



**Barasa v Inspector General of Police & 3 others (Constitutional Petition E069 of 2021)
[2023] KEHC 26908 (KLR) (Constitutional and Human Rights) (15 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26908 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E069 OF 2021
AC MRIMA, J
DECEMBER 15, 2023**

BETWEEN

HON DIDMUS BARASA PETITIONER

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

FIREARMS LICENSING BOARD 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

HON ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

Background:

1. The Petitioner herein, Hon. Didmus Barasa, is the Member of Parliament for Kimilili Constituency. He holds one firearm under Licence No. 004886.
2. The By-election held in Kabuchai Constituency in the year 2021 yielded the instant dispute.
3. It is common ground that on the material date, the Petitioner and three other legislators were arrested and charged with the offence of Preparation to commit a felony contrary to Section 308(1) of the Penal Code.
4. The Petitioner was released on bail, got back his firearm and it went on record that his firearm was not part of the evidence intended to be used in the charges against him.
5. Subsequently, vide press release dated 5th March 2021, the Chairman of the Firearms Licensing Board, the 2nd Respondent herein, revoked the Petitioner's firearm license and directed him to surrender his



firearm certificate and firearms including all the ammunitions within twenty-four hours of the press release.

6. Further to the foregoing, the Petitioner received telephone calls from the Director of Criminal Investigations, the 3rd Respondent herein, urging him to surrender his firearm.

The Petition:

7. Through the Petition dated 8th March 2021, supported by the Affidavit of Didmus Barasa deposed to on a similar date, the Petitioner sought to challenge the constitutionality of the 2nd Respondent's call to revoke his firearm licence and repossess it.
8. The Petitioner was aggrieved that both the 2nd and 3rd Respondent's press release and request to surrender his firearm given that no reasons were ever given for the decision.
9. He posited that his demands to the 3rd Respondent for reasons for the decision had not been given.
10. It was the Petitioner's case that contrary to Section 5(5) of the *Firearms Act* that requires 14-days' notice of revocation of firearm to be in writing and, he only learnt of the revocation of his licence through the press.
11. He pleaded that and at the material time (during the by-election and his tenure as a Member of Parliament), he had not been made aware of any notice of revocation or report of misuse of the firearm as to warrant the revocation and demand for surrender.
12. The Petitioner was aggrieved that the decision by the 2nd Respondent was arbitrary and in contravention of Section 5(7) of *Firearms Act* and of his right to administrative action that is lawful, reasonable and procedurally fair as provided for under Article 47 of *the Constitution*.
13. The Petitioner further decried the 2nd Respondent's actions as discriminatory, a guarantee under Article 27 of *the Constitution*, on the basis that the firearm license and ammunition of other Members of Parliament who played an active role in the by-election were not affected.
14. The Petitioner averred that the 2nd Respondent arrogated to itself power is did not have by failing to satisfy itself on the requirements on when a firearm may be revoked in violation of Articles 10 and 232 of *the Constitution*.
15. It was its case that by directing the 2nd Respondent to revoke the Petitioner's firearm license, the 1st Respondent acted ultra-vires the *Firearms Act*, which does not vest in him such powers.
16. The Petitioner pleaded that the 2nd Respondent's illegal and unjustifiable actions breached his right to legitimate expectation as a Member of Parliament and a firearm licence holder and threatened his security, his life and that of his family contrary to Articles 26, 29 and 40 of *the Constitution*.
17. He averred further that by revoking his lawfully obtained licence, he had been subjected to psychological torture contrary to the dictates of Article 29(d) of *the Constitution*.
18. Separately, the Petitioner posited that by revoking his firearm licence, the 2nd Respondent pre-empted the outcome of his pending criminal case, thereby potentially prejudicing his defence which translates to a violation of his right to be presumed innocent until proven guilty under Article 50(2)(a) of *the Constitution*.
19. Based on the foregoing factual and legal foundation, the Petitioner prayed for the following reliefs: -



