



Case Number:	Judicial Review Case 124 of 2014
Date Delivered:	06 Oct 2014
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	George Vincent Odunga
Citation:	Republic v Cabinet Secretary for Transport & Infrastructure Principle Secretary & 5 others exparte Kenya Country Bus Owners Association & 8 others [2014] eKLR
Advocates:	Mr Harrison Kinyanjui for the Applicants in Judicial Review No. 124 of 2014 Mr Agwara for the 3rd Respondent
Case Summary:	<p style="text-align: center;"><u>Subsidiary legislation must undergo parliamentary scrutiny before having force of law</u></p> <p style="text-align: center;">Republic v Cabinet Secretary for Transport & Infrastructure Principal Secretary & 5 others <i>ex parte</i> Kenya Country Bus Owners Association & 8 others</p> <p style="text-align: center;">Judicial Review Case no. 124 of 2014</p> <p style="text-align: center;">High Court of Kenya at Nairobi</p> <p style="text-align: center;">G V Odunga, J</p> <p style="text-align: center;">October 6, 2014</p> <p style="text-align: center;">Reported by Teddy Musiga, Riziki Emukule & Kipkemoi Sang</p> <p>Brief Facts:</p>

The Petitioners (Kenya Country Bus Owners Association & 7 others) were engaged in the business of public service vehicle transporters. Being aggrieved by the actions of the 1st Respondent (Cabinet Secretary for Transport & Infrastructure Principle Secretary) in promulgating the National Transport and Safety Authority (operation of public service vehicles) Regulations, 2014 (hereafter referred to as the Regulations) vide Legal Notice No. 23 of 2014, they sought for the same to be annulled. The petitioners contended that the Regulations were unconstitutional by virtue of banning night travel, seeking the removal of overhead guard rails for luggage and also the fact that they had not been passed through the Parliament before being gazetted. It was also the petitioner's case that the Regulations contravened the right to individually own and operate public service motor vehicles without belonging to an association as well as contractual rights.

Issues:

1. Whether the failure to lay the Regulations before Parliament within the stipulated period, fell short of the provisions of the Statutory Instrument Act No. 33 of 2012, which in this case was the parent statute.
2. Whether the meaning of the term "Parliament" for purposes of Section 11 of the Statutory Instrument Act No. 33 of 2012 constituted National Assembly and the Senate and which house was relevant for purposes of transmission to the clerk of that house
3. Whether by revoking Legal Notice No. 219 of 2013 three days before the judgment, the respondent engaged in an oppressive, arbitrary and unconstitutional action against the petitioners business so as to declare the Regulations utterly void and cannot be enforced
4. Whether Regulation 11 (e) and (f) of the Legal Notice No. 23 of 2014 which only permitted the carrying of small parcels and banned long distance vehicles from having a cargo carrier mounted on the roof were unconstitutional on discriminatory grounds since it barred people with disabilities who

- used wheelchairs from having the same transported in the overhead carriers
5. Whether Regulations 15(1) and 5(1) of the Legal Notice No. 23 of 2014 was *ultra vires* section 24(5) of the Statutory Instruments Act, and hence null and void.
 6. Whether the removal of the identification or number plates or licences from the petitioners'/applicants' motor vehicles by the 1st respondent under the 4th respondent in circumstances other than those contemplated under Section 106(4) as read with sections 55 and 56 of the Traffic Act and without an order of prohibition was illegal

Constitutional Law-powers of Cabinet Secretary to make subsidiary legislation-whether Parliament meant both National Assembly and Senate for purposes of interpreting section 11 of the Statutory Instruments Act-whether lack of Parliamentary scrutiny of the National Transport and Safety Authority (Operation of Public Service Vehicle) Regulations, 2013 made them null and void-Constitution of Kenya, 2010 articles 92(6), 93(2), 109(3), 122

Constitutional Law- discrimination-discrimination of disabled persons in public service vehicles-Whether Regulation 11 (e) and (f) of the Legal Notice No. 23 of 2014 banned long distance vehicles from having a cargo carrier mounted on the roof was unconstitutional on discriminatory grounds since it barred people with disabilities who used wheelchairs from having the same transported in the overhead carriers-Constitutional of Kenya 2010, Article 2(5) and (6), Convention on the Right of Persons with Disabilities; Article 1

Statute – Subsidiary legislation – national transport and safety regulations - validity of the removal of the identification or number plates or licences from the motor vehicles- Whether the removal of the identification or number plates or licences from the petitioners'/applicants' motor vehicles by the 1st respondent under the 4th respondent in violated section 106(4) as read with sections 55 and 56 of the Traffic Act and without an order of prohibition was illegal- validity of the

National Transport and Safety Authority (Operation of Public Service Vehicle) Regulations, 2013- whether the National Transport and Safety Authority (Operation of Public Service Vehicle) Regulations, 2013 were valid-Traffic Act (Cap) sections 55, 56 and 106(4), Statutory Instrument Act No.33 2012, section 11- National Transport and Safety Authority (Operation of Public Service Vehicle) Regulations, 2013

Section 11 of the Statutory Instruments Act, 2013 provided:

1) (1) Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament.

(2) An explanatory memorandum in the manner prescribed in the Schedule shall be attached to any statutory instrument laid or tabled under subsection (1).

(3) The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.

(4) If a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.

Held

1. Section 11(4) of the Statutory Instrument Act which clearly provided for the consequences for the failure to lay the instrument before the house within the stipulated period voided the instrument. The section gave no option to the court since it was couched in mandatory terms which ought to be read not as merely directory.
2. Statutory instruments made by Ministers or

other competent authorities were valid and effective as soon as they were made and laid before Parliament.

3. The statutory duty to lay an instrument before parliament would not of itself invalidate the instrument though it could amount to a misdemeanor and that even if not complied with, the court could not have held that the regulations and rules were not thereby rendered invalid, the lapse of seven days without the regulation being tabled in Parliament were void and ceased to have any effect. Therefore, such failure to comply with section 11 of the Statutory Instrument Act No.33 of 2012 rendered the instrument in question null and void.
4. Article 93(1) and (2) of the Constitution of Kenya, 2010 established a Parliament consisting of the National Assembly and the Senate, recognising that both had “respective” roles to play. Under article 92(6) of the Constitution of Kenya 2010, the Senate considered, debated and approved Bills concerning counties. Article 109(3) of the Constitution of Kenya 2010, provided for Bills not concerning County government to be considered only in the National Assembly, and passed in accordance with article 122 and the Standing Orders of the National Assembly.
5. In order to give a purposive effect to section 11 of the Statutory Instruments Act, the terms “responsible Clerk” and “respective house” ought to have been read with respect to the house which participated in the enactment of the parent legislation under which the Instrument was enacted or promulgated. In the instant case, the subject Statutory Instrument was enacted under the National Transport and Safety Act. It was not contended that the said Act was an Act which concerned counties and thus it was not necessary that the said Regulations had to be laid before the Senate.
6. Section 11 of the Statutory Instruments Act required that an instrument had to be transmitted but did not provide the means by which such transmission was to be effected. The law did not require a

transmittal letter but that the instrument be transmitted, sent or communicated. The lack of a signature on a transmittal letter or even lack of the transmittal letter itself did not render an otherwise transmitted Instrument ineffectual or invalid. In the instant case there was a letter from the Ministry of Transport and Infrastructure addressed to the Speaker of the National Assembly and this was enough to show that the instrument in question was transmitted to the National Assembly which was the concerned house.

7. Regulation 11(e) and (f) of the Regulations subjected persons with disability to differential treatment when it came to mobility vide public transport means and thus unconstitutional, null and void. It therefore violated the constitution and the Convention on the Rights of Person with Disabilities. Through article 2(5) and (6) of the Constitution of Kenya, 2010 a window of enforcement and enrichment of the rights and freedoms was created to persons with disabilities through the application of international law and principles, treaties and conventions Kenya had ratified. Article 1 of the Convention on the Rights of Persons with Disabilities defined discrimination as to include; any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on equal basis with others.
8. Article 20(3) of the Constitution of Kenya, 2010 required the court to apply the Bill of Rights to develop the law to the extent that it did not give effect to a right or fundamental freedom; that meant that where the law did not give effect to the right or fundamental freedom the court was enjoined to develop the same. The Constitution under that provision described the Constitution to be aptly of transformative character for good governance.
9. Regulation 15(1) was *ultra vires* section 24(5) of the Act when it imposed a fine of Ksh. 50,000 for contravention of the

regulation when the maximum was Ksh. 20,000 provided under the provision of the Parent Statute. Regulation 5(1) was invalidated by its nature of retroactivity, unreasonability and *ultra vires* section 23 (3) of the Statutory Instrument Act No.33 of 2012 when it required that compliance with the Regulations ought to have been from the preceding year.

- a. *Regulation 15(1) of the Legal Notice No. 23 of 2014 was ultra vires the section 24(5) of the Statutory Instruments Act, and hence null and void.*
- b. *All the applicants'/petitioners' unexpired TLB licenses were valid and any attempt to bar them on the basis of the invalidity thereof was illegal, unlawful and devoid of any legal basis.*
- c. *Regulation 5(1) (f) of Legal Notice No. 23 of 2014 was invalid null and void.*
- d. *Regulations 11(e) and (f) of Legal Notice No. 23 of 2014 was unconstitutional, null and void.*
- e. *The removal of the identification or number plates or licences from the petitioners'/applicants' motor vehicles in circumstances other than those contemplated under Section 106(4) as read with sections 55 and 56 of Traffic Act and without an order of prohibition was illegal and the Respondents were directed to restore the same.*
- f. *Costs of the applicants'/petitioners' to be borne by the 1st Respondent.*

Cases

East Africa

1. *Anupa, Paul Pkiach & another v Attorney General & another* Petition 93 of 2011 – (Explained)
2. *Centre for Human Rights and Democracy & 2 others v Judges and Magistrates Vetting Board & 2 others* Petition 11 of

2012 – (Explained)

3. *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No 4 of 2012 – (Mentioned)
4. *Keroche Industries Limited v Kenya Revenue Authority & 5 others* [2007] KLR 240 – (Mentioned)
5. *Kimutai v Lenyongopeta & 2 others* [2005] 2 KLR 317; [2008] 3 KLR (EP) 72 – (Explained)
6. *Nyarangi & 3 others v Attorney General* [2008] KLR 688 – (Followed)
7. *Republic v Cabinet Secretary for Transport & Infrastructure & 5 others ex parte Kenya Country Bus Owners Association (Thro Paul G Muthumbi Chairman) Samuel Njuguna Secretary & 8 others* Judicial Review Case No 124 of 2014 – (Explained)

United Kingdom

1. *Metcalf v Cox* [1895] AC 328 – (Mentioned)
2. *Regina v Immigration Appeal Tribunal ex parte Jeyeanthan* [1999] 3 ALL ER 231; [2000] 1 WLR 354 – (Explained)
3. *Regina v Secretary of State for the Home Department ex parte Fire Brigade Union* [1995] 2 WLR 464; [1995] 2 AC 513 – (Explained)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 10,10(2),(b); 20(3); 27(3),(4); 28; 54; 54(1)(a),(c); 93(1),(2); ;94; 95; 96,(2); 118(1)(b); 132(1)(a); 153(4)(a); 231(3) – (Interpreted)
2. Persons with Disabilities (Access to Employment Services and Facilities) Regulations, 2009 (Act No 14 of 2003 Sub Leg) regulation 3 - (Interpreted)
3. National Payment Systems Act, 2011 (Act No 39 of 2011) section 31(2) – (Interpreted)
4. National Transport and Safety Authority (Operation of Public Service Vehicles)

	<p>Regulation, 2013 (Act No 33 of 2013 Sub Leg) regulations 5(1)(f); 15(1); 16 – (Interpreted)</p> <p>5. National Transport and Safety Authority Act, 2012 (Act No 33 of 2012) sections 4,53 – (Interpreted)</p> <p>6. Statutory Instruments, 2013 (Act No 23 of 2013) sections 11, 23(3); 24(5) – (Interpreted)</p> <p>7. Traffic Act (cap 403) sections 55,56,106(4)(4A) – (Interpreted)</p> <p>8. Traffic Rules (cap 403 Sub Leg) regulation 61(1)(a) – (Interpreted)</p> <p>United Kingdom</p> <p>1. Statutory Instruments Act, 1946 [UK] section 4(1)</p> <p>Texts and Journals</p> <p>1. Alexander, SA et al (Eds)(1995) <i>Judicial Review of Administrative Action</i> London: Sweet & Maxwell 5th Edn p 274</p> <p>2. Craises,WF.,(Eds)(1963) <i>Craises on Statute Law</i> London: Sweet & Maxwell 6th Edn p 66</p> <p>3. Garner,BA., (Ed)(2009) <i>Blacks Law Dictionary</i> Minnesota: West Publisher 9th Edn p 1638</p> <p>Advocates</p> <p>1. Mr Harrison Kinyanjui for the Applicants 2. Mr Agwara for the 3rd Respondent</p>
Court Division:	Judicial Review
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented

Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO. 124 OF 2014

REPUBLIC.....
APPLICANT

VERSUS

CABINET SECRETARY FOR TRANSPORT & INFRASTRUCTURE

PRINCIPLE SECRETARY1ST RESPONDENT

STATE DEPARTMENT OF TRANSPORT2ND RESPONDENT

THE NATIONAL TRANSPORT & AUTHORITY.....3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE. 4TH RESPONDENT

THE TRAFFIC COMMANDANT.....5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

EXPARTE

KENYA COUNTRY BUS OWNERS ASSOCIATION

(Thro' PAUL G. MUTHUMBI – Chairman)

SAMUEL NJUGUNA – SECRETARY

JOSEPH KIMIRI – TRASURER1ST APPLICANT

MBUKINYA BUS SERVICE (KENYA) LTD2ND APPLICANT

CROWN BUS SERVICES LTD.3RD APPLICANT

KAMPALA COACHES LTD 4TH APPLICANT

TRATICOM ENTERPRISES LTD.5TH APPLICANT

UGWE BUS SERVICES 6TH APPLICANT

TRISHA COLLECTIONS LTD..... 7TH APPLICANT

PANTHER TRAVEL LTD.....8TH

APPLICANT

NEON COURIER SERVICES LTD.....9TH APPLICANT

CONSOLIDATED WITH JR MISC. APPL. NO 127 & PETITION NO. 172 OF 2014

JUDGEMENT

Introduction

1. This ruling is in respect of Nairobi High Court JR Miscellaneous Application Nos. 124, 127 and 172 of 2014 which were consolidated.

2. What triggered the institution of these proceedings was the promulgation by the 1st Respondent of Legal Notice No. 23 dated 11th March, 2014, ***The National Transport and Safety Authority (Operation of Public Services Vehicles) Regulations, 2014*** (hereinafter referred to as the Regulations).

3. In these applications the applicants/petitioners (who for ease of reference shall hereinafter be referred to as the Petitioners) are substantially seeking orders annulling the said Regulations.

Petitioners' Case

4. It was the petitioners' case that though this Court in Judicial Review Case No. 2 of 2014 pronounced itself in regard to Legal Notice No. 219 of 2013 (hereinafter referred to as the earlier Legal Notice) published by the 1st Respondent in the same manner as he has purported to do in the Regulations herein, the 1st Respondent remained adamant that the applicants comply with the earlier Legal Notice. It was contended that the promulgation of the said Regulations during the pendency of the proceedings in Judicial Review Application No. 2 of 2014 was unlawful.

5. The petitioner's case was that Article 132(1)(a) of the Constitution demands that the 1st Respondent acts with utmost professionalism and ethics and that his said conduct did not meet that threshold as he has engaged in oppressive, arbitrary and unconstitutional action against the petitioners' lawfully engaged business as public service vehicle transporters. It was their position that Article 153(4)(a) of the Constitution demands of the 1st Respondent acts in accordance with the Constitution and by violating he violated the Court's authority vested by Article 159(1) of the Constitution in publishing the said Regulations the 1st Respondent acted without regard or respect to this Court's authority hence the impugned Legal Notice being an outflow of an unconstitutional decision is utterly void and cannot be enforced.

6. It was further contended the enforcement of the said Regulations Legal Notice No. 23 of 2014 without Parliamentary scrutiny as envisaged under section 11 of the ***Statutory Instruments Act*** denies and deprived the applicants of the opportunity of the protection of the law through Parliamentary scrutiny of the said Regulations and an avenue for the applicants to express their sentiments on the legality thereof more so as no regulation or Rule can have a retroactive effect.

7. In was the petitioners' case that the failure by the 1st Respondent to inform the Court that the earlier Legal Notice was no more as a result of the publication of the said Regulations was unethical and a

demonstration of mala fides and the publication thereof creates a bad and violent governance a practice that amounts to a violation of Article 10(2)(b) on good governance.

8. It was contended that though the petitioners' licences allow them to operate at night which licences are valid till December, 2014, the 1st and 3rd Respondents intend to act arbitrarily in violation of the ex parte applicant's statutory rights to enforce the said Regulations without any force of law.

9. To the petitioners' without repealing Rule 61(1)(a) of the **Traffic Rules** which permit the petitioners' to carry luggage on the roof where guard rails have been fitted, it is a breach and violation of the Rule of law enshrined in the Constitution for the 1st respondent to purport to enact Regulation 11(f) in the said Regulations. Further, the removal of the roof carriers would increase the public cost of travel since the said carriers enable the ex parte applicants to ferry cargo not otherwise readily ferried by other means.

10. On the same point it was contended that Articles 28 and 54 of the Constitution enjoins the applicants to treat persons with physical disabilities with dignity and in particular Article 54(1)(a) enjoins the applicants to ensure that persons with disabilities are treated with dignity and respect. The removal of the carriers, according to the petitioners would leave the applicants without the means of carrying wheelchairs of the physically disabled hence the implementation of the said Regulation would lead to turning away the people with disabilities which would be unconstitutional.

11. It was the Petitioners' case that the said Regulations contravene the rights to individually own and operate public service motor vehicles without belonging to an association as well as contractual rights.

12. In the petitioners' view the said Regulations ought to be scrutinised not just by the National Assembly and also by the Senate.

13. To them the cause of high fatality on the roads is partly the glaring omission by the responsible National and County Government authorities in not providing safe passage on roads and road users hence the denial of members of the public the right to travel by banning night travel is a gross violation of Kenyans' right to freedom of movement guaranteed by the Constitution.

14. It was their case that each and every PSV vehicle on the road as of March, 31st 2014 had a duly authorized speed governor, and as such no safety hazard was posed or is posed by such vehicles and further the 2 brands of speed governors specified by the 1st Respondent in Legal Notice No. 219 of 2013 was outlawed and declared illegal on March, 2014 by this Court's decision in Judicial Review Case No.2 of 2014.

15. To them there were absolutely no consultations at all in respect of the contents of the said Regulations and contrary to the allegations by the Respondents, there will be no exposure to Kenyans to unsafe and "unregulated" mode of public transport as alleged or at all since there is a very comprehensive legal framework of the **Traffic Act**, Cap 403 in regulating public transport and hence there will be no vacuum in legal enforcement as alleged or at all. It was contended that as a result of the impugned Regulations the Respondents have been imposing the same contrary to the **Traffic Rules** which do not prohibit the actions by the petitioners.

16. The petitioners further averred the Regulations 11 and 15 banning overhead careers and providing for a fine of Fifty Thousand Shillings and or imprisonment for a term not exceeding one year or both violate and infringe on the right to equality and freedom from discrimination under Article 27(3) of the Constitution and negates the spirit of sections 53 of the **National Transport and Safety Authority Act** (Act No. 33 of 2012 (hereinafter referred to as the Act) and Regulation 3 of the Persons with **Disabilities**

(Access to Employment Services and Facilities) Regulations, 2009. It was therefore contended that the Respondents not only passed a regulation which was unconstitutional but also ultra vires the Parent Act and other laws.

17. In support of the said contentions it was submitted by **Mr Kinyanjui** and **Mr Nzaku** learned counsel for the respective petitioners that since the said Regulations constitute Subsidiary or Delegated Legislation, such Legislation is in mandatory terms subject to the provisions of Section 11 of the **Statutory Instruments Act, 2013** and hence it was the statutory duty of the 1st Respondent to lay the same before Parliament which under Article 93(1) of the Constitution is constituted by the National Assembly and the Senate.

18. It was submitted that there was no attempt made by the Respondents to show that the said Regulations were laid before Parliament in the manner provided by the Standing Orders of the two Houses and there was no allegation that an exemption to do so was secured. It was contended that from the affidavit sworn on behalf of the 3rd Respondent it was appreciated that it was mandatory that the said Regulations abide by section 11 of the said Statutory Instruments Act. The failure to do so, it was submitted rendered the said Regulations automatically null and void. In support of this submission the petitioners relied on **R vs. Secretary of State for the Home Department ex parte Fire Brigade Union [1995] 2 AC 513** at page 567D para B and **R vs. The Cabinet Secretary for Transport & Infrastructure and Others ex parte Kenya Country Bus Owners Association and 8 Others [2014] eKLR.**

19. Since the letter which purported to transmit the Regulations was not signed, this rendered the purported act ineffectual. Relying on **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240,** it was submitted that the rule of law is a Constitutional imperative under Article 10(2) of the Constitution which the 1st Respondent violated and cannot be ousted by the statutory rule/regulation making power of the 1st Respondent. It was averred that notwithstanding the ambit of section 54 of the Act, conferring upon the 1st Respondent Regulation-making power, any legal instrument in exercise of such power is no subject to Parliamentary scrutiny and approval under section 1 aforesaid.

20. As the said Regulations were never laid before the Senate, it fails the test of procedural vires and based on **R vs. Immigration Appeal Tribunal ex parte Jeyeanthan [2000] 1 WLR 354,** it was submitted that the requirement is never optional. It was submitted that the burden was upon the 1st Respondent to lay before this Court irrefutable evidence that indeed there was compliance thereof. Without evidence that Article 118(1)(b) with respect to public hearing despite the petitioners' request to be allowed thereat, it was submitted the petitioners were never heard because there was no laying of the Regulations.

21. Based on **De Smith and Jowell: Judicial Review of Administrative Action, 5th Edn. Sweet and Maxwell, 1995 at 5-073, page 274,** it was submitted that where any statutory instrument is required to be laid before Parliament after being made a copy must be laid before both houses pursuant to section 4(1) of the England's **Statutory Instruments Act** of 1946. It was further submitted that based on **Judicial Review of Administrative Action** (supra) and **Metcalf vs. Cox [1895] AC 328** that non-compliance with the said provisions render the legal instrument in question null and void and the Legal Notice N. 23 of 2014 is incapable of being salvaged and falls to be quashed in its entirety.

22. It was further submitted that the body authorised under section 31(2) of the National Payment Systems Act to make regulations in the nature of Regulation 7(f) of the said Regulations being the Central Bank of Kenya and not the 1st Respondent, the 1st Respondent had no powers to make the said

Regulation and Article 231(3) of the Constitution prohibits the 1st Respondent from directing the Central Bank of Kenya. Payment of services, it was contended is one of the monetary policies conferred on the Central Bank of Kenya and until he said Bank outlaws the payment of cash the said Regulations cannot be saved by further amendments .

1st, 2nd, 4th, 5th, 6th, 7th, 8th, and 9th respondents' Case

23. On behalf of the 1st, 2nd, 4th to 9th Respondents, it was contended that due to an unacceptable increase in the number of road accidents in the Country, the government was compelled to undertake preventative and control measures to reduce and control the said road carnage. In effecting the said measures the government established the National Transport and Safety Authority, the 1st Respondent Authority herein to be in charge of transport and road safety and in pursuit of the above and with the primary objective of reducing road carnage, the authority together with the 2nd Respondent herein, developed the **National Transport and Safety Authority (Operations of Public Service Vehicles) Regulations, 2013**, which Regulations were gazetted on 17th December 2013 vide Kenya Gazette Supplement No. 173 of 17th December 2013 being Legislative Supplement No 73 as contained in the Legal Notice No. 219 of 2013 and took effect on the 17th day of December 2013.

24. In formulating the Regulations, it was contended the Respondent incorporated all the stakeholders in the public service vehicle industry who were invited to participate in the formulation of the Regulations and discussions of the draft regulations and that further to the public consultation meetings and discussions on the draft Regulations held in various dated in September 2013, a further public advertisement was carried out in the local dailies of 4th October 2013 for further consultative meeting which was attended by the Applicants through their representatives and held at the KICC on 8th October 2013 hence there was requisite consultation between all the relevant stakeholders.

25. To these Respondents, the said Regulations were prepared and gazetted in good faith with full participation of all stakeholders and the same does not introduce any unreasonable requirement and/or unnecessary requirements on the operators of public service vehicles but are designed to benefit the members of the public and reduce road carnage and the Respondents have no personal interest on the same other than to safe guard and safety of the members of the public using the Applicants motor vehicles. Further, the said Regulations were prepared in strict compliance with Section 54 of the Act and the requirements of the Constitution and the related statutes.

26. As the Applicants have not complied with the requirements for night time operation of public services and have not made any application to be allowed to operate at night and consequently, they were charged not coming to court with clean hands as they have not demonstrated a desire to comply with duly laid down regulations but seek a court order to frustrate the letter and intent of the regulations.

27. In the Respondents' view, the grounds of the Application are ill-conceived since the Regulations do not negate and/or contravene any provision of the Constitution, the **Traffic Act** and/or the **National Transport Safety Authority Act**. To them, due to the increased number of public service vehicles' fatal road accidents at night, the Respondents have not banned night transport but have merely created regulations to ensure that the same is carried out in a manner and enhances road safety and reduces road accidents as discerned from Regulation 13 of the Regulations as the enhanced safety requirements for night travel is important for the members of the public.

28. It was contended that the 1st Respondent have powers under the **Traffic Act** and Section 54 of the Act to make Regulations for public good and require anything to be done within the law in order to enhance road safety and reduce road carnage and that all the industry players in the public transport industry including the Matatu Owners Association and other related unions support the implementation of the Regulations herein and trust that the same will reduce road carnage.

29. Since the Regulations have since been gazetted and the same took effect in April 2014, it was averred that the Judicial Review order of Prohibition is not available to the Applicants and as such the court cannot prohibit what has already been implemented. With respect to certiorari, it was contended that the order as sought herein is not available to the Applicants since the Regulations have not contravened any law and their formulation was regularly carried out in full compliance of all the legal requirements and procedures and the Applicants have not demonstrated any rights and/or legitimate expectation and/or any breach of the rules of natural justice to avail them to the orders sought herein and/or to warrant the issuance of an order of Certiorari. Further, the judicial review orders sought herein are against the public interest.

30. It was however conceded that as result of some unforeseen circumstances, Legal Notice No. 219 of 2013 was never laid before Parliament and the same became void by operation of law as provided under Section 11 of the **Statutory Instruments Act** No. 23 of 2013. Therefore, faced with the foregoing, the Respondents were forced to reprint the same and republish them under Legal Notice No. 23 of 2014 which was then submitted to Parliament as required by law and consequently approved by parliament. The said Regulations were therefore re-gazetted on 11th March 2014 vide Kenya Gazetted Supplement No. 24 of 11th March 2014 as contained in the Legal Notice No. 223 of 201 and took effect on the said 11th day of March 2014. It was their position that the content, purport and substance of Legal Notice No. 23 of 2014 is the same as that of Legal Notice No. 219 of 2013 which was rendered void by operation of law and as such the Respondents were forced to reprint the same to safeguard the public interest and void chaos in the public transport.

31. The position taken by these Respondents was that this honourable court has considered the substance content and purport of Legal Notice 23 of 2014 in the elaborate hearing of Judicial Review No. 2 of 2014 and gave a considered judgment which is designed to assist the Industry players which judgment the Respondents are in the process of implementing since the Court in the said judgment found that to declare the Regulations invalid would have the effect of exposing Kenyans to unsafe and unregulated mode of public a transport and that would be contrary to the court's mandate of upholding the dignity of the people the court is meant to protect'.

32. It was further disclosed that the 1st Respondent had already prepared an amendment of the Legal Notice 23 of 2014 which was forwarded to the office of the Attorney General for Processing.

33. In his submissions, **Mr Bitta** contended that from the documents relied on by the Petitioners and the 3rd Respondent, it was clear that the Regulations were submitted to Parliament as evidenced by the stamps appearing on the document in question and the media report of the proceedings which took place therein.

34. According to learned counsel, section 11 of the **Statutory Instruments Act** talks of the responsible clerk and not clerks who are required to register the instrument for tabling before the house rather than the houses so that the argument that it should be tabled before both houses has no foundation in the Act.

35. According to him the Act was passed in 2013 when the Legislature was conversant with the fact of

two houses hence the intention was clear. Since the Regulations are made pursuant to a National legislation passed by the National Assembly, the said Regulations can only be tabled in the National Assembly which passed the same.

3rd Respondent's Case

36. The 3rd Respondent (hereinafter referred to as the Authority), on its part contended that that following this honourable court's judgment delivered on 14th March 2014 in the Judicial Review No. 2 of 2014 dealing with the substance of the Regulations, the Authority and the 1st Respondent was keen to implement the said judgment and had carried out various actions compliance with the same as stated below. As directed by court, the Authority had extensively engage various key industry players with a view of ensuring that nigh travel is carried out with reasonable safety to the members of public who travel at night and the industry players who had co-operated with the authority and complied with reasonable night safety travel requirements had applied for and have been issued with requisite licenses allowing them to operate at night with the result that about 358 buses were now operating at night and ferrying members of public (at night) to various destinations throughout the Country. In the meantime, the Authority was in the process of assisting other industry players who have made applications for night travel licenses to ensure compliance with the reasonable safety requirements for the night travel before issuing them with the licenses to operate at night.

37. However, the Applicants had not made any application for their vehicles to operate at night despite being fully aware that the said night safety requirements are only designed to benefit the members of the public and to reduce road carnage.

38. It was further contended that the Authority with support of the 2nd Respondent herein had equally carried out necessary amendments to the Regulations through the **National Transport and Safety Authority (Operation of Public Services Vehicles) (Amendment) Regulations, 2014** to ensure compliance with the judgment herein which amendments to the Regulations had been forwarded to the Government Printer for publications and would be published anytime. In particular, (a) the Authority has amended paragraph 5(1)(f) of Regulation of the Regulations by deleting the same following the finding that the same was *ultra vires* Section 23(3) of the **Statutory Instruments Act** No. 33 of 2012; (b) the authority has amended paragraphs e and f of Regulation 11 of the Regulations by deleting the same following the observations by the court that the requirement for removal of the cargo carriers mounted on the roof of the public service vehicles may make it impossible for the disabled persons to travel using public service vehicles; and (c) the Authority has amended Regulation 15(1) of the Regulations to ensure that the same is in compliance with Section 24(5) of the **Statutory Instruments Act** No. 22 of 2012 as directed by the court.

39. In the Authority's view, the above steps taken by the Authority and the Respondents demonstrated that the Respondents are acting in good faith with the main objective of improving road safety and had nothing personal in the matter and demonstrated respect to the court's authority and to the Rule of law as established in our Constitution.

40. Since the Authority's mandate as set out in Section 4 of the **National Transport and Safety Authority Act** No. 33 of 2012 are *inter alia* to advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety, implement policies to road transport and safety, implement policies relating to road transport and safety and 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** Chapter 403 of the Laws of Kenya, the Applicants must appreciate the reason why it was necessary for the Government of Kenya through parliament to create the Authority to enhance road safety and reduce road carnage. However, the Applicants are not keen to cooperate in enhancing road safety and have as such taken to opposing any measure taken by the Respondent's to enhance road safety.

41. In the Authority's view, the Regulations herein are in compliance with the Constitution and the Act particularly Sections 4, 26, 27, 28, 29, 30, 44 and 45 thereof.

42. The Authority however denied that it removed and/or detained any of the number plates belonging to the Petitioners' vehicles save that that it was enforcing the subsisting Regulations in the interest of public safety and would not allow the Applicants to endanger the lives of the Kenyan citizens in the name of maximizing profits.

43. The Authority contended that it had powers under both the **Traffic Act** and Section 54 of the **National Transport Safety Authority Act** to make Regulations for public good and require anything to be done within the law in order to enhance road safety and reduce road carnage which power the Applicants had neither challenged nor proved with cogent plausible evidence that the said Regulations were formulated and gazette in contravention of any law. In its view, the enforcement of the Regulations is an important aspect of safety in public road transport and the Applicants are merely required to comply with Regulations in order to increase safety and save lives.

44. To the Authority, the purport and intent of the application for judicial review herein and the order of certiorari sought herein are clearly designed to harass the authority and the Government of Kenya with an intention of stopping them from carrying out their lawful duties as expressed in the Act herein and other relevant legislations. It was however contended that judicial review order of prohibition is not available to the Applicants since the Regulations have since been gazetted and the same took effect on 11th March 2014 and as such the court cannot prohibit what has already been implemented. An order of certiorari, on the other hand, the Authority contended, is not available to the Applicants since the Regulations have not contravened any law and their formulation was regularly carried out in full compliance of all the legal requirements and procedures. The Applicants have not demonstrated any rights and/or legitimate expectation and/or any breach of the rules of natural justice to avail them to the orders sought herein and/or to warrant the issuance of an order of certiorari. Further, the judicial review orders sought herein are against the public interest and the same should not issue for being grossly prejudicial and unfair to the Kenyan Citizenry particularly the users of public service vehicles who rely on the government and the authority herein ensure the provision of safe, reliable and efficient road transport services.

45. It was averred that the import of the judicial review orders applied for herein if the same were to issue is that the Applicant would through the court process control the operations of road transport and curtail the Authority's efforts at regulating the same with a view of enhancing road safety and reducing road carnage.

46. It was contended that the **Statutory Instruments Act** No. 23 of 2013 as read together with Article 93, 94, 95 and 96 of the Constitution requires the subject regulations to be laid before parliament as done in respect to the Regulations herein and that the Petitioners having originally approached the court on the basis that the Regulations were not tabled before the National Assembly can now not change course upon realization that the same were tabled before the National Assembly and now allege that the same must be additionally be tabled before the Senate when there is expressly no such requirement in

law. In any case, the Petitioners are acting in bad faith with the main goal of stretching technical legal points to defeat the Regulations herein when they are fully aware of the importance of the said Regulations and that the authority has bent backwards to incorporate all their concerns but the Applicants simply don't want to invest in public safety but are only keen on making profits at the expense of road safety.

47. It was asserted that the court should consider the fact that the orders sought herein if granted will automatically lead to continued loss of life through avoidable road accidents and as such it would be prudent and in the general public interest that the Applicants be allowed to comply with the requirements of the Regulations herein and in effect save innocent human lives.

48. Being discretionary orders the Court was urged to decline the orders sought as they were against the greater public interest.

49. In support of the aforesaid averments, **Mr Agwara** learned counsel for the Authority reiterated while associating himself with **Mr Bitta's** submissions that the Statutory Instruments Act requires that the Regulations be laid before the responsible House by the responsible Clerk. He submitted that a look at the Act vis-à-vis the Constitution particularly Articles 94, 95 and 96 the Court will appreciate why the wording is specific in such manner. Article 96 sets out the role of the Senate with respect to Bills concerning Counties so that the Senate's role is delineated. Therefore to argue that the Regulations dealing with national issues ought to be tabled before the Senate is a misapprehension and misapplication of **Statutory Instruments Act**.

50. It was submitted that there was evidence demonstrating that the Regulations were submitted for tabling to the relevant Clerk in the responsible House and the mere allegation that it was not signed does not assist the cause of justice as long as they were laid.

51. It was submitted that some of the issues raised herein were raised in JR No. 2 of 2014 and that the Court found that there is no law which can bar night travel and went ahead to strike out particular Regulations which Regulations have been amended in compliance with the Court order. Other than the issue of laying of the Regulations in Parliament it was submitted that there was no evidence that the Petitioners were aggrieved by the findings in JR No. 2 of 2014 which is good law and is applicable since there was no appeal or review. The Court was therefore persuaded by its own findings therein. Learned Counsel submitted that the Authority's stand was anchored in Articles 10 and 159 of the Constitution on administration of justice and legitimate expectation based on the said decision. Having ruled that the substance of the Regulations were lawful, it was submitted that the Respondent had legitimate expectation that the Court will not depart from it.

52. It was contended that whereas the Petitioners came to Court on the basis that the Regulations were not tabled they changed their positions and contended that the same were not tabled before Parliament. Further the Regulations had been in force for 2 months and the Petitioners have not demonstrated that they have attempted to comply and have not been able to comply while it has been shown that some players have done so and have been licensed to operate at night. The Petitioner, on their part do not want to comply despite the intention to enhance public safety.

53. Therefore the Court was urged in deciding whether or not to annul the Regulations to apply the purposive approach as it did in Judicial Review Application No. 2 of 2014 since the Regulations are the same and were they to be annulled would leave a vacuum which would lead to loss of lives yet the Court's duty is to ensure that a limb is not severed. The Regulations, it was submitted serve to save lives.

54. With respect to Regulation 7 it was contended that the same was the subject of an amendment. The Court was therefore urged to allow the Authority to carry out its mandate under section 4 of the Act since it was not contended that the 1st Respondent had no power to formulate the Regulations which were done in good faith as the Respondents do not seek any public gain hence the application ought to be dismissed with costs. The Court was urged to offer supervised interdict in the event that the Court find that any of the Regulations required an adjustment.

55. In his rejoinder **Mr Kinyanjui** submitted that the framers of section 11 were alive to Article 93(1) hence their choice of words in section 11(1) which point to both Houses. The Court was therefore asked to determine the word Parliament as against Article 93 of the Constitution. In his view the term “responsible Clerk” can only be used in relation to the relevant House.

56. He submitted that in Judicial Review No. of 2014 the Court had already found that the instrument must be laid before Parliament. With respect to section 12 it was submitted that the Court had not considered the same. It was reiterated that the Authority’s Director General is not the rule making authority. The Respondents, it was submitted cannot enjoy an illegality based on the lifespan of the Regulations. To him, there would be no vacuum if the orders sought were granted.

Determinations

57. I have considered the issues raised herein.

58. The first and in my view the most important issue for determination is the issue of compliance or lack thereof with the provisions of section 11 of the ***Statutory Instruments Act***. In **Kenya Country Bus Owners’ Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 others vs. Cabinet Secretary For Transport & Infrastructure & 5 others [2014] eKLR**, this Court held:

“Section 11(4) of the Statutory Instruments Act clearly provides for the consequences for the failure to lay the instrument before the house within the stipulated period and the consequences are that ‘the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.’...Therefore, in my view section 11(4) does not give the Court an option since the section is couched in mandatory terms and the consequences for non-compliance are similarly provided. It follows that the requirement must be read in mandatory terms as opposed to being merely directory. It is therefore my view that the Kenyan position must be distinguished from the position taken in *T S S Grain Millers Ltd vs. Attorney General [2003] 2 EA 685*, to the effect that a statutory instrument made by a Minister or other competent authority is valid and effective as soon as it is made or where it is required to be laid before Parliament, as soon as that has been done notwithstanding that the provisions of the Statutory instruments Act of 1946, and the Regulations made thereunder relating to the printing and issuing of statutory instruments have not been complied with. I similarly take a different view from that expressed by Simpson, CJ in *Republic vs. The Commissioner of Prisons Ex Parte Wachira [1985] KLR 398* to the effect that breach of statutory duty to lay an instrument before parliament will not of itself invalidate the

instrument though it may amount to a misdemeanour and that even if not complied with, the Court would have held that the Regulations and Rules were not thereby rendered invalid...However, if after 11th February, 2014, seven days lapsed without the Regulations being tabled in Parliament the same thereby became void and ceased to have any effect.”

59. Therefore the failure to comply with the provisions of section 11 of the **Statutory Instruments Act** has the effect of rendering the instrument in question null and void and this position was clearly appreciated even by the Respondents.

60. The next issue for determination is the meaning of “Parliament” for the purposes of section 11 of the **Statutory Instruments Act**. Whereas the petitioners contend that Parliament is constituted by the National Assembly and the Senate the Respondents’ position is that since an Instrument is to be transmitted to the clerk for the relevant house, the relevant house must be the House responsible for the enactment of the Legislation under which the instrument is made.

61. Article 93 of the Constitution provides:

(1) There is established a Parliament of Kenya, which shall consist of the National Assembly and the Senate.

(2) The National Assembly and the Senate shall perform their respective functions in accordance with this Constitution.

62. It is clear that even under Article 93(2) of the Constitution, it is recognised that the National Assembly and the Senate have “respective” roles to play. Under Article 92(6) 2) “***the Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties...***” Article 109(3) of the Constitution provides that a “***Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.***”

63. Section 11 of the **Statutory Instruments Act, 2013**, on the other hand provides:

1) (1) Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament.

(2) An explanatory memorandum in the manner prescribed in the Schedule shall be attached to any statutory instrument laid or tabled under subsection (1).

(3) The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.

(4) If a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately

after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.

64. The point of departure between the parties herein is what is meant by the terms “responsible Clerk” and “respective house”. Whereas the Petitioners’ case is that what the provisions mean is that the instrument is to be transmitted to the Clerks responsible for each House who shall transmit the same to the house to which the Clerk is responsible, the Respondents’ position is I understand them correctly is that the instrument ought only to be transmitted to the Clerk for the House responsible for the enactment of the parent legislation.

65. In my view, both views cannot be said to be wholly unreasonable. The drafters of section 11 of the ***Statutory Instruments Act***, in my view could have, with due respect done a better job. **Odoki, JA** in **Andrew Lutakome Kayira and Paul Kawanga Semogerere vs. Edward Rugumayo, Omwony Ojok, Dr. F. E Sempebwa & 8 Others Constitutional Case No. 1 of 1979**, a decision of the Uganda Court of Appeal sitting as the Constitutional Court while citing ***Craies on Statute Law (6th Ed.)*** at page 66, expressed himself as follows:

“The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. The tribunal that has to construe an Act of a legislature or indeed any other document has to determine the intention as expressed by the words used and in order to understand these words it is natural to inquire what is the subject matter with respect to which they are used and the object in view. If the words of the Statute are themselves precise and unambiguous then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver.”

66. In **Kimutai vs. Lenyongopeta & 2 Others Civil Appeal No. 273 of 2003 [2005] 2 KLR 317; [2008] 3 KLR (EP) 72**, the Kenya Court of Appeal was of the view that:

“It is elementary rule that a thing which is within the letter of a statute will, generally, be construed as not within the statute unless it also be within the real intention of the legislature, and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that intention...It was necessary, in order to arrive at the real meaning, to get to the exact conception of the aim, scope and aspect of the whole Act, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief.”

67. Under section 13 of the ***Statutory Instruments Act***, the Committee on Delegated Legislation is enjoined to consider whether the Instrument *inter alia* is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other written law, contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament, gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power, appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act

pursuant to which it is made and inappropriately delegates legislative powers.

68. In my view the drafters of the Constitution clearly intended that the Roles of the two houses where possible be demarcated in order to avoid any unnecessary conflicts which may derail the legislative process and agenda of the two houses. In my view, in order for a Committee of House of Parliament to effectively carry out its mandate under section 13 aforesaid, the Committee in question as of a necessity ought to acquaint itself with the provisions of the parent legislation and the reasons which informed its enactment in order for it to for example determine whether a Statutory Instrument made thereunder appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made. To therefore subject a Statutory Instrument to scrutiny by a House which played no role in the enactment of the parent legislation would not only defeat the spirit of Article 93(2) of the Constitution but would lead to the mischief which the said provisions was meant to avoid since the possibility that a House which never played any role in the enactment of the Parent Legislation may for some reasons nullify a Statutory Instrument thus derailing the aforesaid legislative agenda, cannot be ruled out.

69. It is therefore my view and I so hold that in order to give a purposive effect to section 11 of the **Statutory Instruments Act** the terms “responsible Clerk” and “respective house” ought to be read with respect to the house which participated in the enactment of the parent legislation under which the Instrument is enacted or promulgated.

70. In the instant case, the subject Statutory Instrument was enacted under the **National Transport and Safety Act**. It has not been contended that the said Act is an Act which concerns counties. Accordingly, I find that it was not necessary that the said Regulations be laid before the Senate.

71. That leads me to issue whether the said Act was laid before the National Assembly. According to the Petitioners, since the letter which purported to transmit the Regulations was not signed, this rendered the purported act ineffectual. While section 11 requires that the Instrument be transmitted, it does not provide the means by which the said transmission is to be effected. **Blacks Law Dictionary**, 9th Edn at page 1638 defines “transmit” as “To send or transfer (a thing) from one person to another; To communicate” while a “transmittal letter” is defined as “A non substantive letter that establishes a record of delivery, such as a letter to a court clerk advising that a particular pleading is enclosed for filing.” Clearly therefore a transmittal letter is not a document of substance but just a covering letter. The law however does not require a transmittal letter but simply requires that the Instrument be transmitted, sent or communicated. In my view lack of a signature on a transmittal letter or even lack of the transmittal letter itself does not render an otherwise transmitted Instrument ineffectual or invalid.

72. In this case, there was a letter dated 17th March, 2014 which was exhibited to the verifying affidavit in support of the Petitioners’ case. There were two stamps thereon one bearing the stamp of “Table Office” with remarks “Paper laid” date stamped 18th March, 2014 and the other bearing the stamp of “Clerk’s Office” indicating that it was received on 18th March, 2014. The said letter was addressed to the Speaker of the National Assembly from the Ministry of Transport and Infrastructure. In my view there is no basis upon which I can find that the Instrument in question was not transmitted to the National Assembly which was the concerned House.

73. It was contended that by revoking Legal Notice No. 219 of 2013 three days before the Judgement, the 1st Respondent engaged in an oppressive, arbitrary and unconstitutional action against the petitioners’ businesses and being an outflow of an unconstitutional decision the Regulations herein are utterly void and cannot be enforced. In a ruling made by this Court on 14th April 2014 in **Republic vs. Cabinet Secretary For Transport & Infrastructure & 5 Others Ex-Parte Kenya Country Bus Owners**

Association (Thro Paul G. Muthumbi Chairman) Samuel Njuguna Secretary Joseph Kimiri Trasurer & 8 Others [2014] EKLR, this Court expressed itself as follows:

“While there was nothing inherently wrong in revoking LN no. 219 of 2013 upon realising the same was unlawful, it is my considered view that to keep a studious silence and to lull this Court and the country into a false sense of security that the said LN no. 219 of 2013 was still in force was with due respect highly dishonest on the part of the 1st Respondent. Under Article 10(1) of the Constitution all State organs, State officers, public officers and all persons are bound by the national values and principles of governance enumerated thereunder whenever they apply or interpret the Constitution, enact, apply or interpret the law or make or implement public policy decisions. Under Article 10(2) thereof the said national values and principles of governance include integrity, transparency and accountability. Under Article 153(4)(a) of the Constitution Cabinet Secretaries are enjoined to act in accordance with the Constitution. As was rightly held by the Queens Bench Division of the High Court of Justice in Northern Ireland in In the matter of an Application by Brenda Downes for Judicial Review [2006] NIQB 77 at para 21 while citing Quark Fishing Limited vs. Secretary of State for Foreign Affairs [2002] EWCA 149 para 50:

“The duty of good faith and candour lying in a party in relation to both the bringing and defending of a judicial review application is well established. The duty imposed on public duties and not least on central government is a very high one. That this should be so is obvious. Citizens seeking to investigate or challenge governmental decision-making start off at a serious disadvantage in that frequently they are left to speculate as to how a decision was reached. As had been said, the Executive holds the cards. If the Executive were free to cover up or withhold material or present it in a partial or partisan way the citizen’s proper recourse to the court and his right to a fair hearing would be frustrated. Such a practice would engender cynicism and lack of trust in the organs of the State and be deeply damaging of the democratic process, based as it is upon trust between the governed and the government.....A breach of the duty of candour and the failure by the Executive to give a true and comprehensive account strikes at the heart of a central tenet of public law that the court as the guardian of the legal rights of the citizen should be able to rely on the integrity of the executive arm of the government to accurately, fairly and dispassionately explain its decision and actions.”

In recognising the obligation on the part of the Government to be open and candid the South African Constitutional Court expressed itself as follows in Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (1) (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC):

“The Court is thus left in darkness as to the very issue that lies at the heart of the dispute it is called upon to resolve. In this respect the Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open. Furthermore, it is consistent with ensuring that the courts can function effectively, as section 165(4) of the Constitution requires. In the present matter the courts should not find themselves disempowered by lack of information from making a determination..... As this case demonstrates, far from the foundational values of the rule of law and of accountable government existing in discreet categories, they overlap and reinforce each other. Openness of government

promotes both the rationality that the rule of law requires, and the accountability that multi-party democracy demands. In our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness.”

In my view a person who deliberately either by commission or omission misleads the Court and the public that a particular state of affairs exist while knowing very well that that is not the position cannot be said to be open, candid and transparent. Dishonesty in my view is an act which is antithesis to transparency and vice versa. In my view the law enjoined the 1st Respondent through his legal advisers to bring to the attention of this Court the fact that the LN No. 219 of 2013 was no longer in existence so as to avoid the wastage of precious but scarce judicial time.

It is further my view that where a party knows that a matter is pending before a Court of law and the party proceeds to take an action whose effect is to remove the rag from the feet of the Court as it were such an action may well be construed as having been calculated to steal a match on both the Court and the parties. Good practice would in my view dictate that the party moves the Court for recording of appropriate orders so as not create the impression that the action is meant to circumvent the judicial process. Otherwise the Court may view such action as being contemptuous and an affront to judicial process. Judicial process ought not to be misused by parties in order to achieve collateral ends.”

74. In the same case this Court delivered a ruling on 27th May, 2014 in which the Court found that the 1st Respondent's actions were as a result of either misinformation or failure to bring himself up to date on the progress of the court proceedings. Having so found, there is no basis upon which I can find that the action of the 1st Respondent in revoking the Legal Notice No. 219 of 2013 during the pendency of the ruling renders the instant regulations null and void.

75. It was further contended that no opportunity was accorded to the petitioners via public participation over the making or inception of Legal Notice No 23 of 2014 and that in the instant Regulations the very mistakes which appeared in Legal Notice No. 219 of 2013 were repeated. In Judicial Review Case No. 2 of 2014, this Court's findings as reduced in the case summary were as follows:

1. Regulation 16 of the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2013 is *ultra vires* the provisions of section 24(5) of the *Statutory Instruments Act*, No. 33 of 2012, and is to that extent null and void. What it means is that to the extent that the Regulation imposes a fine of Kshs 50,000.00 for contravention of the Regulations when the maximum is Kshs 20,000 imposed under the *Statutory Instruments Act*, the said Regulation is null and void.

2. To the extent that the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2013 have the effect of cancelling the applicants' subsisting and valid licences issued by the Transport Licensing Board the same are invalid, null and void. Whereas reasonable conditions can be imposed in the existing licences, the same cannot be unilaterally cancelled. However, considering the immediate consequences of this declaration on the safety of the public that relies on the public transport, the declaration is hereby suspended to enable the relevant State organs to formulate legislative and policy measures. What it means is that the

applicants' existing licences are valid and that the Regulations in so far as they nullify the said licences is invalid, null and void. However, the invalidity of the regulations cancelling the applicants' licences is suspended for 60 days. In other words the said existing licences are still invalid pending the report to be tabled within the next 60 days.

3. Regulation 5(1)(f) Regulation 16 of the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2013 is hereby struck down as being retroactive, unreasonable and ultra vires section 23(3) of the *Statutory Instruments Act*, No. 33 of 2012. The regulation requiring that compliance with the Regulations ought to have been from the preceding year is invalid.

4. The prescription of the brands of speed governors rather than the standards was a departure from what was expected of the Cabinet Secretary and hence unlawful.

5. Pursuant to the order made in 2 above, the Respondents and the relevant State organs are hereby directed to immediately initiate the process of meaningful engagement not only with the applicants but with the public with a view to ensuring that appropriate legislative and policy measures and instruments are put in place to ensure that both the safety and dignity of persons using public transport are ensured and upheld. Accordingly the Respondents are directed to file a report before this Court on the measures that have been taken or are being undertaken along the said lines within the next 60 days for consideration of this court and further orders.

6. The Respondents to avail to this Court within the same period evidence that the provisions of section 11 of the *Statutory Instruments Act*, No. 33 of 2012 were complied with. In other words the Cabinet Secretary to provide evidence that the Regulations were laid before Parliament within the stipulated period.

76. As already appreciated, these Regulations were published before the decision in Judicial Review No. 2 of 2014 was delivered hence it cannot be said that the Regulations were made in disregard of the decision in the said case. However, the Court having pronounced itself in the said case, it would follow that the provisions which appear in the instant Regulations which the Court nullified remain null and void.

77. Therefore since Regulation 15 is a reproduction of the former Regulation 16 in so far as the penalty is concerned it would follow that Regulation 15(1) is ultra vires the **section 24(5) of the *Statutory Instruments Act***, and is hence null and void.

78. In the same decision, this Court also found that to the extent that the ***National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2013*** have the effect of cancelling the applicants' subsisting and valid licences issued by the Transport Licensing Board the same are invalid, null and void and that whereas reasonable conditions can be imposed in the existing licences, the same cannot be unilaterally cancelled. Consequently, it is hereby reiterated that all the applicants'/petitioners' unexpired TLB licences are valid and any attempt to bar them on the basis of the invalidity thereof is illegal, unlawful and devoid of any legal basis. The Respondents have however urged the Court to invoke its powers and suspend the invalidity of the decision. The Court in Judicial Review No. 2 of 2014 gave the Respondent ample to time to regularise their action but the Respondent seems to have taken no action. Accordingly I do not see the reason for extending any further indulgence to the

Respondents.

79. Since Regulation 5(1)(f) in LN No. 219 of 2013 which was nullified was reproduced in Regulation 5(1)(f) in the current Regulations, the latter is similarly declared to be invalid.

80. Regulations 11(e) and (f) of the Regulations only permits the carrying of small parcels and letters apart from the luggage accompanying a passenger travelling on bus and carried either as hand luggage to be placed in the overhead lockers on board the bus or in the hatch under the vehicle and proceeds to ban long distance vehicles from having a cargo carrier mounted on the roof. These Regulations were challenged by the petitioners on the ground that they are discriminatory since their effect would be to bar people with disabilities who use wheelchairs from having the same transported in the same mode of transport as themselves since the same can neither be transported in the overhead carriers or in the hatch and would therefore force such persons to secure other modes of transport for the same.

81. Article 27(4) of the Constitution provides:

The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

82. Article 54(1)(c) on the other hand entitles a person with disability to reasonable access to all places, public transport and information.

83. Therefore any discrimination based on the foregoing is clearly unjustified. In **Nyarangi & 3 Others vs. Attorney General [2008] KLR 688**, it was held:

“The *Blacks Law Dictionary* defines discrimination as follows: “The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” *Wikipedia, the free encyclopedia* defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. *The Bill of Rights Handbook, Fourth Edition 2001*, defines discrimination as follows:- “A particular form of differentiation on illegitimate ground.”... The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of *Griggs vs. Duke Power Company* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job applications was found “to disqualify Negroes at a substantially higher rate than white applicants”.

84. Although the Regulations do not expressly permit discrimination of the persons with disability, in my view the effect of Regulations 11(e) and (f) of the Regulations amount to subtle discrimination. Article 20(3) of the Constitution enjoins this Court, in applying a provision of a Bill of Rights, to develop the law to the extent that it does not give effect to a right or fundamental freedom. In other words where the law does not give effect to a right or fundamental freedom, the Court is enjoined to develop the same. This in my view is one of the Articles which qualify our Constitution to be aptly described as transformative charter of good governance. See **Mutunga, CJ's decision in Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] eKLR.**

85. In effect Article 20(3) gives the Court some limited measure of legislative authority where there are manifest deficiencies in the law with respect to rights and fundamental freedoms. This position was appreciated in **Centre for Human Rights and Democracy and Others vs. The Judges and Magistrates Vetting Board and Others, Nairobi Constitutional Petition 11 of 2012 (Unreported)** where the Court held that

“As part and core of our Constitutional and statutory obligations we have to innovate new methods and devise new strategies for purposes of providing access to justice to all persons who are or were or about to be denied their basic fundamental and human rights.”

86. In **Paul Pkiach Anupa & Another vs. Attorney General & Another [2012] eKLR**, Majanja, J expressed himself as follows:

The Constitution also provides a window for enforcement and enrichment of the rights and freedoms of persons with disabilities through the application of international law principles, treaties and

conventions Kenya has ratified. This is through the provisions of Article 2(5) and (6). Article 1 of the Convention on the Rights of Persons with Disabilities states that, ‘Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.’.... The Persons with Disabilities Act further contains provisions to aid accessibility and mobility for person with disabilities in public buildings and other social amenities. Section 21 of the Act provides that, “Persons with disabilities are entitled to a barrier-free and disability-friendly environment to enable them to have access to buildings, roads and other social amenities, and assistive devices and other equipment to promote their mobility.”

87. In my view the effect of Regulations 11(e) and (f) of the said Regulations is a step in the wrong direction in our current Constitutional dispensation since it amounts to subjecting persons with disabilities to differential treatment when it comes to their mobility vide public transport means. Accordingly I have no hesitation in declaring the same unconstitutional, null and void.

88. It was further contended that the 1st Respondent has directed and authorised police officers under

the 4th Respondent to remove all the ex parte applicant's number plates should they not comply with the Regulations in Legal Notice 23 of 2014.

89. In this Court's said decision made on 14th April 2014, this Court declared Regulations made pursuant to Legal Notice No. 219 of 2013 null and void and proceeded to quash the same. Accordingly, anyone purporting to implement the same is acting illegally.

90. With respect to the removal of motor vehicle identification plates or number plates as they are known Section 106(4) and (4A) of the **Traffic Act**, Cap 403, Laws of Kenya provides as follows:

(4) Any police officer, licensing officer or inspector, if he is of the opinion that any vehicle is being used in contravention of section 55 or section 56 or in contravention of any rules relating to the construction, use and equipment of vehicles, may by order prohibit the use of such vehicle, under such conditions and for such purposes as he may consider necessary for the safety of the public or to ensure that such vehicle does comply with the provisions of section 55 or 56; and any such order shall remain in force until the repairs specified therein have been satisfactorily completed and the vehicle has been certified as complying with the rules relating to construction, use, equipment and weight.

(4A) Where a police officer, licensing officer or inspector makes an order under subsection (4) he may remove the vehicle identification plates and the vehicle licence and, if he does so, shall deliver them to the Registrar to be kept while that order remains in force.

91. Therefore for a licensing officer, a police officer or inspector to remove the vehicle identification plates and the vehicle licence he must form an opinion that the vehicle is being used in contravention of section 55 or section 56 of the **Traffic Act** which deal with conditions of vehicles and limitation of loads or in contravention of any rules relating to the construction, use and equipment of vehicles. After forming such an opinion, the officer concerned is required to make an order prohibiting the use of the said vehicle. The said identification plates and licences when removed are required to be delivered to the Registrar for keeping while the order is in force.

92. It is therefore clear that to remove the said plates or licences in circumstances other than those contemplated under Section 106(4) as read with sections 55 and 56 of Act and without an order of prohibition is illegal. If therefore the Respondents removed the same and are keeping them without surrendering the same to the Registrar, such action is unlawful and they ought to restore the same.

93. It was further contended in the submissions that since the body authorised under section 31(2) of the **National Payment Systems Act** to make regulations in the nature of Regulation 7(f) of the said Regulations being the Central Bank of Kenya and not the 1st Respondent, the 1st Respondent had no powers to make the said Regulation. Suffice to say that this issue was not raised in any of the grounds in the Notice of Motion in JR No. 124 of 2014 or in the Petition. By virtue of Order 53 rule 4(1) the same cannot be a basis upon which this matter can be determined.

94. I have considered the other issues raised in the instant cases and it is my view that the same were the subject of Judicial Review No. 2 of 2014 hence having been determined thereat they are no longer open to fresh determination in these matters.

95. Before I conclude this matter, let me caution parties who through administrative craft or innovation or by sheer arrogance take actions which are meant to frustrate and obstruct the implementation of lawful orders. This Court has held before and I wish to remind such persons that wilful and mischievous disobedience of court orders amounts to a violation of Article 10 of the Constitution and the Court will not hesitate where it is proved that a person has violated the said Article to make appropriate declaratory orders.

Orders

96. Having considered the issues raised herein I make the following orders:

1. **Regulation 15(1) of the Legal Notice No. 23 of 2014 is ultra vires the section 24(5) of the *Statutory Instruments Act*, and is hence null and void.**

2. **All the applicants'/petitioners' unexpired TLB licences are valid and any attempt to bar them on the basis of the invalidity thereof is illegal, unlawful and devoid of any legal basis.**

3. **Regulation 5(1)(f) of Legal Notice No. 23 of 2014 is invalid null and void.**

4. **Regulations 11(e) and (f) of Legal Notice No. 23 of 2014 is unconstitutional, null and void.**

5. **The removal of the identification or number plates or licences from the petitioners'/applicants' motor vehicles in circumstances other than those contemplated under Section 106(4) as read with sections 55 and 56 of Act and without an order of prohibition is illegal and the Respondents are directed to restore the same.**

6. **Since these proceedings were provoked by the actions of the 1st Respondent in revoking Legal Notice No. 219 of 2013 and promulgating Legal Notice No. 23 of 2014 during the pendency of the decision on the legality of Legal Notice No. 219 of 2013 hence making the same mistakes which were in the Legal Notice No. 219 of 2013, the Costs of the applicants'/petitioners' shall be borne by the 1st Respondent.**

Dated at Nairobi this 6th day of October, 2014

G V ODUNGA

JUDGE

Delivered in tuhe presence of:

Mr Harrison Kinyanjui for the Applicants in Judicial Review No. 124 of 2014

Mr Agwara for the 3rd Respondent

Cc Patricia



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