Njenga & another v Kenya National Highways Authority (KENHA) (Constitutional Petition E013 of 2024) [2024] KEHC 7028 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7028 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CONSTITUTIONAL PETITION E013 OF 2024

RN NYAKUNDI, J

JUNE 12, 2024

159, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: NATIONAL TRANSPORT AND SAFETY AUTHORITY ACT

AND

IN THE MATTER OF: THE TRAFFIC ACT

AND

IN THE MATTER OF: THE EAST AFRICAN COMMUNITY VEHICLE LOAD CONTROL ACT 2016

AND

IN THE MATTER OF: THE KENYA ROADS (KENYA NATIONAL HIGHWAYS AUTHORITY) THE REGULATIONS 2013,

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OFRIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF: DETENTION OF MOTOR VEHICLES REGISTRATION NO. S: KBZ 845R – ZF 5724, KBB 271G – ZG 2639, KBB 738F – ZF 1596 BY KENYA NATIONAL HIGHWAY AUTHORITY (KENHA)

AND

IN THE MATTER OF: THE DECISION THAT THE PETITIONER PAYS TO (KENHA) KSHS 49, 689, 964, KSHS 2,368,132 AND KSHS. 4,267,705, RESPECTIVELY, PRIOR TO THE RELEASE OF THE SAID MOTOR VEHICLES

BETWEEN

JEREMIAH KARURI NJENGA ..... 1ST PETITIONER

SAMSON KABIRO CHURU ..... 2ND PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY (KENHA) ..... RESPONDENT

RULING

159, 165, 258 and 259 OF *THE CONSTITUTION* OF KENYA, 2010

AND

IN THE MATTER OF: *NATIONAL TRANSPORT AND SAFETY AUTHORITY ACT*

AND

IN THE MATTER OF: THE *TRAFFIC ACT*

AND

IN THE MATTER OF: THE EAST AFRICAN COMMUNITY VEHICLE LOAD CONTROL ACT 2016

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IN THE MATTER OF: THE KENYA ROADS (KENYA NATIONAL HIGHWAYS AUTHORITY) THE REGULATIONS 2013,

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IN THE MATTER OF: *THE CONSTITUTION* OF KENYA (PROTECTION OF

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AND

IN THE MATTER OF: DETENTION OF MOTOR VEHICLES REGISTRATION NO. S: KBZ 845R – ZF 5724, KBB 271G – ZG 2639, KBB 738F – ZF 1596 BY KENYA NATIONAL HIGHWAY AUTHORITY (KeNHA)

AND

IN THE MATTER OF: THE DECISION THAT THE PETITIONER PAYS TO (KeNHA) KSHS 49, 689, 964, KSHS 2,368,132 AND KSHS. 4,267,705, RESPECTIVELY, PRIOR TO THE RELEASE OF THE SAID MOTOR VEHICLES

-BETWEEN-

JEREMIAH KARURI NJENGA ..... 1ST PETITIONER/APPLICANT

SAMSON KABIRO CHURU ..... 2ND PETITIONER/APPLICANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY (KENHA) ..... RESPONDENT

RULING

Coram: Before Justice R. Nyakundi

M/s Bryan Khaemba, Kamau Kamau & Co. Advocates

M/s Owiti, Otieno & Ragot

1. Before me for determination is an application dated 3rd June, 2024 expressed to be brought under the provision of Article 23 of *the Constitution*, Rules 3, 4, 13, 19, 23 and 24 of *the Constitution* of Kenya seeking the following reliefs;

    a. Spent.

    b. That pending the hearing and determination of this application, this honourable court be pleased to issue and interim order directing the Respondent herein to release Motor Vehicles Registration No.s KBZ 845R – ZF 5724, KBB 271G – ZG 2639, AND KBB 738F – ZF 1596 to the Petitioners herein, unconditionally.

    c. That pending the hearing and determination of this Petition, this Honourable Court be pleased to issue and interim order directing the Respondent herein to release Motor Vehicles Registration No.s: KBZ 845R – ZF 5724, KBB 271G – ZG 2639, AND KBB 738F – ZF 1596 to the Petitioners herein, unconditionally.

    d. That the costs of this application be provided for.

