REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 323 OF 2014

AND

IN THE MATTER OF THE CHIEF MAGISTRATES' CRIMINAL CASE NO. 251 OF 2014

AND

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 21, 22, 29, 33, 36, 37, 49, 50 AND 51 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 2, 3, 10, 238 AND 244 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI CRIMINAL APPEAL NO. 25 OF 1965

BETWEEN

WILSON OLAL.....1ST PETITIONER

GACHEKE GACHIHI.....2ND PETITIONER

JOHN KOOME.....3RD PETITIONER

NELSON MANDELA.....4TH PETITIONER

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....5TH PETITIONER

INDEPENDENT MEDICO-LEGAL UNIT.....6TH PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE INSPECTOR- GENERAL OF POLICE.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RDRESPONDENT

JUDGEMENT

Introduction

This petition invites a candid discussion of the citizens Fundamental Right to demonstrate, picket and present petitions to public authorities and the importance of the exercise of the freedom of expression which is closely connected to the Freedom to demonstrate. It also calls for discussion of the extent to which such rights can be restricted.

At the centre of the discussion is the truth that criminal law and procedures are safeguards against the indiscriminate application of criminal laws and the wanton treatment of suspected criminals. Specifically, they are designed to enforce the constitutional rights of criminal suspects and accused persons, beginning with initial police contact and continuing through arrest, investigation, trial, sentencing, and appeals. Hence, criminal laws and procedures should not be seen or perceived to be used to violate Fundamental Rights and Freedoms of the citizens guaranteed under the constitution. Where that happens, then the constitutionality of such arrest, prosecution risks being declared an abuse of the criminal justice system and a violation of the Fundamental Rights and Freedoms of the citizen.

The starting point is that Human rights enjoy a *prima facie*, presumptive inviolability, and can only be limited as provided under the constitution. Period. **Louis Henkin** wrote in *The Age of Rights*:-[1]

> *"Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary."*

Petitioners case

The background information relevant to this case is that, a number of civil society organizations and members of the public among them the first to the fourth petitioners organized a demonstration which was to be held on the 13th day of February 2014 to protest against corruption in Government, rising insecurity, unemployment, poverty, mutilation of the constitution and poor leadership among other issues. They notified the police as required.

They were to converge at the Freedom Corner Gardens at Uhuru Park, Nairobi at **11.30 am** and match to Parliament to present a petition to Members of Parliament. However, but upon arrival at the Freedom Corner, they noticed heavy police presence who had cordoned off the entire Uhuru Park, effectively sealing access to the Freedom Corner. Hitherto, there was no communication about the cancellation of the demonstration.

The heavily armed police denied them access to the venue and ordered them to disperse. Their plea that they notified the police about the demonstration as required by the law was ignored. The officer leading the operation ordered them to disperse and at this point the police suddenly unleashed tear gas upon the demonstrators and violently dispersed them.

Later, the first to the fourth Respondents were arrested after returning to the venue to check whether anyone had been injured. The petitioners aver that the police did not notify them reasons for their arrest at the time of arrest or at the police station, but they were informed the reasons for their arrest later at **3.30pm** at the insistence of their advocates. At 7 P.M. they were released on a police of bail of **Ksh. 10,000/=** each. The offence then was stated as refusing to obey an order, but in court, they were charged with the offence of rioting after a proclamation contrary to section **83** of the Penal Code,[2] resisting arrest contrary to section **253 (b)** of the Penal Code[3]and behaving in a disorderly manner in a police

building contrary to section **60 (1)** as read with section **63** of the National Police Service Act.[4]

The petitioners question the constitutionality of the cash bail of Ksh. 200,000/= or bond of Ksh. 500,000/= imposed by the court for being harsh and excessive. The petitioners also state the Police acted illegally in stopping a peaceful demonstration, and that the arrest, detention, charge, arraignment and taking of the plea was illegal, and that the charges were framed in an unconstitutional manner, and that the provisions they were charged with are unconstitutional.

In support of the petition are two affidavits, one by **Wilfred Olal**, the first petitioner reiterating the factual basis of the petition and by **Patricia Mande Nyaundi**, the commission secretary to the Kenya National Commission on Human Rights, the fifth petitioner herein, a body established under article 59 of the constitution and the Kenya National Human Rights Act[5] whose mandate includes *inter alia* the promotion of respect for human rights and development of a culture of human rights in the Republic, promotion of the protection and observance of human rights in public and private institutions, receiving and investigating complaints about alleged abuses of human rights, taking steps to secure appropriate redress where human rights have been violated and securing observance of democratic values and principles and to promote constitutionalism.

She stated that demonstration is a constitutional civic right recognized in international human rights instruments to which Kenya is a party, and stated that disruption of a legally called and organized demonstration is unacceptable in a free and democratic society such as Kenya.

She stated that the Bail terms imposed amounted to infringement of the first to fourth petitioners rights under article **50 (2) (a)** of the constitution and article **14 (2)** of the International Covenant on Civil and Political Rights (ICCPR), and that the charges were defective and unconstitutional since the demonstration was lawfully organized. To her, the conduct of the respondents offended article **21 (1)** of the constitution.

First and Second Respondents Replying affidavit

Cpl Weldon Byegon, the OCPD central police station acknowledged that the petitioners had notified the police of intention to hold the demonstration and that on 13th February 2014 at around 11.30 am. a Mr. Baraza Wambomba, SSP, OCPD Starehe Division, informed the leaders of the demonstration about the cancellation of the demonstration owing to national security concerns and requested them to disperse peacefully but instead they started shouting and became unruly and insisted on proceeding with the demonstration prompting the OCPD to read to the proclamation to disperse, but they refused to heed, and engaged the anti-riot police in running battles forcing the police to use gas to disperse them. Later, they attempted to return to Uhuru park necessitating the arrest.

Petitioners witness statements

Also on record are whiteness statements by the first to fourth petitioners.

The fourth petitioner, a musician, whose band sings to agitate for human rights stated the underlying concerns that necessitated the holding of the demonstration which include corruption in government, insecurity, poor leadership, mutilation of the constitution and unemployment among the youth and poverty.

He states that the police blocked the entrances to Uhuru park and prevented them from entering into the Park and that they had no notification of the cancellation of the demonstration. He states that despite chanting peacefully, the police threw tear gas canisters at them and fired rubber bullets. He denies resisting arrest nor was he told reasons for his arrest.

Jeremiah Mutiso, an employee of a civil society organization recorded a video covering the demonstration which was played in court.

Gacheke Gachihi testified that that in 2010 Kenyans voted for a transformative constitution with a progressive Bill of Rights which *inter alia* sought to address the excesses of the past regimes such as arbitrary use of state machinery, right to peaceful assembly, right to demonstrate, picket and present petitions to public authorities, governments failure to curb corruption, insecurity, unemployment, mutilation of the constitution, poverty, poor leadership as the core reasons that prompted the civil society organizations to organise the demonstrations. He stated that the police declined to listen to their plea that they had notified them of the demonstration, and dispersed them violently. They returned to the scene to establish whether anyone had been injured but were arrested and they were not told reasons for the arrest.

Petitioners counsels submissions

Counsel submitted that the right to assemble and demonstrate is a constitutional right recognized under international and regional human rights law. Kenya is a party to the Universal Declaration of Human Rights,[6] the International Covenant on Civil and Political Rights[7] and the African Charter for Human and People's Rights.[8]Counsel cited UN human rights council Resolution which provide that states have an obligation to respect and fully protect the rights of the individuals to assemble peacefully and associate freely[9]and a report of the special rapporteur on the Rights to Freedom of peaceful Assembly and of Association.[10]

Counsel submitted that the violent disruption of the peaceful demonstration was unfounded and illegal and cited the European Court of Human Rights decision in *Ashughyyan vs Armenia*[11] which upheld the importance of authorities to exercise a certain degree of tolerance where demonstrators do not engage in violence. That national security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order. [12] And also expression may be perceived as threat only if it is intended to incite imminent violence, or is likely to incite violence and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence. [13]Counsel insisted that the sanction imposed by the police was not necessary in a democratic society. [14]

Counsel submitted that the foundation of the prosecution is the legality of the police action, that the prosecution in the lower court is not justifiable in a democratic society and that the DPP did not act in public interest.[15] Counsel questioned the constitutionality of the charges brought under section 60 (1) as read with section 63 of the National Police Service Act,[16] and argued that they are non-existent in law. Counsel also submitted that the offence of rioting after proclamation under section **83** of the Penal Code[17] is unconstitutional and that section **83** and **78 (3)** of the Penal Code[18] is vague and uncertain, hence void for want of clarity. Counsel also submitted that the bail terms were unconstitutional.

***Amicus Curiae* Counsels' Submissions**

Counsel for the *amiccus curiae* submitted that the constitution protects every Kenya's Right to freedom of expression,[19] the right to peacefully assemble, demonstrate, picket and present petitions to public authorities[20]and that the police are mandated to respect, protect and promote these rights under the constitution.[21] Limitations to constitutional rights must meet the threshold outlined in article 24[22]hence, stopping the demonstration amounted to derogation of rights under article **33** and **37** of the constitution since the demonstrators were peaceful and unarmed.

Counsel emphasised the importance of right to freedom of expression assembly[23] and stated that police powers must be exercised in a manner that is sensitive to human rights and consistent with concepts of fundamental justice. Counsel challenged the constitutionality of sections **83** and **78** of the Penal Code[24]on grounds of void for vagueness.[25]

Second and third Respondents submissions

Counsel urged this court to be guided the decision in *Hussein Khalid & 16 Others vs AG and 2 Others*[26] whose facts were similar to this case. He also argued that a defective charge sheet is an issue

to be determined by the trial court[27]and that the right to assemble is not absolute.

He also submitted that the trial court is best equipped to deal with the quality and sufficiency of the evidence in support of the charges[28]and that there is public interest in ensuring that crime is prosecuted and the wrongdoer is punished. Despite being informed that the demonstration had been cancelled, the petitioners kept on arguing with the police, hence stopping the demonstration and the arrest were lawful.

Constitutional right to demonstrate

Article **10 (2**) of the Constitution provides the national values and principles of governance which include the rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. These principles are binding on all State organs, State officers, public officers and all persons whenever any of them applies, or interprets, the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

There is no doubt that the constitution of Kenya 2010 brought a fundamental change to this country with a strong emphasis on the rule of law, national values and Human Rights. It was a major transition from the dark past to a future where constitutionalism would reign supreme. The constitution provides that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies[29] and that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.[30] It is also important to emphasize the rights and fundamental freedoms in the Bill of Rights[31]— **(*a*)** belong to each individual and are not granted by the State; **(*b*)** do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter;[32] and **(*c*)** are subject only to the limitations contemplated in the Constitution.

