



**PUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 43 OF 2020**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**AND**

**FUNDAMENTAL FREEDOMS AND THE CONTRAVENTION AND CONTINUED CONTRAVENTION OF THE  
CONSTITUTION UNDER ARTICLES 2(1), 3(1), 27(1) (2), 47, 156, 245, AND 258.**

**HONOURABLE ALICE MUTHONI WAHOME.....PETITIONER**

**AND**

**INSPECTOR GENERAL OF POLICE .....1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Petitioner through a petition brought pursuant to Articles 2(1), 3(1), 27(1) (2), 47, 156, 245 and 258 of the constitution of Kenya 2010, and filed 12<sup>th</sup> February 2020 seek the following prayers

- a. A declaration that the action of the 1<sup>st</sup> Respondent to withdraw the security of the Petitioner is illegal, unconstitutional and void.
- b. Writs of mandamus directed at the 1<sup>st</sup> Respondent and any one acting under him to restore the security of the Petitioner without fail.
- c. Writs of prohibition prohibiting the 1<sup>st</sup> Respondent from withdrawing the security of the petitioner without following the proper procedure
- d. Any other orders, directions and remedies as this Honourable court may deem fit and just in the circumstances
- e. An order on costs.

**PETITIONER'S CASE**

2. The Petitioner's case is that the Petitioner is an elected Member of parliament for Kandara Constituency. That on 20<sup>th</sup> January 2020, the 1<sup>st</sup> Respondent through the Director of Corporate Communication for the National Police issued a statement to the effect, that the National Police Service shall not provide security to VIPs who are involved or suspected to be involved in crime until cleared by the Courts. That subsequently the security of the petitioner was withdrawn as police bodyguards attached to her were all recalled. That since then the Petitioner is yet to be informed of any reason, that led to the said action to date.

3. The Petitioner contend that in arriving at this decision, the 1<sup>st</sup> Respondent totally disregarded the Constitution and Laws of Kenya regarding protection and security of Members of Parliament. That the decision was made without any force of law, was unreasonable, whimsical and ought to be quashed. It is further asserted the decision is discriminatory in nature as all other Members of Parliament continue enjoying security provided by the National Police Service.

4. The Petitioner further argue that the effect of the said decision now threatens and exposes the petition to security risks as she has enjoyed security ever since being elected as a member of parliament in 2013. She urges that she is apprehensive that she might be attacked and harmed based on the nature of her duties as a Member of Parliament for Kandara Constituency.

5. The Petitioner contend that she is now unable to discharge her functions effectively to members of her constituency and the whole country at large as a result of her security being withdrawn. That the withdrawal of the security is meant to intimidate her to change her stand on bad governance in government is practicing and her political beliefs and affiliation.

6. The Petitioner urge the action by the 1<sup>st</sup> Respondent's withdrawal of security of the Petitioner has no force of law; is ultra vires unconstitutional and the petitioner is entitled to judicial intervention. She avers she has neither been charged or been informed of any investigation being conducted upon her on suspicion of having committed any crimes.

7. The Petitioner states the right to Fair Administrative Action, under **Article 47 of the Constitution** cannot be suspended at the whims of any state organ. That it is therefore for aforementioned reasons, that this Honourable Court is entreated to intervene over the breach of the Petitioner's rights and the law, the constitution and sanction the Respondent's actions as the decision and action of the 1<sup>st</sup> Respondent has no force of law and is unconstitutional and void.

8. The Petitioner further argue, that the 1<sup>st</sup> Respondent has disregarded the Rules of natural justice by condemning the Petitioner unheard as upto date the petitioner is yet to be informed of any reason that led to her security being withdrawn,

9. It is petitioner's case that other Members of Parliament continue to enjoy security provided by the National Police Service and by singling out the petitioner and withdrawing her security amounts to discrimination.

10. It is contended by the Petitioner that the right of protection and safety of the petitioner as provided under the constitution and various legislation is not a gift from the state and cannot be suspended on the whims of any state organ, and for those reasons, urges that this Honourable Court is invited to intervene over the Petitioner's Constitutional rights and sanction the 1<sup>st</sup> Respondent's action. The Petitioner further contend the action of the 2<sup>nd</sup> Respondent has no force of law is unconstitutional and void.

#### **RESPONDENT'S CASE**

11. The Respondents are apposed to the Petition. The Respondents filed grounds of opposition dated 31<sup>st</sup> March 2020. The Respondents rely on a Replying Affidavit by Henry K. Borma a Police Officer of rank of Senior Assistant Inspector General, in the Kenya Police Service, currently the Director of operations sworn on 30<sup>th</sup> April 2020.

12. The Respondents' case is that it is one of the functions of the National Police Service to protect life and property under the **National Police Service Act No. 11A, 2011**. That the aforesaid Act also mandates the, Inspector General, to monitor the implementation of policy, operations and directions of the National Police Service.

13. It is contended by the Respondents, that beside state officers entitlement to security like any other ordinary Kenyan, they are accorded additional security privilege as provided for by the policy on provision of Protective Security to VIPs and other state officers "due to the nature of their duties and high public profile" (see annexure HKB1") a copy of the said policy.

14. It is stated by the Respondents, that the Members of Parliament are defined as state officers under Article 260 of the Constitution and part 4.0 of the aforesaid policy.

15. It is Respondents contention, that following the rise of reports implicating some VIPs and State Officers in crime incidences and unlawful conduct, the National Police Service reconsidered the said privilege.

16. The Respondents urge, that indeed on 20<sup>th</sup> January 2020 the Director of Corporate Communications, National Police Service, issued a press release to the effect that the National Police Service shall not provide security detail to VIPs who are involved or suspected to be involved in crime until they are cleared by the Court.

17. It is urged by Respondents, that the privilege for additional security to state officers is not absolute. Part 5.3 XII of the Policy on the provision of protective security to VIPs and other state officers ("HKB1") states that VIP protection will not be accorded to –

**a. Those who have been convicted of a criminal offence**

**b. Those who have committed offences under Section 103 of the National Police Service Act (2011)**

**c. Those who commit a breach of peace**

**d. Those who will abuse the privilege of being accorded VIP protection**

**e. A VIP who relocates to another country.**

18. It is urged that the Petitioner herein committed an electoral offence by harassing an election officer, who was performing his official duties thereby causing a breach of peace. It is averred that such acts of harassment and intimation puts the police bodyguard in a precarious position as law enforcement officers and is otherwise an abuse of the privilege to police body guards. That after review of the conduct of the Petitioner, Police body guards attached to the Petitioner were withdrawn in accordance with policy guidelines.

19. The Respondents stated that it is not true, that the decision to withdraw the petitioner's police body guards was discriminatory as the petitioner has not demonstrated differential treatment against her. The Respondent further urge it is not true, that **Article 47 of the Constitution** was violated against the Petitioner, averring she has not evidenced, that she was not aware that her security would be withdrawn by the National Police Service. It is contended in withdrawing the Petitioner's Police body guard; the 1<sup>st</sup> Respondent acted within the provisions of the law. It is asserted by the Respondents the Petitioner has not shown that the 1<sup>st</sup> Respondent's decision to withdraw the police body guards was either unlawful, unreasonable or procedurally unfair.

20. The Respondents asserted that the Fundamental rights and freedoms alluded to by the Petitioner are not absolute as they can be limited as long as the limitation is reasonable and justifiable in an open and democratic society based on human dignity. The Respondents further urge through their ground of opposition dated 31<sup>st</sup> March 2020 as follows:-

**a. The Petition does not disclose any constitutional violations against the petitioner to warrant this court to invoke its jurisdiction.**

**b. The petitioner has not labored to demonstrate by way of evidence any differential treatment against her for a claim under Article 27 of the Constitution to stand.**

**c. The petitioner has not demonstrated by way of evidence that her right to fair administrative action was breached to warrant this Honourable court to invoke the provision of Article 47 of the Constitution.**

**d. The fundamental rights and freedoms alluded to by the petitioner are not absolute. They can be limited by law to the extent that the limitation is reasonable and justifiable in an open an democratic society based on human dignity, equality and freedom as provided under Article 24 of the Constitution.**

**ANALYSIS AND DETERMINATION**

21. I have very carefully considered the parties rival pleadings, and submission and from the aforesaid the issues arising for consideration can be summed up as follows;

**a. Whether the Respondent's action to withdraw the petitioner's security is lawful?**

**b. Whether there is an infringement on the Petitioner's rights and freedoms under Fair Administrative Action under Article 47(1) of the Constitution of Kenya?**

**c. Whether there exists a legitimate expectation for the Petitioner to have security as other Members of Parliament?**

**A. WHETHER THE RESPONDENT'S ACTION TO WITHDRAW THE PETITIONER'S SECURITY IS LAWFUL?**

22. The Petitioner in her Petition and mere specifically in her supporting affidavit sworn on 12<sup>th</sup> February 2020 under paragraph 4 states that on 20<sup>th</sup> January 2020, the 1<sup>st</sup> Respondent through the Director of Corporate Communications for the National Police issued a statement to the effect that the National Police Service shall not provide security to VIPs who are involved or suspected to be involved in crime until cleared by Courts.

