



**Awich & 10 others v Attorney General & 2 others; Katiba Institute & another
(Interested Parties) (Petition E304 of 2024) [2025] KEHC 9710 (KLR)
(Constitutional and Human Rights) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 9710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E304 OF 2024

AB MWAMUYE, J

APRIL 30, 2025

BETWEEN

**JOY AWICH 1ST PETITIONER
MUTHONI MATU 2ND PETITIONER
KIPNGETICH EMAN 3RD PETITIONER
CAROLYNE MWIKALI 4TH PETITIONER
STEPHEN OBUNDE 5TH PETITIONER
RAYMOND BURGEI 6TH PETITIONER
FELIX GATOBU 7TH PETITIONER
CATHERINE NJOKI NJANJA 8TH PETITIONER
TIM KUT 9TH PETITIONER
WESLEY TOME 10TH PETITIONER
IMRAN KASUMBA 11TH PETITIONER**

AND

**THE HON. ATTORNEY GENERAL 1ST RESPONDENT
THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT
ADAMSON BUNGEI 3RD RESPONDENT**

AND

KATIBA INSTITUTE INTERESTED PARTY



JUDGMENT

1. The Petitioners approached this court vide a petition dated 25th June, 2024 seeking the following orders;
 - a. A declaration be and is hereby issued that the Press release issued on 18th June 2024 by the 2nd and 3rd Respondents banning any assembly, protest or demonstration in Nairobi CBD is unconstitutional, invalid, null and void.
 - b. A declaration be and is hereby issued that the Respondents do not have the power to arbitrarily outlaw the right to assemble, to picket, to demonstrate and to present petitions to public authorities under Article 37 of the Constitution.
 - c. A declaration be and is hereby issued that the 2nd and 3rd Respondents are liable for the violations of rights and fundamental freedoms suffered by any person while exercising their constitutional rights.
 - d. A declaration be and is hereby issued that the 3rd Respondent in his personal capacity has violated Articles 10, 27(1) and (2), 28, 29, 37, 49, 73 and 244 of the Constitution of Kenya, 2010 as read together with Section 9 of the Leadership and Integrity Act, 2012.
 - e. A declaration be and is hereby issued that the 3rd Respondent is unfit to hold public office.
 - f. A declaration be and is hereby issued that Section 5 of the Public Order Act, 1950 is unconstitutional and inconsistent with the Constitution to the extent that it grants the 2nd and 3rd Respondent's power to arbitrarily deny a right or fundamental freedom in the Bill of Rights.
 - g. An order be and is hereby issued directing the Respondents to compensate the Petitioner for the violation of their rights.
 - h. Costs of the suit.
 - i. Any other or further order the court may deem it fit and just to grant.
2. The Petition is based on affidavits sworn by Joy Awich, Carolyne Mwikali and Stephen Mwikali all dated 25th June 2024 verifying the facts relied upon.
3. The Petitioners state that on 15th May 2024, the National Assembly through the Departmental Committee on Finance and National Planning and Finance Planning chaired by Hon. Kimani Kuria published a Notification of and Invitation to Public Hearings at the Kenyatta International Conference Centre (KICC).
4. They further state that several Kenyans from different economic sectors submitted various memoranda and went a step further to engage their respective Members of Parliament through messages and other social media avenues. Due to the blatant disregard of people's views and in pursuit of their sovereign rights, the Petitioners among other Kenyans organized to peacefully assemble, picket and demonstrate in the Central Business District in Nairobi through the hash tags #RejectFinanceBill2024 and #OccupyParliament.
5. The Petitioners further allege that on 15th June 2024, the OCPD Central Police Station, was notified of the intended peaceful march scheduled for Tuesday the 18th of June 2024 at 12:00 p.m pursuant to



Section 5 of the Public Order Act, 1950 but on 18th June 2024 at around 9:00 a.m the 3rd Respondent fully cognizant of the intended peaceful march, issued an arbitrary, illegal and unconstitutional press release to the media stating that they have mobilized officers to ensure that any gathering within the Nairobi Central Business District will be disbursed.

6. The Petitioners aver that pursuant to the illegal and arbitrary orders issued by the 3rd Respondent, armed police were deployed and started to profile, arrest and carry out other illegalities against the Petitioners and other Kenyans indiscriminately including those who were not engaging in the peaceful march.
7. The Petitioners further aver that as a result of the illegal declaration by the 3rd Respondent and in a bid to curtail Article 37 of the Constitution, police engaged in the use of excessive and disproportionate force against persons participating in the peaceful march. In addition, as a show of malice and impunity, the police under the orders of the Respondents illegally arrested and detained the Petitioners alongside other Kenyan citizens in police stations without any probable cause violated Article 49 of the Constitution by failing to inform the Petitioners of reasons for their arrest and also the right to access legal representation.
8. According to the Petitioners their right to legal representation was curtailed when the 2nd and 3rd Respondents declined the members of the Law Society of Kenya from accessing the arrested persons and lobbed tear gas at Advocates who had visited Central Police Station to secure their clients without any reasonable cause. The Petitioners were later released in the wee hours of the night without any charge and without being booked.
9. The Petitioners contend that the Respondents who are charged with the responsibility of protecting and defending public interest have purported to arrogate themselves power to suspend the Constitution which act is in breach of the National Values and Principles of Governance and their right to assemble, picket and demonstrate as enshrined in the Constitution.
10. The Respondents opposed to the petition filed Grounds of Opposition dated 4th October 2024 to which they averred that the Petitioners were unable to sufficiently prove the nature and manner in which the Respondents have allegedly violated their rights or any of the provisions of the Constitution.
11. They further averred that the Petitioners have annexed a copy of the purported notice to Central Police Stations of their intention to hold a public demonstration to the Supporting Affidavit of the 1st Petitioner marked "JM-3", however the said notice does not bear any stamp or signatures of the said officer Commanding Police Division or an officer under his command acknowledging receipt of it.
12. The Respondents state that pursuant to Section 5(8)(a) of the Public Order Act, the regulating officer or any police officer of or above the rank of inspector may stop or prevent the holding of (a) any public meeting or public procession held contrary to the provisions of subsections (2) or (6).
13. The Respondents contend that the pictures annexed by the Petitioners in support of the Petition depict persons with smiles and camaraderie and further the links marked JM-7, JM-8 and JM-9 do not conform to the requirements of Section 106B of the Evidence Act therefore the orders sought in the Petition are not merited.
14. According to the Respondents the Petitioners have not demonstrated how they violated the Constitution and every statute enjoys a presumption of constitutionality and that the burden of proving unconstitutionality lies with the petitioners which burden was not discharged thus the Petition ought to be dismissed as against the Respondents.