2. The Application is based on 11 substantive grounds and an affidavit in support sworn on 3rd June, 2024 by the 1st Petitioner/Applicant. The grounds are as reproduced hereunder;

    a. On or about 28th May, 2024, the Petitioner's motor vehicles Registration No.s KBZ 845R – ZF 5724, KBB 271G – ZG 2639, and KBB 738F – ZF 1596 (hereinafter, the suit motor vehicles) were transporting cement cargo from Kitale to Lodwar when they were stopped by the Respondent's personals at Aruba in between Kitale and Kapenguria, whereupon the Petitioners' drivers and/or agents were informed that the suit motor vehicles were carrying excess loads.

    b. The Respondent's personals weighed the suit motor vehicles at Aruba without informing neither the Petitioners nor their drivers and/or agents of the exact excess loads as alleged nor were the Petitioners issued with any weighing reports whatsoever.

    c. It is at this point that the Respondent's personals directed that the suit motor vehicles be driven to Kitale Police station for further processing.

    d. That upon arrival at Kitale town, the petitioners' drivers and/agents were further directed to drive the suit motor vehicles to Webuye-Malaba Bound weighbridge station.

    e. Interestingly, on reaching Maili Tatu area, the Respondent's personals instructed the Petitioners' drivers to alight from the suit motor vehicles, whereupon they were arrested and held in custody at Maili Tatu Police Station and later released on free police bond.

    f. The suit motor vehicles were then driven under the control of the Respondent's personals from Maili Tatu to Webuye without any involvement whatsoever of the Petitioners herein, their drivers and/or agents.

    g. The alleged processing was done at Webuye-Malaba Bound weighbridge whereupon the Petitioners were charged with the offense of overloading.

h. That the sole purpose of having the suit motor vehicles driven all the way from Aruba to Webuye was so as to place the suit motor vehicles within the jurisdiction of the East African Regional Trunk Road Network (RTRN) being the Nothern Corridor and Links and by extension thereby, have the Petitioners heftily fined with payment of overloading fees under Section 7 of the East African Community Vehicle Load Control Act, 2016 as opposed to the penalty for overloading prescribed under Section 58 of the *Traffic Act*.

i. That the suit motor vehicles were then impounded and detained at the Webuye-Malaba Bound weighbridge station and the Petitioners ordered to pay Kshs. 49,689,964/=, Kshs. 2,368,132/= and Kshs. 4,267,705/=, respectively, prior to the release of the said suit motor vehicles.

j. That the above impugned actions of the Respondent are ultra vires the Rule of Law and *the constitution* in entirety.

k. Unless and until this honourable court intervenes by granting the orders sought, the petitioners herein will continue to suffer untold economic, financial and business loss.

3. In response to the application, the Respondent filed grounds of opposition dated 10th June, 2024, in which 8 grounds have been raised vehemently opposing the application. The Respondent avers thus:

a. The said application is misconceived and constitutes an abuse of the due process of the Law on the following grounds, identifiable from the facts presented by the petitioners in their own Affidavit in support of the Application:

i. The three motor vehicles and their respective trailers, identified in the application and the affidavit in support thereof, have prima facie been demonstrated from the documents attached thereon as expressed to have been generated by the respondent from the weighbridge station along Webuye-Malaba road, upon being subjected to the Respondent's weighing scale, to have been carrying excess loads, whose measurements have been disclosed thereon as 31,960 Kilograms, 11,770 Kilograms and 14,020 Kilograms, respectively, as per Exhibits JKN/3 (a), (b) and (c) respectively, produced at paragraph 10 of the affidavit of the 1st Petitioner.

ii. The three impugned motor vehicles and their respective trailers constituting their excess loads have been impounded and detained at Webuye-Malaba Weighbridge station.

iii. According to both the two Petitioners, they have been charged along with their respective drivers of the said impugned motor vehicles, with offences of overloading and failing to comply with instructions of police officers in uniform in the course of their traffic duties, contrary to sections 52(1)(a) of the *Traffic Act*, Chapter 403 laws of Kenya, obstruction of the Police Officers from discharging their due mandate as per bundle of documents constituting Exhibit JKN/2, produced at paragraph 8 of the affidavit of the 1st petitioner.

iv. That according to the petitioners, they have been required to pay a prescribed fine/ penalty of sums of Kshs. 49,689,964/=, Kshs. 2,368,132/= and Kshs. 4,267,705/= to the respondent, thought the documents themselves do not disclose to who the payments would be made.

b. The said facts disclosed by the petitioners in their application and affidavit in support, disclose , prima facie, offences under the *Traffic Act*, specifically overloading of the said alleged motor vehicles, and refusing to obey instructions of the Police officers discharging their duties, and obstructing the police in discharging their duties contrary to the provisions of Sections 52(1)(a), 55(2) and 56(1) and (2) of the *Traffic Act*, chapter 403, Laws of Kenya, with their corresponding prescribed penalties as set out in the proviso section 58(1) thereof, as read with section 58 (2) thereof, which identify that the owners of the said motor vehicles as persons responsible for such overloading, would equally be charged with the offences of such overloading.

c. The Respondent's statutory responsibility as set out in Section 4(2)(d) and 50 of the *Kenya Roads Act*, 2007, include its responsibility to ensure adherence to the rules and guidelines on axle load control prescribed under the *Traffic Act* (Cap. 403) and under any regulations under the said statute, which includes the fact of taking charge of detection of excess loads on motor vehicles by making provision of technical input in terms of measurement of excess loads, which renders its personnel as potential witnesses in all criminal prosecutions arising from such detected excess loads.

d. The nature of the Petitioners case now as presented constitutes an attempt to interfere with the prospective exhibits intended for use by the Director of Public prosecutions in the intended or ongoing criminal cases against the two Petitioners and their respective drivers, by using the instant court and its proceedings, to have those prospective exhibits released before the criminal trial commences or is concluded, or before the said exhibits, in the nature of motor vehicles, and their excess loads, are produced as exhibits at the trial in the subordinate court.

e. The instant application by the Petitioners constitutes a gross abuse of the legal proceedings already commenced by the Inspector general of police whose agents constituting the Police Officers at Webuye-Malaba weighbridge have already arrested the persons identified to be charged with various traffic offences thereon, and released them on Police Bond, and identified the respective charges intended to be preferred, and the Director of Public Prosecutions independence to make a decision to charge or continue with the prosecution of the said offences, stand to be prejudiced should any of the orders sought be granted.

f. This instant application is an affront to the express and mandator provisions of Articles 157(1) (4), (6), (7), (8), (9) and (10) of *the Constitution* of Kenya 2010 which establish the office of the Director of Public Prosecution as an independent constitutional office responsible for all prosecution of all criminal cases, at his discretion, either in person or though his delegated officers, whether to commence, or continue with any such prosecution, and to prosecute the same, without being subject to any other authority or influence, yet the consequence of the instant application, would deprive and or compromise that independence of the office by taking away an exhibit before it is either evaluated by the DPP to determine whether there is an offence disclosed, or deprived it of an opportunity to produce the exhibit in court, without compromise to its integrity.

g. That the instant application constitutes an affront to the constitutional rights of a fair hearing to all the accused persons in the intended criminal prosecution contrary to the express and mandatory provisions of Articles 47, 5091), (2) (c) and (j) of *the Constitution* of Kenya, as read with Articles 24 and 25 thereof, which render these fundamental rights to be non-derogable or limited on account of any other persons convenience, as presented by the petitioners in the

instant application, and which require that every accused person shall be afforded adequate facilities to defend himself, and advance access to all evidence intended to be used against him.

h. The instant application is equally misconceived and is frivolous, because the only court with jurisdiction in law, to exercise discretion whether to release the said exhibits sought by the Petitioners to be ordered to be released unconditionally, if at all, is the trial court handling the criminal prosecution in accordance with the provisions of sections 177 of the Criminal Procedure Code Chapter 75, Laws of Kenya, and only after the same would have been produced as an Exhibit before that court, but certainly not this court as approached.

4. The parties filed submissions in support of their positions. In summary, the Petitioner argued that the Respondent's main ground of opposition is based on a grossly erroneous assumption that the petitioners and/or their agents were charged before a court of law with traffic offences hence the assertion that the suit motor vehicles are exhibits. That the same is not correct at all. The Petitioners submitted that neither the Petitioner nor their agents have been charged in any court of law based on the issue at hand as the matter only ended with the notices to attend court issued to the petitioners' drivers at Maili Tatu. That when the said drivers attended court on the material date, they were informed that the ODPP had not approved the charges. It was therefore submitted for the Petitioners that as it stands there are no pending or intended criminal proceedings against the either the Petitioners or their drivers.

5. Additionally, it was submitted for the petitioners that neither the Petitioners nor their drivers/agents were involved in the exercise of weighing the subject motor vehicles in order to ascertain that they were actually carrying excess loads and by what amount. The Petitioners relied on the decision in Kiarie & another v Kenya National Highways Authority (2024) eKLR and submitted that a prima facie case is manifest to warrant the grant of the orders sought. That the suit motor vehicles are carrying cargo belonging to third parties who contracted the Petitioners herein to transport and further, the Petitioners herein depend on the said motor vehicles to earn a living.

6. The Respondent on its part substantially argued that the petitioners' case as presented constitutes an attempt to interfere with the prospective exhibits intended for use by the Director of public Prosecutions in the intended or ongoing criminal cases against the two Petitioners and their respective drivers, by using the instant court and it proceedings, to have those exhibits released before the criminal trial commences or is concluded, or before the said exhibits, in the nature of the motor vehicles, and their excess loads, are produced as exhibits at the trial in the subordinate court.

7. The respondent further argued that the application is misconceived and is frivolous, because the only court with jurisdiction in law, to exercise discretion whether to release the said exhibits sought by the petitioners to be ordered to be released unconditionally, if at all, is the trial court handling the criminal prosecution in accordance with the provisions of Section 177 of the Criminal Procedure Code Chapter 75, laws of Kenya, and only after the same would have been produced as an exhibit before that court, but certainly not this court as approached. On this the Respondent relied on the decisions in Petroleum Institute of East Africa versus Republic, Bush and Beach travel & safaris Ltd, and Peter Kamau Mwaura, (2021) eKLR at pages 4 and 5 and the case of Director of Public Prosecutions vs. Marias Pakine Tenkewa T/a Naresho Bar Restaurant (2017) eKLR.

Determination

8. I have carefully considered the application, the grounds of opposition, the submissions filed and the affidavit evidence. Without a doubt, one of the functions of the Respondent under Section 4(2)(d) of the *Kenya Roads Act* is to; -

> " 4 (2) (d) ensure adherence to the rules and guidelines on axle load control prescribed under the *Traffic Act* (CAP 403) and under any regulations under this Act."

9. Additionally, Section 62 of the Act empowers the respondent to ensure compliance with the provisions of the Act or any other regulations. However, in as much as the Respondent is accorded the powers to detain vehicles for purposes of compliance with the Act, such power should be exercised responsibly.

10. Among the cherished provisions in our Bill of rights is the right to property, which ought not be arbitrarily deprived. Article 40 of *the Constitution* in this regard provides as follows with respect to the right to property:

> " (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property––
>
> (a) of any description; and
>
> (b) in any part of Kenya.
>
> (2) Parliament shall not enact a law that permits the State or any person—
>
> (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
>
> (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

11. The strict regulations on vehicle weight limits have been put in place to maintain the integrity of the Kenyan roads and ensure the safety of all other road users. To this end, fines are imposed to road users who are found guilty of the offences stipulated in the Act. The punishment however ought to be proportional to the offence.

12. The principle of proportionality is a foundational requirement of justice and fairness in all matters, which include the determination of punishment and its purpose. The principle requires that the punishment of crime committed ought to be based on the seriousness of the offence, the circumstances of the offence, the situation of the victim and the situation of offender. Put differently, the principle of proportionality calls for coordination and balance between the offence and the punishment in ensuring justice. That balance does not mean a precise mathematical proportion, but a proper ratio between crime and punishment can be established, although it does not lead to complete equality.

13. The justification and use of punishment is to be determined according to the principle of utility. Punishment is an evil: it brings harm or dissatisfaction to those punished. Therefore, it can be justified only to the extent that it produces, in aggregate, other benefits or satisfactions to a greater degree. Because the principle of utility is wholly consequentialist, punishment cannot be warranted by the ill deserts of those punished. In gauging punishments' net social benefits, general deterrent effects are deemed of particular importance. Punishment is thus warranted only to the extent that its beneficial

effects in discouraging criminal behaviour outweigh the harm it produces. See Andrew von Hirsch C proportionality in the philosophy of punishment 1992 16 Crime and justice

14. In the case of Peter Igiria Nyambura v Director of Public Prosecutions [2018] eKLR, the court held as follows on the principle of proportionality: -

> " As a form of punishment, the principle of proportionality ought to apply. Proportionality is considered to be so important in criminal sentencing because it accedes with principles of fundamental justice. People have a sense that sentences scaled to the gravity of the offence are fairer than punishments which are not proportionate to the crime. It is a generally acceptable principle in criminal law that punishment must fit the crime."

15. A reading of the weighbridge tickets adduced in evidence by the applicants and considering the facts as presented by the parties, by all means and standards do not reveal proportionality. They are punitive in my considered view. Interestingly, the Respondent in its submissions dated 10th June, 2024 appeared to deny the fact that the said fines were imposed by themselves. The Respondent argued that the petitioners have been required to pay a prescribed fine/penalty of sums of Kshs. 49,689,964/=, Kshs. 2,368,132/= and Kshs. 4,267,705/= to the respondent, though the documents themselves do not disclose to who the payments would be made. It is not clear whether the Respondent denies its involvement in imposing the said fines but it is evident that the said fines are not proportionate given the circumstances of the case and the offence in question.

16. What then constitutes a proportionate punishment? The starting point would be Section 56 of the *Traffic Act* which creates the offence of overloading. The provision stipulates: -

> (1) No vehicle shall be used on a road with a load greater than the load specified by the manufacturer of the chassis of the vehicle or than the load capacity determined by an inspector under this Act.
>
> (2) No vehicle shall be used on a road if it is loaded in such a manner as to make it a danger to other persons using the road or to persons travelling on the vehicle; and should any load or part of a load fall from any vehicle on to a road such fact shall be prima facie evidence that the vehicle was loaded in a dangerous manner until the contrary is proved to the satisfaction of the court.

17. Section 58 of the *Traffic Act* provides for penalty for improper condition or overloading in the flowing language:

> "
>
> " 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 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.

(3)

(a) In any case where a motor vehicle or trailer is twice or more times, in a period of twelve months, the subject of a successful prosecution under any of the provisions of sections 55 and 56, the court shall, unless for special reasons to be recorded it decides otherwise, order the Authority to suspend the licence of such vehicle for a period of two years.

(b) The Authority shall thereupon suspend the licence of the vehicle for such period, and the owner of the vehicle shall return the licence of the vehicle to the Authority, who in no case shall issue another licence in respect of such vehicle until the termination of the period of suspension."

18. A careful examination of the weighbridge tickets exhibited by the Petitioners/Applicants indicate that they were fined using a scale that is within the jurisdiction of the East African Community Vehicle Load Control Act, 2016. In their written submissions and pleadings, the applicants contended that the Respondents unlawfully went out of their way to transport and/or cause the subject motor vehicles to be driven/controlled up to Webuye weighbridge in a malicious attempt to bring the dispute and/or alleged offence within the jurisdiction of the East African Community Vehicle Load Control Act, 2016 in order to saddle the Petitioner's with hefty and unreasonable fines.

19. This averment was never countered by the Respondent who substantially argued that the present application is misconceived for reasons that the various person identified to be charged with various traffic offences thereon have been arrested by the Inspector General of Police and released them on police bond. That the Director of Public Prosecutions independence to make a decision to charge or continue with the prosecution of the said offences, stand to be prejudiced should any of the orders sought be granted.

20. The Kenya Roads (Kenya National Highways Authority) Regulations, 2013 [L.N. 86/2013] are clear under Regulation 14, that prior notification of an offence of overloading be given before arrest and prosecution. The Regulation provides: -

(1) Subject to regulation 13, the notification in the weighbridge report form shall form the basis for imposing fees where the vehicle is found to be overloaded in accordance with these Regulations.

(2) Upon issuance of the weighbridge report form, it shall be the duty of the driver to notify the registered owner of an overload offence and the registered owner shall be required to pay the overload fee.

(3) The registered owner of the motor vehicle pulling the trailer is in breach of regulation 10, the owner of the motor vehicle shall be liable for the overload offence and shall be required to pay overload fees.

(4) In order to secure payment of fees, an overloaded vehicle shall be detained free of charge by the Authority for the first three consecutive days, and subsequently, a fee of two thousand shillings shall be charged for each extra day until proof of payment is produced.

(5) Subject to the provisions of this regulation detained vehicles shall be held under the owner's responsibility and payment of fees prescribed in Part 1E of the Schedule shall be made either by cash or irrevocable bankers' cheque in United States dollars or its equivalent in Kenya Shillings.

21. The foregoing provision is explicit as to the process attendant to an overload offence. One of the outstanding prerequisites is a weighing bridge report which was not exhibited in the instant case. I have seen nothing on record to justify the hefty fines imposed. In any event, even if the provisions of the East African Community Load Control Act, 2016 would apply, the Respondent still did not adhere to the process laid in the said Act. For avoidance of doubt, in Section 17 of the East African Community Load Control Act, 2016, it is stipulated that: -

(1) When an authorized officer determines that a vehicle is carrying a load in excess of the legal load limit under this Act, he or she shall issue a weighing report setting out the overload particulars and the amount of overload fees payable.

(2) Where an authorized officer, while a journey is being undertaken, determines that a vehicle is carrying a load in excess of the legal load limit, the authorized officer shall in consultation with relevant implementing agencies, not allow the vehicle in question to continue its journey, unless the load is redistributed and the vehicle is, upon being reweighed, found to be within the legal load limit, or the vehicle is offloaded to lower its weight to the legal load limit and—

(a) any amounts due under subsection (1) have been paid to the national roads authority or its duly appointed agent; or

(b) a guarantee in the prescribed format is provided by the transporter that such amounts shall be paid.

(3) Where the fact of overloading is not disputed by the transporter, the transporter shall sign and acknowledge the weighing report in the prescribed manner and the transporter shall be liable for the overload fees which may be recovered as a summary debt by the national roads authority.

(4) Where the fact of overloading is disputed by the transporter, the authorized officer weighing the vehicle shall indicate such dispute in the weighing report, and a copy of the disputed report shall be issued to the transporter who may—

(a) pay the requisite overloading fees on a without prejudice basis to secure the release of the vehicle, make such necessary adjustment on the load as may be directed by the authorized officer and lodge an appeal against the fees as provided for by regulations made under this Act; or

(b) appeal against the fees, using regulations made under this Act, during which period the vehicle will remain detained at such designated place at the cost of the transporter.

(5) It shall be the duty of the driver to notify the owner and other relevant parties of an overload as indicated in the weighing report and such fees required to be paid for the overloading.

22. This petition cannot escape the principle of proportionality underlying the theories of punishment of whatever nature, modern theories of punishment within our sentencing scheme are classified as either deterrent, retributive, consequentialist, rehabilitation, or as an appropriate desert for the wrong doer. Therefore, there is an obligation to punish sufficiently to speak against the offences which flow from Section 55 & 56 of the *Traffic Act* on conditions of vehicles, and on limitation of Loads within our Local and International Highways. According to retributive theory a finding of guilty by the Respondent should be a necessary condition to justify punishment against the petitioners but that punishment should not be administered to promote other goals that are not tied to censuring the petitioners wrong doing.

23. If that is to be the case, that would instrumentalize the petitioner and increase the risk of the sentencing body, tribunal or court of rendering sentences arbitrary indeterminate. When we speak about just deserts in sentencing proportionality enables fairness by scaling punishment in relation to the offence. There is a sense in Section 41 (a), 2, 3, 4, 5, 6, of the *Traffic Act* that provides for scaling of sentences based on the severity of the breach on limitation of loads under Section 56 of the same Act. From this framework, the sentencing court, tribunal or body are guided by ordinal proportionality test. The spirit and the letter of the law does reflect the gravity of the traffic offence relative to other offences in the same category and the various degree of seriousness in the range of conduct covered by the offence.

24. Within this framework one is able to appreciate the principle of proportionality which is primarily concerned with measuring sentence severity to facilitate fairness, consistency, parity, and predictability in sentencing for those found culpable under the offences within the scheme provided by the enabling statute. Placing the principle of proportionality at the centre of this petition the persuasive dicta from the Canadian jurisdiction in R v M. (C.A) (1996)1 SCR provides the conceptual link between criminal liability, eventual sanction, and the measure of proportionality. The court also distinguished retribution from vengeance in the following terms: " Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporate a principle or restraint, retribution requires the imposition of a just and appropriate punishment, and nothing more.

> It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence, it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system." (See Re B.C [1985] 2 SCR 486 at 533 Anxiously, the affidavits by the petitioners avers:
>
> a. That sole purpose of having the suit motor vehicle driven all the way from Aruba to Webuye was so as to place the suit motor vehicles within the jurisdiction of the East African Regional Trunk Road Network (RTRN) being the Northern corridor and Links and by extension thereby, have the petitioners heftily fined with payment of overloading fees under Section 7 of the East African Community Vehicle Load Control Act 2016 as opposed to the penalty for overloading prescribed under Section 58 of the *Traffic Act*.

b. The suit motor vehicle were then impounded and detained at the Webuye-Malaba Bound weighbridge station and the petitioners ordered to pay Kshs 49,689, 964, Kshs 2,368, 132 and Kshs 4,267, 705, respectively, prior to the release of the said suit motor vehicles."

25. The only evidence available to the respondent was the overloading of the impugned motor vehicles beyond the limitation of the loads provided for under Section 41 as read with Section 55 of the *Traffic Act* Cap 403 of the Laws of Kenya. Difficult questions arise from the decisions made by the respondent given the uncontroverted evidence on notice to attend court dated 28.5.2024 as against Cleophas Wanjala Wepukhulu, Jeremiah Karori, Care of Motor Vehicle KPP 738F and Wycliffe Barasa care of Motor Vehicle KBB 271G. This notices were also followed sequentially with Kenya National High Way authority axle load control dated 28.5.2024. In motor vehicle KBB 738F the actual weight is indicated at 67770 with an overload of 17770. Whereas in motor vehicle KPP 271 G the actual weight was 64020 with an overload of 14020. In addition, motor vehicle registration KBZ 845R the actual weight was 81960 with an overload of 31960 kilograms.

26. The overload weight is the blameworthiness of the law as against the petitioners. The arrest of this three motor vehicles was along Maili Tatu /St Joseph's Kitale road. Without seeking to lay down a precise code to be invoked in so far as the excess load is concerned, inviting the East African Community vehicle load control Act 2016, first there must be a reason to depart from the provisions of Section 41, 55, 56, & 58 of the *Traffic Act* of Kenya. In enforcing this rule the court is underpinning the difference between judicial and administrative processes. The legal rights of litigants are to be decided according to legal rules and precedence so that like cases are treated alike.

27. Clearly why do I say so? The predominant provisions on limitation of loads, weights and dimension of vehicles is in the first instance the *Traffic Act* of Kenya. An administrative authority by the respondents cannot be permitted to act in this way or that way for reason that its decision would be considered ultra-vires and void. Such a tribunal or body is not allowed to pursue consistency at the expense of the merits of individual cases. This doctrine is applied even to statutory tribunals despite their remembrance to the courts of law. In the case of Westminister corporation v LNW Railway 1905 AC 426 at 430. Lord Macnaghten said: "it is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first. This is the essence of what is called the reasonable test in Associated Provincial Picture Houses Limited vs Wednesbur corporation 1948 1KB 2223.

> " It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the world "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak direct himself properly in law. He must call his own attention to the matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said and often said to be acting unreasonably. Similarly, there may be something to absurd that no sensible person could over dream that it lay within the powers of the authority.

28. The respondents in this case hinged there submissions in Article 157 of *the constitution* and 177 of the Criminal Procedure Code, in relation to the intended prosecution and the production of the motor

vehicles as exhibit in support of the intended allegations as premised in the notice to attend court as follows: Failing to obey instructions given to him by a police officer in uniform. This notice to attend court was issued on 28.5.2024 as at the time of making a determination in this case no charge sheet or proceedings presented before this court that there is any meaningful criminal proceedings being processed at the Chief Magistrate's Court at Kitale. The inference I draw from the absence of that record is that no pending proceedings against petitioners have been initiated or commenced by the Director of Public Prosecution in any of the forums before the magistrate's court at Kitale. It remains in the realm of expectation and the doctrine of Article 50 (2) (a) of *the constitution* that every accused person is to be presumed innocent until the contrary is proved remains in favour of the petitioners.

29. The other notion is under Article 50 (2) (E) of *the constitution* which provides that an accused person(s) have a right for any trial against them to begin and be concluded without a reasonable delay. The respondent who effected the arrest against the petitioners have not demonstrated by way of evidence why the petitioners have not been arraigned in the court of law since 28.5.2024 when the notification to attend court was issued. If that has been complied with no cogent evidence is before this court at the time of writing this ruling. It is just an assertion in the respondents submissions that the National Police Service have recommended a prosecution against the petitioners. *The constitution* further commands as in Article 49 (1) (f) that an arrested person has the right to be brought before a court as soon as reasonably possible but not later than 24 hours after being arrested or if the twenty –four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end if the next court day. The number of question arise this far on a structured test in which the decision maker' process of exercise of discretion is to be addressed by this court. The questions which are within the constitutional imperative include:

    a. Whether the legislative objective is sufficiently important to justify limiting a fundamental right

    b. Whether the measures designed to meet the legislative objective are rationally connected to it

    c. Whether the means used to impair the right of freedom are no more than is necessary to accomplish the objective.

    d. Whether a fair balance has been struck between the right of the individual and the interest of the community which is inherent in the whole of the convention. (This is sometimes called "narrow proportionality.)

30. Upon the deep consideration of the evidence disclosed by the petitioners and the re-joinder issued by the respondent plainly each of the elements in the above tests have not been surmounted by the respondent. The respondent cannot be allowed to take refuge in the anticipated prosecution with or without the prospect of high chances of success. The relevant articles of *the constitution* as premised under 49 & 50 provisions are concerned with substance and not procedure. It is clear that court's approach to issues of this nature is to apply the proportionality test which must go beyond that traditionally adopted judicial review in a domestic setting.

31. The rigour of this logic is somewhat aligned with the test of necessity and sensitivity in context of the matter in question. So in the context of this petition the balance has to be struck between the different groups of private interest and those interests in public policy which are more intrusive to impair the economic rights of an individual. Now in the instant case the offence named in the notice to attend court are crafted in the following language: Failing to obey instructions given to him by a police officer in uniform.

32. Simply speaking plainly in ordinary language and as stipulated in Article 50 (2) (b) an accused person has a right to be informed of the charge with sufficient detail to answer it. I am convinced beyond reasonable doubt that the offence in the notice to attend court if ultimately processed cannot attract a fine of 49, 689, 964, Kshs 2, 368, 132 and Kshs 4,267, 705 respectively. It is about disobedience to instructions issued by a police officer.

33. Having re valuated the affidavit evidence by the petitioners and having considered the grounds of the opposition by the respondent there is no prima facie evidence that there was a basis which could have supported the conclusion by the trial court from the charge sheet to such a degree to such a finding of guilty, conviction and the punishment to be imposed against the petitioners of a fine of Kshs 49, 689, 964, Kshs 2, 368, 132 and Kshs 4,267, 705 respectively.

34. With a new constitutional dispensation the dicta in Suchan Investment Limited vs Ministry of National Heritage & Culture and 3 Others (2016) KLR on this sphere the court pronounced its self as follows: "Traditionally , judicial review is not concerned with the merits of the case. However, Section 7 (2) (l) of the *Fair Administrative Action Act* provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of *the Constitution* to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications. Analysis of Article 47 of *the Constitution* as read with the *Fair Administrative Action Act* reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i) (i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the *Fair Administrative Action Act*."

35. Thorny questions often arise why the respondent in adjudicating the matter while intermingling with the provisions of the statute failed to reconcile the procedure of dealing with such offences with the legal standard for fair hearing stressed and set in the judicialization of the administrative procedure. It is trite that natural justice demands that the decision should be based on some evidence of probative value. The investigative body has provided in the documentary evidence annexed by the petitioners the ranges of actual weight and the excess overload of each motor vehicle.

36. This is what the *traffic Act* provides for under Section 41(a) that subject to Section 56 of the Act. The maximum weights and dimensions referred to section 55 (2) of the Act shall be set out in the twelfth schedule. Further in (2) a person who drives or uses on a vehicle in respect of which the weights set out in paragraphs (2) (1) (2) or (3) of the twelfth schedule are exceeded shall as respect each overloaded Axle or any excess over the maximum permitted weight, be guilty of an offence against section 58 of the Act, and shall in respect of that offence, on convictions pay a fine not less than the appropriate fine according to the following scale.

37. For purposes of this petition the specific facts as tabulated by the respondent demonstrates that three motor vehicles degree of Axle overloading or excess gross weight in kilograms was within the margin of over 10,000 or more. The fine for the 1st offender or first conviction is Kshs 200,000 whereas the fine on a second or subsequent conviction is Kshs 400,000. There is scanty information whether the petitioners upon arrest were the very least first offenders or repeat offenders. The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender to the offence.

38. The documentary evidence which is not controverted shows that motor vehicle KBB 738F had an overload weight of 17720 whereas motor vehicle KBB 271G had an overload of 14020. Similarly motor vehicle registration No. KBZ 845R had an excess overload of 31960. This raises the question why the petitioners were not able to keep the degree of permissible load to the required legal standards in the statute. Obviously, they are culpable and obviously the maximum statutory penalty is the starting point. To demonstrate the degree of harmfulness of the conduct and extent of the petitioners culpability in contributing to the destruction, depreciation and wastage of our Highways.

39. The other tangent of this case is where the respondent argued that the nature of the Petitioners'/ Applicants' case constitutes an attempt to interfere with the prospective exhibits intended for use by the Director of Public Prosecutions in the intended or ongoing criminal cases against the two Petitioners and their respective drivers. The Applicants on the other hand contended that neither the Petitioners nor their agents have been charged in any court of law based on the issue at hand as the matter only ended with the notices to attend court issued to the Petitioners' drivers at Maili Tatu. That when the said drivers attended court on the material date, they were informed that the ODPP had not approved the charges.

35. The decision to charge or not to charge rests on the Director of Public Prosecution. The DPP in its guidelines on the Decision to Charge, 2019 capture the role of the prosecutor once investigations are completed. It states as follows: -

> " 3.1 The decision to charge
>
> The decision to charge is the prosecution counsel's determination as to whether evidence availed by an investigator or investigative agencies is sufficient to warrant the institution of prosecution proceedings against an accused person in a court of law..... it is the most important decision that is

made by any prosecution.... Prosecutors are required to, and must exercise, due care in making the decision to charge."

36. At present, it is evident that the DPP has not made a decision to charge the Applicants. The Respondent did not attach any evidence to establish that the applicants have already been charged. In any event, the information gathered this far in my opinion is sufficient for the DPP to make a decision whether to charge or not and therefore holding the subject motor vehicles will not be for the interest of justice. It is important to bear in mind the relevance of the margin of appreciation when considering whether any restrictions on fundamental rights and freedoms are proportionate and justifiable particularly in circumstances where the issues involve purely socio-economic policy instead of core values relating to personal characteristics. The drafters of *the constitution* has given us one of the most remarkable instruments which must be interpreted in a manner which advances the Social Economic Objectives guarantees for the citizens of this Republic. According to *the constitution* the government has a duty to respect, protect, promote, and fulfil all the rights in the Bill of Rights. First and foremost, the duty to respect means that the government should not take away social economic rights or make it difficult for people to exercise to this rights.

37. For all those reasons, the petitioners have discharged the burden of proof of a prima facie case as against the respondent for the following declaration to issue.

    a. That a declaration be and is hereby issued to have all the three motor vehicles namely KBZ 845R, KBB 271G, & KBB 738F be released forthwith with only a condition precedent of paying the necessary fines for Axle overload within the prescribed fines under the *Traffic Act*.

    b. That for the avoidance of doubt Section 41 & 58 of the Act and the schedule provided be enforced by the respondent

    c. That any law or provision which demands that the petitioners pay Ksh 49689964, Kshs 2368132 and 4267705 respectively is voidable for being in contravention of the proportionality principle in sentencing. It is my view that the punishment should equal the crime and that is not the case here

38. upshot of it is that the Petitioners/Applicants have established a Prima facie case to warrant the orders sought. I find that the circumstances of the case fall within the provisions of Section 58 of the *Traffic Act*. To this end, the application dated 3rd June, 2024 is allowed in terms of prayer 3 subject to payment of the requisite fees prescribed under Section 58 of the *Traffic act*.

39. The costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF JUNE 2024

In the Presence of

Mr. Bryan Khaemba Kamau, Kamau & Company Advocates

Owiti, Otieno & Ragot Advocates

.....

R. NYAKUNDI

JUDGE