IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, AZANGALALA & SICHALE,JJA)

CIVIL APPEAL NO.219 OF 2014

BETWEEN

REMINISCE SPORTS BAR LIMITED T/A REMINISCE BAR & GRILL & ANOTHER 1STAPPELLANT

KARIUKI RUITHA ..... 2ND APPELLANT

AND

THE CABINET SECRETARY MINISTRY OF TRANSPORT..... 1STRESPONDENT

MINISTRY OF ROADS AND TRANSPORT..... 2ND RESPONDENT

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

DIRECTOR OF PUBLIC PROSECUTION ..... 4TH RESPONDENT

NATIONAL TRANSPORT AND SAFETY AUTHORITY ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

RICHARD DICKSON OGENDO ..... 7TH RESPONDENT

KENNETH MUGAMBI T/A POTTERMARK ENTERPRISES ..... 8TH RESPONDENT

***(Appeal from the judgment of the High Court of Kenya at Nairobi (Majanja J) dated and delivered on the 9th day of June 2014 in* Petition No.70 OF 2014)**

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JUDGMENT OF THE COURT

1. The era ushered in by the Constitution of Kenya 2010 is characterized by palpable empowerment of Kenyans who today are so emboldened and assertive in enforcing their legal and constitutional rights,

a phenomenon that contrasts sharply with their erstwhile *modus operandi*. The Constitution of Kenya provided at full throttle rights under a robust Bill of Rights in Chapter 4. It also creates obligations on public officers charged with the responsibility of managing public institutions, public affairs and public resources. Through devolution, the People of Kenya took back in the Constitution the right to manage their public affairs by asserting their sovereignty, the most formidable instrument. Under Article 22(1) of the Constitution, *"every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."*

2. The record of this appeal shows that Kariuki Ruitha, the 2nd appellant, a resident of Ngong Road, and a businessman who holds 99% shareholding in the 1st appellant in which he is the Managing Director and the lead investor and proprietor of Reminisce Bar and Restaurant which is operated by the 1st appellant, Reminisce Sports Bar Limited, on plot No.209/1380, Langata Road, Nairobi County considered himself a victim of violation of fundamental rights and so sued for redress. Both appellants *qua* petitioners instituted Petition No.92 of 2014 in the High Court on their own behalf challenging the Traffic Breathylser Rules 2011 which enforce breath test to detect drunk drivers.

3. In the affidavit sworn by the 2nd appellant in support of the said Petition whose determination gave rise to this appeal, the appellants averred that Reminisce Bar and Grill which they lawfully operate is a night club and entertainment facility for members and non-members most of whom are motorists who commute from various residential estates in Nairobi County and its environs.

4. The appellants averred in their Petition that on 5th October 2011, the Minister for Transport published Legal Notice No.138 by which he made the Traffic Breathlyser Rules 2011 in exercise of the powers conferred by Section 119 (1) of the Traffic Act, Cap 403, of the Laws of Kenya which prescribe a breathlyser for measuring alcohol levels in one's blood from a specimen of breath provided by a person.

5. Although the 2nd appellant in the said Petition was never stopped by police at a road block or subjected to the breathalyser testing, it appears that upon leaving the night club some of their patrons were checked by police. This is discernible from the petition in which the 2nd appellant averred that –

"from my personal knowledge and information from patrons of my club, I am aware the police have been enforcing the breathalyser Rules in a manner degrading to the dignity, honor, and esteem of motorists who consume alcohol to an extent that consumption of alcohol and lifestyles that embrace it have been utterly criminalized in the name of road safety but irrespective of the traffic laws."

The 2nd appellant further averred–

"...I believe the Constitution is our collective freedom charter which presupposes that Kenyans are responsible and autonomous people who can make prudent and lawful choices about their lifestyles including how much alcohol to consume..."

"as a result of the uncivilized and illegal enforcement of the unconstitutional breathalyser rules, the 1st Petitioner (read appellant) has lost over 80 per cent of its business as a result of

which it has had to lay off 29 employees and 15 Artistes

..."

"...unless the orders sought are granted, the club will have to close altogether..."

"...the actions and omissions of the respondents have violated the rights and fundamental freedoms of the ..... co- petitioner (read co-appellant) and I alongside those of our patrons and customers."

6. Needless to emphasise, the appellants' case before the High Court was not based on any action or treatment meted out to them by the police. It was abstract save for the extent to which their business was allegedly adversely affected due to dwindling numbers of customers on account of fear of being nabbed by police for "drunk driving". This background is relevant in addressing the allegations of violations of fundamental rights under the Bill of Rights made in the petition and determined in the impugned judgment now under review in this appeal.

7. The appellants challenged, in Petition No.92 of 2014 in the High Court, the validity of legal notice No.138 of 5th October, 2011 and the Traffic (Breathalyser) Rules 2011 made under section 119(1) of the Traffic Act. The Rules are intended to curb drunk driving through the enforcement of breathalyzer tests.

8. The impugned judgment also reflects another Petition (No.70 of 2014) instituted by Richard Dickson Ogendo against the Attorney General (AG) and National Transport Safety Authority (NTSA) which raised similar issues and was consolidated with Petition NO.92 of 2014 and both were heard and determined together in the impugned judgment by Majanja J. However, only the two appellants preferred an appeal against the judgment of the High Court.

9. The appellants sought, in their Petition No. 92 of 2014, a multiplicity of declarations (numbering 12) and two orders and costs of the suit. In a nutshell, the declarations sought were to the effect that the Traffic (Breathalyzer) Rules 2011 were void for being inconsistent with Article 94(5) of the Constitution of Kenya 2010; that Articles 94(5) and 153(4) of the Constitution do not allow the Minister concerned "to prescribe for use of breathalyzer (sic) limits of alcohol consumption; that the definition of "driving under the influence" and "drunk driving" under rule 2 of the Traffic (Breathalyser) rules violates Articles 27, 50 and 94(5) of the Constitution; that alcohol prohibition under rule 3(1) of the Traffic Breathalyser Rules 2011 is invalid and void for contravening Articles 10, 27, 29, 50 and 94(5) of the Constitution; that a police officer is prohibited by the Constitution from requiring a person (whom he has no reasonable cause to suspect that he has committed a traffic offence) to provide specimen of breath for the purpose of breath test; that the Inspector General of Police has violated Articles 3, 10 and 244 of the Constitution for allowing police officers to enforce the Traffic (Breathalyser) Rules 2011 at road blocks in violation of the rights of motorists under Articles 27, 28, 29 and 31 of the Constitution; that the requirement to supply specimen of breath before arrest on reasonable suspicion of having committed a traffic offence is illegal; that the use of road blocks by the police to subject motorists to breath tests is unreasonable and violates the rights and fundamental freedoms of motorists under the Bill of Rights; that Parliament, National and County Governments and State organs are prohibited by dint of Articles 1, 3 and 24 of the Constitution

from enacting or making law that presumes that Kenyans are irresponsible or unworthy of personal autonomy or freedom to choose their preferred lifestyles or imposing on them a moral code; that the enforcement of the Traffic (Breathalyser) Rules 2011 at road blocks violates the rights of motorists to human dignity, freedom and security of the person and privacy; that enforcement of the (breathalyser) rules, 2011 violates motorists rights to property under Article 40 of the Constitution; that the petitioners be compensated by way of damages for violation of human rights and fundamental freedoms under Articles 27, 28, 31, 40 and 47 of the Constitution of Kenya; that an order of certiorari be made to bring into this court and quash the Traffic (Breathalyser) Rules, 2011, on the ground that the rules are invalid, void and inconsistent with Articles 1, 3, 10, 29, 31, 47, 50 and 94(5) of the Constitution; that the 1st and 2nd appellants be paid costs of the Petition.

10. The appellants named (1) the Cabinet Secretary, Ministry of Transport, (2) the Inspector General of Police, (3) The Director of Public Prosecution, (4) The National Transport and Safety Authority and (5) The Attorney General as respondents numbered 1, 2, 3, 4, and 5 respectively.

11. On 9th June, 2014 the High Court (Majanja J) delivered a judgment in which he found that the Minister for Transport has power under section 119 of the Traffic Act to make rules concerning several matters including measures for enforcing the provisions of Sections 44(1) and 45 of the said Act. Further, that the Rules under the Traffic Act are part of the measures enacted to give effect to and enhance the provisions of Sections 44(1) and 45 of the Traffic Act. As to whether the rules were made without public participation and whether they should have been laid before the National Assembly, the learned judge found that the rules are not invalid as they were subjected to one aspect of public participation in that there was consultation with experts. The learned judge had regard to the fact that the rules are “of a technical nature.” In his determination, the learned judge held that the said rules do not create a new offence as rule 3(1) of the Rules has to be read with rule 3(2) which provides the basis for the application of the alcohol limit in sections 44(1) and 45 of The Traffic Act.

