



**IN THE TRANSPORT LICENSING APPEALS BOARD AT NAIROBI APPEAL CASE NO. 020 OF 2018**

**KYENI SHUTTLE COMPANY LTD.....APPELLANT**

**VERSUS**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY....RESPONDENT**

**JUDGMENT**

***Introduction***

1. The Appellant Company is a corporate body that is registered under the Companies Act, Cap 486 of the Laws of Kenya. It is licensed by the Respondent to operate public service vehicles.

2. The Respondent, National Transport and Safety Authority, is established under section 3 of the National Transport and Safety Authority Act No. 33 of 2012 and has the responsibility to: advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety, implement policies relating road transport and safety; plan, manage, and regulate the road transport system; ensure the provision of safe, reliable, and efficient road transport services and to administer the Traffic Act.

***The Appellant's Case***

3. The Appellant filed an appeal at the Transport Licensing Appeals Board (TLAB), on the 19th of December 2018 after its license to operate as a public service vehicle operator was revoked by the Respondent (National Transport and Safety Authority) on the 7th of December 2018.

4. This was effected through a letter dated the 7<sup>th</sup> of December 2018, whereby the Respondent informed the Appellant that its license to operate as a public service vehicle operator had been revoked as a result of non-compliance with the Public Service Vehicle (PSV) Regulations of 2014.

5. The appeal is therefore brought on the following grounds that: the Respondent failed to reply to the Appellant's request for route extension; and the Respondent failed to give notice, to the Appellant of its decision to revoke its licence, before taking any action which then led to the unfair revocation of its licence by the Respondent.

6. Through a letter dated the 4<sup>th</sup> of January 2018, the Appellant had written to the Respondent requesting for an extension of their current route. It was the Appellant's claim that, since 2016, they had been operating along the following routes:

Machakos – Kaveani – Kathiani and Back

Machakos – Mbooni and Back

Machakos – Tala – Kangundo and Back

Cabanas – Machakos and Back

The Appellant therefore sought to extend their current routes to include:

Nairobi – Machakos – Makueni

Nairobi – Kitui – Mwingi

7. It was further alleged by the Appellant, that its request for route extension dated back to 11<sup>th</sup> of January 2017 when it had written a letter to the Respondent applying for a long distance license and an extension of its route as it had previously been operating on commuter routes.

8. However, the Respondent wrote back to the Appellant on the 15<sup>th</sup> of February 2017, declining its request for extension due to the Appellant's non-compliance with section 11 of the Public Service Vehicles Regulations of 2014 (Legal Notice Number 23). The Respondent gave detailed reasons for its rejection and went a step further in lending its assistance to the Appellant to ensure full compliance with the law on the condition that reconsideration of the route extension request will be done after compliance is achieved.

9. On receiving the letter of the 15<sup>th</sup> of February 2017, it was the Appellant's claim that they took the sent letter seriously and made tremendous progress towards complying with section 11 of the PSV Regulations of 2014. They presented before the Board various exhibits that had been sent to the Respondent to prove compliance with the PSV Regulations such as the provision of mutual aid services and the certificate showing the installation of a fleet tracking management system from Vehicle Service Point Technologies.

10. It was further claimed by the Appellant that they wrote additional letters to the Respondent on the request for route extension on the following diverse dates: 28<sup>th</sup> of March 2017; 3<sup>rd</sup> of July 2017 and the 4<sup>th</sup> of January 2018. The Respondent, however, did not respond to the stated letters which were produced before the Board.

11. The Appellant claimed that by the time they had sent the letter dated the 4<sup>th</sup> of January 2018 requesting for an extension of their current route, they had been compliant with the requirements under Section 11 of the PSV Regulations of 2014.

12. It is contended by the Appellant that the revocation of its license by the Respondent was procedurally unfair due to their failure to give prior notice to the Appellant of their intended decision and action.

13. Through a letter dated the 31<sup>st</sup> of July 2018, the Respondent Authority informed the Appellant of its non-compliance with the various provisions of the PSV Regulations of 2014 and gave the Appellant fourteen (14) days from the date of the letter to comply, failure to which the Respondent Authority will take appropriate action.