1. A declaration that the 2nd Respondent's decision to revoke the Petitioner's firearm license and recall the firearm and ammunitions is in breach of the Petitioner's rights under Article 27, 29, 38, 47 and 50 of *the Constitution* of Kenya.
2. A declaration that the Respondents decision to arbitrarily revoke the Petitioner's firearm license violated the Petitioner's right to legitimate expectation.
3. A declaration that by their acts of commission and omission, the Respondents have violated *the Constitution* of Kenya, and in particular Articles 10, 19, 20, 27, 29, 38, 47, 50, 73 and 232 of *the Constitution* of Kenya.
4. A declaration that by their acts of commission and omission, the Respondents have violated Sections 3 and 4(3)b) of the Fair Administrative Act, No. 4 of 2015, Sections 5(5), (7) (8),7 and 33 of the *Firearms Act*, Cap 114 of the Laws of Kenya.
5. An Order of Certiorari be and is hereby issued removing into the Honourable Court for the purposes of quashing the decision of the Respondent to revoke the Petitioner's firearm license.
6. An Order of permanent injunction be and is hereby issued restraining the 1st and 3rd Defendants from directing the 2nd Respondent to revoke and/or cancel the Petitioner's firearm license and/or demanding, calling for, confiscating or otherwise interfering with the Petitioner's lawful possession of the firearm and firearm certificate,
7. That an Order for general damages for violations of the Petitioner's fundamental rights.
8. That costs for this Petition be borne by the Respondents.
9. Any other relief that the Court shall deem fit and just in the circumstances.

The Submissions:

20. The Petitioner filed written submissions dated 16th February 2022.
21. In asserting impropriety of the 2nd Respondent's failure to give him reasons and notice of revocation of his Firearm Licence, the Petitioner drew support from the decision in Republic -vs- County Director of Education, Nairobi & 4 others Ex-parte Abdulkadir Elmi Robleh [2018] eKLR where it was observed:

".... the notice contemplated under Article 47 of *the Constitution* as read with section 4(3) of the *Fair Administrative Action Act* must not only be prior to the decision but must also be adequate and must disclose the nature and reasons for the proposed administrative action."
22. It was submitted that the decision of the 2nd Respondent was vitiated by the ultra-vires direction 1st Respondent gave the 2nd Respondent to revoke the Petitioner's firearm. It was the Petitioner's case that the *Firearms Act* gives no such powers to the 1st Respondent.
23. In urging that his right to non-discrimination was violated, the Petitioner submitted that Respondents singled him out of the other Members of Parliament who played a role in Kabuchai Constituency by-election.
24. He submitted that it was selective profiling, an affront to his right to equal protection and equal benefit of the law under Article 27(4) of *the Constitution*.



25. The Petitioner found support in Peter K. Waweru vs. Republic [2006] eKLR where discrimination was discussed as follows: -

"...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description..."

26. In submitting on violation of his right to dignity, freedom and security of the person, the Petitioner stated that owing to his status as a sitting Member of National Assembly, he is entitled to security as a matter of right. He claimed that the revocation exposed him and his family and property to great danger.

27. It was the Petitioner's case that the Respondents had exhibited impunity and violated his right to be treated with dignity. He relied on the decision in *S -vs- Makwanyane* (1995) 3 SA 391 to bolster the importance of the right to dignity. In the case it was observed: -

"... The right to life and dignity are the most important of all human right and of all other personal rights in the Bill of Rights."

28. The Petitioner sought to demonstrate knowledge of violation of the law by the Respondents by submitting that the letter communicating the decision of the Board was received after he had instituted the suit and obtained conservatory orders.

29. The Petitioner further submitted that his right to fair hearing guaranteed under Article 50(1)(a) of *the Constitution* was under attack by the Respondents.

30. It was his case that the material availed to the Court show a well-coordinated and deliberate effort by the Respondents to harass, intimidate and victimize him under the pretext of carrying out investigations and the move to revoke his license is pre-emptive of the outcome of the trumped-up charges brought by the Respondents against him.

31. In the end, the Petitioner, while relying on the principles enunciated in the decision in *Edward Akong'o Oyugi & 2 Others -vs- Attorney General* (2019) eKLR, claimed that he had demonstrated that his rights and fundamental freedoms had been violated by the State thereby entitling him to redress in the form of monetary compensatory damages.

The Respondents' case:

32. The 4th Respondent, on behalf of the 1st, 2nd and 3rd Respondents, opposed the Petition through Grounds of Opposition dated 23rd February 2022.

