



**Law Society of Kenya v Kithinji & 5 others; Katiba Institute & another
(Interested Parties) (Petition E373 of 2024) [2025] KEHC 7957 (KLR)
(Constitutional and Human Rights) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 7957 (KLR)

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

PETITION E373 OF 2024

AB MWAMUYE, J

APRIL 30, 2025

**IN THE MATTER OF THE THREAT/CONTRAVENTION /INFRIGEMENT OF ARTICLE 10,
19(2), 21(1), 24, 25, 26, 29, 35(1) & (3), 36, 37, 38, 244 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE UNLAWFUL FRUSTRATION AND DISRUPTION
OF THE RIGHTS TO PEACEFUL ASSEMBLY, PROTEST, PICKETING
AND DEMONSTRATIONS BY THE NATIONAL POLICE SERVICE**

AND

**IN THE MATTER OF THE ENFORCEMENT AND PROTECTION OF CONSTITUTION
FROM VIOLATION AND THREATENED VIOLATIONS UNDER ARTICLES 10, 19(2),
21(1), 24, 25, 26, 29, 35(1) & (3), 36, 37, 38, 244 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT CHAPTER 84
OF THE LAWS OF THE STANDING ORDERS, CHAPTER 31 DRESS CODE
ON THE USE OF PLAINCLOTHES (BY POLICE OFFICERS) GENERALLY**

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

MARTIN MBAE KITHINJI 1ST RESPONDENT

ISAIAH NDUMBA MURANGIRI 2ND RESPONDENT

MOSES MUTAYI SHIKUKU 3RD RESPONDENT

ADAMSON BUNGEI 4TH RESPONDENT



INSPECTOR GENERAL, NATIONAL POLICE SERVICE 5TH RESPONDENT
ATTORNEY GENERAL 6TH RESPONDENT

AND

KATIBA INSTITUTE INTERESTED PARTY

KENYA COMMISSION OF HUMAN RIGHTS INTERESTED PARTY

JUDGMENT

1. The Petitioner, the Law Society of Kenya established pursuant to the [Law Society of Kenya Act](#) (Chapter 18 of the Laws of Kenya) is Kenya’s premier bar association, a statutory body with membership of all practicing advocates. It has the mandate to advise and assist members of the legal profession, the government and the larger public in all matters relating to the administration of justice in Kenya. It is also mandated to uphold the [Constitution of Kenya](#) and advance the rule of law and to protect and assist members of the public in matters relating to or ancillary or incidental to the law.
2. The 1st Respondent, Martin Mbae Kithinji is a man, who while purporting to be a police officer in civilian clothing, manhandled one Hanifa Farsafi on 18th June 2024 while unlawfully “arresting” her at a peaceful and unarmed protest at the Archives of Kenya, Moi Avenue.
3. The 2nd Respondent, is a police officer employed by the National Police Service, serving at the rank of Corporal attached to the Officer Commanding Police Division. He is sued in the petition in his personal capacity and as an agent of the state for violating the [Constitution](#) and the police standing orders, arbitrarily causing harm on persons exercising their right to protest and the use of excessive force, which violates the [Constitution](#).
4. The 3rd Respondent, Moses Mutayi Shikuku, is the Officer-in-Charge of Central Police Station, responsible under the doctrine of command responsibility, for deploying ununiformed police officers to fight peaceful and unarmed protesters thus liable for any harm caused by ununiformed officers under his command.
5. The 4th Respondent, Adamson Bungei, is the County Commander for Nairobi County, responsible under the doctrine of command responsibility, for deploying ununiformed police officers to fight peaceful and unarmed protesters thus liable for any harm caused by ununiformed officers under his command.
6. The 5th Respondent is the Inspector General of Police of the National Police Service, an office created by dint of Article 245 of the [Constitution of Kenya](#) , responsible for commanding and leading and leading the National Police Service.
7. The 6th Respondent is the Attorney General of the Republic of Kenya appointed by virtue of Article 156(4)(a) of the [Constitution](#). She is sued in her capacity as the chief legal advisor to the national government. She is also authorized under Article 156 (4)(b) of the [Constitution](#) to represent the national government in any legal proceedings.
8. The 1st Interested Party, Katiba Institute is a constitutional litigation and research institution established in 2011 to promote knowledge and understanding of Kenya’s Constitution and constitutionalism and to defend and facilitate the implementation of the [Constitution](#).



9. The 2nd Interested Party is Kenya Commission of Human Rights is a non-governmental organization whose mission is to promote a culture of Human Rights and Democracy in Kenya through monitoring, documenting and publicizing human rights violations.
10. The Petitioner filed a Petition dated 31st July 2024, seeking the following orders:
 - a. A declaration that the actions of the Respondents violate Articles 10, 19(2), 21(1),25,26,29,35(1) & (3), 36, 37 and 38 of the *Constitution of Kenya*, 2010.
 - b. A declaration that the 1st and 2nd Respondents are personally jointly and severally liable for the violation of Constitutional rights and fundamentally freedoms against the peaceful protestors.
 - c. A declaration that use of plain clothes police officers to manage a protest defeats the ends of Article 37 – on exercising the right to assembly, demonstration, picketing and petition a public authority and subsequently cannot be used to subdue persons exercising such rights.
 - d. A declaration that Chapter 31, Regulation 21 of the *National Police Standing Orders* is unconstitutional to the extent that it allows for the use of plain clothes police officers against person exercising the right to assembly, demonstration, picketing and petition a public authority.
 - e. A declaration that any law enforcement officer deployed in order to ensure safety of persons in the course of an assembly, demonstration or picketing must be uniformed and identifiable to members of the public.
 - f. Damages in the range of Kshs.5 million against the Respondents jointly and severally to be paid from personal funds and to be used for legal aid in cases concerning police accountability.
 - g. Costs of the suit.
 - h. Interest on (e) above until payment in full.
 - i. Any other or further order the court may deem it fit to grant.
11. The Petition relied on the grounds that on 15th June 2024, the OCPD, Central Police Station was notified of the intended peaceful march scheduled against the Finance Bill, 2024 for 18th June 2024 at 12:00 p.m. pursuant to Section 5 of the *Public Order Act*, 1950.
12. The Petitioner avers that on 18th June 2024, at around 9:00 a.m. the 1st Respondent fully cognizant of the intended peaceful march, issued an arbitrary, illegal and unconstitutional press release to Media rooms stating that they have mobilized officers to ensure that any gathering within the Nairobi Central Business District would be dispersed.
13. The Petitioner further avers that pursuant to the illegal and arbitrary orders issued by the 1st Respondent, armed police were deployed and started to profile, arrest and carry out other illegalities against peaceful protestors and other Kenyans indiscriminately including those who were not engaging in the peaceful demonstrations.
14. The Petitioner states that some of the police officers were in civilian clothing/ plain clothes covering their faces with balaclavas and other clothing to disguise themselves as goons and militia and this incognito appearance enabled the officers to blend in with the peaceful protestors who were exercising their rights under Article 37 of the *Constitution of Kenya*. Moreover, the police in plain clothes did not carry any form of identification thus could not be distinguished from members of the public.



15. In addition, the Petitioner avers that the officers utilized unmarked and unidentified civilian vehicles used to conduct abductions on unarmed peaceful protestors. They were equally armed with weapons including guns loaded with live ammunition and teargas canisters which were later used on persons peaceful protesting.
16. According to the Petitioner, the failure of the police to identify themselves and particular use of plain clothes worked to the deliberate frustration of the peaceful protests and caused panic. This subsequently caused the peaceful protest violent. Unbeknownst to the peaceful protestors, the plain clothes officers started detaining and conducting arrests even though they were not identifiable as police officers.
17. The Petitioner avers that the 2nd Respondent has been captured in multiple videos by the media and peaceful protestors, as one of the officers in plain clothes that took advantage of his ability to blend into the crowd and cause disturbance. Because of his excessive use of force, Rex Kanyike Masai who was a peaceful protestor while running away from the mayhem occasioned by plain cloth police officers was shot at point black range while trying to get himself to safety.
18. The Petitioner further avers that the 2nd Respondent was also filmed by the media firing a teargas canister without due regard for the safety of the public in the most lackadaisical manner at the media, peaceful protestors and onlookers next to a police vehicle.
19. The Petitioner states that the plain clothes police officers caused other injuries to peaceful protestors, including but not limited to physical blunt force trauma and gunshot wounds, mental torture, emotional distress and anxiety.
20. The Petitioner further indicated that the Respondents violated Article 10, 25, 26, 36, 37, 38 and the principles laid down under Article 244 of the Constitution.
21. In response to the Petition, the 4th - 6th Respondents filed grounds of opposition dated 9th August 2024, to which they aver that the Petitioner failed to appreciate the role of police service in the maintenance of law and order in the face of the protests scheduled against the Finance Bill, 2024.
22. They further aver that Article 24(1)(d) provides for limitation of human rights including the rights under Article 7 and moreover, the Petitioner has failed to prove and demonstrate specifically how the 4th, 5th and 6th Respondents actually violated their rights guaranteed under Article 36, 37 and 38.
23. The 4th to 6th Respondents finally prayed that this Honourable Court proceeds to dismiss the instant petition with costs as it lacks merit and is an abuse of the court's process.
24. The 1st Interested Party filed a Replying Affidavit in support of the Petition sworn by Emily Kinama on 5th November 2024 to which they averred that the Petition set out a compelling case against the actions of the 1st - 5th Respondent of deploying plain-clothed police officers hence creating a chilling effect on exercising the right to demonstrate which is enshrined in Article 37 of the Constitution.
25. They further aver that the unidentified, plain clothed officers cannot be held accountable for their actions, leading to a situation where they, with impunity, excessive force, abduct, and even kill demonstrators. This anonymity allows them to evade responsibility.
26. The Interested Party stated that the 1st - 5th Respondents undermine the establishment of an accountable National Police Service by violating Articles 10 and 244 of the Constitution of Kenya thus jeopardizing a state grounded in human rights.



27. They further stated that they are in agreement with the Petitioners that Articles 10 and 244 of the Constitution mandate that the police officers embody accountability, integrity and good governance as foundational principles of the rule of law and Article 10 outlines national values such as accountability, transparency and respect for human rights, which every public official, including police officers, must uphold. This commitment to ethical governance is vital to building public trust and ensuring a police service that respects the rights and freedoms of all citizens.
28. According to the 1st Interested Party there are instances where police donning plain clothes is necessary for instance, when conducting an undercover operation, civilian attire may be used to reduce visibility and avoid escalating tension. However, these instances should be temporary and not standard practice.
29. They contend that any deployment of plain clothes police should be carefully regulated and monitored to ensure that it aligns with the constitutional mandates of accountability and professionalism within the police force.
30. The Petitioner filed written submissions dated 5th November 2024 where they relied on the case of Martin Nyaga Wambora & County Government of Embu v Speaker of the Senate & Attorney General (Petition 51 of 2014) [2014] KEHC 7080 KLR (Constitutional and Human Rights) cited in the case of Re Matter of the Interim Independent Electoral Commission, SKC Constitutional Application No. 2 of 2011[2011]eKLR, the case of Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others CA Civil Appeal No. 290 of 2012[2013] eKLR and the case of Benson Makori Makworo v Nairobi Metropolitan Services & 2 others [2022] eKLR to confirm that this Honourable Court has jurisdiction to hear and determine this matter since the present petition was with regards to Articles 10 and 244 of the Constitution.
31. The Petitioner further discussed the issue of whether the Constitution of Kenya contains within it a value based structure where they relied in the case of Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice and Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission (Civil Appeal 290 of 2012) [2013] KECA 445 (KLR), the Supreme Court case of Salat v Independent Electoral and Boundaries Commission and 7 others (Petition 23 of 2014) [2015] KESC 31 (KLR) and the case of Mitu-Bell Welfare Society v Kenya Airports Authority & 3 others.
32. The Petitioners, in reliance to the above cases stated that the framers of the Constitution had the foresight to ensure that the Constitution specifically, held the National Police Service to its highest possible constitutional standards of Human Rights. The active participation in the streets is vital for a functioning democracy and is a primary mechanism retained and exercised absolutely by the sovereign people of Kenya to keep checks and balances on governmental power. Picketing and presentation of petition to public authorities provide a basis for citizens to exercise their constitutional rights.
33. They further stated that the Constitution creates new avenues to hold all persons accountable and, in this case, the National Values and principles outlined in Articles 10 and 244 of the Constitution of Kenya and the doctrine of Command is the avenue through which the mischief can be brought to book. Under this, reliance was placed in the case of Republic & another v Yoma & 11 others & another; Independent Medico-Legal unit & 2 others (Interested Party) (Criminal Case E074 of 2022 & Miscellaneous Criminal Application E033 of 2023 (Consolidated) [2024] KEHC 8984 (KLR) (Crim).
34. The Petitioner argues that the Respondents have categorically failed to prove the necessity of wearing civilian clothing specifically when Article 37 rights are being exercised. They state that there was a flimsy attempt by the Respondents to claim that intelligence gathering is part of their role, however, the same police officers are seen conducting arrests during the protests.



35. They further argued that the 4th and 5th Respondents violated conservatory orders issued on 14th August 2024 ordering them to comply with Paragraph 10 of the Sixth Schedule to the [National Police Service Act](#) in terms of ensuring that all uniformed police officers or persons acting under the direction, control or in support of the National Police Service shall at all times affix a nametag or an identifiable service number in a clearly visible part of their uniform when engaging with persons who are planning on assembling, demonstrating, picketing or petitioning and they shall not remove or obscure the same.
36. The Petitioner further argue that the 4th and 5th Respondents in total disregard to court orders, continue to deploy unidentifiable, masked police officer and uniformed police officers with concealed service numbers in disregard to the pronouncement of this Honourable Court amounting to contempt of Court. They relied on the case of [Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya; Communications Commission of Kenya](#) (Miscellaneous Application 1640 of 2003) [2005] KEHC 1767 (KLR) (Civ).
37. They submit that the violations committed by the Respondents have been so outrageous, that, pecuniary damages are necessary to enforce the rule of law in order to ensure that the same violations are not repeated by the Respondents. Reliance was placed in the case of [Javeria Siddique w/o Arshad Sharif & 2 others v Attorney General & 4 others](#) (Constitutional Petition E009 of 2023) [2024] KEHC 9667 (KLR) which held that monetary award for damages is sufficient to deal with the matter of compensation of violation of fundamental rights and freedoms under the [Constitution](#).
38. The Respondents equally filed submissions dated 25th November 2024 and discussed four issues for determination outlined as follows:
 - a. Whether indeed the Respondents are in violation of the constitutional rights and fundamental freedoms cited by the Petitioner.
 - b. Whether Chapter 31, Regulations 21 of the [National Police Standing Orders](#) is unconstitutional to the extent that it is inconsistent with Article 37 of the [Constitution](#).
 - c. Whether the 1st and 2nd Respondents are jointly and severally liable for the violation of constitutional rights and fundamental freedoms against peaceful protestors.
 - d. Whether the Petitioner is entitled to the damages sought in the Petition.
39. On the first issue, the Respondents argue that they did not violate the said rights and freedoms and were merely discharging their obligations mandated of them under the [Constitution](#) and the [National Police Service Act](#) and in so doing they ensured that the constitutional rights and fundamental freedoms guaranteed under the [Constitution](#) were protected and preserved.
40. They further argue that the instant Petition fails to meet the threshold required for grant of the reliefs sought as it does not disclose the specific violations of constitutional rights and fundamental freedoms alleged to have been violated by the Respondents. They relied on the case of [Anarita Karimi Njeri v R](#) [1976-1980] KLR 1272 and the Supreme Court case of [Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others](#) [2014] eKLR which outlines the constitutional threshold required for grant of reliefs on violation of constitutional rights. They also relied on the case of [Ferdinand Ndung'u Waititu & 4 others v Attorney General & 12 others](#) [2016] eKLR which recognized that the roles played by the police such as maintenance of law and order and preservation of peace are pivotal role whose significance cannot be understated.
41. The Respondents submit that the protestors were not exercising their rights under Article 37 in a peaceful manner while unarmed. They contend that it cannot be put on a wanton destruction of properties and critical infrastructure witnessed in the country were occasioned by peaceful and



- unarmed protestors. Reliance was also placed on the case of *Boniface Mwangi v Inspector General of Police & 5 others* [2017] eKLR , the South African case of *Fourways Mall (Pty) Ltd v South African Commercial Catering* [1999] 3 SA 752 and the case of *Law Society of Kenya v AG & Another; National Commission for Human Rights & Another (Interested Parties)* [2020] eKLR .
42. On the second issue the Respondents argue that the police had to devise all lawful means possible in the quest to halt the riotous protests whose effects were getting out of hand. The going incognito was one of the options available to the police which further was an option prescribed under Chapter 31 Regulation 22 of the *National Police Standing Orders* and was thus lawful.
 43. They state that the key function of the police that necessitates their wearing of plain clothes is when collecting criminal intelligence, detecting and preventing crime thus the police had a pertinent obligation of collecting criminal intelligence by going incognito and seeking to extract the intelligence through interactions with rogue protestors disguising themselves as peaceful. They submit that they did that in furtherance of their role of detecting and prevent crime. To this they relied on the case of *Republic v Commissioner of Police & another ex-parte Michael Monari & another* [2012] eKLR, *Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others*[2013] eKLR and the South African case of *South African Transport and Allied Workers Union and another v Garvas and others* [2012] ZACC 13.
 44. On the third issue, the Respondents submit that the 1st and 2nd Respondents are totally and wholly shielded from personal liability while in the exercise of their mandate and therefore, they cannot be cited for any liability as to the alleged violation of rights and fundamental freedoms. This is because the 1st and 2nd Respondents are public officers and therefore within the meaning provided for under Article 259, they are guaranteed protection pursuant to the provisions of Article 236 of the *Constitution*. They relied on the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR where the court in its pronouncement affirmed that where allegations have been made for constitutional violations, it is the State that bears responsibility and not the individuals that committed the atrocities.
 45. On the last issue, the Respondents submit that the IPOA and DCI are currently investigating complaints lodged against police officers who allegedly applied excessive force against peaceful protestors. They further provided that the Petitioner in the instant Petition are seeking special damages however, it is trite law that special damages must be specifically pleaded and also specifically proved. Reliance was placed in the case of *Dendy v University of Witwatersrand, Johannesburg & others* [2006] 1LRC 291 and the case of *Daniel Waweru Njoroge & 17 Others v Attorney General* [2015] eKLR.
 46. The 1st Interested Party on the other hand filed submissions dated 9th January 2025 to which they reiterated contents of the Affidavit in support of the Petition dated 5th November 2024. They outlined four issues for determination five issues for determination which include:
 - i. Whether the Respondents violated Article 10 of the *Constitution* on the national values and principles of good governance;
 - ii. Whether the Respondents violated persons' right, peaceably and unarmed to assemble and demonstrate, guaranteed under Article 37 of the *Constitution*;
 - iii. Whether the Respondents violated Article 24 of the *Constitution* on the limitation of to assemble and protest peaceably and unarmed under Article 37 of the *Constitution*;
 - iv Whether the actions of the Respondents violated Article 21(1) of the *Constitution of Kenya* ;
 - v Reliefs



47. On the first issue, the 1st Interested party argued that Article 10 is an essential and integral part of the Kenyan Constitution and not merely ornamental and the Constitution has therefore established a value-based society by articulating national values and principle of good governance. This Article ensures that the principles and values reflect the nation's conscience.
48. Reliance was placed on the cases of Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others (Petition 5, 3 & 4 of 2013 (Consolidated) [2013] KESC 6 and Communication of Kenya v Royal Media Services & 5 Others (Petition No. 14 of 2014); [2014] eKLR where the Supreme Court held that Article 10 of the Constitution, underpin the conduct of governance in every aspect and the same Article has reconstituted or reconfigured the Kenyan state from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a state that is accountable, horizontal, decentralized and responsive to the principles and values enshrined in Article 10 and the transformative vision of the Constitution.
49. They argued that the Petitioner challenges the actions of the Respondents, specifically when the police officers who could not be identified conducted arrests and illegal abductions of protestors, activities which could not be traced to an identifiable police officer, and this was a violation of the national values and principles under Article 10 of the rule of law, transparency, accountability and human rights on the part of the Police officers.
50. On the second issue, the 1st Interested Party argue that the Petitioner argues that police officers dressed in plain clothes and balaclava without any form of identification during protests threatened and was a violation of the exercise of rights under Article 37 of the Constitution. The protestors could not identify plain clothes police who wore balaclavas and who conducted arrests and illegal abductions. This, it states, creates a chilling effect on the exercise of rights as people will be afraid to come out and exercise their right to protest for fear of being abducted by unidentified persons who they cannot tell whether they are police officers.
51. The 1st Interested Party relied on the case of 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) which held that rights under Article 37 of the Constitution are amongst a cluster of rights in Chapter 4 of the Constitution recognized as not only inherent in every individual but an also integral part of a democratic state.
52. Reliance was equally relied on the decision by the High Court's case in Lesotho; Lesotho Chamber of Commerce and Industry and Others v Commissioner of Police and others (CIV/ APN 405 of 2011) [2011] LSHC 127(29 August 2011) which stated that the freedom of assembly is crucial for civil and political participation, carrying significant social and economic implications. It serves as a method of social communication, enabling individuals to address issues or express opinions on common problems. Like freedom of the press and freedom of association, peaceful assembly is a civilized means of communication that must be preserved and actively facilitated unless there are compelling reasons to justify its restrictions.
53. On the third issue, the 1st Interested party relied on the case of Karen Kandie v Alassane Ba and Another (Supreme Court Petition 2 of 2015) [2017] eKLR where the Supreme Court described the procedure to evaluate limitations under Article 24 as a reasonable and justifiable test and that analysis must be done on a case-by-case basis since the factors under Article 24(1) are not exhaustive.
54. They also relied on the case of Wilson Olal, Gacheke Gachibi, John Koome, Nelson Mandela, Kenya National Commission on Human Rights & Independent Medico-Legal Unit v Attorney General, Inspector General of Police & Director of Public Prosecutions [2017] KEHC 4909 (KLR) and that of



- Robert Alai v Attorney General* (Petition 174 of 2016) [2017] eKLR where the court outlined that the state must justify a particular limitation by demonstrating that the requirements of Article 24 have been satisfied.
55. The 1st Interested Party further state that the Respondents did not meet the threshold set in Article 24 since they did not provide any evidence to show that the police officers wearing balaclavas and plain clothes fall under the four exceptions provided in the *Standing Orders* under Chapter 31, Regulation 22 therefore unjustifiably limited the rights of the protestors under Article 37 of the *Constitution*.
 56. On the fourth issue, the 1st Interested Party argued that there was a violation of Article 21 of the *Constitution* and relied on the case of *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] where the Supreme Court held that the state and every state organ have a fundamental duty to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
 57. They equally relied on the case of *Coalition of Violence Against Women & 11 others v Attorney General & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (Amicus Curiae)* (Petition 122 of 2013) [2020] KEHC 9208 (KLR) where Justice Korir while agreeing with the holding in *Florence Amunga Omukanda & another v Attorney General & 2 others* [2016] held that a the state has a legal duty and a positive obligation to protect each of its citizen’s rights to security of their person and their property by securing peace through the maintenance of law and order.
 58. They further argued that there is a positive obligation under Article 21 to promote the right to peaceful and unarmed assemblies when police officers must identify themselves before taking any action such as making arrests or using force. Masked officers fail to meet this requirement, eroding public trust in law enforcement. In addition, when police officers engage in excessive force, operate in plain clothes, or resort to abductions or kidnappings, the State fails in both its negative and positive obligations under Article 21(1) of the *Constitution of Kenya* , violating fundamental rights, including Article 37 on peaceful assembly.
 59. On the final issue, the 1st Interested Party submit that Article 23(3) of the *Constitution* empowers the courts to grant several reliefs to petitioners to ensure the Bill of Rights is respected and upheld. Reliance was placed in the case of *Kenya Human Rights Commission & 8 others v Koome Nchebere* [2024] KEHC 16607 (KLR) where the Court held the Inspector General of Police personally liable for police actions. Similarly in the case of *Fred Okengo Matiang’i Cabinet Secretary, Ministry of Interior and Coordination of National Government & 6 others; Kenya National Commission on Human Rights; Constitutional Petition 51 of 2018 (Interested Party)* [2018] eKLR where Fred Okengo Matiang’i Cabinet Secretary, Ministry of Interior and Coordination of National Government, was held personally liable for violation of fundamental rights and freedoms of Miguna Miguna.

Issues for Determination

60. 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 three (3) 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 deployment of unidentified, non- uniformed officers in plain/ civilian clothing that use unmarked vehicles during protests act in violation of the *Constitution of Kenya* ;



- c. 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;

61. 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.
62. 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.
63. 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.
64. 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.
65. 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."
66. 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.
67. 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...”

68. 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.

69. 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.

70. 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.”
71. 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.
 72. 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.
 73. 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.
 74. 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*.
 75. 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.
 76. 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.



77. 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.
78. 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.
79. 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.
80. 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 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.
81. 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.
82. I have gone through the Affidavit sworn by Florence Wairimu Muturi in Support of the Petition dated 31st July 2024 and established that the Affidavit gives a detailed narration of the threat by the 1st Respondent to violate the rights and freedoms of the public.
83. 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.”

84. 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.
85. 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*.

B. Whether the deployment of unidentified, non- uniformed officers in plain/ civilian clothing that use unmarked vehicles during protests act in violation of the *Constitution of Kenya*

86. The National Police Service is established under Article 244 of the *Constitution* and its object and functions outlined under Article 245 which include to comply with constitutional standards of human rights and fundamental freedoms.
87. Section 10(4) of the *National Police Service Act*, cap 84 gives effect to Article 243, 244 and 245 of the *Constitution* and 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 he national values, principles and objects set out in Article 10, 232 and 244 of the *Constitution*.
88. Amongst the national values and principles of governance in Article 10 are, 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 exercise independent command over the National Police Service and perform any other functions prescribed by national legislation.
89. The Petitioner in its Affidavit in support of the Petition sworn by Florence Wairimu Muturi on 31st July 2024, averred that on 18th June 2024, the 1st Respondent fully cognizant of the intended peaceful march protesting the Finance Bill 2024, issued an arbitrary, illegal and unconstitutional press release stating that they have mobilized officers to ensure that any gathering within the Nairobi Central District will be disbursed. Subject to the illegal and arbitrary orders issued by the 1st Respondent, armed police were deployed and some of these police officers were in civilian clothing/ plain clothes, covering their faces with masks balaclavas and other clothing to disguise themselves as goons and militia.
90. The Petitioner attached some of the photographs of the alleged police officers that also utilized unmarked unidentified vehicles to conduct abductions on unarmed peaceful protestors. In addition, the Petitioners stated that the plain clothed officers were also armed with weapons including guns



loaded with live ammunition and tear gas canisters which were later used on persons peacefully protesting.

91. Chapter 31 of the [National Police Service – Service Standing Orders](#) (Service Standing Orders) provides for the Dress Code Regulations. Regulation 22 of Chapter 31 states as follows:

“ 22.

- (1) Police Officers other than those attached to Directorate of Criminal Investigations, Internal Affairs Unit, VI.P protection sections and Crime Branches shall wear uniform when on duty.
- (2) The Officer-in- Charge of a formation may direct that plain clothes be worn in the performance of any specific duty when circumstances require it.
- (3) Subject to paragraph (2), plain clothes shall be worn by personnel escorting non-criminal mental patients.
- (4) A police officer appearing in court as an accused shall wear civilian clothes.”

92. The Respondent did not deny that indeed they deployed police officers who wore plain/ civilian clothing and balaclavas but their explanation was that the going incognito was one of the options prescribed to them under Chapter 31 Regulation 22 of the [National Police Standing Orders](#). They referred to Section 24 of the [National Police Service Act](#) that necessitated their wearing of plain clothes when collecting criminal intelligence, detecting and preventing crime.

93. In addition, they argue that due to the aftermath of the protests that led to violence, looting burning, destruction and vandalization of critical infrastructures, the police had a very pertinent obligation of collecting criminal intelligence by going incognito and seeking to extract evidence through interactions with rogue protestors who disguise themselves as peaceful.

94. Section 24 of the [National Police Service Act](#) states as follows:

“ The functions of the Kenya Police Service shall be the –

- a. provision of assistance to the public when in need;
- b. maintenance of law and order;
- c. preservation of peace;
- d. protection of life and property;
- e. investigation of crimes;
- f. collection of criminal intelligence;
- g. prevention and detection of crime;
- h. apprehension of offenders;
- i. enforcement of all laws and regulations with which it is charged; and



- j. performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.
95. It should be noted however, Chapter 31 Regulation 22(1) of the *National Police Service – Service Standing Orders* provides that all police officers must wear uniforms and there are only four exceptions where they may not wear their uniforms as outlined above.
96. Out of the exceptions outlined in Chapter 31 Regulation 22(1), none of them indicate that police officers are allowed to wear plain clothes and hide their identities in order to collect criminal intelligence while individuals are exercising their constitutional rights to assemble, picket and demonstrate provided for under Article 37 of the *Constitution* to ensure national security.
97. Chapter 31 of the *National Police Service – Service Standing Orders*(Service Standing Orders) which provides on the dressing Regulations for police officers is categorical and very precise on the exceptions as to when police officers are allowed to wear plain clothes and it does not include when carrying out their functions provided under section 24 of the *National Police Service Act*.
98. In order to ensure transparency, accountability and in order to uphold the rule of law, as it is their duty under the *Constitution*, the Respondents and all other police officers are mandated to wear their police uniforms for easier identification unless they fall under the specific exceptions outlined under Chapter 31 Regulation 22 of the *National Police Service – Service Standing Orders* thus the officers serving under the command and control of the Respondents unnecessarily and unjustifiably wearing plain civilian clothes, balaclavas and using unmarked vehicles to illegally arrest individuals who were exercising their constitutional rights to protest, picket, demonstrate and petition amounted to a violation of the *Constitution*.

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

99. The Petitioner sought damages to the tune of Kes. 5 million for violation of constitutional rights. 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.
100. What amounts to “appropriate relief” was discussed by South African Constitutional Court in *Minister of Health & Others v 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.”

101. 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 v 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.”

102. On the question of the award of exemplary damages, Majanja J (as he then was) in the case of *Benedict Munene Kariuki & 14 others v 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.”

103. 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.
104. 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.
105. 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.
106. I find that granting an award of damages for the breach of constitutional rights would not meet the ends of justice and that a declaration of violation of rights would be appropriate remedy in the circumstances of this case.
107. The Petition herein therefore succeeds. The Petitioner has succeeded to prove that the Respondents' actions on 18th June 2024 deploying police officers wearing masks that obscured their faces and being unnecessarily in civilian clothes and unmarked cars to illegally arrest individuals exercising their rights to assemble and picket in accordance to Article 37 of the Constitution 2010, amount to violation and infringement of their Constitutional Rights.
108. Consequently, the following final orders hereby issue: -
- A. 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.
 - B. A declaration be and is hereby issued that any law officer deployed to ensure law and order in the course of an assembly, demonstration and picketing must be uniformed and shall not in any way hide or obscure their face so as to render them unidentifiable.
 - C. A prohibition order be and is hereby issued restraining any Police Officer or any other person acting under the direction, control or in support of the National Police Service from taking any action to obscure the identification, registration, or markings of any motor vehicle being used when in any way dealing with any persons who is or is planning on assembling, demonstrating, picketing or petitioning.
 - D. This being public interest litigation, each Party shall bear its own costs.

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

BAHATI MWAMUYE.

JUDGE.

In the Presence of:



Counsel for the Petitioner - Mr. Ojalaa h/b Mr. Ochiel and Mr. Chirchir

Counsel for the Respondents – Mr. Weche

Counsel for the 1st Interested Party – Mr. Odanga

Court Assistant – Ms. Neema