14. The Appellant claims that they did not receive the stated letter and only came to the realization that they were non-compliant with the PSV Regulations after the Appellant's Director, Madam Juliana Mutuku, received a phone call from Mr Franklin of the NTSA who informed her that the Appellant Company was to appear before the Respondent and state what compliance steps they are going to undertake to realign their operations with the Law.

15. It is claimed by the Appellant, to the denial of the Respondent, that someone appeared on behalf of the Appellant to answer to the non-compliance issues that had been brought against them. Despite their claimed efforts, the Respondent through a letter dated the 25<sup>th</sup> of October 2018, suspended the Appellant Company for thirty days until they achieved full compliance with the PSV Regulations. The Appellant thereafter wrote to the Respondent requesting for an extension of the suspension period by three weeks, through a letter dated the 28<sup>th</sup> of November 2018, as the Appellant had experienced delays while obtaining good conducts for its drivers even though all the vehicles had been ready with valid inspections.

16. The Respondent reverted back to the Appellant through a letter dated the 7<sup>th</sup> of December 2018, which stated that the Respondent Authority had revoked the Operator Licence of the Appellant. The Appellant claimed that they also did not receive the revocation letter but was informed of its revoked status on the 17<sup>th</sup> of December 2018, when it wrote to the Respondent seeking for it to reconsider its decision and grant the Appellant one week to be fully compliant.

17. The Appellant then moved to the Transport Licensing and Appeals Board on the 19<sup>th</sup> of December 2018 seeking to be given

time to comply with the PSV Regulations and also for its request to have its route extended considered so that it can serve its long distance customers.

### ***The Respondent's Case***

18. It was the Respondent's case that the decision to revoke the Appellant's licence was as a result of the failure to comply with the PSV Regulations on the part of the Appellant. The Respondent avers that by the 31<sup>st</sup> of July 2018, while checking on the compliance of vehicles, it noted that the Appellant had not complied with a number of its Regulations. The various non-compliance issues included that: out of the thirty (30) vehicles belonging to the Appellant only twenty (20) had their Road Service Licenses; out of the thirty four (34) drivers they had employed, twenty four (24) of them had expired PSV badges; and out of the nine conductors they had, it is only one that had a valid PSV badge.

19. The Respondent claimed that they diligently notified the Appellant on its various decisions before taking any action through the various letters and emails that they sent to the Appellant on the following multiple dates: the 31<sup>st</sup> of July 2018; the 13<sup>th</sup> of September 2018; the 17<sup>th</sup> of September 2018; the 25<sup>th</sup> of October 2018; and the 7<sup>th</sup> of December 2018.

20. The Respondent also averred that despite the alleged claims by the Appellant that they appeared before the Respondent after they had been issued with a summoning letter, neither the Appellant nor their representative was in attendance on that particular meeting.

21. The Respondent conceded that they cannot deny an entity the opportunity to extend its current route as long as it is compliant with the necessary regulations. They further contended that its mandate under the law included its ability to register and deregister entities according to the National Transport and Safety Authority Act of 2012. It was the Respondent's contention that they had operated within the law when they made the necessary communication to the Appellant on its non-compliance, when they summoned the Appellant to appear before it and when they finally revoked the Appellant's licence.

### ***Determination***

22. Following the evidence adduced by the parties before the Transport Licensing Appeals Board, the Board has isolated the following issues to be the ones requiring a determination:

- a. Whether the Respondent gave notice to the Appellant before taking the decision to revoke the license.
- b. Depending on the answer to (a) above, whether the Respondent erred in revoking the Appellant's licence"

### ***Communication by the Respondent to the Appellant***

23. It was submitted that the Respondent did communicate all its decisions to the Appellant before taking any action and this was adduced before the Board through the various letters that it had allegedly sent to the Appellant.

24. What is therefore in contention is whether the communication made by the Respondent was received by the Appellant who was the concerned subject of the sent communication.

25. Looking at the various letters presented before the Board by both parties, we can conclusively state that there is a distinction on the Appellant's addresses as written by the Respondent in its letters. In the letters dated on the 31<sup>st</sup> of July 2018, the 13<sup>th</sup> of September 2018 and the 25<sup>th</sup> of October 2018, the Respondent's letters are addressed to the Chairman of Kyeni Shuttle Limited, P.O Box 9642 -90100, Machakos. In its letter on the 15<sup>th</sup> of February 2017, the Respondent addresses the Chairman of Kyeni Shuttle Limited, P.O Box 7642 -90100, Machakos. The Board is then called to mind the differences in the addresses as stated in the Respondent's letters.

26. As evidenced by the various letters written by the Appellant to the Respondent, the Appellant's postal address is Kyeni Shuttle Limited, P.O Box 7642 – 90100, Machakos. The Appellant's address being P.O Box 7642 and not P.O Box 9642. The Board can therefore imply that there was an error made when addressing the Appellant's letter as they were addressed to P.O Box 9642 and

not the actual address which is P.O Box 7642. As much as we cannot speculate on the reasons resulting to the mistake, we cannot ignore the implications that arise from it. The issue being whether communication was rightfully made to the Appellant by the Respondent.

27. We stand guided in this matter by the postal rule postulated in contract law regarding postal communication which was laid down in the English case of *Adams v Lindsell* (1818). The rule states that communication is deemed to have been made through post when the letter is sent and not when it is received by the person to whom it was sent to. The reasoning behind the rule being that it is easier to prove that a letter has been sent rather than it has been received. It then follows through the same reasoning that in this matter no communication can be deemed to have been sent to the Appellant as the alleged letters were addressed to the wrong address of the Appellant through no fault of the Appellant and it can therefore be stated that the Respondent did not communicate or notify the Appellant.

28. In the circumstances, we are convinced by the Appellant's argument that they did not receive notification from the Respondent of its decisions to suspend the Appellant's licence and later on its action to revoke the Appellant's licence.

***Whether the Respondent erred when revoking the Appellant's licence"***

29. Following the determination that no communication or notification was made to the Appellant by the Respondent, it can therefore be inferred that the Respondent failed to accord the Appellant the right to a fair hearing by failing to give them prior and reasonable notice of its decisions and actions.

30. It is the clear that Article 47 of the Constitution gives every person the right to be given written reasons for any administrative action taken. As Kaluma observes:

"Notice is a condition precedent to fair hearing. Any hearing undertaken without due notice to the affected party, violates the requirements of natural justice, and is null and void and will be quashed by court... For a notice to be valid, it should be served on the person to be affected by the proceedings. It must give sufficient time to the person to prepare his case..." (Peter Kaluma, *Judicial Review: Law Procedure and Practice* (LawAfrica, Second Edition, 2012), p. 111).

31. It follows, therefore, that as much as the Appellant was not in compliance with the PSV Regulations, the Respondent ought to have followed the law in effecting their mandate. We can sympathise with the fact that were it not for the error occasioned in the addresses, they would have done so. But the current situation holds that the principles of natural justice were not adhered to and that the Appellant was denied the right to a fair hearing.

32. Courts have been consistent in quashing decisions that can be considered as procedural impropriety due to the denial of a party of their right to be heard. Illustrative of this is the case of *Pastoli v Kabale District Local Government Council And Others* [2008] 2 EA 300, where the court held that:

"Procedural Impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

33. In view of the foregoing, it is clearly the case that an administrative decision was taken against the Appellant without regard to the requirements of the law on the need for being given *prior* notices, reasons for the actions, and hearing. The Respondent therefore erred when they revoked the Appellant's license. It is now an established principle of administrative law that a decision that is taken without due regard to the rules of procedural fairness cannot be allowed to stand. This was the position espoused in the case of ***Onyango Oloo vs. Attorney General* [1986-1989] EA 456**, where the Court of Appeal held that the "**denial of the right to be heard renders any decision made null and void *ab initio*.**"

34. Having considered the facts and the law applicable to this case, the Transport Licensing Appeals Board hereby makes the following declarations and orders:

1. A declaration to set aside the Respondent's decision to revoke the Road Service License (RSL) of the Appellant.

2. THAT the Appellant be given one month to comply with the provisions of the PSV Regulations after which their license to operate as a public service vehicle should be granted.

3. THAT NTSA considers the request for route extension after compliance with the PSV Regulations.

**Delivered, dated, and signed in Nairobi by the Transport Licensing Appeals Board on this 15<sup>th</sup> day of March 2019.**

**Dick Waweru Chairman** .....

**Prof. Kiarie Mwaura Member** .....

**Betty Chepng'etichBii Member** .....



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