15. The 1st Interested Party filed a Replying Affidavit in support of the Petition to which it averred that they agree with the Petitioners that the Respondents committed violations of human rights including the adherence to the rule of law under Article 10 and the right to human dignity under Article 28 of the Constitution by use of excessive force against peaceful protesters, beating them with batons, firing tear gas, and spraying them with water cannons.
16. They further averred that the 2nd and 3rd Respondents infringed on the Petitioners right to freedom of expression a fundamental freedom closely related to the right to assemble, picket, demonstrate, and present petitions by unlawfully barricading and blocking roads in order to obstruct the Petitioners and other Kenyans from expressing their views on the Proposed Finance Bill.
17. The 1st Interested Party agreed with the Petitioners that the rights of arrested persons under Article 49 can be violated when someone is unlawfully arrested during the peaceful march; where the person is not informed of the reason for their arrest and denied the right to communicate with one's advocates or any other person; if a person is restricted access to legal representation and withholding the location of those arrested. In addition, this right is violated when a person is detained for more than 24 hours without being booked or charged and eventually released without any charges being preferred against them.
18. In addition, according to the 1st Interested Party, any state organ that violates Article 73 of the Constitution by failing to respect the people and undermining public confidence in the integrity of the office and such state organs should be declared to have violated Article 73(1)(a) and Sections 8 and 9 of the Leadership and integrity Act that mandates that state officers exercise authority as a public trust as per the Constitution, promoting respect, dignity and honour to the nation.
19. The Petitioners filed a further affidavit sworn by Joy Awich on 16th December 2024 where she reiterated contents of her supporting affidavit and further provided the protests on 18th June 2024 were peaceful. There was no violence, looting and/or wanton destruction of public and private.
20. The Petitioners further stated that the Respondents are mistaking the protests of 18th June 2024 with those held in subsequent dates to wit 25th June 2024, there was some altercation and the court should take judicial notice that on 18th June 2024 there was no violence or illegal activity and this was the reason after a long day of arresting several individuals, they were not charged before any court of law and were released in the wee hours of the night.
21. The Petitioners contend that the Constitution under Article 73 mandates all acts of public /state officers shall be exercised in conformity with the Constitution therefore, a public officer shall take personal responsibility for the consequences thus the 3rd Respondent is personally liable for suspending the Constitution by declaring no protest.
22. The Petitioners filed written submissions dated 14th October 2024 where they argued six(6) issues for determination namely: whether the constitutional petition herein is competent; whether the rights of the Petitioners were violated by the Respondents; whether the 3rd Respondent through his illegal declaration violated Articles 10 and 73 of the Constitution on leadership and integrity; whether the 3rd Respondent should bear personal responsibility in light of Articles 10 and 73 of the Constitution as read together with sections 8 and 9 of the Leadership and Integrity Act; whether section 5 of the Public order Act is unconstitutional and finally the amount of damages to be granted to the Petitioners.
23. On the first issue the Petitioners argued that the Constitutional petition is competent as it raises substantial issues on the violation of rights and fundamental freedoms and equally complies with the principles set out in Anarita Karimi Njeru v Republic [1979] eKLR. Reliance was placed on the case



