



**IN THE HIGH COURT AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 70 OF 2014**

**CONSOLIDATED WITH PETITION NO. 92 OF 2014**

**BETWEEN**

**RICHARD DICKSON OGENDO ..... 1ST PETITIONER**

**REMINISCE SPORTS BAR LIMITED**

**T/A REMINISCE BAR AND GRILL ..... 2ND PETITIONER**

**KARIUKI RUITHA ..... 3RD  
PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1ST RESPONDENT**

**CABINET SECRETARY MINISTRY OF**

**ROADS AND TRANSPORT ..... 2ND RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 3RD RESPONDENT**

**DIRECTOR OF**

**PUBLIC PROSECUTIONS ..... 4TH RESPONDENT**

**NATIONAL TRANSPORT AND**

**SAFETY AUTHORITY ..... 5TH RESPONDENT**

**AND**

**KENNETH MUGAMBI T/A**

**POTTERMARK ENTERPRISES ..... INTERESTED  
PARTY**

**JUDGMENT**

**Introduction**

1. The parties in this matter do not dispute the fact that drunk driving is a major cause of road traffic accidents. The loss of life and limb through road accidents caused by drunk driving is a major concern for the State. Families lose loved ones; those who are injured incur substantial medical expense and suffer psychological scars associated with such injuries. The body politic is forced to absorb the large but unnecessary costs associated with road traffic accidents. It is therefore in the State's interest to take steps to minimize accidents caused by drunk driving.
2. In 2011, the Minister for Transport, pursuant to powers granted under **section 119(1)** of the **Traffic Act (Chapter 403 Laws of Kenya)** ("the **Act**") enacted the **Traffic Breathalyser Rules, 2011** ("the **Rules**") by **Legal Notice No. 138 of 2011** dated 5<sup>th</sup> October 2011. In the **Rules** the Minister prescribed, *inter-alia*, the limit of alcohol and made provision for the use of a breathalyser for the purposes of measuring the concentration of alcohol in a person's blood from a specimen of breath provided by the person, through the use of a device now commonly known as 'alco blow'.
3. In order to understand the context of the petitions for determination it is necessary to set out the pertinent provision of the **Traffic Act** and the **Rules**. The offence of driving under the influence of alcohol is to be found at **sections 44, 45 and 85** of the **Traffic Act** as follows;

44. *Driving under influence of drink*

1. *Any person who, when driving or attempting to drive, or when in charge of a motor vehicle on a road or other public place, is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.*
2. *A person convicted of an offence under this section shall, without prejudice to the power of the court to order a longer period of disqualification, be disqualified, for a period of twelve months from the date of conviction, for holding or obtaining a licence.*

45. *Prohibition of drinking when driving or in charge of public service vehicle*

1. *Any person who, when driving or in charge of, or during any period of duty in connexion with the driving of, a public service vehicle, drinks any intoxicating liquor shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.*
2. *Any person who gives any driver or any person in charge of a public service vehicle any intoxicating liquor, whether for reward or not, shall be guilty of an offence and liable to the same penalties as a person guilty of an offence under subsection (1).*

85. *Any person who when driving or attempting to drive, or when in charge of a vehicle, other than a motor vehicle, on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.*

4. The relevant provisions of the **Rules** provide as follows;

**Rule 3**

3(1) *No person shall drive, attempt to drive or be in charge of a motor vehicle on road or other public place if the person has consumed alcohol in such quantity that the blood alcohol concentration in his body is beyond the prescribed limit.*

(2) *A person who contravenes sub-rule (1) commits an offence under Section 44(1) and 45 of the Act.*

## Rule 4(1)

4(1) Where a police officer in uniform has reasonable cause to suspect that a person driving or attempting to drive or who is in charge of a motor vehicle on road or other public place –

