



REPUBLIC OF KENYA



Mombasa Water Products Ltd v Kenya National Highways Authority (Civil Appeal E056 of 2023) [2025] KECA 663 (KLR) (11 April 2025) (Judgment)

Neutral citation: [2025] KECA 663 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E056 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
APRIL 11, 2025**

BETWEEN

MOMBASA WATER PRODUCTS LTD APPELLANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY RESPONDENT

(Being an appeal from the Judgement of the High Court of Kenya at Mombasa (Mativo, J.) delivered on 9th November 2021 in Constitutional & Judicial Review Division Petition No. E037 of 2021)

JUDGMENT

1. This appeal arises from the Judgment delivered by Mativo, J. (as he then was) on 9th November 2021 in Mombasa Constitutional Petition No. E037 of 2021. The brief background giving rise to the appeal is that Mombasa Water Products Limited (the appellant) is a limited liability company registered in Kenya; and that it owned motor vehicle registration No. KBY 469R, make FAW (the motor vehicle), which it used for commercial purposes, making an average profit of Kshs.25,000 a day from two trips between Mombasa and Mariakani and elsewhere within the then Coast Province.
2. Sometime in March 2021, the appellant leased the motor vehicle to one Mr. Richard Mwambi Lundi, who failed to return it as agreed. The appellant later learnt that Kenya National Highway Authority (the respondent) had detained the motor vehicle on 18th March 2021 at Dongo Kundu weigh bridge station on the allegations that the motor vehicle had exceeded the axle load set by the respondent. The respondent condemned the appellant to pay a fine of \$1,308.05 at the rate of Kshs.109.79.
3. The appellant was aggrieved by the respondent's decision to impose a fine since it had not undergone any kind of trial, and the whole condemnation, according to it, was a nullity ab initio.
4. The appellant filed a constitutional petition dated 29th June 2021 in the High Court of Kenya at Mombasa alleging that the respondent violated its fundamental right to natural justice as it operated



what it termed as a ‘kangaroo’ court. The appellant pleaded that the respondent violated the following constitutional rights against it:

- a. Article 47 by failing to accord the appellant fair administrative action;
 - b. Article 50 by depriving the appellant its rights without following the law;
 - c. Article 10 by failing to act in a transparent and accountable manner;
 - d. Article 28 and 40 by unlawfully depriving the appellant its property and thereby denying the appellant the right to work.
5. The appellant contended that, through the respondent’s illegality, it has suffered and continues to suffer the unlawful detention of its motor vehicle; and that the detention of the motor vehicle with the building ballast caused the appellant to suffer irreparable losses by way of loss of income and credibility with its customers as it is no longer able to make firm commitments of deliveries while its vehicle is not under its control.
6. The appellant particularised the compensation it claimed from the respondent as Kshs.25,000 per day from 18th March 2021 until the date when the motor vehicle is released to the appellant, and general damages for violation of the appellant’s right and stress the respondent subjected the appellant’s directors.
7. The appellant accordingly prayed for the following reliefs:
- i. A declaration that the respondent has violated Articles 10, 28, 40, 47 and 50 of *the Constitution of Kenya 2010*;
 - ii. An order that the respondent be restrained by way of an injunction from interfering with the motor vehicle registration No. KBY 469R, make FAW;
 - iii. An order to compel the respondent to release the said motor vehicle to the appellant forthwith and unconditionally;
 - iv. Compensation for the losses the appellant has suffered as a result of the respondent’s wrongful action as set out in the body of the petition;
 - v. General damages for violation of the appellant’s fundamental rights; and
 - vi. Costs of the petition.
8. The respondent opposed the application through a preliminary objection dated 2nd August 2021 in which it raised 4 grounds as follows:
- i. That the suit has been filed without due authority from the appellant’s company;
 - ii. That there is no resolution or valid resolution of the appellant’s appointing the firm of Mutisya Mwanzia & Odeng Advocates to institute the suit on behalf of the appellant;
 - iii. That the suit is incurably defective for failure to comply with Order 4 Rule 1 (4) of the Civil Procedure Rules as the Supporting Affidavit of Joseph Mbugua Gichanga dated 29th June 2021 is not accompanied by a Board Resolution demonstrating authority to swear or file the same on behalf of the company;
 - iv. That the court lacks jurisdiction to entertain the suit as it does not comply with the mandatory provisions of Section 67 (1) of the *Kenya Roads Act, 2007* requiring a thirty (30) days’ notice to the Director General prior to filing a suit and thus fatally defective.



