



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 328 OF 2019

IN THE MATTER OF ARTICLES 20, 22, 23, 29, 45, 47, 50, 159 AND 165 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 20, 22, 23, 29, 45, 47 & 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF DEPORTATION IN CONTRAVENTION OF ARTICLE 27, 29, & 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF THE PRINCIPLE GUIDELINES OF THE KENYA CITIZENS AND FOREIGN NATIONALS MANAGEMENT SERVICES ACT

AND

BETWEEN

OUMAROU MOUMOUNI ALI.....PETITIONER

-VERSUS-

THE DIRECTOR GENERAL KENYA CITIZENS AND.

FOREIGN NATIONALS MANAGEMENT SERVICES.....1ST RESPONDENT

THE CABINET SECRETARY INTERIOR

COORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

THE OFFICER OF THE INSPECTOR GENERAL.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....TH RESPONDENT

JUDGMENT

PETITIONER'S CASE

1. The Petitioner through an amended petition dated 11th October 2019 seek the following remedies:-

a) A declaration that the Petitioner's constitutional rights under Article 47 of the Constitution of Kenya have been infringed by the 1st Respondent.

b) A declaration that the Petitioner's rights under the Vienna Convention on Diplomatic Relations, 1961 have been infringed by

the 1st Respondent.

c) A declaration that to the extent that the 1st Respondent has refused to renew the Petitioner's Work permit, that such refusal is unreasonable, irrational, unprocedural, contrary to the Constitution of Kenya, and applicable law, and is therefore illegal and void.

d) A declaration that the Petitioner, as the Honorary Consul of the Republic of Niger in Kenya, enjoys diplomatic immunity and cannot be unlawfully arrested and deported in blatant disregard of applicable international law including Article 23 of the Vienna Convention on Diplomatic Relations of 1961 read together with Section 34(2) and (3) of the Kenya Citizenship and Immigration Act No. 12 of 2011.

e) A declaration that the declarations dated 14th August 2019 and 21st December 2018 issued against the Petitioner are illegal and void and are hereby quashed.

f) An order of mandamus to compel the Respondents to remove the Petitioner's name from the list of Prohibited Immigrants.

g) An order for mandamus directing the 1st Respondent to forthwith issue the Petitioner with the Class G Work Permit.

h) In the alternative, there be an order of mandamus directing the 1st Respondent to renew the Petitioner's work permit.

i) In the alternative, there be an order extending the Petitioner's Class G Work Permit for a further two years to enable the Respondents and the Petitioner finalise all pending applications by the Petitioner.

j) An order of Prohibiting the 1st, 2nd and 3rd Respondents from preventing the Petitioner from returning to, and remaining in the Republic of Kenya.

k) A permanent injunction restraining the Respondents whether by their agents, servants or anyone acting under them from arresting and/or deporting the Petitioner unlawfully and/or without proven just cause and/or without following due process.

l) That costs of this petition be provided for.

2. The Petitioner describes himself as the Honorary Consul of the Republic of Niger in Kenya having been commissioned as such on 4th March 2019 pursuant to an exequatur issued on the 20th December 2018. He has since lived in Kenya for 10 years and has held valid work permit and complied with all the laws of the land.

3. The petitioner aver that he is married to a Kenyan and has two children who are Kenyan Citizens.

4. It is contended by the Petitioner that on 22nd August 2019, he was approached by five unidentified men who informed him they had orders to escort him to Jomo Kenyatta International Airport and ensure that he left the Country. He sought the grounds for the action but none were given. He consequently informed them he was a diplomat but the individuals were adamant that he had to leave the Country. He cooperated with the five individuals, went to the airport and proceeded to depart the country.

5. The Petitioner subsequently learned through his advocate that the declaration was made by the 2nd Respondent under Section 33(1) of the Kenya Citizenship and Immigration Act, 2011 declaring the Petitioner a prohibited immigrant, on 3rd September 2019. The declaration had been issued on 14th August 2019, which was never served upon the Petitioner.

6. It is averred that the Petitioner further learnt from the Replying Affidavit filed in court on 2nd October 2019 that there was another declaration which had been issued on 21st December 2018, and which was not communicated to him 8 months since being made. The second declaration however referred to a different section of the law which the 1st Respondent was invoking in the said deportation.

7. It is asserted by the Petitioner herein that being the Honorary Consul of the Republic of Niger in Kenya, it follows his presence in the Country cannot be unlawful. It is further averred the Petitioner has never been informed of which law his presence has breached in order for him to either challenge or remedy them as the case may be.

8. It is Petitioner's contention that he has been in the Country legally since the year 2008 and that he lodged his application for extension on 30th January 2019 for the renewal of his work permit. The 1st Respondent did not get back to him with confirmation on either a rejection or approval of his application. He had even applied to become a Kenyan Citizen having established deep roots in both family and business in Kenya. He has a wife and two children of tender age. He also has business legally registered in Kenya which has provided employment for over 100 individuals in those companies.

9. In view of the aforesaid the Petitioner aver that he is unable to come back to a country he has called home for over 10 years. That being aggrieved by the actions of the 1st, 2nd, 3rd, and 4th Respondents he preferred this Petition.

RESPONDENTS CASE

10. The Respondents are opposed to the Petitioner's Petition dated 16th August 2019. The Respondents in opposition to the Petitioner's Petition rely on a Replying Affidavit sworn on 16th September 2019 and on the grounds of opposition dated 10th February 2020.

11. The Respondents grounds of opposition are as follows:-

a) That the Petitioner is a prohibited immigrant, Section 33(1) (d) of Kenya Citizenship and Immigration Act, 2011 provides for persons termed as 'Prohibited Immigrants and Section 43(1) gives power to the 2nd Respondent to remove persons who are unlawfully present in Kenya.

b) That the declaration of the petitioner as a prohibited immigrant automatically resulted in the revocation of his entry and work permits in terms of the provisions of Kenya Citizenship and Immigration Act and the Kenya Citizens and foreign Nationals Management Service Act.

c) That by dint of article 39 93) of the Constitution and Section 22 (1) (a) of the Kenya Citizenship and Immigration Act, the right to enter, remain in and reside anywhere in Kenya is inherently vested in the citizens of Kenya. A non-citizen's resident and their act of remaining in Kenya is a privilege which may or may not be granted.

d) That the right of removal of undesirable aliens under section 33 and 43 of the Kenya Citizenship and Immigration Act, including removal of those involved or suspected to be involved in criminal activities such as money laundering and other transitional organized crimes is an act of absolute state sovereignty and not a determination of a civil right.

e) That provisions of Article 39(3) are in line with the provisions of international conventions. Such conventions do not give a right of entry to aliens. The Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR) and the African Charter on Human and People's Rights do not give a right of entry to aliens. Article 13 of the ICCPR gives states parties the right to remove any alien for compelling reasons, or for national security.

f) That exercise of sovereign authority rests upon the executive. The orders rightly fall within the administrative jurisdiction of the respondents. The doctrine of comity therefore ought to be observed.

g) That the orders sought in the petition seek to violate the principle of separation of powers and for this Honourable court to interfere with the role of the executive arm of government in exercise of its sovereign authority in foreign relations. Admission and expulsion of foreign diplomats are matters under the exclusive jurisdiction of the executive.

h) That the petition is bad in law, unmerited and abuse of the process of this Honourable court and ought to be dismissed forthwith.

ANALYSIS AND DETERMINATION

12. I have very carefully considered the parties rival pleadings, the counsel rival written submissions and from the same the following issues arise for consideration:-

a) Whether due process was followed in the Petitioner's deportation?

b) Whether there is an infringement on petitioner's constitutional rights and freedoms under fair administrative action?

c) Whether there exists a legitimate expectation for petitioner's work permit being renewed and/or approved?

d) Whether the petitioner is entitled to the reliefs sought?

A. WHETHER DUE PROCESS WAS FOLLOWED IN THE PETITIONER'S DEPORTATION?

13. The 1st Respondent contention herein is that under **Section 4 of the Kenya Citizen and Immigration Act, 2011** (herein the KCIA) its functions include but is not limited to the control and regulation of residency, border management including the control and Regulation of entry and exit of all persons at ports and points of entry and exit; advising the 2nd Respondent on declaration and removal of prohibited immigrants and undesirable persons among others.