- a. Has committed a traffic offence whilst the vehicle was in motion; or
  - b. Appears to have consumed alcohol, or is likely to have alcohol in his body, the police officer may require the person to provide a specimen of breath for a breath test.
5. The petitioners claim that since late December 2013, the respondents have been enforcing the **Rules** in a manner that adversely affects the rights and fundamental freedoms of the petitioners' and other people who consume alcohol for entertainment and social purposes. They claim that the **Rules** violate of right to dignity and fair trial, freedom of movement, right to privacy and right to property. They also claim that the **Rules** are *ultra vires* the **Act**. The petitioners' plea to the court is to declare that the **Traffic (Breathalyser) Rules, 2011** unconstitutional.
  6. The 1<sup>st</sup> petitioner's case is outlined in the petition dated 11<sup>th</sup> February 2014 filed as **Petition No. 70 of 2014**. It is supported by the affidavit of Richard Dickson Ogendo sworn on 11th February 2014. The 2<sup>nd</sup> and 3<sup>rd</sup> petitioners have filed the petition dated 28<sup>th</sup> February 2014 filed as **Petition No. 92 of 2014**. It is supported by several affidavits; the affidavits of Kariuki Ruitha sworn on 28th February 2014 and his further affidavit sworn on 14th April 2014, the affidavits of affected persons Gerald Karanja, Maria Mbeneka, James Karoki, Mary Korobia and Timothy Njuguna Gitonga all sworn on 11th April 2014. The petitioners have also filed the written submissions.
  7. All the respondents took a common position in opposing the petitions. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents opposed the petition through the affidavit and further affidavit sworn on 7<sup>th</sup> March and 26<sup>th</sup> March 2014 respectively by Nduva Muli, the Principal Secretary Ministry of Roads and Transport. They also relied on the affidavit of Samuel Kimaru, the Traffic Commandant of the Kenya National Police Service. The Director of Public Prosecutions relied on the affidavit sworn on 26<sup>th</sup> March 2014 by SSP Charles Leotany, the officer in charge of Highway Patrol and overall overseer of the enforcement of the **Rules**. The National Transport Safety Authority opposed the petition through the affidavit and further affidavit sworn on 3<sup>rd</sup> March and 4<sup>th</sup> April 2014 respectively by its Director General, Francis M. Meja.
  8. This matter concerns whether or not legislation and regulations made thereunder are unconstitutional. In determining this issue, the Court begins from the premise that the legislation and regulations are constitutional and that the petitioners bear the burden of establishing that the Constitution has been violated (see **Ndyanabo v Attorney General [2001] EA 495**). In order to determine the constitutionality of legislation, its overall object and purpose must also be considered. This principle was clearly enunciated in the Canadian case of **The Queen v Big M Drug Mart Ltd [1985] 1 S.C.R. 295** where the Supreme Court stated that, "[t]he initial test of constitutionality must be whether or not the legislation's purpose is valid; the legislation's effects need only be considered when the law under review has passed the purpose test. The effects test can never be relied on to save legislation with an invalid purpose." (see **Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011, Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011, Hon. Chirau Ali Mwakwere v Robert Mabera & 4 others, Nairobi Petition No. 6 of 2012**).
  9. As I stated in the opening paragraph of the judgment, the salutary object of the **Rules** is not in dispute. The object of the **Rules** falls within the State's obligation to protect life and property from preventable accidents caused by persons driving under the influence of alcohol. The fundamental premise of the petitioner's case is that the **Rules** have no legal foundation and as a result they violate their fundamental rights and freedoms.

10. The issues raised in the petitions are largely matters of law and having considered the pleadings and depositions before the Court, the following issues call for determination;

- a. Whether the Minister has power to make the **Rules** under the **Traffic Act**.
- b. Whether the Minister can create a new offence under the **Rules** and whether the **Rules** create a new offence.
- c. The **Rules** were enacted without public participation and whether they should have been laid before the National Assembly.
- d. Whether the enforcement of the **Rules** violate the petitioners' fundamental rights and freedoms.

**Whether the Minister has power to make Rules?**

11. The petitioners' contention is that the Minister does not have the power to prescribe new offences, define or redefine new and or existing offences. Mr Mungai, counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners, argued that under **Article 94(5)** of the Constitution, only Parliament has the power to make provisions having the force of law. He contended that **section 119(1)(na)** of the **Act** only empowers the Minister to prescribe prohibited limits of alcohol consumption which makes a motorists liable for prosecution of an offence under **section 44** of the **Act**. Counsel submitted that in enacting the **Rules**, the Minister exceeded his powers and usurped the constitutional authority of Parliament by enacting an offence under **Rule 3**. He further submitted that under the provisions of **Article 50(2)(n)** of the Constitution, no person can be punished in Kenya for an offence unless Parliament has defined such an act to be an offence and prescribed a punishment for it.

12. In response, Mr Njoroge, learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents case, submitted that under **section 119(1)(na)**, the Minister has powers to enact measures for enforcing the provisions of **section 44(1)** and **45** of the **Act** including prescribing limits of alcohol and drugs concentration. Counsel also submitted that taking measures includes making regulations to give effect to the statute. He further submitted that the Minister was empowered to make the **Rules** and prescribe the limits of alcohol concentration and the means of ascertaining such a limit through means such as the use of the breathalyser.

13. The legislative authority of the State is vested in Parliament. **Article 94(1)** and **(5)** of the Constitution provides as follows;

*94. (1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.*

*(5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.*

14. The meaning of **Article 94(5)** of the Constitution is that only other persons or bodies authorised by the Constitution or by legislation may enact provisions that have the force of law in Kenya. **Article 94(5)** empowers the Parliament to delegate authority to make provisions having the force of law by legislation. The **Traffic Act** is one such statute that empowers the Minister to promulgate rules and regulations having the force of law. **Section 119** of the **Act** empowers the Minister to make rules concerning several matters including under **section 119(1)(na)** under which the Minister may prescribe, "*Measures for enforcing the provisions of Section 44(1) and 45 which shall include prescribed limits of alcohol and drugs concentration, provisions of specimens for analysis, choice of the tests and devices and the protection of persons under treatment*"

15. The meaning of **section 119(1)(na)** of the **Act** is that the Minister shall take the necessary steps to implement the provisions of **sections 44(1)** and **45** of the **Act** which shall include prescribing the limits of alcohol and drugs concentration. It empowers the Minister to choose tests and devices which are necessary to determine the limit of drug and alcohol concentration. I therefore find and hold that the **Traffic (Breathalyser) Rules 2011**, were properly made pursuant to the powers conferred on the Minister under **section 119(1)(na)** of the **Traffic Act**.