- of *John Juma & 2 others v Patrick Lihanda & another; Zedekiah Orera & 4 others (Interested Parties)* [2018] eKLR and the case of *Anarita Kirimi Njeru v Republic* [1979] eKLR as quoted in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.
24. On the second issue, the Petitioners submitted that the Respondents violated their rights under Articles 27, 28, 29, 33, 37, 49 and 244. They argued that once the 3rd Respondent issued an arbitrary, illegal and unconstitutional press release to the media banning citizens from exercising their rights under Article 37 amounted to a violation of their constitutional rights. They cited the following cases in support of this issue which include the Russian case of *Barankevich v Russia Application No.10519/03, the case of Khalid & 16 others v Attorney General & 2 others* (Petition 21 of 2017) [2019] KESC 93 (KLR) and the case of *Wilson Olal & 5 others v Attorney General and 2 others* [2017] eKLR.
 25. They also analysed Articles 27, 28, 29, 33, 49 and 244 of the *Constitution* and relied on the cases of *JWI vs. Standard Group Limited & Another* [2013] , *S vs Makwanyane & Another* (CCT3/94) [1995] [ZACC 3] , *Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party)* [2018] eKLR. They also argued that the *National Police Service Act* demands compliance by the police with constitutional standards of human rights where they relied on the case of *Anthony Murimi Waigwe v Attorney General & 4 others* [2020] eKLR, *Leydi Dayan Snachex vs Columbia and Tennessee v Garner* 471 US 1 11 (1985) and finally the case of *Stephen Iregi Njuguna v Attorney General* (1997) eKLR.
 26. On the third and fourth issues, the Petitioners argued that by illegally banning demonstrations, an act the 3rd Respondent knew he had no powers to do, he arrogated his duty, failed to respect the *Constitution* and people of Kenya and seriously impeached the public confidence in the integrity of the office in violation of Article 10 and 73 of the *Constitution* together with Section 8 and 9 of the *Leadership and Integrity Act*.
 27. They further submitted that in violation of the above sections, the 3rd Respondent should take personal responsibility for the consequences. Reliance was placed on the case of *Republic v Communication Authority of Kenya (ICTAK)* [2021] eKLR, the case of *Pastoli vs Kabale District Local Government Council and others* [2008] 2EA 300 and the case of *Kenya Human Rights Commission & another v Non- Governmental Organization Co-ordination Board & another* [2018].
 28. In the fifth issue, the Petitioners argued that Section 5 of the *Public Order Act* grants the police the power to prohibit the exercise of a constitutional right where there is an undefined breach of peace or public order. The two terms are not defined in the section and are left to the subjective interpretation of the police. This does not meet the ‘provided by law’ test under the *Constitution*. Reliance was placed on the case of *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* [2017] eKLR.
 29. The Petitioners further stated that the regulator/police is given massive powers under section 5 of the *Public Order Act* making the decision of the regulator final and there is no right for appeal. They also argued that human rights language frowns upon the use of prison sentences to limit a right. Imposition of prison sentences as a means of limiting a right threatens citizens from exercising a right. The mandatory sentence of imprisonment severely violates the right to demonstrate and picket. They relied on the case of *Katiba Institute & another v Attorney General & another; Independent Policing and Oversight Authority & 3 others (Interested Parties)* (Constitutional Petition 379 of 2017) [2022] KEHC 17072 (KLR).
 30. On the final issue, the Petitioner submitted that crafting remedies in human rights adjudication goes beyond the realm of compensating for loss as it is principally about vindicating rights and it is thus



- important for the court to vindicate and affirm importance of the violated. It is therefore important that this Honourable Court awards damages in a manner that provides for future deterrence. They relied on the Supreme court case of *City of Vancouver v Ward* [2010] 2 SCR 28 and *Wamwere & 5 others v Attorney General* (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR).
31. The Respondents filed submissions dated 31st October 2024 where they argued two issues for determination namely; whether the Petition meets the threshold of a Constitutional Petition and whether the Petitioners rights have been violated.
 32. On the first issue, the Respondents argued that the Petitioners were unable to sufficiently prove the nature and manner in which the Respondents have allegedly violated their rights or any of the provisions of the *Constitution* and have therefore not met the threshold as per the case of *Anarita Karimi Njeru v Republic (No.1)* [1979] KLR 154 and further relied on the case of *Kenya Bus Services Ltd & 2 others v Attorney General & 2 others* [2005] eKLR, the case of *Matiba v Attorney General* H C Misc Appl 666 of 1990 and finally the case of *Cyprian Kubai v Stanley Kanyonga Mwenda* – Nairobi HC Misc 612 of 2002 unreported.
 33. On the second issue, the Respondents argued that the purported notice served upon the Central Police Station bears no sign of having reached the intended destination and hence cannot be relied upon as being proof of conformity of the *Public Order Act*. They submitted that this Honourable Court should be bound by the Supreme Court decision held in the case of *Law Society of Kenya v Attorney General & Another*, SC Petition No. 4 of 2019 [2019] KESC 16 (KLR).
 34. They also contend that the claims of violation of Article 49 rights by the Petitioners are merely conjecture and speculative as the Petitioners were not held beyond their legally allowed period before bringing of charges against them which they have admitted they were released and never charged. In this they relied upon the case of *Republic v Nuseiba Mohammed Haji Osman* [2018] eKLR. They therefore prayed that the Petition be dismissed for being an abuse of the court process.
 35. The Petitioners in reiteration filed Supplementary Written Submissions dated 10th January 2025 stating that the Respondents have asserted wide allegations against the Petitioners but have not adduced any evidence in support of the same.
 36. The 1st Interested Party filed written submissions dated 9th January 2025 and submitted that the Respondents actions as outlined in the Petition as evidenced by the illegal acts and excessive use of force, flagrantly violated the rule of law, undermined the human rights and dignity of the Petitioners in violation of Article 10 of the *Constitution*. They relied on the cases of *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); with Kenya Human Rights Commission & another (Amicus Curiae)* (Petition 229 of 2012) [2012] KEHC 2480 (KLR) (Constitutional and Human Rights).
 37. They further argued that the Petitioners argue that the Respondents engaged in multiple violations of constitutional rights during the peaceful demonstrations. These violations included the use of excessive force, such as beating participants with batons, lobbing tear gas at them and spraying them with water cannons. They argued that the Respondents also profiled young Kenyans commonly known as “Gen-Zs” specifically targeting those wearing black clothes, carrying water bottles or wearing masks. Furthermore, they beat, clobbered, maimed, and tortured individuals participating in the march, subjecting them to cruel, inhuman, and degrading treatment. They also submitted that the Respondents unlawfully used live bullets on unarmed and peaceful protests and conducted invasive, degrading body searches on those arrested. Additionally, the detainees were held in overcrowded, unsanitary, and filthy detention cells, further compounding their rights under Articles 28, 29, 37 and 49 of the *Constitution* most especially their right to human dignity.



38. In support of the above, they relied on several cases which include *inter-alia*: [ANN v Attorney General](#) (Petition 240 of 2012) [2013] KEHC 6004 (KLR) (Constitutional and Human Rights), the Canadian Supreme Court in [Law v Canada \(Ministry of Employment and Immigration\)](#) 1999 (1) SCR 497, the Belgium case of [Bouyid v Belgium](#) (2016) 62 E.H.R.R. 32, the [Kenya Human Rights Commission & 8 others v Koome Nchebere; Law Society of Kenya & 2 others \(Interested Parties\)](#) (Application E082 of 2024) [2024] KEHC 16607 (KLR) (Judicial Review), [Robert Alai v Attorney General](#) (Petition 174 of 2016) [2017] eKLR among others.
39. On whether the Respondents violated Article 244 of the [Constitution](#), the Interested Party submitted that Article 244 reinforces the [Constitution](#)'s vision of a law enforcement system that aligns with national values and that the police must operate as a service to the people. They argued that the police failed to meet this requirement as first there was no legal basis since they relied on a press release which does not constitute a lawful means for limiting rights and secondly, the blanket ban was disproportionate and failed the test of justifiable limitation.
40. The Interested Party contended that the issues raised in the Petition demonstrate clear and egregious violations of the [Constitution](#) particularly the rights and freedoms enshrined in Articles 10, 27, 28, 29, 37, 49, 73 and 244 thus in light of the compelling evidence and the gravity of the constitutional breaches, they pray that this Honourable Court upholds the Petition and grants the prayers sought to ensure that justice is served, constitutional safeguards are reinforced and public confidence in governance and law enforcement is restored.

Issues for Determination

41. Having considered the Petition, the responses thereto both in support and in opposition, and the oral and written submissions by the parties, the Court has identified the following four (4) issues for determination namely:
- a. Whether the Respondents violated citizen's rights to demonstrate, assemble and picket guaranteed under Article 37 of the [Constitution](#);
 - b. Whether the Respondents violated the Petitioners Right under Article 49 of the [Constitution](#);
 - c. Whether Section 5 of the [Public Order Act](#) is unconstitutional;
 - d. Whether the Petitioner is entitled to the damages or any other reliefs sought due to violation of their constitutional rights by the Respondents.

A. Whether the Respondents violated citizen's rights to demonstrate, assemble and picket guaranteed under Article 37 of the [Constitution](#);

42. The Petition herein brings into focus the question whether the executive can interfere with individuals constitutional right and if so the extent to which it may interfere. The constitutional rights brought to the fore and about which the Petitioner are concerned are specifically their right to assemble, picket and present petitions to authorities.
43. Article 37 of the [Constitution](#) provides that every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket and to present petitions to public authorities.
44. This is one of the rights recognized under Chapter 4 of the [Constitution](#) as not only inherent to every individual but is also an integral part of the Republic of Kenya as a democratic right. Article 37 is one of the rights that forms a benchmark for the state's social economic and cultural policies as outlined in Article 19(2) of the [Constitution](#) and is recognized and protected because it is one of the only means by



which the dignity of the individual and communities can be preserved. The same Article is categorical that it is also through such recognition and protection that social justice and realization of the potential of all human beings can be promoted.

45. In addition, under International Law Article 20(1) of the *Universal Declaration of Human Rights*, everyone has the right to freedom of peaceful assembly and association. Kenya is also state party to the *International Covenant on Civil and Political Rights* whose Article 21 states that the “right of peaceful assembly shall be recognized.” Article 11 of the *African Charter on Human and Peoples’ Rights*, also known as the Banjul Charter also states that every individual shall have the right to assemble freely with others.

46. In the case of *Ferdinand Ndung’u Waititu v Attorney General and 12 Others* [2016] eKLR, the court while discussing Article 37 in relation to freedom of expression and association held as follows:

“Besides guaranteeing the right to assemble, demonstrate, picket and petition, Article 37 is itself an imperative rights article and its import is that it brings together other rights critical in any free democratic society. The article inherently invites the freedom of expression and opinion as well as the freedom of association. In their course of their demonstrations, persons are bound to assemble and associate and likewise, in the course of picketing, the picketers are simply bound to express themselves, their common views and opinions.”

47. It is however important to note that rights under Article 37 are not absolute and may be limited by law. It is a constitutional imperative that an individual’s right must and ought not to be interfered with and may only be limited as provided by law.

48. Article 24 of the *Constitution* of Kenya, 2010 lays out the circumstances under which these limitations may apply. It states as follows:

“24.

- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
 - a. the nature of the right or fundamental freedom;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
 - e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
2. Despite clause (1), a provision in legislation limiting a right or fundamental freedom-



- a. in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation; and
 - b. shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
 - c. shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
3. The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied...”

49. The above provision, establishes the criteria for limiting any constitutional right and urged that a right or fundamental freedom in the Bill of Rights can be limited only by law, in pursuit of a legitimate objective and only to the extent that the limitation is necessary.
50. Despite the limitations, it is not implied that the executive has power, independent of statute, to act in derogation of the rights of citizens. In light of these provisions not only must the exercise of executive powers be authorized by law but it must also keep strictly within the scope of that authority.
51. When there is a law upon any particular matter, the executive, just like any private person, cannot defy it or refuse to be bound by it. The criteria for limiting any constitutional right by law is in pursuit of a legitimate objective and only to the extent that the limitation is necessary. This was observed in the Supreme Court in the case of *Kandie v Alassane BA & Another* (Petition 2 of 2015) [2017] KESC 13 (KLR) which held as follows:

- “ 13. The test to be applied in order to determine whether a right can be limited under Article 24 of the *Constitution*, was the reasonable and justifiable test, which 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 was reasonable and justifiable in an open and democratic society. The insertion of the word ‘including’ in Article 24 indicated that the factors to be considered while conducting the balancing act were not exhaustive but they were a guide to the main factors to be taken into account in that consideration.
14. Before applying the reasonable and justifiable test, the court would first have to determine whether a right was limited under a particular law...
15. In assessing whether the limitation of a right was reasonable and justifiable, the court would consider 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 did not prejudice the rights of others, as well as the relationship between the limitation and its purpose, and whether there were less restrictive means to achieve that purpose.”



52. In assessing whether the limitation of a right is reasonable and justifiable, the Court ought to consider 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 as the consideration of the relationship between the limitation and its purpose.
53. The limitation of human rights and freedoms does not give any state organ the right to curtail such rights. The people in a democratic country have the right to raise their voice against injustice and even express their resentment against the action of the government. The government should respect and even encourage exercise of such rights.
54. It is the duty of the state to aid the exercise of right and freedom of speech in its comprehensive state and not to frustrate exercise of such rights by exercising its executive or legislative powers or taking actions in violation of rights and freedoms of citizens in the name of reasonable restrictions.
55. This being a democratic society, limitation of a right must not only be reasonable but also justified by the party seeking to limit the right. Such limitation must strike a balance between the provisions limiting the right and Article 24 of the *Constitution*.
56. The principle enunciated above is that constitutionally guaranteed rights should not be limited except where the limitation is reasonable, justifiable and the objective of that limitation is intended to serve the society. The standard required to justify limitation, is high enough to discourage any limitation that does not meet a constitutional test and that limitation to a right is an exception rather than a rule.
57. In their submissions, the Respondents state that the action taken by the police in response to the demonstrations were all executed in accordance to the *Constitution* and the functions of the police laid out in the *National Police Act* and the same did not amount to excessive use of force in any manner whatsoever. However, they proceed to indicate that due to the state of anarchy that had descended on the country all attributed to by the protestors, the police had to make maximum efforts and actions in all the quest to restore peace, law and order which I presume includes the use of force.
58. In the present case, the state has not even in the remotest sense, attempted to show that the limitation was reasonable and justifiable as required by Article 24(3). No material or policy considerations were placed before this court to justify the limitation. The right to assemble, demonstrate, picket and petition a public authority being a constitutional right, can only be limited in accordance with the *Constitution* itself, and where it is limited by statute, that statute or statutory provision must meet the constitutional test of reasonableness and justifiability.
59. It is prudent however to note that the *Constitution* has provided claw-backs on Article 37 that demonstrators, picketers and petition -presenters must do so peaceably and unarmed. Assemblies, picketing and demonstrations which are not peaceful are excluded from protection of Article 37 of the *Constitution*. However, that does not implicate the right to assemble, demonstrate and picket for the basic reason that the *Constitution* is supreme. The right to picket and to demonstrate is an essential feature in a democratic society that ought to be protected especially where it is shown that they often start as peaceful ones. The focus should not be on the fact that they turn violent but rather how to ensure that they do not turn violent without violating and infringing individual rights.
60. The police service has an obligation to assure the public of peace and order. The public in these respects include both the participants in the demonstrations and picketing as well as the non – participants. There is a positive obligation on the state to facilitate and protect a peaceful exercise of Article 37 Rights.



61. Section 10 (4) of the *National Police Service Act*, cap 84 which has been enacted to give effect to Articles 243, 244 and 245 of the *Constitution* states that in the performance of functions set out under the *Constitution*, the *National Police Service Act* or any other law, the Inspector General shall not just have all the necessary powers for the performance of such functions but, in exercising them, he is under obligation to uphold the national values, principles and objects set out in Articles 10, 232 and 244 of the *Constitution*.
62. Amongst the national values and principles of governance in Article 10 are, of course, the rule of law, democracy, human dignity, human rights and non-discrimination. Article 232, on the other hand, is about values and principles of public service and they include accountability for administrative acts; and finally, Article 245 is with respect to the command of the National Police Service and it states, inter alia, that the Inspector General shall, among other things exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.
63. I am guided by the holding by Tambala J (as he then was) in the Malawian case of *National Consultative Council v The Attorney General* Civil Cause 958 of 1994 stated: “There is need to strike a balance between the needs of society as a whole and those of individuals. If the needs of society in terms of peace, law and order, and national security are stressed at the expense of the rights and freedoms of the individual, then the Bill of Rights contained in the *Constitution* will be meaningless and the people of this country will have struggled for freedom and democracy in vain. In a democratic society, the police must sharpen their skills and competence. They must be able to perform their main function of preserving peace, law and order without violating the rights and freedoms of the individuals. That is the way they can contribute to the development of a free state. Matters of National Security should not be used as an excuse for frustrating the will of the people expressed in their constitution.”
64. The suspension of rights without due process, such as consultation with relevant stakeholders or obtaining necessary judicial approvals, raises concerns about the legitimacy and fairness of the administrative action. Due process requires that any action affecting constitutional rights must be carried out in a manner that follows established legal procedures. This includes providing notice, the opportunity to be heard, and a fair and impartial decision-making process. The unilateral suspension of rights by the Respondents bypasses these procedural safeguards. The principles of due process are fundamental in ensuring fairness and justice in administrative and judicial actions.
65. In as much as the Respondent may have been aware of the infiltration of the demonstration with characters that were out to cause chaos, they had the constitutional obligation to ensure national security in compliance with the law and with utmost respect for the rule of law, democracy, human rights and fundamental freedoms that he ought to under Article 238(2) (b). It is possible for the Respondents and the police in general to maintain law and order even as the citizens exercise their rights under Article 37 of the *Constitution*. It is therefore my finding that the Respondents violated citizen’s rights to demonstrate, assemble and picket guaranteed under Article 37 of the *Constitution*.
66. With regards to the Press statement issued to the media by the 3rd Respondent on 18th June, 2024 this Honourable Court in a recent decision of *Katiba Institute v Inspector General & Another* (Petition E349 of 2024) issued the following orders:

“A declaration be and is hereby issued that the proposed limitation of the right to exercise Article 37 rights in the subject area was a blanket, omnibus, and overly broad one, and thus it did not meet the requirements of Article 24 of the *Constitution*.

A declaration be and is hereby issued that the 1st Respondent’s press statement dated 17th July 2024 was and is unconstitutional and invalid to the extent that it restricted and restricts



any and all demonstrations in the Nairobi Central Business District and its surroundings until further notice and to the extent that it required and requires any and all protests, demonstrations, picketing actions, and public gatherings to have a designated leader(s) to coordinate, collaborate, and cooperate with the Police as a mandatory prerequisite.

An order of certiorari be and is hereby issued quashing the 1st Respondent's Press Statement dated 17/07/2024.

A declaration be and is hereby issued that whereas the 1st Respondent's Press Release dated 17/07/2024 was unconstitutional and invalid as per (a) and (b) above and was quashed as per (c) above, the 1st Respondent's actions in the issuance and implementation of the impugned press release did not however raise to the high standard required for an adverse finding by this Court on any of the adverse finding by this Court on any of the grounds arising under Article 245 (7) of the Constitution.

This being public interest litigation, each Party shall bear its own costs."

67. Having already determined that the Press release by the 3rd Respondent dated 17th June 2024 to be unconstitutional, invalid, discriminatory and a violation of individuals rights under Article 37 of the Constitution, I find no need to address the same issue again.

B. Whether the Respondents violated the Petitioners Right under Article 49 of the Constitution

68. Article 49 of the Constitution outlines the rights of arrested persons which includes the right to be informed promptly; in a language that the person understands the reason for the arrest. Article 49 (1) (c) of the Constitution guarantees that an accused person has the right to communicate with an advocate, and other persons whose assistance is necessary.
69. The Petitioners state that during their illegal arrest while demonstrating and picketing peacefully, they were never informed of the reason for the arrest and were also never granted the right to communicate with the advocate of their choice or any other person. They allege that the 2nd and 3rd Respondents denied them access to legal representation by throwing tear gas at their advocates and chasing them away from the police station. They contend that they were also denied an opportunity to communicate with and seek assistance from their friends and family.
70. The Petitioners equally allege that the Respondents failed to present them before court within twenty-four hours as required by Article 49 (1) (f) of the Constitution but instead released them in the wee hours of the night at around 8:30p.m without being charged or being booked after detaining them for more than twenty -four hours.
71. The Respondent did not dispute the allegations conferred by the Petitioners but indicated in their submissions that the petitioners admit to being released at 8:30 p.m on the day they were arrested and not the wee hours of the morning since they were not released after midnight.
72. In respect to the Petitioners allegation that their right was violated on the account of them not being informed of the reason for their arrest, it is noteworthy that the existence of the power of arrest is one thing and the justification of the exercise is another.
73. The law demands that whenever an arrest is made, the accused person has the right to be informed not only that he is being arrested but also of the reasons or grounds for the arrest. Thus, the police officer must be able to justify the arrest apart from his power to do so. It is incumbent upon those who deprive other persons of liberty in the discharge of what they conceive to be their duty to strictly and scrupulously observe the forms and rules of law.



74. In our constitutional democracy like our own it is imperative for citizens to have confidence and trust in the institutions established to safeguard the rule of law. In this regard the citizens expect the police officers in going about their duties to be fair, transparent and accountable in executing duties on behalf of the state. The police officers are meant to achieve in exercising their powers under the *National Police Service Act* and the *criminal procedure code* to arrest, detain or investigate must be carried out within constitutionally permissible parameters.
75. Therefore any system of law which keeps in mind the constitutional provisions must ask the fundamental question whether in order to fight crime it is necessary to derogate from the Bill of Rights entitlements by denying a suspect right to liberty, freedom, dignity, degrading and inhuman treatment. What is at stake in the instant case is the failure by the 2nd and 3rd Respondents to demonstrate that they took proportionate measures to ensure compliance with the *Constitution* more so the right to be given reasons for their arrest and the right to communicate with counsel or other persons upon arrest as provided under Article 49 of the *Constitution*, issues that were not adequately addressed by the Respondents.
76. In the circumstances of this petition, rules of police station protocols should not negate the realization of the right to legal representation to arrested persons. In the matter before me impairing such a right makes a mockery of the principles laid out in our Constitution. The Petitioners were entitled to legal representation, to be duly informed of the reasons for their arrest and to be arraigned within a court of law within twenty- four hours of their arrest.
77. I find that the 2nd and 3rd Respondents failed to ensure observance and effective protection of Article 49 of the *Constitution*. I am in full agreement with the sentiments of Onkwany J in the case of *Akusala A. Boniface v OCS Langata Police Station & 4 others* Petition Number 351 of 2017 [2018] eKLR where she stated:

“30. Needless to say this court takes judicial notice of the fact that lawyers in this country have, in recent past, been victimized by police officers while in normal course of their duties of representing their clients.

...Lord Denning M.R. in the case of *Rondel v Worsley* [1966] 3 ALL ER 657 stated as follows on the relationship of advocate and client with regard to the performance by the advocate and client with regard to the performance by the advocate of his work thus:

“It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of those things. He owes allegiance to a higher cause. It is the cause of truth and justice.”

31. from the dictum in the above cited case, it is clear that the critical role that lawyers play in the pursuit of the truth and justice must be appreciated as it is a role that should make them partner with the police in fighting crimes and other vices afflicting the society rather than be at cross purpose as was the position in the instant case. What I can infer from the circumstances of this case is that there was no basis whatsoever to arrest or detain the petitioner and that in order to justify their activities, the police made entries of framed up charges of incitement of violence and obstruction of police officers while knowing too well that they had no intentions of pursuing the said charges to their logical conclusion.”



78. In the absence of an alternative explanation by the Respondents, I am inclined to side with the Petitioners on their claim that their rights under Article 49 were violated on account of them not being informed of the reason for their arrest and also being denied their constitutional right of access to legal representation of their choice as guaranteed by Article 49 (1) (c).
79. Having found that, I nevertheless find that no material has been placed before this Court to show that the 3rd Respondent's actions under this and the previous limb meet the threshold required for an adverse finding that the 3rd Respondent in his personal capacity has violated Articles 10, 27(1) and (2), 28, 29, 37, 49, 73 and 244 of the Constitution of Kenya, 2010 as read together with Section 9 of the *Leadership and Integrity Act*, 2012, in order for a declaration to be issued that the 3rd Respondent is unfit to hold public office.

C. Whether Section 5 of the *Public Order Act* is unconstitutional

80. The Petition herein challenges the Constitutionality of Section 5 of the *Public Order Act*, Cap 56 Laws of Kenya. The 2nd and 3rd Respondents are accused of resorting to the misuse of Section 5 of the *Public Order Act* to limit the citizens' rights and fundamental freedoms under the Bill of Rights and in particular to suppress divergent opinions, curtail freedoms of expression, limit and restrict freedom of association in what is clearly a political clampdown on freedoms and liberties of the people of Kenya.
81. The constitutionality of Section 5 of the *Public Order Act* was settled in the Court of Appeal in Nairobi Civil Appeal No. 261 of 2018 *Haki Na Sberia Initiative v Inspector General of police & 3 others* where the court held that the impugned provision is constitutional. This Honourable Court is therefore bound by the finding of the Court of Appeal unless the decision is distinguishable. In keeping with the doctrine of stare decisis, this court finds that Section 5 of the *Public Order Act*, Cap 56 Laws of Kenya, is constitutional.

D. Whether the Petitioner is entitled to the damages or any other reliefs sought due to violation of their constitutional rights by the Respondents.

82. Article 23 (3) of the of the *Constitution* empowers this court to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedom such as this one. The Petitioners seek compensation from the Respondents for the violation of their constitutional rights.
83. The Court has discretion to determine an award of damages in Constitutional violations though the same is limited to what is appropriate and just. What amounts to "appropriate relief" was discussed by South African Constitutional Court in *Minister of Health & Others vs. Treatment Action Campaign & Others* (2002) 5LRC 216 which held as follows: -

"...appropriate relief will in essence e relief that is required to protect and enforce the *Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the *Constitution* are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all-important rights... the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be, to achieve this goal."

84. The principles applicable to award of damages for constitutional violations under the *Constitution* were exhaustively discussed by the Privy Council in the famous case of *Siewchand Ramanoop vs The AG of T&T*, PC Appeal No 13 of 2004 wherein it was held that a monetary award for constitutional



violations was not confined to an award of compensatory damages in the traditional sense. The court held: -

“When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect to the sense of the public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.

All these elements have a place in this additional award. “Redress” in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions “punitive damages” or “exemplary damages” are better avoided as descriptions of this type of additional award.”

85. On the question of the award of exemplary damages, Majanja J (as he then was) in the case of *Benedict Munene Kariuki & 14 others vs The Attorney General* Petition Number 722 of 2009 (2011) eKLR held that:

“ [55.] This holding encapsulates my position on awarding aggravated and exemplary damages in cases where unconstitutional action has been challenged in a changed and improving political environment. I must take judicial notice of that fact in today’s Kenya and I am satisfied that no benefit was procured by the Moi regime in its obviously unconstitutional actions. Kenya’s Government has learnt from its past and the deterrent effect is alive and obvious. I also agree with the Respondents that in the circumstances, exemplary damages are not properly awardable noting the burden to the innocent tax payer. Further I note that the Petitioners were not labouring for the “Second Liberation” in order to get monetary compensation but for the attainment of a higher ideal; a just society. That Society is slowly coming alive and their contribution by this judgment has been recognized.”

86. The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is “just and appropriate” in *Doucet-Boudreau v. Nova Scotia (Minister of Education)* 2003 SCC 62 to include a remedy that will:

1. meaningfully vindicate the rights and freedoms of the claimants;
2. employ means that are legitimate within the framework of our constitutional democracy;



3. be a judicial remedy which vindicates the rights while invoking the function and powers of a court; and
4. be fair to a party against whom the order is made.

87. Having regard to the above, it is clear that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court but that such discretion is limited by what is appropriate and just according to the facts and circumstances of a particular case in view of the fact that the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringement.

88. The appropriate determination is an exercise in in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation on the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the Petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.

89. Pursuant to the holding of liability as set out above, it is my duty to navigate the discretionary jurisdiction on award of damages by placing reliance on past jurisprudence on this issue.

90. The Court of Appeal in the case of *Gitobu Imanyara & 2 others v Attorney General* Civil Appeal No. 98 of 2014 [2016] eKLR while addressing itself on the question of damages, the court held:

“...It seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for an award of damages in constitutional violation cases though is limited to “what is appropriate and just” according to the facts and circumstances of a particular case. As stated above, the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration...”

91. In the case of *Akusala A. Boniface v OCS Langata Police Station & 4 others* Petition Number 351 of 2017 [2018] eKLR on the question of damages, the court held as follows:

“42. In the instant case I find that the appropriate determination is to award reasonable damages in addition to the declaration of violation of constitutional rights. As I have already noted in this judgment, the Petitioner prayed for an award of 10 million for damages, I am however of the view that an award of Kshs. 2 million will be appropriate in the circumstances of this case. I am guided by the decision in the case of *Lucas Omoto Wamari v Attorney General & another* [2017] eKLR wherein the Court of Appeal upheld an award of Kshs. 2 million for violation of constitutional rights under circumstances that were similar to the instant case.”



92. Similarly, Mativo J in the case of *Daniel Waweru Njoroge & 17 others v Attorney General* Civil Appeal No. 89 of 2010 [2015] eKLR the court held as follows:

“The Court has applied the above principles to the facts herein and it makes a finding that the action of the defendant was high handed and an award of Kshs. 100,000/= will be an adequate compensation for each of the plaintiff herein as general damages for unlawful arrest and false imprisonment.”

93. Drawing from the principles laid out in the precedents above, I am of the opinion that where a Petitioner is entitled to compensation for violation of his constitutional right by the state, such compensation ought to be both general and exemplary in nature. This is so because such an award is meant to vindicate the violation of the Petitioners rights and deter future infringements.

94. In light of the violations occasioned by the 2nd and 3rd Respondents on the Petitioners rights as alluded to elsewhere in the judgment, I find that the Petitioners are entitled to general and exemplary damages in addition to a declaration on the violation of their constitutional rights.

95. I hereby award the Petitioners Kes. 100,000.00 each in compensatory damages and an additional similar amount for each as exemplary damages.

96. Consequently, the following final orders hereby issue: -

- A. A Declaration be and is hereby issued that the 2nd and 3rd Respondents were and are jointly and severally liable for the infringement of the constitutional rights of the Petitioners as outlined.
- B. A Declaration be and is hereby issued that the actions of the police officers contravened the Petitioners’ rights and freedoms under Articles 10, 27(1) and (2) , 28, 29, 37, 49, 73 and 244 of the *Constitution*.
- C. A Declaration be and is hereby issued that notwithstanding (a) and (b) above, the 3rd Respondent’s actions did not meet the high threshold required for an adverse finding that the 3rd Respondent in his personal capacity has violated Articles 10, 27(1) and (2), 28, 29, 37, 49, 73 and 244 of the Constitution of Kenya, 2010 as read together with Section 9 of the *Leadership and Integrity Act*, 2012, in order for a declaration to be issued that the 3rd Respondent is unfit to hold public office;
- D. A declaration be and is hereby issued that the 1st Respondent’s press statement dated 17th July 2024 was and is unconstitutional and invalid to the extent that it restricted and restricts any and all demonstrations in the Nairobi Central Business District and its surroundings until further notice and to the extent that it required and requires any and all protests, demonstrations, picketing actions, and public gatherings to have a designated leader(s) to coordinate, collaborate, and cooperate with the Police as a mandatory prerequisite.
- E. The Petitioners are each awarded Kes. 100,000.00 general damages and an additional similar amount to cater for the exemplary amount for violation of their constitutional rights, which shall be paid by the State
- F. The above quantum of damages shall attract interest at court rates from the date of this judgment until payment in full.
- G. Costs of the suit be borne by the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF APRIL, 2025



BAHATI MWAMUYE.

JUDGE.

In the Presence Of :

Counsel for the Petitioners - Mr. Pareno

Counsel for the Respondents – Mr. Terer

Counsel for the 1st Interested Party – Mr. Odanga