Article **37** of the Constitution guarantees the right to assemble, demonstrate, picket and petition in the following terms:-

> *"Every person has the right peaceably and unarmed to assemble, to demonstrate, to picket, and to present petitions to public authorities"*

The essence of democracy is the right to have an alternative opinion and to agitate for its acceptance. Its force lay in truth and the ability to struggle for it. The right to peaceful protest is a Constitutional right.

While freedom of assembly and association is not an absolute right, it cannot "be limited except by law, and then only to the extent that the limitation is reasonable, justifiable in an open democratic society.[33] Any limitation must be subject to a three part test:- **(a)** a limitation will only be acceptable when 'prescribed by law; **(b)** when it is necessary and proportionate; and **(c)** when the limitation pursues a legitimate aim' namely:- the interests of national security or public safety; the prevention of disorder or crime; the protection of health or morals; or the protection of the rights and freedoms of others. This test must be observed by police and authorities at all times.

The right to peacefully protest subject to just restrictions is now an essential part of free speech and the right to assemble. Additionally, it is an affirmative obligation of the State to make that exercise of this right effective. Freedom of speech, right to assemble and demonstrate or peaceful agitation are the basic features of a democratic system. The people of a democratic country like ours have a right to raise their voice against the decisions and actions of the Government or even to express their resentment over the actions of the government on any subject of social or national importance. The Government has to respect, and in fact, encourage exercise of such rights. It is the abundant duty of the State to aid the exercise of right to freedom of speech as understood in its comprehensive sense and not to throttle or frustrate exercise of such rights by exercising its executive or legislative powers or passing orders or taking action in the name of reasonable restrictions.

Whereas Article **37** of the Constitution guarantees every person the right "peaceably and unarmed, to

assemble, to demonstrate, to picket, and to present petitions to public authorities," Article **33**, provides that "everyone has the right to freedom of expression; this right includes freedom to seek, receive or impart information or ideas.

Freedom of Assembly is protected by International and legal frameworks that Kenya is a signatory. Article **2 (5)** and **(6)** of the Constitution provides that general rules of international law, treaties and conventions ratified by Kenya shall form part of law of Kenya. Article **20** of the Universal Declaration of Human Rights states that everyone has the right to freedom of peaceful assembly and association. This is echoed in Article **11** of the African Charter on Human and People's Rights which states:- "Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by the law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others."

Article **21** of the International Covenant on Civil and Political Rights (ICCPR), which Kenya acceded to on 1st May 1972, also protects right to peaceful assembly and stipulates that any restriction on this right must be in conformity with the law and necessary in a democratic society.

The importance of freedom of speech and expression must be examined from the point of view of the liberty of the individual and from the point of view of our democratic form of government. Freedom of speech lay at the foundation of all democratic organizations.[34] Freedom of speech and expression of opinion is of paramount importance under a democratic constitution and must be preserved.[35] The freedom of speech is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions.[36]

This right requires the free flow of opinions and ideas essential to sustain the collective life of the citizenry. While an informed citizenry is a pre-condition for meaningful governance, the culture of open dialogue is generally of great societal importance. In the felicitous words of Justice Holmes in his famous dissent in *Abrams vs. United States*,[37] thus:-

> *"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."*

Justice Brandeis in his famous concurring judgment in *Whitney vs. California*,[38] said:-

> *"Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the ... government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.*
>
> *Fear of serious injury cannot alone justify suppression of free speech and assembly.... To justify*

*suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one..... But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."**[39]**

This leads me to a discussion of what is the content of the expression "freedom of speech and expression." There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement.

Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article **33 (1)** of the constitution. It is only when such discussion or advocacy reaches the level of **(*a*)** propaganda for war; **(*b*)** incitement to violence; **(*c*)** hate speech; or **(*d*)** advocacy of hatred that— **(i)** constitutes ethnic incitement, vilification of others or incitement to cause harm; or **(ii)** is based on any ground of discrimination specified or contemplated in Article **27 (4)** that **Article 33 (2)** kicks in.[40] It is at this stage that a decision may be taken curtailing the speech or expression or assembly.

I must point out that the right under article **37** must be exercised peacefully. And it is important to emphasise that it is the holders of the right who must assemble and demonstrate peacefully. It is only when they have no intention of acting peacefully that they lose their constitutional protection. This proposition has support internationally. As the European Court of Human Rights noted: '[A]n individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour.'[41]

Under article 24 of the constitution, the right to demonstrate may be limited only to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom and in deciding whether any limitation meets this criterion a number of relevant factors must be taken into account.

What is reasonably justifiable in a democratic society is an elusive concept – one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the decision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right.[42]

In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:- **(a)** the objective is sufficiently important to justify limiting a fundamental right; **(b)** the measures designed to meet the legislative object are rationally connected to it; and **(c)** the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[43]

According to the *Oxford English Dictionary* "limit" means "confining within limits, set bounds to, restrict." It is clear, therefore, that article **24** does not authorize the state to "eliminate" rights contained in the Declaration of Rights or to "hollow out such rights, so that they no longer have any meaningful content." Thus, the power to limit rights does not go beyond the power to restrict rights. Writing about the limitation provision in the *Canadian Charter of Rights*, Peter Hogg, says that "… not every Charter infringement is a 'limit,' and any infringement that is more severe than a limit cannot be justified."[44]

The Canadian Supreme Court[45] drew a distinction between "the negation of a right or freedom and a limit on it."[46] Thus, the courts must uphold the fundamental right to demonstrate and any limitations upon this right must be reasonable and must not take away completely or eliminate the right or remove

the essential core of the right.

Kenya is a party to the International Covenant on Civil and Political Rights which guarantees various rights including freedom of assembly.[47] The Human Rights Committee established in terms of Article 28 of this Covenant has commented upon what limitations on rights are permissible. In its General Comment No 31: The Nature of the General Legal Obligations Imposed on State Parties to the Covenant, it used the notion of "the essence" of a human right and emphasized that restrictions on a right must never impair that essence.

At this juncture it is appropriate to recall the provisions of sections **81- 83** of the Penal Code[48] which provides that:-

> **81.** *Proclamation for rioters to disperse*
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> *(1) Any administrative officer or magistrate, or, in his absence, any gazetted officer or inspector of the Kenya Police Force or any commissioned officer in the military forces in Kenya, in whose view twelve or more persons are riotously assembled, or who apprehends that a riot is about to be committed by twelve or more persons assembled within his view, may make or cause to be made a proclamation, in such form as he thinks fit, commanding the rioters or persons so assembled to disperse peaceably.*
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> **82.** *Dispersal of rioters after proclamation*
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> [1] Hogg, Peter, Constitutional Law of Canada (2003) Loose-leaf edition. Toronto: Carswell, pages 35-10
>
> [1] See Ford vs Attorney-General Quebec {1988} 2 SCR 712 at 772
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> [1] A similar approach was put forward in an earlier Canadian case, Attorney General Quebec v Quebec Protestant School Boards [1984] 2 SCR 66 at 88
>
> [1] Article 21
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> [1] Supra
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> *If upon the expiration of a reasonable time after such proclamation made, or after the making of such proclamation has been prevented by force, twelve or more persons continue riotously assembled together, any person authorized to make proclamation, or any police officer, or any other person acting in aid of such person or police officer, may do all things necessary for dispersing the persons so continuing assembled and for apprehending them or any of them, and, if any person makes resistance, may use all such force as is reasonably necessary for overcoming such resistance, and shall not be liable in any criminal or civil proceeding for having, by the use of such force, caused harm or death to any person.*
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> 83. ***Rioting after proclamation***
>
> *If proclamation is made commanding the persons engaged in a riot, or assembled with the purpose of committing a riot, to disperse, every person who, at or after the expiration of a reasonable time from the making of the proclamation, takes or continues to take part in the riot or assembly, is guilty of a felony and is liable to imprisonment for life.*

In view of the clear provisions cited above, the question that follows is whether the police issued the proclamation as required under the law, and if the police gave the protestors *reasonable* time to disperse, and *whether they continued to demonstrate* after the expiry of the reasonable time.

Reasonable time refers to the amount of time that is fairly required to do whatever is required to be done,

conveniently under the permitted circumstances. ... **Reasonable time** is interpreted by the **court** in the in light of the nature, purpose, and circumstances of each case.[49]

The uncontested facts of this case are that demonstrators had notified the police of their proposed demonstration. They proceeded to the venue only to find the venue sealed by heavily armed police in riot gear. They were denied access to the venue. They sought an explanation which was not offered. Instead, they were violently dispersed. A video clip of the sad events was played in court. There is no evidence of the proclamation being given. There is no evidence at all of the protestors being given any time to disperse. There is no evidence that the petitioners were violent. There is no evidence that they were armed. There is no evidence that the alleged proclamation to disperse was communicated before the police unleashed the tear gas upon the unarmed demonstrators. Instead of offering protection to ensure the demonstrators were safe the police unleashed violence. No evidence has been tendered to justify the violence or the limitation of the petitioners rights to assembly and demonstrate.

What is clear is that a decision was taken to curtail the petitioners right to demonstrate without following the above provisions and worse in total disregard to the provisions of article 47 of the constitution which guarantees a citizen the right to an administrative decision that is fair, particularly the right to be heard before a decision is taken that affects them and the right to be given reasons for a decision. The police ought to demonstrate reasonable grounds for their belief that the demonstration would cause public disorder and there must be evidence of the grounds upon which they held this belief.

The failure by the police to follow the procedures stipulated in the above sections rendered the purported notice invalid.[50] Thus, the actions by the police cannot be said to fall under the exceptions in article 24 of the constitution nor can the charges premised on such illegal actions be sustained.

Article 2(1) of the Constitution provides that *'The Constitution is the Supreme Law of the Republic and binds all persons.* 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 court is bound to adopt the interpretation that most favours the enforcement of the rights.

In interpreting the provisions of the Bill of Rights a court *must give full effect to* the rights and freedoms that are enshrined in the Bill of Rights and must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular the values and principles set out in article 10.

In interpreting constitutional provisions the court must employ a purposive and generous rather than a pedantic and restrictive interpretation. This position was affirmed by in Canadian case of *R* vs *Big M Drug Mart Ltd* [51]where it was stated that the interpretation of a constitutional freedom:-

> *"… should be a generous rather than a legalistic one, aiming at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."*

This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations there from, as far as the language permits, should be narrowly or strictly construed.[52]

Although the right of peaceful protest is a fundamental constitutional right, I find that sections **83** and **78 (1) (2**) and **(3)** of the Penal Code are not *ultra vires* the Constitution because they satisfy the requirements set out under article 24 of the Constitution in that the limitation imposed on the constitutional right to demonstrate is "fair, reasonable, necessary and justifiable in a democratic society based on openness,

justice, human dignity, equality and freedom." What is wrong in this case is that the police did not act as provided in the said sections, hence they infringed on the on the constitutional rights of the petitioners.

