



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILINMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 354 OF 2016

**IN THE MATTER OF ARTICLES 22 (10, 10, 258 AND 259, 40, 47, 48 AND 50 OF THE
CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLE 27, 28, 29, 35, 40, 47, 48, 49 AND 50 OF THE
CONSTITUTION OF KENYA 2010**

**AND IN THE MATTER OF SUMMONS UNDER SECTION 49 (8) OF THE KENYA
CITIZENSHIP AND IMMIGRATION ACT 2011**

LI WEN JIE.....1ST PETITIONER

PENG ZHANG.....2ND PETITIONER

CATHAM PROPERTIES LTD.....3RD PETITIONER

VERSUS

CABINET SECRETARY, INTERIOR AND COORDINATION

OF THE NATIONAL GOVERNMENT.....1ST RESPONDENT

THE DIRECTOR OF IMMIGRATION.....2ND RESPONDENT

INSPECTOR GENERAL, NATIONAL

POLICE SERVICE.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGEMENT

Introduction

The Constitution does not distinguish in some respects between the rights of citizens and non citizens. The only right denied to foreigners is the right to vote or vie for elective offices. All other rights, however, are written without such a limitation. U.S. Supreme Court Judge Justice William Brennan^[1] commented that "illegal's had rights because they were "persons." He stated:-

"The illegal aliens who are ... challenging the state may claim the benefit of the Equal Protection clause which provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' Whatever his status under immigration laws, an alien is a 'person' in any ordinary sense of the term....."

But even before the U.S. Supreme court laid the issue to rest, a principal author of the Constitution, James Madison, the fourth president of the United States, wrote: "that as they [aliens], owe, on the one hand, a temporary obedience, they are entitled, in return, to their [constitutional] protection and advantage. In 200, the U.S. Supreme Court ruled in *Zadvydas v. Davis*^[2] that "due process" applies to all aliens in the United States whose presence maybe or is "unlawful, involuntary or transitory."

While natural law theories hold less influence today, the human rights movement of the last fifty years reflects a remarkably parallel secular understanding, namely that there are certain basic human rights to which all persons are entitled, simply by virtue of their humanity. Human rights treaties, including those that Kenya is a party to or has ratified, uniformly provide that the rights of due process, fundamental rights and freedoms, and equal protection are owed to all persons, regardless of nationality. The Universal Declaration of Human Rights, for example, aptly described by Professor Richard Lillich as the "*Magna Carta of contemporary international human rights law*," is expressly premised on "*the inherent dignity and ... the equal and inalienable rights of all members of the human family.*"^[3] The Universal

Declaration explicitly guarantees the rights of due process, political expression and association, and equal protection.^[4] Article 2(5) of the Constitution expressly imports the general rules of international law and makes them part of the laws of Kenya.

The normative idea underlying this broad consensus is that fundamental rights are owed to persons as a matter of human dignity and should be honored no matter what form of government a particular community chooses to adopt. As David Feldman has written, "there are certain kinds of treatment which are simply incompatible with the idea that one is dealing with a human being who, as such, is entitled to respect for his or her humanity and dignity."^[5] The rights of political freedom, right to life, freedom from inhuman and degrading treatment, due process, and equal protection are among the minimal rights that the world has come to demand of any society.

In the words of the U.S. Supreme Court, these rights are "implicit in the concept of ordered liberty."^[6]

Foreign nationals who have lived in a country for any significant stretch of time will likely have developed educational, occupational, business, property, personal and community ties that make it less than a simple matter to be deported without being afforded a fair process or being afforded the right to contest his/her deportation, or to apply for various forms of relief from the court.

The Petitioners case

The first and second petitioners are Chinese citizens. The first petitioner was at the material time the Assistant General manager of the third petitioner, a limited liability company while the second petitioner was its Resident Director and he participated in the acquisition of the properties of the third petitioner. Third petitioner owned parcels of land numbers Nairobi/ Block 17/556 and Nairobi Block/ 17/557 purchased at a cost of Ksh. 210 Million on which it planned to construct houses and apartments.

Briefly, the petitioners aver that hat that:-

*i. **That** in February 2014, the third petitioner purchased the above parcels of land and embarked on plans to develop them and that they are entitled to rights under Articles 40, 27, 48, 29 and 50 of*

the constitution.

ii. ***That*** the title to the said properties was challenged in court[7] where the two titles were described as LR No. 2/75. Also, the third petitioner later learnt of two other suits.[8]

iii. ***That*** the third petitioner avers that in or about August 2014, it was violently evicted from its above properties, and that injunctions were sought in the two suits referred to above and that in the two suits the court ordered that the status quo be maintained but the attention of the court was not drawn to the existence of the earlier mentioned case but the third petitioner in June 2016 applied for the suits to be consolidated.

iv. ***That*** it is also averred that the first petitioner subscribed to the third petitioner at the time of its incorporation and also a one Mr. Guo Dong was also subscriber but later he transferred his 850 shares to Multi Win Trading EA Company Ltd and that in January 2015, Mr. Guo Dong's employment was terminated for gross misconduct, but in June 2015, the said Mr. Dong changed his mind on the transfer of his shares and filed two suits in court.[9]

v. ***That*** it is also averred that after Mr. Dong was dismissed as aforesaid, he started misusing the police to harass the third petitioner and its employees, advocates and directors and also instituted hostile court proceedings[10] made false complaints of criminality against the petitioners advocates and its employees prompting the second petitioner to be summoned by the police for interrogation. He also arranged for the police to freeze the third petitioners bank account and sought a court order for nullification of the third petitioners titles.

vi. ***That*** the said Mr. Dong caused the publication of a defamatory article in a Nairobi publication an excerpt of which is reproduced in paragraph 19 of the petition and within a week of the said publication, the first and second petitioners were arrested on 8th August 2016.

vii. ***That*** the first and second petitioners aver that at all material times they lived in Kenya lawfully under section 34 of the Kenya Citizenship and Immigration Act.[11]

viii. ***That*** on 5th August 2016, the petitioners received summons to report to a Mr. Carlos Maluta at Nyayo House on 8th August 2016 and they complied and presented both oral and documentary evidence demonstrating that they were in Kenya Legally, but they were later arrested, handcuffed, had their phones confiscated, and detained in blatant disregard of the constitution only for the first petitioner to be released around 12.00am on 9th August 2016 without being offered reasons while the first petitioner was illegally deported in total contravention of the constitution and principles of natural justice.

ix. ***That*** the first petitioner was illegally summoned before his area chief but after seeking reasons why he was being summoned, none were supplied, and that on 18th August 2016 he learnt that a police car had been stationed outside his residence, that he was never given reasons for his arrest contrary to Articles 35 (2) and 47 (1) of the constitution and fears that his rights under article 40 and 50 will be violated and that their right to access to justice will be violated in that the first petitioner is its crucial witness in the various cases cited above, hence the reliefs sought in the petition.

Respondents' case

In a Replying affidavit sworn by Alfred Abuya Omangi, the Chief Investigations and Prosecutions Officer of the Department of Immigration avers inter alia that:-

a) ***That*** the first and second petitioners were served with summons to appear in person under section 49 (8) of the Citizenship and Immigration Act[12] for the purpose of determining whether the first and second petitioners were permitted to remain in Kenya and that the said summons were

necessitated by the continued acrimonious relationship between the Directors of the third Petitioner and other persons with allegations and counter allegations of fraudulent activities.

*b) **That** the first petitioners was issued with a Class "G" Entry Permit as a Director with M/S Homelands Development Ltd that expired on 17th October 2014, that he had no foreign national registration certificate as required by Immigration regulations, but had a visitors pass issued under the Regulations that do not permit the holder to engage in business or employment.*

*c) **That** the second petitioner was issued with class 'G' Entry Permit to do business with Multi-Win Trading E.A. Ltd which was still valid and that he was registered as a foreign national as required. However the two had no valid permit to engage in business of Homeland Development Ltd or as directors of the third petitioner.*