16. Under **Article 94(5)** of the Constitution, the legislature has wide latitude in empowering any person or body to make provisions having the force of law including prescribing offences. I do not read any limitation in **Article 94(5)** to exclude the power of the legislature to delegate the power to prescribe penalties for infraction of rules and regulation made under delegated authority or to impose any limitation it deems necessary for the exercise of such power. **Section 119(1)(q)** of the **Act** empowers the Minister to prescribe;

*(q) the penalties which may be imposed for the breach of such rules not exceeding—*

*(i) in the case of a first conviction, a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding two years or both;*

*(ii) in the case of a second or subsequent conviction, a fine not exceeding four hundred thousand shillings or imprisonment for a term not exceeding four years or both.*

17. I therefore find and hold that Parliament has set out the scope of penalties for violation of rules and regulations made under the **Act**. The trial of any person for an offence under rules and regulations under the **Act** does not amount to violation of **Article 50(2)(n)** of the **Constitution**.

### **Whether Rules create a new offence**

18. Having found that the Minister has powers to enact the **Rules** and prescribe penalties for breach of the **Rules**, I must then determine whether the **Rules** are in tandem with **sections 44(1)** and **45** of the **Act** and whether a new offence is created by the **Rules** as contended by the petitioners.

19. Mr Mungai submitted that the **Rules** are inconsistent with **sections 44** and **45** of the **Act**. The petitioners' argument is grounded in **section 31(1)(b)** of the **Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya)** which provides that, "*no subsidiary legislation shall be inconsistent with the provisions of the Act.*" The petitioners case is that in making the **Rules**, the Minister seems to have assumed unlimited powers to, "*prescribe measures for enforcing the provisions of section 44(1) and 45 of the Act*" without regard to the fact that such measures must be consistent with the **Act**.

20. Counsel asserted that the definition of '*driving under the influence*' in the **Rules** is inconsistent with the definition of the same offence under **section 44(1)** of the **Act**. He argued the **Rules** create the offence of '*drunk driving*' contrary to the one the offence of '*driving under the influence of alcohol*' created under **section 44(1)** of the **Act** and that **section 44(1)** and **45** of the **Act** does not empower the Minister to create the offence of '*Alcohol prohibition*' which is what he contends is the meaning of **Rule 3(1)**. Counsel argued that a breath test can only be required of a person who is reasonably suspected of having committed a traffic offence whilst the vehicle was in motion and the Minister cannot prescribe the limit of alcohol without reference to driving in the **Rule** is inconsistent with the **Act**.

21. Mr Njoroge rebuffed this argument by stating that the **Act** prohibits driving under the influence of drink under **sections 44, 45** and **85** of the **Act** and while **Rule 3** refers to driving while having consumed alcohol beyond the prescribed limit. He further argued that the meaning of "*driving under the influence*" includes "*drunk driving*" "*driving under the influence of an alcoholic drink or drug*" or "*driving to an extent as to be incapable of having proper control of the vehicle*" which are the terms referred to in the **Act**.

22. That subsidiary legislation ought to be consistent with the provisions of the parent Act is beyond argument. In order to determine whether the Minister has created new offences in **Rule 3** and **4**, thus causing inconsistencies between subsidiary legislation and the **Act**, the starting point of the consideration is **section 44(1)** and **45** of the **Act**.

23. The petitioners contend that the **Rules** create the offence of "*Alcohol prohibition*" which outlaws

taking of alcohol beyond a certain limit under all the circumstances. I do not agree with this argument. Looking at the provisions of **sections 44 and 85** of the **Act**, the key phrase used is, “is under the influence of a drink or a drug.” In the interpretation section of the impugned **Rules** “driving under the influence of a drink” has been described at **Rule 2** as follows, “Driving under the influence means driving while intoxicated, drunk driving, drinking and driving or the act of operating or taking control of a motor vehicle after having consumed alcohol, or other drugs or to a degree beyond the prescribed limit” while “Drunk driving” means driving, operating, attempting to operate or taking control of a motor vehicle while under the influence of an alcoholic drink or drug to such an extent as to be incapable of having proper control of the vehicle.”

24. While the **Act** does not define driving under influence of drink, **sections 44 and 45** of the **Act** makes it illegal to operate a vehicle under the influence of alcohol to an extent as to be incapable of having control. While the lack of control of the vehicle may be evident, there has not been a means of determining whether a motorist is under the influence of alcohol. The breathalyser is a means of determining the intoxication levels of a motorist and the Minister under **section 119(1) (na)** of the **Act** is empowered to make rules for enforcing the **Act**. The terms “Driving under the influence” and “Drunk driving” are therefore in relation to the prescribed alcohol limits under the **Rules** and are in relation to driving or attempting to drive a motor vehicle.
25. Furthermore **Rule 3(1)** cannot be read in isolation as the petitioners’ attempt to do so as to give it the effect of a general alcohol prohibition. The offence referred to in **Rule 3(2)** is by reference to **section 44(1) and 45** of the **Act**. It is not a new and independent offence but a means of measuring blood alcohol concentration in the body to satisfy the first limb of the offence under **section 44(1)** of the **Act**, that of being under influence under drink. In other words, the **Rules** do not criminalize the mere having of blood alcohol beyond the prescribed limit but that having that alcohol beyond the prescribed limit must result in the offences disclosed under the **Act**.
26. A motorist would therefore commit an offence under **sections 44(1) and 85** of the **Act** if the motorist has alcohol in his body beyond the prescribed limit and is operating a motor vehicle to the extent as to be incapable of having proper control of the vehicle. To determine therefore whether a motorist is having alcohol in his body and whether he is under the influence of alcohol, the police must resort to administering a breath-test which under **Rule 2** means; “a test for the purpose of obtaining an indication of the proportion of alcohol in a person's breath carried out by a breathalyser.”
27. I therefore find and hold that the **Rules** have not created a new offence known as ‘alcohol prohibition’ or ‘drunk driving’ as contended by the petitioners. In my view, the **Rules** have been enacted, and are being enforced in order to give effect to the provisions of **sections 44(1) and 45** of the **Act**. As I have stated above, the Minister for has power under **section 119** of the **Act** to make rules to give effect to the provisions of the **Act**.

### **Whether the Rules were enacted without public participation**

28. The 1<sup>st</sup> petitioner attacked the **Rules** on the ground that there was no public participation in their enactment. The petitioners’ argument on this issue is two-fold. That there was lack of public participation in preparation of the **Rules** and lack of public participation through involvement of the legislature.
29. One of the cardinal principles running through the Constitution is the articulation of the principle of public participation of the people at both national and county levels. The importance of public participation was considered by Lenaola J., in **Nairobi Metropolitan PSVs SACCO Ltd and 25 Others v County of Nairobi Government and 3 Others Nairobi Petition No. 486 of 2013 [2014]eKLR** in the following words, “The issue raised by the Petitioners as to whether they were involved in the enactment of the impugned legislation are not idle. I say so because the Constitution has established a state in which the Constitution is the supreme law and is binding upon the legislature, the executive and all organs of the State. The Preamble of the Constitution

sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at **Article 10(1)** of the Constitution by making it clear that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. **Article 10(2)** of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement. Consistent with this, **Article 174 (c)** of the Constitution provides for the principles of devolved government and has given powers to the people to enhance self-governance and enhance their participation in decisions that affect them.” I agree with the Learned Judge.

30. The 1<sup>st</sup> petitioner’s counsel, Mr Imanyara, submitted that the draft rules were not tabled before the National Assembly and that the **Rules** have never been tabled before the National Assembly without unreasonable delay as required by **section 34** of the **Interpretation and General Provisions Act**. He argued that under **Article 94(2)** of the Constitution Parliament manifests the will of the people and exercises their sovereignty and that failure to table the **Rules** before the National Assembly negates the participation of the people as required by the **Article 10** of the Constitution. He submitted that the **Rules** violate the **Statutory Instruments Act, 2013**.
31. The respondents submitted that while **section 34** of the **Interpretation and the General Provisions Act (Chapter 2 of the Laws of Kenya)** requires that rules and regulations be laid before the National Assembly without unreasonable delay, it was a common practice for rules and regulations to be published in the Kenya Gazette without being tabled before Parliament. The respondents relied on the case of **Pastor James Jessie Gitahi & 202 Others v Attorney General Petition No. 683 of 2009 [2013]eKLR** where the Court approved the reasoning of the Court in **Republic v Wilfred Onyango Nganyi and Another, Nairobi Criminal Appeal No. 96 of 2005 [2008]eKLR** where the Court held that ministerial instruments are not necessarily void for failure to be laid before the National Assembly. In the case of **Republic v Wilfred Onyango Nganyi and Another, Nairobi Criminal Appeal No. 96 of 2005 (Unreported)** Ojwang’ J., (as he then was) observed as follows; “I was not convinced that if ministerial instruments are not laid before the National Assembly they become utterly void. It is clear at the very least, that all things done under such rules will not become void, even if the National Assembly were to revoke the rules in question. General national practice is a highly relevant consideration in such a matter. If it were to be found that routinely, the Executive rarely lays regulations before Parliament, and Parliament itself does not regularly call upon Ministers to comply with the requirement, so that large amounts of ministerial rule-making has gone on without Parliament raising a finger, then the Court would have to take judicial notice of that practice. Although in the present matter, there was no positive evidence that Legal Notice No. 161 of 2003 had been or had not been laid before the National Assembly, the appearances are that it was not laid. Yet much activity on the ground has taken place, during times when the National Assembly has indeed been in session; and yet the point has, apparently, never once been raised at that forum. I think the practical judicial attitude in such a situation is to look to fundamental issues only.” (See also **Michael Mutua Ndunda and another v Attorney General & 3 Others, Nairobi Petition 226 of 2011, Republic v The Minister for Transport & Communications and others, ex parte Gabriel Limion Kaurai, Nairobi High Court Misc. Application No. 109 of 2004, Yuasa International Limited v Kenya Bureau of Standards Msa Petition No. 10 of 2011 [2012]eKLR**).
32. The legal environment concerning subsidiary legislation has been altered by **section 3** of the **Statutory Instruments Act, 2013** which applies to every statutory instrument made directly or indirectly under any Act of Parliament or other written legislation. **Section 27** of the **Act** repeals **sections 27 and 34** of the **Interpretation and General Provisions Act** which was relied upon in the cases cited by the respondents.
33. The issue for determination is whether the provisions of the **Statutory Instruments Act**, 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.*