In holding the constitutionality of the above sections, I have considered that the sections are aimed at preventing public disorder and to protect public safety. No democracy can function if there is public disorder and anarchy and thus the security of any community is of paramount importance. The provisions seek to promote a peaceful environment conducive to the enjoyment of fundamental human rights by citizens and the community at large.

However, the ban of the demonstration by the police was illegal and clearly constituted a denial or violation of a right which had " the effect of imposing *greater restrictions than are necessary* to achieve its purpose."

A restriction that goes beyond what is necessary in a modern democratic society to achieve its purpose must be unconstitutional. If the restriction goes beyond what is necessary, it is unconstitutional.

It is my finding that the cancellation of the demonstrations went beyond what is reasonably necessary. Less stringent restrictions would have catered for the concerns of the police such as providing security to ensure that the demonstration was peaceful. The imposition of lesser restrictions was an option. The level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be. This is undoubtedly the correct approach.[53] In a modern constitutional state courts must subject bans on demonstrations – particularly blanket bans on demonstrations – to intensive scrutiny. As Woolman notes, courts must "require the state to demonstrate that no other means of dealing with a threat of public order … is available."[54]

The decision by the police to violently break a peaceful demonstration was an infringement of the demonstrators constitutional rights. There is no justification for their actions. There is nothing to show that the demonstration would have resulted in the exceptions under article 33 (2). The use of lethal force during protest is unacceptable in a democratic state like ours.

The Public Order Act does not limit the right to demonstrate or to assemble.[55] It instead seeks to preserve and protect the precious right to public assembly and public protest marches or processions by regulating the same with a view to ensuring order.[56] Part III of the Public Order Act seeks to regulate public meetings and processions by providing for the need to notify the police service and also the power of the police service to stop or prevent a public meeting where appropriate and where it is obvious it will not meet the constitutional objectives. Under the same Part III, the Public Order Act also prohibits the possession of "offensive weapons" at public meetings and processions.[57]

Every act of the state and its organs must pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. In cases of violation of fundamental rights, the Court has to examine as to what factors the court should weigh while determining the constitutionality of the actions complained of. The court should examine the case in light of the provisions of the Constitution. When the constitutionality of an act of state agents is challenged on grounds that it infringes a fundamental right, what the court has to consider is the "*direct and inevitable effect*" of such actions. In my view, actions that infringe on fundamental rights unless they can be demonstrated to fall within exceptions under article 24 of the constitution are out rightly unconstitutional.

The Respondents have a statutory and constitutional duty to protect constitutional rights of the citizens. In determining whether or not the Respondents violated the provisions of the constitution, the importance of the constitutional role entrusted to them, has to be kept in mind. In other words, the court has to examine the acts complained of viewed against the background of the Constitution, and, in particular, the constitutional rights of the petitioners and the constitutional obligations of the Respondents, and satisfy itself that the actions complained of sufficiently renders the respondents liable.[58] I find that the actions by the police to violently break a peaceful demonstration were unconstitutional and an infringement of the petitioners rights under article **37** of the constitution. The decision to forcibly break the demonstration

was an invasion of the constitutional rights of the petitioners. Thus the police actions were unreasonable and unwarrantedly executed. The action was an assault on the very basic democratic values enshrined in our Constitution.

The constitutionality of the charges preferred under 60 (1) as read with section 63 of the National Police Service Act[59] has been raised, though not in the reliefs sought in the petition. I agree, the sections cited do not create the offence stated in the charge sheet. However, a defective charge sheet is in my view a matter that can be dealt with by the trial court. It does not require the interpretation of the constitution.

Was the prosecution mounted without factual basis

The law enjoins the DPP to be scrupulously fair to an alleged offender and to ensure fair investigation and fair trial and also to ensure that the citizens constitutional and fundamental rights are not violated. It is the duty of the courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments into these rights.[60] A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose.[61] Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.[62]

But in the end it may come back to the words of Christmas Humphreys QC:- "It is the duty of prosecuting counsel to prosecute, and he need not rise to his feet and apologize for so doing. It is not unfair to prosecute."[63] And again -

> *"Always the principle holds that Crown counsel is concerned with justice first, justice second and conviction a very bad third."* ***[64]***

The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, tends to undermine the confidence of the community in the criminal justice system.

Here is a case where the police were captured on video in broad day light violently breaking a demonstration in total violation to the provisions of the constitution. The police were captured on video arresting the petitioners and putting them in police vehicles, yet there is charge of resisting arrest. The Replying affidavit does not mention that the petitioners resisted arrest. The affidavit by the police officer does not mention unruly conduct at the police station, but there is a count for behaving in a disorderly manner at the police station.

It is settled law that the Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation.[65] A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious. The machinery of criminal justice cannot to be allowed to become a tool for the police violate constitutional rights of citizens[66] The invocation of the criminal law, in unsuitable circumstances or for the wrong ends must be stopped and this court has the mandate to stop such proceedings.

In the instant case, the criminal prosecution is in my view tainted with ulterior motives, namely, to curtail the rights of the petitioners to exercise their fundamental right to assemble, associate, demonstrate and exercise their freedom of expression. It would be a travesty to justice, a sad day for justice system should the criminal process to allowed to be used to stifle fundamental rights and freedoms guaranteed under the constitution.

Abuse of court process

This court has an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of citizens fundamental rights.

Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case. [67] Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. From the material before this court, it is clear that the prosecution is unfair, wrong, baseless and an abuse of police powers or judicial process.

I am aware that the inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[68] The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights. As observed above, the police acted in total violation of the rights of the petitioners.

In *Joram Mwenda Guantai vs. The Chief Magistrate*,[69] the Court of Appeal held *inter alia* that the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court if he is a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.[70] The circumstances under which the petitioners were arrested and arraigned in court leave this court with no doubt that the police acted in a truly oppressive manner, in total violation of the constitution and in clear abuse of criminal process.

Where the prosecution is an abuse of the process of court, as is evidently in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court.[71]

Whether the prosecution was in public interest.

It has never been the rule in this country that suspected criminal offences must automatically

be the subject of prosecution. A significant consideration is whether the prosecution is in the

public interest. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are

employed to pursue those cases worthy of prosecution. The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. The circumstances surrounding the arrest as enumerated above do not suggest the prosecution was undertaken in public interest.

Failure to inform the first to fourth petitioners reasons for their arrest

In discussing the right of an arrested person (accused or otherwise), the first port of call would be the Constitution because it is the supreme law of the land. The constitution embodies, amongst others, the rights of an arrested person under article **49**.

The Constitution is not a mere collection of pious platitudes. It is the **supreme law of the land** *embodying* **basic concepts among them Fundamental Rights and Freedoms of the Individual which not even the power of the State may encroach.**[72] The Constitution, being the supreme law of the land has expressly laid down several rights that must be made available to accused persons (at the pre-trial and trial stages). These are the right to be presumed innocent until convicted, the privilege against self-incrimination and t**he Right to be Informed of the grounds of Arrest.**

Article **49(1)** of the Constitution gives an arrested person the right to be 'informed as soon as may be possible of the grounds of his arrest.' This principle was enunciated in *Christie & Anor vs Leachinsky*, where the English House of Lords held that a person arrested on suspicion of committing an offence, is entitled to immediately know the reason for his arrest. It was also held that if the reason was withheld, the arrest and detention would amount to false imprisonment, until the time he was told the reason.[73] The justification for such right is to ensure that the accused person will know why he is arrested and have sufficient information in order to enable him to defend himself at the police station. Such aright is also important for an effective right to counsel.

In other words a citizen is entitled to know on what charge or on suspicion or what crime he is seized.[74] If the citizen is not so informed but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment. The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.[75] The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed.[76] The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, e.g., by immediate counter-attack or by running away. There may well be other exceptions to the general rule in addition to those I have indicated, and the above propositions are not intended to constitute a formal or complete code, but to indicate the general principles of our law on a very important matter.'[77]

Lord Simonds said: 'it is not an essential condition of lawful arrest that the police should at the time of arrest formulate any charge at all, much less the charge which may ultimately be found in the indictment.'[78] The petitioners herein only learnt of the charges against them in court. At the time of arrest or within reason time of arrest, or at the time they were placed in police cells they were not informed. What was written in the police bond was different from what they were ultimately charged with. To me, the petitioners Rights under article 49 were vilated.

Were the Bail terms exorbitant, hence unconstitutional?

The petitioners urge this court to find that the Bail terms imposed were exorbitant, thus amounted to a denial of Bail, hence unconstitutional. I am aware I am not sitting on appeal on this subject. Determining bail terms is a matter within the discretion of the trial court.

There is no denying of the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned.[79]

The cornerstone of the justice system is that no one will be punished without the benefit of due process. Incarceration before trial, when the outcome of the case is yet to be determined, cuts against this principle. The need for bail is to assure that the accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and punitive.

After considering the circumstances of each case, the court has discretion to grant bail terms provided that the discretion is exercised judicially. In my view, the amount of bail, in and of itself, is not finally determinative of excessiveness. What would be reasonable bail in one case may be excessive in another. The gist of the problem confronting courts in setting the amount of bail is to place the amount high enough to reasonably assure the presence of the accused when required, and at the same time to avoid a figure higher than that reasonably calculated for fulfil this purpose, and therefore excessive. The general rule in my view is for the courts to try to strike a balance between the need for a tie to the jurisdiction and the right to freedom from unnecessary detention of an accused before conviction, and the need to bear in mind the circumstances surrounding each case including the ability or inability of an accused person to meet the bail terms especially those who may be economically disadvantaged. Thus in determining bail amount public good as well the rights of the accused should be kept in mind.

In some jurisdictions, a hearing is conducted to determine a suitable bail amount in each individual case. Time has come for such a procedure to be considered otherwise we risk having financially disadvantaged persons remain in custody owing to inability to raise bail amounts which is a major threat to access to justice for all as enshrined in our constitution.

In my view, a court should give some regard to the accused's circumstances, since what is reasonable bail to a man of wealth may be equivalent to denial of the right to bail if exacted of a poor man charged with a like offence. There is no evidence that the petitioners who were represented in court brought any information to the court before pronouncement of the Bail terms that could have aided the court in exercising its discretion. Since each case must be determined on its own peculiar facts, I find that there is no material before me to question the constitutionality of the Bail terms.

However, I am clear in my mind that the right of an accused person to bail also includes the right not to be required to provide excessive bail.

Whether the petitioner are entitled to damages

The petitioners claim damages as a result of breach of their fundamental rights. The purpose of public law is not only to civilize public power but also to assure citizens that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting 'compensation' in proceedings under Article 23 of the constitution or seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, by not protecting the fundamental rights of the citizen or by subjecting the citizen to acts which amount to infringement of the constitution.

It is thus now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the constitution. The quantum of compensation will, however, depend upon the facts and circumstances of each case. I accept in principle that constitutional damages as a relief separate and distinct from remedies available under private law is competent because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms.

On the quantum of damages, award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.[80]The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the this public law remedy evolved by the Court. The principles emerging from decided cases[81]include:-*Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;*

I note that arriving at the award of damages is not an exact science. I am aware that no monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed.[82] 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 is discretionary.[83]

The fact that the right violated was a constitutional right adds an extra dimension to the wrong. Additionally, the award, not necessarily of substantial size, may be needed to reflect the sense of public outrage and emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case.

It is self evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of

objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise. There is no medium of exchange or market for non-pecuniary losses and their monetary evaluation, it is a philosophical and policy exercise more than a legal or logical one. [84] The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.

Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or

compensation for bodily injury.

Determination

Considering the nature of the violations of the constitutional rights, the above legal principles and bearing in mind the fact that it may not be easy to quantify denial of fundamental rights and freedoms, and considering the short stint the petitioners were held in police cells, I find that each of the petitioners is entitled to an award of damages. Doing the best I can, I find that an award of **Ksh. 250,000/=** to each of the petitioners, i.e. first to fourth petitioners would be reasonable in the circumstances.

In conclusion, I enter judgement in favour of the petitioners as follows:-

> *i.* ***A declaration*** *be and is hereby issued that the action by the police of stopping and violently breaking the peaceful demonstration held on 13th February 2014 in which the first to fourth petitioners participated and the arrest and detention of the first to fourth petitioners was a gross violation of the provisions of Articles 19, 20 (1), 28,29, 32, 33, 37 and 49 of the constitution.*
>
> *ii.* ***A declaration*** *be and is hereby issued that the decision to arrest, detain and mount criminal charges against the first to fourth petitioners was undertaken without any factual basis and was a flagrant abuse of police powers and judicial process, hence unconstitutional.*
>
> *iii.* ***An order of certiorari*** *be and is hereby issued to bring into this honourble court the proceedings in Nairobi -Milimani Chief Magistrates Criminal Case Number* ***251*** *of* ***2014****-(Republic*

vs Gacheke Gachihi and Three others) for purposes of being quashed and quashing the said proceedings.

*iv. **An order of stay** be and is hereby issued **permanently** **staying** the proceedings against the first to fourth petitioners in Nairobi, Milimani Chief Magistrates Criminal Case Number **251** of **2014** (Republic vs. Gacheke Gachihi and Three others).*

*v. **An order of prohibition** be and is hereby issued prohibiting the second and third Respondents or any person acting for and on their behalf from further prosecuting or proceeding with the Chief Magistrates' Criminal case number **251** of **2014**-Milimani-(Republic vs. Gacheke Gachihi and Three others).*

*vi. **That** judgement be and is hereby entered in favour of the petitioners against the Respondents jointly and severally by way of general damages as follows :- **(a)** Wilfred Olal -----**Ksh. 250,000/=** , **(b)** Gacheke Gachihi-----**Ksh. 250,000/=** ,**(c)** John Koome-----**Ksh. 250,000/=** and **(d)** Nelson Mandela-----**Ksh. 250,000/=** ,*

*vii. **That** the above sum shall attract interests at court rates from date of this judgement until payment in full.*

*viii. **That** the Respondents shall jointly and or severally pay the costs of this Petition to the petitioners plus interests thereon at court rates.*

Orders accordingly.

Signed, Dated, Delivered at Nairobi this **28th** day of **June,** 2017

John M. Mativo

Judge

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[1] Louis Henkin, The Age of Rights (Columbia University Press, 1990) 4.

[2] Ibid

[3] Ibid

[4] Act No. 11A of 2011

[5] Act No. 14 of 2011

[6] Article 20, UDHR

[7] Article 21, ICCPR

[8] Article 21, ACHPR

[9] 21/16 {2012}

[10] {A/HRC/20/27, 21 May 2012}

[11] Application number 33268 of 2003, Judgement, 17 July 2008

[12] Counsel cited The 1985 Siracusa Principles on the Limitation and Derogation of Provisions in the

[13] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Principle 6

[14] Counsel cited Ezelin vs France, App No. 11800/85, 26 April 1991, para 53

[15] See Julius Mwenda Kathenge vs DPP & 2 Others, Pet. No. 372 of 2013

[16] Supra

[17] Supra

[18] Cap 63, Laws of Kenya

[19] Article 33

[20] Article 37

[21] Articles 20 (1), 21 (10, 238 (2) (b) and 244 (3)

[22] See **Kriegler J** in Ex parte Minister of Safety and Security and Others: In Re s vs Walters & Another (CCT28/01) {2002} ZACC 6; 2002 (4) SA 613; 2002 (7) BCLR 663

[23] Counsel cited South African National Defence Union vs Minister of Defence & Another CCT 27/98 and South African Transport and Allied Workers Union & Another vs Garvas Others {2012} ZACC 13

[24] Supra

[25] Counsel cited Dawood and Another vs Minister of Home Affairs & Others; Shalabi and Another vs Minister of Home Affairs & Others: Thomas and Another vs Minister of Home Affairs and Others (CCTT 35/99) {2000} ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837

[26] {2014}eKLR

[27] Ibid

[28] Meixner & Another vs A.G {2005}eKLR

[29] Article 19. (1)

[30] Article 19.(2)

[31] Article 19 (1)

[32] Chapter 4 of the Constitution

[33] Article 24, Kenya Constitution

[34] Romesh Thappar v. State of Madras, {1950} S.C.R. 594 at 602

[35] Sakal Papers (P) Ltd. & Ors. v. Union of India, {1962} 3 S.C.R. 842 at 866

[36] See Judgment of Beg J. in Bennett Coleman & Co. & Ors. v. Union of India & Ors., {1973} 2 S.C.R. 757 at 829.

