



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.269 OF 2016

**IN THE MATTER OF ARTICLES 1,2,3,4(2),10,19,20,21,22,23,24,25,28,29(A),29(C),37,39,40,73,165 AND 260 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 27, 28,29,37,39 AND 40 OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

NGUNJIRI WAMBUGU.....PETITIONER

- AND -

THE INSPECTOR GENERAL OF POLICE.....1^S RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR AND NATIONAL

COORDINATION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner through a petition dated 28th June 2016 prays for:-

- a. A declaration that the fundamental right under Article 37 of the Constitution of Kenya to assemble, to demonstrate, to picket and to present petitions to public authorities is conditional on the protestors or demonstrators conducting themselves peaceably and unarmed and that police officers working under the 1st Respondent are duty bound to immediately stop protestors if they are armed with any form of weapons including stones.

b. A declaration that the petitioner and non-demonstrators/third parties enjoy equal rights and freedoms during demonstrations since their rights and fundamental freedoms are not suspended during such times.

c. An order directing the Respondents to formulate and/or amend the requisite law and regulations to ensure that demonstrations are peaceful and held as per the Constitution including inter alia prescriptions for demarcation of demonstration zones, responsibilities for clean-up costs, maximum numbers, consents of persons/entities adjacent to demonstration zones with appropriate penalties when they go outside the expectations of the law.

d. A order directing the Respondents to formulate a conduct for conveners of demonstrations that includes detailed explanations of how they intend to ensure non-demonstrators are not adversely affected by such demonstrations and that provide a clear line of responsibility of who is liable in case of loss to life or property, or for injury, when a member of the public is aggrieved due to such demonstration.

e. Or such other order(s) as this Honourable Court shall deem just.

2. The petition is founded upon the following grounds:-

i. That in the recent past and specifically during the **IEBC** protests during the month of April 2016, the country has experienced loss of destruction of property, injuries and loss of things during protests and demonstrations.

ii. That the protests and demonstrations occasioned numerous losses to business owners where the demonstrations engaged in unlawful activities including lootings and massive destructions of property.

iii. The contention by the petitioner is, that under Article 27(1) of the constitution every person is equal before the law and has the right to equal protection and equal benefit of the law and his right has been interfered with by the said demonstrations.

iv. It is further petitioner's contention, that the actions of demonstrations violate Article 37 of the constitution in so far as the same requires the people who are picketing to be peaceful and unarmed.

v. The petitioner further claims, that if demonstrations are not regulated, Kenyan stand to suffer irreparable harm wherein people decide to demonstrate.

vi. It is against the above mentioned backdrop, that the petitioner seeks to have regulations formulated to guide citizens in exercising the right to picket, assemble and demonstrate.

Respondent's Response

3. The Respondents were served with petition on 30th June 2016. Upon perusal of the court record, it is clear that the Respondents did not file any Replying affidavit or grounds of opposition to the petition but only opted to file Respondents' submissions dated 11th December 2018.

Analysis and Determination

4. I have very carefully considered the petition, counsel rival submissions, and the issues that arise for consideration can be summed up as follows:-

a. Whether the petitioner has established a case for denial of, infringement, violation or threat of the rights or fundamental freedom under the Bill of rights in particular under Articles 28, 29, 39 and 40 of the Constitution"

b. Whether the infringement or threatened violation, of the right are related to the failure to regulate the exercise of freedom of assembly, demonstration, picketing and petition"

c. Whether the petitioner is justified in seeking limitations to the exercise of freedom of assembly, demonstration, picketing and petition and whether proposed limitations fulfil the criteria set out in the constitution on the limitation of rights"

d. Whether there is need for the Formulation of Regulations that will act as a Limitation of the Right to freedom of assembly, demonstration and picketing under Article 37 of the constitution"

e. Whether the court has the power to grant the orders sought"

A. Whether the petitioner has established a case for denial of, infringement, violation or threat of the rights or fundamental freedom under the Bill of rights in particular under Articles 28, 29, 39 and 40 of the Constitution"

5. Article 22 of the constitution of Kenya 2010 is clear that every person has the right to institute court proceedings, claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 258(1) of the constitution is laid out in similar terms. From the contents of the said Articles, it is clear, that the petitioner has exercised his constitutional rights on his own behalf and also in acting in public interest. The rights and freedom in issue in this petition are the right to human dignity, freedom and security of person, freedom of movement and residence, right to own and acquire property, the relevant articles are Articles 28, 29, 39 and 40 of the Constitution of Kenya respectively.

