



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT VOI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO 11 OF 2017**

**(FORMERLY IN THE HIGH COURT OF KENYA AT MALINDI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO 18 OF 2017)**

**IN THE MATTER OF SECTIONS 30, 42 AND 55A OF THE ELECTIONS ACT, NO 24 OF 2011; SECTIONS 13 AND 16 OF THE ELECTIONS CODE OF CONDUCT; SECTION 18 OF THE ELECTION LAWS (AMENDMENT) ACT, NO 36 OF 2016; SECTION 18 OF THE ELECTION LAWS (AMENDMENT) ACT, NO 36 OF 2016; AND REGULATIONS 5, 48, 57, 62, 64, 66, 67, 73, 74, 78, 79, 80 AND 85 OF THE ELECTION (GENERAL) REGULATIONS, 2012**

**AND**

**IN THE MATTER OF ENFORCEMENT OF THE FUNDAMENTAL RIGHTS ENSHRINED UNDER THE ARTICLES 10, 19, 20, 21, 22, 23, 27(1), 38, 48, 238, 258 & 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ENFORECEMENT OF ARTICLES 38, 81, 82, 86, 136 AND 138 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**BETWEEN**

**NATIONAL SUPER ALLIANCE (NASA) KENYA.....PETITIONER**

**AND**

**CABINET SECRETARY FOR INTERIOR AND**

**CO-ORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT**

**NATIONAL POLICE SERVICE.....3RD RESPONDENT**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....4TH RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Petition dated 19th July 2017 was initially filed at the High Court of Kenya, Malindion 20th July 2017. On the same date, Korir J directed that the file be placed before Ongeri J, Presiding Judge at High Court of Kenya, Garsen because the subject matter of the proceedings herein fell under the jurisdiction of that court. However, on 21st July 2017, Ongeri J forwarded the file to Justice Ogola of High Court of Kenya, Mombasa for his further directions. In his order of 25th July 2017, Justice Ogola granted leave for the Petition herein to be heard during the August Recess and directed that the matter be determined by this court.

2. When counsel for the Petitioner and Respondents appeared in this court on 1st August 2017, they all consented to Jubilee Party being enjoined as an Interested Party in the case herein. Parties were further agreed that as the High Court judges had proceeded for the August Recessand the matter was urgent, there was no time for this court to refer the matter to the Honourable Chief Justice David Maraga to constitute a bench to hear and determine the Petition herein. It was therefore agreed that this court could proceed to hear and determine the Petition as a single bench.

3. On the said date, all the parties were ready to proceed with the Petition save for counsel for the 1st, 2nd and 3rd Respondents who indicated that his clients had not been served with the Petition herein, a position counsel for the Petitionervehemently contested. However, this court found and held that it was in the interests of justice that the said Respondents file their Replying Affidavits to respond to the issues that had been raised in the said Petition to enable this court come to a just and fair determination of the matter herein.

4. The Petitioner had sought the following orders in its Petition:-

> **a. A Declaratory Order that THE PUBLIC ORDER (CURFEW) (LAMU, GARISSA AND TANA RIVER COUNTIES) ORDER 2017 issued vide Legal Notice No 107 by the Cabinet Secretary for interior and Co-ordination of National Government be declared null and void and therefore unconstitutional.**
>
> **b. A Declaratory Order that THE PUBLIC ORDER (CURFEW) (LAMU, GARISSA AND TANA RIVER COUNTIES) ORDER 2017 issued vide Legal Notice No 107 by the Cabinet Secretary for interior and Co-ordination of National Government be quashed and set aside.**
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> **c. In the alternative and without prejudice to (a) and (b) above, A** (sic)**Declaratory Order be issued that THE PUBLIC ORDER (CURFEW) (LAMU, GARISSA AND TANA RIVER COUNTIES) ORDER 2017 issued vide Legal Notice No 107 by the Cabinet Secretary for interior and Co-ordination of National Government be declared null and void and therefore unconstitutional to the extent that it imposes a limitation on the political rights guaranteed under Article 38 of the Constitution.**
>
> **d. In the alternative and without prejudice to (a) and (b) above, a Declaratory Order be issued that THE PUBLIC ORDER (CURFEW) (LAMU, GARISSA AND TANA RIVER COUNTIES) ORDER 2017 issued vide Legal Notice No 107 by the Cabinet Secretary for interior and Co-ordination of National Government be suspended on the 6th, 7th, 8th,9th, 10th,**

**11th and 12th AUGUST 2017 to enable the smooth conduct of the General Elections.**

**e. Costs of the Petition,**

**f. Any further Relief or Order that this Honourable Court may deem just and fit to grant.**

**THE PETITIONERS' CASE**

5. The Petitioner'sPetition was supported by the Affidavits of its Chief Executive Officer Norman Magaya and Said Mohamed Rhova, a candidate of Member of County Assembly, Kipini West Ward, Tana River County Assembly contesting on a Forum for Restoration of Democracy- Kenya Party.

6. It stated that pursuant to powers conferred on him by Section 8(1) of the Public Order Act Cap 56 (Laws of Kenya), on 8th July 2017, the Cabinet Secretary for Interior and Co-ordination of National Government imposedThe Public Order (Curfew) (Lamu, Garissa And Tana River Counties) Order 2017.

7. It said that this was illegal as the process leading to the imposition of the same did not comply with the law and that the curfew running from 9th July 2017 to 9th October 2017 was unreasonable and unjustifiable. It contended that this would not only disenfranchise the voters of the three (3) Counties but it had also interfered with the resident's rights to health and socio-economic rights.

8. So as to effect this order, several police officers had been deployed in the three (3) Counties and they were arresting persons who were carrying out their activities outside the time limits imposed by the Curfew. The Petitioner contended that the big numbers of police officers patrolling the three (3) Counties had intimidated the voters residing there and would result to their disenfranchisement.It averred that this was an infringement on the rights of liberty and right to political rights enshrined in Articles 28 and Article 38 of the Constitution of Kenya, 2010 respectively.

9. It was its further averment that unless the Curfew was lifted, the political rights of the voters in the three (3) Counties would be infringed upon on 8th August 2017 for the reason that the said Curfew order applied during the hours of darkness between the period of 6.30 pm and 6.30 am and would thus reduce the time for voters to vote as voting on the aforesaid datewould commence at 6.00 am and be concluded at 5.00pm.

10. It was also apprehensive that its Petitioner's agents and members of public would be locked out of the Polling stations/ Tallying Centres leading to a violation of the Constitutional rights and the Constitutional principles envisaged for the election system and process.

11. In a nutshell, the Petitioner's case was that the said Curfew had infringed on the political rights of the voters of the three (3) Counties was contrary to the provisions of Article 38 of the Constitution of Kenya, 2010 and that it further infringed on the socio-economic rights of the residents of the said three (3) Counties as they were not being able to engage in economic activities or access medical attention without inconveniences. It was its further contention that the said Curfew was illegal and a direct contravention of Article 47 of the Constitution of Kenya more so as Article 58 of the Constitution of Kenya provides that a state of emergency shall not be more than fourteen (14) days.

**THE 1ST, 2ND AND 3RD RESPONDENTS' CASE**

12. On 3rd August 2017, the 1st Respondent filed a Replying Affidavit in opposition to the Petitioner's Petition. It argued that the Acting Cabinet Minister acted within the law when pursuant to Section 8(1) of the Public Order Act, he imposed a curfew affecting Lamu, Garissa and Tana River Counties on 8th July 2017 due to frequent violent activities that had been carried out between 6.30pm and 6.30 am.

13. He averred that the limitation of the freedom of movement in the three (3) Counties, which was permitted by the Constitution of Kenya, was due to insecurity hence, the Curfew was therefore reasonable

and justifiable. He denied that the voters in the three (3) Counties would be disenfranchised by the said curfew because the Election (General) Regulations empower a presiding officer either to adjourn voting or extend hours of voting. He added that if the candidates and their agents wished to move around after 6.30 pm, they could do so with the written permission of the Deputy County Commissioner as provided for in the Public Order Act.

14. They therefore urged this court to consider the principle of proportionality as between the security of the inhabitants at Lamu, Garissa and Tana River and the freedom of movement and not lift the said Curfew.

## THE 4TH RESPONDENT'S CASE

15. On 31st July 2017, the 4thRespondent filed Grounds of Opposition of even date. It argued that the application was bad in law, speculative in nature and an abuse of the process of court and that it had wrongly been enjoined in the proceedings herein because matters of security were in the domain of the 1st, 2nd and 3rd Respondents. It, however, contended that the doctrine of proportionality had not been met to warrant an approval of the orders the Petitioner had sought.

16. It also submitted that civil and political rights could be limited in certain circumstances as their absolute protection was not guaranteed under Article 25 of the Constitution of Kenya. It added that the Election (General) Regulations empowered the Presiding Officer at every polling station to adjourn proceedings at his polling station in consultation with the returning officer where there had been interruptions, to extend hours of polling where the proceedings had been interrupted and to compensate any delay in the opening of a polling station.

17. It therefore urged this court the Petition be dismissed because any security issues that would arise would be dealt with by the 1st, 2nd and 3rd Respondents who had the mandate by law to deal with such security issues.

## THE INTERESTED PARTY'S CASE

18. The Interested Party filed Grounds of Opposition dated 31st July 2017 on 1st August 2017. The essence of its case was that there was no illegality in the imposition of the Curfew under the Public Order Act and that the provisions of Article 58 of the Constitution of Kenya that the Petitioner had relied upon, dealt with a state of emergency and were therefore not applicable in the circumstances of the case herein.

19. It contended that the imposition of the said curfew was as a result of frequent terrorist attacks in the three (3) Counties and was intended to ensure peace and stability were maintained at all times. It was emphatic that a declaratory order could not quash an administrative action that had been done in accordance with the statutory provisions.

## LEGAL ANALYSIS

20. After carefully analysing the Petitioner's pleadings and its submissions, it was apparent to this court that the Petitioner was concerned:-

**a. THAT the elections would not be transparent, impartial and accountable if observers and agents would not be allowed in the polling centres;**

**b. THAT the voters in the three (3) Counties would be disenfranchised because the time for voting will have been reduced;**

**c. THAT the movement of the residents of the three (3) Counties had been restricted thus interfering with their daily lives and livelihood.**

21. It submitted that the Curfew that was imposed in the three (3) Counties was null and void was in contravention of Articles 1, 2, 4, 10, 238 and 244 of the Constitution of Kenya as it went against the principals of national security envisaged thereinand thus sought to have the same declared unconstitutional.

22. It submitted that the said limitation infringed the right to human dignity, freedom of movement, the right to political rights including the right to vote and campaign for a political cause of one's choice as contemplated in Article 38 of the Constitution of Kenya as read with Article 81 of the Constitution of Kenyaand was also contrary to Article 24 of the Constitution of Kenya.

23. It was emphatic that agents and observers act as the eye of the public to ensure that elections are transparent and accountable but that in view of the said Curfew, its agents and observers in the three (3) Counties would be required to leave the polling /tallying centres. It placed reliance on the case of **Hassan Abdalla Albeity vs Abu Mohamed Abu Chiaba &Another[2013] eKLR**in which one of the holdings was that the 4th Respondent has to conduct elections in an transparent, impartial and accountable manner.

24. In respect of the voting time, it argued that the late opening of the polling stations meant that voting would commence late and as a result, many voters would be disenfranchised as they would have to be in their houses by 6.30pm to beat the curfew. The justification of the disenfranchisement was because residents who would be required to travel long distances might not go to the polling stations due to fear that they would be arrested by the big number of police officers as they go home after the voting exercise on 8th August 2017.

25. To buttress its argument the sanctity of the voting rights, it referred this court to the cases of**Sarah Mwangudza Kai vs Mustafa Idd & 2 Others [2013] eKLR**and **Richter vs Minister for Home Affairs & 2 Others (2009) ZACC3**in which in the latter case it was held as follows:-

> **""Memorably, in August vs Election Commission, Sachs J declared that the vote of each and every citizen is a "badge of dignity and personhood. Quite literally, it says that everybody counts""…The right to vote and the exercise of it, is a crucial working part of our democracy…the right to vote imposes an obligation upon the state not merely to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised..."**

26. It also pointed out that Article 58 of the Constitution of Kenya that provides that a State of Emergency could not last longer than fourteen (14) day from the date of the declaration of such state of emergency. In this regard, it placed reliance on the case of **Law Society of Kenya vs Inspector General Kenya National Police Service & 3 Others [2014] eKLR**where it was held that the longest period a curfew could be given was seven (7) days.

27. It was categorical that the period for the Curfew had been imposed in the three (3) Counties was inordinately long as it could only last for a maximum of three (3) to seven (7) days depending on the nature of the curfew. It stated that even if there was no specific period in respect of which a curfew during the hours of darkness could be imposed, it could not be that the same could be imposed for an unreasonable length of time not contemplated under any law and/or specifically under Article 24 of the Constitution of Kenya.

28. It added that in any event, the 1st Respondent did not give reasons for imposing the same as contemplated under Article 47 of the Constitution and further failed to mention of any attacks in Tana River County which could have justified imposition of a Curfew in the said County.

29. It contended that the 1stRespondent had not discharged his burden of proof to demonstrate the measures his had put in place to ensure that the voters in the three (3) Counties were not disenfranchised.He relied on the case of **S vs Zuma & Others (1995)2 SA 642(CC)[A3]** where it was held as follows:-

**"The State has to be innovative in fighting terrorists but within the framework of the Constitution and particularly the Bill of Rights."**

30. On its part, the 4th Respondent's arguments were that this court ought to consider the principal of proportionality in determining whether or not it ought to lift the curfew. In exercising its mandate, it stated that it had put in place voting regulatory frameworks through the enactment of the Elections (General) Regulations, 2012 such as enlargement of time to vote and security to ensure that the elections were seamless.

31. It sought to allay the Petitioner's fears that its polling agents and observers would be locked out of the polling/tallying centres because all party agents and observers had already been accredited to enter the Polling/tallying Centres. It was emphatic that against the backdrop of all the arrangements it had put in place, the Petitioner's case therefore did not raise any cause of action against it and as such its Petition ought to be dismissed with costs to it. It referred the court to this case of **Washington Jakoyo Midiwo vs Minister, Ministry of Internal Security & 2 Others [2013]eKLR**where Majanja J cited the case of **John Harun Mwau and Others v Attorney General and Others, Nairobi Petition No. 65 of 2011**(Unreported)wherein it was stated that:-

**"In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3)(d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute."**

32. The Petitioner correctly pointed out that the voters of the three (3) Counties were entitled to exercise their political rights as enshrined in Article 38 of the Constitution of Kenya. This is a position that was also conceded to by all the Respondents.

33. Indeed, under Article 25 of the International Covenant on Civil and Political Rights (ICCPR) and to which Kenya is a party, it provides as follows:-

**"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:-**

**a. To take part in the conduct of public affairs, directly or through freely chosen representatives;**

**b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;**

**c. To have access, on general terms of equality, to public service in his country."**

34. As Articles 2(5) and 2(6) of the Constitution of Kenya provides that the general rules of international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution, the principles relating to political rights of voters in the ICCPR is enshrined in Article 38 of the Constitution of Kenya.

35. The said Article provides as follows:-

**(1) Every citizen is free to make political choices, which includes the right-**

**a. to form, or participate on forming, a political party;**

**b. to participate in the activities of, or recruit members for, a political party;**

**c. to campaign for a political party or cause;**

**(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for-**

**a. any elective public body or office established under the Constitution; or**

**b. any office or any political party of which the citizen is a member.**

**(3) Every adult citizen has the right, without unreasonable restrictions-**

**a. to be a registered as a voter;**

**b. to vote by secret ballot in any election or referendum; and**

**c. to be a candidate for public office, or within a political party of which the citizen is a member and, if elected, to hold office."**

36. In considering the rights of voters as set out in Article 38 of the Constitution of Kenya, the principles set out under Article 81 of the Constitution of Kenya cannot be ignored. The relevant principles are:-

**a. Freedom of citizens to exercise their political rights under Article 38;**

**b. Universal suffrage based on aspiration for fir representation and equality of vote;**

**c. Free and fair elections, which are:-**

**i. By secret ballot;**

**ii. Free from violence, intimidation, improper influence or corruption;**

**iii. Conducted by an independent body;**

**iv. Transparent; and**

**v. Administered in an impartial, neutral, efficient, accurate and accountable manner.**

37. The question that is to be determined by this court is whether or not the right to exercise political rights could be limited. Article 25 of the Constitution of Kenya stipulates as follows:-

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

**a. freedom from torture and cruel, inhuman or degrading treatment or punishment;**

**b. freedom from slavery or servitude**

**c. the right to a fair trial; and**

**d. the right to an order of *habeas corpus.***

38. The import of Article 25 of the Constitution of Kenya is that other than the four (4) fundamental rights detailed therein, any other right under the Bill of Rights can be limited. Be that as it may, any right other than those that have been detailed in Article 25 of the Constitution of Kenya can only be limited by law as provided in Article 24 of the Constitution of Kenya.

39. Article 24 of the Constitution of Kenya provides as follows:-

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

**a. The nature of the right or fundamental freedom;**

**b. the importance of the purpose of the limitation;**

**c. the nature and extent of the limitation;**

**d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**

**e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**

40. It was evident from the 1st Respondent's Replying Affidavit that the imposition of the said Curfew in the three (3) Counties had limited the freedom of movement of their residents. In his Replying Affidavit, he listed the following incidents that justified the imposition of the said Curfew:-

**a. 8th May 2017, a KRA vehicle was hit by IED in Liboi.**

**b. 16th May 2017, a civilian vehicle was hit at Liboi.**

**c. 24th May 2017, an Administration Police vehicle was hit by an IED in Daadab where 2 Administration Police Officers died and 2 were injured.**

**d. On 31st May 2017 in Fafi area, in Garissa County Al-Shabaab militants destroyed a Safaricom mast and abducted two (2) teachers.**

**e. On 31st May 2017 in the area between Milimani and Baure within Lamu County, 6 officers and I civilian died. On the same day, there was an attempted attack on a KDF convoy travelling from Ishakani to Ras Kamboni.**

**f. A Safaricom mast was also destroyed in the Hulugho area in Garissa County.**

**g. On 1st June 2017, 20 Administration Police Officers were attacked by Al Shabaab and 3 of them were injured and a Land Cruiser vehicle burnt.**

**h. On 27th June 2017, a police vehicle carrying school children was hit by IED where 4 pupils died and 4 security officers also died in Lamu County.**

**i. On 5th July 2017, there was an attack at Pandanguo police camp where 2 police officers lost their lives and a Safaricom mast destroyed.**

**j. On 8th July 2017 at Jami Village there was an attack where 9 people were slaughtered/butchered alive in Lamu County.**

**k. On 13th July 2017, the Principal Secretary Ministry of Public Works was hijacked and injured, 3 people lost their lives after an attack at Milihoi area in Lamu County.**

**l. On 31st July 2017, a Safaricom mast was destroyed by Al Shabaab at Kiunga area in Lamu County.**

41. Indeed, these were serious occurrences that caused the death of innocent citizens and occasioned damage and loss of property to others. On the face of it, the situation demanded immediate attention to preserve lives and property of innocent victims. One of the legal mechanisms that was open to the 1st Respondent to contain the precarious situation in the three (3) Counties was to invoke the provisions of Section 8 of the Public Order Act Cap 56 (Laws of Kenya).

42. Section 8(1) and Section (3) of the Public Order Act provide as follows:-

> **1. The Cabinet Secretary, on the advice of the Inspector-General of the National Police Service may, if he considers it necessary in the interests of public order so to do, by order (hereinafter referred to as a curfew order) direct that, within such area and during such hours as may be specified in the curfew order, every person, or, as the case may be, every member of any class of persons specified in the curfew order, shall, except under and in accordance with the terms and conditions of a written permit granted by an authority or person specified in the curfew order, remain indoors in the premises at which he normally resides, or at such other premises as may be authorised by or under the curfew order…**
>
> **(3) A curfew order shall be published in such manner as the authority making it may think sufficient to bring it to the notice of all persons affected thereby, and shall come into force on such day, being the day of or a day after the making thereof, as may be specified therein, and shall remain in force for the period specified therein or until earlier rescinded by the same authority or by the Minister as hereinafter provided:**
>
> **Provided that no curfew order which imposes a curfew operating during more than ten consecutive hours of daylight shall remain in force for more than three days, and no curfew order which imposes a curfew operating during any lesser number of consecutive hours of daylight shall remain in force for more than seven days."**

43. As was rightly pointed out by the Interested Party, the proviso under Section 8 of the Public Order Act would not apply in the circumstances of this case because the Curfew herein did not fall within the hours of daylight, it fell during the hours of darkness, from 6.30 pm to 6.30 am.

44. The Petitioneralso correctly pointed out that imposition of a curfew is a stop-gap measure. However, it cannot be compared to a state of emergency which is declared under Article 58 of the Constitution of Kenya relating to the declaration of a state of emergency as they relate to two (2) different scenarios.The issue of a curfew being a stop-gap measure was also addressed later on in the Judgment herein.

45. If the curfew is imposed in accordance with the law, the same can run for an unlimited period provided that it is reasonable and justifiable as has been stated in Article 24 of the Constitution of Kenya. The key words for limitation of fundamental rights other than under a state of emergency are that the limitation must be **"reasonable"** and **"justifiable."**

46. Imposition of the curfew against the backdrop of very violent acts is intended to ensure that the right to freedom to movement as sought by the Petitioner does not prejudice the rights and fundamental freedoms of others.As was rightly submitted by the 1st, 2nd and 3rd Respondents, the curfew was imposed during the dark hours and consequently, it could not be said to have been unlawful or unconstitutional for having been imposed for more than seven (7) days during hours of daylight as is envisaged under Section 8 of the Public Order Act.

47. Appreciably, the nature of the fundamental freedom being complained about by the Petitioner is not one that is excluded in Article 24 of the Constitution of Kenya. The limitation is important because of the wanton destruction of property and termination of life through violent means. Indeed, life of residents in the three (3) Counties is guaranteed in Article 26 of the Constitution that provides that a person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

48. However, despite the right of political rights being limited, it is safeguarded and protected by other

existing law. As was rightly pointed out by the 4th Respondent, Regulation 66 of the Elections (General) Regulations, 2012 contemplates that subject to the provisions of Regulation 64(1) of the said Regulations, voting on an election day will begin at 6.00 am and end at 5.00 pm on the polling day.

49. Notably, Regulation 64(1) of the Elections (General) Regulations empowers the Presiding Officer at a Polling Station to adjourn proceedings after consultation with the Returning Officer of the relevant area in the event of interruption or disruption of the voting exercise or for any other justifiable reason.

50. Additionally, Regulation 64(3) of the Elections (General) Regulations empowers the Presiding Officer of a Polling Station to extend the voting time beyond 5.00 pm to compensate for time lost due to delays, disruption of voting or due to any other reason.

51. Further, Regulation 64A of the Elections (General) Regulations, 2012 provides that where it is impossible to conduct the elections as a result of other emergencies and where such election is postponed, to hold it at the earliest practicable time.

52. The Petitioner's concerns that the voters in the three (3) Counties would be disenfranchised due to the fact that they would only leave their residences at 6.30pm and thus start voting later than other voters in Kenya would not prejudice them as the presiding officer in consultation with the returning officer of a polling station may extend the hours for voting as stipulated in Regulation 64 (3) of the Elections (General) Regulations.

53. In addition, under Regulation 64(1) of the Elections (General) Regulations, the presiding officer in consultation with the returning officer is empowered to adjourn the voting and re-start the proceedings at the earliest practicable time due to several reasons, one of them being, administrative difficulty.

54. Appreciably, it is expected that presiding officers in the three (3) Counties must be fully aware of the Curfew. In the mind of this court, the presiding officers in consultation with the returning officers have wide discretion in determining how they will ensure that all voters in the three (3) Counties vote. However, adjourning the voting to the following day because voters might not beat the curfew should only be considered with restraint and caution as voters who might not make it to the Polling Station on 8th August 2017 for one reason or the other might take advantage and come the following day.

55. Indeed, this would be unfair advantage to other polling stations in the other parts of the country as only those persons who are on the queue by 5.00 pm shall be allowed to vote. The presiding officers and the returning officers must therefore use the powers that have been conferred upon them by the law to ensure that none of the voters in the three (3) Counties are disenfranchised.

56. The exercising of the discretion by the presiding officers in consultation with their returning officers in accordance with the law on 8th August 2017 will not be an infringement of the political rights of the voters of the three (3) Counties. Rather, the voters will be inconvenienced by the requirement that they should be at their residences by latest 6.30 pm. This cannot be said to be a contravention of their fundamental right to freedom of movement.

57. This court also noted the Petitioner's arguments that its agents and observers would be locked out of the polling/tallying centres. However, its concerns appeared to have been speculative. Regulation 62 of the Elections (General) Regulations provides as follows:-

> **"The presiding officer shall regulate the number of voters to be admitted to the polling station at the same time, and may exclude all other persons except-**
>
> **a. a candidate;**
>
> **b. a person nominated as a deputy to the candidate, where applicable;**
>
> **c. authorised agents;**

**d. members of the Commission and election officers on duty;**

**e. police officers on duty;**

**f. persons necessarily assisting or supporting votes with special needs or assisted voter; and**

**g. observers and representatives of the print and electronic media accredited by the Commission.**

58. Indeed, this court took judicial notice that counting of votes is normally done after the voting ends and continues late into the night. If an observer or agent opted not to leave the polling/tallying station in the night, that was an option he may want to take. He may suffer inconveniences by being restricted in a polling/tallying centre but not an infringement of his fundamental rights of right to freedom of movement. Appreciably, it will not be peculiar to the Petitioner's agents and observers to remain at the polling/tallying centres on the night of 8th-9th August 2017 as from experience, agents and observers all over the county normally stay in polling/tallying centres till the morning after the election after the exercise of counting votes.

59. If any agent or observer would wish to leave the polling/tallying centre after the voting and counting of votes, all he would be required to do is to apply for a written request from the Deputy County Commissioner of the affected areas to be outdoors after 6.30pm, a position that was correctly submitted by the 1st, 2nd and 3rd Respondents and Interested Party.

60. Undoubtedly, the Petitioner and the voters of the three (3) Counties have rights in an open and democratic society based on human dignity, equality and freedom. However, their rights as private citizens cannot outweigh the public rights bearing in mind the factors that ought to be taken into account under Article 25 of the Constitution of Kenya. The case of Jacqueline **Okuta & Another vs Attorney General & 2 Others [2017] eKLR**that was relied upon by the 1st, 2nd and 3rd Respondents and the Interest Party set out this issue clearly when the court stated as follows:-

**"Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interests (and perhaps even the individual's own interest) to do otherwise. Individual human rights cannot be sacrificed even for the good of a greater number, even for the general good of all. But if all 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."**

61. The imposition of restrictions on fundamental rights was also addressed in the case of Kennedy vs UK (ECHR Applications No. 26839 of 2005) that was relied upon by the Interested Party, a position this court fully associated itself with. It was held as follows:-

**"The general trend is to place restrictions on fundamental rights where it is strictly necessary in the interest of countervailing public interests such as national security, the need to keep secret certain police methods of investigations or the protection of the fundamental rights of another person."**

62. In the case of **Austin vs The United Kingdom Applications Nos 39692/09, 40713/09, 41008/09** that was also relied upon by the Interested Party, the European Court of Human Rights upheld the principle that the Police, Cabinet Secretary, in that case had to be afforded a degree of discretion in matters of public safety.

63. Appreciably, if atrocious activities had been carried out from May 2017 until end of July 2017 and as late as 31st July 2017 despite there having been a curfew, there wasno guarantee that the similar attacks will not be carried out on the day of election. The consequences of such an attack could compromise the

principle of having an election that is free from violence and intimidation. Due to the high stakes of elections, it would be foolhardy to triviliase security issues as they have the potential of plunging the country into chaos by contemplating lifting the curfew.

64. In determining if such restrictions, can be lifted, the court has to consider prevailing public interest vis-a vis private interests. The 4th Respondent set out the tests of adopting the principle of proportionality as the legitimacy test, the suitability test, necessity test and balancing of interest.The curfew was imposed on the three (3) Counties in line with Section 8 of the Public Order Act and Article 24 and Article 25 of the Constitution of Kenya. The 1st Respondent did not therefore contravene any law. Indeed, the Petitioner did not demonstrate that there was any other lesser restrictive measure to limit the rights of the residents in the three (3) Counties except by the 1st Respondent imposing the curfew.

65. Bearing in mind the consequences of the infringement of the socio-economic and political rights vis-a-vis the right to life, the court was more persuaded to find and hold that there was more value in not lifting the curfew so as to avert an otherwise potential volatile situation.The principle of proportionality that had been advanced by the Respondents was thus applicable in the circumstances in the case herein.

66. Turning to the Petitioner's assertions that the 1st Respondent did not mention of there being any attacks in Tana River, this court noted the Interested Party's submissions regarding the powers of the National Police Service.Section 106(1) of the National Police Service Act 2011 provides as follows:-

> **"The Cabinet Secretary may, after consultation with the National Security Council, by notice in the Gazette, and in such other manner as he may direct, declare that an area of Kenya is in a disturbed or dangerous state, or that, by reason of the conduct of the inhabitants of such area or any class or section of such inhabitants, it is expedient to increase the number of police officers stationed in such area."**

67. It is evident from the aforesaid Section 106(1) of the National Police Service Act that it is not necessary that there be attacks. It is sufficient if the Cabinet Secretary, in consultation with the National Security Council, declares that an area in Kenya is in a disturbed or dangerous state for police officers to be increased in that area. The Petitioner's assertion that the large number of police was intimidating the residents of the three (3) Counties was one that cannot be verified. Indeed, legitimate expectation is that to law abiding citizens, police presence is intended to inspire a sense of security.In times of volatile security concerns, citizens must bear the inconveniences of having other fundamental rights limited.

68. Whereas the Petitioner had contended that a comparison should be made with the terms of a State of emergency in order to appreciate that even in the event of a state of emergency, the maximum period of the state of emergency is fourteen (14) days, it is important to point out that a period of three (3) months is not unreasonable and justifiable for purposes of resolving the security issues in the three (3) Counties.

69. It must be appreciated that none of the rights under Article 26, Article 38 and Article 40 of the Constitution of Kenya are superior to each other. They are at per. However, the consequences of the infringement of each of them may differ. In the case of political rights, there may be serious inconveniences which as has been seen in Regulations 64 and 64A of the Election (General) Regulations Act. If a person does not vote at the time the he had scheduled to vote, it may be remedied under the aforesaid Regulations.

70. However, on the other hand, if a person's right to life is infringed unlawfully, the consequence is that there is no remedy as the person would be dead. That is where the principle of proportionality comes in.In the case of**S vs Makwanyane & Another 1995 (3) SA 391, 436 (CC)** that was relied upon by the 4th Respondent herein, the court therein rendered itself as follows:-

> **"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality…The fact that different rights have different**

**implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests."**

71. Having said so, it was the view of this court that just as the curfew during hours of light and state of emergency are clearly defined in the law and Constitution respectively, there is urgent need for the legislators to address their mind to the length of curfews.

72. Undoubtedly, imposition of curfews without a time limit can be open to abuse by a rogue State hence the importance to have the same clearly spelt out. Historically, curfews were used by the colonial governments to subjugate their subjects. The residents in the three (3) Counties continue to suffer inconveniences such as failure to access medical assistance due to a lack of transport which may be tragic.

73. In view of the promulgation of the Constitution of Kenya, it would be critical that citizens have an idea of an impending curfew as the issue of security is really the responsibility of the State. A citizen should not be made to suffer indefinitely due to failure by the State to find expeditious means of sorting out security concerns.

74. Indeed, Article 10 of the Constitution of Kenya provides that the national values will bind any State organs, State officers, public officers and all persons.A careful perusal of Article 10 lists several national values which include participation of the people, social justice, inclusiveness, transparency and accountability. A citizen must never perceive that he or she is marginalised when a law is being implemented. Knowing with certainty how long a curfew will last will promote the national value and principle of inclusiveness.

75. In addressing the issues of a curfew in Lamu in 2014, Kasango and Mureithi JJrendered themselves in the case of **Muslims for Human Rights (MUHURI) & 4 Others vs Inspector General of Police & 2 Others [2014] eKLR** as follows:-

**"In this regard, and to facilitate the parties' reconsideration of less restrictive means of achieving the public security purposes sought to be addressed by the countywide 12 –hour night curfew, including the ones suggested by court hereinabove, the Court hereby directs the respondent in consultation with the petitioners within 14 days from today, to meet and develop and report to the court, a revised scheme of such measures as will consistently with the Bill of Rights, meet the public safety and security needs for the affected region."**

76. Notably, the lack of public participation stipulated in Article 10 of the Constitution of Kenya was not applicable at the time of imposition of the curfew because information relating to matters of national security cannot be shared with members of public in view of the limitations in Section 6(1) of the Access to Information Act No 31 of 2016.

77. The said Section provides as follows:-

"Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—

a. undermine the national security of Kenya…"

78. Section 6(2) of the Access to Information Act further provides as follows:-

For purposes of subsection (1) (a), the information relating to security includes-

a. Military strategy, covert operations, doctrine, capability, capacity or deployment…
b. ….
c. Intelligence activities, sources, capabilities, methods or cryptology
d. …
e. …
f. vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security;
g. information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security;
h. …
i. cabinet deliberations and records;

79. Parliament enacted the National Police Service Act provides that the only consultation the Cabinet Secretary may engage in is with the National Security Council and Article 25 of the Constitution envisages the limitation of rights without any form of public participation. Indeed, Article 244 of the Constitution of Kenya provides that the National Police shall comply with constitutional standards of human rights and fundamental freedoms.

80. It therefore follows that although Section 8 the Public Order Act appears archaic, it is not unconstitutional in view of the provisions of Article 35 of the Constitution whose spirit is contained in the Access to Information Act. However, there is need for Parliament to legislate on how Section 8 of the Public Order Act is to be operationalised regarding hours of darkness as it is open to abuse by a rogue State or Cabinet Secretary.

81. There is a new dispensation in our Constitution that mandates all state organs and state officers be transparent in the way they conduct affairs of the state. In the spirit of the value of transparency in Article 10 of the Constitution of Kenya, the 1st Respondent ought to include the residents either directly or through their elected representatives to address the issue of Curfew if it will be extended on 9th October 2017.

82. The 1st Respondent's Replying Affidavit did indicate that there was an attack on 31st July 2017. The Petitioner did also confirm that there had been an attack but a hundred (100) kilometres from the areas. Whether there had been reduction in the number of attacks after the imposition of the curfew as the 1st, 2nd and 3rd Respondents submitted was not a fact that this court could conclusively confirm.

83. Indeed, the court took judicial notice of the fact that as late as 2nd August 2017, there had been reports in the print media of an Al Shabaab attack at Nyongoro in Witu , Lamu despite the Curfew still being in force in the three (3) Counties.

84. It is true that the curfew was not directed to the Petitioner alone and that its imposition was a positive obligation as the 1st, 2nd and 3rd Respondents submitted which should remain in place until such time that a proper assessment by responsible bodies indicating when the curfew will be lifted. However, it cannot be imposed indefinitely.There is no justification why the curfew for during the hours of light and the state of emergency are clearly spelt out while the limitation of period for curfew during hours of darkness is not set out in Section 8 of the Public Order Act.

85. It must be appreciated that it would be impracticable for pregnant women or persons who fall sick suddenly to seek written permit from the Deputy County Commissioners to go to hospital. In the case of the pregnant mother, the time for delivery if a child is unknown unless of course it is a scheduled caesarean section when a mother would be expected to have been in hospital awaiting caesarean section operation. It would not be known with certainty when a person will fall sick requiring medical attention. Further, there are people's livelihoods that depend on fishing which can only be carried out at night.

86. In view of the fact that the attacks are continuing despite the curfew being in place, it is important

that the State considers other less restrictive options to combat this menace as it is evident that the fundamental rights of the residents in the three (3) Counties will continue being limited for an indefinitely long period without the result of which the State intends to achieve not been achieved in the long run.

87. Accordingly, having considered the pleadings and written submissions by the respective parties, this court came to the firm conclusion that the Petitioner failed to demonstrate that the Curfew that was imposed in the three (3) Counties was unconstitutional or that the same had imposed limitations on the political rights of their residents.

88. It found and held that it could not prohibit the 1st, 2nd and 3rd Respondents from exercising powers donated to them by legislation and the Constitution of Kenya. It agreed with the 1st, 2nd and 3rd Respondents that the Curfew in the three (3) Counties was legal, lawful and constitutional and that it did not contravene the fundamental rights of the residents of the three (3) Counties, a position that was supported by the 4th Respondent and the Interested party.

89. The imposition of the Curfew was an administrative action that was exercised by the 1st Respondent in accordance with the law and it could not be quashed as had been proposed by the Petitioner. It was not in contravention of Article 47 of the Constitution of Kenya as it had argued.

90. Its alternative prayer to lift the curfew from 6th to 12th August 2017 to enable the residents of the three (3) Counties exercise their political rights was not in the best interests of the national security. Should the 4th Respondent fail to conduct the general elections in the three (3) Counties in compliance with Article 81 of the Constitution of Kenya, the Petitioner or any other aggrieved party will be at liberty to file a petition as provided in the Elections Act, 2011to the effect that the residents of the three (3) Counties did not exercise their right to vote as envisaged in Article 38 of the Constitution.

91. The vesting of legislative, executive, and judicial powers of government in separate bodies is spelt out in Article 1 (3) of the Constitution of Kenya. This separation of powers in the three (3) arms of government must work independently but also interdependently. None should interfere with the other if the other is carrying out its mandate in accordance with the law and the Constitution of Kenya.

92. The purpose of the curfew is to safeguard the lives and properties of citizens as enshrined in Article 26 and Article 40 of the Constitution of Kenya. Indeed, Article 25 of the Constitution of Kenya provides that a right can be limited if there are no other lesser restrictive means of maintain security in the three (3) Counties.It ought to and must be embraced by all for the greater good of this country.

**DISPOSITION**

93. For the foregoing reasons, the upshot of this court's decision was that the Petitioner'sPetition dated 19th July 2017 and filed on 20th July 2017 was not merited and the same is hereby dismissed.

94. However, in view of the fact that the Curfew cannot be imposed on the Tana River, Lamu and Garissa Counties indefinitely, the 1st Respondent is hereby directed to engage with the residents of the said Counties either directly or through their elected representatives before extending the Curfew after 9th October 2017, if at all.

95. In the event that the 1st, 2nd and 3rd Respondents shall fail, refuse and/or neglect to engage the residents and/or their democratically elected representatives of Tana River, Lamu and Garissa Counties as aforesaid, the Petitioner and/or the residents and/or their democratically elected leaders will be at liberty to institute proceedings on account of the values of transparency, social justice, inclusiveness and participation of the residents in the Tana River, Lamu and Garissa Counties as envisaged in Article 10 of the Constitution of Kenya.

96. For the reason that this court cannot compel Parliament to enact law and its role is only to interpret enacted law, it hereby strongly recommends that Parliament amends Section 8 of the Public Order Act to

indicate time limitations of imposition of curfews during the hours of darkness. The Section in itself is not unconstitutional in view of the provisions of Article 24 and Article 25 of the Constitution of Kenya. However, left as it is, Section 8 of the Public Order Act has the potential of subjugating citizens who are in an open and democratic society based on human dignity, equality and freedom if the power therein is not exercised judiciously.

97. In view of the fact that the Petition herein brought to fore the need to have time limit set out in the Public Order Act during the hours of darkness, each party will bear its own costs.

98. It is so ordered.

**DATED** and **DELIVERED** at **VOI** this 4th day of August 2017

**J. KAMAU**

**JUDGE**