34. In ***Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 others v Cabinet Secretary For Transport & Infrastructure & 5 others*** Nairobi HC Misc. JR No. 2 of 2014 [2014] eKLR Odunga J., held that failure to comply with **section 11** of the Act renders the rules and regulations null and void and the Court has no choice but to effect the legislative imperative and to declare that the regulations are null and void.

35. The situation in this case is somewhat different; the **Rules** were made on 27<sup>th</sup> September 2011. The **Statutory Instruments Act, 2013** came into force on 25<sup>th</sup> January 2013. **Section 27** of the Act dealing with transition and savings provide as follows;

*27(1) Sections 27 and 34 of the Interpretation and General Provisions Act are hereby repealed.*

*(2) Despite the provisions of subsection (1), any regulations, order or notice issued immediately before the commencement of this Act shall continue in force as it were made under this Act unless it is expressly revoked by an Act of Parliament under which it is made.*  
[Emphasis mine]

36. **Section 27** of the **Statutory Instruments Act** therefore preserves existing subsidiary legislation passed before the Act came into force which may not have been compliant with **section 34** of the **Interpretation and General Provisions Act**. In the circumstances this ground fails.

37. The next issue is whether there was public participation in enacting the **Rules**. Nduva Muli and Francis Meja, in their affidavits have explained the process leading to the enactment of the **Rules**. That there was a stakeholder consultative workshop convened by the 2<sup>nd</sup> respondent in December 2008 in a bid to develop standards and specifications of the Passive Alcohol Sensors. That workshop was concluded by mandating a taskforce that would research, recommend and report back its findings to the stakeholders forum. The stakeholders were from the Traffic Police, Kenya Bus Service, Kenya Bureau of Standards, Kenya Medical Association and NACADA. The Task Force completed its work in November 2009 and forwarded its report to the Minister who held a meeting with representatives of the stakeholders. The report and recommendations of the Task Force were then subjected to a stakeholder's validation workshop June 2010 and thereafter submitted to the Attorney General.

38. Sachs J., in **Minister of Health v New Clicks South Africa (PTY) Ltd (2006) (2) SA 311** stated that, "*The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue*

and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.” The **Statutory Instruments Act, 2013** now has provisions for public participation through consultation. **Section 5** of thereof provides as follows;

5(2) *In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—*

- a. *drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and*
- b. *ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.*

39. The task of the Minister under the **Traffic Act** was to adopt a tool to measure alcohol content as a means of enforcing the provisions of **sections 44 and 45** of the **Act**. The issue, as I have demonstrated, was not one of creating a new offence or a new set of laws that would change the tenor of the **Act**, it was dealing with a technical matter. The evidence demonstrates experts contemplated in **section 5(2)(a)** of the **Statutory Instruments Act** were involved in the identifying a means to enforce the legislative provisions. However, it is clear that a cross-section of the public was not represented in the preparation or promulgation of the **Rules**. Although the **Statutory Instruments Act** was not applicable, it is reflective of the kind of public participation contemplated in future. What is clear from the **Act** is that it does not provide a consequence for lack of public participation because ultimately the legislature, as the representatives of the people will decide whether the statutory instrument is accepted or rejected in accordance with **section 11** of the **Act**.

40. Should the **Rules** be invalidated because one aspect of public participation has not been achieved? I think not. The Court is obliged to look at the entire process of law making, assess both the quantitative and qualitative aspects of public participation and determine whether the legislation should be invalidated on that account. And as I have stated the matter for consideration was a technical matter of how to implement already existing legislation by introducing blood alcohol limits and how to effect measurement. The **Statutory Instruments Act** does not require that subsidiary legislation be annulled on that account as it requires the instruments that have not been tabled before Parliament. However, the respondents have given evidence of how the regulations were validated at a workshop of stakeholders. Although they did not give the scope and nature of public participation, I am inclined to take the position taken by Emukule J., in **John Muraya Mwangi & 495 others & 6 others v Minister for State for Provincial Administration & Internal Security & 4 others Nakuru Petition No. 3 of 2011 [2014 eKLR** where he stated that, “*Similarly the court cannot say with certainty that there was comprehensive consultation in the passage of the new Regulations. It cannot also say that there was no consultation. The benefit of doubt will therefore go to the purpose of the legislation to regulate the manufacture and sale of alcoholic drinks, and to protect consumers, and especially the children.*”

41. In this case I decline to invalidate the **Rules** on account of lack of public participation on the ground that I am also required to give effect to other values of equal importance like good governance and the need to the human rights of others particularly those who are at risk of loss of life and property through road carnage arising from drunk driving.

### **Whether the Rules violate fundamental rights and freedoms**

42. I now turn to consider whether the **Rules** contravene fundamental rights and freedoms of the individual. The petitioners contend that their rights to dignity protected under **Article 28**, privacy under **Article 31**, to a fair trial under **Article 50** and to equality and non-discrimination under **Article 27** of the Constitution are violated.

43. Mr Mungai submitted that the enactment and application of the law must be consistent with the

Constitution and that for fundamental rights to be limited, such limitations must comply with **Article 24** of the Constitution. **Article 24** provides that such a limitation must be by law and is only valid to the extent that it is reasonable and justifiable in an open and democratic society based in human dignity, equality and freedom and taking into account relevant factor including the following; the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation and 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.

### ***Right to dignity***

44. Right to human dignity is provided for under **Article 28** of the Constitution as follows; “*Every person has inherent dignity and the right to have that dignity respected.*” The petitioners allege that in a democratic society like ours, the police cannot act in manner that violates human dignity. Mr Mungai submitted that the police do not have the power to erect road blocks five metres to one kilometre from a motorists home and claim that the motorist is too intoxicated to drive home safely. Counsel suggested that the police cannot erect road blocks within the vicinity of entertainment places licensed to sell alcohol where they stop every motorist to administer the breath test and determine how much alcohol they may have consumed.
45. Right to dignity is an interpretive principle to assist the further explication of the catalogue of rights and all rights have come to be seen as best interpreted through the lens of right to dignity (see ***Dawood v Minister of Home Affairs [2000] (3) SA 936(CC)***). In my view, enforcement of the law that meets constitutional muster may lead to inconvenience but that by that fact alone is not a violation of a person’s right to human dignity.
46. As the issue of road blocks has been raised as a matter of violation of dignity, I will now consider whether the imposition of road blocks violates the law. The petitioner’s case is that the law does not permit the police to erect road blocks unless they are gazetted under **section 65** of the ***National Police Service Act***. The respondents submit that **section 69A** of the ***Act*** and **section 65** of the ***National Police Service Act*** allow the Inspector General of Police or the officer in charge of a police station to erect road blocks/barriers along any public road for purposes of maintenance and preservation of law and order or for the prevention or detection of any offence.
47. **Section 69A** of the ***Act*** provides for the mounting of roadblocks as follows;
- (1) The Inspector General of Police may, by notice in the Gazette designate a place along a public road on which a police roadblock may be mounted.*
- (2) A roadblock shall not be mounted in a place other than the place designated under subsection (1), but may be mounted in a non-designated place only in exceptional circumstances certified as such by the Inspector-General or by an officer authorised on that behalf by the Inspector-General.*
48. **Section 60** of the ***National Police Service Act*** provides as follows;
- 60(1) Notwithstanding the provisions of any other law, any Gazetted officer or inspector or any police officer in charge of a police station may, if he or she considers it necessary to do so for the maintenance and preservation of law and order or for the prevention or detection of any offence, order an officer to erect or place barriers in or across any road or street or in any public place.*
3. *A police officer in uniform may take all reasonable steps to prevent any vehicle from being driven past any barrier, erected pursuant to subsection (1) and a driver who fails to comply with any reasonable signal given by a police officer in uniform requiring the driver to stop the vehicle before the barrier, commits an offence and is liable on conviction to imprisonment for a term not exceeding twelve months or to a fine not exceeding one hundred thousand shillings or to both.*

4. *The head of the Kenya Police Service in the County shall maintain records of all barriers erected under subsection (1) and the reasons therefor in their respective county and submit these to the respective community policing association.*
5. *The records referred in subsection (3) shall state the reasons for laying the barriers and shall be open for inspection by authorized persons.*
6. *The Inspector-General shall issue guidelines on erection of barriers.*
7. *Members of the public may lodge complaints about the barriers with the County Commander or the Authority.*

49. A reading of the provisions under the **Traffic Act** and the **National Police Service Act** reveals that it is not mandatory for the Inspector-General to gazette roadblocks along a public road. The gazettment is discretionary. It gives powers to Inspector-General or an officer authorised on his behalf to designate roadblocks in an ungazetted places in exceptional circumstances. It is upon the Inspector-General or that officer to determine whether such exceptional circumstances exist or not.

50. It must be recalled that the duty of the National Police Service is to *inter alia*, to detect crime and the provisions recognise that there may well be circumstances where road blocks are necessary. The road block must then be justified on the ground of “*exceptional circumstances.*” In this case, there is no allegation that a specific road block in a specific location was in violation of the law. In such circumstances, the police would have been called upon to justify their action regarding the specific road block. The **National Police Service Act** also provides for a means to complain about unnecessary roadblocks.

51. The petitioners have therefore not established that their right to dignity has been violated in this respect.

### ***Right to Privacy***

52. The petitioners case that the **Rules** violate motorists’ right of privacy. **Article 31** of the Constitution deals with the right to privacy. It states that;

*Every person has the right to privacy, which includes the right not to have-*

*(a) their person, home or property searched;*

*(b) their possessions seized;*

*(c) Information relating to their family or private affairs unnecessarily required or revealed; or*

*(d) the privacy of their communication infringed”*

53. the Petitioners Submitted That The Rules Are Unconstitutional Because They Permit The Police To Demand Random, Arbitrary And Suspicion Less Breath Tests By Motorists To Confirm They Have Consumed Alcohol Beyond The Prescribed Limit. Mr Mungai Cited The Case Of Craig Petersen V City Of Mesa 63 P.3d 309 (Ariz. Ct. App. 2003) Where The Arizona Supreme Court Held That Court The Conducting Or Random Drug Tests Among Firefighters Was Unconstitutional In The Absence Of Any Basis For Suspicion.

54. Mr Njoroge submits that the search is neither arbitrary nor random as to constitute a violation of the right to privacy. He submits that the under **Rule 4(1)** one is only required to provide a specimen if there is reasonable cause to suspect that the person has committed an offence. He buttressed his argument that a breatherlyser test cannot be conducted unless a driver stops when ordered to do so by a uniformed police officer under the **section 52** of the **Act** provides that a driver shall at all times stop his vehicle when required to do so by a police officer in uniform.

55. Mr Agwara, counsel for the 5<sup>th</sup> respondent, submitted that it is only upon reasonable suspicion of drunk driving that the police can administer a Breathalyzer test. He also referred to **Rule 5** which refers the Breathalyzer test as preliminary to allow the police officer to make a decision whether or not the driver suspected of drunk driving should be taken off the road or arrested.
56. The right to privacy is not unlimited and may be limited provided such limitation complies with **Article 24** of the Constitution. Driving is a regulated activity and the purpose of **Rule 4(1)** is to prevent persons who are drunk from driving in order to protect other road users and the public. The requirement that a motorist who is reasonably suspected of being under the influence of alcohol is stopped and required to undergo a test is a reasonable and justifiable limitation to the right to privacy protected under **Article 31** of the Constitution. *In Michigan Department of Police v Sitz 446 US 44 (1990), the United States Supreme Court considered whether the highway sobriety checkpoints were in violation of the Fourth Amendment which prohibits arbitrary searches. The Court stated, "In sum, the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the Fourth Amendment."*
57. The 2<sup>nd</sup> petitioner and parties affected claim that motorists are being prosecuted under **section 44(1)** of the **Act** in the absence of reasonable grounds to suspect that they had lost control of their motor vehicles at the point of arrest. In such circumstances, counsel submits that a fair hearing is not possible and a high number of guilty pleas is a testament to a failure of justice. Mr Mungai suggested that prosecutions under the **Rules** are based on a lower standard than that set out in the Constitution, the **Criminal Procedure Code** and the **Traffic Act**.
58. I reject this submission as this court is neither hearing appeals nor conducting a review of cases where persons have been convicted under the **Act**. What is clear, as I have stated above is that there must be a reasonable basis for suspicion before a specimen is taken. Whether there is a breach of this provision is a matter to be taken up before the trial court to deal with on a case by case basis.
59. The petitioners have complained that the media have been invited to certain location where people are being arrested on account of drunk driving thereby violating the right to privacy. As I understand, the right to privacy was violated the events leading to arrest were published in local newspapers and other media. In my view, the right to privacy is violated by the person who published the story and the petitioners or persons aggrieved must look to them for relief of such breach.

### ***Right to fair trial and self-incrimination***

60. The petitioners contend that the **Rules** are unconstitutional as they violate the tenets of a fair trial on the ground that the giving of the sample for the breath test amounts to self-incrimination and thus violates the constitutional requirement that an accused person shall not incriminate himself as provided for under **Article 49(d)** of the Constitution which provides that, "*A person arrested has the right not be compelled to make any confession or admission that could be used in evidence against the person.*"
61. Mr Imanyara submitted that the very definition of Breathalyzer under **Rule 2** betrays the very fact of violation of the Constitution. The rule states that it is a device "*for measuring the proportion of alcohol in a person's blood from a specimen of breath provided by the person*" and the fact that the **Rules** make it an offence to fail to supply a specimen and fail to submit to a breathalyzer test violates the right not be compelled to make a confession. He further submitted that the **Rules** violate a person's right to remain silent during the trial guaranteed in **Article 50(2)(i)** of the Constitution.

62. To my mind the, the privilege of an accused person not to incriminate himself, protects against

compulsory oral examination for the purposes of extorting unwilling confessions or declarations implicating the accused in the commission of the crime. The purpose of protection against self-incrimination was summed up by the US Supreme Court in ***Miranda v Arizona* 384 US 436 (1996)** where it observed as follows; *“All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect of a government, state or federal, must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance, to require the government to shoulder the entire load' to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth”.*

63. The breathalyzer test is not an admission or a confession contemplated under **Article 49(1)(d)** of the Constitution. Further, **Article 49(1)** of the Constitution only applies when one is under arrest. The breathalyzer is a tool for taking evidence of the alcohol blood content. It is no different from taking a photograph of person or of an accident scene or of fingerprints or handwriting samples. In ***Schmerber v California*, 384 U.S 757 (1966)** the United States Supreme held that the compulsory taking of blood for analysis of its alcohol and its use in evidence did not violate the defendants privilege against self-incrimination. The issue has been considered in other jurisdictions. In ***Commonwealth v Kevin T. Brennan, Floyd W. Knockel* 386 Mass. 722** the court stated as follows; *“With respect to the breathalyser test, we see no distinction between this type of test and the blood test involved in the Schmerber case. A breathalyser test is no more communicative or testimonial than a blood test, and it is certainly a less intrusive method of obtaining evidence. The fact that the breathalyser test acquires a greater degree of participation is not a distinguishing factor as suggested .... Numerous cases from other jurisdictions have also concluded that a breathalyser test does not produce evidence of a testimonial nature. Accordingly, we submit that the protections afforded by the Fifth Amendment are not available to an accused who submits to a breathalyser test.”*

64. The use of the breathalyzer does not impair or affect the right to remain silent at the trial. At the end of the day and in order to secure a conviction, the prosecution has to prove the offence of driving under the influence of alcohol to the extent that the person is unable to control the vehicle beyond reasonable doubt.

### ***Right to property***

65. The 2<sup>nd</sup> petitioner owns a business that sells alcohol for pleasure and entertainment. He claims that the enforcement of the **Rules** affected his business negatively. He alleges that his property rights protected by **Article 40** of the Constitution have been violated as he has lost customers who have turned away from alcohol as a result of enforcement of the law. The respondents on the other hand contend that the right to property is not absolute and that it may be limited in terms of **Article 24**.

66. **Article 40** of the Constitution protects the person from arbitrary deprivation of property. The petitioner has not shown how his right to protection has been arbitrarily taken away. In any case, the law does not prevent people from drinking alcohol at places of their choice but driving when drunk.

### **Conclusion**

67. Before I conclude, the 1<sup>st</sup> petitioner, in its submissions, raised the issue that the Breathalyzer kit is unhygienic and that it exposes the public to certain health risks. The interested party who is the supplier of the equipment denied this assertion. I find that there was no evidence presented by the 1<sup>st</sup> petitioner to the court to make any conclusion on the matter.

68. In summary I have made the following finding on the issues framed;

a. ***Whether the Minister has powers to make the Rules under the Traffic Act.***

**Article 94(5)** of the Constitution empowers the Parliament to delegate authority to make provisions having the force of law by legislation. The ***Traffic Act*** is one such statute that empowers the Minister to promulgate rules and regulations having the force of law. **Section 119** of the ***Act*** empowers the Minister to make rules concerning several matters including measures for enforcing the provisions of **sections 44(1)** and **45** of the ***Act***.

b. ***Whether the Rules create a new offence.***

**Rule 3(1)** is not an independent offence and must be read with **Rule (3)(2)** which provides the basis for the application for the alcohol limit in **sections 44(1)** and **45** of the ***Act***. The ***Rules*** are part of the measures enacted to give effect to and enforce the provisions of **sections 44(1)** and **45** of the ***Act***.

c. ***The Rules were enacted without public participation and whether they should have been laid before the National Assembly.***

**Section 27** of the ***Statutory Instruments Act*** which requires subsidiary legislation to be laid before Parliament preserves existing subsidiary legislation which may not be compliant with **section 11** of the ***Act*** as such the ***Rules*** are not invalid. The ***Rules***, being of a technical nature, were subjected to one aspect of public participation, that is, consultation with experts however there is no evidence of wider consultations. However, taking into account the facts and circumstances of the case, the court declines to invalidate the ***Rules***.

d. ***Whether the enforcement of the Rules violate the petitioners' fundamental rights and freedoms.***

The Rules do not violate the right to privacy, the right to dignity, the right to protection of property.

**Disposition**

69. In light of my finding the petition is dismissed but with no order as to costs.

70. I thank the parties for the submissions and if I did not cite all the authorities and all the arguments, it is not because they were not useful.

**SIGNED BY**

**D. S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 9<sup>th</sup> JUNE 2014.**

**MUMBI NGUGI**

**JUDGE**

Mr Mungai instructed by Kinoti and Kibe Advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners.

Mr Njoroge with him Ms Ndirangu instructed by the State Law Office for the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

Mr Okello instructed by the Directorate of Public Prosecutions for the 3<sup>rd</sup> respondent.

Mr Agwara instructed by Prof. Albert Mumma and Company Advocates for the 5<sup>th</sup> respondent.

Mr Sifuma instructed by Nyachae and Ashitiva Advocates for the interested party.