6. A quick perusal of paragraphs 6,7,8 and 10 of the affidavit by Ngunjiri Wambugu, the petitioner, sworn on 28th June 2016, in support of the petition herein dated on the even date gives a detailed narration of the nature of violation of the rights and freedoms that took place during the public demonstration, organized by the coalition for Reforms and Democracy (**CORD**) to force the ouster of commissioners of the Independent Electoral and Boundaries Commission (**IEBC**), which demonstrations were carried out weekly from 25th April 2016 for a period of four (4) weeks. The petitioner has to his affidavit annexed various media reports, copies of Newspapers print outs and photographs of destroyed properties; the information of which was all in the public domain and widely reported in the local dailies, and news on all broadcasters. The Respondent has not filed any Replying affidavit to controvert the petitioner's averment; nor any grounds of opposition. This court would therefore take judicial notice of the same as sufficient to prove, that there were indeed violations of the rights averred in the petitioner's affidavit. Judicial Notice is defined in Black's Law Dictionary Tenth Edition on page 975 as follows:-

"Judicial notice: A court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact; the court's power to accept such a fact the trial court took judicial notice of the fact water freezes at 32 degree."

It is further defined by Oxford Dictionary of Law (*ed. Jonathan Law and Elizabeth A. Martin*) 7th Ed. (*Oxford University Press*) at page 306 as:-

"The means by which the court may take as had proven certain facts without hearing evidence. Notorious facts may be judiciary noticed without inquiry."

It would be noted under **section 60 of the Evidence Act (Cap 80) Laws of Kenya** it provides thus:-

"The courts shall take judicial notice of the following facts:-

a. All matters of general or local notoriety (things that everyone knows)."

7. I am alive to the fact, that one need not wait for a violation of freedoms of right to be breached to pursue an action under a constitutional petition, for threatening is sufficient for one to pursue an action in a constitutional petition. The petitioner in his supportive affidavit under paragraph 18 in support of the petition, the petitioner has expressed an apprehension, that based on the fact that **CORD** demonstrators set a precedent, that in further exercise of the freedom of assembly, there will still be no regard for the rights of non-demonstrators and, that their rights to equal protection of the law will be violated.

8. In **Centre for Rights Education & Awareness (CREAW) v Attorney General & Another [2015] eKLR**, the court reiterated

the position, that a party does not need to wait for a violation to occur in order to seek reprieve from the court and stated at paragraph 68:

I fully agree with the sentiments of the Bench in the CORD case. A party need not wait for a violation of a right or a contravention of the Constitution to occur before approaching the Court for relief. It appears to me that the intent behind the use of the word "threatened" in both Articles 22 and 258 was to preempt the violation of rights, or of the Constitution. If a clear threat to either is made out, it cannot be properly argued that the petitioner should have waited for the violation or contravention to occur, and then seek relief. It is therefore my finding, and I so hold, that this petition is not premature, and is properly before me."

9. In view of the above and taking judicial notice of how demonstrations are organized and conducted in this country, I am of the view, that the apprehension of the petitioner for future violations of this rights is reasonably justified as violations are likely to be caused by rival group sought and organized without prior notice and participate in counter demonstration as is averred in paragraph 16 of the petitioner's affidavit. I find the petitioner in seeking various reliefs in the petition is justified to do so. I find that the petitioner has proved the actual violations of the freedoms and rights in question and has proceed further and demonstrated, that there is a reasonable possibility, that future violations are likely to occur for which the petitioner is not out of order to seek reprieve as per the petition.

B. Whether the infringement or threatened violation, of the right are related to the failure to regulate the exercise of freedom of assembly, demonstration, picketing and petition"

10. It is petitioner's contention, that **CORD** demonstrations were held pursuant to the exercise of freedom of Assembly, demonstration, picketing and petition under **Article 37 of the Constitution** which provides:-

"Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities."

The right is recognized under several international instruments which form part of Kenyan Laws by virtue of **Article 2 (5) and (6) of the Constitution** which provides:-

"(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

Article 20(1) of the Universal Declaration of Human Rights (UDHR) on its part provide:-

"Everyone has the right to freedom of peaceful assembly and association."

Article 11 of the African Charter on Human Rights (Banjul charter) provides that:-

"Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others."

Article 21 of the International Convention on Civil and Political Rights (ICCPR) provides that:

"The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (or republic), the protection of public health or morals or the protection of the rights and freedoms of others."

11. In terms of statutes in Kenya, the right is regulated by the Public Order Act (*Cap 56 of the Laws of Kenya*). Section 5 of the aforesaid Act requires, that public meeting must only be held in accordance with the Act. The section elaborates the due notice in prescribed form must be given to a "regulating officer" by the organizer, who is defined under **Section 2** as a police officer in charge of a police station in an area where a public meeting is proposed to be held. The organizer is on the other hand required at all times to be present and assist the police on maintenance of law and order. **Section 6 of the Act** clearly provides that no one in the public process should have an offensive weapon except a duly authorized police officer. I note, that whereas this right is unalienable and that it is part of integral part of democracy and, that it is not granted by the state per se as enunciated in **Article 19 of the Constitution**. However the same has in a number of occasions been used to justify interference with the exercise of other people's rights. **Article 19 of the constitution** provides:-

"(1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

(2) The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

(3) The rights and fundamental freedoms in the Bill of Rights—

(a) Belong to each individual and are not granted by the State;

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) Are subject only to the limitations contemplated in this Constitution."

12. I have considered paragraphs 7,9,10 and 13 of the petitioner's affidavit in support of the petition, where the petitioner in detail explains how the exercise of the freedom of assembly in the **CORD** demonstrations took a different turn, with demonstrators being armed with crude weapons contrary to the provisions of Section 6 of the Public Order Act. In the entire period of the demonstrations, ordinary businesses were interrupted and most premises closed, businesses looted, roads blocked to curtail movement, people harassed by the demonstrators, public service vehicles burnt, public and private property destroyed.

13. From the contents of the affidavit of the petitioner herein above, he has demonstrated that the 1st Respondent failed to enforce the Public Order Act. It is telling that in the said demonstrations there were no arrests made and charges preferred on the demonstrators, that perpetrated the said acts of violence, destruction or carrying of offensive weapons.

14. The 2nd Respondent is empowered by **section 22 of the public order Act** to make Regulations. The section provides:-

"The Minister may make regulations prescribing anything which may be prescribed under this Act, and generally to give effect to the provisions of this Act".

The 2nd Respondent notwithstanding the empowerment to make regulations regarding demonstration, picketing, petition failed to develop any meaningful regulations to give full effect to the provisions of the **public order Act**, which would otherwise protect or prevent violation of non-demonstrators' rights and also hold the organizers accountable or make them more responsible for any destruction of property or violence.

15. It is trite law, that rights can only be enjoyed to the extent that they do not interfere with other people's rights as the constitutional rights and freedom of the individual are subject to limitations and are not absolute as they are designed to ensure, that they do not prejudice the rights and freedom of others or public interest as all parties' rights should be treated equally and given equally.

16. Having considered the above, I find, that the petitioner has demonstrated, that there should be an element of deterrence, that would guide demonstration, and guide demonstrations to maintain peace, law and order as in absence of further regulation on the

exercise of the freedom, demonstration would most likely not maintain peace, law and order. The petitioner has in his petition demonstrated a direct linkage between the violations of right under Article 27, 28, 29, 39 and 40 and the exercise of freedom of assembly under Article 37 of the Constitution of Kenya 2010.

C. Whether the petitioner is justified in seeking limitations to the exercise of freedom of assembly, demonstration, picketing and petition and whether proposed limitations fulfil the criteria set out in the constitution on the limitation of rights"

17. In the present petition the petitioner is seeking a declaration that will have an impact on the exercise of Article 37 of the Constitution of Kenya on the freedom of Assembly and operate like a limitation. Limitation may exist externally and internally. An internal limitation is embodied in the constitutional definition of the right. Under Article 37 of the Constitution the definition of the freedom of assembly includes such a limitation by specifically, specifying that the same must be done peacefully and unarmed. On the other hand, external limits are anchored in legislation aimed at public policy, national security, public order and protection of others. To this regard the existence of the **public order Act** and **penal code** with provisions related to unlawful assembly there exists external limitations. The petitioner contends, that this is a unique case because there are no existing limitations, that has been passed into law requiring an inquisition on whether they are justifiable or not, urging further that courts have held that the law must exist first before the question of justification and reasonableness is inquired into. In the **Seventh Day Adventist (East Africa Limited) v Minister for Education & 3 others [2017] eKLR** the court held:-

"We have determined the question and found that there was no law, as contemplated in Article 24 permitting any form of limitation, and that denial or restriction of the rights and fundamental freedoms of SDA students to observe the Sabbath as decreed in the Holy Book amounted to an infringement of their freedoms . We repeat that the law must exist first before the question of justification or reasonableness can be enquired into."

18. Under **Article 20(2) of the Constitution** provides, that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. This means generally limitations are the exception as the constitution concerns a situation where there is enjoyment of the rights and freedoms to the greater extent, though the constitution in certain circumstances contemplates, that indeed there may be some limitations. Under **Article 19(3) (c) of the constitution** it provides, that the right and fundamental freedoms in the bill of rights are subject only to the limitations contemplated in this constitution. This article in my view brings about the idea, that some of the rights under the constitution may be limited even though inherent to all.

19. Article 25 of the Constitution of Kenya 2010 provides:-

"Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

- (a) Freedom from torture and cruel, inhuman or degrading treatment or punishment;**
- (b) Freedom from slavery or servitude;**
- (c) The right to a fair trial; and**
- (d) The right to an order of habeas corpus."**

20. The petitioner contend that by virtue of **Article 25 of the constitution**, the freedom of assembly is one of the rights, that can be limited to the constitution since it does not fall under the list of rights under the Article 25 of the constitution and in any way has already been limited both internally and in definition and externally in the penal code and public order Act. I find the petitioner is stretching his arguments too far. I do not agree the freedom of assembly is one of the rights, that can be limited merely by looking at Article 25 of the constitution alone. Article 19 of the constitution is clear that the Bill of Rights is an integral part of Kenya's democratic state and is the framework of social, economic and cultural policies, and that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individual and communities and to promote social justice and the realization of the potential of all human beings. It is further clear, that the Rights and Fundamental freedoms in the Bill of Rights, belong to each individual and are not granted by the state, and do not exclude other rights and fundamental freedoms, not in the Bill of Rights, but recognized or conferred by law, except to the extent, that they are inconsistent with this chapter and are

subject only to limitations contemplated in this constitution. Under Article 20 of the constitution every person is guaranteed to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. I am further persuaded that in interpreting the Bill of Rights, a court, tribunal or other authority shall promote; the value, that underlie in an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights. Further under **Article 24(1)(a) – (e) of the constitution** it is provided:-

"(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) The nature of the right or fundamental freedom;

(b) The importance of the purpose of the limitation;

(c) The nature and extent of the limitation;

(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

21. In view of the above, I find that Article 37 of the constitution which provides that every person has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and the present petitions to public authority to have an internal limitation. I find the only limitation, that can be permitted must be in conformity with the law and only to the extent, that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and which are necessary in a democratic society. In the interest of national security, the safety, health, ethics and rights and freedom of others, if Article 24 of the Constitution is read together with **Article 21 ICCPR and Article 10 Benjull Charter**.

22. The terms national security, public safety and any other justification which seem to be attractive and usable to limit a right have been defined in international law and the extent to which the same can be used to justify limitations. This is specifically during the time under the Siracusa principles on the Limitation and Derogation provision, in the International on Civil and Political Rights (**ICCPR**) also known as the Siracusa principles. It therefore follows that any attempt to deal with any limitation on the freedom of assembly which is part of **ICCPR** ought to be guided by the Siracusa principles.

23. In the instant petition, the petitioner seeks to have regulations passed to govern public order. According to the Siracusa principles that has found expression in Article 24 of the Constitution of Kenya 2010 the limitations must conform to a certain criteria, which include the following:-

1. No limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself

2. The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.

3. All limitation clauses shall be interpreted strictly and in favor of the rights at issue.

4. All limitations shall be interpreted in the light and context of the particular right concerned

5. All limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant.

6. No limitation referred to in the Covenant shall be applied for any purpose other than that for which it has been prescribed.

7. No limitation shall be applied in an arbitrary manner.

8. Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application.

9. No limitation on a right recognized by the Covenant shall discriminate contrary to Article 2, paragraph 1.

10. Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:

(a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant;

a. Responds to a pressing public or social need,

b. Pursues a legitimate aim, and;

c. Is proportionate to that aim.

Any assessment as to the necessity of a limitation shall be made on objective consideration.

11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.

12. The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state.

13. The requirement expressed in Article 12 of the Covenant, that any restrictions be consistent with other rights recognized in the Covenant, is implicit in limitations to the other rights recognized in the Covenant.

14. The limitation clauses of the Covenant shall not be interpreted to restrict the exercise of any human rights protected to a greater extent by other international obligations binding upon the state.

24. The principles define public order as follows:-

22. The expression "public order (order public)" as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (order public).

23. Public order (order public) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.

24. State organs or agents responsible for the maintenance of public order (order public) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.

25. From the above principles, it appears to me, that the petitioner seeks orders for legislative intervention, that is compliant with the criteria for limitation. The petitioner had carried out research and has looked at what other countries have passed in terms of regulating the exercise of the freedom of assembly and developed a draft in line with what he believes unjust to be a code conduct to achieve a balance of rights of demonstrators and non-demonstrators or other members of public. Upon consideration of Article 24 of the constitution, it is clear it introduces what is referred to as a proportionality test. This calls upon a court in determining whether a limitation is justified to strike a balance between an individual right and the community interest. This test has been

adopted in court fully. In the case of **Seventh Day Adventist (East Africa Limited) (supra)** the courts held:

"Even after establishing the existence of a law limiting any specific right and accepting that it is justified the means chosen to achieve the objective must pass a proportionality test by

- a. **The nature of the right or fundamental freedom;**
- b. **The importance of the purpose of the limitation;**
- c. **The nature and extent of the limitations;**
- d. **The need to ensure that the enjoyment any individual does not prejudice the rights and fundamental freedoms of others and ;**
- e. **The relation between the limitation and restrictive means to achieve the purpose.**

26. In the case of **Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR** the court had this to say about proportionality ;

"A common way of determining whether a law that limits rights is justified is by asking whether the law is proportionate. Although it is commonly used by courts to test the validity of laws that limit constitutional rights, proportionality tests can also be a valuable tool for law makers and others to test the justification of laws that limit important (even if not constitutional) rights and principles. Former President of the Supreme Court of Israel, Aharon Barak, said proportionality can be defined as 'the set of rules determining the necessary and sufficient conditions for a limitation on a constitutionally protected right by a law to be constitutionally protected.'"

27. The court further adopted the finding of a Canadian case **R v Oakes [1986] 1 SCR 103 [69]–[70]**. The court stated;

"Dickson CJ said that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.

a. The first criterion concerned the importance of the objective of the law. First, the objective, which the measures responsible for a limit on a constitutional right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

b. Secondly, the means chosen for the law must be 'reasonable and demonstrably justified', which involves 'a form of proportionality test' with three components: First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'"

28. From the findings on **Republic vs Oaks** the following question must be answered in determining whether a limitation is justified:-

- a. **What is the purpose of the limitation"**

b. How important is it"

c. What is the relationship between the limitation and its purpose"

d. Are there less restrictive means to achieve the purposes intended"

29. Upon considering the above questions and considering the purpose of limitation, its importance, the relationship between the limitation and its purposes, I am of the view that the proposed limitations are justified because they are keen on ensuring that the right of other persons especially under Article 27, 28, 39 and 40 are not breached or violated or infringed on during the exercise of freedom of Assembly under Article 37. This if implemented would help the state in achieving objectives of Article 20 and 21 of the constitution in ensuring that the rights are observed, respected, protected, promoted and fulfilled. I further find, that limitations are important to prevent the infringement or breach of rights of other persons as breach was witnessed in the **CORD** demonstrations. I am alive to the fact that granting the orders sought herein will prevent loss of lives, destruction of property, general public disorder and all other negative effects, given that freedom of assembly and equality introduce a form of accountability in the event that the negative effects occur.

30. Thirdly, the limitation is meant to deal with the challenges of administratively policing demonstrations and not to deny the right to assembly as provided under Article 37. For example under the public order Act, an organizer is expected to notify the police whenever such demonstration is required. The regulation could specify the full organizer's details which must be captured to ensure that in the event of loss of lives and destruction of property then they are liable, as currently the notifications do not take into account the full details of the organizers. Section 13 of the public order Act, contemplates solutions in which persons affected by a declaration by ministry by notice in the Gazette, and in such other manner, that an area of Kenya is in a disturbed or dangerous state, may be compensated for losses of lives or damage to property. It states thus;

"In any area, in regard to which any declaration issued under section 106 of the National Police Service Act is in force, death or grievous harm, or loss of or damage to property has been caused by, or has ensued from, the misconduct of the inhabitants of such area, or of any class or section of such inhabitants, any person who claims to have suffered loss, damage or injury by reason of such misconduct may, within one month from the date of such loss, damage or injury, make an application for compensation to a magistrate appointed under subsection (5) of the said section 47 or, where no magistrate has been so appointed, to a magistrate having jurisdiction within the district in which the declared area is situated."

31. From the above section it is clear that such a section is limited in scope on matters of compensation under a riot or demonstrations because in construction it is only applicable where the minister has made a declaration under section 106 of the National Police Service Act. In my view section 106 of the National Police Service Act, needs to be expanded to cover all demonstrations especially where there is loss of lives and property. Upon this being done it will go along with way to compensate for loss of lives and property would be a form of realization of right to own property. This would also result in restraint to exercise of freedom of assembly without affecting the right to peaceful, unarmed assembly and its expression. Prior restraints would be more restrictive hence there should be no form of action that would see the state unnecessarily preventing a person from exercising his rights as enshrined in the constitution under Article 37 of the Constitution of Kenya 2010. The proposal made in my view are not ill intended but seek to serve a greater good to protect the public interest to wit the enjoyment of rights under Article 27,28,39 and 40, which I find satisfies the proportionality test under the Constitution of Kenya 2010.

D. Whether there is need for the Formulation of Regulations that will act as a Limitation of the Right to freedom of assembly, demonstration and picketing under Article 37 of the constitution"

32. The right to assemble and demonstrate is a constitutional right that is recognized nationally and under international and Regional human rights law, that belongs to each individual. The government is under **Article 21(1) of the constitution** obligated to respect, promote and fully protect the rights of the individuals to assemble peacefully and associate among other rights. It is of great significance to acknowledge, that protests play an important part in the civil, political, economic, social and cultural life of all societies. Historically it is appreciated that protests have often inspired positive social change and the advancement of human rights, and they continue to help define and protect our space in all parts of the world and I believe that will continue in this life and life to come. Protests in my view encourage development of an engaged and informed citizenry. They strengthen and bond representative democracy by enabling direct participation in public affairs. Enable individuals and groups to express dissent and grievances, share views and opinions; expose flaws in governance and publically demand, that the authorities and other powerful entities rectify

problems and are accountable for their actions.

33. Article 37 of the Constitution of Kenya states that "Every person has the right, peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities". The right however under Article 37 of the constitution is not absolute, which means, that it is subject to limitations in the sense, that its enjoyment may be curtailed in certain circumstances.

34. In the case of **National Citizens Forum Initiative & 3 Others vs the Governor of the County of Nairobi & 4 others (2013) eKLR** it was held that;

"These rights are not absolute (the right to assemble protected by Article 37) and are subject to reasonable regulation that is consistent with the provisions of Article 24 of the Constitution.....thus, in the circumstances of this case, it would be reasonable for the County Government, to provide for the regulations of traffic, meetings along thoroughfares and open public spaces apart from those public places specifically designed for open and public meetings. It is true that the Petitioners have a right to assemble but this right must be exercised in such a manner as not to interfere with other citizens' rights."

35. There are however relatively few rights which can be enjoyed in absolute terms as per **Article 25 of the constitution** as most of the rights are subject to limitations, that are necessary and reasonable in a democratic society for the realization of certain common goods which include social justice; public order and effective government or protection of the rights of others. I have to point out, that it is of paramount importance in exercise of the right to demonstration, picketing, assemble not to interfere with the rights of other citizen's right to property, right to human dignity, freedom of movement as duly protected under the constitution. In this country it is no longer a secret that demonstration, picketing, assemble have escalated from peaceful and unarmed gathering to a violent unruly and unlawful gathering which end up clouding the real agenda for demonstration and in which every member of the gathering takes law into their own hands. That lives are usually lost and property damaged or looted. I find this to be a justified case to have regulations in force to limit the right to picket, demonstrate and present petitions to public authorities. I find that indeed it would be antithesis of constitutional values and principles if picketing and demonstrators are allowed to participate in non-peaceful demonstrations or picketing, whilst armed to the teeth with implements set to agitate and stimulate anguish against non-demonstrators or against anyone they come across as well as destroying properties at will. It is therefore no surprise when the constitution itself limits the right to assemble, to demonstrate, to picket and present petition.

36. I find undoubtedly, freedom of assembly is an important component for the existence of a democratic society. In the case of **South African Transport and Allied Workers Union and another vs Garvas and others [2012] ZACC 13**, the Court correctly summarized the significance of the right to freedom of assembly in the following words:-

"The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms."

37. I am in complete agreement with the general principles of the law as stated herein above, however much as the protection of freedom of assembly must be strongly supported and advocated for, I find some situations may demand its curtailment. It is common knowledge for example that our beautiful country has severally been affected by various acts of violence and other aggressive behaviors especially during the exercise of rights to demonstrate or picket. Such acts no doubt has many a times, in great way, compromised the rights of others such as demonstrators in the demonstrations or picketing. It should be emphasized that the scope of the right to assemble in some respects dependent on the enjoyment of others rights and though such a rights must be respected and preserved, it must be exercised in due regard to others rights.

38. The constitution itself has provided claw-backs. The demonstrators, picketers and petition-presenters are obligated to enjoy their right "*peacefully and unarmed*". The constitution has spoken loudly and clearly, that Assemblies, picketing and demonstrations which are not peaceful and demonstrators who are armed are excluded from the protection of the Article. If they consist of violence to or intimidation of the public then the assembly or demonstration ought to be stopped. Likewise the participants in assemblies, picketers and demonstrators must not be armed. Weapon as well as defensive or protective contraptions, which breed or stimulate aggression, ought not to be in possession of the demonstrators or picketers.

39. The constitution is very clear and the supporting of the constitutional claw-back is to ensure that the rights of others within the vicinity of the place of assembly or of the demonstration or picketers are not disturbed or interfered with. In the South African case of **Four ways Mall (Pty) vs South African Commercial Catering [1999] 3 SA 752**, it was held that the Constitution as well as statute law does not protect picketers who proceed in a manner that interferes with the rights of the public or assault others. The court, in interpreting Section 17 of the South Africa's Constitution which is *pari materia* with our Constitution at Article 37, was clear that the Constitution does not encourage a volatile environment in a protest march.

40. I therefore find that even though limitations are necessary they must meet the threshold outlined in Article 24 of the Constitution of Kenya. The purpose of Article 24 on the constitution is therefore to enable rights to be prudently limited to the extent necessary to protect the public good and the rights of others without undermining essential human rights or other civil liberties that provide the foundation of a free society. The rights under Article 37 of the constitution can on assembly can be protected by ensuring it does not limit or infringe or other individual rights through legislation as provided for in Article 24 of the constitution. Article 24(3) of the constitution state, the state or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirement of this Article have been satisfied.

41. A common way of determining whether a law or a decision that limits right is justified is by asking whether the law of proportionate is satisfied and if that is satisfied then a limitation of a constitutional right will be constitutionally permissible. A classic discussion of principle of proportionality may be found in 1986 **Canadian Supreme Court case of R vs Oakes. (supra)**. This case concerned a statute, the Narcotic Control Act, which placed a legal burden of proof on the defendant, and so undermined the person's right, under the Canadian Charter of Rights and Freedoms, to be presumed innocent until proven guilty. Section 1 of the Canadian Charter guarantees the rights and freedoms in the Charter 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Dickon CJ said that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.

42. In employing the language of proportionality the court should ask whether the end could be pursued by less drastic means, and the courts have been particularly sensitive to laws that impose adverse consequences unrelated to their object; such as the infringement of basic common law rights. In determining what is reasonably justifiable in a democratic society. In the **Zimbabwean case of Nyambirai vs National Social Security Authority & Another, 1996 (1) SA 636: [44]** Gubbay CJ elaborated the test as follows:-

"In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:-

i. The legislative objective is sufficiently important to justify limiting a fundamental right;

ii. The measures designed to meet the legislative object are rationally connected to it; and

iii. The means used to impair the right or freedoms are no more than is necessary to accomplish the objective."

43. There has been an argument that the public order Act is the law that limits the right under Article 37 of the constitution. The public order Act, in my view does not limit non attempt to limit the demonstration or picket or assembly. It is purpose is to seek to preserve and protect the right to public assembly; public protest marches or procession by regulating the same with a view to ensure maintenance of law and order. Part III of the public order Act seeks to regulate public meetings and procession by providing for the need to notify the police service and also the power of police service to or prevent a public meeting where appropriate and where it is obvious it will not meet the constitutional objections. Still under the same part III, the public order Act also prohibits the possession of "*offensive weapon*" at public meeting, and procession. In view of the above it follows, that there is currently no law that limits the right under Article 37 of the constitution. It should be noted, that other jurisdictions have formulated regulations on demonstration. For instance South Africa enacted the Regulation of Gathering Act No. 205 of 2003, enacted pursuant to section 117 of South Africa's 1996 constitution on the right to peaceful and unarmed to assemble, demonstrate, picket and present petition. The Act provided that citizens had a right to take part in demonstration and protest marches but provides for an elaborate procedure requiring negotiations between the authorities and the organizers of protests to ensure the protest caused less disruption to the other members of the public.

44. In the case of **The South African Transport and Allied Workers Union vs Garvers and Others** dealt, amongst others, with

the question of whether a Union under whose auspices a gathering or demonstration was held and then degenerated into a riot causing damage to others could be held liable in terms of the Gatherings Act. The match in the Cape Town City Bowl arose out of a protected strike in the security sector by members of the Union. As the march proceeded, in the Union's own words, it "*descended into chaos*", with admitted extensive damage caused to vehicles and shops along the route. The respondents went to court claiming damages of violation of section 11 of the Public Gathering Act.

45. The said Section 11(1) Public Gathering Act states, "if any riot, damage occurs as a result of a gathering, every organization on behalf of or under the auspices of which the gathering was held, or, if not so held, the convener; shall subject to subsection (2), be jointly and severally liable for that riot damage which occurred.

46. Australia has also enacted the Trade Practices Act which also limits the right to picket. The **Ameiu vs Mudginberri Station Pty Ltd (1985) AILR 245, 311,312,326,379,393** show the extensive reach of Section 45D of the Trade Practices Act of 1974. The meat workers Union (applicant) had picketed the premises of Mudginberri Station Pty Ltd (Respondent) in circumstances which caused the union to be in contravention of S. 45D without, in the Court's opinion, being entitled to the defence available under S.45D (3) which absolves a contravention of the complained activity is for the purpose of peaceably enhancing the employees' working conditions. An interlocutory injunction was issued by the Federal Court ordering the Union to dismantle the picket line. The Union's refusal to obey the interlocutory injunction led to its being fined \$10,000 and \$2,000 per day for each day thereafter that the Picket remained. Subsequently, the interlocutory injunction was made permanent. Again the union refused to obey the terms of the Federal Court's order and for breach of the permanent injunction the union was fined \$100,000. In addition, in both cases at the first instance and on appeal the Court ordered the sequestration of all of the Union's assets by the Federal Court to secure payment of the fines and associated costs.

47. Upon considering the above mentioned authorities, I have no doubt to state that we can rightly borrow a leaf from South African and Australian experience by developing regulations, which will enable the maintenance of law and order in this country during demonstrations, picketing or . Further under section 22 of the public order Act, the minister may make regulations prescribing any regulation that may be prescribed under the act and generally to give effect to the provision of the act. I find that formulating of regulations that will limit the right to picket, demonstrate, presenting petition under Article 37 of the constitution is of utmost importance as it will enable in resolving the dilemma that has failed the country in managing, controlling and containing the violent demonstration that have threatened the piece of the country at times of demonstration; picketing or presenting petition to public authorities.

E. Or such other order(s) as this Honourable Court shall deem just.

48. Article 23 and 165 of the constitution expressly gives the High Court jurisdiction to hear and determine applications for redress of denial, violation or infringement of or threat to right of fundamental freedom in the Bill of Rights. Further in interpreting the constitution Article 259 of the Constitution of Kenya 2010 calls for an interpretation, that is purposive and advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights. Article 10 of the constitution calls court to give purposive interpretation of the constitution. From the above I find the court is called upon to interpret the constitution in a purposive manner since this is a matter dealing with human rights. Further the petitioner stands guided that on matters of legislation, the court often relies on the doctrine of separation of powers to restrain itself on orders it may make such as was held in the case of **Katiba Institute & another vs Attorney General & another (2017) eKLR**. The court went further on to explain that any judicial authority must only go as far as it is mandated in the constitution when dealing with function of the executive (**see Minister of Health and others vs Treatment Action Campaign and others (2002) 5 LRC 216**).

49. In the instant petition, I am alive to the fact that the petitioner is not asking the court to amend, legislate or otherwise encroach on any other arms of the government duties but rather that the court should order legislation to be enacted to give effect to the Bill of Rights and as far as the limitation on the freedom of assembly is concerned. I have considered the petition and the basis of the petition and find that the court can issue any appropriate remedy as prayed or on its own terms, even though on perusal of the constitution, the constitution may have offered alternatives to granting the orders sought. I find that the fact the parliament/executive holds or has power to deal with certain issues, it does not mean that the court hands are tied and has to sit back and do nothing. This court can issue appropriate and just orders (*see Nation Media Group Limited vs Attorney General (2007) IEA 261*). I conclude on this issue by finding and holding that this Honourable Court has jurisdiction and power to grant orders sought and any other appropriate remedies that it may find fit and just to issue.

50. I find the petition to be meritorious and proceed to order as follows:-

a. A declaration be and is **HEREBY** issued to the effect that the fundamental right under Article 37 of the Constitution of Kenya to assemble, to demonstrate, to picket and to present Petitions to public Authorities is conditional on the protestors or demonstrators conducting themselves peaceably and unarmed and that police officers working under the 1st Respondent are duty bound to immediately stop protestors or demonstrators if they are armed with any form of weapons including stones or any offensive weapon of whatever nature.

b. A declaration be and is **HEREBY** issued to the effect that the Petitioner and non-demonstrators/third parties enjoy equal rights and freedoms during demonstrations since their rights and fundamental freedoms are not suspended during such times.

c. An order be and is **HEREBY** issued directing the Respondents to formulate and/or amend the requisite law and regulations to ensure that demonstrations are peaceful and held as per the Constitution including *inter alia* prescriptions for demarcation of demonstration zones, responsibilities for clean-up costs, maximum numbers, consents of persons/entities adjacent to demonstration zones with appropriate penalties when they go outside the expectations of the law.

d. An order be and is **HEREBY** issued directing the Respondents to formulate a Code of Conduct for convenors of demonstrations that includes detailed explanations of how they intend to ensure non-demonstrators are not adversely affected by such demonstrations and that provide a clear line of responsibility of who is liable in case of loss to life or property, or for injury, when a member of the public is aggrieved due to such demonstration.

e. As the petition is brought in public interest I direct each party to bear its own costs.

Dated, signed and delivered at Nairobi this 29th day of July, 2019.

.....

J .A. MAKAU

JUDGE



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