



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 152 OF 2015

EGAL MOHAMED OSMANPETITIONER

AND

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT
CABINET SECRETARY FOR INTERNAL SECURITY

AND COORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS.....INTERESTED PARTY

JUDGEMENT

1. The Petitioner, Egal Mohamed Osman is a British National, holder of a British Passport No. 508268718. He has resided in Kenya for the last seventeen years and has been a lecturer at RAF International University-Kenya having obtained a two year Entry Permit No. 904685 from the Director of Immigration Services valid from 29th September, 2012 to 29th September, 2014. He is married to a Kenyan citizen, Sainab Mohamed Yussuf. The marriage was solemnized on 8th March, 1997 and the union is blessed with five children all born and resident in Kenya.

2. The Petitioner has filed this petition challenging the Gazette Notice No. 2326 of 7th April, 2015 issued by the 1st Respondent, the Inspector General of Police and published in the Special Issue of the Kenya Gazette Vol. CXVII-No. 36 which called upon the entities enlisted therein to demonstrate within twenty four hours why they should not be recommended to the 2nd Respondent, the Cabinet Secretary for Internal Security and Co-ordination of National Government for declaration as specified entities within the meaning of Sections 2(1)(m) and 3 of the Prevention of Terrorism Act (POTA). He contends that he was No. 37 in the list of those allegedly associated with the Al Shabaab terrorist group.

3. He states that he came to know about the directive and the inclusion of his name late in the day on 8th April, 2015 from third parties. He therefore contends that the said Gazette Notice is illegal and

unconstitutional as it offends Section 3 of POTA and Articles 24(1), (27(1) and (2), 28, 29(c), 33(3), 35(1) and (2), 45(1), 47(1) and (2), 50(2), 238(2)(a) and (b) and 244 (c) of the Constitution.

4. In his petition, he therefore seeks the following orders:

“(a) A declaration that the 1st Respondent’s actions are in contravention of the provisions of Articles 2(1), 3(1), 10(1) and (2), 24(1), 238(2) (a) and (b), 244(C) of the Constitution 2010, have been and continue to be contravened and infringed upon by the Respondents.

(b) A declaration that the Petitioner’s fundamental rights and freedoms as enshrined under Articles 27(1) AND (2), 28, 29(c), 33(3),35(1) and (2), 45(1), 47(1) AND (2) AND 50(2), 238(2) (a) AND (b), 244(C) of the Constitution of Kenya 2010, have been and continue to be contravened and infringed upon by the Respondents.

(c) A declaration that the Gazette Notice No. 2326 Published by the 1st Respondent in the Kenya Gazette VOL. CXVII – NO. 36, is unconstitutional and illegal hence void *ab initio*.

(d) An order of Certiorari to bring into the Court for purposes of being quashed, directive by the 1st Respondent issued vide the Gazette Notice No. 2326 Published in the Kenya Gazette VOL. CXVII – NO. 36.

(e) An order of prohibition do issue restraining and/or staying the implementation and/or further implementation by the Respondents, their agents, servants, officials or offices under their docket and/or any other entity, of any directive/order issued by or on behalf of the Respondents in relation to Gazette Notice No. 2326 Published in the Kenya Gazette VOL. CXVII – NO. 36.

(f) An order of prohibition do issue restraining the 2nd Respondent, its agents, servants, officials or offices under its docket, from acting, dealing and /or in any manner whatsoever executing any recommendations given by the 1st Respondent pursuant to the Gazette Notice No. 2326 Published in the Kenya Gazette VOL. CXVII – NO. 36.

(g) General, exemplary and aggravated damages under Article 23(3) of the Constitution of Kenya 2010 for the unconstitutional conduct of the Respondents.

(h) Any other orders and directions as this Honourable Court may consider appropriate.

(i) Costs of this Petition.”

5. The Petitioner’s case is contained in his petition, the Petitioner’s affidavit in support thereof sworn on 20th April, 2015 and his written submissions dated 27th May, 2015.

6. Mr. Musyoki learned counsel presented the Petitioner’s case. It was his submission that the 1st Respondent has failed to accord the Petitioner due process of law as contemplated under the provisions of Section 3 of the POTA as a result of which his fundamental rights enshrined under the Constitution have been violated. He claimed that due process envisaged that the rules of natural justice must be adhered to. On that submission he relied on the case of **Mandeep Chauhan v Kenyatta National Hospital & 2 Others [2013] eKLR**, wherein the Court held that a cardinal rule of natural justice demanded that no one should be condemned unheard. He contended that the principle of due process which encompasses rules of natural justice is codified under Article 47(1) of the Constitution. That Article 47(1) of the Constitution grants every person the right to administrative action that is lawful and procedurally fair.

7. He claimed that the provisions of Section 3(2) of POTA require that before the 1st Respondent makes his recommendations to the 2nd Respondent that a person should be enlisted as a ‘specified entity’ under

POTA, the 1st Respondent ought to call upon that person to demonstrate why he should not be so listed. It is therefore Mr. Musyoki's position that the call for a person to 'demonstrate' is equivalent to a 'show cause' notice, and in issuing such notice, the 1st Respondent is required to furnish the person with a list of allegations against him so that he can reasonably prepare a meaningful response. He referred the Court to the case of **Geothermal Development Company Limited v Attorney General & 3 Others [2013] eKLR** where the Court held that the right to a hearing is of fundamental importance in the Kenyan justice system and even when it is not expressly provided for in the statute it must be implied in every act including when making an administrative action and it cannot be taken away. He also relied on the case of **Selvarajan v Race Relations Board (1976) 1 All ER 12** where Lord Denning stated that an investigating body is under a duty to act fairly and is required to give the individual the case against him and he also be accorded an opportunity to answer to it.

8. It was Mr. Musyoki's further submission that the provisions of Section 3(2) of POTA do not in any way limit the right to a fair hearing or due process of the law as is contemplated under Article 24(2) of the Constitution. It is his position that under the provisions of Article 2(1) and 3(1) of the Constitution, the respondents are duty bound to respect and uphold the Constitution and adhere to the national values and principles of governance set out in the Constitution while discharging their duties or applying any law or implementing public policy decisions even where matters of national security are involved. He therefore claimed that the respondents are in breach of Articles 238 (2) (a) and 244 (c) of the Constitution.

9. Mr Musyoki stated that the act of illegally publishing the name of the Petitioner without prior communication coupled with the 1st Respondent's subsequent conduct was malicious and a clear indication that the 1st Respondent has a predetermined position. That the Petitioner has been subjected to psychological and mental anguish contrary to the provisions of Articles 29(d) of the Constitution. He claimed that his reputation has been tarnished as the general public sees him as a terrorist without regard to due process therefore violating his right to dignity as enshrined under the provisions of Article 28 of the Constitution.

10. Mr. Musyoki's also submitted that the Petitioner is a father and a husband whose family is resident in this country. That the provisions of Article 45(1) of the Constitution obligate the state and indeed the 1st Respondent to protect the Petitioner's family. He thus submitted that through his actions the 1st Respondent has exposed the Petitioner's family to unnecessary stigma instead of offering protection.

11. According to Mr. Musyoki, the respondents have also demonstrated the deliberate and sheer disregard of the law by freezing the Petitioner's bank account at Barclays bank in contravention of the provisions of Regulation 11 of the Prevention of Terrorism (Implementation of the United Nations Security Council Resolutions on Suppression of Terrorism) Regulations, 2013.

12. It was his further submission that the actions of the 1st Respondent are not in good faith and are intended for other collateral purposes. That there is another case being **Petition No. 176 of 2014** where the Petitioner complained against the failure of the State to consider the Petitioner's application for citizenship. He claimed that the state commenced the process under Section 3 of POTA when it became apparent that it could not substantiate its allegation made in **Petition No. 176 of 2014**. That, in the present petition, the state has made allegations that the Petitioner is associated with Al Shabaab operatives. Yet in another case, **Petition No. 139 of 2015**, the state alleges that the Petitioner is the Key financier and point man of the Al-Qaeda terrorist group in the whole of Eastern Africa region. It was therefore Mr. Musyoki's contention that there are inconsistencies in the account given by the state.

13. It was also the submission of Mr. Musyoki that the 1st Respondent does not have the authority to issue a Gazette Notice under the provisions of Section 3 of POTA. That, such authority is bestowed upon the 2nd Respondent under the provisions of Section 3(3) of POTA.

14. On the basis of the foregoing, Mr, Musyoki urged the Court to grant the orders sought in the petition.

15. The respondents did not file any response to the petition. However, Mr. Kuria learned State Counsel

appearing for the respondents made submissions on points of law in opposing the Petition.

16. He submitted that the Inspector General of Police only declared his intention to request the 2nd Respondent to declare certain persons as specified entities. Accordingly, the Petitioner was to demonstrate to the Inspector General why he should not be listed. He stated that the evidence now being produced in Court i.e. the photos, certificate of good conduct and other documents ought to have been availed to the Inspector General of Police as a demonstration that the Petitioner is a good person. He stated that the Kenya Revenue Authority was already investigating the Petitioner's tax affairs even before the Gazette Notice was issued. In any event, it was his case that POTA has not set out the procedure to be used by the 1st Respondent in notifying the persons that he recommends for listing and that Section 3 of POTA has not been challenged to be unconstitutional accordingly it should be presumed to be constitutional.

17. Further, that the Petitioner has not been declared as a specified entity within the meaning of Section 36 and 37 of POTA. That, the decision has not been made declaring the Petitioner a specified entity. And that under Section 35 of POTA it is only a specified entity which can apply for lifting of an order made under Section 3(3) of POTA.

18. It was Mr. Kuria's submission that the Inspector General had complied with the law and the Petitioner had failed to prove his denial of due process of the law. And that in the absence of any declaration that POTA is unconstitutional, then the Court cannot issue any order against the 1st Respondent's decision.

19. Mr. Kuria urged the Court to take judicial notice of the terrorism acts committed in the country and urged that the petition be dismissed.

20. The Interested Party opposed the petition through the affidavit sworn on 2nd June, 2015 by Inspector Leonard Bwire, a police officer attached to the Anti-Terrorism Police Unit.

21. Mr. Bwire deposed that he has been involved in the day to day investigation of terrorism related offences. That the individuals named in the Gazette Notice subject of these proceedings were supposed to demonstrate why they should not be declared as specified entities per Section 3 of POTA. That pursuant to that Gazette Notice a number of individuals have already appeared before the investigators and others have been arrested and custodial orders sought.

22. He also averred that the Kenya Revenue Authority (KRA) has filed Misc. Criminal App. No. 531 of 2015 seeking warrants to enter the Petitioner's premises situated at Amal Plaza, 2nd floor, 1st Avenue, Eastleigh Estate within Nairobi. The KRA investigations are ongoing. He thus claimed that the evidence gathered so far and the evidence to be gathered by the 1st Respondent cannot be assessed at this stage neither can this Court weigh its sufficiency.

23. Mr. Ondimu, learned counsel presented the Interested Party's case. He submitted that Kenya is a party to various international instruments on terrorism. In that regard he claimed that the United Nations Security Council in its Resolution 1373 (2001) made on 28th September, 2001 requires member states to take the necessary steps to prevent the commission of terrorists acts. Further, that Article 8 of the International Convention for the Suppression of the Financing of Terrorism requires State Parties to the Convention to take appropriate measures for the identification, detection and freezing of any funds used or allocated for the purposes of terrorism. That the African Union Convention on the Prevention and Combating of Terrorism requires Member States to take all necessary measures to prevent the establishment of terrorists support networks in any form whatsoever.

24. He further stated that terrorism has offered a huge challenge to the country. He referred to the decision of the Court in **Coalition for Reform and Democracy & others v Attorney General & others (2015) eKLR**. He therefore claimed that the Gazette Notice was proper and this Court ought to take notice of the Government's intention in combating terrorism and complying with her international obligations.

25. It was his further contention that the 1st Respondent issued the Gazette Notice with the main purpose of calling the organizations and individuals named therein to demonstrate why they should not be declared as specified entities as per the provisions of POTA. That the contents of the said Gazette Notice are similar to those of a hearing notice and required the attendance of a person and in this case the Petitioner.

26. He claimed that the 1st Respondent has powers under Section 52 of the National Police Service Act to require the attendance of any person whom the officer has reason to believe that he has information which may assist in the investigation of an alleged offence. He thus contended that the 1st Respondent had observed the procedural fairness in discharging his obligation. He indeed claimed that the impugned Gazette Notice amounted to a hearing notice for which the Petitioner has already honoured and investigations were progressing.

27. He stated that the Petitioner had already appeared before the Directorate of Criminal Investigations (D.C.I.) and he is yet to make any recommendations to the Cabinet Secretary in regard to declaring the individuals and entities as specified entities.

28. Mr. Ondimu urged the Court to take judicial notice of the fact that terrorism is a threat to national, regional, and international peace and security. That it violates the fundamental principles of law, order, and human rights and freedom. And further that it has become a global phenomenon and its prosecution has become challenging due to the evolving nature of terrorism. He relied on the decision of **Dr. Ismael Kalule & 4 others v Uganda, Crim. Misc. Applications No. 57, 58, 59, & 60 of 2010** where the Court recognized that offences related to terrorism were a global phenomenon and had caused much public anxiety and resentment.

29. On reasonableness, Mr. Ondimu submitted that the 1st Respondent was best suited to make a decision in regard to ensuring the security of the country. That the 1st Respondent has a constitutional duty to ensure security of all persons within Kenyan borders.

30. For the foregoing reasons, Mr. Ondimu therefore urged the Court to dismiss the petition.

31. Having read and reflected on the submissions made by the parties, it is clear that the facts of this Petition are not contested. It is not in dispute that the 1st Respondent issued the impugned Gazette Notice. In that regard the Petitioner's case as I understand it is straight forward; his case is not based on the report or the intelligence information the 1st Respondent may have as against him, but at the core of his challenge against the impugned Gazette Notice is that he was neither informed of the allegations facing him nor was he given an opportunity to be heard before the 1st Respondent could enlist his name in the said Gazette Notice as a person suspected to be associated with Al Shabaab.

32. On the other hand Section 3(1) and (2) of POTA provides thus:

“3 (1) Where the Inspector-General has reasonable grounds to believe that—

(a) an entity has—

(i) committed or prepared to commit;

(ii) attempted to commit; or

(iii) participated in or facilitated the commission of, a terrorist act; or

(b) an entity is acting –

(i) on behalf of;

(ii) at the direction of; or

(iii) in association with, an entity referred to in paragraph (a), he may recommend to the Cabinet Secretary that an order be made under subsection (3) in respect of that entity.

(2) Before making a recommendation under subsection (1), the Inspector-General shall afford the affected entity an opportunity to demonstrate why it should not be declared as a specified entity.”

33. It is therefore clear and contrary to the submission made by Mr. Musyoki that the provisions of Section 3 of POTA grant powers to the 1st Respondent to make recommendation to the Cabinet Secretary that a certain entity ought to be declared as specified entity. It is therefore my finding that the 1st Respondent has the powers to make such recommendation. However, Section 3 (2) is to the effect that before making such recommendation, the 1st Respondent ought to afford the affected entity an opportunity to demonstrate why it should not be declared as a specified entity. Therefore, at the core of the dispute before me, is whether, the Petitioner’s right under Article 47(1) and (2) of the Constitution was violated when the 1st Respondent issued the Gazette Notice without making known the allegations against him and according him an opportunity to be heard. To paraphrase, the issue is whether the 1st Respondent was obliged to give the Petitioner the reasons as to why he was suspected of being associated with Al Shabaab and also whether he was entitled to be heard before his name was published in the impugned Gazette Notice.

34. In that regard, Article 47 of the Constitution enshrines the right to fair administrative action in the following manner:

“47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

35. In the case of **Dry Associates Ltd v Capital Markets Authority and Another Petition No. 328 of 2011**, Majanja J stated as follows in regard to right to fair administrative action:

“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law...but is to be measured against the standards established by the Constitution”.

36. I agree with the learned Judge. The right to be heard is one of the two cardinal rules established under the principle of natural justice and it is generally expressed as *audi alteram partem* (that a party should not be condemned unheard). The Court of Appeal in **Onyango Oloo v Republic (1986-1989) EA 456** stated as follows as regards the importance of the right to be heard:

“It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided.”

37. Similarly, in **The Management of Committee of Makondo Primary School and Another v Uganda National Examination Board, HC Civil Misc Applic No.18 of 2010**, the Ugandan Supreme Court stated as follows regarding the rules of natural justice:

“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that

contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing.”

38. It is thus a settled principle of law that the right to be heard requires that whenever an administrative decision has to be made; the person affected by such decision should be given an opportunity to express himself in that regard. Also that if in the circumstances of a case it would be impossible to hear any party affected, such a party must be given reasons for the decision being made. See **Independent Police Oversight Authority & others v The National Police Service Commission & others, High Court Petition No. 390 of 2014.**

39. Applying the above principles to the instant Petition, it is not contested that the 1st Respondent listed the Petitioner as the 37th person in the list of the persons allegedly associated with Al Shabaab. He, however, contends that before such listing could be done, the 1st Respondent ought to have given him the allegations against him and also accord him a hearing before adversely mentioning him in the Gazette Notice.

40. On their part the respondents and the Interested Party contend that it was not necessary to accord the Petitioner a hearing because the 1st Respondent is not the person who enlists but his duty is limited to making the recommendation to the 2nd Respondent who is the person mandated in law to enlist an entity as a specified entity.

41. The question I must therefore answer is whether the respondents violated the Petitioner's right to be heard. While deciding a similar issue arising from the same Gazette Notice, Emukule J in **Muslims For Human Rights (MUHURI) & another v The Inspector General of Police & 4 others [2015] eKLR** stated as follows;

“It was argued that Section 3(2) of the Prevention of Terrorism Act does not expressly require the Inspector-General of Police either to provide reasons for his suspicions or investigations. The Inspector-General of Police could have conveyed summons to the Petitioners/Applicants and other persons listed in any number of ways to present themselves to him or his representatives on the ground in order to defend themselves. That he chose to summon the Petitioners in a Special Gazette Notice had not been shown to cause any particular prejudice to the Petitioners/Applicants or infringed their constitutional rights. It was also argued that depending on the decision finally taken by the Inspector-General of Police, and the Cabinet Secretary, the Applicants would have another opportunity under Section 3(6) of the Prevention of Terrorism Act to redeem themselves. It was similarly pleaded that until then, the proceedings in this Court with regard to the question whether there are or were sufficient grounds for their suspicion or investigation no them are premature, and that on this ground alone the application should also be dismissed.

With respect I do not agree. The Petitioners/Applicants are not inanimate things or mere names. They are represented by living men and women who have emotions and feelings or if you prefer minds and souls.”

42. While I agree with the learned judge that the Petitioner is not an inanimate thing but is a human being with feelings and emotions, I do not think that the 1st Respondent violated any of his rights at the stage he published his name in the impugned Gazette Notice.

43. I say so because the Gazette Notice specifically notified the Petitioner and other entities set out in the notice to demonstrate within twenty four hours why he should not be declared as a specified entity. Indeed, this notification is in accordance with Section 3(2) of POTA which requires the 1st Respondent to accord the entity an opportunity to demonstrate why it should not be declared a specified entity. The law

is clear that all that is required of the 1st Respondent at that stage is to give the opportunity to demonstrate why the 1st Respondent should not recommend to the 2nd Respondent to enlist the Petitioner as a specified entity. The law as I understand it does not call upon the 1st Respondent to give reasons to the Petitioner at that stage as to why the 1st Respondent has reasonable basis to believe that the Petitioner has committed or is prepared to commit or has facilitated a terrorist act.

44. I do not see any violation of Article 47 of the Constitution because the Petitioner would have to undergo various stages before he is so specified as an entity. In that regard Section 3 of POTA is safe-checking and ensures that the decision of both the Inspector General and the Cabinet Secretary are in accordance with the law. For avoidance of doubt, it states as follows:

“3 (3) Upon receipt of the recommendation under subsection (1), the Cabinet Secretary may, where he is satisfied that there are reasonable grounds to support a recommendation made under subsection (1), declare, by order published in the Gazette, the entity in respect of which the recommendation has been made to be a specified entity.

(4) The Cabinet Secretary shall, subject to subsection (5), inform the entity in respect of which the order is made, in writing, of his decision under subsection (3) together with reasons for arriving at that decision, within a period seven days from the date of declaring the entity a specified entity.

(5) A specified entity may apply to the Inspector-General requesting for the revocation of an Order made under subsection (3) in respect of that entity.

(6) If on an application made under subsection (5), the Inspector-General is satisfied that—

(a) there are reasonable grounds for making the application, recommend to the Cabinet Secretary the revocation of the Order; or

(b) there are no reasonable grounds for making the application, the Inspector-General shall reject the application and shall, within sixty days of receiving the application, inform the applicant of the decision.....”

45. I must state that under the provisions of Section 51(1) of the National Police Service Act, the police service is charged with *inter alia* the function of taking all the necessary steps to prevent commission of offences and public nuisance and also to investigate crime. In performing its functions, the National Police Service works closely with other national security organs such as the Defence Forces and the National Intelligence Service. It is also bound to observe and respect the provisions of the Constitution. I must then agree with Emukule J in the **MUHURI** case (*supra*) when he stated that:

“The First Respondent is not just an investigating body. It is an independent constitutional body charged with the maintenance of security and protection of the citizens of Kenya, the governors and the governed. The First Respondent in conducting its investigations is bound to comply with basic requirements of natural justice. The principles of natural justice concern procedural fairness and ensure that a fair decision is reached by an objective decision-maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process.”

46. I am in agreement. But I am aware of the fact that in the course of its work, the National Police Service receives several complaints and various intelligence information that enables it perform its mandate. In my view, it would be impossible to grant every person a hearing whenever adverse security reports are made against that person. Secondly, whenever such adverse reports are made or the 1st Respondent has reasonable reasons to believe that a certain person has committed or is about to commit a crime, he ought to take prompt action thus it becomes impossible to accord such a person a hearing at that stage.

47. This is why in **R v Aga Khan Education Services ex parte Ali Sele & 20 Others [2010] eKLR** the Court while considering the applicability of the rules of natural justice held *inter alia*:

“On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the Court and there cannot be a general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the Court has to strike a balance.”
(Emphasis mine).

48. Similarly in **Russel v Duke of Norfolk (1949) All ER 118**, the Court had the following to say on the same issue:

“There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly, I do not derive much assistance from the definition of natural justice which have been from time to time used, but whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.” (Emphasis added).

49. Thus far, it is clear that the right to be heard is not absolute and is not necessarily always strictly applied. It is a right that can be limited under the provisions of Article 25 of the Constitution and to the extent set out under Article 24 of the Constitution. Article 24 is in the following terms:

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

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

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

(c) the nature and extent of the limitation;

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

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

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

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

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

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

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

50. 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.

51. So far, it can be seen that the ground rule is that the requirements of natural justice are not applicable in all situations involving the making of administrative and quasi-judicial decisions and the framers of the Constitution did not envisage that it would be applied in every case. Their application depends on the circumstances of each case, the nature of the inquiry, and lastly, whether the person concerned was given a reasonable opportunity of presenting his or her case.

52. Applying that finding in the present case *vis-à-vis* the limitation criteria established under Article 24 of the Constitution, the Petitioner's complaint is that the 1st Respondent did not issue direct communication to him and he came to know about the directive and the inclusion of his name in the Gazette Notice on 8th April, 2015 from third parties. However, I did not hear the Petitioner claim that he was not granted an opportunity to be heard at all. Neither is he aggrieved that the opportunity he was granted to be heard was not reasonable. I have already found that in security cases, the 1st Respondent is not compelled to give out his reasons and for a good reason. In any event, I did not hear the Petitioner claim that he was not granted an opportunity to be heard at all. Instead of appearing before the 1st Respondent and presenting his case, the Petitioner chose to file the instant petition. But, the evidence on record reveals that the Petitioner did appear before the investigating officer and to date the 1st Respondent is yet to make a decision on whether he should recommend his listing to the 2nd Respondent.

53. In any case, the Gazette Notice itself was a notice to demonstrate why he should not be listed. To my mind the Gazette Notice as published demonstrates that the Petitioner was to present his case before the 1st Respondent could make his recommendation to the 2nd Respondent. He cannot now be heard to complain that he was not heard before the 1st Respondent made his decision to recommend him if at all; when he actually did not controvert the averment by Inspector Bwire that he was accorded a hearing. The 1st Respondent did not adhere to his timeline of twenty four hours. The Petitioner was given sufficient opportunity to present his case. He concedes that he has done so by filling certain forms. The Court cannot question the process used by the 1st Respondent in order to decide whether or not the Petitioner should be recommended to the 2nd Respondent for listing as a specified entity. The most important thing is that the Petitioner has been availed a chance to present his side of the story.

54. Be that as it may, I have already stated that the decision of the 1st Respondent is not final and that POTA is self-guarding because the Petitioner has to undergo various other stages in which he would be accorded a hearing as to whether he ought to be listed as a specified entity as provided for under Section 3(3) of POTA. In any event, even when the order has been made against an individual, under Section 3(5) of POTA he can make an application to the 1st Respondent requesting him to revoke the said order. Under Section 3(7) of POTA a person has the right to petition the Court when aggrieved against the decision of the 1st Respondent.

55. In conclusion, I must reiterate that the national security is an important aspect of the public interest. As observed in the case of **Coalition of Reform for Democracy** (supra) we are living in troubled times partly because of the terrorism acts committed in this country. Security must be taken seriously by the State, the security forces and generally each 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”. This Act has in my view given the security forces wide powers 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 the society. On that aspect, the words of Hon. Justice Chigamoy Owiny-Dollo in **Dr. Ismael Kalule & 4 others v Uganda (supra) where he stated as follows:**

“Nevertheless I have taken judicial notice of the fact that terrorism has become a global phenomenon that has caused much public anxiety and resentment; the more so because the perpetrators target soft targets and their victims are usually people with whom they have no quarrel at all.”

56. I have said enough to the effect that the 1st Respondent acted in accordance with the law. I did not hear the Petitioner to claim that Section 3 (3) of POTA is unconstitutional. That being my finding and as long as it remains in our law books it must be observed and adhered to. I therefore do not find any wrong doing on the part of the respondents.

57. In the circumstances, I do not find that the impugned Gazette Notice violated any of the Petitioner’s rights as alleged. I will therefore dismiss the petition.

58. As to costs, let each party bear its costs.

59. Orders accordingly.

Dated, signed and delivered at Nairobi this 10th day of July, 2015.

W. KORIR, J

JUDGE OF THE HIGH COURT