



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 57 OF 2018

DR. DAVID NDII

DR. ADAMS OLOO

MR. PAUL MWANGI

MR HENRY MIEN

MR. JIMMY WANJIGI

HON. JAMES ORENGO

HON. SIMBA ARATI.....PETITIONERS

VERSUS

DR. GORDON KHALANGWA, DIRECTOR OF CITIZENS &

IMMIGRATION SERVICES.....1ST RESPONDENT

DR. FRED MATIANG'I

THE CABINET SECRETARY MINISTRY OF INTERIOR COORDINATION

OF NATIONAL GOVERNMENT.....2ND RESPONDENT

JUDGMENT

1. In the petition filed on 16th February 2018, the petitioners herein, who describe themselves as Kenyan citizens by birth and residents of Nairobi County sued the 1st and 2nd respondents herein who are the Director in Charge of Citizenship and Immigration matters, and the acting Cabinet Secretary for Interior and Coordination of National Government respectively, seeking the following orders:

1. A declaration be and is hereby issued that the respondents' decision purporting to suspend the petitioners' passports is a violation of the petitioners' rights to hold a passport under Article 12, to equal protection of the law under Article 27, to free movement under Article 39 and to Fair Administrative Action under Article 47 of the Constitution and is accordingly null, void and of no effect in law.

2. An order of certiorari quashing the 1st respondent's decisions dated 5th February 2018 to suspend the petitioners' passports.

3. An order of prohibition restraining the respondents by themselves and/or their agents from in anyway interfering with the petitioners' rights to hold passports and/or freedom of movement otherwise than by strict compliance with the Kenya Citizenship

and Immigration Act and Fair Administrative Actions Act.

4. An order of prohibition restraining the respondents by themselves and/or their agents from in anyway interfering with the petitioners' rights to leave and re-enter Kenya as and when they please.

5. Special damages

6. General damages.

7. Costs of this petition.

8. Any further relief or orders that this Honourable court may deem just and fit to grant.

2. The petition was not opposed by the respondents who did not file any response to it despite proper service and despite an undertaking made in court on 10th April 2018 by a Miss Ndirangu counsel from the Attorney General's office to file a replying affidavit within 14 days.

The petitioners' case

3. The petitioners challenge the respondents decision of 5th February 2018 to arbitrarily suspend their respective Kenyan passports which action, they contend, contravene various provisions of the Constitution and the Kenyan Citizenship and Immigration Act (hereinafter "**the Act**").

4. The petitioners' case is that the decision to suspend their passports was unreasonable, grossly high-handed and unjustified in an open, democratic society considering that the freedom of movement by its very nature impacts on several other fundamental rights and freedoms including freedom of association and the right to pursue economic, professional and academic interests among other pursuits.

5. The petitioners state that the respondents did not demonstrate the objective that their impugned draconian decision was intended to achieve and whether the objective falls within the legislative objective of the Act. They further contended that by suspending their passports on unilateral and whimsical beliefs, the respondents acted ultra vires Article 12(2) as read with Article 24(3) of the Constitution that enjoin the respondents to provide reasonable justification for every limitation of a constitutional right.

6. Each of the petitioners swore separate but identical affidavits dated 15th February 2018 in support of the petition wherein they explain the circumstances under which the 1st respondent issued them with identical letters, dated 5th February 2018 directing them to surrender to him their passports within twenty one (21) days of receipt of the said letter.

7. They aver that the 1st respondent did not, in his said letter dated 5th February 2018, specify the reasons, within the provisions of Section 31(1) of the Act or the circumstances, within the Constitution under which the decision to confiscate their passports was arrived at. They all attached a copy of the impugned letter of 5th February 2018 as annexure marked "A" to the supporting affidavits. The common thread that ran through the petitioners affidavits except the 4th petitioner is that they believed that the genesis of the suspension of their passports was the remarks made at the press conference of 1st February 2018 and attributed to them. They each attached a copy of a transcription of the said remarks of their affidavits as annexure marked "B".

8. On his part, the 4th petitioner avers that he is a businessman who frequently travels out of the country on business trips and that on 6th February 2018, he was at Jomo Kenyatta International Airport ready to travel to Berlin in Germany and had been issued with a boarding pass when immigration officials informed him that he could not travel as he was required to report to Terminal IE after which the airline officers removed his luggage from the aircraft after which he was informed that his passport had been revoked but he was not given any reasons for purported revocation.

9. He attached a copy of the air ticket as annexure "HMD1" to his supporting affidavit and stated that the respondents' arbitrary action to suspend his passport and prematurely halt his trip to Germany curtailed his freedoms of movement and right to earn a living thereby occasioning him loss and suffering. He prayed to special damages for:

- a) Air ticket booking
- b) Airport taxi and from home.
- c) Legal fees for instructing a lawyer to institute the instant proceedings.

Petitioners written submissions.

10. M/S Awele & Bashir Advocate for the petitioners filed their written submissions to the petition on 9th July 2018 in which they state that the right to hold a passport is expressly enshrined under Article 12(1) (b) of the Constitution under the fundamental rights, privileges and entitlement of every Kenyan Citizen. They further submit that the law is settled that entitlement to a passport is not only a privilege or entitlement of citizens but is a substantive constitutional right which is inextricably intertwined with other constitutional rights of citizens and that the interference with the right, while itself a violation, would also inevitably interfere with other equally fundamental rights and freedoms that are hinged on it.

11. According to the petitioners, like any other constitutional right, the right to hold passport cannot be suspended or denied except as provided by law and in any event, within the strict confines of Article 24 of the Constitution. The petitioners relied on the decision in the case of E. W. A. & 2 Others vs Director of Immigration and Registration of Persons and Another [2018] eKLR wherein it was held:

“It is a constitutional imperative that a person was born in Kenya and at the time of birth at least one of his parents is a Kenya Citizen, the person enjoys citizenship by birth in terms of Article 14(1). Such citizenship cannot be revoked or lost under any circumstances. Article 12(1) of the Constitution provides that every citizen is entitled to the rights, privileges, and benefits of citizenship, subject to the limits provided or permitted by the Constitution, and a Kenya passport and any other document of registration or identification issued by the state to citizens. A passport or other documents referred to in Clause (1) (b) of Article 14 may only be denied, suspended or confiscated in accordance with an Act of Parliament that satisfies the criteria mentioned in Article 24.”

12. The petitioner also cited the case of Kenya Anti Corruption Commission vs Deepak Chamanlal Kamani & 4 Others [2014] eKLR wherein it was held inter alia that:

“The right to personal liberty and freedom of movement guarantees the citizens, among other things, the right to leave and return to Kenya. To facilitate this, the government issues passport to all its citizens because a passport is a necessary condition for travel abroad.”

13. The petitioners also cited the Canadian case of Khadi vs Canada (Attorney General) (F.C.) (08-05-2006) of Ontario in which the court discussed the necessity of a passport in the modern global economy without which the fundamental freedoms of movement and all its attendant benefits, and privileges, including the right to earn a living are curtailed. The petitioners argued that the right to hold a passport is not a favour or a prerogative of the state that can be given and withdrawn at the states pleasure as it is an essential constitutional right that facilitates the enjoyment of the fundamental freedom of movement and travel on which several other vital rights and freedoms including the right to seek employment, enjoyment and association among others are hinged.

14. The petitioners case was that Section 31 of the Act specifically provides for the circumstances under which an immigration officer or any other law enforcement officer may suspend or confiscate a passport or other travel documents and that he respondent had not demonstrated that the conditions enumerated in the said Section existed before suspending the petitioners passports.

15. It was the petitioners case that under Article 24(3) of the Constitution and Section 109 of the Evidence Act, the burden of proving the legality or otherwise of the limitation of constitutional right vests on the state or the person who seeks to justify the said limitation. The petitioners maintained that the purported suspension of their passports as communicated to them in the letter dated 5th February 2018 was illegal, null and void for the reasons that the said letter was vague and did not meet the conditions set out under Section 31 of the Act and breached the provisions of Article 47 and 50 of the Constitution as read together with the Fair Administrative Actions Act. Counsel relied on the Court of Appeal’s decision in the case of Onyango Oloo vs Republic (1986-1989) EA 456 wherein it was held that:

“ It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided.”

16. On Article 47 of the constitution on Fair Administrative Action, petitioners’ counsel cited the case of Republic vs. County Director of Education, Nairobi & 4 Others Exparte Abdukadir Elmi Robleh(2018)eKLR wherein the court underscored the mandatory pre- requisite of notice before administrative action taken against an individual as follows:

“ 44. It must also be noted that Section 5(1) of the Fair Administrative Act, 2015 provides that:

In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall-

- a. Issue a public notice of the proposed administrative action inviting public view in that regards;***
- b. Consider all views submitted in relation to the matter before taking administrative action;***
- c. Consider all relevant and material facts;***

45. That the impugned decision was likely to materially and adversely affect the legal rights or interests of a group of persons or the general public is not in doubt since the decision would have affected the rights and interests of the students and their parents/guardians. The importance of this requirement is emphasized by the provision of Section 4(3) of the same Act which provides that:

Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposes administrative action;

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

46. there is no indication that before the impugned decision was arrived at the respondents issued a public notice of the proposes administrative action inviting public views in respect of the proposed deregistration of the Applicant's schools let alone considering the resultant views."

17. Counsel submitted that the decision to suspend the petitioners' passports was laced with illegality and cannot stand in light of the clear violations of Sections 4 and 5 of the Fair Administrative Action Act and violation of the respondents duty under Article 21(a) of the Constitution.

Determination

18. I have considered the petition filed herein, the affidavit in support thereto and the written submissions of the petitioners advocates. As I have already stated in this judgment the respondents did not file any response to the petition despite proper service with the suit papers and despite an undertaking, by the counsel from the Attorney General's office made in court on 10th April 2018 to file a replying affidavit to the petition within 14 days. It is therefore my finding that the averments made by the petitioners were not controverted by the respondent and therefore remain unchallenged.

19. Be that as it may, this court is still under a duty to determine the merits of the petition. The main issue for determination is whether by suspending the petitioner's passports, through letters dated 5th February 2018, the respondents violated the petitioners rights and the provisions of the Constitution and the Act. The impugned letter of 5th February 2018 was worded as follows;

" Pursuant to Section 31(1) (2) of the Kenya Citizenship & Immigration Act 2011, you are hereby notified that passport Number C02494 which is in your possession remains suspended forthwith.

Consequently, you are required to surrender the said passport Number C02494 to the Director of Immigration Services at Nyayo House, 9th Floor within twenty one (21) days of receipt of this notice.

Failure to comply shall render the said passport null and void."

Section 31(1) (2) of the Act stipulates as follows:

1. "An immigration officer or any other law enforcement officer may suspend or confiscate a passport or other travel documents where-

- a) The holder permits another person to use his passport or travel document;**
- b) The holder has been deported or repatriated to Kenya at the expense of the Government;**
- c) The holder is convicted for drug trafficking, money laundering, trafficking in persons and smuggling, acts of terrorism or any other international crime;**
- d) A warrant of arrest has been issued against the holder and there is a risk of absconding.**
- e) The holder is a person against whom there is a court order restricting movement or authorizing denial, confiscation, or suspension of the passport or travel document;**
- f) The holder is involved in passport or document fraud, passport or document forgery or transnational crimes; and**
- g) It is necessary to examine the passport or travel document for a period not exceeding seven days.**
- h) Subject to the Constitution, any other circumstances which in the opinion of the Director would be prejudicial to the interest of the state of holder of the passport.**

2. The immigration officer shall, on suspension or confiscating the passport or travel document in accordance with subsection (1), inform the holder, in writing, within seven days, citing the reason, and may require him to surrender the passport or travel document.

3. Upon being served with a notice under Sub section (2), the holder shall within twenty one days of service, surrender the passport or travel document to the nearest immigration office or an authorized agent.

4. Where the holder of passport or travel documents fails to surrender the passport or travel document as required under Subsection (3), it shall become null and void after the expiry of twenty one days from the date of service of the notice to surrender the passport or travel document.

5. A person who is aggrieved by the decision to suspend or confiscate their passport may, within fourteen days of the receipt of written notice of such suspension or confiscation, file an appeal to the High Court."

20. In the instant case, I note that the impugned letter of 5th February 2018 was not specific on the reasons for the suspension of each of the petitioners passports and in respect to the 4th petitioner there was no letter at all, suspending his passport as all that was done was to stop his intended trip to Germany at the eleventh hour when he had already secured a boarding pass ready to board a Lufthansa Flight to Zurich Airport. I further note that the respondents did not inform the petitioners in writing or at all and within 7 days, citings of the reasons for the suspension of passports as is stipulated under Section 31(2) of the Act.

21. The right to fair administrative action is an integral part of the Bill of Rights and an essential feature of our Constitution as it is at the heart of a democratic society without which democracy and the rule of law cannot be said to exist. The right to fair administrative action is now firmly embedded in our Constitution as a way of ensuring that administrative actions meet the standards set by the Constitution. In this regard, Article 47 of the Constitution of Kenya provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

22. It is now trite law that even in cases where there is no express requirement that a person be heard before a decision affecting them is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly. This was the finding in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, Civil Appeal 52 of 2014 in which the Court of Appeal held that:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

23. The importance of fair administrative action as a Constitutional right was stated in the South African case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1**, at paragraphs 135 -136 where it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

24. In **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817** 6 it was held:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

25. The ingredients of fairness or natural justice that must guide all administrative decisions are; firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

26. The above cases and principles emphasize the fact that whatever form of proceedings adopted by an authority must meet the basic elements of fairness. In this case, it is clear that an adverse action of suspending the petitioners' passports was taken without any notice or information to them and without inviting them to defend themselves against any allegations or reasons that may have precipitated the said suspensions.

27. Article 47 of the Constitution envisages that the petitioners would have been heard before a determination to suspend their passports is made. This court notes that all the letters addressed to the petitioners did not include the reasons for the said suspension. In the case of **Geothermal Development Company Limited v Attorney General & 3 Others 2013] eKLR** it was held:

*“As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well..... Hilary Delany in his book, *Judicial Review of Administrative Action*, Thomson Reuters 2nd edition, at page 272, notes that, “Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision.”*

28. The totality of the evidence tendered by the petitioners in this case points to the fact that the respondent remained completely mute and did not explain to the petitioner, even after the filing of the instant petition, why they had taken the adverse action against him. It is instructive to note that to date, and despite the fact that the petitioner lodged this petition before this court seeking the enforcement of his constitutional rights, the respondent have not made good any of the petitioners' claims by withdrawing the impugned letter dated 5th February 2018 so as to mitigate the threatened and/or actual nullification of the said passports.

29. In the instant case, it was not disputed that the petitioners were not informed, in advance, of the intended adverse action of suspending their passports and neither were they accorded any hearing before their passports were suspended. The respondents, as state officers, in this case forgot their responsibility and call of duty to uphold the Constitution and as stipulated Under Article 21(1) "to observe respect, protect, promote and fulfill the rights and fundamental freedoms under the Bill of Rights". I therefore find and hold that the petitioners' rights under to hold passports, to free movement and to fair administrative action as provided for under **Articles 12, 39 and 47(1)** of the Constitution respectively were violated by the respondents when they purported to suspend the passports.

30. Among the orders sought by the petitioners in the petition were prayers for both special and general damages for the violation of their rights. Having found that the petitioners constitutional rights were violated, I now find it necessary, at this point, to consider the comparative jurisprudence and general principles applicable to awards and assessment of damages for the violation of the Constitutional rights of an individual by a State. It is not in doubt that under common law principles, an injured party is entitled to damages for the loss and injury suffered under private law causes of action, such as tort, where compensation of personal loss is at issue. However, in this case, I will consider what appropriate remedies are available for damages arising out of the violation of Constitutional and fundamental rights of an individual by a State under public law.

31. The principles applicable to award of damages for constitutional violations under the Constitution were explained exhaustively by the Privy Council in the famous case of **Siewchand Ramanoop vs. The AG of T&T**, PC Appeal No 13 of 2004 wherein was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

Per Lord Nicholls at Paragraphs 18 & 19:

When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.

All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.

32. In **Peters v. Marksman & Another** [2001] 1 LRC the Eastern Caribbean Supreme Court quoted with approval the words of Patterson JA in **Fuller v A-G of Jamaica (Civil Appeal 91/1995, unreported)**, where the Court held that:

"It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable... Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory."

33. The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is "just and appropriate" in **Doucet-Boudreau v. Nova Scotia (Minister of Education)**, 2003 SCC 62 to include, a remedy that will :

- (1) meaningfully vindicate the rights and freedoms of the claimants;*
- (2) employ means that are legitimate within the framework of our constitutional democracy;*
- (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and*
- (4) be fair to the party against whom the order is made.*

34. Having regard to the above judicial experience and philosophy, it is clear that the award of damages for constitutional violations of an

individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court but that such discretion is limited by what is "appropriate and just" according to the facts and circumstances of a particular case in view of the fact that the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements.

35. In the instant case I note that the petitioners were silent on whether or not they surrendered their passports to the 1st respondent within 21 days as was stated in the impugned letter of 5th February 2018 or if the alleged suspension of passports was actualized by subsequent nullification of the said passports such that the petitioners are currently not been able to use the same as a travel document or for any other purposes. No material was placed before this court to show that the respondents' impugned letter purporting to suspend the passports was acted upon thereby curtailing the petitioners' freedom of movement. Under the above circumstances, I find that the appropriate determination is not to award damages but to make a declaration of violation of constitutional rights to the extent that the impugned letter was not written in line with the provisions of the constitution. It is also noteworthy that even though the 4th petitioner claimed special damages in respect to payment for air ticket booking, airport taxi and legal fees, the particulars of the special damages were neither pleaded nor proved and I am therefore unable to find in favour of the petitioners for special damages.

36. In view of my findings and conclusion in this matter, I make the following final orders:

a) A declaration is hereby issued that the respondents' decision purporting to suspend the petitioners' passports is a violation of the petitioners' rights to hold a passport under Article 12, to equal protection of the law under Article 27, to free movement under Article 39 and to Fair Administrative Action under Article 47 of the Constitution and is accordingly null, void and of no effect in law.

b) An order of certiorari quashing the 1st respondent's decisions dated 5th February 2018 to suspend the petitioners' passports.

c) An order of prohibition restraining the respondents by themselves and/or their agents from in anyway interfering with the petitioners' rights to hold a passport and/or freedom of movement otherwise than by strict compliance with the Kenya Citizenship and Immigration Act and Fair Administrative Actions Act.

d) No orders as to costs.

Dated, signed and delivered in open court at Nairobi this 31st day of October 2018.

W. A. OKWANY

JUDGE

In the presence of:

Mr Awele for the petitioners

No appearance for the respondents

Court Assistant – Kombo