



**Katiba Institute v Inspector General of Police & another; Law Society of Kenya
(Interested Party) (Constitutional Petition E349 of 2024) [2025] KEHC 5240 (KLR)
(Constitutional and Human Rights) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 5240 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E349 OF 2024
AB MWAMUYE, J
FEBRUARY 6, 2025**

BETWEEN

KATIBA INSTITUTE PETITIONER

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

LAW SOCIETY OF KENYA INTERESTED PARTY

The press statement by the Inspector General of Police restricting demonstrations in the Nairobi Central Business District and its surroundings declared unconstitutional

The petition challenged a press statement issued by the Inspector General of Police suspending the exercise of the right to assemble, demonstrate, picket, and to present petitions in the Nairobi CBD citing public safety concerns. The court highlighted the factors to consider when determining whether a limitation of a right was justified and noted that the right to picket and to demonstrate was an essential feature in a democratic society that ought to be protected. It held that the suspension of rights without due process raised concerns about the legitimacy and fairness of the administrative action. The court further held that the Inspector General’s actions amounted to a threat to violation and infringement of the rights of the public to assemble and picket. The court thus declared the press statement unconstitutional.

Reported by Kakai Toili

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms - right to assemble, demonstrate, picket, and to present petitions to public authorities – claim that the Inspector General of Police issued a press statement suspending the right to assemble, demonstrate, picket, and present



petitions due to public safety concerns - whether the Inspector General of Police's press statement amounted to a violation or threat of violation of those rights – Constitution of Kenya, articles 24 and 37.

Constitutional Law – *fundamental rights and freedoms – limitation of fundamental rights and freedoms – limitation of the right to assemble, demonstrate, picket, and to present petitions to public authorities - factors to consider in determining whether a limitation of a right was justified - whether the Inspector-General of Police could unilaterally suspend the exercise of constitutional rights without due process or statutory basis – Constitution of Kenya, article 24.*

Brief facts

The petition challenged a press statement issued by the Inspector General of Police, the 1st respondent on July 17, 2024, which suspended the exercise of the right to assemble, demonstrate, picket, and present petitions in the Nairobi Central Business District and its surroundings until further notice, citing public safety concerns. The petitioner claimed that between June 18 and July 16, 2024, Kenyans sought to exercise their rights under article 37 of the Constitution, including protesting against the passage of the Finance Bill 2024, but the respondents repeatedly attempted to curtail those rights through extra-constitutional measures such as abductions, excessive force, and use of live ammunition.

The petitioner further contended that the 1st respondent's actions amounted to suspending constitutional rights without due process. It was argued that the 1st respondent had arrogated himself the authority to determine who could enjoy the rights under article 37, thereby undermining the Bill of Rights. The petitioner sought, among other reliefs, declarations that the impugned press statement was unconstitutional and invalid, and a permanent order prohibiting the respondents from suspending the enjoyment of the right to picket and demonstrate under article 37 of the Constitution.

The respondents did not file any response to the petition. The interested party supported the petition asserting that the 1st respondent's directive exceeded the legal limits of restricting constitutional rights and infringed article 27 of the Constitution on equality and freedom from discrimination. They urged the court to intervene to prevent further infringement of Kenyans' rights as sought in the petition.

Issues

- i. Whether the Inspector General of Police's press statement suspending the right to assemble, demonstrate, picket, and present petitions due to public safety concerns amounted to a violation or threat of violation of those rights.
- ii. What were the factors to consider when determining whether a limitation of a right was justified?
- iii. Whether the Inspector-General of Police could unilaterally suspend the exercise of constitutional rights without due process or statutory basis.

Relevant provisions of the Law

Constitution of Kenya

Article 24 - Limitation of rights and fundamental freedoms

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

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

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

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

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—



(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

(a) Article 31 — Privacy;

(b) Article 36 — Freedom of association;

(c) Article 37 — Assembly, demonstration, picketing and petition;

(d) Article 41 — Labour relations;

(e) Article 43 — Economic and social rights; and

(f) Article 49 — Rights of arrested persons.

Article 37 – Assembly, demonstration, picketing and petition

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

Held

1. Article 22 of the Constitution of Kenya granted every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or was threatened. Article 258 of the Constitution also granted every person the right to institute court proceedings, claiming that the Constitution had been contravened, or was threatened with contravention.
2. Article 165(3)(b) of the Constitution vested power to the High Court to determine the question whether a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or threatened. One needed not wait for a violation of freedoms of right to be breached to pursue an action under a constitutional petition, for the threatening was sufficient for one to pursue an action in a constitutional petition. The apprehension of the 1st respondent to deter future violation was justified.
3. In the absence of an affidavit or any sort of response from the respondents to controvert the petitioner's allegations of fact, the court was entitled to proceed on the presumption that the foundational facts upon which the petition was based were as deposed by the petitioners and the interested party.
4. Article 19(1) of the Constitution stated that the Bill of Rights was an integral part of Kenya's democratic state, and was the framework for social, economic and cultural policies. Article 19(2) outlined rights that were a benchmark for State's social, economic and cultural policies. Those rights were recognized and protected because they were the only means by which the dignity of the individual and communities could be preserved. The right to assemble, demonstrate, picket and present petitions to the public authorities was an example of such rights thus a constitutional guarantee. It was one of the fundamental rights and freedoms under the Constitution.
5. Under article 20(1) of the Universal Declaration of Human Rights, everyone had the right to freedom of peaceful assembly and association. Kenya was also a state party to the International Covenant on Civil and Political Rights whose article 21 stated that the right of peaceful assembly shall be recognized.



- Article 11 of the African Charter on Human and Peoples' Rights, also known as the Banjul Charter also stated that every individual shall have the right to assemble freely with others.
6. Rights under article 37 of the Constitution were not absolute and may be limited by law. It was a constitutional imperative that an individual's right must and ought not to be interfered with and may only be limited as provided by law. Article 24 of the Constitution of Kenya laid out the circumstances under which those limitations may apply. Article 24 established the criteria for limiting any constitutional right and urged that a right or fundamental freedom in the Bill of Rights could be limited only by law, in pursuit of a legitimate objective and only to the extent that the limitation was necessary.
 7. When assessing whether the limitation of a right was reasonable and justifiable, the court ought to consider the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation and the fact that the need for enjoyment of the right by one individual did not prejudice the rights of others, as well as the consideration of the relationship between the limitation and its purpose.
 8. When determining whether a limitation was justified, the following questions must be answered;
 1. what the purpose of the limitation was;
 2. how it was important;
 3. what the relationship between the limitation and its purpose was; and
 4. whether there were less restrictive means to achieve the purposes intended.
 9. Article 24(3) of the Constitution provided that the onus of proving that a limitation on a right or freedom was reasonable and demonstrably justified in an open and democratic society lay with the respondent thus the respondent bore the burden of satisfying the court that limitation was
 1. provided by law;
 2. it was intended to serve a legitimate aim; and
 3. it was necessary in an open and democratic society.
 10. Despite the limitation, it was not implied that the Executive had power, independent of statute, to act in derogation of the rights of citizens. Not only must the exercise of Executive powers be authorized by law but it must also keep strictly within the scope of that authority.
 11. Kenya being a democratic state with a democratically elected leadership, the citizens had a democratic right to discuss affairs of their Government and leadership because their rights were guaranteed by the Constitution. Public criticism helped public officers understand the feelings of citizens and make their leaders act to address the criticism directed to them.
 12. The limitation of human rights and freedoms did not give any State organ the right to curtail such rights. The people in a democratic country had the right to raise their voice against injustice and even express their resentment against the action of the government. The government should respect and even encourage exercise of such rights.
 13. It was the duty of the State to aid the exercise of right and freedom of speech in its comprehensive state and not to frustrate exercise of such rights by exercising its Executive or Legislative powers or taking actions in violation of rights and freedoms of citizens in the name of reasonable restrictions.
 14. Kenya being a democratic society, limitation of a right must not only be reasonable but also justified by the party seeking to limit the right. Such limitation must strike a balance between the provisions limiting the right and article 24 of the Constitution.
 15. Constitutionally guaranteed rights should not be limited except where the limitation was reasonable, justifiable and the objective of that limitation was intended to serve the society. The standard required to justify limitation, was high enough to discourage any limitation that did not meet a constitutional test and that limitation to a right was an exception rather than a rule. The respondents had not sufficiently demonstrated that the limitation through the 1st respondent's press statement was justified.



16. It was the duty of the State to justify the derogation of a constitutional right. The State had not even in the remotest sense, attempted to show that the limitation was reasonable and justifiable as required by article 24(3) of the Constitution. No material or policy considerations were placed before the court to justify the limitation. The right to assemble, demonstrate, picket and petition a public authority being a constitutional right, could only be limited in accordance with the Constitution itself, and where it was limited by statute, that statute or statutory provision must meet the constitutional test of reasonableness and justifiability.
17. The Constitution had provided claw-backs on article 37 that demonstrators, picketers and petition-presenters must do so peaceably and unarmed. Assemblies, picketing and demonstrations which were not peaceful were excluded from protection of article 37 of the Constitution. However, that did not implicate the right to assemble, demonstrate and picket for the basic reason that the Constitution was supreme. The right to picket and to demonstrate was an essential feature in a democratic society that ought to be protected especially where it was shown that they often started as peaceful ones. The focus should not be on the fact that they turned violent but rather how to ensure that they did not turn violent without violating and infringing individual rights.
18. The police service had an obligation to assure the public of peace and order. The public included both the participants in the demonstrations and picketing as well as the non-participants. There was a positive obligation on the State to facilitate and protect a peaceful exercise of article 37 of rights.
19. Section 10(4) of the National Police Service Act, cap 84 which had been enacted to give effect to articles 243, 244 and 245 of the Constitution stated that in the performance of functions set out under the Constitution, the National Police Act or any other law, the Inspector General shall not just have all the necessary powers for the performance of such functions but, in exercising them, he was under obligation to uphold the national values, principles and objects set out in articles 10, 232 and 244 of the Constitution.
20. Amongst the national values and principles of governance in article 10 of the Constitution were; the rule of law, democracy, human dignity, human rights and non-discrimination. Article 232 of the Constitution, on the other hand, was about values and principles of public service and they included accountability for administrative acts; and article 245 of the Constitution was with respect to the command of the National Police Service and it stated, *inter alia*, that the Inspector General shall, among other things exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.
21. The suspension of rights without due process, such as consultation with relevant stakeholders or obtaining necessary judicial approvals, raised concerns about the legitimacy and fairness of the administrative action. Due process required that any action affecting constitutional rights must be carried out in a manner that followed established legal procedures. That included providing notice, the opportunity to be heard, and a fair and impartial decision-making process. The unilateral suspension of rights by the Inspector -General bypassed those procedural safeguards. The principles of due process were fundamental in ensuring fairness and justice in administrative and judicial actions.
22. The 1st respondent's actions on July 17, 2024 amounted to threat to violation and infringement of the constitutional rights of the public to assemble and picket in accordance to article 37 of the Constitution.

Petition allowed.

Orders

- i. *A declaration was issued that the proposed limitation of the right to exercise article 37 rights in the subject area was a blanket, omnibus, and overly broad one, and thus it did not meet the requirements of article 24 of the Constitution.*
- ii. *A declaration was issued that the 1st respondent's press statement dated July 17, 2024 was unconstitutional and invalid to the extent that it restricted and restricted any and all demonstrations in the Nairobi*



Central Business District and its surroundings until further notice and to the extent that it required any and all protests, demonstrations, picketing actions, and public gatherings to have a designated leader(s) to coordinate, collaborate, and cooperate with the Police as a mandatory prerequisite.

- iii. *An order of certiorari was issued quashing the 1st respondent's press statement dated July 17, 2024.*
- iv. *A declaration was issued that whereas the 1st respondent's press release dated July 17, 2024 was unconstitutional and invalid as per i and ii above and was quashed as per iii above, the 1st respondent's actions in the issuance and implementation of the impugned press release did not however raise to the high standard required for an adverse finding by the court on any of the adverse finding by the court on any of the grounds arising under article 245(7) of the Constitution.*
- v. *Each party shall bear its own costs.*

Citations

Cases

1. Centre for Rights Education & Awareness (CREAW) v Attorney General & another (Petition 182 of 2015; [2015] KEHC 7433 (KLR)) — Explained
2. Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & others (Petition 628, 630 of 2014; [2015] KEHC 7074 (KLR)) — Explained
3. Ferdinand Ndung'u Waititu & 4 others v Attorney General & 12 others [2016] KEHC 4820 (KLR) Ferdinand Ndung'u Waititu & 4 others v Attorney General & 12 others (Petition 169 of 2016; [2016] KEHC 4820 (KLR)) — Explained
4. Kandie v Alassane BA & another (Petition 2 of 2015; [2017] KESC 13 (KLR)) — Explained
5. Harry Nakandawire & Another (Criminal case number 5 of 2010; [2010] MWHC 5) — Explained
6. National Consultative Council v The Attorney General (Civil Cause 958 of 1994; [1994] MWHCCiv 36) — Explained
7. Moise v Greater Commission Transitional Local Council; Minister of Justice and Constitutional Development, intervening (Women's Legal Centre as Amicus Curiae) (2001 (4) SA 481 CC) — Explained
8. South African Transport and Allied Workers Union and Another v Garvas and others ([2012] ZACC 13) — Explained
9. S v Zuma & Others ((1995)2 SA) — Mentioned
10. Edmonton Journal vs Alberta ({1989}45 CRR 1) — Explained
11. R v Oakes ([1986] 1scr 103 [69]-[70]) — Explained

Statutes

1. Constitution of Kenya — article 10, 19, 20, 21, 22, 24, 27, 37, 47, 73, 165(3)(b); 243; 244; 245; 258 — Interpreted
2. National Police Service Act (cap 84) — section 10(4) — Cited

International Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 — article 11
2. International Covenant on Civil and Political Rights (ICCPR), 1966 — article 21
3. Universal Declaration of Human Rights (UNDHR), 1948 — article 20(1)

Advocates

None mentioned

JUDGMENT

1. The petitioner through a petition dated July 18, 2024 seeks the following orders:



- a. A declaration that the respondent's actions violate article 10, 19, 20, 21, 27, 37, 47, 73, 244 and 245 of the Constitution of Kenya.
 - b. A Declaration that the 1st respondent's actions of issuing the Press Statement dated July 17, 2024, has violated articles 10, 19, 20, 21, 27, 37, 47, 73, 244 and 245 of the Constitution of Kenya by suspending a Constitutional Right.
 - c. A Declaration that the office of the 1st respondent's press release dated July 17, 2024 is unconstitutional and invalid under article 2(4) of the Constitution.
 - d. A permanent order of prohibition prohibiting the respondents from suspending the enjoyment of a Constitutional Human Right, the right to picket and demonstrate under article 37 of the Constitution.
 - e. Any other prayers this court deems fit.
2. The petition is founded upon the following grounds: -
 - i. On June 18, 2024 to July 16, 2024, Kenyans have tried to exercise their right to picket and assemble while unarmed under article 37 of the Constitution protesting the current situation in the country including the passage of the Finance Bill 2024. The respondents have attempted severally to limit this right.
 - ii. The petitioner claims that the respondents resorted to using extra-constitutional measures to curtail the right to picket and assemble such as abduction, use of water cannons, tear gas, live ammunition, rubber or other crude weapons or draconian measures and deploying brute force and violence against persons exercising their Constitutional rights to picket and assemble.
 - iii. The petitioner further claims that on April 14, 2024, the Inspector General of Police suspended the medics' right to strike or protest through a press release. This court issued stay orders restraining the respondents or any other officer from enforcing the Inspector General's decision in violation of articles 36, 37 and 41 of the Constitution.
 - iv. The petitioner contends that the respondents appeared untouched by the court orders and on July 17, 2024, the 1st respondent, in a press statement, suspended article 37 of the Constitution by declaring that no demonstration will be permitted in the Nairobi Central Business District and its surroundings until further notice to ensure public safety.
 - v. The petitioner contends further that the 1st respondent has neutered the citizen's rights in article 37 and has grabbed himself the sole privilege of determining who does and who does not enjoy the right to assemble, picket and protest under article 37 of the Constitution. The petitioner claims that the 1st respondent has abrogated himself the sole privilege to determine who does and who does not enjoy the right to assemble and has also trampled upon the Bill of Rights and other Constitutional provisions.
 3. Despite being served with the petition, the respondents did not file any document in response.
 4. The interested party was enjoined on September 24, 2024 after which they filed an Affidavit in support of the Petition sworn by the CEO of the Law Society of Kenya, Florence Muturi, on October 16, 2024. The Interested party affirmed contents of the Petition to which they averred that indeed the 1st respondent issued a press release on July 17, 2024 which went beyond the legal bounds allowed for the limitation of a right.



5. The Interested Party further stated that the 1st respondent's act of refusing the conduct of demonstrations within Nairobi Central Business District and its surroundings is an infringement of the right to equality and freedoms of discrimination as provided under article 27 of the Constitution.
6. The Interested party prayed that this court intervenes and stops the infringement of the Rights of Kenyans as sought for in the Petition.

Jurisdiction

7. Article 22 of the Constitution of Kenya 2010 grants every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened.
8. Article 258 of the Constitution also grants every person the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention.
9. Article 165(3)(b) of the Constitution vests power to the High Court to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

Analysis and Determination

10. I have very carefully considered the petition and subsequent submissions by respective counsels of the petitioner and the Interested Party and authorities cited. This Petition challenges 1st respondent's actions of issuing the Press Statement dated July 17, 2024, suspending article 37 of the Constitution by declaring that no demonstration will be permitted in the Nairobi Central Business District and its surroundings until further notice to ensure public safety.
11. I am alive to the fact, that one need not wait for a violation of freedoms of right to be breached to pursue an action under a constitutional petition, for the threatening is sufficient for one to pursue an action in a constitutional petition.
12. The court reiterated the above position, that a party need not to wait for a violation to occur in order to seek reprieve from the court. In the Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR the court held as follows:

“I fully agree with the sentiments of the Bench in the CORD case. A party need not wait for a violation of a right or a contravention of the *Constitution* to occur before approaching the court for relief. It appears to me that the intent behind the use of the word “threatened” in both articles 22 and 258 was to preempt the violation of rights, or of the *Constitution*. If a clear threat to either is made out, it cannot be properly argued that the petitioner should have waited for the violation or contravention to occur, and then seek relief. It is therefore my finding, and so I hold, that this petition is not premature, and is properly before me.”
13. This court takes judicial notice in light of the decision above and finds that the apprehension of the 1st respondent to deter future violation is justified.
14. In the absence of an affidavit or any sort of response from the respondents to controvert the petitioner's allegations of fact, I am entitled to proceed on the presumption that the foundational facts upon which this Petition is based are as deposed by the petitioners and the Interested Party.
15. This petition brings into focus the question of whether the executive can, in the first place, interfere with certain individual constitutional rights and, if so, the extent to which it may interfere. The



- constitutional rights brought to the fore are their right to assemble, picket and present petitions to authorities coupled with the right not to be discriminated upon.
16. Article 19(1) of the *Constitution* states that the Bill of Rights is an integral part of Kenya’s democratic state, and is the framework for social, economic and cultural policies. Clause 3 states that the rights and fundamental freedoms in the Bill of Rights –
 - a. belong to each individual and are not granted by the state;
 - b. do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and
 - c. are subject only to the limitations contemplated in the *Constitution*.
 17. Article 19(2) outlines rights that are a benchmark for state’s social, economic and cultural policies. These rights are recognized and protected because they are the only means by which the dignity of the individual and communities can be preserved.
 18. The right to assemble, demonstrate, picket and present petitions to the public authorities is an example of such rights thus a constitutional guarantee. It is one of the fundamental rights and freedoms under the *Constitution*. Article 37 provides;

“Every person has the right peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.”
 19. Under article 20(1) of the *Universal Declaration of Human Rights*, everyone has the right to freedom of peaceful assembly and association. Kenya is also state party to the *International Covenant on Civil and Political Rights* whose Article 21 states that the “right of peaceful assembly shall be recognized.” Article 11 of the *African Charter on Human and Peoples’ Rights*, also known as the Banjul Charter also states that every individual shall have the right to assemble freely with others.
 20. In the case of *Ferdinand Ndung’u Waititu v Attorney General and 12 Others* [2016] eKLR, the court held as follows:

“Besides guaranteeing the right to assemble, demonstrate, picket and petition, Article 37 is itself an imperative rights article and its import is that it brings together other rights critical in any free democratic society. The article inherently invites the freedom of expression and opinion as well as the freedom of association. In their course of their demonstrations, persons are bound to assemble and associate and likewise, in the course of picketing, the picketers are simply bound to express themselves, their common views and opinions.”
 21. It is however important to note that rights under Article 37 are not absolute and may be limited by law. It is a constitutional imperative that an individual’s right must and ought not to be interfered with and may only be limited as provided by law.
 22. Article 24 of the *Constitution* of Kenya, 2010 lays out the circumstances under which these limitations may apply. It states as follows:
 - “24. A right or fundamental freedom in the Bill of Rights shall not be limited (1) except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-



- a. the nature of the right or fundamental freedom;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
 - e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
2. Despite clause (1), a provision in legislation limiting a right or fundamental freedom-
 - a. in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation; and
 - b. shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
 - c. shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
 3. The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied...”
23. The above provision, establishes the criteria for limiting any constitutional right and urged that a right or fundamental freedom in the Bill of Rights can be limited only by law, in pursuit of a legitimate objective and only to the extent that the limitation is necessary.
24. The Supreme Court in the case of *Kandie v Allassane BA & Another* (Petition 2 of 2015) [2017] KESC 13 (KLR) while discussing article 24 of the *Constitution* held as follows:
- “ 13. The test to be applied in order to determine whether a right can be limited under article 24 of the Constitution, was the reasonable and justifiable test, which must not be conducted mechanically. Instead, the court must, on a case-by-case basis, examine the facts before it, and conduct a balancing exercise, to determine whether the limitation of the right was reasonable and justifiable in an open and democratic society. The insertion of the word ‘including’ in article 24 indicated that the factors to be considered while conducting the balancing act were not exhaustive but they were a guide to the main factors to be taken into account in that consideration.
 14. Before applying the reasonable and justifiable test, the court would first have to determine whether a right was limited under a particular law...



15. In assessing whether the limitation of a right was reasonable and justifiable, the court would consider the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, and the fact that the need for enjoyment of the right by one individual did not prejudice the rights of others, as well as the relationship between the limitation and its purpose, and whether there were less restrictive means to achieve that purpose.”
25. In assessing whether the limitation of a right is reasonable and justifiable, the court ought to consider the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation and the fact that the need for enjoyment of the right by one individual does not prejudice the rights of others, as well as the consideration of the relationship between the limitation and its purpose.
26. I am also guided by the Canadian case of *R v Oakes* [1986] 1SCR 103 [69]-[70] where the court stated:
- “Dickson CJ said that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be justified.
- a. The first criterion concerned the importance of the objective of the law. First, the objective, which measures responsible for a limit on a constitutional right or freedom are designed to serve, must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom.’ The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to free and democratic society do not gain protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
- b. Secondly, the means chosen for the law must be ‘reasonable and demonstrably justified’, which involves ‘a form of proportionality test’ with three components: First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in his first sense, should impair ‘as little as possible’ the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of sufficient importance.”
27. From the decision above, in determining whether a limitation is justified, the following questions must be answered; what is the purpose of the limitation, how important is it, what is the relationship between the limitation and its purpose and finally are there less restrictive means to achieve the purposes intended?
28. Article 24(3) of the *Constitution* further provides that the onus of proving that a limitation on a right or freedom is reasonable and demonstrably justified in an open and democratic society lies with the respondent thus the respondent bears the burden of satisfying this court that limitation was first, provided by law; second, it was intended to serve a legitimate aim; and third, it was necessary in an open and democratic society.



29. Despite the limitation, it is not implied that the executive has power, independent of statute, to act in derogation of the rights of citizens. In light of the above provisions, not only must the exercise of executive powers be authorized by law but must also keep strictly within the scope of that authority.
30. Kenya being a democratic state with a democratically elected leadership, the citizens have a democratic right to discuss affairs of their government and leadership because their rights are guaranteed by the Constitution. It must be appreciated that only through public criticism helps public officers understand the feelings of citizens make their leaders may act to address the criticism directed to it.
31. In the case of *Edmonton Journal v Alberta* {1989}45 CRR 1, the Supreme Court of Canada (Corey J), underlined the importance of freedom of expression when it states that;
- “It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democratic society cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions.”
32. In the Malawian case of *Harry Nakandawire & Another*, Criminal case number 5 of 2010 also held as follows:
- “It must not be forgotten that our constitution guarantees freedom of speech/expression, opinion, conscience and association. Freedom of speech/ expression should not, in our view, be restricted to speaking about only those things that delight the power that be. It must extend to the freedom to speak about even those things that have the capacity/potential to displease, indeed annoy. Persons, institutions should not therefore be barred from expressing themselves on any issue merely because doing so will discomfort certain quarters for the remedy in such instances, is not to bar expression but to allow those offended to pursue civil suits... people must be free to hold and impact even unpopular and for minority opinions...”
33. I am also in agreement with the findings in the case of *South African Transport and Allied Workers Union and Another v Garvas and others* [2012] ZACC 13 where the South African court held: “The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes the groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms.”
34. The limitation of human rights and freedoms does not give any state organ the right to curtail such rights. The people in a democratic country have the right to raise their voice against injustice and even express their resentment against the action of the government. The government should respect and even encourage exercise of such rights.
35. It is the duty of the state to aid the exercise of right and freedom of speech in its comprehensive state and not to frustrate exercise of such rights by exercising its executive or legislative powers or taking actions in violation of rights and freedoms of citizens in the name of reasonable restrictions.
36. This being a democratic society, limitation of a right must not only be reasonable but also justified by the party seeking to limit the right. Such limitation must strike a balance between the provisions limiting the right and article 24 of the *Constitution*.



37. The principle enunciated above is that constitutionally guaranteed rights should not be limited except where the limitation is reasonable, justifiable and the objective of that limitation is intended to serve the society. The standard required to justify limitation, is high enough to discourage any limitation that does not meet a constitutional test and that limitation to a right is an exception rather than a rule.
38. The respondents herein have not sufficiently demonstrated that the limitation through the 1st respondent's press statement was justified.
39. The Honourable Court in the case of *Moise v Greater Commission Transitional Local Council; Minister of Justice and Constitutional Development, intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 481 CC stated:
- “The respondents have been found woefully wanting on this front. They have not submitted any evidence or material of whatever nature in justification of the limitation in question. That being the case, the conclusion is, in my view, inescapable that the respondent have failed to satisfy this court that the restrictions and limitations imposed on the applicants' freedom of speech or expression are either reasonable or justifiable. Besides, the deeming provisions of subsection 3 are plainly contrary to the constitutionally entrenched right of being presumed innocent until proven otherwise.”
40. Similarly, in the case of *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & others* [2015] eKLR the court relied on the case of *S v Zuma & Others* (1995)2 SA where the court held “A party alleging violation of a constitutional right or freedom must demonstrate that the exercise of a fundamental right has been impaired, infringed or limited. Once a limitation has been demonstrated, then the party which would benefit from the limitation must demonstrate a justification for the limitation. As in this case, the State, in demonstrating that the limitation is justifiable, must demonstrate that the societal need for the limitation of the right outweighs the individual's right or freedom in question.”
41. The jurisprudence emerging from the above decision is that it is the duty of the state to justify the derogation of a constitutional right. In the present case, the state has not even in the remotest sense, attempted to show that the limitation was reasonable and justifiable as required by article 24(3). No material or policy considerations were placed before this court to justify the limitation. The right to assemble, demonstrate, picket and petition a public authority being a constitutional right, can only be limited in accordance with the *Constitution* itself, and where it is limited by statute, that statute or statutory provision must meet the constitutional test of reasonableness and justifiability.
42. It is prudent however to note that the *Constitution* has provided claw-backs on article 37 that demonstrators, picketers and petition -presenters must do so peaceably and unarmed. Assemblies, picketing and demonstrations which are not peaceful are excluded from protection of article 37 of the *Constitution*. However, that does not implicate the right to assemble, demonstrate and picket for the basic reason that the Constitution is supreme. The right to picket and to demonstrate is an essential feature in a democratic society that ought to be protected especially where it is shown that they often start as peaceful ones. The focus should not be on the fact that they turn violent but rather how to ensure that they do not turn violent without violating and infringing individual rights.
43. The police service has an obligation to assure the public of peace and order. The public in these respects include both the participants in the demonstrations and picketing as well as the non – participants. There is a positive obligation on the state to facilitate and protect a peaceful exercise of article 37 Rights.



44. Section 10(4) of the *National Police Service Act*, cap 84 which has been enacted to give effect to articles 243, 244 and 245 of the *Constitution* states that in the performance of functions set out under the *Constitution*, the *National Police Act* or any other law, the Inspector General shall not just have all the necessary powers for the performance of such functions but, in exercising them, he is under obligation to uphold the national values, principles and objects set out in articles 10, 232 and 244 of the *Constitution*.
45. Amongst the national values and principles of governance in article 10 are, of course, the rule of law, democracy, human dignity, human rights and non-discrimination. Article 232, on the other hand, is about values and principles of public service and they include accountability for administrative acts; and finally, article 245 is with respect to the command of the National Police Service and it states, inter alia, that the Inspector General shall, among other things exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.
46. I have gone through the affidavit sworn by Emily Kinama in Support of the Petition dated July 18, 2024 and established that the affidavit gives a detailed narration of the threat by the 1st respondent to violate the rights and freedoms of the public.
47. In the press release, the Inspector General states: “...As a result, no demonstrations will be permitted in the Nairobi Central Business District and its surroundings until further notice to ensure public safety.” This is a clear threat to the violation and infringement of article 37 of the right to assembly and picket peacefully.
48. In the holding by Tambala J (as he then was) in the Malawian case of *National Consultative Council v The Attorney General* Civil Cause 958 of 1994 stated: “There is need to strike a balance between the needs of society as a whole and those of individuals. If the needs of society in terms of peace, law and order, and national security are stressed at the expense of the rights and freedoms of the individual, then the Bill of Rights contained in the Constitution will be meaningless and the people of this country will have struggled for freedom and democracy in vain. In a democratic society, the police must sharpen their skills and competence. They must be able to perform their main function of preserving peace, law and order without violating the rights and freedoms of the individuals. That is the way they can contribute to the development of a free state. Matters of National Security should not be used as an excuse for frustrating the will of the people expressed in their constitution.”
49. The suspension of rights without due process, such as consultation with relevant stakeholders or obtaining necessary judicial approvals, raises concerns about the legitimacy and fairness of the administrative action. Due process requires that any action affecting constitutional rights must be carried out in a manner that follows established legal procedures. This includes providing notice, the opportunity to be heard, and a fair and impartial decision-making process. The unilateral suspension of rights by the Inspector -General bypasses these procedural safeguards. The principles of due process is fundamental in ensuring fairness and justice in administrative and judicial actions.
50. The Petition herein therefore succeeds. The petitioner has succeeded to prove that the 1st respondent’s actions on July 17, 2024 amount to threat to violation and infringement of the Constitutional Rights of the public to assemble and picket in accordance to article 37 of the *Constitution* 2010.
51. Consequently, the following final orders hereby issue: -
 - a. A declaration be and is hereby issued that the proposed limitation of the right to exercise article 37 rights in the subject area was a blanket, omnibus, and overly broad one, and thus it did not meet the requirements of article 24 of the *Constitution*.



- b. A declaration be and is hereby issued that the 1st respondent's press statement dated July 17, 2024 was and is unconstitutional and invalid to the extent that it restricted and restricts any and all demonstrations in the Nairobi Central Business District and its surroundings until further notice and to the extent that it required and requires any and all protests, demonstrations, picketing actions, and public gatherings to have a designated leader(s) to coordinate, collaborate, and cooperate with the Police as a mandatory prerequisite.
- c. An order of certiorari be and is hereby issued quashing the 1st respondent's Press Statement dated July 17, 2024.
- d. A declaration be and is hereby issued that whereas the 1st respondent's Press Release dated July 17, 2024 was unconstitutional and invalid as per (a) and (b) above and was quashed as per (c) above, the 1st respondent's actions in the issuance and implementation of the impugned press release did not however raise to the high standard required for an adverse finding by this Court on any of the adverse finding by this Court on any of the grounds arising under article 245 (7) of the Constitution.
- e. This being public interest litigation, each Party shall bear its own costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS SIXTH DAY OF FEBRUARY 2025.

BAHATI MWAMUYE

JUDGE

