



**Fiidow v Director of Immigration & 5 others (Petition E057 of 2023)
[2024] KEHC 16212 (KLR) (Constitutional and Human Rights) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E057 OF 2023
LN MUGAMBI, J
DECEMBER 20, 2024**

BETWEEN

HANI ABDULLAHI ANYTE FIIDOW PETITIONER

AND

DIRECTOR OF IMMIGRATION 1ST RESPONDENT

CABINET SECRETARY, INTERIOR & CITIZEN SERVICES 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

OCS KILIMANI POLICE STATION 4TH RESPONDENT

INSPECTOR GENERAL OF POLICE 5TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 6TH RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 3rd March 2023, is supported by the Petitioner's affidavit in support of even date and a further affidavit dated 16th May 2023.
2. The gravamen of this Petition as supported by the Petitioner's affidavit is that the arrest and detention of the Petitioner by the 1st Respondent on the claim that she fraudulently acquired Kenyan citizenship and her intended deportation is unlawful. Consequently, the Petitioner seeks the following reliefs:
 - i. A declaration that the Petitioner was illegally detained and should have been presented before court within twenty four (24) hours upon arrest.
 - ii. A declaration that the Petitioner is a Kenyan citizen and her citizenship should not be deprived.



- iii. A declaration that the 1st Respondent violated the rights of the Petitioner by detaining her and her detention for over twenty four hours is unconstitutional.
- iv. A declaration that the Petitioner should not be deported out of her Country of birth.
- v. This court be pleased to issue a declaration that the Respondents have grossly violated the Constitution and an order for compensation.

Petitioner's Case

3. The Petitioner states that she is a Kenyan Citizen by birth and holds a valid identification card number 41227006. She further avers that she is currently a resident in Nairobi having moved from Mandera County. She also states that she applied for her Passport and was scheduled to attend the interview on 20th April 2023.
4. The Petitioner depones that on 28th February 2023, the 1st Respondent's officers, arrested and detained her at Kilimani Police Station without informing her of the reason of her arrest.
5. She alleges that during the arrest, the officers assaulted her and forced her to disclose her passwords. Additionally, that the officers took her phone and her original documents being her birth certificate, her father's original death certificate and her mother's national identity card.
6. She avers that she was held for 3 days and was not issued any bond or arraigned in Court. She as well alleges that there are no records of her arrest held by the 4th Respondent in effect aiding the 1st Respondent's illegal detention.
7. The Petitioner is apprehensive that the Respondents are keen on deporting her on the premise that she is a Somali citizen. This is based on allegations that she was invited to Kenya by one Khalif Yusuf Ibrahim whom she asserts is a stranger to her. Furthermore that her real name is Abdirahanam Hani Abdulahi.
8. She disputes those allegations and assets that she complied with all the requisite immigration regulations and her documents were taken through a vetting process before she was issued with the identity card.
9. She contends that the Respondents are obligated to uphold and enforce the Constitution but have instead violated her constitutional rights.
10. The Petitioner for this reason seeks to stop her intended illegal deportation and the unconstitutional revocation of her Kenyan citizenship. Consequently, she urges the Court to allow the Petition.

1st Respondent's Case

11. In response, the 1st Respondent filed its Replying Affidavit sworn on 8th March 2023 by its Senior Immigration Officer, Christine Kinyua.
12. She depones that the Petitioner is a Somali national and not a Kenyan as alleged. She asserted that prior to coming to Kenya, the Petitioner had made a visa application with the required documents. Customarily such applications require approval before an applicant leaves their country of origin. Accordingly, the 1st Respondent approved the Petitioner's visa application in effect allowing her to visit Kenya.
13. She states that the Petitioner arrived in Kenya through Jomo Kenyatta International Airport on 18th February 2022 using Somali passport number P00775050.