14. The Respondents aver that through a declaration dated 21st December 2018, the 2nd Respondent in accordance with the provisions of **Section 33(1) (j) of KCIA** lawfully declared the petitioner a member of the prohibited class and a prohibited immigrant whose presence in the Republic of Kenya was contrary to national interests. That further through another declaration of even date, the 2nd Respondent in accordance with powers vested upon him by **Section 43(1) of KCIA** directed the removal of the Petitioner from the territory of Kenya to his country of origin Niger.

15. **Section 33(1) (j) of KCIA** provides as follows:-

"33. (1) For purposes of this Act, a prohibited immigrant is a person who is not a citizen of Kenya and who is-

(j) a person involved in or is reasonably suspected to be engaged in money laundering.”

16. From clear provisions of **Section 33(1) of KCIA** it gives the definition of the class of prohibited immigrants. By virtue of the declaration therefore dated 21st December 2018, the Petitioner fell within the category under **Section 33(1)(j) KCIA**.

17. The Petitioner contend that a deportation order amounts to a finding on his character. In view of the impact that results from a deportation order, I find that it is improper to have the order prepared and issued without the affected party begin made aware of the laws, he was breaking and accorded a fair chance to defend himself. In the instant Petition, the petitioner has averred he was not made aware of the deportation orders before they were issued against him. He should have been made aware of any allegation made against him and accorded a fair hearing as opposed to the drastic measures and act of a deportation order being issued.

18. The 1st deportation order was issued on 21st December 2018 a day after he was issued with an exequatur by the Government of Kenya. The said declaration / deportation was not effected for 9 months and a different one relying on a different section of law was issued on 14th August 2019. As regards the first deportation order the petitioner was allowed to stay in the country for 9 months conducting his affairs normally without being made aware that a declaration had been made requiring his removal from the country. This, I find was not only wrong but illegal, as it offends all constitutional and statutory imperatives for fair administrative action that is, transparency, in the conduct of such serious matters.

19. The Petitioner has in his Petition contended that he is a law-abiding gentlemen, with clean record. He has a family of two children. His wife is a Kenyan Citizen. He has never engaged in any criminal activity in Kenya or in any other place in the world. He has stated that he is an honest hardworking business person, responsible and a dedicated family man. He is an Honorary Consul of Niger. His Exequatur was issued on 20th December 2019 by the Ministry of Foreign Affairs. It therefore follows the Petitioner enjoyed diplomatic immunity under **Vienna Convention on Diplomatic Relations 1961** and the **Vienna on Consular Relations 1963**. I find that the laid down procedure in dealing with diplomats was not followed; as his diplomatic immunity was not waived by the sending state at no particular instance. **Section 34 of KCIA** which donates power to the 2nd Respondent herein also prohibited the issuance of declaration such as the impugned one in this matter.

20. The Privileged Immunities Act set out the circumstances under which immunity is conferred to persons having diplomatic status in Kenya. The Act incorporates some articles of Vienna Convention on Diplomatic Relations as part of the Laws of Kenya. The Articles of Vienna Convention on Diplomatic Relations having the force of law in Kenya are provided in the First Schedule of the Act. **Article 31 (1) of the Convention** provides thus:

“A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:-

a. A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

b. An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

c. An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.”

Article 32 of the Convention provides that:-

“1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.

2. The waiver must always be express.”

21. From the Petitioner’s averments he urged that he was never served with any deportation order and was first made aware of its existence when his advocate was served with the same on 3rd September 2019, more than a month after it had been issued.

22. In **Nairobi High Court Misc. Civil Application No. 430 of 2004, Leonard Stamen v The Minister for Home Affairs & 2 Others**, Justice J. B. Ojwang (as he then was) stated as follows:

“Dr. Khaminwa for the Applicant submitted that the powers granted the Minister for Home Affairs under Section 3 and 8 of the Immigration Act were well and truly amenable to abuse. On this argument, I am in agreement with counsel. He then submitted that in such a situation, where powers granted under the law are open to abuse, to the detriment of the individual in the matter of fundamental rights, then intrinsically and as of the very essence of judicialism and of the well accepted principles of the rule of law in a common law system such as that applicable in Kenya, the Judicial Review jurisdiction of this Court is, perforce, applicable and is indeed mandatory. This with respect, is the correct statement of the most elemental principle of law governing the jurisdiction of the High Court, in all situations where an abuse of public powers is alleged to have come to pass. Powers of this nature are quasi-judicial. They are potentially inimical to the fundamental human rights of the individual and in civilized society, there must be an agency of State in place to protect those rights, and thus to call to order any public officer who treads rough-shod upon them. That agency of the State is this Court; it has full jurisdiction to exercise review powers over all public bodies which make decisions with impacts on the sphere of individual liberty.”

23. The position taken in the above-mentioned case was recently restated by Justice G. V. Odunga, in the *Republic v. Minister of State for Immigration of Persons exparte C. O. (2013) eKLR* where the learned Judge under paragraph 33 of the Judgment stated:-

“To hold that the Minister is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim. 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 tee with branches in illegality, irrationality, impropriety of procedure (the three “1’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.”*

24. It is instructive to note that 1st Respondent invoked **Section 33(1) (f) of KCIA, 2011** in the declaration dated 14th August 2019 and **Section 33(1)(j) of the Act** in the declaration dated 21st December 2018 (exhibit AOM7) in the supporting affidavit are the said two declarations. **Section 33 (1)(f) of KCIA** is clear and provides that:

“33. Prohibited immigrants and inadmissible person:-

(f) a person whose presence in or entry into Kenya is unlawful under any written law.”

Section 43(1) reads as follows:

“(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.”

Section 43(1, 3) further stipulates as follows: **“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.”**

25. From the pleadings herein I find nowhere where there is a finding to the effect that the Petitioner herein was unlawfully in the Country and further noted that the Cabinet Secretary made the declaration subject to the constitution and related laws. The Petitioner was not informed of any reasons why he was being deported neither was he given a chance to be heard as provided by the Constitution and the statutes. I am further of the view that even if the Cabinet Secretary had powers to deport the Petitioner, he ought to have been given a fair hearing and be informed of the charges against him as provided under **Article 50 of the Constitution of Kenya 2010**.

26. In the case of **Leonard Sitanze vs. The Minister for Home Affairs & 2 Others, HC. Misc. Civil Application No. 330 of 2004 ((unreported) Justice Ojwang’** (as he then was), in dismissing allegations that the state actions against the applicant were justified on grounds of national security and in quashing the deportation order and prohibiting the applicant’s deportation, observed as follows:-

“Mr. Kaka for the Respondents opposed the application, for the reason that the Minister was not minded to approve the Applicant’s application for the renewal of the permit to stay in the country, Counsel restated the content of the deposition by Damaris Mboya of the Immigration Department (dated 22nd April 2004), that in considering the Applicant’s case for renewal of the permit, some classified information had been received that the Applicant was a threat to national security. I have to note that not much information is given about this threat, and neither the formulation of the relevant affidavit on the question, nor the manner in which counsel communicated this claim before the Court, appeared business-like, done in genuine course of duty or indeed carried any conviction at all. The model of presentation of this charge that the Applicant was a danger to national security was essentially causal, and the Court has no reason to believe it. So, in effect, Mr. Kaka is left with bald contentions, that the applicant must be restricted and deported just because the Minister had by an instrument declared him to be a prohibited immigrant by virtue of Section 3 of the Immigration Act, and then proceeded under Section 8 of the same Act, to make a declaration that the Applicant as a prohibited immigrant be placed in Police custody awaiting deportation. Mr. Kaka then proceeded to argue that the Immigration Act has no place for a hearing to persons begin restricted and deported, and that Parliament had not given the Minister any leeway for any hearing to be accorded to such persons...”

The good judge went on to state as follows:

“...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 must take judicial notice that the precious ingenuity of the common law and its jurisprudence and philosophy, where matters of public law are concerned, is that good governance has judicialism as its partner, and that there are to be no decisions taken by public bodies which derogate from the private rights of individuals where the views of such individuals are entirely disregarded. The richness of the safeguards of a written Constitution, such as that of Kenya, is assured by the philosophy and practices of the common law as maintained by the Judiciary...”

The learned judge then went on to hold as follows:

“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 tell-tale 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.”
(Emphasis mine).

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. 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.

B. WHETHER THERE IS AN INFRINGEMENT ON PETITIONER’S CONSTITUTIONAL RIGHTS AND FREEDOMS UNDER FAIR ADMINISTRATIVE ACTION?

28. The Petitioner urge that **Article 47(1) of the Constitution** provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. That subsection 2 makes it even more forceful that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, that person has the right to be given written reasons for that action. In the instance Petition, it is asserted that the 2nd Respondent instigated the arrest and deportation of the Petitioner by the 3rd Respondent.

29. The 1st Respondent invoked **Section 33(1) (f) of the KCIA, 2011** in the declaration dated 14th August 2019 and **Section 33(1)(j) of the KCIA 2011** in the declaration dated 21st December 2018. The Petitioner was never granted any hearing nor was he informed of any charges against him before the 1st Respondent proceeded to issue the declarations and consequently deported the Petitioner. It is of great interest to note the declaration made on 21st December 2018 was made a day after the Cabinet Secretary for Foreign Affairs had issued the Petitioner with a Exequatur on 20th December 2018. The declaration of 21st December 2018 was not enforced 9 months down the line since its issuance. The Petitioner was never granted a hearing neither was he informed of any charges nor were they substantiated.

30. The Constitutional Court of South Africa in the case of **President of the Republic of South Africa and Others Vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1**, stated that:

“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 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...”(emphasis mine)

31. It should be noted that the right to fair administration action is of great significance in ensuring that there is a constitutional control over the exercise of power and in regulating the conduct of public administration and in following and complying with constitutional standards of administrative justice. The court of Appeal in the case of **Judicial Service Commission v. Mbalu Mutava & another (2014) eKLR** held thus:-

“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 form which administrative law under the common law was developed.” (emphasis mine)

32. In the case of **Kenyan Human Rights Commission & another v. Non-Governmental Organization Co-ordination Board & another (2018) eKLR**; Justice E. C. Mwita stated:-

“Taking the above jurisprudence into account, there is no doubt in my mind, that acting as it did, the respondent violated 1st Petitioner’s right to a fair Administrative Action contrary to Article 47 of the Constitution. Administrative Actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness. According a party, a hearing before taking action against him is no longer discretionary. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation.

The Judge further stated ... “Taking the above jurisprudence into account, there is no doubt in my mind, that acting as it did, the respondent violated 1st petitioner’s right to a fair Administrative Action contrary to Article 47 of the Constitution. Administrative

Actions that flow from statutes, must not meet the constitutional test of legality, reasonableness and procedural fairness. According to a party, a hearing before taking action against him is no longer discretionary. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation.

This court can only emphasize that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void.”

33. Similarly in the *High Court Petition No. 586 of 2012 between Bashir Mohamed Jame Abdi and Minister for Immigration & Others* Justice I. Lenaola (as he then was) 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.” (emphasis mine)

34. From the uncontroverted facts of the Petitioner’s case, I find that the deporting of the Petitioner to Niger without any formal process or service on him with the declaration, written allegations, reasons and failure to accord him a hearing and giving him time to appeal against the deportation order or challenge the same, the Respondents violated the Petitioner’s constitutional rights as to equal treatment of the law. The 2nd Respondent’s action was unfair, unreasonable, irrational, unprocedural and illegal. The declaration thereof deserve to be quashed bearing in mind that the Petitioner has children born of a Kenyan mother and his investments in Kenya where he has been residing for 10 years. This case is similar to the case of *Egal Mohamed Osman vs. CS Ministry of Interior and Co-ordination of National Government & 2 Others (2015) eKLR* where Hon. Justice I. Lenaola (as he then was) stated:

“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 J. 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.” (emphasis mine)

35. From the above, it should be a reminder to the 3rd Respondent, that this Court will not tire in reminding the 3rd Respondent, that the Constitution of Kenya is the Supreme law. It has life and it has teeth. It is speaking loudly and reminding everyone frustrating justice that I find justice is our shield and defender. The earlier the 3rd Respondent should realize that impunity is the biggest threat to the achievement of our constitutional aspirations, the better for those who seek the services of that office. The 3rd Respondent is reminded justice and fairness demands one to walk the narrow straight path focused on doing justice to all, without turning to the right or left otherwise impunity will kill our constitutional aspirations.

I find the manner in which the Petitioner has been treated is unbearingly shameful of a democracy, callous to the extreme and insensitive to a human dignity and to an individual whose children are born of a Kenyan mother, and are Kenyan citizens by birth.

From the above I have no doubt to find and firmly hold that the Petitioner’s rights and freedoms under Fair Administrative Action under *Article 47(1) (2) of the Constitution* were infringed by the Respondents herein.

C. WHETHER THERE EXISTS A LEGITIMATE EXPECTATION FOR PETITIONERS WORK PERMIT BEING RENEWED AND/OR APPROVED?

36. The Petitioner urges that legitimate expectation is defined in the book of *Pollard, Parpworth and Hughes Writing at Page 583 in the 4th Edition of Constitutional and Administrative Law*: Text with material; the authors stated:

“Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads to a person or body to expect that the public authority will, in the future, continue to act in a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, resale from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue. This is of particular importance if an individual has acted on the representation to his or her detriment”.

Also, in the 4th Edition, Vol. 1 (1) At Page 151, Paragraph 81 of the Halsbury’s Laws of England, legitimate expectation is described as follows:

“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice”.

37. In the instant Petition, the Petitioner made an application seeking to have his work permit renewed on 30th January 2019, paid the

processing fees (see exhibit AOM 4) in the affidavit in support of the amended petition in an acknowledgementship for processing fees. It is Petitioner's position that he had invested in this country, he has never breached any law and is married to a Kenyan lady. They have two children who are Kenyan Citizens (See exhibit AOM 2 and AOM 3).

38. It is Petitioner's case that he had a legitimate expectation that his work permit was going to be renewed. He had thus invested heavily in Kenya and had lived in Kenya for over 10 years. He avers that he was on the path to citizenship and even though this is issued on discretion; he had a legitimate expectation that the work permit would be renewed to enable him carry on with his family life, business and even the diplomatic assignment bestowed on him by a friendly state (Niger). It is contended that at the time of his deportation, he was in charge of issuing visas and all diplomatic activities for the Republic of Niger.

39. The Respondent's contention on the other hand is, that the legal position has always been that there cannot be a legitimate expectation without adherence to statutory or constitutional provisions. That it is an established principle that no legitimate expectation can override clear statutory provisions.

40. That according to *De Smith Woolf & Jowell*, "*Judicial Review of Administrative Action*" 6th Edn. Sweet & Maxwell page 609; it states:-

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage."

41. Further in the case of *Republic v Kenya Revenue Authority Ex-parte Shake Distributors Limited HC Misc Civil Application No. 359 of 2012* court observed as follows:

"For the promise to hold, the same must be made within the confines of law. A public body cannot make a promise which goes against the express letter of the law."

42. In addition to the above the Respondent relies in the case of Supreme Court case of *Communication Commission of Kenya & 5 Others v Royal Media Services & 5 Others, SC Petition Nos. 14, 14A, 14B & 14C of 2014 [2014] eKLR* in which the supreme Court succinctly set out the principles of legitimate expectation as follows in paragraph 269:

- a) **There must be an express, clear and unambiguous promise given by a public authority;**
- b) **The expectation itself must be reasonable;**
- c) **The representation must be one which it must competent and lawful for the decision-maker to make; and**
- d) **There cannot be a legitimate expectation against clear provisions of the law or the Constitution."**

43. The Respondent avers that it had granted the Petitioner work permits over the years as demonstrated by the Petitioner's exhibit AOM 3, for a company identified as Linkers International Limited and not the Petitioner's Work Permit. That a certificate of Registration for a business entity is not sufficient proof of grant of work permit. That the two documents are different and the process of applying for the issuance of the two is regulated under different statutory regimes. The Respondents urge that it is therefore false and misleading for the Petitioner to claim he had legitimate expectation whereas he has not applied and been granted work permits over the years. It's Respondents contention that applying the principles elucidated by the Supreme Court to the present Petition, legitimate expectation cannot possibly accrue or be enforced in the presence of clear and express legally issued statutory declaration issued by the 2nd Respondent against the petitioner.

44. From the facts on record the 1st Respondent was yet to either reject or accept the Petitioner's application seeking to renew and/or extend his work permit, which the petitioner avers he had legitimate expectation that the same would have been renewed and /or extended. In the case of *Republic v Attorney General & Another Ex parte Waswa & 2 others [2015] 1 KLR 280* it was held thus :-

"The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trust and confidences must be honoured in public law and therefore the situations where the expectations shall be recognized and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine." (Emphasis mine)

45. The rationale for this doctrine was restated in *R v Devon County Council ex parte P Baker [1955] 1 ALL ER* where it was held:

"...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness: the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decisions." (Emphasis mine)

46. In the case of *Republic v Principal Secretary Ministry of Mining Ex parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR* Justice G. V. Odunga stated:

“It is clear that by placing the applicant in a state of suspense, the Respondent failed to exercise its statutory duty, not to enter into a contract, and to notify the applicant of that decision. In those circumstances what remedy lies in favour of the applicant? Article 23 of the Constitution provides that a court “may grant appropriate relief, including a declaration of rights” when confronted with rights violations. Under the said Article, the Applicant is entitled to ‘appropriate relief’ which means an effective remedy: An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.”

47. **Article 23(3) of the Constitution** clearly states that in any proceedings brought under **Article 22 of the Constitution** a Court may grant appropriate relief. One of the relief the court may grant is an order compelling the performance by an administration of a Public duty owed in law and in respect of which the applicant has a legally enforceable right. In this case the Respondents had a duty both under **Article 47 of the Constitution** and **Section 4 of the Fair Administrative Action Act, 2015**, and the Applicant had a right to administrative action, which was expeditious, efficient, lawful, reasonable and procedurally fair. The Respondents clearly did not comply with these requirements, and to that extent I find the Applicant’s application to be merited. I find that there is justification for this court to issue an order of mandamus compelling the 1st Respondent to consider and make a decision on the Petitioner’s application for renewal and/or extension of his work permit made on 30th January 2019.

48. In the case of *Bhangra, Kana and Bashir Mohamed Jama Abdi vs Minister for Immigration and Registration of Persons [2014] eKLR*, the Court stated that **an unreasonable delay in processing applications for registration e.t.c. is an affront to the right to fair administrative action under Article 47 of the Constitution.**

49. Further in the case of *Hannah Lucy Elizabeth v Director General, Kenya Citizens and Foreign Nationals Management Services & 3 Others [2017] eKLR*, the Honourable Justice Isaac Lenaola (as he then was), ordered that the Petitioner be issued with a Work Permit after finding that the refusal to consider the application was unreasonable, in breach of Article 43 of the Constitution and therefore void.

50. From the above and in view of the authorities relied upon, I am satisfied that the Petitioner satisfied this Court there existed a legitimate expectation for petitioner’s work permit being renewed and /or extended and the 1st Respondent violated the Petitioner’s rights to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

D. WHETHER THE PETITIONER IS ENTITLED TO THE RELIEFS SOUGHT?

51. The Respondents contend that the rights the Petitioner is seeking to enforce are not absolute and are subject to limitation by the state in line with **Article 24 of the Constitution; the Citizens and Immigration Act; the Privileges and Immunity Act** and the **Vienna Convention on Consular Relations, 1963**. It is Respondents’ contention that in discharge of the mandate of the 1st Respondent, discretion is allowed within KCIA, Legal framework which discretion is exercised responsibly and within the legal parameters of the constitution and the Acts thereto. It is Respondents averment that impugned declaration under the present circumstances of the Petition are thus in compliance with the Constitution.

52. The Respondent further contend it is not within the jurisdiction of this Court to grant the orders sought as the issue rightly falls within the administrative jurisdiction of the Respondents.

53. The Petitioner on the other hand, urge that he is entitled to the orders that he is seeking having established that the declaration dated 21st December 2018 and 14th August 2019 were unlawful, arbitrary and thus null and void. The Petitioner herein was not served with the two declarations nor was he given reasons for such declarations nor an opportunity to be heard. The Respondents in doing so violated clear provisions of the Constitution and it is for these reasons, that I find the two declarations are unlawful, arbitrary and null and void.