Incidentally, the Ark of the Covenant is perhaps the single most important focal point in Judaism. The original ten commandments which the Lord himself gave to Moses was housed in a wooden chest which was gold plated and called the Ark of the Covenant and carried by the Jews from place to place until it found its final repose in the first temple - that is the temple built by Solomon.

[37]250 US 616 {1919}

[38] 71 L. Ed. 1095

[39] At page 1105, 1106

[40]A good example of the difference between advocacy and incitement is Mark Antony's speech in Shakespeare's immortal classic Julius Caesar. Mark Antony begins cautiously. Brutus is chastised for calling Julius Caesar ambitious and is repeatedly said to be an "honourable man". He then shows the crowd Caesar's mantle and describes who struck Caesar where. It is at this point, after the interjection of two citizens from the crowd, that Antony says- "ANTONY- Good friends, sweet friends, let me not stir you up To such a sudden flood of mutiny. They that have done this deed are honourable: What private grief's they have, alas, I know not, That made them do it: they are wise and honourable, And will, no doubt, with reasons answer you. I come not, friends, to steal away your hearts: I am no orator, as Brutus is; But, as you know me all, a plain blunt man, That love my friend; and that they know full well That gave me public leave to speak of him: For I have neither wit, nor words, nor worth, Action, nor utterance, nor the power of speech, To stir men's blood: I only speak right on; I tell you that which you yourselves do know; Show you sweet Caesar's wounds, poor dumb mouths, And bid them speak for me: but were I Brutus, And Brutus Antony, there were an Antony Would ruffle up your spirits and put a tongue In every wound of Caesar that should move The stones of Rome to rise and mutiny. ALL- We'll mutiny."

[41] SATAWU v Garvas [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (Garvas)

[42] See re Munhumeso & Others 1994 (1) ZLR 49 (S) at 64B-C

[43] See Nyambirai v National Social Security Authority & Another 1995 (2) ZLR 1 (S) at 13C-F, GUBBAY CJ

[44] Hogg, Peter, Constitutional Law of Canada (2003) Loose-leaf edition. Toronto: Carswell, pages 35-10

[45] See Ford vs Attorney-General Quebec {1988} 2 SCR 712 at 772

[46] A similar approach was put forward in an earlier Canadian case, Attorney General Quebec v Quebec Protestant School Boards [1984] 2 SCR 66 at 88

[47] Article 21

[48] Supra

[49] legal-dictionary.thefreedictionary.com/Reasonable+Time

[50]**See Chigumba J** Democratic Assembly for the Restoration & Empowerment (DARE) & Ors vs The Commissioner of Police & Ors HH-554-16 (Zimbambwe)

[51]{1958} 1 SCR 295

[52] This dictum from the case of Rattigan & Ors v Chief Immigration Officer & Ors 1994 (2) ZLR 54 (S) at 57 F-H

[53] S v Manamela and Another (Director General of Justice intervening) 2000 (5) BCLR 491 (CC), a

decision of the South African Constitutional Court, O'REGAN J said at para 53:

[54] Woolman, Stuart '*Assembly, Demonstration and Partition*' (2013) In Curry, Iain & de Waal, Johan *The Bill of Rights Handbook* 6 ed (2014) Cape Town: Juta.

[55] Ferdinand Ndung'u Waititu & 4 others v Attorney General & 12 others [2016] eKLR- Onguto J

[56] Ibid

[57] Ibid

[58] 1986 (1) SA 117 (A)

[59]Act No. 11A of 2011

[60]Bradley J. in Edward A. Boyd and George H. Boyd v. Unites States (1884) 116 U.S. 616

[61] Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001

[62] Ibid

[63] {1955} Crim LR 739 at 741

[64] Ibid p.746.

[65] Kuria & 3 Others vs. Attorney General{[2002} 2 KLR 69

[66] Ibid

[67] *Hui Chi-Ming v R [1992] 1 A.C. 34, PC*

[68] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[69] Nairobi Civil Appeal No. 228 of 2003 {2007} 2 EA 170

[70] Ibid

[71] Ibid

[72] In the case *Lob Kooi Choon v Government of Malaysia,* {1977}2 MLJ 187 Raja Azlan Shah FJ (as His Highness then was) held that the Constitution embodied three basic concepts; namely; the Rule of Law; Federalism; and Separation of powers

[73] [1947] AC 573, [1947] UKHL 2, [1947]1 All ER 567, [1947] 63 TLR 231, (1947) 111 JP 224

[74] Ibid

[75] Ibid

[76] Ibid

[77] Ibid

[78] Ibid

[79]The Supreme Court of India in Gulabrao Baburao Deokar vs. State of Maharastra and Others, Criminal Appeal 2113 of 2013 cited its previous decision in Masroor v. State of Uttah Pradesh and Anor {2009} (14) SCC 286

[80]*Mbogo & Another vs Shah{1968} EA 93*

[81] V.K. Sircar, Compensation for Violation of Fundamental Rights, a new remedy in Public Law Distinct

from relief of damages in tort, http://ijtr.nic.in/articles/art7.pdf

[82] Koigi Wamwere vs Attorney General{2015} eKLR

[83]Attorney General vs Ramanoop [2005] UKPC 15, [2006] 1 AC 338

[84] As Dickson J said in Andrews v Grand & Toy Alberta Ltd(1978) 83 DLR (3d) 452, 475-476, (cited by this court in Heil v Rankin [2001] QB 272, 292, para 16)