REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 440 OF 2018

LATEMA SACCO……...1ST PETITIONER

NAZIGI SACCO…….……2ND PETITIONER

HANNOVER TRANS LTD…….....3RD PETITIONER

SUPER METRO LTD…….……4TH PETITIONER

KANGEMI MATATU OWNER SACCO…….…….....5TH PETITIONER

MARIMBA INVESTMENTS LTD…….…6TH PETITIONER

SONY CLASSIC SHUTTLE…….…....7TH PETITIONER

RUKAGUNA SACCO…….…..8TH PETITIONER

MADIWA MATATU OWNERS GROUP LTD…….…9TH PETITIONER

EASTLEIGH ROUTE SACCO LTD…….....10TH PETITIONER

EXPRESS LTD…….……11TH PETITIONER

ZURI GENESIS COMPANY LTD…….……12TH PETITIONER

FORWARD TRAVELLERS SACCO…….……13TH PETITIONER

LOPHA MULTI PURPOSE SACCO…….…..…14TH PETITIONER

RISEN COMPANY LTD…….…….15TH PETITIONER

MANMO SACCO……..……16TH PETITIONER

SERIAN SACCO…….17TH PETITIONER

GANAKI SACCO……18TH PETITIONER

OBAMANA SACCO……...19TH PETITIONER

NAKATHI TRAVELERS SACCO……...20TH PETITIONER

FOURTY FOUR OWNERS CO LTD……..21ST PETITIONER

EASTERN BYPASS SACCO……22ND PETITIONER

DIGITAL LUXURY TRAVELERS LTD……23RD PETITIONER

EMBASSAVA COOPERATIVE SAVINGS

& CREDIT SOCIETY LTD……..24TH PETITIONER

NNK SHUTTLE LTD……25TH PETITIONER

QUINE SERVICES SACCO LTD……...26TH PETITIONER

NKIKAN SAVINGS & CREDIT CO-OPERATIVE

SOCIETY LIMITED……..27TH PETITIONER

SALTY SUPPORTERS INVESTMENT LTD…….28TH PETITIONER

MARIMBA TRAVELLERS SACCO……...29TH PETITIONER

UTAWALA BYPASS TRAVELLERS SACCO……..……..30TH PETITIONER

NGUMO-LINE SAVINGS & CREDIT CO-OPERATIVE

SOCIETY LIMITED……..31ST PETITIONER

-VERSUS-

NATIONAL TRANSPORT & SAFETY AUTHORITY…..….1ST RESPONDENT

HON ATTORNEY GENERAL……..….2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE…….…...3RD RESPONDENT

CABINET SECRETARY STATE DEPARTMENT OF INTERIOR &

COORDINATION OF NATIONAL GOVERNMENT……...4TH RESPONDENT

CABINET SECRETARY STATE DEPARTMENT OF TRANSPORT,

INFRASTRUCTURE, HOUSING & URBAN DEV……...5TH RESPONDENT

TRAFFIC COMMANDANT…….6TH RESPONDENT

KENYA BUREAU OF STANDARDS…….7TH RESPONDENT

REGIONAL METROPOLITAN TRANSPORT LTD..……8TH RESPONDENT

-AND-

UBER CHAP CHAP…….....1ST INTERESTED PARTY

TAXIFY……2ND INTERESTED PARTY

KENYA TAXI CABS OWNERS ASSOC…….3RD INTERESTED PARTY

(CONSOLIDATED WITH)

PETITION NO. 1 OF 2019

MADIWA MATATU OWNERS SACCO

SOCIETY LTD……...1ST PETITIONER

JESMAT TRAVELLERS SACCO LTD……..…2ND PETITIONER

12 C TRANSPORT SACCO SOCIETY LTD……3RD PETITIONER

ST MARY'S TRANSPORT SACCO SOCIETY LTD……..4TH PETITIONER

NAWAKU SACCO SOCIETY LTD……...…5TH PETITIONER

RUNKA SACCO SOCIETY LTD…….……...…6TH PETITIONER

SOUTH B MATATU OWNERS

SACCO SOCIETY LTD……..…….…….7TH PETITIONER

MWAMBA SACCO SOCIETY LIMITED…….…….8TH PETTITIONER

HOME SACCO SOCIETY LIMITED……..……...9TH PETITIONER

INDIMA (NJE) SACCO SOCIETY LTD……..…..10TH PETITIONER

INDO STAR SACCO SOCIETY LTD…….…..11TH PETITIONER

BD TRAVELLERS SACCO SOCIETY LTD…….…...12TH PETITIONER

TRAVEL MART LTD…….....13TH PETTIIONER

UTIMO SACCO SOCIETY LTD……...14TH PETITIONER

WALOKANA SACCO SOCIETY LTD……..…15TH PETITIONER

TANSWORLD TRANSPORT

SACCO SOCIETY LTD……..…16TH PETITIONER

STAHITO COMMUTER SERVICES LTD…….....…..17TH PETITIONER

THOMAT SACCO SOCIETY LTD…….....18TH PETITIONER

KANI TRANSPORT SACCO SOCIETY LTD…….....19TH PETITIONER

UTAWALA BYPASS TRAVELLERS SACCO…….....20TH PETITIONER

8 B SACCO SOCIETY LTD…….....21ST PETITIONER

MARVEROUS SHUTTLE LTD…….....….22ND PETITIONER

FREE STYLE CONNECTION LTD……..…23RD PETITIONER

ISKA INVESTMENTS LTD…….....…24TH PETITIONER

-VERSUS-

THE NATIONAL TRANSPORT

& SAFETY AUTHORITY…….....….1ST RESPONDENT

THE HON. ATTORNEY GENERAL……...…2ND RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING

& URBAN DEVELOPMENT.....3RD RESPONDENT

-AND-

NAGIRU CO-OPERATIVE

SACCO SOCIETY LTD……...…1ST INTERESTED PARTY

WEST MADARAKA

ROUTE14 SACCO LTD…….....2ND INTERESTED PARTY

ELEVENTH HOUR TRANSPORT

SACCO LTD……...……...3RD INTERESTED PARTY

LAKENYA TRANSPORT

SACCO SOCIETY LTD…….……..….4TH INTERESTED PARTY

HIGHRISE KIBERA

SACCO SOCIETY LTD…….…...…..5TH INTERESTED PARTY

RUKINE TRAVELLERS

SACCO SOCIETY LTD……..……...….6TH INTERESTED PARTY

2KR ROUTE 105 MULTI-PURPOSE

CO-OP SACCO……...….7TH INTERESTED PARTY

CITY TRAM SHUTTLE LTD…….…...8TH INTERESTED PARTY

DIXHULT MATATU OWNERS

SACCO SOCIETY LTD…….…..……9TH INTERESTED PARTY

PRIME TRANCITY LIMITED…….…..10TH INTERESTED PARTY

JIMAL IBRAHIM HUSSEIN

(Suing for and on behalf of ASSOCIATION

OF MATATU OPERATORS)…….....11TH INTERESTED PARTY

MOONLIGHT COACH COMPANY LTD..…..12TH INTERESTED PARTY

MATATU INVESTORS AGENCY LTD…….....13TH INTERESTED PARTY

JUDGEMENT

A. INTRODUCTION & CONSOLIDATION

1) In Petition No. 440 of 2018 the original 1st to 24th petitioners being Latema Sacco; Nazigi Sacco; Hannover Trans Ltd; Super Metro Ltd;

Kangemi Matatu Owners Sacco; Marimba Investments Ltd; Sonny Classic Shuttle Ltd; Rukagina Sacco; Madiwa Matatu Owners Group Ltd; Eastleigh Route Sacco Ltd; Expresso Ltd; Zuri Genesis Company Ltd; Forward Travellers Sacco; Lopha Mult-Purpose Sacco; Risen Company Ltd; Manmo Sacco; Serian Sacco; Ganaki Sacco; Obamana Sacco; Nakathi Travellers Sacco; Fourty Four Owners Co. Ltd; Eastern Bypass Sacco; Digital Luxury Travellers Ltd; and Embasava Cooperative Savings & Credit Society Ltd through their petition dated 5th December, 2018 have sued the 1st to 8th respondents being the National Transport & Safety Authority; Hon. Attorney General; the Inspector General of National Police Service; Cabinet Secretary State Department of Interior & Co-ordination of National Government; Cabinet Secretary State Department of Transport, Infrastructure, Housing & Urban Development; Traffic Commandant; Kenya Bureau of Standards; and Regional Metropolitan Transport Limited seeking orders as follows:-

a) A declaration do issue that pursuant to the judgment of the High Court at Nairobi Misc. Application No. 109 of 2004 (Rep vs. Minister for Transport & others) Legal Notice 161 of 2003 ceased to exist, and is not available for enforcement.

b) A declaration do issue that the demand by 1st, 3rd, 4th, 5th, and 6th Respondents that the Petitioners and their members' PSV licensed vehicles and other PSV operators comply with Legal Notice 161 of 2003, otherwise known as "*Michuki Rules*" prior to, or as a condition precedent to their being issued with Road Service Licenses by the 1st 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.

c) A declaration do issue that the speed limiters outlawed by a Judgment in Nairobi HC Judicial Review case No. 234 of 2014 (Republic vs. Cabinet Secretary for Infrastructure & 6 Others [2014] eKLR) cannot be demanded by the NTSA to be fitted in the Petitioners' members vehicles, as a precondition to the NTSA issuing RSL licences to the Petitioners' and their members' PSVs.

d) A declaration do issue that the 1st Respondent's NTSA grant of Taxicab service licenses to Uber Chap Chap Taxicabs, Taxify cabs and such other taxi cabs without their compliance with the mandatory provisions of Section 102(2) of the Traffic Act, Cap 403 Laws of Kenya is a violation of the Principle of Rule of Law Article 10(2)(a) of the Constitution.

e) A declaration do issue that pursuant to the directive from His Excellency the President of the Republic of Kenya current at the lodging of this Petition, His Excellency President Uhuru Muigai Kenyatta in November 2014 that the 1st Respondent NTSA continues to issue Road Service Licenses to the Petitioners' members' 14- seater PSV vans and such of similar PSV operators 14-seater PSV van effectively suspended the NTSA's effectuation of the terms of Section 4(2) and 4(3) of Legal Notice 179 of 31st December 2014.

f) A declaration do issue that the NTSA is bound by estoppel by its conduct of NOT effecting the terms of Section 4(2) and 4(3) of Legal Notice 179 of 31st December 2014 against the Petitioners and the Petitioners' members since the said date, and it cannot without amending the said provisions effect the same unilaterally suddenly in 2018 or thereafter against the Petitioners and the Petitioners members.

g) An Order do issue prohibiting the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Respondents, by themselves, their servants, agents, employees, or by any person acting at their behest or direction from demanding of the Petitioners compliance with Legal Notice 161 of 2003 popularly called "*Michuki Rules*" in the operation of the Petitioners' and their members' PSV licensed vehicles.

h) An order of prohibition in Judicial Review do issue prohibiting NTSA 1st Respondent from effecting Section 4(2) and 4(3) of Legal Notice 179 of 31st December 2014 when processing the Road Service PSV licenses for the Petitioners' members' Road Service Applications.

i) An order of certiorari in Judicial Review do issue to remove to this Honourable Court for purposes of being quashed, and to quash the 1st Respondent's NTSA Legal Notice 179 of 2014 published on 31st December 2014.

j) An Order of prohibition in Judicial Review do issue, forthwith prohibiting the 1st Respondent NTSA from issuing any Road Service Licenses for taxi cab services to the 1st and 2nd Interested Parties' taxi cabs and any taxi cab plying within the Republic of Kenya as such taxi cabs, where such taxi cabs have failed to comply with the mandatory provisions of Section 102(2) of the Traffic Act to paint their taxi cabs with the legislated continuous yellow band.

k) An Order of mandamus in Judicial Review do issue forthwith compelling the NTSA, the Inspector General of the Police Service, and the Traffic Commandant and all police officers under their command and control to forthwith forbid and direct to be removed from the road ALL taxi cabs without a continuous yellow ban specified in Section 102(2) of the Traffic Act, Cap 403.

l) An order of damages do issue against the 7th Respondent Kenya Bureau of Standards, to compensate the Petitioners and such of their members for the losses occasioned by the Petitioners and such of their members by the purchase and fitting repetitively substandard safety belts to the Petitioners PSV vehicles.

m) An order of prohibition in Judicial Review do issue prohibiting the NTSA, the 5th and 6th Respondents and any person acting under their behest from removing or causing to be removed from the Petitioners' and their members' PSV vehicles non-reflective tint fitted in the Petitioners' PSVs windshields solely as sun reflection safety protection in the same manner sun visors act in private cars.

n) An order of prohibition in Judicial Review do issue prohibiting the NTSA, and/or any of the Respondents from effecting or rolling out the BRT program ABSENT applicable Rules/Regulations and such necessary statutory platform to govern the operations and parameters thereof.

o) An order of mandamus do issue compelling the 7th Respondent Kenya Bureau of Standards to ensure that any and all safety belts for fitting in PSVs imported into Kenya or produced within Kenya meet all safety and fitting standards as by law specified in the Standards Act and such applicable legislated standards.

p) An injunction do issue prohibit the 8th Respondent from representing to the 1st, 2nd, 3rd, 4th, 5th, or 6th Respondents or any party that it (the 8th Respondent) represents or otherwise acts on behalf of the Petitioners or any of Petitioners members in respect of Public Service Vehicles issues or the BRT project howsoever.

q) Costs of this Petition.

r) Any other relief as may be ordered.

2) The 25th to 31st petitioners NNK Shuttle Ltd; Que Services Sacco Society Ltd; Nkikan Savings and Credit Co-operative Society Limited; Salty Supporters Investment Limited; Marimba Travellers Sacco; Utawala Bypass Travellers Sacco; and Ngumo-Line Savings and Credit Co-operative Society Limited were subsequently allowed to join the petition.

3) Uber Chap Chap; Taxify; and Kenya Taxi Cabs Owners Association are named as the respective 1st to 3rd interested parties.

4) Petition No. 440 of 2018 was heard contemporaneously with Nairobi High Court Constitutional Petition No. 1 of 2019 in which the respective 1st to 24th petitioners are Madiwa Matatu Owners Sacco Society Ltd; Jesmat Travellers Sacco Ltd; 12C Transport Sacco Limited; St Mary's Transport Sacco Society Ltd; Nawaku Sacco Society Ltd; Runka Sacco Society Ltd; South B Matatu Owners Sacco Society Ltd; Mwamba Sacco Society Ltd; Home Sacco Society Ltd; Indima (Nje) Sacco Society Ltd; Indo Star Sacco Society Ltd; BD Travellers Sacco Society Ltd; Travel Mart Ltd; Utimo Sacco Society Ltd; Walokana Sacco Society Ltd; Transworld Transport Sacco Society Ltd; Stahito Commuter Services Co. Ltd; Thomat Sacco Society Ltd; Kani Transport Sacco Society Ltd; Utawala Bypass Travellers Sacco Ltd; 8B Sacco Society Ltd; Marverous Shuttle Ltd; Free Style Connection Ltd; and Iska Investments Ltd. The National Transport and Safety Authority; the Hon. Attorney General; and the Cabinet Secretary Ministry of Transport, Infrastructure, Housing and Urban Development are the respective 1st, 2nd and 3rd respondents.

5) Nagiru Co-operative Sacco Society Ltd; West Madaraka Route 14 Sacco Ltd; Eleventh Hour Transport Sacco Ltd; Lakenya Transport Sacco Society Ltd; Highrise Kibera Sacco Society Ltd; Rukine Travellers Sacco Society Ltd; 2KR Route 105 Multi-Purpose Co-operative Sacco; City Tram Shuttle Ltd; Dixhult Matatu Owners Sacco Society Ltd; Jimal Ibrahim Hussein (Suing for and on behalf of Association of Matatu Operators); Moon Light Coach Company Ltd; and Matatu Investors Agency Ltd are named as the 1st to 13th interested parties.

6) In Petition No. 1 of 2019 the petitioners through their petition dated 3rd January, 2019 are seeking orders as follows:-

a) An order do issue prohibiting the Respondents from effecting Section 4(2) and 4(3) of Legal Notice 179 of 31st December 2014 when processing the Petitioners' members' Road Service Licenses applications.

b) A declaration that the provisions of Legal Notice 179 of 31st December 2014 and more particularly Sections 4(2) and (3) thereof are unconstitutional.

c) A declaration do issue that the Respondents are through their conduct bound by the principle of estoppel from effecting the provisions of Legal Notice 179 of 31st December 2014 and in their action in doing so is arbitrary, unfair and infringes on the Petitioners rights and freedoms as guaranteed in the Constitution.

d) A declaration do issue that the implementation of the Rapid Bus Transport scheme without a legal or legislative framework duly enacted and/or implemented with public participation and/or without compensating the Petitioners' members' property in the public service vehicles is unconstitutional and infringes on the Petitioners rights and freedoms as guaranteed in the Constitution.

e) An order do issue prohibiting the Respondents or any other state organ, jointly and severally from formulating, publishing and/or effecting any other legislative tool similar to Legal Notice 179 of 31st December 2014.

f) Costs of this Petition.

g) Such other or further orders that this Honourable Court shall deem fit.

7) In order to save the time of the Court, I have consolidated the two petitions for the purpose of this judgment.

B. PLEADINGS IN PETITION NO. 440 OF 2018

The petitioners' case

8) The petitioners in Petition No. 440 of 2018 are either cooperative societies or companies registered with the Registrar of Co-operatives and the Registrar of Companies. The petitioners' grievance is the alleged arbitrary and unconstitutional demands by the 1st-7th respondents that they comply with, what is in their view, a non-existent Legal Notice No. 161 of 2003 (also known as the Michuki Rules). It is their case that the respondents' actions primarily and ultimately stand to decimate Kenyans' use of public service vehicles as envisaged and expressed in Article 46(1)(a), (b), (c) and (d) of the Constitution.

9) The petitioners' case is that through a press announcement made on 4th November, 2018, the 3rd, 4th and 5th respondents demanded that public service vehicle (PSV) operators should comply with the Michuki Rules or cease operating their vehicles as PSVs. According to the petitioners, the 1st Respondent took up this illegal directive fully aware that the Michuki Rules are not and could not be available for enforcement or compliance having been quashed by J. B. Ojwang, J (as he then was) in **Nairobi HC Misc. Application No. 109 of 2004 (JR) Republic v Minister for Transport and Communication & 6 others [2004] eKLR.**

10) According to the petitioners, they had complied with all applicable regimes for the PSVs business. They accuse the 1st Respondent of failing to licence their members notwithstanding the fact that it is aware that the Michuki Rules do not exist. The petitioners aver that the Michuki Rules had been enforced as confirmed by the 3rd Respondent on 12th November, 2018 that about 2000 offenders had been arrested and charged with violating the Rules.

11) The petitioners allege that they have been forced to comply with the terms of the Michuki Rules, key of which includes painting their vehicles with a continuous yellow line. They accuse the 1st, 3rd, 4th, 5th and 6th respondents for violating Section 102(2) of the Traffic Act which requires taxicabs to have a yellow line by permitting the 1st and 2nd interested parties to operate and run taxicabs in Kenya without compliance with the provision. Further, that Section 102(2) of the Traffic Act clearly states that no vehicle not being a taxi cab shall be painted like a taxi cab. In their view, this means that no matatu should be painted with a yellow line. The petitioners treat the demand that they paint their PSVs with a carrying capacity below 25 passengers with a continuous yellow band as discriminatory and a violation of Article 27(4) of the Constitution.

12) The petitioners contend that the 1st Respondent's denial of operating licences to matatus not having a yellow line is unconstitutional and a violation of the principle of rule of law espoused in Article 10(2)(a) of the Constitution.

13) The petitioners assert that even if there was legalization of the Michuki Rules vide Legal Notice No. 65 of 2005 ("the Murungaru Rules"), the Murungaru Rules were stayed and have been stayed to date by dint of a consent order recorded before Emukule J, in **Nairobi HC JR No. 1145 of 2005.** The petitioners further claim that there is no prove that the Murungaru Rules had ever been laid before Parliament in compliance with Section 34(2) of the General Provisions & Statutory Interpretations Act, Cap 2. In their view therefore, the Murungaru Rules are also not available for enforcement.

14) The petitioners assert that by demanding compliance with the Michuki Rules, the 1st, 3rd, 4th, 5th and 6th respondents are acting in violation of Article 50(1)(n)(i) of the Constitution which provides that every accused person has a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya.

15) It is the petitioners' case that the 8th Respondent has been formed to perpetuate what is essentially oppressive terms of engagement of PSVs operators with the 1st and 4th respondents with respect to the Bus Rapid Transit (BRT) scheme. This, according to them, is a violation of Article 36(2) of the Constitution. They aver that to date there exists no legal or lawfully incepted rules or regulations for the inception of the BRT program other than the markings of roads within Nairobi County and the Thika Superhighway with a magenta/red line. They assert that the marking designated for BRT buses has no location in the existing traffic rules or the Traffic Act and the 8th Respondent cannot bind the petitioners to any commitment it may make with the 1st and 4th respondents in furtherance of such nebulous program as this would be in violation of Article 36(2) of the Constitution. It is the petitioners' averment that they have not been advised by the respondents as to the fate of their vehicles, for which they have invested colossal sums, in the event that the 8th Respondent becomes the vehicle to effect the BRT program. They claim that pursuant to Article 46(1)(b) of the Constitution, they are entitled to information necessary for them to gain full benefit from the potential impact of the BRT program on their operations. The petitioners also assert that the respondents have failed the principle of good governance espoused in Article 10(2)(c) of the Constitution by not disclosing to them and the commuting public the fate of PSVs in view of the emergence of the BRT program.

16) At paragraph 48 of the Petition, the petitioners make an allegation in the following words:-

> **"The 6th Respondent has failed to adhere to its own set standards in the importation of seat belts and speed limiters insisted upon by the 1st Respondent NTSA in the aftermath of the "enforcement" of the illegal Legal Notice 161 of 2003".**

17) At paragraph 49 the petitioners jump to another issue as follows:-

> **"The NTSA 1st Respondent has been demanding of the Petitioners that they remove ALL of the safety windshield tint, sold with the PSVs by the respective manufacturers. This has no basis in any law."**

18) It is the petitioners' averment that the entire visor section of the windshields of their PSVs are tinted by the manufacturers with non-reflective tint whose purpose is to shield the drivers of the buses from glare of the sun. The tint, they assert, is not illegal. They read unfair discrimination resulting in violation of Article 27(4) of the Constitution in the 1st Respondent's failure to extend the operation against tints on windshields of private vehicles. The petitioners talk of a High Court Order, without providing specifics, which allegedly outlawed and castigated arrest of drivers of motor vehicles having non-reflective tint on their windows.

19) Turning to Legal Notice No. 179 of 31st December, 2014 which allegedly banned the licensing of all 14-seater PSVs, the petitioners aver that this legal instrument was immediately suspended by the President of Kenya and the licensing of this particular class of PSVs continued thereafter. It is the petitioners' case that in November, 2018 after the 1st Respondent suddenly acted illegally to enforce the Michuki Rules, the licensing of 14-seater PSVs was stopped. According to the petitioners, this was done without the President revoking the earlier suspension of Legal Notice No. 179 of 2014. It is the petitioners' claim that there was a legitimate expectation created by the President's directive and the 1st Respondent's continued licensing of their 14-seater PSVs that they could continue purchasing the vehicles.

20) As for their case against the 7th Respondent, the petitioners depose that it has failed, refused and totally neglected to enforce the standards applicable for safety belts and their sale in Kenya. They state that the seat belts are forcibly fitted on their PSVs under the threat of not being issued with road service licences by the 1st Respondent. The petitioners depose that the impression created is that the 7th Respondent under the duress of the 1st Respondent has encouraged unscrupulous traders to import substandard safety belts that fail to secure the safety of the passengers travelling in their vehicles. According to them, this is a violation of their right to goods of reasonable standards under Article 46(1) of the Constitution.

21) It is further the petitioners' case that the digital speed limiters which the respondents were demanding that they fit in their vehicles were outlawed in **Nairobi HC Judicial Review Case No. 234 of 2014, Republic v Cabinet Secretary for Infrastructure & 6 others [2014] eKLR**. The petitioners assert that the respondents' insistence on the fitting of the digital speed limiters on their vehicles is therefore a violation of the principle of the rule of law.

22) Finally, the petitioners allege that the 8th Respondent is forcing them to join it without consultation. They assert that even though the 1st, 3rd, 4th, 5th, 6th and 8th respondents have given the impression that there is currently no law that provides for large capacity of buses, Section 100 of the Traffic Act provides a framework for licensing of large capacity buses. The petitioners therefore assert that the respondents' coercive action is oppressive and a violation of Article 29(f) of the Constitution which forbids their treatment in a degrading manner.

23) In summary therefore the petitioners allege violation of Articles 10(2)(a), 27(4), 28, 29(c) & (d), 41(1), 41(2)(b), 41(3)(f), 41(4)(a), 46(1)(c), 47(1), (54(1)(c), and 232(1)(a) & (f) & (2) of the Constitution in the manner specified in the petition.

The 2nd, 3rd, 4th, 5th and 6th respondents' case

24) The 2nd, 3rd, 4th, 5th and 6th respondents opposed the petition through grounds of opposition dated 10th April, 2019 as follows:-

a) THAT the Petition does not disclose any unconstitutionality of any impugned sections of the Traffic Act No. 26 of 2017.

b) TTHAT the impugned Respondents actions demanding compliance to the Traffic Laws is not irrational and unconstitutional as alleged because the intention is to enhance safety on Kenyan roads and protect the general public.

c) THAT it is in the public interest that all the declarations and orders sought in the Petition should be declined as public interest far outweighs narrow private interest.

d) THAT the Traffic Laws currently in operation are the Traffic Act and Rules; Legal Notice No. 179 of 2014 and Legal Notice 23 of 2014 and not the purported Legal Notice No. 161 of 2003 which [is] not in operation.

e)* THAT all Acts of Parliament are presumed to be constitutional unless otherwise as was captured in the case of Council of County Governors v Inspector General of National Police Service & 3 others [2015] eKLR where the High Court held that: *"Having so found, I must at this stage, point out, as Courts have always done that in interpreting a legislation, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise."

f) THAT [the] Petitioner has failed to demonstrate with precision how the Respondents violated their constitutional rights and the harm they have suffered as a result of the violation.

g) THAT the 1st Respondent has the sole mandate of:

(a) Advising and making recommendations on matters relating to road transport and safety.

(b) Implementing policies relating to road transport and safety.

(c) Planning, managing and regulating the road transport sector in accordance with the provisions of the Act No. 33 of 2012.

(d) Ensuring the provision of safe, reliable and efficient road transport service.

h) THAT Section 103A of the Traffic Act, provides that every driver and every conductor of a public service vehicle shall wear a special badge and uniform. Section 103A(1) The uniform referred to in section 103(1) shall be prescribed by the Registrar of Motor Vehicles and shall, in the case of a driver, be navy blue in colour and in the case of a conductor, be maroon in colour.

i) THAT the Traffic Act, Traffic Rules, 1953 revised in 2018, rule 22A provides that no motor vehicle shall be used or driven on a road unless it is fitted with seat belts. It creates an offence if the seatbelts are not fitted or if fitted is not of proper standard or specification.

j) THAT the Traffic Act, Traffic Rules No. 39 of 1953 revised in 2018, rule 41A provides that the engine of every public service vehicle except taxicabs and commercial vehicles whose tare weight exceeds 3048kg, shall be fitted with a speed governor which conforms to such specifications as the Minister may by notice in the gazette prescribe.

k) THAT the Traffic Act, Traffic Rules No. 39 of 1953 revised in 2018, rule 55A provides that every matatu shall have painted on both sides and on the rear a broken horizontal band having a width of 150 millimeters and on a consistency sufficient to enable such band to be clearly visible by day at a distance of at least 275 meters.

l) THAT the Traffic Act, Traffic Rules, No. 39 of 1953 revised in 2018, rule 55A sub rule 6 provides that there shall be prominently exhibited in every matatu a recent photograph of the head and shoulders of the driver who for the time being has charge of the matatu and the photograph shall be taken full face without hat, of postcard size.

m) THAT the Traffic Act prescribes speed limits to be observed by all motorist, the limits are different depending on the road the motorist is plying.

n) That due process of the law was followed in the publication and gazzettement of L/N 23/2014 and L/N 179 of 2014 having been made to improve road safety on Kenyan roads and for the benefit of 45 Million Kenyans. The Petitioner has failed to disapprove this position.

o) THAT [the] petition is otherwise incompetent, misconceived, misplaced and is an abuse of the process of this Honourable Court as the Petitioner's rights and fundamental freedoms have not been breached and the same ought to be dismissed.

25) The 2nd, 3rd, 4th, 5th and 6th respondents also opposed Petition No. 440 of 2018 through a replying affidavit sworn by Martin Eshiwani, the Director in Charge of Road Transport in the State Department under the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works. Through the affidavit the said respondents' evidence is that Section 103A of the Traffic Act provides that every driver and every conductor of a PSV shall wear a special badge and uniform; that Rule 22A of the Traffic Rules provides that no motor vehicle shall be used or driven on a road unless it is fitted with seat belts; that Rule 41A provides for fitting of speed governors on PSVs; that Rule 55A of the Traffic Rules provides that every PSV be painted with a yellow band; and that Rule 55A(b) requires that the photograph of the head and shoulders of the driver in charge of a PSV be displayed.

26) Eshiwani avers that if at all the Michuki Rules are unlawful then there is no gap in the law as there have been subsequent regulations and amendments to the Traffic Act legitimizing the said rules.

27) On the drawing of the magenta/red lines on Thika Super Highway to demarcate lines for buses and ambulances, it is averred that the same was done in preparation for the BRT system and the project is yet to be implemented as final administrative actions are awaited.

28) Eshiwani deposes that the due process of the law was followed in the publication and gazettement of Legal Notice No. 23 of 2014 and Legal Notice of 179 of 2014 which rules were issued to improve road safety for the benefit of Kenyans.

The 7th Respondent's response

29) The 7th Respondent opposed the petition through a replying affidavit sworn on 18th December, 2018 by its Acting Head of the Inspection Department, Birgen Rono and an affidavit sworn on 23rd April, 2019 by its Acting Manager, Pre-Shipment Verification for Conformity, Emmanuel Nguzo. The two affidavits are aptly summarized by the 7th Respondent's grounds of opposition dated 26th March, 2019 as follows:-

a) The Petition raises not triable issue against the 7th Respondent.

b) The Kenya Bureau of Standards has at all times discharged its mandate as stipulated under section 14 of the Standards Act and all the Regulations and standards made thereunder especially Kenya Standard 06-664:1985: Specification for seat belt assemblies for motor vehicles, Kenya Standard 822:1987: Specification for anchorage for seat belts-Automobiles and East African Standard 465:2007: Anchorages for Automobile seat belts-specification.

c) The Petitioners' impression and allegations are based on beliefs, thoughts and apprehensions which are ambiguous and baseless.

d) The Petitioners' claim for compensation against the 7th Respondent is baseless.

C. PLEADINGS IN PETITION NO. 1 OF 2019

The petitioners' case

30) Like the petitioners in Petition No. 440 of 2018, the petitioners in Petition No. 1 of 2019 are registered legal entities with the Registrar of

Co-operatives and the Registrar of Companies operating in the public service transport sector. Their case is that the 1st Respondent had with the knowledge of the 2nd and 3rd respondents proceeded to enforce the provisions of Legal Notice No. 179 of 31st December, 2014 by declining to accept and or renew the road licence applications presented with respect to PSVs carrying less than 25 passengers.

31) It is the petitioners' case that after the publication of Legal Notice No. 179 of 2014 which provided that all public service vehicles below the capacity of 25 passengers would not be licensed, the President of Kenya having considered the adverse effects of the legislation on the petitioners and other operators issued a directive communicated through the mass media suspending the implementation of the law. It is the petitioners' case that the 1st and 3rd respondents did indeed comply with the presidential directive and they continued issuing licences for PSVs that carried less than 25 passengers until 30th November, 2018. It is the petitioners' case that the 1st Respondent is therefore estopped from seeking to enforce Legal Notice No. 179 of 2014 long after it came into force.

32) It is further the petitioners' case that the respondents' action is aimed at oppressing them into ceding ground for the respondents to effect the BRT scheme yet there is no legal or legislative framework for its implementation thereby violating their right to property under Article 40 of the Constitution and their freedoms under Article 36 of the Constitution.

33) According to the petitioners, on or about 12th November, 2018 the 1st and 3rd respondents moved to enforce the provisions the Michuki Rules and at the same time proceeded to revive the implementation of Legal Notice No. 179 of 2014 without the reversal of the presidential directive or any consultation with the petitioners and other operators. The petitioners depose that the Michuki Rules are not legally available for enforcement.

34) Turning to the alleged unconstitutionality of Legal Notice No. 179 of 2014, the petitioners aver that the same violated the Constitution as it was not subjected to public participation before its enactment or publication. Further, that it violates the law as it was not laid before Parliament for approval.

35) The petitioners aver that close to 20,000 PSVs worth Kshs. 100 billion whose carrying capacity is less than 25 passengers will be lost as a result of the implementation of the legal instrument. Further, that loss of employment and livelihoods would result if the law is implemented.

36) The petitioners therefore assert that the respondents' actions violated Articles 2, 3, 10, 27, 29, 35, 40, 46, 47, 50 and 232(1) of the Constitution.

The 1st, 2nd and 3rd respondents' grounds of opposition

37) The 1st, 2nd and 3rd respondents' grounds of opposition to Petition No. 1 of 2019 can be abridged as follows: that the traffic laws currently in operation are the Traffic Act, Legal Notice No. 23 of 2014, Legal Notice No. 179 of 2014 and not the Michuki Rules; that all Acts of Parliament are presumed to be constitutional and the burden of proof lies on any person who alleges otherwise; and that the petitioners have not demonstrated violation of any constitutional rights and the harm allegedly suffered. The other grounds of opposition appears to be targeted at Petition No. 440 of 220 and I do not find it necessary to reproduce them in regard to Petition No. 1 of 2019.

D. THE SUBMISSIONS IN PETITION NO. 440 OF 2018

The petitioners' submissions

38) When the matter came up for hearing on 24th February, 2020, Ms. Kirwa who was holding brief for Mr. Kinyanjui for the petitioners indicated to the Court that she was relying on the petition. However, on 8th June, 2020 I mentioned this matter for purposes of receiving the Attorney General's pleadings and submissions after discovering that they were not on record. During the mention of the case, counsel for the petitioners in Petition No. 440 of 2018 pleaded with the Court to allow him to file submissions. He told this Court that although the submissions were ready on 24th February, 2020 when the matter was heard, the counsel who was holding brief for him had erroneously informed the Court that there were no submissions. In the interests of justice I allowed counsel to file submissions and he indeed filed the submissions dated 15th May, 2020 on 8th June, 2020.

39) Through the submissions counsel identified several issues for the determination of the Court. The petitioners allege discrimination by the NTSA against them by giving a free pass to taxis on the enforcement of the legal requirement that taxicabs should be painted with a yellow band. Counsel points to Section 102(2) of the Traffic Act and Rule 70(1) of the Traffic Act (Taxi Cabs) Rules as requiring taxicabs to have **"painted on both sides and on the rear a continuous horizontal yellow band."** The petitioners accuse the NTSA of licensing taxicabs without ensuring compliance with the said requirement hence violating Article 10(2)(a) of the Constitution on the principle of the rule of law.

40) According to the petitioners, demanding of PSVs to have the yellow band while ignoring the same requirement in respect of taxicabs is discriminatory and violates Article 27(4) of the Constitution. It is the petitioners' case that they have produced evidence, which evidence was not controverted, of taxis operated by the 1st Interested Party without a yellow line. Based on the said submissions the petitioners submit that prayers 4, 10 and 11 of the petition should be allowed.

41) As to whether Michuki Rules are available for enforcement, the petitioners submit that they are not. According to the petitioners, the Rules were outlawed in a judgment delivered in **Republic v Minister for Transport & others, Nairobi HC Misc. Civil Application No. 109 of 2004; [2004] eKLR.** The petitioners assert that there was no evidence adduced by the respondents demonstrating that the directive of the Court in that case to the Minister of Transport to effect necessary amendments to the Rules within six months was ever complied with. The petitioners stress that the Rules lacked legal validity and they were therefore not available for enforcement as they contravene Article 50(1)(n)(i) of the Constitution and the petitioners cannot be impugned for failing to obey them.

42) The petitioners interpret the decision in **Nairobi HC Misc. Application No. 109 of 2004** as holding that the Michuki Rules were not passed in a legal manner as they were not laid before Parliament as required by Section 34(1) of Chapter 2 of the Laws of Kenya. They submit that it is an encroachment on the exclusive power of Parliament and a violation of Article 94(5) of the Constitution for the 1st, 3rd, 4th 5th, and 6th respondents to convert outlawed regulations into law.

43) On the issue of alleged violation of their legitimate expectations, the petitioners contend that after the President suspended Legal Notice No. 179 of 2014, the NTSA's attempt to reintroduce it without the revocation of the suspension by the President violates their legitimate expectation that they would be allowed to continue operating the 14-seater PSVs. They state that the NTSA had indeed continued with the licensing of the 14-seater matatus and the petitioners had continued investing in that category of vehicles. The petitioners therefore urge the granting of prayers 1, 2 and 7 of the petition.

44) As for the introduction of the BRT system, the petitioners insist that the system has been introduced without the support of any law. They therefore pray for the grant of prayers 14 and 16 of the petition. The petitioners wonder where they will take their vehicles once the BRT project is entrenched. According to the petitioners, the magenta road markings designed for the BRT do not have any location in the existing traffic rules which only makes provision for yellow and white road markings.

45) In regard to Prayer No. 13 of the petition the petitioners submit that they buy their vehicles already fitted with non-reflective tint to act as sun visors and it is oppressive for the NTSA to demand that they remove the safety tint. According to the petitioners, all their buses have a wide windshield but no suitable sun visor, hence the visor section of the buses is tinted by the manufacturers with non-reflective tint which is intended to shield and protect the drivers of the buses from the glare of the sun. The petitioners allege unfair discrimination in violation of the provisions of Article 27(4) of the Constitution stating that the operation against tints has not been extended to private cars.

46) The petitioners submit at length on alleged non-enforcement of the standards for safety belts and speed governors by the 7th Respondent. It is the petitioners' case that the 7th Respondent has failed, refused, and totally neglected to enforce the standard applicable for safety belts resulting in their being forced by the NTSA to fit substandard safety belts. This, according to the petitioners, violates Article 46(1) of the Constitution which protect their right to goods of reasonable standards.

47) The petitioners further contend that the digital speed limiters which they are being asked to fit in their vehicles were outlawed in **Nairobi HC Judicial Review No. 234 of 2014.** They therefore assert that the NTSA is enforcing the fitting of the speed limiters in contempt of a court order. According to them, the NTSA is violating the principle of the rule of law. Further, that the actions of the NTSA are oppressive and a violation of Article 29(f) of the Constitution which forbids their treatment in a degrading manner.

The 2nd-6th respondents' submissions

48) In their written submissions, the 2nd-6th respondents contend that the petitioners' constitutional rights have not been violated in any way and all that the respondents demanded was compliance with traffic laws which cannot amount to violation of rights. Articles 3 and 27(1) & (2) of the Constitution are cited as requiring every person to respect, uphold and defend the Constitution, and as providing the principle of equality before the law. It is asserted that although the petitioners enjoy rights, they must respect and obey laws.

49) The 2nd-6th respondents also submit that the alleged constitutional violation and the manner of the violation have not been pleaded with precision hence failing the test set in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** which requires constitutional claims to be pleaded with precision.

50) On the petitioners' assertion that the Michuki Rules are no longer in existence by virtue of the judgment in **Nairobi HC Misc. Application No. 109 of 2004,** the respondents retort that the directive for re-enactment issued in the said case was complied with by the promulgation of the Murungaru Rules.

51) On the alleged violation of Article 94(5) of the Constitution which grants legislative authority to Parliament, it is stated that there has been no violation of the Constitution for the reason that the Cabinet Secretary retains the power to make rules that have the force of law. Reliance is placed on the decision in **Nairobi HC Misc. Application No. 109 of 2004** in support of the assertion.

52) According to the 2nd-6th respondents, any limitation imposed by the respondents on the petitioners is justified in law and done in the public interest. The decisions in **Transafaris Sacco Limited & another v Classic Luxury Shuttle & 2 others [2019] eKLR** and **Kenya Pharmaceutical Distributors Association v Kenya Veterinary Board & 3 others [2017] eKLR** are cited in support of the said argument. The respondents accuse the petitioners and their members for operating in a state of anarchy without complying with the traffic requirements for fitting seat belts, speed governors and the wearing of uniforms by their agents or employees.

53) Turning back to the prayer by the petitioners for the Michuki Rules to be quashed, the respondents submit that since the Michuki Rules were replaced by the Murungaru Rules, there is nothing that remains to be quashed by the Court as the Michuki Rules are no longer in existence. According to the respondents, the traffic laws which are currently applicable are found in the Constitution; Traffic Act as revised in 2018; Traffic Rules; Legal Notice No. 23 of 2014; and Legal Notice No. 179 of 2014.

54) The 2nd-6th respondents specifically cite Rules 22A and 41A of the Traffic Rules as respectively requiring the fitting of seat belts in all motor vehicles and speed governors in PSVs. They stress that Legal Notice No. 23 of 2014 and Legal Notice No. 179 of 2014 have never been declared unconstitutional and are available for enforcement.

55) In regard to the effect of the suspension of the operation of Legal Notice 179 of 2014 by the President, the 2nd-6th respondents assert that the suspension was for a limited period which lapsed in 2016. They urge that all laws made by Parliament are to be obeyed. In their view, allowing PSVs to operate without seat belts and speed governors will result in anarchy and multiple cases of road traffic accidents.

The 7th Respondent's submissions

56) Through submissions dated 7th June, 2019 counsel for the 7th Respondent identifies three issues for the determination of the Court namely:-

a) Whether the Michuki Rules have legal force;

b) Whether the petitioners are entitled to any damages as against the 7th Respondent; and

c) Whether the petitioners have established a case for the issuance of an order of mandamus as against the 7th Respondent.

57) As to whether the Michuki Rules have legal force, counsel for the 7th Respondent submits that they do. Counsel states that the Michuki Rules were subjected to litigation in **Republic v Minister for Transport and Communications & 6 others [2004] eKLR** where Ojwang, J (as he then was) granted the 1st Respondent therein six months from the date of the judgment being 4th March, 2005 to amend the regulations. According to the 7th Respondent, the then Minister for Transport, Christopher Murungaru carried out amendments as directed by the Court through Legal Notice No. 65 of 2nd June, 2005. Counsel points out that the amendments were carried out within the six months granted by the Court and hence complied with the Judgment. Counsel consequently opines that the Michuki Rules have legal force.

58) On the second issue as to whether the petitioners are entitled to damages against the 7th Respondent, counsel submits that the 7th Respondent has discharged its mandate as stipulated under Section 14 of the Standards Act and all the regulations and standards made thereunder especially Kenya Standard 06-664:1985: Specification for seat belt assemblies for motor vehicles; Kenya Standard 822:1987: Specification for anchorage for seat belts-Automobiles; and East African Standard 465:2007: Anchorage for Automobile seat belts-Specification.

59) Counsel for the 7th Respondent contends that the petitioners have not provided any particulars of the damages allegedly suffered to warrant compensation by the 7th Respondent. Further, that the petitioners have failed to establish the link between the claimed damages and the 7th Respondent. Counsel for the 7th Respondent stresses that sections 107(1) and 109 of the Evidence Act, Cap. 80 places a duty on the petitioners to prove their allegations.

60) It is the submission of counsel for the 7th Respondent that the petitioners have not discharged the burden of proving how the 7th Respondent has failed, refused or neglected to enforce the standards applicable for safety belts and their sale in Kenya. Further, that the petitioners have not proved that the safety belts sold in Kenya are substandard and have failed to secure the safety of passengers.

61) Counsel for the 7th Respondent additionally submit that the petitioners have not particularized the losses they have suffered as a result of the alleged substandard safety belts. It is pointed out that although the petitioners repetitively claim that they bought safety belts, they have not tendered evidence of the purchases and the prices thereof. Reliance is placed on the decision in **Siree Limited v Lake Turkana El Molo Lodges [2002] 2 E.A. 521,** as cited in **Macharia Waiguru v Muranga Municipal Council & another [2014] eKLR,** for the proposition that special damages must not only be pleaded but must also be specifically proved. The Court is urged to find that the petitioners did not specifically plead or prove their claim for special damages.

62) It is also the 7th Respondent's submission that the petitioners have not pleaded with sufficient precision and particularity, as required by the Court of Appeal decision in **Mumo Matemu v Trusted Society of Human Rights & others, Nairobi Civil Appeal No. 290 of 2012**, the extent to which their rights and fundamental freedoms have been infringed, the provisions said to be infringed and the manner in which they are alleged to have been infringed. Counsel's view is that the allegations against the 7th Respondent are based on mere perceptions and the petition does not therefore raise a triable issue.

63) On the third and final issue as to whether the petitioners have proved a case to warrant the issuance of an order of mandamus against the 7th Respondent, counsel submits that no case has been established for the issuance of such an order. Reliance is placed on the decisions in the cases of **Mwau v Principal Immigration Officer [1983] eKLR** and **Republic v Attorney General & another Ex-parte Ongata Works Limited [2016] eKLR** as stating the conditions that must be met before an order of mandamus can issue. It is the 7th Respondent's case that the petitioners have not proved that it has failed to perform its duty and the detriment suffered as a result of the alleged failure. The Court is therefore urged to dismiss the petition with costs.

E. SUBMISSIONS IN PETITION NO. 1 OF 2019

The petitioners' submissions

64) Through the written submissions dated 21st June, 2019 counsel for the petitioners urge that the implementation of Legal Notice No. 179 of 2014 is a threat to their right to property under Article 40 of the Constitution. It is the petitioners' case that grounding the vehicles with the capacity of less than 25 passengers will affect the livelihoods of its members and their employees thereby exposing them to inhuman and degrading treatment contrary to Article 29 of the Constitution.

65) According to the petitioners the impugned Legal Notice is also unconstitutional as it was enacted without public participation contrary to Article 232(1)(d) of the Constitution. The petitioners object to the respondents' suggestion that it is the duty of the petitioners to prove that public participation was not done. According to the petitioners, once they alleged that there was no public participation, it is the onus of the legislating body to demonstrate that either public participation was not required or that adequate public participation was conducted. The petitioners cite the case of **Nairobi Metropolitan PSV SACCOS Union Limited & 25 others v County of Nairobi Government & 3**

others [2013] eKLR as an example of a situation where the respondents had established that there was public participation.

66) It is the petitioners' position that the public transport sector is a critical player in the economy and its regulation is important not only to the petitioners but to the commuters. They therefore refuse to agree with the respondents' suggestion that the matters raised in the petition are mere private or commercial interests.

67) The petitioners support their submission on the importance of public participation in legislative affairs by citing the decisions in the cases of **Doctors for life International v Speaker of the National Assembly & others** (citation not provided); **George Ndemo Sagini v Attorney General & 3 others [2017] eKLR; British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others [2017] eKLR; Land Access Movement of South Africa Association for Rural Development & others v Chairperson of the National Council of Provinces & others [2016] ZACC 22; Joseph Musila Mutual & 9 others v Attorney General & 3 others [2018] eKLR;** and **Okiya Omtatah Okoiti v Commissioner General Kenya Revenue Authority & 2 others [2018] eKLR.** According to counsel for the petitioners, the cited decisions will show that the respondents herein failed the public participation test and the impugned legal instrument is therefore null and void for not adhering to the constitutional process for making legislation.

68) The petitioners assert that another test the impugned law did not pass is the lack of approval by Parliament as required by the Statutory Instruments Act, 2013 ("S.I.A."). It is pointed out that a statutory instrument is defined by Section 2 of the S.I.A. and Section 11 makes provision for parliamentary approval of statutory instruments made by cabinet secretaries. The decision in **Anthony Otiende Otiende v Public Service Commission & 2 others [2016] eKLR** is cited as confirming that the procedure for making statutory instruments as provided by the S.I.A. should be complied with. According to the petitioners, the challenged law is a statutory instrument within the meaning of the S.I.A. and it required parliamentary approval. It is urged that the absence of parliamentary approval renders the instrument null and void.

69) The petitioners submit that the respondents have conceded that the implementation of the Legal Notice was connected to the Government's plan to introduce the BRT system even though there is no legal and infrastructural framework for BRT system. Further, that the respondents have not proved how the PSVs were contributing to traffic congestion so as to warrant the hurried, unlawful and unfair actions by the respondents.

70) Another ground upon which the petitioners anchor their case is the doctrine of legitimate expectation. It is the petitioners' case that upon the suspension of the impugned Legal Notice through the presidential directive they continued investing in 14-seater PSVs. Their case is that the suspension of the Legal Notice created legitimate expectation that they could continue investing in the subject motor vehicles and the law would not be enforced. Counsel for the petitioners cite **Halsbury's Laws of England, 4th Edition, Vol. 1(1) at paragraph 151** and **Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 others [2013] eKLR** as defining the principle of legitimate expectation. The petitioners therefore urge the Court to allow their petition.

The 1st-3rd respondents' submissions

71) The respondents' submissions in Petition No. 1 of 2019 largely mirrors the submissions of the 2nd-6th respondents in Petition No. 440 of 2018 and it is not necessary to restate the arguments again in this judgement. One of the additional points made is that the doctrine of legitimate expectation is not applicable in the circumstances of this case. The decisions in the cases of **Royal Media Services Limited & 2 others v Attorney General & 8 others [2014] eKLR** and **Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR** are cited as enunciating the principle of legitimate expectation.

72) On the legality of Legal Notice No. 179 of 2014, the respondents reject the petitioners' assertion that the instrument is unconstitutional for lack of public participation and for not being tabled in Parliament. The respondents' starting point is that Section 54 of the National Transport and Safety Authority Act empowers the Cabinet Secretary for Transport and Infrastructure, in consultation with the NTSA board, to make regulations under the Act. It is submitted that Legal Notice No. 179 of 2014 contains amendments to the principal regulations (Legal Notice No. 23 of 2014) and the amendments were done within the law and are therefore constitutional. Reliance is placed on the decision in **Republic v Minister for Transport & Communications & 6 others [2004] eKLR** for the proposition that failure to lay regulations before Parliament should not necessarily result in the issuance of quashing orders.

73) It is further submitted that the legal instruments complained of enjoy presumption of constitutionality in accordance with the principle outlined in the case of **Council of County Governors v The Attorney General & the Independent Electoral Boundaries Commission [2017] eKLR.**

74) In regard to the petitioners' claim that Legal Notice No. 179 of 2014 was not subjected to public participation, the respondents assert that the petitioners have not tendered any evidence to support their allegation. The respondents submit that the legal instrument was subjected to public participation and as was held in **Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others [2013] eKLR,** Parliament has a discretion on how it achieves the objective of public participation. It is stressed that the petitioners have failed to prove their allegation that public participation was not implemented.

75) The respondents support their submissions on the issue of public participation by citing the decisions in **Mui Coal Basin Local community [2015] eKLR, Doctors for Life International v The Speaker National Assembly & others [2006] ZACC 11,** and **Nairobi Metropolitan PSV SACCOS Union Ltd & 25 others v County of Nairobi Government & 3 others, Petition No. 486 of 2013.** The Court is consequently urged to dismiss the petition.

F. ANALYSIS AND DETERMINATION

76) The petitioners in Petition No. 440 of 2018 raised a plethora of issues in their pleadings. On their part, the petitioners in Petition No. 1 of 2019 clearly narrowed their challenge to Legal Notice No. 179 of 2014 and explained through their written submissions why they hold the

view that the impugned instrument is unconstitutional.

77) A perusal of the pleadings in both petitions discloses that the petitioners are challenging the constitutionality and legality of the Michuki Rules, the Murungaru Rules, and Legal Notice No. 179 of 2014. The petitioners in the two petitions also challenge the BRT system. The petitioners in Petition No. 440 of 2018 additionally challenge the requirement of a yellow line for PSVs; the non-compliance by taxicab operators with the requirement for a yellow line; and the failure of the Kenya Bureau of Standards to execute its statutory mandate.

78) I have carefully read the pleadings of the parties in the two petitions and it is clearly apparent that the petitioners' case is that the Michuki Rules and the Murungaru Rules are no longer available for litigation. The petitioners in Petition No. 440 of 2018 allege that the Michuki Rules were quashed in **Republic v Minister for Transport & Communications & 6 others [2004] eKLR.** Further, that even if the Michuki Rules were legalized through the Murungaru Rules, the Murungaru Rules were stayed in **Nairobi HC JR No. 1145 of 2005.** Additional that the Michuki Rules and the Murungaru Rules are bad in law as they were not tabled in Parliament in compliance with Section 34(2) of the General Provisions and Statutory Interpretations Act, Cap. 2.

79) The respondents' case is that the Michuki Rules were saved by the Murungaru Rules because the Court had given an opportunity to the respondents in **Republic v Minister for Transport and Communications & 6 others (2014) eKLR** to re-enact the rules in compliance with the law within six months from the date of the Judgment. Further, that those rules had in any case been overtaken by Legal Notice No. 23 of 2014.

80) In **Republic v Minister for Transport & Communications & 6 others [2004] eKLR,** among the prayers sought by the ex-parte applicants was the quashing of the Michuki Rules. In a judgment delivered 4th March, 2005, J.B. Ojwang, J (as he then was) issued the following orders:-

> **"1. The 1st respondent shall effect necessary amendment to Legal Notice No. 161 of 2003 within six months of the date hereof, failing which the same shall be removed into the High Court and quashed by order of certiorari now issued but suspended till the expiration of that period of time.**
>
> **2. The 1st respondent shall amend Legal Notice No. 161 of 2003 so as to incorporate amended provisions of *Gazette Notice* No. 384 of 2004, within the period of time specified in the first order herein; or in the alternative, the 1st respondent shall amend *Gazette Notice* No. 384 of 2004 and convert it into a Legal Notice within the period of time specified in the first order herein, failing which the same shall be removed into the High Court and quashed by order of certiorari now issued but suspended till the expiration of the said period of time.**
>
> **3. The 1st respondent shall amend the text of the *Daily Nation* notice of 9th January, 2004 and shall incorporate its content into Legal Notice within the period of time specified in the first order herein, failing which the same shall be removed into the High Court and quashed by order of certiorari now issued but suspended till the expiration of the said period of time.**
>
> **4. An order of prohibition is hereby issued but suspended for a period of six months, to enter into force against the 2nd respondent if the 1st respondent should fail to comply with the first three orders herein.**
>
> **5. An order of prohibition is hereby issued but suspended for a period of six months, to enter into force against the 3rd respondent if the 1st respondent should fail to comply with the first three orders herein.**
>
> **6. The applicants' prayer that an order of certiorari do issue to remove into Court for the purpose of being quashed any decisions of the 3rd respondent made pursuant to the Notice published in the *Daily Nation* of January 30, 2004, is refused.**
>
> **7. The applicants' prayer that an order of prohibition do issue, prohibiting the 3rd respondent from deliberating, acting upon, taking any proceedings, or issuing any directives whatsoever prohibiting the 1st applicant from running his public transport business on the basis of L.N. No. 161 of 2003 of *Gazette Notice* No. 384 of the 1st respondent, is refused.**
>
> **8. The applicants' prayer that an order of prohibition do issue prohibiting the 5th respondent from deliberating, acting upon, taking any proceedings, or issuing any directive, in any manner prohibiting the 1st applicant from operating his public transport business, or the 2nd applicant from using public transport that does not conform to Legal Notice No. 161 of 2003 and *Gazette Notice* No. 384 of 2004, is refused.**
>
> **9. The applicants' prayer that an order of mandamus do issue compelling the 2nd respondent to produce before the Court records of manufacturers, dealers, and agents of motor vehicle makes Nissan Caravan 2.7 Diesel matatus registered as at 31st January, 2004, is refused.**
>
> **10. The applicants' prayer that an order of prohibition do issue prohibiting the 1st respondent from issuing any directive akin to L.N No. 161 of 2003 and *Gazette Notice* No. 384 of 2004 without consultation with the 1st applicant and the Interested Parties, is refused.**
>
> **11. There will be no order as to costs."**

81) As for the claim by the ex-parte applicants that the Michuki Rules offended the law because they were not tabled in Parliament, the

learned Judge held that:-

> **"Although the question of laying the Minister's regulations before Parliament as required by statute was actively canvassed by counsel for the applicants, I was not convinced that if ministerial instruments are not laid before the National Assembly they become utterly void. It is clear at the very least, that all things done under such rules will not become void, even if the National Assembly were to revoke the rules in question. General national practice is a highly relevant consideration in such a matter. If it were to be found that routinely, the Executive rarely lays regulations before Parliament and Parliament itself does not regularly call upon Ministers to comply with the requirement, so that large amounts of ministerial rule-making has gone on without Parliament raising a finger, then the Court would have to take judicial notice of that practice. Although in the present matter, there was no positive evidence that Legal Notice No. 161 of 2003 had been or had not been laid before the National Assembly, the appearances are that it was not laid. Yet much activity on the ground has taken place, during times when the National Assembly has indeed been in session; and yet the point has, apparently, never once been raised at that forum. I think the practical judicial attitude in such a situation is to look to fundamental issues only. The *"laying"* requirement is not meant to serve the judiciary in the first instance; it is intended primarily for Parliament, to enable it to perform its political and legislative function of controlling the conduct of government. Applying that general principle to the present case, I would be reluctant to invoke the Court's quashing powers where the real gravamen belongs pre-eminently to Parliament and, indirectly, to the electorate. I would add, however, that good and responsible conduct of governmental affairs dictates that Ministers ought to comply with the statutory requirement of laying their rules and regulations before the National Assembly, for approval, disapproval or acquiescence. That is the responsible position in law."**

82) The respondents submit that the said Judgment was complied with through the enactment of the Murungaru Rules which were enacted within the six months granted by the Court.

83) It is therefore clear that the Michuki Rules are no longer open for litigation in this matter as they were subjected to comprehensive litigation in **Republic v Minister for Transport & Communications & 6 others [2004] eKLR.** They are also no longer in force as submitted by the respondents. The Michuki Rules were either quashed upon the lapse of six months from the date of the delivery of the judgement in **Republic v Minister for Transport & Communications & 6 others [2004] eKLR** or they were repealed through the enactment of the Murungaru Rules. The respondents are therefore correct that an order cannot issue to quash a thing that is no longer in existence.

84) Although the petitioners claim that there is an order staying the implementation of the Murungaru Rules in **Nairobi HC JR No. 1145 of 2005**, they did not explain why the matter has not been prosecuted for over fifteen years. In my view there is nothing on record upon which it can be said the Murungaru Rules which are the successor of the Michuki Rules are illegitimate. The claim by the petitioners in Petition No. 440 of 2018 that the respondents were trying to invoke non-existent Rules is therefore found to be without merit. In any case, the respondents have pointed out that the Traffic Act and the Traffic Rules contain all the laws they enforce. This assertion has merit in that any charge sheet presented to a trial court must be based on an existing provision of the law and any attempt to charge the petitioners or their employees for committing traffic offences unknown to the law can always be challenged before the trial court. Indeed Section 89(5) of the Criminal Procedure Code, Cap. 75 empowers a magistrate to reject a charge sheet that does not disclose an offence. A blanket order stopping the respondents from executing their statutory and constitutional mandates cannot therefore issue in the manner sought by the petitioners.

85) Another issue raised by the petitioners in Petition No. 440 of 2018 is that the digital speed limiters imposed on the petitioners by the NTSA were outlawed by Odunga, J in **Republic v Cabinet Secretary for Transport & Infrastructure & 6 other [2014] eKLR; Nairobi HC JR No. 234 of 2014.** A reading of the judgment delivered on 19th November, 2014 in the above case shows that what the Court rejected was the "**prescription of the brands of speed governors rather than the standards**." The use of speed limiters in public service vehicles was therefore not outlawed. A generalized order that speed limiters should not be installed in public service vehicles cannot therefore issue. The law requiring that speed limiters be fitted in public service vehicles and making it an offence not to do so was not quashed.

86) There is the question of the yellow band for PSVs carrying less than 25 passengers. According to the petitioners, this requirement is only imposed on taxicabs by Section 102(2) of the Traffic Act. The petitioners also complain that the law is not enforced in respect of taxicabs. No evidence was, however, adduced in support of this averment. The respondents cannot be accused of failing to enforce laws against taxicabs whose particulars are not provided and are unknown. It is, however, observed that law enforcers have a duty to enforce the laws of the land including Section 102 of the Traffic Act.

87) Another argument by the petitioners is that Section 102(2) of the Traffic Act which requires taxicabs to have a yellow line cannot be extended to matatus. They also fault the Michuki Rules for introducing the yellow line requirement for matatus. I have already addressed the issue of the legitimacy of the Michuki Rules.

88) The respondents have also pointed out the traffic laws currently in operation are the Traffic Act, Traffic Rules, Legal Notice No. 23 of 2014 and not the Michuki Rules. On the issue of the yellow band, the Court is referred to Rule 55A of Traffic Rules No. 39 of 1953 as revised in 2018 as providing that every matatu shall have painted on both sides and on the rear a broken horizontal yellow band having a width of 150 millimeters and consistency sufficient to enable such band to be clearly visible by day at a distance of at least 275 meters. The respondents are indeed correct in their submission. The Murungaru Rules introduced Rule 55A which at Sub-Rule 1 provided that:-

> **"With effect from 4th August 2005, every matatu shall have painted on both sides and on the rear, a broken horizontal yellow band having a width of 150 milimeters and a consistency sufficient to enable such band to be clearly visible by day at a distance of at least 275 metres."**

The law is therefore in place and I do not understand what the petitioners' complaint is all about.

89) The laws on speed governors and seat belts are also in place. As pointed out by Kenya Bureau of Standards, the standards have been

established. The petitioners made a generalized complaint about the products being substandard but did not avail evidence to support their claim. As correctly pointed out by Kenya Bureau of Standards, the claim for special damages was not pleaded and neither was it proved. If the petitioners are dissatisfied with the quality of particular products they should take up the issue of the quality of such products with the 7th Respondent and only sue when the 7th Respondent fails to discharge its statutory mandate.

90) It is my finding therefore that the majority of the allegations by the petitioners in Petition No. 440 of 2018 are unfounded. They are without merit. The petitioners have not proved their allegations and they have therefore failed the test that requires that he who alleges must prove.

91) The petitioners in both petitions made generalized complaints about the BRT project without stating exactly what the alleged constitutional violation is. Indeed the petitioners in Petition No. 440 of 2018 conceded that Section 100 of the Traffic Act allows for the introduction of such a passenger transport system. I am therefore at a loss as to why they want the Court to outlaw the BRT system. The respondents also averred that the BRT system is still at the conception stage and the appropriate laws would be introduced in due course. I need not say more.

92) What therefore remains for the determination of this Court is the constitutionality and legality of Legal Notice No. 179 of 2014. Counsel for the Attorney General submitted that the constitutionality of Legal Notice No. 179 of 2014 had been litigated and some of its provisions found unconstitutional. I have not come across any decision challenging Legal Notice No. 179 of 2014 and neither has any of the parties placed such a decision before this Court.

