



MWK & another v Attorney General & 4 others; Independent Medical Lega Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae) (Constitutional Petition 347 of 2015) [2017] KEHC 1496 (KLR) (Constitutional and Human Rights) (18 December 2017) (Judgment)

M W K v another v Attorney General & 3 others [2017] eKLR

Neutral citation: [2017] KEHC 1496 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 347 OF 2015

JM MATIVO, J

DECEMBER 18, 2017

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 2, 3, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 31, 48, 49, 50 AND 53, 159 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLE 27, 28, 29, 31, 41, 43, 48 & 49 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE PREAMBLE AND ARTICLES 7, 9, 10, 16, 17, 23, 24, 25, 26 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

AND

IN THE MATTER OF THE PREAMBLE, ARTICLE 1, 2, 3, 5, 6, 7, 8, 12, 13, 26 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

BETWEEN

MWK 1ST PETITIONER

THE CRADLE-THE CHILDREN FOUNDATION 2ND PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT



DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT
IP INSPECTOR AGNES MAGIRI 4TH RESPONDENT
POLICE CONSTABLE ANNE OGINDO 5TH RESPONDENT

AND

INDEPENDENT MEDICAL LEGAL UNIT (IMLU) INTERESTED PARTY

AND

THE REDRESS TRUST AMICUS CURIAE

Arrest, strip search and detention of a minor without considering the best interests of the minor violates the rights of the child.

The police arrested the petitioner, a female minor, and subjected her to a strip search, photographed her while nude, and published her nude photos. Aggrieved the petitioner approached the court for orders that her best interests as a child, her rights as a child, her right to privacy, dignity and freedom from inhuman and degrading treatment had been violated. The High Court issued a declaration that the aforesaid rights had been violated and awarded the petitioner Kshs. 4,000,000 as general damages. The court however declined to lift the conviction in the petitioner's criminal case on grounds that the law provided for appeal and review mechanisms.

Reported by Ian Kiptoo

Constitutional Law - fundamental rights and freedoms - enforcement of fundamental rights and freedoms - rights of the child - best interests of the child - where a female minor was arrested, detained, subjected to a strip search, photographed when nude, and where the nude photos were published - whether arresting the petitioner, subjecting her to a strip search without adhering to the statutory provisions governing the search of women and children, taking photographs of the petitioner while nude and publishing the photos was against the child's (petitioner's) best interest and violated the petitioners' rights of the child – Constitution of Kenya, 2010, articles 25, 28, 31 and 53(d), (f) and (2); Universal Declaration of Human Rights, 1948 articles 1, 5, and 12.

Constitutional Law - fundamental rights and freedoms - right to dignity - right to privacy - right not to be subjected to inhumane and degrading treatment - where a female minor was arrested, detained, subjected to a strip search, photographed when nude, and where the nude photos were published - whether the arrest of the petitioner, subjecting her to a strip search without adhering to the statutory provisions governing the search of women and children, taking photographs of the petitioner while nude and publishing the photos violated the petitioners' rights to dignity, privacy and the right not to be subjected to inhuman or degrading treatment - Constitution of Kenya, 2010, articles 25, 28, 31 and 53(d), (f) and (2); Universal Declaration of Human Rights, 1948 articles 1, 5, and 12.

Criminal Procedure - conviction - quashing of a conviction - jurisdiction to quash a criminal conviction - where the arrest and detention of a petitioner by the police was declared to have violated the rights of the accused - whether a conviction rendered by a competent court on a plea of guilty could be quashed by a declaration in a constitutional petition as opposed to a review or appeal.

Civil Practice and Procedure - constitutional petitions - damages - award of damages in a constitutional petition - where a female minor was arrested, detained, subjected to a strip search, photographed when nude, and where the nude photos were published - what factors did courts consider in awarding damages in constitutional petitions - whether the arrest, strip search, photographing while nude and publishing the said photos of a female minor entitled to the minor to damages.



Brief facts

On August 5, 2015, the media was awash with news of a *matatu* that was intercepted by traffic police officers along Karatina/Nairobi Road carrying students. It was playing loud music; the students were allegedly intoxicated, and it was alleged some were engaging in sex in the vehicle. The police commandeered the vehicle to the police post where they searched the students. They recovered *Cannabis sativa* hidden in the under garments of the 1st petitioner. She was detained at the police station overnight and charged in court the following day with the offence of being in possession of *cannabis sativa*.

The 1st petitioner was then 18 years old and a form 4 student. She brought the petition seeking to vindicate her constitutional rights not to be subjected to degrading and inhuman treatment, to safeguard her right to privacy, rights of an arrested person and fair process and compensation for the violations.

Issues

- i. Whether the arrest of the petitioner, subjecting her to a strip search without adhering to the statutory provisions governing the search of women and children, taking photographs of the petitioner while nude and publishing the photographs violated the petitioners' rights to dignity, privacy and the right not to be subjected to inhuman or degrading treatment.
- ii. Whether arresting the petitioner, subjecting her to a strip search without adhering to the statutory provisions governing the search of women and children, taking photographs of the petitioner while nude and publishing the photographs was against the child's (petitioner's) best interest and violated the petitioners' rights of the child
- iii. Whether a conviction rendered by a competent court on a plea of guilty could be quashed by a declaration in a constitutional petition as opposed to a review or appeal.
- iv. What factors did courts consider in awarding damages in constitutional petitions?
- v. Whether the arrest, strip search, photographing while nude and publishing said photographs of a female minor entitled to the minor to damages.

Held

1. Article 28 of the Constitution of Kenya, 2010 (Constitution) provided no definition of dignity. However, its role and importance as a foundational constitutional value had been emphasized. So important was the right not to be subjected to cruel, inhuman or degrading treatment or punishment that under article 25 of the Constitution, it was one of the rights that would not be limited.
2. Article 31 of the Constitution provided the right to privacy of the person, home or property searched. It had become established law, insofar as privacy was concerned, that the right became more powerful and deserving of greater protection the more intimate the personal sphere of the life of a human being which came into legal play.
3. There was a connection between an individual's right to privacy and the right to dignity. Privacy fostered human dignity insofar as it was premised on and protected an individual's entitlement to a sphere of private intimacy and autonomy. The rights of equality and dignity were closely related, as were the rights of dignity and privacy.
4. The Constitution placed human dignity and equality as the central theme to Kenya's constitutional order. The determination of whether an invasion of the common law right to privacy had taken place was a single enquiry. It essentially involved an assessment as to whether the invasion was unlawful. The assertion had also been made that in the case of female prisoners' expectation of privacy, the courts had held that gender and gender differences had to matter because the courts imbued women with a sense of modesty and a greater need for privacy than men.
5. When a constitutional right was infringed, it was important to determine whether such infringement was justified in terms of article 24 of the Constitution which provided that the rights in the bill of rights would be limited only in terms of law and only to the extent that the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking



- into account all relevant factors, including —the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.
6. The court was constitutionally obliged to consider the facts complained of through the lens of article 53(d),(f) and (2) of the Constitution to determine if the police officers considered the 1st petitioners' best interests, and if they did, whether they accorded the best interests paramount importance. Courts were enjoined when interpreting any legislation to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. That required courts to play a crucial role in giving content and meaning to the fundamental rights enshrined in the bill of rights. The courts were the guardians of the Constitution and the values it espoused.
 7. In interpreting the law, courts had to infuse it with values of the Kenyan Constitution. Courts did not shirk that constitutional responsibility. All courts, including the High Court, were enjoined by the Constitution to uphold the rights of all, to ensure compliance with constitutional values, and to do so by granting appropriate relief, just and equitable orders, and by developing the common law taking into account the interests of justice. In a constitutional democracy such as Kenya's, courts had to devise means of protecting and enforcing fundamental rights.
 8. Article 2 of the Constitution proclaimed the Constitution to be the supreme law of the country. Importantly, it declared that law or conduct inconsistent with it was invalid, and further that the obligations it imposed had to be fulfilled. The Constitution was underpinned by a bill of rights that, according to article 19, was declared a cornerstone of Kenya's' democracy.
 9. The bill of rights was an integral part of Kenya's democratic state and was the framework for social, economic and cultural policies. The rights and fundamental freedoms in the bill of rights belonged to each individual and were not granted by the State. Article 21 of the Constitution commanded the State, and every state organ including the police to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights subject to the limitations in article 24 or elsewhere in the bill of rights.
 10. Therefore, the police were also required to honour the obligation to respect, protect, promote and fulfil the rights in the bill of rights. That was crucial as the police were, in the daily execution of their duties, involved in instances that had the potential to affect people's rights to dignity, equality and freedom—which were foundational to Kenya's democracy. Kenya's people deserved a police service which was steeped in a culture of respect for human rights. That required them in all their dealings with society whilst executing their constitutional duties to be guided by respect for human rights and strict observance of the rights to human dignity, equality and freedom.
 11. It was trite that an arrest was an invasive curtailment of a person's freedom. Under any circumstance an arrest was a traumatising event. Its impact and consequences on children might be long-lasting if not permanent. The need for the Kenyan society to be sensitive to a child's inherent vulnerability was behind the provisions of article 53 of the Constitution which was broadly worded. The interests of children were multifarious. However, in the context of arrests of children, article 53 of the Constitution sought to insulate them from the trauma of an arrest by demanding in peremptory terms that, even when a child had to be arrested, his or her best interests had to be accorded paramount importance.
 12. The importance which Kenya's Constitution placed on the rights of children, meant that an arrest of a child would be resorted to when the facts were such that there was no other less invasive way of securing the attendance of such a child before a court. That required police officers to consider and weigh all the facts carefully and exercise a value-judgment whether an arrest could be justified. Invariably that positioned the police in an invidious position. A question on how the police executed their constitutional mandate to prevent and combat crime without falling foul of article 53 of the Constitution could be asked. It did not mean that children would not, under any circumstances, be



- arrested or detained for it was a fact that children did commit crimes. Even heinous crimes for that matter. Statistics could attest to that. It was sad but it was a reality of our times.
13. The fact that article 53(2) of the Constitution demanded that the best interests of children be accorded paramount importance did not mean that children's rights trumped all other rights. All that the Constitution required was that, unlike pre-2010, and in line with Kenya's solemn undertaking as a nation to create a new and caring society, children were to be treated as children— with care, compassion, empathy and understanding of their vulnerability and inherent frailties. Even when they were in conflict with the law, the court would not permit the hand of the law to fall hard on them like a sledgehammer lest they were destroyed. The Constitution demanded that Kenya's criminal justice system was to be child sensitive.
 14. Contrary to the position before the Constitution of Kenya, 2010, Kenya's constitutional dispensation had ushered in a new era – an era where the best interests of a child had to be accorded paramount importance in all matters affecting the child—an era where Kenya, as a society, was committed to raising, developing and nurturing Kenya's' children in an environment that conduced to their well-being.
 15. In line with its constitutional obligation, the High Court was obliged to interpret police actions premised on provisions relating to arrest, detention and searching of children through the prism of article 53 of the Constitution to determine if the police officers had accorded the applicant's best interests paramount importance. That was a constitutional obligation imposed on them by article 53 of the Constitution. Therefore, when the constitutionality of the manner in which the police conducted the search was challenged, the court ought first to determine whether, through the application of all legitimate interpretive aids, the impugned action was capable of being read in a manner that was constitutionally compliant.
 16. The court, in line with its constitutional mandate to promote and protect the values and ethos that underpinned Kenya's Constitution, would undoubtedly find and hold that an arrest, search and detention of a child that violated privacy and dignity of the child was unconstitutional. The thrust of that conclusion was that, because an arrest, search and detention constituted an infringement of a person's rights to his or her liberty, dignity and privacy, all of which were enshrined in the bill of rights, the actions had to be justifiable according to the dictates of the bill of rights. Consequently, in line with Kenya's nascent human rights culture, before every arrest, search and a detention of a child was executed, police officers had to consider whether there were no less invasive methods which might have been used to bring the suspect before court and to secure the evidence.
 17. Article 259 of the Constitution enjoined the courts, in interpreting the Constitution, to promote the purposes, values and principles of the Constitution, advance the rule of law, and human rights and fundamental freedoms in the bill of rights, permit development of the law and contribute to good governance. That required courts to interpret the 4th respondents' actions in line with those constitutional values. Article 259 of the Constitution introduced a new approach to the interpretation of the Constitution. That approach had been described as a mandatory constitutional canon of statutory and constitutional interpretation. The duty to adopt an interpretation that conformed to article 259 of the Constitution was mandatory.
 18. It was sufficient that in arresting a child, police officers had to do it through the lens of the bill of rights and pay special attention to the paramount importance of the best interests of such a child. The Constitution demanded that of the police as a constitutive part of the State. A failure to do that would render such an arrest, search and detention inconsistent with the Constitution and consequently unlawful.
 19. The 1st petitioner was detained and arraigned before the court the next day. Article 53(2) of the Constitution demanded that a child ought only to have been detained as a measure of last resort. In its ordinary and grammatical meaning, the expression a measure of last resort meant that the detention of a child ought to have happened when all else had failed. That required police officers to investigate



- other less invasive methods which could satisfy their legitimate purpose without having to detain a child. That was because, first, a detention constituted a drastic curtailment of a person's freedom which Kenya's Constitution guarded jealously and would only be interfered with where there was a justifiable cause. Second, detention had traumatic, brutalising, dehumanizing and degrading effects on people and of course, worse on children.
20. It was a known fact that Kenya's detention centers, be it police holding cells or correctional centers, were not ideal places. They were not homes; they were bereft of most facilities which one required for raising children. It was worse for children. The atmosphere was not conducive to their normal growth, healthy psycho-emotional development and nurturing as children. Evidence by the 1st petitioner, the mother and the doctor was that the 1st petitioner was psychologically affected. She was seriously traumatised by the experience. Her detention had left her with serious psycho-emotional problems. Wounds that were still festering. Those were the deleterious effects of incarceration against which the Constitution sought to protect children. That was the reason why, even when a child had to be detained, article 53(2) of the Constitution stipulated that it ought to have been as a last resort and for the shortest appropriate time. There was no evidence the police considered other options such as bail which the parents said they were ready to provide or why the police failed to admit her into bail pending charge which was a constitutional right.
 21. The detention of the petitioner in the circumstances of the case was not justifiable as a measure of last resort because both her parents reported to the police station, were ready to provide bail, and, importantly, it was not shown that she was a flight risk; nothing prevented the police officers from leaving the 1st petitioner in the custody of her parents with appropriate instructions to ensure her appearance in court. There being no evidence that the police considered her circumstances to determine if her detention was a measure of last resort, hence, it followed that her detention was in flagrant violation of article 53(2) of the Constitution and therefore unlawful.
 22. A strip search was generally humiliating, uncomfortable, and of an invasive nature, and in the instant case affected the dignity of the girls and in particular the 1st petitioner. The photographs annexed to the petition attested to that. The right to dignity was at the heart of the Constitution. It was the basis of many other rights. The basis was that of recognizing that every person had worth and value and had to be treated with dignity. That was also highlighted in the international treaties Kenya had assented to.
 23. The right to dignity was further relevant to the specific social context in Kenya. In many instances, past and present, children and women's basic rights had been violated within society. Women and children were vulnerable to violence and unjust treatment due to economic inequalities and gross abuse of power as was evident in the instant case.
 24. A strip search constituted an interference with the privacy of the individual concerned. It was recognized that common law recognized the right to privacy as an independent personality right. Privacy was therefore, a valuable aspect of one's personality. The right to privacy was protected in terms of both common law and the Constitution of Kenya. The right was however not absolute as there were competing factors such as maintaining law and order that could bear a significant limitation on the right. A careful weighing up of the right to privacy and other factors was necessary.
 25. In the case of a constitutional invasion of privacy the following questions needed to be answered:
 1. Had the invasive law or conduct infringed the right to privacy in the Constitution? ;
 2. If so, was such an infringement justifiable in terms of the requirements laid down in the limitation clause of the Constitution?
 26. The act of causing the 1st petitioner and her colleagues to strip naked in the presence of the 4th and 5th respondents and of one another and other persons was undeniably an invasion of their privacy. The search was unlawful in that it violated her constitutional right to privacy and dignity. Even if the court assumed that the 1st petitioner and her colleagues stripped naked without a request to do so, the presence of other persons while they did so, would also amount to wrongful conduct.



27. On freedom and security of the person, the searching of any person that involved the exposure of that person's naked body, and in particular the most private parts thereof, to the gaze of another person, was degrading to the person being so exposed. The conduct of the 4th and 5th respondents with regard to the 1st petitioner and her colleagues was inherently inhumane, and amounted to a degrading assault upon their physical, emotional and psychological integrity.
28. Children needed special protection because they were among the most vulnerable members of society. They were dependent on others - their parents and families, or the State when those failed - for care and protection. As a result, the drafters of Kenya's Constitution made children's rights a priority - and stated that the best interests of a child were the overriding concern when it came to any matter affecting a child. Thus, the inclusion in the bill of rights of a provision on the rights of the child was an important development for Kenyan children, many of whom had suffered and continued to suffer long imprisonments and detention in harsh conditions.
29. The objective of the special protection was to ensure that the justice system treated every child in conflict with the law in a manner that recognized and upheld human dignity and worth, and instilled in the child respect for the fundamental rights and freedom of others. The rule considered the developmental age of the child and the desirability of the child's reintegration in and assumption of a constructive role in society in accordance with the principles of balanced and restorative justice.
30. The police were specifically required to search women within the limits provided under the law and had to uphold the values enshrined in the Constitution. In the Constitution of Kenya, 2010 constitutional dispensation, an unlawful interference with a person's right was a constitutional infringement. The police failed to exercise their duties in line with the law, the Constitution and uphold the bill of rights. In terms of article 53 of the Constitution, in all matters concerning children, including litigation or police investigations, their best interests were of paramount importance. Article 53 of the Constitution had to be interpreted so as to promote the foundational values of human dignity, equality and freedom. The reach of article 53 of the Constitution extended beyond those rights enumerated in the bill of rights, it created a right that was independent of the other rights specified in the bill of rights. It established a set of rights that courts were obliged to enforce.
31. The ambit of the provisions was undoubtedly wide. The comprehensive and emphatic language of article 53(d), (f) and (2) of the Constitution indicated that just as law enforcement had to always be gender-sensitive, it had to always be child-sensitive; those statutes had to be interpreted and the common law developed in a manner which favoured protecting and advancing the interests of children; and courts had to function in a manner which at all times showed due respect for children's rights.
32. The inclusion of a general standard, the best interest of a child, for the protection of children's rights in the Constitution became a benchmark for review of all proceedings in which decisions were taken regarding children. Courts and administrative authorities were constitutionally bound to give consideration to the effect their decisions would have on children's lives.
33. There existed in the case the reasonable privacy interest of the 1st petitioner who was depicted in the images. There was also a significant public interest in ensuring that no duplication or distribution occurred in the disclosure process. Those interests ought not to have been further compromised by the copying, viewing, circulation or distribution of the images beyond what was reasonably necessary to give effect to her constitutional rights.
34. A State's interest in safeguarding the physical and psychological well-being of a minor was compelling and a democratic society rested, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. The prevention of exploitation and abuse of children constituted a government objective of surpassing importance.
35. The harm of child abuse was real and ongoing. The State was under a constitutional obligation to combat it. To hold otherwise would place the State in jeopardy of having to close the gate, as it were, after the horse had bolted and might signal a breach by the State of its obligation towards children.



- Children's dignity rights were of special importance. The degradation of children through publishing their nude images was a serious harm which impaired their dignity and contributed to a culture which devalued their worth.
36. Society had recognised that childhood was a special stage in life which was to be both treasured and guarded. The State had to ensure that the lives of children were not disrupted by overzealous police officers who in total disregard of the law, the Constitution and children's rights engaged in acts as was witnessed. There was obvious mental and physical harm suffered by the victims of child abuse. The 1st petitioner and her colleagues were forced naked to pose for photographs to be taken. Even if the police desired to gather evidence, they ought to have done it within the confines of the law. The chief purpose of the statutory provisions prescribing the manner in which women were to be searched was to protect their dignity, humanity and integrity.
 37. A child whose nude images were circulated in the media had to go through life knowing that the image was probably circulating within the mass distribution network for the public to see. That experience might haunt him or her for long because it created a permanent record of the child's image. The psychological harm to the child was exacerbated if he or she knew that the photograph continued to circulate among viewers who might use it to derive sexual satisfaction or other purposes. Maintaining the integrity of the administration of justice was also an important principle of fundamental justice. The principles of fundamental justice operated to protect the integrity of the system itself. The Constitution guaranteed individuals a fundamentally fair trial and not the fairest of all possible trials. A fair trial included a fair investigation and arrest process.
 38. The photographing and publication of the child's images struck at the dignity of the child, it was harmful to the child, and it was potentially harmful because it invaded on her privacy and dignity. Dignity was a founding value of Kenya's Constitution. It informed most if not all of the rights in the bill of rights and for that reason was of central significance in the limitations analysis. The value of dignity in Kenya's constitutional framework could not therefore be doubted. The Constitution asserted dignity to contradict Kenya's past in which human dignity was routinely and cruelly denied. It asserted it to inform the future, to invest in Kenya's democracy respect for the intrinsic worth of all human beings.
 39. Human dignity therefore informed constitutional adjudication and interpretation at a range of levels. It was a value that informed the interpretation of many, possibly all, other rights. The court acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity was also a constitutional value that was of central significance in the limitations analysis. Dignity was not only a value fundamental to Kenya's Constitution; it was a justiciable and enforceable right that had to be respected and protected.
 40. Similarly, article 1 of the Universal Declaration of Human Rights stressed the importance of human dignity. It stated that all human beings were born free and equal in dignity and rights. Children merited special protection by the State and had to be protected by legislation which guarded and enforced their rights and liberties. That was recognised in article 53 of the Kenyan Constitution. Children's dignity rights were of special importance. The degradation of children through illegal body search as had happened and taking nude photos was a serious harm which impaired the petitioner's dignity and devalued her worth.
 41. The 1st petitioner was charged in a criminal court. She was convicted on her own plea of guilty by a court of competent jurisdiction. The petitioner ought to have challenged the said conviction either by way of an appeal or by way of a revision as provided under the provisions of the Criminal Procedure Code. There was a well laid down statutory mechanism of challenging the said conviction. Therefore, it would have been inappropriate for the court to exercise its jurisdiction and quash the said decision.
 42. The Constitution recognized the hierarchy of Kenyan courts and the appellate mechanism through which decisions of inferior courts were subjected to appeals to the higher courts. A holistic and



purposive reading of the Constitution would have therefore entailed construing the unlimited original jurisdiction conferred on the High Court by article 165(3)(a) and article 23(3) of the Constitution in a way that would have recognized and upheld its appellate jurisdiction to hear and determine appeals from the lower court.

43. A party could not be heard to move a court in glaring contradiction of the judicial hierarchal system of the land on the pretext that an injustice would be perpetrated by the lower court. Courts of justice had the jurisdiction to do justice and not injustice. However, the law acknowledged that judges were human and were fallible hence the judicial remedies of appeal and review. A party could not in total disregard of those fundamental legal redress frameworks move the apex court.
44. A person's image constituted one of the chief attributes of his or her personality, as it revealed the person's unique characteristics and distinguished the person from his or her peers. The right to the protection of one's image was thus one of the essential components of personal development. It mainly presupposed the individual's right to control the use of that image, including the right to refuse publication thereof. Personality rights, generally speaking, consisted of two types of rights, the right to privacy and the right of publicity. The right of privacy was the right to keep one's image and likeness from exploitation without permission or compensation and generally applied to members of the general public. The right of publicity was the exclusive right of an individual to market his or her image, likeness or persona for financial gain.
45. Aggravated damages were the special and highly exceptional damages awarded against a defendant by a court, when his or her conduct amounted to tortious conduct subjecting the plaintiff to humiliating and malicious circumstances. Additional damages were also awarded in situations where a plaintiff was subjected to distress, embarrassment, or humiliation.
46. Aggravated damages were basically compensatory in nature, and they were awarded for the aggravated damage that was caused to a plaintiff. Aggravated damages were determined on the basis of the intangible injury inflicted on a plaintiff. Intangible injury included the pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that were caused by the conduct of a defendant. When compared to punitive damages, aggravated damages required proof of injury. Aggravated damages could be attained as additional compensation if the injured established that a breach caused mental distress.
47. It was well settled that an award of compensation was an appropriate and effective remedy for redress of an established infringement of a fundamental right under the Constitution. The quantum of compensation would, however, depend upon the facts and circumstances of each case. An award of damages entailed an exercise of judicial discretion which would have been exercised judicially and that meant that it had to be exercised upon reason and principle and not upon caprice or personal opinion.
48. Arriving at the award of damages was not an exact science. No monetary sum could really erase the scarring of the soul and the deprivation of dignity that some of those violations of rights entailed. When exercising that constitutional jurisdiction, the court was concerned to uphold, or vindicate, the constitutional right which had been contravened. A declaration by the court would have articulated the fact of the violation, but in most cases, more would be required than words. If the person wronged had suffered damage, the court could award compensation.
49. An award of compensation would go some distance towards vindicating the infringed constitutional right. How far it went would depend on the circumstances, but in principle it might not suffice. The fact that the right violated was a constitutional right added an extra dimension to the wrong. An additional award, not necessarily of substantial size, would be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. All those elements had a place in helping the court arrive at a reasonable award. The court had to consider and have regard to all the circumstances of the case.



50. It was self-evident that the assessment of compensation for an injury or loss, which was neither physical nor financial, presented special problems for the judicial process, which aimed 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 were incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency was bound to be an artificial exercise.
51. There was no medium of exchange or market for non-pecuniary losses and their monetary evaluation, it was a philosophical and policy exercise more than a legal or logical one. The award ought to be fair and reasonable, fairness being gauged by earlier decisions; but the award ought not to be arbitrary or conventional. No money could provide true restitution.
52. Although they were incapable of objective proof or measurement in monetary terms, hurt feelings were none the less real in human terms. The courts and tribunals had to do the best they could on the available material to make a sensible assessment, accepting that it was 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.

Petition partly allowed.

Orders

- i. *Declaration issued that the 4th respondents conduct of searching the 1st petitioner in the presence of male police officers and/or other students and members of the public and photographing her or allowing or permitting third parties to take her nude photographs was a gross violation of the law and an infringement of her constitutional rights to dignity, privacy and her right not to be subjected to degrading treatment.*
- ii. *A declaration issued that the manner in which the police strip searched the 1st petitioner and the other students was a gross violation of the statutory provisions governing conduct of police while searching women, a violation of article 53(d), (f) and (2) of the Constitution and the Children's Act.*
- iii. *Order of judicial review seeking to quash the conviction and sentence of the 1st petitioner in Baricho Criminal Case No. 1262 of 2015 refused on grounds that the law provided for right of appeal or revision against the said decision.*
- iv. *Declaration issued that the 1st petitioner was entitled to damages for violation of her constitutional rights to dignity, degrading treatment and privacy.*
- v. *That judgement entered in favour of the 1st petitioner against the respondents jointly and severally for a global sum of Ksh. 4,000,000/= by way of general damages.*
- vi. *That the above sums would attract interests at court rates from date of filing suit until payment in full.*
- vii. *No orders as to costs.*

Citations

Cases

Kenya

1. *Abdallah, Yusuf Gitau v Building Centre (K) Ltd & 4 others* Civil Case 1394 of 1998; [2013] KEHC 5254 (KLR)— Explained
2. *ANN v Attorney General* Petition 240 of 2012; [2013] KEHC 6004 (KLR)— Explained
3. *Kamuru, Marilyn Muthoni & 2 others v Attorney General & another* Petition 566 of 2012; [2016] eKLR) — Explained
4. *Koigi Wamwere v Attorney General* Civil Appeal 86 of 2013; [2015] KECA 917 (KLR) — Explained
5. *Ngoge, Peter Oduor v Francis Ole Kaparo & 5 others* Petition 2 of 2012; [2012] eKLR — Explained

South Africa

1. *Centre for Child Law v Minister for Justice and Constitutional Development and Others* (CCT98/08) [2009] ZACC 18; 2009 (2) SACR 477 (CC) ; 2009 (6) SA 632 (CC) ; 2009 (11) BCLR 1105 (CC) — Explained



2. *Centre for Child Law v The Governing Body of Hoerskool Fochville* (156/2015) [2015] ZASCA 155; [2015] 4 All SA 571 (SCA); 2016 (2) SA 121 (SCA) — Explained
3. *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837) — Explained
4. *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* (CCT 36/08) [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC) — Explained
5. *Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape* (ECJ 2004/028) [2004] ZAECHC 25; [2005] 1 All SA 745 (SE); 2005 (1) SA 141 (SE) — Explained
6. *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517) — Explained
7. *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC) — Explained
8. *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1) — Explained
9. *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) — Explained

Canada

1. *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452, 475-476 — Explained
2. *Boucher v the Queen* [1955] SCR 16; 1954) 110 CCC 263 — Explained
3. *R v O'Connor* 1995] 4 SCR 411; (1995) 33 CRR (2d) 1; 103 CCC (3d) 1 (SCC) — Explained

Regional Court

Mbogo & Another v Shah [1968] EA 93 — Explained

Germany

Von Hannover v Germany (No 2) (Grand Chamber judgment of 7 February 2012, § 96) — Explained

United Kingdom

1. *Heil v Rankin* [2001] QB 272 — Explained
2. *Beard v Whitmore Lake School Dist* 402 F 3d 598, 601 (6th Cir, 2005) — Applied

United State

1. *New York v Ferber* (458 U.S. 747 (1982)) — Explained
2. *Osborne v Ohio* 495 US 103 (1990) — Explained
3. *Palko v Connecticut* 302 US 319 (1937) — Explained

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2. Constitution of Kenya articles 2, 3, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 31, 48, 49, 50, 53, 157,159 — Interpreted
3. Criminal Procedure Code (cap 75) In general — Cited
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2. Universal Declaration of Human Rights (UNDHR), 1948 — article 1, 5, 12

Advocates

None mentioned

JUDGMENT

Introduction

1. On August 5, 2015 the Media was awash with news of a *Matatu* that was intercepted by traffic police officers along Karantina/Nairobi Road carrying students. It was playing loud music, the students were allegedly intoxicated, it was alleged some were engaging in sex in the vehicle. The police were acting on a tip off from members of the public.
2. Upon entering the *Matatu*, the police noted it was overcrowded, it smelt alcohol, and had pieces of used *cannabis sativa* were scattered on its floor. The police commandeered the vehicle to the Police Post where they searched the students. They recovered *Cannabis sativa* hidden in the under garments of the first petitioner. She was detained at the police station over night. She was charged in court the following day with the offence of being in possession of *cannabis sativa*. She pleaded guilty and was convicted. She was remanded at Embu GK Prison for five days and was sentenced to 18 months Probation.
3. But what caught the attention of the public and Human Rights crusaders to the extent that it overshadowed the seriousness of the offence and the conduct of the students is the posting and wide circulation of nude images of the first petitioner in the press and the social media. The images exposed her private parts and breasts and sachets of *cannabis sativa* allegedly hidden under her panties and bra.
4. The publication of her nude images raised fundamental questions such as:- the conduct of the police officers during the search, whether the search was conducted in conformity with the law, whether her rights to privacy, dignity and not to be subjected to degrading treatment were violated, whether her rights as an arrested person were respected, whether her rights as a child in conflict with the law were respected, where and how the search was conducted, who took the images, who posted the images in the social media, whether the search conducted in public or in private. More significant is the fact that she was then aged 18 years and therefore a child within the meaning of the definition of a child



under article 260 of the [Constitution](#) and the [Children Act](#).¹ The questions raised in this case touch on constitutionally guaranteed rights.

5. The considerable interest generated by facts and circumstances of this case is also evidenced by the number of organizations that successfully applied to be enjoined in this case, among them, the second petitioner, the interested party and the *amicus curiae*.

The Parties

6. The first petitioner was then 18 years old and a form student. She brings this petition seeking to vindicate her constitutional rights not to be subjected to degrading and inhuman treatment, to safe guard her right to privacy, rights of an arrested person and fair process and compensation for the violations. The second petitioner is a non-partisan, non profit making non- governmental organization committed to the protection and promotion of the rights of the child through representation, advocacy and reform.
7. The first respondent is the Hon Attorney General, the principal legal adviser to the Government constitutionally tasked with the responsibility of representing the Government in court,² while the second respondent is the Inspector General of Police. The third respondent is the DPP charged with inter alia the constitutional mandate of directing criminal investigations and exercising powers of state prosecutions.³
8. The fourth and fifth respondents were at the material time traffic police officers involved in arresting, searching and prosecution of the first petitioner. The interested party is a governance, health and Human rights non-profit organization whose vision is a just world free from torture. Its functions include monitoring governance adherence to human rights obligations and advocate for policy, legal and institutional reforms.
9. The *amicus curiae* is an international human rights organizations whose mandate includes assisting survivors of torture, seeking justice and other forms of reparation. It has experience in intervening before national, regional and international courts and tribunals.
10. At this point it is apposite that I briefly examine the facts of this case.

The Petitioners' Case

11. The first petitioner was among 37 students travelling to Nairobi from Karatina in the *Matatu*. The students were alleged to have been intoxicated, smoking bhang and engaging in sex in the vehicle which was playing loud music.
12. She avers that the police stopped vehicle and entered. At this point a male student gave her some folded substance to hide for him. At the Police Patrol Base, the Police stripped her blouse, lifted her skirt, and pulled her under wear exposing her private parts in breach of her privacy. She stated that she was indecently searched and was not promptly told of the reasons for her arrest. She avers that the fourth and fifth respondents and or their subordinates and or third parties were allowed to take her nude

¹ Act No 8 of 2001

² Article 156 of the [Constitution](#)

³ Article 157 of the [Constitution](#)



pictures. She was arraigned in court⁴ for possessing Cannabis Sativa,⁵ and was convicted on her own plea of guilty. To her, the conviction was unlawful and she invites this court to quash it.

13. She avers that posting her nude images in the media caused her psychological torture, embarrassment, seclusion, poor concentration in studies, public ridicule, deprivation of privacy and fears that her photographs may be used for pornography.

First Respondents' Replying Affidavit

14. On behalf of the Hon Attorney General is the replying affidavit of LK Kieng, the Regional Police Co-ordinator, Central Province. He avers that the petitioner was charged with the offence of being in possession of cannabis sativa, and was convicted on her own plea of guilty. He avers that unknown people took her photographs and posted them on the internet and investigations exonerated the fourth respondent from wrong doing.

Second and Third Respondents Response to the Petition

15. Spt Susan Kirori led the team that inquired the releasing of the images to the media and that the inquiry cleared the fourth Respondent of any wrong doing. In her view, the search was properly conducted and the first petitioner was found in possession of the Bhang.
16. However, the facts as disclosed in the above two affidavits differ sharply with the contents of the written submissions made by counsel for the DPP, Mr Ashimosi discussed later in this judgement casting doubts on the veracity of the above affidavits.

Fourth Respondents Response to the Petition

17. The fourth respondent, is traffic police officer who was in charge of the officers who arrested the vehicle and the search. Her conduct was the subject of the inquiry referred to above which allegedly cleared her of any wrong doing. However, as discussed below, an investigation done by the DPP found her conduct breached the law putting the veracity of her affidavit into question.

First Petitioners Oral Evidence

18. In her oral evidence the first petitioner narrated how she boarded the vehicle at Karatina. The vehicle picked more students on the way. She admits there was loud music which attracted attention from members of the public. A principal of a Secondary School demanded that students from her school alight from the bus, but they declined stating that they had paid fare to Nairobi. On the way they were stopped by the police and directed to the police station. She narrated how another student who sat next to her gave her something to hide and at that point she did not know it was bhang.
19. She stated that she was forced to unbutton her blouse and was asked to pose for photographs. Also, her pants was removed, and she was asked to pose for a photograph. The police officer allowed for the photos to be taken. She also stated that she was not given time to call an advocate and that her parents were called after the search. She was humiliated, ridiculed and fears her images may be misused.

Medical Evidence and the First Petitioners Parents' Evidence

20. Dr Catherine Syengo Mutisya examined her and concluded that she suffered from post traumatic stress disorder, while her mother testified that upon visiting the police station, the fourth Respondent

⁴ Baricho Magistrates Criminal Case Number 1262 of 2015

⁵ Contrary to section 39(1) as read with 3(2) of the *Narcotic Drugs and Psychotropic Substances Act* No 4 of 1994,



showed her daughters nude photos in a phone. She stated that the experience has psychologically affected her daughter. Her husband corroborated her evidence.

The Fourth Respondents Evidence

21. The fourth respondent's oral evidence basically reiterated the contents of her replying affidavit referred to above which sharply differ from the facts presented by counsel for the DPP discussed below.

Advocates' submissions

22. The petitioners' counsel submitted that the fourth and fifth respondents violated the petitioner's rights to dignity,⁶ privacy and urged the court to award her aggravated damages.
23. The submissions by Mr Ashimosi, counsel for the DPP are crucial in this case in that they sharply differ from the contents of the affidavits filed by the Hon Attorney General and the fourth respondent who was in charge of the officers involved in the arrest. Whereas counsel for the Honourable Attorney General not only defended but went into great pains to justify the actions by the police, Mr Ashimosi submitting for the DPP took a totally diametrically opposed position.
24. It is not clear why the Honourable Attorney General filed responses for and on behalf of the DPP and the Police officers sued in this case yet under article 157(10) of the Constitution, the DPP is required to exercise his functions independently and without the direction or control of any person or authority.
25. But what emerges from the responses by the Hon Attorney General's office is that there was a thinly veiled attempt to cover up the ills committed by the Police. It is not clear why the AG delved into functions of the DPP. It was for the DPP to investigate the conduct of the police officers which had been put into question.
26. Article 157(4) and (11) of the Constitution underscores this point. It provides that:-
- “ 4. The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
11. In exercising the powers conferred by this article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.” (our emphasis supplied).
27. In terms of article 157(11) of the Constitution, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process.

⁶ Counsel cited Marilyn Muthoni Kamuru & 2 others v Attorney General & another PET No 566 of 2012 and ANN v Hon AG, Pet No 240 of 2012



28. The candour and honesty of Mr Ashimosi's submissions is discernible from the opening paragraph and throughout his submissions. Mr Ashimosi opens his submissions by stating:-

"This was an investigation into the circumstances surrounding the cruel, inhuman and degrading treatment of Magdalene Wanjiru by Police Officers at Kiangwaci Police Patrol Base, Sagana Police Station within Kirinyga County on August 5, 2015."

29. This candidness brings to mind the often quoted statement by DA Bellemare, MSM, QC who put best the often difficult course for the prosecutor when he said:-

"It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner strength and self-confidence. It requires personal integrity and solid moral compass. It requires humility and willingness, where to appropriate, to recognize mistakes and take appropriate steps to correct them. Prosecutors must be passionate about issues, but compassionate in their approach, always guided by fairness and common sense."⁷

30. The constitutional provision in article 157(10) of the Constitution ensures that the DPP has complete independence in his decision making processes. This is vital to protect the integrity of the criminal justice system and the functions of the Police because it guarantees that any decision to investigate or prosecute a person is made free of any external influences. In the words of John Kelly TD, the prosecution system

"should not only be impartial but should be seen to be so and that it should not only be free from outside influence but should be manifestly so."⁸

The affidavits filed by the Hon Attorney General cannot pass this elementary test.

31. Also relevant are the following observations:-

"...the use of prosecutorial discretion should be exercised independently and free from ANY interference. Prosecutors are required to carry out their duties without fear, favour or prejudice—impartially, with objectivity, unaffected by individual or sectional interests and public or media pressures, fairly, having regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect and make all necessary and reasonable enquiries and disclose the results of those enquiries, regardless of whether they point to the guilt or innocence of the suspect ...That is a role which, I fear, is not well understood in the community. It may not be a popular position but it is a very valuable and important one."⁹

32. The role of the prosecutor excludes any notion of winning or losing; it is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.¹⁰ It is said that the prosecutor acts in the general public interest and so it must be. That is where he

⁷ Infra

⁸ <http://www.paclii.org/fj/other/prosecutors-handbook.pdf>

⁹ Extract from a Speech by Anna Katzmann, SC at a dinner of the NSW Law Society's Government Lawyers CLE Conference on 30 October 2007. (Now the Hon Anna Katzmann, Judge of the Federal Court of Australia).

¹⁰ (see Boucher v the Queen (1954) 110 CCC 263, 270).



prosecutor's ultimate loyalty and responsibility lie. Mere or reasonable suspicion that the DPP did not act independently or acted on totally inadequate evidence or the police abused their investigation powers is in my view sufficient to taint the proceedings. Mr Ashimosi's view of the manner in which the search was conducted is summarized in the following excerpt from his submissions:-

"... from analysis of evidence on the file, the DPP was satisfied that the actions of the fourth respondent contravene the conditions to follow when searching a female prisoner as set out in the Criminal Procedure Code section 27 which states that:- "

Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman with strict regard to decency."

33. Citing the Police Standing Orders and relevant statutory provisions Mr Ashimosi submitted that:-

"The DPP concluded that by parading the petitioner in an open place at the report office and exposing her public area (*sic*) to a male police officer and other female and male students, the suspect, IP Agnes Magiri violated the rights of the petitioner as enshrined in the *Constitution*"(Emphasis added)
34. In Mr Ashimosi's submissions, the fourth respondent conducted the search in total violation of the law and in breach of the first petitioners' constitutional rights. Mr Ashimosi also pointed out that the DPP ordered institution of criminal proceedings against the fourth respondent. He urged the court to dismiss the case against the DPP and that the prayer seeking quash the conviction ought to have been sought by of an appeal. Mr Ashimosi was clear in his submissions that by parading the first petitioner in a public area and exposing her to a male police officer, the fourth respondent violated her rights to dignity and that the fourth petitioner has since been charged with the offence subjecting the first petitioner to inhuman and degrading treatment.¹¹
35. Mr Ashimos's submissions cast serious doubts on the veracity of the affidavits filed by the AG and the alleged investigation that purportedly exonerated the conduct of the police and puts into question the constitutional validity of the alleged investigations in view of the provisions of article 157(4) & (11) of the *Constitution* cited above.
36. Counsel for the *amicus curiae* identified three issues, namely, use of force and torture by state agents to persons in custody, use of illegally obtained evidence and appropriate remedy and reparation to victims of torture. Counsel submitted that international standards strictly limit the circumstances in which state agents may use force to arrest, search and detain suspects and that evidence obtained through torture ought to be excluded. Counsel also submitted that victims of torture have a right to redress.
37. The crux of the submissions by counsel for the interested party is that by stripping the first petitioner panties and bra, the police officer subjected her to inhuman and degrading treatment; infringed her privacy; acted against her best interest as a child; circulating her photographs was improper; and her constitutional rights as an arrested person were violated.
38. The Hon AG did not file submissions even though i granted party's fourteen days to file from November 27, 2017.

¹¹ Contrary to section 95(3) of the *National Police Service Act, 2011*



Issues For Determination

39. From the facts and submissions enumerated above, I find that the following issues fall for determination, namely; (a) whether the first petitioners Rights to Dignity and privacy were violated, (b) whether this court can quash a conviction rendered by a competent court on a plea of guilty other than by way of an appeal or revision, (c) whether the first petitioner is entitled to damages and if so, what is the quantum, (d) what are the appropriate reliefs in this case.

Applicable Legal Framework

40. Article 2(5) of the *Constitution* provides that the general rules of international law shall form part of the law of Kenya.

41. Article 1 of the *Universal Declaration of Human Rights, 1949* provides:-

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

Article 5

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 12

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

42. The *Universal Declaration of Human Rights*, was, aptly described by Professor Richard Lillich as the

“Magna Carta of contemporary international human rights law.” It is expressly premised on “the inherent dignity and ... the equal and inalienable rights of all members of the human family.”¹²

43. The *African Charter on Human and Peoples' Rights*¹³ provides that

“Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the charter without distinction of any kind....”

It also provides for equality before the law, equal protection of the law,¹⁴ guarantees respect for life and the integrity of the person,¹⁵ and the right to the respect of the dignity inherent in a human being and prohibits all forms of degradation, torture, cruel, inhuman or degrading punishment and treatment.¹⁶

¹² Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law*, 41 (Manchester University Press 1984); *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3d Sess, Supp No 13, at 71, UN Doc A1810 (1948).

¹³ Article 2

¹⁴ Article 3

¹⁵ Article 4

¹⁶ Article 5



44. the Constitution entrenches respect for human dignity, the achievement of equality and the advancement of human rights and freedoms, being the foundational values of the Constitution and forming the bedrock upon which the Constitution is based. article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity respected and protected.
45. Article 19 of the Constitution stipulates that the Bill of Rights is the cornerstone of democracy in Kenya. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.
46. Article 31 provides the Right to Privacy of the person, home or property searched. It recognizes the right of every person to privacy, which includes the right not to have their person searched. There are elaborate statutory provisions prescribing the manner in which the police are to search women.
47. Article 29 guarantees the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause, to be free from all forms of violence from either public or private sources, and the right not to be treated or punished in a cruel, inhuman or degrading way. This Constitution recognizes the right of everyone who is arrested for allegedly committing an offence not to be compelled to make any confession or admission that could be used against him.¹⁷
48. Article 52 of the Constitution elaborates certain rights to ensure greater certainty as to the application of those rights and fundamental freedoms to certain groups of persons. Among these groups are children. Article 53 guarantees rights to children, particularly children in conflict with the law.

Whether the first Petitioners' Rights to Dignity, privacy and right not to be subjected to inhuman/ degrading treatment were violated

49. Article 28 provides no definition of dignity. However its role and importance as a foundational constitutional value has been emphasized in a number of cases. In the South African case of S v Makwanyane,¹⁸ O'Regan J pointed out that "without dignity, human life is substantially diminished" and pronounced the prime value of dignity in the following terms:-

“The importance of dignity as a founding value of the ... Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in chapter 3.”

50. O'Regan J drew attention to the centrality of human dignity as a constitutional value when he stated:-

“Human dignity ... informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. ... dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however where the value of human dignity is offended, the primary

¹⁷ Article 49

¹⁸ {1995} ZACC 3; 1995 (3) SA 391(CC) in para [328].



constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.”¹⁹

51. So important is the right not to be subjected to cruel, inhuman or degrading treatment or punishment that under article 25 of the Constitution, it is one of the rights that may not be limited.
52. Article 31 of the Constitution provides the right to privacy of the person, home or property searched. It has become established law, insofar as privacy is concerned, that this right becomes more powerful and deserving of greater protection the more intimate the personal sphere of the life of a human being which comes into legal play. Ackerman J mentioned some examples of breaches of privacy and specifically included "peeping at a woman while she is undressing."²⁰
53. There is a connection between an individual's right to privacy and the right to dignity. Privacy fosters human dignity insofar as it is premised on and protects an individual's entitlement to a "sphere of private intimacy and autonomy."²¹ The rights of equality and dignity are closely related, as are the rights of dignity and privacy.²²
54. Guidance can be obtained from the case of Beatrice vs. Whitmore Lake School²³ which related to the unreasonable nature of a search. In that case a student reported that \$364 had been stolen from her gym bag during a physical education class. In response to the alleged theft, teachers searched the entire class of 20 boys and five girls in their respective locker rooms. Boys were required to undress to their underwear. Similarly, girls were required to undress in front of each other. At the conclusion of the search, no money was found. A suit was filed by the American Civil Liberties Union of Michigan on behalf of students

impacted by the search claiming fourth amendment rights violations against unreasonable search and seizure and a Fourteenth Amendment rights violation involving an equal protection violation. The court found the strip search was unreasonable in the circumstances of the case.

55. The Constitution places human dignity and equality as the central theme to our constitutional order. According to Currie and De Waal,

'the determination of whether an invasion of the common law right to privacy has taken place is a single enquiry. It essentially involves an assessment as to whether the invasion is unlawful.'²⁴ The assertion has also been made that in the case of female prisoners' expectation

¹⁹ In Dawood vs Minister of Home Affairs; Shalabi vs Minister of Home Affairs; Thomas vs Minister of Home Affairs [2000] ZACC 8; 2000 (3) SA 936 (CC) in para [35].

²⁰ 1996 (2) SA 751 (CC) at [711].

²¹ As the court noted in Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and another 2014 (2) SA 168 (CC) at para 64:

²² National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998Y)

²³ Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 601 (6th Cir, 2005)

²⁴ Currie I & De Waal J; Bill of Rights Handbook 6th ed (Juts & Company Ltd 2013) at page 295.



of privacy, the courts have held that gender and gender differences must matter because the courts imbue women with a sense of modesty and a greater need for privacy than men.²⁵

56. When a constitutional right is infringed, it is important to determine whether such infringement is justified in terms of article 24 of the Constitution which provides that the rights in the Bill of Rights may be limited only in terms of law and 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 — The nature of the right; The importance of the purpose of the limitation; The nature and extent of the limitation; The relation between the limitation and its purpose; and Less restrictive means to achieve the purpose.
57. The provisions of the law governing conduct of police officers while searching women prisoners' were correctly captured by Mr Ashimosi in his submissions. I need not repeat them here. It will suffice to state that the police violated the said provisions and the Constitution.
58. This courts is constitutionally obliged to consider the facts complained of in this case through the lens of article 53(d), (f) and (2) of the Constitution to determine if the police officers considered the first petitioners' best interests, and if they did, whether they accorded the best interests paramount importance. The said provisions provide that every child has a right-
- (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
 - (f) not to be detained, except as a measure of last resort, and when detained, to be held-
 - (i) for the shortest appropriate period of time; and
 - (ii) separate from adults and in conditions that take account of the child's sex and age.
 - (2) A child's best interests are of paramount importance in every matter concerning the child.
59. Courts are enjoined when interpreting any legislation to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. This requires of courts to play a crucial role in giving content and meaning to the fundamental rights enshrined in the Bill of Rights. The courts are the guardians of the Constitution and the values it espouses.
60. In interpreting the law, courts must infuse it with values of our Constitution. Courts must never shirk this constitutional responsibility. As Moseneke DCJ stated:-
- “The Constitution has reconfigured the way judges should do their work. It invites us into a new plane of jurisprudential creativity and self-reflection about legal method, analysis and reasoning consistent with transformative roles. The new legal order liberates the judicial function from the confines of the common law, customary law, statutory law or any other law to the extent of its inconsistency with the Constitution. This is an epoch making opportunity which only a few, in my view, of the High Court judges have cared to embrace or grasp. A substantive, deliberate and speedy plan to achieve an appropriate shift of

²⁵ Jurado, R, "The essence of her womanhood: defining the privacy rights of women prisoners and the employment rights of women guards" ,1998-199 Journal on Gender, Social Policy and the Law - Vol 7 at 4.



legal culture at the High Courts and Magistrates' Courts is necessary. After all, it is the Constitution that confers substantial review powers on the judiciary. However, without an appropriate legal culture change the judiciary may become an instrument of social retrogression. In time the judiciary will lose its constitutionally derived legitimacy.”²⁶

61. All courts, including the High Court, are enjoined by the Constitution to uphold the rights of all, to ensure compliance with constitutional values, and to do so by granting ‘appropriate relief’, ‘just and equitable orders’, and by developing the common law ‘taking into account the interests of justice’. In a constitutional democracy such as ours, courts have to devise means of protecting and enforcing fundamental rights.²⁷
62. Seven years ago, we adopted our Constitution. In doing so we signalled a decisive break with our past – a ringing rejection of a history of denial of human rights to our people. We started an ambitious and laudable project to develop, nurture and infuse a culture of respect for human rights in all aspects of our lives. We all committed ourselves to a new and egalitarian society founded on values of human dignity, equality and freedom for all.
63. Article 2 proclaims the Constitution to be the supreme law of the country. Importantly, it declares that law or conduct inconsistent with it is invalid, and further that the obligations it imposes must be fulfilled. the Constitution is underpinned by a Bill of Rights that, according to article 19, is declared a cornerstone of our democracy. The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.
64. The rights and fundamental freedom in the Bill of Rights belong to each individual and are not granted by the State. Article 21 commands the state, and every state organ including the police to observe, to respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights subject to the limitations in article 24 or elsewhere in the Bill of Rights.
65. Thus the police are also required to honour the obligation to respect, protect, promote and fulfil the rights in the Bill of Rights. This is crucial as the police are, in the daily execution of their duties, involved in instances that have the potential to affect people’s rights to dignity, equality and freedom – which are foundational to our democracy. Our people deserve a police service which is steeped in a culture of respect for human rights. This requires them in all their dealings with society whilst executing their constitutional duties to be guided by respect for human rights and strict observance of the rights to human dignity, equality and freedom.
66. It is trite that an arrest is an invasive curtailment of a person’s freedom. Under any circumstances an arrest is a traumatising event. Its impact and consequences on children might be long-lasting if not permanent. The need for our society to be sensitive to a child’s inherent vulnerability is behind the provisions of article 53 of the Constitution. Article 53 is broadly worded. The interests of children are multifarious. However, in the context of arrests of children, article 53 seeks to insulate them from the trauma of an arrest by demanding in peremptory terms that, even when a child has to be arrested, his or her best interests must be accorded paramount importance.
67. Given the importance which our Constitution places on the rights of children, this means that an arrest of a child should be resorted to when the facts are such that there is no other less invasive way of securing the attendance of such a child before a court. This requires police officers to consider and weigh all the facts carefully and exercise a value-judgment whether an arrest can be justified. Invariably this puts

²⁶ In “*Transformative adjudication, the fourth Bram Fischer memorial lecture*” (2002) 18 SAJHR 309 at 318

²⁷ Froneman J, in *Kate v MEC for the Department of Welfare, Eastern Cape* [2005] 1 All SA 745 (SE) at para 16



them in an invidious position. A question might be asked: how do they execute their constitutional mandate to prevent and combat crime without falling foul of article 53? Does this mean that children shall, under no circumstances, be arrested or detained? The answer is No For it is a fact that children do commit crimes. Even heinous crimes for that matter. Statistics can attest to this. Sad as it might be, it is a reality of our times.

68. Does the fact that section article 53(2) demands that the best interests of children be accorded paramount importance mean that children’s rights trump all other rights? Certainly not. All that the Constitution requires is that, unlike pre-2010, and in line with our solemn undertaking as a nation to create a new and caring society, children should be treated as children – with care, compassion, empathy and understanding of their vulnerability and inherent frailties. Even when they are in conflict with the law, we should not permit the hand of the law to fall hard on them like a sledgehammer lest we destroy them. the Constitution demands that our criminal justice system should be child-sensitive.
69. Contrary to the position pre-2010, our constitutional dispensation has ushered in a new era – an era where the best interests of a child must be accorded paramount importance in all matters affecting the child – an era where we, as society, are committed to raising, developing and nurturing our children in an environment that conduces to their well-being. This resolve was captured admirably in the following passage:-
- “Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that are necessary for their positive growth and development. Indeed, this court has recognised that children merit special protection through legislation that guards and enforces their rights and liberties. We must be careful, however, to ensure that, in attempting to guide and protect children, our interventions do not expose them to harsh circumstances which can only have adverse effects on their development.”²⁸
70. In line with its constitutional obligation, the High Court is obliged to interpret police actions premised on provisions relating to arrest, detention and searching of children through the prism of article 53 of the Constitution to determine if the police officers had accorded the applicant’s best interests paramount importance. This is a constitutional obligation imposed on them by article 53 of the Constitution.
71. Thus when the constitutionality of the manner in which the police conducted the search is challenged, this court ought first to determine whether, through “the application of all legitimate interpretive aids, the impugned action is capable of being read in a manner that is constitutionally compliant.
72. This court, in line with its constitutional mandate to promote and protect the values and ethos that underpin our Constitution, will undoubtedly find and hold that an arrest, search and detention of a child that violates privacy and dignity of the child is unconstitutional. The thrust of this conclusion is that, because an arrest, search and detention constitutes an infringement of a person’s rights to his or her liberty, dignity and privacy, all of which are enshrined in the Bill of Rights, the actions must be justifiable according to the dictates of the Bill of Rights. Thus, in line with our nascent human rights culture, before every arrest, search and a detention of a child is executed, police officers must consider whether there are no less invasive methods which may be used to bring the suspect before court and to secure the evidence.

²⁸ By Khampepe J in Teddy Bear Clinic for Abused Children and Another vs Minister of Justice and Constitutional Development and Another [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) (Teddy Bear Clinic) at para 1.



73. Article 259 enjoins the courts, in interpreting the Constitution, to promote the purposes, values and principles of the Constitution, advance the Rule of Law, and Human Rights and Fundamental Freedoms in the Bill of Rights, permit development of the law and contribute to good governance. This requires courts to interpret the fourth respondents actions in line with these constitutional values.

74. Article 259 of the Constitution introduced a new approach to the interpretation of the Constitution. This approach has been described as 'a mandatory constitutional canon of statutory and constitutional interpretation'.

The duty to adopt an interpretation that conforms to article 259 mandatory.

75. It is sufficient that in arresting a child, police officers must do it through the lens of the Bill of Rights and pay special attention to the paramount importance of the best interests of such a child. the Constitution demands that of the police as a constitutive part of the state. A failure to do this would render such an arrest, search and detention inconsistent with the Constitution and thus unlawful.

76. The first petitioner was detained and arraigned before the court the next day. Article 53(2) demands that a child should only be detained as a measure of last resort. In its ordinary and grammatical meaning, the expression "a measure of last resort" means that the detention of a child should happen when all else has failed. This requires police officers to investigate other less invasive methods which can satisfy their legitimate purpose without having to detain a child. This is because, first, a detention constitutes a drastic curtailment of a person's freedom which our Constitution guards jealously, and should only be interfered with where there is a justifiable cause. Second, detention has traumatic, brutalising, dehumanising and degrading effects on people and of course, worse on children.

77. It is a known fact that our detention centres, be it police holding cells or correctional centres, are not ideal places. They are not homes. They are bereft of most facilities which one requires for raising children. It is worse for children. The atmosphere is not conducive to their normal growth, healthy psycho-emotional development and nurturing as children. The evidence by the first petitioner, the mother and the doctor is that the first petitioner was psychologically affected. She was seriously traumatised by this experience. Her detention has left her with serious psycho-emotional problems. Wounds that are still festering. These are the deleterious effects of incarceration against which the Constitution seeks to protect children. This is the reason why, even when a child has to be detained, article 53(2) stipulates that it should be as a last resort and for "the shortest appropriate time." There is no evidence the Police considered other options such as bail which the parents said they were ready to provide or why the police failed to admit her into bail pending charge which is a constitutional Right.²⁹

78. Similar to the discussion on arrest, does the constitutional injunction to safeguard children's rights mean that children will never be detained? The answer is also No The need to detain a child is necessarily a fact based inquiry that requires a balancing of interests. Cameron J eloquently explains this balance in Centre for Child Law:-

"the constitutional injunction that '[a] child's best interests are of paramount importance in every matter concerning the child' does not preclude sending child offenders to jail. It means that the child's interests are 'more important than anything else', but not that everything else is unimportant: the entire spectrum of considerations relating to the child

²⁹ Article 49(h)



offender, the offence and the interests of society may require incarceration as the last resort of punishment.”³⁰

79. Was the first petitioner's detention in the circumstances of this case justifiable as a measure of last resort? Certainly not. This is because both her parents reported to the police station, were ready to provide bail, and, importantly, it was not shown that she was a flight risk; nothing prevented the police officers from leaving the first petitioner in the custody of her parents with appropriate instructions to ensure her appearance in court. There being no evidence that the Police considered her circumstances to determine if her detention was a measure of last resort, hence, it follows that her detention was in flagrant violation of article 53(2). It is therefore unlawful.
80. In this case, to determine whether the dignity of the first Petitioner was impaired, the question that should be asked is whether the conduct diminishes the feelings of her self-worth. A strip search is generally humiliating, uncomfortable, and of an invasive nature, and in the instant case it affected the dignity of the girls and in particular the first petitioner. The photographs annexed to the petition attest to this.
81. The right to dignity is at the heart of the Constitution. It is the basis of many other rights. The basis is that of recognizing that every person has worth and value and must be treated with dignity. This is also highlighted in the international treaties Kenya has assented, some of which are mentioned above.
82. This right to dignity is further relevant to the specific social context in Kenya. In many instances, past and present, children and women's basic rights have been violated within society. Women and children are vulnerable to violence and unjust treatment due to economic inequalities and gross abuse of power as is evident in the instant case.
83. The submissions by Mr Ashimosi that the fourth respondent conducted the search in total violation of the law and the Constitution is telling. The fourth respondent was charged in court for her conduct. The evidence of the first petitioner is clear that the strip search was conducted illegally.
84. Mr Ashimosi also submitted that investigations revealed that the fourth respondent conducted the search in public and or allowed male police officers to be present and photographs to be taken. It is clear the first petitioner was stripped naked to be searched and exposed to cameras.
85. A strip search constitutes an interference with the privacy of the individual concerned. It is recognized that common law recognizes the right to privacy as an independent personality right. Privacy is therefore, a valuable aspect of one's personality. The right to privacy is protected in terms of both common law and the Constitution of Kenya. The right is however not absolute as there are competing factors such as maintaining law and order that can bear a significant limitation on the right. A careful weighing up of the right to privacy and other factors is necessary.
86. In the case of a constitutional invasion of privacy the following questions need to be answered:
- (a) Has the invasive law or conduct infringed the right to privacy in the Constitution?
 - (b) If so, is such an infringement justifiable in terms of the requirements laid down in the limitation clause of the Constitution?
87. The act of causing the first petitioner and her colleagues to strip naked in the presence of the fourth and fifth respondents and of one another and other persons is undeniably an invasion of their privacy. The search was unlawful in that it violates her constitutional rights to privacy and dignity. Even if we

³⁰ See Centre for Child Law v Minister for Justice and Constitutional Development and others [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) (Centre for Child Law).



are to assume that the first petitioner and her colleagues stripped naked without a request to do so, the presence of other persons while they did so, would also amount to wrongful conduct.

88. The Police are required by law to uphold the values enshrined in the Constitution. They are further prohibited from conducting strip searches except as provided by the law.
89. On freedom and security of the person. Searching of any person that involves the exposure of that person's naked body, and in particular the most private parts thereof, to the gaze of another person, is degrading to the person being so exposed. The conduct of the fourth and fifth respondents with regard to the first Petitioner and her colleagues was inherently inhumane, and amounted to a degrading assault upon their physical, emotional and psychological integrity.
90. The normative idea underlying this broad consensus is that fundamental rights are owed to persons as a matter of human dignity and should be honored by all government agents. As David Feldman has written,

"there are certain kinds of treatment which are simply incompatible with the idea that one is dealing with a human being who, as such, is entitled to respect for his or her humanity and dignity."³¹ The rights, freedom from inhuman and degrading treatment, privacy, due process, and equal protection under the law are among the minimal rights that the world has come to demand of any society. In the words of the US Supreme Court, these rights are "implicit in the concept of ordered liberty."³²

91. The African Charter on the Rights and Welfare of the Child recognises in its preamble—

“that the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security.”

Article 16(1) goes on to provide that:

“States parties to the present charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially . . . maltreatment including sexual abuse”.

92. Children need special protection because they are among the most vulnerable members of society. They are dependent on others - their parents and families, or the state when these fail - for care and protection. As a result, the drafters of our Constitution made children's rights a priority - and stated that the best interests of a child are the overriding concern when it comes to any matter affecting a child. Thus, the inclusion in the Bill of Rights of a provision on the rights of the child was an important development for Kenyan children, many of whom have suffered and continue to suffer long imprisonments and detention in harsh conditions. The objective of this special protection is to ensure that the justice system treats every child in conflict with the law in a manner that recognizes and upholds human dignity and worth, and instils in the child respect for the fundamental rights and freedom of others. The Rule considers the developmental age of the child and the desirability of the child's reintegration in and assumption of a constructive role in society in accordance with the principles of balanced and restorative justice.

³¹ David Feldman, Human Dignity as a Legal Value -Part I, 1999 Pub L 682, 690-91.

³² Palko v Connecticut, 302 US 319, 325 (1937).



93. The search was conducted in a manner which was degrading in that it was a strip search. The fact that the search was conducted in the presence of others added to the indignity of the situation. The fourth respondents' search of the first petitioner and her colleagues constitutes a violation of their rights to human dignity, privacy and freedom and security of their person.
94. Further, the fourth respondents' act of causing the complainant and her colleagues to undress diminished the self worth, confidence and emotional well being of the first petitioner and her colleagues. The conduct by the Police contradicts the values enshrined in the Constitution.
95. The Police are specifically required to search women within the limits provided under the law and must uphold the values enshrined in the Constitution. In the current constitutional dispensation, an unlawful interference with a person's right is a constitutional infringement. The Police failed to exercise their duties in line with the law, the Constitution and uphold the Bill of Rights.
96. In terms of article 53 of the Constitution, in all matters concerning children (including litigation or Police investigations)³³ their best interests are of paramount importance. Article 53 of the Constitution must be interpreted so as to promote the foundational values of human dignity, equality and freedom. The reach of article 53 extends beyond those rights enumerated in the Bill of Rights, it creates a right that is independent of the other rights specified in the Bill of Rights. It establishes a set of rights that courts are obliged to enforce.³⁴
97. The ambit of the provisions is undoubtedly wide. the comprehensive and emphatic language of article 53(d), (f) and (2) indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights.³⁵
98. The inclusion of a general standard ('the best interest of a child') for the protection of children's rights in the Constitution can become a benchmark for review of all proceedings in which decisions are taken regarding children. Courts and administrative authorities will be constitutionally bound to give consideration to the effect their decisions will have on children's lives.
99. There exists in this case the reasonable privacy interests of the first petitioner who is depicted in the images. There is also a significant public interest in ensuring that no duplication or distribution occurs in the disclosure process. Those interests ought not to be further compromised by the copying, viewing, circulation or distribution of the images beyond what is reasonably necessary to give effect to her constitutional rights.
100. It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling' and that '[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.

³³ *Centre for Child Law v Governing Body of Hoërskool Fochville & another* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA) para 23

³⁴ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (2) SACR 130 (CC) paras 130 and 132; *S v M (Centre for Child Law as amicus curiae)* [2007] ZACC 18; 2008 (3) SA 232; 2007 (2) SACR 539 (CC) para 14-26

³⁵ See *S vs M (Centre for Child Law as amicus curiae)* [2007] ZACC 18; 2008 (3) SA 232; 2007 (2) SACR 539 (CC) para 15, the constitutional Court of South Africa



The prevention of exploitation and abuse of children constitutes a government objective of surpassing importance.³⁶

101. The harm of child abuse is real and ongoing and the State is under a constitutional obligation to combat it. To hold otherwise would place the State in jeopardy of having to close the gate, as it were, after the horse has bolted and might signal a breach by the State of its obligation towards children. Children's dignity rights are of special importance. The degradation of children through publishing their nude images is a serious harm which impairs their dignity and contributes to a culture which devalues their worth.
102. Society has recognised that childhood is a special stage in life which is to be both treasured and guarded. The State must ensure that the lives of children are not disrupted by overzealous police officers who in total disregard of the law, the Constitution and children's' rights engage in acts as was witnessed in this case. There is obvious mental and physical harm suffered by the victims of child abuse. The first petitioner and her colleagues were forced naked to pose for photographs to be taken. Even if the Police desired to gather evidence, they ought to have done it within the confines of the law. The chief purpose of the statutory provisions prescribing the manner in which women are to be searched is to protect their dignity, humanity and integrity.
103. A child whose nude images are circulated in the media has to go through life knowing that the image is probably circulating within the mass distribution network for the public to see. This experience may haunt him or her for long because it creates a permanent record of the child's image. The psychological harm to the child is exacerbated if he or she knows that the photograph continues to circulate among viewers who may use it to derive sexual satisfaction or other purposes. Maintaining the integrity of the administration of justice is also an important principle of fundamental justice. The principles of fundamental justice operate to protect the integrity of the system itself. the Constitution guarantees individuals a fundamentally fair trial and not the fairest of all possible trials.³⁷ A fair trial includes a fair investigation and arrest process.
104. The photographing and publication of the child's images strikes at the dignity of the child, it is harmful to the child, and it is potentially harmful because it invades on her privacy and dignity. Dignity is a founding value of our Constitution. It informs most if not all of the rights in the Bill of Rights and for that reason is of central significance in the limitations analysis.
105. The value of dignity in our constitutional framework cannot therefore be doubted. the Constitution asserts dignity to contradict our past in which human dignity was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.
106. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This court acknowledges the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.

³⁶ The US Supreme Court has consistently upheld restrictions on First Amendment freedoms to combat the 'extraordinary problem' of child pornography (see Osborne v Ohio 495 US 103 (1990); New York v Ferber (above)).

³⁷ See R v O'Connor [1995] 4 SCR 411; (1995) 33 CRR (2d) 1; 103 CCC (3d) 1 (SCC), a case concerned with disclosure of therapeutic records of a sexual assault complainant, the Supreme Court of Canada



107. Similarly, article 1 of the Universal Declaration of Human Rights stresses the importance of human dignity. It states: “All human beings are born free and equal in dignity and rights.” Children merit special protection by the state and must be protected by legislation which guards and enforces their rights and liberties. This is recognised in article 53 of our Constitution. Children’s dignity rights are of special importance. The degradation of children through illegal body search as happened in this case and taking nude photos is a serious harm which impairs the petitioners’ dignity and devalues her worth.
108. Based on the above exposition of the facts, the law and authorities, I conclude that the search was illegal in that it violated the provisions of the Children act,³⁸ article 53 of the Constitution, the right to dignity and not to be subjected to degrading treatment and international conventions protecting the rights to children and the statutory provisions governing police conduct while searching women.

Whether this court can quash the conviction in the criminal case.

109. The first petitioner was charged in a criminal court. She was convicted on her own plea of guilty by a court of competent jurisdiction. In my view, the petitioner ought to have challenged the said conviction either by way of an appeal or by way of a revision as provided under the provisions of the Criminal Procedure Code.³⁹ There is a well laid down statutory mechanism of challenging the said conviction. It would be inappropriate for this court to exercise its jurisdiction and quash the said decision.
110. the Constitution recognizes the hierarchy of our courts and the appellate mechanism through which decisions of inferior courts are subjected to appeals to the higher courts. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by article 165(3)(a) and article 23(3) of the Constitution in a way that will recognize and uphold its appellate jurisdiction to hear and determine appeals from the lower court.
111. As was held in Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 Others:⁴⁰
- “A party cannot be heard to move a court in glaring contradiction of the judicial hierarchal system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex court”.
112. Also relevant is the Supreme Court decision in Peter Oduor Ngoge v Hon Francis Ole Kaparo,⁴¹ [para. 29-30] it was held:-

“... it will be perverse for this court to assume a jurisdiction which, by law, is reposed in the Court of Appeal,... In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters...Consequently, this court recognizes that

³⁸ Particularly sections 4(2), 13, 18, 19, 22 and 76

³⁹ Cap 75, Laws of Kenya

⁴⁰ {2014} eKLR

⁴¹ SC Petition 2 of 2012



all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions..." framework".

113. My reading of the law and authorities is that the spirit and intention of the *Constitution* is that decisions of the lower courts as in the present case ought to be challenged through the appellate mechanism or by way of revision as provided under the Criminal Procedure Code⁴² without necessarily invoking this courts powers under articles 165 and 23.

Whether the Petitioner is entitled to damages

114. A person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof.⁴³
115. Personality rights, generally speaking, consist of two types of rights, the right to privacy and the right of publicity. The right of privacy is the right to keep one's image and likeness from exploitation without permission or compensation and generally applies to members of the general public. The right of publicity is the exclusive right of an individual to market his or her image, likeness or persona for financial gain.
116. The petitioners claim an order of compensation and aggravated damages as a result of breach of fundamental rights of the first petitioner. Aggravated damages are the special and highly exceptional damages awarded on a defendant by a court, when his/her conduct amounts to tortious conduct subjecting the plaintiff to humiliating and malicious circumstances. Additional damages are also awarded in situations where a plaintiff is subjected to distress, embarrassment, or humiliation. Aggravated damages are basically compensatory in nature and they are awarded for the aggravated damage that is caused to a plaintiff. Aggravated damages are determined on the basis of the intangible injury inflicted on a plaintiff. Intangible injury includes the pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of a defendant. When compared to punitive damages aggravated damages require proof of injury. Aggravated damages can be attained as additional compensation if the injured establishes that a breach caused mental distress.⁴⁴
117. It is well settled that award of compensation 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.
118. 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.⁴⁵ The jurisprudence that has emerged in cases of violation of fundamental rights has cleared

⁴² Supra

⁴³ *Von Hannover v Germany (No 2)*, Grand Chamber judgment of 7 February 2012, § 96

⁴⁴ <https://definitions.uslegal.com/a/aggravated-damages/>

⁴⁵ *Mbogo & another v Shab*{1968} EA 93



the doubts about the nature and scope of the this public law remedy evolved by the courts.⁴⁶ Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights; Such claim is distinct from, and in addition to remedy in private law for damages for tort.

119. Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entail.⁴⁷ 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 compensation.
120. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, 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.
121. 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.
122. 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.⁴⁸ 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.
123. 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.
124. The petitioners claim a sum of Kshs 7,000,000/= as compensation. It is not clear how this amount was arrived at. In the submissions, there is no serious argument to support this amount.
125. However considering the nature of the violations, the legal principles discussed above, the nature of the violations, and bearing in mind the fact that it may not be easy to quantify infringement of fundamental rights in a case of this nature, and doing the best I can, I find that an award of a global sum of Kshs 4,000,000/= would be reasonable in the circumstances.

⁴⁶ VK 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>

⁴⁷ *Koigi Wamwere v Attorney General*{2015} eKLR

⁴⁸ 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)



126. Courts do not and cannot countenance a denial or violation of constitutionally guaranteed fundamental rights which are a cornerstone of our legal system. It is the court's primary duty to protect these basic rights of the people vis-à-vis actions by government agents. As Albert Camus, a noble prize winner once remarked "either cooperate with injustice or fight with it." Elie Wiesel, a holocaust survivor once remarked "...we must always side with the rule of law."⁴⁹
127. It cannot be denied that the police actions in this case were inspired by a noble intention of fighting crime, geared towards the betterment of the nation and its people and in particular the youth. But then again, it is important to remember this ethical principle:

"The end does not justify the means." No matter how noble and worthy of admiration the purpose of an act, but if the means to be employed in accomplishing it is simply irreconcilable with constitutional parameters, then it cannot still be allowed. The court cannot just turn a blind eye and simply let it pass. The court will continue to uphold the *Constitution* and its enshrined principles."

Final orders

128. In view of my analysis above, I find and hold that the fourth and fifth respondents violated the statutory provisions governing conduct of police officers while searching women. I find and hold that their actions violated the first petitioner's rights in that they failed to act in the best interests of the first petitioner as provided under the *Children Act*,⁵⁰ article 53 of the *Constitution* and that their conduct was a gross violation of the first petitioner's constitutional right to human dignity, freedom and security of her person and her right to privacy.
129. I further find and hold that the first, second, third and fourth Respondents are vicariously liable for the actions and or omissions of the fourth and fifth respondents complained of in this petition.
130. In view of my above analysis and guided by the law and authorities enumerated above, I conclude and find that this petition partly succeeds. Accordingly, I find the appropriate orders which command themselves for issue in this case are:-
- i. A declaration be and is hereby issued that the fourth respondents' conduct of searching the first petitioner in the presence of male police officers and/or other students and members of the public and photographing her or allowing or permitting third parties to take her nude photographs was a gross violation of the law and an infringement of her constitutional rights to dignity, privacy and her right not to be subjected to degrading treatment.
 - ii. A declaration be and is hereby issued that the manner in which the police strip searched the first petitioner and the other students was a gross violation of the statutory provisions governing conduct of police while searching women, a violation of article 53(d), (f) and (2) of the *Constitution* and the *Children Act*.
 - iii. The order of judicial review seeking to quash the conviction and sentence of the first petitioner in Baricho Criminal Case No 1262 of 2015 is hereby refused on grounds that the law provides for right of appeal or revision against the said decision.

⁴⁹ Mr Dainius Zalimas, President of the Constitutional Court of the Republic of Lithuania, *The Rule of Law and Constitutional Justice in the Modern World*, 11-14 September 2017, Vilnius, Lithuania, delivering a Speech at the Farewell Dinner for the 4th Congress of the World Conference on Constitutional Justice, September 13, 2017.

⁵⁰ act No 8 of 2001



- iv. A declaration be and is hereby issued that the that the first petitioner is entitled to damages for violation of her constitutional rights to dignity, degrading treatment and privacy.
- v. That judgement be and is hereby entered in favour of the first petitioner against the respondents jointly and severally for a global sum of Kshs 4,000,000/= by way of general damages.
- vi. That the above sums shall attract interests at court rates from date of filing suit until payment in full.
- vii. No orders as to costs

Orders accordingly.

SIGNED, DATED, DELIVERED AT NAIROBI THIS 18TH DAY DECEMBER 2017.

JOHN M. MATIVO

JUDGE

