



**IN THE TRANSPORT LICENSING APPEALS BOARD AT NAIROBI**

**APPEAL CASE NO 11 OF 2016**

**ONGATALINE TRANSPORTERS CO LTD .....APPELLANT**

**VERSUS**

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

**FREDRICK GORI (CHAIRMAN, KISERIAN AND ONGATA RONGAI  
RESIDENTS ASSOCIATION) ..... 1<sup>ST</sup> INTERESTED PARTIES**

**KIVALI MWANGI (SECRETARY, KISERIAN AND ONGATA RONGAI  
RESIDENTS ASSOCIATION) ..... 2<sup>ND</sup> INTERESTED PARTY**

**CHRISTINE KURIA (TREASURER, KISERIAN AND ONGATA RONGAI  
RESIDENTS ASSOCIATION) ..... 3<sup>RD</sup> INTERESTED PARTY**

**PATRICK WAWERU, ORGANIZING SECRETARY, KISERIAN AND ONGATA  
RONGAI RESIDENTS ASSOCIATION) ..... 4<sup>TH</sup> INTERESTED PARTY**

**FRANCIS PARSIMEI GITAU (CHAIRMAN, KAJIADO NORTH CITIZEN  
PARTICIPATION FORUM) ..... 5<sup>TH</sup> INTERESTED PARTY**

**COL (RTD) JOSEPH KING'ORI (VICE CHAIRMAN, KAJIADO NORTH SUB-  
COUNTY CITIZEN PARTICIPATION FORUM) ..... 6<sup>TH</sup> INTERESTED PARTY**

**REV EVANSON GITU (ORGANISING SECRETARY, KAJIADO NORTH SUB-  
COUNTY CITIZEN PARTICIPATION FORUM) ..... 7<sup>TH</sup> INTERESTED PARTY**

**REV GIKERIA KAHARA (SECRETARY, KAJIADO NORTH SUB-COUNTY  
CITIZEN PARTICIPATION FORUM) ..... 8<sup>TH</sup> INTERESTED PARTY**

**MS LUCY WACUKA (TREASURER, KAJIADO NORTH SUB-COUNTY  
CITIZEN PARTICIPATION FORUM) .....9<sup>TH</sup> INTERESTED PARTY**

**RUTH MWIHAKI (ADMINISTRATOR, KAJIADO NORTH SUB-COUNTY  
CITIZEN PARTICIPATION FORUM) ..... 10<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

*Introduction*

1. The Appellant, which is a corporate body operating public service vehicles along the Ongata-Rongai route, filed an appeal at the Transport Licensing Appeals Board (TLAB) on the 27<sup>th</sup> of September 2016 and after its license to operate as a public service vehicle operator was revoked by the Respondent (National Transport and Safety Authority) on the 26<sup>th</sup> of September 2016.
2. The Respondent is established under section 3 of the National Transport and Safety Authority Act No. 33 of 2012 and has the responsibility to advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety, implement policies relating road transport and safety; plan, manage, and regulate the road transport system, ensure the provision of safe, reliable, and efficient road transport services and to administer the Traffic Act.
3. The interested parties reside in the locality of the operation of the Appellant and they have been directly and substantially affected by the actions of the Appellant and the decision of the Respondent.

*The Appellant's Case*

4. Through a letter dated the 26<sup>th</sup> of September, 2016, the Respondent informed the Appellant that its license to operate as a public service vehicle operator had been revoked as a result of an accident that occurred on the 25<sup>th</sup> of September 2016 along Langata road, where four people died and several others were injured. The accident was caused by vehicle registration number KCG 784M. The appeal was based on the grounds that: NTSA failed to give a hearing to the respondent before revoking the license to operate; NTSA failed to give notice of the intended action; the respondent had addressed all the issues that NTSA wanted it to address; NTSA lacks jurisdiction to deregister a Sacco; the action was discriminatory; the Appellant had had consultative forums with the Respondent and had cooperated with a view to addressing all the concerns raised by the Respondent.
5. The Appellant averred that it had done all that it could have done within its powers to control the non-compliant vehicles. As a result, it was the contention of the Appellant that the actions by the Respondent were taken in bad faith with a view to passing blame to the Appellant instead of exercising their powers to deal

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with errant drivers through the revocation of their licenses, a power that the Appellant does not have.

6. To prove that it had taken sufficient action, the Appellant produced a letter dated the 5<sup>th</sup> of September 2016 indicating that it had written to the NTSA's Director of Road Safety confirming that it had withdrawn the licenses of some non-compliant vehicles, but they were still operating. As a result, the Appellant was requesting the Respondent to authorize the following vehicles to be inspected at the Likoni Motor Vehicle Inspection Unit: KCG 877M; KCH 287B; KCG 477W; KCG 784M. The last one was the vehicle that eventually got involved in the accident that triggered this appeal.
  
7. In another letter, dated the 19<sup>th</sup> of August 2016, addressed to the NTSA's Director of Licensing and Registration, the Appellant refers to the consultative meeting held with the Respondent on the 18<sup>th</sup> of August 2016 and confirms that it had complied with the recommendations of the Respondent and removed the offending accessories on vehicles. The same letter informed NTSA that the owners of the non-compliant vehicles had been issued with warning letters that would be followed by the suspension of their Road Service Licenses (RSLs) in the event that they were found again with the offending devices. The vehicles concerned in this case were: KCH 381K; KCG 477W; KCH 287B; KCE 546Y; KCG 784M. The last one was the vehicle that eventually got involved in the accident that triggered this appeal.
  
8. In yet another letter dated the 9<sup>th</sup> of September 2016, the Appellant wrote to NTSA's Director of Registration and Licensing to confirm that it had taken action and withdrawn the RSLs of four non-compliant vehicles and surrendered the licenses to NTSA's office on the 1<sup>st</sup> of September 2016. The purpose of the letter was to request NTSA to take further action on the non-compliant vehicles. The Appellant averred that it had also reported the vehicles to the Traffic Department of the Kenya Police, but no action had been taken. The vehicles that were subject to the withdrawal of the licenses by the appellant were: KCG 877M; KCH 287B; KCG 477W; KCG 784M. The last one was the vehicle that eventually got involved in the accident that triggered this appeal.
  
9. In its letter of the 9<sup>th</sup> of September 2016 to NTSA, the Appellant contended that it could not ban completely the non-compliant vehicles from its fleet, as they owed the company million of shillings. In the same letter, the appellant had asked NTSA to "advise on the best way to address this issues in a manner that we will

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also be able to protect our relationship with the banks which we are still paying for the loans.”

10. The same letter also confirmed that the Appellant had suspended Martin Kamau Njoroge (driving license no SMB076) and surrendered his work related documents to NTSA. The suspension was meant to stand until he gets a letter of certification from the Ruaraka Driving Test Unit.
11. To assist the Appellant contain the non-compliant vehicles, the Appellant, in the same letter, had recommended to NTSA that, rather than withdrawing the RSL, it should retain the number plates of vehicles that were non-compliant with the law so as to force them off the road. To them, withdrawing the RSL alone was insufficient, as the vehicles would still continue operating.
12. In another letter dated the 21<sup>st</sup> of September 2016, the Appellant wrote to the NTSA’s Director of Registration and Licensing regarding actions taken on vehicles with blaring horns and modified exhaust pipes. As directed by NTSA, the Appellant confirmed that it had taken the vehicles in question for inspection and the said vehicles were issued with compliant certificates. In addition to this, the owners of the vehicles in question were given warnings by the Appellant. The vehicles in question were: KCG 477W; KCH 287B; KCG 877M; KCG 784M. The last one was the vehicle that eventually got involved in the accident that triggered this appeal.
13. It is as a result of the foregoing engagements that the Appellant averred that it had always complied with all the directives from the Respondent. It was the contention of the Appellant that it could not do more than it did, as it reported all the cases of non-compliance to NTSA, but did not have the powers to detain or impound non-compliant vehicles. It was the Appellant’s case that those powers were in the hands of NTSA. According to the Appellant, it is a result of the failure to deal firmly with the concerned non-compliant vehicles that the accident that triggered this appeal happened on the 25<sup>th</sup> of September 2016.
14. The Appellant also averred that the revocation of its operational license was unlawful on the grounds of not being given a notice, reasonable time for response, and hearing. Further, they contended that it was discriminatory and also violated the provisions of the Fair Administrative Action Act 2015. It was also the contention of the Appellant that the Respondent did not have the jurisdiction to deregister any Sacco, as the power is vested in the Commissioner

of Cooperatives. Similarly, the Appellant argued that the Respondent could only revoke the license of individual vehicles, but not the entire Sacco or Company.

