



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 134 OF 2019

HUMANITY ACTION KNOWLEDGE INTEGRITY

IN AFRICA TRUST (HAKI AFRICA) & 19 OTHERSPETITIONERS

AND

ATTORNEY GENERAL.....1ST RESPONDENT

THE MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT.....2ND RESPONDENT

THE SPEAKER OF THE NATIONAL ASSEMBLY.....3RD RESPONDENT

NATIONAL COUNTER TERRORISM CENTRE (NCTC).....4TH RESPONDENT

AND

KENYA NATIONAL COMMISSION ON

HUMAN RIGHTS (KNCHR).....1ST INTERESTED PARTY

NON-GOVERNMENTAL ORGANIZATION

CO-ORDINATION BOARD (NGO BOARD).....2ND INTERESTED PARTY

KATIBA INSTITUTE.....3RD INTERESTED PARTY

JUDGMENT

Introduction

1. On 12th October 2012, the President assented to the Prevention of Terrorism Act, 2012 (POTA) and it commenced on 24th October 2012. The primary objective of the Act as captured in its preamble is to provide measures for the detection and prevention of terrorist activities in Kenya.

2. The Act listed five key offices obligated with the implementation of the Act. These are the Cabinet Secretary of the Ministry of Interior and Coordination of National Government (2nd Respondent), the Attorney General, the Inspector General of Police, the Financial Reporting Centre and the National Counter Terrorism Centre (NCTC). The role of NCTC is limited to the coordination of national counter terrorism efforts in the detection, deterrence and disruption of terrorism acts.

3. On 29th March 2019, the National Assembly published, through a special issue of the Kenya Gazette supplement, the Statute Law (Miscellaneous Amendment) Bill (National Assembly Bill No. 21 of 2019) for debate and enactment as an Act of Parliament. The effect of the Bill was to amend several existing statutes including the Prevention of Terrorism Act, 2012.

4. The Bill sought to amend the Prevention of Terrorism Act (POTA) by inserting the following subsections:-

Section 40 (A) (2) which subsection reads

“Delete paragraph (e) and substitute therefore the following new paragraph

(e) the Directorate of Immigration;”

Insert the following new paragraphs immediately after paragraph (e)-

(f) the National Police Service;

(g) the Ministry for the time being responsible for foreign affairs;

(h) the Office of the Director of Public Prosecutions;

(i) the Kenya Wildlife Services;

(j) the Probation and Aftercare Services Department;

(k) the Kenya Prisons Service;

(l) the Kenya Civil Aviation Authority; and

Renumber paragraph (f) as paragraph (m)

Section 40 A (3) which subsection reads

“Add the expression “renewable once” at the end thereof.

Section 40 B (2) which subsection reads

“Insert the following new paragraph immediately after paragraph (e)-

“(f) Analyze all information and intelligence on terrorism and counterterrorism for purposes of proposing policy and legal adjustments to the National Security Council and other national security leadership.”

Section 40 C which sub section reads:

“(1) The Centre shall be an approving and reporting institution for all civil society organizations and international non-governmental organizations engaged in preventing and countering violent extremism and radicalization through counter-messaging or public outreach, and disengagement and reintegration of radicalized individuals.”

5. The Bill was debated and enacted into an Act of Parliament which was assented to by the President on 5th July 2019 in effect amending POTA accordingly.

6. Humanity Action Knowledge Integrity in Africa Trust (HAKI AFRICA) and 19 Others, the Petitioners, filed a petition dated 16th August 2019 and filed an amended petition dated 7th May 2020 against the Attorney General, the Ministry of Interior and Coordination of National Government, the Speaker of the National Assembly, and the National Counter Terrorism Centre (NCTC), the respondents, as well as the Kenya National Commission on Human Rights (KNCHR), Non-Governmental Organizations Coordination Board (NGO Board), and Katiba Institute, the 1st, 2nd, 3rd, and 4th interested parties respectively. Further, a Supporting Affidavit was sworn by Mr. Hussein Khaleed on 7th May 2020.

Petitioner’s Case

7. The Amended Petition prays that:-

a) The Honourable Court do grant Conservatory orders suspending Section 40 C (1) of the Prevention of Terrorism Act, 2012.

b) The Honourable Court do grant a declaration that Section 40 (A) (2), 40 A (3), 40 (B) and 40 C (1) of the Prevention of Terrorism Act, 2012 are unconstitutional.

c) Costs of the Petition

d) Any other relief that the Honourable Court may deem just and/or to grant under the circumstances of the Petition.

8. The Petition states that the amendment is illegal and unconstitutional for the following reasons:-

a) It grants NCTC powers to regulate the operations of Civil Society Organizations (CSOs) and International Non-Governmental Organizations (INGOs) which is not the intended objective of POTA and which role falls under the NGO Coordination Board under the NGO Coordination Act. Similarly, this role is given to the Public Benefit Organizations Regulatory Authority under the Public Benefits Organizations Act. This creates multiplicity of roles and responsibilities which creates confusion, delays and sometimes complete shutdown of operations which impacts negatively on the principle of good governance and separation of powers.

b) Considering that the NCTC is under the Ministry of Interior and Coordination of National Government (2nd Respondent) and coordinates all the agencies tasked with the detention and prevention of terrorist activities, the amendment by implication, grants NCTC powers to refuse approving programmes of CSOs and INGOs on suspicion that they are interacting with suspected terrorist or radicalized persons. Consequently, the CSOs and INGOs will be denied the right to operate freely without intimidation from the Respondent's.

c) The amendment will enable NCTC to have in its record all the programmes, operations and activities of all CSOs and INGOs most of which is information given on trust by vulnerable individuals which violates the right to privacy of these individuals.

d) The amendment infringes on the freedom of association as it is intended to prevent CSOs and INGOs from interacting in any meaningful way with suspected terrorists and or radicalized people.

e) The amendment interferes and or infringes on the freedom of expression of CSOs and INGOs as it is intended to prevent them from independently participating in preventing and countering violent extremism.

f) The process through which the laws were legislated and the amendments made, were unconstitutional and illegal as the amendments are substantive in nature and they ought not to have been brought through the omnibus statute.

3rd Respondent's Response

9. The 3rd Respondent filed a Replying Affidavit sworn on 18/9/2019 by Michael Sialai and a further Replying Affidavit sworn by same person who is the Clerk of the National Assembly of Kenya on 10th July 2021, stating that the National Assembly Department Committee on Administration and National Security requested for memoranda from the Public as is mandated by the National Assembly Standing Order 127 (3) and Article 118 of the Constitution. On 10th April, the National Assembly facilitated public participation through print media by placing an advertisement in both the Standard and the Daily Nation newspapers asking for memoranda from stakeholders. The Committee received various submissions and memoranda from institutions, individuals and the general public. The memoranda submitted by the Coast Civil Society Network was received by the office of the Clerk of the National Assembly on 17th April 2019 and Mr. Hussein Khaleed the Deponent of the Affidavit in Support of the Petition herein was one of the signatories. The National Assembly Committee on Administration and National Security compiled its report having taken into account the nature of the concerns of different stakeholders, including the concerns of the Coast Civil Society Network. The said report was laid before the National Assembly on 7th May 2019.

10. The Petitioners have not specifically outlined with the required degree of precision on how the impugned provision violates their right to privacy, neither have they outlined with the required degree of precision how the impugned provision curtails their right to freedom of expression. Also, the Petitioners have failed to demonstrate the extent to which the limitation is excessive in relation to the objective to protect public interest.

11. Under the Constitution as well as international instruments, the right to privacy cited by the Petitioners is not absolute and is subject to reasonable restrictions in the public interest on grounds of national security, to preserve public order, to protect public health, to maintain moral standards, to secure due recognition and respect for the rights and freedoms of others or to meet the just requirements for the general welfare of a democratic society. A Statute cannot be unconstitutional merely because it seeks to approve the operations of the CSOs and INGOs in an effort to combat terrorism.

12. No evidence was tendered before court to demonstrate that a member of the public was prevented from presenting their views to parliament. The alleged dispute herein is based on perceived grievances that the NCTC may delay approval indefinitely which may affect the time frame within which the proposed NGOs of CSOs programme was to be executed and/or implemented. It is a cardinal doctrine of our jurisprudence that a court of law will not adjudicate on hypothetical questions, where no or real dispute exists.

13. The 3rd Respondent prayed that the Petition be dismissed.

4th Respondent's Response

14. The 4th Respondent's Replying Affidavit was sworn by the Director of the 4th Respondent Martin Kimani on 11th August 2020. The deponent gave an account of over 200 terrorist incidents in Kenya between 1980 and 2019 involving explosives and weapons mainly linked to Al-Shabaab and Al-Qaeda.

15. He stated that on 17th December 1996, the United Nations Security Council passed the General Assembly Resolution 51/210. On 8th September 2006, the United Nations General Assembly member nations including Kenya passed a resolution adopting the United Nations Global Counter-Terrorism Strategy. The aim of the measures was to prevent and combat terrorism, in particular by denying terrorists access

to the means to carry out attack against their targets and to the desired impact of their attacks.

16. The 4th Respondent has undertaken a critical path analysis of the process undertaken in enacting Sections 40A, 40B and 40C of the Prevention of Terrorism Act, 2012 through the Statute Law (Miscellaneous Amendment Act), 2019, and cannot detect any impropriety in the process.

17. The 4th Respondent therefore urged the court to dismiss the Petitioner's Amended Petition with costs.

3rd Interested Party's Response

18. The 3rd Interested Party's Replying Affidavit was sworn on 18th November 2019 by Lempaa Suyianka, an advocate of the High Court of Kenya who has the conduct of this matter. He averred that the amendments are unconstitutional because parliament used a Miscellaneous Amendment Act to fundamentally alter POTA and failed to adequately provide public participation before enacting the amendments. Among the justification for the amendment was to provide additional responsibility to the center and to further vet and interrogate operations of civil society organizations and international non-governmental organizations. The amendment named the National Counter Terrorism Centre (NCTC) a reporting and approving body for all Civil Society Organizations (CSOs) and International Non-Governmental Organizations (INGOs) that engage in preventing and countering violent extremism and radicalization through counter-messaging or public outreach and disengagement and reintegration of radicalized individuals.

19. The introduction of the said amendment was inappropriate and unconstitutional as the amendment was not minor or non-controversial. Therefore, it was not proper to use an omnibus statute miscellaneous amendment legislation to make substantial amendments to statutes, including the Prevention of Terrorism Act, 2012 (POTA) requiring all CSOs and INGOs engaged in this work to report to and seek approval from another body before carrying out their mandates and that establishing a new authority all together is not a minor non-controversial and generally house-keeping amendments. The amendment of POTA were substantial and required wide and genuine consultation through public participation of the people as dictated by the National values and principles of governance under Article 10 of the Constitution.

20. The requirements that CSOs and INGOs must seek approval from the NCTC on all activities relating to the prevention and countering of violent extremism and radicalization limits the right to privacy under the constitution. The target individuals will be hesitant to seek assistance from CSOs and INGOs knowing that their activities will be reported to the NCTC. The requirement that CSOs and INGOs must seek approval from the NCTC on all activities relating to the prevention and countering of violent extremism and radicalization limits the freedom of expression and association of the Petitioners and the individuals with which they interact and serve.

21. The 1st and 2nd Respondents did not file a response but they filed submissions to the petition. The 2nd Interested Party did not participate in these proceedings.

22. The 1st and 2nd Respondents did not file a response but they filed submissions to the petition. The 2nd interested party did not participate in those proceedings.

Petitioners Submissions

23. The Petitioners submitted that the primary issue for determination were:-

- i) Whether the amendment of POTA has violated the fundamental rights and freedoms of the Petitioners.
- ii) Whether the right process was followed in the enactment of the said amendment.
- iii) Whether the Petitioners are entitled to the prayers sought in the Petition.

24. On the issue of whether the right process was followed, the Petitioners submitted that Articles 10 and 118 of the Constitution give parliament the mandate to facilitate public participation and involvement in its legislative business. However, this constitutional duty was never discharged by the National Assembly (3rd Respondent). The Petitioners submitted that indeed on 29th March 2019, the National Assembly published the Bill through a special issue of the Kenya Gazette Supplement for debate and enactment as an Act of parliament and the effect of the Bill was to amend several existing statutes including the prevention of Terrorism Act, 2012. On 10th April 2019, the National Assembly placed an advertisement through print media on the Standard and Daily Nation asking for memoranda from stakeholders to be submitted by 16th April 2019. The Bill is 43 pages written in legal jargon addressing 15 statutes. Therefore, requiring lay persons to go through 15 statutes and make meaningful contribution in 6 days was unreasonable and impossible even for professionals.

25. The Petitioners submitted that on the principle of Public Participation under the Constitution of Kenya 2010 by citing a few cases such as the *Kenya Union of Domestic, Hotels, Education, and allied worker (Kudhehia Workers) v Salaries and Remuneration Commission*, Petition Number 294 of 2013, *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Other* [2015] eKLR, *Republic v The Attorney General & Another ex parte Hon. Francis Chachu Ganya* (JR Misc. App. No. 374 of 2012), *Okiya Omtata Okiiti v Commissioner General, KRA & Others, Doctors for Life International v Speaker of the National Assembly and Others, Martin Nyaga Wambora v County Assembly of Embu and 37 Others*, Civil Appeal No. 14 of 2015, Civil Appeal No. 200 of 2014; *Kiambu County Government & Others v Robert N. Gakuru & Others, Court of Appeal in the Case of the Law Society of Kenya v the AG & 2 Others*, Civil Appeal No. 96 of 2014, *Hugh Glenister v President of the Republic of South Africa & Others* Case CCT 41/08; [2008] ZACC, and High Court Constitutional Petition No. 284 consolidated with No. 353 of 2019, *The Senate of Republic of Kenya & 4 Others v AG & Others*.

26. The Petitioners submitted that the amendment of POTA has violated the fundamental rights and freedoms of the Petitioners especially the

right to privacy, freedom of expression, freedom of association, and access to justice. The said amendments are an affront to human rights and fundamental freedoms and intended to cripple the powers of the Petitioners herein.

27. The Petitioners further submitted that Section 40 C (1) of the Prevention of Terrorism Act is unconstitutional since it gives constitutional mandate to the National Counter Terrorism Center (NCTC) to approve and regulate the conduct of NGOs and CSOs. The functions are limited to the coordination of national counter terrorism efforts in the detection, deterrence and disruption of terrorism acts, in a manner otherwise than as provided by the Constitution 2010 thus presents several constitutional and legal problems.

28. The Petitioners submitted that Parliament must conform with the constitution and the Court is required to look at both the purpose and effect. The Petitioners cited *R v Big M Drug Mart Ltd* [1985] 1 S.C.R. 295, *Keroche Industries Limited v Kenya Revenue Authority & 5 Others* [2007] eKLR, *Coalition for Reforms and Democracy & Others v Attorney General & Others*, Petition No. 628 of 2014, *Trusted Society of Human Rights Alliance & 2 Others v Attorney General & 2 Others*.

29. Further the Petitioners submitted that the right to privacy is guaranteed under Article 31 of the Constitution which provides as follows:-

‘Every Person has the right to privacy, which includes the right not to have-

(a) Their person, house or property searched

(b) Their possessions seized

(c) Information relating to their family or private affairs unnecessarily required or revealed; or

(d) The privacy of their communications infringed.’

30. The Petitioners further submitted on the right to privacy by citing international and regional covenants on fundamental rights and freedoms. Article 12 of the UDHR, Article 17 of the ICCPR, Article 8 of the European Convention on Human Rights, and Article 14 of the African Charter on Human and People’s Rights.

1st and 2nd Respondents

31. The 1st and 2nd Respondents submitted that the issues for determination were:-

- i) Whether the amendment to Prevention of Terrorism Act was conducted in accordance with the law.
- ii) Whether the amendment offends the rights provided for in the constitution.

32. On the first issue of whether the said amendment was done in accordance with the law, the 1st and 2nd Respondents submitted that public participation was duly conducted and the opinions of various stakeholders taken into account. Therefore, the Petitioner’s allegations that public participation was not conducted is misleading. The 1st and 2nd Respondents cited *Republic v County Government of Kiambu Ex parte Robert Gakuru & Another* [2016] eKLR, where it was held that:-

“...The mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question.”

33. The 1st and 2nd Respondents further submitted that in *Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government 3 Others* Petition No. 486 of 2013, Lenaola, J. held that:-

“...it does not matter how the public participation was effected. What is needed in my view is that the public was accorded some reasonable level of participation...”

34. The 1st and 2nd Respondents cited *Law Society of Kenya v the Attorney General* [2016] eKLR where the court reiterated the principle that public participation does not connote hearing of every single person to establish that public participation was duly conducted.

35. Therefore, it was submitted, public participation does not connote Parliament factoring in the views of every single person who participated. If that were to be the case, then the process of law-making would be a tedious and impossible exercise since opinions vary from individual to individual.

35. The 1st and 2nd Respondents further submitted that citizens have entrusted their democratically elected leaders with power to make decisions on their behalf. Parliament represents the citizenry. Members of Parliament understand the needs and aspirations of the citizens and in coming up with legislation, they mirror the opinions of the people. Terrorism has been a menace in the society; it needs quick action if future threats are to be averted. This is the main reason why amendments to the Prevention of Terrorism Act had to be made.

36. On the second issue of whether the amendment offends the rights provided for in the Constitution, the 1st and 2nd Respondents submitted that to establish the constitutional validity of a statute, the court looks at both the purpose and effect of the impugned statute. The Prevention

of Terrorism Act has the purpose of boosting counter-terrorism campaign by empowering the National Counter Terrorism Center to act as an approving and reporting institution for all civil society organizations and international non-governmental organizations engaged in preventing and countering violent extremism and radicalization. It was submitted that terrorism is a serious crime that has in the past caused loss of life and damage to property both locally and internationally and any information relating to its activities or perpetrators ought to be reported at the first instance of detection.

3rd Respondent

37. On the issue of public participation, the 3rd Respondent submitted that parliament has the discretion to determine how best to facilitate public participation and that how it is effected will vary from case to case. The enactment of the Bill did not violate the principle of public participation under the Constitution. See *Law Society of Kenya v the Attorney General and 10 others* Petition No. 3 of 2016 where the court held that:-

“The law is not that all persons must express their views or that they must be heard and that the hearing must be oral...”

38. On the issue of the rationale behind the impugned law, the 3rd Respondent submitted that the purpose and effect of the impugned section is to boost counter-terrorism campaign by empowering the Center to act as an approving and reporting institution for all civil society organizations and international non-governmental organizations engaged in preventing and countering violent extremism and radicalization.

39. The 3rd Respondent cited *Samuel G. Momanyi v Attorney General & Another* [2012] eKLR where the learned judge was persuaded by the reasoning in *Hamdardda Wakhama v Union of India* AIR 160 at 554 where the court stated inter-alia as follows:-

“...when an enactment is impugned on the ground that it is ultra vires and unconstitutional what has to be ascertained is the true character of the legislation and for that purpose regard must be had to the enactment as a whole to its objects, purpose and true intentions...”

40. On the issue of separation of powers, the 3rd Respondent submitted that the Petition contravenes the principle of presumption of constitutionality of legislation enacted by parliament which should not be entertained by Court. The 3rd Respondent cited Nairobi Civil Appeal No. 79 of 2018, *Pharmacy and Poisons Board v DR. George Wang’anga & Others*.

4th Respondent

41. The 4th Respondent submitted that due process was followed in enacting the Statute Law (Miscellaneous Amendment) Act, 2019. Therefore the Petitioners are misleading court by stating that there was no public participation involved. In support of this position the 4th Respondent quoted *Republic v County Government of Nyamira & 3 Others; Ex-Parte Kennedy Mong’are Mogaka* [2021] eKLR, *Doctors for Life International v Speaker of the National Assembly and Others*, *Republic v County Government of Kiambu Ex parte Robert Gakuru & Another* [2016] eKLR.

1st Interested Party

42. The 1st Interested Party submitted issues for determination as follows:-

- i) Whether or not the process leading to enactment of Section 40C (1) was devoid of public participation.
- ii) Whether or not the impugned amendment to wit section 40C (1) limits constitutional guarantees provided for under Article 33 and 36 of the Constitution of Kenya on freedom of expression and association.
- iii) Whether or not the limitation of the constitutional rights was reasonable and justifiable.

43. On the issue of whether or not the process leading to enactment of Section 40C (1) was devoid of public participation 1st interested party submitted that the right to public participation is based on the democratic idea of people’s sovereignty and political equality as enshrined in Article 1 of the Constitution which is exercised at both national and county levels as was held in the case of **British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 Others** [2017] eKLR. The 1st Interested Party further submitted that public participation is one of the national values and principles of governance that bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. The 1st Interested Party relied on the followed authorities on what constitutes public participation: **Robert N. Gakuru & Others v Governor Kiambu County & 3 Others** [2014] eKLR which relied on the pronouncements of the South African Constitution in *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC). The 1st Interested Party further cited *Matatiele Municipality & Others v President of the Republic of South Africa & Others* (2) CCT7 3/054 [2006] and *Robert N. Gakuru & Others v Governnor Kiambu County & 3 Others* [2014] eKLR where the Court stated as follows:-

“In my view public participation ought to be real and not illusionary and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively.”

44. On the issue of whether or not the impugned amendment to wit section 40 C (1) limits constitutional guarantees provided for under Article 33 and 36 of the Constitution of Kenya on freedom of expression and association, the 1st Interested Party submitted that the impugned Section 40 C (1) mandating the Centre to be an approving and reporting institution for all CSOs and INGOs as well as the general public failed to meet the constitutional thresholds under Article 24 of the Constitution. It was submitted that freedom of expression is provided under Article 33 (1) of the Constitution and by dint of Article 2 (5) & 2 (6) recognized at Article 19 of the UDHR and Article 19 (2) of the ICCPR, while the right to freedom of association is provided under Article 36 of the Constitution and by dint of Article 2 (5) and 2 (6) recognized at Article 20 of the UDHR and Article 22 of the ICCPR. The 1st Interested Party further submitted that this Court has jurisdiction to intervene and protect the constitution as was held in the *Commission for the Interpretation of the Constitution and v The National Assembly & 2 Others* [2013] eKLR and the *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others; Others* [2015] eKLR.

45. On the issue of whether or not the limitation of the constitutional rights was reasonable and justifiable within the meaning of Article 24 of the Constitution, the 1st interested party submitted that the impugned provision lacks legality and legitimacy of the people and must fall on the precincts of Article 2(4) of the Constitution because it failed to meet the core constitutional requirement. The Respondents were well aware of the impact of the impugned particularly on Article 33 and 36 of the Constitution of Kenya, but elected not to conform with Article 24 (2) (a) of the Constitution of Kenya.

3rd Interested Party

46. The 3rd Interested Party submitted issues for determination as follows:-

- i) Did Parliament violate the Constitution by using an omnibus statute to make fundamental alterations to POTA?
- ii) Did Parliament violate the Constitution by failing to provide for adequate public participation before considering and passing the bill?
- iii) Does newly added section 40C (1) of POTA violate the constitutional rights of CSOs and INGOs engaged in deradicalisation and countering violent extremism by requiring them to be approved by and report to, the NCTC?

47. On the issue of whether Parliament violated the Constitution by using an omnibus statute to make fundamental alterations to POTA, the 3rd Interested Party submitted that the Kenyan courts have consistently held that the Statute Law (Miscellaneous Amendments) Acts have a limited legislative scope. They are omnibus legislation that amend multiple statutes and must not be used to enact substantive legislation, but only to correct minor anomalies, inconsistencies and errors that have no significant effects or change to the meaning and import of the statute. The 3rd Interested Party cited the *Dock Workers Union & 2 Others v Attorney General & 2 Others; Kenya Ports Authority & 4 Others (Interested Parties)* [2019] eKLR, *Josephat Musila Mutua & 9 Others v Attorney General & 3 Others* [2018] eKLR, *Law Society of Kenya v the Attorney General*, Constitutional Petition No. 3 of 2016 [2016] eKLR where it was held as follows:-

“...the Statute Law (Miscellaneous Amendment) Bills...be confined to only minor non-controversial generally house keeping amendments.”

48. On the issue of whether Parliament violated the Constitution by failing to provide for adequate public participation before considering and passing the bill, the 3rd Interested Party submitted that although there is no particular way by which public participation is to be effected, the standard is one of reasonableness – was a reasonable opportunity afforded to members of the public and interested parties to know about the issue and have an adequate say? The critical stakeholders affected, including CSOs and INGOs, were never consulted. Even the few concerns raised by some of these organizations on the effect of these amendments that, if allowed to pass, they would have far-reaching consequences on the smooth operations of CSOs and INGOs engagement in counter violence extremism, were never considered.

49. On the issue of whether the newly added section 40 C (1) of POTA violated the constitutional rights of CSOs and INGOs engaged in deradicalisation and countering violent extremism by requiring them to be approved by and report to the NCTC, the 3rd Interested Party submitted that Section 40 C (1) of the Prevention of Terrorism Act violates the right to privacy and limits the freedoms of expression and assembly, limits which are not justified in the circumstances. The 3rd Interested Party further submitted that the 3rd Respondent failed to have due regard for the requirements and application of Article 24 of the Constitution. In the case of *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & Others* [2015] eKLR, the Court found that there can be no presumption of constitutionality with respect to legislation that limits fundamental rights, as it must meet the criteria set out in Article 24.

Determination

50. I have carefully considered the petition and submissions of parties. In my view the items for determination are:

- a) Whether the amendment of POTA has violated the fundamental rights and freedoms provided for in the Constitution.
- b) Whether the amendment of POTA followed the due process in terms of public participation.
- c) Whether the limitations of the constitutional rights was reasonable and justifiable.

Whether the amendment of POTA has violated the fundamental rights and freedoms provided for in the Constitution

51. It cannot be disputed that the fight against terrorism is an important purpose and agenda for the Kenyan State. The State has an obligation to protect its citizens from internal and external threats. However in so doing it must maintain the delicate balance between protecting the fundamental rights of citizens and protecting them from terrorists by providing national security. The State thus has an obligation to satisfy the Court that the limitations it has imposed in the legislation under consideration is justified by the realities it is confronted with, and that they have a rational nexus with the purpose they are intended to meet.

52. Article 33 of the Constitution provides that:-

33. (1) *Every person has the right to freedom of expression, which includes:-*

(a) *freedom to seek, receive or impart information or ideas;*

(b) *freedom of artistic creativity; and*

(c) *academic freedom and freedom of scientific research.*

(2) *The right to freedom of expression does not extend to:-*

(a) *propaganda for war;*

(b) *incitement to violence;*

(c) *hate speech; or*

(d) *advocacy of hatred that:-*

(i) *constitutes ethnic incitement, vilification of others or incitement to cause harm; or*

(ii) *is based on any ground of discrimination specified or contemplated in Article 27 (4).*

(3) *In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.*

52. The constitutional guarantee of freedom of expression in our Constitution, as in the Constitution of South Africa, is not absolute, and is subject to the limitations set out in Article 33 (2) which states that the protection of freedom of expression does not extend to propaganda for war, incitement to violence, hate speech or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm and is based on any ground of discrimination specified or contemplated in Article 27 (4). Such limitations also accord with the provisions of Article 19 (3) of ICCPR, which provides as follows:

3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

(a) *For respect of the rights or reputations of others;*

(b) *For the protection of national security or of public order (order public), or of public health or morals.*

53. On the right to privacy, As O'Higgins C.J commented in **Norris vs Attorney General (1984) I.R 587**, a right to privacy can never be absolute. It has to be balanced against the State's duty to protect and vindicate life. What needs to be done, as was recognised in **Campbell vs MGN Ltd (2004) 2 AC 457**, is to subject the limitation and the purpose it is intended to serve to a balancing test, whose aim is to determine whether the intrusion into an individual's privacy is proportionate to the public interest to be served by the intrusion.

54. Taking judicial notice of the numerous terrorist attacks that this country has experienced in the last few years, I am of the view that the right to privacy must be weighed against or balanced with the exigencies of the common good or the public interest. It is, I believe, useful to set out the provisions of the Prevention of Terrorism Act as they are currently. Section 35, which limits various rights, provides as follows with regard to the right to privacy:

35. *Limitation of certain rights*

(1) *Subject to Article 24 of the Constitution, the rights and fundamental freedoms of a person or entity to whom this Act applies may be limited for the purposes, in the manner and to the extent set out in this section.*

(2) *A limitation of a right or fundamental freedom under subsection (1) shall apply only for the purposes of ensuring:-*

(a) *the investigations of a terrorist act;*

(b) *the detection and prevention of a terrorist act; or*

(c) that the enjoyment of the rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others.

(3) The limitation of a fundamental right and freedom under this section shall relate to:-

(a) the right to privacy to the extent of allowing:-

(i) a person, home or property to be searched;

(ii) possessions to be seized;

(iii) the privacy of a person's communication to be investigated, intercepted or otherwise interfered with.

Whether the amendment of POTA followed the due process of public participation.

55. It is a constitutional obligation on the National Assembly to facilitate public participation in the process of enactment of legislation. The question before this Court then is whether the public participation allegedly afforded in the amendment of POTA was reasonable in the circumstances.

56. The sacred fountain of the constitutional doctrine of public participation is embedded in the principle of sovereignty of the people under **Article 1** of the **Constitution**. In addition, **Article 2** contemplates direct and indirect exercise of sovereignty by the people through elected representatives, at all times the people reserving the right to direct exercise of sovereignty.

57. The right of public participation is further captured as one of the national values and principles of governance enshrined in Article 10 of the Constitution which provides that:-

(1) *The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them -*

(a) *Applies or interprets this Constitution;*

(b) *Enacts, applies or interprets any law; or*

(c) *Makes or implements public policy decisions.*

(2) *The national values and principles of governance include-*

(a) *Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.*

58. With respect to parliamentary proceedings, **Article 118**, which is titled "*Public Access and Participation*" provides that:-

(1) *Parliament shall-*

(a) *Conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and*

(b) *Facilitate public participation and involvement in the legislative and other business of Parliament and its committees.*

59. Our courts have also recognised the central place of the principle of public participation in the new constitutional dispensation. In **Kenya Small Scale Farmers Forum & 6 Others vs Republic of Kenya & 2 Others [2013] eKLR** the Court held as follows:-

"One of the golden threads running through the current constitutional regime is public participation in governance and the conduct of public affairs. The preamble to the Constitution recognizes, "the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law." It also acknowledges the people's 'sovereign and inalienable right to determine the form of governance of our country...' Article 1 bestows all the sovereign power on the people to be exercised only in accordance with the Constitution. One of the national values and principles of governance is that of 'inclusiveness' and 'participation of the people.'"

60. The petitioners in this matter argued that the mode of advertisement in the *Daily Nation* and *The Standard* newspapers did not lend itself to a proper avenue for public participation. I have noted that the invitation allowed the submission of views and representations. I have further noted that a number of persons and organizations engaged the National Assembly on the Bill within the period that was allowed for public participation. In the circumstances, and taking into account the views of the courts in the authorities, local and from other jurisdictions, cited above, I am satisfied that the National Assembly acted reasonably in the manner in which it facilitated public participation on POTA.

Whether the limitations of the constitutional rights was reasonable and justifiable.

61. In the case of *S v Zuma & Others (1995)2 SA 642(CC)* the South African Constitutional Court held that a party alleging a violation of a constitutional right or freedom must demonstrate that the exercise of a fundamental right has been impaired, infringed or limited. Once a limitation has been demonstrated, then the party who would benefit from the limitation must demonstrate a justification for the limitation. As in this case, the State, in demonstrating that the limitation is justifiable, must demonstrate that the societal need for the limitation of the right outweighs the individual's right to enjoy the right or freedom in question.

62. The burden of proving the allegations lay squarely upon the petitioner upon the Petitioner. In *Godfrey Paul Okutoyi (suing on his own behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) vs. Habil Olaka- Executive Director (Secretary) of the Kenya Bankers Association being sued on behalf of Kenya Bankers Association) & Another [2018] eKLR*, the High Court held:

“It is principle of law that he who asserts must prove, and in this regard, Section 107 (1) of the Evidence Act (Cap 80) 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.” It is therefore the duty of the person who asserts that there is a breach of section 44 of the Banking Act to prove by evidence that, that indeed is the case. That is why section 109 of the Evidence Act again provides that “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.”

63. In conclusion, I must reiterate that the national security is an important aspect of the public interest. We are living in troubled times partly because of the terrorism acts committed in this country against the citizens. Security must be taken seriously by the State, the security forces and generally every person in this country. The preamble to POTA reads: An Act of Parliament to provide measures for the detection and prevention of terrorist activities; to amend the Extradition (Commonwealth Countries) Act and the Extradition (Contiguous and Foreign Countries) Act; and for connected purposes”. Amendment of the Act on the requirement that CSOs and INGOs must seek approval from the NCTC on all activities relating to the prevention and countering of violent extremism and radicalization aims to prevent and detect terrorist activities. It is trite law that the legislature does not enact law in a vacuum. Each and every legislation enacted serves a particular purpose and function in society. I therefore do not find any wrong doing on the part of the respondents with regard to the amendments to POTA. Those amendments are constitutional. For that reason the petition herein is not proved on the required standards, lacks merit and is dismissed. On the issue of costs, this being a public interest litigation, parties shall bear own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT ON 15TH NOVEMBER 2021.

HON. JUSTICE E. K. OGOLA

JUDGE

PERIS- COURT ASSISTANT

MS. OCHOO FOR PETITIONER

MS. OPIYO FOR 1ST AND 2ND RESPONDENT

MR. KUYONI FOR 3RD RESPONDENT

MS. MUCHIRI FOR 4TH RESPONDENT

MR. LUGONJE FOR 1ST INTERESTED PARTY

MS. NYABERI FOR 3RD INTERESTED PARTY

HON. JUSTICE E. K. OGOLA

JUDGE