12. As regards the question whether the Rules violate the appellants’ fundamental rights and freedoms, the learned judge held that the enjoyment of the fundamental rights and freedoms is not absolute as it can be limited by law *“to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all the relevant factors including those set out in Article 24(1) (a) to (e).”* It was the learned judge’s finding that no case had been made out on violation of the right to dignity or right to privacy on account of enforcement of the Breathalyser Rules 2011 and further that as regards road blocks, there was no allegation that a specific road block in a specific location had violated the law which would have necessitated calling upon the police to justify their action regarding the specific road block. It was the finding of the learned judge that the appellants had failed to establish that their right to dignity has been violated. The learned judge dismissed the two petitions on 9th June, 2014 with no order as to costs.

13. Aggrieved by the decision of the High Court, the appellants gave notice of appeal on 10th June, 2014 and lodged the record of appeal on 13th August, 2014. In their memorandum of appeal, they

proffered 17 grounds of appeal impugning the decision of the High Court on the grounds, in summary, that the court erred in holding that the Minister's exercise of the powers under S.119 of the Traffic Act does not breach Article 50(2) (a); that the Breathalyser Rules 2011 do not contravene Article 94(5) of the Constitution; that the Breathalyser Rules 2011 do not create a new offence; that the Breathalyser Rules 2011 are not invalid and do not violate motorists' right to human dignity guaranteed by Article 28 of the Constitution; that the enforcement of the Breathalyzer Rules 2011 is a justifiable limitation to the right to privacy; that the learned judge should have held that rules 3(1) and 4(1) (b) of the Traffic (Breathalyser) Rules 2011 are not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as envisaged by Article 24 of the Constitution and that the learned judge should have granted prayers (e) and (h) of the appellant's Petition No.92 of 2014 which sought a declaration that a police officer is prohibited by Articles 27,29,31 & 50 of the Constitution from requiring a person whom he has no reasonable cause to suspect that he has committed a traffic offence to provide a specimen of breath for a breath test in view of his holding that there must be a reasonable basis for suspicion before a specimen is taken; that the learned judge abdicated his jurisdiction under Article 165(3) of the Constitution by holding that the enforcement of the rules 3(1) and 4(1) of the Breathalyser Rules 2011 is a matter for the trial court on a case by case basis as opposed to constitutionality of the provisions, and further, that the learned judge adopted a restrictive interpretation of the Constitution as regards the right to property.

14. When the appeal came up for hearing, learned counsel Mr. Kibe Mungai appeared for the appellants while learned counsel Ms Lydiah Ndirangu appeared for the 1st, 2nd and 5th respondents. The 3rd and 4th respondents were represented by learned counsel Mr. F. S. Ashimosi and Charles Agwara respectively while the 6th respondent was represented by learned counsel Mr. Julius Njoroge who held brief for Mr. Gitobu Imanyara. The 7th respondent was represented by Mr. Charles Agwara who held brief for Mr. Benson M. Ashitiva.

15. In accordance with this Court's Practice Directions, the appellants filed written submissions on 24th November, 2014 and the 1st, 2nd and 5th respondents filed written submissions on 7th April, 2016 and supplementary record of appeal on 8th April, 2016. The 3rd respondent filed written submissions on 13th March, 2016 while the 4th respondent filed written submissions on 26th October, 2015 and supplementary record of appeal on 12th November, 2015. Counsel appearing adopted the written submissions and highlighted aspects of those submissions.

16. On his part, Mr. Kibe Mungai contended that the High Court had erred in the impugned judgment by upholding as valid the Breathalyser Rules 2011 when under the Traffic Act a motorist was only culpable if he had no control of a motor vehicle after drinking as drinking per se was not a crime; that the Minister wrongly makes it an offence for a motorist to consume alcohol beyond authorized limit whether or not the motorist had full and proper control of the vehicle; that the Minister had power to enforce the law not to make or create new offences; that Parliament, under the Traffic Act, penalizes motorists for consumption of alcohol that results in lack of control of motor vehicle; that the Minister has created a strict offence; that the right of fair trial is absent in strict liability offences; that in a constitutional democracy, a person who is about to enter his homestead having driven all the way cannot be charged with the offence of being incapable of having proper control of the motor vehicle; that the difference between a slave and free person is that the former has dignity; that roadblocks and alcoblow should only

be implemented where there is suspicion and that road blocks must be gazetted; that road blocks next to one's residence are arbitrary; that the enforcement of the alcoblow on motorists is in breach of the Bill of Rights; that the decision of the High Court was wrong as it did not take into account the violation of the fundamental rights of the appellants.

17. On behalf of the 1st, 2and 5th respondent, Ms Lydiah Ndirangu relied on the written submissions and associated herself with the oral highlighting by her colleague Mr. Charles Agwara.

18. On behalf of the 4th and 7th respondents, Mr. Charles Agwara contended that the respondents are under a duty to ensure that there is safety on the roads. He submitted that the Breathalyser is a tool to ensure compliance with the law aimed at toning down deaths from road accidents. It was his contention that driving under the influence of alcohol is an offence under the Traffic Act. He contended that the Breathalyser is intended to assess level of intoxication to determine control or otherwise of the driver. He referred to Section 119 of the Traffic Act and to the Minister's power to make rules and opined that a Task Force had looked at the matter and the levels of intoxication that make a motorist incapable of control of a motor vehicle; he refuted the submissions by the appellants' counsel that the Breathalyser Rules create a new offence. In his view, the rules were nothing more than a means of determining offence under Sections 44 and 45 of the Traffic Act. The Rules, he said, were preserved by the 2013 Statutory Instruments Act. In his view, decisions from the USA show that human dignity is not violated by Breathalyser. He contended that the appeal has no merit and that the High Court was correct in its judgment in its interpretation of the law. He urged us to dismiss the appeal.

19. On behalf of the 3rd respondent, Mr. Ashimosi, while relying in the written submissions and the affidavits filed, contended that the validity of Sections 44 and 45 of the Traffic Act under which motorists are charged were not challenged in the Petitions in the High Court and that only the Breathylser Rules were. He opined that the appellants did not prove violation of the Bill of Rights. In his view, the appellants failed to prove the violations they alleged in the High Court.

20. On behalf of the government side, that is to say, the 1st, 2nd, 4th 5th and 7th respondents represented by Ms Lydia Ndirangu and Mr. Charles Agwara as aforesaid, Mr. Agwara contended that no evidence was tendered by the appellants to show that in terms of hygiene and safety as a gadget, the Breathalysers used are not of standards recommended worldwide. No evidence, he said, had been adduced in this regard. He drew the attention of the Court to Section 27(2) of the Statutory Instruments Act.

21. On her part, Ms Lydia Ndirangu also drew our attention to the South African case of **Dawood v. The Minister of Home affairs** [200 S.A.] (3) 936 (21). Counsel opined that driving in Kenya as is the case elsewhere is regulated and the Traffic Rules must be adhered to by all for the purpose of ensuring road safety and reduction of road accidents and the issue of violation of the right to dignity on account of compliance with the regulations did not arise.

22. We have perused the record of appeal and duly considered the submissions of counsel, both written and oral and the authorities cited. We are mindful that this is a first appeal, thus necessitating our evaluation of evidence, and the need to come up with our own conclusions. It is salient from the record

of appeal that there was absolutely no evidence before the trial judge to support the allegations of violations of constitutional rights under the Bill of Rights. The record shows that what was placed before the learned judge was a suit challenging the constitutionality of the Breathalyser Rules 2011 and the power of the Minister to make those Rules. That is the central issue for determination in this appeal. That is what was before the High Court. The allegations relating to violation of fundamental rights of the appellants allegedly on account of the enforcement of the Breathalyser Rules were hypothetical because, while the first appellant is not a human being with blood and tissue and is therefore not capable of driving or violating the Breathalyser Rules, the second appellant, though a human being, admittedly was never involved in the enforcement of or subjected to Breathalyser test. The allegations relating to the administration of the breath test and enforcement of the Breathalyser Rules were not based on facts and in so far as the appellants founded their claims on a hypothesis due to non-existence of a factual case, there was nothing before the learned judge to consider or determine for purposes of redress. We think the learned judge was made to engage in an exercise that was hypothetical in that regard. If, however, as a result of the roadblocks, the appellants' business suffered losses, evidence should have been tendered and liability and loss proved. No such evidence or material was placed before the learned judge. The case pleaded in the petition was hypothetical. In both the claims for breach of the fundamental rights and loss of business, there was not a scintilla of evidence before the judge to prove the allegations. For this reason we dismiss those claims as we do not consider it necessary to dissipate more time and energy examining hoax allegations.

23. What is germane, in our view, are the following issues, that is to say,

- Did the Minister have power to make the Breathalyser Rules"
- Do the Breathalyser Rules violate Article 94(5) of the Constitution"
- Is there a new offence created by the Breathalyser Rules"
- Do the Rules criminalize consumption of alcohol by motorists beyond the prescribed limits irrespective of whether such consumption has rendered the motorist incapable of proper control of the motor vehicle" Do the Breathalyser Rules violate the dignity of the motorist" Under what circumstances should the Breathalyser test be administered by police" We shall address these issues back to back.

