



**PMK v Inspector General of Police, Director of Criminal Investigations & Attorney General
(Constitutional Petition 10 of 2019) [2019] KEHC 486 (KLR) (19 December 2019) (Judgment)**

PMK v Inspector General of Police & 2 others [2019] eKLR

Neutral citation: [2019] KEHC 486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CONSTITUTIONAL PETITION 10 OF 2019**

GV ODUNGA, J

DECEMBER 19, 2019

**IN THE MATTER OF ARTICLES 20, 21, 22(1) & (2) (A), 23(1) & (3) AND
258(2)(A) OF THE CONSTITUTION & SECTION 22 CHILDREN ACT 2001**

AND

**IN THE MATTER OF THE CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 2 (1), (4),(5),(6), 10(1)(C) &(2)(B), 19(3), 31(C), 38(2), 39(2),
43(1)(F), 47(1), 52, 53(2), 238(2)(B) AND 258(1) OF THE CONSTITUTION OF KENYA
AND SECTIONS 4(2)&(3), 19, 76(5), 186, 189 & 191 OF THE CHILDREN ACT 2001**

BETWEEN

PMK PETITIONER

AND

THE INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

HON THE ATTORNEY GENERAL OF KENYA 3RD RESPONDENT

Consolidating, archiving, keeping and publishing of permanent criminal records of minors found guilty of criminal offences is a violation of their constitutional rights

Following a spate of arson attacks in high schools, the Director of Criminal Investigations (the DCI) made pronouncements and declarations to the effect that all minors who were found guilty of any known crime were to get permanent criminal records which would appear in their certificates of good conduct. The court held that consolidation, archiving, keeping and publishing of permanent criminal records of minors found guilty of criminal offences was a violation of their constitutional rights.

Reported by Kakai Toili



Constitutional Law – fundamental rights and freedoms – limitation of fundamental rights and freedoms – children's rights - factors to consider in determining whether a restriction on a right could be applied - where the Director of Criminal Investigations(DCI) made pronouncements and declarations that all minors who were found guilty of any known crime were to get permanent criminal records which would appear in their certificates of good conduct - whether the consolidation, archiving, keeping and publishing of permanent criminal records of minors found guilty of criminal offences was a violation of the minor's constitutional rights - whether the State could restrict the rights and fundamental freedoms in the Bill of Rights in order to achieve its objectives which it could achieve by taking less restrictive means – Constitution of Kenya, 2010, article 24; International Covenant on Civil and Political Rights, 1966, articles 19(3)(a) and (b); African Charter on the Rights and Welfare of the Child, 1990, article 17; United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985, rules 21 and 8.2; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990, rule 19.

Brief facts

The petitioner was charged with murder, entered a plea of not guilty and was released on bail pending trial. At the time of the alleged offence, the petitioner was fifteen years old. Subsequently, the parties in the instant case entered into plea bargaining negotiations with a view to reducing the charges to the lesser charge of manslaughter. During the pendency of the negotiations, sometime in 2018 following the spate of arson attacks in high schools, several pronouncements were made by the 2nd respondent, the Director of Criminal Investigations (the DCI) which pronouncements and declarations stated that all minors who were found guilty of any known crime were to get permanent criminal records which would appear in their certificates of good conduct.

According to the petitioner, she faced the real and dire threat of having a permanent criminal record in contravention of her fundamental rights and freedoms under the Constitution of Kenya, 2010, (Constitution), the Children Act and various international human rights instruments. The petitioner therefore filed the instant petition seeking among other orders a declaration that the 1st and 2nd respondents' actions were a violation of her constitutional and human rights and that an order of *certiorari* be issued quashing the decision by the 1st and 2nd respondents to consolidate, archive, keep and publish permanent criminal records of any minor found guilty of any criminal offence.

Issues

- i. Whether the consolidation, archiving, keeping and publishing of permanent criminal records of minors found guilty of criminal offences was a violation of the minor's constitutional rights.
- ii. What were the factors to consider in determining whether a restriction on a right could be applied?
- iii. Whether the State could restrict the rights and fundamental freedoms in the Bill of Rights in order to achieve its objectives which it could achieve by taking less restrictive means.

Held

1. Despite the respondent averring that the petition was *sub judice* (meaning that a particular case or matter was under trial or being considered by a judge or court) in Nairobi Constitutional Petition 345 of 2016, *Bernard Ouma Omondi & another v Attorney General & Inspector General of Police*, the pleadings in the Nairobi matter were never annexed to the replying affidavit to enable the court to make a finding to that effect. Accordingly, there was no basis upon which a finding could be made.
2. The respondents treated juveniles or children on the same plane as adults. The Constitution and the Children Act appreciated that there was a difference in the level of maturity expected in children as opposed to adults. Therefore, treating them in the same manner by subjecting them to the same mode of treatment diluted and obliterated the constitutional and statutory mandate distinction.
3. The pronouncements and declarations by the DCI were a reaction to a spate of arson that was rampant in schools. However, high crime levels and well-justified public anger did not provide a justification for a legislative intervention overriding a specific protection in the Bill of Rights. Justifying the limitation



- of rights required information or policies bearing directly on that group. In its absence, it was difficult to appraise less restrictive means.
4. It was the duty of the State to deter crimes. The citizenry paid taxes so that the State could do just that. It was a duty which the State could not delegate to the citizenry. It should not therefore be seen to be throwing in the towel and devising certain unorthodox means of dealing with the offenders. Where the methods adopted by the State were *prima facie* (at first sight) restrictive, it was upon the State to satisfy the court that there existed no less restrictive means of achieving its purpose.
 5. If the State failed in its mandate it could not resort to unlawful means of achieving its mandate. It could not unduly restrict the rights and fundamental freedoms in the Bill of Rights in order to achieve its objectives which it could achieve by taking less restrictive means. The burden was upon it to satisfy the court that there were no less restrictive means in the circumstances. The State's action of infringing upon the rights of the children to privacy and to have their best interests taken into account was unwarranted. For the right to be limited the provisions of article 24 of the Constitution had to be satisfied.
 6. For a limitation to be justified it had to satisfy the criteria that it was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The pronouncements and declarations made by the DCI amounted to a restriction of the rights of the children to have their best interests given paramount consideration. It was therefore imperative for the court to take into account the international treaties on fundamental and human rights, and freedoms all of which provided for universal application of those rights and freedoms and the principles of democracy as well as decisions by courts in jurisdictions with similar legal systems in determining what was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
 7. International human rights bodies had developed detailed guidance on how the restrictions on the right could be applied and they had to meet the three part test described as follows;
 - a. the restrictions had to be prescribed by law: that meant that a norm had to be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly;
 - b. restrictions had to pursue a legitimate aim, exhaustively enumerated in article 19(3)(a) and (b) of the International Covenant on Civil and Political Rights (ICCPR) as respect of the rights or reputations of others, protection of national security, public order, public health or morals; and
 - c. restrictions had to be necessary and proportionate to secure the legitimate aim: necessity required that there had to be a pressing social need for the restriction.
 8. The party invoking the restriction had to show a direct and immediate connection between the expression/information and the protected interest. However, the premise of the memos was misguided and thus not necessary.
 9. Proportionality required that a restriction on expression was not overly harsh or irrational and that it was appropriate to achieve its protective function. It had to be shown that the restriction was specific and relevant to attaining that protective outcome and was no more intrusive than other instruments capable of achieving the same limited result.
 10. Article 17 of the African Charter on the Rights and Welfare of the Child, 1990, ratified by Kenya on July 25, 2000, on Administration of Juvenile Justice provided that the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law should be his or her reformation, reintegration into his or her family and social rehabilitation.
 11. The keeping of permanent records with the aim of making them available to prospective employers could not be said to be geared towards the juvenile's reformation, reintegration into his family and social rehabilitation. The release of the records to prospective employers also ran contrary to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 1985, under which in rule 21 provided that records of juvenile offenders should be kept strictly



- confidential and closed to third parties and that access to such records should be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons.
12. The release of the records to prospective employers violated rule 8.2 of the Beijing Rules which provided that in principle, no information that could lead to the identification of a juvenile offender should be published. Releasing certificates of good conducts which could be issued at the request of prospective employers fell afoul of rule 19 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) which provided that all reports, including legal records, medical records and records of disciplinary proceedings, and all other documents relating to the form, content and details of treatment, should be placed in a confidential individual file, which should be kept up to date, accessible only to authorized persons and classified in such a way as to be easily understood.
 13. The General Comment No. 10 issued in 2007 by the Committee on the Rights of the Child on Children's rights in juvenile justice (General Comment) which enunciated articles 16 and 40 of the Convention on the Rights of the Child recommended *inter alia* (among other recommendations) that the right to privacy also meant that the records of child offenders should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case. With a view to avoiding stigmatization and/or pre-judgements, records of child offenders should not be used in adult proceedings in subsequent cases involving the same offender, or to enhance such future sentencing.
 14. The General Comment recommended that the states parties introduce rules which would allow for an automatic removal from the criminal records of the name of the child who committed an offence upon reaching the age of 18, or for certain limited, serious offences where removal was possible at the request of the child, if necessary, under certain conditions (for example not having committed an offence within two years after the last conviction). Kenya's juvenile justice system recognized that criminal offences committed by children were to be handled in a totally different way from crimes committed by adults. They therefore could not be subjected to the harsh punishment of permanent criminal records, publishable on demand because children were different.
 15. Keeping permanent records of juvenile offenders presupposed that such offenders were incapable of reforming since the decision by the DCI did not provide for mechanisms through which such records could be expunged. By issuing permanent criminal records to juveniles, the respondents would extinguish the petitioner's potential and by extension, her life to be a productive, vibrant part of society.
 16. Both on the law and from the scientific point of view, a decision by which juvenile offenders were treated as an incorrigible mass could not be supported. It flew in the face of the law and the reality. It failed to appreciate the fragility and immaturity of juvenile offenders and failed to take into account the best interests of a child, it was patently unconstitutional. When the mighty and powerful such as the respondents trampled or threatened to trample upon the rights of the weak, powerless and vulnerable such as children whom the petitioner represented, the court had to offer the latter refuge.

Petition allowed; no order as to costs.

Orders

- i. *A declaration was issued that the 1st and 2nd respondents' acts of consolidating, archiving and keeping permanent criminal records of the petitioner was a violation of her constitutional and human rights.*
- ii. *An order of certiorari was issued quashing the decision by the 1st and 2nd respondents to consolidate, archive, keep and publish permanent criminal records of any minor found guilty of any criminal offence.*

Citations

Cases

1. Muruatetu & another v Republic & 6 others (Petition 15 & 16 of 2015; [2017] KESC 2 (KLR); [2017] 2 KLR 101) (Consolidated) — Applied
2. Omari v Ali (Civil Case 3144 of 1987; [1987] eKLR; [1987] KLR 616) — Mentioned



3. Omondi, Bernard Ouma & another v Attorney General & Inspector General of Police (Petition 345 of 2016; [2021] KEHC 2513 (KLR)) — Explained
4. Ndyanabo v Attorney-General ((2002) AHRLR 243 (TzCA 2002); [2001] 2 EA 485) — Explained
5. Obbo and another v Attorney General (Constitutional Appeal No. 2 of 2002; [2004] UGSC 81; [2004] 1 EA 265) — Explained
6. State v Ontefetse Molaodi (Criminal Appeal 10 of 1988) — Explained
7. Centre for Child Law v Minister for Justice and Constitutional Development and Others ((CCT98/08) [2009] ZACC 18; 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC)) — Followed
8. J v National Director of Public Prosecutions and Another ((CCT 114/13) [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC)) — Explained
9. Raduvha v Minister of Safety and Security and Another ((CCT151/15) [2016] ZACC 24; 2016 (10) BCLR 1326 (CC); 2016 (2) SACR 540 (CC)) — Explained
10. S v M ((CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC)) — Explained
11. S v Williams and Others ((CCT20/94) [1995] ZACC 6; 1995 (3) SA 632; 1995 (7) BCLR 861 (CC)) — Explained
12. R v Oakes ([1986] 1 SCR 103) — Explained
13. Leonardus Johannes Maria de Groot v. The Netherlands (Communication No. 578/1994, U.N. Doc. CCPR/C/54/D/578/1994 (1995)) — Mentioned
14. Vladimir Velichkin v. Belarus (Communication No. 1022/2001, U.N. Doc. CCPR/C/85/D/1022/2001 (2005)) — Mentioned
15. Yasmin v Mohamed ([1973] EA 370) — Explained
16. In Re an application by Lorraine Gallagher for Judicial Review (Northern Ireland); R (P, G & W) v Secretary of State for the Home Department; R (P) v Secretary of State for the Home Department ([2019] UKSC 3) — Explained
17. Eddings v Oklahoma (455 U.S. 104 (1982)) — Mentioned
18. Graham v Florida (560 U.S. 48 (2010)) — Explained
19. Haley v Ohio (332 U.S. 596 (1948)) — Explained
20. J. D. B. v. North Carolina (564 U.S. 261 (2011)) — Explained
21. Miller v Alabama (567 U.S. 460 (2012)) — Mentioned
22. Roper v Simmons (543 U.S. 551 (2005)) — Explained

Statutes

1. Children Act, 2001 (Act No 8 of 2001) — section 4, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194; Schedule 3 — Interpreted
2. Constitution of Kenya, 2010 — article 2 (6); 31(c); 35(1)(a); 38(2); 39(2); 43(1)(f); 47(1); 52; 53 (2); 238(2); Chapter 4, part 3 — Interpreted
3. Elections Act, 2011 (Act No 24 of 2011) — section 24(2)(g) — Interpreted
4. Political Parties Act, 2011 (Act No 11 of 2011) — section 7 (3)(b) — Interpreted

International Instruments

1. African Charter on the Rights and Welfare of the Child (ACRWC), 1990 — article 17
2. European Convention on Human Rights, 1950 — article 8
3. International Covenant on Civil and Political Rights (ICCPR), 1966 — article 19 (3)(a), (b)
4. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 — article 6 (1)
5. United Nations Convention on the Rights of the Child (UNCRC), 1989 — article 16, 40
6. United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990 — In general
7. Universal Declaration of Human Rights (UNDHR), 1948 — article 23 (1)



8. UN Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (The Beijing Rules) — rule 2.2(a); 21.1; 21.2

Advocates

Ms Ndegwa for Petitioner

JUDGMENT

Petitioner's Case

1. In this petition, the petitioner herein, PMK, was charged with murder in criminal case No 43 of 2016 and entered a plea of not guilty and was released on bail pending the trial. At the time of the alleged offence on October 30, 2016, the petitioner was fifteen years old having been born on November 2, 2000. Subsequently, the parties herein entered into plea bargaining negotiations with a view to reducing the charges to the lesser charge of manslaughter.
2. During the pendency of the said negotiations, sometime in 2018 following the spate of arson attacks in high schools several pronouncements were made by the 2nd Respondent, the Director of Criminal Investigations (the DCI) which pronouncements and declarations were posted on the DCI Twitter page stating that henceforth all minors who were found guilty of any known crime were to get permanent criminal records which would appear in their Certificates of Good Conduct and samples of the said records were also attached to the 2nd respondents press statement.
3. According to the petitioner, she faces the real and dire threat of having a permanent criminal record in contravention of her fundamental rights and freedoms under the Constitution, the Children Act 2001 and various international human rights instruments. The petitioner therefore moved this court seeking the following orders:
 1. A declaration that the 1st and 2nd respondents' acts of consolidating, archiving and keeping permanent criminal records of the petitioner is a violation of her constitutional and human rights;
 2. An order of *certiorari* to remove to this honourable court and quash the decision by the 1st and 2nd respondents to consolidate, archive, keep and publish permanent criminal records of any minor found guilty of any criminal offence.
 3. Costs of this petition be granted to the petitioner;
 4. Any other order that the court may deem fit to grant.
4. According to the petitioner, in 1990, Kenya signed the Convention on the Rights of the Child (CRC) and soon after domesticated its provisions with the enactment of the Children Act 2001 under a child in conflict with the law is termed as a child offender and once a child is in conflict, in addition to all the provisions of the Act, s/he has additional special protections accorded under sections 184 to 194 of the Act. It was noted that section 4 of the Act provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative bodies or legislative bodies, the best interest of the child shall be a primary consideration. This position is also underpinned in article 53(2) which provides that a child's best interest is of paramount importance in every matter concerning the child, a provision preceded by a rider in article 52 that elaborates certain rights to ensure greater certainty as to the application of rights and fundamental freedoms to certain groups of persons. According to the petitioner, the of Kenya has granted children special status in terms



