



REPUBLIC OF KENYA



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Susan Nyachania Thimu t/a Silent Pub & another v Wamathai & 3 others (Constitutional Petition E001 of 2024) [2024] KEHC 11264 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11264 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CONSTITUTIONAL PETITION E001 OF 2024**

DKN MAGARE, J

SEPTEMBER 26, 2024

**IN THE MATTER OF CONTRAVENTION OF THE PETITIONER'S
FUNDAMENTAL RIGHTS AND FREEDOMS GUARANTEED UNDER THE
CONSTITUTION OF KENYA AS READ WITH THE FAIR ADMINISTRATIVE
ACTION ACT AND THE ALCOHOLIC DRINKS CONTROL ACT**

AND

IN THE MATTER OF THE PROHIBITION OF CRIMINAL INVESTIGATIONS

AND

**IN THE MATTER OF THE PROTECTIONS OF THE LAW AGAINST
UNREASONABLE AND IRRATIONAL INVESTIGATION OF THE PETITIONERS**

AND

IN THE MATTER OF THE APPLICATION FOR JUDICIAL REVIEW ORDERS

BETWEEN

SUSAN NYACHANIA THIMU T/A SILENT PUB 1ST PETITIONER

SALLY WAMBUI 2ND PETITIONER

AND

JOSEPHAT WAMATHAI 1ST RESPONDENT

**NYERI COUNTY DIRECTOR OF ALCOHOLIC DRINKS CONTROL &
MANAGEMENT 2ND RESPONDENT**

THE NATIONAL POLICE SERVICE 3RD RESPONDENT

OFFICE OF THE ATTORNEY GENERAL 4TH RESPONDENT



JUDGMENT

1. By a Petition dated 4/3/2024, the Petitioners sought the following reliefs:
 - i. A declaration that the continued investigation of the Petitioners in relation to the operation of a bar without a license is a threat to the Petitioners' right under Article 47 of *the Constitution* as read with Section 7(2) of the *Fair Administrative Action Act* and Article 50 of *the Constitution*.
 - ii. A Judicial Review Order of certiorari be issued to quash the decision of the 1st and 2nd Respondents in which they took away the 1st Petitioner's business license on 23/2/2024.
 - iii. A Judicial Review Order of certiorari be issued to quash the decision of the 3rd Respondent to carry out investigations of the Petitioners in relation to matters concerning the operation of a bar without a license.
 - iv. A Judicial Review Order of Prohibition be issued restraining the Respondents, their servants and/or agents, junior officers and/or anybody acting on their authority from continuing with the investigations, effecting arrest and or/arresting, charging, harassing or howsoever interfering with the Petitioners in relation to matters concerning the business license cart away on 23/2/2024 at Silent Pub.
 - v. A Judicial Review Order of Mandamus be issued directed at the 1st and 2nd Respondents to immediately return the Petitioners' business license they took away on 23/2/2024 from Silent Pub.
 - vi. An award of general damages to each of the Petitioners from the 1st and 2nd Respondents jointly and severally.
2. The Petition was supported by the Supporting Affidavit of Susan Nyachania Thimu sworn on 4/3/2024 in which it is deponed as follows:
 - a. The 1st Petitioner has in place all requisite business permits in respect of the operation of her Silent Pub.
 - b. The 1st Respondent accompanied by the OCS Gichira Police Station and the Area Chief stormed Silent Pub and arrested the 2nd Petitioner, an employee of the 1st Petitioner on allegations of operating without a license.
 - c. The 2nd Respondent has subsequently failed to give the Petitioners the reason for taking away the business permit.
 - d. The 1st Petitioner paid Kshs. 5,000/- to bail out the 2nd Petitioner after the 2nd Respondent indicated that the 2nd Petitioner should appear in court to face charges on 29/2/2024.
 - e. There were no such charges and the 2nd Respondent has not offered any explanation for their actions.
 - f. It is abuse of investigatory powers for the 3rd Respondent to exercise nonexistent powers in the house of criminal conduct on the part of the Petitioners.
 - g. The taking away of the business permit was arbitrary, unlawful, unreasonable and unprocedural.



- h. The Petitioners were denied the opportunity to be heard.
 - i. The Petitioner secured a loan to carry on business and suffered damages as result of actions of the Respondents.
3. The 1st and 2nd Respondents filed a Replying Affidavit sworn on 1/7/2024 in which it was deposed as follows:
- a. The 1st Respondent is the holder of the office established under Section 4 of the Nyeri County [Alcoholic Drinks Control Act](#) 2024.
 - b. The 1st Respondent's office received reports from the Ministry of Interior and members of the public of gross violation by the Petitioners of alcohol sale license hours.
 - c. On 24/2/2024, the 1st Respondent visited the Petitioners' Pub at 3.00 p.m. and it was open contrary to the allowed operating hours from 5.00 p.m.
 - d. The 1st Respondent removed the license in accordance with Section 17 of the Nyeri County [Alcoholic Drinks Control Act](#) 2014 now repealed which allowed such action.
 - e. The Petitioners operation had promoted social disorder within the society.
 - f. The Act under which the license was issued has since been repealed.
 - g. The license was to expire on 30/6/2024.
 - h. The court is estopped from making pronouncements on the license as the same is preserve of the County Committee.
4. The 3rd and 4th Respondents also filed an undated Replying Affidavit sworn by Abdi M. Sora, the OCS Githira Police Station as follows:
- a. The Petitioner's bar operated despite the order issued by the 1st Respondent against such operation.
 - b. The 2nd Respondent arrested the 2nd Petitioner for operating without a license and booked her under OB 15/24/02/2024. The 2nd Petitioner was later released on bail of Kshs. 5,000/- vide OB No. 17/24/02/2024 at 10.45 p.m.
 - c. The confiscation of the license was lawful following the 1st Petitioner's misconduct.
5. In the further affidavit sworn on 10/7/2024, the Petitioners among others maintained that Section 17 as read with Section 24 of the Nyeri County [Alcoholic Drinks Control Act](#) 2014 (repealed) did not permit removal of the Petitioners' license as posed by the 3rd and 4th Respondents.

Submissions

6. The Petitioner filed submissions dated 10/7/2024. It was submitted that the actions of the Respondents carrying away the Petitioners license were arbitrary and unconstitutional. Reliance was placed on the case of Muigana & 16 others v County Government of Nyandarua (Petition [E007 of 2023](#)) [2024] KEHC 960 (KLR) based on which it was also submitted that the actions of the Respondents were contrary to Article 47 of [the Constitution](#).



7. It was the submission of the Petitioners that the 3rd Respondent was not interested in investigating, arresting or causing the Petitioners to be charged but merely to harass them. They relied on *Hassan Ali Joho v Inspector General of Police & 3 Others* [2017] eKLR.
8. It was also submitted that the actions of the 3rd Respondent fell short of the dictates of *the Constitution* and a reading of Section 7 of the *Fair Administrative Action Act* sets out circumstances under which this Court can review any administrative action.
9. On damages, they relied on *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 Others (Civil Appeal 243 of 2017)* [2021] KECA 328 (KLR) to submit that the award for general damages in Constitutional Petitions is allowed with immense powers to grant the Petitioners the same and such powers are purely discretionary. They urged the Court to exercise its discretion in favour of the Petitioners and consider granting them general damages.
10. On the part of the 2nd and 3rd Respondents they filed submissions dated 1/7/2024. Reliance was placed on Section 17 of the repealed Nyeri County *Alcoholic Drinks Control Act*, 2014 on which it was submitted that the 1st and 2nd Respondents had the powers to grant, renew, transfer or remove a license or may refuse to grant, renew, transfer, withdraw or cancel a license.
11. It was also submitted that the Petitioners failed to demonstrate that the decision to remove the license was tainted with illegality, irrationality or procedural impropriety as to be entitled to the judicial review orders sought. They cited *Republic vs Public Procurement Review Board & Another ex parte Intertek Testing Services EA Pty Limited & Others* (2022) eKLR.
12. It was also submitted that Section 19 of the Nyeri County *Alcoholic Drinks Control Act* 2014 (repealed) ousted the jurisdiction of the Court as no appeal is allowed until internal mechanisms are exhausted.

Analysis

13. The issue that presents to me for determination is whether the Respondents acted in breach of the constitutional right of the Petitioners under Article 29 and Article 47 of *the Constitution* as to entitle the Petitioners to the reliefs sought.
14. The Petitioners maintained that the acts of the Respondents in confiscating the business permit in respect of Silent Pub was arbitrary, illegal, unreasonable and unconstitutional and infringed on Article 47 of *the Constitution* as it violated the Petitioners' right to fair administrative action.
15. The Petitioners' case was also that the arbitrary arrest of the 2nd Petitioner without just cause was contrary to this constitutional right to freedom and security of persons under Article 29 of *the Constitution*.
16. The right to fair administrative action is enshrined under Article 47 of the 2010 Constitution as doth;
 - “(1) Every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and



(b) promote efficient administration.”

17. On the other hand, Article 29 of *the Constitution* provides as doth:

Every person has the right to freedom and security of the person, which includes the right not to be—

- “(a) deprived of freedom arbitrarily or without just cause;
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner, whether physical or psychological;
- (e) subjected to corporal punishment; or
- (f) treated or punished in a cruel, inhuman or degrading manner.”

18. It was the case of the Petitioners that the business permit was confiscated without due process also since the threatened arraignment in court following arrest was never done nor was the permit returned.

19. On the other hand, the Respondents general case is that the business permit was confiscated within the law following the Petitioners’ breach of the rule of law under the Nyeri County *Alcoholic Drinks Control Act*, 2014 (repealed). The manner in which the Petitioners were said to have violated the law was chiefly in respect of the selling alcohol outside permitted operation hours. As was stated in the case of *Republic v Commissioner of Police and Another ex parte Michael Monari & Another* [2012] eKLR:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”

20. This court notes that it is not in dispute that the business permit for the Petitioner was confiscated and taken away on 23/2/2024 and it is still under the custody of the 1st and 2nd Respondents.

21. The business permit is said to have been confiscated following the Petitioners’ breach of the alcohol selling hours. There are minutes of 4/9/2023 attached to the Replying Affidavit of the 1st and 2nd Respondents in attempt to demonstrate that a meeting was held in which the proprietor of what is stated to be Zebra Bar was said to be notorious seller of liquor outside permitted selling hours. Therein, there is also an observation that there were arrests in respect of the said bar on 21/9/2023. The said bar is described to be operated by the 1st Petitioner who is also said to be a county government worker. The minutes are also said to have originated from a security meeting in the Ministry of Interior and National Administration.

22. However, it is not apparent whether the communique contained in the minutes is what informed the arrest of the 2nd Petitioner. The minutes are dated 4/9/2023 and the arrest was done about 5 months later on 23/2/2024. What is also curious to this court is that the attendants of the said meeting are not stated. It is difficult to tell whether the Petitioners, Respondents or their representatives were party to the meeting. The minutes also do not expressly point to any of the Petitioners. Consequently, this



court does not find reliability and admissibility in the content of the minutes. The minutes thus have no legal force in respect of the matters under this Petition.

23. As was held in the case of *Muigana & 16 others v County Government of Nyandarua (Petition E007 of 2023)* [2024] KEHC 960 (KLR) (8 February 2024) (Judgment):

“The question is, in the instant matter can the reasons rendered meet the aforesaid constitutional threshold. Reasons like the premises did not meet minimum requirements under Nyandarua County Alcohol Drinks Control Act 2019. There was an intelligent report by CID. The Public Petitioned against the premises. Cannot by any standard meet the stated threshold of adequacy, intelligible even of being rational! What does an intelligence report by CID, entail and how would a petitioner defend himself from a CID report without knowing what was gathered and contained therein?? How would a petitioner defend such undisclosed grounds against him/herself?”

24. Back to the Petition, the Petitioners pray for certiorari and prohibition orders. They seek to quash the decision to confiscate their business license and carry investigations and also seek to stop the Respondents from continuing with investigations in respect of the license issue and effecting the arrests. The principles for Judicial Review reliefs were set out in a landmark case of *Republic v Kenya National Examination Council Ex parte Gathenji and others Civil Appeal No.266 of 1996*}, where the Court of Appeal stated inter alia:

“an order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision-making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal.”

25. Purpose of Judicial Review remedies was addressed in the case of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002] eKLR*, where the Court of Appeal held that: -

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself- such as whether there was or there was not sufficient evidence to support the decision.”

26. To this court, the decision to charge is at the discretion of the Directorate of Criminal Investigations and the Director of Public Prosecutions but the same must be exercised in the spheres of the law. As was held by Nyamu, J (as he then was) in *Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004* (HCK) [2008] 2 EA 323:

“The Court can only intervene in the following situations:

- (1) where there is an abuse of discretion;
- (2) where the decision-maker exercises discretion for an improper purpose;



- (3) where the decision-maker is in breach of the duty to act fairly;
- (4) where the decision-maker has failed to exercise statutory discretion reasonably;
- (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;
- (6) where the decision-maker fetters the discretion given;
- (7) where the decision-maker fails to exercise discretion; and
- (8) where the decision-maker is irrational and unreasonable.”

27. Similarly, in the same vein, the court in the case of *Kuria & 3 Others vs. Attorney General* [20021 2 KLR 69] observed as doth:

1. The court has the power and indeed the duty to prohibit the continuation of criminal prosecutions if extraneous matters divorced from the goals of justice guide their instigation.
2. It is the duty of the court to ensure that its processes are not used as tools for vilification on issues not pertaining to that which the system was even formed to perform.
3. An order of prohibition should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie on society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious.
4. The machinery of criminal justice is not to be allowed to become a pawn in personal feuds and individual vendetta. The power of judicial review is invariably invoked so as to jealously guard it from this abuse.
5. It is the duty of the court to ensure that the utilization and or invocation of its processes and the law is not actuated by other considerations so divorced from the goals of justice as to make the court virtually a scapegoat in personal score settling and vendetta.
6. The limits of judicial review should not be curtailed but should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in contemporary society.
7. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. It is therefore imperative that the intrusion of judicial review remedies into criminal proceedings would have the effect of requiring a much broader approach.
8. It does not matter whether the decision has been made or not, what matters is the objectives for which the court procedures are being utilized. Once it is decided that the process is an abuse, it matters not that it has been commenced or whether there was acquiescence by all parties. The duty of the court in such instances is to purge itself of such proceedings. Thus whereas the court cannot order that the prosecution be commenced, because already it can still order that the continued prosecution be stayed. An order of prohibition can be issued to prohibit the continued hearing.
9. An order of prohibition should be granted where there is an abuse of the process of the court, which will have the effect of stopping the prosecution already commenced. A prerogative order is an order of a serious nature and cannot and should not be granted lightly. There should be



concrete grounds for supposing that continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest could be best served by staying of the prosecution.

10. In the instant case several allegations of selective prosecution, harassment and pressure from the state were made. However no evidence of those allegations or of malice unlawful actions, excess or want of authority and or manipulation had been shown.
11. In order for an application such as this one to succeed, there is need to show how the court is being abused or misused, there is need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution.

The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in society. There is a public interest underlying every criminal prosecution, which are being jealously guarded, whereas at the same time there is private interest of the rights of an accused person to be protected. Given these bipolar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence.”
28. This court notes that there is no material placed before it by the Respondents to demonstrate that there are ongoing investigations into the matter of the Petitioner’s operation of Silent Pub. There is no evidence that the Petitioners continue to be invited for enquiries by the Respondents over the possible culpability or any witnesses have been summoned. The Respondents were mute on whether they intend to prosecute the Petitioners.
29. Therefore, there is no justification for retaining the Respondent’s permit. In the case of *R v Attorney General Ex parte Kipngeno Arap Ngeny High Court Civil Application No 406 of 2001*, the court held:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting criminal prosecution otherwise the prosecution will be malicious and actionable.”
30. In respect to the powers of the Court in proceedings of this nature, in *Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170*, the Court of Appeal held as follows:

“It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings ... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”



31. The action by the Respondents of confiscating the Petitioners' business permit indefinitely was improper. Whereas the Respondents submitted that they were permitted under the Nyeri County *Alcoholic Drinks Control Act* 2014 (repealed) to do what they did, the same law did not permit the Respondent to keep the Petitioner's commercial interest in limbo ad infinitum. This was against commercial and merchandise law. The Respondents did not charge the Petitioners and have not expressed the desire to do so.
32. They did not cancel, suspend or transfer the permit as confiscated in specie. They also did not withdraw the permit. They confiscated the permit and sat on it without action. Ipso facto, the Respondents' omission to exercise their administrative powers abrogated the Petitioners' right to fair administrative action. It borders on rent seeking and is improper of the law to harass and intimidate traders with a view that is not in consonance with Public Officers' Ethics Act as read with the Prevention of Corruption Act.
33. The right to fair administrative action would require the Respondents, if prudent to confiscate the license and immediately take action in terms of withdrawing, suspending, transferring or cancelling the permit. They were not entitled to hold the commercial rights of the Petitioners suspended without remedy.
34. To do so would not let the Respondents escape the legal trap of unreasonable, un-procedural and irrational action or omission corrigible by a judicial review remedy. The Court in *George Joshua Okungu & Another v The Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another Petition No. 227 and 230 of 2009* stated as doth:
- “...it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted.”
35. The acts of the Respondents were contrary to the protection expected to be enjoyed under Article 29 of *the Constitution* as they were arbitrary and without a just cause. There was no prior notice given for closure of the impugned bar and the Petitioners were not said to have ignored or breached any commands from any authorities or the Respondents as to inform forceful confiscation of the permit. Indeed, this was the caution given by the Court of Appeal in the case of *Commissioner of Police & the Director of Criminal Investigation Department & Another v Kenya Commercial Bank Limited & 4 Others* [2013] eKLR as follows:
- “By the same token and in terms of Article 157(11) of *the Constitution* quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See *Githunguri V. Republic* [1985] LLR 3090.
- It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for



personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See *Ndarua v. R.* [2002] 1EA 205. See also *Kuria & 3 Others v. Attorney General* [2002] 2KLR 69.”

36. The Petitioners also prayed for mandamus to compel return of the confiscated business permit. The court notes from the copies attached by the Petitioners that the 1st Petitioner’s permit was valid until 31/12/2024. The 3rd and 4th Respondents’ averment that the permit was set to expire on 30/6/2024 is incorrect. Therefore, based on the finding that the Respondents actions infringed on the Petitioners’ right to fair administrative action, this court is inclined to issue an order for the return of the permit to the Petitioners.
37. What the Respondents ought to understand is that in our constitutional dispensation, arrest must not be prompted by intimidation, rivalry, rack enforcements to stimulate compliance to some desired authoritative end or motives so extraneous as to unnecessarily delimit the universal liberty enjoyed by humanity.
38. This court does not countenance the arrest instigated by the 1st Respondent and actualized by the 3rd Respondent against the 2nd Petitioner. The 2nd Petitioner was arrested on 23/2/2024 and had to pay Ksh. 5,000/- cash bail following which he was only released upon paying the said amount and directed to attend court on 29/02/2024 to be charged.
39. The charges were never preferred and there is no evidence that investigations are in motion about 7 months later. As such, the Petitioners plead that they live in reasonable apprehension of being arrested again, or charged and incarcerated on the alleged operation of a bar without a license, a license which they were lawfully issued but which is staying with the 1st and 2nd respondents unlawfully. The Petitioners’ said license is being unlawfully withheld by the Respondents without action and worse so, indefinitely.
40. The Petitioners cannot live upon the rack influenced by the Respondents to choose only what is the Respondent’s desire to achieve motives other than justice for if the law were to allow this, the petitioners and other citizens at large would live and operate their businesses at the mercy of exterior authorities.
41. This reminds me of Act 3 Scene 2 in William Shakespeare’s “The Merchant of Venice” as doth:
“Bassanio: Let me choose
For as I am, I live upon the rack.
Portia: Upon the rack, Bassanio! then confess
What treason there is mingled with your
love.
Bassanio: None but that ugly treason of mistrust, Which makes me fear the enjoying of my
love:
There may as well be amity and life ‘Tween snow and fire, as treason and my love.
Portia: Ay, but I fear you speak upon the rack, Where men enforced do speak anything...”
42. The Petitioners were kept in a state of animated limbo while the respondents, in particular, the 1st Respondent was engaged in diabolic miasma having total disregard to the economic and social rights of the Petitioners. It is callous and in bad taste to use public office to harass and intimidate traders



who have complied with the law. Days when inspectors and supervisors held sway in the lives and livelihoods of people are long gone. There is no longer a government of men but a government of laws and constitutional protection.

43. It must be remembered that the traders who sell alcohol are not the problem but the drinkers. Regulation of alcohol in this county is a matter of concern. However, once traders have been given licenses, they have a legitimate expectation that they will work unperturbed. It is in breach of security and protection of rights to take away a license and threaten to charge a person for operating without a license.

44. The Respondents submitted that this court's jurisdiction to intervene is ousted by Section 19 of the Nyeri County Alcoholic Drinks Act 2014 (repealed). The said section provides as follows:

“No person shall appeal to court under this act on a matter related to section 18 unless the person has exhausted the review mechanisms provided therein.”

45. Section 18 provided as follows:

18(1) An applicant whose application for a new licence, to renew or transfer a licence has been refused may within fourteen days of such refusal, request in writing the review of such refusal to the County Committee.

(2) A person aggrieved by the decision of the sub-county committee to approve grant of a new licence or to renew a licence may request in writing the review of such decision by the County Committee.

(3) Upon receipt of a request under this section, the County Committee shall notify the sub-county committee of the pending review.

(4) The County Committee shall within twenty-one days consider and make a final determination on the review.

(5) The County Committee may –

- a. dismiss the request for review if in its opinion, the request is frivolous or vexatious;
- b. uphold the decision of the sub-county committee;
- c. annul the decision of the sub-county committee;
- d. give directions to the sub-county committee with respect to any action to be taken;
- e. make any other declaration as it may deem fit.

46. I find section 18 of the 2014 Act irrelevant. I do not follow the position agitated by the Respondents that Section 19 of Nyeri County Alcoholic Drinks Act 2014 (repealed) ousted the jurisdiction of this court to intervene on allegations of breach of the right to fair administrative action under Article 47 of *the Constitution*. The jurisdiction of this court is circumscribed under Article 165(3) of *the Constitution* of Kenya, which posits as follows: -

(3) Subject to clause (5), the High Court shall have-

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;



- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

47. Further, the jurisdiction of this court to grant judicial review orders in a constitutional petition is premised on Article 23(3) of *the Constitution* as follows:

“In any proceedings brought under Article 22, a court may grant appropriate relief, including

—

- (a) a declaration of rights;
- (b) an injunction;
- (c) a conservatory order;
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) an order for compensation; and
- (f) an order of judicial review.”

48. This was amplified by the Court in the case of *Matagei v Attorney General; Law Society of Kenya (Amicus Curiae) (Petition 337 of 2018)* [2021] KEHC 460 (KLR) (Constitutional and Human Rights) (13 May 2021) (Judgment) as doth: -

“Upon promulgation of the current Constitution in 2010, judicial review attained constitutional underpinning under article 47, with judicial review remedies being accorded constitutional status by article 23. In regard to judicial review Constitution therefore achieved two objectives: it entrenched judicial review in *the Constitution* under article 47 and expressly provided under article 23 that an order of judicial review is one of the remedies for correcting constitutional violations.”

49. I find and hold that the Petitioners moved this court to assert their constitutional right to security and protection and fair administrative action and were entitled to do so on account of threatened security and protection of person and failure of fair administrative action in the manner the Respondents conducted themselves. Holding otherwise will be entrenching impunity and abuse of power by the Respondents.

50. The court in *Judicial Service Commission & another v Njora (Civil Appeal 486 of 2019)* [2021] KECA 366 (KLR) (7 May 2021) (Judgment) stated as doth, when addressing impunity: -

“The question that I must grapple with is whether it is permissible that a public body that is subject to *the Constitution* and its statute, and which has been found to have been in breach of law and to have acted unlawfully, irrationally and disproportionately in dismissing an employee, can escape an order of reinstatement. I think that were courts to accept such a position, they would be aiding in the entrenchment of a culture of lawlessness and impunity by such bodies, which would consider themselves safe from a reversal of their actions, notwithstanding that they were irrational, unjustified and in violation of the duty to act fairly.”



51. The question herein is not that the Respondents made a decision under the Act to deny or otherwise cancel the license. It is an action wholly outside the law. A public officer, relying on fiat decided to confiscate a valid license without a demonstrable cause. They appear to use the same to drive the Petitioner out of business. We must look at the dragon of impunity in the eye and call it as it is, if we were to slay the same.
52. It is utter disregard of common decency to take away a license and purport that someone is operating without a license. Evidence of proceedings to cancel the license were not there. The actions were not in public interest but use of public office to lord it over the people as opposed to using public office to serve the people. Article 10 of *the Constitution* provides as follows: -

“ 10.

- (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them-
 - (a) applies or interprets this Constitution;
 - (b) enacts, applies or interprets any law; or
 - (c) makes or implements public policy decisions.
- (2) The national values and principles of governance include
 - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
 - (c) good governance, integrity, transparency and accountability; and
 - (d) sustainable development.”

53. The 1st and 2nd Respondents were in breach of Article 10(1)(c) and 2(b) of *the Constitution*. They did not accord and have regard to the Petitioner’s rights in particular, human dignity, equity, equality, human rights and non-discrimination, they acted arbitrarily and without regard to servant leadership. They abdicated their roles in favour of personal vendetta and aggrandizement. They failed to bring honour to the office they hold and engaged in activities which at best mirror the ancient Mafioso style where traders had no right to live.
54. As to general damages, I think that the Respondents should have been entitled to a remedy in General damages. The action by the 1st and 2nd Respondents were arbitrary and contrary to security and protection and fair administrative action of the Petitioners in confiscating the permit without action as to leave the Petitioners in indefinite fear of subsequent such actions.
55. It must have also occasioned the Petitioners loss as the business continued to close indefinitely. This was an action that the law frowns. However, the rule is that the Petitioners are expected to prove the loss incurred as a consequence of the Respondents’ action in Constitutional matters.



56. The relevant principles applicable to award of damages for constitutional violations under *the Constitution* were explained by the Privy Council in the case of *Siewchand Ramanoop vs The AG of T&T*, PC Appeal No 13 of 2004. It was as doth:

“When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminus with the cause of action at law. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.”

57. The same view was expressed by the Court of Appeal in *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others (Civil Appeal 243 of 2017)* [2021] KECA 328 (KLR) (17 December 2021) (Judgment) as doth:

“It is notable in this respect that comparative jurisprudence limits the award of general damages in constitutional cases to only proven damages and not presumed damages. In *Ntanda Zeli Fose vs Minister of Safety and Security*, 1996 (2) BCLR 232 (W),, the Court [of Appeal] held that an award of constitutional damages in addition to delictual damages would not be appropriate, and that delictual damages are an adequate vindication of the Plaintiffs constitutional rights. The Court was however not decided on the nature of an award where delictual damages are not available, and observed that the law was flexible to provide relief that was appropriate for a breach of constitutional rights.

14. The US Supreme Court in *Carey v Piphus*, 435 U.S. 247 [1978] ruled that while presumed compensatory damages may not be awarded in an action for a violation of procedural due process, nominal and proven compensatory damages are appropriate to redress such a grievance. Presumed compensatory damages in this regard are general damages that are recoverable without proof of actual loss.”

58. In Civil Appeal No. E004 of 2020 National Environment Management Authority Versus Kelvin Musyoka (Minor suing through Mother and Best friend Scholastica Khalayi Shikanga) the Court of Appeal [Gatembu, Nyamweya & Lesiit JJ.A] held as follows: -

“The relevant principles applicable to award of damages for constitutional violations under *the Constitution* were also explained by the Privy Council in the case of *Siewchand Ramanoop vs The AG of T&T*, PC Appeal No 13 of 2004. It was held by Lord Nicholls at Paragraphs 18 & 19 that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense as follows:



“When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.”

104. The guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case.”

59. Therefore, the trite law on the award of general damages in respect of constitutional rights infringement is based on the guiding principle that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss. This was not generally proved or even pleaded.
60. The Petitioners did not prove the loss and this court is unable to exercise discretion to assess general damages for to do so would be to offend the law. In animating the discretionary powers of the Court in the case of Ramakant Rai vs. Madan Rai, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

“Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life.’ Wide enough in all conscience is the field of discretion that remains.

61. The Petition largely succeeds. The petitioners having succeeded are entitled to costs. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating



the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

62. The costs however have to be modest enough not to distort access to justice and have it as a reserve for the very rich. Costs of Ksh 45,000/= will suffice in the circumstances.

Determination

29. The upshot is that I make the following orders: -
- a. A declaration is hereby issued that the 1st and 2nd Respondents' conduct of confiscating and withholding the 1st Petitioner's Business permit for the Year 2024 in respect of Silent Pub was in breach of the Petitioners' fair administrative action under Article 47 of *the Constitution*.
 - b. A Judicial Review Order of Certiorari is hereby issued to bring to this Court and quash the decision of the 1st and 2nd Respondents taking away the 1st Petitioner's Business license on 23/2/2024.
 - c. A Judicial Review Order of Prohibition is hereby issued restraining the Respondents, their servants and/or agents, junior officers and/or anybody acting on their authority from continuing with the investigations, effecting arrest and or/arresting, charging, harassing or howsoever interfering with the Petitioners in relation to matters concerning the business license carted away on 23/2/2024 at Silent Pub.
 - d. A Judicial Review Order of Mandamus is hereby issued compelling the 1st and 2nd Respondents to forthwith release the 1st Petitioner's Business permit in respect of Silent Pub for the Year 2024 back to the 1st Petitioner.
 - e. The 1st and 2nd Respondents shall jointly and severally bear the costs of this Petition payable to the Petitioners assessed at Kshs. 45,000/-
 - f. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF SEPTEMBER, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by:-

Mahugu Mbarire Advocates for Petitioners

Attorney General for the Respondents

Court Assistant – Jedidah