*The Respondent's Case*

15. It was the Respondent Authority's case that it revoked the operation license of the Appellant because of failing, on various dates, to comply with the conditions attached to its license. The various incidents include the accident that arose on the 29<sup>th</sup> of February 2016 at Cooperative University, whereupon vehicle registration number KCG 206 F was involved in a fatal accident resulting in two fatalities and 33 injuries. As a result of this accident, the Respondent invited the Appellant to a meeting on the 3<sup>rd</sup> of March 2016 to discuss the accident and seek a way forward. It emerged that the driver of the vehicle had driven the said vehicle when he was under the influence of alcohol. The Appellant was issued with a warning letter.
16. The other incidents concerned, firstly, having vehicles with blaring horns and modified exhausts, for which the Respondent wrote to the Appellant, on the 15<sup>th</sup> of August 2016, asking for the situation to be remedied. Secondly, the suspension, on the 24<sup>th</sup> of August 2016, of the license for motor vehicle registration number KCF 468Z for 30 days as a result of overlapping. Thirdly, the issuance of a warning letter on the 29<sup>th</sup> of August 2016 for overlapping in relation to motor vehicles registration numbers KCH 287B and KCG 179E. Fourthly, the letter written to the Appellant on the 7<sup>th</sup> of September 2016 asking the Respondent to present vehicles for inspection at Likoni. Fifthly, the Respondent wrote a show cause letter to the Appellant pointing out the numerous traffic operations and asking the Appellant to show cause why their license should not be suspended.
17. It was the Respondent's case that the Appellant was under a duty to ensure that their members complied with the Public Service Vehicle Regulations and the Traffic Act. According to the Respondent, the failure to discharge this duty attracted the penalty of revocation of license.

*The Interested Parties' Case*

18. The interested parties, who are residents of the locality within which the Appellant operated, averred that the manner in which the Respondent (NTSA) planned, managed, and regulated transport in the Ongata - Rongai route was inefficient, ineffective, and unaccountable. As a result of the failure of the Respondent, the rights of the general public were not only violated, but the road

users were put in grave danger of death, injury and damage to property. The interested parties also averred that the Respondent was justified in taking the action that it did and that allowing the appeal would be contrary to public interest. It was the interested parties' case that acts complained of as well the failure to regulate the sector gave rise to a variety of human rights violations, including the right to life (Article 26 of the Constitution), human dignity (Article 28), protection of property (Article 40), socio-economic rights (Article 43) and the entitlement good governance in the public service transport sector (Article 10 and 232).

### *Determinations*

19. Following the evidence adduced by the Appellant, Respondent, and interested parties before the Transport Licensing Appeals Board, the Board isolated the following issues to be the ones requiring a determination:
1. Whether the appellant's right to a fair hearing was violated.
  2. Whether the respondent has the jurisdiction to deregister a Sacco or a Company.
  3. Who has the legal duty and power to detain or impound non-compliant vehicles?
  4. Whether the appellant is entitled to damages.

### *Whether the appellant's right to a fair hearing was violated.*

20. The contention by the Appellant that his right to a fair hearing was violated was based on the fact that he was not given notice and a hearing before its operational license was revoked. However, it is the case that both the Appellant and Respondent confirmed before the Board that there had been several consultations between the two, where even meetings were held with a view to ensuring that the Appellant complied with the law. Apart from the meetings held and the letters exchanged between the parties, the Respondent had sent, on the 7<sup>th</sup> of September 2016, a notice to show cause why the authority should not suspend the license issued to the Appellant. In the same letter, the Respondent had indicated, under paragraph 3 that "in future the Authority would consider cancelling your operating license should you be found in any other violation of the public service vehicles regulation." Given that the two parties had been in constant consultation with each other over various violations of the law, one incident of violation should not be looked at in isolation of the others. In the

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circumstances, we find that the Respondent did not violate the Appellant's right to a fair hearing.

*Whether the respondent has the jurisdiction to deregister a Sacco or a Company.*

It was the contention of the Appellant that the Respondent did not have the jurisdiction to deregister any Sacco, as the power is vested in the Commissioner of Cooperatives. This arose as a result of the revocation letter from the respondent dated the 26<sup>th</sup> of September 2016 with the subject reading as "Deregistration of Ongataline Company." This needs to be read together with the content of the letter, which say, in the second last paragraph, "the authority has therefore no option but to **deregister your company as a public service vehicle operator.**" From this, one can see that what was deregistered or revoked was the license to operate as a public service vehicle operator, but not the company or the Sacco.

Given that the Appellant has argued that the Respondent is only authorized to revoke an individual vehicle's license, but not an operator's license, which, according to the Appellant, does not exist, it is important to determine this issue.

The operative provision for this particular issue is Regulations 4 and 5 of the National Transport and Safety Authority (Operations of Public Service Vehicles) Regulations 2014. In relation to the public service vehicles to be licensed, the regulations provide that:

" (4) A person shall not operate a public service vehicle **without a valid license** issued by the Authority.

Conditions to be met by applicants.

5. (1) A person desirous of operating public service vehicles shall be a member of a body corporate which shall –

(a) **be licensed to operate** if the body corporate owns a minimum of thirty serviceable vehicles registered as public service vehicles.

5. (2) The Authority may –

**refuse to issue a public service vehicle licence** to an applicant who fails to comply with any of the minimum conditions stipulated in sub-regulation (1)"

From the reading of the above sections, it is clear that the Respondent Authority has the mandate to license individual vehicles as well as corporate bodies or operators, such as the Appellant. Although the respondent has the power to revoke the

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licenses of operators, it is the case that it does not have powers to deregister Saccos or companies.

*Who had the legal duty and power to detain or impound non-compliant vehicles?*

It was the Appellant's case that it could not detain or impound non-compliant vehicles, as the power to do so belonged to the Respondent. It is as a result of this that the Appellant withdrew the licenses from the non-compliant vehicles and reported them severally, through writing, to NTSA and the traffic police so that they could take further action in terms of impounding the vehicles. Despite this, the Appellant averred that no action was taken by neither the NTSA nor the traffic police and, as a result, the non-compliant vehicles continued to operate, including the vehicle registration number KCG 784M that got involved in the accident that triggered the license revocation under consideration in this appeal. The Appellant argues that the accident could not have happened and their license would not have been revoked if the Respondent had discharged its legal duty as recommended by the Appellant.

On the other hand, the Respondent contended that the Appellant had the duty to ensure that their members comply with the Public Service Vehicle Regulations and the Traffic Act, including the duty to ensure that the vehicles were not plying on the roads. Although the interested parties contended that the Respondent Authority was justified in revoking the license, they also contended that manner in which the Respondent Authority (NTSA) planned, managed, and regulated transport in the Ongata - Rongai route was inefficient, ineffective, and unaccountable.

In the circumstances, the Transport Licensing Appeals Board has to determine who had the responsibility of ensuring that the non-compliant vehicles were not on the road. Once this question is answered, it will then be clear who was to blame for the accident that occurred on the 25<sup>th</sup> of September 2016. Before this accident happened, the Appellant was able to prove that it had complied consistently with all the recommendations of NTSA and that is why its license had not been revoked. It is, therefore, the accident of the 25<sup>th</sup> of September 2016 along Langata Road that triggered the revocation of the license. As such, we need to establish who was to blame for this accident in order to determine whether the revocation of the license by the Respondent was lawful or not. In the event that exercise of power by the Respondent was unlawful, then the same cannot be justified even on the grounds of public interest. This is because punishing the Appellant for an omission that it was not responsible for would be disproportionate to the objective of enhancing road safety.

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In order to draw a line between where the legal duties of the Respondent end and where those of the Appellant start, it is important to examine both the law and the Code of Conduct governing the operations of the Appellant Company. It is worth noting that the Code of Conduct of any operator is subject to the approval of the Respondent (NTSA) before a license is issued.

According to section 4 (1) of the National Transport and Safety Authority Act 2012, it is the Authority that has the mandate to:

“(a) advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety;

(b) **implement** policies relating to road transport and safety;

(c) **plan, manage and regulate** the road transport system in accordance with the provisions of this Act;

(d) **ensure the provision of safe, reliable and efficient** road transport services;

Regulation 7 of the National Transport and Safety Authority (Operations of Public Service Vehicles) Regulations 2014 stipulate the duties of every licensed operator. The regulation provide, for example, that every operator of a licensed public vehicle should “display at a conspicuous place on the vehicle a sticker or an identification mark approved by the Authority; ensure that the driver and conductor if any wears the prescribed uniform and identification badge while at work; the driver of the vehicle adheres to the approved routes, schedule and drop off and pick up points; ensure that passengers are treated courteously; ensure that music played does not exceed the prescribed limits in the course of the journey. In these regulations, the operator is not given any powers to detain and impound vehicles.

For an operator to be licensed under the Regulations 5 (1) (c) of the National Transport and Safety Authority (Operations of Public Service Vehicles) Regulations 2014, it is required to “have in place a code of conduct approved by the Authority governing its employees, agents and sub-contractors.”

A close examination of the “Code of Conduct for Ongataline Transporters Ltd”, which was approved by the Respondent Authority, reveals that it does not address the question of the person who has the powers to detain or impound vehicles. Although it provides that the company “will **not condone** the activities of employees who achieve results through violation of the law or unethical business dealings”, it can be argued, as the Appellant did, that an operator who asks the Respondent and the police to detain or impound a vehicle has not condoned unethical dealings given that the law does not give him powers to detain or arrest vehicles.

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In view of the foregoing, the Transport Licensing Appeals Board finds that there was an omission on the part of NTSA for failing to detain or impound the non-compliant vehicles when the same had been reported to it by the Appellant. Given that the Appellant had done everything within its powers to ensure that the vehicle registration number KCG 784M was not operating on the roads, the Board finds that the decision to revoke the Appellant's license was contrary to section 7 (2) of the Fair Administrative Action Act 2015, which implements Article 47 of the Constitution, for: failing to take into account relevant considerations; being unfair and unlawful; being disproportionate and not rationally connected to the purpose for which it was taken.

*Whether the appellant is entitled to damages.*

The appellant seeks KES 10, 000, 000 in damages as a result of the loss of income occasioned by the revocation of the license. On this issue, we follow the precedent of Justice Onguto in the case of *Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board [2016] eKLR*, where it was held that:

“Constitutional remedies should be forward-looking, community-oriented and structural. However, an award for damages is not a forward looking remedy. It requires the court to look back to the past in order to determine how to compensate the victim or even punish the violator.”

According to Justice Onguto, instances that would make a court award damages include, where decisions are made completely outside the legitimate scope of the empowering provision. In this case, the Respondent made the decision within the powers given to it by the NTSA Act 2012 and we, therefore, make no orders for damages.

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

1. A declaration that the Respondent Authority did not violate the Appellant's right to a fair hearing.
2. A declaration that the Respondent Authority has the mandate to license individual vehicles as well as corporate bodies or operators, but does not have the powers to deregister a Sacco or company.
3. A declaration that there was an omission on the part of NTSA for failing to detain or impound non-compliant vehicles when the same had been reported to it by the Appellant.

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4. An order of **Certiorari quashing** the revocation of the Appellant's operators' license that is contained in the Respondent's letter dated the 26<sup>th</sup> of September 2016.
5. An order of **Mandamus compelling** the Respondent to reinstate the operator's license of the Appellant.
6. That this order be served upon the NTSA and Traffic Commandant with a view to ensuring that the Appellant's vehicles are not impounded.

**Delivered, dated, and signed in Nairobi by the Transport Licensing Appeals Board on this 13<sup>th</sup> day of October 2016.**

<b>Prof. Kiarie Mwaura</b>	<b>Member</b>	.....
<b>Nkanata Johnson Gitobu</b>	<b>Member</b>	.....
<b>Aden Noor Ali</b>	<b>Member</b>	.....
<b>Betty Chepng'etich Bii</b>	<b>Member</b>	.....