

# THE MATATU INDUSTRY: REGULATION AND COMPETITION CONCERNS

*A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE  
REQUIREMENTS FOR THE AWARD OF THE DEGREE OF BACHELOR  
OF LAWS (LL.B) OF THE UNIVERSITY OF NAIROBI.*

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## DEDICATION

1. *To my beloved parents for bringing me forth into this world as just one of the many God's seeds; and to all my brothers and sisters both of filial consanguinity as well as friendly ties, who have been supportive in mentionable and invisible ways, but at least their background as the pedestal for my inspiration and ambition.*
2. *To all good and able men and women in the universe whose greatest call is the service of humanity and whose works have touched the hearts of human kind.*

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Secondly I thank Elizabeth for her outstanding typing without whose effort, this work would not be in its present form.

Finally with great sincerity I thank good friends Doris, Waweru, Molo, Muthui and George Wamukoya for their great and constant availability to me in all circumstances. To the rest of you, I acknowledge your presence in my life as a big community upon which all of my being had incessant reflection in my daily doings.

I learnt a lot from everyone.

# TABLE OF CONTENTS

Dedication	i
Aknowledgement	ii
Table of contents	iii
Table of statatues and abbreviations	iv
<b>Chapter 1: INTRODUCTION</b>	<b>1</b>
<b>Chapter 2: OVERVIEW OF THE MATATU INDUSTRY</b>	<b>7</b>
2.0 Growth and Development	7
2.1 The Matatu Market Share	13
2.2 The Need for Competition Regulation	17
2.3 Consumer Concerns	22
2.4 Insurance Concerns	25
<b>Chapter 3: REGULATION</b>	<b>27</b>
3.0 Introduction	27
3.1 Regulatory Framework in the Matatu Industry – A critique	29
3.2 Reforming the Matatu Sector	36
3.2.1 Institutional Reform	36
3.2.2 Industry Reform	37
3.2.3 Consumer Concerns	39
<b>Chapter 4: CONCLUSION</b>	<b>40</b>



## TABLE OF STATUTES AND ABBREVIATIONS

### A. STATUTES

1. The Transport Licensing Act, Cap 404, Laws of Kenya
2. The Traffic Act, Cap 403, Laws of Kenya.
3. The Income Tax Act, Cap 470, Laws of Kenya
4. The Insurance (Motor Vehicle Third party Risks) Act, Cap 405, Laws of Kenya
5. The Local Government Act, Cap 265, Laws of Kenya
6. The Restrictive Trade Practices, Monopolies and Price Control Act, Cap 504, Laws of Kenya.
7. Sherman Act (US) 1890.

### B. ABBREVIATIONS

A-G	-	Attorney General
AKL	-	Association of Kenya Insurers
CAP	-	Chapter
K£	-	Kenya Pound (equivalent of Kshs. 20/-)
KBS	-	Kenya Bus Services
Kshs.	-	Kenya Shillings
MVOA	-	Matatu Vehicles Owners Association
MWA	-	Matatu Welfare Association
p.a	-	Per annum
PSV	-	Public Service Vehicle
RSL	-	Road Service License
RTP	-	Road Trade Practice
RTPM &PC	-	Restrictive Trade Practices, Monopolies and Price Control Act.
Sec.	-	Section
Sh.	-	Shillings
TLB	-	Transport Licensing Board
USA	-	United States of America

# CHAPTER 1

## INTRODUCTION

The matatu industry is a visibly lucrative enterprise for many. It is not by any standard a mean venture. It is an indigenous industry that has thrived and succeeded where most industries including state corporations have failed. The following statistics and data do reflect the 10.5 billion worth-of-stake industry annual operation figures.<sup>1</sup>

- (i) The number of matatus averages 30,000 employing 120,000 people directly.
- (ii) Taxes paid in lieu of licences total Kshs. 288,067,005.
- (iii) Fuel consumption Kshs. 4,081,000,000.
- (iv) Tyres used for a year Kshs. 2,400,000,000.
- (v) Consumables (spare parts and accessories) Kshs. 1,800,000,000.
- (vi) Insurance premiums old rates (60,000-76,000 per 18-seater van) 1,980,000,000  
Total Kshs. 10,500,000,000.

From the above it is evident that the industry is an economic wheel in our business circuit. The significance of the industry is further manifest by the need for provision and satisfaction of transport commuter services. Akin to the industry's nature is the sporadic growth and rapid expansion the sector has witnessed. The industry has arisen amidst competition from existing Kenya Bus Services and other transport modes including taxis and train services (for commuters).<sup>2</sup>

However, the good of the industry has seen the development of a market structure predisposed to competition. The nature of competition has

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<sup>1</sup> Daily Nation, March 13, 2000 p. 7.

<sup>2</sup> The Transport Licensing Act, Chapter 404 Laws of Kenya sets up a licensing authority, the Transport Licensing Board whose concern is all public transport vehicles including buses and taxis.

prompted resort to certain practices that in essence have turned out anti-competitive.<sup>3</sup> Initially, matatus came into the passenger service market as alternatives to bus services by the Kenya Bus Services (KBS) and Nyayo Bus Services which had a primordial life span.<sup>4</sup>

In the transport sector evolution, the government has played an active and diverse role in domestic road transportation. There has been a regulatory regime namely the Transport Licensing Board under the Ministry of Transport. The Kenya Police, Traffic Police Department has been a lead enforcement agency of policy measures by the government of relevance to mention, the policy measures have been directed at rates, routes and entry in the transport service industry.<sup>5</sup> But of much concern and hence the subject of this study, a number of aspects of transportation have been neglected, such as income gains and losses to specific groups and the general industry's stability. Present regulatory practices encourage excess capacity and an inefficient rate structure that do not favour the poor and remote areas as a social goal for regulation. Ann F. Friedlaender<sup>6</sup> argues that regulation is necessary to control monopolistic excesses while permitting them to maintain a rate structure that not only benefits the transporters but society, and that regulation can be favoured to control competitive excesses of the industry and stabilize rates and profits when firms face excess capacity and cut throat competition.

While regulatory and investment policies may often overtly pursue conflicting goals, they have a certain rationality when viewed in the

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<sup>3</sup> The matatu industry itself suffers from cartelisation that goes with price-fixing, market allocation and predatory practices for a further reading see Kinyanjui, B.M. "Restrictive Trade Practices in the 'matatu' industry" LL.B. Dissertation, University of Nairobi (1996) unpublished Chapter 3.

<sup>4</sup> Nyayo Bus Services were a 1980s development. However, the Corporation created collapsed due to rampant mismanagement and loss of revenues to the point great insolvency. See Kinyanjui, B.M. (1996) Ibid. Pg. 46.

<sup>5</sup> The Transport Licensing Act, Cap. 404 Laws of Kenya, Section 8.

<sup>6</sup> Friedlaender, A. 7 (1969) "The Dilemma of Freight Transport Regulation", Washington D.C., The Brookings Institution, p. 2.



broader context of multiple objectives:-<sup>7</sup> fairness, industrial stability and economic efficiency, support for the majority (less privileged) consumer interests. The concern now, is, whether new institutional arrangements could be found to reduce efficiency costs while attaining other objectives.

To bring the point closer home, the regulation in the matatu industry is wanting to the achievement of three broad objectives:- first, fairness. Associated with the matatu service industry is the eminent exploitation of their dominant monopoly power; high rates of fare charged, arbitrary undue preference between persons, the localities of operation, the traffic mode and changes over distance, when compared to other transport alternatives mainly bus services. Within the industry itself (intra-specific), cartelisation has made certain groups suffer while favouring others. This urgently calls for a regulatory regime that will restore order and seek to nurture fairness by any willing player (investor) in the business to the best access of service to the consumers.

Secondly, value of service structure. As already mentioned, regulation is important to serve social goals, among them service to poor and remote areas without exploitation. This can be achieved by the central government's investment and user charge policies explained largely in terms of a desire to provide alternative sources of transportation to regions subject to potential monopoly power. Hand in hand to this, income redistribution could be a major policy direction.

The third broad goal is industry stability. In the interests of the producer, transporter and consumer governmental regulation of traffic is necessary

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<sup>7</sup> Ann F. Friedlaender and Richard de Neufville, "The Political Rationality of Federal Transportation Policy" 1979 (Vol. I) Journal of Research in Law and Economics pp. 97-113.

and desirable. In this case, regulation could come in handy to permit fare charges within a given range, prevent charges in the face of market dominance where reductions would hurt competitors, save certain matatus facing collapse by assigning to them advantageous routes or allowing them so to do.<sup>8</sup> In addition stability could be targeted by reluctance and ease to grant new licenses of entry in new markets, response to innovations in the form of new technologies in the pattern of service as the case may be.

Despite these objectives, the fundamental question regarding government regulation should remain: To what extent does it actually change the performance of firms in a regulated industry. William D. White<sup>9</sup> argues that Regulation may have dynamic effects which make it easier to block the introduction of a given type of regulation than to remove it after it is introduced, and that the introduction of regulation may create demands for additional regulation. He<sup>10</sup> postulates that regulation could achieve its desired ends in a market scenario in which:- one, entry of new firms is effectively limited such that fewer firms exist at any given time, and exit controlled in such a way that the market shares of departing firms are re-allocated or transferred to the remaining firms. Two, higher price levels (average revenues) should be achieved and that a more varied price structure should exist with greater use of price discrimination. Three, that the cost of reaching, policing and enforcing agreements in the industry should not yield upward shifts in industry cost curves and that regulation should aim at raising average costs above marginal costs, by for example

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<sup>8</sup> In the USA, the Interstate Commerce Commission carefully examines proposed railroad rates to see if they might lead to "destructive competition" and impose a risk of driving a competitor or competing mode out of business. See Ibid.

<sup>9</sup> William D. White, "DYNAMIC ELEMENTS OF REGULATION: THE CASE FOR OCCUPATIONAL LICENSURE" University of Illinois at Chicago Circle 1979 (Vol. I) Research in Law and Economics.

<sup>10</sup> Ibid.



assigning production quotas to the would-be market players. Four, productivity and efficiency should be a major goal. This could be ensured by killing any kind of cartelisation. Therefore in absence of pooling or other explicit market allocation agreements, carrier rivalry arises. Any effort of two or more firms to obtain more passengers, more revenue and hopefully more profit, must take the form of improvements in service quality.

Pertinent concerns in the regulation of matatu industry should bear due regard to the industry's subtle competitive nature, in which practices that oppose desired competition are dealt with. The huge losses that arise in the Industry's operation should be given consideration, this is due to inefficiencies in the management and running of the matatu sector. It is little wonder that the Insurance compulsory policy has been a bone of contention in the recent past in the wake of proposed increases. Thirdly, the major consumer concerns are unsatisfied. The high fare charges, undue unprofessionalism, dangerous ferrying and other discomforts in the matatu services need be addressed. In addition, cartelisation and collusive agreements in the matatu operations should not escape the regulator's eye and efforts. These in a nutshell are the regulatory deficiencies that necessitate works of this nature for redress.

The discourse that shall follow mainly in Chapter 2 will dig into the nature, development and growth of the matatu industry. In this we shall set forth the path of discovering the main concerns and extent of the problems that have grown with the matatu industry. Then Chapter 3 will entail the discussion on the existing regulatory regime under the Transport Licensing Act. A critique to this regime shall attend with the

purpose of proposing reform. This will be enabled by reference to regulation in other jurisdictions.

Finally, there will follow a conclusive chapter to close up the discussion under Chapter 4. In the course of learning with us in the observations made, all criticism shall be welcome as a natural flow in academic pursuits. However, this work ran short of greater expectations by various constraints in terms of research data which was hard to come by, time and mobility resource that would have enabled anyone go to the roads and research on matatus nationwide. Any effort in future towards this objective must be received as a welcome idea. True, the matatu sector requires further studies into the transport business. It is an essential service we cannot do without. Please read on.

2.0 Growth and Development

Kenya's transport sector has witnessed the emergence and growth of a household name: The Matatu Industry. From humble initiation in the 1950s<sup>1</sup>, the Matatu Industry has assumed tremendous significance over the years and today, it is an indispensable form of public transport. The definition of Matatu under the Traffic Act<sup>2</sup> identifies a public service vehicle (PSV) with a seating capacity of between ten and twenty-five passengers. Today most matatus are eighteen-seater vans or twenty-five seater mini-buses.

Matatus arose spontaneously to fill the lacuna in the public transport network but quite informally. The earliest matatus (a 1950s development) transported people from Nairobi city centre to the Makadara estate.<sup>3</sup> They were owned and licensed as private vehicles. The number of matatus rose with the population growth, as this created a corresponding demand for public transport services.<sup>4</sup> Initially matatus were owned by low-income persons who converted their private vehicles into public carriers. Thus, they operated in contravention of legal requirements for Road service licensing and public service licenses. They operated "hide and seek" from the police, without definite routes and terminuses<sup>5</sup>. Then luck smiled upon the matatu operators in 1973<sup>6</sup>

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<sup>1</sup> Mwanzia, A. N, *Road accidents and the law: A study with special reference to the matatu industry*. LL.B dissertation 1986

<sup>2</sup> The Traffic Act CAP 403, section 2

<sup>3</sup> Kinyanjui, BM, *Restrictive trade practices in the matatu industry: The legal, policy and administrative perspectives*. LL.B dissertation, 1996.

<sup>4</sup> Situma L and Mogridge M, *A study of private taxis -matatu operations in Nairobi* 1971

<sup>5</sup> supra note 3

<sup>6</sup> The presidential decree was immediately implemented vide Gazette Notice LN No. 89 of 1973.



when the late President Kenyatta decreed that matatus be exempted from all the provisions of the Transport Licensing Act.<sup>7</sup> This shifted the *modus operandus* and the sector became legalised in effect. This, as history recalls today, has been the landmark event in the development of the matatu industry.

However, the matatus were still subject to the control of insurance and Traffic Acts, for instance. All matatus (as PSV) must take out motor vehicle third party risks policy<sup>8</sup>, while the Traffic Act<sup>9</sup> caters for registration, licensing and provides for demerit and offences relating to the use of vehicles on roads. Other consequential laws include the Income Tax Act<sup>10</sup> and by-laws for example of the Nairobi City Council under the Local Government Act.<sup>11</sup> These aspects will form an eccentric guide to the discourse on appraisal of the existing legislative and regulatory regime in this study.

Since 1979<sup>12</sup>, Matatu associations, groupings and cartels have developed. These have been very vocal on the fight for collective rights of matatu owners. They also take over the management and assignment of routes of operation. Most of these associations are unregistered. The most interesting feature of these associations is that they are no longer exclusively controlled by matatu owners. There have been attempts to form umbrella organisations for matatu associations, over the years. The most successful was of the 1980s<sup>13</sup>, the Matatu Vehicle Owners

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<sup>7</sup> The effect of the exemption was that matatus were no longer required to take out PSV licences.

<sup>8</sup> This policy is compulsory under section 4. The Insurance Motor Vehicle Third Party Risks Act, CAP 405

<sup>9</sup> *supra* note 2

<sup>10</sup> The Income Tax Act CAP 470

<sup>11</sup> The Local Government Act CAP 265

<sup>12</sup> Kapila S, Maundu M, Lamber D, *The matatu mode of public transportation in metropolitan Nairobi*, Mazingira Institute 1982 at 92

<sup>13</sup> *supra* note 3

Association (MVOA). It was deregistered as a society in 1988 because in the words of A-G, Amos Wako "*it endangered peace and good order*"<sup>14</sup>. Most umbrella associations are not tolerated because they enshrine themselves in political pursuits and machinations. Importantly, they are in economic terms anti-competitive in their activities and demand for fare-hikes, strikes. The associations engage in predatory practices designed to exclude others, hinder entry or force exit contrary to the spirit of Restrictive Trade Practices Monopolies and Price Control Act.<sup>15</sup> These predatory practices in the matatu industry encompass allocating markets to exclusion of all others through stringent membership requirements, price-fixing and co-operation and the zealous pursuits to enforcement of these predatory, restrictive practices. In the wake of this, enforcement and regulatory agencies must accordingly act to the sound monitoring of any industry or sector in the anticompetitive behaviour for the general economic good.

What then are the peculiar regulatory considerations in the matatu industry? The quest for regulation often hinges and thrives on the size of the given economic sector relative to the general comparison in the economic web. This means assessing or feeling the economic impact of the sector in question. In order to substantially appreciate the need for regulation of matatus, the market share of the industry in the transport sector must be determined. The transport sector has a varying number and degree of performers including buses, taxis, private vehicles and the subject of this study - the matatus. In this study it is imperative to identify and define the market share of the matatus vis-avis the other players in order to accord the industry significance for regulation.

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<sup>14</sup> Daily Nation, November 24, 1993: Quote of the AG Amos Wako, explaining in parliament why the MVOA was deregistered

Secondly, the market structure can only be meaningful if analysed within geographical limitations (borders).

To come to terms with concentration analysis in the public transport sector, the basis deemed necessary and satisfactory was from licences issued. It is appreciable that the Road Transport department of the Ministry in charge of Transport had available data on licenses issued between 1995-1999<sup>16</sup>. See table 1.1 <sup>17</sup>below. A total of 39,870 licences were issued during 1999 against 33,443 in 1998, a significant rise of 19.2%. Of the 39,870 licences issued, 28,805 were for PSV matatus compared to 3,359 PSV buses and vehicles representing (a 70% of the total licensed vehicles).

Table 1.1 LICENCES ISSUED FOR FREIGHT AND PASSENGER TRANSPORT VEHICLES 1995-1999\*

	1995	1996	1997	1998
1999*				
Passenger Service	22,820	24,470	21,662	24,334
28,805				
Vehicles**				
Passenger Service	2,185	2,042	1,996	1,952
3,389				
Vehicles***				
Freight Transport	7,752	6,517	9,031	7,157
7,706				
Vehicles				

<sup>15</sup> CAP 504

<sup>16</sup> The Ministry of Planning and National Development, *Economic Survey Report, May, 2000* Nairobi, Central Bureau of Statistics

<sup>17</sup> *ibid* at 182



TOTAL	32,757	33,029	32,689	33,443
	39,870			

\* provisional

\*\* PSV matatus

\*\*\* PSV buses and tourist vehicles only

Source: Road Transport Department, Ministry of Transport and Communications

In terms of economic growth contribution, Table 1.2<sup>18</sup> on the value of output of the transport and communication sector between 1995-1999 shows an overall registered growth of 9.7% in 1999 compared to 3.9% in 1998 to K4,148.6 million from K 3,782.5 million. The total number of newly registered motor vehicles grew by 2.3%. Receipts from road transport declined by 0.6% due to poor state of roads. In addition as Table 1.3<sup>19</sup> indicates, earnings from road and rail transport grew by 6.8% from K 1,041.8 million (1998) to K 1,112.9 million (1999) a big improvement over the decline of 4.3% attained in 1998.

Table 1.2 TRANSPORT AND COMMUNICATIONS - VALUE OF OUTPUT 1995-99

	1995	1996	1997	1998	1999*
Road Transport	810.7	926.4	949.7	870.7	865.1
Railway Transport**		225.0	183.6	150.0	204.8
		260.3			
Water Transport	372.3	367.3	393.4	389.2	371.6

<sup>18</sup> *ibid.* at 181

<sup>19</sup> *ibid.*

Air Transport	471.1	540.6	592.9	701.3
1,000.1				
Services Incidental to	153.8	181.1	248.2	201.8
163.7				
Transport				
Pipeline Transport	197.8	230.7	240.1	264.1
286.4				
Communications	805.1	996.1	1065.2	1150.6
1201.4				
TOTAL	3,035.8	3,425.8	3,639.5	3,782.5
4,148.6				

\* Provisional

\*\* Includes other Revenue

Table 1.3 EARNINGS FROM ROAD AND RAIL TRAFFIC (1995-99)

	1995	1996	1997	1998	1999*
Road	466.0	526.9	499.7	474.7	458.2
Rail	14.5	14.9	14.6	13.4	14.4
TOTAL	480.5	541.8	514.3	488.1	472.6
Freight Traffic					
Road	344.7	399.4	450.0	396.0	406.9
Rail	171.3	156.7	123.9	157.7	233.4
TOTAL	516.0	556.1	573.9	553.7	640.3
Total Road traffic	810.7	926.3	949.7	870.7	865.1
Total Rail Traffic	185.8	171.6	138.5	171.1	247.8
TOTAL RAIL & ROAD	996.5	1079.9	1088.2		1041.8
1112.9					

The significance of road transport is self-evident from the above figures. In the passenger service category, our main concern in this work, road traffic was the highest revenue earner. Revenue from the transport sector immensely contributed to the consolidated fund in times of economic slump (drop) for the government's economic obligations. However, the progress so far made in the transport sector has left urban transport in want of the services characterized by congestion and high fares to inhabitants of Nairobi City. The severity of the problem can in the words of some observers be stated "there appears to be no solution in sight for the severe transportation crisis in Nairobi and its peri urban satellite towns."<sup>20</sup>

## 2.1 The Matatu Market Share

Despite the public transport market being open to entry of buses, taxis and matatus, dominance in the sector has leaned on the side of matatus. Virtually every discernible route in Nairobi and elsewhere spots a number of matatus. In terms of market analysis, we shall limit ourselves to the geographic market of public transport services within Nairobi City. This shall be so owing to the fact that the city has the highest concentration comprising about 60% of matatus (at least in destination ply to, into or out of the City).<sup>21</sup> It shall therefore be assumed that behaviour within Nairobi shall be apt representation of the nationwide trend in the industry. Also, the buses and taxis have operational significance within Nairobi as public transport vehicles serving the growing need of commuter services in the populated city. Secondly, the regulatory regime is centred in Nairobi, and thus the information source being conveniently located.

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<sup>20</sup> Daily Nation, May 5, 1992 "Business week at 5

<sup>21</sup> Interview with the Chief Executive Officer, TLB, Mr. Wanyange. June 3<sup>rd</sup> 2000.



Thirdly, time, financial and mobility resources pose logistical inadequacies that would render the study a futile exercise. We sincerely hope that all will bear and embrace the geographic representation of Nairobi as a suitable guide nationwide.

The second limb of market analysis entails assessment of market power of the matatus in the relevant service market. The relevant product (service) market enables one to locate all substitutes available to the consumer of a seller's product/service. The definition process asks whether the seller's product competes with other products, and whether these products limit the seller's ability to raise prices<sup>22</sup>. In this regard the relevant service market for matatus would mean identifying bus, taxi and train services as substitutes to matatu services. This is done to ascertain with what ease can commuters opt for bus, taxi and train services. This entails considering commuters preferences, choices and satisfaction. This study revealed that availability and convenience of matatus offers no suitable match from other competitors.<sup>23</sup> Most Kenya Bus Services (KBS) buses are never conveniently available to commuters especially during rush hours. One could spot one Kenya bus amongst ten matatus and after a long wait of at least half-an-hour. In fact KBS withdrew services from certain routes. As for taxis, it is a different thing altogether because they are unaffordable to an ordinary daily commuter who would pay a "fortune" to reach city centre or get to the far off estates, hence they are considered a luxury. The other alternative is the train (Kenya Railways) which is only unidirectional in the city operating from Thika-Juja to and from City to serve passengers from estates along the line.

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<sup>22</sup> Gellhorn E et al, *Anti trust Law and Economics*, West publishing Co. 1994 at 95

<sup>23</sup> This study involved the writers observations as a commuter.

Railway service suffers from total absence of elaborate wide network and in best, the presence of overly remote service network almost vestigial.

These characteristics then leave public transport to the advantage of matatus. The matatus, almost, are the first choice because of their flexibility, speed, and general convenience out of their outreaching-to-customer nature. Matatus are more flexible than the train and buses because they ply on all routes at all times unless when on strike. They are speedier than buses because they easily go about traffic jams. They are fair in prices. They charge normally more or less at bus rates and are definitely cheaper than hired taxis. Matatus come in dynamic colours and design. For the youth music played is an irresistible attraction though illegal under Traffic Act.

In measuring market power, three approaches are employed:- performance, rivalry and structure of the market.<sup>24</sup> Performance means identifying how much a firm's prices depart from the marginal cost, or the amount that a firm's net exceeds the industry's average. This would mean weighing performance of matatus against the backdrop of Kenya Bus Services, taxis and the train within Nairobi. However, this approach has the handicap that marginal costs are difficult to estimate and profit data may not reflect actual market power where a firm fails to maximise profits. Today, the industry incurs heavy expenses in terms of repair and maintenance, due to poor state of roads, fuel costs, corruption of police officers and exhortation by the route cartels. This really brings down the profit margins.

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<sup>24</sup> supra note 22



Rivalry entails studying the sensitivity of the industry sales (output) to changes in its rival's sales and prices and to adjustments in buyer behaviour. This approach embodies three econometric techniques. One, estimating residual demand to assess how much a firm could raise prices by cutting output after accounting for the demand responses of buyers and supply responses of competitors. Two, calculating industry demand elasticities to assess whether firms can exploit the inability of buyers to substitute other goods by raising price above costs. And three, observing pricing behaviour to determine whether industry pricing patterns are punctuated by occasional price wars, which are followed by a return to prevailing high price levels.

Structural approach involves counting the number of firms in a market and comparing each firm's share of market rivalry in terms of output. Market shares are then used as surrogates for market power. It is then inferred that a firm with a major share of the market has monopoly power, for instance. However this approach is not without limitations. The inference would be misleading where ease of entry into the market would deny an incumbent the ability to raise prices by curbing output or where product differentiation obscures the full range of products that constrain a firm's ability to charge more for its own services.

These three approaches show to reasonable degrees, market power of matatus in the transport sector being near monopolistic. There are certain peculiarities which convince one to assume this monopolistic dominance. The matatu operators are usually quick to manipulate prices (in fare charges); they have a fair performance by daily increase and frequent replacement of matatus on routes; often exploit inability of commuters to substitute their services by raising fare charges, the matatu output is pretty significant compared to bus, taxi and train services, hence the

industry is the leading rival in the public transport market for passenger services. In fact, matatus have come to be identified with price leadership in the fare charges, in which the potential and actual rival KBS bus services take after price increments of matatus. On most city routes, KBS charge twenty to thirty shillings one way more or less the same price as matatus. When it is off-peak hours and weekends both modes go down by between five to ten shillings on the same routes.

## 2.2 The Need for Competition Regulations

Having described the nature of the matatu industry, we then seek to answer the question: why should matatus be subject to regulatory reform? What is the problem with the seemingly lucrative industry, a leading contender in public service transport?

First, the growth and development of the Industry was unique and has been unique. From private service vehicles conversion into public carriers, the industry's transition bespeaks great concern for checked regulation. It is apparent that the sporadic growth of the matatu industry has not received commensurate regulatory policy. Today, the Industry has grown into cartels and associations that are devoid of any legal sanctity. It is these cartels that run the industry. In fact before 1973 matatus were not legally recognised as public carriers. Since their advent, matatus have out competed KBS. KBS laments that matatus break all the traffic rules, disregard traffic to ferry passengers faster and dangerously to make more trips and higher profits. Matatus have for long not been paying lay-by fees to Nairobi City Council. They do not pay corporate taxes. It was not until mid last year (1999) that the City Council began to seriously levy parking fees and Transport Licensing Board (TLB) regulations came into force to the surprise and lack of



expectation of the matatu operators<sup>25</sup>. The peculiarity of matatu industry goes to the entrepreneurship which is mostly individual (unlike KBS which is a single corporate entity). Matatu trips are not scheduled with fluctuating fares. They have no designated bus-stops and they wholly operate within the cartel (association) system. This really contrasts KBS. It is therefore a general consensus that efficacious regulation must be sought to bring sanity in the industry and more so to enhance level playing ground with the KBS competitors. As of now, KBS has introduced mini-buses branded "metro shuttles" on upmarket routes of the Nairobi city such as Lavington and Westlands. This development is to supplement the company's bus services, while offering competition to matatus.

Secondly, the matatu industry has hindered fair competition. The industry is characterized by restrictive trade practices that harm economic efficiency. This harm extends to the consumers of transport services who have to frequently (almost regularly) contend with strikes, fare-hikes, boycotts and harassment by matatu crews. The main restrictive trade practices in the industry are predatory practices, market allocation and price-fixing (co-operation). A predatory practice is one that is designed to exclude others from participating in similar or other economic activities. The predatory practice bars entry or forces exit from an economic activity. This has the effect of limiting competition, by locking out possible competitors. In the USA, a conspiracy to put a single competitor out of business violates the Sherman Act.<sup>26</sup> This is the kind of business to which matatus belong. In the matatu industry, every route is governed by an association in place ostensibly to cater for the welfare of

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<sup>25</sup> supra note 21

<sup>26</sup> Schwartz, *Justice and other non economic goals of anti trust*. 127 University of Pennyslva

its members. Observations and interviews made within the matatu industry reveal that to ply a route, one must pay a hefty figure of between Kshs. 40,000-100,000 to the mafia-type cartels/associations. Newspaper reports highlight some of the incidences in which these cartels show teeth to bite by keeping out or shutting out poor matatu operators. The hefty sums are usually demanded before commencement of business. The Restrictive Trade Practices Monopolies and Price Control Act prohibits the practice of deterring persons wishing to join the Matatu industry without the desire to join an association or upon compulsory payment of some 40,000/=. Sad enough, as it is matatu operators who do not belong to any association are regarded by association members as "poaching" upon their terminals and routes.

It is a matter of competition concern that the associations, despite demands for initial commencement of business, continue to extort money from matatu operators on daily, monthly and annual basis. This thoroughly offends section 10 of the Restrictive Trade Practices, Monopolies and Price Control Act. This is so because, the exclusionary practices raise barriers to entry into the matatu business, such as envisaged under sec. 6. Section 10(1) provides

"A person who, whether as principal or agent, and whether by himself or his agent, commits predatory practices with the intention , whether exclusively or in common with other objects, of accomplishing the purposes to drive a competitor out of business, or to deter a person from establishing a competitive business in Kenya or in any specific area or location within Kenya..." .....shall be guilty of an offence."

The provisions under section 10 are therefore per se prohibitions. Any tribunal, to which a complain has been lodged in regard to the

exclusionary practices can only be concerned with whether or not the practice occurred and not the reasonableness or otherwise of the practice.

Section 6(a)(i) prohibits the practice of raising entry barriers by declaring as a restrictive trade practice

"an agreement or arrangement between persons engaged in the business of selling services to engage in conduct hindering or preventing the sale or supply or purchase goods or services between persons engaged in the selling of services, limiting or restricting the terms and conditions of sale or supply between persons engaged in the selling or buying of goods or services".

These arrangements and agreements are typical of the matatu industry. Before anyone puts up matatu services, one has to part with the princely sum to the tune of tens of thousands of shillings, and must have joined an association or cartel.

The second aspect to the concern in the matatu industry's restrictive trade practices revolves around market allocation. Market allocation refers to a situation where businessmen agree that a certain area will be served only by a particular producer or trader to the exclusion of all others. Contrary to the regulations under the Transport Licensing Act, matatu associations have tacitly allocated markets among themselves throughout the city and the country. A matatu owner cannot simply operate on any route of his choice except that which he is a member. This culminates in the problem of protected and inefficient markets rather than ideal market situation where market forces carry the day resulting in allocative efficiency. The problem manifests when non-members to an association on a particular route are discriminated against or restricted to ply the route except upon payment of certain fees that then become increased costs far much higher



reducing their profits. These costs are eventually passed on to the consumer. The problem is persistent. Despite there being an increased number of matatus on our roads, the fare charges are still high. This could be the reason. The Restrictive Trade Practices Monopolies and Price Control Act at section 6(1)(i) declares market allocation to be an offence. It states:-

"an agreement or arrangement between persons whether as producers, wholesalers, retailers or buyers,... or allocate territories or markets for disposal of goods..." - is a restrictive trade practice.

The other RTP germane to the matatu industry is price fixing or co-operation on prices. This is a case where buyers or sellers agree to fix uniform prices to be charged on certain goods or services. In the matatu industry, it is the associations which fix the fare charges. This has the effect of eliminating price competition to the detriment of consumers. Section 6(1) (d) of RTPM&PC Act declares it a RTP

"an agreement or arrangement between manufacturers, wholesalers, retailers or contractors or any combination of persons other than a partnership, engaged in the selling of services, to sell services, at prices or on terms agreed upon between the parties to any such agreement or arrangement."

Further section 7 of the RTPM&PC Act makes special provision for trade associations in regard to inter alia price fixation or co-operation. Section 7(1)(b)(i) prohibits and declares as restrictive trade practices, practices conducted by or on behalf of a trade association - by way of

"making directly or indirectly of a recommendation by a trade association to its members or to any class of its members - which

relate to the prices charged or to be charged by such members or to the margins included in the prices or to the pricing formula used in the calculation of those prices."

The seriousness of such recommendations is captured by the Act to the extent that compliance or non-compliance with the recommendations renders it a restrictive trade practice.

These RTPs viewed as they are pose economic problems in the operation of the transport market. Suffice it to say, they form bigger barriers to entry into the matatu business. Any regulatory regime must not lose sight to focus on these anti-competitive aspects. We are in the era of global free market to which satisfaction of consumer needs within affordable limits is the primacy of any economic policies. The matatu industry has grown with these unique and peculiar practices limiting the foundation for economic efficiency and consumer satisfaction.

### 2.3 Consumer Concerns

The major concerns of commuters served by the matatu revolve around unpredictable fare charges, surprise matatu strikes and boycotts, dangerous driving (over-speeding), harassments and bad language from the matatu crew (touts).

These are issues that have escaped the law enforcement agencies for a painfully long period of time. Firstly, the fare charges by matatu operators rise without notice and to the chagrin of commuters. Indeed on an ordinary day, fare depends on the time of the day, the demand of commuters at the stages, the weather conditions and at times whether the said matatu has just begun operating or whether it is the trip to town or to

the estate. Most commuters see this as the greatest inconvenience to the use of matatu service. In fact those who prefer KBS, base their preference on this fact. It is imperative that the city council authorities, the traffic police and TLB seek to regulate fare charges as a plight for the commuters. Indeed the TLB by its regulations prior to 1973 had generally fixed fare rates of 85 cents per kilometre per passenger. However, this would not be reflective of modern day economic realities for profitable matatu service operations. Unfortunately, today TLB is disinterested in the fare charges, despite lying within its mandate to set/fix prices.

Secondly, through and through the recent past, the matatu sector has experienced a spate of strikes and boycotts on city routes and nationwide. The calls hinge on reasons such as alleged harsh treatment of the drivers and crews, bad state of roads, high levies for parking and other demands political in nature that had little to do directly with the industry's operations. Whereas everyone has the right to express his interests within the legal confines of the law, the matatu strikes are really in most cases uncalled for, and where justified, they get into the excesses purposely to harm the commuters. The commuters are the guinea pigs or sacrificial lamb to the attainment of matatu operators selfish gains. This is largely due to the fact that it is a formidable transport mode. There is not in existence a suitable mechanism in place that would address the problems that the sector may face. Even though there is an unregistered matatu welfare association, it has no registered office. The officials are an impromptu selection who call for strikes whimsically. Above all the drive behind matatu operators is profit maximisation, no regard is paid to the best satisfaction of commuters.



Third, the nature of matatu operations has drivers of reckoning recklessness in their course of service delivery. Overspeeding is the norm to these competing drivers. Many overtake carelessly and drive on the wrong side. Indeed the rise in the number of accidents caused by matatus had the insurers propose to implement high insurance premiums. This led to an embroiled dispute between the Association of Kenya Insurers (AKI) and the unregistered Matatu Welfare Association. The matatus disregard the highway code, pick and drop passengers anywhere and anyhow. The drivers either avoid the traffic police in control or are ready to bribe then whenever caught on the wrong side of the law. Many of them do not hold valid driving licences. Experience is never a consideration when engaging one's services as a driver. Some matatus on our roads are distinctly unroadworthy, devoid of regular maintenance and in a state of disrepair. The drivers are never permanently employed, they are picked to run just one or two trips called "squad". Overloading is a major feature, where passengers are packed and packed to utter discomfort. Matatus obstruct road traffic and have no respect for other road users.

Finally as a consumer concern, there is a trend of unprofessionalism and bad conduct descriptive of the matatu crew. It is the crew dubbed "makanga" that harasses commuters by pushing and pulling them around, use bad and abusive language, pick passengers pockets, impregnate school age girls, teach school boys drug-habits and general indiscipline in cases of street violence, estate chaos and political disruptions. It is on these grounds that the Nairobi Provincial Office in conjunction with the City Council and Traffic Police Headquarters came up with the directive requiring the crew to have certificates of good conduct. In all terms the industry has been regarded with nostalgia, seen to be devoid of sanity. It

is therefore necessary that a regulatory regime seek to enforce order and customer service orientations in the matatu industry.

These highlighted consumer concerns are great contributors to the inefficiencies in the service market. The losses arising out of numerous accidents lower profit-margin. Recklessness increases maintenance and repair costs. The strikes and boycotts are a wastage of time as a resource and consumer services. The crew's conduct lacks public relations and courtesy for retaining consumers.

#### 2.4 Insurance Concerns

Out of the thirty-seven insurance companies in Kenya, only six have been covering matatus. United Insurance Company has been for a long time insuring matatus charging shs. 76,000 p.a. for an 18-seater van. The premium charges recently were a big storm in the cup when the Association of Kenya Insurers (AKI) proposed premium increments. The premiums in contention were introduced when new comers Lakestar and Invesco insurance companies entered the market with lower rates to attract customers. The increase by AKI to Kshs. 109,000 p.a. representing a forty-three per cent rise but this was reduced to 87,000 following deliberations with the Matatu Welfare Association (MWA) and the government. Over the years, AKI Chairman, Mr. Ashok Shah said the PSV insurers have been losing out. In 1995, insurers paid out claims totalling sh. 482 million against gross premiums of sh. 380 million. In 1996 they paid out sh. 284 million above the premiums they had received. In 1997, claims exceeded premiums by a whopping sh. 442 million and in 1998 the losses were at sh. 203 million.

It is on the loss claims that the insurance fraternity proposed premium inflations. This move saw reaction from the matatu operators in opposition. The operators called for strike protests, postponing the boycotts three times. The matatu welfare association argued that they too were meeting huge losses and costs of repair and maintenance due to bad roads, bribes to police officers, charges at the parks by the city council, increased fuel prices and it would be unfair for them to meet further insurance cover charges. Indeed they argued that they would operate at losses.

From the foregoing, it is true that losses characterise the matatu industry. However given the limited scope of willing insurers would mean restricting the choice of underwriting whereby just the six have oligopolistic premium charges. This would mean that the insurers could fix insurance cover charges to the detriment of matatus. This is coupled by the fact that the policy cover in issue is compulsory under the laws. No one can run PSV vehicles having not undertaken insurance cover. No licence will be issued under the Traffic Act. All these factors contribute to a great deal of allocative inefficiency in the resources utilisation pertaining the matatu service industry. Regulation should never lose sight of this fact if industry's growth and economic contribution is to be meaningful and appreciable. Planners and policy-makers should look into ways of enhancing efficiency to the rapidly growing industry.



## Chapter 3

### REGULATION

#### 3.0 Introduction

We have seen in Chapters 1 and 2 the nature of the matatu industry. In the discourse that now follows, we shall try to deal with the question of regulation. Is it desirable in the matatu industry? If so how best can regulation be effected? What are the limits to the regulatory regime?

What is regulation? Rather than define the term, it is convenient to look at regulation by defining the purpose for which regulation is put. In this light, regulation is usually employed as a corrective device to an existing economic structure so as to ensure maximum public benefit. Regulation is also pursued for attainment of policy goals, restoring order and enhancing efficiency, efficacy and effectiveness. In addition regulation serves as the system for checks and balances.

Regulation comes in various forms. In this study we shall do with two broad typologies of regulation. First there is classical regulation in which government regulation is assumed to be a perfect solution to any perceived problem within the unregulated market place. This kind of regulation usually takes the form of price controls and entry controls.<sup>11</sup>

The regulation is characterised by the central government, local government and similar other institutions setting up an agency to specifically monitor, license or delicense, register or deregister participants in a given segment of economic organisation. It is a policing device by which economic goals could be attained by the regulator. Such would entail enhancing competition in a

given market, price and standards setting, entry controls, licensing, uniformity of services, social service provision, and so on.

However, a good regulator considers the underlying characteristics of a given industry. This means that an indepth understanding of industry's market structure is vital; to the extent of appropriate knowledge in market performance.<sup>12</sup> Economists often than not oppose regulation on grounds of perceived restrictive entry in the industry that gives room for excessive profits by the regulated market players and leads to redistribution of income from consumers to producers with the end result that misallocation of the industry's needs or concerns.<sup>13</sup> On the other hand, arguments for regulation are based on public welfare concern, prevention of destructive competition and assumption of continued service by entry controls, rate regulation and collective rate-making rights. These in economic pursuits are due regards for sound competition and maintenance of a financially viable industry.<sup>14</sup>

In Kenya the regulation of the matatu industry has fallen largely on the state agency mandated under statute law. Although in the historical development of the matatu industry, the agency, namely the Transport Licensing Board, TLB, established under the Transport Licensing Act<sup>15</sup> has had over twenty five years of suspended mandate,<sup>16</sup> its retention of regulation in the sector is evidently forceful.

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<sup>11</sup> Breyer, S. "Regulation and its Reform", Harvard University Press, 1994.

<sup>12</sup> This is why competition regulation is favoured as against non-competition regulation. See *ibid.* chapter 1.

<sup>13</sup> Posner R.A. (1969) "Oligopoly and Anti trust Laws: A suggested approach" 21 *Stanford Law Review* (1562) 1569-1575.

<sup>14</sup> James R. Frew, "The existence of monopoly profits in the motor carrier industry". *University of W. Carolina, Rep. J. Law and Economics* Vol. 24 (1981).

<sup>15</sup> Chapter 404, *Laws of Kenya*.

<sup>16</sup> Legal notice no. 89 of June 1973 exempted matatus from operations under TLB regime. Legal notice no. 18 of February 1999 reinstated the TLB regulatory regime to the matatus. For a further

### 3.1 Regulatory Framework in the Matatu Industry: a Critique

Today the matatu industry is a subject of classical regulation under the Transport Licensing Board.<sup>17</sup> The board is established under section 3<sup>18</sup> as the licensing authority with full discretionary powers. The board under section 8(2)<sup>19</sup> may attach a number of conditions to a licence. These include:

- (a) That authorised vehicles shall or shall not be used in a specified area or over specified routes.
- (b) Classes or descriptions of goods that shall or shall not be carried.
- (c) Specify maximum or minimum charges to be made for carriage of goods.
- (d) Other conditions in the public interest or with a view to preventing uneconomic competition.
- (e) Specify the number and type of vehicles to be used.
- (f) That they shall be so used only in a specified district or between specified places.

These licence conditions to an economist lead to the conclusion that the transport service industry has entry controls put up by the regulatory regime under the Transport Licensing Act. There is not a free market into which anyone with any type of vehicle so long as designed to offer transport services can enter into the market. Whereas there is a general mention of licensing conditions not to constitute uneconomic competition, section 8(2)(d) is not clear on what would amount to this

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reading on classical regulation and its effect see Thomas G. Moore, "The Beneficiaries of Trucking Regulation" Vol. 21 *Journal of Law & Economics* (1978).

<sup>17</sup> For a further reading on classical regulation and its effect see Thomas G. Moore, "The Beneficiaries of Trucking Regulation" Vol. 21 *Journal of Law & Economics* (1978).

<sup>18</sup> *Supra* note 5.

<sup>19</sup> *Ibid.*



kind of competition. It is clear however that the concern of the regulation is the number of licensed vehicles at any given time. This study reveals that the formal policy of the Transport Licensing Act has not been fully endorsed. This is so because, the limitations perceived by the licence conditions do not seem to have had any price reduction in the transport services.

The regulation has not led to uniformity of service. For example the fares though are to be specified, the matatu industry has fares that fluctuate forever. There is not in place a mechanism to enforce nor ensure the maximum or minimum fares. The regulatory regime has failed to enforce minimum standards of conditions and appearance on vehicles. In addition little can be said of whether the Transport Licensing Act regulatory regime has endeavoured towards adequate profits for owners and operators to justify the imposition of entry controls. In a study conducted in Chicago (United States of America) on the Regulation of Taxi-cabs,<sup>20</sup> the regulatory regime under the Chicago-Taxis municipal code appeared to protect all licencees against entry of competitors by restricting the minimum eligible return on capital of at least 47% for any new entrant. As to the uniformity of service, each taxi-cab had to have a taxi-meter indicating the fare charged corresponding with the mileage at fixed rates per mile.

The Chicago taxi-cab regulation<sup>21</sup> entailed a comprehensive system with a number of objectives:-

1. to raise revenue through licence fees.
2. to put limits on the terms of the contract of carriage to prevent extraction of extortionate rates.

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<sup>20</sup> Edmund W. Kitch, Marc Isaacson and Daniel Kasper, "The Regulation of Taxi-cabs in Chicago", *Journal of Law and Economics* Vol. XIV(2) October 1971.

3. to organise the slow of cabs in traffic.
4. to impose minimum standards of condition and appearance of vehicles.
5. to ensure that drivers were likely to be responsible and law abiding.
6. to compel financial responsibility.

In regulation revenue would be a straight forward objective. Transport service providers conduct their business exclusively on the public streets. A user charge in form of annual licence fees imposed is a charge for the use of this public asset. The Transport Licensing Board raises revenue by charging for road licence services. RSL fees. These cost a matatu operator Kshs. 1250 per matatu per annum.<sup>22</sup> However, for a big fleet operator, the licence fees would translate into large costs. This would culminate into entry control. Licence fees are a pre requisite for operation and any operator who hesitates or tries to fool around may have severe consequences befall him to the risk of a total ban.

The second regulatory function is the central concern of fares. The regulation of fares appears to be typical utility rate regulation designed to substitute regulated for negotiated prices and limit the regulated firms to a reasonable profit. It is for this reason that the Transport Licensing Act provides under section 8(3)<sup>23</sup> that conditions be attached to a road service licence particularly for securing that

- (a) ... "the fares shall not be unreasonable"

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<sup>21</sup> Ibid. pg. 302.

<sup>22</sup> This figure was obtained from the Transport Licensing Board's office, Nyayo House, Nairobi in the interview of June 4, 2000. These licence charges are annual renewal requirements per matatu before operating in any given calendar year.

<sup>23</sup> Supra note 5.



- (b) ... "in the public interest that fares be fixed as to prevent wasteful competition with alternative forms of transport, if any, along the routes or part thereof.
- (c) Copies of time-table and fare-tables be carried by vehicles and available for inspection.

These have the effect of ensuring compliance as to the fare charges that the regulator deems suitable or reasonable. In our Kenyan case, the nearest the Transport Licensing Board has gone to the implementation of these provisions has been the 85 cents per kilometre fare stipulation.<sup>24</sup> Today this is found archaic in the current economic trends. It is not reasonable to have the stipulation still in force due to fuel, maintenance and insurance costs, *inter alia*. On the other hand, fixing of fare charges limits price competition, because then the market players may not lower their charges below that fixed by the regulatory agency where this would be desirable. But in the trend of matatu operations, it would nonetheless be desirable if prices were set by the board to cure the unpredictability in fares charged. This kind of regulation protects strangers who do not know the ordinary rate of fare and others compelled to use the service - those who because of the urgency of their needs, are unable to bargain effectively. However, the setting of fare rates should bear in mind the fact that if the maximum rate is properly set it can prevent a windfall transfer from customer or operator with no undesirable impact on the allocation of the service or its availability.

Indeed the regulation through fare setting is a development of the common law. The common law imposed upon the common carrier and

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<sup>24</sup> TLB regulations under the Transport Licensing Act, Cap. 404.

other public service undertakings the obligation to serve the public at a reasonable rate.<sup>25</sup>

The third consideration for regulation should entail the flow of traffic. Matatus are notorious for obstructing traffic, overspeeding, overtaking dangerously and in due disregard of traffic code. This contributes to a lot of inefficiency by the losses met in costs of maintenance, insurance premiums, bribing of traffic enforcement agencies. Whereas under the Transport Licensing Act, TLB is empowered to licence PSVs upon satisfaction to the use in specified areas and routes,<sup>26</sup> little has been done to the satisfaction of this objective. Indeed, many routes and areas of operation are assigned by the numerous and powerful cartels that dominate the matatu industry. The traffic police department has tried to enforce the highway code under the Traffic Act,<sup>27</sup> but this agency is dogged by rampant corruption. Interview with the matatu drivers revealed that they always buy their way out when caught on the wrong side of the traffic rules by dishing out between Kshs. 100-1000 depending on the likely severity of the offence committed.<sup>28</sup> A regulator's concern in the matatu services would be enhancement of safety standards. This is for the good of commuters who lose their lives to increasing incidences of road carnage. Secondly, traffic jam is a common characteristic of our roads and streets. This means that a lot of valuable time is lost in these snarl ups. Much of the traffic jam is a result of matatu boys trying to be smart who always spiral around the rest of motorists.

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<sup>25</sup> William W. Stony, "A treatise on the Law of Contracts" (1847). Robert Hutchinson, "A treatise on the Law of Carriers (1906), ed. 3.

<sup>26</sup> Supra note 5, section 8(2).

<sup>27</sup> Chapter 403, Laws of Kenya.

<sup>28</sup> Interview with matatu drivers on Limuru road (June 2000) and routes 46, 4, 8 (June 2000).

Fourth, the regulatory regime should have certain standards set in the operations of market players in a given service sector. The Transport Licensing Act provides under section 8(1) that a licence shall issue only to vehicles that are in (a) "fit and serviceable condition". Ironically, the conditions for licence reveal little or no regard to safety status of the vehicle, for instance, by requiring the vehicle's equipment with safety devices. The regulation has concern just for the appearance and condition. It is perhaps of interest to a city that its public vehicles, as its public places, should appear in good order and condition.<sup>29</sup> But it is difficult to place the concern at a very high level of priority.

The fifth limb for regulatory goals would entail driver standards. The approach of the Chicago regulation<sup>30</sup> entails, each driver of a public passenger vehicle required to have a public chauffeur licence from the city in addition to the regular state chauffeur's licence. Under the Chicago Municipal Code "the character and reputation of each applicant shall be investigated under the supervision of the captain of the police district in which the applicant resides, and report of such investigation containing any facts relevant to the character and reputation of the applicant shall be forwarded to the commissioner of police, who shall forward the same to the vehicle commissioner together with his recommendation. If the commissioner shall be satisfied that the applicant is of good character and reputation and is a suitable person to be entrusted with driving a public passenger vehicle, he shall issue the licence."<sup>31</sup>

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<sup>29</sup> Supra note 10, p. 312.

<sup>30</sup> Ibid. These being provisions under Chicago Municipal Code, see Chicago, Laws & Ordinances Ch. 69 2260 (1905).

<sup>31</sup> Chicago, Laws & Ordinances Ch. 69 & (2260) (1905).



This would deal with the problem of unscrupulous, indolent, rude and unprofessional drivers that make up the driving force of the matatu industry. In our local scenes, the Transport Licensing Board seem to have abrogated this role and occasional spot checks by the traffic police seem to be the way out in dealing with driver standards.

Finally, a major regulatory concern today centres on the extent of financial responsibility. A lot of accidents attend matatu operations. In addition, the city itself and its residents are prone to injury, damage and grief by the neglect or refusal by the matatu operators to observe and obey the Acts of Parliament in force and the regulations formulated. Many complaints arise about matatu operations. In 1934,<sup>32</sup> the Chicago City Council passed a resolution stating "whereas one of the most important provisions customarily contained in taxicab laws and ordinances is that of requiring taxicab operators to carry public liability insurance...Not only does this protect the public from loss due to accidents in which taxicabs may be involved, but it also tends to eliminate financially irresponsible taxicab operators, who are often unable, because of financial or other reasons, to secure the necessary insurance coverage...."

The Association of Kenya Insurers has proposed forty three percent insurance premium<sup>33</sup> rises for undertaking matatu cover. This insurance cover is compulsory under the Traffic Act. However, insurers complain of losses that swallow the contributed premiums as cover charges.<sup>34</sup> Therefore, if any meaningful scheme for financial liability is to be devised, as a regulatory goal, the existing controversy must be settled to

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<sup>32</sup> Reported in the Chicago City Council Journal, May 18, 1934. See supra note 10, p. 315.

<sup>33</sup> The Daily Nation, March 9, 2000 p. 8.

allow negotiated and consensus scheme of Insurance cover. This would be good to insurers as well as the matatu operators. A well-arranged insurance scheme would have in mind the good of the commuters who are vulnerable to the risks on our roads. Further, the objective of a well-designed insurance scheme would also encompass the benefit of the regulated as well as the general public benefit.<sup>35</sup>

### 3.2 Reforming the Matatu Sector

The matatu industry suffers from the deficiencies that have been highlighted above. As a reform objective thought must be given to the institutional regulatory arrangement, now in place. Secondly, reform should be towards dealings in the matatu services that are anti-competitive. Finally, the reform should bear in mind consumer satisfaction, as this is a formidable service industry.

3.2.1 Institutional Reform:- we have seen that the matatu industry falls in the domain of the ministry of Transport under the auspices of Transport Licensing Board.<sup>36</sup> The board has to overcome in its face tendencies which hinder efficiency in the service industry. As a regulatory agency, the board's regulation would result in a slower growth in the industry. Indeed, the period 1973-99 when matatus were exempted from TLB regulations witnessed a sporadic rapid growth.<sup>37</sup> A regulatory regime such as by a board suffers inefficiency because many programs designed operate effectively only for a few years<sup>38</sup> due to absence of accurate

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<sup>34</sup> Ibid.

<sup>35</sup> Posner, R.

<sup>36</sup> A board established under the Transport Licensing Act, Cap. 404, Laws of Kenya, Section 3.

<sup>37</sup> Kapila, S. Maundu, M. and Lamber, D. "The matatu mode of public transportation in metropolitan Nairobi", Mazingira Institute, 1982 p. 38.

<sup>38</sup> This is the argument against regulatory regime under a government agency, argues Breyer S. "Regulatin and its Reform".

studies to measure and value impact of regulatory programs. Breyer Stephen<sup>39</sup> argues that such a regulatory regime is characterised by unfair and unwieldy procedures often fraught with delay; the regulatory process is fundamentally undemocratic and lacks legitimacy in which regulators are appointed (not elected), whose enormous powers may not be controllable. Most of those appointed have political backgrounds and are not necessarily experts. The study revealed that the TLB's composition was of political appointees with the Chairman appointed by the President. He also happens to have been a former minister and member of Parliament.<sup>40</sup> Breyer suggests that a participatory approach to a regulating regiment is a better alternative. Discretion would be exercised more wisely if representatives of all affected groups participate in the regulatory process, files and documents then are open to the public, and meetings take place in public.

TLB should take charge over matatu operators having been reformed of its composition to include representatives from the matatu operators, insurers, the traffic police department, local authority representatives and the provincial administration as well as consumer welfare organisation. These will enhance capacity building essential to the articulation of various interests, towards increased productive and allocative efficiency. The decisions of the board will then be binding and widely accepted or waived.

3.2.2 Industry Reform:- many problems that have to do with the matatu operations

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<sup>39</sup> This was revealed when the writer met the Transport Licensing Board, June 2000, Nairobi.

<sup>40</sup> Chapter 504, Laws of Kenya.



are to be tackled. The restrictive trade practices must be eliminated. The cartels within the industry must be broken down and consumed of their existence. The monopolies and price commission regime under the Restrictive Trade Practices, Monopolies and Price control Act<sup>41</sup> must look into the problem of predatory practices in the matatu industry. The regulatory regime should be sensitive to entry controls and price control as understood in economic terms of their influence to an industry's growth. Competition regulation seek to create or maintain the conditions of a competitive market place rather than replicate the results of competition or correct the defects of competitive markets. This kind of regulation prohibits certain forms of private conduct and rather than not affirmatively order firms to behave in specified ways, mostly firms are told of what not to do.

TLB's pricing rules and restrictive entry policies lead directly to inefficiency by restricting the services that carriers can offer. For instance route assignment may be effected by road status. In addition the cartels that sell prices and fix routes inhibit price flexibility, prevent setting of rates that reflect competitive pressures. These should be a first priority as basis for regulatory reform.

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3.2.3 Consumer Concerns:- we have seen that commuters have not had the benefit of reduced fare charges. Many of them have suffered the inconveniences by the matatus modus operandi. Many have lost their lives. The strikes, boycotts and mass-action by matatus have painfully put the commuters in awkward situations when least suspecting. The driver standards have not been adequate to render to the consumer professional service. The matatu crew has been devoid of good conduct and courtesy. The vehicle standards have been appalling, in mind I have matatus plying Lunga Lunga road and industrial area - many matatus are damaged, dilapidated and unclean and commuters are forever squeezed in by the unrelenting crew. The third party insurance policy should be developed towards a no-fault's scheme such as in Canada. This is dispose of the burden of heavy insurance costs that are passed on to the commuters in high fare charges. The many insurance agencies and brokers that purport to undertake PSV matatus should be vetted of their suitability, probably by setting a ceiling of their networth to a fixed amount.

All in all competition regulation should supercede other forms of regulation owing to the nature of the matatu and general transport services business.

CONCLUSION

The notion that government regulation of a market or industry always serves the public interest has been questioned recently. Those opposed propose that regulation is undertaken in response to demand by special interest groups and that it will serve the interests of the most powerful of these groups. An industry may specifically seek regulation for its own benefit. This study has been a voyage towards the appreciation of the existing regulatory framework in the matatu industry and a grapple with the peculiarities in the industry's general nature since its inception.

We have also attempted to bring to the fore the inadequacies of the matatu industry by setting up the premises for a critique. Finally and importantly, the study has given the basis for a reform in the sector, suggesting pertinent issues for improvement. The latter is indeed a desirable objective that every economic and regulatory conscious mind including policy-makers must never lose sight thereof.

We have established that the matatu industry needs reform. The reason for this necessity being the unchecked growth and development in



the sector that witnessed exponential expansion when the sector enjoyed a gracious absenteeism from the Transport Licence Board regime (1973-99). We have also established that consumer (commuter) demands and satisfaction have not been aptly met. This has been the basis for advocating an improved regulation towards the ends of consumer needs in view of the explosive population increase. Further, we have discussed the need for improved regulation being the interface of the matatu transport service and other transport service providers, and above all the practices that hinder efficient and effective competition inherent underlying the matatu industry itself, namely the cartels and related restrictive trade practices - all these as necessitating regulation. As the industry's major concern we have shed some light on the several links between the insurance sector and the matatu insurance arrangements especially on the contentious proposed cover increment regarding the mandatory policy. Consideration has also been paid on the general conduct of the matatu business defined by recklessness and accident-rich, dangerous operations to the extent of rogue matt crews. This is for the general good and sane conduct of business in present economic fashion. Finally, the central role played by the matt sector in view with the general transport sector in our economic development cannot be overlooked. We generally have gone into this study with the recognition of the industry's conceived and perceived contribution to the overall economic growth and

national GDP. In our present economic turmoil's the little we have (spectrally), we must build our hopes on it and seek better ways of improving upon it. The matt industry should be thus embraced. To end, we should all agree that more research in this subject, namely matt industry and other domestic industries should be a good cause for researchers, scholars and everyone. This study therefore like all studies precedent to it should form the inspirational block upon which more blocks will be laid to build a monument of study works. We encourage more interest in this area and hope for an eventual glorified matt sector and the general transport sector regime. Of course not forgetting the overall multi-sectoral improvement.