33. It was its case that the Petition was not pleaded with precision and does not disclose any violation of the Petitioners' fundamental rights and freedom by the Respondents.

34. The decision in *Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, was relied upon where it was observed: -

"..... It is our finding that the Petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the petition and supporting affidavit, we have concluded that they did not provide adequate particulars of the claims relating to the alleged violations of *the Constitution* of Kenya and the Ethics and Anti -



Corruption Commission Act, 2011. Accordingly, the petition did not meet the standard enunciated in the Anarita Karimi Njeru case."

35. The Respondents claimed that according to Section 5(5) of the *Firearms Act*, there are instances where a firearm can be confiscated and withdrawn from the holder without notice.
36. It was its case that Section 8(1) of the Firearm Act states that '... Notwithstanding anything contained in any of the foregoing sections of this Act, a licensing officer may refuse to grant, renew or vary a firearm certificate, or to grant a permit under subsection (12) of section 7, unless and until any firearm to which the firearm certificate or permit will, if granted, renewed or varied, relate is produced to him for his inspection and for marking, if necessary, in accordance with the requirements of subsection (2) of this section...'
37. Based on the foregoing provision, the 2nd Respondent claimed that it acted within its mandate and was not under the control or direction of any party.
38. In urging the Court to dismiss the Petition, the Respondents stated that the Petitioner failed to demonstrate that the Respondents had acted in bad faith or abused the legal process in a manner to trigger this Court's intervention.

The Submissions:

39. In its written submissions dated 24th May 2022, the 4th Respondent submitted that no right of the Petitioner was violated by the 1st, 2nd and 3rd Respondent.
40. It claimed that the as per the provisions of Article 244(b) of *the Constitution* as read alongside Section 35 of the *National Police Service Act*, the National Police Service is under duty to strive to the highest standards of professionalism and discipline among members.
41. It, therefore, was the Respondents' position that no single provision of *the Constitution* was singled out by the Petitioner to demonstrate how it was violated as to occasion harm to the Petitioner.
42. The Respondents reiterated that the decision to recall the Firearm together with the ammunitions did not amount to any constitutional violations on the part of the Petitioner since the 2nd Respondent, acting in the greater public interest, was within its statutory function.
43. The Respondents submitted that under Section 5 of the Firearm Act, the Firearm and Licensing Board is mandated to issue, cancel, terminate or vary any licence or permit issued under the Act.
44. It was its case that the Petitioner's firearm, ammunition and licence revoked on 5th March 2021 was done pursuant to Section 5(7) and 8(1) of the *Firearms Act* which empowers licensing officer to prohibit a person form from possessing a firearm and grant, renew, vary a firearm certificate respectively.
45. The Respondent submitted that under Section 5(7) of the *Firearms Act*, the Board has power to revoke a firearm certificate if the holder is a threat to the National security or fraudulently acquired the licence.
46. It further stated that a revocation may occur where it is established that an Applicant is not a person suitable to hold a firearm because of how he or she conducts himself or herself in public.
47. The Respondents asserted that that it was the Petitioner's behaviour that threatened public safety and peace in Kabuchai Constituency By-Elections that led to revocation on his licence, not any other collateral reason.
48. In conclusion, the Respondents submitted that the Petitioner had not proved its case to the required standard. The prayed that the Petition be dismissed with costs.



Analysis:

49. From the reading of the pleadings, the parties' submissions and the decisions referred to, there is no doubt that the 2nd Respondent is legally-obligated to discharge its respective duties which involve regulation of firearms in the country. What comes to the fore in this Petition is largely the manner of exercise of that power.
50. Therefore, the discussion will attempt to deal with the issue of whether in discharging the said duties, the Respondents kept within the Constitution and the law. This Court will, therefore, interrogate the processes as undertaken by the Respondents with a view to ascertain if the Constitution and the law were upheld.
51. The main contention herein is whether the 2nd Respondent acted in contravention of Article 47 of the Constitution in revoking the Petitioner's firearm licence and ordering him to immediately deliver up his firearm with the 1st and 3rd Respondents. In other words, the Petition interrogates whether the process was lawful, reasonable and procedurally fair.
52. The Petition also raises allegations of violations of other Articles of the Constitution including Articles 10, 19, 20, 27, 29, 38, 50, 73 and 232 of the Constitution.
53. Given that the main contention in this matter borders on the procedure undertaken by the Respondents in revoking the licence, a discussion on Article 47 of the Constitution now follows. A consideration of the rest of the alleged violations will follow thereafter.
54. Article 47(1), (2) and (3) of the Constitution states that: -
1. Every person has the right to 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—
 - a. provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and
 - b. promote efficient administration.
55. The legislation that was contemplated under Article 47(3) is the Fair Administrative Actions Act. Section 4 thereof provides that: -
4. Administrative action to be taken expeditiously, efficiently, lawfully etc.
 - (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
 - (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—



- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;
 - (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to–
- (a) attend proceedings, in person or in the company of an expert of his choice;
 - (b) be heard;
 - (c) cross-examine persons who give adverse evidence against him; and
 - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
- (5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
- (6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of *the Constitution*, the administrator may act in accordance with that different procedure.

56. Section 2 of the Fair Administrative Actions Act defines an ‘administrative action’, an ‘administrator’ and a ‘decision’ as follows:

‘administrative action’ includes –

- i. The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or



- ii. Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

‘administrator’ means ‘a person who takes an administrative action or who makes an administrative decision’.

"decision" means any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be;

57. The Court of Appeal in Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR addressed itself to Article 47 of *the Constitution* as follows: -

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

58. In South Africa, the Constitutional Court in *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98* 2000 (1) SA 1 ring-fenced the importance of fair administrative action as a constitutional right. The Court referred to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution. The Court expressed itself as under: -

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...

59. Article 47 of *the Constitution*, therefore, goes beyond being a mere codification of the common law principles on administrative action. Its main purpose is to ‘... regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice...’. The entrenchment of Article 47 in *the Constitution* was a deliberate move by Kenyans in demanding inter alia fairness, transparency and accountability in public administration. Public officers must, therefore, embrace the paradigm shift and engage the right gear in ensuring that the manner in which they make and execute administrative decisions complies with Article 47 of *the Constitution* and the Fair Administrative Actions Act.



60. This Court will now apply the foregoing to the facts in this case. As said, the issue is whether the Petitioner was accorded an expeditious, efficient, lawful, reasonable and procedurally fair process before the impugned decision was made.

61. There is no doubt that the Petitioner was, at the time the 2nd Respondent revoked the license, authorised to hold a firearm. The Respondents contended that their actions were in line with Sections 5(7) and 8(1) of the *Firearms Act*. The said provisions state as follows: -

5.

(7) A firearm certificate may be revoked by a licensing officer if—

- (a) the licensing officer is satisfied that the holder is prohibited by or under this Act from possessing a firearm to which the firearm certificate relates, or is of intemperate habits or unsound mind, or is otherwise unfit to be entrusted with a firearm; or
- (b) the holder fails to comply with a notice under subsection (5) requiring him to deliver up the firearm certificate.

8.

(1) Notwithstanding anything contained in any of the foregoing sections of this Act, a licensing officer may refuse to grant, renew or vary a firearm certificate, or to grant a permit under subsection (12) of section 7, unless and until any firearm to which the firearm certificate or permit will, if granted, renewed or varied, relate is produced to him for his inspection and for marking, if necessary, in accordance with the requirements of subsection (2) of this section.

62. As a starting point, it is imperative to assert the position that statutes cannot be read in isolation of *the Constitution*. Article 2(4) of *the Constitution*, affirms that any law, including customary law, that is inconsistent with *the Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of *the Constitution* is invalid. Therefore, any action undertaken on the strength of any law which action does not stand to the dictates of *the Constitution* cannot be sustainable.

63. In this matter, therefore, even as the 2nd Respondent relied on the provisions of the *Firearms Act* in making the decisions, it was under an obligation to ensure that such decisions were in tandem with *the Constitution*.

64. Apart from holding to the provisions of the *Firearms Act*, the Respondents did not demonstrate any compliance with Article 47 of *the Constitution* and Section 4 of the Fair Administrative Actions Act. There was need for such compliance since the impugned decision was an administrative decision as it affected the rights of the Petitioner. Further, even the procedures laid down under the *Firearms Act* including giving notice to the Petitioner were not complied with.