9. Contemporaneously, Engineer Kennedy Ndugire, the respondent's Senior Engineer, swore a replying affidavit on 13th October 2021. He deposed that operations at the weighbridge are guided by the [Traffic Act](#), Cap 403 as well as the East African Community Vehicle Load Control Act, 2016 (EACVLCA); and that the process leading to the issuance of the weighing ticket was carried out in conformity with the [Kenya Roads Act](#), Cap 408 and EACVLCA so as to ensure equality, equity and fairness in the discharge of the respondent's mandate.
10. It was stated that, pursuant to section 4(2) of the [Kenya Roads Act](#), the respondent is empowered, among other things, to ensure adherence to the rules and guidelines on axle load control prescribed under the [Traffic Act](#) and any regulations under the [Kenya Roads Act](#), as well as EACVLCA; and that, on 18th March 2021 at around 1444hrs, when at the Dongo Kundu Weighbridge along the Mariakani- Mombasa (A8) Road, the motor vehicle was weighed and found to be overloaded and was consequently detained pursuant to the First Schedule to EACVLCA.
11. The respondent deposed that, in line with the set procedure, a weight ticket number KNDKNBB20210300007286 was issued to the appellant; that the ticket showed the extent of overloading as well as the overload fees that was payable; that the suit motor vehicle was a 3-axle truck and the legal limits it should have loaded was a maximum of 26,000 Kilograms on the gross vehicle weight; that, at the time of the detention, it was carrying 28,280Kgs on the gross vehicle weight, thus exceeding by 2,280Kgs; and that there was no dispute that the motor vehicle was overloaded, and that the overload fees payable was Kshs.143,610.
12. It was deposed that, under regulation 13 (2) of the EACVLCA (Enforcement Measures) Regulations, 2018, a vehicle would be detained without charge for the first 3 days and thereafter a charge of \$50 per day becomes payable for every extra day until proof of payment of overload fees is produced; that section 15(1) (a) – (h) of EACVLCA provides a detailed procedure on what happens when an overloaded vehicle is detained pending payment of overload fees and correction of the overload through its authorised officer.
13. The respondent stated that, pursuant to section 17 (1) of EACVLCA, a weighing report is issued even in an instance where the fact of overloading is disputed; and that the transporter is still required to pay the requisite overloading fees on a 'without prejudice' basis to secure release of the vehicle, make necessary adjustments on the load and pursue an appeal against the fees as provided under section 17(4) (a) and (b) of EACVLCA.
14. The respondent further contended that the appellant failed to indicate the dispute in the weighting report as provided for under EACVLCA; and that, having failed to pay the overload fees implied that the ticket issued was not disputed; and that the appellant had failed to exhaust all the avenues of appeal provided for under EACVLCA before filing the constitutional petition in the High Court.
15. The respondent contended that the appellant had not demonstrated how it had contravened the law or violated its rights as alleged in the petition under Articles 28, 40, 47 and 50 of [the Constitution](#); that the petition did not disclose any violation of the appellant's right that could justify the orders sought; that, to the contrary, the respondent had fully complied with the provisions of EACVLCA as the appellant failed to specifically point out in the petition what part of the law it had not conformed to; that the superior court had jurisdiction to entertain the petition; and that, in any event, the petition did not raise any constitutional issues worth determination by the court.
16. It was the respondent's prayer that the petition be dismissed; the appellant be ordered to pay the overload and parking fees due to the respondent; and that it be awarded costs of the petition.



17. In rejoinder, the appellant's Managing Director, one Joseph Mbugua Gichanga, swore a supplementary affidavit on 27th October 2021. He annexed to the affidavit a board resolution for a meeting held on 25th June 2021 which authorised him to swear the affidavit and instructing the firm of Mutisya Mwanzia & Odeng Advocates to prosecute the petition on its behalf.
18. He further deposed that the respondent did not demonstrate how it complied with Articles 10, 47 and 50 of *the Constitution* as it did not serve the appellant with any notice before detaining the motor vehicle; that the respondent did not explain to the appellant that it had the right to appeal against the detention of the motor vehicle; and that it was only given a copy of the axle load control print out which, in any event, did not provide the provisions of the law under which it was issued, or the appellant's right to challenge the said notice.
19. The appellant was not particularly amused with the manner in which it was condemned to pay the subject fine and detention fees which, according to it, was done in total violation of the right to fair trial and the rules of natural justice, and in contravention to the finding in the High Court case of Chania Genesis Limited vs. Kenya National Highways Authority (KeNHA); National Transport & Safety Authority (Interested Party) [2021] eKLR)
20. Prior to determining the dispute, the learned Judge began by addressing the issues raised in the preliminary objection, being: that the petition offended Order 4 rule 1(4) of the Civil Procedure Rules for want of Board Resolution authorizing the appellant's director, Joseph Mbugua Gichanga to swear the supporting affidavit, and to appoint the appellant's firm of advocates to act for it; and that the court lacked jurisdiction to entertain the petition by dint of section 67(a) of the *Kenya Roads Act*, Cap 408, which requires a 30 days' notice to the Director General prior to filing of a suit.
21. After an analysis of each of the points of objection, the learned Judge found that the preliminary objection was legally frail and unsustainable, and it was accordingly dismissed.
22. The learned Judge went on to further make findings on whether the petition offends the doctrine of exhaustion. He referred to the provisions of section 9(2) of the Fair Administrative Act, Cap 7L (FAA) which provides in mandatory terms that the High Court or the subordinate court shall not review an administrative action or decision unless all mechanisms, including internal ones that are available for dispute resolution, and all remedies thereof available, are first exhausted; that section 9(4) of the FAA provides exception to the general rule in circumstances and on application by the applicant, and that the exemption is in the interest of justice; that where the exception to the rule applies, the applicant must demonstrate the exceptional circumstances prevailing and, secondly, that the applicant must apply the exception; and that none of these conditions applied to the petitioner. In conclusion, the Judge held that the appellant ought to have exhausted the mechanism provided for under the relevant law in pursuing a resolution of the dispute at hand, and/or in the alternative, it ought to have applied for an exception under section 9(4) of the FAA.
23. On the allegations that the impugned action of the respondent violated the various Articles of *the Constitution* cited, and the appellant's constitutionally guaranteed rights, the learned Judge examined the issue of whether the impugned decision can be read in a manner consistent with the provisions of law conferring the power to the respondent and, secondly, whether judicial oversight is necessary so as to ensure that decisions by administrative bodies are undertaken in a manner which is lawful, reasonable, rational and procedurally fair.
24. The learned Judge held that section 4 of the Roads Act and its accompanying Regulations provide that the respondent has a statutory duty to ensure adherence to the rules and guidelines on axle load control; that sections 4(1) and (2) of EACVLC provides for the permissible weight limits under the



- Second and Third Schedules respectively; that sections 5 and 6(1) of EACVLCA prohibits overloading of a vehicle on the Regional Trunk Road Network while section 6(2) of EACVLCA stipulates that an overloaded vehicle shall be liable to pay overloading fees where such overloading is detected; and that section 8(1) of EACVLCA provides that a transporter operating a vehicle with a gross weight of 3,500 Kilograms present such a vehicle to be weighted at every weighing station situated along the Regional Trunk Road Network.
25. On the enforcement process, it was held that section 15 and 15 (2) of the EACVLCA provides for the powers of an authorised officer and insulates the authorised officer from liability for any damage to, or, loss in respect of, a vehicle or its load unless it is shown that the authorised officer acted maliciously or recklessly respectively; that section 17 of EACVLCA lays down an elaborate procedure in the case of overloading of a vehicle; and that there was nothing placed before him to suggest that the processes under these provisions were not adhered to.
26. The learned Judge went on to find that the appellant’s complaint was that he was not accorded a fair hearing; that no reasons were given before the respondent reached its decision; and that Articles 10 and 50 of *the Constitution* were breached. The learned Judge observed that section 4 of the FAA which re-echoes Article 46 of *the Constitution* reiterated the entitlement every Kenyan has to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; that section 4 of the FAA obligates the administrator to accord the affected person an opportunity to attend proceedings, defend himself, cross examine the persons who give adverse evidence against him all in a bid to ensure that the person is given a fair hearing; that the person accused must be given prior notice to the hearing; and that failure to do so is itself a denial of natural justice and fairness.
27. On the claim by the appellant that it was earning Kshs.25,000 per day, it was stated that there was no proof thereof and since there was no oral evidence adduced, the same could not have succeeded. The Judge found no merit in the appellant’s petition and dismissed it with costs to the respondent.
28. In this appeal, the appellant raises 6 grounds. He faults the learned Judge for:
- a. Holding that the appellant’s petition offended the doctrine of exhaustion;
 - b. Failing to find that the axle load control print which was issued by the respondent is null and void as it does not show under which law it was issued;
 - c. Finding that the respondent’s decision to impose a fine of \$1,308.05 at Kshs.109.79 and detention of the motor vehicle complied with the procedure laid down under the law;
 - d. Failing to find that the respondent violated Articles 10, 47, and 50 of *the Constitution* in the manner in which it detained the appellant’s vehicle;
 - e. Failing to award the appellant damages; and
 - f. Dismissing the petition dated 29th June 2021.
29. The appellant prayed that the decision of the trial court be set aside and be substituted for an order allowing the petition dated 29th June 2021 as prayed; that the appellant be awarded loss of earnings at the rate of Kshs.25,000 per day from 18th March 2021 to the date the lorry is released to the appellant; costs of the appeal; and any other relief we should deem fit to grant.
30. The appeal came up for hearing on 30th October 2024 with learned counsel Mr. Mwanzia appearing for the appellant and learned counsel Mr. Mudavadi appearing for the respondent. Each counsel relied on their parties’ respective written submissions which they orally highlighted. Those of the appellant are dated 9th February 2024 while the respondent’s are dated 2nd May 2024



