

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CONSTITUTIONAL PETITION NO. E399 OF 2024

IN THE MATTER OF ARTICLES 22, 10, 258 AND 259, 47, 48 AND 50 OF THE
CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLE 27, 28, 29, 35, 39, 47, 48, 49 AND
50 OF THE CONSTITUTION OF KENYA 2010

AND IN THE MATTER UNDER SECTION 22, 49 OF THE KENYA CITIZENSHIP
AND IMMIGRATION ACT 2011

BETWEEN

ABDIQADAR OMAR OSMAN..... THE PETITIONER
AND

MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT..... 1ST RESPONDENT

DIRECTOR GENERAL OF IMMIGRATION.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

ATTORNEY GENERAL4TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....5TH RESPONDENT

REGISTRAR OF PERSONS..... 6TH RESPONDENT

AND

ABDIQADAR OMAR OSMAN.....1ST INTERESTED PARTY

JUDGMENT

1. What is before this Court for determination is the Petitioner’s Petition dated 9th August, 2024 together with the Notice of Motion application of even date. The Petition is opposed by the Respondents, who have filed replying affidavits, grounds of opposition, written submissions, and a preliminary objection challenging, inter alia, the jurisdiction of the Court and the propriety of the proceedings. At the core of the dispute is the alleged unlawful arrest, deportation, and continued exclusion from Kenya of the Petitioner, who asserts that he is a Kenyan citizen by birth, and the attendant question whether his constitutional rights and fundamental freedoms were violated.

2. The Petitioner’s case is that he is a Kenyan citizen by birth who, until May 2018, freely enjoyed his constitutional right to movement. He avers that while travelling from Kampala to Kenya in May 2018, he was arbitrarily arrested at Jomo Kenyatta International Airport without being informed of the reasons for his arrest, without access to legal counsel, and without any charges being preferred against him. He contends that he was not presented before a court within the period prescribed by the Constitution but was instead taken to the immigration offices at Nyayo House and summarily deported to Somalia.

3. According to the Petitioner, the deportation was carried out without due process, without an opportunity to be heard, and in flagrant disregard of his dignity and procedural fairness, notwithstanding his status as a Kenyan citizen evidenced by a birth certificate and a Kenyan national identity card. He attributes the impugned actions to mistaken identity arising from similarity of names with another individual and faults the Respondents for failing to conduct proper verification and due diligence. He further avers that since the deportation, he has persistently been denied re-entry into Kenya, thereby suffering prolonged hardship, loss of livelihood, and separation from his family and social support systems.

4. The Petitioner contends that the arrest, deportation, and continued denial of entry violated a multiplicity of his constitutional rights, including the right to inherent dignity under Article 28, freedom of movement under Article 39, the right to fair administrative action under Article 47, access to justice under Article 48, the rights of an arrested person under Article 49, and the right to a fair hearing under Article 50 of the Constitution. He submits that the statutory powers of removal under the Kenya Citizenship and Immigration Act do not apply to Kenyan citizens and, in any event, were not lawfully invoked in his case as no deportation order was issued or served upon him. He urges the Court to grant the following reliefs:

- A. A declaration that the arrest of the Petitioner was in the circumstances arbitrary, unlawful illegal, unconstitutional and in violation of the Petitioner's fundamental right guaranteed by Article 49 of the Constitution of Kenya.
- B. A declaration that the forcible removal from Kenya to Somali without due process of law, without extradition proceedings without deportation orders, was unlawful, illegal and unconstitutional.
- C. An order of Certiorari to call, remove and deliver up to this Honourable Court to be quashed the decision, declaration and or directive of the Respondents to deport the Petitioner from Kenya to Somali and or to restrain the Petitioner from residing, living and or working within the Republic of Kenya.
- D. An order of Mandamus to compel the Respondents whether by themselves and or through their agents or officers to forthwith allow the Petitioner peaceful entry, exit, residence, stay, working and or carry out business in Kenya.
- E. An order of Prohibition to prohibit and or restrain the Respondents whether by themselves or through their agents and or officers from arresting, detaining, deporting and or in any manner interfering with the Petitioner's peaceful and lawful right to entry, exit, stay, residence and or working in Kenya.

F. An award of such general, exemplary, aggravated and/ or punitive damages as may be assessed by the Honourable Court.

G. Costs of this Petition

H. Any other order(s) and directions as the Honourable Court shall deem fit and just to grant.

5. The 2nd Respondent's case, as discerned from the Replying Affidavit sworn by Christine Kinyua, a Senior Immigration Officer within the Directorate of Immigration Services (Enforcement and Compliance Section), and as amplified by the Grounds of Opposition and the written submissions of the 5th Respondent, is anchored on the assertion that the Petition is wholly devoid of merit, discloses no violation of the Constitution, and constitutes an abuse of the court process. The Respondents aver that they are duly established government agencies acting within their constitutional and statutory mandate under the Constitution of Kenya, the Kenya Citizenship and Immigration Act, 2011, and other enabling legislation, to enforce immigration laws and ensure compliance therewith. They categorically deny having violated the Petitioner's fundamental rights and freedoms as alleged or at all.

6. The 2nd Respondent's uncontroverted position is that the acquisition of Kenyan primary identity documents through fraud neither confers citizenship nor attracts constitutional protection, but instead constitutes a criminal offence under Section 51(1)(a) and (i) as read with Section 54(2) of the Kenya

Citizenship and Immigration Act, 2011, and Section 355 of the Penal Code, punishable by penal sanctions including imprisonment. It is their case that the Petitioner irregularly procured a Kenyan national identity card at the age of twenty-nine (29) years, in flagrant contravention of Section 6 of the Registration of Persons Act, Cap 107, which mandates every Kenyan citizen to present themselves for registration upon attaining the age of eighteen (18) years. The Respondents further aver that, as a matter of common notoriety, identity documents and birth certificates are indispensable prerequisites for participation in basic educational, civic, and socio-economic transactions, thereby rendering the Petitioner's purported first application for a birth certificate at the age of twenty-nine both implausible and inherently suspect.

7. The Respondents invite the Court's attention to the inordinate haste and questionable sequence in which the Petitioner obtained Kenyan documentation, namely the issuance of a national identity card in February 2017, a birth certificate on 24th February 2017, and a Kenyan passport on 27th April 2017. They emphatically repudiate the assertion that the Petitioner's predicament arose from mistaken identity occasioned by similarity of names. To the contrary, the Respondents aver that the Petitioner's particulars are wholly distinct from those of one Abdikadir Omar Osman, an individual born in Mandera on 13th November 1993 and issued with identity card number 31108092 on 25th November 2012, whereas the Petitioner, Abdiqadar Omar Osman, allegedly born in Wajir on 1st July 1988, bears identity card number 35816739.

8. It is further contended that the Petitioner deliberately altered and counterfeited the identity card of the said Abdikadir Omar Osman by superimposing his own personal particulars, photograph, and signature thereon, a fact, the Respondents submit, that is corroborated by documentary evidence annexed to the Replying Affidavit. Additionally, a routine biometric audit conducted through the PISCES (Personal Identification Secure Comparison and Evaluation System) revealed that the Petitioner is in fact an Ethiopian national holding passport number EP6621139, reflecting a date of birth of 10th August 1988 and place of birth as Jigjiga, and further a Somali national holding passport number P00248718. On the basis of these findings, the Respondents assert that the Petitioner fraudulently acquired Kenyan identity documents and, by extension, posed a security risk to the Republic of Kenya, thereby justifying prompt administrative action for his removal.

9. The Respondents further submit that the orders sought, if granted, would amount to an unwarranted intrusion into and usurpation of their constitutional and statutory mandate, particularly in circumstances where the Petitioner has willfully failed to comply with the lawful procedures for acquisition of citizenship as prescribed under Section 13(1) of the Kenya Citizenship and Immigration Act, 2011. In the premises, the Petition is characterized as frivolous, vexatious, and an abuse of the court process, and the Court is urged to dismiss it with costs.

10. With specific regard to the 5th Respondent, it is contended that no cause of action has been disclosed against it within the meaning of Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Petitioner is faulted for failing to plead or demonstrate any act, omission, or decision attributable to the 5th Respondent that violated or threatened his constitutional rights. The 5th Respondent maintains that its constitutional mandate, as delineated under Article 157(4) and Article 157(6) of the Constitution of Kenya, is confined to directing investigations and instituting criminal proceedings, and does not extend to arrest, detention, or deportation.

11. In support of this proposition, reliance is placed on ***Muslims for Human Rights v Attorney General & 2 others (Petition E168 of 2018) [2022] KEHC 12775 (31 August 2022)***, wherein the Court held that the Director of Public Prosecutions had been improperly enjoined in proceedings in the absence of any specific allegations or violations attributable to that office. A similar principle was reiterated in ***Ambasa & 4 Others v National Executive Council of the Kenya National Union of Teachers & 3 Others (Petition E037 of 2023) [2023] KEELRC 2826 (KLR)***, where the Court struck out a respondent against whom no cause of action, omission, or relief had been pleaded. On the strength of the foregoing authorities, the 5th Respondent urges the Court to find that it is not a proper party to these proceedings and to dismiss the Petition as against it with costs.

Analysis and Determination

12. Having carefully considered the pleadings, affidavits, submissions, and authorities filed by the parties, the Court is of the considered view that the following issues arise for determination:

- i. Whether the Preliminary Objection raised by the 1st, 2nd, 3rd, 4th and 6th Respondents meets the legal threshold of a proper preliminary objection and, if so, whether it divests this Court of jurisdiction.*
- ii. Whether the arrest, detention, and deportation of the Petitioner violated Articles 49, 50, and 51 of the Constitution of Kenya.*
- iii. Whether a cause of action has been disclosed against the 5th Respondent and whether it was properly joined to these proceedings.*
- iv. Whether the Petitioner is entitled to the reliefs sought.*

Whether the Arrest, Detention, and Deportation Violated the Constitution

13. Article 49(1)(f) of the Constitution guarantees every arrested person the right to be brought before a court as soon as reasonably practicable, and in any event not later than twenty-four hours after arrest. This safeguard is neither technical nor optional, it is a substantive constitutional command intended to prevent arbitrary detention and to subject the exercise of State power to prompt judicial scrutiny.

14. The evidence before this Court, which the Respondents have not controverted, establishes that the Petitioner was arrested at Jomo Kenyatta International Airport, detained, and instead of being presented before a court within the constitutionally prescribed period, was taken to the immigration offices at Nyayo House and summarily removed from the country. This conduct amounted to a deliberate circumvention of judicial oversight and an outright negation of the protections guaranteed under Article 49 of the Constitution.
15. In ***Julius Kamau Mbugua v Republic [2010] eKLR, as affirmed in Fappyton Mutuku Ngui v Republic [2014] KECA 570***, the Court of Appeal held that a violation of the right to be produced in court within twenty-four hours does not automatically invalidate subsequent proceedings, but it entitles the affected person to appropriate constitutional remedies. The rationale is that Article 49 protects personal liberty and the rule of law, and its breach constitutes a constitutional wrong that attracts redress.
16. It is therefore beyond dispute that failure to bring an arrested person before a court within the time mandated by Article 49(1)(f) engages constitutional protections against arbitrary detention and implicates the right of access to justice.
17. In the present case, the violation was aggravated by the fact that the Petitioner was not merely detained unlawfully but was forcibly expelled from the jurisdiction altogether, thereby rendering access to the courts illusory.

The Court finds that the Respondents' actions constituted a grave violation of Articles 49, 50(1), and 51 of the Constitution and cannot be justified under any statutory or administrative framework.

18. The Respondents' conduct was manifestly unconstitutional, undermined the rule of law, and deliberately circumvented judicial oversight. As emphasised in *Fappyton Mutuku Ngui v Republic (supra)*, Article 49(1)(f) is a substantive safeguard intended to protect personal liberty and to prevent arbitrary detention through prompt judicial scrutiny of State power. The Respondents' failure to comply with this requirement, compounded by the Petitioner's forcible removal from the country, strikes at the very core of constitutional governance.
19. This Court is therefore satisfied that the Respondents' failure to present the Petitioner before a court within the constitutionally prescribed period, coupled with his deportation without due process, amounted to a gross violation of his constitutional rights to liberty, access to justice, and protection from arbitrary State action, thereby attracting constitutional liability.

Whether the Petitioner Is a Kenyan Citizen by Birth

20. Turning to the substance of the Petition, the Court finds that the Petitioner placed before it a Kenyan birth certificate, Entry No. L04001335/1, issued by the Registrar of Births and Deaths on 24th February 2017, and a Kenyan

National Identity Card No. 35816739, issued by the Registrar of Persons on 8th February 2017. These documents constitute *prima facie* proof of Kenyan citizenship and remain valid unless and until lawfully cancelled through a process that complies with the Constitution and statute.

21. Citizenship by birth accrues automatically by operation of law under Article 14(1) of the Constitution. Documentation does not confer citizenship, it merely recognises a pre-existing constitutional status. There is no constitutional or statutory provision prescribing the age at which a citizen must obtain primary identification documents, and the timing of registration, without more, cannot negate citizenship by birth.

22. In *Attorney General v Kituo Cha Sheria & 7 Others [2017] eKLR*, the Court of Appeal underscored the inherent nature of constitutional rights in the following terms:

“Rights under the Constitution have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.”

23. This principle equally informs the jurisprudence on citizenship by birth. In *E W A & 2 Others v Director of Immigration and Registration of Persons & Another [2018] eKLR*, the Court held that:

“By operation of law, they are Kenyan citizens by birth. Such citizenship cannot be revoked or lost by the mere fact that a person had acquired citizenship of another country.”

24. The Respondents have not produced any Gazette Notice, administrative revocation, or court order cancelling the Petitioner’s birth certificate or identity card. Mere allegations of fraud, unsupported by due process, cannot suffice to strip a person of citizenship.
25. The Court therefore finds, in accordance with the burden and standard of proof required in a civil matter, that the Petitioner is a Kenyan citizen by birth.

Whether the 2nd Respondent Acted Lawfully and Fairly

26. The 2nd Respondent contends that the Petitioner fraudulently acquired Kenyan identity documents and is a foreign national holding Ethiopian and Somali passport. These allegations, if lawfully established, would raise serious legal and security concerns. However, constitutional governance demands that even the gravest allegations be addressed through fair, transparent, and lawful procedures.
27. Article 47 of the Constitution guarantees every person the right to administrative action that is lawful, reasonable, and procedurally fair. Where an administrative decision is likely to adversely affect rights or status, the

affected person must be given prior notice, reasons, and an opportunity to be heard.

28. The evidence demonstrates that the Petitioner was afforded none of these safeguards. He was not notified of the allegations against him, was not given an opportunity to respond, and was not subjected to any discernible decision-making process culminating in a reasoned deportation order.
29. The principle of *audi alteram partem* applies with particular force where citizenship and personal liberty are at stake. In ***R v Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531***, Lord Mustill stated:

“Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances... Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken... or after it is taken...”
30. This principle has been consistently applied by Kenyan courts. In ***Okiya Omtatah Okoiti & 3 Others v Attorney General & Another [2019] eKLR***, the High Court affirmed that where a decision adversely affects constitutional rights, the affected person is entitled to a meaningful opportunity to be heard.

31. The Respondents' reliance on biometric audits and intelligence findings does not absolve them of the duty to act fairly. In ***Coalition for Reform and Democracy (CORD) v Republic of Kenya [2015] eKLR***, the Court held that constitutional rights are not suspended by the mere invocation of national security.
32. The Court further finds that similarity of names did not justify the drastic measures taken. Identity card numbers are unique identifiers designed precisely to eliminate confusion arising from similar names. The failure to verify this basic distinction amounts to administrative recklessness. As held in ***Republic v Kenya Revenue Authority ex parte Universal Corporation Ltd [2016] eKLR***, negligence in administrative processes cannot be visited upon citizens.

Whether a Kenyan Citizen Can Be Deported

33. Having found that the Petitioner is a Kenyan citizen by birth, the Court must state, without equivocation, that a Kenyan citizen cannot be deported. Deportation is a statutory mechanism applicable only to non-citizens. Sections 33 to 45 of the Kenya Citizenship and Immigration Act regulate the removal of prohibited immigrants and inadmissible persons; citizens fall outside this framework.

34. Article 39(3) of the Constitution guarantees every citizen the right to enter, remain in, and reside anywhere in Kenya. Any act purporting to expel a citizen from the Republic is unconstitutional *ab initio*. The maxim *quod ab initio non valet, in tractu temporis non conualescit* applies.
35. The Petitioner's detention and removal further violated Article 51 of the Constitution, which preserves the rights of detained persons, including access to court and the right to challenge the legality of detention. Detention does not extinguish citizenship, dignity, or access to justice.

Whether a Cause of Action Lies Against the 5th Respondent

36. The Court finds merit in the 5th Respondent's submission that no cause of action was disclosed against it. No specific act, omission, or decision attributable to the 5th Respondent was pleaded or proved, and none of the reliefs sought were directed at it.
37. In ***Muslims for Human Rights v Attorney General & 2 Others [2022] KEHC 12775***, the Court declined to sustain proceedings against a respondent against whom no specific wrongdoing was alleged. The joinder of the 5th Respondent was therefore improper.

Reliefs and Damages

38. Having found that the arrest, detention, deportation, and continued exclusion of the Petitioner from the Republic were arbitrary, unlawful, and unconstitutional, and in violation of Articles 39, 49, 50, and 51 of the Constitution, the Court turns to the question of appropriate relief.
39. Article 23(3) of the Constitution empowers this Court to grant appropriate relief, including an award of damages, where a violation of fundamental rights and freedoms is established. The primary purpose of constitutional damages is not enrichment, but the vindication of rights, compensation for proven injury, and the affirmation of constitutional values. This principle has been consistently emphasized by the Court of Appeal, which has cautioned that damages in constitutional litigation must be reasonable, proportionate, and responsive to the particular facts of each case.
40. The Respondents' conduct in the present matter was not merely unlawful, it was arbitrary, high-handed, and oppressive. The Petitioner was deprived of liberty without lawful cause, denied access to court, forcibly removed from the country without due process, and thereafter unlawfully excluded from his own country. The cumulative effect of these acts was to subject the Petitioner to humiliation, prolonged hardship, and a sustained denial of constitutional protection. The manner in which the violations were carried out materially aggravated the injury suffered.
41. Aggravated damages are compensatory in character and are awarded where the circumstances of the violation increase the harm suffered by the

claimant, particularly through humiliation, arbitrariness, or deliberate disregard of constitutional rights. Exemplary damages, though exceptional, may be awarded where the conduct of State actors is oppressive, arbitrary, or unconstitutional, and where such an award is necessary to mark the Court's disapproval and deter future misconduct.

42. In *Odembo & 7 Others v Attorney General [2022] eKLR*, the High Court articulated the governing principles in the following terms:

“Aggravated damages are awarded where the conduct of the defendant has aggravated the injury to the plaintiff by humiliating him or showing a deliberate disregard of his rights. Exemplary damages, on the other hand, are meant to punish and deter oppressive, arbitrary or unconstitutional conduct by servants of the government.”

43. The Court proceeded to award both aggravated and exemplary damages, holding that arbitrary and unconstitutional conduct by State officers, which resulted in serious violations of personal liberty and dignity, warranted a monetary award that would both compensate the victims and vindicate the Constitution.

44. Applying these principles to the present case, the Court is satisfied that this is an appropriate case for the award of aggravated and exemplary damages. The Respondents' actions were taken outside the bounds of the law, in conscious disregard of the Petitioner's constitutional status and rights, and in a manner that deliberately circumvented judicial oversight. Such conduct

strikes at the heart of the rule of law and cannot be left without a meaningful judicial response.

45. At the same time, the Court remains mindful of the need for proportionality and restraint in the assessment of quantum, consistent with appellate guidance. Taking into account the nature of the violations, the duration and impact of the harm suffered, the conduct of the Respondents, and awards made in comparable cases, the Court considers that a global award of KES 3,500,000 by way of general (KES 2,000,000), aggravated (KES 500,000) and exemplary damages (KES 1,000,000) is fair, reasonable, and proportionate.
46. This award is intended to compensate the Petitioner for the aggravated injury suffered, to vindicate the violated constitutional rights, and to mark the Court's unequivocal disapproval of arbitrary and unconstitutional conduct by State organs, while remaining consistent with the remedial, rather than punitive, orientation of constitutional damages jurisprudence.
47. In light of the foregoing findings, the Court makes the following orders:
 - a) A Declaration be and is hereby issued that the Petitioner is a Citizen of Kenya by Birth;
 - b) A Declaration be and is hereby issued that the Petitioner's arrest was arbitrary, unlawful, illegal, unconstitutional, and in violation of his fundamental right to liberty under Article 49 of the Constitution;

- c) a Declaration be and is hereby issued that the forcible removal of the Petitioner from Kenya to Somalia without due process, extradition proceedings, or a deportation order was unlawful, illegal, and unconstitutional;
- d) An Order of Certiorari be and is hereby issued removing into this Court for the purpose of quashing, which this Court does hereby quash, the decision, directive, and actions of the Respondents in deporting the Petitioner and restraining the Petitioner from residing, living, or working within the Republic of Kenya;
- e) An Order of Mandamus be and is hereby issued compelling the Respondents, whether by themselves or through their agents or officers, to forthwith allow the Petitioner peaceful entry, exit, residence, stay, and the right to work or carry out business in Kenya;
- f) An Order of Prohibition be and is hereby issued permanently restraining the Respondents, whether by themselves or through their agents or officers, from arresting, detaining, deporting, or otherwise interfering with the Petitioner's lawful rights of entry, exit, residence, and work in Kenya without full compliance with due process and all applicable law;
- g) General, Aggravated and Exemplary damages in the global sum of KES 3,500,000 are awarded to the Petitioner and shall be borne by the 1st, 2nd, 3rd, 4th and 6th Respondents, jointly and severally, with interest at Court rates until payment in full;
- h) Costs to the Petitioner which shall be borne by the 1st, 2nd, 3rd, 4th and 6th Respondents, jointly and severally.

Orders accordingly. File closed accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11th DAY OF
FEBRUARY 2026.**

**BAHATI MWAMUYE MBS
JUDGE**

In the presence of: -

Counsel for the Petitioner - Ms. Nekesa h/b Mr. Dastan Omari

Counsel for the 1st 2nd 3rd 4th and 6th Respondent - Ms. Rukiya h/b Ms. Opio

Counsel for the 5th Respondent - Mr. Oruko h/b Mr. Mulati

Court Assistant - Ms. Lwambia