65. The impugned decision, of unilaterally revoking the Petitioner's licence and directing the surrender of the firearm forthwith was, therefore, procedurally unfair and it was contrary to Article 47 of *the Constitution* and Section 4 of the Fair Administration Actions Act.



66. On the allegation that the impugned decision was discriminatory, a look at what discrimination entails follows first.

67. The Black's Law Dictionary, 10th Edition, defines discrimination as;

- (1) The effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship”
- (2) Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured”

68. Article 1(a) of the Convention Concerning Discrimination in Respect of Employment and Occupation (1958) defines discrimination as follows:

Any distinction, exclusion or reference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

69. In *Peter K. Waweru v Republic* [2006] eKLR, the Court defined of discrimination as follows: -

Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.

70. Discussing what discrimination entails, a Three-Judge bench of the High Court (Mwera, Warsame and Mwilu JJ., as they then were, before they were all elevated to the Court of Appeal shortly afterwards) in *Federation of Women Lawyers Fida Kenya & 5 Others vs. Attorney General & Anor* 2011 eKLR and in recognition that justice, fairness or reasonableness may not only permit but actually require different treatment rendered themselves as follows: -

In our view, mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which *the Constitution* had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of *the Constitution*. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases.

71. The South African Constitutional Court in *National Coalition for Gay and Lesbian Equality –Vs- Minister for Justice* [1998] ZAAC 15 further added its voice to the discussion as under: -

The present case shows well that equality should not be confused with uniformity, in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across differences. It does not presuppose the elimination or suppression of differences. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a leveling or homogenization of behavior but an acknowledgment and acceptance



of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalization, stigma and punishment – At best, it celebrates the validity that difference brings to any society.

72. Further, the South African Constitutional Court in *City Council of Pretoria v. Walker* [1989] ZACC 1 in considering direct and indirect discrimination made the following comment with which I respectfully agree: -

The inclusion of both direct and indirect discrimination, within the ambit of the prohibition imposed by section 8(2) [our Article 27(4)] of *the Constitution*, evinces a concern for the consequences rather than the form of conduct. It recognizes that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of section 8(2) [our Article 27(4)] of *the Constitution*.

73. A common thread of reasoning flowing from the foregoing is that equal should be equally treated and unequal unequally treated as called for by the inequality.

74. In attaining that legal bar, Courts have developed guiding principles. In *Mbona vs. Shepstone and Wylie* (2015) ZACC 11, the South African Constitutional Court rendered itself on proof of direct discrimination. The Court stated that: -

26. The first step is to establish whether the respondent's policy differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. If the discrimination is based on any of the listed grounds in section 9 of *the Constitution*, it is presumed to be unfair.... Where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.

75. The English case of *The Queen on the application of Sarika Angel Watkins Singh (A child acting by Sanita Kimari Singh her mother and litigation friend) vs. The Governing Body of Aberdare Girls' High School and Anor* [2008] EWHC 1865 (Admin) dealt with an analysis of proof of indirect discrimination. The Court developed the following four steps: -

- (a) to identify the relevant 'provision, criterion or practice' which is applicable;
- (b) to determine the issue of disparate impact which entails identifying a pool for the purpose of making a comparison of the relevant disadvantages;
- (c) to ascertain if the provision, criterion or practice also disadvantages the claimant personally;
- (d) Whether this policy is objectively justified by a legitimate aim; and to consider, if the above requirements are satisfied, whether this is a proportionate means of achieving a legitimate aim.

76. The Court will now apply the above tests to this Petition. The Petitioner cited discrimination against the way the other firearm holders were treated. He asserted that he was the only one whose firearm license was revoked and called to surrender his firearm.



77. Section 5(7) of the *Firearms Act* has it that a licence may be revoked if the holder is ‘... of intemperate habits or unsound mind, or is otherwise unfit to be entrusted with a firearm...’ It, therefore, means that a firearm holder undertakes a personal responsibility in the manner he/she deals with the firearm. When one out of several other firearm holders deals with his/her firearm contrary to the law and the 2nd Respondent initiates the revocation process, such a holder cannot demand that the rest of the holders be also subjected to the revocation process. The only instance one can demand as much is when there is evidence that all the firearm holders dealt with their firearms in like manner, but the complainant was later singled out.
78. The Petitioner failed to demonstrate as much. It is on record that the Petitioner was charged before a Court of law in relation to the use of his firearm. The rest of the firearm holders who were possibly with the Petitioner were not. The contention of discrimination cannot, hence, hold. It is not proved and is for rejection.
79. Likewise, the rest of the alleged violations of the Petitioner’s rights and fundamental freedoms were not proved.

Reliefs:

80. The foregoing discussion has resulted to the success and failure of the Petition in equal measure. Whereas the Petitioner failed to prove that the impugned decision was procedurally unfair since it was contrary to Article 47 of *the Constitution* and Section 4 of the Fair Administration Actions Act, the rest of the alleged constitutional violations failed.
81. This Court has also been asked to grant various orders given the now partial success of the Petition. The orders sought include declarations, judicial review orders, damages among others.
82. In deciding on the nature of the relief to issue, this Court must consider the most appropriate relief. Even in instances where a party fails to ask for a specific relief, a Court, depending on the nature of the matter ought to craft an appropriate relief.
83. Courts have severally rendered on reliefs. The Court of Appeal in *Total Kenya Limited vs Kenya Revenue Authority* (2013) eKLR held that even in instances where there are express provisions on specific reliefs a Court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties. The High Court in *Simeon Kioko Kitheka & 18 Others vs. County Government of Machakos & 2 Others* (2018) eKLR held that Article 23 of *the Constitution* does not expressly bar the Court from granting conservatory orders where a challenge is taken on the constitutionality of legislation.
84. In *Republic Ex Parte Chudasama vs. The Chief Magistrate’s Court, Nairobi and Another Nairobi HCCC No. 473 of 2006*, [2008] 2 EA 311, Rawal, J (as she then was) stated that:

While protecting fundamental rights, the Court has power to fashion new remedies as there is no limitation on what the Court can do. Any limitation of its powers can only derive from *the Constitution* itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal. See *Gaily vs. Attorney-General* [2001] 2 RC 671; *Ramanoop vs. Attorney General* [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago); *Wanjuguna vs. Republic* [2004] KLR 520...The Court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure,



especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many faceted jurisdiction and discretionary powers of the High Court. See The Judicial Review Handbook (3rd Edn) by Michael Fordham at 361.

85. The Constitutional Court of South Africa in *Fose vs. Minister of Safety & Security* [1977] ZACC 6 emphasized the foregoing as follows: -

Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.

86. On the award of damages in constitutional violations vis-à-vis making of declarations as part of the available remedies, the Court of Appeal in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR while dealing with the issue of damages as a relief in constitutional violations emphasized the need for appropriate and just remedies. On the power of declarations, the Learned Judges stated as follows: -

Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.

87. Having carefully considered this matter, this Court is not convinced that the Petitioner is entitled to any compensatory damages. This is such a case where declarations and other reliefs adequately suffice given the manner in which the Petitioner dealt with his firearm during the by-election. In fact, apart from the procedural requirements, the Respondents are at liberty to pursue the revocation of the Petitioner's licence within the constitutional and legal confines.

88. The quest for damages is, hence, declined.

Disposition:

89. Deriving from the foregoing, the following final orders do hereby issue: -

- a. A declaration be and hereby issue that the decisions by the Firearms Licensing Board to unilaterally revoke the Petitioner's firearm licence and to require the surrender of the firearm was contrary to Article 47 of the Constitution, Section 4 of the Fair Administrative Actions Act



and Section 5(5) of the *Firearms Act*. The said decisions are, therefore, constitutionally infirm, null and void ab initio.

- b. An order of Judicial Review in the nature of Certiorari hereby issue bringing the said decisions by the Firearms Licensing Board to unilaterally revoke the Petitioner's firearm licence and to require the surrender of the firearm before this Court for quashing. The said decisions are hereby quashed.
- c. For avoidance of doubt, the Respondents are at liberty to consider the revocation of the Petitioner's firearm licence in accordance with *the Constitution* and the law.
- d. As the Petition has partially succeeded, each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 15TH DAY OF DECEMBER, 2023.

A. C. MRIMA

JUDGE