24. Under Section 119 (1) of the Traffic Act, the Minister may make rules prescribing, under subparagraph (a), anything required by the Act to be prescribed, and under subparagraph(n), measures for controlling or prohibiting the movement of vehicles of any specified class or description between the hours of 6.45 p.m. and 6.15 a.m. and under subparagraph (p), measures for generally restricting or regulating the use of vehicles in such manner as the circumstances and safety on the roads may appear to him to require, and for the further, better or more convenient carrying out of any provisions of the Act. The section states -

"119 (1) the Minister may make rules prescribing

(a) anything required by this Act to be prescribed;

(b) measures for generally restricting or regulating the use of vehicles in such a manner as

the circumstances and safety on the roads may appear to him to require, and for the further, better or more convenient carrying out of any provisions of this Act;

25. In October 2011, the Minister, made Traffic (Breathalyser) Rules 2011 pursuant to Section 119(1) of the Traffic Act **in Kenya Gazette Supplement No.130 of 5th October, 2011 in Legal Notice No.138**,

26. Rules 3 and 4 of the Breathalyser Rules stipulate –

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

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

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

a. Has committed a traffic offence whilst the vehicle was in motion; or

b. Appears to have consumed alcohol, or is likely to have alcohol in his body,

The police officer may require the person to provide a specimen of breath for a breath test."

27. The prescribed limit of alcohol referred to in rule 3(1) is defined in rule 2 of the Breathalyser Rules as (a) 35 microgrammes of alcohol in 100 milliliters of breath; (b) 80 milligrammes of alcohol in 100 milliliters of blood; or (c) 107 milligrammes of alcohol in 100 milliliters of urine.

28. It is contended by the appellants that the Minister exceeded his powers or violated Article 94(5) of the Constitution which delegates power to make rules. Article 94(5) states –

"94(5) No person or body other than Parliament has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation."

29. The Breathalyser Rules were made in harmony with the provisions of S.27 of the Interpretation and General Provisions Act (Cap 2) now repealed by the Statutory Instruments Act. They are deemed to have been made under the latter Act. They are in public interest not least because they aim at public good as they are designed to reduce accidents on the roads and hence road fatalities and injuries by prohibiting drunk driving where a driver has exceeded the prescribed limit of alcohol. It is salient that what constitutes an offence under Sections 44 of the Traffic Act is driving while under the influence of alcohol or drug to such an extent as to be incapable of having proper control of the vehicle. Rule 3(1) of the Breathalyser Rules prescribes the limit of alcohol consumption. The argument that the rule creates an offence does not hold true. Sections 44 & 45 create the offences do. The assertion that some motorists have a greater capacity for alcohol and may not be incapable of control of a motor vehicle even with consumption beyond the prescribed limit does not hold water. The law is made for all without discrimination. The inconvenience that some may suffer as a result of their peculiarity cannot in law give rise to breach of or bear on fundamental rights. If this were not so, it would be impossible to legislate on

matters of public interest where people have varying idiosyncrasies. A threshold has to be determined and applied universally. Members of society must abide by the rules made for the general good of all. We agree with the learned trial judge that the rules neither create a new offence under the Traffic Act nor violate the appellants' fundamental rights. The learned judge delivered himself thus –

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

30. Clearly, the Minister had power, under Section 119 (1) of the Traffic Act, to make the Breathalyser Rules. The Rules did not violate Article 94(5) or any other Article of the Constitution. At the time when the Breathalyser Rules 2011 were made, the Statutory Instruments Act, 2013 which requires such subsidiary legislation to be tabled in Parliament was not in being. Section 27 of the Act preserved the Breathalyser Rules. The Breathalyser Rules are not shown to be inconsistent with the letter and spirit of the Constitution or to be inconsistent with any statute.

31. Although they were not elegantly drafted, rules 3(1) and 4(1) show clearly that a specimen of breath for a breath test may be demanded by a police officer in uniform if he has reasonable cause to suspect that a person driving or attempting to drive or who is in charge of a motor vehicle on a road or other public place appears to have consumed alcohol, or is likely to have alcohol in his body. Rule 3(1) prohibits driving while one has consumed alcohol beyond the prescribed limit. Driving while one has consumed alcohol beyond the prescribed limit is an offence under Section 44 of the Traffic Act. Perhaps Rule 3(1) should have been more elegantly cast as an amendment Section 44(1) (supra) stipulating that any person who consumes alcohol beyond the prescribed limit is guilty under section 44 of the Traffic Act of an offence of driving under the influence of alcohol and liable to a fine prescribed in the section.

