



IN THE TRANSPORT LICENSING APPEALS BOARD AT NAIROBI

APPEAL CASE NO 039 OF 2019

EDWIN MUKABANA & MICHAEL KARIUKI.....APPELLANTS

VERSUS

THE NATIONAL TRANSPORT & SAFETY AUTHORITY.....RESPONDENT

SPEED GOVERNORS & SAFETY AUTHORITY.....INTERESTED PARTY

RULING

Introduction

1. The Appellants are representatives of the Association of Bus Operators Kenya and Mount Kenya Matatu Owners Association.
2. The Respondent, National Transport and Safety Authority (NTSA), 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 to 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 Appellants' Case

3. The Appellants, through their Advocate, Mbiyu Kamau, submitted that the new speed limiters (2295:2018) which were gazetted on 30th September 2018 and whose implementation was enforced by the Respondent on 05th August 2019 not only limits the speed of the vehicles, but also have a tracking device which relays data every 5 seconds to the speed limiters companies.
4. The Appellants also argued that the operators of Public Service Vehicles (PSV) including themselves were not consulted and no public participation was undertaken before the gazettment of the new speed limiters.
5. The Appellants raised two issues which the board was to consider namely: that there was no public participation done before the new speed limiters were gazetted and introduced and secondly that the tracking device inherent in the new speed limiters poses a risk to national security and infringes on the right to data privacy because it is unclear whether the data retrieved and transmitted may end up in the wrong hands.
6. The Appellants, through Advocate Mr. Kariuki holding brief for Mr. Mbiyu, therefore asked the honourable board to find the appeal meritorious and order the respondent to issue all PSV vehicles that are in good condition and have installed the previous speed limiters (2295:2011) with the necessary inspection sticker so as to enable them get their licenses back and continue with their matatu operations.

Respondents' Case

7. The Respondent Authority filed a Replying Affidavit sworn by Engineer Gerald Wangai, the Director in charge of Motor Vehicle

Inspection, dated 03rd November 2019, claiming that by virtue of gazettment of 2295:2018 (the new speed limiters), the requirement for motor vehicles to be fitted with the new speed limiters became law and the authority cannot be compelled not to implement a law that is in force and has been gazetted; that there are other similar applications seeking to stop the implementation of the new speed limiters pending at the High Court and that the board has no jurisdiction to hear and entertain an appeal challenging the validity of a statutory instrument and whether public participation was conducted in respect to the gazettment of the KS 2295:2018 standards as the same is the preserve of the High Court.

8. During his submissions before the board, Mr. Ronald, advocate for NTSA opined that various pleadings including the Replying Affidavit and a Preliminary Objection were filed at the board. He also argued that since there were matters pending in High Court at Chuka touching on virtually the same subject matter and seeking the same prayers, it would be prejudicial for the board to hear the cases.

9. Accompanying bundle documents were also adduced as evidence. Copies of petition numbers 9 of 2019 at Chuka (Wanja Karuku vs The Traffic Commandant Department & 9 others), petition number 181 of 2019 in Mombasa (currently petition number 10 of 2019 at Chuka), (Kenya Transporters Association Limited vs NTSA) and Miscellaneous Judicial Review case number 297 of 2019(R vs NTSA exparte Association of Bus Operators Kenya & another) were tabled before the board. The latter case became this present appeal after representatives of one of the applicants (Association of Bus Operators Kenya) transferred it before the board.

10. In the Preliminary Objection dated 3rd November 2019, the Respondent Authority raised a few grounds as to why the Memorandum of Appeal should not be heard. Four grounds were raised namely: that the board does not have jurisdiction; that the appellants have not exhausted the provisions under section 16A of the Standards Act which require them to file an appeal at the Standards Tribunal to challenge the decision of the Standards Council in gazetting the new speed limiters; that the Appellants have not filed any application for a license at NTSA and that the appeal does not fall among appeals that can be filed against the decisions of NTSA.

11. Further, Mr. Ronald pontificated that the board had no jurisdiction to hear an appeal seeking to challenge gazettment of legislation and that the Appellants are not aggrieved parties by dint of Section 38 of the NTSA Act, no.33 of 2012. He emphasized the fact that any licensing decision or action of NTSA is what can be challenged and be heard by the board but not implementation of gazetted laws. He thus asked the board to dismiss the appeal with costs.

12. During the hearing on 24th January 2020, Mr. Gacheru, Advocate for Speed Governors and Road Safety Authority sought to be enjoined in the suit, a request which was duly granted by the honourable board. He argued that there are two continuing matters, consolidated petitions number 9 & 10 filed in the High Court at Chuka slated for mention on 10th February 2020 for directions for hearing. He informed the court that petition number 10 was initially Petition 181 filed in Mombasa. It was transferred to the High Court at Chuka.

13. Mr. Gacheru supported the respondent's preliminary objection on the ground that the board had no jurisdiction to hear the appeal which raises constitutional principles that can only be litigated in the High Court. He further opined that in the event that the board found it had jurisdiction, it should then stay the appeal pending the hearing and determination of the matters in the High Court.

Determination

14. Following the arguments made and evidence adduced by the parties before the Transport Licensing Appeals Board, the Board has extrapolated only one discernible issue for determination whether:

i. The board has jurisdiction to hear the appeal and whether it should stay the appeal pending the hearing and determination of the cases in the High Court at Chuka.

Whether the board has jurisdiction to hear the appeal and whether it should stay the appeal pending the hearing and determination of the cases in the High Court at Chuka.

15. The Appellants have asked this board to hear this appeal because it has jurisdiction pursuant to section 38 and 39 of the NTSA Act no. 33. Of 2012. The Respondents preliminarily objected to this by arguing that the board did not have jurisdiction. As a matter

of fact, the 2nd Respondent stated that if the board at all finds that it has jurisdiction, it should in the interest of justice stay the appeal pending the hearing and determination of other two matters in the High Court at Chuka. The two matters being referred to herein are petition number 9 and 10 of 2019 filed in the High Court at Chuka. The Judicial Review case number 297 of 2019 filed in the High Court at Nairobi became this present appeal after one of its applicants filed an appeal before this board.

16. Petition 9 of 2019 raised the issues that owing to a memo issued by NTSA to matatu owners on 30th September 2019 indicating that no matatu would be inspected and passed at any NTSA inspection centre without being fitted with the new speed limiters/governors yet matatus are currently fitted with the old speed governors, which are not defective, would equal to economic sabotage of matatu owners. The petitioner, Wanja Karuku, therefore averred that due to the grounds that there was no public participation carried out, that matatu operators were not given enough time to comply, no consultation was held with them and no reasons were given to them for the rolling out of the new speed limiters, the court should stay the notice/memo issued by NTSA pending the hearing and determination of the notice of motion she had filed.

17. Constitutional Petition number 112 of 2019 in Mombasa High Court was transferred to Chuka and became petition number 10. It raised similar issues to those in petition number 9, calling for the directive of NTSA to implement the new speed limiters to be stayed on the basis of, *inter alia*, lack of public participation, insufficient reasons were advanced to the affected applicants, greater financial strain was occasioned to them and that their constitutional rights to fair administrative action were infringed.

18. Since the issues to be canvassed before and determined by this board are subject to hearing and determination in another forum, suffice to note, a higher court than this tribunal, this board will stay this appeal until the other matters we have highlighted hereinabove are heard and determined by the High Court for the sake of administration of justice and effective service delivery.

19. Article 165(6) and (7) of the Constitution of Kenya, 2010 posit that the High Court exercises supervisory powers over all tribunals, bodies, persons or subordinate courts. The High Court has power to intervene and interfere in cases where it is called upon to do so. By the higher authority granted to the High Court by the Constitution and respect accorded by this honourable board to the hierarchy of court system in Kenya, we hold that this matter should be dispensed with at the High Court whose decisions are binding to all subordinate courts including this board.

20. In determining whether there was public participation or not which is an issue addressed by both parties and a constitutional right, the right forum for that to be adjudicated is in the High Court which by virtue of Article 165(3) is conferred with unlimited original and appellate jurisdiction in criminal and civil matters; jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

21. It follows that even without deeply analysing and deciding whether the board has jurisdiction or not to hear the matter, we allow the course of justice to take its course in the High Court at Chuka which is already seized of two consolidated petitions raising similar issues to this appeal.

22. Furthermore, the issues raised in the two petitions are similar to the issues raised in the memorandum of appeal and submissions filed before the board. It suffices to note that due to the similarity in the subject matter in these different suits and the desire to ensure flawless dispensation of justice not fraught with contradictory rulings, the board makes a finding that this present appeal be stayed pending the hearing and determination of the consolidated petitions number 9 & 10 filed in the High Court at Chuka.

23. Having considered the facts of the case, evidence tendered before the board and the law applicable to this case, the Transport Licensing Appeals Board hereby makes the following orders:

1. That this appeal be stayed pending the hearing and determination of consolidated petitions no. 9 & 10 in the High Court at Chuka.

Delivered, dated, and signed in Nairobi by the Transport Licensing Appeals Board on this 2nd day of March 2020.

Dick Waweru **Chairman**

Prof. Kiarie Mwaura **Member**

Aden Noor Ali	Member
Moses Parantai	Member
Betty Chepng'etich Bii	Member



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