23. Under paragraph 5 of the affidavit of the Petitioner she avers that subsequently her security was withdrawn and she was not informed prior to the action of withdrawal of the bodyguards attached to her were recalled. The Petitioner avers that her call on 4<sup>th</sup> February 2020 to Mr. Murage, the Commandant at SGB, Uhuru Camp and the calls on 5<sup>th</sup> February 2020 to Dr. Fred Matiangi, the Cabinet Secretary Ministry of Interior and Coordination of National Government were all not responded to.

24. The Petitioner further under paragraph 12 of her affidavit depone that on 5/2/2020 she visited the office of the Inspector General of Police at Jogoo House, Harambee Avenue between 2.00p.m and 2.30p.m and on 6<sup>th</sup> February 2020 at 8.30a.m, and left without meeting the Inspector General or getting a response on the issue of the withdrawal of her security.

25. The Respondent's in their Replying Affidavit contend the Petitioner in this case committed an electoral offence by harassing an election official who was performing his official duties thereby causing a breach of peace. That after the review of the conduct of the petitioner, police body guard were withdrawn in accordance with the policy guidelines.

**26. Part 5.3 xii of the policy on the provision of protective security to VIPs** and other state officers provides the ground for withdrawal or denial of provision of protective security on the following grounds:-

**a. Those who have been convicted of a criminal offence**

**b. Those who have committed offences under Section 103 of the National Police Service Act (2011)**

**c. Those who commit a breach of peace**

**d. Those who will abuse the privilege of being accorded VIP protection**

**e. A VIP who relocates to another county.**

27. In the instant petition and from the contents of affidavit of the Respondents and that of the petitioner, it is clear other than assertion by the Respondents of the existence conditions under which the privilege for additional security to state officers may be withdrawn there is no evidence to the effect, that the petitioner was made aware of the offence(s) she was alleged to have breached, and accorded a fair chance to defend herself, in the event that the same was unfounded. The Petitioner has so far not been charged with any offence as alluded to in the Respondents' affidavit.

28. Under the policy on provision of protective security to VIPs and other State Officers, though not absolute, it is clearly provided, the conditions under which the police body guards can be withdrawn. The body guards can be withdrawn in respect of those who have been convicted of criminal offence(s), or those who have committed offence under **Section 103 of the National Police Service Act (2011)**, or those who commit a breach of peace or those who abuse the privilege of being accorded VIP protection and VIP who relocates to another country. The Petitioner was however not given any reason for withdrawal of her security nor was she told she was in breach of any of the conditions of **Part 5.3 XII** by the 1<sup>st</sup> Respondent and/or his agents.

29. The Petitioner herein was not given any hearing by the Respondents in spite of her efforts to find out why her security had been withdrawn. **Article 50(2)(a) of the Constitution**, clearly states that everyone person has the right to a fair trial which includes the right to be presumed innocent until the contrary is proved.

30. I find in this matter the Petitioner was not afforded an opportunity to be heard but was condemned unheard. I further find that taking a draconian action without deference to fair administrative action is void for offending a constitutional imperative.

31. The Petitioner under paragraph 2 of her supporting affidavit deposes that she has been a Member of Parliament for Kandara Constituency, Murang'a County, since 4<sup>th</sup> March 2013 and ever since she has been enjoying armed security granted to her by the National Police Service. In this Petition, I find that there is no evidence of the Petitioner having been accused of breaking any law nor has she been informed of any investigation being conducted against her; if any. The mere allegation in the Replying Affidavit by the Respondents is that the Petitioner committed an electoral offence by harassing an election official, without more this is not sufficient. This at any rate has not been said to have been communicated to the Petitioner as a reason of the withdrawal of her security.

32. In the case of **Salvarajan vs. Race Relations Board [1976] 1 All ER 122 at page 19 Lord Denning MR** observed that:

**“In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice if the broad grounds are given. It need not name its informants. It can give the substance only. Mover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.” (Emphasis mine)**

33. Further in **Nairobi High Court Misc. Application No. 430 of 2004, LEONARD SITAMZE v ~THE MINISTER FOR HOME AFFAIRS & 2 OTHERS** Justice J. B. Ojwang (as he then was) stated, “What is in my view, the correct legal position 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 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.”**

34. The Position in the above cases was recently restated by Justice G. V. Odunga in **REPUBLIC VS. MINISTER OF STATE FOR IMMIGRATION AND REGISTRATION OF PERSONS EX-PARTE C. O. [2013] eKLR** where the learned Judge opined at paragraph 33 of his judgment that:

**“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 tree 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.” (*Emphasis mine*)

35. I find that it would be against the Constitutional Bill of Rights if the 1<sup>st</sup> Respondent herein would be left as the sole judge of who will receive security in the National Assembly and who should not. I find if that would be allowed, would comment to granting the 1<sup>st</sup> Respondent such wide powers, which would obliterate the right of court’s to oversight administrative action.

36. In the instant petition I find that there is no cogent evidence or any at all to the affect that the petitioner has broken any law or is under investigation of having broken any law as per pleadings on record. She was not informed of any reason why her security was being withdrawn. I further find even, if the Inspector General of Police, had the powers to withdraw the security of the petitioner, he ought to have informed the petitioner of the charges and given her a fair hearing. I find that it was unfair, unprocedural, unlawful and an abuse of power by the 1<sup>st</sup> Respondent to have withdrawn the Petitioner’s security, contrary to the provisions, set out under the ***Policy on Provision of protective security to VIPs and other state officers; under Part 5.3 xii.*** The Respondents cannot therefore be allowed to selectively withdraw Petitioner’s Security for ulterior motives contrary to criteria set, when, it is clear that there is uncontroverted fact that the Petitioner has not been charged with any offence and she is not under any known or disclosed investigations for any offence.

#### **B. WHETHER THERE IS AN INFRINGEMENT ON THE PETITIONER’S RIGHTS AND FREEDOMS UNDER FAIR ADMINISTRATIVE ACTION UNDER ARTICLES 47(1) OF THE CONSTITUTION OF KENYA?**

37. The Petitioner starts by referring to the general position as restated in Halsbury’s Law of England Fourth Edition Vol. 1 page 90 paragraph 74 where it is stated as follows:-

“The rule that no man shall be condemned unless he has been given prior notice of the allegation against him and a fair opportunity to be heard is a cardinal principle of justice... Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that state; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice, as has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decision have civil consequences for individuals by directly affecting their legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available.”(*Emphasis mine*)

38. **Article 47(1) of the Constitution** clearly provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

39. **Section 10 of the National Police Service Act, 2011** vest the 1<sup>st</sup> Respondent with powers to inter alia, implement policy decisions and to distribute and deploy police officers in the service in the rank of superintendent and below. He also has a mandate to recommend to Commission and the Country Policing Authorities for distribution and deployment of officers above the rank of superintendent. The National Police Service Act does not require that 1<sup>st</sup> Respondent to act in consultation with any party prior to exercising his mandate under ***Section 10 of the Act.***

40. The Respondent further aver that in addition, ***Part 4.0(g) of the Policy*** on the provision of protective security to VIPs and other state officers, entitles the petitioner to additional security privileges by virtue of being a state officer in accordance with ***Article 260 of the Constitution.***

41. The Respondents urge that it is imperative to note, that the provision under ***Article 47 of the Constitution*** is not absolute and can be limited by law to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedoms, taking into account factors such as the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedoms of others as per ***Article 24 of the Constitution.***

42. The Respondents urged further the privilege of provision of additional security to state officers as provided under ***Part 4.0(g) of the policy on provision of Protective Security to VIPs and other state officers*** is not absolute. ***Part 5.3 xii of the Policy*** provides for circumstances when VIP protection will not be accorded. They include VIPs who:

- a. Commit a breach of peace.
- b. Abuse the privilege of being accorded VIP protection.
- c. Have been convicted of a criminal offence.

d. Have committed offence under Section 103 of the National Police Service Act (2011)

e. Relocates to another country

43. In the instant petition the Petitioner has been a Member of Parliament since 2013 to date and all through she has enjoyed security granted to Members of Parliament. In this Petition there is no evidence nor averment that the Petitioner has been accused of breaking any law nor has she been informed of any investigations being conducted against her. She was never granted a hearing neither was she informed of any charges that substantiated the decision of withdrawing her security.

44. In the Court of Appeal in *Judicial Service Commission vs. Mbalu Mutava & another (2015) eKLR* the Court defined Fair Administrative Action as follows:-

**“Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law.”**

45. Further in the case of *Republic v. Firearms Licensing Board & another Ex parte Boniface Mwaura (2019) eKLR*, the Court stated;

**“The task for the Courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations.”** The court further relied on the *South African case of AAA Investments (Pty) Ltd vs. Micro Finance Regulatory Council and another where it was held as follows:*

**“(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised.... Public power .... Can be validly exercised only if it is clearly sourced in law”**

46. The Petitioner in support of the above proposition sought reliance in the case of Constitutional Court of South Africa in the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98)2000 (1) SA 1*, where it was stated that:-

**“Although the right to just administrative action was entrenched in our Constitution in recognition of the important 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...”** (*Emphasis mine*)

47. The Importance of the right to Fair Administrative Action as a Constitutional Right under *Article 47 of the Constitution* cannot be downplayed. The Court of Appeal stated as follows in the case of *Judicial Service Commission v. Mbalu Mutava & another (2014) eKLR*; that:-

**“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.”** (*Emphasis mine*).

48. In the case of *Kenya Human Rights Commission & another vs. Non-Governmental Organisation co-ordination Board & another (2018) eKLR* Justice E.C. Mwita, established the test to be used in establishing whether a particular administrative action is fair. He stated thus:-

**“Taking the above jurisprudence into account there is no doubt in my mind, that acting as it did, the respondent violated 1<sup>st</sup> 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.**

**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.”** (*Emphasis mine*)

49. The Respondents herein sought to rely on **Article 47 of the Constitution of Kenya 2010 and Part 4.0 and 5.3 of the Policy on Provision of Protective Security to VIPs and other State Officers** as a basis of withdrawing security from the Petitioner. However the Respondents in acting as it did, it violated the Petitioner's right to fair Administrative Action contrary to **Article 47 of the Constitution** as the Administrative Action that flow from the statutes, must meet the constitutional test of legality, reasonableness and procedural fairness. The Petitioner herein was not accused of breaking any law neither was she informed of any investigation being conducted against her. She was not granted a hearing nor informed of any charges despite having sought for information from the Respondents. The decision to withdraw her security was and has not been disclosed to the Petitioner to date. A party has the right to be informed of the charge against him or her and be heard before an action is taken against her/him. This is no longer discretionary, as such right is deeply entrenched in the Constitution as an inviolable right. It is no doubt an important safeguard against capricious and whimsical actions that likely lead to an abuse of authority by public bodies exercising administrative and quasi-judicial functions. Having considered the facts of this Petition, I have no doubt, the 1<sup>st</sup> Respondent in withdrawing security from the Petitioner its action was unfair, unreasonable, irrational, un-procedural and illegal and this justifies an order for quashing the 1<sup>st</sup> Respondent's decision.

**C. WHETHER THERE EXISTS A LEGITIMATE EXPECTATION FOR THE PETITIONER TO HAVE SECURITY AS OTHER MEMBERS OF PARLIAMENT?**

50. Legitimate expectation is defined properly in the book of **POLLARD , PARPWORTH AND HUGHES** writing at **page 583 in the 4<sup>th</sup> edition of Constitutional and administrative law**: text with material the learned authors posited as thus:-

**“Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads 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, result 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”.**

51. The Petitioner herein has been a Member of Parliament for Kandara Constituency, since the year 2013 up to date. That through all these years the Petitioner used to have armed bodyguards as her security. That all other Members of Parliament have armed police officers as part of their security too. The Petitioner therefore as a Member of Parliament and have not been demonstrated that she has violated **Part 5.3 xii of the policy on provision of protective security to VIPs and other state officers**, has a legitimate expectation to be given armed police officers as her security, this being what all other members of parliament are entitled to.

52. In the case of **Republic vs. Devon County Council ex parte P. Baker [1955] 1 All ER** 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 decision.”** (Emphasis mine)

53. From the above I am satisfied, the Petitioner having been a Member of Parliament for Kandara Constituency, since 2013 and all the years having been used to be assigned with armed security and noting all Members of Parliament have armed police officers, as part of their security, I find that she genuinely has a legitimate expectation to be given armed police officers as her security and not to be withdrawn without justification or without any information as to why the security are being withdrawn.

54. Having considered the evidence and submission by both parties, I find that the security assigned to the Petitioner was not withdrawn in accordance with the law, but was withdrawn unlawfully, arbitrary and thus null and void.

55. To the extent of my findings, I am satisfied that the Petitioner's Petition is meritorious. I therefore proceed to grant the following orders:-

- a. A declaration be and is hereby issued that the action of the 1<sup>st</sup> Respondent to withdraw the security of the Petitioner is illegal, unconstitutional and void.**
- b. Writs of mandamus be and is hereby issued directed at the 1<sup>st</sup> Respondent and anyone acting under the 1<sup>st</sup> Respondent to restore the security of the Petitioner without fail.**
- c. Writs of prohibition be and is hereby issued prohibiting the 1<sup>st</sup> Respondent from withdrawing the security of the Petitioner without following the proper procedure.**
- d. Each party to bear its own costs.**

Dated, Signed and Delivered at Nairobi on this 30<sup>th</sup> day of July, 2020.

.....

J. A. MAKAU

JUDGE