32. The core work of policemen is to detect crime and nip it in the bud or effect arrest where crime has been committed. The Breathalyser Rules provide a tool to the police to nab motorists who pose danger on the road as a result of their inability to have control of their vehicles on account of consumption of alcohol. By dint of rule 3(1) (supra), if an uninformed policeman has reasonable cause to suspect that a driver appears to have consumed alcohol, he can require him to provide a specimen of breath for a breath test. As correctly submitted by Ms Lydiah Ndirangu in her written submissions on behalf of 1st, 2nd and 5th respondents, such motorist would have no cause to complain as the enjoyment of his or her rights and fundamental freedoms should not prejudice the rights and fundamental freedoms of others. After all, the right to life under Article 26(1) of the Constitution and the right to the highest attainable standard of health as well as the right to social security under Article 43(1) (a) & (b) including the right to human dignity under Article 28, being an obligation of the Government, it behoves the Government to put in place measures geared towards the attainment of an environment in which the enjoyment of such individual rights and freedoms is facilitated, hence the need to put down crime. As the Breathalyser tests on reasonable suspicion are geared towards public good, the argument that the Rules are anti the Constitution does not hold sway nor do the Breathalyser Rules 2011 violate the right to privacy or the right to dignity or fair trial, nor do they amount to self-incrimination of motorists. In his written submissions, Mr. Charles Agwara drew our attention to decisions from the State Supreme

Court in the United States of America on analogous situations. In all of them, the litigants were participants in the acts and actions complained of and were embroiled in the legal wrangles unlike in this appeal where the position of the appellants in relation to the allegations made is hypothetical.

33. Our Constitution has made provisions for the protection of life and property and for promotion of the general welfare of the citizenry. The responsibility for the enjoyment of these rights and freedoms reposes on the Government and is dependent on the measures in place to ensure that the enjoyment of the rights is a reality. Road safety has direct bearing on the enjoyment of these rights and freedoms. It is for this reason that Parliament, in recognition of the need for the law to promote safety on the roads, empower the Minister to make regulations to give effect to the provisions of sections 44 and 45 of the Traffic Act. The Breathalyser Rules have been attacked by Mr. Kibe Mungai on the ground that the Minister had no powers to make them; that they have created a new offence; and that in a democratic state like Kenya they have no place.

34. The Minister does not appear to have exceeded his delegated power in making the Breathalyser Rules which have simply prescribed intoxication levels of motorists as can be deciphered from Rule 2 thereof. The rules are intended to give a greater efficacy to sections 44 and 45 of the Traffic Act. During the promulgation of the rules, the record of appeal shows that they were subjected to participation by experts but it is discernible that the general public did not make any input. That matter was raised in the High Court. The learned judge opined that the rules are of such technical nature that expert participation alone was sufficient. This is not an aspect that was taken up seriously or in depth in the High Court either by the appellants or by the respondents and it seems to us that as the issue of road safety which the rules were intended to secure was never in contention at the trial, the rules which the Minister had the power to make cannot on that ground be impugned unless it is shown that they are inconsistent with the Constitution.

35. Law to detect drunk motorists is not peculiar to Kenya. South Africa has South African Road Traffic Act 93/96 which has been in force since 1998. It sets a legal limit of alcohol while driving. The South African Police Service conducts roadblocks and man check points to discourage people from drinking and driving through conducting breath tests.

36. Philipinnes has Republic Act No.10586 known as "Anti-Drunk and Drugged Driving Act of 2013" which makes provision for a breath analyser test to detect if it has reached the level of intoxication as established jointly by the Department of Health, the National Police Commission and the Department of Transport and Communications. The Act penalises persons driving under the influence of alcohol, dangerous drugs and other similar substances.

37. In the **United States of America**, States have drunk driving law which defines the prohibited level of blood alcohol concentration but specific laws and penalties vary substantially from State to State.

38. The Supreme Court of the United States of America in a 5-3 decision in the case of **Birchfield vs**

North Dakota upheld a conviction for refusal to take a breath test in Minnesota by appellant William Benard Junior. The Court reasoned that *"a breath test, but not a blood test, may be administered as such incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation."* The court in a 5-3 decision ruled that *"while officers can require a warrantless breath test, and States can require drivers arrested for being intoxicated to submit to one, that blood tests are too invasive and require a warrant of arrest."*

39. In **Commonwealth v. Kevin T. Brennan & Commonwealth v Lloyd W. Knockel,** 386 Mass. 772, the Supreme Court of Massachusetts (referred to us by Mr. Charles Agwara), the appellants could not successfully rely on the

Fifth Amendment to ward off the prospect of the evidence from Breathalyzer test from being used against them on the basis that it was self-incriminating.

It was held that it was not evidence of a testimonial nature but rather real or physical evidence whose source was the suspect himself. In **Chief Constable of Gwent v. Dash** [1986] RTR 41, Macpherson J held that *"in absence of malpractice, oppression, caprice or opprobrious behavior, there is no restriction on the stopping of motorists by a police officer in the execution of his duty and subsequent requirement of a breath test if the officer then and there genuinely suspects the ingestion of alcohol."*

40. Mr. Charles Agwara was right in his submission *"that the right to stop motorists applies uniformly across the board to any motorist who on reasonable cause the police suspect has committed a cognizable offence under the Traffic Act such as that under Section 44(1). Stopping of motorists and subjecting them to breath test is therefore not discriminatory as it is pegged on reasonable suspicion"*

41. The breathalyser rules are supposed to reinforce section 44 of the Traffic Act. Under section 44, the offence of driving under the influence of drink or a drug ensues if the motorist is incapable of having proper control of the vehicle. The section does not criminalise drinking per se. Where drinking does not result in the motorist's lack of proper control of the vehicle, no offence is committed.

42. Section 45 (supra) relates to public service vehicles. It makes it an offence for any person driving or in charge of a public vehicle to drink any intoxicating liquor. In other words, drinking of intoxicating liquor by a driver of a public service vehicle is prohibited completely under Section 45 of the Traffic Act.

43. The prescribed limits of alcohol consumption in the breathalyser rules need not relate to drivers of public service vehicles because they are not permitted under the law to drink alcohol while driving. Therefore, the question of a driver of a public service vehicle contravening the prescribed limits of the alcohol consumption as stipulated in rule 3(2) of the Breathylser Rules should not arise.

44. How then does rule 3 as read with rule 2 of the Breathylser Rules fit in with Section 44 of the Traffic Act. Rule 3 as read with rule 2 prohibits consumption of alcohol beyond the prescribed limits. But Section 44 has not been amended to bring the rules in harmony with it.

45. Section 44 makes it an offence for a private motorist to be under the influence of alcohol or drug

"to such an extent as to be incapable of having proper control of the vehicle ..."

46. Rules cannot amend statutory provisions. For the Breathyser Rules to apply to Section 44, Section 44 needed to be amended to make it an offence to drive after consumption of alcohol beyond the prescribed limits. Where such consumption does not result in lack of control of the vehicle, this ought to be a defence. It does not seem plausible to purport that it is an offence to drive after consumption of alcohol even beyond the prescribed limits while at the same time consumption of alcohol even beyond the prescribed limits is not an offence if the motorist is not incapable of having proper control of the vehicle.

47. The whole purpose of having the Breathyser Rules is to outlaw drunk driving and to detect whether a motorist is driving while under the influence of alcohol or a drug. The breath test ought to indicate the level of intoxication and whether it exceeds the prescribed or permitted level. Motorists have varying capacities of alcohol intoxication. Perhaps this is why Section 44 focuses on *"extent as to be incapable of having proper control of the vehicle..."*

48. Sections 44 & 45 sit side by side with the Breathlyser Rules. The amendment effected to Section 44 (supra) by The Traffic (Amendment) (No.2) Act, 2012 merely amended subsection (1) of Section 44 by deleting the words "ten thousand" and "eighteen months" and substituting therefor the words "one hundred thousand" and "two years" respectively. The amendment to Section 44 did not harmonise the Breathylser Rules with Section 44. The Breathylser Rules cannot create an offence unless they are part of Section 44 of the Traffic Act. Rule 3(2) states that a person who contravenes subrule (1) **(**by driving a motor vehicle on a road or public place if he has consumed alcohol in quantities that result in blood concentration beyond the prescribed limit**)** commits an offence under Section 44 (1) and 45 of the Act. In effect, the Breathlyser Rules on the one hand limit the alcohol consumption to quantities that do not give rise to more than the prescribed limit of alcohol content in the body **(**and this makes it an offence where the prescribed alcohol content on the body is exceeded**)** and at the same time, under Section 44(1) of the Traffic Act, it is not an offence to consume alcohol and drive if one is not incapable of having proper control of the vehicle. Sitting side by side, these two scenarios are in conflict. If Section 44(1) were amended the effect that no motorist shall drive a motor vehicle if he has consumed alcohol in such quantities that the blood alcohol concentration in his body is beyond the prescribed limit, there would be harmony and perhaps the Breathlyser rules would be sustainable. The position as it stands creates a dichotomy. On the one hand, while the law as stipulated in Sections 44 and 45 is clear, the Breathylser Rules do not specify whether a motorist who has consumed alcohol in such quantity that the blood alcohol concentration in his body is beyond the prescribed limit is guilty of an offence if he is not incapable of having proper control of the vehicle. It does not seem proper to charge motorists for drunk driving unless the law requires that by exceeding the prescribed limit, they are guilty regardless of whether they are or are not incapable of having proper control of the vehicle. That in turn, bears strict liability.

