



Limin v Director General Kenya Citizen and Foreign National's Management Services & 3 others (Petition E272 of 2021) [2025] KEHC 3429 (KLR) (Constitutional and Human Rights) (20 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E272 OF 2021

LN MUGAMBI, J

MARCH 20, 2025

BETWEEN

WANG LIMIN PETITIONER

AND

**DIRECTOR GENERAL KENYA CITIZEN AND FOREIGN NATIONAL'S
MANAGEMENT SERVICES 1ST RESPONDENT**

**CABINET SECRETARY INTERIOR AND CO-ORDINATION OF NATIONAL
GOVERNMENT 2ND RESPONDENT**

OFFICE OF INSPECTOR GENERAL 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

Introduction

1. The Petition dated July 13, 2021 is supported by the petitioner's affidavit in support and a further affidavit dated May 24, 2022.
2. The gist of this petition is the allegation by the petitioner that the respondents not only unlawfully and illegally detained him but also illegally issued him Deportation Order to deport him back to China. He complains that the respondents' actions ignored the due process of law and violated his constitutional rights besides and also contravened the [*Kenya Citizenship and Immigration Act*](#).
3. The petitioner seeks the following relief against the respondents:



- a. A declaration that the petitioner's constitutional rights have been breached by the respondent's unilateral decision to detain and/or deport him without affording him a fair hearing nor a plausible explanation.
- b. A declaration that the petitioner's constitutional rights under Article 47 of *the Constitution* have been infringed by the 1st respondent.
- c. A declaration that the unilateral decision to deport the petitioner infringes on his right to property pursuant to Article 40 of *the Constitution*.
- d. An order of mandamus to compel the respondents to remove the petitioner's name from the list of Prohibited Immigrants.
- e. An order of compensation and reparation for the violation of the fundamental rights of the petitioner as provided for and guaranteed under *the Constitution*.
- f. An order of judicial review of certiorari do bring to this Court quashing the unilateral decision to deport the petitioner without according him a fair hearing.
- g. An order judicial review of prohibition do bring to this Court restraining the respondents from harassing, intimidating, threatening, detaining, and mistreating the petitioner during his stay here in Kenya.
- h. Costs of the Petition.
 - i. Any other order that this Court may deem fit and just in the circumstances.

Petitioner's Case

4. The petitioner is a Chinese national who has been living and working in Kenya as a Director at Wawanga (K) Trader Company Limited for the last 4 years. He states that throughout this period he has complied with every legal requirement concerning his residency and operation of his business in Kenya.
5. He asserts that on 7th July 2021, he became aware of the 2nd respondent's scheme in conjunction with his business rivals to unlawfully deport him without affording him the right to be heard.
6. For context, he depones that on 29th June 2021, he was picked from his house at Sunshine Garden Estate at Machakos County by 5 men who purported to be officers from the Director of Criminal Investigations Office attached to the Immigration office.
7. On the following day, the 2nd respondent wrote to the Embassy of the People's Republic of China seeking the removal of the petitioner from Kenya without issuing any reasons for the same.
8. The petitioner avers that on the fateful day, he was unlawfully and irregularly arrested and detained at Kilimani Police Station. He remained there from 29th June 2021 until 7th July 2021. Throughout this period he was not informed of his offence until his Advocate intervened.
9. The petitioner through his Counsel learnt on 2nd July 2021 that the claim was that, he had failed to settle Ksh.16,000,000 owed to one Ahmed Rashid Mohammed. He makes known that prior to his arrest, Ahmed Rashid Mohammed had issued him with a demand letter requiring he pays this sum.
10. In a dramatic turn of events, the petitioner's Counsel was on 7th July 2021, furnished with a Deportation Order dated 1st November 2019 as executed by the 2nd respondent. The petitioner asserts that just like his arrest and detention, he was not informed of the reason for this drastic action.



11. The petitioner depones that on the same day, the respondents took him to Jomo Kenyatta International Airport and incessantly urged him to purchase an air ticket and return to China as a normal passenger failure to which they would deport him as an illegal immigrant. He states that he refused to acquiesce to their demands. As a consequence, he was thereafter held in comunicado.
12. The petitioner in light of this, is apprehensive that unless this Court intervenes the respondents will illegally and unlawfully deport him without adhering to the dictates of natural justice and principles of fair hearing.
13. The petitioner urges that he stands to lose both socially and economically. He avers that as a resident he has a permanent home at Machakos County which he co-owns with his wife, Yashuang Ke. He also states that he is renowned businessman both locally and internationally trading in wholesale mosquito coil and diapers and thus stands to lose the businesses and investments that he has already established in Kenya.
14. The petitioner contends as a result that the respondents have violated Article 10(2), 25, 27, 40, 47, 49, 50, 129, 131(2)(a), 153(4)(a), 156(4)(a) & (6) of *the Constitution*. Moreover, the petitioner asserts that the 2nd respondent violated Section 43 of the *Kenya Citizenship and Immigration Act* with regard to the manner in which the Deportation Order was issued.
15. The petitioner further asserts that he primarily is grieved by the violation of his constitutional rights not the *Kenya Citizenship and Immigration Act*'s constitutionality.
16. Additionally, he avers that he does not fall under the category of the persons listed under Section 33(1) (a) to (u) of the *Kenya Citizenship and Immigration Act*. He notes that the Deportation Order was not approved by Parliament as required under Section 33(1) (v) of the Act.

1st and 2nd Respondents' Case

17. These respondent in rejoinder to the petition filed grounds of opposition dated 7th April 2022 on the basis that:
 - i. The provisions of *Kenya Citizenship and Immigration Act, Act No. 12 of 2011* enjoys the presumption of [its] constitutionality until it is substantively determined otherwise upon representations by the respondents.
 - ii. The *Kenya Citizenship and Immigration Act* No. 12 of 2011 is set to regulate the immigration status of foreign nationals and lack of compliance to the regulations by the petitioner has got nothing to do with the enforcement because it flows from non-compliance by the petitioner.
 - iii. Whilst executing the dictates of an Act of Parliament, or sections thereof, the officers charged with the said mandate are not supposed to interpret the law, theirs is to enforce the law just like parliament while making the said laws were exercising a mandate given to them by the people.
 - iv. The impeachment of an Act of Parliament, or a section thereof, on the basis of Article 24 of *the Constitution* requires full-blown responses from the respondents, and a hearing, in order to determine its rationale, justification, the policy justifications behind it, the ramifications of the same being interdicted and whether or not there exists other lesser restrictive ways of limiting the right(s) it seeks to limit. It is not possible to do this at the interlocutory stage.
 - v. Articles 2(4) and 24 of *the Constitution* shifts a heavy burden of proof to the respondent, to inter alia demonstrate that his arrest, handling and impugned deportation is: -



- a. reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors;
 - b. balanced in purpose i.e. it is not excessive and disproportionate;
 - c. the least restrictive means of achieving the intended purpose of the statute.
- vi. The foregoing can only be done after a full hearing of both sides of the story in this petition; and not at the interlocutory stage.
 - vii. It is in the public interest that all foreign nationals that choose Kenya as a home and trade hub adhere to and obey all the Laws of the Land including but not limited to *Kenya Citizenship and Immigration Act*, 2011.
 - viii. There being no charge sheet or charges being preferred against the petitioner after his alleged arrest, there is no cause of action against the respondents herein and therefore no prima facie case, with a high chance of succeeding, that has been established by the petitioner to warrant confirmation of the Orders granted on 14th July, 2021.
 - ix. From the foregoing, and in the public interest, the respondents urge and pray that the Orders granted on 14th July, 2021 be vacated and/or set aside and the confirmation thereof be declined and afford the respondents a right to be heard for elucidation of pertinent issues raised in court by a litigant who has approached court with unclean hands.

Petitioner's Submissions

18. The petitioner through Mwenda Royford and Company Advocates did not file submissions. Instead Counsel filed a list of authorities dated 18th October 2024 in support of his case.
19. Focusing on the issuance of the Deportation Order, Counsel submitted that the heart of a plethora of cases on this topic affirm a number of principles in nutshell. The principles are:
 - i. Procedural Fairness: Deportation orders must adhere to principles of natural justice, including the right to a fair hearing and adequate notice.
 - ii. Specific Reasons Required: Deportation orders must be based on clear, specific, and substantiated reasons. General allegations without evidence are insufficient.
 - iii. Judicial Review: The High Court maintains the authority to review deportation orders, ensuring compliance with constitutional and legal standards.
20. To support this summation, Counsel relied in a number of authorities being: Republic V Minister Of Home Affairs & Another Ex Parte Sitamze [2008] eKLR, Omar Faruk Abubakar V Cabinet Secretary, Ministry Of Interior & Coordination Of National Government & 2 Others [2017] eKLR, George Okuto Olale V Director Of Immigration Services & 2 Others [2020] eKLR, Republic V Director Of Immigration Services & Another Ex Parte Dnt [2021] eKLR, Mohammed Arafat Alwefao V Director Of Immigration & Another [2019] eKLR among others.

Respondents' Submissions

21. State Counsel, Macheso Dan Weche filed submissions dated 18th July 2022 and outlined the issues for determination as: whether the petition offends the provisions of Section 107 of the *Evidence Act*; whether the petitioner demonstrated in precision that the respondents' actions amount to a violation



- of fundamental rights and freedoms; whether the petition amounts to a constitutional matter and whether the respondents conduct amounts to an infringement of the petitioner's constitutional rights.
22. On the first issue, Counsel submitted that the petitioner had failed to demonstrate how his constitutional rights were violated by the respondents. Reliance was placed in *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR where it was held that:
- “The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues.”
23. On the second issue, Counsel relying in *Anarita Karimi Nieri v R (1976-1980)* KLR submitted that the petitioner is required to demonstrate with precision how the respondents' actions and conduct constitute a violation of fundamental rights. It was stressed that the petitioner has the burden to show that the impugned arrest, detention and impugned deportation was not justifiable and not in accordance with the law. In Counsel's view the petitioner had not proved this violation.
24. Reliance was placed in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR of [Evidence Act](#) where the Supreme Court held as follows:
- “Article 22 of [the Constitution](#) of Kenya gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened. A party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance.”
25. Counsel submitting on the third issue submitted that the petition does not raise a constitutional matter. This is because as a constitutional matter is one that confronts the various protections outlined in [the Constitution](#) not statutory violations as raised herein. Reliance was placed in *Jennifer Shamalla v. Law Society of Kenya & 15 Others (2017)* eKLR where it was held that:
- “Courts will not normally consider a constitutional question unless the existence of a remedy is dependent on it. It is an established practice that where a matter can be disposed of without recourse to [the constitution](#), [the constitution](#) should not be involved at all.”
26. Comparable reliance was placed in *Otoo Margare Kanini & 16 others v The Attorney General & 4 others (2022)* eKLR, *Renita Choda v Kirit Kapur Rajput No. E406 of 2020 (unreported)*, *Minister of Safety & Security vs. Luiters, (2007)* eKLR and *Turkana County Government & 20 Others vs. Attorney General & Others (2016)* eKLR.
27. On the last issue, Counsel was certain that the petitioner had not demonstrated how the respondents' conduct constitutes violation of fundamental rights and freedoms. More so, since Section 43 of the [Kenya Citizenship and Immigration Act](#) grants the 2nd respondent the power to remove a person from Kenya if their existence herein is unlawful. This mandate is also provided for under Section 33 of the Act. As such, it was argued that the respondents in performing their lawful mandates cannot be said to be in violation of a person's constitutional rights.
28. Relying on the petitioner's annexure marked “B” in his supporting affidavit, Counsel submitted that it was clear that the petitioner did not have a valid work permit as the one that had been issued was valid for only two years. It was argued that Section 49 of the Act provides that one is not permitted to stay in Kenya when their work permit is expired. It was noted however that the petitioner remained in the country and continued conducting business unlawfully. Counsel additionally underscored that the right to property is not an absolute right.



29. In sum, Counsel submitted that it is in public interest that all foreign nationals adhere and abide by all the laws. It was argued that the deportation was founded on reasonable and probable cause and was not actuated by any malice. Considering this, Counsel submitted that public interest tilts in the favour of the respondents in that the petitioner lacks proper documentation to stay in the country.

Analysis and Determination

30. It is my humble view that the issues that arise for determination in this matter are:
- i. Whether the petitioner’s constitutional rights were violated by the respondents in the circumstances of this case.
 - ii. Whether the petitioner is entitled to the relief sought.
31. A sovereign state has the authority to exercise its territorial control over entry, residency, and departure from its territory.
32. However, this power must be exercised in conformity with international and national laws that provide for the lawful expulsion of foreign nationals from states.

Article 13 of the International Covenant on Civil and Political Rights states as follows:

“An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against this expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

33. Article 12(4) of the African Charter on Human and Peoples’ Rights provides that:
- A non-national legally admitted in a territory of a State party to the Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
34. The *Kenya Citizenship and Immigration Act* under Section 2 of the Act defines deportation as:
- The action or procedure aimed at causing an illegal foreign national to leave the country either voluntarily or compulsorily, or under detention in terms of this Act.

35. Section 43 of the Act provides as follows:

Power to remove persons unlawfully present in Kenya

1. The Cabinet Secretary may make an order in writing, directing that any person whose presence in Kenya was, immediately before the making of that order, unlawful under this Act or in respect of whom a recommendation has been made to him or her under section 26A of the *Penal Code* (Cap. 63), shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.
2. A person against whom an order has been made under this section shall—
 - a. be returned to the place where he originated from, or with the approval of the Cabinet Secretary, to a place in the country of habitual residence, permanent residence or citizenship, or to any place to which he consents to be taken if the competent authorities or government of that place consents to admit him or her to the country; or



- b. if the cabinet secretary so directs, be kept and remain in police custody, prison or immigration holding facility or until his departure from Kenya, and while so kept is deemed to be in lawful custody whether or not he has commenced any legal proceedings in court challenging the Tribunal's decision until the suit is finally disposed of.
 - (3) Subject to this section, an order under this section shall be carried out in such manner as the Cabinet Secretary may direct, subject to *the Constitution* and related laws.
36. Accordingly, Section 49 of the Act grants the 2nd respondent and its officers the following power:
Power of arrest and search of persons
 1. Within twenty-four hours after a permanent resident or a foreign national is taken into detention, or without delay afterward, the arresting officer of the Service shall produce the person detained before a judicial officer to review the reasons for the continued detention.
 2. An immigration officer or a police officer who has reasonable cause to believe that a person has committed an offence under this Act, or is unlawfully present in Kenya, may, if it appears to him to be necessary to do so in order to ensure that the purposes of this Act are not defeated, arrest that person without warrant subject to the Bill of Rights; and the Criminal Procedures as if police officer include a reference to immigration officer.
 3. At least once during the seven days following the review under subsection (1), and at least once during each thirty day period following each previous review, the Service shall produce the detained person before a judicial officer to review the reasons for continued detention.
 4. A person other than a citizen of Kenya who, having been ordered to be deported from any country, enters Kenya on his way to his final destination, may be arrested without warrant by an immigration officer or a police officer and may be detained in prison or in police custody or immigration holding facility pending the making of arrangements for his departure from Kenya, and shall be deemed to be in lawful custody while so detained and such person needs to be taken to court within twenty four hours.
 5. The Court shall not order the release of a permanent resident or a foreign national unless it is satisfied that the permanent resident or foreign national shall present himself on being required to do so by an immigration officer or a police officer and taking into account the following factors—
 - a. whether he is a danger to the public and whether or not he is carrying or conveying any documents;
 - b. whether he is likely to appear for examination or an admissibility hearing or a hearing regarding his removal from Kenya or a hearing to determine whether he should be permitted to remain in Kenya or whether there are pending proceedings that could lead to the making of a removal order;
 - c. where the Cabinet Secretary is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on the grounds of security or for violating human or international rights;
 - d. where the Cabinet Secretary is of the opinion that the identity of the foreign national has not been, but may be, established and have not reasonably cooperated with the Cabinet Secretary by providing relevant information for the purposes of establishing



his or her identity or the Cabinet Secretary is making reasonable efforts to establish his or her identity.

6. Notwithstanding any provisions of this Act, all persons against who a deportation order has been issued shall be removed from Kenya within a period of ninety days from the day such final removal order is made or after appeal and further detention shall be extended by a court of law for not more than thirty days; or
 7. The court ordering release of a permanent resident or a foreign national in (d) above may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.
 8. An immigration officer may, by summons in writing, require any person other than a citizen of Kenya to attend at his office and to furnish to that officer such information, documents and other particulars as are necessary for the purposes of determining whether that person should be permitted to remain in Kenya.
 9. An immigration officer may by summons, in writing, require any citizen of Kenya to attend at his office, for the purposes of determining whether that person has committed an offence under this Act, or to provide that officer with necessary information, documents and other particulars as may be required.
 10. An immigration officer may enter into recognizance any person suspected of having committed an offence under this Act.
37. It is trite law that even where a public body or officer enjoys discretion to make decisions they have a duty to act fairly and the task of the for examining of circumstances complained of to determine whether public power was exercised in accordance with the laid down values and principles or is in violation of rights.
38. This principle was explained by the Court in *Republic v Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 others* [2014] KEHC 8130 (KLR) as follows:

“However, it is trite law that where a statute gives a statutory or public body discretion, that discretion ought to be properly exercised. In *Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others* Nairobi HCMA No. 743 of 2006 [2007] KLR 240 it was held as follows:

“On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are --- essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his landregardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the



fulfillment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them... “

It is now trite that there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion. This Court is empowered to interfere with the exercise of discretion in the following situations:

- (1) where there is an abuse of discretion;
- (2) where the decision-maker exercises discretion for an improper purpose;
- (3) where the decision-maker is in breach of the duty to act fairly;
- (4) where the decision-maker has failed to exercise statutory discretion reasonably;
- (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;
- (6) where the decision-maker fetters the discretion given;
- (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See *Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323*.

39. *In Miguna Miguna v Fred Okengo Matiang’i Cabinet Secretary, Ministry of Interior and Coordination of National Government & 6 others; Kenya National Commission on Human Rights (Interested Party) [2018] KEHC 1922 (KLR)* in considering the application of Section 43 of the *Kenya Citizenship and Immigration Act* observed as follows:

“ 84. The other provision that the 1st and 2nd Respondents used to justify their actions against the Petitioner is Section 43(1) of the Act which is for removing persons who are unlawfully in Kenya. The Section authorizes the Cabinet Secretary to make an order in writing, directing that a person whose presence in Kenya was, immediately before the making of that order, “unlawful” under the Act or in respect of whom a recommendation has been made to him or her under Section 26A of the *Penal Code*, shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order....

86. Even assuming that the Petitioner deserved to be removed from Kenya, he had to be subjected to the provision of the Act and Articles 47(1) and 50(1) of *the Constitution* and given the right to fair administrative action and fair hearing as amplified by Section 21 of the Act. So much so that whatever the Respondents were doing had to comply with constitutional standards of procedural fairness and fair hearing. The 1st and 2nd Respondents could not just decide to suspend the Petitioner’s passport and declare him a prohibited immigrant without subjecting him to any known form of due process. Their



actions were not in accord with the constitution and the law thus violated the rule of law.

93. In this regard, it did not matter whether the Petitioner was a Kenyan citizen or not. He was entitled to due process of the law as an incidence of the rule of law. That is what the Court of Appeal stated in Moses Tengenya Omweno v Attorney General [2018] eKLR that one is entitled to due process irrespective of citizenship.”

40. Further, in Oumarou Moumouni Ali v Director General Kenya Citizens and Foreign Nationals Management Services, Cabinet Secretary Interior Coordination of National Government, Inspector General & Attorney General [2020] KEHC 9787 (KLR) the Court citing with approval the decision by Justice Ojwang in the unreported case of Leonard Sitamaze v Minister of Home Affairs & 2 others frowned upon the State’s contention that the decision by the Minister to deport was unfettered and immune from Court’s review allegedly because the decision was made in the interest of national security and that there was no obligation placed on the Minister to consider renewal of the permit. The Court held:

“

“26. In the case of Leonard Sitamze vs. The Minister for Home Affairs & 2 Others, HC. Misc. Civil Application No. 330 of 2004 ((unreported) Justice Ojwang’ (as he then was), in dismissing allegations that the state actions against the applicant were justified on grounds of national security and in quashing the deportation order and prohibiting the applicant’s deportation, observed as follows:-

“Mr. Kaka for the Respondents opposed the application, for the reason that the Minister was not minded to approve the Applicant’s application for the renewal of the permit to stay in the country, Counsel restated the content of the deposition by Damaris Mboya of the Immigration Department (dated 22nd April 2004), that in considering the Applicant’s case for renewal of the permit, some classified information had been received that the Applicant was a threat to national security. I have to note that not much information is given about this threat, and neither the formulation of the relevant affidavit on the question, nor the manner in which counsel communicated this claim before the Court, appeared business-like, done in genuine course of duty or indeed carried any conviction at all. The model of presentation of this charge that the Applicant was a danger to national security was essentially casual, and the Court has no reason to believe it. So, in effect, Mr. Kaka is left with bald contentions, that the applicant must be restricted and deported just because the Minister had by an instrument declared him to be a prohibited immigrant by virtue of Section 3 of the Immigration Act, and then proceeded under Section 8 of the same Act, to make a declaration that the Applicant as a prohibited immigrant be placed in Police custody awaiting deportation. Mr. Kaka then proceeded to argue that the Immigration Act has no place for a hearing to persons being restricted and deported, and that Parliament had not given the Minister any leeway for any hearing to be accorded to such persons...”

The good judge went on to state as follows:



...It is clear, in my interpretation of the law, that I have preferred the more expansive approach which requires decisions by the Executive, which expose the individual to loss of his fundamental rights, to be subjected to the test of legality as superintended and enforced by the High Court... I must take judicial notice that the precious ingenuity of the common law and its jurisprudence and philosophy, where matters of public law are concerned, is that good governance has judicialism as its partner, and that there are to be no decisions taken by public bodies which derogate from the private rights of individuals where the views of such individuals are entirely disregarded. The richness of the safeguards of a written Constitution, such as that of Kenya, is assured by the philosophy and practices of the common law as maintained by the Judiciary....

The learned judge then went on to hold as follows:

“I would hold that it is contrary to law that the Minister should have the Applicant, a family man living in Kenya as his domicile, doing normal business and possessed of relevant certificates of legitimate presence, arrested and detained without any hearing at all, deprived of his own properties, extracted from his family environment, detained for long, and then deported. Such actions are tell-tale instances of violation of the fundamental rights of the individual as set out in detail in Chapter V of *the Constitution*. They also bespeak a failure to observe human rights obligations which Kenya assumed under international law.” (Emphasis mine).

41. Furthermore, in Republic v Minister of State for Immigration and Registration of Persons Ex-Parte C.O. [2013] KEHC 5766 (KLR) the Court opined that:

“To hold that the Minister is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of *the Constitution* are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim. It must always be remembered that under Article 25 of *the Constitution* one of the rights and fundamental freedoms which cannot be limited is the right to a fair trial. Accordingly, the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion. This is in tandem with the holding in *Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43* that judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.”

42. Having thus reviewed the authorities, it is crystal clear that Courts in this Country have been steadfast in affirming that administrative decision taken by public authorities including in matters of deportation cannot derogate from the Constitutional safeguard enshrined by Article 47 which guarantees fair administrative action that is lawful, reasonable and procedurally fair.
43. The question thus becomes, are actions of the Respondents against the Petitioner reasonable, lawful and procedurally fair?
44. According to the deposition of the Petitioner, he was picked from his home at Sunshine Gardens in Machakos County by five men who introduced themselves as Directorate of Criminal Investigations Officers attached to immigration department on 29th June, 2021 and detained at Kilimani Police



Station. He was not informed he was being detained because he had not paid a debt he owed one Ahmed Rashid Ahmed Kshs. 16,000,000. On 7th July, 2021; the Petitioner's Advocate was furnished with Deportation declaration dated 1st November, 2019 signed by the Cabinet Secretary Interior and Co-ordination of National Government of which the Petitioner was not privy and only came to his attention during the time of his confinement. The Respondents then started cajoling him to purchase as air ticket and travel to China as a normal passenger or else he be deported to China as an illegal immigrant. On the 30th June, 2021; the 1st respondent had written to the Embassy of the People's Republic of China indicating the intention to have him removed.

45. Despite the damning allegations, the Respondents did not file a replying affidavit to rebut these allegations of fact made by the Petitioner. Instead, Counsel for the Respondent Mr. Macheso Weche referred to the annexure in the Petitioner's affidavit and stated that his work permit serial number 7177771 had expired having been issued on 5th January, 2018 for a validity period of 2 years as per Section 40 of the *Kenya Citizenship and Immigration Act*. Counsel thus used this as the basis of arguing that the petitioner lacked a valid work permit and that is why a recommendation to the Cabinet Secretary that the Petitioner was not a lawful immigrant was made and was thus a subject of deportation pursuant to Section 33 of *Kenya Citizenship and Immigration Act*.
46. This is evidence from the bar. No such evidence was presented by the Respondents to explain why the petitioner was being considered for deportation. There was no replying affidavit to back the contention by Mr. Weche. If indeed the Petitioner was being removed because of his expired work permit, why was the Petitioner not confronted with that information first hand. Why bring up the matter the factual matter during submissions yet the Respondents were all along aware of the Petitioner's contention in this petition. Why not give the Petitioner a chance to confront or explain the position by the respondent. The analogy by Mr. Weche is a belated afterthought to justify a flawed decision.
47. In my view, once the Petitioner swore asserting that the decision to remove him was unjustified, the evidential burden shifted to the Respondents to displace this assertion by providing evidence to the contrary so that the Court can examine the entirety of the evidence by both sides and decide whether the Petitioner had discharged the legal burden of proving his case on a balance of probability. That is what Section 107 entails, it provides:
 1. Burden of proof
 - a. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - b. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 108. Incidence of burden
The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
 109. Proof of particular fact
The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
48. In the present case, considering that the Respondents did not tender any evidence to counter the allegations of fact put forth by the Petitioner, it means that they did not discharge their evidential burden and thus prima facie, the allegations of fact by the Petitioner went unchallenged.



49. This principle was discussed in *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] KEHC 8440 (KLR) as follows:

“

“ 15. ... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya)...

16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

17. The Court of Appeal in *Jennifer Nyambura Kamau Humphrey Mbaka Nandi* [2013] eKLR considered the applicability of these provisions as follows;

We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

50. Without any evidence by the Respondents to counter or justify their action against the allegations made against them by the Petitioner concerning the decision to deport him without giving him a reason for the decision or affording him a chance to explain anything, this court finds that the petitioner’s right to fair administrative action under Article 47 was violated.

51. In addition, arresting and detaining the petitioner without informing him of the reason for his detention or arrest, detaining him past the twenty- four hour period was also a violation of his rights and fundamental freedom under Article 49 (1) (a) & (f) (i). Further, there was no evidence that the said arrest by the respondents was founded on any reasonable or just cause hence was a violation of Article 29 (1) and a violation of his right to dignity under Article 28 of *the Constitution*.

52. These findings entitle the Petitioner to reliefs for violations of his constitutionally protected rights.

53. In arriving at the appropriate reliefs, the case of *Charles Muturi Macharia & 6 Others v Standard-Group & 4 Others* (SC Petition No.13 (E015) of 2022) in which the Supreme Court guided on the



approach to be taken in deciding the reliefs to award in constitutional matters is relevant. The Court observed as follows:

- “(91) By the provisions of Articles 22 and 23 of *the Constitution*, the High Court has the power and authority to enforce and uphold the Bill of Rights in claims of infringements. In proceedings brought by any person claiming that a right or fundamental freedom has been denied, violated or infringed, or is threatened, the court may, under Article 23 grant appropriate relief, including:
- “(a) a declaration of rights
 - (b) an injunction
 - (c) a conservatory order
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24.
 - (e) an order for compensation
 - (f) an order of judicial review.”

- (92) This Court in the case of *Gitobu Imanyara & 2 Others v. Attorney General*, SC Petition No. 15 of 2017, described Article 23 as “the launching pad of any analysis on remedies for Constitutional violations”. This statement has repeatedly been made in other decisions like *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*; *Initiative for Strategic Litigation in Africa (Amicus Curiae)*, SC Petition No. 3 of 2018; [2021] KESC 34 (KLR) and others. As a launching pad, it is acknowledged that the list of six remedies in Article 23(3) is not closed; that the court can grant any other appropriate relief not included in the list; that whether or not to grant a constitutional relief is an act of judicial discretion which must be exercised upon known legal principles and not arbitrarily, whimsically or capriciously.”

...

- “[94] To answer directly the question posed by this issue, under common law principles, it is settled that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, like in tortious claims. In situations like those, compensation for personal loss depends on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in Article 23. While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In deserving cases, the redress may be in the form of an award of damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.



(95) In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim's constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim.

Therefore, once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present evidence of any loss or damage suffered as a result of the violation. For these reasons, it can be said that the approach in awarding damages or compensation in constitutional rights violation cases is different from that in tortious claims....”

54. I thus award the Petitioner the following reliefs:

- a. A declaration is hereby issued that by arresting and detaining the Petitioner without just cause, the Respondents violated the Petitioner's constitutional rights under Article 49 (1) (a) & f(i), 29 (1) and 28 of *the Constitution*.
- b. A declaration is hereby issued that the Respondents infringed the petitioner's right to fair administrative action under Article 47 of *the Constitution* by commencing unprocedural, unlawful and arbitrary deportation process against the petitioner.
- c. An order of certiorari is hereby issued quashing the decision to deport the Petitioner in violation of his Constitutional rights.
- d. An order of compensation being that the Respondents shall pay a sum of Kshs.800,000/- (Eight Hundred Thousand) to the Petitioner for violation of the Petitioner's constitutional rights.
- e. Costs of this Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF MARCH, 2025.

.....

L N MUGAMBI

JUDGE

