



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. E010 OF 2021**

**AZ.....PETITIONER**

**VERSUS**

**1. CABINET SECRETARY INTERIOR & COORDINATION OF NATIONAL SECURITY**

**2. DIRECTOR, DEPARTMENT FOR IMMIGRATION.....RESPONDENTS**

**JUDGMENT**

**Parties**

1. The Petitioner is a British citizen born in the Republic of Kenya on 3/11/1946 and holder of Passport Number xxxxxxxxx issued by the Government of the United Kingdom. The 1<sup>st</sup> Respondent is the Cabinet Secretary in charge of the Ministry of Interior & Coordination of National Security of Kenya; while 3<sup>rd</sup> Respondent is the Director of the State Department for Immigration Services and Registration of Persons.

**The Petition**

2. Vide the Petition herein dated 1/02/2021, the Petitioner states that on 2/10/2020, he travelled to Kenya, as is customary, hoping to get a visa upon arrival, since being a British national and holder of a British passport and having met all the health requirements for entry into the Republic, he qualified for a Kenyan Visa. However, upon presenting his passport for visa and subsequent entry stamp, the immigration officer at the desk refused to issue him with an entry without cause, explanation, or reasons for the refusal. Upon enquiry, the Petitioner was informed that he was unwanted and/or unwelcomed in Kenya, and that he would be deported back to the United Kingdom where he had come from. He was thereafter detained at the airport for two days without food or drink, and was kept incommunicado without access to consular services or to an advocate; neither was he arraigned before a Court of law to answer to any allegations or charges for the two days he was under detention at the airport.

3. The Petitioner avers that on 4/10/2020, he was conveyed to an aircraft and issued with a copy of a notice addressed to the airline, which notice did not set out any reasons for his forceful deportation to the United Kingdom.

4. It is the Petitioner's case that he is a son to the late Dr. Manzoor Ahmad who was recruited by the British Colonial Government as a veterinary surgeon and brought to Kenya; he was born and raised within the Republic of Kenya; he is married to a Kenya Citizen, **Dr. Asmat Ara Begum** who is a holder of a Kenya I.D No. xxxxxxx issued by the relevant authorities in Kenya; one of his children is married to a Kenyan citizen and his grandchildren are Kenyan citizens as well; he attended his primary and secondary school education in Kenya; he is a holder of a PhD in Biochemistry awarded by the university of Nairobi in 1977; he was previously employed as an assistant lecturer and thereafter promoted to a full lecturer at the University of Nairobi; over the years he has visited Kenya over 20 times to carry out charitable activities and visit family members who are in Kenya; he has always applied a for a Visa on arrival and left the jurisdiction within the time permissible; he has never been charged with any criminal activity or offence within the Republic of Kenya and that he has faithfully complied with the terms and conditions of his visa, respected and obeyed the laws of the Republic of Kenya. Therefore, the forceful deportation was not supported by any Statute, was unconstitutional and a violation of his fundamental rights and freedoms.

5. The Petitioner avers that being a renowned scientist, academician of reputable professional standing, and a person engaged in charitable work in Kenya, his forceful deportation has dented his credential and standing in the society; he has been psychologically traumatized; he has suffered mental pain and anguish and he will in future proactively have to disclose that he had been deported from another country whenever he applies for visa to other countries or for any consultancies worldwide.

6. It is the Petitioner's case that, his right to a fair hearing cannot be limited; pursuant to Article 27(1) of the Constitution everyone has the

right to equal protection of the law; the Respondents failed to give written reasons for the arbitrary decision made against the Petitioner contrary to Article 47 of the Constitution and the Respondent failed to give notice of intention to make an adverse decision against him without granting him an opportunity to make representation contrary to Article 50 of the Constitution.

7. Being aggrieved by the actions of the Respondents, the Petitioner filed this Petition seeking the following orders:

- a) A declaratory Order do hereby issue that the decision to deport the Petitioner from Kenya was illegal and contrary to the law and the Constitution.*
- b) A declaratory Order that the Petitioner's right to fair administrative action was infringed by the Respondents in deporting the Petitioner from the Republic of Kenya.*
- c) A declaratory Order that the Petitioner's right under Articles 25, 29, 45 and 50 of the Constitution have been infringed by the impugned Act of the Respondents deporting the Petitioner from the Republic of Kenya.*
- d) An Order that the Petitioner be supplied with written reasons informing the decisions to declare him a prohibited immigrant by the 1<sup>st</sup> Respondent.*
- e) An Order of Certiorari to move into this Court and quash the decision by the Respondents to declare the Petitioner a prohibited immigrant/inadmissible person into the Republic of Kenya.*
- f) An Order of mandamus do issue directing the Respondent to remove the Petitioner's name from the list of prohibited immigrants/inadmissible persons.*
- g) An Order directing the Respondent to rectify and correct any and all inaccurate information in their records relating to the Petitioner that may have led them to arrive at the impugned decision to illegally deport the Petitioner.*
- h) Compensation for the violation of the Petitioner's fundamental rights and freedoms by the 1<sup>st</sup> Respondent.*
- i) Costs of this Petition.*
- j) Any further Relief or Order that this Honourable Court may deem fit to grant.*

8. The Petition is supported by the affidavit of the Petitioner notarized in London on 6/11/2020.

### **The Response**

9. The Respondents opposed the Petition vide Replying Affidavit sworn on 26/04/2021 by **Jimmy Nyikuli** who is a legal officer to the 2<sup>nd</sup> Respondent. The deponent avers that contrary to the allegations made by the Petitioner, the Petitioner was lawfully denied entry into the country and therefore, the Petition is incompetent, frivolous, vexatious, devoid of merit and constitutes an abuse of the Court process as it fails to disclose any reasonable ground sustainable in law.

10. The deponent concedes that while the Petitioner was born on 3/11/1946 in Mombasa to a British colonial veterinary surgeon, the petitioner remained a British national and at no time did he make any application to be registered as a Kenyan. Further, the Petitioner himself like his father has never been a Kenyan citizen; neither has he held a Kenyan passport nor an Identity Card. At all times, the Petitioner has sought Re-entry permits from as early as 5/09/1969, when he was in the University of Karachi and subsequently in 1971-1976, the Petitioner held several work permits as a lecturer at the University of Nairobi. Therefore, the Petitioner is not Kenyan by birth since neither his father nor mother were Kenyan citizen at the time of his birth in Kenya.

11. The deponent avers that the 2<sup>nd</sup> Respondent received adverse reports from the National Intelligence Service, that the Petitioner was engaged in human trafficking. The Petitioner was subsequently watch listed in the directorate's PISCES border management system, and on 20/10/2020, when the Petitioner attempt to enter the country via Jomo Kenyatta International Airport, he was declared an inadmissible person, denied entry into the country pursuant to the watch list, and returned to his country of origin.

12. It is the Respondent's case that that, the right to enter, live and work in Kenya is a preserve of Kenyan citizens only; the directorate of Immigration is mandated by Statute to regulate entry and exit of a person into Kenya; all foreign nationals who intend to enter, live and work in Kenya ought to comply with statutory and administrative criteria for admission which include possession of a valid visa, work permit and not being a threat to national security.

13. The 2<sup>nd</sup> Respondent does not dispute that the Petitioner is married to a Kenya citizen and their marriage is blessed with two children who are Kenya citizens. However, the status of the Petitioner's wife and children does not grant the Petitioner automatic citizenship. The Petitioner ought to have applied for citizenship through the right channels.

### **Rejoinder**

14. In response to the Replying Affidavit by the Respondent, the Petition filed a Further Affidavit sworn on 6/05/2021. The Petitioner avers that the allegations of human trafficking against him are false, and are meant to mislead this Court and that if at all the allegations were true,

he ought to have been apprehended and taken through the due process of law either in Kenya, the United Kingdom and/or any other place the alleged trafficking occurred since trafficking of persons is a very serious international crime.

