



**Onyango v National Police Service & 2 others; Kenya Human Rights Commission
(Interested Party) (Constitutional Petition E487 of 2022) [2024] KEHC 377 (KLR)
(Constitutional and Human Rights) (26 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 377 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E487 OF 2022**

**M THANDE, J
JANUARY 26, 2024**

BETWEEN

EZEKIEL OSEWE ONYANGO PETITIONER

AND

NATIONAL POLICE SERVICE 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

NATIONAL TRANSPORT AND SAFETY AUTHORITY 3RD RESPONDENT

AND

KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY

JUDGMENT

1. The Petitioner has moved this Court by way of a Petition herein dated 31.10.22, seeking the following reliefs:
 - a. A declaration that the press release dated 28th October 2022, issued by the 1st Respondent pursuant to section 55 of the *Traffic Act* and Rule 23 and 24 of the Traffic Rules to traffic enforcement officers to impound and charge all motor vehicle, motor cycle owners who have installed illuminating and other lights on their motor vehicles is unconstitutional and violates Articles 10, 40, 46 and 47 of *the Constitution*;
 - b. An order of CERTIORARI to issue to quash the press release dated 28th October 2022, issued by the 1st Respondent pursuant to section 55 of the *Traffic Act* and Rule 23 and 24 of the Traffic Rules to traffic enforcement officers to impound and charge all motor vehicle, motor



cycle owners who have installed illuminating and other lights on their motor vehicles for being in contravention of Articles 10, 40, 46 and 47 of *the Constitution*;

- c. Any other relief that the Honourable Court may deem fit to grant.
 - d. Costs of the Petition.
2. The Petitioner sought interim relief in an application of even date. On 8.12.22, the Court granted interim orders by way of staying the implementation of the impugned directive.
 3. The Petitioner's claim is that vide the impugned directive, the 1st Respondent highlighted its concern with regards to the requirements for lights on motor vehicles and the requirement to have valid licences including road service and tour service licences, inspection sticker and PSV badge for drives ad conductors. The 1st Respondent issued a blanket directive to all traffic enforcement officers to impound and charge motor vehicle/motor cycle owners in accordance with the law. The directive was immediately implemented by impounding motor vehicles even during the day, for allegedly contravening the requirements of the stated laws. This resulted in most motor vehicles being withdrawn from operation thereby leaving consumers of matatu services such as the Petitioner, who leaves in Nairobi Eastlands, stranded. This has also led to increase in matatu fare that is unaffordable to most Kenyans making it difficult for them to work places with the attendant risk of loss of employment.
 4. It is the Petitioner's case that the issuance of the blanket directive to charge, the 1st Respondent has usurped the power of the Director of Public Prosecutions (DPP) under Article 157 of *the Constitution*, to charge. Further that Section 55 of the *Traffic Act* only curbs the use of lights which are likely to cause a danger to other road users or persons travelling in the vehicle. The law does not prohibit the use of lights listed by the 1st Respondent in the impugned directive as long as they comply with the law. The impugned directive has therefore effectively amended Section 55 of the Act and Rules 23 and 24 of the Rules. Through the directive, the 1st Respondent has made additional rules which under Section 119 of the Act, is the preserve of the Minister responsible public roads. Further that the lights installed are strategically placed to indicate the length and breadth of vehicles at night to assist other road users.
 5. The Petitioner thus claims that by issuing the impugned directive, the 1st Respondent has violated the provisions of Article 10 for failure to involve stakeholders such owners of private vehicles, owners of matatus and motor cycles and their associations as well as the public. , owners of motorcycles. The Petitioner further claims a violation of the right to property by impeding the absolute use of motor vehicles; violation of consumer rights under Article 46 by causing irreparable suffering of more than half the masses in urban areas who depend on matatus as their only means of transport. The Petitioner further claims through the directive the 1st Respondent usurped the DPP's power to charge thereby violating Article 157 of *the Constitution*. The directive further usurped the powers of the Minister to make regulations, in contravention of Section 119 or the Act.
 6. The Petition is opposed by the 1st and 2nd respondents vide a replying affidavit sworn on 18.4.23 by Boniface Otieno Ojalah, the officer in charge of the Road Safety Section in Nairobi County. He denied the allegations in the Petition and asserted that there is no evidence of vehicles being impounded or withdrawn or any road users being stranded. On the issue of the DPP having sole power to charge, it was deposed that a similar judgment was issued in Pet No. E495 of 2022 on 3.5.22 and an interim stay of the judgment issued by the Court of Appeal in Civil Application No. E188 of 2022 on 22.6.22. Further that all traffic cases are taken to court through the office of the DPP after investigations by the 1st Respondent. It was further asserted that the claim lights installed in vehicles are for indicating the length and breadth thereof is not supported by any law. Further that Section 55 of the Act refers to installation of additional un-prescribed lights. Part IV of the Traffic Rules provide specific guidelines



