



Odero (Suing on his behalf and on behalf of New Life Prayer Center & Church) v Attorney General & 3 others (Petition E027 of 2023) [2024] KEHC 7311 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 7311 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E027 OF 2023**

**OA SEWE, J
MAY 23, 2024**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS
& FUNDAMENTAL FREEDOMS UNDER ARTICLES 2, 10, 22, 23,
27, 28, 32, 40, 47, 48 & 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF RULES 4, 10, 11, 13 & 20 OF THE CONSTITUTION
OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES 2013)**

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

BETWEEN

**EZEKIEL OMBOK ODERO (SUING ON HIS BEHALF AND ON BEHALF OF
NEW LIFE PRAYER CENTER & CHURCH) PETITIONER**

AND

ATTORNEY GENERAL 1ST RESPONDENT

INSPECTOR GENERAL POLICE 2ND RESPONDENT

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD
RESPONDENT**

COMMUNICATION AUTHORITY OF KENYA 4TH RESPONDENT

JUDGMENT

[1] The petitioner, Ezekiel Ombok Odero, described himself in his Petition dated 3rd May 2023 as the Chairperson of New Life Prayer Centre & Church, an evangelical ministry involved in spreading the



gospel internationally, as well as elimination of poverty and illiteracy through the establishment of international schools. He filed this Petition seeking various reliefs on the basis of allegations that his constitutional rights had been infringed or were threatened with violation.

- [2] The factual basis of his Petition was that he was arrested on 27th April 2023 and subsequently presented before Shanzu Law Courts in Miscellaneous Application No. E075 of 2023 on an application seeking his detention for a period of 30 days, pending the completion of investigations allegedly linking him to one Paul Mackenzie. He explained that the said Paul Mackenzie is associated with the many deaths and dead bodies retrieved from Shakahola forest.
- [3] He further averred that, soon after his arrest, the officers of the 2nd respondent unreasonably and without any written notice or notification, ordered the closure of the New Life Prayer Centre & Church for an indefinite period of time and for undisclosed reasons. He also stated that the said officers proceeded to evict and/or chase away worshippers from the Church based at Mavueni in Kilifi County, and warned against future assemblies or association within the church compound.
- [4] The petitioner also complained that, in the wake of his arrest, the CEO of the 4th respondent, Mr. Ezra Chiloba, sent to him a letter dated 27th April 2023 communicating the Authority's directive to immediately suspend and/or shut down the frequency enjoyed by World Evangelism TV; a modern day tool he was using to spread the gospel. In addition, he was apprehensive that his bank accounts and the bank accounts of the Church were on the verge of being subjected to freeze orders.
- [5] In the premises, the petitioner filed this Petition seeking the following reliefs:
 - (a) A declaration that the petitioner is entitled to fair administrative action that includes the right to be informed well in advance of the 4th respondent's intention to suspend the broadcasting licence for the New Life Communications Limited (World Evangelism TV) and as such the decision to suspend the broadcasting licence as communicated vide the letter dated 27th April 2023 is illegal and unconstitutional ab initio for violating Article 47 of the [Constitution](#) as read with Section 4 of the [Fair Administrative Action Act](#), 2015.
 - (b) An order of certiorari to bring to this Court for the purpose of quashing the 4th respondent's letter to the petitioner dated 27th April 2023 communicating the suspension of the broadcasting licence of the World Evangelism TV for having been made in violation of Article 47 of the [Constitution](#) as read with Section 4 of the Fair Administrative Actions Act.
 - (c) An order of mandamus compelling the 4th respondent to immediately reinstate the licence and frequency enjoyed by World Evangelism TV as used by New Life Prayer Centre & Church for its ministry.
 - (d) An order of prohibition restraining the respondents either by themselves or their servants from in any manner acting adversely to the interest of the petitioner by way of either freezing the bank accounts (whose particulars were supplied in the Petition).
 - (e) An order of prohibition restraining the respondents either by themselves or through their agents from closing or shutting down the ministry as run by the petitioner and registered under the [Societies Act](#) in the name of New Life Prayer Centre & Church or in any other manner acting in violation of the petitioner's rights under Articles 32, 33 and 36 of the [Constitution](#).
 - (f) An order of compensation for the violation of the petitioner's rights to dignity, freedom of religion, expression, association and his right to a fair administrative action as decreed under Article 28, 32, 33, 36 and 47 of the [Constitution](#).



- (g) Costs of the Petition.
- (h) Any other relief that the Court will be pleased to grant in the circumstances.
- [6] Alongside his Petition, the petitioner filed a Notice of Motion dated 3rd May 2023 under a Certificate of Urgency. That application was expressed to have been filed under Articles 2, 10, 22, 23, 25, 27, 47, 48, 49, 50 and 258 of the Constitution; Rules 4, 13, 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, as well as Section 4 of the Fair Administrative Action Act. He prayed for the following interlocutory orders:
- (a) In the interim and pending the hearing and determination of the Petition, the Court be pleased to issue a conservatory order temporarily staying the 4th respondent's communication to the petitioner dated 27th April 2023 suspending the operation of the television frequency operated by the petitioner under the name World Evangelism Television.
- (b) That in the interim and pending the hearing and determination of the Petition, the Court be pleased to issue a conservatory order restraining the respondents either by themselves or their agents from taking adverse action against the petitioner or New Life Prayer Centre & Church including the freezing of the church accounts to wit, Account Numbers 01128...100, 01128...101, 01128...102, 01128...103, 01128...104, 02100...100, 22100...100, 03100...100 all domiciled at Cooperative Bank and Account Numbers 60540...018, 60540...026, 60540...031, 60540...047, 60540...052, 60540...068 and 60540...073 all domiciled at NCBA Bank.
- (c) In the interim and pending the hearing and determination of the Petition, the Court be pleased to issue a conservatory order directing the respondents to refrain from interfering with the religious activities as conducted by the petitioner or prayer sessions in New Life Prayer Centre & Church and to allow the smooth running of the ministry.
- (d) Any other order that the Court will be pleased to issue in the circumstances.
- [7] The application was heard and determined on 15th May 2023. One of the findings of the Court was that, upon the filing of the 1st application, the 1st 2nd and 7th respondents made depositions denying that the petitioner's church was ever closed. Upon counsel for the 1st and 2nd respondents confirming this position to the Court on 9th May 2023, prayer [c] of the application dated 3rd May 2023 was granted purely for the avoidance of doubt. Similarly, prayer [g] of the Notice of Motion dated 3rd May 2023 was granted because it was unopposed. The other prayers were dismissed for having been overtaken by events or on account of the doctrine of exhaustion.
- [8] Following that ruling, the petitioner filed an Amended Petition on 29th May 2023. The effect of that amendment was that the CEO of the 4th respondent was removed from the proceedings and averments against him deleted, including the allegations in connection with the cancellation of the petitioner's TV licence. In the same vein, the petitioner deleted the averments pertaining to his apprehensions as to the freezing of his accounts and the bank accounts of New Life Prayer Centre and Church. In essence, the only prayers left, which are the subject of the Courts consideration in this Judgment are:
- (a) That an order of prohibition be issued prohibiting the respondents either by themselves or through their agents from closing or shutting down the ministry as run by the petitioner registered under the Societies Act in the name of New Life Prayer Centre & Church or in any other manner acting in violation of the petitioner's rights under Articles 32, 33 and 36 of the Constitution.



- (b) That an order of compensation be awarded to the petitioner for the violation of his rights to dignity, freedom of religion, expression, association and his right to a fair administrative action as decreed under Articles 28, 32, 33, 36 and 47 of the Constitution.
- (c) That costs of the Petition be provided for.
- (d) Any other relief that the Court is pleased to grant in the circumstances.
- [9] In support of the Amended Petition, the petitioner relied on his affidavit sworn on 29th May 2023. He averred that his ministry is well organized with an Administrator who champions good order and the welfare of staff. He deposed that the staff are accommodated within the church compound. He added that, other than providing accommodation for staff, he had put up temporary accommodation for visitors, along with restaurants and banking facilities for their convenience.
- [10] The petitioner reiterated that he was arrested on 27th April 2023 on allegations of committing murder, crimes against humanity, money laundering, fraud, child cruelty, among other offences. He further averred that contemporaneous to his arrest, the State issued a press briefing to all national media outlets stating that his church had been closed down and congregants evacuated from the church premises. His concern was that the public was thereby misinformed by the malicious pronouncements by the State. He contended that the media briefing amounted to violation or threats of violation of his fundamental freedom of worship and association.
- [11] The petitioner denied having committed any offence of the sort alleged against him, or any collusion with Paul Mackenzie. He therefore prayed that his Petition, as amended, be allowed and the orders sought by him granted.
- [12] The Amended Petition was opposed by the respondents. On behalf of the 1st, 2nd and 3rd respondents, a Replying Affidavit was filed herein by Chief Inspector Leonce Sombo on 9th September 2023. He averred that the 2nd respondent was undertaking investigations against the petitioner which involved multiple offences, including murder, aiding suicide, abduction, radicalization, fraud, money laundering and for being accessories before or after the fact of crime. He added that they had received credible information that several deaths occurred within the New Life Prayer Centre and Church and had been reported to Kilifi Police Station, lending credence to the allegations they had received.
- [13] CI Sombo further deposed that the investigations extended to the association between the petitioner, the New Life Church & Centre and Paul Mackenzie and the bodies recovered in the 800 acres of land at Shakahola. He added that, due to the complexity of the investigations and to avoid interference by the petitioner, the 2nd respondent applied for and obtained orders for the detention of the petitioner pending investigations. He annexed a copy of their application and the ruling delivered in Shanzu Miscellaneous Application No. E075 of 2023 in support of his assertion.
- [14] It was therefore the averment of the 2nd, 3rd and 4th respondents that, although there were police officers deployed at New Life Prayer Centre, their role was to secure the church as a scene of crime and ensure the integrity of the investigation process. They refuted the petitioner's allegations that the intention was to evacuate the church or interfere with the petitioner's freedom of worship or association. They denied having violated the petitioner's rights to dignity, freedom of worship, expression, association or the right to fair administrative action. They contended that their actions were all done in the public interest and within the parameters of the law.
- [15] On behalf of the 4th respondent, Grounds of Opposition dated 2nd February 2024 were filed herein, to the effect that:



- (a) The Amended Petition does not disclose any reasonable cause of action against the 4th respondent;
 - (b) The Amended Petition does not, in relation to the 4th respondent, meet the requirements of a constitutional petition as it does not disclose the rights allegedly violated by the 4th respondent and the nature of the alleged violations.
 - (c) No proper legal or factual basis has been laid for grant of the orders sought in the Amended Petition to the extent that they are sought against the 4th respondent.
 - (d) The Amended Petition is therefore an abuse of the process of the Court to the extent that it is made against the 4th respondent.
- [16] The Amended Petition was canvassed by way of written submissions, pursuant to the directions given herein on 11th October 2023. To that end, the petitioner filed written submissions dated 30th October 2023 and proposed the following issues for determination:
- (a) Whether the respondents herein violated and continues to violate the petitioner’s rights under Articles 32, 33 and 36 of the Constitution by shutting down the ministry as run by the New Life Prayer Centre & Church.
 - (b) Whether the criminal investigations instituted against the petitioner are irrational, unreasonable, malicious and an abuse of process.
 - (c) Whether an order of compensation should be made in favour of the petitioner for the violation of his rights to dignity, freedom of religion, expression, association and his right to fair administrative action as decreed under Articles 28, 32, 33, 36 and 47 of the Constitution.
- [17] The petitioner submitted on his constitutional right and the right of the members of the New Life Prayer Centre & Church to practice their freedom of religion in peace. He contended, therefore, that the respondents’ act of preventing worshippers from accessing the church is in violation of the Constitution and infringes upon internationally recognized principles. In addition to Article 32, the petitioner made reference to Article 18 of the International Covenant of Civil and Political Rights (ICCPR) to which Kenya is a signatory. The petitioner also cited the cases of Nyakamba Gekara v Attorney General & 2 Others [2013] eKLR, J W M (alias P) v Board of Management (particulars withheld) High School & 2 Others (Petition 10 of 2019) for the proposition that religious beliefs and convictions are innate to every individual; and that every person is free to hold whatever religious beliefs his or her conscience dictates, provided such manifestations do not injure the rights of others.
- [18] In respect of Article 33 of the Constitution, the petitioner submitted that, at all material times, he used World Evangelism TV as a medium to deliver his sermons, propagate the gospel and offer service to humanity. In his submission, it was a violation of the right of expression for his TV licence to be suspended without any justification. Reliance was placed in this regard on Robert Alai v The Hon. Attorney General & Another [2017] eKLR in urging the Court to find that the respondents’ actions were entirely unwarranted and therefore amount to a breach of the petitioner’s right under Article 33 of the Constitution.
- [19] It was also the submission of the petitioner that the respondents unlawfully dispersed worshippers from the New Life Prayer Centre & Church in disregard of their right of association as enshrined under Article 36 of the Constitution. He added that the Christian culture is firmly founded on communal worship; and that prohibiting the petitioner’s congregation from gathering is an infringement of the freedom of association. He relied on NGOs Co-ordination Board v E G & 4 Others; Katiba Institute



- (Amicus Curiae)* (Petition 16 of 2019) [2023] KESC 17 (KLR) to support the assertion that any limitation on the rights and freedoms under Article 36 must be compliant with Article 24 of the *Constitution*; and that in this instance, no such justification was made.
- [20] Regarding the criminal investigations instituted against the petitioner, his submission was that an attempt was made to link him with one Paul Mackenzie who is the main suspect in what has come to be known as “the Shakahola Massacre”. He reiterated his explanation that the only contact he had with Paul Mackenzie was when he sought to buy Times Television network from Mr. Mackenzie. He emphasized his assertion that the transaction fell through after he found out that network was encumbered in debt.
- [21] While acknowledging the constitutional mandate of the 2nd and 3rd respondents to conduct investigations and prosecutions, respectively, the petitioner submitted that criminal investigations should not be instituted in abuse of process. He relied on *Peter Maina Muturi v Director of Public Prosecutions; Standen Supplies Limited (Interested Party)* [2022] eKLR and *Kenya Commercial Bank Limited & 2 Others v Commissioner of Police and Another* [2013] eKLR in urging the Court to find that the criminal investigations against him are marred by ulterior motives and therefore amount to abuse of power on the part of the 2nd and 3rd respondents.
- [22] On whether an order of compensation should be made herein, the petitioner made reference to the range of reliefs provided for in Article 23(3) of the Constitution and submitted that an order of compensation is one of them. He was of the posturing that such an order would serve as a poignant reminder to state agencies to adhere to national values and principles of good governance in the exercise of their mandate.
- [23] Hence, the petitioner submitted that the Amended Petition is merited and is properly on record. He prayed that the reliefs prayed for therein be granted.
- [24] On behalf of the 3rd respondent, written submissions dated 5th February 2024 were filed herein by the Senior Prosecution Counsel, Ms. Anyumba. She relied on the Replying Affidavit sworn by CI Sombo as to the factual basis of their response. She urged the Court to first and foremost make an inquiry as to whether the Petition meets the specificity test as against the 3rd respondent. She submitted that, although the petitioner has enumerated the applicable constitutional provisions, he failed to account on how the actions of the 3rd respondent have resulted in the alleged violations.
- [25] Counsel submitted that Sections 107(1), (2) and 109 of the *Evidence Act* lay the burden of proof on the petitioner to furnish the evidential basis of each violation. In this regard, the 3rd respondent relied on *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR and *Wamwere & 5 Others v Attorney General* (Petition 26, 34 & 35 of 2019, Consolidated) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) and urged the Court to find that the burden of proof was not discharged by the petitioner.
- [26] On whether the 3rd respondent acted in abuse of its mandate under Article 157, counsel submitted that, whereas the petitioner was suspected of having committed a number of criminal offences which were the subject of investigation, the decision to prosecute was yet to be taken. Reliance was placed on *Kinoti & 7 Others v Chief Magistrates Court, Milimani Law Courts & 4 Others; Sanga & 2 others (Interested Parties)* (Constitutional Petition E495 of 2021) [2022] KEHC 11622 (KLR) and *Hon. James Ondicho Gesami v The Attorney General & Others*, Petition No. 376 of 2022 as to the distinction between the functions of the National Police Service and the Director of Public Prosecutions.
- [27] The 3rd respondent also underscored their assertion that the petitioner’s church was never closed down as alleged. According to the 3rd respondent the church was operational, not only at the time of



institution of this Petition, but also during the pendency of the Petition. Counsel pointed out that the presence of the police at the church was simply to safeguard the scene of crime pending investigations. Accordingly, the 3rd respondent urged for the dismissal of the Petition as amended, contending that the petitioner is not entitled to any of the reliefs sought.

- [28] The 4th respondent filed written submissions dated 5th February 2024 contending that, since no allegations have been made in the Amended Petition against it, there is no valid cause of action disclosed thereby. Reliance was placed on *Sanitam Services (EA) Limited v Tamia Limited & 16 others* [2012] eKLR to support the proposition that the Amended Petition amounts to abuse of the process of the Court and therefore ought to be struck out.
- [29] The 4th respondent also submitted that the Amended Petition lacks specificity with regard to the details and manner of the alleged infringement against it. The cases of *Anarita Karimi Njeru* [1979] eKLR, *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR, *John Gitbinji Wangondu & 7 others v Coffee Board of Kenya & another* [2012] eKLR and *Haki Focus v Multimedia University College of Kenya & Another* [2012] eKLR were relied on to buttress the 4th respondent's argument that the Amended Petition seeks reliefs against the 4th respondent jointly with the other respondents without specifically alleging any violations of the petitioner's rights by the 4th respondent. Accordingly, the 4th respondent similarly prayed for either the striking out of the Amended Petition for disclosing no cause of action against it or its dismissal with costs.
- [30] From the foregoing summary, there is no dispute that the petitioner was arrested on 27th April 2023 by police officers in connection with the Shakahola investigations; or that he was presented before Shanzu Law Courts in Miscellaneous Application No. E075 of 2023 on an application seeking to have him detained for a period of 30 days, pending the completion of investigations allegedly linking him to one Paul Mackenzie. A copy of the application dated 28th April 2023 was annexed to the petitioner's affidavit as Annexure EO-2. It confirms that the investigations involved allegations of murder, aiding suicide, abduction, radicalization, child cruelty, fraud, money-laundering, among others.
- [31] It is further not disputed that, on the 2nd May 2023, a ruling was delivered by the Shanzu Magistrates Court authorizing the petitioner's detention for 7 days only from the date of his arrest on 27th April 2023. In the said ruling, the court observed that the State was at liberty to continue with investigations and apprise it on the status of investigations and for further orders. CI Sombo confirmed that the police were at liberty to continue with their investigations. Since this Court was not apprised of the current status of those investigations as of 3rd February 2024 when this matter was fixed for judgment, it is not altogether clear what became of those investigations and whether the petitioner was ever charged with any offence.
- [32] Granted the averments in the Amended Affidavit and its Supporting Affidavit, the responses thereto by the respondents as well as the written submissions filed herein on behalf of the parties, the issues for determination are:
- (a) Whether the Amended Petition satisfies the requirement as to specificity; and if so,
 - (b) Whether the petitioner has demonstrated the violations or threats of violations alleged by him against the respondents to the requisite standard.
 - (c) Whether the petitioner is entitled to the reliefs sought.



A. On the test of Specificity:

[33] It is now settled that there is a basic threshold that constitutional petitions must adhere to. Hence, in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR, it was held:

...if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

[34] The principle was affirmed by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR as hereunder:

(42) ...the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch D 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

[35] A perusal of the Amended Petition shows general compliance, in the sense that the petitioner provided the legal foundation of his case at paragraphs 6 to 22. He also furnished the factual basis thereof, including the alleged violations at paragraphs 23 to 39 of the Petition as amended. On the face of it, the contention that the Petition does not meet the requisite threshold appears to be ill-founded. Indeed, Rule 10(3) and (4) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, recognizes that:

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.”

[36] Accordingly, I fully endorse the expressions of Hon. Odunga, J. (as he then was) in *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another* [2016] eKLR that:

On the issue whether this Court can determine the constitutional issues raised without compliance with the requirements stipulated in *Anarita Karimi Njeru v Attorney General* (supra), it is my view that the said decision must now be read in light of the provisions of



Article 22(3)(b) and (d) of the *Constitution* under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which these proceedings may even be commenced on the basis of informal documentation...”

[37] Indeed, in *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR, the Court of Appeal pointed out that:

...precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

[38] In this respect, the Court of Appeal reiterated the viewpoint taken by a 3-judge bench of the High Court in *Trusted Society of Human Rights Alliance v Attorney General & 2 Others* [2012] eKLR in which it was held that:

We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the respondents in a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case...”

[39] Thus, it is my considered finding that the Amended Petition is indeed compliant as to specificity.

B. On whether the alleged violations or threats of violations have been proved against the respondents:

[40] It is instructive to mention at the outset that, in exercising its interpretive function, the Court must bear in mind the precepts set out at Article 259 of the *Constitution*. The provision states:

(1) This Constitution shall be interpreted in a manner that—



- (a) promotes its purposes, values and principles;
 - (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - (c) permits the development of the law; and
 - (d) contributes to good governance.
- (2) ...
- (3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things—
- (a) a function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office;
 - (b) any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;
 - (c) a reference in this Constitution to an office, State organ or locality named in this Constitution shall be read with any formal alteration necessary to make it applicable in the circumstances; and
 - (d) a reference in this Constitution to an office, body or organisation is, if the office, body or organisation has ceased to exist, a reference to its successor or to the equivalent office, body or organisation.

[41] Hence, in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR it was held:

91. the *Constitution* has given guidance on how it is to be interpreted. Article 259 thereof requires that the Court, in considering the constitutionality of any issue before it, interprets the *Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance.
92. We are also guided by the provisions of Article 159(2) (e) of the *Constitution* which require the Court, in exercising judicial authority, to do so in a manner that protects and promotes the purpose and principles of the *Constitution*.
93. Thirdly, in interpreting the *Constitution*, we are enjoined to give it a liberal purposive interpretation. At paragraph 51 of its decision in *Re The Matter of the Interim Independent Electoral Commission* Constitutional Application No 2 of 2011, the Supreme Court of Kenya adopted the words of Mohamed A J in the Namibian case of *S. v Acheson*, 1991 (2) SA 805 (at p.813) where he stated that:

“the *Constitution* of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals and ...aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the *Constitution* must,



therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”

94. Further, the Court is required, in interpreting the *Constitution*, to be guided by the principle that the provisions of the *Constitution* must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other: see *Tinyefuza v Attorney General of Uganda* Constitutional Petition No. 1 of 1997 (1997 UGCC 3).

[42] A similar position was articulated in *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* [2011] eKLR, as follows:

...In interpreting the *Constitution*, this court is bound by the provisions of Section 259 which requires that the *Constitution* be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law and the human rights and fundamental freedoms in the bill of rights, permits the development of the law and contributes to good governance. ...

...In interpreting the *Constitution*, the letter and the spirit of the supreme law must be respected. Various provisions of the *Constitution* must be read together in order to get a proper interpretation. In the Ugandan case of *Tinyefuza v Attorney General*, Constitutional Appeal No. 1 of 1997, the court held as follows:

“The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.”

[43] In the Amended Petition, the single complaint laid thereby is the assertion that, upon the arrest of the petitioner, the respondents issued a press briefing to the national media to the effect that the Police had closed down the petitioner’s New Life Prayer Centre & Church situate in Mavueni and evicted all congregants from the church premises. The petitioner averred that no reasons were given for the decision and added that the respondents had continued to unreasonably restrain the worshippers from accessing or congregating at their usual place of worship. The Petitioner further averred that the Registrar of Societies had also issued threats to shut down the New Life Prayer Center and Church.

[44] From the foregoing averments, the petitioner alleged violations of not only Article 32, but also Articles 33 and 36 of the *Constitution*. Article 32 of the *Constitution* and it provides:

- (1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.
- (3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person’s belief or religion.
- (4) A person shall not be compelled to act, or engage in any act, that is contrary to the person’s belief or religion.



[45] The rights can only be curtailed in the manner envisaged by Article 24, 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. Thus, in *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, it was held: -

...any statute limiting a right or fundamental freedom should be clear about the right or freedom being curtailed and specifically express such intention as well as the nature and extent of the limitation for it to be valid. For the avoidance of doubt, the framers of the *Constitution* included a list of rights and freedoms which may not be limited notwithstanding any provisions of the *Constitution*...

[46] I pause here for a moment to restate the law on burden of proof. There is no gainsaying that the legal burden of proving the alleged violations rested on the petitioner, as provided for in Sections 107(1), (2) and 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya. Accordingly, in *Wamwere & 5 Others v Attorney General* (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment) the Supreme Court held:

A petitioner bore the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which was on a balance of probabilities. Such claims were by nature civil causes. The onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that she owned or erected or live in the alleged properties; and that State agents interfered or deprived her of the subject properties. That was the import of section 107 of the *Evidence Act* on the burden of proof.”

[47] Likewise, in *Leonard Orieno v Airtel Kenya Limited* [2018] eKLR it was emphasized that:

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be in a factual vacuum. To attempt to do so would trivialize the *Constitution* an inevitable result in ill-considered opinions. 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. Decisions on violation of constitutional rights cannot be based upon unsupported hypotheses.”

[48] The question to pose, therefore, is whether the petitioner proved, on a balance of probabilities the allegations that the New Life Christian Prayer Centre & Church was closed by the police and has remained closed during the pendency of this case. I have carefully perused the petitioner’s Supporting Affidavit to the Amended Petition. At paragraph 10 of that affidavit, the petitioner made reference to a press briefing that was held after his arrest at which the announcement was made. In proof thereof, the petitioner made reference to some unverified open source link as Annexure EO-3, yet Section 106B of the *Evidence Act* is explicit on admissibility of electronic evidence. The provisions states:

- (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.



- (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following —
- (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
 - (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
 - (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

[49] It is plain then that the petitioner failed to demonstrate, by way of acceptable evidence that any of the 4 respondents impleaded in the Amended Petition called a press conference involving the national media and made the pronouncements complained of by the petitioner. As to whether the church was closed down as a matter of fact, again there is no such proof in the petitioner’s Supporting Affidavit. To the contrary, the court record supports the contention by the 1st 2nd and 3rd respondents that the presence of the police at the church was to preserve the scene of crime and nothing more. This posturing was communicated at the first opportunity on 8th May 2023 by counsel for the petitioner, Mr. Omari who then required confirmation from the 1st and 2nd respondents that the church had not been closed. He intimated that the church had an international gathering the following day.

[50] Mr. Makuto is on record as having confirmed that, although there were police officers at the church site, they were there for security reasons; and that the church had not been closed to worshippers. The position was thereafter articulated in the Replying Affidavit of CI Sombo in response to the petitioner’s interlocutory application dated 3rd May 2023. The said affidavit was sworn on 8th May 2023. To confirm that the church was operational, CI Sombo averred, at paragraph 11 of his Replying Affidavit sworn on 8th May 2023 that, as a matter of fact worshippers congregated at the church premises the previous day on 7th May 2023 despite the presence of security officers. Those assertions were not refuted. Consequently, the Court granted interim orders in terms of Prayer (c) of the petitioner’s Notice of Motion dated 3rd May 2023 simply for the avoidance of doubt. The orders were reiterated in the Ruling of the Court dated 15th May 2023. At paragraph 36 thereof, the Court noted that:

...upon counsel for the 1st and 2nd respondents confirming this position to the Court on 9th May 2023, prayer (c) of the 1st application was granted purely for the avoidance of doubt. In the same vein, prayer (g) of the Notice of Motion dated 3rd May 2023 requires no further deliberation since it is unopposed. The same is accordingly granted without further ado.

[51] If the church was open and accessible for worship on 7th May 2023 and thereafter, then it follows that the petitioner has utterly failed to prove violation of not only Article 32, but also Articles 33 and 36 of the Constitution. It is also not lost on the Court that the petitioner relied on the letter dated 27th April 2023 (Annexure EO-4) in proof of the intention to close the Petitioner’s establishment. The letter was written by the Ezra Chiloba against whom the petitioner’s case was withdrawn.



[52] Indeed, the Court pronounced itself on the effect of that letter in its ruling dated 15th May 2023; and the same position applies to the letter from the Registrar of Societies marked Annexure E04 to the Amended Petition. The Court relied on, inter alia, *Speaker of National Assembly v James Njenga Karume* [1992] eKLR in which the Court of Appeal held that:

...where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed..."

[53] Such alternative dispute resolution mechanisms are recognized under Article 159(2)(c) of the Constitution; and therefore it would be anomalous to suggest that compliance therewith is unconstitutional. In the same vein, claims of violation of Articles 28 and 47 of the Constitution which provide for the right to human dignity and fair administrative action, are untenable, there being no proof of such violations.

C. On the reliefs sought by the petitioner:

[54] In his Amended Petition, the petitioner asked for the following reliefs:

- (a) That an order of prohibition be issued prohibiting the respondents either by themselves or through their agents from closing or shutting down the ministry as run by the petitioner registered under the *Societies Act* in the name of New Life Prayer Centre & Church or in any other manner acting in violation of the petitioner's rights under Articles 32, 33 and 36 of the *Constitution*.
- (b) That an order of compensation be awarded to the petitioner for the violation of his rights to dignity, freedom of religion, expression, association and his right to a fair administrative action as decreed under Articles 28, 32, 33, 36 and 47 of the *Constitution*.
- (c) That costs of the Petition be provided for.
- (d) Any other relief that the Court is pleased to grant in the circumstances.

[55] Article 23(3) of the *Constitution* is explicit that:

In any proceedings brought under Article 22, a court may 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; and
- f. an order of judicial review.

[56] It is now trite that what amounts to appropriate relief depends on the nature and circumstances of the case. Hence, *Law Society of Kenya v Attorney General & another; Mohamed Abdulahi Warsame & another (Interested Parties)* [2019] eKLR Hon. Chacha, J. held that an appropriate relief should be an effective remedy for purposes of enforcing the *Constitution*, human rights and the rule of law. He



relied on *Fose v Minister of Safety and Security* [1997] (3) SA 786(CC)1997(7) BCLR 851 wherein it was held that:

(19) Appropriate relief will in essence be relief that is required to protect and enforce the *Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the *Constitution* are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”

[57] The petitioner having failed to demonstrate any of the infringements alleged by him, there is absolutely no basis for the Court to issue an order of Prohibition or an award of compensation.

[58] In the result, it is my finding that the Petition is devoid of merit. It is hereby dismissed with an order that each party shall bear own costs thereof.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF MAY 2024

OLGA SEWE

JUDGE

