REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 485 OF 2016

IN THE MATTER OF AN APPLICATION BY KENYA NATIONAL UNION OF CO-OPERATIVES STAFF FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE ENACTMENT AND ENFORCEMENT OF THE TRAFFIC (MINOR OFFENCES) RULES 2016 BY THE CABINET SECRETARY IN CHARGE OF TRANSPORT, INFRASTRUCTURE, HOUSING AND URBAN DEVELOPMENT; AND THE NATIONAL TRANSPORT & SAFETY AUTHORITY

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CABINET SECRETARY FOR TRANSPORT, INFRASTRUCTURE,

HOUSING AND URBAN DEVELOPMENT.....1ST RESPONDENT

NATIONAL TRANSPORT & SAFETY AUTHORITY.....2ND RESPONDENT

AND

KENYA NATIONAL UNION OF CO-OPERATIVES STAFF...EX PARTE APPLICANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

JUDGMENT

Introduction.

1. This case presents a unique opportunity for this Court to address the constitutionality or otherwise of the use of infringement notices (instant fines) as a way of dealing with minor criminal matters. Infringement notices deal with minor offences in a way that is convenient for prosecuting authorities and the offenders. However, their use raises issues of access to justice, equity and natural justice. More broadly, as Marshall put it, it is emphatically the province and duty of the Courts to say what the law is.[1]

2. The starting point is that the spirit of the Constitution, the recognition of basic human rights, and the right to freedom and fair trial in particular, enshrined in the Constitution, should not be compromised in any way whatsoever. The Courts should therefore jealously guard these rights and act decisively upon the infringement thereof. On the other hand, it is important that those who act with impunity, particularly in our roads, and who think that they can do as they please, must simply face the force of the law, should be brought to book and restrained and or punished. The whole wrath of the legal system, the Rule of Law, the Courts and the public should be brought upon such persons.

The factual background.

3. The factual matrix underpinning this case is that by a Notice of Motion dated **27th** October 2016, the *ex parte* applicant prays for:-

*a. An order of **Certiorari** to quash the Traffic (Minor Offences) Rules, 2016, promulgated by the first Respondent vide Legal Notice No. **161** dated **23rd** September 2016.*

*b. An order of **Prohibition** prohibiting the first and second Respondents from either in person or through servants, agents, police officers, employees or anyone else claiming to derive such authority from the Respondents, from implementing/enforcing Traffic (Minor Offences) Rules, 2016, promulgated by the first Respondent vide Legal Notice No. **161** dated **23rd** September 2016.*

*c. An **Declaration** that the Traffic (Minor Offences) Rules, 2016, promulgated by the first Respondent vide Legal Notice No. **161** dated **23rd** September 2016 are unconstitutional and contrary to public policy and public interest.*

4. The crux of the *ex parte* applicant's case as far as I can distill it from the face of the application, the statutory statement annexed to the application seeking leave and the verifying affidavit of **Hon. Justus Aloo Ogeka** annexed thereto is that:-

*a. Article **10** of the Constitution mandates State Organs, State Officers, Public Officers and all persons to consider national values and principles of governance which include; Rule of Law, democracy, integrity, transparency and accountability when enacting, applying or interpreting any law; or, when making, or implementing public policy decisions.*

*b. Article **118** of the Constitution enjoins Parliament to facilitate public participation and involvement in all legislative processes.*

*c. Under Section **117** of the Traffic Act,**[2]** Parliament has delegated legislative function to the Minister for the promulgation of Rules for handling and prosecution of minor traffic offences in accordance with the act.*

*d. **That** on **23rd** September 2016, the first Respondent purported to make Traffic (Minor Offences)Rules, 2016 vide Legal Notice number **161** of 2016 pursuant to section **117** of the Traffic Act**[3]** **(herein after referred to as the Rules**).*

*e. **That** the Rules have profound consequences upon the business and livelihoods of members of the applicant's union engaged in the transport sector, in particular, and the public in general.*

*f. **That** the first Respondent did not facilitate and or involve participation by members of the public, and ignored the concerns of other stake holders in the transport sector in the purported exercise of the delegated function; hence the said ministerial act was illegal.*

*g. **That** the Rules were not laid before Parliament for scrutiny prior to their enactment as required by law; and the legislative process culminating in the Rules violated the relevant statutes and the Constitution.*

*h. **That** the Rules impose fines/penalties thus denying alleged offenders the benefit of Court trial, and restricting access to the Courts, and that, the first Respondent acted ultra vires the enabling statute and the Constitution which provide for fair trial by a competent Court of law.*

*i. **That** by enacting the Rules, the first Respondent has usurped the function of the judiciary by purporting to replace Courts/Court processes with the second Respondent and the police in blatant breach of the constitutional doctrine of separation of powers. Further, the Rules have has assigned the police the function of the Director of Public Prosecutions in breach of the Constitution.*

***j. That** by imposing mandatory bail amounts equivalent to statutory fines, the first Respondent acted disproportionately and has arrogated to himself judicial authority, fettered judicial discretion in the grant of bail terms contrary to the law/Constitution and in excess of his powers.*

*k. **That** the first Respondent acted unreasonably and illegally by fixing bail amounts equivalent to statutory fines, and, in failing to provide an alternative to cash bail, hence, has unjustly and unconstitutionally deprived alleged offenders the benefits of the hallowed constitutional principle of presumption of innocence pending trial by a competent Court of law.*

*l. **Further**, the first Respondent has unlawfully curtailed the rights to legal representation, fair trial, and, the right to refuse to give self incriminating evidence.*

*m. **That** the Rules mandate the police officers to arrest, charge, prosecute, try, sentence and collect fines from alleged offenders, thereby offending established principles of natural justice.*

*n. **That** the first Respondent acted illegally and beyond his powers by enabling the making of confessions before any police officer, in breach of Section **25A** of the Evidence Act.**[4]***

*o. **That** through the Rules, the first Respondent has acted illegally, arbitrarily/capriciously and in bad faith to oppress, harass, intimidate and coerce alleged offenders and the public into a corrupt scheme of extortion and to unjustly curtail individual liberties.*

*p. **That** the ends intended by the Rules are extraneous to the objects of the Traffic Act**[5]** and the Constitution and override public interest. Further, the impugned rules and the process of promulgation thereof is not anchored on the constitutional requirements of integrity, transparency and accountability.*

*q. **That** in enacting the impugned Rules, the first Respondent solely considered and majored on the need for revenue collection at the expense of due process of law, hence took into account irrelevant and extraneous considerations.*

*r. **That** unless the rules are quashed, they will unlawfully infringe the right to fair trial, and the public will suffer undue inconvenience, prejudice, caprice, malice and bad faith.*

First Respondent's Replying Affidavit.

5. **Mr. Irungu Nyakera**, the Principal Secretary, State Department of Transport, Ministry of Transport, Infrastructure, Housing and Urban Development swore the Replying Affidavit dated **23rd** January 2017. He averred that pursuant to section **117** of the Traffic Act,[6] (herein after referred to as the Act), the first Respondent enacted the Rules vide legal Notice Number **161** of 2016 dated **2nd** September 2016.

6. He averred that prior to the enactment of the Rules, there were calls from different stakeholders and members of public for the amendment of the Act to address challenges faced by various parties in implementing the law governing Traffic Offences, and that there was a need to come up with a long term solution to the challenges which included uncertainty and inconsistencies as to the applicable fines for the various offences. He further averred that a taskforce was formed to involve all stake holders and come up with proposed minor offences and corresponding penalties. He also averred that the task force called for a meeting and advertised in the newspapers and also invited government officials, and that, besides the meeting, the task force also received responses through e-mail from members of the public as evidenced by copies attached to his Affidavit. Further, he averred that the task force wrote a report taking into account the views of the various stake holders, and, subsequently, the Cabinet Secretary Gazetted the Rules.

7. He further averred that the Rules were presented before Parliament for scrutiny as required under the law and, that, Parliament subjected them to public participation. Also, he averred that the proper procedure was followed in the enactment of the Rules, and that the Rules do not exclude Court trial, nor do they not replace the Court processes, or take away the right to be presumed innocent, or the right to legal representation, nor does it confer powers upon the police to prosecute, try and sentence and or collect fines from alleged offenders or take confessions from the offenders.

The Second Respondent's Replying Affidavit.

8. **Robert Ngugi,** the second Respondent's Senior Deputy Director, Legal Services swore the Replying Affidavit dated **5th** April 2018. He averred that the Cabinet Secretary published the Rules in exercise of powers conferred by section **117** of the Act prescribing a statutory maximum penalty, which does not exceed the penalty prescribed for such offences by the Act, for any of the scheduled minor offences to be dealt with and prosecuted in line with the said section.

9. **Mr. Ngugi** averred that the Rules prescribe the form of police notification of a traffic offence for use by police officers where a person is reasonably suspected to have committed minor traffic offences, pursuant to the section. He also averred that prior to the Gazettement of the Rules, the first Respondent constituted a Task Force which was mandated to propose appropriate reforms to the Legal and Institutional framework for the development and operationalization of a minor offence instant fine system, consider and propose appropriate mechanism for the payment of instant fines and undertake public participation of the proposed statutory instrument.

10. **Mr. Ngugi** averred that the Task Force through the second Respondent invited the public to a stakeholder meeting on **1st** March 2016 by placing an advertisement on the Standard Newspaper inviting the public and the stakeholders to give their views, concerns and comments on the proposed instant fines. Further, he averred that the meeting was well attended by various stakeholders and members of the public. He also averred that a further meeting was held on **15th** March 2016 at Upper Hill Plaza in Nairobi, and, on **19th** February 2016 at Technical University. He averred that both meetings were attended by stakeholders and members of the public.

11. **Mr. Ngugi** further averred that the Task Force thereafter considered the views and concerns submitted by the public and stakeholders and formulated a final report on the proposed instant fine system wherein it recommended a schedule of Minor Offences and the corresponding fine(s). Further, he averred that the mere fact particular views and concerns of particular stakeholders in the public sector did not prevail in the process of the enactment of the Rules does not necessarily mean that there was no public participation. He also averred that the Cabinet Secretary, the Principal Secretary, State Department of Transport transmitted the Rules to the Clerk of the National Assembly and the Clerk of the Senate to be laid before two houses of Parliament, pursuant to Section **11** of the Statutory Instruments Act.[7]

12. **Mr. Ngugi** also averred that contrary to the allegation that the Rules deny the offenders due process, the Rules simply designate the minor offences pursuant to the said section and maximum penalty which may be imposed. Further, he averred that it is section **117** of the act and not the Rules that require a person suspected of having committed an offence under the act to be served with a notification of a traffic offence by a police officer in the prescribed form under the second schedule to the Rules. Further, he averred that the notification of charges requires such a person to attend Court to answer to the charge within the time prescribed in the notification.

13. He averred that a person served with the notification is not obligated to attend Court in answer to the charge if he pleads guilty in writing and sends the notification and the amount of the statutory maximum penalty or penalties for the offence or offences to which he has pleaded guilty, by prepaid registered post or by hand to the Court indicated in the notification so as to reach the Court within the time indicated in the notification.He averred that the Court, and not the Respondents, may on receipt of a plea of guilty proceed to convict, and may after considering any mitigating circumstances stated in writing or personally by the accused, pass a sentence imposing the statutory maximum penalty or remitting the penalty in whole or in part and direct that a refund of the whole or any portion of the penalty remitted to be made to the accused.

14. Further, he averred that the process outlined in section **117** of the Act mandates police officers to arrest and charge alleged offenders. Also, he averred that the prosecutorial and judicial functions of the Director of Public Prosecutions and the Judiciary are not abrogated by either the Act or the Rules. He also averred that the suit is based on misconceptions and misinterpretation of the Rules. Also, he averred

that the applicant has not demonstrated that the Rules are unlawful, irrational and tainted with procedural impropriety to warrant the orders sought.

Interested Party's Replying Affidavit.

15. **Humphrey Mahiva,** the Deputy Director, Intelligence and Operations at the Ethics and Anti-Corruption Commission (herein after referred to as the Commission) swore the Replying Affidavit dated **13th** March 2017. He averred that he participated in the launch of the "Directions on Traffic Cases" at Nairobi by the former Chief Justice Dr. Willy Mutunga. He also averred that sometimes in 2009, the Commission carried out a study on the problem of corruption on Kenyan roads, which problem led to the enactment of the impugned Rules. He further averred that the study was a result of outcry that the Traffic Police Officers were extorting bribes from Traffic offenders and findings of the study established that there was a weak legal and regulatory framework and that the lengthy criminal process that offenders were subjected to led to high rates of corruption.

16. He averred that during the study, police corruption was found to be the highest at 36% amongst public institutions and one of the recommendations was the traffic regulations to enhance the speedy dissemination of justice, improve transparency and accountability of the traffic police. He also averred that investigations conducted by the Commission into M-Pesa analysis of **28** police officers involved in corruption at Mariakani and Mlolongo Weighbridges within a period of one year revealed that **Ksh. 18,363,759/=** was transacted by the police officers.

17. **Mr. Mahiva** averred that the Rules were formulated in strict observance of the dictates of section **117 (1)** of the Act, Articles **10, 35** and **118** of the Constitution. He further averred that on **15th** January 2016, the acting Cabinet Secretary for Transport and Infrastructure appointed a task force for the purpose of, proposing appropriate reforms to the legal, policy and institutional framework for the development and operationalization of a minor traffic offences instant fines system, consider and propose appropriate mechanism for payment of instant fines and undertake public participation for the proposed statutory instrument. He also averred that the membership of taskforce was drawn from key agencies and stakeholders such as Judiciary, National Police Service, Attorney General, Law Society of Kenya, e-Citizen Government Digital Payment and Public Service Vehicle Industry.

18. **Mr. Mahiva** averred that the requirement for public participation was complied with, public participation forums were held in various counties and the public submitted their comments. He also averred that members of the public were invited to attend Parliamentary Committee hearings at the Senate, and that the Rules were Gazetted on **23rd** September 2016. He also averred that the legislative process prescribed by the law was followed to the letter culminating in the Rules.

19. **Mr. Mahiva** Further averred that in order to streamline the management of Traffic offences, to curb corruption involving police and traffic Courts and to minimize costly delays which adversely affect motorists in the processing of traffic cases, the Judiciary launched directions on handling of traffic cases, and brought into operation a system of payment of cash bail, bonds and fines through M-pesa services and KCB Bank, a system that was supported by the Commission.

20. He further averred that the applicants contention that the instant fines deny the offenders due process is misguided, since section **117** of the act provides that the police shall issue a notification of traffic offence in the prescribed form charging that person with having committed the offence indicated in the notification and requiring such a person to attend Court to answer such charge. He also averred that under sub section **4** of section **117** of the act, if a person has pleaded guilty in the notification, he shall not be obliged to attend Court in answer to the charge but shall send to the Court the notification together with the amount of the statutory maximum penalty whereupon the Court on receipt of the plea of guilty shall proceed to convict and after considering any mitigating circumstances stated in writing by the accused, pass a sentence imposing the statutory maximum penalty in whole or in part and direct refund of the whole or any portion of the penalty remitted to be made to the accused.

21. **Mr. Mahiva** also averred that whether an offender denies or admits the charges against him, the matter still goes to Court for the Court to either hear the case or to convict and sentence as the case may be. He averred that it is not true that the function of the Judiciary has been usurped by purporting to replace the Court process. He also averred that Section **25A** of the Evidence Act[8] gives the police the power to take confessions on condition that the police officer is of or above the rank of Inspector. Further, he averred that similar Rules have been enacted in other jurisdictions such as the State of Ohio, U.S.A. and that the Commission believes that the system provides accountability in the payment of court fines.

Issues for determination.

22. Upon analyzing the respective party's positions enumerated above and the party's advocates submissions, I find that the following issues distill themselves for determination, namely:-

a. Whether there was sufficient public participation in the process leading to the enactment of the Rules.

b. Whether the Rules were enacted in a manner that violated the Statutory Instruments Act.

*c. Whether the Rules violate rights guaranteed under Articles **48**, **49** & **50** of the Constitution.*

d. Whether the ex parte applicant has established any grounds to warrant any of the Judicial Review orders sought.

a. Whether there was sufficient public participation in the process leading to the enactment of the Rules.

23. Counsel for the *ex parte* applicant submitted that the impugned Rules were enacted without public participation and or involvement of

the concerned stakeholders, contrary to the relevant statutes and the Constitution.[9]

24. The first Respondent's counsel submitted that reasonable opportunities were granted to members of the public, and that the public were invited to a meeting to discuss the proposed traffic Rules at the KICC. He submitted that the invitation was published in a local daily, and members of the public had an opportunity to attend the Parliamentary Committee hearings at the Senate and the National Assembly. Also, he argued that the public had the opportunity to offer views online as evidenced by annextures to the first Respondent's Replying affidavit. To buttress her argument she cited *Republic vs County Government of Kiambu Ex parte Robert Gakuru & another.**[10]***

25. The second Respondent's counsel submitted that the first Respondent followed due process in the enactment and promulgation of the Rules. He submitted that appropriate public consultation is deemed to have been attained once persons likely to be affected by the proposed statutory instrument are given a reasonable opportunity to know about the proposed instrument and have an adequate say on it.[11] He also argued that the National Assembly has a broad measure of discretion in how it achieves the object of public participation[12] and that what is needed is that the public was accorded some reasonable level of participation.[13]He submitted that prior to the promulgation of the Rules, the public and stakeholders were invited to meetings and gave their views. He argued that the fact that particular views of certain stakeholders did not prevail does not necessarily mean that there was no public participation[14]nor is it expected that a personal hearing will be given to every individual who claims to be affected by the regulations that are being made.[15]

26. Counsel for the Interested Party also cited *Republic vs County Government of Kiambu Ex parte Robert Gakuru & another**[16]*** and argued that reasonable opportunities were granted to the members of the public and that the relevant procedures as stipulated under the Statutory Instruments act were followed. He further argued that the mere fact that a particular interested party did not participate in public hearing or views have not been incorporated in the enactment does not justify the Court in invalidating the enactment in question. He also argued that the Court is inclined to look at the entire process of law making, assess both the quantitative and qualitative aspects of public participation and determine whether the legislation should be invalidated on that account.[17]

27. The question that calls for an answer is whether in the circumstances of this case, the first Respondent undertook public participation that in any meaningful sense meets the threshold appropriate for public participation. Differently put, what was the threshold for public participation which would have been appropriate for this exercise? As Justice Sachs observed *"... What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."**[18]*** *(Emphasis added).*

28. An analysis of the Constitutional provisions yields a clear finding that public participation plays a central role in legislative, policy as well as executive functions of the Government."[19]Local and foreign jurisprudence are in agreement that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is also established jurisprudence that any decision to exclude or limit fundamental participatory rights must be proportionate in order to be lawful. [20]

29. In the ***Mui Basin Case**[21]*** a three-judge bench of the High Court considered relevant case law, international law and comparative jurisprudence on public participation and culled the following practical elements or principles which both the Court and public agencies can utilize to gauge whether the obligation to facilitate public participation has been reached in a given case:-

> *a.* ***First,*** *it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.*
>
> *b.* ***Second****, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.*
>
> *c.* ***Third,*** *whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See* ***Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya*** *(JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:*
>
> *"Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."*
>
> *d.* ***Fourth****, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.*
>
> *e.* ***Fifth****, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.*

*f. **Sixthly,** the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.*

30. In *Okiya Omtata Okoiti vs Commissioner General, KRA & Others**[22]*** this court observed that there are at least two aspects of the duty to facilitate public involvement. *First* is the duty to provide meaningful opportunities for public participation in the process. *Second* is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.[23]

31. In *Doctors for Life International vs Speaker of the National Assembly and Others*,[24] the SA court held that in determining whether there was public participation in any particular case, the Court will consider what has been done in that case. The question will be whether what has been done is reasonable in all the circumstances. When a decision, a policy or legislation is challenged on the grounds that it was not adopted in accordance with the provisions of the Constitution, Courts have to consider whether in enacting the law in question or adopting the policy or decision, the State agency exercising it gave effect to their constitutional obligations.

32. The primary duty of the Courts is to uphold the Constitution and the law "which they must apply impartially and without fear, favour or prejudice."[25]What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the Rule of Law including any obligation of a State agency in exercising powers is required to fulfil. Article **10 (1)** of the Constitution provides that "The national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them— *(a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions*.

33. Article **10 (2) (a)** and **(c)** provides that "The national values and principles of governance include— **(*a*)** patriotism, national unity, sharing and devolution of power, the Rule of Law, democracy and participation of the people; **(*c*)** good governance, integrity, transparency and accountability. Article **10** expressly provides that public participation is one of the national values and principles of governance that bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.

34. In *Okiya Omtata Okoiti vs Commissioner General, KRA & Others**[26]***this court observed that *"Kenyans were very clear in their intentions when they entrenched Article **10** in the Constitution.**[27]** They were singularly desirous of insisting on certain minimum values and principles to be met in constitutional, legal and policy framework and therefore intended that Article **10** be enforced in the spirit in which they included it in the Constitution. It follows, therefore, that all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions must adhere to Article **10** of the Constitution. In order to justify their exclusion in matters falling under Article **10**, the burden is indeed heavy on the person desiring to do so considering that Article **10** is one of the provisions protected under Article **255** of the Constitution whose amendment can only be achieved by way of a referendum."*

35. The essence of public participation was also captured in the South African case of *Poverty Alleviation Network & Others vs. President of the Republic of South Africa & 19 Others*,[28] in the following terms:-

> *"…engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision."*

36. Considering the above Constitutional and statutory dictates, and guided by the above jurisprudence, I find that public participation must apply to policy decisions affecting the public though the degree and form of such participation will depend on the peculiar circumstances of the case.

37. It is now my solemn duty to apply the above elements and established legal principles on what constitutes public participation to the facts of this case so as to determine whether the Respondents have demonstrated that there was sufficient public participation in the process leading to the promulgation of the Rules.

38. The Replying Affidavits filed by both Respondents and the Interested Party address this question. The annextures referred to in the Replying affidavits include a newspaper advertisement inviting submissions from the public and stakeholders, attendance registers for the meetings and views submitted via e-mail correspondence from various stakeholders. These show that the meetings were held and views were submitted. The *ex parte* applicant concedes to the meetings but seem to argue that their view were not considered. **Mr. Mahiva** in his Replying Affidavit is even more emphatic that the membership of taskforce was drawn from key agencies and stakeholders such as judiciary, National Police Service, Attorney General, Law Society of Kenya, e-Citizen Government Digital Payment and Public Service Vehicle Industry.

39. As was held in the *Doctors for life**[29]*** case what is ultimately important is that steps were taken to afford the public a reasonable opportunity to participate effectively in the law-making process. Further, in the *Doctors for life case*,[30] the court went on to hold that "in determining whether the duty to facilitate public participation was complied with, the Court will consider what was done in the particular case. The question will be whether what has been done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what we must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what was done is reasonable, this Court will pay respect to what the institution assessed as being the appropriate method. In determining the appropriate level of scrutiny of public institutions duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect the institutions autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what the public institution or body does in each case is reasonable.

40. It is common ground that views were presented by some stakeholders. This raises fundamental questions, such as can a Court invalidate

the Rules or the legislation on grounds that the first Respondent did not take into account the views expressed or ignored them or must the Respondents agree with all the views. The following excerpt from *Republic vs County Government of Kiambu Ex parte Robert Gakuru & another* where the court grappled with similar questions is relevant:-***[31]***

> *"51. Therefore the mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question. As was appreciated by* ***Lenaola, J*** *in* ***Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013****, public participation is not the same as saying that public views must prevail."*

41. Public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public.[32] This position was appreciated *in* ***Doctors for Life International vs. Speaker of the National Assembly and Others[33]*** as hereunder:-

> ***"If legislation is infused with a degree of openness and participation, this will minimize dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy."***

42. 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. But as held in the above cited case, public participation does not mean that the views collected must prevail.

43. A close analysis of the material presented before me leads me to the irresistible conclusion that the first Respondent conducted a reasonable process of public participation. It has not been disputed that the meetings referred to above were held. It has not been disputed that the public were afforded an opportunity to present their views. In fact, there is ample evidence that the public and stakeholders presented their views. In my view, for a Court to exercise its powers to invalidate a legislation, it must act on clear evidence beyond doubt that either the process was unconstitutional in that it violated the relevant law, standing orders and the Constitution or the legislation is out rightly unconstitutional. The material before me does not meet the threshold for this Court to invalidate the Rules on grounds of absence of public participation.

b. Whether the Rules were enacted in a manner that violated the Statutory Instruments Act.

44. The *ex parte* applicant's counsel argued that the procedure stipulated in the Statutory Instruments Act[34] was not complied with.[35] On his part, counsel for the first Respondent cited sections **11** and **9** of the Statutory Instruments Act[36] and argued that first Respondent provided room for consultations, hence, the provisions of the said act were complied with.

45. The second Respondent's counsel argued that in conformity with section **11** of the Statutory Instruments Act,[37] the Principle Secretary, State Department of Transport transmitted the Rules to the Clerk of the National Assembly and the Clerk to the Senate to be laid before the two Houses of Parliament. He referred to the forwarding letter annexed to the Replying Affidavit of **Robert Ngugi** and argued that the allegations that the Rules were not placed before Parliament are baseless. On his part, counsel for the Interested Party argued that the fact that there was non-compliance with statutory provisions does not necessarily render the regulations void.[38]

46. Article **165** of the Constitution grants this Court the jurisdiction to determine *inter alia* the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.

47. Article **94 (5)** of the Constitution precludes all other persons or bodies, other than Parliament from making provisions having the force of law in Kenya except under authority conferred by the Constitution or delegated by the legislature through a statute. The National Assembly may, therefore delegate to any person or body the power to make subsidiary legislation, which require approval of the House before having the force of law. Subsidiary legislation made by persons or bodies other than Parliament are commonly known as Statutory Instruments.[39]

48. Section **2** of the Statutory Instruments Act[40] and the Standing Orders of the respective Houses define Statutory Instrument as ***"*** *any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued."*

49. Regulation is defined as a Principle or Rule (with or without the coercive power of law) employed controlling, directing, or managing an activity, organization, or system. It also means Rule based on and meant to carry out a specific piece of legislation. Regulations are enforced usually by a regulatory agency formed or mandated to carry out the purpose or provisions of a legislation.[41] It is also defined as the act of regulating; a rule or order prescribed for management or government; a regulating principle; a precept.[42]

50. There is no doubt that the impugned Rules or Regulations is Statutory Instrument within the above definition. Statutory Instruments are prepared by the Cabinet Secretary or a body with powers to make them, e.g. a Commission, authority or a Board. Statutory Instruments must conform to the Constitution, Interpretation and General Provisions Act,[43] The Parent Act, The Statutory Instruments Act.[44]

51. The Statutory Instruments Act[45] requires:- **(a)** Consultation with stakeholders, **(b)** preparation of regulatory Impact Statement,[46] preparation of explanation memorandum, tabling of statutory instrument in the House,[47] consideration of the statutory instrument by the National Assembly,[48] Committee on Delegated Legislation.

52. Section **13** of the Statutory Instruments Act[49] provides for guidelines for the relevant Parliamentary committee while examining Statutory instruments. These guidelines focus on the principles of good governance and the Rule of Law. The Committee considers whether the Statutory Instrument conforms with the Constitution; the parent Act or other written laws; whether it infringes the Bill of Rights or contains a matter that ought to be dealt with by an act of Parliament, and whether it contains taxation; directly or indirectly bars the jurisdiction of the Courts; gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power; involves expenditure from the Consolidated Fund or other public revenues; is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation; appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made; appears to have had unjustifiable delay in its publication or laying before Parliament; makes rights liberties or obligations unduly dependent upon non-reviewable decisions; makes rights liberties or obligations unduly dependent insufficiently defined administrative powers; inappropriately delegates legislative powers; imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation; appears for any reason to infringe on the rule of law; inadequately subjects the exercise of legislative power to parliamentary scrutiny; and accords to any other reason that the Committee considers fit to examine. The criteria set out in Section **13** is replicated in standing Order number **210 (3)** on the procedure for considering statutory instruments.

53. It is common ground that it is a constitutional and statutory imperative that sufficient public participation be undertaken prior to implementation and secondly it was a legal imperative that it be presented to Parliament as the law demands. I have already held that there was adequate consultations with the stakeholders and that the public were engaged in the process leading to the enactment. What remains is whether Parliament as dictated by the Statutory Instruments Act[50] and the Constitution subjected the process to adequate public participation.

54. It is trite that Rules must conform to the Constitution and the statute in terms of both their content and the manner in which they are adopted. Failure to comply with manner and form requirements in enacting Rules, Regulations or policy guidelines renders the same invalid. Courts have the power to declare such Rules, Regulations or policy guidelines invalid. This Court not only has a right but also has a duty to ensure that the Rules, Regulation or guidelines making processes prescribed by the Constitution and the Statute(s) is observed. And if the conditions for Regulation-making processes have not been complied with, it has the duty to say so and declare the resulting statute, regulation, policy or guideline invalid.[51]

55. Other than alleging breach of the Statutory Instruments Act,[52] the ex parte applicant has not provided details of the particulars of the alleged breach. The key elements are enumerated in Section **13** of the Act discussed above. The only breach cited is absence of public participation. I have above enumerated the applicable steps to be undertaken by Parliament. It is clear that the Rules were forwarded to the two houses. It should be noted that upon being forwarded as such, if Parliament fails to perform its part within fourteen days, the Rules become effective. That notwithstanding, there is no material before me to demonstrate breach of any of the requirements stipulated in section **13** discussed above. The burden lies upon the ex parte applicant to tender ample evidence to fault the manner in which Parliament enacted the Rules. It is not enough to allege. The allegation of non-compliance with the Statutory Instruments Act[53]lacks specificity.

56. In my view the *ex parte* applicant has failed to discharge the burden of prove on the issue under consideration to the required standard. All cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** in *Rhesa Shipping Co SA vs Edmunds*[54] remarked:-

> *"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."*

57. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[55] **:-**

> *"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"*

58. The starting point is that *whoever desires* any court to give *judgement* as to any legal right or liability, dependant on the existence of fact which he asserts, *must prove* that those facts exist. The *burden of proof* in a suit or proceeding *lies* on that person *who would fail if no evidence at all were given on either side.* The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

59. The standard determines the degree of certainty with which a fact must be proved to satisfy the Court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*,[56]**Lord Denning** said the following about the standard of proof in civil cases:-

> *'The …{standard of proof}…is well settled. It must carry a reasonable degree of probability…..if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'*

60. I find and hold that no evidence was tendered to demonstrate that the impugned Rules were not adopted in a manner consistent with the constitutional and statutory requirements.

c. Whether the Rules violate rights guaranteed under Articles 48, 49 & 50 of the Constitution.

61. The *ex parte* applicant's counsel argued that the Rules impose instant fines/penalties and mandatory bail terms equivalent to statutory fines while purporting to replace Courts/ Court processes. He argued that this restricts access to the Courts, denies alleged offenders the due process of law and the benefits of Court process through fair trial.

62. He also submitted that imposing instant fines without affording an offender the opportunity to be heard offends natural justice because it condemns individuals unheard through fair public trial before a competent Court established under the Constitution. He submitted that the right to a fair trial is non-derogable. He also argued that criminal process is initiated at the point at which the coercive power of the State in the form of an arrest is exercisable against a suspect[57] and that the second Respondent and the Police can neither be independent/impartial in their purported adjudication of traffic offences, nor guarantee alleged offenders fair procedures in a public hearing vide the impugned Rules. Consequently, he argued that the impugned Rules are unlawful and *ultra vires*.

63. He further argued that by mandating the Police to arrest, charge, take plea, admit to bail, prosecute, try, take plea in mitigation, sentence and collect fines from alleged offenders via the Rules, the first Respondent offended the settled principles of natural justice by making the second Respondent and the police judges in their cases.[58]

64. He argued that the Rules violate Article **160 (1)** of the Constitution[59] which guarantees the independence of the Judiciary. He also argued that by imposing mandatory bail amounts equivalent to the statutory fines, the first Respondent acted disproportionately, unreasonably and arrogated to himself judicial authority and acted against the principle of presumption of innocence. Further, he argued that the first Respondent erred in failing to provide an alternative to cash bail.

65. The *ex parte* applicant's counsel also submitted that through the instant justice/summary punishment, the Respondents have curtailed the right to legal representation, and have assigned the functions of the DPP and the Police to the second Respondent in breach of the Constitution. To buttress his argument, counsel cited *Gregory & Another vs Republic through Nottingham & 2 Others*[60] whereby it was held that any person purporting to supplant the constitutional role of a prosecutor is incompetent as they are not brought themselves within the category of an authorized prosecutor under the Constitution.

66. He also argued that the first Respondent acted illegally and beyond his powers by enabling the making of confessions before any police officer in breach of Section **25A** of the Evidence Act[61] and a violation of the right to give self incriminating evidence.

67. In her rejoinder, the first Respondent's counsel argued that section **B** of the second schedule of the Rules provides an opportunity for persons who intend to deny the charges to be charged and tried in a Court of law while section **C** provides an opportunity for persons to admit the charges. She argued that in the event of denying the charges, the Rules provide the police officer to bond the offender to attend Court. She described the applicant's counsel's argument as a misguided.

68. On the allegation that the Rules empower the police to arrest, charge, prosecute and sentence and collect fines, she submitted that section **24** of the National Police Service Act[62] empowers the police to apprehend offenders, and upon arresting the police may impose the statutory fines in the event of admission. Further, she argued that the fees are statutory, hence, the police have no discretion in determining the fines. She argued that those denying the charges will be bonded to appear in Court.

69. The first Respondent's Counsel submitted that the Rules do not limit the Right to legal representation, fair trial or the right to refuse self incrimination, and that an offender can opt to deny the charges, be bonded and attend Court and upon opting to be charged, the offender will enjoy rights under Article **49** and **50** of the Constitution. She argued that the Rules do not require the offenders to make a confession at any stage, but only provide that the offender may admit the charge.

70. The second Respondent's counsel submitted that the Rules merely prescribe the minor offences, the corresponding maximum penalties, and the forms for police notification of the traffic offences. Counsel argued that the manner in which the offence committed under the Rules is to be dealt with is left to section **117** of the act, hence, it is not true that the Rules deny the offender due process, but, the section stipulates that the offender be served with the requisite notification, and that the offender has the option of admitting or denying the offence. Further, counsel submitted that the Court, not the police on receipt of the plea of guilty proceeds to convict, and may, after considering any mitigation stated in writing or personally by the accused, pass a sentence imposing the statutory maximum penalty or remitting the penalty in whole or part and direct that a refund of the whole or of any portion of the penalty remitted to be made to the accused. He argued that section **117** of the act guarantees the offender due process. He also submitted that a reading of Section **117** of the Act reveals that the function of the judiciary and the DPP have not been usurped by the impugned rules.

71. On the submission that the Rules deny the offenders the benefit of going through due process, counsel for the Interested Party submitted that the Rules afford the offenders the benefit of either admitting or denying the charges, and that the instant fines only apply to those who willingly admit the charges, and, that judicial time and resources should not be wasted if the persons charged are admitting the charges, and that a party should only have judicial time only if he has something to hear.[63] He also submitted that the Minister acted within his powers conferred by section **117** of the Act in making the Rules and fixing the bail amounts equivalent to Statutory fines.

72. Counsel for the Interested Party also argued that the Rules provide those who wish to exercise their right to legal representation with an opportunity to do so since the offenders can opt to deny the charges and have the matter determined in Court. On the allegation that the Rules mandate police officers to arrest, charge, prosecute, try, sentence and collect fines from offenders, thus offending the principles of natural justice and the Rule of law, he argued that section **24 (h)** of the National Police Service Act,[64] empowers the police to apprehend offenders. Further, he argued that upon effecting arrest, the police can grant bail to those admitting the charges or impose fines to those pleading guilty, hence, the Rules do not offend the principles of natural justice. He argued that the Rules do not require the offender to confess at any stage.

73. Article **259** of the Constitution provides that the Constitution shall be interpreted in a manner that promotes it's purposes, values and principles; advances the Rule of Law, and human rights and fundamental freedoms in the Bill of Rights and permits the development of the law; and contributes to good governance. Consistent with this, when the constitutionality of legislation or any act or omission is in issue, the court is under a duty to examine the objects and purport of the legislation, the act or omission and to read the provisions of the legislation, the conduct or omission so far as is possible, in conformity with the Constitution.[65]

74. The *ex parte* applicant's counsel's submissions is a direct invitation to this Court to determine whether the cluster of rights afforded to an

arrested person under Articles **49** and **50** of the Constitution and the right to access the Courts under Article **48** have in any manner been infringed by the impugned Rules.

75. Article **49.** (1) provides that "An arrested person has the right— (*a*) to be informed promptly, in language that the person understands, of — (i) the reason for the arrest; (ii) the right to remain silent; and (iii) the consequences of not remaining silent; (*b*) to remain silent; (*c*) to communicate with an advocate, and other persons whose assistance is necessary; (*d*) not to be compelled to make any confession or admission that could be used in evidence against the person; (*e*) to be held separately from persons who are serving a sentence; (*f*) to be brought before a court as soon as reasonably possible, but not later than— (i) twenty-four hours after being arrested; or (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day; (*g*) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and(*h*) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. (2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.

76. Article **50 (2) (a)** of the Constitution guarantees the right to a fair hearing. It reads that ***(2)*** *Every accused person has the right to a fair trial, which includes the right—****(a)*** *to be presumed innocent until the contrary is proved;*

77. It is imperative that I reproduce below Section **117** of the Act. It provides that the Minister may prescribe—

> *1. (a). schedule of minor traffic offences (in this section referred to as "the scheduled minor offences") which may be dealt with and prosecuted in accordance with the provisions of this section, and may for the purposes of this section prescribe a statutory maximum penalty, which shall not exceed the penalty prescribed for such offence by this Act, for any of the scheduled minor offences to be so dealt with and prosecuted; and*
>
> *(b) a form of police notification of a traffic offence for use under this section.*
>
> *2.Subject to this section, any statutory maximum penalty prescribed under subsection (1) shall, notwithstanding that any other penalty may be prescribed by this Act, have effect for offences dealt with under this section.*
>
> *(3) Notwithstanding any provision contained in this or any other Act, it shall be lawful for any police officer to serve, either personally or by affixing the same prominently to the vehicle concerned, upon the owner or person in charge of any motor vehicle who is reasonably suspected of having committed any of the scheduled minor offences, a police notification of a traffic offence in the prescribed form charging such person with having committed the offence or offences indicated in the notification and requiring such person to attend court to answer such charge or charges, at such time (which if the police notification is served personally on the owner or person in charge of the motor vehicle, may be within forty-eight hours of such service; or if the police notification is affixed prominently to the vehicle concerned, shall not be sooner than seven days after the date of such service) as is shown on such notification.*
>
> *(4)Such notification as aforesaid shall for all purposes be regarded as a summons issued under the Criminal Procedure Code (Cap. 75):*
>
> *Provided that the person served with the notification shall not be obliged to attend court in answer to the charge if he has pleaded guilty in writing and sent the notification, together with the amount of the statutory maximum penalty or penalties for the offence or offences to which he has pleaded guilty, by prepaid registered post or by hand, to the court indicated in the notification so as to reach that court within the time indicated in the notification.*
>
> *(5) The court may, on receipt of a plea of guilty, proceed to conviction and may, after considering any mitigating circumstances stated in writing or personally by the accused, pass a sentence imposing the statutory maximum penalty or remitting the penalty in whole or in part and direct that a refund of the whole or of any portion of the penalty remitted to be made to the accused.*
>
> *(6) If any person served with a notification under this section fails to comply with such notification, the person to be liable for the offence shall be the registered owner of the vehicle or, when the registered owner is a company, the person appointed by the company to be liable under this subsection or, in default of such appointment, the secretary, or person performing the duties of secretary, of such company, unless it is shown by such person, owner or secretary, as the case may be, that he was not in charge of the vehicle at the relevant time and he satisfies the court that he has given all information at his disposal to the police or the court to enable the person who was in charge at the relevant time to be summoned.*
>
> *(7)A copy of the notification shall be placed before the court by which the charge is to be dealt with at the time fixed for the attendance of the accused to answer the charge and, unless the court otherwise directs, such copy may be used as a charge sheet.*
>
> *(8)If any person having been served with a notification issued under this section fails either to attend the court on the day and at the time specified in such notice or to plead guilty and pay the statutory maximum penalty in the manner indicated before such day, he may be brought before the court either by summons or by warrant and, unless he shows good cause to the contrary, shall be guilty of an offence and liable forthwith by order of the court to a fine not exceeding two hundred shillings or to imprisonment for a term not exceeding one month.*
>
> *(9) (a) If any person, other than an authorized person, removes from a vehicle a police notification of a traffic offence which has been affixed thereto by a police officer in pursuance of this section, or any portion of such notification, or tears or defaces the same, he shall be guilty of an offence and liable on first conviction to a fine not exceeding two hundred shillings, and on each subsequent conviction to a fine not exceeding five hundred shillings or to imprisonment for a term not exceeding three months.*

*(b) In this subsection, **"authorized person"** means the owner or person in charge of the vehicle or any person authorized by the owner to remove the notification.*

(10) Any owner or person in charge of a vehicle who finds affixed thereto a police notification of a traffic offence which appears to have been torn or defaced so that it is not fully legible shall within two days report, either in writing or personally, to the police station of the area in which the notification was found, and if he fails so to report he shall be guilty of an offence and liable to a fine not exceeding one hundred shillings.

78. The impugned Legal Notice was issued pursuant to the above section which confers powers to the Cabinet Secretary to promulgate the Rules. The Rules provide for the minor traffic offences which may be dealt with and prosecuted in accordance with the provisions of the section. The offences are prescribed in the first schedule. Rule (3) provides for the penalties while Rule (**4)** provides for the form of police notification of a traffic offence for use under section **117** of the act.

79. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our Constitution. It follows that for the impugned Legal Notice to be annulled, it must be demonstrated that it is not grounded on law.

80. As such, the Gazette Notice must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the Rule of Law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* where the court held as follows:-

> *"(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . . Public power . . . can be validly exercised only if it is clearly sourced in law"**[66]***

81. Courts are similarly constrained by the doctrine of legality, i.e to exercise only those powers bestowed upon them by the law.[67] The concomitant obligation to uphold the Rule of Law and, with it, the doctrine of legality, is self-evident. In this regard, the first Respondent is constrained by that doctrine to enforce the law by ensuring that appropriate rules are in place as provided by section **117** of the Act.

82. The first Respondent has not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with the law and Regulations governing traffic in our roads. It would in general be wrong to whittle away the obligation of the first Respondent to uphold the law. A lenient approach could be an open invitation to the first Respondent to act against his legal mandate and pose a real danger of compromising road safety in the country.

83. When the constitutionality of legislation or a provision in a statute or a decision or subsidiary legislation, an act or omission of a statutory or public body is challenged, the Court's duty is first to determine whether, through "the application of all legitimate interpretive aids,"[68] the impugned legislation or provision or decision, or act or omission is capable of being read in a manner that is constitutionally compliant. Differently put, whether a law, act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution[69] and the relevant statutory provisions.

84. The Court is obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances Rule of Law, Human Rights and Fundamental Freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance.

85. A reading of the powers conferred to the Minister under section **117** of the act leaves me with no doubt that the Minister acted pursuant to the said section in issuing the impugned Gazette Notice.

86. It is alleged that the Rules infringe rights conferred by Articles **48, 49** and **50** of the Constitution.

87. When a constitutional right is infringed, it is important to determine whether such infringement is justified in terms of Article **24** of the Constitution which provides that the rights in the Bill of Rights may be limited only in terms of law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including — *The nature of the right; The importance of the purpose of the limitation; The nature and extent of the limitation; The relation between the limitation and its purpose; and Less restrictive means to achieve the purpose.*

88. A reading of the Rules reveals that an offender is at liberty to plead guilty or not guilty. These being minor offences under the Act, Bail is guaranteed. Upon paying cash Bail, the suspected offender is bonded to attend Court, in which event, the matter will be tried and determined by the Court.

89. The question to be addressed is whether the alleged infringement of Article **48** and **49** Rights of the Constitution meets the Article **24** analysis test. Even though instant fines are a rapidly growing feature of our criminal justice system, they have received relatively little attention from the academic community or the justice sector in terms of understanding their effects. This is despite the fact that infringements are the only interaction most offenders especially those pleading guilty will have with the justice system. It is not disputed that instant fines are a low-cost, simple way of punishing minor offenders without, in most cases, recourse to the courts.

90. Instant fines can prevent minor cases reaching Court and save time and money for the offender and the criminal justice system. The avoidance of a criminal conviction reduces the stigma to offenders. The regime is based on a liberal bureaucratic model that offenders will be more inconvenienced by delays, costs and complexity than they will be by diminution of legal rights.

91. Considering the foregoing reasoning, and the rationale behind instant fines, I find that the *ex parte* applicant has carefully avoided addressing the question whether or not the Rules can pass the Article **24** analysis test. It has not been shown that instant fines are unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. I may add that road safety and the need to restore sanity in our roads is a matter of grave public interest which the Court cannot ignore.

92. The Police are legally allowed to arrest offenders and also to release suspects on cash bail. The Rules provide for fines for those pleading guilty. The reasonableness and convenience of instant fines to the offender pleading guilty cannot be ignored. It saves time to both the state and the offender. It is a less restrictive means which in my view satisfies the Article **24** analysis test. Why would a person desiring to plead guilty be compelled to attend Court only to go and plead guilty. Besides, if well managed and the payment of fines is automated, the instant fines can eliminate graft and hence serve a legitimate purpose. The study by the Interested Party and the recommendations on this issue are relevant.

93. As for the submission that the Rules infringe Article **50** rights which are non-derogable, the answer is that a suspect has the choice of not pleading guilty upon being served with the notification. In the event of pleading not guilty, the offender is admitted to Bail and will have his day in Court, hence, the alleged of violation of Article **50** cannot arise.

94. The Rules allows the police to notify the offender of the offence, permits the offender to opt either to admit or deny the offence. They stipulate instant fines leaving no room for discretion. Section **117** sub-section **(5)** provides that the Court may, on receipt of a plea of guilty, proceed to conviction and may, after considering any mitigating circumstances stated in writing or personally by the accused, pass a sentence imposing the statutory maximum penalty or remitting the penalty in whole or in part and direct that a refund of the whole or of any portion of the penalty remitted to be made to the accused. This subsection clearly provides that it is for the Court to enter the conviction, not the police, hence, the argument that the Rules confer judicial function upon the police is totally misguided. The submission that the Rules deny the offenders the benefit of due process or confers judicial functions to the Police lacks substance and merit and must fail.

95. A clear reading of the Rules leaves me with no doubt that they do not in any manner take away the right to due process, nor do they take away a citizen's right to have the dispute resolved by a Court of law as guaranteed under the Constitution. The alleged violation of Natural Justice lacks merit. Similarly, the *ex parte* applicant's argument that by promulgating the Rules, the Minister violated the doctrine of Separation powers by pursuing the functions of the judiciary and the Director of Public Prosecutions equally lacks substance and also fails.

96. My reading of the Rules is that they do not take away an offenders right to request for legal representation or plead not guilty or refuse to give incriminating evidence. The Rules do not provide that the Police can compel the accused persons to plead guilty. All that the police are required to do is to notify the offender of the offence they are accused of and leave it to the offender to decide whether to admit or deny the offence. The Rules do not in any manner limit the right not to be a compellable witness against oneself and the right to silence.[70] There is nothing in the Rules to suggest that the offender will be required to make a confession to the police. Admitting a traffic offence upon being notified of the offence is not a confession in the strict sense. It should be understood within the context of the purpose and goal of instant fines system which is beneficial to both the offender and the State. Instant fines are a useful administrative tool and they play an important part in the justice system. They are expedient, comparatively low in cost and generally are an appropriate response to minor offences.

97. The Rules do not infringe on the right to silence under Article in **49 (1) (a) (ii)** of the Constitution. The inevitable effect of the Rules is that the accused is free to either admit the charge and pay the statutory fine applicable or deny the charge and prove his innocence in Court. In addition, the accused may opt to remain silent. There is nothing to show that the presumption of innocence or the right to legal representation is transgressed by the impugned Rules.

d. Whether the ex parte applicant has established any grounds to warrant any of the Judicial Review orders sought.

98. The *ex parte* applicant's counsel submitted that the impugned Rules were actuated by irrelevant considerations, such as the need to raise revenue at the expense of due process hence, an abuse of the power.[71]He argued that the Rules have profound consequences upon the business and livelihoods of members of the *ex parte* applicant engaged in the transport sector in particular and the public in general.

99. The first Respondent's counsel argued that the first Respondent acted *intra vires* by exercising his powers under section **117** of the Act.

100. The second Respondent's counsel submitted that Section **117** of the act requires the first Respondent to prescribe a schedule of minor offences with their corresponding statutory maximum penalty which does not exceed the penalty prescribed for such offence under the act and in exercise of the powers conferred under the said section, the first Respondent promulgated the impugned rules. He submitted that the first Respondent was guided by the provisions of the Constitution and the Statutory Instruments Act.

101. Counsel for the Interested Party argued that the Judicial Review Orders sought by the *ex parte* applicant are not available to it. Citing *Kenya National Examinations Council vs Geoffrey Gathenji Njoroge*,[72] counsel argued that an order of prohibition cannot quash a decision that has already been made, but, it can only prevent the making of a contemplated decision.

102. On the alleged unconstitutionality, counsel for the Interested Party argued that a Court is required to examine the object and purpose of the act.[73] He further argued that the decision whether or not to grant Judicial Review reliefs is discretionary, and that, the Court has the discretion whether or not to grant the orders.[74]

103. It is common ground that the prayers sought are Judicial Review remedies and the rules governing grant of Judicial Review orders do apply. Judicial review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. It is not an appeal and the Court should not attempt to adopt the 'forbidden appellate approach'. Judicial Review is the review by a judge of the

High Court of a decision; proposed decision; or refusal to exercise a power to determine whether the decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the Courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

104. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the Rule of Law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the paramountcy of the law.

105. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. Broadly, in order to succeed, the applicant will need to show either:-

> *a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or*
>
> *b. a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.*

106. An administrative decision is flawed if it is illegal. A decision is illegal if it: - ***(a)*** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* ***(b)*** *pursues an objective other than that for which the power to make the decision was conferred;* ***(c)*** *is not authorized by any power;* ***(d)*** *contravenes or fails to implement a public duty.*

107. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the Rule of law. The task for the Courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The Courts when exercising this power of construction are enforcing the Rule of Law, by requiring administrative bodies to act within the ‘‘four corners’’ of their powers or duties. They are also acting as guardians of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments.

108. Where discretion is conferred on the decision-maker the Courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[75]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In other words as was appreciated by the Court of Appeal in *Kimutai vs. Lenyongopeta & 2 Others****[76]*** while citing Lord Denning:-[77]

> *“The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the “purposive approach”. In all cases now in the interpretation of statutes such a construction as will “promote the general legislative purpose” underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, “There is nothing we can do about it”. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.”(Emphasis added).*

109. It has not been shown that the first Respondent acted illegally in enacting the Rules. As discussed earlier, the first Respondent is vested with powers to make the decision in question. No abuse of such powers has been proved. It has not been shown that this power was not exercised as provided under the law. It has not been proved that the first or second Respondent acted outside their powers. The rules are promulgated pursuant to section **117** of the Act.

110. The grant of the orders of *Certiorari, Mandamus* and *Prohibition* is discretionary. The Court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

111. *Mandamus and Certiorari* are discretionary remedies, which a Court may refuse to grant even when the requisite grounds for it exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.

112. The applicant also seeks an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation.

113. The discretionary nature of the Judicial Review remedies sought in this application means that even if a Court finds a public body has acted wrongly, it does not have to grant any remedy. Examples where discretion will be exercised against an applicant may include where the applicant’s own conduct has been unmeritorious or unreasonable. There is evidence that the Rules were necessitated by the need to curb corruption in the Traffic Department and also the need to expedite Traffic cases and to bring sanity in our roads. There is evidence that a task force comprising of various stakeholders was formed to look into the problem. The report presented by the task force informed the need to enact the Rules. This Court hoists high the need to combat corruption, restore sanity and observance of the law in our roads to ensure safety. To that extent, the Rules are aimed at achieving a legitimate purpose and public good. Even if the Court was to fault the process leading to the impugned decision, the remedies sought being discretionary in nature, the Court would be reluctant to exercise its discretion in favour of the applicant on the face public interest in ensuring safety, lawfulness and order in our roads. In other words, such information is a relevant consideration to be considered by the Court while exercising its discretion.

114. The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. How that conclusion is arrived at depends on established principles informed by the constitutional imperative that administrative action or legislative process must be lawful, reasonable and procedurally fair.[78] I am afraid, the *ex parte* applicant has not demonstrated unlawfulness, unreasonableness or procedural impropriety in the enactment of the Rules or their illegality or non-conformity with the parent statute, the statutory instruments act or any other legislation or the Constitution.

Disposition.

115. In view of my foregoing analysis and findings, the conclusion becomes irresistible that the *ex parte* applicant's application must fail. I find that the applicant has not established any grounds to warrant the grant of any of the Judicial Review Orders sought. I also find that there is no justifiable basis to award costs to the *ex parte* applicant as prayed. Instead I direct each party to bear its costs. The upshot is that the *ex parte* applicants Application dated **27th** October 2016 fails. I hereby dismiss it with no orders s to costs.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this 10th day of September 2018

John Mativo

Judge

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[1] *Marbury vs. Madison*, 5 U.S. 137 (1803).

[2] Cap 403, Laws of Kenya.

[3] Ibid.

[4] Cap 80, Laws of Kenya.

[5] Cap 403, Laws of Kenya.

[6] Ibid.

[7] Act No. 23 of 2013.

[8] Cap 80, Laws of Kenya.

[9] Counsel cited *Kenya Small Scale Farmers Forum & 6 Others vs Republic of Kenya & 2 Others* {2013}eKLR and *Maalim Hussein & 4 Others vs Minister of State for Planning National Development and Vision 2030 & 2 Others* {2012}eKLR.,

[10] {2016} eKLR.

[11] Counsel cited *Republic vs County Government of Kiambu Ex parte Robert Gakuru & another* {2016} eKLR.

[12] Counsel cited *Commission for the Implementation of the Constitution vs Parliament of Kenya & 5 Others* {2015} eKLR.

[13] Citing *Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others vs County of Nairobi Government & 3 Others* {2013} eKLR.

[14] Counsel cited *Merafong Demarcation Forum and Others vs President of the Republic of South Africa & Others*, CCT (41/07) {2008} ZACC 10; 2008 (5) SA 171 (cc); 2008 (10)BCLR (cc) (13) June 2008.

[15] Citing *Minister of Health vs New Clicks South Africa (PTY) Ltd.*

[16] {2016} eKLR.

[17] Richard *Dickson Ogendo vs A.G & CS Ministry of Roads & Others***, {2014} eKLR.**

[18] In the South African case of *Minister of Health and Another vs New Clicks South Africa(Pty) Ltd and Others* 2006 (2) SA 311 (CC), at para 630.

[19]See *Pevans East Africa Limited vs Chairman Betting Control and Licensing Board & Others*, Pet No. 353 of 2017 consolidated with Pet No 505 of 2017 and *Okiya Omtata Okoiti vs Commissioner General*, KRA & Others, Pet 532 of 2017.

[20] See e.g. *Daly vS SSHD* [2001] UKHL 57 §§24-32 and ACCC/C/2008/33.

[21] *In the Matter of the Mui Coal Basin Local Community* {2015} eKLR.

[22] Pet 532 of 2017.

[23] Ibid.

[24] (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).

[25] Article 165(3) (d) of the Constitution.

[26] Supra.

[27] *Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others*, Petition No. 229 of 2012.

[28] CCT 86/08 [2010] ZACC 5.

[29] Supra.

[30] Infra.

[31]{2016} eKLR.

[32] Ibid.

[33] **(CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).**

[34] Act No. 23 of 2013.

[35] Counsel cited sections 3, 4 5 and 11 of the Statutory Instruments Act & Articles 2 (4), 10, 94 (5) and 153 (4) of the Constitution.

[36] Act No. 23 of 2013.

[37] Act No. 23 of 2013.

[38] Counsel cited *Republic vs Wilfred Onyango Ngayi & Another* {2008}eKLR.

[39]Statutory Instruments, Fact Sheet No. 21, Published by the Clerk of the National Assembly,2017.

[40]Supra.

[41] http://www.businessdictionary.com/definition/regulation.html.

[42]See *Curry vs. Marvin*, 2 Fla. 415; *Ames vs. Union Pac. Ry. Co*. (C. C.) 64 Fed. 178; *Hunt vs. Lambertville*, 45 N. J. Law, 282.

[43]Cap 2, Laws of Kenya.

[44] Supra.

[45] Supra.

[46]Sections **6,7,** & **8** of the Act.

[47] Section **11.**

[48] Standing Order number **210.**

[49] Supra.

[50] Supra.

[51]See Doctors for life case.

[52] Supra.

[53] Ibid.

[54]{1955} 1 WLR 948 at 955.

[55]{2007} 4 SLR (R} 855 at 59.

[56] {1947} 2ALL ER 372.

[57] Counsel cited *Coalition for Reform and Democracy (CORD) & 2 Others vs Republic of Kenya & 10 Others* {2015}eKLR.

[58] Counsel referred to *Republic vs National Police Service Commission ex parte Daniel Chacha Chacha* {2016}eKLR at Para 54.

[59] Citing *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others* {2013}eKLR.

[60]{2004} 1KLR 547.

[61] Cap 80, Laws of Kenya.

[62] Act No. 11A of 2011.

[63] Citing *Muchana Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 Others*, Civil Ap No. 25 of 202, {2009} KLR 229.

[64] Act No. 11A of 2011.

[65]*Investigating Directorate: Serious Economic Offences and Others vs Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others vs Smit NO and Others* [2000] ZACC 12; 2001(1) SA 545; 2000 (10) BCLR 1079 (CC) at para 22.

[66] AAA Investments (Pty) Ltd v Micro Finance Regulatory Council [2006] ZACC 9; 2007 (1) SA 343 (CC).

[67] National Director of Public Prosecutions vs Zuma, Harms DP

[68] *National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24.

[69] *Ferreira vs Levin NO and Others; Vryenhoek and Others vs Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26.

[70] Constitutional Court of South Africa, *The State vs Abraham Liebrecht Coetzee & Others* Case CCT 50/95.

[71] Counsel cited *Republic vs Commissioner of Customs ex parte Mulchand Ramji & Sons Limited* {2010}eKLR.

[72] CA NBI Civil Appeal No. 266 of 1996.

[73] Citing *Geoffrey Andare vs A.G. & 2 Others*, Constitutional Petition No. 149 of 2015

[74] Citing *Halsbury's Laws of England*, 4th Edition, Vol. 1 (1) para 12, at page 270.

[75] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[76] Civil Appeal No. 273 of 2003 {2005} 2 KLR 317; {2008} 3 KLR (EP) 72

[77] Lord Denning, *The Discipline of Law* ,1979 London Butterworth, at page 12.

[78] See *Gauteng Gambling Board vs Silverstar Development* 2005 (4) SA 67 (SCA) paras 28-29.