on how a motor vehicle should appear physically in relation to lights, the standards and specifications that must be adhered to.

7. It was further averred that matatu fares are rarely affected by the implementation of Section 55 of the act and are influenced by other factors. Section 55 of the Act which requires all vehicles to comply the law in terms of parts and equipment, lights and tyres before being used on the road. Rules 23 and 24 of the Rules stipulates the specifications of lights including their dimensions. The impugned directive was thus based on the existing law and rules and hence no need for public participation. Further that directive a realization of the 1st Respondent's statutory mandate to ensure that Section 55 of the Act and Rules 23 and 24 of the Rules are adhered to. It was further averred that the claim that the directive has the effect of killing and stifling the matatu culture was not supported by data. It was further asserted that the right to property is not absolute and does not apply to illegal use and enjoyment of the said right.
8. The 1st and Respondent contend that the Petition is incompetent, misconceived and speculative as there is no evidence of any breach or violation by them of the Petitioner's rights and fundamental freedoms. They urged that the same be dismissed with costs.
9. Neither the 3rd Respondent nor the Interested Party filed any pleadings in this matter.
10. For the Petitioner, it was submitted that the 1st Respondent does not have the authority or mandate to issue or come up with additional rules and regulations under the [Traffic Act](#), or to order or charge perceived persons who contravene Section 55 of the Act or the impugned directive. Reliance was placed on Section 24 of the [National Police Service Act](#) which stipulates the functions of the 1st Respondent. Further, that additional rules and regulations may only be made in conformity with Section 5 of the [Statutory Instruments Act](#) and that by dint of Section 119 of the [Traffic Act](#), only the Minister in charge of transport has the mandate to make regulations. The impugned directive was therefore ultra vires the provisions of Section 55 of the [Traffic Act](#) and Rules 23 and 24 of the Traffic Rules. It was further submitted that the decision to charge is to be made solely by the DPP. As such, the impugned directive was ultra vires the provisions of Article 157(6)(a) of [the Constitution](#).
11. To buttress this submission, the Petitioner cited the case of Nature Foundation Limited v Minister for Information and Communication & another [2015] eKLR where the Court of Appeal addressed the principle of ultra vires and stated:

This is the regulation that is complained of as being ultra vires the Kenya Information and Communication Act, 1998. In determining the whether regulation is ultra vires the Act that they are made under, the decision of the Supreme Court of India (which was also cited by the learned trial judge) in Maharashtra State Board of Secondary & Higher Secondary Education v Kurmarsheth & Others [1985] LRC (Const) is instructive. The court stated that:

“The validity of regulation is to be determined by reference to specific provisions of the statute conferring the power of delegated legislation and to its objects and purposes. Provided the regulations have a rational nexus with the object and purpose of the statute, the client should not concern itself with the wisdom and effectiveness... The court should not concern itself with the merits or demerits of a policy pursued by means of delegated legislation, but only with the question whether the delegated legislation falls within the scope of power conferred by statute and is consistent with the Act and [the Constitution](#).”(emphasis ours)



12. It was further submitted that the decision to charge is to be made solely by the DPP. As such, the directive contravenes Articles 10, 40, 46 and 47 of *the Constitution*. Following the implementation of the directive, owners of public transport withdrew their vehicles on 31.10.22 rendering them unable to render the essential service. This contravened the right to own property which presupposes the right to use such property. Further that the broad nature of the directive makes it prone to abuse and violate consumer rights as guaranteed under Article 46 of *the Constitution*.
13. Further that the directive is too broad and ambiguous capable of different interpretations. It is difficult to understand which lights are prohibited considering that all motor vehicles come from the manufacturer with red lights. Reliance was placed on the cases of *Waweru & 3 others* (suing as officials of Kitengela Bar Owners Association) & another v National Assembly & 2 others; *Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others* (Interested Parties) (Constitutional Petition E005 & E001 (Consolidated) of 2021) [2021] KEHC 9748 (KLR) (20 September 2021) (Judgment) and *Commissioner of Domestic Taxes (Large Tax Payer Office) v Barclays Bank of Kenya Ltd* [2020] eKLR.
14. For the Respondents, it was submitted that the impugned directive was guided by Section 55 of the *Traffic Act* as read with Rules 23 and 24 of the Traffic Rules and Regulations. The Respondents asserted that the said provisions stipulate, in particular, the requirements for the lights of a motor vehicle. A person using a motor vehicle that does not comply with the said requirements commits an offence under Section 58 of the Act. The directive was issued as a notice to the public on compliance with Section 55 of the Act and Rules 23 and 24 following observation of motor vehicles bearing lights not authorized by the Act. Accordingly, in issuing the impugned directive, the 1st Respondent was guided by Article 245 of *the Constitution* and Section 24(a) – (j) of the *National Police Service Act*.
15. It was further submitted that the directive having been issued pursuant to the stated provisions and further being based on existing law did not call for public participation. The Respondent relied on the case of
16. *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others* (Interested Parties) [2020] eKLR
 133. The manner in which a public body exercises its statutory powers is largely dependent on the resultant effect. This yields two scenarios. The first scenario is when the exercise of the statutory authority only impacts on the normal and ordinary day-to-day operations of the entity. We shall refer to such as the ‘internal operational decisions concept’. The second scenario is when the effect of the exercise of the statutory power transcends the borders of the entity into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public.
 134. Subjecting the first scenario to public participation is undesirable and will, without a doubt, result to more harm than any intended good. The harm is that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions. It would likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.
17. Also cited was the case of *Commission for Human Rights & Justice v Board of Directors, Kenya Ports Authority & 2 others; Dock Workers Union* (Interested Party) [2020] eKLR where Riika, J. had this to say about public participation:
 70. Should the process of appointment of the Managing Director of the KPA, be equated to the process of making legislation or regulations in public entities? The High Court, in Robert N.



Gakuru & Others v. Governor Kiambu County & 3 others [2014] e-KLR, held that it behoves County Assemblies, in enacting legislation, to do whatever is reasonable, to ensure that many of their Constituents are aware of the intention to enact legislation. The constituents must be exhorted to give their input. Should the level of public participation be the same, in appointment of the Managing Director of a State Corporation? Should the Respondents exhort Kenyans to participate in the process of appointment of the Managing Director? In the respectful view of this Court, appointment of the Managing Director, KPA, is a highly specialized undertaking, which is best discharged by the technocrats comprising the Board, assisted by human resource expert committees as the Board deems fit to appoint. The existing law governing the process of appointment of the Managing Director KPA, leans in favour of technocratic decision-making. Democratic decision-making, involving full-blown public participation may be suitable in the processes of legislation and related political processes, such as the Makueni County Experiment and the BBI, subject matter of Dr. Mutunga's case studies. But technocratic decision-making suits the appointment of CEOs of State Corporations. Even as we promote democratic [people-centric] decision-making processes, we must at the same time promote technocracy, giving some space to those with the skills and expertise to lead the processes, and trusting them to provide technical solutions to society's problems. The Board and the Committees involved in the process are in the view of the Court, well -equipped to give the Country a rational outcome. The Court agrees with the Respondents, that the 1st Respondent is sufficiently representative of stakeholders of the KPA, and the appointment of the Managing Director, is more of a technocratic decision-making process, than a democratic-decision making process. It need not totally open itself up, to the scrutiny of every person. The public is aided by public watchdogs – DCI, EACC, CRB, KRA and HELB – in assessing the antecedents of the applicants. The State Corporations Inspector General, is part of the ad hoc committee set up by the 1st Respondent, to evaluate and shortlist applicants. Interviews shall be carried out by the full Board, face to face with the candidates. There are adequate measures taken by the 1st Respondent to ensure the process meets the demands of transparency and accountability to the public.

18. And in In the Matter of the Speaker of the Senate & another [2013] eKLR, where the Supreme Court cautioned courts on taking up all matters that come before them as follows:
 - (246) On the contrary, the South African case clearly indicates that courts must strive to strike a balance between their duty as the custodians of *the Constitution* and respect for the doctrine of separation of powers. Indeed that ruling unequivocally states at paragraph 37 that the judicial arm of government should not interfere in the processes of other arms of government except as mandated by *the Constitution*.
 - (247) This is a clear indication that the courts ought not to indiscriminately take up all matters that come before them but must exercise caution to avoid interfering with the operations of the other arms of government save for where they are constitutionally mandated.
19. The Respondents have further submitted that the Petition does not meet the threshold for a constitutional petition. They contend that the Petitioner has not set out precisely the articles of *the constitution* alleged to have been infringed and the manner of infringement as set out in the case of Anarita Karimi Njeru v Republic [1979] 1 KLR 154.
20. On the alleged infringement of the right to property under Article 40 of *the Constitution*, the Respondents submitted that the Petitioner has not discharged the burden placed upon him under Sections 107 and 109 of the *Evidence Act* to prove that matatus were impounded and motor vehicles withdrawn from operation. Further the claim of violation of Article 46 was pegged on the claim under



Article 40 of *the Constitution*, the same cannot stand. It is the Respondents' case that the Petition was instituted based on a misrepresentation of the law and hearsay. Accordingly, the orders sought cannot be granted as no evidence has been placed before the Court to support the alleged claims.

22. The directive of which the Petitioner complains is contained in a press release dated 28.10.22 and signed by the Director of Corporate Communications/Spokesperson, National Police Service.
23. From the submissions which I have duly considered, the following issues fall for determination:
 - i. Whether the impugned directive is unconstitutional.
 - ii. Whether the Petition meets the threshold of a constitutional petition.

Whether The Impugned Directive Is Unconstitutional

24. The Petitioner challenges the constitutionality of the impugned directive on 3 fronts. The first is that the 1st Respondent has usurped the power of the DPP to charge, thereby contravening the provisions of Article 157 of *the Constitution*.
25. For the Petitioner, it was submitted that the 1st Respondent does not have the authority or mandate to issue or come up with additional rules and regulations under the *Traffic Act*, or to order or charge perceived persons who contravene Section 55 of the Act or the impugned directive. Reliance was placed on Section 24 of the *National Police Service Act* which stipulates the functions of the 1st Respondent. Further, that additional rules and regulations may only be made in conformity with Section 5 of the *Statutory Instruments Act* and that by dint of Section 119 of the *Traffic Act*, only the Minister in charge of transport has the mandate to make regulations. The impugned directive was therefore ultra vires the provisions of Section 55 of the *Traffic Act* and Rules 23 and 24 of the Traffic Rules. It was further submitted that the decision to charge is to be made solely by the DPP. As such, the impugned directive was ultra vires the provisions of Article 157(6)(a) of *the Constitution*.
26. The directive
27. To buttress this submission, the Petitioner cited the case of Nature Foundation Limited v Minister for Information and Communication & another [2015] eKLR where the Court of Appeal addressed the principle of ultra vires and stated:

This is the regulation that is complained of as being ultra vires the Kenya Information and Communication Act, 1998. In determining the whether regulation is ultra vires the Act that they are made under, the decision of the Supreme Court of India (which was also cited by the learned trial judge) in Maharashtra State Board of Secondary & Higher Secondary Education v Kurmarsheth& Others [1985] LRC (Const) is instructive. The court stated that:

“The validity of regulation is to be determined by reference to specific provisions of the statute conferring the power of delegated legislation and to its objects and purposes. Provided the regulations have a rational nexus with the object and purpose of the statute, the client should not concern itself with the wisdom and effectiveness... The court should not concern itself with the merits or demerits of a policy pursued by means of delegated legislation, but only with the question whether the delegated legislation falls within the scope of power conferred by statute and is consistent with the Act and *the Constitution*.”(emphasis ours)



28. It was further submitted that the decision to charge is to be made solely by the DPP. As such, the directive contravenes Articles 10, 40, 46 and 47 of [the Constitution](#). Following the implementation of the directive, owners of public transport withdrew their vehicles on 31.10.22 rendering them unable to render the essential service. This contravened the right to own property which presupposes the right to use such property. Further that the broad nature of the directive makes it prone to abuse and violate consumer rights as guaranteed under Article 46 of [the Constitution](#).
29. Further that the directive is too broad and ambiguous capable of different interpretations. It is difficult to understand which lights are prohibited considering that all motor vehicles come from the manufacturer with red lights. Reliance was placed on the cases of Waweru & 3 others (suing as officials of Kitengela Bar Owners Association) & another v National Assembly & 2 others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested Parties) (Constitutional Petition E005 & E001 (Consolidated) of 2021) [2021] KEHC 9748 (KLR) (20 September 2021) (Judgment) and Commissioner of Domestic Taxes (Large Tax Payer Office) v Barclays Bank of Kenya Ltd [2020] eKLR.
30. For the Respondents, it was submitted that the impugned directive was guided by Section 55 of the [Traffic Act](#) as read with Rules 23 and 24 of the Traffic Rules and Regulations. The Respondents asserted that the said provisions stipulate, in particular, the requirements for the lights of a motor vehicle. A person using a motor vehicle that does not comply with the said requirements commits an offence under Section 58 of the Act. The directive was issued as a notice to the public on compliance with Section 55 of the Act and Rules 23 and 24 following observation of motor vehicles bearing lights not authorized by the Act. Accordingly, in issuing the impugned directive, the 1st Respondent was guided by Article 245 of [the Constitution](#) and Section 24(a) – (j) of the [National Police Service Act](#).
31. Section 55 of the [Traffic Act](#) stipulates the requirements for the condition vehicles must be in for use on roads as follows:
1. No vehicle shall be used on a road unless such vehicle and all parts and equipment thereof, including lights and tyres, comply with the requirements of this Act, and such parts and equipment shall at all times be maintained in such a condition that the driving of the vehicle is not likely to be a danger to other users of the road or to persons travelling on the vehicle.
 2. No motor vehicle the weight or dimensions of which laden or unladen exceeds the maximum weight or dimensions provided for such vehicles by rules made under this Act shall be used on a road.
32. The requirements apply to all parts, equipment, including lights and tyres and all vehicles must comply with the same. The object of the requirements is to ensure that the vehicles are not likely to be a danger to persons travelling in such vehicles or to other road users.
33. Rule 23 of the Traffic Rules makes provision for Lights on motor vehicles and the illumination thereof as follows:
1. Every motor vehicle shall be equipped with two lamps at the front of the vehicle, one on each side; and when a motor vehicle is in motion on a road at night the two lamps at the front of the vehicle shall be lighted and the rays from the lamps shall be white or yellow, and, if the vehicle is capable of proceeding at a speed greater than 30 kilometres an hour, shall be of such intensity as to illuminate the road ahead for a distance of at least 100 metres:
Provided that—
 - i. a motorcycle shall show one such light as aforesaid, but if a side-car is attached to the motorcycle there shall be shown on that side of the side-car not adjacent to the



motorcycle an additional light of sufficient intensity as to be visible for a distance of at least 150 metres at night;

- (ii) when a motor vehicle is in motion at night on a road lighted by electric lamps, it shall be lawful for such vehicle to show two lights in front of the kind and in the manner described in paragraph (2) in place of the lamps described in this paragraph.