54. In the *Republic v. Director of Immigration Services Ex Parte Planet Motors Company Limited and another (2015) eKLR* Hon. Lady Justice Aburili held thus:

“In the end, I find the ex parte applicant’s notice of motion dated 14th September, 2016 merited. I make the following judicial review orders;

a) Certiorari to issue to bring into this court to be quashed and I hereby bring into this court and quash the respondent’s decision made on 5th July, 2016 and communicated to the ex parte applicants verbally, placing the 2nd ex parte applicant Maratab Bashir on the immigration watch list;

b) Mandamus is hereby issued compelling the respondent to remove the 2nd ex parte applicant Maratab Bashir from the immigration watch list;

c) Prohibition is hereby issued prohibiting the respondent acting either in person or through savants, agents, police officers, employees or anyone else claiming to derive such authority from the respondent, from arbitrarily arresting, detaining, harassing and or deporting the 2nd ex parte applicant Maratab Bashir or in any manner whatsoever curtailing/impending the 2nd ex parte applicant’s liberty/freedom of movement with regard to the matters herein;

d) A declaration I hereby declare that the action of the respondent in placing the 2nd ex parte applicant Maratab Bashir

under the immigration watch list is unlawful, unfair and a breach of the ex parte applicant's rights to fair hearing, fair administrative action, freedom and security of the person of the 2nd ex parte applicant Maratab Bashir; and the 2nd ex parte applicant's right to freedom of movement and secure protection of the law;

e) I order that the respondent do consider all the 1st and 2nd ex parte applicant's applications for the resident/work permit and for the 2nd applicant Maratab Bashir's dependant's pass, on their merits once lodged and that due process be followed in arriving at any decision affecting the exparte applicants."

55. From the myraids of authorities relied upon and from the clear provisions of the Constitution, it is clear that there is no bar for this Honourable Court to intervene with the executive over-reach and the callous manner the petitioner has been treated herein. I find the amended petition to be meritorious and I proceed to grant the following orders:-

a) A declaration be and is hereby issued that the Petitioner's Constitutional Rights under Article 47 of the Constitution of Kenya have been infringed by the 1st Respondent.

b) A declaration be and is hereby issued that the Petitioner's rights under the Vienna Convention on Diplomatic Relations, 1961 have been infringed by the 1st Respondent.

c) A declaration be and is hereby issued that to the extent that the 1st Respondent has failed, neglected in regard to consider and make a decision on the application for renewal and/or extension of the Petitioner's work permit made on 30th January 2019 such failure is unreasonable, irrational, unprocedural, contrary to the Constitution of Kenya and applicable law and is therefore illegal and void.

d) A declaration be and is hereby issued that the Petitioner, as the Honorary Consul of the Republic of Niger in Kenya, enjoys diplomatic immunity and cannot be unlawfully arrested and deported in blatant disregard of applicable international law including Article 23 of the Vienna Convention on Diplomatic Relations of 1961 as read together with Section 34(2) and (3) of the Kenya Citizenship and Immigration Act No. 12 of 2011.

e) A declaration be and is hereby issued that the declarations dated 14th August 2019 and 21st December 2018 issued against the Petitioner are illegal and void and are hereby quashed.

f) An order of mandamus be and is hereby issued compelling the 1st Respondent to consider and make a decision on the Petitioner's application for renewal and/or extension of his work permit made of 30th January 2019, and within 30 days of service of this decision to notify the Petitioner of the outcome in writing.

g) An order for mandamus be and is hereby issued compelling the Respondents to remove the Petitioner's name from the list of prohibited Immigrants within 30 days from the date of service of the decision and notify the Petitioner of the compliance in writing.

h) An Order of Mandamus be and is hereby issued directing the 1st Respondent to forthwith consider and issue the Petitioner (if need be) with appropriate Work Permit.

i) An order be and is hereby issued prohibiting the 1st, 2nd and 3rd Respondents from preventing the Petitioner from returning to and remaining in the Republic of Kenya without justifiable cause, and contrary to and without following due process.

j) A permanent injunction be and is hereby issued retraining the Respondents whether by their agents, servants or anyone acting under them from arresting and/or deporting the Petitioner unlawfully and/or without proper and justifiable cause and/or without following due process.

k) On costs I have considered the nature of the petition herein and the fact that award of costs is discretionary and normally the guiding principle is that costs follow the event. However I find that it won't be proper to burden tax payers with costs of litigation arising out of misinterpretation of the law by the Respondents. I direct each party bears its own costs.

Dated, Signed and Delivered at Nairobi on this 18th day of June, 2020.

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J. A. MAKAU

JUDGE