49. Parliament, no doubt may take up this very important public interest matter because there is no doubt that drunk driving on our roads must be prohibited to mitigate the scourge of road carnage and thus promote the welfare of the citizenry.

50. It is important to point out that it is an accepted principle of construction of statutes that The Legislature does not make mistakes, and clearly it is not for the court to legislate in order to correct the mistake. It is also an important principle of construction of statutes that the Legislature does not intend any alteration in the existing law except what it expressly declares and it is in our view, a correct proposition of the law that statutes are not presumed to make any alteration on the common law, further or otherwise, than the Act does expressly declare [**See R. v. Scott** [1856] 25 LJ M.C. 128 at pg 13 per Coleridge J). Having regard to the principle that Rules cannot repeal or contradict express provisions in the parent Act from which they derive their authority, and the requirement that rules must be fairly and reasonably related to the scope and object of the parent Act **(see Fawcett Properties Limited v. Buckingham** cc [1961] AC 636 at pg 678 per Lord Denning. See also **Roberts v. Hopwood** [1925] A.C. 698 it seems clear to us that while the Breathylser Rules were well intentioned, their ill-promulgation rendered them bad in law.

51. As shown in **Ex. P. Davis** [1872] L.R. 7. Ch. 526 at pg 526 per James LJ, if a statute is plain, the rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled, the rule must give way to the plain terms of the Act.

52. Mr. Kibe Muigai made heavy weather over the issue of *mens rea* and strict liability created by the Breathylser Rules. It is true that in Criminal Law, *mens rea* is a cardinal maxim, that a guilty mind or *mens rea* must be proved before the penalty provided by the law can be inflicted. But *mens rea* may be dispensed by statute. A balance must be maintained between presumption of *mens rea* and the public interest.

53. In **Lim Chin Aik v. The Queen** [1963] AC 160 Lord Evershed analysed the position in the case (in which a man had been charged with entering Singapore and remaining there when he had been prohibited from entering by a ministerial order which had not in fact come to his attention).

The court held that the presumption of *mens rea* had not been ousted. It stated –

"That proof of the existence of a guilty intent is an essential ingredient of a crime at common law is not at all in doubt. The problem is of the extent to which the same rule is applicable in the case of offences created and defined by statute or statutory instrument... Where the subject-matter of the statute is the regulation for the public welfare a particular activity – statutes regulating the sale of food and drunk are to be found among the earliest examples – it can be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for see that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of mens rea.... but it is not enough... merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of

the regulations. Unless this is so, there is no reason in penalizing him, and it cannot be inferred that the legislature imposed strict liability merely in order to find luckless victim. This principle has been expressed and applied in Reynolds v. Austin and James v. Smee. [We] prefer it to the alternative view that strict liability follows simply from the nature of the subject-matter and that persons whose conduct is beyond any sort of criticism can be dealt with by the imposition of a nominal penalty. This latter view can perhaps be supported to some extent by the dicta of Kennedy L.J. in Hobbs v. Winchester Corporation and of Donovan J. in R. v. St. Margaret's Trust Ltd. But though a nominal penalty may be appropriate in an individual case where exceptional lenience is called for, [we cannot] suppose that it is envisaged by the legislature as a way of dealing with offenders generally. Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct not in any way affect the observance of the law, [we consider] that even where the statute is dealing with a grave social evil, strict liability is not likely to be intended."

54. Having regard to what we have stated above, the upshot of our decision is that the Breathylser Rules do not create an offence independent of Sections 44 and, 45 of the Traffic Act. They are incapable of creating an offence. No one can be charged under rule 3(1) of the Breathyliser Rules. To that extent, rule 3(1) does not reinforce the provisions of Sections 44(1) of the Traffic Act as was intended. There is no doubt that as promulgated, the Rules must give way to the Act. As the need to prohibit drunk driving is still dire, and this matter being of great public interest, no doubt the respondents will move with quick dispatch to remedy the position.

55. In light of the above, we find no merit in the appeal. The High Court (Majanja J) did not error in denying the appellants the reliefs they sought in their petition dated 28th February 2014. Although the enforcement of the Traffic Breathylser Rules 2010 is part of the lawful duty of the police to detect crime, they were badly drafted and must give way to the Traffic Act.

56. Accordingly, we dismiss the appeal and all the appellants' claims. We thank counsel appearing in this appeal for their submissions which made our task lighter.

57. In view of the public interest nature of the issues in the appeal, we order that each party shall bear its own costs.

Dated and delivered at Nairobi this *7th day of April, 2017*.

G. B. M. KARIUKI

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR