



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. 5 (E007) OF 2021

– BETWEEN –

HAKI NA SHERIA INITIATIVEAPPELLANT

-VERSUS-

THE INSPECTOR OF POLICE.....1ST RESPONDENT

THE CABINET SECRETARY,

INTERNAL SECURITY.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

KENYA NATIONAL HUMAN RIGHTS &

EQUALITY COMMISSION.....INTERESTED PARTY

(Being an appeal from the Judgment and Order of the Court of Appeal at Nairobi (W. Karanja, Sichale & J. Mohammed JJ.A) dated 19th June 2020 at Nairobi in Civil Appeal No. 261 of 2018)

Representation:

Mr. Jibril Noor & Ms. Sumayyah Mukku for the Petitioner
(Bashir, Noor & Co Advocates)

State Counsel Ms. Wamuyu for the Respondent
(Office of the Hon. Attorney General)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This appeal challenges the constitutionality of the provisions of Section 8 and 9 of the Public Order Act which provides for the mandate of the Cabinet Secretary of Interior and a police officer in charge of a county or division to issue curfew orders and curfew restriction orders respectively.

[2] The appellant also submits that as a result of the said curfew orders specific constitutional rights and freedoms of the citizens were infringed or violated including the right to life under Article 26; the Right to equality and freedom from discrimination under Article 27; the right to liberty under Article 29; freedom of conscience, religion, belief under Article 32 and the right to movement under Article 39 of the Constitution.

[3] The appellant instituted this case before the High Court Constitutional & Human Rights division challenging the directive issued by the then Cabinet Secretary for Internal Security imposing a curfew in Wajir, Garissa, Mandera and Tana River Counties from 6.30pm to 6.30 am between the months of April 2015 to June 2015. The curfew orders and restrictions were imposed following a heinous terrorist attack on 2nd April 2015 at Garissa University where at least 148 innocent Kenyans were killed and numerous others injured.

[4] Both the High Court and the Court of Appeal dismissed the appellant's case and made a finding that Section 8 and 9 of the Public Order Act was not unconstitutional and that the alleged limitation of human rights and freedoms within Section 8 and 9 of the Public Order Act is justifiable, reasonable and necessary under Article 24 of the Constitution.

B. BACKGROUND

i. Proceedings in the High Court

[5] The appellant filed a constitutional petition before the **Garissa High Court Petition No. 6 of 2015** which challenged the constitutionality of Sections 8 and 9 of the Public Order Act, on which the curfew was predicated. It also contended that the continued enforcement of the curfew severally curtailed the residents' rights of movement and worship. The effect of the

curfew reduced the number of hours in the day leading to a serious negative impact on the socio-economic activities and livelihoods of the people living in these counties since economic activities in these areas are particularly active during the night due to the severe high temperatures, these activities include but not limited to retail trading, video shows, travel, and social gatherings.

[6] The appellant prayed for the High court to grant inter alia the following orders; An order of injunction restraining the respondents, whether by themselves, agents, police, military officers, or other assigns, from continuing to enforce the orders of curfew affecting Garissa, Wajir, Mandera, and Tana River county residents and interfering with the free movement of the residents of the aforementioned counties, an order lifting the curfew and a declaration that that curfew imposed on the aforementioned counties is illegal, unconstitutional, and null and void.

[7] The appellant also prayed for a declaration that Sections 8 and 9 of the Public Order Act are unconstitutional and void, that the 1st respondent acted without authority to impose the curfew on the counties, that the citizens' right to religion especially during the month of Ramadhan be safeguarded and an Order for the payment of damages to communities and residents to be assessed.

[8] The High Court identified four key issues for determination: whether the petition can be allowed even though the respondent and the interested party did not file replying affidavits; whether Sections 8 and 9 of the Public Order Act are unconstitutional; whether the curfew imposed on the residents of Garissa, Wajir, Mandera, and Tana River Counties infringed on their fundamental rights and was unconstitutional, null and void, and whether the prayers sought can be granted.

[9] On 14th March 2017, the High Court (Dulu J) dismissed the Petition with no order as to costs and made the following findings. On the issue of failure by respondents and the interested party to file replying affidavits to the petition, the learned Judge found that the points in dispute were legal rather than factual therefore, a replying affidavit was not necessary as it is only required when controverting facts.

[10] On the question of the unconstitutionality of Sections 8 and 9 of the Public Order Act, the learned Judge observed that powers to declare a state of emergency are different from those of the imposition of a curfew or curfew restriction orders. The presidential powers to declare a state of emergency under Article 58 of the Constitution require the national assembly, however, there was no such requirement for curfew orders and curfew restriction orders. Therefore, the powers conferred on the President to declare a state of emergency differ from the powers bestowed on the Cabinet Secretary to declare curfew orders and curfew restrictions. Ultimately, it found that Sections 8 and 9 of the Public Order Act were not unconstitutional.

[11] On the violation of the fundamental rights and freedoms, the learned Judge while admitting that certain fundamental rights had been limited by the imposition of the curfew due to the prevalence of insecurity, held that the curfew order was justified at the time it was imposed and not unconstitutional.

ii. Proceedings in the Court of Appeal

[12] The appellant being aggrieved by the judgment delivered by the High Court lodged an appeal raising the following grounds of appeal, that the learned judge erred in: holding that Sections 8 and 9 of the Public Order Act vis a vis Article 58 of the Constitution are constitutional; failing to consider the effect or consequence of Sections 8 and 9 of the Public Order Act; failing to consider its submissions; and for holding that the appellant had not pointed out any specific Article of the Constitution which was violated.

[13] The Court of Appeal distilled four issues for determination as follows. Whether the appellant set out his case precisely to the required standard; whether the learned Judge considered the appellant's submissions; whether Sections 8 & 9 of the Act infringe on human rights and freedoms protected by the Constitution and are therefore unconstitutional; and whether Sections 8 & 9 of the Act are acceptable limitations of the rights and freedoms as envisioned under Article 24 of the Constitution.

[14] The Court of Appeal dismissed the appeal with no order as to costs and made the following findings. On the question of whether the appellant set out his case precisely to the required standard, the superior court found that the appellant had laid out the purported infringed constitutional provisions, and its submissions were considered.

[15] On the legality and constitutionality of Sections 8 and 9 of the Public Order Act, the court held that the curfew order imposed in the four counties forestalled further loss of life, injury, and destruction of property and the purpose and effect of the impugned provisions were in the circumstances justifiable. The court further held that the provision is not open-ended in so far as it donates power to authorities to declare curfews. The court found that the authorities are mandated to issue curfews where it is in the interest of public order. It was also held that the daylight hours are stipulated in Section 8 while Section 9 unequivocally prohibits the issuance of a curfew restriction order for more than 28 days. Furthermore, the court found that the Commissioner of Police also has the authority to vary or rescind the curfew orders. Ultimately, it found Sections 8 and 9 of the Public Order Act constitutional.

[16] On whether Sections 8 & 9 of the Act are acceptable limitations of the rights and freedoms as envisioned under Article 24 of the Constitution, the Court of Appeal found that where public order or safety has been or is at risk of being violated due to factors which include terror attacks or criminal insecurity, the limitation of the affected person's rights and freedoms within the context of Sections 8 and 9 of the Act is justifiable, reasonable and necessary under Article 24 of the Constitution to ensure the delicate balance of the rights of the citizens.

iii. Proceedings in the Supreme Court

[17] Aggrieved by the Court of Appeal's decision, the appellant has now filed the instant petition. The condensed grounds of appeal are that: the learned judges erred holding that Sections 8 and 9 of the Public Order Act are constitutional vis a vis Article 58 of the Constitution; the checks under the Public Order Act are constitutional and proper and yet the powers are not

subjected to Parliamentary or judicial control like powers of the President under Article 58.

[18] The appellants urged the learned judges erred in holding that Sections 8 and 9 of the Public Order Act are constitutional vis a vis Articles 39, 28, 29, 32, 26, 37, and 43 of the Constitution and International human rights instruments and that the limitations of Human Rights by the impugned Sections 8 and 9 of the Public Order Act are acceptable and justifiable in the circumstances. The appellants also argued that the learned judges failed to consider Article 23 of the constitution on the justiciability of a threat to human rights vis a vis actual violation. Lastly, that the learned judges made a contradictory finding that sections 8 and 9 of the Public Order Act are legal, checked through judicial oversight but depriving any party the basis to challenge the powers under the impugned provisions by holding that the provisions are constitutional.

[19] The reliefs sought are for this Court to: allow the Petition, set aside the Court of Appeal judgment and order, and declare sections 8 and 9 of the Public Order Act unconstitutional.

D. PARTIES' SUBMISSIONS

i) Appellant's Submissions

[20] The appellant submits that sections 8 and 9 of the Public Order Act give sweeping powers to the Cabinet Secretary and the police without checks and balances and lack parliamentary and judicial oversight contrary to Articles 58 and 95 of the Constitution. Furthermore, that the provision does not provide timelines on the duration of curfews, contrary to Article 58, which stipulates the duration of a state of emergency. The appellant also submits that the impugned provisions are too intrusive on the Bill of Rights.

[21] The appellant urged that sections 8 and 9 of the Public Order Act is archaic, draconian and unreasonable as it is incompatible with Kenya's modern and progressive Constitution having been inspired by the Native Passes Regulations 1900 and Ordinance 1903, the 1906 Master and Servant's Ordinance, and the Vagrancy (Amendment) Ordinance of 1925, a colonial legislation was used to

regulate African labour and African movements. The appellant argues that owing to the historical context of the impugned provisions having been enacted more than 70 years ago, such law did not consider human rights and good governance for lack of constitutional provisions such as Articles 238, 10, and 73. To reinforce this assertion, the appellant referred to the case of **Attorney General vs. Salvatory Abuki** [1999] UGSC 7 where the Supreme Court of Uganda whilst declaring Section 7 (1) and 7 (2) of the Witchcraft Act unconstitutional held that the aforesaid provisions must give way to the new constitutional order.

[22] The appellant urges the Court to look at similar provisions in the United Kingdom, Turkey, and Malawi. With reference to the United Kingdom, the appellant points out the repeal of the Prevention of Terrorism Act 2005 which had a “control order” that prevented and restricted terrorism suspects' movement and activities to fight terrorism. It is also pointed out that the Terrorism Prevention and Investigation Measures Act 2011 was later enacted to provide for broad judicial oversight of the system, including a requirement for High Court permission to impose the measures, full review of each case in which measures are imposed and rights of appeal for the individual against refusal of a request to revoke or vary the measures.

[23] The appellant also cites the curfew declared by Turkish Authorities under the Provincial Administrative Law during the upsurge in violence and terrorism by insurgents of the Kurdistan Workers Party. The **European Commission For Democracy (through Law Venice Commission) Opinion** on the legal framework governing curfews urged Turkish authorities to no longer use the provisions of Provincial Administration Law as a legal basis for declaring curfews and to ensure that the emergency measures including curfews are carried out in compliance with the constitutional and legislative framework showing due regard to relevant international standards and complying with national values and international obligations concerning the protection of fundamental rights. The Venice Commission further advised the Turkish authorities to introduce necessary amendments to state emergency laws so that there is a clear description in the law of the material, procedural and temporal

arrangements for the implementation of curfews, particularly the conditions and safeguards to which they must be subjected including parliamentary and judicial supervisions.

[24] The appellant also referred to ***the State (on the application of) Esther Cecilia Kathumba and 4 Others vs. President of Malawi and 5 Others***, Constitutional Reference No. 1 of 2020, where the Malawian court in declaring the lockdown rules unconstitutional held that a state of emergency was imposed without following Section 45 of the Malawian Constitution that provides for checks and balances.

ii) The 1st, 2nd and 3rd respondent's submission

[25] The 1st, 2nd, and 3rd respondents submit that there was a general rebuttable presumption that a statute or statutory provision is constitutional and that the burden of proof rests on the person who alleges unconstitutionality. The Respondents cited ***Katiba Institute & Another vs. Attorney General & Another*** [2017] eKLR, ***Law Society of Kenya vs. Attorney General & Another*** SC. Petition No. 4 of 2019 [2019] eKLR to support their assertion.

[26] On whether sections 8 and 9 of the Public Order Act violate human rights as guaranteed by the Constitution, the respondents submitted that there was no infringement of the appellant's rights. They also submit that in cases where public order or safety is at risk of being violated by factors such as terror attacks or insecurity, the limitation of the affected persons and freedom rights is justifiable, reasonable, and necessary under Article 24 of the Constitution. They further submit that the imposition of the curfew was necessary to ensure public safety and security and to maintain public order.

[27] The respondents also argue that the curfew order issued was in line with the precautionary principle as elucidated in the ***Republic vs Ministry & 3 Other Ex-Parte Kennedy Amdany Langat & 24 Others*** [2018] eKLR. They urge that the curfew did not only apply to Muslims but all the residents of the four counties, therefore, they did not violate the right to freedom of religion. It is also their argument that the appellant failed to address the question of

proportionality between the claim to their rights and public interest and further that they did not produce evidence to support their claim for violation of its rights. The respondents cited the case of ***East Africa Cables vs. Public Procurement Complaints Review Appeals Board & Another*** [2007] eKLR.

[28] The respondents argue that the imposition of the curfew was part of the government's mandate to ensure the provision of security to its people as stipulated under Article 238 (2) of the Constitution. In this regard, reliance is placed on ***the Law Society of Kenya vs. Attorney General & Another: National Commission for Human Rights & Another*** (Interested Parties) [2020] eKLR, ***National Super Alliance Kenya vs Cabinet Secretary for Interior and Coordination of National Government & 3 Others*** [2017] eKLR and ***CKW vs Attorney General & Another*** [2014] eKLR. Lastly, the respondents urge that the appellant has no valid grievance before this Court and that the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

E. ISSUES FOR DETERMINATION

[29] From the pleadings and the parties' submissions, the following issues crystallize for determination:

- i. *Whether Sections 8 and 9 of the Public Order Act are unconstitutional vis a vis Article 58 of the Constitution.*
- ii. *Whether the imposition of curfew in Wajir, Garissa, Mandera, and Tana River violated the rights enshrined under Articles 26, 27, 29, 32 and 39 of the Constitution.*

F. DETERMINATION

[30] We shall first dispense with the issue of jurisdiction. The appellant has filed this appeal as a matter of right pursuant to Article 163(4)(a) of the constitution. The guiding principles set by this Court to interpret whether this Court has jurisdiction to hear and determine this appeal have been set out in several cases by this Court. In the case of ***Lawrence Nduttu & 6000 others***

vs Kenya Breweries Ltd & another [2012] eKLR and *Hassan Ali Joho & another vs Suleiman Said Shahbal & 2 others* [2013] eKLR, this Court established that an appeal must originate from a matter where the issues contested revolved around the interpretation or application of the Constitution and the same is now being contested before the Supreme Court. Where the case has had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163(4)(a) of the Constitution.

[31] We have reviewed the record of appeal and heard the submissions by the parties and find that this appeal faults the challenges the Court of Appeal's finding on whether the provisions of sections 8 and 9 of the Public Order Act are constitutional vis a vis Article 58 and the rights and freedoms under Articles 26,27,29,32 and 39 of the Constitution which were purportedly violated as a result of enforcement of curfew orders and restrictions in Wajir, Garissa, Mandera and Tana River Counties between 2nd April 2015 and 18th June 2015. We find that this appeal is properly before us pursuant to Article 163(4)(a) of the Constitution.

(i) Whether sections 8 and 9 of the Public Order are unconstitutional?

[32] The second issue for our determination is whether sections 8 and 9 of the Public Order Act is constitutional vis a vis Article 58 of the Constitution. We shall reproduce the provisions and analyse the constitutionality thereof.

"8. Curfew orders

(1) The Cabinet Secretary, on the advice of the Inspector-General of the National Police Service may, if he considers it necessary in the interests of public order so to do, by order (hereinafter referred to as a curfew order) direct that, within such area and during such hours as may be specified in the curfew order, every person, or, as the case may be, every member of any class of persons specified in the curfew order, shall, except under and in accordance with the terms and specified in the curfew order, remain indoors in the premises at which

he normally resides, or at such other premises as may be authorized by or under the curfew order.

(2)(a) It shall be a condition of every permit granted under subsection (1) of this section that the holder thereof shall at all times while acting under the authority thereof during the hours of darkness carry a light visible at a distance of twenty-five feet.

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

(3) A curfew order shall be published in such manner as the authority making it may think sufficient to bring it to the notice of all persons affected thereby, and shall come into force on such day, being the day of or a day after the making thereof, as may be specified therein, and shall remain in force for the period specified therein or until earlier rescinded by the same authority or by the Minister as hereinafter provided:

Provided that no curfew order which imposes a curfew operating during more than ten consecutive hours of daylight shall remain in force for more than three days, and no curfew order which imposes a curfew operating during any lesser number of consecutive hours of daylight shall remain in force for more than seven days.

(4) Deleted by Act No. 19 of 2014, s. 4(b).

(5) The variation or rescission of a curfew order shall be published in like manner as that provided in subsection (3) of this section for the publication of a curfew order.

(6) Any person who contravenes any of the provisions of a curfew order or any of the terms or conditions of a permit granted to him under subsection (1) of this section shall be guilty of an offence and liable to a

fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment.

(7) A certificate under the hand of the authority making, varying or rescinding a curfew order, specifying the terms, and the date and manner of publication, of such order, variation or rescission, shall be prima facie evidence thereof in all legal proceedings.

(8) Any person who, without lawful excuse, carries or has in his possession, in any area in which a curfew order is in force and during the hours during which the curfew imposed thereby is operative, any offensive weapon shall be guilty of an offence:

Provided that no person shall be convicted of an offence under this section if he proves to the satisfaction of the Court that he carried or had in his possession the offensive weapon—

(i) solely for domestic or defensive purposes within enclosed premises which he lawfully occupied or in which he was lawfully present; or

(ii) with the authority of his employer and solely for domestic or defensive purposes within enclosed premises in the lawful occupation of his employer”.

[33] Section 9 of the Public Order Act provides for curfew restriction orders as follows:

“(1) A police officer in charge of the police in a county or a police officer in charge of a police division may, if he considers it necessary in the interests of public order within the area of his responsibility so to do, by order (hereinafter referred to as a curfew restriction order) prohibit, during such hours as may be specified in the curfew restriction order, all persons, or, as the case may be, all members of any class of persons specified in the curfew restriction order, from entering, being or remaining, except under and in accordance with the terms and conditions of a written permit granted by an authority or

person specified in the curfew restriction order, in or at any premises specified in the curfew restriction order:

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

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

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

(4) Every curfew restriction order shall, forthwith on its being made, be reported to the Commissioner of Police, and the Commissioner of Police may, if he thinks fit, vary or rescind the curfew restriction order.

(5) The variation or rescission of a curfew restriction order shall be published in like manner as that provided in subsection (3) of this section for the publication of a curfew restriction order.

(6) Any person who contravenes any of the provisions of a curfew restriction order or any of the terms or conditions of a permit granted to him under subsection (1) of this section shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment.

(7) A certificate under the hand of the authority making, varying or rescinding a curfew restriction order, specifying the terms, and the date and manner of publication, of such order, variation or rescission, shall be prima facie evidence thereof in all legal proceedings”.

[34] Article 58 of the Constitution provides as follows on the declaration of a state of emergency:

“1) A state of emergency may be declared only under Article 132 (4)(d) and only when—

(a) the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and

(b) the declaration is necessary to meet the circumstances for which the emergency is declared.

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of the declaration, shall be effective only—

(a) prospectively; and

(b) for not longer than fourteen days from the date of the declaration, unless the National Assembly resolves to extend the declaration.

(3) The National Assembly may extend a declaration of a state of emergency—

(a) by resolution adopted—

(i) following a public debate in the National Assembly; and

(ii) by the majorities specified in clause (4); and

(b) for not longer than two months at a time.

(4) The first extension of the declaration of a state of emergency requires a supporting vote of at least two-thirds of all the members of the National Assembly, and any subsequent extension requires a supporting vote of at least three-quarters of all the members of the National Assembly.

(5) The Supreme Court may decide on the validity of—

(a) a declaration of a state of emergency;

(b) any extension of a declaration of a state of emergency; and

(c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

(6) Any legislation enacted in consequence of a declaration of a state of emergency—

(a) may limit a right or fundamental freedom in the Bill of Rights only to the extent that;

(i) the limitation is strictly required by the emergency; and

(ii) the legislation is consistent with the Republic's obligations under international law applicable to a state of emergency; and

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

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

[35] Having set out the legislative provisions on curfew orders and curfew restriction orders under contention as against the Constitutional provisions on state of emergency, we now turn to the analysis of the constitutionality of the legislative provisions.

[36] We have previously pronounced ourselves on the test on determining constitutionality of legislative provisions. In the case of *Law Society of Kenya vs Attorney General & Another* Petition No. 4 of 2019[2019] eKLR this Court held as follows at paragraph 36:

“Before determining the above issues, we consider it pertinent to restate the approach that every court should take when determining the question whether any statutory provision is unconstitutional or not. It is alleged in the Petition of Appeal that the cited provisions of WIBA should be struck off for being in violation of the former and present constitutions. In addressing that issue, it must always be borne in mind that the Legislature's primary constitutional mandate is the making of laws. Those laws set the ultimate direction of all activities in a State and the actions of all persons. Thus, there exists principles that underline the determination of constitutional validity of a statute or

its provisions because it is the function of the Courts to test ordinary legislation against the governing yardstick: the Constitution.”

[37] This Court further enumerated on the applicable presumption and onus dischargeable as follows at paragraph 37:

“At the forefront of these principles is a general but rebuttable presumption that a statutory provision is consistent with the Constitution. The party that alleges inconsistency has the burden of proving such a contention. In construing whether statutory provisions offend the Constitution, the courts must therefore subject the same to an objective inquiry as to whether they conform with the Constitution.”

[38] Additionally, in the same paragraph, the Supreme Court enumerated the principle that, *“the true essence of a statutory provision as well as its effect and purpose must be considered.”*

[39] Reference is also made to this Court’s precedent and findings made by the courts on legislative interpretation in the following respective cases; ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others*** [2014] eKLR, and ***Hamdarddawa Khana vs Union of India and Others*** 1960 AIR 554 and ***Pepper vs Hart*** [1992] 3 WLR.

[40] The Supreme Court of India in the case of ***Reserve Bank of India vs Peerless General Finance & Investment Co. Ltd & Others*** [1987] 1 SCC 424 considered the intent of text and context in interpretation and held as follows.

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

[41] The appellant contends that the provisions of Section 8 and 9 of the Public Order Act are unconstitutional as they give sweeping powers to the Cabinet

Secretary and the Police without checks and balances or parliamentary and judicial oversight contrary to the provisions of Article 58 and 95 of the Constitution. It is its case that the provisions do not provide timelines on duration of curfews and further that the provisions infringe on an array of human rights. The appellant also contends that the provisions are archaic and contrasted the provisions to the colonial statutes on issuance of passes which were written permits granted by an authority under inter alia the Native Passes Regulations 1900.

[42] It is the respondents' case that the impugned provisions are not unconstitutional as they meet the objective of the Public Order Act which is to attain the legitimate purpose of ensuring safety, peace, and order at the attainment of national security in a given area of the country. Further that sections 8 and 9 of the Act presuppose a state of security, peace, and stability that is free from criminal activities and violence.

[43] The Court in determining the purpose of a curfew held as follows in the case of *Muslims for Human Rights (MUHURI) & 4 others v Inspector General of Police & 2 others* [2014] eKLR

“The underlying objective of a curfew is to enable security personnel to move into an area affected by criminal acts leading to public disorder, or such other acts that affect normal operations of the residents of the affected area...”

[44] In analyzing the constitutionality of sections 8 and 9 of the Public Order Act, we shall begin by considering the purpose of the Act. The long title of the Act provides that the objective of the Statute is to make provision for the maintenance of public order and for purposes connected therewith. With reference to curfew orders, the Cabinet Secretary responsible for Internal Security is mandated to issue the order which is premised on advice of the Inspector General of Police. The order is issued in the interests of maintaining public order.

[45] In the circumstances of this case, the curfew orders in dispute were issued following a heinous terrorist attack in Garissa and it was necessary in the

circumstances to forestall any other attacks as well as maintain public order while investigations relating to the attack were conducted whilst maintaining law and order in the affected county as well as the neighboring counties. Therefore, the 2nd respondent legitimately issued the curfew order which was also a precautionary measure to avert any further potential risk upon the lives of the residents in the four (4) counties.

[46] In the case of *Republic vs Ministry & 3 others Ex-parte Kennedy Amdany Langat & 27 others*, Judicial Review Case No. 2 of 2018 and JR 709 of 201 (Consolidated) [2018] eKLR held as follows on the application of the precautionary principle.

“126. Therefore, applying the precautionary principle, which principle is designed to prevent potential risks, I find and hold that it is the duty of the state to take protective measures without having to wait until the reality and seriousness of those risks are fully demonstrated or manifested. This approach takes into account the actual risk to public health, especially where there is uncertainty as to the existence or extent of risks to the health of consumers. The state may take protective measures without having to wait until the reality and the seriousness of those risks are apparent.”

[47] Further, there was need to maintain national security considering that the nature of terrorism translates across the victim country’s borders. Article 238 (2) of the Constitution provides that the principles of national security are that it is subject to the authority of the Constitution and Parliament, it shall be pursued in compliance with the law and utmost respect for the rule of law, democracy and human rights and fundamental freedoms and that national security organs shall respect the diverse culture of the communities within Kenya.

[48] Sections 8 and 9 of the Public Order Act provide for the duration of hours to remain indoors and which applies to every member of any class except with a written permit. Additionally, curfew restriction orders are issued by the police in charge of a county or division restricting persons from entering, being or

remaining in any premises. The Black's Law Dictionary defines a curfew as 'a regulation that forbids people from being outdoors or in vehicles during certain hours.' Although the statutory provisions do not state the hours for the curfew operation, the proviso in Section 8(3) caters to the limitation of hours to a curfew as it prohibits the operation of a curfew order for more than ten (10) hours consecutive hours of daylight for three (3) consecutive days or for less consecutive hours for more than seven (7) days. Further, a curfew restriction order should not exceed twenty-eight (28) days. We therefore find that the law does provide for the operation hours of a curfew which is not excessive but rational to meet the objective of the issuance of the orders.

[49] On publication of the orders, sections 8 and 9 of the Public Order Act provides that the authority making the order shall in a manner it may think sufficient notify all persons of the day the curfew shall come into force and its duration. We, therefore, find that although the proviso does not state how the publication should be issued, the 2nd respondent has the onus to ensure that the publication is widespread and that all affected persons are informed on the issuance of the curfew.

[50] The appellant contends that the provisions of sections 8 and 9 of the Public Order Act should be considered vis a vis Article 58 of the Constitution on a declaration of a state of emergency. A reading of Article 58 of the Constitution provides that a state of emergency is declared in the limited circumstances where the State is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency. The declaration is for an initial period of fourteen (14) days and any subsequent extension is subject to the approval by National Assembly and its validity or legislation enacted pursuant to the declaration can be challenged in the Supreme Court.

[51] The Constitution anticipates that a declaration of a state of emergency is likely to limit the enjoyment of rights and freedoms and provides that the limitation should strictly be required by the emergency and be consistent with the Republic's obligation under international law applicable to a state of emergency.

[52] Therefore, in contrast to the legislative provisions on curfew orders and curfew restriction orders, it is apparent that a declaration of a state of emergency affects the entire State. Consequently, the declaration must be subjected to oversight by Parliament and any legal challenge arising thereof be resolved by the courts and in this instance, the jurisdiction is limited to the Supreme Court. On the other hand, curfew orders and curfew restriction orders are limited to a particular area and therefore will not require Parliamentary approval. However, any legal challenge arising from the declaration of a curfew can be adjudicated upon in the courts. The duration of a curfew restriction order shall not exceed a period of twenty-eight (28) days which we opine is a reasonable period upon recommendation by the authority making it.

[53] Consequently, gleaning on the considerations above we find that the appellant's arguments fail and hold that the provisions of sections 8 and 9 of the Public Order Act attain the constitutional threshold as well as meet the intent and purpose of the Act.

(ii) Whether the imposition of the curfew orders violated the rights enshrined under Articles 26, 27, 29, and 39 of the Constitution and whether the limitation was justifiable?

[54] The appellant contends that the curtailing of movement of people had the effect of depriving people of their livelihood contrary to Article 26 of the Constitution on the right to life, and that the voluntary limitation violated the right to liberty under Article 29 of the Constitution, that sections 8 and 9 of the Public Order Act provides that the curfew can be imposed on members of a specific class which purportedly causes segregation thereby violating the right to equality and freedom from discrimination contrary to Article 27 of the Constitution; that persons in the areas that the impugned curfew orders were declared are majority Muslim faithful who could not conduct night prayers during the holy month of Ramadhan thereby curtailing the freedom of religion contrary to Article 32 of the Constitution, and that the movement of persons where the curfew and restriction orders were imposed was in contravention of the right of movement under Article 39 of the Constitution.

[55] The respondents in opposition urged that there was no infringement of rights but the orders merely limited the enjoyment of certain rights. It is their case that the right of movement was limited to ensure safety and security and maintain public order as many lives had been lost during the terrorist attack. Additionally, that the orders applied to all residents and did not discriminate against the Muslim residents right to freedom of religion.

[56] We now turn to the principles applicable. With reference to international law, some human rights treaties include special provisions allowing for derogations from particular rights in times of war or other emergencies threatening the life of the nation.

[57] Article 4 of the International Covenant on Civil and Political Rights specifies that:

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.

[58] Other treaties containing a derogation clause include Article 15 of the European Convention on Human Rights, Article 4 of the International Covenant on Civil and Political Rights, Article 27 of the American Convention on Human Rights and part V of the European Social Charter. These provisions generally require states to officially notify the respective treaty regime and indicate the reasons for their derogation as well as the duration.

[59] The derogation clauses are included because, during exceptional times, it can be crucial to curtail rights in order to preserve their long-term existence. This is important because human rights themselves come under threat in situations where there is no public order. In addition, the measures must be of

an exceptional and temporary nature and only in a situation that amounts to a public emergency threatening the life of a nation.

[60] In this matter, it is imperative to note that the curfew orders and restriction orders were issued as a result of an unfortunate terrorist attack. Terrorism is classified as an international threat and its suppression involves a combined multi-national and multi-agency approach. Internationally, Kenya is core in the fight against terrorism having been a victim of the heinous attacks on occasions we do not wish to recollect.

[61] The Siracusa Principles drafted in 1958 provide for the limitation and derogation principles in the International Covenant on Civil and Political Rights - ICCPR. The principles define which public emergencies fall under Article 4 of the ICCPR and provide for example, that public health may be invoked to trigger emergency provisions for the purpose of allowing ‘a State to take measures dealing with a serious threat to the health of the population or individual members of the population.’ These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

[62] The Siracusa Principles specifically state that restrictions should, at a minimum, be:

- i. *“provided for and carried out in accordance with the law;*
- ii. *directed toward a legitimate objective of general interest;*
- iii. *strictly necessary in a democratic society to achieve the objective;*
- iv. *the least intrusive and restrictive available to reach the objective;*
- v. *based on scientific evidence and neither arbitrary nor discriminatory in application; and*
- vi) *of limited duration, respectful of human dignity, and subject to review.”*

[63] In relation to the ICCPR, the Siracusa Principles specify that limitation clauses based on the Covenant provisions can only be invoked if they are necessary, based on one of the grounds justifying limitations recognized by the

Covenant, responding to a pressing social need, pursuing a legitimate aim, are necessary in a democratic society, and proportional to the nature of the threat.

[64] During the Covid 19 pandemic the Human Rights Committee in its ‘Statement on derogations from the Covenant in connection with the COVID-19 pandemic’, specifies that the pandemic has put an onus on Member States to take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction, and that such measures may result in restrictions on the enjoyment of individual rights guaranteed by the Covenant

[65] Article 24 of the Constitution provides as follows on the limitation of rights and fundamental freedoms; that

“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”.*

[66] This Court in the case of ***Karen Njeri Kandie vs Alassane Ba & another*** SC Petition No.2 of 2015 [2017] eKLR held at paragraph 78 that:

“Before applying the ‘reasonable and justifiable’ test, therefore, a court must first determine whether a right has been limited under a particular law . . .it is important to consider the factors set out in the

Constitution that will assist us to answer this question including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation and the fact that the need for enjoyment of the right one individual does not prejudice the rights of others, as well the consideration of the relationship between the limitation and its purpose, and whether there is a less restrictive means to achieve that purpose”

[67] Chaskalson P, of the Constitutional Court of South Africa held as follows on the limitation test in the case of **S v Makwanyane and Another** [1995] ZACC 3 at paragraph 104:

“The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for ‘an open and democratic society based on freedom and equality’, means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could

reasonably be achieved through other means less damaging to the right in question.”

[68] Turning to the contention by the appellant, on the alleged infringement on the right of movement, we opine that the very nature of curfew orders is to limit movement of people so as to maintain security, law, and order. The operating hours of the curfew were between 6.30 pm and 6.00 am. These hours are reasonable and it was justifiable for this right to be limited for the duration of the curfew. On the alleged infringement of the right of life whose enjoyment the appellant urged infringed on the rights of the good people of the Wajir, Mandera, Garissa and Tana River counties to livelihood as the curfew orders restricted persons from being in their business premises, we find as follows. In the circumstances, the need to preserve the right to life, after over a hundred lives were lost in the terrorist attack, outweighed the limitation on the restriction of business trading hours. In any event, during the curfew period, the residents were notified of the curfew and were therefore obliged to adjust their business trading hours.

[69] On the alleged discrimination, segregation and infringement of the freedom of religion, the appellant urged that sections 8 and 9 of the Public Order Act speaks to the issuance of curfew orders against a class of persons. A reading of the provision shows that the curfew orders apply to “*every member of any class of persons specified in the curfew order*” and that the exception is only granted to persons who have a written permit from the authority. In this instance, the curfew order applied to all the residents of the four counties and did not segregate any class of persons as alleged. It was unfortunate that the curfew run during the month of Ramadhan thereby restricting the Muslims from attending night prayers. However, the limitation of the freedom of religion was justifiable in the circumstances.

[70] Consequently, relying on the provisions of the Constitution, International Law, and the principles on the reasonable and justifiable test and taking into account all factors attendant to this cause, we find that the limitations were

justifiable and reasonable in the circumstances and that there was no violation of the enjoyment of human rights as alleged by the appellant.

G. ORDERS

- i. The appeal is hereby dismissed*
- ii. Each party shall bear its own costs.*
- iii. We hereby direct that the sum of Kshs. 7,000/-, deposited as security for costs upon lodging of this appeal, be refunded to the appellants.*

DATED and DELIVERED at NAIROBI this 23rd day of June 2023.

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M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S.C WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA