



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CONSTITUTIONAL PETITION NO 11 OF 2017**

**BETWEEN**

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....PETITIONER**

**VERSUS**

**HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY FOR INTERIOR AND**

**CO-ORDINATION OF NATIONAL GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE..... 3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

1. The petitioner describes itself as a Constitutional Commission, with the role of promotion and protection of Human rights created pursuant to Article 59 of the Constitution and the Kenya National Commission on Human Rights Act, 2011 and has filed the instant petition pursuant to article 22 (1) of the Constitution. The 1<sup>st</sup> Respondent is the Government principal legal advisor created under Article 156 of the Constitution, the 2<sup>nd</sup> Respondent is the person with the mandate to oversee and coordinate matters of internal security affairs in the Republic. The 3<sup>rd</sup> Respondent is a Constitutional office created under Article 245 of the Constitution and is the person with independent command over the National Police service.

2. The instant petition is dated 24<sup>th</sup> August, 2017 and filed on 30<sup>th</sup> August, 2017 and supported by the Supporting affidavit of Patricia Mande Nyaundi the Petitioner Secretary/CEO sworn on 24<sup>th</sup> August, 2017. They seek the following prayers: -

**a) A Declaration that the manner in which the 2<sup>nd</sup> Respondent has imposed and continues to impose curfew orders in Mandera County is unreasonable, illegal, unconstitutional and void.**

**b) A Declaration that section 8 of the Public Order Act is unconstitutional, null and void to the extent that it allows for arbitrary, indefinite and unreasonable imposition of curfew orders.**

**c) A Declaration that to the extent that section 8 of the public Order Act fails to reasonably make provisions for public participation in the process of the imposition, review and management of curfew orders, is arbitrary, undemocratic, oppressive and unconstitutional.**

**d) An Order directed to the 1<sup>st</sup> Respondent to initiate amendments to among others, section 8 of the Public Order Act, so as to bring it into conformity with the Constitution of Kenya.**

**e) Costs of the Petition**

**f) In the alternative to and without prejudice to the above prayer for costs, considering that this is a public interest matter that is not frivolous, that no costs be awarded against the petitioner in the unlikely event that the petition is lost.**

**g) Any other or further orders that this court may deem fit to grant to meet the ends of justice.**

3. The Respondents were all represented by the Office of the Attorney General and in response to the petition filed grounds of opposition dated 2<sup>nd</sup> October, 2017 and filed on 10<sup>th</sup> October, 2017.

**Background**

The Petitioners case

4. The genesis of the petitioners case is that pursuant to the Kenya incursion into Somalia through operation Linda Nchi in 16<sup>th</sup> October, 2011 to deal with the terror threats from Al shabab Militia, the Country thereafter began experiencing worst terror attacks, and as a consequence in May, 2015 the government through the 2<sup>nd</sup> Respondent imposed a curfews in Mandera, Wajir, Garissa and Tana River Counties vide Public Order(curfew)(Mandera, Wajir, Garissa and Tana River Counties) Order, 2015 after gunmen linked to Al shabab massacred 147 students at Garissa University, this was pursuant to the provision of section 8 of the Public Order Act.

5. In addition, they allege that on 26<sup>th</sup> October, 2016 the 2<sup>nd</sup> Respondent further imposed another curfew in Mandera County vide Public Order(curfew)(Mandera County) Order, 2016, which curfew was later extended to March, 2017, and was further extended to 28<sup>th</sup> June, 2017 vide Public Order(Curfew)(Mandera County) Extension Order, 2017.

6. It is the petitioner's case that they are apprehensive that the curfew orders in Mandera shall be arbitrarily imposed to their detriment as they suffer and continue to suffer as the same violates their constitutionally protected rights as a result of the continued and arbitrary imposition of curfews by the Respondents.

7. They hinged their petition on the following provisions of the Constitution, Articles 1, 2,3, 19, 20, 21, 24, 28, 29, 39, 44,58 238, 244 and Article 259 of the Constitution.

8. Vide their submissions dated 20<sup>th</sup> September, 2020 and highlighted by Counsel Mr. Lando. They addressed two issues, the first is the Locus to institute the instant petition, and in this regard they submitted that they filed the instant petition pursuant to Article 22(1), Article 258(1) and (2)(c) and Article 23 of the Constitution and in the interest of safeguarding the Constitution and in particular, the fundamental rights and freedoms of the people of Mandera County and Kenyans at Large and out of its obligations under Article 249 of the Constitution.

9. The second issue addressed by Counsel is whether section 8 of the Public Order Act is consistent with the Constitution. In this regard Counsel submitted that they have abandoned their prayer seeking a declaration that section 8 of the Public Order Act as unconstitutional, this was in view of the Court of Appeal decision in **Muslims for Human Rights (MUHURI) & 4 others vs Inspector General of Police & 2 others, Petition No. 4 of 2014** and Civil Appeal No. 261 of 2018 where the court emphasized that the said section was not unconstitutional.

10. Having abandoned the above prayer, Counsel submitted that they are now challenging the manner of implementation of curfew orders, and that the management and the lifting of the same is opaque, which they submit does not involve members of the public who donate their powers vide the Constitution. It is their submission that the manner of imposition and management of curfew is unconstitutional.

11. Further, they submitted that there is a lacuna in section 8 of the Public Order Act, which make it fall short of the standards of the Constitution, in that the exercise of the executive authority under Article 129 of the Constitution, the people must be central as the beneficiaries and must be involved and participate as envisaged under Article 10 of the Constitution which lists the principles of governance to include democracy and participation of the people, human dignity, inclusiveness, human rights, good governance, integrity, transparency and accountability which binds all state organs.

12. In addition, they submitted that Article 238(2)(b) of the Constitution reiterates the need for public involvement in the maintenance of National security by providing that national security shall be pursued in compliance with the utmost respect for the rule of law,, democracy, human rights and fundamental freedoms, thus implying that participation of the people is key.

13. It is therefore their submission that pursuant to the reiteration of public participation in the Constitution, it is imperative that the affected populations in any part of Kenya must be afforded an opportunity to meaningfully participate in the decision leading up to the imposition, revision, rescission and overall management of any curfew order.

14. It is their case that the manner in which section 8 of the Public Order Act is framed is unconstitutional as it does not provide for a manner in which the public can participate in the management and imposition of a curfew. They rely in the case of **Muslims for Human Rights (MUHURI) & 4 Others vs Inspector General of Police & 2 others, Petition No. 4 of 2014** and **National Super Alliance (NASA) Kenya vs Cabinet Secretary Interior and Coordination of National Government and 3 Others Petition No. 11 of 2017**.

15. Further, it is their submission that including public participation in matters curfew does not threaten national security in view of access to information under Article 35 of the Constitution, as it stands the people have been involved in matters security through the so called government nyumba kumi initiative, and therefore involving the people in matters curfew cannot compromise national security. In this regard they rely in the case of **Katiba Institute vs President Delivery unit & 3 others [2017] eKLR**.

16. State Counsel Mr. ogoosso submitted on behalf of the Respondents. He told the court that the instant petition is Res judicata as Justice Dulu had dealt with the issues herein in Garissa Petition No. 6 of 2015 HAKI vs IG and 3 3 others, where he held that section 8 of the Public Order Act was Constitutional and that the instant petition is mainly challenging the Unconstitutionality of section 8 and 9 of the Public Order Act.

17. Counsel submitted that the curfew challenged herein cannot be equated with a state of emergency which can only be declared by the President pursuant to Article 132(4) and 58 of the Constitution, but is a mechanism that is used by the Cabinet Secretary interior for security purposes.

18. In addition, he submitted that there is no prove of the allegations by the petitioners, and that no particulars were pleaded and the specific provisions of the Law violated pointed out, and that even if there are violations, there are no evidence tendered, and therefore any violation or limitation of rights if any under section 8 and 9 of the Public Order Act is justifiable under Article 24 of the Constitution which provides for limitation of rights, and that there is nothing to prove that the absolute rights provided for under Article 25 of the Constitution have been violated.

19. Further, the Respondents submitted that the imposition of curfew is part of the government measures to ensure that it undertakes its duty of provision of security to the people of Kenya and Mandera as provided for under the Constitution, and the imposition of curfew under section 8 and 9 of the Public Order Act is justified and in the best interest of the public.

20. In regard to the issue of public participation, Counsel submitted that the security agencies has its own experts who advise the government on security matters and that the people and the leadership of the area are usually involved and that there is no evidence that the people were not involved in the imposition of the curfew and that what is before the court are mere allegations. In sum, it is their submissions that the instant petition lacks merit and ought to be dismissed with no orders as to costs.

### **Issues ,analysis and Determination**

21. I have considered the petition, the responses and submissions by parties. I have also considered the authorities relied on. In my view, **two issues arise for determination. First, whether the Constitutionality or otherwise of section 8 and 9 of the Public Order Act has been determined rendering the said issue res judicata, and second, whether Public Participation is required in implementing and management of curfews imposed under section 8 and 9 of the Public Order Act.**

#### **The question of Unconstitutionality of section 8 and 9 of the Public Order Act**

22. Indeed and as admitted by the Petitioners, the issue of unconstitutionality of section 8 and 9 of the Public Order Act has been determined by the Court of Appeal in the case of **Haki Na Sheria Initiative v Inspector General Of Police & 3 others [2020]** , where it held that the said sections were justifiable and within the Constitution.

23. It is also notable that the said appeal emanated from this Court, it is a decision of Hon. Justice Dulu in Garissa Petition No. 6 of 2015, where the petitioners had challenged the imposition of curfew in the four counties of Mandera, Garissa, Wajir and Tana River, which is basically similar to the instant petition. The Court in this regard held as follows: -

**“We find that the impugned provisions are an acceptable limitation to the rights of the residents of the Four Counties and were not discriminatory as they applied to all the residents in the Four Counties. The objective of the Act is to attain the legitimate purpose of ensuring safety, peace and order and the attainment of national security in any given area of the country. Likewise, we find that Sections 8 & 9 of the Act furthers and is connected to the attainment of the objective of the Act.**

**66. Considering the essence of Sections 8 & 9 of the Act, we are satisfied that not only are curfew orders and curfew restriction orders imposed thereunder proportionate means of achieving the Act’s objective of maintenance of public order but are also in line with the principles of national security stipulated under Article**

**238(2) –**

**“2) The national security of Kenya shall be promoted and guaranteed in accordance with the following principles—**

**a) national security is subject to the authority of this Constitution and Parliament;**

**b) national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;**

**c) in performing their functions and exercising their powers, national security organs shall respect the diverse culture of the communities within Kenya; ...”**

24. The Court went ahead and further stated: -

**“In totality, we are satisfied that in circumstances where public order or safety has been or is at risk of being violated due to factors which include terror attacks or criminal insecurity, the limitation of the affected persons’ rights and freedoms within the context of Sections 8 & 9 of the Act is justifiable, reasonable and necessary under Article 24 of the Constitution to ensure the delicate balance of the rights of citizens.”**

25. Therefore, the question Constitutionality or otherwise of section 8 and 9 of the Public Order Act has been settled. The court found that the same was not unconstitutional, which decision emanates from the Court of appeal and therefore binding on this court. I will therefore not say much on the issue.

## On Public Participation

26. The petitioners herein trained their guns on the issue of public participation submitting that section 8 and 9 of the Public Order Act are unconstitutional as framed, as it does not give an opportunity to the members of public to participate in imposition and implementation of curfews.

27. As submitted by the petitioner, the sacred fountain of the constitutional doctrine of public participation is embedded in the principle of sovereignty of the people under Article 1 of the Constitution. Article 2 contemplates direct and indirect exercise of sovereignty by the people through elected representatives, at all times the people reserving the right to direct exercise of sovereignty. The right of public participation is further captured as one of the national values and principles of governance enshrined in Article 10 of the Constitution which provides that:

**(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them-**

**(a) Applies or interprets this Constitution;**

**(b) Enacts, applies or interprets any law; or**

**(c) Makes or implements public policy decisions.**

**(2) The national values and principles of governance include-**

**(a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.**

28. In *Kenya Small Scale Farmers Forum & 6 Others vs Republic Of Kenya & 2 Others* [2013] eKLR the Court held as follows:

*“One of the golden threads running through the current constitutional regime is public participation in governance and the conduct of public affairs. The preamble to the Constitution recognizes, “the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.” It also acknowledges the people’s ‘sovereign and inalienable right to determine the form of governance of our country...’ Article 1 bestows all the sovereign power on the people to be exercised only in accordance with the Constitution. One of the national values and principles of governance is that of ‘inclusiveness’ and ‘participation of the people.’”*

29. Therefore, this court appreciates that public participation is a key component of our Constitution, and the critical question that comes up in the subject petition is the issue of access to information, as the public cannot participate in matters curfew and its implementation without being granted access to information appertaining to the curfew.

30. Indeed Article 35 of the Constitution provides for the right to access information. However, the question of national security and access to information arises and more specifically the safety of such critical information comes into question herein.

31. Article 35 of the Constitution has been operationalized by the Access to Information Act, which at section 6 provides for **Limitation of right of access to information**, it states as follows.

**“(1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—**

**(a) undermine the national security of Kenya;**

**(b) impede the due process of law;**

**(c) endanger the safety, health or life of any person;**

**(d) Involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;**

**(e) Substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;**

**(f) cause substantial harm to the ability of the Government to manage the economy of Kenya;**

**(g) Significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;**

**(h) Damage a public entity's position in any actual or contemplated legal proceedings; or**

**(i) Infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.**

*(2) For purposes of subsection (1)(a), information relating to national security includes—*

- a) military strategy, covert operations, doctrine, capability, capacity or deployment;*
- b) foreign government information with implications on national security;*
- c) intelligence activities, sources, capabilities, methods or cryptology;*
- d) foreign relations;*
- e) scientific, technology or economic matters relating to national security;*
- f) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security;*
- g) information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security;*
- h) information between the national and county governments deemed to be injurious to the conduct of affairs of the two levels of government;*
- i) cabinet deliberations and records;*
- j) information that should be provided to a State organ, independent office or a constitutional commission when conducting investigations, examinations, audits or reviews in the performance of its functions;*
- k) information that is referred to as classified information in the Kenya Defence Forces Act; and*
- l) any other information whose unauthorized disclosure would prejudice national security.*

32. **Article 24** of the **Constitution** provides, in part, as follows

*“(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*

- (a) the nature of the right or fundamental freedom;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

*(2) ...*

*(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.”*

33. **Article 25** of the **Constitution** provides for the rights that cannot be limited (non-derogable rights), and it is clear that Access to information is not such a right. It provides as follows:

*“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—*

- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;*
- (b) freedom from slavery or servitude;*
- (c) the right to a fair trial; and*

*(d) the right to an order of habeas corpus”.*

34. Consequently, it is apparent to me that involving the public in matter security such as the instant issue of imposition of curfews and sharing information thereof would be a threat to the national security, without saying much, especially in the terror prone region of Mandera. Therefore, this petition fails on this ground.

35. Further, the issue of public participation has been entrenched in the legislation making process and therefore the public view cannot be said not to have been captured unless contrary evidence is tabled. In any event the court is there to monitor excesses in the implementation of curfew and grant commensurate remedies. The court of appeal noted in **Haki Na Sheria Initiative v Inspector General Of Police & 3 others(supra)** as follows:-

**“We find that the curfew orders and curfew restriction orders imposed under Section 8 & 9 of the Act are, like a State of Emergency, subject to judicial oversight and therefore are not devoid of checks and balances as claimed by the appellant. More importantly, there is nothing in the Constitution which prohibits the declaration of curfew orders or curfew restriction orders as envisaged under the Act. This position is further buttressed by the fact that after the promulgation of the Constitution, The Security Laws (Amendment) Act, 2014 No. 19 of 2014 amended certain provisions of the Act but left intact the powers to declare curfews under Sections 8 & 9.”**

**conclusion**

The upshot of the foregoing is that the instant petition lacks merit and the court makes the following orders;

i)The petition is dismissed with no orders as to costs.

**DATED, DELIVERED AND SIGNED AT GARISSA 20<sup>TH</sup> THIS DAY OF OCTOBER, 2020.**

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**C. KARIUKI**

**JUDGE**