- of certain rights and freedoms. It was contended that it is not in the best interest of the petitioner to be saddled with a permanent criminal record for an alleged offence committed when she was a minor.
5. In support of this position the petitioner relied on the decision of the South African Constitutional Court (SACC) in *Jv National Director of Public Prosecutions and Anor* (CCT 114/13) [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC) (6 May 2014), *Centre for Child Law v Minister for Justice and Constitutional Development and others* (CCT98/08) [2009] ZACC 18; 2009 (2) SACR 477 (CC) ; 2009 (6) SA 632 (CC) ; 2009 (11) BCLR 1105 (CC) , *Raduwba v Minister of Safety and Security and Another* (CCT151/15) [2016] ZACC 24; 2016 (10) BCLR 1326 (CC); 2016 (2) SACR 540 (CC) (11 August 2016) , *Sv M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (26 September 2007), *Sv Williams and others* (CCT20/94) [1995] ZACC 6; 1995 (3) SA 632 ; 1995 (7) BCLR 861 (CC) (9 June 1995)
 6. In this case, it was submitted that the respondents have decided to impose permanent criminal records for any minor found guilty regardless of the offence, and as shown in annexure, they will publish the said convictions on the Certificate of Good Conduct of the individual child, once an adult. This, it was submitted, from the foregoing jurisprudence, contravenes and violates the best interest of any child in conflict with the law. The petitioner relied on the dissenting opinion of Lord Kerr *In Re an application by Lorraine Gallagher for Judicial Review (Northern Ireland); R (P, G & W) v Secretary of State for the Home Department; R(P) v Secretary of State for the Home Department* [2019] UKSC 3 it is iniquitous. It was submitted further that the UK Supreme Court early this year dealt with four appeals related to the disclosure of criminal records and whether certain legislation in the UK violated the *European Convention on Human Rights* (ECHR), specifically article 8.
 7. According to the petitioner, by virtue of article 2(6) of the *Constitution*, “any treaty or convention ratified by Kenya shall form part of the law of Kenya.” She relied on article 17 of the *African Charter on the Rights and Welfare of the Child 1990*, ratified by Kenya on July, 25th 2000, on Administration of Juvenile Justice and submitted that the import of the aforementioned provision is that every child in conflict with the law must be treated in a manner that supports their reformation and rehabilitation and reintegration into society and their family. However, what the Respondents are purporting to do runs contrary to this principle of reformation and rehabilitation and reintegration into society and their family since a tainted Certificate of Good Conduct will impact an individual’s life at all levels; work, education, career, travel, political aspirations, right to adopt etc.
 8. The petitioner also relied on the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules")1985, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990)*, General Comment No 10 issued in 2007 by the Committee on the Rights of the Child on Children’s rights in juvenile justice which enunciated Articles 16 and 40 of the *Convention on the Rights of the Child*, article 23(1) of the *Universal Declaration of Human Rights* and article 6(1) of the *International Covenant on Economic, Social and Cultural Rights*.
 9. According to the petitioner, aforementioned international instruments provide that it is the right of every person to work and to be protected from unemployment. The 1st and 2nd respondents action will however, directly affect the right of the petitioner to secure work owing to the fact that the certificate of good conduct is now a ubiquitous document required by almost every employer. The petitioner’s right to work is in real and present danger and threatened by the 1st and 2nd Respondent’s actions.
 10. From the foregoing it was submitted that our juvenile justice system recognizes that criminal offences committed by children are to be handled in a totally different way from crimes committed by adults. They therefore cannot be subjected to the harsh punishment of permanent criminal records,



publishable on demand because children are different and according to the Beijing Rules, rule 2.2(a) the juvenile

#is a child or young person, who under the respective legal system, may be dealt with for an offence in a manner which is different from an adult.”

In this regard the petitioner relied on the decisions of the United States Supreme Court (SC) in Haley v Ohio 332 US 596 (1948), Eddings vs. Oklahoma 455 US 104 (1982), Roper v Simmons 543 US 551 (2005), Grabam v Florida 560 US 48 (2010), JDB v North Carolina 564 US 261 (2011) and Miller v Alabama 567 US 460 (2012) and submitted that the pronouncement/proclamation by the 2nd respondent violates several of the petitioner’s constitutional rights. A permanent criminal record for any offence committed as a minor is an unconscionable, harsh and inhuman punishment to bear. It is equivalent to having the Scarlet Letter “M” for Murderer emblazoned on the petitioner for the rest of her adult life. It will cause irreparable damage and discrimination of untold magnitude.

11. According to the petitioner therefore:

- a. Article 53(2) provides that a child’s best interest is of paramount importance in every matter concerning the child. The 1st and 2nd Respondents’ actions are not in the best interest of any minor who has been found guilty of a criminal offence. Their intention to brand such minors as criminals for the rest of their lives is contrary to the spirit and the letter of the aforesaid article.
- b. Article 31(c) provides that every person has the right to privacy, which includes the right not to have—
 - (c) information relating to their family or private affairs unnecessarily required or revealed. The petitioner’s right to privacy will clearly be violated as should she enter into the aforesaid plea agreement and a finding of guilt is entered, her record will not only be archived by the 1st and 2nd respondents but shared and published permanently.
- c. Article 39(2) provides for the freedom of movement and residence and in particular that every person has the right to leave Kenya. Should the petitioner be branded with a permanent criminal record, her freedom of movement out of Kenya will be severely impacted and limited. New Zealand, Australia, United Arab Emirates and South Africa as an example of some of the destinations where a clean Certificate of Good Conduct is required for travel and work permits.
- d. Article 43(1)(f) provides that every person has the right to education. Should the petitioner ever have the opportunity to travel overseas to further her education, the 1st and 2nd respondents actions will make it impossible as stated above.
- e. Article 38(2) provides that every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—
 - (a) any elective public body or office established under this Constitution. It is common knowledge that one of the requirements of seeking any electoral position in Kenya is to provide a certificate of good conduct. The actions of the 1st and 2nd respondents in effect, will deny the petitioner the right, if she chooses in future to run for any public office in Kenya.
- f. Article 47(1) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The petitioner herein has been



exposed to an administrative act by the 1st and 2nd respondents that is wholly unlawful and unfair as they will permanently keep and publish her criminal record.

- g. Article 238(2) principles of national security. This article provides that 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. The 1st and 2nd Respondents, by the aforesaid declarations and pronouncements have violated the aforesaid provision in its entirety.
- h. Section 158(3) of the *Children Act 2001* provides that an adoption order shall not be made if the applicant or, in the case of joint applicants, both or any of them...b) has been charged and convicted by a court of competent jurisdiction for any of the offences set out in the third schedule to this Act or similar offences...” Should the petitioner ever wish to adopt a child either as a sole applicant or jointly, she will be automatically disqualified as a result of the permanent criminal record. Her right to have a family by way of adoption will have been curtailed by the respondents actions.
- i. Section 19 of the *Children Act 2001* provides that every child shall have the right to privacy subject to parental guidance. The 1st and 2nd respondents, will violate this right of the minor petitioner as her plea agreement to manslaughter will become a permanent criminal record, accessible to all.
- j. Section 76(5) of the *Children Act 2001* provides that in any proceedings concerning a child, whether instituted under this Act or under any written law, a child’s name, identity, home or last place of residence or school shall not, nor shall the particulars of the child’s parents or relatives, any photograph or any depiction or caricature of the child, be published or revealed, whether in any publication or report (including any law report) or otherwise. The 1st and 2nd respondents however, will report and publish a child’s identity and his/her criminal record at will.
- k. Section 186(g) of the *Children Act 2001* provides that one of the guarantees to a child accused of an offence is that every child accused of having infringed any law shall— have his privacy fully respected at all the proceedings. The 1st and 2nd respondent, by consolidating, archiving, keeping and publishing the criminal records of the petitioner will have infringed this guarantee.
- l. Section 189 of the *Children Act 2001* provides that the words “conviction” and “sentence” shall not be used in relation to a child dealt with by the Children’s Court, and any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of a child, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order upon such a finding, as the case may be. This provision is extremely important and the Court of Appeal of Botswana in *State v Ontefetse Molaodi* Cr App 10 of 1988 in a matter when the issue of imprisonment of a juvenile pronounced itself on the same at pages 5-6:

“The Act is a wide reaching statute dealing with the care, custody, welfare and judicial discipline of infants, children and juveniles. In setting up juvenile courts the legislation has tried to get rid of any awesome or, to a young person, intimidating appearance of the judicial system. It has imposed informality, excluded the public and publicity and has required the juvenile court to take cognizance of certain



specific matters when dealing with a child or juvenile. It has sheltered the child or juvenile to the extent that section 28 makes no mention of conviction but only refers to the magistrate being satisfied of guilt. Similarly in section 31 of the Act dealing, with appeals again there is no use of the word "conviction". The powers given by section 28 are remedial and clearly not punitive in intent. They are intended for the protection of the child or juvenile and to ensure his keeping out of trouble. Any punitive aspect is incidental. The general tenor of the Act seems to show an intention in section 28 to substitute in respect of children and juveniles an educational and protective measure in substitution for the more rigorous and substantially punitive aspects of the general law."

Respondent's Case

12. The respondents opposed the petition *vide* grounds of opposition dated September 26, 2019 and filed on an even date. According to the respondent, the petition is *sub judice* Nairobi Constitutional Petition 345 of 2016 - [*Bernard Ouma Omondi & another v Attorney General & Inspector General of Police*](#). It was contended that the petition to be omnibus and lacked the sufficient detail of the alleged violations, mischievous and an abuse of the court process and ought to be dismissed.
13. There was a replying affidavit sworn on October 14, 2019 by Protas Onyango, the Deputy Principal Criminal Registrar attached to the Directorate of Criminal Investigations. He averred that he was one of the custodians of the criminal records and that the certificate of good conduct is produced from the criminal records of all adults and children of 12 years and above who have committed serious offences. The deponent detailed the procedure for applying for issuance of a police clearance certificate and added that every person is issued with a clearance certificate. However, the same bears details of any criminal record that is held by a person if available. The deponent added that in cases where an applicant previously convicted is released or on a successful appeal, the information is communicated to the DCI for purposes of updating the records.
14. According to the deponent, the need for a police clearance certificate was necessitated by instances including the right of access to information under article 35(1)(a) of the [*Constitution*](#); evidence of good conduct of state officers; requirement for nomination as member of parliament as per section 24(2)(g) of the [*Elections Act*](#); as a members of a political party under Section 7(3)(b) of the [*Political Parties Act*](#) and persons who intend to acquire a visa to travel to other countries. It was the deponent's contention that the claim of threat to infringement of the petitioner's constitutional rights by sharing and publishing criminal records is unfounded. The deponent also added that the claim by the petitioner is pre-emptive for the petitioner had not began the process of applying for the police clearance certificate and in any event the petitioner is no longer a minor hence the cited provisions of the law are not applicable to her circumstances. The deponent averred that there was need to balance the petitioner's rights with that of the potential employer to access information and hence the instant petition sought to circumvent the ongoing criminal proceedings and is an abuse of the court process and ought to be dismissed.

Determination

15. I have considered the issues raised in this petition. In my view there are two issues to be resolved in this petition. The first issue is whether this petition is *sub judice* Nairobi Constitutional Petition 345 of 2016 - [*Bernard Ouma Omondi & another v Attorney General & Inspector General of Police*](#). The second issue is whether the pronouncements and declarations made in 2018 by the 2nd Respondent, the Director of Criminal Investigations (the DCI) to the effect that henceforth all minors who were



found guilty of any known crime were to get permanent criminal records which would appear in their Certificates of Good Conduct.

16. Though the respondent averred that this petition is *sub judice* Nairobi Constitutional Petition 345 of 2016 - *Bernard Ouma Omondi & another v Attorney General & Inspector General of Police*, the pleadings in the Nairobi matter were never annexed to the replying affidavit to enable me make a finding to that effect. Accordingly, there is no basis upon which I can make the said finding.
17. Regarding the Constitutionality of the pronouncements and declarations made in 2018 by the 2nd respondent, the Director of Criminal Investigations (the DCI), the Constitution in Part 3 of Chapter Four (Bill of Rights) deals with Specific Application of Rights. Article 52 of the said Part introduces the said part by stating that:
 - (1) This Part elaborates certain rights to ensure greater certainty as to the application of those rights and fundamental freedoms to certain groups of persons.
 - (2) This part shall not be construed as limiting or qualifying any right.
18. Article 53(2) of the Constitution provides that:

A child's best interests are of paramount importance in every matter concerning the child.
19. There is no doubt that the subject pronouncements and declarations made in 2018 by the 2nd respondent, the Director of Criminal Investigations (the DCI) are matters which concern the child. The question therefore is whether those pronouncements and declarations are in the best interest of the child. Is it in the best interest of the child that whenever found guilty, that fact ought to form a permanent criminal record which is to appear in their Certificates of Good Conduct? The respondent has justified this action by stating that, the need for a police clearance certificate was necessitated by instances including the right of access to information under article 35(1)(a) of the Constitution; evidence of good conduct of state officers; requirement for nomination as member of parliament as per section 24(2)(g) of the Elections Act; as a member of a political party under section 7(3)(b) of the Political Parties Act and persons who intend to acquire a visa to travel to other countries.
20. The respondents seem to treat juveniles or children on the same plane as adults. However as held by Skweyiya, ADCJ in the South African Constitutional Court (SACC) case of *J v National Director of Public Prosecutions and Anor* (CCT 114/13) [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC) (6 May 2014):

“[33] The applicant submits that having one's particulars entered on the Register infringes that offender's rights to dignity, privacy, fair labour practices, and freedom of trade, occupation and profession...

[35] The amici argue that the provision infringes the best interests of the child, in terms of section 28(2) of the Constitution, which provides: “A child's best interests are of paramount importance in every matter concerning the child.”

The amici are correct that the starting point for matters concerning the child is section 28(2). This court has held that the “best-interests” or “paramountcy” principle creates a right that is independent and extends beyond the recognition of other children's rights in the Constitution. The “ambit of the [best-interests provision] is undoubtedly wide.”



- [36] The contemporary foundations of children’s rights and the best-interests principle encapsulate the idea that the child is a developing being, capable of change and in need of appropriate nurturing to enable her to determine herself to the fullest extent and to develop her moral compass. This court has emphasised the developmental impetus of the best-interests principle in securing children’s right to “learn as they grow how they should conduct themselves and make choices in the wide and moral world of adulthood.” In the context of criminal justice, the Child Justice Act affirms the moral malleability or reformability of the child offender.
- [37] A number of key principles arise from this approach to the best interests of the child offender. First, the law should generally distinguish between adults and children...
- [38] A second important principle is that the law ought to make allowance for an individualised approach to child offenders. The best-interests standard should be flexible because individual circumstances will determine which factors secure the best interests of a particular child. In *M*, this court held:
- “A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.”
- [39] Individualised justice is foreseen in the Child Justice Act. It requires that certain guiding principles are taken into account in the implementation of criminal justice concerning children. These include that all “consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society...
- [42] The provision requires that registration follows automatically from conviction of and sentencing for the particular crimes. This infringes the best interests of the child. The opportunity for an individualised response to the particular child offender, taking into account the child’s representations and views, is excluded both at the point of registration and in the absence of an opportunity for review. The limited circumstances in which an offender can apply for his or her removal from the Register are insufficiently flexible to consider the particular child’s development or reform.
- [43] Being placed on the Register bears serious consequences for the offender. As outlined above, restrictions are placed on the ability to work, on the ability to license certain facilities or ventures, and on the privileges of certain roles in the care of children or mentally disabled persons. While it is clear that child offenders fall within the ambit of “persons” to be registered under section 50(2)(a), the consequences that flow from the provision may not always affect the child offender while still a child. The impact of registration is reduced in practical terms and varies according to the particular child’s circumstances and age. However, this court has held that consequences for the criminal



conduct of a child that extend into adulthood (such as minimum sentences) do implicate children's rights. So, in the case of J, the fact that he was a child when the offence was committed means that his rights as a child are implicated, albeit that the consequences of registration will, for the most part, only be felt as an adult.

[44] Child offenders who have served their sentences will remain tarred with the sanction of exclusion from areas of life and livelihood that may be formative of their personal dignity, family life, and abilities to pursue a living. An important factor in realising the reformatory aims of child justice is for child offenders to be afforded an appropriate opportunity to be reintegrated into society. Furthermore, it is undoubted that there is a stigma attached to being listed on the Register even if the Sexual Offences Act closely guards the confidentiality of its contents. Given that a child's moral landscape is still capable of being shaped, the compulsory registration of the child sex offender in all circumstances is an infringement of the best-interests principle.

[45] Having found that the provision limits the child offender's right in terms of section 28(2) of the *Constitution*, it is not necessary to consider the further infringements alleged by the parties.

b. Is the limitation justifiable?

[46] The right of the child offender in terms of section 28(2) is nevertheless not absolute and can be limited. Section 36 of the *Constitution* provides for the limitation of rights when it is justifiable in an open and democratic society...Context and proportionality must be kept in mind when conducting the limitations analysis.

[47] The importance of the best-interests principle cannot be gainsaid, particularly when, as here, one is dealing with children exposed to the criminal justice system. How we treat and nurture our children today, including child offenders, impacts the shared dignity of the broader community for years to come....

[49] The limitation aims to achieve a valuable purpose. The objectives of the Register are, however, premised on the idea that the relevant offenders pose a risk to children and persons with mental disabilities. And patterns of recidivism for sexual offences may vary significantly between adults and children. The automatic operation of section 50(2)(a) means that the limitation will not always achieve its purpose for child offenders.

[50] There are less restrictive means to achieve the aims of the Register. Affording courts a discretion and the concomitant opportunity to the child offender to lead evidence and make argument on the question of registration would permit the possibility of greater congruence between the limitation and its purpose. Where a court decides on matters affecting children, discretion plays an important role in allowing for an individualised response to meet the child's best interests. Modifications to registration parameters (such as when registration is triggered and how it is terminated) may also permit for more individualised concerns to be taken into account in a consistent fashion.

[51] I conclude that the limitation of the right of child offenders in section 50(2)(a) is not justified in an open and democratic society. While the limitation promotes legitimate and constitutionally sound aims, there exist accessible and direct means to achieve



the purpose that are less restrictive to the child offender's rights. Section 50(2)(a) is constitutionally invalid and must be declared so."

21. In our own jurisdiction the Supreme Court has frowned upon any law and policy that treats person as a faceless, undifferentiated mass to be subjected to the blind infliction of the same penalty as infringing upon the right to a person's dignity by dehumanizing them. This was the position of the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic*, Petition No 15 of 2015, where it expressed itself as hereunder:

"[50] ...Article 28 of the *Constitution* provides that every person has inherent dignity and the right to have that dignity protected. It is for this court to ensure that all persons enjoy the rights to dignity...To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial...Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict."

22. I agree with the petitioner that the failure to take into account the different circumstances under which an offence is committed may well lead to an undesirable effect. I therefore associate myself with the opinion of Cameron J in *Centre for Child Law v Minister for Justice and Constitutional Development and Others* (CCT98/08) [2009] ZACC 18; 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC) ; 2009 (11) BCLR 1105 (CC) where he stated inter alia that:

"[25] It is evident that this provision draws upon and reflects the Convention on the Rights of the Child. Amongst other things section 28 protects children against the undue exercise of authority. The rights the provision secures are not interpretive guides. They are not merely advisory. Nor are they exhortatory. They constitute a real restraint on Parliament. And they are an enforceable precept determining how officials and judicial officers should treat children.

[26] the *Constitution* draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults.

[27] These considerations take acute effect when society imposes criminal responsibility and passes sentence on child offenders. Not only are children less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others. And, most vitally, they are generally more capable of rehabilitation than adults.

[28] These are the premises on which the *Constitution* requires the courts and Parliament to differentiate child offenders from adults. We distinguish them because we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.



- [29] This is not to say that children do not commit heinous crimes. They do. The courts, which deal with child offenders every day, recognise this no less than Parliament. The affidavit on behalf of the Minister rightly points to legislators’ concern about violent crimes committed by under-18s. the *Constitution* does not prohibit Parliament from dealing effectively with these offenders. The children’s rights provision itself envisages that child offenders may have to be detained. The constitutional injunction that “[a] child’s best interests are of paramount importance in every matter concerning the child” does not preclude sending child offenders to jail. It means that the child’s interests are “more important than anything else”, but not that everything else is unimportant: the entire spectrum of considerations relating to the child offender, the offence and the interests of society may require incarceration as the last resort of punishment...
- [32] In short, section 28(1)(g) requires an individuated judicial response...one that focuses on the particular child...rather than an approach encumbered by the rigid starting point...It does not import a supervening legislatively imposed determination...
- [33] The general considerations mitigating the treatment and punishment of child offenders find resonance with comparable systems of justice. In declaring unconstitutional the death penalty for offenders under 18, the Supreme Court of the United States of America has held that, as a category, children are less culpable. It observed that—
- “as any parent knows and as scientific and sociological studies . . . tend to confirm, [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”
- [34] That court also alluded to the fact that juveniles are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”. In part, this is due to the fact that “juveniles have less control, or less experience with control, over their own environment”.
- [35] As already pointed out, since the character and personality of children under 18 are not yet fully formed, child offenders may be uniquely capable of rehabilitation. Juveniles are still engaged in the process of defining their own identity. The United States Supreme Court has therefore pointed out that their “vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment”. Hence:
- “From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”
- [36] The Supreme Court of Canada has similarly found that because of their heightened vulnerability, relative lack of maturity and reduced capacity for



moral judgment, children are entitled to a presumption of diminished moral culpability. This, the court found, is “fundamental to our notions of how a fair legal system ought to operate”. The court therefore allowed a challenge based on the Canadian Charter of Rights to a statute that required the imposition of adult sentences on certain categories of violent child offenders unless the young person could justify why an adult sentence should not be imposed.

[37] In a practical and entirely unsentimental sense, children embody society’s hope for, and its investment in, its own future. The Bill of Rights recognises this. This is why it requires the state to afford them special nurturance, and affords them special protection from the state’s power...

[47] ...A child’s interests are not capable of legislative determination by group. As Ngcobo J has recently affirmed, albeit in a different context:

“What must be stressed here is that every child is unique and has his or her own individual dignity, special needs and interests. And a child has a right to be treated with dignity and compassion. This means that the child must ‘be treated in a caring and sensitive manner.’ This requires ‘taking into account [the child’s] personal situation, and immediate needs, age, gender, disability and level of maturity’. In short, ‘[e]very child should be treated as an individual with his or her own individual needs, wishes and feelings.’”

[48] The children’s rights provision thus applies to each child in his or her individual circumstances. This is no less so in the sentencing process than anywhere else. As Sachs J wrote for the court in *S v M*:

“A truly principled child-centred approach requires a close and individualized examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.”

23. Our *Constitution* and the *Children Act 2001* appreciates that there is a different in the level of maturity expected in children as opposed to adults. To therefore treat them in the same manner by subjecting them to the same mode of treatment dilutes and obliterates this constitutional and statutory mandate distinction. It would seem that the said pronouncements and declarations were a reaction to a spate of arson that was rampant in schools. However as was stated in the above case:

“[60] But high crime levels and well-justified public anger do not provide justification for a legislative intervention overriding a specific protection in the Bill of Rights. The effect of the Amendment Act is to single out one precisely defined group of offenders and limit the rights the *Constitution* specially affords them. Justifying the limitation of their rights requires information or policies bearing directly on this group. But the Minister offers no such evidence, nor any stated policy objectives. In its absence, it is difficult to appraise less restrictive means.”



24. In *Raduwa v Minister of Safety and Security and another* (CCT151/15) [2016] ZACC 24; 2016 (10) BCLR 1326 (CC); 2016 (2) SACR 540 (CC) (11 August 2016), Bosielo, AJ expressed himself as hereunder:

“[54] Section 39(1) commands a court, tribunal or forum, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. This is a constitutional injunction. Both the High Court and the full court were constitutionally obliged to consider the evidence through the lens of section 28(2) to determine if the police officers considered the applicant’s best interests, and if they did, whether they accorded them paramount importance. However, it does not appear from the judgments of either court that there was compliance with this constitutional injunction.

[55] Our courts are enjoined by section 39(1) when interpreting any legislation to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. This requires of our courts to play a crucial role in giving content and meaning to the fundamental rights enshrined in the Bill of Rights. Therefore the courts are the guardians of the *Constitution* and the values it espouses. In interpreting the law they must infuse it with values of our Constitution. Courts must never shirk this constitutional responsibility...

[56] However, this responsibility is not confined to the courts. Section 7(2) talks of the State. The Executive is also required to honour the obligation to respect, protect, promote and fulfil the rights in the Bill of Rights. This is crucial as the police are, in the daily execution of their duties, involved in instances that have the potential to affect people’s rights to dignity, equality and freedom – which are foundational to our democracy. Our people deserve a police service which is steeped in a culture of respect for human rights. This requires them in all their dealings with society whilst executing their constitutional duties to be guided by respect for human rights and strict observance of the rights to human dignity, equality and freedom...

[57] ...The need for our society to be sensitive to a child’s inherent vulnerability is behind section 28(2) of the *Constitution*. Section 28(2) is broadly worded. The interests of children are multifarious. However...section 28(2) seeks to insulate them from the trauma...by demanding in peremptory terms that...his or her best interests must be accorded paramount importance.

[59] ...All that the *Constitution* requires is that, unlike pre-1994, and in line with our solemn undertaking as a nation to create a new and caring society, children should be treated as children – with care, compassion, empathy and understanding of their vulnerability and inherent frailties. Even when they are in conflict with the law, we should not permit the hand of the law to fall hard on them like a sledgehammer lest we destroy them, the *Constitution* demands that our criminal justice system should be child-sensitive...

[61] Contrary to the position pre-1994, our constitutional dispensation has ushered in a new era – an era where the best interests of a child must be



accorded paramount importance in all matters affecting the child – an era where we, as society, are committed to raising, developing and nurturing our children in an environment that conduces to their well-being. This resolve was captured admirably by Khampepe J in *Teddy Bear Clinic*:

“Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that are necessary for their positive growth and development. Indeed, this court has recognised that children merit special protection through legislation that guards and enforces their rights and liberties. We must be careful, however, to ensure that, in attempting to guide and protect children, our interventions do not expose them to harsh circumstances which can only have adverse effects on their development.”

[65] There is no need to make section 28(2) an additional jurisdictional requirement. It is sufficient that in arresting a child, police officers must do it through the lens of the Bill of Rights and pay special attention to the paramount importance of the best interests of such a child. the *Constitution* demands that of the police as a constitutive part of the State. A failure to do this would render such an arrest inconsistent with the *Constitution* and thus unlawful...

25. Not too dissimilar sentiments were expressed Sachs, J in *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (26 September 2007) in which he expressed himself as hereunder:

“(12) Section 28(2) of the *Constitution* provides that “[a] child’s best interests are of paramount importance in every matter concerning the child.” South African courts have long had experience in applying the “best interests” principle in matters such as custody or maintenance. In our new constitutional order, however, the scope of the best interests principle has been greatly enlarged...

(14) While section 28 undoubtedly serves as a general guideline to the courts, its normative force does not stop there. On the contrary, as this court has held in *De Reuck, Sonderup and Fitzpatrick*, section 28(2), read with section 28(1), establishes a set of children’s rights that courts are obliged to enforce. I deal with these cases later. At this stage I merely point out that the question is not whether section 28 creates enforceable legal rules, which it clearly does, but what reasonable limits can be imposed on their application.

(15) The ambit of the provisions is undoubtedly wide. The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts



must function in a manner which at all times shows due respect for children's rights. As Sloth-Nielsen pointed out:

“ [T]he inclusion of a general standard (‘the best interest of a child’) for the protection of children’s rights in the *Constitution* can become a benchmark for review of all proceedings in which decisions are taken regarding children. Courts and administrative authorities will be constitutionally bound to give consideration to the effect their decisions will have on children’s lives.”

- (16) Secondly, section 28 must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child (the CRC). Section 28 has its origins in the international instruments of the United Nations. Thus, since its introduction the CRC has become the international standard against which to measure legislation and policies, and has established a new structure, modelled on children’s rights, within which to position traditional theories on juvenile justice...
- (17) Regard accordingly has to be paid to the import of the principles of the CRC as they inform the provisions of section 28 in relation to the sentencing of a primary caregiver. The four great principles of the CRC which have become international currency, and as such guide all policy in South Africa in relation to children, are said to be survival, development, protection and participation. What unites these principles, and lies at the heart of section 28, I believe, is the right of a child to be a child and enjoy special care.
- (18) Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.
- (19) Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma...
- (22) Furthermore, as Goldstone J pointed out in Fitzpatrick, section 28(1) is not exhaustive of children’s rights:

“Section 28(2) requires that a child’s best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and 28(2) must



be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1). This interpretation is consistent with the manner in which s 28(2) was applied by this court in *Fraser v Naude and others*.”

(23) It will be noted that he spoke about a right, and not just a guiding principle. It was with this in mind that this court in *Sonderup* referred to section 28(2) as “an expansive guarantee” that a child’s best interests will be paramount in every matter concerning the child...

[24] ...Yet this court has recognised that it is precisely the contextual nature and inherent flexibility of section 28 that constitutes the source of its strength. Thus, in *Fitzpatrick* this court held that the best interest principle has “never been given exhaustive content”, but that “[i]t is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child.” Furthermore “(t)he list of factors competing for the core of best interests [of the child] is almost endless and will depend on each particular factual situation’.” Viewed in this light, indeterminacy of outcome is not a weakness. A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.”

26. It is the duty of the state to deter crimes. The citizenry pays taxes so that the state can do just that. It is a duty which the state cannot delegate to the citizenry. It should not therefore be seen to be throwing in the towel and devising certain unorthodox means of dealing with the offenders. Where the methods adopted by the state are prima facie restrictive, it is upon the state to satisfy the court that there exist no less restrictive means of achieving its purpose. In other words, if the state fails in its mandate it cannot resort to unlawful means of achieving its mandate. It cannot unduly restrict the rights and fundamental freedoms in the Bill of Rights in order to achieve its objectives which it can achieve by taking less restrictive means. The burden is upon it to satisfy the court that there are no less restrictive means in the circumstances. In this case, its action of infringing upon the rights of the children to privacy and to have their best interests taken into account is unwarranted. For the said right to be limited the provisions of article 24 of the Constitution must be satisfied. Article 24(1), (2) and (3) provide 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) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—
- a. In the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
 - b. Shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
 - c. Shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
- (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.

27. Therefore, for a limitation to be justified it must satisfy the criteria that it is “is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. In dealing with these standards, the Supreme Court of Uganda while dealing with a similar provision in *Obbo and Another vs. Attorney General* [2004] 1 EA 265 expressed itself as follows:

“It is not correct that the test of what is acceptable and demonstrably justifiable for the purposes of limitation imposed on the freedoms of expression and freedom of the press in a free and democratic society must be a subjective one. The test must conform with what is universally accepted to be a democratic society since there can be no varying classes of democratic societies for the following reasons:- (i). First Uganda is a party to several international treaties on fundamental and human rights, and freedoms all of which provide for universal application of those rights and freedoms and the principles of democracy. The African Charter for Human and Peoples Rights and the International Covenant on Civil and Political Rights are only two examples. (ii). Secondly, the preamble to the *Constitution* recalls the history of Uganda as characterised by political and constitutional instability: recognises the people’s struggle against tyranny, oppression and exploitation and says that the people of Uganda are committed to building a better future by establishing through a popular and durable constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. When the framers of the *Constitution* committed the people of Uganda to building a democratic society, they did not mean democracy according to the standard of Uganda with all that it entails but they meant democracy as universally known...It is a universally acceptable practice that cases decided by the highest courts in the jurisdictions with similar legal systems which bear on a particular case under consideration may not be binding but are of persuasive value, and are usually followed unless there are special reasons for not doing so.”



28. In *Ndyanabo v Attorney General* [2001] 2 EA 485 it was held that:

“In interpreting the *Constitution*, the court would be guided by the general principles that,

- (i) the *Constitution* was a living instrument with a soul and consciousness of its own,
- (ii) fundamental rights provisions had to be interpreted in a broad and liberal manner,
- (iii) there was a rebuttable presumption that legislation was constitutional,
- (iv) the onus of rebutting the presumption rested on those who challenged that legislation’s status save that,
- (v) where those whom supported a restriction on a fundamental right relied on a claw back or exclusion clause, the onus was on them to justify the restriction.”

29. In this case it is clear that the pronouncements and declarations made by the DCI amounted to a restriction of the rights of the children to have their best interests given paramount consideration.

30. It is therefore imperative for the court to take into account the international treaties on fundamental and human rights, and freedoms all of which provide for universal application of those rights and freedoms and the principles of democracy as well as decisions by courts in jurisdictions with similar legal systems in determining what is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

31. In *R v Oakes* [1986] 1 SCR 103, it was held that:

“Firstly the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective the more severe the deleterious effects of a measure, the more important the objective must be.”

32. International human rights bodies have developed a detailed guidance on how the restrictions on the right can be applied and to meet so called the ‘three part test’ described below.

33. First, the restrictions must be prescribed by law: this means that a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly (see, Human Rights Committee, *Leonardus JM de Groot v The Netherlands*, No 578/1994, UN Doc CCPR/C/54/D/578/1994 (1995).



34. Second, restrictions must pursue a legitimate aim, exhaustively enumerated in article 19(3)(a) and (b) of the [ICCPR](#) as respect of the rights or reputations of others, protection of national security, public order, public health or morals.
35. Third, restrictions must be necessary and proportionate to secure the legitimate aim: Necessity requires that there must be a pressing social need for the restriction. The party invoking the restriction must show a direct and immediate connection between the expression/information and the protected interest. However, we have shown that the premise of the memos was misguided and thus not necessary.
36. Proportionality requires that a restriction on expression is not overly harsh or irrational and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and relevant to attaining that protective outcome and is no more intrusive than other instruments capable of achieving the same limited result. (see Human Rights Committee, [Velichkin vs. Belarus](#), Communication No 1022/2001, U.N. Doc. CCPR/C/85/D/1022/2001 (2005)).
37. Dealing with the sentence of juvenile whipping, pursuant to the provisions of section 294 of the Criminal Procedure Act, Langa, J in a unanimous judgment while declaring the sentence unconstitutional in [S v Williams and others](#) (CCT20/94) [1995] ZACC 6; 1995 (3) SA 632 ; 1995 (7) BCLR 861 (CC) (9 June 1995) noted:

“ [37] ...In determining whether punishment is cruel, inhuman or degrading within the meaning of our Constitution, the punishment in question must be assessed in the light of the values which underlie the [Constitution](#).

(38) The simple message is that the State must, in imposing punishment, do so in accordance with certain standards; these will reflect the values which underpin the [Constitution](#); in the present context, it means that punishment must respect human dignity and be consistent with the provisions of the [Constitution](#)...

(46) It was further claimed that age in itself was a redeeming feature; that while an adult whose character and personality has already been formed was likely to be hardened by the infliction of judicial whipping, the position was the opposite in the case of a juvenile. The basis for this was the view that as a juvenile's character was still in the process of formation, he was still susceptible to correction and advice; corporal punishment might therefore still have a reformatory effect on the young even though it was accepted that it was likely to have the opposite effect on the old.

(47) I do not agree. One would have thought that it is precisely because a juvenile is of a more impressionable and sensitive nature that he should be protected from experiences which may cause him to be coarsened and hardened. If the State, as role model par excellence, treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished. As Brandeis J observes in a dissenting opinion in *Olmstead v United States*:

“ Our Government is the potent, the omni-present teacher. For good or for ill, it teaches the whole people by its example.” ...



[60] In *State v Makwanyane and Mchunu* Chaskalson P deals with the "proportionality" test which is also implicit in the limitation of rights in Canada and the European Court. As a general conclusion he notes that the limitation of constitutional rights for a purpose that is necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. He points out how the German Constitutional Court applies the proportionality test in dealing with limitations authorised by the German Constitution:

"It has regard to the purpose of the limiting legislation, whether the legislation in fact achieves that purpose, whether it is necessary therefor, and whether a proper balance has been achieved between the value enhanced by the limitation, and the fundamental right that has been limited."

(61) The grounds on which the State sought to justify juvenile whipping were, firstly, that it made good practical sense to have juvenile whipping as a sentencing option. The practice had advantages for both the offender and the State, particularly in view of a shortage of resources and the infrastructure required for the implementation of other sentencing options for juveniles. Secondly, it was suggested that juvenile whipping was a deterrent....

[80] The State stressed the deterrent nature of juvenile whipping. Deterrence is, obviously, a legitimate objective which the State may pursue. We live in a crime-ridden society; the courts and other relevant organs of the State have a duty to make crime unattractive to those who are inclined to embark on that course. The concerns which the provision seeks to address are indeed pressing and they are substantial. But, as already stated, the means employed must be reasonable and demonstrably justifiable. No clear evidence has been advanced that juvenile whipping is a more effective deterrent than other available forms of punishment.

(84) What has not been shown is that such deterrent value as might exist is sufficiently significant to enable the State to override a right entrenched in the *Constitution*. All indications are to the contrary. While juvenile whipping has a brutalising effect, it has not been shown that it has the capacity to deter more than other punishments would do.

(85) Howie AJA, quite correctly in my view, warned against the idea that the accused should be sacrificed on the altar of deterrence. To this I would add that this is even more so when the court is dealing with a youthful offender.

(87) It needs to be stressed that it is in the interests of justice that crime should be punished. As pointed out by Schreiner JA in *R v Karg*:

"It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the



administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.”

(88) However, punishment that is excessive serves neither the interests of justice nor those of society. According to Brennan J, punishment is excessive if it is unnecessary, and it is unnecessary “if there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted.”

38. Article 17 of the *African Charter on the Rights and Welfare of the Child 1990*, ratified by Kenya on July, 25th 2000, on Administration of Juvenile Justice provides:

(3) The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, reintegration into his or her family and social rehabilitation.

39. The keeping of permanent records with the aim of making them available to prospective employers as alluded to in the replying affidavit, in my view cannot be said to be geared towards the juvenile’s reformation, reintegration into his family and social rehabilitation. The release of the records to prospective employers also runs contrary to the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (“The Beijing Rules”) 1985 under which in rule 21 provides that records of juvenile offenders shall be kept strictly confidential and closed to third parties and that access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons. It also violates rule 8.2 which provides that in principle, no information that may lead to the identification of a juvenile offender shall be published.

40. Releasing certificates of good conducts which can be issued at the request of prospective employers clearly falls afoul of rule 19 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990)* which provides that all reports, including legal records, medical records and records of disciplinary proceedings, and all other documents relating to the form, content and details of treatment, should be placed in a confidential individual file, which should be kept up to date, accessible only to authorized persons and classified in such a way as to be easily understood. The General Comment No 10 issued in 2007 by the Committee on the Rights of the Child on Children’s rights in juvenile justice which enunciated Articles 16 and 40 of the *Convention on the Rights of the Child* recommends inter alia that the right to privacy also means that the records of child offenders should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case. With a view to avoiding stigmatization and/or prejudgements, records of child offenders should not be used in adult proceedings in subsequent cases involving the same offender (see the *Beijing Rules*, rules 21.1 and 21.2), or to enhance such future sentencing. It is further recommended that the States parties introduce rules which would allow for an automatic removal from the criminal records of the name of the child who committed an offence upon reaching the age of 18, or for certain limited, serious offences where removal is possible at the request of the child, if necessary under certain conditions (eg not having committed an offence within two years after the last conviction)”

41. I therefore agree with the petitioner that our juvenile justice system recognizes that criminal offences committed by children are to be handled in a totally different way from crimes committed by adults. They therefore cannot be subjected to the harsh punishment of permanent criminal records,



publishable on demand because children are different. As appreciated by the United States Supreme Court (SC) in *Haley v Ohio* 332 US 596 (1948):

“What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child-an easy victim of the law-is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 am. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him.”

42. That juvenile offenders ought not to be treated with the same lens as adult offenders was appreciated by the Supreme Court in *Roper v Simmons* 543 US 551 (2005) where Kennedy, J writing for the majority noted:

“Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” Johnson, *supra*, at 367; see also Eddings, *supra*, at 115–116 (“Even the normal 16-year-old customarily lacks the maturity of an adult”). It has been noted that “adolescents are overrepresented statistically in virtually every category of reckless behavior.” Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992).

In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B–D, *infra*. The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. Eddings, *supra*, at 115 (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage”). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003) (hereinafter Steinberg & Scott) (“[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting”). The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E Erikson, Identity: Youth and Crisis (1968).

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.” Thompson, *supra*, at 835 (plurality opinion). Their own vulnerability and comparative lack of control



over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford*, 492 US, at 395 (Brennan, J, dissenting). The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside." Johnson, *supra*, at 368; see also *Steinberg & Scott* 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled.

Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood")... Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults.... Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity...When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity."

43. Keeping permanent records of juvenile offenders presupposes that such offenders are incapable of reforming since the said decision by the DCI does not provide for mechanisms through which such records can be expunged. I agree with the petitioner that by issuing permanent criminal records to juveniles, the respondents will extinguish the petitioner's potential and by extension, her life to be a productive, vibrant part of society. I therefore associate myself with the sentiments of Kennedy, J, in *Graham v Florida* 560 US 48 (2010) that:

"Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. Roper, 543 US, at 570.

It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."

...Deterrence does not suffice to justify the sentence either. Roper noted that

"the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." Ibid. Because juveniles' "lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions,"

Johnson v Texas, 509 US 350, 367 (1993), they are less likely to take a possible punishment into consideration when making decisions....



To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable.

“It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” Roper, *supra*, at 573.”

44. Sotomayor J in [*JDB v North Carolina*](#) 564 US 261 (2011) had this to say on the issue:

“Our various statements to this effect are far from unique. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. See, eg, 1 W Blackstone, Commentaries on the Laws of England (hereinafter Blackstone) (explaining that limits on children’s legal capacity under the common law “secure them from hurting themselves by their own improvident acts”). Like this court’s own generalizations, the legal disqualifications placed on children as a class— eg, limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal. Indeed, even where a “reasonable person” standard otherwise applies, the common law has reflected the reality that children are not adults. As this discussion establishes, “[o]ur history is replete with laws and judicial recognition” that children cannot be viewed simply as miniature adults. Eddings, 455 US, at 115–116. We see no justification for taking a different course here... The State and its amici offer numerous reasons that courts must blind themselves to a juvenile defendant’s age. None is persuasive.”

45. What comes out of the foregoing decisions is that both on the law and from the scientific point of view, a decision by which juvenile offenders are treated as an incorrigible mass cannot be supported. It flies in the face of the law and the reality. It fails to appreciate the fragility and immaturity of juvenile offenders and fails to take into account the best interests of a child. In a nutshell, it is patently unconstitutional. When the mighty and powerful such as the respondents herein trample or threaten to trample upon the rights of the weak, powerless and vulnerable such as children whom the petitioner herein represents, this court must offer the latter refuge. For as Madan, J (as he then was) appreciated in [*Yasmin v Mobamed*](#) [1973] EA 370:

“The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved.”

See also [*Omari v Ali*](#) [1987] KLR 616.

46. In the premises, I find this petition merited and I issue the following orders:

1. A declaration that the 1st and 2nd respondents’ acts of consolidating, archiving and keeping permanent criminal records of the petitioner is a violation of her constitutional and human rights;



2. An order of *certiorari* to removing to this honourable court and quash the decision by the 1st and 2nd respondents to consolidate, archive, keep and publish permanent criminal records of any minor found guilty of any criminal offence.
47. That brings me to the issue of costs. In my view if there are any proceedings in which public interests is a factor to be considered, these must be such. By this petition the petitioner has no doubt been true to her patriotic calling expected by article 3(1) of the Constitution to respect, uphold and defend the Constitution. The petition was filed in my view in the exercise of the petitioner's right under article 258(1) of the Constitution whereby the petitioner was claiming that the Constitution has been contravened, or is threatened with contravention. She was not mistaken in that claim. She ought to consider herself privileged to have been at the forefront in advancing the rule of law. She might be poorer in her pockets but to her I say your reward cannot be quantified in monetary terms and hers is the Kingdom of Patriotism. Kenyans will no doubt be grateful to her for having spiritedly made sacrifices to defend the interests of the children and for that I am sure the country and the children of this country will be forever indebted to her.
48. In the premises I will make no order as to costs.
49. I take this opportunity to express my appreciation to counsel who for their well-researched submissions. If I have not referred to all the submissions made and the decisions referred to me, it is not out of lack of appreciation for the industry.
50. Those shall be the orders of the court.

SIGNED AND DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER, 2019.

G V ODUNGA

JUDGE

