IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, SICHALE & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO 261 OF 2018

BETWEEN

HAKI NA SHERIA INITIATIVE.....APPELLANT

AND

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE CABINET SECRETARY FOR INTERNAL SECURITY.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERA.....3RD RESPONDENT

AND

KENYA NATIONAL HUMAN RIGHTS AND EQUALITY COMMISSION.....4TH RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Garissa (Dulu, J.)

dated 14th March 2017 in Petition No 6 of 2015

JUDGMENT OF THE COURT

Background

1. At the heart of this appeal is whether, **Sections 8 and 9** of the **Public Order Act** (the Act), are unconstitutional and whether the curfew imposed on the residents of **Garissa, Mandera, Tana River** and **Wajir Counties** (the Four Counties) by the **Inspector General of Police** (the 1st respondent), infringed on the fundamental rights and freedoms of the residents of the Four Counties and hence unconstitutional, null and void. **The Cabinet Secretary for Internal Security** and **the Honourable Attorney General** are the 2nd and 3rd respondents respectively. **Kenya National Human Rights and Equality Commission,** the 4th respondent herein was an interested party in the High Court.

2. The brief background to the appeal is that the imposition of the curfew followed the heinous terrorist attack which occurred at Garissa University on 2nd April, 2015, killing at least 148 Kenyans and injuring scores more. Thereafter, the 1st respondent imposed a curfew to run in the Four Counties during the hours of 6:30pm to 6:30 am from 3rd April to 16th April 2015. From the record, the 2nd respondent extended the curfew to 16th June, 2015 and the curfew was lifted following a Presidential directive on 18th June, 2015.

3. During the pendency of the curfew, **Haki Sheria Initiative** (the appellant) filed a Petition in the High Court on 22nd May, 2015 and subsequently amended it on 11th November, 2015. The appellant, a civil society organization for the promotion of human rights and good governance based in Garissa challenged the constitutionality of the curfew and **Sections 8 and 9** of the **Public Order Act (the Act)** on which the curfew was predicated. The amended petition was supported by the affidavit of **Barre Adan Kerrow,** the co-ordinator of the appellant organization in Garissa County. The respondents did not file a replying affidavit to the petition but by consent of the parties the matter was disposed of through written submissions. The 1st and 2nd respondents' position, articulated through the 3rd respondent, was that the objective of the curfew as well as ***Sections 8 & 9*** of the ***Act*** was to assist in achieving peace and order in the Four Counties; and that the limitations of the residents' rights and freedoms resulting from the curfew were therefore justifiable.

4. By a judgment delivered on 14th March, 2017, the High Court (Dulu, J.) found in favour of the 1st, 2nd and 3rd respondents. The learned Judge concluded as follows:

> ***"In conclusion, the petition herein is dismissed. I decline to grant any of the prayers sought against the respondents, and decline to declare the Public Order Act and Section 8 and 9 thereof as unconstitutional. Though the petitioner has lost this petition. I order that each party will bear the respective costs as this is a matter of great public importance…"***

5. Aggrieved by that decision, the appellant filed this appeal which essentially faults the learned Judge's decision to uphold ***Sections 8 & 9*** of the ***Act*** as constitutional. The appellant relies on four grounds of appeal that the learned Judge erred in law in: holding that ***Sections 8 & 9*** of the **Act** *vis a vis* **Article 58** of the **Constitution** are constitutional; failing to consider the effect or consequence of Sections **8 & 9** of the **Act**; failing to consider the appellant's submissions; and in holding that the appellant failed to point out any specific article of the Constitution which was violated. The appellant urged us to allow the appeal and declare **Sections 8 & 9** of the **Act**, unconstitutional.

Submissions by Counsel

6. At the plenary hearing, the appellant was represented by learned counsel **Mr. Noor** while the 1st, 2nd and 3rd respondents were represented by **Ms. Irari**. There was no appearance for the 4th respondent. Counsel relied on the respective written submissions filed on behalf of the parties and also made oral highlights.

7. **Mr. Noor** submitted that the appeal turns on two issues. Firstly, whether ***Sections 8 & 9*** of the ***Act*** infringe human rights and freedoms protected under the ***Constitution***. Secondly, whether **Sections 8 & 9** of the **Act** are acceptable limitations of the rights and freedoms as envisioned under ***Article 24*** of the ***Constitution***.

8. **Mr. Noor** submitted that **Sections 8 & 9** of the **Act** contravene a number of fundamental rights and freedoms under the **Constitution** and other international human rights instruments. Expounding on that argument, counsel argued that **Sections 8 & 9** of the **Act** limit the rights to: movement under **Article 39**; equality and freedom from discrimination under **Article 27**; liberty under **Article 29(a)**; freedom of conscience, religion and belief under **Article 32**; and the right to life and livelihood under **Article 26** of the **Constitution.** It was counsel's further argument that the impugned provisions also infringe international human rights instruments such as the **Universal Declaration of Human Rights (UDHR)** and the **International Covenant on Civil and Political Rights** (**ICCPR**).