*d) **That** no attempt was made by the first petitioner to renew his permit, hence the second respondent recommended to the Cabinet Secretary that the first petitioner was not permitted to remain in Kenya, hence he was deported legally pursuant to section 33 of the Kenya Citizenship and Immigration Act[13] and that the Respondents decision met the constitutional threshold under Article 47 of the constitution, and that the right to property under Article 47 is not absolute but subject to the provisions of the Kenya Citizenship and Immigration Act[14] and that the first petitioner has a right to apply for review of the said decision and that the said decision was not calculated to bar the first Respondent from giving evidence in the cases in court.*

Replying affidavit

In a replying affidavit to the above, the first petitioner avers that the effect of his pass port being held by the state was to make it impossible for him to apply for the renewal of his work permit, that it was necessary to have the work permit extended to enable him to defend his investments in Kenya, that the state is mandated to uphold the rule of law, that the state ought not support one party in litigation, that the decision complained of violated the rules of natural justice,[15] that article 50 guarantees right to a fair and public hearing, that his pass port was impounded in early June 2016, that the above replying affidavit did not disclose criminal case number 3830 of 2014, that he deposited his pass port in court in September 2014, that the first Respondent has no powers to arbitrarily deport foreign nationals and must observe the provisions of the constitution.[16]

Advocates submissions

Counsel for the petitioners submitted that this court has jurisdictions to hear this petition[17] and cited article 165 (3), 22 and 23 of the constitution.[18] Counsel also relied on the provisions of articles 259 and 25 of the constitution and submitted that the petitioners rights were violated, namely, right to property, that the decision was not impartial and violated articles 27 (1), 10, and 47 of the constitution. Counsel also submitted that the petitioners right to dignity[19] freedom of the person[20] and access to information, right to property, fair trial and right to fair administrative action were all violated and cited numerous authorities. Also counsel cited violation of right to access to justice and violation of rights of arrested persons and urged the court to invoke its supervisory powers and grant the reliefs sought.

Respondents counsels submissions

Counsel for the Respondents submitted that summons complained of were issued pursuant to section 49 (8) of the Kenya Citizenship and Immigration Act,[21] that the first petitioners work permit had expired, hence he was not permitted to remain in Kenya, hence his status in Kenya was unlawful[22] therefore his deportation was lawful and that the first and second petitioners constitutional rights were not violated, and that the petitioners were treated fairly and the violation of the various provisions of the constitution were denied and that the court has no jurisdiction to intervene in the present case under article 165 of the constitution and cited the doctrine of separation of powers and urged the court to decline the reliefs sought.

Petitioners counsels' submission in Reply

Counsel for the petitioners reiterated his earlier submissions and submitted that at the time the work permit expired, the first petitioners passport had been deposited in court and he was in the process of regularizing his immigration status, that as was held in *Nabro Properties Ltd vs Sky Structures Ltd & Two Others*,^[23] a person cannot base his claim on his own wrong, hence the petitioners cannot take advantage of their own illegal act of impounding the first petitioners passport and allege that his immigration status in Kenya was invalid and that the case of *Khatija Muhamed* cited by the Respondents' counsel can be distinguished from the present case, hence the petitioners deportation was illegal and a violation of his constitutional rights.

Jurisdiction

Article 165(1) of the Constitution establishes the High Court and vests in it vast powers including the power to ‘*determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened*’ and the jurisdiction ‘*to hear any question respecting the interpretation of the Constitution.*’ **Article 23** provides that; “23. (1) *The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*”

Article **165 (6)** provides that “*The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.*” Article **165 (7)** provides that “*For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.*”

Article 2(1) of the Constitution provides that ‘*This Constitution is the Supreme Law of the Republic and binds all persons ...*’ Article **260** defines person to include company, association or other body of persons whether incorporated or unincorporated. Article **259** of the constitution enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. This court is obliged under Article **159 (2) (e)** of the constitution to protect and promote the purposes and principles of the constitution. Also, the constitution should be given a purposive, liberal interpretation. The Constitution of Kenya gives prominence to national values and principles of governance. Article 10 (2) of the Constitution provides the national values and principles of governance which include Rule of Law, Human Dignity, Equity, Human Rights, non-discrimination, social justice, Equality, integrity, transparency and accountability.

Still on jurisdiction, I find it fit to recall the words of Atkin, L.J. who summed up the law on this point in *Rex vs. Electricity Commissioners*^[24] when he said:-

“Whenever anybody or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division.....”

On reliefs available from this court, Article 23 (3) provides that the court may grant appropriate relief including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right, compensation and an order of judicial review.

Judicial review is available as relief to a claim of violation of the rights and freedoms guaranteed in the constitution. The constitution has expressly granted the High Court jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus is whether the function was judicial or quasi-judicial and affected constitutional rights of the individual. Any decision making process that does not adhere to the **constitutional tests** either on constitutional rights or on procedural fairness, cannot stand court scrutiny. The Supreme Court of Kenya recognized that the power of any judicial review is now found in the constitution in the case of *C.C.K. vs Royal Media Services Ltd*^[25] where it painted the

clearest picture of the evolved nature of judicial review in Kenya. In that case, the Supreme Court held that the power of judicial review in Kenya is found in the Constitution, as opposed to the principle of the possibility of judicial review of legislation established in *Marbury v Madison*[26]. The Court cited Articles 23(3)(d) and 165(3)(d) of the constitution. Also, the Constitution has entrenched the right of fair administrative action under Article 47 of the Constitution.

Comparative jurisprudence

The concept of judicial review under the Constitution of Kenya is similar to that under the Constitution of South Africa where it was held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others*[27] that “[t]he common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts. The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

Expanded scope of judicial review

As can be seen, the entrenchment of the power of judicial review, as a constitutional principle should of necessity expand the scope of the remedy. Parties, who were once denied judicial review on the basis of the public-private power dichotomy, should now access judicial review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Court decisions should show strands of the recognition of the Constitution as the basis of judicial review.

Our courts need to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision of power and develop the law on this front. Our courts must develop judicial review jurisprudence alongside the mainstreamed “theory of a holistic interpretation of the Constitution. Judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal. Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the rule of law to ensure the paramountcy of the law. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*[28]:-

“Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making

the decision the decision maker took into account relevant matters or did take into account irrelevant matters....."

Applying the law to the facts of this case

A person or a body exercising statutory power is bound to adhere to the mandate stipulated in the statute creating it and its actions must conform to the constitutional prescriptions as clearly provided in our transformative constitution. As observed earlier, foreign nationals who have lived in a country for any significant stretch of time will likely have developed educational, occupational, business, property, personal and community ties that make it less than a simple matter to be deported without being afforded a fair process or being afforded the right to contest his/her deportation, or to apply for various forms of relief from the court. This leads to the question whether or not the actions complained of conformed to the principles of natural justice.

Natural justice

Article 47 of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[29] Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.[30] The issue that inevitably follows is whether or not the manner in which the second Respondent conducted the challenged deportation amounted to breach of the rules of natural justice. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "*an essential inbuilt component*" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

In *Local Government Board v. Arlidge*,[31] Viscount Haldane observed, "...those whose duty it is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice."

In India the principle is prevalent from the ancient times.[32] In this context, para 43 of the judgment of the Supreme Court in the case of *Mohinder Singh Gill vs. Chief Election Commissioner*,[33] may be usefully quoted:-

"Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognized from earliest times and not a mystic testament of judge-made law. Indeed from the legendary days of Adam-and of Kautllya's Arthashastra-the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system."

In a recent decision of this court[34] I held that the principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. De Smith, in his *Judicial Review of Administrative Action*,[35] observed, "Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice." **Wade** in *Administrative Law*[36] says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

Natural justice has been described as “fair play in action the principles and procedures which in any particular situation or set of circumstances are right and just and fair.”^[37] Its rules have been traditionally divided into two parts: *Audi alteram partem*– the duty to give persons affected by a decision a reasonable opportunity to present their case. *Nemo iudex in causa sua debet esse*– the duty to reach a decision untainted by bias. “Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it.”^[38]

Generally, however, it is imperative that individuals who are affected by administrative decisions or decisions made by statutory bodies be given the opportunity to present their case in some fashion. They are entitled to have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process which is appropriate to the statutory, institutional, and social context of the decision being made.^[39]

In the modern state, the decisions of statutory or administrative bodies can have a more immediate and profound impact on people’s lives than the decisions of courts, and public law has since *Ridge vs. Baldwin*^[40] **been alive to that fact.** Procedural fairness has embedded in it the age old natural justice requirements that no man is to be a judge in his own cause, no man should be condemned unheard and that justice should not only be done but seen as done.^[41]

The question that follows is, considering the facts enumerated by the parties herein, and the manner in which the entire process was handled by the Respondents, can a reasonable observer properly exercising his mind safely conclude that justice was seen to be done in this case. I do not think so. Here is a foreigner whose passport had been taken away from him, yet this key aspect was never considered. Here are foreigners who had heavily invested in the country, yet the decision taken was bound affect their property rights. Here are foreigners who had litigation touching on their properties pending in court. The deportation was bound to prejudice their right to access to justice. There were court cases involving their properties and the deportation was bound to give undue advantage to their opponents in the cases in question. Effectively, procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. There is serious and reasonable perception that their opponents in the civil disputes pending in court had a hand in the deportation process. This was not rebutted. Such allegations or possibility of the process having been engineered by their business opponents misusing the police tainted the entire process. There are allegations that the police powers were abused. These have not been rebutted.

The question that begs for answers is whether or not the manner the respondents acted constituted a breach of the rules of natural justice. I think it is important to bear in mind that Article 259 of the constitution enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. This court is obliged under Article 159 (2) (e) of the constitution to protect and promote the purposes and principles of the constitution. Also, the constitution should be given a purposive, liberal interpretation. The Constitution of Kenya gives prominence to national values and principles as earlier mentioned which include Rule of Law, human dignity, equity, social justice, inclusiveness, equality, human rights etc.^[42] I am not persuaded that the actions complained of can pass these constitutional tests.

The constitution has expressly granted the High Court jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus is whether the decision affected constitutional rights including the right to fair administrative action under Article 47, or the right to natural justice under Article 50.

Determination

The Bill of Rights applies to all persons including foreign national and any decision that is bound to affect their rights must be arrived at in conformity with the constitutionally guaranteed rights to fair process. It is important to recall the words in the Respondents replying affidavit which disclose the reasons why the first and second petitioner were summoned to the offices of the immigration offices. It is averred on oath

that "the said summons were necessitated by the continued acrimonious relationship between the Directors of the third Petitioner and other persons with allegations and counter allegations of fraudulent activities." This confirms that the reasons behind their being summoned to the said offices had nothing to do with their immigration status but had everything to do with a dispute with other persons. This raises the question whether or not the immigration officers were acting at the behest of persons who had interests in the civil cases in court. This also raises the question whether or not the deportation was meant to give undue advantage to some parties to the disputes pending in court. These questions are disturbing and go to the core of the manner in which the deportation process was hurriedly rushed.

Section 49 (8) of the Kenya Citizenship and Immigration Act^[43] provides that "an immigration officer may, by summons in writing, require any person other than a citizen of Kenya to attend at his office and to furnish to that officer such information, documents and other particulars as are necessary for the purposes of determining whether that person should be permitted to remain in Kenya." My reading of the foregoing section is that it does not entail arbitrary deportation nor does it justify a situation whereby a foreign national is summoned, held at the immigration offices or cells and then escorted to the next available flight without being afforded a reasonable opportunity to defend himself or show cause why he ought not to be deported or seek court intervention. A procedure that excludes a fair process or due process cannot meet the constitutional test.

Section 2 of the act defines deportation as:- "**deportation**" means the action or procedure aimed at causing an illegal foreign national to leave the country either voluntarily or compulsorily, or under detention in terms of this Act and the verb 'to deport' has a corresponding meaning;"

It is important to mention that the provisions of the law cannot be read in isolation and I think section 49 (8) ought to read together with section 49 (6) which provides that "Notwithstanding any provisions of this Act, all persons against who a deportation order has been issued shall be removed from Kenya within a period of ninety days from the day such final removal order is made or after appeal and further detention shall be extended by a court of law for not more than thirty days;" This raises the fundamental question as to why the first petitioner was hurriedly removed from the country within hours of the decision being made even if his status was wanting.

The speedy manner in which the deportation process was undertaken raises fundamental questions. Was the deportation process handled too *speedily*, in a way that equally undermined any sound conception of justice? Was the first Respondent accorded adequate time to offer his defence or show cause as to why he should not be deported? This, and many more questions are bound to arise. In other words, did the speedy manner in which the process was conducted cause what **Brooks Holland** authoritatively describes as "*The Two-Sided Speedy Trial Problem.*"^[44]

The problem caused by speedy trials was ably discussed by **Shon Hopwood**^[45] who while invoking the maxim "*justice delayed is justice denied*" considered the fuller picture of criminal justice, (which I think is relevant to the present case, even though we are dealing with a deportation case). He postulates what he calls the flip side of the said maxim and argues that it poses an equal danger. This danger was ably brought out by *Martin Luther King, Jr.'s Letter from Birmingham Jail* where he wrote:- "*justice too long delayed is justice denied.*"^[46] *Not because delays contrary to justice should be tolerated for any time. Rather, because the flip side of justice delayed can be an equal danger: a rushed, unconsidered justice.*"

In my considered opinion, the speedy trial provided for in our constitution is not "*a rushed and unconsidered justice.*" No. It cannot be nor can it be so construed under any circumstances. In my considered view, our constitution provides for a speedy trial process but it anticipates a trial with two sides, which must as of necessity exhibit the best antidote to both sides. It must demonstrate a justice system **that is not too fast, and not too slow, but just right.**^[47] To me that is the proper meaning of the phrase "*to have the trial begin and conclude without unreasonable delay.*" The drafters of the constitution never anticipated a process that is too speedy to the detriment of an accused person. I reiterate that the flip side of the maxim "*justice delayed is justice denied...*" **"is a rushed, unconsidered, un-procedural and unconstitutional process that undermines sound justice system."** The effect is that

such a process is a sham and has absolutely no place in our constitutionalism. I find that the speedy manner in which the deportation process was undertaken is a mockery to justice and cannot taking all into account qualify to be called a fair process and as observed above, the principles of natural justice were flouted.

The other important aspect that cannot escape the attention of this court is the multiple role played by the immigration officer which to me is unacceptable and cannot meet the tests of fairness prescribed in the constitution. The immigration officer summons the person, interrogates him and makes the decision. In short, he is the investigator, arbiter and executioner. In all fairness, such a decision cannot stand on account of procedural fairness and rules of natural justice. Article 47 of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.^[48] On this ground, I find that the deportation was tainted with illegality and cannot stand alone.

If there is one principle which runs through the entire fabric of the constitution, it is the principle of the Rule of Law. Under the constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective.

The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under our transformative constitution judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to principles, ideas, purposes and values enshrined in the constitution. I am persuaded beyond doubt that the process of deportation subjected to the first petitioner cannot stand the test of the constitutional values and ideas enshrined in our transformative constitution.

I find that the Respondents' actions violated fundamental rights of the petitioners. Consequently, I allow the petition and make the following orders:-

a) *That a declaration be and is hereby issued that the Respondents contravened the rights of the first and second petitioners guaranteed under Article 27, 28, 29, 35, 47, 49 and 50 of the constitution.*

b) *That a declaration be and is hereby issued that the Respondents' violated the third petitioners constitutional rights to property under Articles 40 of the constitution, the right to access to justice under article 48 and the right to a fair trial under article 50 of the constitution.*

c) *An order be and is hereby issued quashing the purported deportation of the first petitioner on grounds that the decision was arrived at in total violation of the provisions of Article 47 of the constitution and in breach of the principles of natural justice, hence the said deportation is hereby declared to be null and void.*

d) *That an order of mandamus be and is hereby issued compelling the second Respondent to remove the first petitioner from the watch list.*

e) *That the Respondents shall pay the costs of this petition to the petitioners.*

Orders accordingly.

Signed, Dated and Delivered at Nairobi this 22nd day of March 2017

John M. Mativo

Judge

[1] *Plyler v. Doe* {1982}

[2] {2001}

[3] Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law*, 41 (Manchester University Press 1984); Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., Supp. No. 13, at 71, U.N. Doc. A/810 (1948).

[4] Universal Declaration of Human Rights, pmb., art. 7-11, 19, 20(1). G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

[5] David Feldman, *Human Dignity as a Legal Value -Part I*, 1999 Pub. L. 682, 690-91.

[6] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

[7] In ELC No. 615 of 205, *Delta Haulage Services Ltd vs Catham Properties*

[8] These are ELC No. 100 of 2007, *Samvo Company Ltd vs Delta Haulage Services Ltd & Catham Properties Ltd* and ELC No. 2=326 of 201`2 *Delta Haulage Services Ltd vs Commissioner of Lands & Others*

[9] Misc Civil App No. 264 of 2015, *Guo Dong vs Multi Win Trading EA Ltd & Others* and High Court Misc Civil App No. 268 of 2015, *Guo Dong vs Christine Anyango Muga Ongalo, Tobias Muga & Others*

[10] Pet No. 571 of 2015, CR Case No. 222 of 2015, HCC No. 615 of 2014

[11] Act No. 12 of 2011

[12] *Supra*

[13] *Ibid*

[14] *Ibid*

[15] Counsel cited *De sOuza vs Tanga Town Council* {1961} EA 377, *R vs Parole Board* {2005} UKHL, 45

[16] Counsel cited *Geothermol Development C Ltd vs A.G & Others* {2012} eKLR

[17] Counsel cited *Samuel K Macharia & Another vs KCB & Others* {2012} eKLR

[18] Counsel also cited *Kimani vs A.G* {1969} EA 29

[19] Counsel cited *Kituo Cha Sheria and 8 Others vs A.G* {2013} e KLR AND *Samuel M. Mohochi vs AG of Uganda* {2013} eKLR

[20] Counsel cited *Salim A. Salim & Others vs Comm. of Police & 3 others* Pet No 822 of 2008

[21] *Supra*

[22] Counsel cited *Khatija Ramyula Nur Muhamed & Another vs Min for Citizenship & Immigration & OtherS* {2015} eKLR

[23] {2002} 2KLR 299

[24] 1924-1 KB 171 at p.205 (C)

[25] {2014}eKLR

[26] 5 U.S. 137 (1803).

[27] 2000 (2) SA 674 (CC) at 33,

[28] [2014] eKLR

[29] Article 47(1) of the Constitution of Kenya, 2010

[30] Article 47(2) of the Constitution of Kenya, 2010

[31] {1915} AC 120 (138) HL

[32] We find it Invoked in Kautilya's Arthashastra.

[33] AIR 1978 SC 851

[34] Sceneries Limited vs National Land Commission & Others, Misc Pet No. 1 of 2016

[35] (1980), at page 161

[36] (1977) at page 395

[37] Wiseman v. Borneman [1971] A.C. 297

[38] Kanda v. Government of the Federation of Malaya, [1962] A.C. 322, 337, as quoted by the Alberta Court of Appeal in R. v. Law Society of Alberta, (1967) 64 D.L.R. (2d) 140, 151 (Alta C.A.).

[39] David Phillip JONES and Anne S. de VILLARS, Principles of Administrative Law (4th edition), Thomson Carswell, 2004, p. 251.

[40] {1963} 2 ALL E.R. 66, {1964} A.C.40

[41] see **Kanda vs. Government of Malay {1962} AC 322,337** (per Denning LJ).

[42] Article 10 (1) (a)-(e)

[43] Act No. 12 of 2011

[44] April 14, 2015 90 Wash. L. Rev. Online 31 available at <https://www.law.uw.edu/wlr/online-edition/the-two-sided-speedy-trial-problem/>

[45] "The Not So Speedy Act" 89 Wash. L. Rev. 709 (2014) at page 710

[46] Letter from Martin Luther King, Jr., 5–6, *original document available at The Martin Luther King, Jr. Research and Educ. Inst., Stan. Univ., http://mlk-pp01.stanford.edu:5801/transcription/document_images/undecided/630416-019.pdf* (emphasis added).

[47] See Wikipedia, *The Goldilocks Principle*, http://en.wikipedia.org/wiki/Goldilocks_principle (last visited Jan. 25, 2015).

[48] Article 47(1) of the Constitution of Kenya, 2010

