



**Kaiti v OCS Kakamega Police Station & another (Constitutional Petition
E004 of 2024) [2025] KEHC 10610 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10610 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CONSTITUTIONAL PETITION E004 OF 2024**

SC CHIRCHIR, J

JULY 17, 2025

IN THE MATTER OF ARTICLES 6,10,22,23,27,165,185&191 OF THE CONSTITUTION

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS UNDER ARTILCES 27,40,46,&47 OF THE CONSTITUTION**

AND

IN THE MATTER OF KAKAMEGA COUNTY ALCOHOLIC DRINKS CONTROL ACT, 2014

AND

IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL ACT NO. 4 OF 2010

BETWEEN

CAROL WETANGULA KAITI PETITIONER

AND

OCS KAKAMEGA POLICE STATION 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

JUDGMENT

1. The petitioner's petition dated 23rd July,2024 is premised on Articles 6,10,22,23, 27, 40, 46 ,47, 165,176, 185 and 191 of *the Constitution* of Kenya, the Kakamega County *Alcoholic Drinks Control Act*, 2014 and *Alcoholic Drinks Control Act* No.4 of 2010. The petition is supported by the affidavit of the petitioner.
2. The petitioner seeks for the following reliefs:



- a. A declaration that the action of the respondents to charge the petitioner herein with the offence of operating a bar in premises situated less than 300 meters from a learning institution for persons under the age of 18 years is unconstitutional and contravention of Article 176 (1), (2), 185 (1) (2) and 191 (4) of *the Constitution*, Part 2 of the Fourth Schedule to *the Constitution* of Kenya and Paragraph 4 (c) and Section 14 (1) (c) of the Kakamega County *Alcoholic Drinks Control Act*, 2014
- b. An order of certiorari be issued calling, removing, delivering up to this honorable court and quashing or revoking the decision to charge and prosecute the petitioner in Kakamega Chief Magistrate Court Criminal Case No. E761 of 2024.
- c. An order of prohibition be issued prohibiting the respondents and the Chief Magistrate Court Kakamega from prosecuting, trying, hearing or taking any further proceedings whatsoever in Kakamega Chief Magistrate Court Criminal Case No. E761 of 2024.
- d. The respondents be directed to bear costs of this petition.

Petitioner's Case

3. The petitioner states that, on 16th April 2024, the 1st respondent raided her business premises, arrested and detained her at Kakamega Police Station. She was thereafter charged with the offence of operating a bar in premises situated less than 300 meters from a learning institution, for persons under the age of 18 years contrary to section 12 (1) (c) as read with section 62 of the Alcohol drinks Control *Act No.4 of 2010* (Hereafter The National Legislation).
4. The petitioner further states that section 14(1) (c) of the Kakamega County *Alcoholic Drinks control Act* 2014 (hereafter referred to as The county legislation) allows the putting up of the Alcoholic drinks business premises at least 100 meters away from a learning institution; that the county Government of Kakamega inspected her premises and having found them compliant with the county Government Act ,issued her a licence to operate the bar.
5. The Petitioner states that the raiding of her premises contravened Article 185(1) and (2) and 191 of *the constitution* and the county Government Act; that it was an affront to the petitioner's legitimate expectation to the equal protection of the law , the right to own property under Article 41 as well as the right to fair Administrative action.

Petitioner's Submissions.

6. In her submissions dated 19th November, 2024 the petitioner addressed two issues;- Firstly, whether Section 14 (1) (c) of the County Government Act is in conflict with the provisions of Section 12 (1) (c) as read with section 62 of the *Alcoholic Drinks Control Act* No.4 of 2010.Secondly, whether Section 14 (1) (c) of the county legislation is inconsistent with *the Constitution* of Kenya and to what extent if any, and further whether it hinders economic development within the meaning of Article 174 (1) of *the Constitution*.
7. It is the petitioner's submission that the County legislation was passed in exercise of the legislative Authority of the Kakamega county Assembly, pursuant to Article 185(1) and (2) of *the constitution* and part 2 of the 4th schedule of *the constitution*; that the schedule at paragraph 4 (c) lists one of the functions of a county government as liquor licencing; that the function of liquor licencing is not a shared function with the National Government.



8. It is further submitted that pursuant to the provisions of the county legislation, the Directorate of Alcoholics control drinks of the county of Kakamega issued the petitioner the licence to operate the bar. It is pointed out that the distance from the nearest school is 175 metres; that the bar does not share a boundary with the school, is surrounded by a perimeter wall, and cannot be seen by the learners or locals.
9. While acknowledging that there is a conflict between section 12(1) of the National legislation and the County legislation, it is submitted that the provisions of the county legislation should prevail as there are no circumstances contemplated in clause 2 of Article 191 of *the constitution* to warrant the National legislation prevailing over the county legislation.
10. It is further submitted that section 2 of the County Act, 2014 has effectively provided for regulation on liquor licensing and there is no threat to national security or economic unity. Reliance was placed in the case of Meru Bar, Wines & Spirit Owners Self Help Group v County Government of Meru (2014) eKLR.
11. The respondents did not file any response, or submissions.

Analysis and determination

12. The following issues arise for determination:
 - a). whether Liquor licensing is a shared function and whether there is a conflict between the National legislation and the County legislation on the issue of delimitation of the distance of liquor licensed premises from a learning institution of minors.
 - b). whether section 14(1) of the National legislation is inconsistent with Article 174 (1) of *the constitution*.

Whether there is a conflict between the National legislation and the County legislation

13. At the heart of this petition is the apparent conflict between the National laws and county government legislation on matters apparently falling under concurrent jurisdiction of both levels of Government. In the present case, the apparent conflict is between the *Alcoholic drinks control Act*, No. 4 of 2010 which is the National legislation and the Kakamega county *Alcoholic Drinks Control Act*, which is a county legislation. Both statutes were enacted to control the manufacture, sale and licensing of Alcoholic drinks, at National level, and County level, respectively.
14. However, first, the question of whether licensing of Liquor premises is a shared function between the two levels of government needs to be addressed.
15. It is the petitioner's case that liquor licensing is the exclusive mandate of the County government; that there exist no circumstances contemplated under clause 2 of Article 191 of *the constitution* as the county legislation has effectively provided for regulation on liquor licensing; that there is no threat to National security or economic unity or any of the other circumstances set out in clause 2 as aforesaid. It is further stated that the county Government of Kakamega has not complained about the location of the premises.
16. I have looked at the objectives of the National legislation. Section 3 states: The object and purpose of this Act is to provide for the control of the production, sale, and use of alcoholic drinks, in order to –
 - (a) protect the health of the individual in the light of the dangers of excessive consumption of the alcoholic drinks;



- (b) protect the consumers of alcoholic drinks from misleading or deceptive inducements and inform them of the risks of excessive consumption of alcoholic drinks;
- (c) protect the health of persons under the age of eighteen years by preventing their access to alcoholic drinks;
- (d) inform and educate the public on the harmful health, economic and social consequences of the consumption of alcoholic drinks;
- (e) adopt and implement effective measures to eliminate illicit trade in alcohol including smuggling, illicit manufacturing and counterfeiting;
- (f) promote and provide for treatment and rehabilitation programmes for those addicted or dependent on alcoholic drinks; and
- (g) promote research and dissemination of information drink consumption, in particular the health risks that may arise therefrom.”

17. Though licensing is not mentioned in the objects of the National legislation, the above section as well as the entire part III of the legislation carries elaborate provisions on licensing , including the licensing of the premises where alcoholic drinks are sold. It is therefore correct to conclude that both legislations has provisions on licensing.

18. The next question then is whether there is a conflict between the two legislation in regard to the issue before this court.

19. Section 12 the National legislation provides as follows:

“(1)...The District Committee shall not grant a new licence for the sale of an alcoholic drink to be consumed on the premises unless the District Committee is satisfied—

- (a)
- (b)
- ;
- (c) that the premises in respect of which the application is made are located at least three hundred metres from any nursery, primary, secondary or other learning institutions for persons under the age of eighteen years.

20. On the other hand Section 14 (1)(c) of the county legislation states:

(1) The Sub-county Committee shall not grant a new licence for the sale of an alcoholic drink to be consumed on the premises unless the Sub-county committee is satisfied—

- (a)
- (b)
- (c) that the premises in respect of which the application is made are located at least one hundred metres from any nursery, primary, secondary or other learning institutions for persons under the age of eighteen years.



21. Thus, whereas the National legislation requires that the liquor licensed premises be located at least 300 metres away from a learning institutions of learners under 18 years the county legislation provides for 100 metres. It is therefore evident that there is a conflict between the two statutes .
22. Article 191 of the Constitutions provides guidelines on the Application of either law, whenever a conflict arises between the National legislation and the County legislation. The Article provides as follows:

“ Conflict of laws

191. This Article applies to conflicts between national and county legislation in
- (1) respect of matters falling within the concurrent jurisdiction of both levels of government.
 - (2) National legislation prevails over county legislation if—
 - (a) the national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or
 - (b) the national legislation is aimed at preventing unreasonable action by a county that—
 - (i) is prejudicial to the economic, health or security interests of Kenya or another county; or
 - (ii) impedes the implementation of national economic policy.
 - (3) The following are the conditions referred to in clause (2)(a)—
 - (a) the national legislation provides for a matter that cannot be regulated effectively by legislation enacted by the individual counties;
 - (b) the national legislation provides for a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—
 - (i) norms and standards; or
 - (ii) national policies; or
 - (c) the national legislation is necessary for—
 - (i) the maintenance of national security;
 - (ii) the maintenance of economic unity;
 - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
 - (iv) the promotion of economic activities across county boundaries;
 - (v) the promotion of equal opportunity or equal access to government services; or



- (vi) the protection of the environment.
- (4) County legislation prevails over national legislation if neither of the circumstances contemplated in clause (2) apply.
 - (5) In considering an apparent conflict between legislation of different levels of government, a court shall prefer a reasonable interpretation of the legislation that avoids a conflict to an alternative interpretation that results in conflict.
 - (6) A decision by a court that a provision of legislation of one level of government prevails over a provision of legislation of another level of government does not invalidate the other provision, but the other provision is inoperative to the extent of the inconsistency.
23. The petitioner has argued that clause 2 of Article 191 should not apply as the circumstances contemplated under the clause are non-existent in this case. I disagree with the petitioner's observation in this regard and this is why:- Under clause (2) (b) (i) of Article 191(supra), National legislation prevails where the said National legislation is aimed at preventing unreasonable action by County Government that " is prejudicial to the economic, health or security, interest of Kenya or another country" .
 24. In regard to the above I have considered the objects of the National legislation which include the protection of the health of persons under the age of eighteen years by preventing their access to alcoholic drinks (section 3(c)) There is no gainsaying that the delimitation of liquor premises in relation to learning institutions by minors ,is about the health and welfare of the children.
 25. Further it is the constitutional duty of the National Government under Article 43 of *the constitution* to guarantee inter alia the right to attainable standard of health to its citizenry .In this regard , I adopt the reasoning of Musinga J, who, while addressing the 300 metres Rule under the provisions of Section 12(c) of the National Legislation ,in *Murang'a Bar operators & Ano. v minister for state for provincial administration and internal security & 2 others* [2011] KEHC 4242 (KLR) stated :”The State has Constitutional obligation to take legislative and policy measures to ensure that there is progressive realization of each and every right guaranteed under Article 43 of *the Constitution* and that includes the right to healthcare, accessible and adequate housing, reasonable standard of sanitation, freedom from hunger, adequate food of acceptable quality, clean and safe water, social security and education. The State is also constitutionally mandated to address the needs of vulnerable groups within society and that includes women, children and the youth. Section 12(c) of the Act states that the premises in respect of which an application for liquor licence is made ought to be at least three hundred metres from any nursery, primary, secondary or other learning institutions for persons under the age of eighteen years. Such a person is a child as per the definition of “child” under Article 260 of *the Constitution*.”
 23. To the extent that the kakamega county *Alcoholic Drinks control Act* 2014 contradicts section 12(1) (c) of the *Alcoholic drinks control Act* 2012 , on matters licensing of Liquor premises , then on the basis of Article 191 clause 2(b) (i) of *the constitution* the later legislation prevails. Consequently section 14(1) (c) of the former Act is inoperative to the extent of the said inconsistency.
 24. The petitioner has further argued that the attempt to prosecute her is a violation to her rights to property protected by Article 40 of *the constitution*. However in the case of *Kaaniru v Meru County Government & 4 others* [2022] KEHC 16715 (KLR) the Court held that: “..... the public interest consideration evident in the statutory provisions of section 12 of the national *Alcoholic Drinks Control Act* for the avoidance of interference and adverse impact on education of children is a reasonable



limitation on any private rights to property through the business of alcoholic drinks. The object of the Act in keeping the schooling environment clean from all manner of disruption and distraction that may be engendered for the students, teachers and staff of the educational institutions is an obvious overriding interest against the bar owners' right to property or profit. With respect, the public interest embodied in the provision of the Act as to the distances from educational institutions must prevail over the private profiteering of an individual Applicant.

25. The petitioner has further contended that the attempt to prosecute her on the alleged violation of the 300 metres Rule violates consumer Rights. However, no attempt has been made to demonstrate how the rule violate the this right. In the same vein, save to plead violation, the petitioner has not demonstrated how her intended prosecution has contravened Articles 176(1) (on establishment of county Governments).
26. On clause (2) of Article 176 which is on decentralization of functions, the issue before this court, in my view is not about decentralization, but rather, what is to happen when there is a clash between the National and county legislation as it pertains to a shared function(s) by the two levels of Governments.

Whether section 14 (c) of the National legislation is inconsistent with the constitution and whether it hinders development within the meaning of Article 174(f) of the constitution

23. Section 14 (c) of the National legislation states that any premises licensed to sell or otherwise deal with liquor must be located at least 300 metres from a nursery , primary or secondary school , as aforesaid. On the other hand Article 174(f) of the constitution provides one of the objects of devolution as : “ to promote social and economic development and the provision of the proximate , easily accessible services throughout Kenya”.
24. In addressing this issue , I can do no more than to adopt the reasoning of the Judge in Kaaniru’s case(supra) that “ the object of the Act in keeping the schooling environment free from the allure of Alcoholic drinks which is not just disruptive to learning but also endangers the health of the minors is an obvious overriding interest against any claim to economic or social development for the counties ,envisaged under Article 174(f) of the constitution.
25. Further to suggest that economic development must go on at the expense of the health of a human person make non - sense of the right to health under Article 43(1) , but also the Bill of rights under Article 19(2) which provides that the purpose of recognizing and protecting fundamental freedoms and rights is to preserve the dignity of individuals and realization of the potential of all human beings, Article 21(3) which places the duty on all state organs and public officers to address the needs of vulnerable groups within the society which group include children; Article 26(1) on the right to life , as the right to health has a direct effect on preservation of life, and finally, Article 53(2) which make the best interest of the child a paramount consideration by every state officer.
26. In view of what I have stated under paragraph 30 to 32 hereof , it is my finding that there is no inconsistency between section 14 (c) of the Alcoholic drinks control Act 2010 and Article 174(f) of the constitution.
23. In the end, I do not find any merit in the petition . It is hereby dismissed.
24. Right of Appeal: 30 days.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ISIOLO THIS 17TH DAY OF JULY 2025.

S. CHIRCHIR

JUDGE



In the presence of :

Godwin Luyundi- Court Assistant

Ms. Kagai for the 2nd Respondent.