9. The gist of **Mr. Noor's** submissions was that **Section 8** & **9** of the **Act** which provide for the imposition of curfew orders and curfew restriction orders respectively were unconstitutional as they provide for imposition of curfew orders and curfew restriction orders on a class of persons which is discriminatory and contrary to **Article 27** of the Constitution which provides for equality before the law, and the right to equal protection and equal benefit of the law; and that **Article 29** of the **Constitution** was violated as a curfew order required residents in the Four Counties to remain indoors at all times, thereby effectively interfering with their right to movement without just cause.

10. Counsel further submitted that the curfew order was imposed in the Four Counties which were primarily inhabited by residents who profess the Muslim faith and who could not conduct prayers in the mosques during the curfew hours. As such, this was an infringement of the right to freedom of conscience, religion, thought, belief and opinion, under **Article 32** of the **Constitution, Article 18** of the and **Article 18** of the **ICCPR.**

11. It was counsel's further contention that the curfew order imposed in the Four Counties had an adverse effect on the right to life under **Article 26** of the Constitution as social and economic activities in the Four Counties were curtailed during the pendency of the curfew which deprived the residents of their right to a livelihood, and therefore affected their right to life; that the right to livelihood is part and parcel of the right to life protected under ***Article 26*** of the ***Constitution***, ***Article 3*** of the ***UDHR*** and ***Article 6(1)*** of the ***ICCPR***; and that the residents' right to life was therefore infringed.

12. It was the appellant's further claim that the impugned provisions deprive the affected people's right to life which is a non-derogable right under ***Article 4*** of the ***ICCPR;*** that the right to livelihood is intrinsically linked to the right to life; that in as far as the impugned provisions allow the imposition of curfew orders and curfew restriction orders against a class of people, the same propagate discrimination contrary to ***Article 27*** of the ***Constitution***; that ***Sections 8 & 9*** of the ***Act*** could not be construed as acceptable limitations of fundamental rights and freedoms as contemplated under ***Article 24*** of the ***Constitution*** as the impugned provisions sanction issuance of blanket orders of curfews; that the sweeping powers donated to the Cabinet Secretary and/or a Police Officer by the impugned provisions are unchecked; that ***Sections 8 & 9*** of the ***Act*** do not meet the international standards of acceptable limitation of rights and freedoms as outlined in the ***Siracusa Principles on The Limitation and Derogation Provisions in the ICCPR.***

13. The second prong of the appellant's submissions was that while the **Constitution** allows for a limitation of these rights, the limitations imposed by the curfew in the Four Counties were not lawful under **Article 24** of the **Constitution** as they were not reasonably justifiable in a democratic society, and were instead draconian and unreasonable. In counsel's view, the impugned provisions did not limit those rights, rather they infringed them.

14. The appellant also took issue with the fact that the 2nd respondent (in the case of **Section 8 of the Act**) or the police (in the case of **Section 9** of the **Act)** had what counsel termed as sweeping power to declare a curfew. **Mr. Noor** urged us to make a comparison with **Article 58** of the **Constitution** of Kenya, which provides for the procedure under a State of Emergency. It was **Mr. Noor's** contention that under **Article 58** of the **Constitution**, the President is granted power to declare a State of Emergency for a period of not more than fourteen (14) days, which can only be extended upon the involvement of the National Assembly. Drawing on this comparison, the appellant contended that **Sections 8 & 9** of the **Act** give the 1st and 2nd respondents unchecked power that is not exercised within a defined timeline and which infringes on fundamental human rights and freedoms.

15. Counsel invited us to make a finding that it could not have been the intention of the framers of the ***Constitution*** to give the 2nd respondent or a Police Officer as the case may be, sweeping powers to issue curfew orders and curfew restriction orders as stipulated under ***Sections 8 & 9*** of the ***Public Order Act***. **Mr. Noor** added that by virtue of ***Article 238(2)*** of the ***Constitution***, national security is subject to the ***Constitution***, rule of law, democracy and human rights and fundamental freedoms. Counsel urged us to allow the appeal.

16. **Ms. Irari** learned counsel for the 1st, 2nd and 3rd respondents opposed the appeal and submitted that in spite of making reference to several articles of the ***Constitution***, the appellant's petition contained blanket allegations which failed to particularize the precise alleged contraventions. Counsel submitted that as a result, the appellant's amended petition did not meet the threshold established in the case of ***Anarita Karimi Njeru vs. R*** **[1976-1980] KLR 1272.**

17. Addressing us on the import of ***Sections 8 & 9*** of the ***Act***, counsel relied on the case of **Attorney General vs. Law Society of Kenya & Another [2017] eKLR** wherein this Court expressed itself as follows:

> ***"The cardinal rule in construing a statute or provision of a statute is to interrogate the intention expressed in the statute itself by the drafters. The intention would be determined by reference to the precise words used in the statute, their factual context, and, their aim and purpose, while having regard to the fact that each case would have to be resolved by reference to its particular factors."***

18. **Ms. Irari** further submitted that the intention behind the impugned provisions of the ***Act*** was furtherance of the rule of law within a particular region of the country in need of order; that the impugned provisions aim to preserve human life and to prioritize the safety of citizens; maintain peace, order and security of the country at large; and to ensure the furtherance of the rule of law for the betterment of the residents of the Four Counties and the country at large. It was counsel's further submission that it is common ground that without life, citizens cannot enjoy the rights and freedoms alleged to have been violated by the imposition of the curfew order.

19. Counsel urged us to adopt a purposive interpretation of the ***Constitution*** in line with **Article 259** of the **Constitution** in determining this appeal. Towards that end, **Ms. Irari** postulated that the rights and freedoms alleged to have been violated by ***Sections 8 & 9*** of the ***Act*** are not absolute in nature but subject to limitation under ***Article 24*** of the ***Constitution***. As such, they should not be interpreted in a manner that overshoots their purpose. Counsel postulated that a purposive approach to interpreting **Sections 8 and 9** of the **Act** had the objective of ensuring law and order in the country. Counsel argued that the curfew order imposed in the Four Counties was justifiable considering the circumstances of the case, and that it was not discriminatory as it applied to all the residents of the Four Counties and not to a class of persons. For these reasons, counsel urged us to dismiss the appeal with no order as to costs.

Determination

20. As this is a first appeal, the guidelines succinctly set out by this Court in ***Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212*** are pertinent. They are that:

> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"***

21. We have distilled four (4) issues for determination:-

a) Whether the appellant set out his case precisely to the required standard;

b) Whether the learned Judge considered the appellant's submissions.

c) Whether **Sections 8 & 9** of the **Act** infringe human rights and freedoms protected by the Constitution and therefore unconstitutional;

d) Whether **Sections 8 & 9** of the **Act** are acceptable limitations of the rights and freedoms as envisioned under **Article 24** of the Constitution?

22. We have considered the record of appeal, the submissions by counsel, the authorities cited and the law. Before delving into the substantive merits of the appeal, counsel for the appellant took issue with the learned Judge's finding that the appellant had not specified any article of the ***Constitution*** which had been violated by ***Sections 8 & 9*** of the ***Act***.

23. The question that we must determine is whether the principle requiring that constitutional petitions be pleaded with reasonable precision was properly applied by the High Court? The proposition in **Anarita Karimi Njeru** *(supra),* stipulates that a person who alleges the contravention or threat of contravention of a constitutional right must specifically set out the right infringed and the particulars of such infringement or threat.

24. Our perusal of the amended petition on record reveals that the appellant herein set out the constitutional provisions it deemed are violated by ***Sections 8 & 9*** of the ***Public Order Act***. The particular paragraph read as follows:

> ***"Section 8 and 9 of the Public Order Act contravene Article 39 on the freedom of movement and residence, Article 37 on the freedom of Assembly, demonstration, picketing and petition, Article 26 on the right to life (livelihood), Article 24 on the limitation of Rights, Article 58 on the declaration (sic) state of emergency and Article 2(4) on the supremacy of the Constitution."***

25. In ***Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others*** **[2013] eKLR**. this Court elaborated on the nature of precision required in the following terms:

"We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

[Emphasis supplied]

26. Further, this Court in ***Mohammed Fugicha v Methodist Church in Kenya (suing through its registered trustees) & 3 others [2016] eKLR*** stated as follows:

"It seems to us unacceptable in principle that a creeping formalism should be allowed to claw back and constrict the door to access to justice flung open by the Constitution when it removed the strictures of standing and formality that formerly held sway. We apprehend that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer. Within that general rubric of notification to court and respondent, the Constitution, if it says anything at all on this subject, clearly does not lionize form over substance.

Thus, while ANARITA and other cases decided prior to the Constitution of 2010 were decided correctly in their context with their insistence on specificity, the constitutional text now doubtless presents an epochal shift that would preserve informal pleadings that would otherwise have been struck out in former times. We are satisfied that there was no doubt at all as to what Fugicha's complaints, against whom they were, and the provision of the Constitution he alleged had been violated or contravened..."[Emphasis supplied].

27. By parity of reasoning, considering the amended petition as a whole, we are satisfied that there was no doubt as to what the appellant's complaints were with regard to the ***Act*** and the provisions of the ***Constitution*** it alleged were violated or contravened. Accordingly, we find that the appellant set out its case to the required standard.

28. On the appellant's claim that the learned Judge failed to take its submissions into consideration, we are guided by the decision of this Court in ***City Chemist*** (***NRB***) & ***Others*** vs. ***Oriental Commercial Bank Ltd***, ***Civil Application No. Nai 302*** of ***2008*** (***UR199/2008***) which held as follows:

"…is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assist litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application…"

29. From the record, the learned Judge succinctly laid down the appellant's submissions and considered the same in the impugned judgment. This ground of appeal therefore fails.

30. On the legality and constitutionality of the **Act**, it was the appellant's contention that through the operation of **Sections 8 and 9** of the **Act,** various fundamental rights and freedoms of the residents of the Four Counties were unlawfully and unreasonably infringed by the actions of the respondents thereby rendering the said provisions unconstitutional.

31. In ***Attorney General vs v Kituo Cha Sheria & 7 others [2017] eKLR (Civil Appeal No. 108 of 2014)*** this Court expressed itself on the primacy of human rights as they are enshrined in the **Constitution** in the following terms:

"Quite beyond argument then, the Bill of Rights in Kenya's constitutional framework is not a minor peripheral or alien thing removed from the definition, essence and character of the nation. Rather, it is said to be integral to the country's democratic state and is the framework of all the policies touching on the populace. It is the foundation on which the nation state is built. There is a duty to recognize, enhance and protect the human rights and fundamental freedoms found in the Bill of Rights with a view to the preservation of the dignity of individuals and communities. The clear message flowing from the constitutional text is that rights 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."[Emphasis supplied].

32. As we embark on determining whether the impugned sections of the **Act** pass constitutional muster, we take cognisance of the fact that there is a general, although rebuttable presumption, that a provision of law is constitutional, and that it falls on the party alleging otherwise to prove its claim. This was the precedent set in ***Ndyanabo vs Attorney General [2001] 2 EA 495*** where the Court of Appeal of Tanzania held as follows:

"In interpreting the Constitution the court would be guided by the general principles that … there was a rebuttable presumption that legislation was constitutional, and…the onus of rebutting the presumption rested on those who challenged the legislation's status save that, where those who supported a restriction on a fundamental right relied on claw back or exclusion clause, the

onus was on them to justify the restriction."

33. This was also stated in the case of ***Olum and Another v The Attorney General [2002] EA***, where the Constitutional Court of Uganda dealing with the question of determining the constitutionality of a statute held that:

> ***"To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional."***

34. This Court in ***Attorney General v Law Society of Kenya & another [2017] eKLR (Civil Appeal No. 133 Of 2011)*** held that when determining the constitutionality of a statute or a provision of the law, it is important to consider the object, purpose and effect of implementation of that legislation. If the effect of the impugned law is to violate constitutional rights, then it must be declared so and struck down. In the words of the Court:

> ***"The cardinal rule in construing a statute or a provision of a statute is to interrogate the intention expressed in the statute itself by the drafters. That intention must be determined by reference to the precise words used in the statute, their factual context, and, their aim and purpose, bearing in mind that each case must be resolved by reference to its particular factors. In other words, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect…"***

[Emphasis supplied].

35. These are the principles that will guide us as we seek to determine whether the impugned provisions pass constitutional muster. Our starting point are the principles laid out in **Article 259** of the Constitution which enjoin us to interpret the **Constitution** in a manner that promotes its purposes, values and principles, advances the rule of law and human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.

Further, **Article 2(4)** of the **Constitution** provides that

> ***"Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."***

36. A reading of the impugned provisions of the **Act** will put the appeal in perspective. ***Section 8*** of the ***Public Order Act*** stipulates, in part, that-

> ***"8. Curfew orders***
>
> ***(1) The Cabinet Secretary, on the advice of the Inspector-General of the National Police Service may, if he considers it necessary in the interests of public order so to do, by order (hereinafter referred to as a curfew order) direct that, within such area and during such hours as may be specified in the curfew order, every person, or, as the case may be, every member of any class of persons specified in the curfew order, shall, except under and in accordance with the terms and conditions of a written permit granted by an authority or person specified in the curfew order, remain indoors in the premises at which he normally resides, or at such other premises as may be authorised by or under the curfew order.***
>
> ***(2)***
>
> ***a) It shall be a condition of every permit granted under subsection (1) of this section that the holder thereof shall at all times while acting under the authority thereof during the hours of darkness carry a light visible at a distance of twenty-five feet.***
>
> ***b) Subject to paragraph (a) of this subsection, a permit under subsection (1) of this section may be granted subject to such conditions, to be specified in the permit, as the authority or person granting it may think fit.***
>
> ***(3) A curfew order shall be published in such manner as the authority making it may think sufficient to bring it to the notice of all persons affected thereby, and shall come into force on such day, being the day of or a day after the making thereof, as may be specified therein, and shall remain in force for the period specified therein or until earlier rescinded by the same authority or by the Minister as hereinafter provided:***
>
> ***Provided that no curfew order which imposes a curfew operating during more than ten consecutive hours of daylight shall remain in force for more than three days, and no curfew order which imposes a curfew operating during any lesser number of consecutive hours of daylight shall remain in force for more than seven days.*** [Emphasis supplied]

37. ***Section 9*** provides, in part, as follows:

> ***"9. Curfew restriction orders***
>
> ***(1) A police officer in charge of the police in a county or a police officer in charge of a police division may, if he considers it***

necessary in the interests of public order within the area of his responsibility so to do, by order (hereinafter referred to as a curfew restriction order) prohibit, during such hours as may be specified in the curfew restriction order, all persons, or, as the case may be, all members of any class of persons specified in the curfew restriction order, from entering, being or remaining, except under and in accordance with the terms and conditions of a written permit granted by an authority or person specified in the curfew restriction order, in or at any premises specified in the curfew restriction order:

Provided that no person shall, by or in pursuance of a curfew restriction order, be prohibited or prevented from entering, being or remaining in any premises at which he normally resides, or, during reasonable hours of business, work or employment, any premises at which he normally has his place of business, work or employment.

(2) A permit under subsection (1) of this section may be granted subject to such conditions, to be specified in the permit, as the authority or person granting it may think fit.

(3)

(4) A curfew restriction order shall be published in such manner as the authority making it may think sufficient to bring it to the notice of all persons affected thereby, and shall come into force on such day, being the day of or a day after the making thereof, as may be specified therein, and shall remain in force for such period, not exceeding twenty-eight days, as may be specified therein or until earlier rescinded by the same authority or by the Cabinet Secretary as hereinafter provided. *[Emphasis supplied]*

38. In the circumstances of this case, did the appellant rebut the presumption of the constitutionality of ***Sections 8 & 9*** of the ***Act***?

The answer lies with whether the appellant was able to discharge its burden of demonstrating violation of the alleged constitutional provisions as aptly appreciated by this Court in ***Mohammed Abduba Dida vs. Debate Media Limited & Another*** **[2018] eKLR** in the following terms:

"…ordinarily, the burden of demonstrating that a right was infringed would be upon the person alleging such violation, as, that person would be in the better position to prove it. It is for the petitioner to show that, compared to another person, he or she has been denied a benefit or suffered a disadvantage, which are matters within the petitioner's knowledge. Once the case is made out, the burden shifts to the other party. More particularly, in view of the observation that the rights alleged to have been infringed do not fall within the grounds classified by Article 27(4), more so the reason for the petitioner have to prove that his or her rights have been infringed in respect of the grounds alleged. And this is why the learned Judge stated, and we agree, that, *"…where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair."*

38. The objective of the ***Act*** should be discernible from the words used by the Legislature and the context of its enactment. The Supreme Court of India in **Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others [1987] 1 SCC 424**

observed that-

"Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."

39. Applying the above principle to this case, the purpose of the ***Act*** is evident from the preamble therein which reads:

"An Act of Parliament to make provision for the maintenance of public order, and for purposes connected therewith." *[Emphasis supplied]*

Public order by its very definition presupposes a state of security, peace and stability that is free from criminal activities and violence. It is an integral component in national security which is defined in the following terms under ***Article 238 (1)*** of the ***Constitution***:

"National security is the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests."

40. In ***Law Society of Kenya v Inspector General Kenya National Police Service & 3 others*** (supra) the High Court, (Chitembwe, J.) stated as follows:

"The underlying objective of a curfew is to enable security personnel to move into an area affected by criminal acts leading to public disorder, or such other acts that affect normal operations of the residents of the affected area. This therefore means that a curfew is a temporary stop gap measure intended to enable the security officers operate smoothly and calm the situation."

41. It is clear from the above provisions, which we have set out *in extenso*, that the aim of the said provisions is the furtherance of the Act's main objective namely, maintenance of public order. Notwithstanding the fact that ***Sections 8 & 9*** empower different authorities (Cabinet Secretary and Police Officer in charge of a County or police division respectively) to issue different orders (curfew orders and curfew restriction orders respectively), it is undeniable that the basis of issuance of any of those orders is in the interest of the attainment of peace,

security and public order for good of the residents of the Four Counties and the country at large. The curfew order was imposed in the Four Counties following a terrorist attack in Garissa and the 2nd respondent on the advice of the 1st respondent deemed it fit to impose a curfew order on the Four Counties to forestall further loss of life, injury and destruction of property. We therefore find that the purpose and effect of the impugned provisions of the **Act** was in the circumstances justifiable.

42. On the appellant's claim that ***Sections 8 & 9*** of the ***Act*** grant the concerned authorities unchecked powers to issue sweeping curfews we find that in as much as the impugned provisions donate power to the authorities to declare curfews the same is not open ended. The Cabinet Secretary on the advice of the Inspector-General of the National Police Service and the police officer in charge of the police in a county or a police officer in charge of a police division, as the case may be, are mandated to issue curfews where it is in the interest of public order. Additionally, ***Section 8*** of the **Act** stipulates a restriction on the number of hours of daylight that such curfew orders can affect. Similarly, ***Section 9*** of the **Act** unequivocally prohibits the issuance of a curfew restriction order for more than 28 days.

43. We therefore find that the powers donated under the impugned provisions are not unchecked. ***Section 9(4)*** provides that once a curfew restriction order is declared it should be immediately reported to the Commissioner of Police who has the authority to vary or rescind the same.

44. In an effort to substantiate its allegation that ***Sections 8 & 9*** of the ***Act*** are unreasonable, the appellant drew a comparison between the impugned provisions with the power donated to the President to declare a State of Emergency under ***Article 58*** of the ***Constitution***.

Article 58 provides as follows:

> **"State of emergency. 58. (1) A state of emergency may be declared only under Article 132 (4) (d) and only when—**
>
> **(a) the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and**
>
> **(b) the declaration is necessary to meet the circumstances for which the emergency is declared.**
>
> **(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of the declaration, shall be effective only—**
>
> **(a) prospectively; and**
>
> **(b) for not longer than fourteen days from the date of the declaration, unless the National Assembly resolves to extend the declaration.**
>
> **(3) The National Assembly may extend a declaration of a state of emergency—**
>
> **(a) by resolution adopted—**
>
> **(i) following a public debate in the National Assembly; and**
>
> **(ii) by the majorities specified in clause (4); and**
>
> **(b) for not longer than two months at a time.**
>
> **(4) The first extension of the declaration of a state of emergency requires a supporting vote of at least two-thirds of all the members of the National Assembly, and any subsequent extension requires a supporting vote of at least three-quarters of all the members of the National Assembly.**
>
> **(5) The Supreme Court may decide on the validity of—**
>
> **(a) a declaration of a state of emergency;**
>
> **(b) any extension of a declaration of a state of emergency; and**
>
> **(c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.**
>
> **(6) Any legislation enacted in consequence of a declaration of a state of emergency—**
>
> **(a) may limit a right or fundamental freedom in the Bill of Rights only to the extent that—**
>
> > **(i) the limitation is strictly required by the emergency; and**
> >
> > **(ii) (ii) the legislation is consistent with the Republic's obligations under international law applicable to a state of emergency; and**

(b) shall not take effect until it is published in the Gazette.

(7) A declaration of a state of emergency, or legislation enacted or other action taken in consequence of any declaration, may not permit or authorise the indemnification of the State, or of any person, in respect of any unlawful act or omission."

45. We find that the curfew orders and curfew restriction orders imposed under **Section 8 & 9** of the **Act** are, like a State of Emergency, subject to judicial oversight and therefore are not devoid of checks and balances as claimed by the appellant. More importantly, there is nothing in the ***Constitution*** which prohibits the declaration of curfew orders or curfew restriction orders as envisaged under the ***Act***. This position is further buttressed by the fact that after the promulgation of the ***Constitution***, ***The Security Laws (Amendment) Act, 2014 No. 19 of 2014*** amended certain provisions of the ***Act*** but left intact the powers to declare curfews under ***Sections 8 & 9***.

46. Are the impugned provisions an acceptable limitation? To put the issue in perspective, a consideration of the limitation clause in **Article 24** of the **Constitution** is imperative. **Article 24** of the **Constitution** provides, in part, as follows

"(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) ...

(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."

47. **Article 24** of the Constitution should also be read together with **Article 25**, which provides for the rights that cannot be limited (non-derogable rights) as follows:

"Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and

(d) the right to an order of habeas corpus".

48. The Supreme Court of Kenya in **Karen Njeri Kandie v Alassane Ba** & **another** [**2017**] **eKLR** stated as follows**:**

"Kenyan courts have previously analysed the limitation test enshrined in Article 24 of the Constitution; for example, in the case of Attorney-General & another v. Randu Nzai Ruwa & 2 others Civil Appeal No. 275 of 2012; [2016] eKLR, the Court of Appeal observed that the rights and freedoms in the Bill of Rights can only be limited under Article 24 of the Constitution, and neither the State nor any State functionary can arbitrarily do so. The Court further endorsed the holding of the trial court with respect to Article 24, and stated thus:

"Our reading of Article 24 (1) is that not only must the law limiting a right or fundamental freedom pass constitutional muster but also the manner in which the law is effected or proposed. So both the law prescribing the limitation and the manner in which it is acted upon must satisfy the requirement of Article 24."

49. The Supreme Court further stated as follows:

"After carefully considering Article 24 of the Constitution and the above cases, we find that the test to be applied in order to determine whether a right can be limited under Article 24 of the Constitution, is the 'reasonable and justifiable test', that must not be conducted mechanically. Instead the Court must, on a case-by- case basis, examine the facts before it, and conduct a balancing exercise, to determine whether the limitation of the right is reasonable and justifiable in an open and democratic

society. The insertion of the word 'including' in Article 24 also indicates that the factors to consider while conducting the balancing act are not exhaustive but a guide as to the main factors to be taken into account in that consideration.

…

Is this limitation reasonable and justifiable? It is important to consider the factors set out in the Constitution, that will assist us to answer this question including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, and the fact that the need for enjoyment of the right by one individual does not prejudice the rights of others, as well the consideration the relationship between the limitation and its purpose, and whether there is a less restrictive means to achieve that purpose. We will herebelow carry out an analysis on the rights that the appellant alleges were unjustifiably limited."

(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) ...

(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." [Emphasis supplied].

50. The limitation of fundamental rights and freedoms under **Article 24** of the Constitution was a question of inquiry by this Court in ***Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others [2017 eKLR (Civil Appeal 172 of 2014)*** and the Court held that:

"While *Article 19(3)(c)* ***recognizes that the rights and fundamental freedoms in the Bill of Rights are only subject to the limitations contemplated in the Constitution,*** *Article 25* ***identifies only four rights and fundamental freedoms that cannot be limited. It follows that by*** *Article 24* ***the rest of the rights and fundamental freedoms under the Bill of Rights are enjoyed and guaranteed subject to strict terms of limitations.***

First, it must be demonstrated that the limitation is imposed by legislation, and even then only when it is shown that the limitation is reasonable and justifiable in an open democratic society. Further it must be based on dignity, equality and freedom, taking into consideration the nature of the right or fundamental freedom sought to be limited, the importance of the purpose of the limitation, its nature and extent, the enjoyment by others of their own rights as well as a consideration whether there are less restrictive means to achieve the purpose".

[Emphasis supplied].

51. In that appeal, the court further reiterated that the first inquiry the court should delve into is whether there is a law that restricts the enjoyment of a fundamental right and whether the limitation was justifiable or reasonable in an open and democratic society. In considering this latter point, the Court held that:

"The limiting law must be clear enough and devoid of ambiguity, for if a guaranteed constitutional right is to be limited, the limitation must be specific enough for the citizen to know the nature and extent of the limitation, his or her rights and obligations under the right as limited and the law supplying the limitation must be easily accessible to the citizen."

52. This position was buttressed in ***Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR (Civil Appeal No 56 of 2014)*** wherein the court set out similar prescriptions for a law that would limit fundamental rights to ensure legal certainty. Applying the principles therein to the appeal at hand, the law in question is the **Public Order Act.** It is clear to us that the impugned provisions do constitute a limitation on certain fundamental rights.

53. In ***Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others (supra)*** this Court noted that:

"Even after establishing the existence of a law limiting any specific right and accepting that it is reasonable and justified the means chosen to achieve the objective must pass a proportionality test by considering [the parameters set out in Article 24(a)-(e)."

54. In the instant appeal, the curfew served to restrict movement between the hours of 6:30 pm to 6:00 am. Because of this limitation, certain other rights such as the right to attend prayers at the mosques were interfered with.

55. **Sections 8 & 9** of the **Act** provide that the curfew order or curfew restriction order would call on the affected persons to remain indoors

or prohibit their entrance or presence in identified premises for the specified duration. As such, these orders have a limiting effect on some of the rights and freedoms of the residents of the Four Counties. Would the rights and freedoms as pleaded by the appellant be limited by these provisions?

56. One of the rights alleged to be affected by the impugned provisions is the right of freedom of movement and residence as protected under ***Article 39*** of the ***Constitution***. ***Sections 8 & 9*** of the ***Act*** curtail the aforementioned right since the predominant element in the curfews thereunder involves constraint of the affected persons' movement. Our position is reinforced by the essence of freedom as succinctly captured by Dickson, J. in **R –vs- Big M. Drug Mart Ltd. (supra)**. The Judge stated as follows:

> ***"Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter [the Constitution] is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices."***

57. We also find that the limitation of the freedom of movement would also have an impact on the freedom of conscience, religion belief and opinion under ***Article 32*** of the ***Constitution***. More particularly on **Article 32 (2)** which reads:

> ***"Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship***."[Emphasis supplied].

This is because depending on the specified period and hours in the curfew orders or curfew restriction orders issued under the ***Act***, the consequence would be that a person's right to gather with others for religious purposes would be hampered if the timing and date fall within a curfew. Accordingly, this limitation would not be only in respect of people who profess the Islamic faith but on every other religion which advocates for the communal gathering of its members at particular times. Further, as correctly observed by the learned Judge:

> ***"the imposition of the curfew did not prevent prayers of the residents of these four counties. It only meant that the said residents would not pray in the Mosque during the hours of night. That is a limitation yes, but in my view and understanding, though it is preferable to hold prayers in the mosque, in difficult situations such as the prevalence of insecurity, prayers can be held in places other than the mosque."***

58. As to the right of freedom and security of a person under ***Article 29*** of the ***Constitution*** and right to life under **Article 26** of the ***Constitution***, we find that the appellant did not demonstrate any cogent basis to support its allegation that the impugned provisions limited or infringed the said rights.