14. It is stressed that a person can only get citizenship in Kenya either through birth as dictated under Article 14 of *the Constitution* or by registration as provided under Article 15 of *the Constitution*. As such, acquiring Kenya's identification documents by other means amounts to fraud and also does not confer citizenship. Instead such acquisition is an offence contrary to Section 51(1) (a) and (l) of the *Kenya Citizenship and Immigration Act*, 2011 and Section 355 of the Penal Code.
15. She depones that when the Petitioner arrived in Kenya, she acquired a Kenyan Identity Card number 41227006 issued on 11th June 2022. This was issued while the Petitioner was 25 years instead of the required age which is 18 years for citizens by birth.
16. Thereafter, it is deponed that the Petitioner applied for a birth certificate and was issued with one bearing Entry number L02206929/22 on 8th December 2022. In addition she acquired a new fourth name and set of parents different from those on her visa application.
17. It is deponed that all this came to light when the Petitioner applied for a Kenyan passport. During the vetting and profiling of the application form, it was discovered that the Petitioner had failed to meet the threshold. This is because the system indicated that she was a Somali citizen who had entered Kenya on 18th February 2022 from Somali. As a consequence, the passport application was rejected and her particulars forwarded to the enforcement and compliant section for further interrogation.
18. It is alleged that during the interrogation held at the 1st Respondent's office on 28th February 2023, the Petitioner admitted that she had acquired the Kenyan documents by the help of her alleged Kenyan mother. The Petitioner added that she was applying for the passport as she seeks to go for further studies in Ireland. It was noted that one of the conditions was that she had to be Kenyan. Additionally, the Petitioner averred that she would rather go back to Somalia than criminal proceedings be instituted against her for fraud.
19. Choosing to exercise a fair administrative action under Article 47 of Constitution in light of this appeal, the 1st Respondent wrote to the 2nd Respondent requesting that she be declared a prohibited immigrant as well as issuance of removal and custodial orders as envisaged under Section 33 and 43 of the *Kenya Citizenship and Immigration Act*. She informs that these Orders were yet to be finalized at the time of filing this suit.
20. She in addition depones that the 1st Respondent also requested the Embassy of Somalia for travel documents to enable the Petitioner travel back to Somalia.
21. It is alleged that the Petitioner who claims to be a Kenyan citizen has failed to ascertain this claim by adducing the necessary evidence. Additionally, that none of the alleged family members have either visited or sought to bail her out. Equally it is asserted that the Petitioner has failed to demonstrate how the 1st and 2nd Respondent violated her constitutional rights.
22. According to her, the instant Petition is the Petitioner's attempt to secure her presence in Kenya without proper immigration status in contravention of Section 34(1) and (2) of the *Kenya Citizenship and Immigration Act*. Correspondingly, the Petition seeks to interfere with the 1st and 2nd Respondents' constitutional and statutory mandate. The Petition for this reason is adjudged frivolous, vexatious and further fails to meet the threshold set out in law. Consequently, the 1st Respondent urges the Court to dismiss the Petition.

2nd to 6th Respondents' Case

23. These Respondents responses are not in the Court file or Court online platform (CTS). The 6th Respondent's submissions are also not on record.



Parties Submission

Petitioner's Submission

24. Metto and Company Advocates for the Petitioner filed submissions dated 18th May 2023 and further submissions dated 5th August 2024. The issues for argument were identified as: whether the Petitioner was illegally detained and not arraigned in within (24) hours; whether the Petitioner is a Kenyan Citizen; whether the Petitioner's constitutional rights were violated and whether the Petitioner is entitled relief.
25. On the first issue, The Petitioner reiterated the averments as elaborated in her affidavits and contended that the Petitioner had been arrested without any lawful cause. Nevertheless, Counsel argued that even if there was a reasonable cause for arresting the Petitioner, she was still entitled to her right to a fair administrative action and a fair hearing as stipulated under Article 47 and 50 of *the Constitution*. Counsel pointed out that there was no finding made by the 1st Respondent that the Petitioner was unlawfully present in the country. Consequently, it was argued that due process was not followed in the circumstances of this case.
26. Reliance was placed in Leonard Sitamze vs. The Minister for Home Affairs & 2 Others, HC. Misc. Civil Application No. 330 of 2004 ((unreported) where it was held that:

“It is clear, in my interpretation of the law, that I have preferred the more expansive approach which requires decisions by the Executive, which expose the individual to loss of his fundamental rights, to be subjected to the test of legality as superintended and enforced by the High Court...I would hold that it is contrary to law that the Minister should have the Applicant, a family man living in Kenya as his domicile, doing normal business and possessed of relevant certificates of legitimate presence, arrested and detained without any hearing at all, deprived of his own properties, extracted from his family environment, detained for long, and then deported. Such actions are telltale instances of violation of the fundamental rights of the individual as set out in detail in Chapter V of *the Constitution*. They also bespeak a failure to observe human rights obligations which Kenya assumed under international law.”
27. Counsel further submitted that indeed the Petitioner is a Kenyan citizen by birth having been born in the year 1997 and so entitled to her rights as envisaged under Articles 12, 13 and 14 of *the Constitution*. Moreover that the Petitioner was granted a national identity card after following the due process as outlined in the *Registration of Persons Act*. It is noted that prior to issuance of the said documents, the Petitioner underwent a vetting process by a multi-agency government team under the 2nd Respondent's office. Counsel thus questioned why the allegations of citizenship were not brought up during this vetting process.
28. Reliance was placed in Hersi Hassan Gutale & another v Attorney General & Another [2013]eKLR where it was held that citizenship of an individual is an important matter and has to be determined on the basis of material presented and the duty is cast upon the Registrar of persons to undertake appropriate inquiries.
29. Accordingly, Counsel submitted that the Petitioner being a citizen of Kenya has a right to stay in the Country. Counsel further asserted that the Respondents had used the Petitioner's photograph to attach to the particulars of the alleged Somali citizen who they claim is the Petitioner. Reliance



was placed in *Egal Mohamed Osman vs. CS Ministry of Interior and Co-ordination of National Government & 2 Others* (2015)eKLR where it was held that:

“This Court will not tire in reminding the 3rd Respondent that *the Constitution* of Kenya is all supreme. It has life and it has teeth. Like Warsame]. in *Kana* (supra), the earlier the 3rd Respondent realizes that impunity is the biggest danger to the achievement of our constitutional aspirations, the better for those who seek the services of that office. The manner in which the Petitioner has been treated is shameful of a democracy, callous to the extreme and insensitive to a man whose children are born of a Kenyan mother.”

30. Owing to the stated averments, Counsel was certain that the Petitioner’s right to dignity and freedom and security of person under Article 28 and 29 of *the Constitution* had been violated when she was arrested arbitrarily and detained. It was further contended that the Petitioner cannot get meaningful employment thus her right under Article 41 of *the Constitution* was violated. Equally that her right to a fair Administrative Action under Article 47(1) & (2) of *the Constitution* was also violated by the 1st Respondent.
31. Having demonstrated that the Petitioner’s rights had been violated, Counsel submitted that the Petitioner was entitled to compensation of at least Ksh.1, 500, 000 for the loss of livelihood, withholding of her personal documents and the illegal detention. This was later reviewed in the further submissions to general damages of Ksh.5, 000, 000. Correspondingly Counsel argued that the Respondents ought to bear the costs of this suit.
32. Reliance was placed in *Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another interested Party* [2018] eKLR where it was held that:

“It must be noted that the protection of individuals from arbitrary punishment and abrogation of rights is one of the central purposes incumbent upon judicial process. The action that is before this court is one of unlawful arrest and detention. Wrongful arrest involves deprivation of a person’s liberty; it consists of arresting and holding a person without legal justification. Thus liability thereof is strict, a party need not show that the person causing the arrest was at fault or that he was aware that the arrest was wrongful. It is one that falls under action injuriam, and so proof of damage is not necessary to support the action.”

33. Similar dependence was placed in *Erastus Maina Karanja v Machakos County Government* [2021] eKLR, *Judicial Service Commission versus Mbalu Mutava & Another* [2015] eKLR, *Jamlik Muchangi Miano versus The Attorney General* [2017]eKLR, *Gitobu Imanyara & 2 others v Attorney General Civil Appeal No. 98 of 2014* [2016] eKLR and *Lucas Omoto Wamari v Attorney General & another* (2017)eKLR.

1st to 5th Respondents’ Submissions

34. Prosecution Counsel, Jackline Kiramana filed submissions for these Respondents dated 21st June 2023. Counsel highlighted the issues for consideration as: whether the Respondents had cause to confiscate the Petitioner’s documents and whether the rights of the Petitioner were violated.
35. Relying on the facts outlined in the 1st Respondent’s affidavit, Counsel submitted that its officers’ actions were justified. Counsel stressed that Section 49(2) of the *Kenya Citizenship and Immigration Act* makes it clear that an immigration officer or a police officer who has reasonable cause to believe



that a person has committed an offence under the Act, or is unlawfully present in Kenya, may arrest that person without warrant subject to the Bill of Rights. In this case, it was stated that the Petitioner had violated Section 54(1) (a) and (I) and (2) of the Act. Considering this Counsel, stressed that the Petitioner's arrest was valid and lawful.

36. In addition, Counsel noted that the 1st Respondent went further and sought to ensure the return of the Petitioner to her Country by initiating the deportation process as well as reaching out to the Somali Embassy to facilitate the return. It was submitted that all these actions were carried out within the same day of her arrest. It is highlighted that the 1st Respondent was waiting for the deportation order when this Petition was filed. For this reason, Counsel refuted the allegation that the 1st Respondent had violated the Petitioner's right under Article 47 of *the Constitution*.
37. On the flipside, Counsel contended that the Petitioner had failed to adduce evidence to support her allegations of the said violation and also a rebuttal to the raised discrepancies by the 1st Respondent in her citizenship claim. If anything, it was averred by the 1st Respondent that the Petitioner's identification documents had been procured fraudulently.
38. To support this argument reliance was placed in *Diana Waceke Wainaina Vs. The Director of Immigration Services & Another* (2022) eKLR, where it was held as follows:

“ 41. I find as clearly submitted a foreign national has no independent or inherent right to remain in Kenya. The right to reside, work and or engage in any economic activity in Kenya is restricted and can only be exercised by non-citizens in compliance with the statutes regulating the same. The International Principle of Sovereignty of states presupposes that the right to entry into the Kenya is a preserve of Kenya Citizens only and the State through its authorized agents (the Respondents) reserves the right of entry to foreigners. The Petitioner has not demonstrated otherwise to persuade this Court to decide in her favour.”

39. Furthermore, Counsel submitted that the Petitioner by virtue of Section 43 of the *Kenya Citizenship and Immigration Act* was lawfully detained pending her deportation. As such the 1st Respondent was within its mandate to initiate the Petitioner's deportation. Reliance was placed in *Republic v Ministry of Interior and Coordination of National Government & another Ex parte Bao Aiwu & 2 others* (2021) eKLR where the Court held as follows:

“It is evident that there is a statutory precondition that requires to be satisfied before the exercise of that power in section 43(1), which is that the presence of the person being removed from has been established to be unlawful. Where a statutory precondition for the exercise of power exists, the repository of the power is required to firstly properly direct itself as to the meaning of the statutory precondition, and secondly be satisfied that of the existence of the relevant factual situation, before exercise of the power. Failure to do so will render any actions undertaken in the exercise of that power unlawful.”

40. In view of the foregoing submission, Counsel submitted that the reliefs sought are not sustainable as the premise of the Petition is anchored on a fraudulent claim and the Petitioner's own admission that she is a Somali citizen. Counsel also contended that the Petitioner sought the orders without even adducing the evidence to support her claim that she is a Kenyan citizen. In sum Counsel argued that the Petitioner was not entitled to the relief sought.



Analysis and Determination

41. It is my considered opinion that the issues that arise for determination are as follows:
- i. Whether there is constitutional and statutory basis for the intended revocation of the Petitioner's alleged Kenyan citizenship and her intended deportation by the 1st Respondent.
 - ii. Whether the Petitioner's rights under Article 28, 29, 41, 47 and 50 of *the Constitution* were violated by the Respondents; and
 - iii. Whether the Petitioner is entitled to the relief sought.

Whether there is constitutional and statutory basis for the intended revocation of the Petitioner's alleged Kenyan citizenship and her intended deportation by the 1st Respondent.

42. The Petitioner's central assertion is that her arrest and detention by the 1st Respondent was unfounded leading to violation of her constitutional rights as a Kenyan citizen by birth. The Petitioner further claims that the 1st Respondent has sought to unlawfully revoke her Kenyan citizenship and deport her to Somali which she alleges is not her Country.
43. The 1st Respondent on the other hand claims that the Petitioner is a Somali citizen and acquired the alleged Kenyan citizenship through fraudulent means, thus is justified to seek to deport her in accordance with the law.

Citizenship by birth

Article 14(1) of *the Constitution* provides that a person is a Kenyan citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen.

44. On the flipside, Article 17(2) of *the Constitution* provides for revocation of citizenship by birth as follows:

The citizenship of a person who was presumed to be a citizen by birth, as contemplated in article 14(4), may be revoked if—

- a. the citizenship was acquired by fraud, false representation or concealment of any material fact by any person;
 - b. the nationality or parentage of the person becomes known, and reveals that the person was a citizen of another country; or
 - c. the age of the person becomes known, and reveals that the person was older than eight years when found in Kenya.
45. These provisions are equally echoed in the *Kenya Citizenship and Immigration Act*. Section 6 of the Act provides as follows:

Citizenship by Birth

A citizen by birth will carry the same meaning as provided in article 14 as read together with clause 30 of the Sixth Schedule of *the Constitution*.

46. Section 21 of the Act provides for revocation of citizenship and provides as follows:



1. The Cabinet Secretary may, where there is sufficient proof and on recommendation of the Citizenship Advisory Committee, revoke any citizenship, acquired by registration on the grounds specified in article 17 of *the Constitution*.
 2. The Cabinet Secretary shall by notice, in writing, inform any person whose citizenship is due for revocation of the intention to revoke his or her citizenship giving reasons for the intended revocation.
 3. The Cabinet Secretary shall give a person who has been given a notice under subsection (2) an opportunity to present the reasons why his or her citizenship should not be revoked.
 4. The Cabinet Secretary may after considering the presentations made under subsection (3) revoke the citizenship and cause the revocations to be entered into the register for revocation of citizenship.
47. The issue here is however, the acquisition of citizenship on account of fraudulent acquisition of the Kenyan identity card. In this regard, I turn to the *Registration of Persons Act* which provides for registration under Section 6(1) as follows:

Registration

Every person who attains or has attained the age of eighteen years and is unregistered shall be liable to registration under this Act and shall, within ninety days of attaining that age, present himself before a registration officer and register himself by giving to the registration officer the particulars specified in subsection (1) of section 5, and for that purpose shall permit his finger and thumb or toe or palm impressions to be recorded in any manner prescribed.

48. On revocation of an issued identity card, the Act under Section 18A provides as follows:
1. The Director shall cancel the registration and revoke the identity card of any person issued under this Act if the card was obtained through—
 - a. misrepresentation of material facts;
 - b. concealment of material facts;
 - c. fraudulently;
 - d. forgery;
 - e. multiple registration; or
 - f. any other justifiable cause.
 2. Before cancellation of the registration and revocation of the identity card as provided in subsection (1), the Director shall notify the card holder in writing of the intention to cancel the registration and revoke the card unless the holder can show cause within fifteen days why the cancellation should not be done.
 3. The cancellation of a registration and the revocation of a card under subsection (2) shall not take effect until after the expiry of fifteen days from the date of cancellation and revocation to allow the card holder to appeal to a court of competent jurisdiction.



4. Any person whose registration has been cancelled and identity card revoked or whose citizenship has been otherwise revoked under an existing law shall be under obligation to surrender the identity card to the registrar.
 5. The Director shall by notice in the Gazette publish the names and identity card number of the person whose registration is cancelled and the identity cards revoked.
49. Interpreting Article 17 (1) the Court in *Miguna Miguna v Fred Okengo Matiang'i Cabinet Secretary, Ministry of Interior and Coordination of National Government, Gordon Kihalangwa, Director of Immigration, Joseph Boinnet, Inspector General of Police the National Police Service, George Kinoti, Director of Criminal Investigations, Said Kiprotich, Officer In-Charge, the Flying Squad of Kenya Police Service, Officer Commanding Police Division Jomo Kenyatta International Airport & Attorney General; Kenya National Commission on Human Rights (Interested Party) [2018] KEHC 1922 (KLR)* observed thus:
- “78. ... Article 17(1) of *the constitution* is to the effect that citizenship acquired by registration can be revoked. And Article 17(2) on the other hand provides that citizenship of a person who was “presumed” to be a citizen by birth as contemplated in Article 14 (4), may be revoked if; (a) the citizenship was acquired by fraud, false representation or concealment of any material fact by any person; (b) the nationality or parentage of the person becomes known, and reveals that the person was a citizen of another country; or (c) the age of the person becomes known, and reveals that the person was older than eight years when found in Kenya.
 79. Other than citizenship falling in the above categories, citizenship by birth cannot be revoked and for that reason, the 1st and 2nd Respondents did not have power or discretion to exercise in so far as the Petitioner’s citizenship was concerned. He was not one whose citizenship could be revoked as contemplated by Article 17 of *the Constitution* or whose passport could be suspended or revoked in terms of Section 33(1) of the Act.
 80. Even if the 1st Respondent had power to revoke citizenship, he had to comply with the law namely, Section 21 of the Act. The Section is clear that where there is sufficient proof and on recommendation of the Citizenship Advisory Committee, the Cabinet Secretary may revoke citizenship acquired by “registration” on the grounds specified in Article 17 of *the Constitution*. However before doing so, the Cabinet Secretary is required to give written notice and inform the person whose citizenship is due for revocation, of the intention to revoke his or her citizenship, giving reasons for the action. The Cabinet Secretary is then required to give the person who has been given such notice an opportunity to present reasons why his or her citizenship should not be revoked.... “
50. In the present case, it was the 1st Respondent’s assertion that the Petitioner set foot in this Country via JKIA on 18/2/22 under Somali Passport Number P0077050. That it was subsequently discovered after the Petitioner lodged an application for the Kenyan Passport that on 11/6/22 she had fraudulently acquired Kenyan Identity card number 41227006 which she had been issue at age 25. Furthermore, on 8/12/2022; she went ahead and procured herself a birth certificate No. LO2206929/22.



51. Apart from mere denials, the Petitioner was in my view unable to credibly displace these hard facts proffered by the 1st Respondent in confronting her right to Kenyan citizenship which means that the Petitioner’s claim to Kenyan Citizenship is effectively dislodged.

Article 17 (2) (a) of *the Constitution* allows citizenship that is acquired through fraud, false representation or concealment of any material fact to be revoked. Her identity card having been acquired fraudulently can be revoked under Section 18A of *Registration of Persons Act*.

52. States are free to exercise their territorial sovereignty in regulating the entry, residency, and departure of people from its territory. International law on expulsion of foreign nationals in States provides that removal of any foreign national or migrant, should be lawful and in accordance with the law. Article 13 of the International Covenant on Civil and Political Rights provides thus:

“An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against this expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

53. Article 12(4) of the African Charter on Human and Peoples’ Rights provides that:

A non-national legally admitted in a territory of a State party to the Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

54. The *Kenya Citizenship and Immigration Act* under Section 2 of the Act defines deportation as:

“The action or procedure aimed at causing an illegal foreign national to leave the country either voluntarily or compulsorily, or under detention in terms of this Act.”

55. Section 43 of the Act provides as follows:

Power to remove persons unlawfully present in Kenya

1. The Cabinet Secretary may make an order in writing, directing that any person whose presence in Kenya was, immediately before the making of that order, unlawful under this Act or in respect of whom a recommendation has been made to him or her under section 26A of the Penal Code (Cap. 63), shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.

2. A person against whom an order has been made under this section shall—

be returned to the place where he originated from, or with the approval of the Cabinet Secretary, to a place in the country of habitual residence, permanent residence or citizenship, or to any place to which he consents to be taken if the competent authorities or government of that place consents to admit him or her to the country; or

if the cabinet secretary so directs, be kept and remain in police custody, prison or immigration holding facility or until his departure from Kenya, and while so kept is deemed to be in lawful custody whether or not he has commenced any legal proceedings in court challenging the Tribunals decision until the suit is finally disposed of.



3. Subject to this section, an order under this section shall be carried out in such manner as the Cabinet Secretary may direct, subject to *the Constitution* and related laws.
56. Accordingly, Section 49 of the Act grants the 1st Respondent and its officers the following power:

Power of arrest and search of persons

1. Within twenty-four hours after a permanent resident or a foreign national is taken into detention, or without delay afterward, the arresting officer of the Service shall produce the person detained before a judicial officer to review the reasons for the continued detention.
2. An immigration officer or a police officer who has reasonable cause to believe that a person has committed an offence under this Act, or is unlawfully present in Kenya, may, if it appears to him to be necessary to do so in order to ensure that the purposes of this Act are not defeated, arrest that person without warrant subject to the Bill of Rights; and the Criminal Procedures as if police officer include a reference to immigration officer.
3. At least once during the seven days following the review under subsection (1), and at least once during each thirty day period following each previous review, the Service shall produce the detained person before a judicial officer to review the reasons for continued detention.
4. A person other than a citizen of Kenya who, having been ordered to be deported from any country, enters Kenya on his way to his final destination, may be arrested without warrant by an immigration officer or a police officer and may be detained in prison or in police custody or immigration holding facility pending the making of arrangements for his departure from Kenya, and shall be deemed to be in lawful custody while so detained and such person needs to be taken to court within twenty four hours.
5. The Court shall not order the release of a permanent resident or a foreign national unless it is satisfied that the permanent resident or foreign national shall present himself on being required to do so by an immigration officer or a police officer and taking into account the following factors—
 - a. whether he is a danger to the public and whether or not he is carrying or conveying any documents;
 - b. whether he is likely to appear for examination or an admissibility hearing or a hearing regarding his removal from Kenya or a hearing to determine whether he should be permitted to remain in Kenya or whether there are pending proceedings that could lead to the making of a removal order;
 - c. where the Cabinet Secretary is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on the grounds of security or for violating human or international rights;
 - d. where the Cabinet Secretary is of the opinion that the identity of the foreign national has not been, but may be, established and have not reasonably cooperated with the Cabinet Secretary by providing relevant information for the purposes of establishing his or her identity or the Cabinet Secretary is making reasonable efforts to establish his or her identity.
6. Notwithstanding any provisions of this Act, all persons against who a deportation order has been issued shall be removed from Kenya within a period of ninety days from the day such



final removal order is made or after appeal and further detention shall be extended by a court of law for not more than thirty days; or

7. The court ordering release of a permanent resident or a foreign national in (d) above may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.
 8. An immigration officer may, by summons in writing, require any person other than a citizen of Kenya to attend at his office and to furnish to that officer such information, documents and other particulars as are necessary for the purposes of determining whether that person should be permitted to remain in Kenya.
 9. An immigration officer may by summons, in writing, require any citizen of Kenya to attend at his office, for the purposes of determining whether that person has committed an offence under this Act, or to provide that officer with necessary information, documents and other particulars as may be required.
 - (10) An immigration officer may enter into recognizance any person suspected of having committed an offence under this Act.
57. The Court in *Miguna Miguna v Fred Okengo Matiang'i*(supra) observed as follows:

“84. The other provision that the 1st and 2nd Respondents used to justify their actions against the Petitioner is Section 43(1) of the Act which is for removing persons who are unlawfully in Kenya. The Section authorises the Cabinet Secretary to make an order in writing, directing that a person whose presence in Kenya was, immediately before the making of that order, “unlawful” under the Act or in respect of whom a recommendation has been made to him or her under Section 26A of the Penal Code, shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order....Even assuming that the Petitioner deserved to be removed from Kenya, he had to be subjected to the provision of the Act and Articles 47(1) and 50(1) of *the Constitution* and given the right to fair administrative action and fair hearing as amplified by Section 21 of the Act. So much so that whatever the Respondents were doing had to comply with constitutional standards of procedural fairness and fair hearing. The 1st and 2nd Respondents could not just decide to suspend the Petitioner’s passport and declare him a prohibited immigrant without subjecting him to any known form of due process. Their actions were not in accord with *the constitution* and the law thus violated the rule of law.

...

93. In this regard, it did not matter whether the Petitioner was a Kenyan citizen or not. He was entitled to due process of the law as an incidence of the rule of law. That is what the Court of Appeal stated in *Moses Tengenya Omweno v Attorney General* [2018] eKLR that one is entitled to due process irrespective of citizenship.”



58. In *Mohammed Ibrahim Naz v Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & another* [2013] eKLR the Court stated as follows:

“... The requirement in removing an alien from a state’s territory, as provided under the above conventions and in accordance with the constitutional provisions contained in Article 47, is that such removal should be ‘in accordance with the law’, that due process should be followed. This, I believe, is also the essence of the decision in the case of *Samuel Murial Mohochi –vs- The Attorney General of Uganda*, though distinguishable from this case to the extent that the court found that the provisions of the Uganda Citizenship and Immigration Act were modified by the Treaty for the Establishment of the East African Community and the East African Common Market Protocol. The question then is whether the petitioner was accorded due process.”

59. Further in *Republic v Minister Of State For Immigration And Registration Of Persons Ex-Parte C.O.* [2013]eKLR the Court opined that:

“... It must always be remembered that under Article 25 of *the Constitution* one of the rights and fundamental freedoms which cannot be limited is the right to a fair trial. Accordingly, the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion. This is in tandem with the holding in *Re Bivac International SA (Bureau Veritas)* [2005] 2 EA 43 that judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.”

60. In *Oumarou Moumouni Ali v Director General Kenya Citizens and Foreign Nationals Management Services, Cabinet Secretary Interior Coordination of National Government, Inspector General & Attorney General* [2020] KEHC 9787 (KLR) the Court observed as follows:

“... I find that it would be contrary to law, that the Respondents should have the Petitioner, who has been residing in Kenya for 10 years, a family man with Kenyan wife and 2 Kenyan children, doing business in this country and a consul of Niger and an employer of over 100 people be deported without being served with deportation order and being given an opportunity to be heard. This very act goes against the dictates of our constitution and International Law and should not be allowed at all.”

“27. The Respondents in exercise of their functions as state officers are bound by provisions of Article 10 of *the Constitution* thus the National Values and Principles of Governance which includes the rule of law, democracy, human dignity, equity, social justice, human rights, non-discrimination and protection of the marginalized, transparency and accountability. It is not for them to urge that they should be accorded the anatomy vested in them by statute without unnecessary intervention of the Court when it is clear such autonomy has been abused by issuing deportation order, failing to serve the same and failing to accord the Petitioner the right to be heard. In view of the above, I find that the due process was not followed in the Petitioner’s deportation....”



61. The Petitioner claims she was arrested and detained for 3 days. During this time, she was not presented before any Court.
62. Prima facie, the facts disclosed by the 1st Respondent, the existence of a reasonable cause to believe an offence of obtaining registration by fraud had been committed which is sufficient basis for an arrest but certainly after the arrest the legal rights of the Petitioner had to be observed. Certainly, under Article 49 (1) (f) she ought to have been presented before a Court not later than 24 hours being arrested. Even if the Petitioner was being processed for deportation as alleged by the Respondents, failure to produce her in Court within 24 hours for judicial officer to review the reasons for her continued detention violated the provisions of Section 49 (1) of the Citizenship and Immigration Act as well. The detention of the Petitioner for more than 24 hours either on suspicion of having committed a crime or for purposes of deportation thus amounted to unlawful detention despite the existence of any prior reasonable and just cause to cause for the arrest or deportation. This therefore leads me to the next issue, which is:

Whether the Petitioner’s rights under Article 28, 29, 41, 47 and 50 of *the Constitution* were violated by the Respondents;

63. The threshold was set in *Anarita Karimi Njeru v Republic* [1976-1980] KLR 1272 and later on reaffirmed by the Supreme Court and the Court of Appeal. The Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* (2013) eKLR affirmed that:

“If a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

64. The Petitioner must demonstrate the manner in which the Respondents violated the purported constitutional provisions. In this respect, the Supreme Court in *Gwer & 5 others v Kenya Medical Research Institute & 3 others* (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment) guided as follows:

“(49) Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

65. Equally, in *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro* (2015)eKLR it was held that:

“15. ... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue.



That is the purport of Section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya)...

16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:

66. In the present case, the claim of detention of the Petitioner beyond the 24-hour period provided for in the Constitution and the law without being presented in Court either to answer to a criminal charge or for the Court to review the reasons for the continued detention in accordance with the law was not disputed by the Respondents. On this basis, I hold that the detention past 24-hour period was unauthorized and thus unlawful. It was a violation of her right to freedom and security of the person under Article 29 (1) (b) of Constitution.
67. I thus hold that this Petition partially succeeds on this limb only and the Petitioner is entitled to compensation for the violation.
68. However, the claim for declaration of Kenyan Citizenship and against her deportation must flop as the 1st Respondent has effectively displaced the contention that the Petitioner is a Kenyan citizen by birth as alleged.
69. On compensation for unlawful detention beyond 24 hours without being presented before a Court of law, I shall be guided by The Supreme Court in *Charles Muturi Macharia & 6 Others v Standard-Group & 4 Others* (SC Petition No.13 (E015) of 2022) which opined as follows:

“(94) To answer directly the question posed by this issue, under common law principles, it is settled that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, like in tortious claims. In situations like those, compensation for personal loss depends on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in Article 23. While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In deserving cases, the redress may be in the form of an award of damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.

(95) In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim’s constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim.

....



Therefore, once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present evidence of any loss or damage suffered as a result of the violation. For these reasons, it can be said that the approach in awarding damages or compensation in constitutional rights violation cases is different from that in tortious claims....”

70. At the time of instituting the Petition, the Petitioner indicated that she had been detained for more than 3 days which amounts to 72 hours, and 48 hours over and above the stipulated 24-hour period. The 1st Respondents must have been aware that this was wrong and unlawful since as an agency whose work is primarily dealing with immigration, it is reasonable to expect that it has dealt with many other cases of this nature before hence I infer that the omission to present the Petitioner in Court was deliberate. In any case, no justification was provided for this delay.
71. I consider that compensation to the tune of Kshs. 380,000/- (Three hundred and eighty thousand) is proper and reasonable compensation for the injury and failure to abide by the recommended legal timeline for presentation of the Petitioner in Court either for a criminal charge or for review of the continued detention pending the processing of her deportation.
72. For avoidance of doubt, all other reliefs sought are declined unless expressly granted for it has been established that she is not a Kenyan Citizen.
73. I grant costs of this Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER, 2024.

.....

L N MUGAMBI

JUDGE