93) In **Republic v Cabinet Secretary for Transport and infrastructure Principle Secretary & 5 others ex-parte Kenya Country Bus Owners Association & 8 others [2014] eKLR; Nairobi HC JR No. 124 of 2014,** the subject of the litigation was Legal Notice No. 23 of 2014. Certain provisions of that Legal Notice were nullified by the Court. Legal Notice No. 23 of 2014 is dated 11th March, 2014. Legal Notice No. 179 of 2014 is dated 15th December, 2014 and is titled the National Transport and Safety Authority (Operation of Public Service Vehicles) (Amendment No. 2) Regulations, 2014. The general theme of the latter regulations is to amend Legal Notice No. 23 of 2014 being the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014. However, Legal Notice No. 179 of 2014 at Regulation 4 provides that:-

> **"4 Regulation 9 of the Principal Regulations is amended by-**
>
> **(a) Renaming regulation 9 as regulation 9(1),**
>
> **(b) Inserting the following new paragraphs immediately after regulation 9(1)-**
>
> **(2) The authority shall not license any new Public Service Vehicle as commuter service vehicle whose seating carrying capacity is less than twenty-five passengers.**
>
> **(3) The Authority shall not, with effect from the 1st January, 2016 renew the licence of any Public Service vehicle whose seat carrying capacity is less than twenty five passengers."**

94) The cited provision is the regulation the petitioners have a problem with. Counsel for the Attorney General attempted to brush off the Regulation 9(2) as introduced by Regulation 4 of Legal Notice No. 179 of 2014 as just a mere amendment. The Attorney General's argument is found to be without merit. An act which in one fell swoop decimates the livelihoods of thousands of Kenyans cannot be disguised as an amendment in order to evade the attention of the people's representatives. This was a new provision that required the attention of Parliament in accordance with Section 11 of the S.I.A. The provision was entirely new and was not an amendment of any existing provision of Legal Notice No. 23 of 2014. It introduced a new policy with far-reaching consequences on the livelihoods of thousands of Kenyans. Such an amendment required public participation as it introduced a substantive amendment to the law-see **Law Society of Kenya v The Hon. Attorney General & 2 others [2019] eKLR; Civil Appeal No. 96 of 2014.** The interrogation to which Legal Notice No. 23 of 2014 had been subjected by the Court did not extend to the new provision whose effect was to take out of the Kenyan roads PSVs carrying less than 25 passengers. The new regulation ought to have been subjected to both public participation as required by the Constitution and parliamentary approval as required by the S.I.A.

95) The law on public participation is now so well developed in this country. Public participation is a mandatory requirement in the process of making legislation including subsidiary legislation. This statement of law is found in the decision of the Court of Appeal in **British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others [2017] eKLR** where it was held that:-

> **"49. From these decisions and others that were cited before us by the parties' advocates, it is clear that public participation is a mandatory requirement in the process of making legislation including subsidiary legislation. The threshold of such participation is dependent on the particular legislation and the circumstances surrounding the legislation. Suffice to note that the concerned State Agency or officer should provide reasonable opportunity for public participation and any person concerned or affected by the intended legislation should be given an opportunity to be heard. Public participation does not necessarily mean that the views given must prevail. It is sufficient that the views are taken into consideration together with any other factors in deciding on the legislation to be enacted."**

96) In the South African case of **Doctors for Life International** (supra) it was acknowledged that failure to comply with the principle of public participation can result in the invalidation of the legislation. Ngcobo J, observed that:-

> ***"When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the***

Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution."

97) In the case at hand, the respondents have not placed any evidence before the Court to confirm that there was public participation. They have instead attempted to shift the burden of proof upon the petitioners by stating that because the petitioners allege that there was no public participation they are the ones to show that there was indeed no public participation. Their argument is not convincing. It is the respondents who enacted the challenged legislation and it is only them who have the evidence as to whether there was public participation. In **Law Society of Kenya v The Hon. Attorney General & 2 others [2019] eKLR; Civil Appeal No. 96 of 2014,** the Court of Appeal held that:-

"It was an error for the learned Judge to require the appellant prove the negative, for once it states that there was no public participation, the burden shifted to the Respondents to show that there was….Additionally, the onus is on the Parliament to take the initiative to make appropriate consultations with the affected people. It is therefore a misdirection for the learned judge to hold that the appellant had the responsibility to prove that the consultations did not happen."

98) The Court reiterated the importance of public participation thus:-

"**Much weight has been placed on public participation because it is the only way to ensure that the legislature will make laws that are beneficial to the *mwananchi*, adversely affect them.**"

99) It was incumbent upon the makers of the regulations to demonstrate that the public was involved in the enactment of the regulations. The respondents have failed to prove that there was public participation in the enactment of the impugned regulation. The Court therefore finds that Regulation 4 of Legal Notice No. 179 of 2014 did not comply with this particular constitutional requirement for enactment of legislation.

100) There is also no evidence placed before the Court to show that Section 11 of the S.I.A. was complied with. The said provision provides that:-

"11. (1) Every Cabinet Secretary responsible for a regulation-making authority shall 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 Parliament.

(2) An explanatory memorandum in the manner prescribed in the Schedule shall be attached to any statutory instrument laid or tabled under subsection (1).

(3)The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.

(4) If a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this 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."

101) In **George Ndemo Sagini v Attorney General & 3 others [2017] eKLR,** Lenaola, J (as he then was) confirmed the mandatory nature of Section 11 (4) of the S.I.A. when he held that:-

"44.I am persuaded by the reasoning in all the decisions above and in my view, Section 11(4) does not give the Court an option since the Section is couched in mandatory terms and the consequences for non-compliance are similarly provided. It also follows that the requirement must be read in mandatory terms as opposed to being merely directory.

45.I must also add that Section 11(4) of the *Statutory Instruments Act* clearly provides for the consequences for the failure to lay the instrument before the National Assembly within the stipulated period and the consequences are that *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.*

46….

47. In the above context and looking at the Petition before me, the Respondent made no effort to answer the contention that the Statutory Instruments Act was not complied with and without any such attempts, I will find and hold that there was indeed no compliance with the elaborate and relevant provisions of the said Act."

102) In **Anthony Otiende Otiende v Public Service Commission & 2 others [2016] eKLR,** the late Onguto**,** J held that:-

"Thirdly, and finally, Section 110(2) of the LRA expressly provides for approval of Parliament to be sought by the Cabinet Secretary prior to the promulgation of the regulations forms or rules. The Statutory Instruments Act No. 23 of 2013 also

expressly, at Section 11, provides for the laying of any regulations, rules and forms before Parliament for scrutiny and approval. Before the enactment of the Statutory Instruments Act, the interpretation and General Provisions Act (Cap 2) at Section 34 also provided for such subsidiary legislation or forms to be laid before Parliament for approval. There is consequently no doubt that the 3rd Respondent had an obligation under statute (or more correctly two statutes) to lay the impugned forms made under Section 110 of the LRA before Parliament for approval."

103) Odunga, J had his say on the compulsory nature of Section 11 of the S.I.A. when he held in the already cited case of **Republic v Cabinet Secretary for Transport & Infrastructure Principle Secretary & 5 others ex-parte Kenya Country Bus Owners Association & 8 others [2014] eKLR** that:-

"58. The first and in my view the most important issue for determination is the issue of compliance or lack thereof with the provisions of section 11 of the *Statutory Instruments Act*. In Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 others vs. Cabinet Secretary For Transport & Infrastructure & 5 others [2014] eKLR, this Court held:

"Section 11(4) of the Statutory Instruments Act clearly provides for the consequences for the failure to lay the instrument before the house within the stipulated period and the consequences are that '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.'…Therefore, in my view section 11(4) does not give the Court an option since the section is couched in mandatory terms and the consequences for non-compliance are similarly provided. It follows that the requirement must be read in mandatory terms as opposed to being merely directory. It is therefore my view that the Kenyan position must be distinguished from the position taken in T S S Grain Millers Ltd vs. Attorney General [2003] 2 EA 685, to the effect that a statutory instrument made by a Minister or other competent authority is valid and effective as soon as it is made or where it is required to be laid before Parliament, as soon as that has been done notwithstanding that the provisions of the Statutory instruments Act of 1946, and the Regulations made thereunder relating to the printing and issuing of statutory instruments have not been complied with. I similarly take a different view from that expressed by Simpson, CJ in Republic vs. The Commissioner of Prisons Ex Parte Wachira [1985] KLR 398 to the effect that breach of statutory duty to lay an instrument before parliament will not of itself invalidate the instrument though it may amount to a misdemeanour and that even if not complied with, the Court would have held that the Regulations and Rules were not thereby rendered invalid…However, if after 11th February, 2014, seven days lapsed without the Regulations being tabled in Parliament the same thereby became void and ceased to have any effect.

59. Therefore the failure to comply with the provisions of section 11 of the *Statutory Instruments Act* has the effect of rendering the instrument in question null and void and this position was clearly appreciated even by the Respondents."

104) All the cited decisions lead to the inevitable conclusion that the impugned Regulation 4 of Legal Notice No. 179 of 2014 ought to have been submitted to Parliament for approval and the failure to submit it to Parliament rendered it null and void within seven days of its publication. The petitioners are therefore correct that Regulation 4 of Legal Notice 179 of 2014 was enacted in violation of the provisions of the S.I.A.

105) In light of the findings above, it is no longer necessary to explore the question as to whether the respondents' actions violated the petitioners' legitimate expectations.

106) In conclusion this petition succeeds to the extent that it seeks nullification of Regulation 4 of Legal Notice No. 179 of 2014 which introduced Regulation 9(2) & (3) to Legal Notice No. 23 of 2014. All the other prayers in the two petitions are found to be without merit and they fail.

107) In the circumstances, a declaration is hereby issued declaring Regulation 4 of Legal Notice No. 179 of 2014 unconstitutional and unlawful and therefore null and void *ab initio.*

108) The petitions being matters touching on public interest litigation, I direct each party to meet own costs of the proceedings.

Dated, signed and delivered through video conferencing/email at Nairobi this 16th day of July, 2020.

W. Korir,

Judge of the High Court