59. On whether the right of equality and freedom from discrimination is limited by ***Sections 8 & 9*** of the ***Public Order Act***, the starting point would be a consideration of the meaning of equality. In that regard, we adopt the views of Justice Albie Sachs in the Constitutional Court of South Africa decision in ***National Coalition For Gay and Lesbian Equality vs. Minister for Justice [1998] ZAAC 15***, which we find persuasive:

> ***"The present***
>
> ***uppression of differences. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a leveling or homogenization of behavior but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalization, stigma and punishment – At best, it celebrates the validity that difference brings to any society".***

60. It follows that mere differentiation or unequal treatment does not *per se* amount to discrimination prohibited under ***Article 27*** of the ***Constitution***. ***Black's Law Dictionary, Tenth Edition*** defines differential treatment as follows:

> ***"Differential treatment; …,a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."***

61. This Court in ***Mohamed Fugicha vs. Methodist Church in Kenya (suing through its registered trustees) & 3 others*** **[2016] eKLR** stated as follows:

> ***"It therefore becomes a desideratum of both justice and logic that equal should be equally treated and unequal unequally treated as called for by the inequality. This immediately and necessarily calls for a level of analysis that is deeper and more nuanced than a mere conclusion of injustice or discrimination on the basis only of different treatment. This is in recognition that justice, fairness or reasonableness may not only permit but actually require different treatment."***

See also this Court's decision in ***Kenya Medical Research Institute vs. Samson Gwer & 8 others*** **[2019] eKLR**.

62. ***Sections 8 & 9*** of the ***Act*** prescribe for curfews to be imposed against a class of persons which scenario envisages different treatment of persons belonging to the class in question. Does the ensuing differential treatment amount to prohibited discrimination?

63. While considering the nature of differential treatment which would amount to discrimination, this Court in ***Mohammed Abduba Dida vs. Debate Media Limited & Another*** ***(supra)*** undertook a comparative analysis of decisions made within and outside this Country's jurisdiction on that aspect. The Court summed up the applicable criteria in the following manner:

> "***From the above cited authorities two fundamentals become apparent, one is that provisions or rules that create differences amongst affected persons do not of necessity give rise to the unequal or discriminatory treatment prohibited by Article 27, unless it can be demonstrated that such selection or differentiation is unreasonable or arbitrary and created for an illegitimate or surreptitious purpose. And the second is that, whether or not there has been a violation of the Constitution should be determined by applying a three stage enquiry to the circumstances of each case. The three stage enquiries are; firstly, whether the differentiation created by the provision or rules has a rational or logical connection to a legitimate purpose; if so, a violation of Article 27 will not have been established. If not, a second enquiry would be undertaken to determine whether the differentiation gives rise to unfair discrimination. If it does not, there is no violation of the constitution. But if the selection or differentiation gives rise to unfair discrimination, then the third enquiry would be necessary to determine whether it can be justified within the limitation provisions of the constitution."*** *[Emphasis supplied]*

64. Does the differential treatment which would arise from implementation of ***Sections 8 & 9*** amount to discrimination prohibited by the ***Constitution***? We do not think so. The appellant neither established nor is there anything to suggest that the impugned provisions were based on the prohibited grounds as set out in ***Article 27 (4)*** which provides:

> "***The state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth***." *[*Emphasis supplied].

65. We find that the impugned provisions are an acceptable limitation to the rights of the residents of the Four Counties and were not discriminatory as they applied to all the residents in the Four Counties. The objective of the ***Act*** is to attain the legitimate purpose of ensuring safety, peace and order and the attainment of national security in any given area of the country. Likewise, we find that ***Sections 8 & 9*** of the ***Act*** furthers and is connected to the attainment of the objective of the Act.

66. Considering the essence of ***Sections 8 & 9*** of the ***Act***, we are satisfied that not only are curfew orders and curfew restriction orders imposed thereunder proportionate means of achieving **the Act's** objective of maintenance of public order but are also in line with the principles of national security stipulated under ***Article***

> ***238(2)*** –
>
> "***2) The national security of Kenya shall be promoted and guaranteed in accordance with the following principles—***
>
> ***a) national security is subject to the authority of this Constitution and Parliament;***
>
> ***b) national security shall be pursued in compliance with the law and with the utmost respect for the rule of law,democracy, human rights and fundamental freedoms;***
>
> ***c) in performing their functions and exercising their powers, national security organs shall respect the diverse culture of the communities within Kenya; …"***

67. In totality, we are satisfied that in circumstances where public order or safety has been or is at risk of being violated due to factors which include terror attacks or criminal insecurity, the limitation of the affected persons' rights and freedoms within the context of ***Sections 8 & 9*** of **the** ***Act*** is justifiable, reasonable and necessary under ***Article 24*** of the ***Constitution*** to ensure the delicate balance of the rights of citizens.

68. Accordingly, we find that the appeal lacks merit and is hereby dismissed. We uphold the High Court's finding that ***Sections 8 & 9*** of ***the Act*** are constitutional. Taking into account that the appeal herein involves a public interest matter, the order that commends itself to us, is that each party shall bear their own costs. Orders accordingly.

Dated and delivered at Nairobi this 19th day of June, 2020.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR