



**Makara & 2 others v County Government of Mombasa (Petition
E016 of 2024) [2025] KEHC 2889 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2889 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

PETITION E016 OF 2024

OA SEWE, J

FEBRUARY 26, 2025

**IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 232,
258, 259 AND 260 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF ARTICLE 159 (2) (D) AND (C) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLE 27(1) (2) AND (4) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLE 28 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE MOMBASA COUNTY FINANCE ACT, 2024

BETWEEN

MICHECK MAKARA 1ST PETITIONER

PATRICK NKIRI 2ND PETITIONER

ANTHONY MWENDA 3RD PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT



JUDGMENT

1. The petitioners, Micheck Makara, Patrick Nkiri and Anthony Mwenda, filed the Petition dated 16th May 2024 seeking the following reliefs:
 - (a) A declaration that Items No. 517, 518, 519 and 630 contained in the Mombasa County Finance Act, 2024 are discriminatory against Miraa traders thus unconstitutional.
 - (b) A declaration that Items No. No. 517, 518, 519 and 630 contained in the Mombasa County Finance Act, 2024 are unconstitutional for lack of public participation.
 - (c) A declaration that Miraa is a lawful crop duly classified as a Scheduled Crop under the Crops Act, Chapter 318 of the Laws of Kenya.
 - (d) Any other order that the Court deems fit and just to grant in the circumstances.
2. The brief background to the Petition, as set out in the Petition, is that the three petitioners are Miraa traders within Mombasa County; and that, like all other traders operating from Kongowea Market, they pay levies as may be legislated from time to time by the respondent, the County Government of Mombasa. They averred that the respondent has now singled out Miraa traders for excessive and punitive levies by passing the Mombasa County Finance Act, 2024 in which the levies payable for Miraa have been increased from Kshs. 50,000/= for a 7-ton lorry to Kshs. 70,000/=.
3. The petitioners contended that the impugned legislation is not only discriminatory, but was also enacted in contravention of the Constitution in so far as no public participation was conducted before its enactment. Accordingly, the petitioners alleged violations of Article 10 of the Constitution on the right of public participation, Articles 27 of the Constitution on the right of equal protection and equal benefit of the law and the right to non-discrimination; and Article 28 on the right to dignity.
4. In response to the Petition, the respondent relied on the affidavit of Jeizan Faruk, sworn on 4th June 2024. The respondent thereby averred that, with the advent of the Constitution of Kenya 2010, the County Governments were given obligations and powers, inter alia, to impose property rates, entertainment taxes and any other tax that is authorized by an Act of Parliament. They added that, in enacting the Mombasa County Finance Act, 2024, due process as provided by law, including public participation, was observed from its inception as a Bill to conclusion.
5. The respondent averred that, pursuant to Sections 87 and 91 of the County Governments Act, No. 17 of 2012, it notified the general public and invited stakeholders to give their views on the draft Mombasa County Finance Bill, 2024. The respondent pointed out that public participation was conducted on 15th February 2024 at Changamwe Social Hall, Mikindani Social Hall, Loma Grounds in Bamburi, VOK Social Hall, Likoni Social Hall and Tononoka Social Hall; and that the general public responded by attending and participating in the exercise.
6. Further to the foregoing, the respondent averred that Article 185(1) vests legislative authority upon the County Assembly. It endeavoured to show that the County Assembly of Mombasa also conducted its own public participation as by law required. They denied that the petitioners in particular, or Miraa traders in general, were discriminated against as alleged by the petitioners. The respondent urged for the dismissal of the Petition, contending that the County Government's expenditure is dependent on the monies collected and levied as per the Act; and that to allow the Petition would be to cripple service delivery operations within the County.



7. The Petition was canvassed by way of written submissions, pursuant to the directions given herein on 22nd May 2024. Accordingly, the petitioners filed written submissions dated 6th June 2024. They reiterated their allegations of discrimination and lack of public participation, and made reference to Articles 10, 27 and 28 of the Constitution and the cases of Sammy Musembi Mbugua & 4 others v Attorney General & another 2019 eKLR in which discrimination, for purposes of Article 10 of the Constitution, was discussed at length. They urged the Court to find in their favour and grant the reliefs sought by them. On the part of the respondent, no submissions appear to have been filed.
8. In the light of the foregoing, the issues for determination are:
 - (a) Whether public participation was conducted before the enactment of the Mombasa County Finance Act, 2024; and,
 - (b) Whether the new levies on Miraa, as provided for in the Mombasa County Finance Act, 2024, are discriminatory and violate the provisions of Articles 27(1), (2), (4) (5) and 28 of *the Constitution*.

A. Whether the Public participation was conducted before the enactment of the Mombasa County Finance Act 2024:

9. Needless to say that public participation has been entrenched in *the Constitution* as a national value and principle of governance under Articles 1, 10(2) (a). The citizens have the right not only to have their opinions heard but also taken into account on matters of national importance. Indeed, Article 118 (1) (b) of *the Constitution* is explicit that:

Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its committees.
10. Article 196 (1) (b) of *the Constitution* similarly states that a County Assembly shall facilitate public participation and involvement in the legislative and other business of the assembly and its committees. It is, therefore, clear that both the Parliament and County Assemblies are required to facilitate public participation and involvement in the legislative processes before any law can be enacted.
11. Further to the foregoing, Article 201 (1) (a) of *the Constitution* further states that there shall be openness and accountability, including public participation in financial matters in all aspects of public finance in the Republic.
12. In terms of the process, Section 125 of the *Public Finance Management Act* sets out the stages in the budget making process for County governments in any financial year and states that the County Executive Committee Member for Finance shall ensure that there is public participation in the budget process. Section 125 of the Public Finance and Management Act provides:
 - (1) The budget process for county governments in any financial year shall consist of the following stages—
 - (a) integrated development planning process which shall include both long term and medium term planning;
 - (b) planning and establishing financial and economic priorities for the county over the medium term;
 - (c) making an overall estimation of the county government’s revenues and expenditures;
 - (d) adoption of County Fiscal Strategy Paper;



- (e) preparing budget estimates for the county government and submitting estimates to the county assembly;
 - (f) approving of the estimates by the county assembly;
 - (g) enacting an appropriation law and any other laws required to implement the county government's budget;
 - (h) implementing the county government's budget; and
 - (i) accounting for, and evaluating, the county government's budgeted revenues and expenditures.
- (2) The County Executive Committee member for finance shall ensure that there is public participation in the budget process.
13. The *County Governments Act* also provides for citizen and public participation. Section 87 provides for, and in mandatory terms, the principles guiding citizen participation. Section 87 states thus:
- Principles of citizen participation in counties
- Citizen participation in county governments shall be based upon the following principles—
- (a) timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;
 - (b) reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;
 - (c) protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;
 - (d) legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;
 - (e) reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;
 - (f) promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and
 - (g) recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.
14. It is manifest therefore that public participation is compulsory for all state organs, officers and public officers who apply, interpret, enact and implement any law and public policies. It is imperative that any person or body that enacts any laws and/or legislation ensures that public participation has been conducted. The Supreme Court in the case of *British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited*



(Affected Party) (Petition 5 of 2017) 2019 KESC 15 (KLR) (26 November 2019) (Judgment), made the point as follows:

85. Public participation has been entrenched in our Constitution as a national value and a principle of governance under Article 10 of *the Constitution* and is binding on all State organs, State officers, public officers and all persons whenever any of them: (a) applies or interprets *the Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. As aptly stated by the Appellate Court, public participation is anchored on the principle of the Sovereignty of the People “that permeates *the Constitution* and in accordance with Article 1(4) of *the Constitution* is exercised at both national and county levels”.
15. It is now trite that public participation should be meaningful and qualitative. In *Doctors for Life International v Speaker of the National Assembly & Others* (CCT12/05) 2006 ZACC 11, the Court identified the standard and quality of public participation as follows:
 128. Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament’s conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation’s content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement.
 129. What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making.” This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. It will be convenient here to consider each of these aspects, beginning with the broader duty to take steps to ensure that people have the capacity to participate...”
 16. In the case of *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* 2014 eKLR, Odunga, J (as he then was) held:
 75. In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass



legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action...”

17. In the instant matter, it is noteworthy that the petitioners did not sue the County Assembly, the legislative arm of the County Government and neither did they sue the County Executive Committee Member for Finance who under Section 125 (2) of the *Public Finance Management Act* is tasked with ensuring that public participation is conducted in the County Government’s budget process.
18. Be that as it may, the burden of proof was on the petitioners to prove all aspects of their allegations to the requisite standard. In this regard, the Supreme Court pronounced itself in *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* 2020 eKLR, as follows:
 - (47) It is a timeless rule of the common law tradition, Kenya’s juristic heritage, and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the “balance of probability”. Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the Court can determine that it was more probable than not, that the Respondent bore responsibility, in whole or in part.
19. The position was reiterated by the Supreme Court in *Wamwere & 5 Others v Attorney General* (Petition 26, 34 & 35 of 2019 Consolidated)) 2023 KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) thus:

A petitioner bore the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which was on a balance of probabilities. Such claims were by nature civil causes. The onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that she owned or erected or lived in the alleged properties; and that State agents interfered or deprived her of the subject properties. That was the import of section 107 of the *Evidence Act* on the burden of proof.”
20. As against the broad allegations that public participation was never conducted, the respondent stated that due process of the law was followed in the enactment of the Mombasa County Finance Act 2024 from its inception as a Bill to its assent by the Governor. The respondent demonstrated that draft Mombasa County Finance Bill was uploaded to the County’s website www.mombasa.go.ke for ease of access; and that public participation was conducted pursuant to Sections 87 and 91 of the County Government Act and stakeholders invited to give their views on the draft Mombasa Finance Bill 2024. The Respondents stated that Public participation was conducted on 15th February 2024 at Changamwe Social Hall, Mikindani Social Hall, Loma Ground (Bamburi), VOK Social Hall and Tononoka Social Hall wherein members of the general public gave their views.
21. The Respondent further deposed that it is fully aware of its obligation to involve the public in its legislative process, an obligation that it has been observed religiously; and that the Mombasa Finance Act, 2024, was no exception. The respondent indicated it carried out its mandate on public participation when it duly advertised, in a newspaper of nationwide circulation, an invite to the general public, the business community, civil society organizations, special interest groups, CBOs and private sector to attend a citizen’s consultative forum to deliberate on the inputs of the Mombasa



Finance Bill 2024; the notice provided that the Bill was to be obtained from the County's website www.mombasa.go.ke and hard copies were availed during the consultative forums.

22. The respondent also stated that the invite to the consultative forums was also done by mounting public speakers on County's vehicles to create awareness to the general public on the need to participate in the consultative forum; and that those unable to attend the forums were allowed to forward their submissions to the County Secretary's office.
23. Finally, it was the contention of the respondent that the citizens' views and recommendations were discussed by the Finance Committee of Mombasa County Assembly before a report on public participation was tabled before the County Assembly. The respondent added they were aware that the County Assembly of Mombasa also conducted their own public participation.
24. In *Kaps Parking Limited & another v County Government of Nairobi & another* 2021 eKLR it was pointed out that:
 137. The manner in which public participation is carried out depends on the matter at hand. There is no straight-jacket application of the principle of citizen participation. However, any mode of undertaking public participation which may be adopted by a public entity must factor, in the minimum, the following basic four parameters. First, the public be accorded reasonable access to the information which they are called upon to give their views on. In other words, the mode of conveying the information to the public reigns. Second, the people be sensitized or be made to understand what they are called upon to consider and give their views on. In this case, the language used in conveying the information to the public becomes of paramount importance. For instance, if those affected by the intended decisions or the legislation are mostly illiterate, then such realities must be factored in deciding the mode and manner of conveying the information. Third, once the public is granted reasonable access to the information and is made to understand it, the public must then be accorded reasonable time to interrogate the information and to come up with its views. Fourth, there must be a defined manner in which the public or stakeholders will tender their responses on the matter.
 138. The effect of the above constitutional and statutory parameters is to ensure that public participation is realistic and not illusory. Public participation should not be a mere formality, but must accord reasonable opportunity for people to have their say in what affects them. In that way, the dictates of *the Constitution* and the law will be achieved..."
25. In the circumstances, I am satisfied that public participation was indeed conducted in respect of the impugned legislation.

B. Whether the new levies on Miraa are discriminatory and violate the provisions of Articles 27(1), (2), (4) (5) and 28 of *the Constitution*:

26. The Petitioners have also alleged that the Mombasa County Finance Act, 2024, is discriminatory against Miraa traders in that they have been singled out and are required to pay new levies that are excessive and have not been introduced to any other trader. The applicants were therefore of the posturing that that their right to equality and freedom from discrimination under Article 27 of *the Constitution* has been violated.
27. According to the petitioners, no logical explanation has been given as to why the cost per 7 tonnes lorry of Miraa has changed from Kshs. 50,000/= in the financial year 2023 to Kshs. 70,000 in the financial year 2024 while the levies on things such as vegetables, vehicle spare parts and alcohol have remained the same. It was therefore the petitioners' case that Miraa traders were being openly discriminated against



in that, aside from being required to pay Kshs. 70,000 per 7 tonnes lorry of Miraa, they are required to pay for Miraa/Moguka Shop Exclusive Licence of Kshs. 15,000/=, an additional licence/charge to the annual single business permit that they are required to pay to the County.

28. The petitioners accused the respondent's leadership of having publicly confessed that they want to drive Miraa traders out of Mombasa, yet Miraa is a lawful crop under the Crops Act, CAP 318 and is routinely promoted and funded by the National Government.
29. Section 2 of the Crops Act defines a scheduled crop as any of the crops listed under the First Schedule and includes such other crop as the Cabinet Secretary, on the advice of the Authority, may declare to be a scheduled crop under Section 7. Section 7 of the Crops Act on the other hand provides:
 - (1) The crops specified in the First Schedule are scheduled crops for purposes of this Act.
 - (2) The Cabinet Secretary may, by notice in the Gazette, declare any other crop to be a scheduled crop for purposes of this Act.
 - (3) The notice under subsection (1) shall prescribe development and regulation measures with respect to each scheduled crop.
30. Under the First Schedule of the Crops Act, Scheduled Crops have been grouped into three parts; Part 1: Crops with breeding program under compulsory certification, Part 2: Crops with breeding program under voluntary certification and Part 3: Crops with no breeding program. Miraa also known as catha edulis is classified under Part 3 of the First Schedule as a crop with no breeding program. In the premises, to issue a declaratory order in that regard would be superfluous.
31. Turning now to the question as to whether Miraa traders are being discriminated against Regulations 7 and 11 of the Crops (Miraa) Regulations, 2023, the County Governments are allowed to license Miraa aggregators and vendors. Regulation 7 provides:
 - (1) A person shall not carry on business as a miraa aggregator without a licence issued by the respective county government.
 - (2) A miraa aggregator who is registered under regulation 6 shall apply for a licence to the respective county government in Form Mr8 set out in the First Schedule.
 - (3) The county government shall not issue a licence unless the applicant complies with the following requirements—
 - (a) the applicant has a field holding facility at his disposal;
 - (b) the field holding facility is serviced with a reliable source of potable water for use;
 - (c) the area has a well demarcated waste disposal area;
 - (d) all staff have appropriate personal protective equipment.
 - (4) The county government shall, if satisfied that the applicant meets the requirements in paragraph (3), issue, within ten days of receiving the application, a licence to a successful applicant in Form Mr9 set out in the First Schedule.
 - (5) Where the applicant does not meet the requirements in paragraph (3), the county government shall, within ten days from the receipt of the application, reject the application and notify the applicant of the reasons for the rejection.



- (6) Where the requirements set out in paragraph (3) have been met, the applicant whose application is rejected under paragraph (5) may resubmit the application for consideration.
- (7) A miraa aggregator shall submit annual returns to the respective county government in Form Mr10 set out in the First Schedule not later than the tenth day of the first month after the end of the financial year.
- (8) The county government shall, annually, share with the Authority a list of all licensed miraa aggregators.
- (9) A person who contravenes paragraph (1) or (7) commits an offence.

32 Regulation 11 provides:

- (1) A person shall not carry out business as a miraa vendor without a licence issued by the respective county government.
- (2) An applicant for a miraa vending licence shall apply to the respective county government in Form Mr18 set out in the First Schedule.
- (3) The county government shall, before issuing the licence in Form Mr19 set out in the First Schedule satisfy itself that the applicant has been registered by the Authority.
- (4) Where the applicant does not meet the requirement in paragraph (3) or does not provide the information required in the application form, the county government shall, within seven days from the receipt of the application, reject the application and notify the applicant in writing of the reasons for the rejection.
- (5) Where the reasons for the rejection of the application have been addressed, the applicant may resubmit the application for consideration.
- (6) Each county government shall, annually, share with the Authority a list of all licensed miraa vendors.
- (7) Every miraa vendor shall sell miraa or miraa products at a designated point.
- (8) The county government shall designate areas for the sale of miraa which shall be—
 - (a) well marked;
 - (b) kept free of and from waste material; and
 - (c) used exclusively for the sale of miraa.
- (9) Miraa shall not be sold to a person below the age of eighteen years.
- (10). A person who contravenes paragraph (1), (7) or (9) commits an offence.

33. The petitioners took issue with the charges set out in Items 517, 518, 519 and 630 as provided for in the Schedule to the Mombasa County Finance Act, 2024. Items 517, 518 and 519 are under Part 34: Offloading-Flat Rates which provides - items 517-Motor Vehicle with a capacity above 7 tonnes at Kshs. 70,000, 518- Motor Vehicle with a capacity below 7 tonnes at Kshs. 55,000 and 519 Motorcycle/ Handcart at Kshs. 20,000. Part 38 Single Business Permit provides for Item 630- Miraa/Moguka Shop Exclusive Licence at Kshs. 15,000. On account of the aforementioned prices, the petitioners urged the Court to find that said items are discriminatory against them and are intended to chase them out of Mombasa.



34. Article 27 provides for equal treatment and non-discrimination. At Sub-Articles 1 and 2 *the Constitution* stipulates that:
- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
 - (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms”.
35. Sub-Articles (4) and (5) of Article 27 further stipulate that;
- (4) 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”.
 - “(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified in clause (4)”.
36. In the case of *Peter K Waweru v Republic* 2006 eKLR discrimination was defined as follows:
- Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
- Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”
37. Accordingly, the onus was on the petitioners to demonstrate their allegations of discrimination to the requisite standard; in respect of which the Supreme Court in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* 2020 eKLR, stated: -
- (48) The petitioners’ case is set around the constitutional right of freedom from discrimination (*Constitution of Kenya, 2010*, Article 27). It is already the standpoint of this Court, as regards standard of proof, that this assumes a higher level in respect of constitutional safeguards, than in the case of the ordinary civil-claim balance of probability. The explanation is that, virtually all constitutional rights-safeguards bear generalities, or qualifications, which call for scrupulous individual appraisal for each case...”
38. The Petitioners in this case have compared the rates applicable to them as Miraa traders to offloading charges per 7 tonnes of cabbages, oranges, maize, pineapples, potatoes, quarry products, vehicle and motorcycle spare parts and electronics, cement, alcohol and tobacco, eggs, sugar, salt, milk and meat that are alleged to attract 3-10% of the levies paid by Miraa traders.
39. The Court of Appeal in the case of *Rawal v Judicial Service Commission & another; Okoiti (Interested Party); International Commission of Jurists & another (Amicus Curiae)* (Civil Appeal 1 of 2016) 2016 KECA 534 (KLR) (27 May 2016) (Judgment) held:
98. We now turn to consider the appellant’s argument that the respondents violated her right to equality and freedom from discrimination under Article 27. In *Andrews v Law Society of British Columbia* 1989 1 SCR 143, the Supreme Court of Canada explained the essence of discrimination as follows:



“Discrimination is a distinction which, whether intentional or not (is) based on grounds relating to personal characteristics of the individual or group, (and) has effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society.”

99. It cannot be gainsaid that differential treatment per se does not in and of itself constitute a violation of the right to equality or the kind of discrimination prohibited by *the Constitution*. The differential treatment must be based on the grounds prohibited by *the Constitution* and be devoid of any reasonable or rational basis. Judge Tanaka, of the International Court of Justice powerfully articulated the essence of equality in his dissenting opinion in the South West Africa Cases (www.icj-cij.org/docket/files/46/4945.pdf) as follows:

The most fundamental point in the equality principle is that all human beings as persons have an equal value in themselves, that they are the aim itself and not means for others, and that, therefore, slavery is denied. The idea of equality of men as persons and equal treatment as such is of a metaphysical nature. It underlies all modern, democratic and humanitarian law systems as a principle of natural law. This idea, however, does not exclude the different treatment of persons from the consideration of the differences of factual circumstances such as sex, age, language, religion, economic condition, education, etc. To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently. We know that law serves the concrete requirements of individual human beings and societies. If individuals differ one from another and societies also, their needs will be different, and accordingly, the content of law may not be identical. Hence is derived the relativity of law to individual circumstances...We can say accordingly that the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal.”

40. It is clear, therefore, that discrimination can only be said to have occurred where a person or group of persons are treated differently from other persons who are in similar position and circumstances, on the basis of one of the prohibited grounds like race, sex, disability, social origin, belief etc or due to unfair practice and without any objective and reasonable justification.
41. An example was given in *Nyarangi & Others v. Attorney General* 2008 KLR 688 as follows:

Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of *Griggs v Duke Power Company* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in a job application was found “to disqualify negroes at a substantially higher rate than white applicants”.

42. Consequently, there is a difference to be drawn between discrimination and differentiation. In the case of *Mohammed Abduba Dida v Debate Media Limited & another* 2018 eKLR, the Court of Appeal relied on *Kedar Nath v State of W.B. (1953) SCR 835 (843)* where the Supreme Court of India stated that:

Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is



necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view.”

43. Since Regulations 7 and 11 of the Crops (Miraa) Regulations, 2023 allow the respondent to impose various levies including a single business permit, is not enough for the petitioners to make a blanket claim without laying a proper basis of their claim. Accordingly, it is my finding that they have failed to prove discrimination for purposes of Article 27 of *the Constitution*.

44. The petitioners also alleged violation of their rights under Article 28 of the Constitution. That Article provides that:

Every person has inherent dignity and the right to have that dignity respected and protected.”

45. Human dignity connotes self-worth and respect. Hence, according to Black’s Law Dictionary, Tenth Edition, dignity is defined as:

The quality, state, or condition of being noble; the quality, state or condition of being dignified.”

46. It is therefore apt, to restate the expressions of Hon. Lenaola, J. (as he then was) in *J W I v Standard Group Limited & Another* 2013 eKLR Hon. Lenaola, J. that:

27 ...the right to human dignity has been recognised as the basis of fundamental rights and the Universal Declaration of Human Rights in its Preamble states that;

“recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

28 . In the context of the issue under consideration, human dignity need not be pleaded as a right for it to be enforced because it is inherent and together with the right to life, they form the basis for all other rights to be enjoyed by a human being qua human being. I need not say more...”

47. And, in the South African case of *S v Makwanyane & Another* (CCT3/94) 1995 ZACC 3, the right to dignity was underscored thus:

The importance of dignity as a founding value of the new Constitution cannot be over emphasized. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched in *the Constitution*”.

48. Having failed to prove discrimination, it follows that violation of Article 28 of *the Constitution* was also not proved granted that the petitioners hinged that averment on their assertion that they were discriminated against and therefore made to feel “less Kenyan” and “unwanted”. I am in agreement with the view expressed by Hon. Okwany, J. in *Andrew Laird White v Director of Criminal Investigations & 2 Others; Betty Tett & Another* (Interested Parties) 2019 eKLR that:

36 ...Courts have held the view that it is not enough to merely cite a violation of *the constitution* and maintained that there must be concrete evidence relating to the alleged breaches and real concrete and direct loss damage or injury arising out of the violation. (see *Josephat Koli Nanok & Another –vs Ethics & Anti- Corruption Commission* 2018 eKLR).



37. In the instant case, ...I find that not only has the petitioner not furnished this court with concrete evidence pointing towards the violation of his rights but that he has also not provided cogent evidence of the loss/injury that has arisen out of the alleged violation.
49. The upshot of the above is that the Petition dated 16th May 2024 is without merit. The same is hereby dismissed with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 26TH DAY OF
FEBRUARY 2025**

OLGA SEWE

JUDGE