2. Every motor vehicle and every trailer not attached to a motor vehicle shall, when stationary on a road at night, other than in a car park or in a place reserved for parking in a street where adequate lighting is normally provided, show two lights in front, one at each side, of sufficient intensity to indicate the presence of the motor vehicle or trailer from a distance of 150 metres to approaching traffic:

Provided that a motorcycle not attached to a side-car shall show one such light as aforesaid.

3. Every motor vehicle or trailer, when on a road at night, and whether in motion or stationary, shall carry two lamps at the rear of the vehicle of such intensity as to indicate clearly within a distance of not less than 200 metres (in the absence of fog, mist or rain) its presence on the road to traffic approaching from behind, and the lamps shall—

- a. be mounted securely to the body-work or chassis of the vehicle at a height of not less than 20 cm and not more than 1.5 m;
- b. be positioned so that they are not more than 10 cm inboard from the outer extremity of the body or chassis, and at least one lamp shall be so constructed as to provide an uncoloured light of sufficient intensity to illuminate clearly the figures and numbers on the rear identification plate unless other means of so illuminating that plate are provided:

Provided that—

- i. where a trailer is attached to a tractor vehicle it shall be sufficient if the lamps are carried at the rear of the trailer;

- (ii) a motorcycle not attached to a side-car shall carry one lamp.

- 4.

- (a) All lamps required by subrule (1) shall be equipped with a means of eliminating any dazzling effect produced by such lamps, but such elimination shall in every case leave sufficient light to illuminate clearly the road ahead for at least 25 metres

- (b) Such elimination shall be effected—

- (i) on the approach from the opposite direction of another vehicle;
- (ii) where in the interests of safety it is necessary;
- (iii) where the lamp is used pursuant to paragraph (7).

5. No motor vehicle shall be equipped with more than one swivelling light.

6. No spot-light or swivelling light shall be used—

- (a) in place of head-lights, save to complete a journey where the head-lights have been damaged;



- (b) in such a manner as to impede the vision of, or cause annoyance to, any user of the road.
7. Every motorcycle shall, when in motion in daylight hours, have its front lamp lighted.
34. Rule 24 provides as follows regarding lights on vehicles other than motor vehicles:
- Every vehicle other than a motor vehicle or trailer, when on a road at night whether in motion or stationary, shall—
- a. be equipped with two lamps showing a white light, so fixed and lighted as to indicate clearly to approaching traffic from a distance of 150 metres the presence and width of the vehicle and of any load carried thereon; and
 - b. two lamps to the rear so as to indicate clearly its presence on the road to traffic approaching from behind:
- Provided that—
- i. in the case of a bicycle, it shall be sufficient to show one only of the lamps referred to in paragraph (a) and paragraph (b);
 - (ii) this rule shall not apply in respect of a vehicle stationary in a car park, or in a place reserved for parking in a street where adequate lighting is normally provided.
35. A reading of the above provisions will show that there are very specific requirements relating to lights on all types of vehicles, the number thereof and how they should be mounted and positioned on vehicles. to have and how they should be lit. the rules also stipulate the colour of the lights and their illumination capacity.
36. Turning to the impugned directive, it can be seen that the 1st Respondent had made an observation that both private and public service vehicles, as well as motorcycles had lights that did not comply with the statutory requirements. The directive enumerated the lights as unlawfully equipped lamps, modified illuminating lights, red lights, opaque rear lights, flashing and flickering lights LED illuminating bars, unauthorized sirens and unauthorized red and blue lights. The 1st Respondent further stated that these were endangering the lives of other road users and advised all vehicle owners to adhere to the law to avoid inconveniences.
37. The Petitioner’s case is that in issuing the impugned directive, the 1st Respondent usurped the power of the DPP or of the Cabinet Secretary in charge of transport. In order to make a determination, it is necessary to look at the powers of the 1st Respondent under the establishing law, namely *the Constitution* and the *National Police Service Act*.
38. The 1st Respondent is established under Article 243 of *the Constitution*. The objects and functions of the 1st Respondent are set out in Article 244 as follows:
- The National Police Service shall—
- (a) strive for the highest standards of professionalism and discipline among its members;
 - (b) prevent corruption and promote and practice transparency and accountability;
 - (c) comply with constitutional standards of human rights and fundamental freedoms;
 - (d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and



