



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW CASE NO. 2 OF 2014**

**IN THE MATTER OF AN APPLICATION**

**FOR JUDICIAL REVIEW ORDERS OF PROHIBITION & CERTIORARI**

**AND**

**IN THE MATTER OF LEGAL NOTICE NO. 219 OF 2013**

**(THE NATIONAL TRANSPORT AND AUTHORITY (OPERATION OF PUBLIC SERVICE VEHICLES) REGULATIONS, 2013)**

**AND**

**IN THE MATTER OF THE NATIONAL TRANSPORT AND SAFETY AUTHORITY ACT, (ACT NO. 33 OF 2012)**

**AND**

**IN THE MATTER OF THE NOTICE OF DECEMBER 25<sup>TH</sup>, 2013 IN *THE DAILY NATION* NEWSPAPER OF DECEMBER 27<sup>TH</sup>, 2013**

**AND**

**IN THE MATTER OF THE TRAFFIC CAP 403, LAWS OF KENYA**

**AND**

**IN THE MATTER OF A JUDICIAL REVIEW APPLICATION BY:**

**KENYA COUNTRY BUS OWNERS' ASSOCIATION**

**(Through PAUL G. MUTHUMBI – CHAIRMAN,**

**SAMUEL NJUGUNA – SECRETARY,**

**JOSEPH KIMIRI – TREASURER).....1<sup>ST</sup> APPLICANT**

**MBUKINYA BUS SERVICE (KENYA) LTD.....2<sup>ND</sup> APPLICANT**

CROWN BUS SERVICE LTD.....3<sup>RD</sup> APPLICANT  
KAMPALA COACHS LTD.....4<sup>TH</sup> APPLICANT  
TRATICOM ENTERPRISES LTD.....5<sup>TH</sup> APPLICANT  
UGWE BUS SERVICES LTD.....6<sup>TH</sup> APPLICANT  
TRISHA COLLECTIONS LTD.....7<sup>TH</sup> APPLICANT  
PANTHER TRAVELS LTD.....8<sup>TH</sup> APPLICANT  
NENO COURIER SERVICES LTD.....9<sup>TH</sup> APPLICANT

VERSUS

CABINET SECRETARY FOR TRANSPORT &

INFRASTRUCTURE.....1<sup>ST</sup> RESPONDENT

PRINCIPAL SECRETARY -

STATE DEPARTMENT OF TRANSPORT.....2<sup>ND</sup> RESPONDENT

THE NATIONAL TRANSPORT

& SAFETY AUTHORITY.....3<sup>RD</sup> RESPONDENT

THE INSPECTOR GENERAL OF THE POLICE.....4<sup>TH</sup> RESPONDENT

THE TRAFFIC COMMANDANT.....5<sup>TH</sup> RESPONDENT

THE HONORABLE ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT

CONSOLIDATED WITH MISCELLANEOUS APPLICATION NO. 464 OF 2013

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN, NATIONAL TRANSPORT

AND SAFETY AUTHORITY.....1<sup>ST</sup> RESPONDENT

CABINET SECRETARY FOR TRANSPORT.....2<sup>ND</sup> RESPONDENT

INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT

TRAFFIC COMMANDANT.....4<sup>TH</sup> RESPONDENT

JUDGEMENT

1. This judgement is in respect of two judicial review applications.

**Application No. 464 of 2013**

2. The first application is Miscellaneous Application No. 464 of 2013 and is dated 15<sup>th</sup> January, 2014 seeking the following orders:

**1. An order of Certiorari directed at the 1<sup>st</sup> to the 4<sup>th</sup> respondents, quashing/setting aside their decision to unilaterally purportedly via a legal notice number 219 of 2013 ban holders of licenses in the category subject of which the applicants are lawful holders from undertaking night travel.**

**2. An order of prohibition directed to the 1<sup>st</sup> and 4<sup>th</sup> Respondents and officers under their command form arbitrary arresting the applicants their servants and agents on the premises that they are violating a directive by the 4<sup>th</sup> respondent from commencing of journeys past 6.00 p.m. and before 6.00 a.m.**

**3. The cost of this application.**

**Applicants' Case**

3. The application was supported by an affidavit sworn by **Joseph Karanja Mbugua**, the 1<sup>st</sup> applicant's Director.

4. According to the deponent, the applicants are registered Limited Liability Companies and Sacco whose Core business is Public Service Transportation each of whom applied for Transport Licensing Board (TLB) license and after paying the requisite fees they were issued with a license for each vehicle, allowing the same to operate without conditions in regard to time as they had to furnish the Respondents with their travel time tables showing their arrivals and departures. According to the deponent, their licenses are valid for one year from the date of issue unless previously revoked which has not been done. Their licenses are still in force as they have not been suspended, revoked and/or revised.

5. Based on legal advice, it was deposed that it is trite jurisprudence that every duty has its own attendant/corresponding protection in the event of fulfilment of the same, and therefore when they carried out the statutory obligation of applying for a TLB license for the applicants' respective vehicles and the same being valid for one year, and the same not limiting timings of operations, the applicants thereby started enjoying protection from unjustified persecution from the Respondents and that by issuing the directive, the Respondents have in essence revoked the applicants' licenses for 12 hours daily.

6. To the applicants, the directive though well intentioned is draconian and was made without their being given either notice or a hearing or ample time to comply with all requirements National Transport and Safety Authority (NTSA), the 1<sup>st</sup> Respondent needed which is against the rules of natural justice which dictate that no man should be condemned unheard. The lack of notice and denying their participation in making this decision has caused huge losses as they are forced to reschedule 24 hour travel time tables to 12 hours of day travel, which not only left many passengers stranded but also led to cancellation of travel plans which has led to massive financial loss. The said directive, it was deposed was made with the assumption that road accidents are caused solely by the negligence of the Passenger Service Vehicles yet there are accidents involving trailers and trucks which were being driven negligently.

7. To them the Respondents directive is discriminatory as the Respondents have failed to recognize that most of the accidents on our roads involve trucks and trailers which are still allowed to operate between 6PM and 6AM.

8. In arriving at the said decision, it was averred that contrary to section 30 of the **National Transport and Safety Authority Act** No. 33 of 2012 (hereinafter referred to as the Act), the Respondents clearly

failed to consider the convenience of the public on issuing the directive banning night travel leading to families cancelling travel plans and stranded.

9. To the applicants, legal notice No. 219 does not ban night travel, rather it gives conditions under which a service provider shall be allowed to operate at night, conditions which the applicants have met hence the issuance of licenses in the first place. However, by unprocedurally banning travel between 6 PM and 6AM, the Respondents have in essence revoked their licenses before the expiring of the one year for a period of 12 hours daily as a result of which traffic police officers have been arresting the applicants' drivers as early as 2 minutes past the ban, instead of allowing the drivers to stop at a place that is not only convenient for the passengers, but also safe. The said officers expect the drivers to stop abruptly at 6PM on the dot.

### **1<sup>st</sup> Respondent's Case**

10. In Response to this application, the 1<sup>st</sup> Respondent filed a replying affidavit sworn by **Hon. Lee M. Kinyanjui**, the Chairman of the Board of the 1<sup>st</sup> Respondent's Authority on 2<sup>nd</sup> January, 2014.

11. According to him, increasing number of road accidents in the Country is a major concern of the government and all stakeholders and that the Government of Kenya has been keen to carryout necessary measures to ensure the reduction of the road carnage which has so far claimed large number of Kenyan lives. Therefore in effecting the said measures the Government established the National Transport and Safety Authority, the 1<sup>st</sup> Respondent herein (also referred to as the Authority or the NTSA) to be in charge of transport and road safety which was established as a parastatal under Section 3 of the Act with the statutory functions of inter alia to;- advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety, implement policies relating to road transport and safety; plan, manage and regulate the road transport system, ensure the provision of safe, reliable and efficient road transport services and to administer the **Traffic Act** Chapter 403 of the Laws of Kenya. In the performance of its above functions, the Authority is mandated to *inter alia* register motor vehicles, conduct motor vehicle inspections and certification, regulate public service vehicles, develop and implement road safety strategies, conduct research and audits of road safety etc. See annexure LK-01.

12. To the deponent, in carrying out its mandate, the Authority established that 85% of all the accidents in Kenyan roads occur at night and the same involve public service and are mainly as a result of irresponsible driving of the subject motor vehicles. It was further established that in order to reduce road carnage, it was necessary to come up with regulations that would require the drivers, the operators and the owners of public service vehicles to be responsible and accountable to the public in order to avoid negligence, recklessness and irresponsible acts on the part of the drivers which in most occasions have been the cause of road accidents. Therefore in pursuit of the above and with the primary objective of reducing road carnage, the Authority together with the 2<sup>nd</sup> Respondent herein, developed the **National Transport and Safety Authority (Operations Of Public Service Vehicles) Regulations, 2013** (The Regulations) which were gazetted on 17<sup>th</sup> December 2013 vide Kenya Gazette Supplement No. 173 of 17<sup>th</sup> December 2013 being Legislative Supplement No. 73 as contained in the Legal Notice No.219 ad took effect on the said 17<sup>th</sup> day of December 2013 with which the majority of the operators of public transport have complied without complaining save for the Applicants herein.

13. It was deposed that in formulating the above Regulations, the Respondents incorporated all the stakeholders in the public service vehicle industry who were all invited to participate in the formulation of the Regulations and discussions of the draft regulations. To this end public advertisement was carried out in the local dailies of 4<sup>th</sup> October 2013 and the consultative meeting which was attended by the Applicants through their representatives was held at the KICC on 8<sup>th</sup> October 2013.

14. To the deponent, the said Regulations were prepared and gazetted in good faith with full participation of all the stakeholders and the same does not introduce any unreasonable requirements and/or strange requirements on the operators of public service vehicles as the same is merely designed to enhance road safety and reduce road carnage. In view of the foregoing the said Regulations were prepared in strict

compliance with Section 54 of the Act and the requirements of the Constitution and the related statutes and the Applicants were granted an opportunity to participate in the preparation and the formulation of the same and public notice issued in that regard.

15. To him, the said Regulations do not ban public road transport at night but creates rules which the operators are required to comply with before they can be issued with a license to operate public transport at night. However, the Applicants have not complied and as such have not made any application to be allowed to operate at night. Contrary to the allegations by the Applicants, the 1<sup>st</sup> Respondent has not issued them with any license to operate at night as the 1<sup>st</sup> Respondent will only consider the same upon a competent application by the Applicants as required by the Regulations herein.

16. To the deponent, the Application as filed herein by the Applicants is wholly misconceived and lacks in merit since the same is substantially premised on none existent facts and utter misrepresentation designed by the Applicants to mislead this Honourable Court into granting unmerited stay orders. To him, the subject Regulations have so far fundamentally contributed to Road safety as there have been no road accident involving public service vehicles during this festive season as opposed to previous festive seasons when road accidents involving public service motor vehicles characterized the whole Christmas season. According to him, public transport at night is one of the leading causes of road accidents in developing countries and that explains why the same has been banned in our neighbouring countries including but not limited to Rwanda, Tanzania and Uganda.

17. It was therefore contended that it is therefore proper and necessary that the Authority is allowed to continue with its implementation of the Regulations herein and the Applicants must not be allowed to only consider their perceived financial gains and profits at the expense of road safety and the important need to reduce road accidents involving public service vehicles.

18. It was the deponent's view that the entire proceedings herein are anchored on a misconceived believe that there exists a decision to ban passenger service vehicles from operating between 6PM and 6AM while the truth is that there is no such ban save for that Regulation 13 of the Regulations require the Applicants to apply for a license to operate at night which license is issued upon the Applicant complying with certain road safety measures before it can be issued with a license to operate at night.

19. The deponent contended that the purport and intent of the Application for judicial review herein and the order of certiorari sought herein are clearly designed to harass the Authority and the Government of Kenya with an intention of stopping them from carrying out their lawful duties as expressed in the Act herein and other relevant legislations. To him, all the industry players in the public transport industry including the Matatu Owners Association and other related unions support the implementation of the Regulations herein and trust that the same will reduce road carnage.

20. It was the said 1<sup>st</sup> Respondent's case that the Applicant's Application herein is incompetent and fatally defective and should be struck out forthwith for want of compliance with Order 53 of the Civil Procedure Rules 2010. Further, judicial review order of prohibition is not available to the Applicants since the Regulations have since been gazetted and the same took effect on 17<sup>th</sup> December 2013 and such the Court cannot prohibit what has already been implemented. With respect to the orders of certiorari, the same is not available to the Applicants since there is no decision that has been made as against them, which decision can lawfully be quashed as the Applicants have not demonstrated any rights and/or legitimate expectation and/or any breach of the rules of natural justice to avail them to the orders sought herein and/or to warrant the issuance of an order of certiorari. In his view, the judicial review orders sought herein are against the public interest and the same should not issue for being grossly prejudicial and unfair to the Kenyan citizenry particularly the users of public service vehicles who rely on the government and the Authority herein ensure the provision of safe, reliable and efficient road transport services. The import of the judicial review orders applied for herein if the same were to issue is that the Applicant will through the Court process control the operations of road transport and curtail the Authority's efforts at regulating the same with a view of enhancing road safety and reducing road carnage.

21. The 1<sup>st</sup> Respondent's position was therefore that this Honourable Court ought to safeguard its integrity and the due process by dismissing the application herein with costs to the Respondents.

### 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent's Case

22. On behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent's a replying affidavit was filed sworn by **Samuel Kimaru**, the Traffic Commandant, the 4<sup>th</sup> Respondent herein.

23. According to him, there is also no directive that has emanated from the respondents as alleged by the applicants and indeed there is none annexed to the application or supporting affidavit hence there is nothing to stay and the application dated 30<sup>th</sup> December 2013 ought be dismissed with costs on that basis alone. To him, the functions of the NTSA are to advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety, implement policies relating to road transport ad safety, plan, manage and regulate the road transport system in accordance with the provisions of the Act and ensure the provisions of safe, reliable and efficient road transport services, and administer the **Traffic Act** any other written law. It therefore has the responsibility of registering and licensing motor vehicles, regulating public service vehicles, develop and implement road safety strategies, establish systems and procedures for, and oversee the training, testing and licensing of drivers, co-ordinate the activities of persons and organisations dealing in matters relating to road safety, among others.

24. It was deposed that the Act provides at Section 54 that the Cabinet Secretary may, in consultation with the Board, make regulations for the better carrying into effect of the provisions of the Act and pursuant to this power, the Cabinet Secretary in consultation with the NTSA Board formulated the Regulations. Further, under section 30(2)(d) Authority may impose on a licensee of any class such as the applicants, other conditions as the Authority may prescribe and regulation 13 contains such other express conditions and implementation thereof does not amount to persecution as alleged. To him, according to regulation 13 of the Regulations, only the vehicles which meet the night travel safety conditions laid out therein can legally operate at night hence it is therefore not true that there is a blanket ban on night travel as alleged by the applicants. Since the Regulations define "long distance night time passenger service" as "a transport service other than a commuter service offered by a public service vehicle registered to operate form or after the hours of 6.00 pm or whose scheduled time of arrival at its destination is after 9.00 pm," it is not true that the hours of operation have been cut by 12 hours daily nor is it true that police officers have been arresting PSV drivers driving after 6 pm as alleged.

25. To him, it is clear that any person wishing to operate a PSV motor vehicle which would essentially operate after 9.00 pm must be registered with the Authority and in practice as part of the enforcement of the regulation, the motor vehicles not registered as "long distance night time passenger service" may depart from their departure stations at any time from 6.00 am but they are not permitted to leave their departure station after 6 pm or arrive after 9.00 pm.

26. It was contended that the formulation and implementation of the regulations followed the increased rate of road traffic accidents in Kenya which was claiming the lives of, or maiming thousands of otherwise productive road users and the government realized that there were many accidents arising out of operation of PSVs at night, including poor vision and driver fatigue. Therefore the imposition of the conditions as contained in the Regulations and in particular regulation 13 is part of the government's response to the increased number of night time road accidents attributed to PSVs operating at night. Since the commencement of the implementation of the said Regulations, it was contended that the rate of accidents involving PSVs at night has drastically dropped.

27. Since the applicants are free to operate between 6 am and 9pm daily, provided they fulfil the conditions stipulated in regulation 13, which they have wilfully refused and/or neglected to do, the applicants' licenses have not been revoked as alleged

28. In his view, there was public participation and consultation in the development of the Regulations contained in legal notice 219 of 2013 and the applicants need not have been consulted personally, but

they were at liberty to participate, which they did. To him, the application is not supported by adequate evidence to warrant the granting of the prayers sought hence it is only just, fair, equitable and meet that the court does not issue any order as urged by the applicants.

### **Judicial Review Case No. 2 of 2014**

29. The other matter is Judicial Review Case No. 2 of 2014.

30. In the said matter, the applicants who are public service bus operators in this country are seeking the following orders:

**1. THAT by way of Judicial Review, an order of certiorari do issue, to remove to this Honorable Court for purposes of being quashed, and to quash, the 1<sup>st</sup> Respondent's Legal Notice Number 219 of 2013 published on 17<sup>th</sup> December 2013 for being *ultra vires* and unconstitutional.**

**2. THAT by way of Judicial Review, an order of certiorari do issue, to remove to this Honourable Court for purposes of being quashed, and to quash, the 3<sup>rd</sup> Respondent's demands set out in its Application Form for License titled "OPERATION OF PUBLIC SERVICE VEHICLES REGULATIONS, 2013 APPLICATION FOR LICENCE" for being *ultra vires* and unconstitutional.**

**3. THAT by way of Judicial Review, an order of certiorari do issue, to remove to this Honourable Court, and be quashed, the 1<sup>st</sup> Respondent's declaration made on December 25<sup>th</sup> 2013 and published on December 27<sup>th</sup>, 2013, in the *Daily Nation* newspaper of December 27<sup>th</sup> 2013 indefinitely prohibiting the use of the ex parte Applicant's duly licensed public service vehicles for night travel, and which is in contravention of Section 61(1) of The National Transport and Authority Act, (Act No. 33 Of 2012)..**

**4. THAT by way of Judicial Review, an order of certiorari do issue to remove to this honourable court and be quashed any and such of the decisions of the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents made by them pursuant to the announcement made on December 25<sup>th</sup> 2013 and published in the *Daily Nation* newspaper of December 27<sup>th</sup>, 2013 indefinitely banning the ex parte Applicants' operation of their duly licensed PSV buses during night time.**

**5. THAT by way of Judicial Review, an order of prohibition do issue, prohibiting the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents from deliberating, acting upon, taking any proceedings, issuing any directive or directives, or doing anything in any manner effecting and/or enforcing any aspect of Legal Notice 219 of 2013 published by the 1<sup>st</sup> Respondent herein on 17<sup>th</sup> December under Gazette Notice Supplement Number 73 of 2013.**

**6. THAT by way of Judicial Review, an order of prohibition do issue, prohibiting the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents from acting upon, taking any proceedings, or issuing any directive whatsoever prohibiting the ex parte Applicants from running their duly licensed public transport businesses not conforming to Legal Notice No. 219 of 2013 of the 1<sup>st</sup> Respondent herein, or doing anything in any manner effecting Legal Notice No. 219 of 2013 and licensing demands made there under.**

**7. THAT by way of Judicial Review, an order of prohibition do issue, prohibiting the 1<sup>st</sup> Respondent from issuing any directive akin to Legal Notice No. 219 of 2013 and any declaration made on December 25<sup>th</sup> 2013 as contained in the *Daily Nation* newspaper of December 27<sup>th</sup> 2013, without consultation with the Applicants herein and the PSV operators as envisaged under the relevant and applicable law.**

**8. THAT the costs be to the Applicants in any event.**

31. The grounds upon which the said application was based were as follows:

**1. The sudden, draconian and arbitrary enforcement of the night travel ban against the ex parte Applicants' PSV vehicles made in purported enforcement of Legal Notice Number 219 of 2013 of the 1<sup>st</sup> Respondent is a direct violation of Article 47 of the Constitution of Kenya, and that no opportunity was accorded to the ex parte Applicants to demonstrate to the Respondents that indeed the ex parte Applicants were then, (and to date remain) validly licensed to conduct and execute lawful night travel as such PSV operators as envisaged under Section 61(1) of *The National Transport and Authority Act*, (Act No. 33 of 2012) (hereinafter referred to as the Act and in the result they were treated procedurally unfairly in violation of Article 47(1) of the Constitution.**

**2. That Section 34(1) of the Act, directs the 3<sup>rd</sup> Respondent in mandatory terms to give the ex Parte Applicants reasons in writing on the revocation or suspension of their PSV licences yet to date no such compliance or attempted compliance has been effected by the 3<sup>rd</sup> Respondent.**

**3. That the officers of the 4<sup>th</sup> Respondent under the behest of the 5<sup>th</sup> Respondent concerned with public transport and traffic matters have adamantly refused the ex Parte Applicants the right to the enjoyment and benefit of the proprietary interest the ex parte Applicants have over and in the already paid for and issued TLB licences, in enjoyment of the rights under Article 40(2)(a) of the Constitution of Kenya.**

**4. That Absent any specific action or express communication from the 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> Respondents that these subsisting and valid TLB licences which the ex parte Applicants to date hold have been suspended or revoked, the ex parte Applicants have no basis to invoke Section 34(2) of the Act and hence the oral directive made by the 2<sup>nd</sup> Respondent banning the PSV night travel (in purported enforcement of the 1<sup>st</sup> Respondent's Legal Notice 219 of 2013) is ultra vires, arbitrary, capricious, and a violation of Article 47(1) of the Constitution of Kenya.**

**5. That ex parte Applicants have a legitimate expectation that any decision by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents whose effect directly affects their and the 1<sup>st</sup> Applicant's members' public transport business and their sole source of income and hence livelihood) will be fairly arrived at, after due consideration of all the facts surrounding the decision yet this was not done in respect of the directive of December 25<sup>th</sup> 2013. Further , ex parte Applicants had a legitimate expectation that due process will be followed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in so far as increasing the parking rates is concerned.**

**6. That although the power to make by Rules and Regulations governing and regulating public transport vehicles as used by the Applicant's members' public Service vehicles is envisaged and based on under Section 119(1) (g) of the *Traffic Act*, Cap 403 of the Laws of Kenya, or Section 54 of the Act, the officers of the 4<sup>th</sup> Respondent are now misusing and exploit the police powers to harass, clamp down, intimidate, and altogether detain unlawfully the Applicant's members' vehicles not complying with the directive issued by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

**7. That the 1<sup>st</sup> Respondent never at any time laid before Parliament the Regulations contained in Legal Notice 219 of 2013, in express contravention of Section 11(1) of the *Statutory Instruments Act*, Act No. 23 of 2013 but merely published the said Regulations and imposed them on the Applicants, without laying them before Parliament, thereby grossly depriving the Applicants of an opportunity to challenge the said regulations before they were gazetted into law; Section 13 of Act No. 23 of 2013 is in tandem with Standing Order No. 210**

of Parliament, intended to give effect to this provision. A fortiori, Parliament envisaged the making of such Regulations as contained in Legal Notice 219 of 2003 by the 1<sup>st</sup> Respondent and his laying them before it prior to their gazettment as law rather than the 1<sup>st</sup> Respondent ousting Parliament's exclusive legislative power as conferred by the Constitution of Kenya; hence 1<sup>st</sup> Respondent had no such power to arrogate himself the right to make Regulations and have them become law without any scrutiny, challenge, debate, or contribution by the Applicants, especially the 1<sup>st</sup> Applicant, directly and adversely affected by the said Regulations.

8. That no intention implicitly or explicitly appears in the entire *Traffic Act* to oust the operation of Section 11 of *The Statutory Instruments Act*, Act No 23 of 2013 in respect to Legal Notice 219 of 2013. To this extent, the entire Legal Notice 219 of 2013 is null and void *ab initio* and should be quashed since it cannot be salvaged by any act of goodwill on this Honourable Court's part.

9. That Legal Notice No. 219 of 2013 is riddled with illegalities, as hereunder exposted, by reason of which the Applicants invoke the maxim *ex turpi causa oritur non actio*, so that the Applicants are not bound to comply with an illegal Legal Notice 219 of 2013 and its consequent outflow declarations by the Respondents.

10. The removal of roof carriers on PSV buses operated by the ex parte Applicants as expressed in Regulation 12(f) of Legal Notice 219 of 2013 will increase the public costs of travel since the roof carriers enable the ex parte Applicants buses to ferry cargo otherwise not readily ferried by other means. Apart from that the ex parte Applicants whose buses have roof carriers will hence be compelled to re-configure their buses to accommodate the illegal demands of the stated Regulation yet Rule 61(1) (a) of the *Traffic Rules* under the *Traffic Act*, Cap 403 permits the ex parte Applicants to carry luggage "on the roof where guard rails have been fitted". Absent a repeal of Rule 61(1)(a) of the said Traffic Rules, the ex parte Applicants contend that it is a breach and violation of the Rule of Law of the 1<sup>st</sup> Respondent to purport to enact Regulation 12(f) in Legal Notice 219 of 2013.

11. That the 1<sup>st</sup> Respondent illegally and unconstitutionally incepted Regulation 5(1)(f) in Legal Notice 219 of 2013 whose effect is illegal retroactivity, demanding of each of the ex parte public service vehicle operators wishing to be licensed for the period commencing on 1<sup>st</sup> January 2014 to have complied as of January 2013 with the contents of Legal Notice 219 of 2013 which did not exist then, and was only published on 17<sup>th</sup> December 2013. Regulation 5(2) of Legal Notice 219 of 2013 entirely removes the principle of fairness from the issuance of PSV licences to the ex parte Applicants and such like long distance passenger operators as the 3<sup>rd</sup> Respondent NTSB is thereby conferred with arbitrary power without any check or balance. It was never discussed or brought to our attention as stakeholders and this violates Article 47 of the Constitution, and hence the Regulation is unconstitutional and *ultra vires*. Regulation 5 within Legal Notice 219 of 2013 totally ousts the ex parte Applicants' proprietary rights enshrined in the Constitution for individuals to own property as an individual *per se* and BE licensed as an individual fleet owner, without being a member of a corporate entity. Further, Regulation 5 in Legal Notice 219 of 2013 wrongly (and illegally) assumes that a human person cannot own 100 buses and be licensed as such PSV operator as an individual, which is arbitrary and unconstitutional as there is no legal ceiling or bar to any individual owning as many buses as one can operate provided they do so within the prescription of the law. On the same vein, the further effect of Regulation 5 of Legal Notice 219 of 2013 is to force one and indeed any individual public service vehicle to join and belong to an association, in violation of Article 36(2) of the Constitution.

12. That an entirely oppressive and illegal Regulation 6(a) and 6(j) in Legal Notice of 2013 mean that the 1<sup>st</sup> Applicant with its due registration under the Societies Act, (and as sanctioned by the very Regulation 2 of Legal Notice 219 of 2013) cannot be issued with a PSV

license since “Societies” are by operation of these 2 provisions not included in the class of “persons” that can be issued with PSV licenses. The 1<sup>st</sup> Respondent’s stated Regulation is thus totally unconstitutional and ultra vires Article 30(1) of the Constitution. Such arbitrary action is indignifying and certainly has no place in civilized society.

13. That Regulation 6(m) in Legal Notice 219 of 2013 creates an illegal intervener in consensual contracts of sale that clearly violates Article 36(1) and Article 40(2)(b) of the Constitution, and converts the 3<sup>rd</sup> Respondent NTSB into a merchant which is in violation of the objects set in Section 4(2) of the Authority Act, (Act No. 33 of 2012. Further, no legal power or lawful authority is conferred upon the 3<sup>rd</sup> Respondent to sanction and approve transfer or sale of motor vehicles even when such vehicles are not even licensed PSV vehicles but which are owned by SACCOS or such PSV companies for their own use. The right to own and dispose of property ought not be interfered with by the 3<sup>rd</sup> Respondent NTSA as now purported under Regulation 6(m) of Legal Notice 219 of 2013, yet the right to dispose of property lawfully acquired is inherent bound and interwoven in the right to deal fully and effectually without restriction such as now purported to be imposed by Regulation 6(m) of Legal Notice 219 of 2013. The 3<sup>rd</sup> Respondent National Transport and Safety Authority cannot have any form of interest in the ex parte Applicants’ Public Service Vehicles beyond the regulatory framework and issuance of licenses it has issued and has to issue.

Section 35 of the National Transport and Safety Authority Act renders this Regulation as ultra vires to that extent.

14. That Regulation 10 in Legal Notice 219 of 2013 is unconstitutional inasmuch the ex parte Applicants, as PSV vehicle owners have no control over any driver who is out there on any public road driving their vehicle over roads, distinct traffic conditions, personal emergency conditions, or even circumstances involving 3<sup>rd</sup> parties, yet this Regulation binds the ex parte Applicants to that degree, and they cannot be held accountable for the actions of 3<sup>rd</sup> parties. The 3<sup>rd</sup> Respondent’s application form contains these very same objected to demands. This form demands that the ex parte Applicants fit only 2 brands of speed governors, which is illegal and unconstitutional and contrary to the decision of Hon. Justice J B Ojwang (as he then was) in Misc. Civil Case (Judicial Review) No. 109 of 2004.

15. That Legal Notice No. 219 of 2013 directly violates the ex parte Applicants’ directors’ right to freedom of conscience under Article 32(1) of the Constitution of Kenya. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents’ actions effectively amount to a sabotage of the Kenyan economy and a breach of the rights of the passengers ferried by the ex parte Applicants.

16. That The demand for stoppage and provision of refreshment is a violation of Rule 59 of the Traffic Rules within the Traffic Act, Cap 403 which binds every one of the ex parte Applicants’ drivers to “proceed direct to the place or places included in the route of such motor omnibus without unnecessary delay, and shall not return to the place of departure except on the scheduled return journey, save in the event of a breakdown....” The provisions of Legal Notice 219 of 2013 are thus a complete sham and a violation of the existing Traffic Rules which have not been repealed to date.

### Applicants’ Case

32. The said application was principally supported by an affidavit sworn by **Paul G. Muthumbi**, the 1<sup>st</sup> applicant’s chairman as well as other verifying affidavits sworn on behalf of the other applicants.

33. According to the deponent, the applicants are aggrieved by the 1<sup>st</sup> Respondent’s Legal Notice Number 219 of 2013, was published on 17<sup>th</sup> December 2013 titled *The National Transport And Authority (Operation Of Public Service Vehicles) Regulations*, 2013; the unilateral, illegal, and unconstitutional

ban of night travel by the applicants' buses (long distance PSV buses) via an oral "roadside" directive that was made on December 25<sup>th</sup> 2013 by the 1<sup>st</sup> Respondent, announced by the 2<sup>nd</sup> Respondent, and executed by the 5<sup>th</sup> Respondents and to date upheld by the officers of the 4<sup>th</sup> Respondent as it was published on December 27<sup>th</sup> 2013 in the *Daily Nation* newspaper; the 3<sup>rd</sup> Respondent's Transport License Application Form which all PSV operators including the Applicants must fill, titled "**Operation Of Public Service Vehicles Regulations, 2013 Application For Licence**".

34. According to the deponent, he was shocked and dismayed when he read the said Legal Notice 219 of 2013 upon its publication on December 17<sup>th</sup> 2013 as it was materially different from what the Applicants were led to believe all along by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents during "consultative meetings" prior to the publication of the said Legal Notice. Without any consultations with the stakeholders, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents sneaked in additional, unapproved, and without-consultations Regulations eventually published as Legal Notice 219 of 2013 which effectively nullified all that the stakeholders had been led to believe were to be contained in the arising regulations, and the bases of the consultations initiated by the 3<sup>rd</sup> Respondent. To the deponent, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents thus negated their public duty to consult stakeholders.

35. According to the deponent, the entire Legal Notice 219 of 2013 ought to be brought before this Honourable court and be quashed for not having been laid before Parliament for approval as such Subsidiary Legislation entail. To him, he was waiting for the Parliamentary commentary on the same upon the Draft Regulations being tabled before the Parliamentary Legal and Constitutional Affairs Committee and hence securing Parliamentary approval, but this never happened as the 1<sup>st</sup> Respondent never complied with this requirement. In the result the purported Legal Notice 219 of 2013 is null and void and invalid and cannot bear the force of law, which this Court ought to find.

36. It was further deposed that there has been a violation of the principle of Good Governance and Accountability as envisaged in the Constitution of Kenya and that the purported definition of "public service vehicle" contained in Legal Notice 219 of 2013 is illegal and ultra vires as it violates the very definition set out in the Act. To him, the said Act states that "public service vehicle" has the meaning assigned to it under the **Traffic Act**, which does not dichotomize between so-called "commuter service" PSV and "long-distance passenger" PSV such as the applicants' buses and that this definition in Regulation 2 of the impugned Legal Notice offends Article 27 of the Constitution, and it cannot be sustained as Subsidiary Legislation. His contention is that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents cannot violate or contravene the substantive Acts applicable in the circumstances (Traffic Act, and The National Transport and Safety Authority, Act No. 33 of 2012) by means of the Legal Notice 219 of 2013, and as such the said subsidiary instrument is ultra vires.

37. I was averred that on December 25<sup>th</sup> 2013, the 1<sup>st</sup> Respondent made an arbitrary directive through the mass media, prohibiting all public service vehicles including the Petitioners' duly licensed buses from carrying passengers between 6pm and 6am without a night travel license from the 2<sup>nd</sup> Respondent, The National Transport and Safety Authority (NTSA) and the 2<sup>nd</sup> Respondent Transport Principal Secretary **Nduva Muli** alleged that this was informed by Legal Notice No. 219 of 2013, Gazetted on December 17<sup>th</sup> 2013 by the 1<sup>st</sup> Respondent. The resultant ban has unquestionably led to a transport crisis occasioning an unexpected hike in fares, which cannot be in the public interest by any stretch of the imagination.

38. The deponent further stated that the 5<sup>th</sup> Respondent went to Machakos Country Bus Station on December 25<sup>th</sup> 2013 at around 11.00a.m. and approached his Manager **Daniel Gichinga**, and told him that there were no public service buses that were to operate nightly thence at a time when his vehicles had been booked. To him this arbitrary action and it smacked of malice and gross inconsiderateness of the harshness of the arising consequences since this ban was not only announced but implemented drastically and in a draconian fashion at a time when many passengers had already booked for night-time travel jeopardizing even other business people engaged in distant markets thus rendering the country's exports uncompetitive and creating a huge transport liability for Kenya.

39. The deponent opined that bus companies are likely to retrench workers, mostly drivers and crew that operated at night before the impugned travel ban since the ban had rendered them redundant, which cannot be in the public interest at all and ought not be sanctioned by this Court and from the legal instruments the impugned ban has no legal basis and is manifestly unsustainable; and utterly arbitrary. It is indiscriminate without consideration even to emergency situations.

40. Although in issuing the stated directive, the 3<sup>rd</sup> Respondent alleged that most accidents were happening at night, and irrationally blamed the PSV operators (including the Applicants) whom he alleged were reluctant to adhere to laid regulations without specifying which these alleged regulations were, the deponent's view was that this blanket accusation is false and not backed by any supportive evidence. Instead, the 1<sup>st</sup> Respondent employed his unilateral and illegal directive in a blanket fashion without affording the Applicants a hearing to demonstrate that not only were the Petitioners fully compliant with the necessary regulations but they were lawfully licensed to operate their buses at night by the 2<sup>nd</sup> Respondent's predecessor, The Transport Licensing Board, (TLB) but that no notice or sufficient notice was accorded to the Applicants in regard to the impugned decision, contrary to the legitimate expectations of the Applicants. Despite the fact that the 1<sup>st</sup> Respondent's action is purely administrative and governed by Article 47 of the Constitution.

41. The deponent believed that singling out PSV buses for such a cap on the license amounts to hostile discrimination, in violation of Article 27 of the Constitution. To the deponent, there is no prescribed "Special License" alleged by the 1<sup>st</sup> Respondent for "Night Travel" set out either in Legal Notice No. 219 of 2013, *The Traffic Act*, cap 403, or even the Act, such as would create a legal license enforceable in law. There being no such prototype or format of the "Special License", it was deposed that the 1<sup>st</sup> Respondent acted ultra vires the *Traffic Act*, Cap 403, and the Act and further, there are no such restrictions on the already issued road travel licenses issued to the Applicants.

42. It was contended that the Respondents never took into account the fact that over the last 7 or so years, Kenya has witnessed an unprecedented explosion in growth of motorized vehicles, yet on any date the majority of the general public depends on the public transportation such as operated by the Applicants for inter and intra counties' commuting, especially given the timing of the ban. To the deponent, the 2<sup>nd</sup> Respondent has no statistical data available to the public exemplifying what percentage of the motorized vehicles as of now that constitutes duly licensed PSV vehicles in order to ascertain the proportionate contribution to accident fatalities on Kenyan Roads and in the result, the allegation that PSVs contribute to the largest share of such fatalities is without basis and is at best anecdotal. The 4<sup>th</sup> Respondent has further not shown diligence in keeping reliable and factual accident data within Kenya, and has no accessible media where such data is easily retrieved, even at their webpage, hence the impugned night travel ban imposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is utterly irrational if the need to eliminate road accidents aimed at achieving passenger safety is the ultimate objective.

43. The deponent further deposed that inter County PSV buses are the least expensive and most convenient form of transport especially for short distance commuters –for, they provide service during all hours of the day; they are road friendly in congested areas of the city; and they constitute convenient feeder service for public transport users and those accessing public transport service as well as main arterial roads in the city from far flung areas and outlying counties. It was added that PSV buses are the most convenient for parcel and courier transportation between counties as well as transport to wholesale markets within Kenya, yet they are being illegally required to pull off the roof carriers they have. Trips especially to Western Kenya regions require roof carriers because of the nature of the goods passengers take there. This is a draconian and oppressive measure that is purely egalitarian and has no utility value.

44. The deponent believed that night travel is actually existent as it meets the demands of commuting passengers within Kenya and East Africa since they actually pay for it and such being the case, commuters and users of such PSV vehicles irrefutably avail themselves of the services without compulsion. To him, there is no scientific or other data which irrefutably demonstrates that PSV night travel is dangerous or inimical to general public or other road users so as to justify the impugned decision and therefore, absent any objective study, based on scientific or rational principles, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>

Respondents cannot invoke non-existent powers and arbitrarily inhibit themselves with a policy that restricts the scope of the existing regulatory framework that authorizes the Applicants of night travel as endorsed in the Time tables attached to their TLB licenses which TLB licenses have not been revoked to date and there is no express or implied directive to that effect revoking or suspending a single TLB license. At any rate, as at the 25<sup>th</sup> December 2013 when the impugned arbitrary decision was made, (to date) these TLB licences were and remain valid.

45. Based on the deponent's experience as a PSV bus operator, he was of the view that the impugned decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent does not serve public interest as alleged in the media, but it is an oppressive instrument for exploitation and harassment of the Applicants and other PSV operators authorized to operate their PSVs at night under regulated and authorized time tables.

46. The deponent contended that the applicants' forced illegal status (due to the impugned decision) is rampantly misused by the 3<sup>rd</sup> Respondent's officials and the 4<sup>th</sup> and 5<sup>th</sup> Respondents' police as a tool for exploitation, and corruption. The impugned directive has thus been unlawfully enforced (and continues to be unlawfully enforced) to contrary to interests and requirements of the Petitioners and other like PSV operators. To him, Section 25 of the **Police Act** (Cap 84 of the Laws of Kenya) authorizes the officers under the 3<sup>rd</sup> Respondent to arrest and detain such of the PSV operators that may be required to produce a non-existent license alluded to by the 1<sup>st</sup> Respondent permitting such night travel when in fact the TLB issued to the Applicants already demonstrate amply they are duly licensed to so operate at night. The oral directive given by pendent arrest of any person "flouting" the oral directive issued by the 1<sup>st</sup> Respondent is, however, without authority of law, and contrary to Article 47 of the Constitution, and the right to freedom of carrying on business of the Petitioners' election, which is PSV as duly licensed by the 2<sup>nd</sup> Respondent (NTSB). As the NTSB Act does not permit such action; the Respondents action is therefore ultra vires the enactment.

47. To the deponent, the glaring omission by the responsible National Government and County Government authorities in not providing safe passage on roads to road users are among the main causes of high fatality of road users and not night travel per se and as a consequence, to deny members of public the right to already licensed, legally authorized, legitimate, safe passage on roads carrying fast moving traffic, by banning night travel and adequate provision for safe, pothole-free and tar-faced roads is a gross violation of Kenyans' right to freedom of movement guaranteed under the Constitution.

48. It was averred that the 3<sup>rd</sup> Respondent has not provided a single parking or resting site along any arterial road in any part of Kenya to accommodate public service users whose day travel is cut short by nightfall from Kampala to Mombasa hence the 3<sup>rd</sup> Respondent has thus acted arbitrarily and heaped the burden of shouldering stranded travellers' accommodation and feeding needs on the Petitioners. Therefore, as a long term measure to accommodate long distance travel, the 3<sup>rd</sup> Respondent has absolutely no focus on the provision of passenger transit or PSV parking or halting sites including for night rest and repair yards and wherever any of the applicants' buses is compelled to stop by nightfall on any given day, the ex parte Applicants have no guaranteed repair yard or reliable spare parts supplier and thus they stand exposed to graver travel hazards.

49. The deponent doubted that the 4<sup>th</sup> Respondent is possessed of sufficient manpower to man or police the gamut of Kenyan Roads, and the allegation that the PSV operators violate the relevant "regulations" (including the Applicants) is a lame excuse as no single bus operated by the Applicants is permitted to operate as such PSV without undergoing pre-licensing inspection to certify the vehicles as roadworthy and for use as Public Service Vehicles. The precondition for licensing includes the certification that each of the applicants' buses have sufficiently standardized and properly maintained headlights, indicators, and mechanical fitness which are prerequisites for night travel and not a single dossier has been produced by the Respondents to show such of the Applicants' buses that have been driven on any public road as PSVs without headlights or other impairing deficiencies that handicap them for night travel. The deponent also believed that when the predecessor to the 3<sup>rd</sup> Respondent (TLB) issued the applicants with night travel licenses to the end of 2014, these conditions had been inspected fully and they were not in any way

shown to have been violated when the illegal ban was imposed. Further, the 5<sup>th</sup> Respondent has publicly conceded in the past that there are only 2,000 traffic police officers serving 40 million Kenyans to control the 1.6 million vehicles registered in Kenya as at August 7<sup>th</sup> 2013. With such a high number of vehicles in Kenya, the 3<sup>rd</sup> Respondent's traffic department is grossly understaffed to sufficiently police Kenyan roads for enforcement of traffic Rules across the motorized road users, not just Public Service Vehicle operators such as the Applicants.

50. The deponent deposed that from his own experience, the cost on the economy through the domino effect of delayed transportation of both passengers and cargo within Kenya owing to the impugned decision is monumental, as reported in the mass media, entitling this Court to intervene as sought hence he cannot understand why the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent have imposed the draconian measure that the applicants re-fit their buses with speed governors that are specific yet all that he is aware they ought to do is set the standards but not limit the applicants' choice or restrict them in the manner the Form by the 3<sup>rd</sup> Respondent indicates.

### **1<sup>st</sup> Respondent's Case**

51. On behalf of the 1<sup>st</sup> Respondent, the following grounds of opposition were filed:

- 1. That the 1<sup>st</sup> Respondent has powers by dint of Section 54 of the National Transport and Safety Authority Act No. 33 of 2012 to make regulations.**
- 2. That the 1<sup>st</sup> Respondent pursuant to those powers and in consultation with the Board formulated and gazetted the National Transport and Safety Authority (Operations of Public Service Vehicles) Regulations 2013.**
- 3. That the Regulations having come in force on 17<sup>th</sup> December, 2013 can only be quashed if at all after a full hearing of the Judicial Review application.**
- 4. That the prayers in the application are coached in terms of a mandatory injunction or prohibition and the material placed before this Honourable Court falls far below the threshold required to grant a mandatory injunction or prohibition at the ex parte stage.**
- 5. That the balance of convenience militates against the grant of the order sought as such orders would undermine the proper implementation of the mandate donated to the respondents by the National Transport and Safety Authority Act to ensure provision of safe, reliable and efficient road transport services in the republic of Kenya.**
- 6. That the High Court in Nairobi HC MISC 464/13 has decisively and extensively dealt with all the issues raised herein and therefore this application is Res Judicata.**

52. The said Respondent also filed an affidavit sworn by the said **Samuel Kimaru** on 14<sup>th</sup> January, 2014.

53. According to the deponent, that the Authority is a public body established as a parastatal under Section 3 of the Act with the statutory functions *inter alia* to; advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety, implement policies relating to road transport and safety, plan manage and regulate the transport system, ensure the provision of safe, reliable, and efficient road transport services and to administer the **Traffic Act** Cap 403 Laws of Kenya. To the deponent, the instant application basically questions the legality of the Legal Notice No. 219 that appeared in the Kenya Gazette on 17<sup>th</sup> December 2013 vide Gazette Supplement No. 173 of 17<sup>th</sup> December 2013 being Legislative Supplement No. 7

54. In his view, there has been a steady increase in the number of road accidents in the country and it is a major concern to the government and all the major stakeholders in the transport industry and as such the

government has taken necessary measures to ensure the reduction of the road accidents which continue to claim the lives of many Kenyans. In view of the aforementioned concerns, the Cabinet Secretary in charge of Transport and infrastructure in collaboration with the Authority who are the 3<sup>rd</sup> respondents came up with the ***National Transport and Safety Authority (Operations of Public Service Vehicles) Regulations, 2013*** that are aimed at reducing road carnage and thus reduce the number of lives lost on the road.

55. He deposed that in accordance with Article 118 of the Constitution the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents invited the public and all the stakeholders in the transport industry to participate in the formulation of the aforementioned regulations and discussion of the draft regulations which participation are confirmed and admitted by the applicant in the verifying affidavit of **Paul G. Muthumbi** and the statement of acts filed therein. The said advertisements were carried out in the local daily newspapers of 4<sup>th</sup> October 2013 for further consultative meetings which was attended by the Applicants through their representatives and held at KICC on 8<sup>th</sup> October 2013.

56. It was contended that under section 53 of the Act, the Cabinet Secretary may, in consultation with the board, make regulations for the better carrying into effect of the provisions of the Act and in pursuance to the Act, the regulations under contention were formulated and gazetted which regulations were prepared and gazetted after consultations and the same are fair and do not introduce any unreasonable requirements and/or unnecessary requirements on the operators of public service vehicles as the regulations are only meant to enhance road safety and thus reduce the number of lives lost on the roads.

57. According to him, there is no blanket ban on night travel and regulation 13 of the Regulations provides that only vehicles which meet the night travel safety conditions laid out therein can legally operate at night; the conditions are that the operator must ensure the employment of at least two drivers to handle each PSV motor vehicle who should be certified by the National Transport and Safety Authority to operate a motor vehicle at night and further regulation of the maximum number of hours of duty of each driver to be 8 hours and ensure a minimum of 8 hours resting period between shifts in respect of each driver and a 30 minute refreshment break every three to four hours on the course of the journey. However, the applicants have not complied with the requirements for night time operations for public service vehicles and have not made any application to be allowed to operate at night and as such the applicants are coming to court with unclean hands as they have not demonstrated a desire to comply with duly laid down regulations.

58. To him, night travel is meant to reduce the number of accidents that occur at night due to the fact that many accidents that occur on our roads normally occur at night and mainly involve public service vehicles and in fact in countries like Tanzania and Rwanda night travel has been banned completely.

59. It was however contended that the applicants have neither challenged the said power to formulate the regulations nor brought enough evidence to show that the said regulations were formulated and gazetted in contravention of the law and that the instant application is only meant to cause further confusion in the transport industry and this will allow more accidents to occur and as such Kenyans will continue to lose lives on the roads and this is why the government has moved in with speed to rein in the transport sector.

60. According to the deponent, Judicial Review order of prohibition is not available to the applicants since the regulations have since been gazetted and the same took effect on 17<sup>th</sup> December 2013 and as such the court cannot prohibit what has already been implemented while Judicial Review order of Certiorari as sought herein is not available to the applicants since the regulations in contention have not contravened any law.

61. It was averred that the rate of accidents involving PSVs at night has reduced sharply since the commencement of the implementation of the regulations and that the instant application is misinformed, misconceived and is not supported by adequate evidence to warrant the granting of the prayers sought hence it is only just and fair that this Honourable Court does not issue any order of stay, review and prohibition as urged by the applicants.

62. On behalf of the 3<sup>rd</sup> Respondent, the Authority, an affidavit sworn by **Isaac Kamau**, its Acting Director General, on 8<sup>th</sup> January, 2014 was filed.

63. Apart from reiterating the contents of the affidavit sworn by **Hon. Lee Kinyanjui** and **Samuel Kimaru** herein, it was deposed that Authority further established that in order to reduce road carnage, it was necessary to come with regulations that would require the drivers, the operators and the owners of public service vehicles to meet specific requirements for night time operation so as to enhance safety and reduce the number of fatalities arising from accidents occurring at night.

64. It was deposed that there was substantial and reasonable consultation between all the industry players and stakeholders and the 3<sup>rd</sup> Respondent ensured that the Draft Regulations was amended to incorporate all comments that serve the interest of the government, the regulator and the general public and that this was aimed at striking a balance within all the stakeholders hence it is therefore misleading for the applicants to allege that the final regulations departed from the Draft Regulations which was the subject of discussions in the stakeholders meeting of September 2013 yet the applicants together with other industry players are the ones who proposed the changes to the draft regulations. The deponent averred that the respondents did not sneak in any new regulations as alleged and/or at all but merely amended the draft regulations to incorporate all he legitimate and reasonable concerns raised by the industry stakeholders and subjected the amended Draft Regulations to incorporate all the legitimate and reasonable concerns raised by the industry stakeholders and subjected the amended Draft Regulations to further stakeholders' discussions in October 2013. The draft, according to him, subject to adjustments following comments from stakeholders.

65. To the deponent, the public transport is already organized as corporate entities through SACCOs and companies as demonstrated by the fact that several of the applicants herein are corporate entities or SACCOs, a practice that has been in place for over two years already and therefore there is nothing draconian or unfair about this and other requirements.

66. It was deposed that the Authority has not denied the applicants herein a licence to operate their vehicles at night and it has the discretion under regulation 5(2)(b) to grant an applicant a conditional licence if the applicant demonstrates that it needs time to fulfil the new safety requirements within a stipulated period of time and therefore the door is not closed to a meritorious application.

67. In the deponent's opinion, every human life is worth protecting through ensuring safety in the roads and the respondents being the custodians of that duty must not watch as road accidents increase and more lives are lost merely because the applicants have a business interest and are keen to make profits. Further the enhanced safety requirements for night travel is important for the members of the public and the same overrides individual convenience since it is better to save lives than to lose the same at the altar of convenience.

68. In his view, in light of the 2013 regulations, the existing licenses do not authorize operation of public service vehicles at night and the 3<sup>rd</sup> respondent has not issued the applicants with any license to operate at night as the 3<sup>rd</sup> respondent will only consider the same upon a competent application by the applicants as required by the regulations herein and the applicants are yet to make such application.

### **Applicants' Submissions**

69. The applicants filed written submissions which were highlighted by their respective learned counsel **Mr. Kinyanjui** and **Mr Kimathi**.

70. On behalf of the applicants' it was submitted that the ex parte Applicants had a legitimate expectation that due process will be followed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in so far as imposing the demands in Legal Notice 219 of 2013 are concerned. According to the Applicants, the power to make by Rules and Regulations governing and regulating public transport vehicles as used by the Applicant's members' public Service vehicles is envisaged and based on under Section 119(1) (g) of the **Traffic Act**, Cap 403 of

the Laws of Kenya. However, the Legal Notice No. 219 of 2013 was incepted in the public domain in violation of the ***Statutory Instruments Act***, Act No. 23 of 2013, came into force on 25<sup>th</sup> January, 2013, in that it was never laid before Parliament for scrutiny and approval as mandated by Section 11 thereof.

71. Upon the ex parte Applicants' plea that Legal Notice No. 219 of 2013 was not laid before Parliament in accordance with this statutory mandate, the burden shifted to the 1<sup>st</sup> Respondent as the responsible Cabinet Secretary to lay e before this Court that indeed there was compliance on his part in furtherance of the ***Statutory Instruments Act*** and this burden the 1<sup>st</sup> Respondent failed satisfy. Since there is no evidence that Legal Notice 219 of 2013 complied with 11 aforesaid, by operation of Section 11(4) of the said Act, the said Legal Notice ceased to have any effect and it became void on the very same December 25<sup>th</sup> 2013 it was purported to be implemented; more so as there was no evidence that the 1<sup>st</sup> Respondent secured the exemption of the relevant Committee, which in this instance is the **Committee on Delegated Legislation**, or even the Legal affairs and Administration of Justice Committee in respect of Legal Notice No. 219 of 2013 as provided under Section 14 of Act No. 23 of 2013.

72. It was submitted that Parliament's Standing Order No. 210 lays down in an elaborate manner the fashion of laying such Regulations as purport to be contained in Legal Notice 219 of 2013 before Parliament and that the 1<sup>st</sup> Respondent never complied with this Standing Order No. 210. Citing **De Smith, Woolf and Jowell** in ***Judicial Review of Administrative Action*** at paragraph 5 – 073 at page 274, the applicant submitted on what in England constitutes 'laying before Parliament' in accordance with Section 4(1) of the ***Statutory Instruments Act*** of 1946 of England thus:-

***“Where any statutory instrument is required to be laid before Parliament after being made a copy must be laid before both houses [House of Lords and House of Commons].”***

73. Judicial ***Review of Administrative Action*** 5<sup>th</sup> Edition, Sweet and Maxwell, 1995 was cited where it is stated:

***“If however, the instrument is required to be laid before Parliament, it is arguable that the instrument acquires legal validity only when it is so laid. It is true that the laying requirements have generally been regarded as directory by both the courts and learned commentators, but the wording of the 1946 Act is strong (“a copy of the instrument shall be so laid before the instrument comes into operation”) and there is a dictum to the effect that these words are to be read in their literal sense.”***

74. It was submitted that the net effect of the 1<sup>st</sup> Respondent's stated default in complying with the demands of Section 11 of the ***Statutory Instruments Act***, is that Parliament was denied the mandatory platform and opportunity availed by Section 12 of the said Act No. 23 of 2013 to **scrutinize** and **review** the contents of Legal Notice No. 219 of 2013, applying the criteria set out in Section 13 of the said Act and that this is a violation of the Principle of Rule of Law espoused under Article 10(2)(b) of the Constitution, and the said Legal Notice 219 of 2013 cannot stand hence it is null and void. According to the applicants, the default is fatal to the legal status of Legal Notice 219 of 2013 and consequently, Legal Notice No. 219 of 2013 is thus not merely illegal and void, but altogether ultra vires and without any basis of being upheld or applied. At any rate, pursuant to Section 3(1) of Act No. 23 of 2013, the 1<sup>st</sup> Respondent had no option since the provisions of ***The Statutory Instruments Act*** applies to every statutory instrument made directly or indirectly under any Act of Parliament or other written legislation, which brings Legal Notice No. 219 of 2013 under the purview of the said legislation. To the applicants, Article 94 of the Constitution of Kenya vests legislative power in the people of Kenya, and the 1<sup>st</sup> respondent cannot usurp that power to bypass Parliament and unilaterally incept Legal Notice No. 219 of 2013 absent Parliamentary approval.

75. It was submitted that the sudden, draconian and arbitrary enforcement of the night travel ban against the ex parte Applicants' PSV vehicles declared orally on December 25<sup>th</sup> 2013 in purported enforcement of Legal Notice Number 219 of 2013 of the 1<sup>st</sup> Respondent is a direct violation of Article 47 of the

Constitution of Kenya, by reason of which it is null and void. To the applicants, no opportunity was accorded to the ex parte Applicants to demonstrate to the Respondents that indeed the ex parte Applicants were then, (and to date remain) validly licensed to conduct and execute lawful night travel as such PSV operators as envisaged under Section 61(1) of *The National Transport and Safety Authority Act*, (Act No. 33 of 2012) since their duly issued TLB licenses subsist and are still operative to date. It was contended that the decision communicated by the 5<sup>th</sup> Respondent to the ex parte Applicants and to date enforced by the officers of the 4<sup>th</sup> Respondent was for all intents and purposes procedurally unfair, unreasonable, and unlawful and that it failed to meet the set threshold under Article 47(1) of the Constitution and by operation of Article 2(2) and 2(4) the said action is null and void, regardless of the motivations behind the said act. Based on Macfay vs. United Africa Co. Ltd [1963] 3 All E.R. 1169, it was submitted that:

**“If an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”**

76. It was further submitted that the Timetables under which their current licences that run to December 2014 (and remain valid) clearly demonstrate their buses are permitted under the law to travel at night, and the 3<sup>rd</sup> Respondent has all along been aware of these time tables, but has acted arbitrarily in violation of the ex parte Applicants’ statutory rights. While the regulatory authority for such of the ex parte Applicants’ long distance licenses was the *Transport Licensing Act*, Cap 404 of the Laws of Kenya which statutory regime has since been replaced by the *National Transport and Safety Authority Act*, (Act No. 33 of 2012, the respondents have not however shown that the application of Section 61(1) of the latter does not apply to the ex parte Applicants’ subsisting licenses.

77. It was submitted that had the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents sought to uphold and abide by Article 47(1) of the Constitution in regard to effecting of the impugned PSV night travel ban, the ex parte Applicants could have amply demonstrated that they possess (to date) valid TLB licences duly recognized as valid and lawfully issued by a competent authority, by operation of Section 61(1) of the Act which licenses have not been suspended, revoked, or otherwise nullified to date. The applicants based their submissions on General Medical Council vs. Spackman [1943] 2 All E.R. 337, where Lord Wright held thus:

**“If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence or departure from the essential principles of justice. The decision must be declared to be no decision at all.”**

78. Further support was sought in Chief Constable of North Wales Police vs. Evans [1982] 3 All E.R. 141 at pg. 143, where Lord Hailsham L.C. stated:

**“The purpose of judicial review is to ensure that the individual receives fair treatment, not to ensure that the authority after according fair treatment, reaches on a matter which it is authorized or joined by law to decide from itself a conclusion which is correct in the eyes of the law.”**

79. The applicants also relied on Breen vs. Amalgamated Engineering Union [1971] All E.R. 1148, where Lord Denning held as follows:

**“It is now settled that a statutory body which is entrusted by Statute with discretion must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand or as administrative on the other or what you will, still it must act fairly. It must in a proper case give chance to be heard.”**

80. It was submitted that section 34(1) of the Act directs the 3<sup>rd</sup> Respondent in mandatory terms to give the ex parte Applicants reasons in writing on the revocation or suspension of their PSV licences yet to date no such compliance or attempted compliance has been effected by the 3<sup>rd</sup> Respondent. To the applicants, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents' actions effectively amount to a sabotage of the Kenyan economy and a breach of the rights of freedom of movement and to be treated with dignity of the passengers ferried by the ex parte Applicants due to lack of necessary infrastructure which amounts to an abuse of power.

81. It is further contended that the right to be treated with dignity as enshrined in Article 28 of the Constitution is constantly being violated by the enforcement of the illegal directive impugned banning night travel in that every time a journey is prematurely truncated due to nightfall, the passengers have to sleep in the Applicants' PSV vehicles and some have had health emergency issues which are heaped upon the ex parte Applicants.

82. The applicants contend that the 1<sup>st</sup> Respondent illegally and unconstitutionally incepted Regulation 5(1)(f) in Legal Notice 219 of 2013 whose effect is illegal retroactivity, demanding of each of the ex parte public service vehicle operators wishing to be licensed for the period commencing on 1<sup>st</sup> January 2014 to have complied as of January 2013 with the contents of Legal Notice 219 of 2013 which did not exist then, and was only published on 17<sup>th</sup> December 2013. In their view, no regulation or Rule can have the force of law retroactively as purported by Regulation 5(1)(f) of Legal Notice 219 of 2013 to create criminal sanctions, as provided under Section 23(3) of *The Statutory Instruments Act*, act No. 23 of 2013 which so far as material, this provision states:

***“A statutory instrument may be made to operate retrospectively to any date not being earlier than the commencement of the enactment under which it is made but no person shall be liable to a penalty in respect of any contravention of a provision in an statutory instrument required to be published in the Gazette where the alleged contravention occurred before the publication unless the court is satisfied that before the alleged contravention the purport of the statutory instrument had been brought to that person’s notice.”***

83. According to the applicants, absent a repeal of Rule 61(1)(a) of the *Traffic Rules*, the ex parte Applicants contend that it is a breach and violation of the Rule of Law enshrined in the Constitution for the 1<sup>st</sup> Respondent to purport to enact Regulation 12(f) in Legal Notice 219 of 2013. This is due to the fact that the ex parte Applicants whose buses have roof carriers will hence be compelled to re-configure their buses to accommodate the illegal demands of the stated Regulation yet Rule 61(1)(a) of the *Traffic Rules* under the *Traffic Act*, Cap 403 permits the ex parte Applicants to carry luggage “on the roof where guard rails have been fitted”. The already existing permission under the *Traffic Act*, Cap 403 to use carriers on the ex parte Applicants' buses has not been vacated and hence the compliance with the requirement in Legal Notice 219 of 2013 is illegal since an already existing right unless expressly removed cannot be violated without redress hence the said Rule is ultra vires.

84. Apart from that the removal of roof carriers on PSV buses operated by the ex parte Applicants as expressed in Regulation 12(f) of Legal Notice 219 of 2013 will increase the public costs of travel as the roof carriers enable the ex parte Applicants buses to ferry cargo otherwise not readily ferried by other means. To the applicants Regulation 12(f) in Legal Notice No. 219 of 2013 is thus a violation of the *Traffic Act*, which altogether breaches Section 24(2) of *The Statutory Instruments Act*, which so far as material provides:

***“A statutory instrument shall not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument shall be void to the extent of the inconsistency.”***

85. It was submitted that Regulation 5 within Legal Notice 219 of 2013 totally ousts the ex parte Applicants' proprietary rights enshrined in the Constitution for individuals to own property as an individual *per se* and be licensed as an individual fleet owner, without being a member of a corporate entity. The said Regulation, it was submitted, assumes that a human person cannot own 100 buses and be

licensed as such PSV operator as an individual, which is arbitrary and unconstitutional as there is no legal ceiling or bar to any individual owning as many buses as one can operate provided they do so within the prescription of the law. The further effect of the Regulation is to force one and indeed any individual human person public service vehicle owner to join and belong to an association, in violation of Article 36(2) of the Constitution.

86. It was contended that an entirely oppressive and illegal Regulation 6(a) and 6(j) in Legal Notice of 2013 mean that the 1<sup>st</sup> Applicant with its due registration under the **Societies Act**, (and as sanctioned by the very Regulation 2 of Legal Notice 219 of 2103) cannot be issued with a PSV license since “societies” are by operation of these 2 provisions not included in the class of “persons” that can be issued with PSV licenses. Similarly, Regulation 6(m) creates an illegal intervener in consensual contracts of sale that clearly violates Article 36(1) and Article 40(2)(b) of the Constitution, and converts the 3<sup>rd</sup> Respondent NTSB into a merchant which is in violation of the objects set in Section 4(2) of the Act. Further, no legal power or lawful authority is conferred upon the 3<sup>rd</sup> Respondent to sanction and approve transfer or sale of motor vehicles even when such vehicles are not even licensed PSV vehicles but which are owned by SACCOS or such PSV companies for their own use. The right to own and dispose of property ought not be interfered with by the 3<sup>rd</sup> Respondent NTSA as now purported under Regulation 6(m) of Legal Notice 219 of 2013, yet the right to dispose of property lawfully acquired is inherently bound and interwoven in the right to deal fully and effectually with one’s property without restriction such as now purported to be imposed by Regulation 6(m) of Legal Notice 219 of 2013.

87. The applicants’ position is that the 3<sup>rd</sup> Respondent National Transport and Safety Authority cannot have any form of interest in the ex parte Applicants’ Public Service Vehicles beyond the regulatory framework and issuance of licenses it has issued and has to issue hence section 35 of the National Transport and Safety Authority Act renders this Regulation as ultra vires to that extent. It was also contended that Regulation 6(e) effectively implies that a duly licensed PSV operator can be held in servitude by a previous licensee in a franchise unhappy with such an operator’s move to a new and possibly competitively more lucrative franchising entity. According to the applicants, the Regulation is unconstitutional and ultra vires Article 30(1) of the Constitution.

#### Respondent’s Submissions

88. On behalf of the Respondents, submissions were made by **Mr Bitta** and **Mr. Agwara** respectively.

89. According to **Mr Bitta**, the issue of laying the Regulations before Parliament is an issue of fact and under section 107(1) of the Evidence Act, it is the party who alleges who bears the burden of proof and in this case, it is the applicants. According to him, the applicants failed to satisfy this burden.

90. It was submitted that the Court must further examine the intention of the legislation and general practice as well as the person complaining. And based on those considerations the Court ought to decline to issue the orders sought. It was submitted that the voidance of the Act for non-compliance with section 11 of the **Statutory Instruments Act** is without prejudice to acts done before the actions become void. It was contended that it is incorrect to argue that statutory instrument cannot be retroactive since the same can have retroactive effect up to the enactment of the parent Act.

91. It was submitted that since only a few subsections are under challenge the same are severable and even if found to be ultra vires a substantial part of the Legal Notice remain unchallenged and taking into account the fact that judicial review remedies are discretionary, the entire Legal Notice ought not to be rendered ultra vires. He submitted that the Regulations were made under the National Transport and Safety Authority Act and not under the **Traffic Act** and hence the meaning of the Regulations can only be gauged within the meaning of the parent Act.

92. On section 61 with respect to the cancelling of licences, it was submitted that the said section falls under the Transitional clauses and that the said section does not state that the licences were to be carried over. According to him, section 54 of the Act was not suspended so that the transitional period is carried

over until the coming into force of the new Regulations and Rules.

93. On the issue of legitimate expectation, it was submitted that there was ample evidence, that opportunity was offered to comment on the contents of the Legal Notice hence the issue cannot render the Legal Notice void as all that is required is an opportunity to make representations.

94. It was submitted that taking into account the public interest involved the court ought to exercise its discretion with that consideration in mind more particularly the consumer rights.

95. On behalf of the 3<sup>rd</sup> Respondent, it was submitted by **Mr Agwara** that in formulating the Regulations, the Respondents incorporated all stakeholders in the public service vehicle industry who invited to participate in the same and that the 3<sup>rd</sup> Respondent ensured that the draft Regulations were amended to incorporate all comments that serve the interest of Government, the regulator and the general public.

96. Upon completion of the consultative meetings and preparation of the final draft the same were procedurally and regularly laid in Parliament as required by the law and were gazetted. It was therefore submitted that the Regulations were made *intra vires* the provisions of section 54 of the Act and the requirements of the Constitution and related statutes.

97. Since the public transport is already organised as corporate entities through SACCOs and companies it was submitted that there is nothing draconian or unfair about this and other requirements.

98. According to the 3<sup>rd</sup> Respondent, the Regulations do not ban public road transport at night but creates rules with which the operators are required to comply in order to be issued with licenses to operate public transport at night which rules the applicants have not complied with. Apart from that under Regulation 5(2)(b) the Authority has discretion to grant an applicant a conditional licence if the applicant demonstrates that it needs time to fulfil the new safety requirements within a stipulated period of time.

99. According to the 3<sup>rd</sup> Respondent, the 1<sup>st</sup> Respondent has power under both the **Traffic Act** and section 54 of the Act to make Regulations for public good which power has not been challenged and there is no proof that the said Regulations were formulated and gazetted in contravention of any law.

100. It was submitted that the Regulations were published on 17<sup>th</sup> December 2013, while Parliament went on recess on or about 11<sup>th</sup> December, 2013 and were to resume sitting on or about 11<sup>th</sup> February, 2014 hence there were no sittings during the said period. As such section 11 of the **Statutory Instruments Act** could not be applied to the Regulations. It was further submitted that there was no evidence that the Regulations were not laid before Parliament yet section 107(1) of the **Evidence Act** placed the burden of proof on the applicants.

101. It was contended that there is no bad faith, abuse of power, illegality, unreasonableness and/or the issues of *ultra vires* as alleged in the formulation of the Regulations and the applicants having participated in their formulations cannot turn back and allege that they were never consulted.

102. According to the 3<sup>rd</sup> Respondent, the application is premature and wholly lacks merit and is an attempt by the applicants to unlawfully curtail the Respondents from carrying out their lawful mandates.

103. It was further submitted that the orders sought herein are against the public interest and the same should not issue for being grossly prejudicial and unfair to the Kenyan citizenry since the Regulations are designed to benefit the public and reduce road carnage.

### **Determinations**

104. The Court has considered the foregoing.

105. The first issue for determination is whether the provisions of the **Statutory Instruments Act**, Act No.

23 of 2013 were complied with and what would be the effect of such a finding on the Regulations. Section 11 of the said Act provides

***(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.”***

106. Whereas the applicants contend that the Regulations were not laid before Parliament as required under the said provision otherwise proof thereof ought to have been availed, the Respondents on their part allege that it was upon the applicants to provide evidence to the effect that the said obligation was not complied with. I appreciate that under Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya, “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” I also appreciate the legal maxim that *omnia praesumuntur legitime facta donec probetur in contrarium* (all things are presumed to have been legitimately done, until the contrary is proved). However, as was held by **Seaton, JSC** in the Uganda Case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85:**

**“The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat not ei qui negat incumbit probatio*. It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons..... As applied to judicial proceedings the phrase “burden of proof” has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence.... The *onus probandi* rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced.” See **Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L); Trevor Price vs. Kelsall [1975] EA 752 at 761; Phipps on Evidence 12<sup>th</sup> Ed Para 91; Phipps At Para 95.****

107. Similarly, the Supreme Court of Uganda in **Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA NO. 9 of 1990 [1992] V KALR 30** was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them.

108. In this case, there was a statutory obligation on the part of the Cabinet Secretary responsible for the Authority to within seven (7) sitting days after the publication of the Regulations, ensure that a copy of the Regulations were transmitted to the responsible Clerk for tabling before Parliament. Thereafter, the Clerk was enjoined to register or cause to be registered the Regulations for tabling or laying thereunder. Whether or not the relevant Cabinet Secretary did transmit the Regulations was, in my view, peculiarly within the knowledge of the said Cabinet Secretary and therefore it behoved him to place before the Court material supporting the fact that he had fulfilled the legal obligation placed on him. Without such

evidence, it would be unreasonable to expect the applicants to prove the negative that the Cabinet Secretary did not so comply apart from making an allegation to that effect.

109. 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.***”

110. 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.

111. There is however a difficulty in understanding the said provision. Whereas subsection (1) of section 11 of the Act provides that the Cabinet Secretary is enjoined within seven (7) sitting days after the publication of a statutory instrument, to ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament, there is no express period within which the Clerk is to table the Instrument. However, it is worth repeating that subsection (4) thereof provides that “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.” One of the rules of statutory interpretation is the rule of harmonisation which is to the effect that all provisions concerning an issue should be considered together to give effect to the purpose of the instrument. See **Foundation For Human Rights Initiatives Vs. Attorney General HCCP No. 20 of 2006 [2008] 1 EA 120**, **Olum & Another vs. Attorney General (1) [2002] 2 EA 508** and **Kigula And Others vs. Attorney-General [2005] 1 EA 132**.

112. Applying the rule of harmonisation it is therefore clear that since there is no other timeline stipulated under section 11 of the **Statutory Instruments Act**, save for the 7 days provided in subsection (1), the phrase “in accordance with this section.....after the last day” must necessarily refer to the same period of 7 days. Therefore if the Regulations were not laid before Parliament within seven (7) sitting days after the publication, the same would on the 8<sup>th</sup> day have become void although the voidance of the Regulations would not nullify the acts which were done thereunder before the said 8<sup>th</sup> day.

113. However under subsection (1) of the section the transmission of the instrument is to be done “***within seven (7) sitting***”. In this case it is contended which contention is not seriously disputed that between 11<sup>th</sup> December, 2013 and 11<sup>th</sup> February, 2014 Parliament was on recess and was not sitting. Therefore that period was excluded from computation of time so that the 7 days period would have started running from the 11<sup>th</sup> February, 2014. To that extent I agree with the Respondents that this ground was prematurely taken. However, if after 11<sup>th</sup> February, 2014, seven days lapsed without the Regulations being tabled in Parliament the same thereby became void and ceased to have any effect.

114. The next issue which I wish to deal with is the conflict between the Regulations and the provisions of the **Traffic Rules**. According to principles of construction if the provisions of a later legislation are so inconsistent with or repugnant to those of an earlier legislation that the two cannot stand together, the earlier legislation stands impliedly repealed by the later legislation. It is immaterial whether both legislations are Penal legislations or both refer to Civil Rights. The former must be taken to be repealed

by implication. Another branch of the proposition is that if the provisions are not wholly inconsistent in their application to particular cases, then to that extent the provisions of the former legislation are excepted or their operation is excluded with respect to cases falling within the provisions of the legislation. If the provisions of the later legislation were manifestly inconsistent with the earlier, then on general principles of construction the Court would be obliged to treat the earlier as *pro tanto* repealed by the later. But the provisions of the two enactments can stand side by side without contradiction, as long as the dual functions established by the later enactment are kept distinct. It is therefore well settled that the court does not construe a later legislation as repealing an earlier one unless it is impossible to make the two legislations or the two sections of the legislation stand together i.e. if the section of the later legislation can only be given a sensible meaning if it is treated as impliedly repealing the section of the earlier legislation. Where general words in a later legislation are capable of reasonable and sensible application without extending them to subjects especially dealt with by the earlier legislation, that earlier and special legislation is not to be held to be indirectly repealed, altered or derogated from, merely by force of such general words, without any indication of a particular intention to do so. The presumption is that a subsequent general enactment is not intended to interfere with a special enactment unless the intention to do so is very clearly manifested. In English Law, the maxim is *generalia specialibus non derogat*. See Maxwell on Interpretation of Statutes, 10<sup>th</sup> Ed at Page 162; Kariapper vs. Wijesinha [1968] AC 716; Godwin vs. Phillips [1908] AC 7 CLR 1; Re Kenya National Union Of Teachers Nairobi HCMCA No. 5 of 1969 [1969] EA 637; Re Berrey [1936] 1 CH. 274; Attorney General vs. Silver Spings Hotel Ltd and Others SCCA No. 1 of 1989 [1992] V KALR 43; Seward vs. The Vera Cruze [1884] 10 App. Cas. 59 AT 68; Baker Vs. Edgar [1898] AC 754.

115. It would therefore follow that where the Regulations conflict with the **Traffic Rules** and the said conflict cannot be resolved the Regulations, being later in time are presumed to have repealed the **Traffic Rules**.

116. It is however contended that some Regulations are inconsistent with the provisions of the **Traffic Act**. Section 24(2) of the **Statutory Instruments Act** provides:

***A statutory instrument shall not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument shall be void to the extent of the inconsistency.***

117. Similarly, section 31(b) of the **Interpretation and General Provisions Act**, Cap 2 provides that where an Act confers power on an authority to make subsidiary legislation, no subsidiary legislation shall be inconsistent with the provisions of an Act.

118. In this case, I have considered the submissions made and apart from the allegations that the fine imposed by the Regulations is *ultra vires* the **Statutory Instruments Act** and that the Regulations create another type of long passenger service vehicle not recognised by the **Traffic Act**, the rest of the allegations are to the effect that that the Regulations are inconsistent with the **Traffic Rules** and by extension with the provisions of the **Traffic Act**. I have however, already hereinabove, dealt with conflicts between subsidiary legislation. With respect to the alleged creation of another type of long distance passengers service vehicle, I am not convinced that the Regulations have the alleged effect since in my view the said provisions can stand together and there is no inconsistency between them.

119. With respect to the **Statutory Instruments Act**, section 24(5) thereof provides:

***There may be annexed to the breach of statutory instrument a penalty, not exceeding twenty thousand shillings or such term of imprisonment not exceeding six months, or both, which the regulation making authority may think fit.***

120. Regulation 16 on the other hand prescribes a fine of not exceeding Kshs 50,000.00 or a term of imprisonment of not more than one year or both. Clearly Regulation 16 is *ultra vires* the provisions of section 24(5) aforesaid and to that extent the said Regulation is null and void.

121. With respect to the validity of the applicants' licences, section 61 of the Act provides as follows:

***All directions, orders and authorizations given, or licenses or approvals issued, or registrations made by the Transport Licensing Board and subsisting or valid immediately before the appointed day, shall be deemed to have been given, issued or made by the Authority as the case may be, under this Act.***

122. In my view, the effect of this provision was to preserve the existing directions, orders and authorisations given, or licences or approvals issued, or registrations made by the Transport Licensing Board subsisting or valid before the appointed day. This provision in my view was meant to ensure smooth transition between the old order and the new order with minimum disruption of the transport services in the country. Any Regulation which is inconsistent with the said section or whose effect is to vary the same would not only be unreasonable but also *ultra vires*. It would be unreasonable because its effect would be to bring the transport services in the country to a standstill by abruptly cancelling all subsisting licences. I do not agree with the position advanced by the Respondents that since the said section appears in the transition part of the Act, it would only subsist pending the promulgation or enactment of the Regulations. If that was the intention the section ought to have expressly provided so. To construe the said section in the manner suggested would amount to subjecting the provisions of the Act to the Regulations and that would be contrary to section 24(2) and 31(b) of the ***Statutory Instruments Act*** and the ***Interpretations and General Provisions Act*** respectively.

123. It was however argued that the Authority was exercising its powers under section 30(4) of the Act. The said section provides that the Authority may, from time to time in such manner as it considers fit, vary or cancel the conditions attached to the issuance of a road service licence. That section must however be tested against the constitutional provisions. Article 47 of the Constitution provides for the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

**“The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and the appellant’s legitimate expectation to benefit from the remission by a release...The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To consider”** is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... **“Consider”** implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings or of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone’s advantage if the executive exercises its discretion

**in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void *ab initio*.”**

124. Therefore if it was intended that the Regulations were to vary or cancel the conditions attached to the subsisting road service licences the Respondents were obliged to do so fairly in compliance with the provisions of Article 47 of the Constitution. Therefore if the effect of the Regulations is the cancelling the applicants' valid and subsisting licences without the same being validly and legally cancelled the Regulations would, to that extent be invalid.

125. It was further contended that the 3<sup>rd</sup> Respondent's application form contains a form which demands that the ex parte Applicants fit only 2 brands of speed governors, which is illegal and unconstitutional contrary to the holding by **Hon Justice J. B. Ojwang** (as he then was) in Misc. Civil Case (Judicial Review) No. 109 of 2004 that the 3<sup>rd</sup> Respondent has no power to restrict the ex parte Applicants in a liberalized economy as to which brand of speed governors they are to buy. To the applicants the 3<sup>rd</sup> Respondent can only regulate what specifications speed governors are to possess but not to restrict the speed governors to 2 brands or who the supplier will be.

126. I have perused the requirements attached to the application for licence. One of the requirements is original copy of valid speed governor compliance certificate, tested and approved by Kenya Bureau of Standards, Chief Mechanical and Transport Engineer as competent Speed Limiter and thereto is a schedule in which two types of speed governors are indicated as KS-2295-1-2011 and KS-2295-2-2011. Dealing with a similar issue **Justice J B Ojwang** in Nairobi Misc. Civil Case (Judicial Review) No. 109 of 2004 – **Republic vs. The Minister for Transport & Communications & Others ex parte Gabel Limion Kaurai & Another** held:

**“It is obvious that the Minister departed from the requirements of section 119(1)(d) when he went out of his way to prescribe brands of speed governors and to name dealers from whom these were to be obtained”.**

127. I similarly have no hesitation in finding that the Cabinet Secretary acted *ultra vires* his powers in prescribing the brands of speed governors. In my view the requirement for certification from the specified agencies provided sufficient safeguards for ensuring that the speed governors in use met the requisite standards.

128. With respect to consultation, it was contended on behalf of the applicants that the Respondents decision breached the rules of natural justice. It was contended that although the applicants gave their views to the draft Regulations, the end product was altered to their detriment. It is therefore clear that the applicants were consulted on the draft Regulations. Whereas the end product may not have reflected the applicants' view, it is incorrect to contend that the applicants were not afforded an opportunity of being heard. The Respondents have exhibited a notice in the Daily Nation of 4<sup>th</sup> October, 2013 inviting stakeholders to a consultative forum. Dealing with a similar issue, **Nyamu, J** (as he then was) in **Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688** expressed himself as follows:

**“Firstly, the City fathers had published a notice of the intended making of the bylaws in March 2006 by a notice in the local daily. The by-laws came into force on 20<sup>th</sup> March 2008. It follows therefore the Petitioners had more than ample time to challenge the by-laws and were given an opportunity of being heard. The right of hearing as understood in law does not have to take the shape of a baraza or an oral hearing and an opportunity of making written submissions is adequate. Surely in cases where there is no legitimate expectation as in this case, there cannot be a right of hearing as well. As regards the two communities from Eastlands the fact that they are now required to pay additional fare does not in my view set them apart from any other fare paying residents of Nairobi. The state of affairs is such that the residents of Ongata Rongai for example could be paying more than those from Eastlands but this differential is not based on discrimination but on economic dynamics.”**

129. Therefore the applicants can only challenge the Regulations if the same are illegal, irrational or unreasonable.

130. The said Regulations have been challenged on the ground that they are retroactive in application. One such provision is cited is Regulation 5(1)(f). The said Regulation provides a person desirous of operating public service vehicles shall be a member of a body corporate which shall where it operated public service vehicles in the immediately preceding calendar year fully complied with the requirements of these regulations in the immediately preceding year. That these Regulations came into force on 17<sup>th</sup> December, 2013 is not in doubt. It is therefore clear that to expect the applicants to have complied with the said regulation in the preceding year is unreasonable. Section 23(3) of the Statutory Instruments Act which provides:

***A statutory instrument may be made to operate retrospectively to any date not being earlier than the commencement of the enactment under which it is made but no person shall be liable to a penalty in respect of any contravention of a provision in an statutory instrument required to be published in the Gazette where the alleged contravention occurred before the publication unless the court is satisfied that before the alleged contravention the purport of the statutory instrument had been brought to that person's notice.***

131. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240:**

**“In this case imposing a liability of 1 billion on the applicant to be paid within 14 days though attractive in terms of enhanced public revenue and perhaps for the zeal of meeting annual tax targets, I find is not such an overriding interest for the reasons set out in this judgment including failure to satisfy the principle of legality. In order to ascertain whether or not the respondents decision and the intended action is an abuse of power the court has taken a fairly broad view of the major factors such as the abruptness, arbitrariness, oppressiveness and the *quantum* of the amount of tax imposed retrospectively and its potential to irretrievably ruin the applicant. All these are traits of abuse of power. .... Statutory power must be exercised fairly. Perhaps it is important to recall the observations made in the English case of *Reg vs. Secretary of State for the Home Department ex-parte Doody [1994] 1 AC 531* as follows: “The rule of law in its wider sense has procedural and substantive effect ... Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.” ..... One other reason why the respondents conduct in changing the tariff and making its effect retroactive is illegal, is that it became penal and penal laws should not be retroactive. The applicant has in the circumstances of this case the right to protect its reliance on legitimate expectations as elaborated elsewhere in this judgment. The applicant in conducting its affairs is entitled to rely on certainty and regularity of law. The capriciousness, oppression and arbitrary application of the tariff retroactively is the antithesis of certainty and regularity of law. ... This is the reason why our Constitution prohibits *ex-post facto* laws. Although the tariffs were in existence and not new laws, their arbitrary imposition in a retroactive manner has the same effect as the *ex post facto* laws..... One of the ingredients of the rule of law is certainty of law. Surely the most focused deprivations of individual interest in life, liberty or property must be accompanied by sufficient procedural safeguards that ensure certainty and regularity of law. This is a vision and a value recognized by our Constitution and it is an important pillar of the rule of law. No one including a zealous taxman should be allowed to violate these principles.”**

132. Accordingly Regulation 5(1)(f) is hereby struck down as being retroactive, unreasonable and ultra vires the said Act.

133. With respect to the issue whether or not there has been a night ban, if the Respondents had imposed a night ban on passenger service vehicle transportation, this Court would have had no hesitation in

declaring such a decision as both unconstitutional and unreasonable. In that event any judiciary worth its salt would grasp and uphold the letter and spirit of the constitution of its country and stand as a strong wall against any action of the officials of the Government which is irrational, capricious or arbitrary and term the same as unconstitutional. See **Royal Media Services (Ltd) vs. Commissioner of Customs & Excise Nairobi H.C. Misc. Application No. 383 of 1995 [2002] 2 EA 576** and **Re: Peter Mwangi Githibwa Nairobi H.C. Misc. Criminal Application No. 877 of 2000.**

134. Article 24 of the Constitution which provides *inter alia* that:

***(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—***

***(a) the nature of the right or fundamental freedom;***

***(b) the importance of the purpose of the limitation;***

***(c) the nature and extent of the limitation;***

***(d) 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***

***(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.***

***(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—***

***(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;***

***(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and***

***(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.***

***(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.***

135. The law is, once it is shown that there is a limitation on a fundamental right or freedom, the burden of proving that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom rests of the State or the authority limiting the fundamental right or freedom. As was held in **Lyomoki and Others vs. Attorney General [2005] 2 EA 127**, the principles of constitutional interpretation are that firstly, the onus is on the petitioners to show a *prima facie* case of violation of their constitutional rights. Thereafter the burden shifts to the respondent to justify that the limitations to the rights contained in the impugned statute is justified within the meaning of Article 43 of the Constitution. Secondly, both purposes and effect of an impugned legislation are relevant in the determination of its constitutionality. Thirdly, the constitution is to be looked at as a whole. It has to be read as an integrated whole with no particular provision destroying another but each supporting the other. All provisions concerning an issue should be considered together so as to give effect to the purpose of the instrument.

136. However the determination of what is justifiable in a democratic society is not an easy one. It has been held that what is reasonably justifiable in a democratic society is an elusive concept – one that

cannot be precisely defined by the Courts. There is no legal yardstick save that the quality or reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right. The illusive concept of what was reasonably 'justifiable in a democratic society' could not be precisely defined by Courts, but regard had to be given to a 'proper' respect for the rights and dignity of mankind. The proper test was an objective one and, taking into account the interests of everyone in a democratic society. See **Nation Media Group Limited vs. Attorney General [2007] 1 EA 261.**

137. I associate myself with the decision of the Supreme Court of Uganda in **Obbo and Another vs. Attorney General [2004] 1 EA 265** to the effect that:

**“It is not correct that the test of what acceptable and demonstrably justifiable for the purposes of limitation imposed.....in a free and democratic society must be a subjective one. The test must conform with what is universally accepted to be a democratic society since there can be no varying classes of democratic societies.”**

138. The applicants submitted that Regulation 10 in Legal Notice 219 of 2013 is unconstitutional inasmuch the ex parte Applicants, as PSV vehicle owners have no control over any driver who is out there on any public road driving their vehicle over roads, distinct traffic conditions, personal emergency conditions, or even circumstances involving 3<sup>rd</sup> parties, yet this Regulation binds the ex parte Applicants to that degree, and they cannot be held accountable for the actions of 3<sup>rd</sup> parties. It was further contended that Regulation 5 within Legal Notice 219 of 2013 totally ousts the ex parte Applicants' proprietary rights enshrined in the Constitution for individuals to own property as an individual *per se* and be licensed as an individual fleet owner, without being a member of a corporate entity. Regulation 6 was also challenged on the ground that it is unconstitutional and creates an illegal intervener in consensual contracts.

139. I have considered the aforesaid provisions and whereas the said provisions place limitations on the rights and freedoms of the applicants I am, however satisfied that taking into account the objects of the Regulations and the obligation on the part the State to protect its citizens and prevent unnecessary loss of lives on our roads, the measures introduced by the aforesaid regulations are necessary to enable the Government meet its constitutional obligations. In other words the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

140. On the other hand, it is my view that a ban on night travel would amount to a limitation on Article 39(1) which provides that every person has the right to freedom of movement. Such a limitation, for it to be valid must pass the aforesaid test. In this case, it has been repeatedly contended by the Respondents that the Regulations are justified on the basis that they are necessary to reduce road carnage. That a number of lives being lost on the roads in this country is unjustifiably high and needs agent measures to be taken to curb this national catastrophe is not in doubt. Where legal and necessary Regulations are put in place no reasonable Kenyan ought to pick a quarrel with that. As was appreciated in **Karina vs. Transport Licensing Board Nairobi HCMCA NO. 1214 of 2004 (HCK) [2004] 2 KLR 406:**

**“it is a sensible way of instilling sense to these category of public service vehicle users who know no discipline and who have over the years been the source of senseless accidents in Kenya's roads and who had prior to the introduction of the measures complained of had developed a culture of road madness impunity and invisibility to law enforcement agencies.”**

141. Similarly, the Court in **Republic vs. The Minister for Transport & Communications & Others ex parte Gabiel Limion Kaurai & Another** (supra) expressed itself as follows:

**“I have already noted two signal fact-situations that dominate the setting of these proceedings, namely (i) the Minister for Transport was attempting to establish his control over the strategic sector of passenger transport, a sector that for years was marked by anarchy, mayhem and severe compromises to normal human expectations of civilised services...and (ii) either as a consequence of the euphoria shoring up the new public**

**initiative, or due to unavailability of professional advice, the Minister's panoply of instruments paid scant regard to fundamental principles of public law, and so these instruments feel liable to appropriate judicial review orders."**

142. It is upon the government to ensure that whatever measures it takes towards the protection of Kenyans while travelling, the provisions of Article 24 of the Constitution are adhered to. Such considerations include the nature and extent of the limitation and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. It is further stipulated that the relevant provision shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

143. In my view, if the Respondents were to decide that in order to reduce road carnage in the country, they would promulgate regulations absolutely banning night travel in the country by public service vehicles that decision would not only be unjustifiable in an open and democratic society based on human dignity, equality and freedom but would also not have taken into account less restrictive means to achieve the purpose and would derogate from the core or essential content of the freedom of movement. To justify such a decision on the ground that as a result the number of accidents have reduced, would be irrational. In fact if such a position were to be justified we would as well justify the banning of public transport altogether with the result that the accidents would be reduced to a bare minimum. Such a decision however, would be objectionable as stemming from illegality, improper exercise of law, contravention of the fundamental rights and freedoms, breach of the rule of law, abuse of power and in total disregard of constitutionalism all of which would constitute proper grounds of intervention by this court.

144. It is therefore upon the State to ensure that it puts into place measures which would ensure that the rate of deaths in this country are reduced while at the same time ensuring that the freedom of movement in this country does not become a torturous process, which ought to be dreaded and avoided by all means. Those who travel by use of public service means ought to be ferried in dignity and it is the duty of the State to put into place measures that ensure this is achieved. Under Article 10(2)(b) of the Constitution, human dignity is one of the values and principles of governance and under Article 10(1) thereof this Court is bound by *inter alia* the said principle when applying or interpreting the Act herein or implementing policy decisions of the Respondents.

145. Further Article 19 of the Constitution provides:

***(1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.***

***(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.***

***(3) The rights and fundamental freedoms in the Bill of Rights—***

***(a) belong to each individual and are not granted by the State;***

***(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and***

***(c) are subject only to the limitations contemplated in this Constitution.***

146. Where a law does not give effect to a right or fundamental freedom, Article 19 (3)(a) mandates and enjoins this Court to develop such a law to that extent and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Dealing with this obligation the South African Constitutional Court in **Masiya vs. Director of Public Prosecutions Pretoria (The State) & Another [2007] ZAC** expressed itself as follows:

**‘The constitutional role of the courts in the development of the common law must be distinguished from their other role in considering whether legislative provisions are consistent with the Constitution. The latter role is one of checks and balances on the power provided for in our Constitution, whereby courts are empowered to ensure that legislative provisions are constitutionally compliant. The development of the common law on the other hand is a power that has always vested in our courts. It is exercised in an incremental fashion as the facts of each case require. This incremental manner has not changed, but the Constitution in section 39(2) provides a paramount substantive consideration relevant to determining whether the common law requires development in any particular case. This does not detract from the constitutional recognition, as indicated above, that it is the Legislature that has the major responsibility for law reform. Courts must be astute to avoid the appropriation of the Legislature’s role in law reform when developing the common law. The greater power given to the courts to test legislation against the Constitution should not encourage them to adopt a method of common-law development which is closer to codification than incremental, fact-driven development.....The question of development of the common law was comprehensively discussed by Ackermann and Goldstone JJ in *Carmichele* in which the duty of courts that is derived from sections 7, 8(1), 39(2) and 173 of the Constitution was stressed. The Court sounded a reminder to judges when developing the common law to “be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary.” The Court repeated with approval the remarks of Iacobucci J in *R v Salituro*,—**

**“Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. . . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.”**

**The Court however said that “courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights . . . whether or not the parties in any particular case request the Court to develop the common law under s 39(2).” Where there is deviation from the spirit, purport and objects of the Bill of Rights, courts are obliged to develop the common law by removing the deviation.’**

147. In interpreting the Bill of Rights Article 19(4) obliges the Court to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights. Article 28 on the other hand recognises that every person has inherent dignity and the right to have that dignity respected and protected. Human dignity is therefore an integral ingredient of the Bill of Rights and the Bill of Rights is expressed under Article 19 to be an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies. As expressed by Albie Sachs in *The Strange Alchemy of Life and Law* (OUP) at page 213:

**“Respect for human dignity is the unifying constitutional principle for a society that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not simply to ensure that the “haves” can continue to have, but to help create conditions in which the basis dignity of the “have nots” can be secured. The key question then, is not whether the unelected judges should ever take positions on controversial political questions. It is to define in a principled way the limited and functionally manageable circumstances in which the judicial responsibility for being the ultimate protector of human dignity compels judges to enter what might be politically contested terrain. It is precisely where political leaders may have difficulty withstanding constitutionally undue populist pressure, and where human dignity is most at risk, that it becomes an advantage that judges are not accountable to the electorate. It is at these moments that the judicial function expresses itself**

**in its purest form. Judges, able to rely on the independence guaranteed to them by the Constitution, ensure that justice as constitutionally envisaged is done to all, without fear, favour or prejudice.”**

148. It is therefore my view that any law or policy must as of necessity have as its core objective the upholding of human dignity, a test to which any law and polity must be subjected. As was aptly put by this Court in **Federation of Kenya Women Lawyers (Fida-K) & Others vs. Attorney General & Others Nairobi HCCP No. 102 of 2011 [2011] ECLR (HCK)**:

**“One of the greatest challenges which has occurred as a result of the new Constitution is the remarkable and dramatic increased expectation people have in the institution of Government. People now expect their Government to not just maintain order but to achieve progress and development. People expect the Government to solve the problems of poverty, inequality, discrimination, unemployment, housing, education and health etc. This vast increase of expectation has given rise to huge anxiety and positive beliefs. The new situation has rekindled public awareness and interest in the role of the courts through which one seeks individual and collective justice and the sustenance of a democratic culture.....The new winds of change brought fundamental and dramatic Constitutional changes and awareness among citizens of this country. There is much euphoria and hope but the question that remains is whether the new Constitution as a popular and desirable document is a durable document that can help citizens achieve their aspirations. Whilst recognizing that even the most progressive Constitution cannot alone solve all the ills of society, the constitution that aspires to be legitimate, progressive, authoritative and to be accepted as a fundamental law must also address, inter alia, the fundamental rights of the people and ensure elimination of all forms of discrimination especially against women and disabled persons. As was stated by Madan, CJ in the case of *Githunguri vs. Republic KLR [1986] 1* these proceedings have put our Constitution on the anvil. It is the subject of considerable anxiety, notoriety and public attention. To quote the words of Madan, CJ; “We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community. We believe we are speaking correctly and not for the sake of being self-laudatory when we say the Republic of Kenya is praised and admired by other people and other systems for the independent manner in which justice is dispensed by the courts of this country. We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the constitution if it fails to give effective protection to the fundamental rights. The people know and believe that to destroy the rule of law you destroy justice thereby also destroying the society.”**

149. Back to the allegation the alleged ban, it is the Respondent’s position that the Regulations do not ban public road transport at night but creates rules with which the operators are required to comply in order to be issued with licenses to operate public transport at night which rules the applicants have not complied with. As already stated hereinabove if such rules in fact amount to a derogation from the core or essential content of the freedom of movement, they would still be unconstitutional and this Court would declare then to be so.

150. In my view the Regulations do not expressly ban night travel in the country by public service vehicles. However, that is not the end of the matter as the next issue is whether the rules meet the constitutional test of ensuring that the dignity of the people of Kenya is attained.

151. The Respondents’ position is that the public vehicle operators have not met the requirements put in place to enable them secure the licences to operate at night. In my view, for the Court to fail to appreciate the circumstances of our society in which a majority are not privileged to have personal means of transport and to place them at the mercy of public motor vehicle operators would be to shirk the responsibility placed upon the Court to uphold human dignity. In my view the primary obligation of ensuring that the provisions of the Bill of Rights are safeguarded, protected and achieved rests squarely on the State. Therefore, it is the constitutional obligation of the State to put into place the necessary

policies that ensure that Kenyans are able to travel in dignity and without unnecessary inconvenience. This obligation is underpinned in Article 21 of the Constitution which provides that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. That obligation, it is my view, cannot be shifted by the Government to the Respondents by merely stating that since the Respondents have not complied with the conditions put in place to enable them secure the licence to travel at night, the Government would just stand aside as a disinterested observer. To do so would amount to the Government shirking its constitutional responsibility to ensure that every person enjoys the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom as provided under Article 20(2) of the Constitution. The Bill of rights impose upon the State both positive and negative obligations. Negative obligations in the sense that the State ought not to unnecessarily intrude into the affairs of the citizens. In effect Kenyans ought to be given the freedom to exercise their inalienable rights without undue interference. However, the State is also under an obligation to make provisions towards ensuring that the Bill of Rights is realised and attained. That constitutes a positive obligation on the part of the State. These rights are provided under Article 43 of the Constitution and to this end Article 20(5)(a) provides that in applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the principle that it is the responsibility of the State to show that the resources are not available. To implement the right of movement with dignity, it is not enough for the State to simply state that the public transport service providers have not complied with the Regulations. Where the said providers have not so complied and do not intend to so comply, the State is under a Constitutional duty to formulate policies that will ensure that the freedom of movement under Article 39 does not remain a mirage. Ours is a transformative Constitution, hence the State may subject to availability of resources even be compelled to step in and provide the means of transport for its citizens where the same is not forthcoming from the private sector. This was the position of the Supreme Court in Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] EKLK where it expressed itself as follows:

**“Kenya’s Constitution of 2010 is a transformative charter. Unlike the conventional “liberal” Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today’s Constitution is to institute *social change and reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy*. This is clear right from the preambular clause which premises the new Constitution on – “*RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.*” And the principle is fleshed out in Article 10 of the Constitution, which specifies the “national values and principles of governance”, and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government. The transformative concept, in operational terms, *reconfigures the interplays between the States majoritarian and non-majoritarian institutions*, to the intent that the desirable goals of governance, consistent with dominant perceptions of *legitimacy*, be achieved. A depiction of this scenario has been made in relation to the unique processes of constitution-building in South Africa, a country that was emerging from an entrenched racist governance system. Karl Klare, in his article, “*Legal Culture and Transformative Constitutionalism*,” *South African Journal of Human Rights*, Vol. 14 (1998), 146 thus wrote [at p.147]: “*At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent.*” The scholar states the object of this South African choice: “*By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed...to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.*” The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country’s**

**achievements in constitutional precedent. We in this Court, conceive of today's constitutional principles as incorporating the transformative ideals of the Constitution of 2010".**

152. Under Article 46(1)(c) of the Constitution consumers have the right to the protection of their health, safety, and economic interests.

153. This Court cannot close its eyes to the fact that the implementation of these Regulations has subjected a majority Kenyans who rely on the public transport as their means of transport to a lot of suffering in as much as they have in a way reduced the number of accidents on our roads. To declare that there would be no night travels whether as a result of non-compliance with the Regulations by the motor vehicle operators or otherwise without taking into account the safety of passengers whose journeys have to be brought to sudden halt in the wilderness and their safety and convenience severely compromised in my view is an abrogation of the right to human dignity. It would be a grave dereliction of its constitutional obligation for the State to subject its citizens from whom it acquires its legitimacy and authority to govern them to such discomfort or ordeals. This Court bears the responsibility for casting the dignity concept in the legitimate course intended by the people. It behoves this Court to signal directions of compliance by State organs, with the principles, values and prescriptions of the Constitution; and as regards the purpose and objects of the Constitution, this Court bears the legitimate charge of showing the proper course. That Kenyans would like a return to normalization of night travel albeit with maintenance of high standards of safety cannot be doubted. It is therefore necessary that both the Applicants and the Respondents to arrive at some minimum and reasonable arrangements which will ensure that the twin objectives are achieved. The two parties ought to appreciate that theirs is a symbiotic relationship. In as much as the Respondents require the Applicant to provide the means of transport in order for the State to actualise its obligation to achieve freedom of movement to Kenyans, the Applicants similarly expect the State to create and maintain an enabling environment in which the Applicants can realise their economic rights. As was held by **Sachs, J** in **Doctors for Life International vs. The Speaker of the National Assembly and Others [2006] ZACC 11:**

**“A vibrant democracy has a qualitative and not just a quantitative dimension. Dialogue and deliberation go hand in hand. This is part of the tolerance and civility that characterise the respect for diversity the Constitution demands. Indeed, public involvement may be of special importance for those whose strongly-held views have to cede to majority opinion in the legislature. Minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy. Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections. Public involvement accordingly strengthens rather than undermines formal democracy, by responding to and negating some of its functional deficits.....A long-standing, deeply entrenched and constantly evolving principle of our society has accordingly been subsumed into our constitutional order. It envisages an active, participatory democracy. All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws. An appropriate degree of principled yet flexible give-and-take will therefore enrich the quality of our democracy, help sustain its robust deliberative character and, by promoting a sense of inclusion in the national polity, promote the achievement of the goals of transformation.”**

154. Whereas this Court appreciates that the proceedings before this Court are in respect of judicial

review reliefs, under Article 22(3) of the Constitution, the Chief Justice is enjoined to make rules providing for the court proceedings relating to the Bill of Rights which Rules are required to satisfy *inter alia* the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation. Apart from that Clause (1) and (2) of the same Article provides:

***(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.***

***(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***

***(a) a person acting on behalf of another person who cannot act in their own name;***

***(b) a person acting as a member of, or in the interest of, a group or class of persons;***

***(c) a person acting in the public interest; or***

***(d) an association acting in the interest of one or more of its members.***

155. Therefore where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles enunciated above and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the later ought to prevail over the former.

156. It is therefore my view that it is necessary that the dignity of Kenyans a majority of whom rely on public transport be upheld while their safety while so travelling is similarly assured.

157. Where the Court finds that a person's constitutional rights have been contravened, the remedies available are not limited to the one specified under Article 23 of the Constitution. In determining allegations of contraventions of the Bill of Rights, Article 20(3) of the Constitution, provides that the Court is enjoined, to the extent that it does not give effect to a right or fundamental freedom, to develop the law and adopt an interpretation which favours the enforcement of a right or fundamental freedom.

158. Article 23 of the Constitution provides that a court "may grant appropriate relief, including a declaration of rights" when confronted with rights violations. Under the said Article, the Applicant is entitled to 'appropriate relief' which means an effective remedy: An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. As was held by the Constitutional Court of South Africa in **Fose vs. Minister of Safety & Security [1977] ZACC 6:**

***“Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”***

159. One of the remedies which is now recognized in jurisdictions with similar constitutional provisions as our Article 23 is what is called structural interdict. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Five elements common to structural interdicts have been isolated in this respect. First the court issue a declaration identifying how the government has infringed an individual or group's

constitutional rights or otherwise failed to comply with its constitutional obligations. Second, the court mandates government compliance with constitutional responsibilities. Third, the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the government's action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached. Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and whether it brings the government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple government presentations at several 'check in' hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders. The chance to assess a specific plan, complete with deadlines, is especially valuable in cases involving the rights of 'poorest of the poor,' who must make the most of rare and costly opportunities to litigate. After court approval, a final order (integrating the government plan and any court ordered amendments) is issued. Following this fifth step, the government's failure to adhere to its plan (or any associated requirements) essentially amount[s] to contempt of court. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Structural interdicts also provide significant advantages for the political branches. The very process of formulating and presenting a plan to the courts can improve government accountability, helping officials identify which organ or department of the State is responsible for providing particular services or for ensuring access to specific rights. In addition, structural interdicts have contributed to a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst also assisting the judiciary in gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties. The "check in" hearings that follow the initial interdict facilitate information sharing between qualified experts and government officials grappling with critical policy decisions and may clarify the content the rights at stake. In addition, structural interdicts may help authorities comply with otherwise politically unpopular constitutional obligations. An explicit court order to satisfy constitutional obligations can support government officials against pressure from small but politically powerful interest groups opposed to certain rights. Finally structural interdicts may provide a more fundamentally fair outcome than other remedies in Economic and Social Rights litigation. By requiring the responsible government officials to formulate a plan designed to operationalise the right in general, rather than just to remedy an individual violation thereof, structural interdicts can provide relief to all members of a similarly situated class, whether or not any given individual has the resources to litigate his or her own case. As such, structural interdicts do not privilege those who can afford to litigate over those who cannot, and can prevent "queue jumping" in access to Economic and Social Rights. See *Structural interdicts* | *Law Teacher* <http://www.lawteacher.net/human-rights/essays/structural-interdicts>.

160. Another remedy is the suspension of invalidity of legislation. Such orders are generally granted where the matters in question are complex or where a declaration of invalidity would disrupt law enforcement processes. The Constitutional Court of South Africa in **Minister for Transport & Another vs. Anele Mvumvu & Others** [2-12] ZACC 20, expressed itself as follows:

**“Section 172(1) of the Constitution empowers this Court to make a just and equitable order, following a declaration that legislation is invalid for being inconsistent with the Constitution. In the context of this section, a just and equitable remedy includes an order suspending the declaration of invalidity for a period determined by the court. The operation of the invalidity order is suspended so as to allow Parliament to cure the defect. But sometimes it occurs, as is the position here, that Parliament is unable to correct the defect before the period of suspension lapses....When Parliament fails to cure the defect during the suspension period, it becomes necessary to request the Court to extend the period of suspension in order to prevent the coming into operation of the order of invalidity. However,**

**the request must be made and the decision to extend must come before the suspension expires as an expired one cannot be extended, nor can it be revived”**

161. Similarly, Sachs, J in Doctors for Life Case (supra) dealing with the suspension of invalidity held:

**“On the facts of this case I accordingly agree with the orders of invalidation made by Ngcobo J, subject to the terms of suspension he provides for. In doing so I do not find it necessary to come to a final conclusion on the question of whether any failure to comply with the constitutional duty to involve the public in the legislative process, must automatically and invariably invalidate all legislation that emerges from that process. It might well be that once it has been established that the legislative conduct was unreasonable in relation to public involvement, all the fruit of that process must be discarded as fatally tainted. Categorical reasoning might be unavoidable. Yet the present matter does not, in my view, require us to make a final determination on that score.....New jurisprudential ground is being tilled. Both the principle of separation (and intertwining) of powers in our Constitution, and the notions underlying participatory democracy, alert one to the need for a measured and appropriate judicial response. I would prefer to leave the way open for incremental evolution on a case by case in future. The touchstone, I believe, must be the extent to which constitutional values and objectives are implicated. I fear that the virtues of participatory democracy risk being undermined if the result of automatic invalidation is that relatively minor breaches of the duty to facilitate public involvement produce a manifestly disproportionate impact on the legislative process. Hence my caution at this stage. In law as in mechanics, it is never appropriate to use a steam-roller to crack a nut.”**

162. In this case to declare the Regulations invalid would have the effect of exposing Kenyans to unsafe and unregulated mode of public transport and that would be contrary to the Court’s mandate of upholding the dignity of the same people the Court is meant to protect.

163. Therefore where there are minor breaches which can be remedied, it would be appropriate that the principle of proportionality be adopted so as to give the relevant authorities a chance to remedy the defects rather than to invalidate the whole enactment and thereby deprive the society of some useful provisions contained in the enactment. As was recognised in Republic vs. The Minister for Transport & Communications & Others ex parte Gabiel Limion Kaurai & Another (supra),

**“the Court, in coming to its decision, must strike a balance between the two scenarios described above – the public yearning for an effective, humane and civilised passenger transport sector, and the juridical imperatives of compliance with the law as it has been enacted. Such an attempt to find a balance will show that there are no cut and dried borderlines between the social purpose, on the one side, and the sacrosanct law, on the other. Social purposes are more dynamic, sometimes feeding into the domain of legal norms, and their earning acceptance and sanctification by the jurist; but sometimes not getting quite there, and so remaining pre-legal, even though they still represent part of normal human venture and endeavours towards improved quality of life.”**

### **Order**

164. Having considered the applications the subject of this judgement I make the following orders:

**1. Regulation 16 of the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2013 is *ultra vires* the provisions of section 24(5) of the *Statutory Instruments Act*, No. 33 of 2012, and is to that extent null and void.**

**2. To the extent that the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2013 have the effect of cancelling the applicants’ subsisting and valid licences issued by the Transport Licensing Board the same are invalid, null and void. Whereas reasonable conditions can be imposed in the existing licences, the same cannot be**

unilaterally cancelled. However, considering the immediate consequences of this declaration on the safety of the public that relies on the public transport, the declaration is hereby suspended to enable the relevant State organs to formulate legislative and policy measures.

3. Regulation 5(1)(f) of the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2013 is hereby struck down as being retroactive, unreasonable and ultra vires section 23(3) of the *Statutory Instruments Act*, No. 33 of 2012.

4. The prescription of the brands of speed governors rather than the standards was a departure from what was expected of the Cabinet Secretary and hence unlawful.

5. Pursuant to the order made in 2 above, the Respondents and the relevant State organs are hereby directed to immediately initiate the process of meaningful engagement not only with the applicants but with the public with a view to ensuring that appropriate legislative and policy measures and instruments are put in place to ensure that both the safety and dignity of persons using public transport are ensured and upheld. Accordingly the Respondents are directed to file a report before this Court on the measures that have been taken or are being undertaken along the said lines within the next 60 days for consideration of this court and further orders.

6. The Respondents to avail to this Court within the same period evidence that the provisions of section 11 of the *Statutory Instruments Act*, No. 33 of 2012 were complied with.

7. Liberty to apply given to the parties.

Dated at Nairobi this 14<sup>th</sup> day of March 2014

G V ODUNGA

JUDGE

*Delivered in the presence of:*

*Mr Harrison Kinyanjui and Mr Kimathi for the Applicants*

*Miss Maina for Mr Bitta for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.*

*Mr Agwara for the 4<sup>th</sup> Respondents*