



**Khaemba v Inspector General of Police & 2 others (Constitutional Petition E002 of 2024) [2025] KEHC 11616 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11616 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CONSTITUTIONAL PETITION E002 OF 2024**

**REA OUGO, J**

**JULY 30, 2025**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 11, 22, 23, 27,  
32, 44 AND 258 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES**

**AND**

**IN THE MATTER OF SECTION 7 (1), 27 (1) (B) AND  
62 OF THE ALCOHOLIC DRINKS CONTROL ACT**

**AND**

**IN THE MATTER OF THE PROTECTION OF TRADITIONAL  
KNOWLEDGE AND CULTURAL EXPRESSIONS ACT**

**AND**

**IN THE MATTER OF THE CONTRAVENTION AND THREATENED CONTRAVENTION  
OF THE RIGHT TO CULTURE AND FREEDOM FROM DISCRIMINATION AS PROVIDED  
FOR UNDER ARTICLES 11, 27 AND 44 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**BRYAN MANDILA KHAEMBA ..... PETITIONER**

**AND**

**INSPECTOR GENERAL OF POLICE ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL AUTHORITY FOR THE CAMPAIGN AGAINST ALCOHOL AND  
DRUG ABUSE (NACADA) ..... 2<sup>ND</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**



## JUDGMENT

### The Parties

1. The Petitioner is a male adult of sound mind and disposition residing and working for gain in Bungoma County within the Republic of Kenya.
2. The 1st Respondent is an office established under Article 245 of *the Constitution* of Kenya, 2010, with the core function of exercising command over the National Police Service. The service is mandated under the *National Police Service Act* to maintain law and order, investigate, prevent, detect crimes, apprehend offenders, and enforce all laws and regulations it is tasked with.
3. The 2nd Respondent is a statutory body established under Section 4 of the National Authority for Campaign against Alcohol and Drug Abuse Act, mandated to, among other things, coordinate and facilitate, in collaboration with other lead agencies and non-state actors, the development of national policies, laws, and action plans on controlling alcohol and drug abuse, and to facilitate their implementation, enforcement, ongoing review, monitoring, and evaluation.
4. The 3<sup>rd</sup> Respondent is the bearer of the office of the Attorney General as established under Article 156 of *the Constitution* of Kenya, 2010 and is sued in its capacity as the Principal Legal Advisor to the Government.

### The Petition

5. The Petitioner seeks the following prayers in his Petition dated 22<sup>nd</sup> April 2024: -
  - a. A declaration that the Bukusu traditional brew known as ‘Busaa’ is not an illicit brew and its preparation, storage and use in the celebration of Bukusu traditional ceremonies is not subject to the provisions of the *Alcoholic Drinks Control Act*.
  - b. A declaration that the Bukusu people are at liberty to prepare and consume ‘Busaa’ as part of their culture and tradition.
  - c. A permanent injunction be and is hereby issued to prevent the Respondents and any other state/government agencies, from harassing, arresting or prosecuting members of the Bukusu Community for the preparation, possession, storage, consumption and/or use of ‘Busaa’ in the celebration of their traditional ceremonies.
  - d. Any other order that this Honourable may in the interest of justice, deem fit and just to grant.
6. The Petition is supported by the Petitioner’s affidavit sworn on even dates in which he averred that he was a member of the Bukusu Sub-Tribe within the Luhya community in Western Kenya and has filed the Petition on his behalf and on behalf of the entire Bukusu community seeking to protect their right to culture and the freedom to express, celebrate and participate in the said culture without unwarranted harassment, reservations and/or unlawful restrictions from the Respondents particularly with respect to their traditional brew known as ‘Busaa’ which according to him was an integral part of their cultural identity and any cultural celebration within the community, including but not limited to the birth of a child, circumcision ceremonies, initiation ceremonies, dowry negotiations, weddings, burials and many other traditional ceremonies.
7. He averred that the Respondents have abused the provisions of the *Alcoholic Drinks Control Act* that outlaws the manufacture and possession of alcoholic drinks without a license in declaring ‘Busaa’



- an illicit brew and have constantly harassed, arrested and prosecuted any member of the Bukusu community that has manufactured and/or has been found in possession of the traditional brew yet there was no Bukusu traditional ceremony that could be celebrated without the preparation and use of the said 'Busaa'; that a blanket classification of it as an illicit brew and the blanket ban on its manufacture, possession and consumption by the Respondents constituted an unjustified restriction on the right of the Bukusu people to celebrate, participate in and express their culture.
8. The Petitioner asserted that there was indeed no justification by the Respondents for the restriction and/or ban on the preparation, manufacture and use of the traditional brew and/or its classification as an illicit brew as the same had no health implications since it had been used by the Bukusu community throughout their history; that a restriction on the manufacture and use of the traditional brew in traditional ceremonies amounted to an unfair discrimination against the Bukusu people who were unable to celebrate and express their culture, just like all the other communities within the Republic of Kenya, without the Respondents impounding and destroying the traditional brew and arresting persons who were been found in possession of the same and that the Respondents did not pay any regard to its cultural significance.
  9. The Petitioner averred that *the Constitution* of Kenya under Article 11 recognised culture as the foundation of the nation and as the cumulative civilisation of the Kenyan people, and as such, every person had the right to celebrate and participate in the culture of their choice. That there was already in place precedent from the High Court of Kenya at Kiambu in Constitutional Petition No. E020 of 2023 where it recognized and acted to protect the right of the Kikuyu people to celebrate their culture by declaring that their traditional brew 'Muratina' was not an illicit brew and as such, they were at liberty to prepare and consume it as part of their culture and tradition, which was similar to the Bukusu's Busaa and that it was in the interests of justice that this Honourable Court intervenes and exercises its jurisdiction to protect the rights of the Bukusu people to celebrate, express and participate in their culture and to protect them against any unwarranted discrimination by the Respondents.
  10. In response to the Petition, the 2nd Respondent filed the Replying Affidavit of its Chief Executive Officer, Mr. Anthony Omerikwa, dated 9th July 2024, in which he averred that the Petition was incompetent, incurably defective, untenable in law, and devoid of merit. He also claimed it was based on misrepresentations of facts and falsehoods to gain the court's sympathy unjustly; that the 2010 Constitution delegated the manufacture, distribution, licensing, and sale of all alcoholic drinks within the counties, which were to enact their own laws. Accordingly, the Bungoma County Government enacted the Bungoma County *Alcoholic Drinks Control Act*; that any challenge to it should pertain to the said Act, as it establishes laws and regulations for the manufacture of such alcoholic drinks within the County. It was further averred that Section 2 of the Bungoma County *Alcoholic Drinks Control Act* defined alcoholic drinks to include Busaa as a traditional drink, that it did not prohibit traditional brews but merely regulated their manufacture to meet specific standards, and that, as regulated by the Act, anyone manufacturing it was required to meet the licensing requirements stipulated in the Act.
  11. The 2nd Respondent also states that traditionally brewed drinks are not exempt from regulations as proposed by the Petitioner, since they are legally recognised and governed by different licenses outlined in the 1st Schedule of the Bungoma County *Alcoholic Drinks Control Act*. The import of the judgement in *Gitau & 11 Others v County Commander Kiambu & 3 Others*, Petition No. E020 of 2023 (2024) KEHC 1659 KLR was that the High Court did not exclude legal instruments or regulations regarding Muratina as an alcoholic drink, but limited its declaration to the preparation and consumption of Muratina by the Agikuyu people solely as part of their culture and tradition. Furthermore, the Court held that the preparation and consumption of Muratina shall be regulated by two sets of regulatory frameworks without prejudice to existing laws.



12. It is further averred that the Petitioner failed to demonstrate that the Bukusu people themselves regulated the production of Busaa during those ceremonies or how the requirement to be properly licensed impeded the manufacture of the traditional brew; that the mere fact that Busaa forms part of the Bukusu cultural heritage cannot be grounds to invalidate the legal requirements for the proper production of alcoholic drinks. He averred that the Petitioner failed to show how the Respondents' actions in prohibiting the practice of Bukusu cultural traditions were unlawful, and asserted that the Respondents acted lawfully, reasonably, and fairly in the circumstances, with public interest supporting the actions undertaken.
13. It was further asserted that Article 47 of *the Constitution* and the provisions of the Fair Administrative Actions Act were not applicable in this case, that Section 5 of the *Protection of Traditional Knowledge and Cultural Expressions Act* stated that one of the functions of the National Government was to protect traditional knowledge and cultural expressions from misuse and misappropriation. The 2nd Respondent supported this by ensuring that the production and sale of alcoholic drinks at appropriate hours and only by authorised sellers was regulated. It was also asserted that the Bukusu community's right to culture had not been infringed, as argued by the Petitioner, and that they were permitted to express, celebrate, and participate in their culture without prejudice to existing laws.
14. Finally, it was argued that since the Respondent did not breach any of the constitutional rights or statutory provisions as alleged, the Court could not grant the orders sought. Firstly, because the Petitioner failed to demonstrate that Busaa was treated as an illicit brew by the Respondents, and secondly, because the orders sought were also to be directed at third parties who were never enjoined in the proceedings, such as the County Government of Bungoma and other clans of the Bukusu people.
15. The 2nd Respondent filed a further affidavit dated 13th September 2024, in which the deponent Anthony Omerikwa stated that the regulation of traditional brews like Busaa is influenced by various entities including the National Government, County Government, community elders, and cultural institutions. He noted that the 4th Schedule of *the Constitution* vested the responsibility of licensing and regulating liquor, including its manufacture and use in cultural activities, in the counties—such as with Busaa—for the purpose of maintaining public health and safety standards. He further stated that community elders ensure traditional practices are maintained in a manner that respects both cultural heritage and the law. To protect public health, the 2nd Respondent, in accordance with Article 43 (1) (a) and Article 46 (1) of *the Constitution*, was mandated to conduct regular raids and inspections to curb illegal brewing operations and seize illicit alcohol unfit for human consumption, thereby enforcing the relevant laws. He averred that court decisions emphasise the need for strict enforcement of the *Alcoholic Drinks Control Act* to safeguard public health and safety. Therefore, since no constitutional rights have been breached, he argued that the orders sought should not be granted.
16. The Petitioner filed a further Affidavit dated 30th September 2024, in which he averred that his Petition was not a blanket invalidation of the existing laws regulating the manufacture, production, and sale of alcoholic drinks but was limited to the preparation, use, and consumption of Busaa as a traditional drink in celebration of Bukusu cultural ceremonies. These activities did not include any sale, manufacture, or distribution to be subject to regulation. He stated that under Sections 2 and 7 of the Alcoholic Drinks and Control Act, the Respondents had harassed, arrested, and prosecuted persons from the Bukusu community who were found to have prepared, possessed, or consumed the traditional brew during cultural celebrations. This was an unwarranted interference with the rights of the Bukusu community to celebrate their culture.
17. He further stated that the Respondent's application of the law implied that every member wishing to celebrate a cultural event had to obtain a license, which was unreasonable because not all could afford it.



He argued that the Respondent's claim about regulating traditional brew in accordance with consumer protection under Article 46 of *the Constitution* was misplaced and that they had not provided any evidence to directly link the preparation and use of traditional brew to any health issues. He maintained that it was in the interests of justice for the court to intervene and grant the orders in the Petition to protect the rights of the Bukusu people.

18. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents did not enter any appearance in this matter.
19. The Petition was canvassed by way of written submissions which I have carefully read and considered.

### **Analysis And Determination**

20. The main issue for my determination is whether the Petitioner has made out a case for granting the prayers sought in the Petition before the Court.
21. As a preliminary issue, it is vital for this Court to set out the threshold of all constitutional Petitions as determined in the case of *Anarita Karimi Njeru vs. Republic* 1979 eKLR thus: -

“We would however, again stress that if a person in seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important that (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

22. These principles were further restated in the case of *Mumo Matemo vs. Trusted Society of Human Rights Alliance & 5 Others* [2014] eKLR where the Court of Appeal held that:-

“... However the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. The respondent has cited the case of *Thorp v Holdsworth* [1876] 3 Ch D.637 at 639 and submits that the petitioner has not pleaded with reasonable precision the provisions of *the Constitution* which he alleges were violated and has not set out the particulars of how the violation were done.”

23. Thus, a party seeking constitutional redress from the court based on the violation or threatened violation of their rights must meet the three-part test of; clearly identifying the right that has been infringed, the specific provision that has been violated, and the manner in which the infringement occurred.
24. In this case, the Petitioner stated that his Petition was based on the fact that the Bukusu Community's right to prepare, use, and consume Busaa as a traditional brew during their cultural celebrations was being violated by the Respondents due to arrests and prosecutions of Bukusu community members who either prepared, possessed, or consumed the brew. He argued that since the brew is a fundamental part of their culture, it should not only be declared legal but also be exempt from regulation under the current Alcohol laws.
25. This Court acknowledges the sanctity of our Constitution, particularly the fact that it recognises the diversity and culture of the people of Kenya for whom it was enacted. In the Preamble, *the Constitution* states as follows: -

We, the people of Kenya—

Proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation:.....



Committed to nurturing and protecting the well-being of the individual, the family, communities and the nation:

26. Articles 11 and 44 of *the Constitution* set out the importance of culture and how the same must be recognised and protected. They state as follows: -

1. Article 11. Culture

1. This Constitution recognises culture as the foundation of the nation and as the cumulative civilisation of the Kenyan people and nation.
2. The State shall—
  - a. promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage;
  - b. recognise the role of science and indigenous technologies in the development of the nation; and
  - c. promote the intellectual property rights of the people of Kenya.
3. Parliament shall enact legislation to—
  - a. ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and
  - b. recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

2. Article 44. Language and culture

1. Every person has the right to use the language, and to participate in the cultural life, of the person's choice.
2. A person belonging to a cultural or linguistic community has the right, with other members of that community—
  - a. to enjoy the person's culture and use the person's language; or
  - b. to form, join and maintain cultural and linguistic associations and other organs of civil society.
3. A person shall not compel another person to perform, observe or undergo any cultural practice or rite.

27. I find that although the Petitioner has listed Articles 11 and 44 of *the Constitution* as the provisions that have been infringed, he did not plead with the specificity required by law the details of how those rights have been violated and the extent of the violation. He merely stated that the Respondents and their officers or agents outlawed the brew, classified it as an alcoholic drink, thereby subjecting it to regulations which, according to him, meant that they unfairly restricted and prevented the Bukusu people from enjoying, participating in, and celebrating their culture. In my view, this was not enough to establish the alleged infringement. At the same time, he did not present evidence to demonstrate why the said traditional brew ought not to be classified as an alcoholic drink.



28. It is clear that the regulation of Busaa as an alcoholic drink arises from the fact that it is intended for human consumption, not merely because it is alcoholic. It is evident that, in line with the government's role of ensuring the safety and protection of citizens' health and well-being, anything meant for human consumption must be regulated so that the relevant authorities can confirm that high standards of Public Health and Safety are maintained.
29. My position on the above is anchored on *the Constitution*, which is the foundation of all legislative authority in our country. In Article 46, it states the consumer protection rights as follows: -
46. Consumer rights
1. Consumers have the right—
    - a. to goods and services of reasonable quality;
    - b. to the information necessary for them to gain full benefit from goods and services;
    - c. to the protection of their health, safety, and economic interests; and
    - d. to compensation for loss or injury arising from defects in goods or services.
  2. Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.
  3. This Article applies to goods and services offered by public entities or private persons.
30. The *Food, Drugs and Chemical Substances Act*, Cap 254 under Section 2 defines food to include drinks as follows: -
- “food” includes any article manufactured, sold or represented for use as food or drink for human consumption, chewing gum, and any ingredient of such food, drink or chewing gum;
31. The Act further stipulates: -
3. Prohibition against sale of unwholesome, poisonous or adulterated food  
Any person who sells any food that—
    - a. has in or upon it any poisonous or harmful substance; or
    - b. is unwholesome or unfit for human consumption; or
    - c. consists in whole or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased substance or foreign matter; or
    - d. is adulterated, shall be guilty of an offence.
  7. Preparation of food under insanitary conditions  
Any person who sells, prepares, packages, conveys, stores or displays for sale any food under insanitary conditions shall be guilty of an offence.
32. Section 30 of the same Act grants authorised officers' powers, including the authority to enter any premises where food is prepared, preserved, stored, conveyed, or packaged, to inspect and examine whether the food complies with the standards specified by the Act.



33. In line with the above legal provisions is the *Alcoholic Drinks Control Act* No. 4 of 2010, which defines alcoholic drinks to include traditional brews under Section 2 as follows: -
- “alcoholic drink” includes alcohol, spirit, wine, beer, traditional alcoholic drink, and any one or more of such varieties containing one-half of one percent or more of alcohol by volume, including mixed alcoholic drinks, and every liquid or solid, patented or not, containing alcohol, spirits, wine, or beer and capable of being consumed by a human being;
34. Section 7 provides that any manufacture of alcoholic drinks must be done within the law i.e. licensed.
7. Control of alcoholic drinks
1. No person shall—
- a. manufacture or otherwise produce;
- b. sell, dispose of, or deal with;
- c. import or cause to be imported; or
- d. export or cause to be exported, any alcoholic drink except under and in accordance with a licence issued under this Act.
35. The *Alcoholic Drinks Control Act* No. 4 of 2010, similar to the *Food, Drugs and Chemical Substances Act*, Cap 254, also provides for other matters, such as the inspection of the manufacture or production of alcoholic beverages to ensure they meet established standards, as they are intended for human consumption. Section 27 of the *Alcoholic Drinks Control Act* No. 4 of 2010 states that it is an offence to possess an alcoholic drink that does not comply with the requirements of the Act.
36. The common feature of the above legislations is that the law aims at regulating the production and use of anything intended for human consumption primarily for public health and safety benefits and to ensure the protection of human life, which is fundamental in *the Constitution*. On the same note, I also observe that no right is absolute. It is well known that rights, especially the right to culture, may be limited in certain instances where there is a need to protect consumers’ health and safety (See Article 24 of *the Constitution*).
37. In this case, the Petitioner has not only failed to demonstrate that their rights as the Bukusus were infringed, but also did not recognise the importance of the Respondents’ role in inspecting and regulating the use of Busaa. While it was undisputed that Busaa is an alcoholic drink classified as a traditional brew, it is clear that it falls under the category of alcoholic drinks and is therefore subject to the control and regulation of the Act. The Petitioner claimed that the drink was also considered illegal. I have reviewed the pleadings and find no evidence supporting this. However, it was evident to the Court that the Respondents were advocating for a controlled use of the drink, ensuring its manufacture and distribution occur within legal boundaries. Therefore, no convincing reason has been provided by the Petitioner to persuade this Court to exercise its inherent jurisdiction to override this obligation.
38. All in all, I find that the Petitioner did not present any evidence to prove that the drink had been illegalised. I also find that Busaa, just like the Agikuyu’s Muratina in the High Court decision in Kiambu Petition No. E020 of 2023, constitutes an alcoholic drink and is therefore subject to regulation under the Act. There was no evidence or justification provided by the Petitioner to demonstrate how the Respondent threatened or infringed the Bukusu people’s right to culture under Articles 11 and 44 of *the Constitution* of Kenya.



39. Therefore, I find that the Petition does not satisfy the threshold established in the Anarita Karimi case. It lacks merit and is dismissed. Each party will bear their own costs of the Petition. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 30<sup>TH</sup> DAY OF JULY 2025**

**R.E. OUGO**

**JUDGE**

In the presence of:

Mr. Bulowa -For the Petitioner

Respondents - Absent

Wilkister - C/A

