.
90. I have considered this argument and perused the rules made by the Cabinet Secretary. I note that the rules made under Legal Notice No. 50 were general on restriction of movement of persons. These rules also applied to rail transport as opposed to public service vehicles only. The Cabinet Secretary issued other legal notices. These were Legal Notice No. 51, Public Health (Covid 19 Restriction of Movement of Persons and Related Measures (Nairobi Metropolitan Area) Order 2020 which applied to Nairobi Metropolitan;(City County of Nairobi, Kiambu County; Machakos County and Kajiado County); Legal Notice No. 52, Public Health (Covid 19 Restriction of Movement of Persons and Related Measures (Mombasa County) Order 2020, which applied to Mombasa County; Legal Notice No. 53, Public Health (Covid 19 Restriction of Movement of Persons and Related Measures (Kilifi County) Order, 2020 which applied to Kilifi County and Legal Notice No. 54, Public Health (Covid 19 Restriction of Movement of Persons and Related Measures (Kwale County) Order, 2020 which applied to Kwale County. These rules affected all modes of public transport as well as private or personal vehicles.



91. The protocols issued by the 7<sup>th</sup> respondent on 2<sup>nd</sup> June 2020 also affected other passenger operators such as can be seen from guideline 10. Guideline 11 targeted air travels, rail travels, intercity, among others, which were to follow measures prescribed by the Ministry of Health.
92. In other words, the rules affected public service vehicles (matatus and buses), tourist service vehicles, taxicabs, motorcycles and tricycles, e-hirings services and air passenger service transport. Guideline 11, on Airports, Railway stations, intercity Termini, National Game Parks, imposed limitation on passenger carrying capacity in airlines and trains to half of the licensed carrying capacities, just like public service vehicles.
93. The rules, protocols and guidelines applied to all businesses across the counties mentioned and not to public service vehicles operators only. In this respect, the petitioners' argument that the rules, protocols or guidelines applied to the petitioners and their members operating public service vehicles only cannot be correct. The respondents were under legal obligation to ensure that action was taken to guard against the spread of the disease and prevent, control and suppress the threat of corona virus, a very serious infectious disease.
94. The respondents explained and, there can be no argument about it, that the rules, protocols and guidelines were needed to suppress the unfolding covid 19 pandemic. The measures did not target particular people or group of people. They applied to all transport sectors across the areas declared to be disease infected. The fact that the rules initially applied to public transport did not mean that other sectors were not affected. The guidelines and protocols were issued to augment the rules for maximum effect in dealing with the spread of corona virus.
95. In my respectful view, the petitioners did not show that the considerations taken into account in formulating and applying the rules, protocols and guidelines targeted their sector only to amount to discrimination, or that they had a discriminatory effect. Where a party alleges discrimination, there must be evidence that the treatment he/she was subjected to was constitutionally forbidden or had a discriminatory effect.
96. As the Court correctly observed in *James Nyasora Nyarangi & 3 others v Attorney General* [2008] eKLR, "discrimination that is forbidden by *the constitution* involves an element of unfavourable bias. Thus, firstly unfavourable bias must be shown by the complainant; and secondly, the bias must be based on the grounds set in *the constitution*."
97. *The Constitution* prohibits unfair discrimination, namely; treating people inherently equal in dignity, differently and in a way that impairs their fundamental dignity as persons. In this petition, the petitioners did not demonstrate that the rules, protocols and guidelines were unfairly applied to them or that they were differently treated to amount to discrimination. In their pleadings the petitioners clearly referred to the rules, protocols and guidelines showing that those instruments applied to other sectors and not to them only.
98. A perusal of the rules, protocols and guidelines shows that everyone was in one way or another affected by the restrictions. Even people with personal vehicles, motorcycle operators, rail transport and air travel operators were also affected. The petitioners did not demonstrate that there was differential application of the rules where they were targeted as a sector. They did not show that they were subjected to negative treatment that would amount to discrimination. I am unable to find in their favour in this regard.



### **Limitation of rights.**

99. The petitioners did also argue that the rules limited their right in violation of Article 24(1) of *the Constitution*. Article 24(1) provides that a right or fundamental freedom should not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic Society based on human dignity, equality and freedom taking into account all relevant factors, including- the nature of the right and fundamental freedom, the importance of the purpose of the limitation and the nature and extent of the limitation.
100. The limitation was indeed by law since the rules were formulated pursuant to powers conferred by statute. The limitation was also reasonable as it was intended to protect health and lives of the people which are rights guaranteed by *the Constitution*. They were to protect the dignity of the people and applied equally to all people.
101. Article 24(1)(d) is clear that there is need to ensure that enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others. This means the Court must balance rights and fundamental freedoms of all people.
102. Addressing this issue in *Jack Mukhongo Munialo & 12 others v Attorney General & 2 others*, [2018] eKLR, the Court observed that in considering the limitation, the court must bear in mind that there is no superior right and take into consideration factors, including; the need to ensure that enjoyment of rights and fundamental freedoms by one individual does not prejudice the rights of others, which “calls for balancing of rights under the principle of proportionality because rights have equal value and, therefore, maintain the equality of rights.”
103. The petitioners had the right to do business. Passengers and the crew also had the right to health. The two rights had to be balance because none of the rights was superior to the other. Even then, the petitioners did not point out what measures they had put in place to protect the crew and passengers, the seriousness of the decease notwithstanding. Once again, I am unable to agree with the petitioners that the rules violated Article 24(1) of *the Constitution*.

### **Loss suffered**

104. The petitioners pleaded and argued that they had legitimate expectation that they would operate their public service vehicles for the period licenced; that they would carry the licensed capacity of passengers and would continue with businesses as the *Traffic Act* and NTSA Act permitted. Instead, because of the restrictions, they experienced thinned disposable income, some of their members lost vehicles to repossessions due to default in loan repayment or failed to meet hire purchase obligations, leading to financial turmoil. They thus, sought compensation for the losses they suffered.
105. The Court has already determined that the rules, protocols and guidelines were universally applied to various sectors. The measures were necessary to prevent the spread of corona virous, an essential step taken in public interest. The petitioners and their members were not the only ones who suffered losses. Businesses across the country were affected and people are still recovering from the effects of Covid 19. The government enacted the rules and formulated protocols and guidelines in public interest. In that respect, where public interest and private interest converge, public interest prevails.
106. In the circumstances of this case, the petitioners cannot claim to have lost business due to the restrictions. The cause of the loss was Covid 19 and not the restrictions. The government had an obligation to take measures to safeguard the health and lives of the people which was more important than protecting private businesses and, therefore, private interest at the expense of public interest.



**Conclusion**

107. Having considered the petition, the response and arguments by parties *the Constitution*, the law and decisions relied on, the conclusion I come to, is that the petition is not merited. It is declined and dismissed with no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF FEBRUARY 2025**

**E C MWITA**

**JUDGE**