15. The Petitioner avers that while the Kenyan State has the right to admit or deny admission into its territory, it does not have an absolute right to hold and maintain false and erroneous information in their databases, which has adverse effect on the Petitioner's fundamental rights and freedoms, since he was never given any written reasons why he was being deported or informed what wrong he had done to warrant his forceful removal from Kenya.

### **Submissions**

16. The Petition was canvassed through written submissions.

17. **Mr. Otieno** learned counsel for the Petitioner reiterated the contents of the Affidavits in support of the Petition and submitted that the deportation of the Petitioner was not in accordance with Section 33(2) of the Kenya Citizenship and Immigration Act (hereinafter "the Act") which outlines the instance where a person can be declared a prohibited immigrant or an inadmissible person.

18. **Mr. Otieno** further submitted that the Respondents violated the Petitioner's right to a fair administrative action in making the decision condemning the Petitioner unheard. Counsel cited the finding in **High Court Petition No. 586 of 2012** between **Bashir Mohamed Jame Abdi and Minister for Immigration & Others** Lenaola Judge held:

**"By denying the subject Abdi Bashir Mohamed alias Cabdiqani Bashir Moxamed entry into Kenya and deporting him to the UK without a formal process or service on him with any written allegations, reasons or order/s and without according him a hearing, to contact his family or counsel, to appeal against the order of denial of entry into Kenya and deportation to the UK was a violation of the subject's constitutional rights of a citizen under Article 123, his fundamental rights and freedoms as to equal treatment and equal action/justice, to deprivation of the society and recognition of his family to a fair hearing under Articles, 27(1), 39, 45(1), 47 and 50(1) of the Constitution."**

19. Counsel submitted that the Respondents by arbitrarily removing the Petitioner from the country, they violated the Petitioner's right to a fair hearing guaranteed under Article 50 of the Constitution; freedom and security of person guaranteed under Article 25 and 29 of the Constitution and the right to family guaranteed under Article 45 of the Constitution. Counsel submitted that under Article 35(2) of the Constitution every person has the right to correction and/or deletion of untrue or misleading information that affect them. Consequently, since the Petitioner will in future be required to explain the reason for his irregular deportation if the Respondent's records are not amended, it is only prudent that the Petitioner be removed from the Respondents' watch list. Counsel cited the finding in **Republic v Director of Immigration Services Ex-parte Planet Motors Company Limited & Anor. [2016] eKLR**, where the Court held that the conduct of the Respondent was unacceptable. Consequently, the Respondent was compelled to remove the 2<sup>nd</sup> Applicant's file from the label "watch list".

20. **Ms. Opio** learned counsel for the Respondent reiterated the content of the Respondents' Replying Affidavit and submitted that the Petitioner was declared a prohibited immigrant in accordance with Section 33 of the Act, after the Respondent received an adverse report on the Petitioner from the National Intelligence Service.

21. On the question of whether the decision to deny the Petitioner entry into the country contravenes the Petitioner's rights under the Constitution, counsel submitted that under Section 33 of the Act, the 1<sup>st</sup> Respondent has the power to remove persons who unlawfully attempt to enter the country. Further, counsel submitted that the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), and the Banjul Charter do not give a right of entry to foreigners. Counsel submitted that in fact, Article 13 of the ICCPR only allows aliens who are already lawfully present in the territory of the State party to be allowed to submit reasons against their expulsion.

22. **Ms. Opio** further submitted that the limitation of the Petitioner's constitutional rights under Article 24 of the Constitution was reasonable in the circumstances of this particular case. Counsel cited the finding in **Khatija Ramtula Nur Mohamed & another v Minister for Citizenship and Immigration & 2 others [2015] eKLR**, where the Court held that considering the provisions of Section 39(d) of the Act vis-à-vis Article 24(1) of the Constitution, the limitation was reasonable and justifiable and hence not unconstitutional.

23. **Mr. Otieno** in rejoinder submitted that the law treats an inadmissible person differently from a prohibited immigrant and the Respondents ought to have made up their minds about which provision of law the Petitioner was deported, since from the Respondents pleading and submission it is not clear whether the Respondent was declared a prohibited immigrant or an inadmissible person.

### **The Determination**

24. I have carefully considered the Petition, further affidavit, the opposing affidavits and submissions by the parties. I have isolated the following issue, which is my view fall for determination:

***Whether due process was followed in denying the Petitioner entry into Kenya.***

25. There are constitutional ways through which a person can become a Kenyan citizen. Article 13(2) of the Constitution provides that citizenship may be acquired through birth or registration. Article 14 of the Constitution provides that:

#### ***Citizenship by birth***

**“14(1) A person is a 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;**

**(2) Clause (1) applies equally to a person born before the effective date, whether or not the person was born in Kenya, if either the mother or father of the person is or was a citizen;**

**(3) Parliament may enact legislation limiting the effect of clauses (1) and (2) on the descendants of Kenyan citizens who are born outside Kenya;**

**(4) ...”**

26. Therefore for a person to be a citizen by birth one or both of his or her parents must have been a Kenyan citizen on the day of his or her birth. In this case, it is clear that the petitioner was born on 3/11/1946 in Mombasa. The petitioner’s father was a colonial veterinary surgeon from Britain who was recruited by the British colonial government in Kenya. However, until his death in 1956 the petitioner’s father never at any time made an application to be registered as a Kenyan citizen. There is no information pertaining to the petitioner’s mother citizenship status that has been furnished to this court. Therefore, this court finds and holds that at the time of the petitioner’s birth in 1946 his parents were not Kenyan Citizens. Therefore, as at the time of the birth of the petitioner, none of his parents were citizens of Kenya.

27. It follows that the Petitioner herein can only acquire Kenyan citizenship by registration which is provided for in Article 15 of the Constitution as follows:

**“(1) A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen.**

**(2) A person who has been lawfully resident in Kenya for a continuous period of at least seven years, and who satisfies the conditions prescribed by an Act of Parliament, may apply to be registered as a citizen.**

**(3) A child who is not a citizen, but is adopted by a citizen, is entitled on application to be registered as a citizen.**

**(4) Parliament shall enact legislation establishing conditions on which citizenship may be granted to individuals who are citizens of other countries.**

**(5) This Article applies to a person as from the effective date, but any requirements that must be satisfied before the person is entitled to be registered as a citizen shall be regarded as having been satisfied irrespective of whether the person satisfied them before or after the effective date, or partially before, and partially after, the effective date.”**

28. However, the real issue before the Court is not about citizenship. It is about denial of entry rights to Kenya. Any authorized person can enter Kenya regardless of whether or not they are Kenyan citizens, provided that the law allows them entry. Therefore, the issue for consideration by the Court is whether due process was followed in denying the Petitioner entry into Kenya.

29. The Respondents have averred that the Petitioner was simply declared an inadmissible person and deported to his country of origin, Britain. The relevant part of Section 33 of the Act addressing the issue of Prohibited Immigrants and inadmissible persons provides thus:

**(1) For purposes of this Act, a prohibited immigrant is a person who is not a citizen of Kenya and who—**

**(a)**

**(b) a person engaged in human trafficking, human smuggling, sexual exploitation and sex crimes;**

**(c) ...**

**(2) For purposes of this Act, an inadmissible person is a person who is not a Kenyan citizen and who—**

**(a) refuses to submit for examination by a medical practitioner after being required to do so under section 48(1)(d) of this Act;**

**(b) the family and dependants of a prohibited immigrant;**

**(c) incapable of supporting himself and his dependants (if any) in Kenya;**

**(d) is adjudged bankrupt;**

**(e) anyone who has been judicially declared incompetent;**

**(f) an asylum seeker whose application for grant of refugee status has been rejected under the Refugee Act, 2006 (No. 13 of 2006); or**

*(g) is, by order of the Cabinet Secretary, declared inadmissible on grounds of national security or national interest.*

*(3) The Cabinet Secretary may make regulations on admission of immigration officer's right to deny entry a person other than an asylum seeker who, upon entering or seeking to enter Kenya, fails to produce a valid and acceptable passport or travel document recognized in Kenya to an immigration officer on demand or within such time as that officer may allow.*

*(4) Deleted by Act No. 12 of 2012, Sch.*

*(5) Subject to section 34 the entry into and residence in Kenya of a Prohibited Immigrant or an inadmissible person shall be unlawful, and a person seeking to enter Kenya shall, if he or she is a prohibited immigrant or inadmissible person, be refused permission to enter or transit through Kenya, whether or not he or she is in possession of any document which, were it not for this section, would entitle him or her to enter or transit through Kenya.*

*(6) An immigration officer may issue a pass to a prohibited immigrant or inadmissible person to enter or remain temporarily in Kenya for such period or authorize such prohibited immigrant or inadmissible to transit through Kenya subject to such conditions as may be specified in that pass or for transit purposes.*

*(7) The Cabinet Secretary may make Regulations for the declaration of prohibited immigrants or inadmissible persons.*

*(8) The Cabinet Secretary may from time to time review the status of prohibited immigrants and inadmissible persons, subject to the advice of the relevant committee.*

30. On the Power to remove persons unlawfully present in Kenya. Section 43 of the Act provides:

*“43(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, 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—*

*(a) 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*

*(b)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.*

*(4) Any order made or directions given under this section may at any time be varied or revoked by the Cabinet Secretary by a further order, in writing.*

*(5) In the case of a person who arrives in Kenya illegally, the powers of the Cabinet Secretary under this section may be exercised either by the Cabinet Secretary or by an immigration officer.*

*(6) An order made or deemed to have been made under this section shall, for so long as it provides that the person to whom it relates shall remain out of Kenya, continue to have effect as an order for the removal from Kenya of that person whenever he is found in Kenya, and may be enforced accordingly; but nothing in this subsection shall prevent the prosecution for an offence under this Act or any other written law of any person who returns to Kenya in contravention of such an order.*

*(7) Where a person is brought before a court for being unlawfully present in Kenya, and the court is informed that an application, to the Cabinet Secretary, for an order under this section has been made or is about to be made, the court may order that such person be detained for a period not exceeding fourteen days or admit the person to bail, pending a decision by the Cabinet Secretary.”*

31. The Respondents have alleged that it is pursuant to an adverse report against the Petitioner from the National Intelligence Services they watch listed the Petitioner's names in the Directorate's PISCES border management system.

32. The Petitioner alleges that he was detained at the airport for two days without food; he was held incommunicado; he was denied access to an advocate; he was denied consular services, he was not presented before any court of law or tribunal for the two days he was detained; he was not given written reasons as to why he was declared a prohibited immigrant and he was never afforded a hearing or an opportunity to make representations on the decision to deport him. Consequently, the Petitioner avers that his rights guaranteed under Articles 25, 27(1), 47 and 50 of the Constitution were violated.

33. It is noteworthy that Regulation 33 of the Kenya Citizenship and Immigration Regulations, 2012 is in respect of a person who has been found to be a prohibited immigrant or inadmissible for a prohibited immigrant's pass or inadmissible person's as stipulated under Section 33 of the of the Citizenship and Immigration Act. It provides:

***“(1) An application by a person who is, in accordance with section 33 of the Act, a prohibited immigrant or inadmissible for a prohibited immigrant's pass or inadmissible person's pass shall be in Form 32 set in the First Schedule and the application shall be made before arriving at the point of entry.***

***(2) An immigration officer may, after considering an application made under paragraph (1), issue a prohibited immigrant's or inadmissible person's pass in Form 34 set out in the First Schedule, to the applicant.”***

34. On the issuance of notice to prohibited immigrant or inadmissible persons, Regulation 37 provides:

***“(1) An immigration officer may issue a notice, in Form 38 set out in the First Schedule, to a person who has been declared to be a prohibited immigrant or an inadmissible person and who enters or intends or attempts to enter Kenya by any means.***

***(2) A notice to a prohibited immigrant or an inadmissible person may require the prohibited immigrant or inadmissible person—***

***(a) to remain on the carrier by which he entered, intended or attempted to enter Kenya;***

***(b) to leave Kenya by such means and within such period as may be stated in the notice; and***

***(c) to enter into or remain in Kenya subject to complying with such requirements as to place of residence, occupation, security or reporting to a specified authority as may be specified in the notice.***

***(3) An immigration officer may vary the terms and conditions specified in the notice to a prohibited immigrant or inadmissible person.***

***(4) Any prohibited immigrant or inadmissible person to whom a notice has been issued under this regulation has been who refuses or fails to comply with any requirements of the notice commits an offence.***

***(5) Where an immigration officer has issued a notice to a prohibited immigrant or inadmissible person under this regulation, the immigration officer may, if he deems it fit, issue a copy of such notice to the owner, person in charge or agents of the carrier on or from which the prohibited immigrant or inadmissible person entered, intended or attempted to enter Kenya, and thereafter the owner, person in charge or agents may take such steps as shall be necessary to ensure that the prohibited immigrant or inadmissible person complies with the terms of the notice served on him:***

***Provided that compliance with the requirements of a notice under this regulation shall not relieve the owner, person in charge or agents of the carrier of his obligations under the Act or any other written law.***

***(6) Where a prohibited immigrant or an inadmissible person has been refused permission to enter Kenya, the immigration officer shall issue a notice in Form 39 set out in the First Schedule to the owner, person in charge or agents of the carrier on or from which the prohibited immigrant or inadmissible person entered, intended or attempted to enter Kenya requiring the owner, person in charge or agents of the carrier on or from which the prohibited immigrant or inadmissible person entered, intended or attempted to enter Kenya to take the prohibited immigrant or an inadmissible person into their custody and ensure that the prohibited immigrant or an inadmissible person is removed from Kenya.”***

35. From the foregoing, I find and hold that under Section 33(7) of the Act, the Cabinet Secretary may make Regulations for the declaration of prohibited immigrants or inadmissible persons. It is very unfortunate that the aforesaid Regulations on declaration of a prohibited immigrants or inadmissible persons are yet to be enacted 10 years after the Act came into force. However, it is noteworthy that under Section 33(2) (g) of the Act, it is provided, that by order of the Cabinet Secretary, a prohibited immigrant or inadmissible person may be declared inadmissible on grounds of national security or national interest. Therefore, the Cabinet Secretary has the discretion to declare a person to be an inadmissible person and/or a prohibited person under Section 33(2) (g) of the Act. However, like every discretion, this discretion must be exercised judiciously and in an open and transparent way. Even a foreigner who comes to Kenya has constitutional rights. It would be very unfortunate that such a foreigner is unilaterally declared a prohibited person without any due process.

36. In **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR** the Court of Appeal cited **Marbury v Madison– 5 US. 137** where it was stated that:

***“The province of the court is solely, to decide on the rights of individuals and not to enquire how the executive or executive officers perform duties in which they have discretion.”***

37. From the foregoing, it would appear that it is not the duty of this Court to enquire how the Respondents arrived at the decision to declare the Petitioner an inadmissible person. Further, under the Act, once a person has been declared to be an inadmissible person under Section 33 of the Act, there is no provision for the dispute to be resolved by a court of competent jurisdiction. What happens after a notice under Section 33 of the Act is issued is provided for under Regulation 37 of the Kenya Citizenship and Immigration Regulations as mentioned earlier. There is no provision for the due process before a court of law or even the right to appeal the decision of the Respondents. Clearly, the provisions of the Act and regulations made under it are in contravention of the right to fair hearing under Article 50 of the constitution and

the right to fair administrative action under Article 47.

38. In *Bashir Mohamed Jame Abdi and Minister for Immigration & Others (supra)* Lenaola J held that:

**“By denying the subject Abdi Bashir Mohamed alias Cabdiqani Bashir Moxamed entry into Kenya and deporting him to the UK without a formal process or service on him with any written allegations, reasons or order/s and without according him a hearing, to contact his family or counsel, to appeal against the order of denial of entry into Kenya and deportation to the UK was a violation of the subject’s constitutional rights of a citizen under Article 123, his fundamental rights and freedoms as to equal treatment and equal action/justice, to deprivation of the society and recognition of his family to a fair hearing under Articles, 27(1), 39, 45(1), 47 and 50(1) of the Constitution.”**

39. Section 33 (6) of the Act states:

***“(6) An immigration officer may issue a pass to a prohibited immigrant or inadmissible person to enter or remain temporarily in Kenya for such period or authorize such prohibited immigrant or inadmissible to transit through Kenya subject to such conditions as may be specified in that pass or for transit purposes.”***

40. The question to be answered by this Court is whether the Petitioner was accorded a fair hearing, or his rights to fair administrative action under Article 47 and the Fair Administrative Actions Act, 2015. Article 47 states:

***“(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)...”***

Section 4 of the Fair Administrative Action Act (No. 4 of 2015) 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.”***

41. It is this Court’s view that the aforesaid Section 33 (6) is a discretionary power to be exercised by the immigration officer. In addition, this power only comes after a person has been declared as an inadmissible person under Section 33 of the Act. In other words, this Section is available to persons already found unfit to enter Kenya. The Section does not cure the mischief, which Article 47 and the Fair Administrative Actions Act envisaged. Therefore, Section 33 of the Act is not applicable until the Petitioner has accepted the status of an inadmissible person. Further, it would appear that Section 33 (6) of the Act affords affected persons fair administrative action, but in the reverse gear, that is, after they have already been condemned unheard. It has not been demonstrated that the petitioner was accorded a fair administrative action and the right to be heard, and that being so, it is the finding hereof that the Petition has been proved on a balance of probability.

42. The criminal allegations made against the Petitioner should be investigated and appropriate action taken according to the results of the investigations.

43. In the upshot, I issue orders as hereunder:

***i. That a declaration is hereby issued declaring that the decision of the Respondents to declare the Petitioner an inadmissible person into the Republic of Kenya is illegal, null and void.***

***ii. An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing and to quash the decision of the Respondents to declare the Petitioner an inadmissible person into the Republic of Kenya.***

***iii. A declaration is hereby made that the Petitioner is not an inadmissible person and that he shall be allowed to enter and remain in Kenya in terms of the visa granted.***

***iv. An Order is hereby issued directing the Respondents to remove the Petitioner’s name from the list of inadmissible person pending investigation on the allegations against him.***

***v. An Order is hereby issued allowing the Petitioner to enter Kenya upon him acquiring the necessary visa.***

***vi. An Order is hereby issued that upon the entry into Kenya by the Petitioner, any adverse criminal allegations against him shall be investigated in accordance with the laws of Kenya, and necessary actions be taken pursuant to any such investigations.***

***vii. Costs of the Petition are for the Petitioner.***

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF JULY, 2021.**

**E. K. OGOLA**

**JUDGE**

Judgment delivered via MS Teams in the presence of:

Ms. Leah Ezekiel for Willis Otieno for Petitioner

Ms. Opio for Respondents

Ms. Peris Court Assistant