31. The appellant's counsel submitted that the learned Judge erred in failing to note that the appellant was not heard before the decision was made by the respondent to impound its vehicle and subsequently impose the fine (labelled 'fees'), which violated Articles 10 and 47 of *the Constitution*; and that, after the respondent impounded its motor vehicle, it was neither informed that such action had been taken, nor given an opportunity to be heard.
32. The appellant contends that there was no alternative administrative remedy for it to exhaust in accordance with the doctrine of exhaustion before filing the petition as EACVLCA did not provide for such a mechanism; and that, even under EACVLCA, there is no prescribed appeal mechanism with regards to instances when vehicles are found to be overloaded. It relied on the decision in John Kipkoech Maritim t/a Jolly Super Enterprises Limited vs. Kenya National Highways Authority & 7 others (2021) KEHC 1743 (KLR) in support of this submission.
33. Further, the appellant submitted that section 6 of EACVLCA created an offence of overloading whereby a party is presumed guilty without being heard, which violated the appellant's right to a fair hearing. In support of this submission, reliance was placed on the decision of the High Court in Marius Wahome Gitonga vs. Kenya National Highways Authority (2019) KEHC 4931 (KLR).
34. Lastly, the appellant disputes that the applicable law with respect to the events leading to the detention of its motor vehicle is EACVLCA; and that, in contrast, the Form/Weight ticket that a driver is issued with after being found to be overloaded does not state under which law it is issued.
35. We were therefore urged to allow the appeal.
36. On the respondent's part, learned counsel Mr. Mudavadi started off by submitting that the appellant was guilty of violating this Court's Rules, which prohibit a party from arguing, without the leave of Court, grounds of appeal other than those set out in the memorandum of appeal. For this proposition, counsel referred us to this Court's rule 107(a) and the decision in Republic vs. Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others Ex- Parte Tom Mbaluto (2018) KECA 576 (KLR). It was submitted that the appellant had submitted on new grounds of appeal other than those set out in the memorandum of appeal.
37. The respondent urged the Court to uphold the finding that the appellant was guilty of not exhausting the available administrative remedies; that section 17 of the EACVLCA provides for a comprehensive procedure and mechanism to be followed when a vehicle is found to be overloaded on the Regional Trunk Road Network; and that EACVLCA provides for a remedy where a dispute arises, namely raising the dispute with the authorised officer on the prescribed form.
38. We were further referred to section 17(6) of EACVLCA, which also provides that the overloaded vehicle shall be detained without a charge by the National Road Authority for prescribed period; that, upon lapse of that period, the vehicle may be either sold or auctioned, or such other actions be taken; and that, the appellant having failed to raise its objection through the prescribed avenue, had violated the doctrine of exhaustion. To buttress this submission, it (the respondent) relied on the decisions of Geoffrey Muthinja & Another vs. Samuel Muguna Henry & 1756 others (2015) KECA 304 (KLR); and Speaker of the National Assembly vs. Karume (1992) KECA 42 (KLR).
39. As regards the issue as to whether the offence of overloading exists under section 7 of EACVLCA, the respondent submitted that overloading has not been criminalized, and no charge can be brought against a transporter for overloading; that, instead, the transporter is expected to pay the overload fee and/or have the excess load offloaded or redistributed subsequent to which the motor vehicle is released; and that the appellant has not demonstrated any procedural impropriety on the part of the respondent.



40. On the issue of damages, it was submitted that the contracts produced by the appellant in evidence to support the claim were for the years 2015 and 2017 while the overload was committed in the year 2021; that the appellant ought to have produced recent invoices that could support the claim; and that, given that special damages must be specifically pleaded and strictly proved, we were asked to dismiss the appeal.
41. Our mandate as a first appellate court was astutely elaborated in *Geoffrey Muthinja & Another (supra)* to wit:
- “As this is a first appeal, our mandate is a broad one and involves, ..., a fresh and exhaustive examination, re-evaluation and re- analysis of the entire record with a view to drawing our own inferences and making our own independent conclusion, on all the material before us. We pay a measure of deference to the findings of the first instance Court but are free to depart from them in appropriate cases, where they are founded on no evidence, constitute a misapprehension of the law or are plainly wrong. The latitude to depart is wider where, as in this case, there was no trial involving the taking of viva voce evidence in which case the first instance Judge would have had the added advantage of hearing and seeing the witnesses and so would have been better placed to judge their credibility and make a more informed judgment on the veracity of the opposing cases.”
42. Having carefully considered the record of appeal, the submissions of both counsel and the authorities cited, we find that the only issue for determination is whether the appellant exhausted the available administrative remedies before approaching the court vide the constitutional petition filed in the High Court. Based on the answer to the foregoing, what order should we issue?
43. The crux of the dispute between the parties was the overloaded motor vehicle belonging to the appellant. The appellant is aggrieved that the respondent, without affording it a fair hearing, adjudged it guilty and condemned it to pay a fine of \$1,308.05 at the rate of Kshs. 109.79 together with parking fees for the detained motor vehicle. On the other hand, the respondent contended that it was merely executing its statutory duty under EACVLCA.
44. Section 2 of EACVLCA defines an overloaded vehicle to mean “a vehicle that is detected by an authorised officer as overloaded, either with regard to the permissible maximum axle or axle unit weight or permissible maximum gross vehicle weight.”
45. There were competing submissions made regarding the question as to whether a criminal offence of overloading was created within the framework of EACVLCA. However, it is clear that this was not a ground of appeal as set out in the memorandum of appeal and, as such, the issue is not live before this Court. Consequently, this Court cannot ponder over, consider or make a determination thereon in light of rule 107 of the Court of Appeal Rules, 2022.
46. The doctrine of exhaustion of remedies requires that parties should explore all the available local administrative remedies before invoking a competent court’s jurisdiction.
47. The oft cited *Speaker of the National Assembly vs. Karume* case (*supra*), this Court held that:
- “Where there is a clear procedure for redress of any particular grievance by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”



48. Further sentiments by this Court were expressed in the case of William Odhiambo Ramogi & 3 Others vs. Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) KEHC 10266 (KLR) where it was held that:

“the question of exhaustion of administrative remedies arises when a litigant aggrieved by an agency’s action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts.”

49. To further lend credence to this discussion, the Supreme Court of Kenya in Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 Others (2014) KESC 53 (KLR) determined whether where a legislation has provided a remedy and prescribed a clear procedure for address of a particular grievance, a litigant can invoke the provisions of *the Constitution* for redress of such grievance thus:

The Appellant in this case are seeking to invoke the principle of avoidance also known avoidance a constitutional issue, a that a court will matter may properly be decided on another basis. In South Africa, in *S v Mhulungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority judgment as follows at paragraph

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

Similarly, the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).”

50. In *Albert Chaurembo Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) vs. Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* (2019) KESC 83 (KLR,) the Supreme Court in addressing similar circumstances was emphatic that:

“In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi- judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”

51. It is apparent that the relevant provision with regards to the impounding of the appellant’s motor vehicle is section 17 of EACVLC, which provides at sub-section (4) (a) & (b):

4. Where the fact of overloading is disputed by the transporter, the authorized officer weighing the vehicle shall indicate such dispute in the weighing report, and a copy of the disputed report shall be issued to the transporter who may-



- a. pay the requisite overloading fees on a without prejudice basis to secure the release of the vehicle, make such necessary adjustment on the load as may be directed by the authorized officer and lodge an appeal against the fees as provided for by regulations made under this Act; or
- b. appeal against the fees, using regulations made under this Act, during which period the vehicle will remain detained at such designated place at the cost of the transporter. (emphasis ours)

52. It is clear from the above provision that the appeal from a decision of the authorized officer is made under the Regulations. The relevant regulations, as duly admitted by the respondent, and as provided under section 17(4) (a) and (b), are the East African Community Vehicle Load Control (Enforcement Measures) Regulations, 2018 (the Regulations), and more particularly Part III thereof which relates to Overloading Fees.

53. We have perused the Regulations, and it is clear that no appellate mechanism is provided thereunder as envisaged under section 17(4) (a) and (b) of EACVLC with regard to how a person found to have overloaded his vehicle is dealt with. Given this lack of an appellate mechanism, it follows that there was no alternative dispute resolution remedy available to the appellant or any other transporter who is found to have overloaded.

54. We are aware that the regulation 11 provides that an authorized officer upon determining that the motor vehicle is overloaded should issue a Weighbridge Certificate in terms of Form EACV-1 as set out in the Second Schedule to the Regulations. Upon perusal of the Form, we note that the same provides at its foot a portion for the transporter to, inter alia, express his/her dissatisfaction with the findings in the Certificate. The portion states:

“If not satisfied with the findings and you may appeal, tick the boxyes no”

55. Whereas, though a transporter may sign the portion provided in the Form to express their dissatisfaction with the decision of the authorized officer, it is of no consequence, as there is no appellate mechanism provided in the Regulations which he/she can utilize to fully ventilate his/her dissatisfaction.

56. Further, a comparison of the two documents, namely what was issued to the appellant at the weighbridge on 18th March, 2021 at 14:52:47hrs and Form EACV-1 as provided in the regulation 11, illustrates that there are material discrepancies between the two documents. Of particular importance and relevance to the present proceedings is the fact that the Weighbridge Certificate issued to the appellant does not contain the provision that it could express dissatisfaction as provided at the bottom of Form EACV-1. Ultimately, the appellant was unaware of the existence of the right to ventilate its dissatisfaction with either the manner of weighing or the detention of its motor vehicle. We emphasise that knowledge of perceived remedy goes to the heart of the doctrine of exhaustion since a party must be aware that there exists an appellate remedy in case they are dissatisfied with the decision at the weighbridge.

57. In finding that the respondent followed the right procedure, the learned Judge held:

“Equally important is the fact that whether or not a person was given a fair hearing of his case depends on the circumstances and type of the decision to be made. Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met. On this point we can usefully benefit from the Court of Appeal decision



in *Judicial Service Commission vs Mbalu Mutava & another* (2015) KECA 741 (KLR) which succinctly elucidated the law in cases of this nature. It held that the right to a fair administration action under Article 47 is a distinct right from the right to a fair hearing under Article 50 (1) and (2) of *the Constitution*. Fair administrative action broadly refers to administrative justice in public administration and is centred mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative actions, through fundamental right is contextual and flexible in its application and can be limited by law, fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies. In this regard, the applicant's attempt to invoke Article 47 and 50 of *the Constitution* is misdirected. The respondent followed the procedure set out in the governing statute. It is not sufficient to cite provisions of *the Constitution*. The alleged breach must not only be pleaded but must be proved.”

58. We do not hesitate to point out that, from our foregoing finding, the learned Judge erred in holding that the appellant did not properly frame his grievance and, more importantly, that there were other avenues through which its grievance would have been ventilated. In contrast, it is clear that, while EACVLCA provides for an appellate mechanism as set out in its regulations, no such a mechanism was provided by the Regulations.
59. The lack of an appellate mechanism meant that the appellant was not therefore mandated to utilize an alternative remedy before approaching the court. Accordingly, we respectfully disagree with the findings of the superior court that the appellant had a duty to exhaust the internal dispute resolution mechanism provided under the law and, in this case, EACVLCA, or apply for an exemption to approach the court as provided in section 9(4) of the FAA.
60. We therefore find that, on this ground alone, the appeal succeeds.
61. Taking cognizance of the fact that the appeal was determined on a preliminary legal question, we deem it prudent in the circumstances to exercise our powers under rule 33 of this Court's Rules to remit the matter to the High Court at Mombasa for the petition to be heard on its merits. For the avoidance of doubt, rule 33 states:

“On any appeal the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings of the superior court with such directions as is appropriate, or to order a new trial, and to make any incidental or necessary orders, including orders as to costs.”

62. We are also cognisant of the fact that the rule does not provide for circumstances under which a matter can be remitted to the trial court. However, by its own wording, the Court is clothed with wide discretion to determine on its own motion the circumstances under which a retrial can be ordered. This was aptly stated by this Court in the case of *Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited* [2001] eKLR thus:

“The rule does not spell out circumstances under which a retrial may be ordered. The rule, however, clothes the court with wide judicial discretion to consider when an order for retrial can be made. So the decision one way or the other would largely depend on the facts and circumstances of each case.”



63. On the ground that the appellant was not accorded an opportunity to ventilate his grievance in court, which was the only available avenue to do so, the petition is eligible for retrial. We therefore allow the appeal with costs to the appellant and set aside the Judgment of the learned Judge (Mativo, J.) (as he then was) delivered on 9th November 2021 with orders that the petition subject of this appeal be remitted for hearing and determination at the High Court in Mombasa. The costs at the High Court shall abide the outcome of the constitutional petition.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF APRIL, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original
signed

DEPUTY REGISTRAR

