



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**MISC. CRIMINAL APPLICATION NO. E018 OF 2026**

**IN THE MATTER OF CHAPTER 4 AND ARTICLES 20, 22, 23(1), 27 (I),  
29(a) AND 49 (I) (h) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 123 OF THE CRIMINAL PROCEDURE**

**CODE, CHAPTER 75 LAWS OF KENYA**

**BETWEEN**

**DANDORA MILLERS LIMITED.....APPLICANT**

**VERSUS**

**(ODPP) BUSIA .....1<sup>ST</sup> RESPONDENT**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY .....INTERESTED PARTY**

**RULING**

1. Before me is a Notice of Motion Application dated 6<sup>th</sup> May 2026 filed pursuant to Sections 362 and 364 of the Criminal Procedure Code, Article 40 of the Constitution, and all other enabling provisions of the law seeking review of a sentence imposed in Busia CM Traffic Case No. MCTR/E144/2026 – Republic vs Daniel Kipchirchir Boit for purposes of satisfying itself as to the correctness, legality and propriety wherein the Applicant seeks the following relief(s);

- i. SPENT**
- ii. That this Honourable Court be pleased to call for and examine the record in Busia CM Traffic Case No. MCTR/E144/2026 – Republic vs Daniel Kipchirchir Boit for purposes of satisfying itself as to the correctness, legality and propriety of the orders issued therein.**
- iii. That this Honourable Court be pleased to revise, vary and/or set aside the order issued on 27<sup>th</sup> April 2026 by the trial court directing that Motor Vehicle Registration Number KCG 087Y/ZF4053 be released only upon payment of the full fine imposed upon the accused person.**
- iv. That this Honourable Court be pleased to order the immediate and unconditional release of Motor Vehicle Registration Number KCG 087Y/ZF4053 to the Applicant by the Respondents and the Interested Party**
- v. That in the ALTERNATIVE and without prejudice to prayer (3 AND 4 ) above, this Honourable Court be pleased to direct that Motor Vehicle Registration Number KCG 087Y/ZF4053 be offloaded to the lawful and permissible limits under the supervision of the Respondent and the Interested Party or their authorised officers. For that purpose the Applicant, be permitted to avail an alternative motor vehicle/truck at the Respondents' yard or designated place of custody to receive the excess load. Thereafter the said motor vehicle be released to the Applicant or its authorized representative(s)/nominee(s) on such terms as this Honourable Court may deem fit.**
- vi. That costs of this Application be in the cause.**

2. The Application is predicated on the Sworn Affidavit of Loice Wambui Kagiaa and on the following grounds;

- a) The order requiring payment of the fine as a condition for release of the motor vehicle amounts to punishing the Applicant who was not an accused person.
- b) The impugned order is ultra vires the powers of the trial court.
- c) The order results in double punishment, over and above the sentence already imposed upon the accused.
- d) The continued detention of the motor vehicle is unlawful and unjustified, the criminal proceedings having been concluded.
- e) The order violates the Applicant's constitutional right to property under Article 40.
- f) The Applicant is an innocent owner who was neither charged, investigated, nor called as a witness.
- g) The motor vehicle is subject to a loan facility, and continued detention is causing substantial financial prejudice.
- h) The motor vehicle was engaged in a commercial contract, and its detention exposes the Applicant to contractual breach and liability.
- i) This Honourable Court has jurisdiction to correct such illegality, impropriety and irregularity.

3. The Court had Certified the Application as Urgent, a judge matter, dispensing with service and or any further arguments and called for the lower court file for review.

## **ANALYSIS AND DETERMINATION**

4. The Applicant cannot argue innocence and would be

5. This Court's Revision Jurisdiction flows from Article 165(6) of the Constitution and Sections 362- 367 of the Criminal Procedure Code.
6. **Article 165 (6)** expressly provides that the supervisory jurisdiction of the High Court is limited to supervision of the subordinate courts, and tribunals and would only constitute evaluation to ensure the correctness, legality, or propriety of any finding, sentence, or order.
7. **Article 165(7)** of the Constitution empowers this court upon review to may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
8. **Section 362** of the Criminal Procedure Code empowers this Court to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.  
Section 364 (1) a), and b), of the Criminal Procedure Code empowers the court upon review in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence and in the case of any other order other than an order of acquittal, alter or reverse the order.
9. A plea of the guilty must be unequivocal, the facts upon which the charge is founded must be given for the accused to admit or deny the

same as was emphasized by the Court of Appeal for East Africa in the celebrated in the case of **Adan –Vs- Republic [1973] E A 447**

10. **Article 50** of the Constitution guarantees an accused person right to hearing. It provides as follows:

**“50(2) Every accused person has the right to a fair trial, which includes the right-**

**(g) to choose, and be represented by an advocate, and to be informed of this right promptly.**

**(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of his right promptly”.**

11. Section 17 of the East African Community Vehicle Load Control Act, 2016 decriminalized overloading to avert resolution of disputes through the court process and create a harmonious way of doing business hence a vehicle once determined to be overloaded was required to pay overload fees and thereafter correct the offending load before exiting the weighbridge. This was meant facilitate trade among the EAC Partner States as weighbridges were deemed to non-tariff barriers within the region. The compliant trucks could be released as soon as they complied, a process which would take an hour or days, depending on how fast the transporter moved to clear the violation. This was an

alternative to the lengthy court processes when dealing with cases of overloading.<sup>1</sup>

12. This court has time and again emphasized that, an accused be informed of this right to legal representation promptly. In the case of **Karisa Chengo v Republic Criminal Appeal 44 of 2019** of the courtheld that:-

*“the right to legal representation.....under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more”.*

13. The Applicant Dandora Millers Limited is the ‘Owner’ of Motor vehicle Registration number KCG 087Y/ZF4053 Actros in make while the convict Daniel Kipchirchir Boit whose sentence is under review was the driver and agent of the owner both falling within the meaning of transporter under the East African Community Vehicle Load Control Act, 2016.

14. On the 25<sup>th</sup> April 2026 at about 1540hrs at the Busia Weigh Bridge along Busia-Kisumu road operated by the KENHA the interested party, Daniel Kipchirchir Boit being the driver of Motor vehicle Registration number KCG 087Y/ZF4053 Actros of axle configuration of 6C drove the said motor vehicle on the aforesaid regional trunk-road having its terrier lifted thus altering the axle configuration to 5D hence a gross vehicle overload of 960kgs he was arraigned before the chief magistrate’s court on the 27<sup>th</sup> April 2026 (two days later).

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<sup>1</sup> Para 29 and 30 Public Petitions Committee Report on Consideration of Public Petition No. 41 of 2023 Regarding Punitive Charges Levied by The Kenya National Highways Authority, By Hon. Francis Nguga, MC

15. He was arraigned and charged while being unrepresented by counsel with contravention of section 20 (1) I as read together with section 21 (1) East African Community Vehicle Load Control Act, 2016 of operating the motor vehicle on a public road with other mechanism in the vehicle that affect the weight of that motor vehicle.
16. He pleaded Guilty, the Prosecutor was invited to provide the fact and in response he indicated “facts as per the charge-sheet”, the prosecutor proceeded to produce photographs of the motor vehicle marked as exhibits 1A’, B’, C’, D’ E’ F’ and H’ together with a certificate accompanying the same. The was accused was never invited to confirm or deny whether the facts were true.
17. The Prosecutor further indicated to the court that, the accused had paid a fine of ksh 62,000/-.
18. The accused was invited to offer mitigation of which he stated;  
*“I pray for leniency, the sensor of the Alarm failed. I paid a fine of kshs 62,000- I pray for leniency”*
19. The Court proceeded to sentence the accused as follows;  
*“I have considered the accused’s mitigation; the accused is fined kshs equivalent USD 15,000\$ less Kshs 62,000/- in default 3 years imprisonment”.*
20. Further the Court noted

*“Motor Vehicle be released to the accused upon payment of the fine”*

21. My Review reveals the following;

- a) The accused was unrepresented by an advocate.
- b) The accused was not forewarned or cautioned while pleading guilty
- c) The technologically assisted bypass Charges preferred against the accused were complex entailing a transporter having installed a by-pass equipment in the motor vehicle sending signals to the weigh bridge which equipment was manipulatable.
- d) Section 20 of the act equally anticipates illegal physical bypass by the transporter all together avoid the weigh bridge by detouring away from the weigh bridge only to rejoin the road thereafter and is without a certificate of weight.
- e) Illegal bypassing charges carry a hefty monetary fine and far reaching penal consequences owing to the avoidance of weighing or manipulation by a transporter to conceal the actual axle overweight.
- f) KENHA as a national operator is empowered by law to levy overloading fees and not impose fines.
- g) The Court was never furnished “weighing report” setting-out the overload particulars and the amount of overload fees payable,
- h) The Court was never furnished with a receipt for the alleged 62, 000/- fine paid by the accused.

- i) The overload fee payable as per schedule is USD 482.50 or an excess of 1000kgs which translates almost equivalent kshs 62,000/- allegedly termed as a fine.
- j) It remained a mystery as to why the accused was held in custody for a period of more than 24 hours whereas the court was hardly 3kilometers from the Interested Party's weight-bridge.
- k) The Prosecution never offered any aggravating circumstances.
- l) The Penalty imposed was the maximum provided for under Section 21 of the Act.
- m) The additional condition for release of the motor vehicle after only after the payment of the fine is illegal to the extent that where in default the driver concedes in serving the imprisonment term then such motor vehicle shall be detained indefinitely to the prejudice and disadvantage of the owner.
- n) It would amount to double jeopardy where the driver is serving an imprisonment sentence in default of payment of a fine and the motor vehicle is detained until payment of the same fine.

22. Disturbing or interfering with an exercise of judicial discretion is limited as was held in the case of **Ogolla S/o Owuor v R {1954} EACA 270** in holding, that:

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material

factors. for this Court to interfere it must be shown that in passing the sentence, the sentencing Court took into account an irrelevance factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.” (See also Sayeka v R {1989} KLR 306)

23. The observation by this court at paragraph 5 explicitly manifests Serious shortcomings including contravention of the constitutional right of the accused, an equivocal plea was entered, disregard of material factors by the trial court, disregard of mitigation and imposition of a maximum sentence without reason.
24. I am thus persuaded that the conviction and sentence-imposed warrant interference.
25. While it remains a fact that Motor vehicle Registration number KCG 087Y/ZF4053 was overloaded by 960kgs which overload-fee was duly paid the same shall suffice.
26. The criminal count of bypassing the weighbridge, was dead on arrival and the totality would amount to a mistrial beyond redemption.
27. This court accordingly sets-aside the conviction and sentence of Daniel Kipchirchir Boit entirely and he shall forthwith be set free to liberty unless otherwise lawfully held.

28. As for the overloaded Motor vehicle Registration number KCG 087Y/ZF4053 that has remained detained in the parking bay at the weigh bridge, it shall forth with be released to the owner or his lawful agent and no further fees shall be charged for the thirteen (13) days it has remained in detention.

29. The Owner shall be allowed to offload the excess 960kg to an alternative motor vehicle before it is released to continue to its final destination.

It is So Ordered

**Signed, Delivered Virtually on Teams platform**

**On this 8<sup>th</sup> day of May, 2026**

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**Mohochi S.M**

**JUDGE**