- (e) foster and promote relationships with the broader society.
39. Parliament enacted the *National Police Service Act* to give effect to Article 243 that established the 1st Respondent. The functions of the 1st Respondent are provided for in Section 24 of the Act:
The functions of the Kenya Police Service shall be the –
- a. provision of assistance to the public when in need;
 - b. maintenance of law and order;
 - c. preservation of peace;
 - d. protection of life and property;
 - e. investigation of crimes;
 - f. collection of criminal intelligence;
 - g. prevention and detection of crime;
 - h. apprehension of offenders;
 - i. enforcement of all laws and regulations with which it is charged; and
 - j. performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.
40. The impugned directing stated that several vehicle owners had mounted lights and other equipment on their vehicles in contravention of the law. Further, this was endangering the lives of other road users. The directive further advised all vehicle owners to adhere to the requirements of the law to avoid inconveniences. Th impugned directive was in my view issued in line with the statutory mandate of the 1st Respondent which includes inter alia, maintenance of law and order, preservation of peace, protection of life and property, investigation of crimes, prevention and detection of crime, apprehension of offenders and enforcement of all laws and regulations with which it is charged.
41. It is thus not clear how the 1st Respondent contravened the law by doing exactly what it is mandated under statute, to do. No evidence of such contravention was availed to the Court.
42. Further, the Petitioner did not avail any evidence to support his claim that vehicles had been impounded. And even if any vehicle had been impounded for contravening the requirements of the law, such action would be within the ambit of the mandate of the 1st Respondent. Additionally, the Petitioner claimed that public service vehicles had been withdrawn from the road for fear of being impounded as a result of which the right of the owner’s to property had been violated. Further that his consumer rights and that of other public service vehicle users had been violated. Again, no evidence was availed to support this claim.
43. It is trite law that whoever alleges must prove as stipulated in the *Evidence Act* as follows:
Section 107. Burden of Proof
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.



Section 107. Burden of Proof

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

44. The above provisions impose a burden on the Petitioner to prove to the satisfaction of the Court that the 1st Respondent by issuing the impugned directive violated the rights of motor vehicle owners, the Petitioner and other road users and the public in general. The Petitioner has however failed to place any material before Court to prove his allegations. The onus placed upon him thus remains undischarged.
45. I now turn to the claim that by issuing the impugned directive, the 1st respondent usurped the powers of the DPP and of the line Cabinet Secretary.
46. Article 157(6) of *the Constitution* relied upon the Petitioner provides as follows:

The Director of Public Prosecutions shall exercise State powers of prosecution and may-

- (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
 - (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
47. It is the Petitioner's claim that the 1st Respondent has no powers to charge. It bears repeating that the role of the 1st Respondent as provided by statute is investigation of crimes, prevention and detection of crime, apprehension of offenders and enforcement of all laws and regulations with which it is charged. A careful look at the material placed before Court does not demonstrate that any vehicle owner was charged by the 1st Respondent. Indeed, no arrest or impounding of vehicles is shown to have taken place.
 48. On the claim that the power of the Cabinet Secretary to make regulations was usurped, the Petitioner claims that the 1st Respondent has no power to make rules. Reliance was placed on Section 119 of the *Traffic Act*. Under that provision, the Cabinet Secretary is empowered to make rules under the Act. The Petitioner further asserted that the impugned directive was issued contrary to the provisions of Section 5 the *Statutory Instruments Act* which makes consultation before making statutory instruments mandatory.



49. The question that then begs is whether the impugned directive is a statutory instrument. Section 2 of the *Statutory Instruments Act* defines a statutory instrument as follows:
- “statutory instrument” means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.
50. Flowing from the above definition, it can be seen that a statutory instrument is made or established in execution of a power conferred by or under statute under which that statutory instrument or subsidiary legislation is expressly authorized to be issued. The impugned directive was a notice by the 1st Respondent to the public that it had observed non compliance with the law and its stated the manner in which the law had been contravened. The 1st Respondent further advised motor vehicle owners to comply with the law to avoid inconveniences. There is nothing in the said directive to remotely suggest that the directive was a rule, order direction form, tariff, by-law, guideline etc, as contemplated in the *Statutory Instruments Act*.
51. In this regard, I associate with the finding in the case of Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-parte: Francis Andrew Moriasi [2019] eKLR, where Nyamweya, J. (as she then was) stated:
26. From the definition given above of statutory instruments, and the powers granted to the Respondent, it is therefore the case that not all the guidelines, orders, or directions given by the Respondent are legislative in character and therefore statutory instruments. There may be guidelines and directions that are purely executive in character, in the sense that their objectives are solely administrative in guiding implementation of standards in laws and policies.
52. Having found that the impugned directive is not a statutory instrument within the meaning of Section 2 of the *Statutory Instruments Act*, it follows that the directive was not subject to the procedure set out in Section 5 the said Act, including the requirement for consultation and public participation. The contention by the Petitioner in this regard is thus without merit.

Whether The Petition Has Met The Threshold For A Constitutional Petition

53. It is the Respondents’ submission that the Petition does not meet the threshold of a constitutional petition. Further that it is not enough for the Petitioner to allege that the 1st Respondent has violated his constitutional rights as well as those of matatu owners and users but must demonstrate how such rights have been violated. It was contended that the Petitioner has alleged violation of rights without proof of the manner of the violation. Accordingly, the Petition falls short of the requirements of a constitutional petition.
54. Rule 4(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides that any person affected or likely to be affected by the denial, violation or infringement or threaten to any right or fundamental freedom provided for in *the Constitution* may make an application to the High Court for redress. Rule 10(1) provides that an application under Rule 4 shall be made by way of a petition while Rule 10(2) stipulates what a petition is required to disclose, as follows:
- a. the Petitioner’s name and address;



- b. the facts relied upon;
 - c. the constitutional provision violated;
 - d. the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - e. details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - f. the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - g. The relief sought by the petitioner.
55. All constitutional petitions are required to be pleaded with reasonable precision, and a party who alleges violation of rights must clearly state the nature of injury, the rights violated and the manner in which they have been violated. This principle was enunciated in the oft cited case of *Anarita Karimi Njeru v Republic* [1979] eKLR in which Trevelyan and Hancox, JJs stated:
- We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.
56. This principle was upheld in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR by the Court of Appeal, which observed as follows:
- The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:
- “The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”
- The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements.
57. Flowing from the cited Rules and authorities, it is quite evident that for a constitutional petition to be sustainable, a petitioner must cite the constitutional provisions that are alleged to have been violated or threatened and must also demonstrate with facts and evidence, the manner in which the said provisions have been violated or are threatened with violation.
58. Other than listing constitutional provisions he alleges to have been violated by the 1st Respondent, the Petitioner has not given any specific details on the manner of violation. The Petition provides little or no particulars as to the allegations and the manner in which the Respondents are responsible for



the alleged infringements. It is not sufficient to allege without proof, that public service vehicles have been impounded by the 1st Respondent, while others have been withdrawn from the roads, as a result of which the stated rights have been infringed. My finding therefore is the Petition does not meet the threshold for a constitutional petition.

59. Accordingly, I find that the Petition herein dated 31.10.22 lacks merit and the same is hereby dismissed. There shall be no order as to costs.

DATED AND DELIVERED VIA MS TEAMS THIS 26TH DAY OF JANUARY 2024

M. THANDE

JUDGE

