Kenya Human Rights Commission & 8 others v Nchebere; Law Society of Kenya & 2 others (Interested Parties) (Application E082 of 2024) [2024] KEHC 16607 (KLR) (Judicial Review) (31 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16607 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E082 OF 2024

J NGAAH, J

DECEMBER 31, 2024

BETWEEN

KENYA HUMAN RIGHTS COMMISSION .... 1ST APPLICANT

KATIBA INSTITUTE .... 2ND APPLICANT

KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ KENYA) .... 3RD APPLICANT

TRANSPARENCY INTERNATIONAL KENYA (TI) .... 4TH APPLICANT

THE INSTITUTE FOR SOCIAL ACCOUNTABILITY (TISA) .... 5TH APPLICANT

AFRICA CENTER FOR OPEN GOVERNANCE .... 6TH APPLICANT

SIASA PLACE .... 7TH APPLICANT

TRIBELESS YOUTH .... 8TH APPLICANT

MUSLIMS FOR HUMAN RIGHTS (MUHURI) .... 9TH APPLICANT

AND

JAPHET KOOME NCHEBERE .... RESPONDENT

AND

LAW SOCIETY OF KENYA .... INTERESTED PARTY

KENYA MEDICAL PRACTITIONERS, PHARMACISTS AND DENTISTS UNION (KMPDU) .... INTERESTED PARTY

KENYA UNION OF CLINICAL OFFICERS .... INTERESTED PARTY

JUDGMENT

tHE aPPLICANTS Case

1. The applicants' application is a motion dated 17 April 2024 expressed to be filed under sections 8 and 9 of the *Law Reform Act* cap 26; sections 7, 8, 9, 11 and 14 of the *Fair Administrative Actions Act*, 2015; and, Order 53 of the *Civil Procedure Rules*. The applicants have sought the following orders:

   " 1. Prohibition restraining the Respondent, Japhet Koome Nchebere, the Inspector General of the National Police Service, or any other officer subordinate to him, from enforcing Nchebere's decision of 14th April 2024 to suspend Articles 36, 37 and 41 of the *Constitution* by cancelling medics' right to strike and to picket peaceably and unarmed.

   2. Certiorari quashing Nchebere's decision of 14th April 2024 to suspend Articles 36, 37 and 41 of the *Constitution* by cancelling medics' right to strike and to picket peaceably and unarmed.

   3. A declaration that the Inspector General of National Police Service, such as Nchebere, or other superior officer are personally liable under the doctrine of command responsibility for:

      a) issuing unconstitutional orders and directives to officers under their command to use unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets under Articles 36, 37, and 41 of the *Constitution*.

      b) abdicating effective control of police officers under their command by failing to investigate and discipline officers who violate the *Constitution* by using unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets contrary to Articles 36, 37, and 41 of the *Constitution*.

   4. A structural interdict or supervisory mandamus be and is issued directing the Respondent to investigate and to discipline police officers who have violated the *Constitution*, by using unlawful force, to disperse peaceable and unarmed strikes, assemblies, protests, and pickets by the medics contrary to Articles 36, 37, and 41 of the *Constitution*.

      a) The investigation to include the OCPD of Capitol Hill Police Station and any other officer culpable for using unlawful force against Dr Davji Atela and other medics at a peaceable and unarmed strike, assembly, protest, or picket on 29 February 2024 at Afya House.

      b) The Respondent be and is ordered to publish, in a newspaper of national circulation within 14 days of this order, an apology to Dr Davji Atela for the violation of his rights by the police.

      c) The court further orders the Respondent to file an affidavit within 30 days of the court's order, outlining his steps to comply.

5. The Respondent, from his personal funds, pays Dr Davji Atela, compensation in the form of general damages (under Article 23 of the *Constitution* and section 7(1)(j) of the *FAA*) for violating his rights while using unlawful force, to disperse the peaceable and unarmed picket at Afya House, Nairobi on 29 February 2024.

6. A costs order requiring the Respondent to pay, from his personal funds, the costs of this litigation, to deter his future attempts to suspend Articles 36, 37, and 41 of the *Constitution* or his use or authorisation of the use of unlawful force, to disperse peaceable and unarmed strikes, assemblies, protests, and pickets contrary to Articles 36, 37, and 41 of the *Constitution*."

2. The application is based on a statutory statement dated 15 April 2024 and an affidavit sworn on even date by Mr. David Malombe verifying the facts relied upon.

3. Mr. Malombe has sworn that he is the executive director of Kenya Human Rights Commission, the 1st applicant in these proceedings, and that he is competent, duly informed, and authorised to swear the affidavit on behalf of the rest of the applicants.

4. Mr. Malombe has sworn that Mr. Japhet Koome Nchebere, the former Inspector General of the National Police Service,habitually acted with high impunity and that he regularly directed subordinate police officers to disperse peaceable and unarmed protests forcibly and violently. At times, he personally participated in forcibly dispersing peaceful assemblies.

5. It is alleged that Mr. Nchebere never investigated or disciplined police officers who forcibly, violently, or lethally dispersed peaceable and unarmed protests. For instance, he failed to investigate or discipline the police officers, including the Officer Commanding Police Division for Capitol Hill, who violently attacked one Dr Davji Atela on 29 February 2024 at a peaceable picket at Afya House. Dr. Atela is the secretary general of the Kenya Medical Practitioners, Pharmacists, and Dentists Union (KMPDU).

6. In a show of bias, Mr. Nchebere is said to have ignored or even facilitated certain other protests. For instance, on 28 December 2023 at Milimani Law Courts, he did not take any action on protests in support of the housing levy verdict. He also did not disperse the protests through town and around the Supreme Court over the same levy. According to the applicants, such open and glaring bias by an officer who should be neutral, is discriminatory and violates articles 27 and 47 of the *Fair Administrative Action Act*,2015.

7. The applicants allege that true to his habit, on 14 April 2024, Mr. Nchebere claimed to suspend articles 36, 37, and 41 of the *Constitution* by cancelling the KMPDU members' right to strike, assemble, protest, or picket peaceably and unarmed. He disclosed that he had directed police commanders to "deal firmly and decisively" with the striking and picketing KMPDU members. To him, the striking KMPDU members had "become a public nuisance" by "blowing whistles and vuvuzelas during the demonstrations" yet blowing whistles and vuvuzelas is exactly what striking and picketing workers do, not just in Kenya but everywhere else in the world.

8. Except for the appalling act of violence and use of unnecessary and excessive force perpetrated against members of the KMPDU during their peaceful demonstration on 29 February 2024 in Nairobi during which Dr. Atela was gravely injured by a teargas canister thrown at him by the police, the 1st applicant has observed that the KMPDU members' strike had been peaceful.

9. It is the applicants' case that Nchebere's decision was disproportionate, intrusively limiting the rights of the KMPDU members to strike, assemble, or picket under articles 36, 37, and 41 of the *Constitution*.

They urge that the use of batons, teargas, or firearms, as a first option to disperse peaceable and unarmed KMPDU members on 29 February 2024 was unreasonable. According to the applicants, the decision was illegal under international and local law, including this Honourable Court's decisions. Secondly, the decision was so outrageous in its defiance of logic that no reasonable Inspector General of Police would replicate it. Mr. Nchebere's actions are also said to have been ultra vires article 47 of the *Constitution* and section 4 of the *Fair Aadministrative Action Act*.

10. The applicants seek to have have Mr. Nchebere held accountable for issuing unconstitutional orders and directives to officers under his command to use unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets contrary to articles 36, 37, and 41 of the *Constitution*. They also seek him to be held accountable for abdicating effective control of police officers under his command by failing to investigate and discipline officers who violate the *Constitution* by using unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets despite Articles 36, 37, and 41 of the *Constitution*.

Despite having been served with the application and the hearing notice neither Mr. Nchebere nor his office responded to the application. Of the three named interested parties, only the 1st interested party responded by way of a replying affidavit.

1st interested party's case

11. The replying affidavit was sworn by Ms. Florence Muturi who introduced herself as the secretary to the 1st interested party's council and its chief executive officer. She deposed that the 1st interested party is a statutory body established by the *Law Society of .Kenya Act*, 2014 with a statutory mandate under section 4 to assist the Government and the courts in matters relating tb legislation, the administration of justice and the practice of law in Kenya; uphold the *Constitution* of Kenya and advance the rule of law and the administration of justice; and to protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law.

12. The rest of the depositions made in the affidavit are more or less similar to those made by Mr. Malombe on behalf of the applicant. As a matter of fact, Ms. Muturi has sworn that the 1st respondent agrees with the applicants' bid to impeach the respondent's decision to suspend the *Constitution* and to hold him personally liable for his actions and omissions.

Applicants' submissions

13. In their submissions, the applicants identified the following issues for determination. I reproduce the issues verbatim as follows:

> " a) Whether the Respondent's decision of 14 April 2024 limited the medics' rights under Articles 36, 37, and 41 of the *Constitution*.
>
> b) Whether the Respondent's actions are tainted with illegality, irrationality, or procedural impropriety.
>
> c) Whether the Respondent's actions violated or posed the threat of violation to the rights provided for under Article 36, 37 and 41 of the *Constitution*.
>
> d) Whether the Respondent's decision of to suspend the medics' rights under Articles 36, 37 and 41 was justifiable in the circumstances of the case in terms of Article 24(1) of the *Constitution* 2010.

e) Whether the Inspector General of Police can be held criminally responsible under the doctrine of command responsibility for the actions of his subordinates."

14. On the first issue, the applicants have submitted that article 24 of the *Constitution* 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. 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 the consideration of the relationship between the limitation and its purpose, and whether there were less restrictive means to achieve that purpose. In support of these arguments, the applicants have relied on the Supreme Court decision in *Karen Njeri Kandie v Alassane Ba & Anothe*r [2017] eKLR and also *Seth Panyako & 5 Others v Attorney General & 2 Others* [2013] eKLR.

15. They have also urged that under article 24(3) of the *Constitution*, the onus of proving that a limitation on a right or freedom is reasonable and demonstrably justified in an open and democratic society lies with the respondent and in this regard they have cited Robert Alai v Attorney General [2017] eKLR at para 56; *R v Oakes* [1986] 1 SCR 103. Thus, the respondent bears the burden of satisfying this court that limitation was, first, provided by law; second, it was intended to serve a legitimate aim; and, third, it was necessary in an open and democratic society.

16. The applicants urge that the respondent did not meet this burden. His limitation of the rights in articles 36, 37, and 41 of the *Constitution* was outside article 24. Accordingly, the limitation was an arbitrary abuse of power and was only calculated to prejudice the legal rights of the peaceful protestors.

17. The applicants have also submitted that article 36(1) of the *Constitution* guarantees everyone the right to freedom of association, including the right to form, join or participate in any association.

18. The right to freedom of association protects, inter alia, expression; criticism of state action; advancement of the rights of those discriminated-against, marginalized and socially vulnerable communities, including the rights of women and children. This right also protects all other conduct permissible in the light of regional and international human rights law according to which, states are enjoined to respect, in law and practice, the right of associations to carry out their activities, without threats, harassment, interference, intimidation or reprisals. States are also under obligation to protect associations, including their principal and most visible members, from threats, harassment, interference, intimidation or reprisals by third parties and non-state actors.

19. Contrary to these constitutional provisions and international norms, the respondent is alleged to have unlawfully threatened to disrupt the strike and directed police commanders to "deal firmly and decisively" with the striking and picketing medics. Therefore, the respondent's decision of 14 April 2024 limited the KMPDU members' right to participate in a strike called by their union, the KMPDU, under Article 36 of the *Constitution*. The respondent's actions and decisions aimed at abridging the striking KMPDU members' rights to engage in their respective unions' activities are said to have violated the constitutional right to freedom of association.

20. Article 37, it is urged, equally entitles every person peaceably and unarmed, to assemble, demonstrate, picket, and present petitions to public authorities. Under 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 *Banjul Charter* also states that "every individual shall have the right to assemble freely with others"

21. In support of their submissions, the applicants have relied on *Ferdinand Ndung'u Waititu v Attorney General and 12 Others* [2016] eKLR where it was held that, 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 the 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. 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 the Article 37 rights.

    Against this background, it is urged, the *Constitution* obligates the respondent and the police officers in general to facilitate the exercise of the right provided under Article 37.

22. The applicants have also relied on the Guidelines on Freedom of Association and Assembly in Africa which are to the effect that:

    > "the right to freedom of assembly extends to peaceful assembly. An assembly should be deemed peaceful if its organizers have expressed peaceful intentions, and if the conduct of the assembly participants is generally peaceful. 'Peaceful' shall be interpreted to include conduct that annoys or gives offence as well as conduct that temporarily hinders, impedes or obstructs the activities of third parties. Isolated acts of violence do not render an assembly as a whole non-peaceful".

23. The applicants have also urged that Article 41 confers a right to fair labour practices including the right to participate in trade union activities and programmes and go on strike. They have cited *Kenya Ferry Services Limited v Dock Workers Union (Ferry Branch)* [2015] eKLR where it was held that:

    > "the right to strike is a fundamental element in stable collective bargaining. Employees promote and protect their economic and social interest, and resolve labour disputes, through strike action...Employees who may feel they should continue to work during the strike, must be protected".

24. For the same argument they cited *Okiya Omtatah Okoiti v Attorney General & 5 Others* [2015] eKLR where the court declared sections 78(1)(f) and 81(3) of the *Labour Relations Act* invalid as far as they are inconsistent with the *Constitution* to the extent that they purported to derogate from the core content of the right to strike under article 41(2)(d) of the *Constitution*. They sought to nullify the right to go on strike for workers in essential services sector.

25. The applicants urge that the respondent's directive to his subordinates to 'deal firmly and decisively' with the striking and picketing KMPDU members was intended to curtail their rights to strike under article 41(2)(d) of the *Constitution*. Thus, the respondent's usurpation of the power to determine who enjoys the right to picket and who does not is unconstitutional and a misuse of his office's powers.

26. On the second issue of whether the respondent's actions were tainted by illegality, irrationality or procedural impropriety, the applicants urge that the respondent's action of issuing orders and directives to officers under his command to use unlawful force to disperse peaceable and unarmed strikes, assemblies, protests and pickets are contrary to the provisions of Articles 36, 37 and 41 of the *Constitution*. They have relied on the *Council of Civil Unions v Minister for the Civil Service* [1985]

AC 2 where Lord Diplock defined the ground of illegality, amongst other grounds for judicial review. According to the learned judge, a decision-maker must correctly understand the law that regulates his decision-making and must give effect to it failure of which his decision is exposed to nullification on the ground of illegality.

27. It is urged that the office of Inspector General of Police is established by Article 245 of the *Constitution* of Kenya, with its parent statute being the *National Police Service Act*, 2011. The powers and functions of the Inspector General of Police are set out under Section 10 of the *National Police Service Act*, 2011. Sub section 4 of section 10 states as follows:

> 10(4)(b) In the performance of functions set out under the *Constitution*, this Act or any other law, the Inspector General shall uphold the national values, principles and objects set out in Articles 10, 232 and 244 of the *Constitution*.

28. Article 10 of the *Constitution* to which reference has been made bespeaks the national values and principles of governance. Article 10(2)(b) highlights the right to, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized as being part of the national values and principles of governance.

29. Article 232 of the *Constitution* provides for the values and principles of Public Service. Under article 232(1)(e), these values and principles include accountability for administrative acts. the *Constitution* further provides under Article 244(c) that the National Police Service shall comply with constitutional standards of human rights and fundamental freedoms.

30. The applicants relied on *Republic v Betting Control and Licensing Board & another Ex parte Outdoor Advertising Association of Kenya* [2019] eKLR on when a decision is deemed illegal and urged that the respondent's suspension of the KMPDU members' right to strike, assemble, protest or picket peaceably and unarmed, is illegal since no law allows him to cancel those rights. By cancelling the rights instead of facilitating the enjoyment of those rights, the respondent acted outside the jurisdiction conferred to him by articles 244 and 245 of the *Constitution* of Kenya.

31. Further, the respondent violated his duty to 'execute command by issuing lawful orders, directives or instructions' as required of him under Section 8A(4) of the *National Police Service Act*. His decision to suspend the rights are also in violation of Section 49(4) of the Act which requires that a police officer who performs an official duty or exercises police powers shall perform such duty or exercise such power in a manner that is lawful.The respondent's decision to cancel the rights of the KMPDU members to strike and picket peaceably and unarmed also violates the rules of natural justice under Articles 47 and 50, and sections 4(1), 7(2)(a)(v) and 7(2)(c) of the *Fair Administrative Action Act*. In particular, the respondent did not accord any of the KMPDU members a hearing before suspending their right to strike, assemble, or picket peaceably and unarmed under Articles 36, 37, and 41 of the *Constitution*.

32. The applicants have also submitted that, in the recent past, prior to the filing of the application, the respondent had adopted a pattern of facilitating the protests he fancied and disrupting those he did not like. This open bias in selectively respecting the rights of the groups he liked while curtailing the rights of the groups he dislikes is, according to the applicants, discriminatory and in violation of article 27 of the *Constitution*. This bias also violates section 7(2)(a)(iv) of the *Fair Administrative Action Act* under which the court is empowered to review an administrative action where the administrator is biased or may reasonably be suspected of bias.

33. On the question of irrationality, the applicants have argued that section 7(2)(k) of the *Fair Administrative Action Act*, provides that a court or a tribunal may review an administrative action or decision if it is unreasonable. Section 7(2)(i) of that *Act* also provides that an administrative action or

decision may be subject to review if the action is not rationally connected to; first, the purpose for which it was taken; second, the purpose of the empowering provision; third, the information before the administrator; and, fourth, the reasons given for it by the administrator.

34. The applicants have cited *Republic v Public Procurement Administrative Review Board & 2 Others ex Parte Rongo University* [2018] eKLR, where the court spelt out the criteria for legal unreasonableness as any or all of the following:

i. Specific errors of relevancy or purpose

ii. Reasoning illogically or irrationally

iii. Reaching a decision which lacks an evident and intelligible justification such that an interference of unreasonableness can be drawn even where a particular error in reasoning cannot be identified

iv Giving excessive or disproportionate weight— in the sense of more than was reasonably necessary—to some factors and insufficient weight to others.

35. The applicants have submitted further that the respondent's decision was made in defiance of logic and that no reasonable and informed Inspector General of Police would purport to cancel constitutionally provided for rights on a whim. The decision to cancel the KMPDU members' rights provided in articles 36, 37, and 41 of the *Constitution* is not rationally connected to the reasons given for it. Moreover, the respondent's decision is in violation of article 24 of the *Constitution*, which requires that there be a rational connection between a limitation of a constitutional right and the purpose of the limitation. It is urged that the respondent's decision to suspend the peaceful strikers' constitutionally provided for rights meets all the points in the criteria set above.

36. As far as the ground of procedural impropriety is concerned, it has been urged thatthe respondent's action of issuing orders and directives to officers under his command to use unlawful force to disperse peaceable and unarmed strikes, assemblies, protests and pickets lack procedural propriety. The case of *Republic v Cabinet Secretary for Interior & Co-ordination of National Government & another; Ex parte Applicant: Peter Adiele Mmegwa & another* [2020] eKLR, has been cited on what constitutes procedural impropriety. In that case the Court is said to have established two ways procedural impropriety can manifest: first, procedural ultra vires— where an administrative decision is challenged because a decision maker has overlooked or failed to properly observe statutory procedural requirements; and, second, common law rules of natural justice and fairness.

37. For the same argument, the applicants relied on *Pastoli v Kabale District Local Government Council and Others* (2008) EA 300. The applicants have concluded that the respondent's decision to suspend the rights of the KMPDU members to strike and picket peaceably violated the right to fair administrative action under Article 47 of the *Constitution* of Kenya, which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

38. In support of their argument, the applicants have relied on*Super Nova Properties Limited v the National Land Commission* [2019] eKLR where it was held that procedural fairness requires that persons who are likely to be affected by a decision be allowed to be heard before the decision is taken. The respondent, it is urged, did not allow any of the KMPDU members' to be heard before he decided to suspend their right to strike, assemble, or picket peaceably and unarmed. Thus, the respondent's actions and decisions breach the rules of natural justice and bias and, as such, constitute procedural impropriety.

39. On the their issue whether the decision of the respondent to suspend the rights of the KMPDU members as provided for under article 36, 37 and 41 was justifiable in the circumstances of the case in terms of article 24 of the *Constitution* of Kenya, it has been urged on behalf of the applicants that the *Constitution* in article 20(2) provides that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

40. To this end, the applicants have cited Louis Henkin, in his book, 'The Age of Right' where he stated, inter alia, that individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. This proposition is mirrored in article 24 of the *Constitution* which is to the effect thatthat 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. They also cited *R v Oakes* (1986) 1SCR 103 which set out the criteria that could be used in establishing whether a limitation to constitutional rights is reasonable and justified in a free and democratic society.

41. The applicants submit that the respondent's decision to suspend articles 36, 37 and 41 of the *Constitution* by cancelling the KMPDU members' right to strike, assemble, protest, or picket peaceably and unarmed, and issuing the directive to 'deal decisively and firmly' with the demonstrators is a limitation that does not meet the criteria above.

42. As far as the question of whether the Inspector General of Police can be held personally responsible under the doctrine of command responsibility for the actions of his subordinates, the applicants have submitted that the respondent is personally culpable for the harm by police officers to Dr Atela on 28 February 2024. In support of their argument, they have relied on *Republic v University of Nairobi ex Parte Michael Jacobs Odhiambo & 7 Others* [2016] eKLR which cited Judge Bakone Justice Moloto in 'Command Responsibility in International Criminal Tribunals' in which he stated:

> " To hold a person criminally responsible under the doctrine of command responsibility for an international crime, the prosecution must prove three legal elements:
>
> 1. The existence of superior-subordinate relationship between the accused as a supervisor and the perpetrator of the crime as his subordinate.
> 2. That the superior knew or had reason to know that the crime was about to be or had been committed; and
> 3. That the superior failed to take the necessary and reasonable measures to prevent the criminal acts or punish the perpetrators thereof.
>
> The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his or her subordinates...A superior position for purposes of command responsibility can be based on de facto powers of control...At least in the military context, command responsibility applies to every commander at every level of command. What matters is whether the superior has actual powers to control the actions of his or her subordinates. To determine this, all three aforementioned tribunals apply the "effective control" test, which aims to determine whether the superior has "the material ability to prevent and punish criminal conduct."

43. If a superior has this ability, then there is a legal basis for command responsibility. The applicants also citedthe International Criminal Tribunal for the former *Yugoslavia, Prosecutor v Zejnil Delalic,*

Zdravko Mucic, Hazim Delic, Esad Landzo (Appeals Chamber) IT-96-21-A (ICTY); at paragraph *98*, the court stated as follows:

> " If a superior has control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crime if he failed to exercise such abilities of control."

44. Based on these authorities, the applicants have submitted the Inspector General of National Police Service such as the respondent ought to be held personally liable under the doctrine of command responsibility for;

> " i. Issuing unconstitutional orders and directives to officers under their command to use unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets under Articles 36, 37 and 41 of the *Constitution*.
>
> ii. Abdicating effective control of police officers under their command by failing to investigate and discipline officers who violate the *Constitution* by using unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets contrary to Articles 36, 37 and 4 of the *Constitution*."

1st interested party's submissions

45. The 1st interested party's submissions are, by and large, similar to those made by the applicants in support of their case except that, in some instances, the 1st interested party has cited cases different from those cited by the applicants but which are, nonetheless in agreement with those which the applicants have relied on in support of the legal arguments they have posited.

46. For instance, on the argument that article 24(1) of the *Constitution* is express that a right or fundamental freedom in the Bill of Rights shall not be limited except by law and, therefore,the Inspector General did not have the legal authority to unilaterally suspend constitutional rights, the 1st interested party has cited *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* (2000) [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

47. It is urged that the case concerned the validity of a proclamation issued by the President of South Africa to bring certain sections of the Medicines and Related Substances Control Amendment Act into operation. The Constitutional Court held that the President had acted beyond his legal authority because the proclamation was issued without fulfilling the necessary statutory requirements. The 1st interested party urges that the case established that the exercise of all public power must be consistent with the *Constitution* and that public officials must act within the scope of their legally conferred authority and that it reinforced the principle of legality, emphasizing that actions taken without proper legal authorization are invalid. For the same argument, the 1st interested party has cited other South African decisions of *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Other*s (1998) [1998] ZACC 17 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC); *Affordable Medicines Trust and Others v Minister of Health and Another* (2005) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC); . *Masetlha v President of the Republic of South Africa* (2007) Citation: [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) and *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* (2004) [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC).

48. On the right to due process, the 1st interested party urged that the suspension of rights without following 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 Inspector General bypasses these procedural safeguards. It is urged that the principle of due process is fundamental in ensuring fairness and justice in administrative and judicial actions. In Kenya, the courts have addressed the absence of due process in several significant cases.

49. For these submissions, the 1st interested party cited *Dry Associates Limited v Capital Markets Authority and Another* (2012)(Petition No. 328 of 2011)*; Kenya Human Rights Commission v Non-Governmental Organizations Co-ordination Board* (2016), Petition No. 471 of 2016; *Trusted Society of Human Rights Alliance v Attorney General & 2 others* (2012) (Petition No. 229 of 2012); *Judicial Service Commission v Mbalu Mutava & Another* (2015); Civil Appeal No. 52 of 2014; and, *Moses Kipkolum Kogo v Nyamogo & Nyamogo Advocates* (2004) Citation: Civil Appeal No. 120 of 2004.

50. The 1st interested party has also urged that the respondent's action was arbitrary and capricious hence calling for the intervention of this Honourable Court. It has been submitted that the respondent's action may be deemed arbitrary and capricious because it lacks a sound basis, such as any clear and present danger to public order, health, or safety. The rationale for such a drastic measure must be transparent and well-founded and that for an administrative action to be lawful, it must be based on reasonable and legitimate grounds.

51. Arbitrarily suspending constitutional rights, especially in response to industrial action by a specific group, can be seen as a capricious use of power without a sound legal basis. It is submitted that the directive by the Inspector General made on 14 April 2024 is the archetypal paradigm of caprice. It was not based on any law and even the excuses given warranting the purported suspension of constitutional rights are wholly hollow, bereft of any evidence and groundless.

52. As to what the concepts of "arbitrary and capricious" entail, it has been submitted that they refer to decisions made by public officials or bodies that lack a rational basis or are not grounded in consideration of relevant factors. One of the cases cited in support of the 1st interested party's arguments is the case of *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co*. (1983)1 463 U.S. 29 (1983). The case is said to have involved the National Highway Traffic Safety Administration's decision to rescind a regulation requiring passive restraints in vehicles. The Court found that the agency's action was arbitrary and capricious because it failed to provide a reasoned explanation for its change in policy and did not consider all relevant factors.

53. Other decisions cited in support of the 1st interested party's submissions are *Baker v Canada (Minister of Citizenship and Immigration)* (1999) [1999] 2 SCR 817; . *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* (2000) [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC); *R v Minister for Home Affairs and Others Ex Parte Sitamze* (2008) [2008] 2 KLR (EP) 15; *Council of Civil Service Unions v Minister for the Civil Service* (1985) [1984] UKHL 9; [1985] AC 374.

54. On the issue of lack of proportionality on the respondent's part, it has been urged that the suspension of fundamental rights must be proportionate to the threat or issue at hand. The intervention of this Honourable Court is necessary because overreaching measures that excessively restrict constitutional rights can be challenged as disproportionate and unjustified. And the principle of proportionality requires that any restriction on rights must be necessary and proportionate to the aim sought to be

achieved. Suspending the rights to strike, assemble, protest, or picket, especially without exploring less restrictive means, must be deemed disproportionate.

55. Speaking of proportionality, it has been urged that the principle is a key element in administrative law and constitutional law, ensuring that the actions of public authorities do not exceed what is necessary to achieve a legitimate aim. To this end, the 1st interested party has relied on *R v Secretary of State for the Home Department, ex parte Daly* (2001) Citation: [2001] UKHL 26 which is a case that involved a challenge to a prison policy that allowed prison officers to examine legally privileged correspondence between prisoners and their lawyers. The House of Lords found the policy disproportionate, as it was more intrusive than necessary to achieve the legitimate aim of prison security.

56. Also cited in support of the 1st interested party's argument is the Canadian case of *R v Oakes* (supra). Other cases cited on this question of proportionality are *S v Makwanyane* (1995) [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC); *Tennessee v Garner* (1985)2 Citation: 471 U.S. 1 (1985); *Katiba Institute & 3 others v Attorney General & 2 others* (2018) Petition No. 372 of 2016; and, *R (on the application of Daly) v Secretary of State for the Home Department* (2001) Citation: [2001] 2 AC 532.

57. It was also urged that the respondent's action constituted abuse of power where executive authorities might circumvent legal procedures and checks to impose restrictive measures unilaterally. Once again, the 1st interested party relied on Pharmaceutical Manufacturers Association of SA and Another (supra); In *Re Ex Parte President of the Republic of South Africa and Others* (2000) [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) where it was held that the exercise of all public power must comply with the *Constitution*, and any action taken without proper authority or in bad faith is invalid. The court emphasized that the rule of law is a fundamental principle of the *Constitution*, and abuse of power by public officials violates this principle.

58. Other South African decisions cited for the same argument are *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (SARFU case) (1999) [1999] ZACC 9; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC); *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* (2005) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2005 (3) BCLR 292 (CC); *Affordable Medicines Trust and Others v Minister of Health and Another* (2005) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC). Besides the South African decisions, the 1st interested party also cited the Canadian decisions of *Roncarelli v Duplessis* (1959) [1959] SCR 121; *Operation Dismantle v The Queen* (1985) Citation: [1985] 1 SCR 441; . *Baker v Canada (Minister of Citizenship and Immigration)* (1999) [1999] 2 SCR 817; *Canada (Attorney General) v Bedford* (2013) Citation: [2013] 3 SCR 1101; and, 5. *Vavilov v Canada (Citizenship and Immigration)* (2019) Citation: [2019] 4 SCR 653.

59. The 1st interested party also cited host of other Canadian decisions for the argument thatarbitrary suspension of rights can erode public trust in law enforcement and government institutions, leading to increased social unrest and loss of legitimacy. It can also escalate social unrest, particularly when the affected group, such as the KMPDU membership, is engaged in lawful industrial action to address grievances.

60. Public trust and the integrity of government actions are crucial themes in Canadian jurisprudence and the Supreme Court of Canada has addressed these issues in several landmark cases, emphasizing transparency, accountability, and the preservation of public trust. Amongst the cases cited in this regard are *Roncarelli v Duplessis* (1959) [1959] SCR 121; . *R. v Morgentaler* (1988) Citation: [1988] 1 SCR 30; *Canada (Attorney General) v Bedford* (2013) Citation: [2013] 3 SCR 1101; *Reference re Secession of Quebec* (1998) [1998] 2 SCR 217; 5. *Dunsmuir v New Brunswick (2008) Wabomba Masinde and*

Associates - [2008] 1 SCR 190; and, *Vavilov v Canada (Citizenship and Immigration)* (2019) [2019] 4 SCR 653.

61. In conclusion, the 1st interested urged that the abuse of power, strikes at the very heart of our democracy and the rule of law. It is not merely a breach of duty; it is an affront to the very foundations upon which our society is built. Power, entrusted to public officials, is not a privilege but a sacred responsibility and, therefore, it must be exercised with utmost integrity, transparency, and in strict adherence to the principles of justice and fairness. When this power is abused, it erodes public trust, undermines the rule of law, and inflicts harm upon those it was meant to protect.

Analysis and determination.

62. In the absence of an affidavit or any sort of response from the respondent to controvert the applicants' allegations of facts, I am entitled to proceed on the presumption that the foundational facts upon which this application is based are as deposed by the applicants and the 1st interested party.

63. Central to this application is, first, the fact that on 28 or 29 February 2024, the police perpetrated violence against KMPDU members during their peaceful demonstration. Dr. Davji Atela, the KMPDU secretary general was injured by a teargas canister fired by the police during the demonstration on the material date. Second, on 14 April 2024 the respondent purported to suspend the KMPDU members' right under articles 36, 37 and 41 of the *Constitution*, more particularly, the KMPDU members' right to strike, assemble, protest, or picket peaceably and unarmed and stated in categorical terms that he had directed Police Commanders to "deal firmly and decisively" with the striking and picketing the KMPDU members.

64. In proof of this fact, Mr. Malombe exhibited to his affidavit a copy of the press statement issued by the respondent expressing his discontent with the applicants' conduct and cautioning them of the police response if they did not desist from the demonstrations which the respondent described as "a threat to public safety and security". It is worthwhile reproducing the statement here in its entirety for better understanding. It reads as follows:

> " Office of the Inspector General
>
> National Police Service
>
> Press Statement
>
> National Police Service Headquarters
>
> For Immediate Release
>
> Statement on strike by Doctors and Clinical Officers
>
> The National Police Service takes cognizance of the ongoing doctor's strike, with utmost concern. The service has witnessed and received reports of the inconveniences arising from the strike, with medics lying on the streets thus obstructing highways, public roads and disrupting free flow of vehicles and movement of people.
>
> The medics have become a public nuisance, blowing whistles and vuvuzelas during the demonstrations thus causing discomfort to patients in hospitals and general public.
>
> Contrary to the constitutional provisions on the right to picket, petition or demonstrate, the medics continue to engage in demonstrations without notifying the police. Yet, we have information that non-medics with intention to cause havoc and terror to the public

intended to join the ongoing processions, a move that poses a threat to public safety and security.

In the interest of national security therefore, all respective police commanders have been instructed to deal with such situations firmly and decisively in accordance with the law. We wish to caution all doctors to refrain from infringing on the rights of others while demonstrating, and that their efforts to disrupt smooth operations of hospitals will not be tolerated.

We wish to assure the public that our country is safe, and that the National Police Service remains committed to maintaining law and order.

Signed

IG Japhet Koome, MGH,EBS, ndc (k)

Inspector General,

National Police Service &

President of Afripol General Assembly

April 14,2024."

65. The respondent's conduct as expressed in the violence meted out on KMPDU members as a result of which their secretary general was injured and, subsequently, his press statement issued on 14 April 2024 need to be weighed against the constitutional and statutory provisions on the KMPDU members' rights and the respondent's obligation to not only respect those rights but also to protect them.

66. With this perspective in mind, the applicants' application brings into focus the question of whether the executive can, in the first place, interfere with certain individual constitutional rights and, if so, the extent to which it may interfere. The constitutional rights brought to the fore and about which the applicants are concerned are specifically, their right associate which, of course, necessarily constitutes the right to form, join or participate in the activities of an association of any kind. Coupled with this right is the right to assemble, picket and present petitions to authorities. The application also brings to the fore the right to fair labour practices including the right to form, join or participate in the activities and programs of a trade union.

67. These rights are respectively expressed in articles 36, 37 and 41 of the *Constitution* as follows:

36. (1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

(2) A person shall not be compelled to join an association of any kind.

(3) Any legislation that requires registration of an association of any kind shall provide that—

(a) registration may not be withheld or withdrawn unreasonably; and

(b) there shall be a right to have a fair hearing before a registration is cancelled.

37. Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.

41.(1) Every person has the right to fair labour practices.

(2) Every worker has the right—

(a) to fair remuneration;

(b) to reasonable working conditions;

(c) to form, join or participate in the activities and programmes of a trade union; and (d) to go on strike.

(3) Every employer has the right—

(e) to form and join an employers organisation; and

(f) to participate in the activities and programmes of an employers organisation.

(4) Every trade union and every employers' organisation has the right—

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

68. These rights are amongst a cluster of rights in the Chapter Four of the *Constitution* recognised as not only inherent in every individual but are also an integral part of Kenya, as a democratic state. The rights guaranteed are rights already possessed and enjoyed by the individual; they are neither created by the Bill of Rights nor given by the state. They are the benchmark for the state's social, economic and cultural polices. Article 19(2) of the *Constitution* states that these rights are recognised and protected because they are 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 realisation of the potential of all human beings can be promoted.

69. The question that then follows is this: from whom are these rights to be protected?

According to B.O. Nwabueze, in his book, Constitutionalism in the Emergent States (at page 34), almost every executive act bears directly or indirectly upon citizens and, in order to protect the individual from the excesses of the state, there is an established principle that the executive has no inherent discretionary power to act against the citizen. The Bill of Rights embraces this principle.

70. According to the learned author, this principle was applied by the Privy Council as early as 1931 in *Eshugbayi Eleko v Officer Administering the Government of Nigeria and Another* (1931) AC 662. In that case, the Officer Administrating the Government of Nigeria, which was then a British Colony, purported to depose and deport Chief Eshygbayi Eleko under the Deposed Chiefs Removal Ordinance. In holding that the Governor had no such authority, the Privy Council held as follows:

> " Prima facie deposition with the sanction appears to point to deposition by some authority other than the Governor which would only become effective when sanctioned by the Governor: in which case it would appear that a valid deposition by the appropriate authority would be necessary as well as the sanction by the approving authority."

71. Reiterating that the executive can only exercise power which it has been bestowed with, the Privy Council held that:

> " The Governor acting under the Deportation Ordinance acts solely under executive powers, and in no sense as a court. As the executive he can only act in pursuance of the powers given to him by law.
>
> In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his actions before a court of justice. And it is the tradition of British justice that courts should not shrink from deciding such issues in the face of the executive." (per Lord Atkin).

72. In Kenya, it is not just a question of jurisprudence that the individual's right to liberty or property, or to any other right in the Bill of Rights, for that matter, should not be interfered with. It is a constitutional imperative that such rights must and ought not to be interfered with and may only be limited as provided by law. Article 24 of the *Constitution* lays out the circumstances under which these limitations may apply. It reads 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;

(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.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service–

(a) Article 31—Privacy;

(b) Article 36—Freedom of association;

(c) Article 37—Assembly, demonstration, picketing and petition;

(d) Article 41—Labour relations;

(e) Article 43—Economic and social rights; and

(f) Article 49—Rights of arrested persons.

73. 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 authorised by law but it must also keep strictly within the scope of that authority.

74. This means that 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. A fortiori, a subordinate officer of the government who has committed a contravention of the law cannot plead in defence that he can acted upon the orders of the government. The government and its officers enjoy no special dispensation or immunity from the ordinary laws of the land. Neither can the executive give itself the necessary legal authority to interfere with private rights. (See *Nwabueze* (supra) at page 35).

75. As far as the respondent is concerned, his office is among those recognised as security organs in Chapter 14 of the *Constitution*, on National Security. According to article 239, the other two organs are the Kenya Defence Forces and the National Intelligence Service. Article 239 (2) is express that the primary object of the national security organs and security system is to promote and guarantee national security in accordance with the principles mentioned in Article 238(2). In order to understand the context of these principles, it is necessary to reproduce here, in its entirety, article 238 of the *Constitution*. It reads as follows:

238. Principles of national security

(1) National security is the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.

(2) The national security of Kenya shall be promoted and guaranteed in accordance with the following principles—

(a) national security is subject to the authority of this Constitution and Parliament;

(b) national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;

(c) in performing their functions and exercising their powers, national security organs shall respect the diverse culture of the communities within Kenya; and

(d) recruitment by the national security organs shall reflect the diversity of the Kenyan people in equitable proportions.

76. Besides these principles, it is reiterated in article 239 (3) that in performing their functions and exercising their powers, the national security organs and every member of the national security organs shall not, inter alia, act in a partisan manner. Further, in execution of their functions, they must submit to the dictates of the *Constitution* and comply with the law, respecting its rule, democracy, human rights and fundamental freedoms.

It is apparent from these provisions that national security organs have the obligation of not just protecting the people of Kenya but their rights and freedoms as well.

77. Further, section 10 (4) of the *National Police Service Act*, cap. 84 which has been enacted to give effect to articles 243, 244 and 245 of the *Constitution* states that in the performance of functions set out under the *Constitution*, the *National Police Service Act* or any other law, the Inspector-General shall not just have all the necessary powers for the performance of such functions but, in exercising them, he is under obligation to uphold the national values, principles and objects set out in Articles 10, 232 and 244 of the *Constitution*.

78. 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.

79. Considered from the foregoing perspective, the unprovoked police action of violently breaking up the KMPDU's members' peaceful and unarmed demonstration in exercise of their constitutional right to assemble, demonstrate, picket and present their petitions and, in the process, hurting Dr. Atelu was an act that contravened articles 36, 37 and 41 of the *Constitution*. It was not act that is within the limitations circumscribed in article 24 and neither could it be justified under any written law.

80. Although, in his press statement of 14 April 2024, the respondent warned of 'firm and decisive' action against the striking KMPDU members, ostensibly because the National Police Service had "received reports of the inconveniences arising from the strike, with medics lying on the streets thus obstructing highways, public roads and disrupting free flow of vehicles and movement of people" there is no evidence that the violence visited upon KMPDU members' earlier, more particularly in February 2024, was informed by such information.

81. In the absence of any reason or any valid reason why the police violently broke up the KMPDU members' demonstration, it can only be assumed that the purported reports of the "inconveniences arising from the strike, with medics lying on the streets thus obstructing highways, public roads and disrupting free flow of vehicles and movement of people" and the allegation that the "medics have become a public nuisance, blowing whistles and vuvuzelas during the demonstrations thus causing discomfort to patients in hospitals and general public" were only meant to lay ground for further unprovoked and unwarranted disruption of the KMPDU members' exercise of their rights under articles 36, 37 and 41 of the *Constitution*.

82. The reason that the police had information that "non-medics with intention to cause havoc and terror to the public intended to join the ongoing processions" which, according to the respondent, posed a threat to public safety and security, is not also plausible because, no proof or basis of such, rather alarmist report was provided by the respondent. Secondly, according to Chapter V of the *Interantional Labour Organization's (ILO) Freedom of Association* and Protection of the Right to Organise Convention, 1948 (No.8) strike picketing is aimed at ensuring the success of a strike by persuading as many persons as possible to stay away from work.

83. Thus, although on the face of it the statement appears to have been an innocent communication from the respondent's office, in truth, and going by what had transpired in February 2024 when the police descended upon KMPDU members and violently broke up their demonstration, the statement is laced with veiled threats against further demonstrations by the KMPDU members in exercise of their right to picket. I interpret the respondent's statement that "all respective police commanders have been instructed to deal with such situations firmly and decisively in accordance with the law" to have been no more than a threat to disrupt the KMPDU members' demonstrations and to subdue their resolve.

84. If at all the respondent had any information that "non-medics" intended to join the strike to cause havoc and terror, it was incumbent upon him to arrest such elements and foil any attempts to cause the alleged havoc or terror without necessarily interfering with the KMPDU members' rights under articles 36,37 and 41 of the *Constitution*. I need not belabour the point that under Article 38 of the *Constitution*, protection of the people of Kenya and their rights and freedoms is a vital component of the principles of National security.

85. And as much as the respondent may have been aware of the infiltration of the KMPDU members' demonstration with characters that were out to cause chaos, he had the constitutional obligation to ensure national security "in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms" as he ought to under article 238 (2)(b). No doubt, the human rights and fundamental freedoms to which reference is made include the KMPDU members' rights under articles 36, 37 and 41 of the *Constitution*. Under our constitution, it is possible for the respondent and the police under his command to maintain law and order even as the citizens exercise their rights under articles 36, 37 and 41 of the *Constitution*.

Command responsibility.

86. The next issue to which my attention has been drawn is whether the respondent ought to be held personally responsible for the acts of the officers under his command under the doctrine of command responsibility. In particular, the applicants seek to hold the respondent personally accountable for the injury sustained by Dr. Atela when the officer lobbed a teargas cannister at him during the KMPDU members' demonstrations on 28 February 2024.

87. The applicants' case in this respect is based on their argument that the respondent issued unconstitutional orders and directives to officers under his command to use what turned out to be excessive and unlawful force to break up what was otherwise a peaceable and unarmed assembly of KMPDU members exercising their constitutional right to protest and picket under articles 36,37 and 41 of the *Constitution*.

88. The second limb of their submissions is that the respondent effectively abdicated his responsibility of effective control of police officers under his command who violated the *Constitution*. The respondent is said to have failed to take any measure towards investigating and disciplining officers who violated the *Constitution* by employing unlawful force to disperse peaceable and unarmed strikes, assemblies, protests and pickets contrary to articles 36,37 and 41 of the *Constitution*.

89. In support of the applicants' argument to hold the respondent personally accountable under the doctrine of command responsibility, the applicants have cited cases where this doctrine has been applied one of which is *Republic v University of Nairobi ex Parte Michael Jacobs Odhiambo & 7 Others* (supra). In this case, the court is said to have cited Justice Bakone Moloto, in his article "Command Responsibility in International Criminal Tribunals", 3. Berkeley J. Int'l Law. 1 (2009).12 at page 15, where the learned judge stated that one can be held criminally responsible under the doctrine of command responsibility for an international crime if, first, there is in existence a superior-subordinate relationship between the accused as the superior and the perpetrator of the crime as his subordinate; second, the superior must have known that the crime was about to be committed or that had been committed; and, third, the superior failed to take the necessary and reasonable measures to prevent the criminal acts or punish the perpetrators.

90. The learned judge noted further as follows:

> " Superior-subordinate relationship
>
> The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his or her subordinates. In this respect, a military hierarchy is not required, the ICTY, the ICTR, and the Special Court have all held that the doctrine of command responsibility applies not only to military commanders, but also to political leaders and other civilian superiors in possession of authority. It is also not necessary that a formal, de jure subordination exist. A superior position for purposes of command responsibility can be based on de facto powers of control. Furthermore, the perpetrator does not need to be directly subordinated to the superior but can be several steps down the chain of command. At least in the military context, command responsibility applies to every commander at every level of command, even if the troops were only temporarily commanded by the superior.
>
> What matters is whether the superior has actual powers to control the actions of his or her subordinates. To determine this, all three aforementioned tribunals apply the "effective control" test, which aims to determine whether the superior has "the material ability to prevent and punish criminal conduct." If a superior has this ability, then there is a legal basis for command responsibility. Lesser degrees of control, however, for example "substantial influence," do not incur command responsibility.
>
> In determining whether the "effective control" test had been satisfied, a tribunal must consider the evidence of each particular case. There are, however, factors that may be generally indicative of an accused' position of authority. Some indicia of authority include: the accused's official position, his or her capacity to issue orders, the procedure for appointment, the accused's position in the military or political structure, and the actual tasks that he or she performed. In cases of irregular armed groups with less formal structures, it becomes more important to focus on the superior's de facto authority."

91. The other case cited by the applicants in support of holding the respondent culpable for acts of the officers under him is *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo* (Appeals Chamber) IT-96-21-A (ICTY).

92. As the cited article and cases suggest, the doctrine of command responsibility appears to be more pronounced in international criminal tribunals. In the International Criminal Tribunal for Rwanda Statute, for example, the doctrine is covered in article 6(3) and (4) thereof. This article reads as follows:

> " Command Responsibility (Article 6(3))
>
> a) Statute
>
> Article 6:
>
> "3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."
>
> "4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires."

93. The acts referred to in articles 2 to 4 are, of course crimes against humanity and included such crimes as genocide, murder, torture, rape persecution on political, racial and religious grounds and other inhuman acts.

94. The Tribunal in *Prosecutor v Bagilishema*, Case No. ICTR-95-1A-T (Trial Chamber), June 7, 2001, explained the elements of the doctrine of command responsibility in article 6 of the Statute to comprise "(i) the existence of a superior-subordinate relationship of effective control between the accused and the perpetrator of the crime; and, (ii) the knowledge, or constructive knowledge, of the accused that the crime was about to be, was being, or had been committed; and, (iii) the failure of the accused to take the necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrator."

95. The superior-subordinate relationship was explained in *Prosecutor v Semanza*, Case No. ICTR-97-20 (Trial Chamber), May 15, 2003 to be "a relationship which requires a formal or informal hierarchical relationship where a superior is senior to a subordinate."

96. As to whether the doctrine would apply to a civilian set-up such as the police as contrasted to the rank and file of a military command, the Tribunal held that "the relationship is not limited to a strict military command style structure" and that "Article 6(3) provides that civilian leaders may incur criminal responsibility for acts committed by their subordinates or others under their 'effective control." (see *Prosecutor v Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10 & ICTR-96-17-T (Trial Chamber), February 21, 2003.

97. On what "effective control" entails, it was held in *Prosecutor v Kayishema and Ruzindana*, Case No. ICTR-95-1-A (Appeals Chamber), June 1, 2001, that it is where "the superior has effective control over the persons committing the [crimes], in the sense of having the material ability to prevent and punish the commission of these offences." The ability to prevent and punish a crime being a question that is inherently linked with the given factual situation.

98. The Tribunal also held in Bagilishema (supra) that command responsibility is not based on strict liability. It held: "As to the mens rea, the standard that the doctrine of command responsibility establishes for superiors who fail to prevent or punish crimes committed by their subordinates is not one of strict liability"

99. No doubt, as is the case with similar statutes for trial of international crimes, the *International Criminal Tribunal for Rwanda Statute*, was specific to a particular set of circumstances or situation. Nonetheless, the application of those statutes offer a guide to the understanding and application of certain concepts and doctrines such as the doctrine of command responsibility, the application of which is certainly not restricted to any particular statute or tribunal. The concept is of universal character except that, as noted, it is more pronounced in international criminal tribunals.

100. That said, with or without this doctrine, the constitutional and statutory provisions with respect to the respondent's office, read in their entirety point to the conclusion that the Inspector General of Police bears the responsibility of the actions of the officers under his command. In article 245 (2) (b) of the *Constitution*, for instance, the Inspector-General exercises independent command over the National Police Service. Article 245(1) and (2) reads as follows:

245. Command of the National Police Service

(1) There is established the office of the Inspector-General of the National Police Service.

(2) The Inspector-General—

(a) is appointed by the President with the approval of Parliament; and

(b) shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.

101. Section 8 of the *National Police Service Act* is also clear that the National Police Service is under the command of the Inspector General and even in a case where he has delegated tasks that would otherwise be performed by himself, he is not thereby divested of the responsibility of the exercise of powers or the duties delegated. The section reads as follows:

8. Command of the Service

(1) The Service shall be under the overall and independent command of the Inspector-General appointed in accordance with Article 245 of the *Constitution* and the provisions of this Act.

(2) The Inspector-General may perform the functions or exercise the powers of the office in person or may delegate to an officer subordinate to him.

(3) A delegation under this Act—

(a) shall be in writing;

(b) shall be subject to any conditions the Inspector-General may impose;

(c) shall not divest the Inspector-General of the responsibility concerning the exercise of the powers or the performance of the duty delegated, and

(d) may be withdrawn, and any decision made by the person so delegated may be withdrawn or amended by the Inspector-General.

(4) The Inspector-General shall give direction in situations of conflict between the different mandates of the different Services and units within the Service (Emphasis added).

102. The extent of the Inspector General's responsibility as one in whom the command of the police service vests is also explicit in section 8 A of the *National Police Service Act*. This section reads as follows:

8A. Inspector General to be responsible for matters relating to command and discipline of the service

(1) Notwithstanding the provisions of any written law, independent command of the Inspector-General in relation to the Service envisioned in Article 245(2)(b) and section 8 of the Act, means that the Inspector-General shall be responsible for all matters relating to the command and discipline of the Service subject to disciplinary control of the Commission.

(2) The Inspector-General shall exercise Command over the National Police Service and lawfully administer, control and manage the National Police Service as a disciplined Service.

(3) The Deputy Inspector-General's of Kenya Police and Administration Police under the direction of the Inspector-General shall command, control and administer the service for which he or she is responsible.

(4) The Inspector-General shall execute command by issuing lawful orders, directives or instructions to and through the Deputy Inspectors General;(5)The Cabinet Secretary may lawfully give a direction in writing to the Inspector-General with respect to any matter of policy for the National Police Service.

Further, section 10 (1)(c) of the same Act states that among the functions of the Inspector General is that of coordinating all police operations.

103. Irrespective of whether these provisions are considered from the perspective of the doctrine of command responsibility, or any other doctrine, by whatever name called, they all lead to the conclusion that, where, as in the instant case, the Inspector General violently descends upon members of the public exercising their rights to assemble and express themselves in a manner endorsed by the *Constitution* in the Bill of Rights, to curtail or in any other way to disrupt their appropriation of these rights, he will thereby be held accountable and personally responsible for the consequences that may inevitably ensue. The buck stops with him, so to speak.

104. I am minded that under section 66 (1) of the *National Police Service Act*, "no matter or thing done by a member, employee or agent of the Service shall, if the matter or thing is done in good faith for the performance and execution of the functions, powers or duties of the Service, render the officer, employee or agent personally liable to any action, claim or demand whatsoever".

105. However, according to section 66(2) of the same *Act*, a person is not precluded from bringing legal proceedings against the Inspector-General in respect of an act or omission of the kind referred to in subsection (1) as long as the aggrieved party can satisfy the court that the police officer or other person would, but for that subsection, have incurred liability for the act or omission.

106. In any event section 66 of the *National Police Service Act*, and indeed the entire Act is subject to the *Constitution* and none of its provisions can be read or interpreted as abrogating the inherent and inalienable rights in the Bill of Rights.

Conclusion

107. In conclusion, and turning back to the issues identified for determination, I hold that for the reasons I have proffered, the respondent's decision of 14 April 2024 limited the KMPDU members' rights under articles 36, 37, and 41 of the *Constitution*. In the same breath, the decision violated the rights provided for under article 36, 37 and 41 of the *Constitution*. Accordingly, the decision was not justifiable in terms of article 24(1) of the *Constitution*.

108. The decision was also tainted on the judicial review grounds of illegality, irrationality and procedural impropriety. It was tainted on the ground of illegality to the extent the decision coupled with the events that transpired in February 2024 were ultra vires the *Constitution* and, in particular, contrary to articles 36, 37 and 41 of the *Constitution*.

109. And going by the definition of the ground of illegality given by Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] A.C. 374,410 it is apparent from the respondent's conduct that he did not understand correctly the constitutional and statutory provisions regulating the functions of his office, his powers in general and his decision-making power, in particular and that, as far as the KMPDU members rights are concerned he never gave effect to these provisions.

110. As far as the ground of irrationality is concerned, I also take cue from Lord Diplock's definition of this ground in the cited decision and hold that a person in the station of the respondent, at the time material to this suit, could not have possibly reached the same decision that the respondent made. The fact that the decision of 14 April 2024 was made weeks after the respondent violently disrupted the KMPDU members' demonstration for no apparent reason, qualifies the decision to be amongst the category of decisions that would properly be described as being outrageous in their defiance of logic or of accepted moral standards.

111. Again, borrowing from Lord Diplock's definition of the ground of procedural impropriety, I am satisfied the respondent's decision was bereft of procedural fairness towards the KMPDU members. The decision deprived them of their rights yet they were never given any opportunity to be heard prior to the making of the decision. The respondent failed to observe the basic statutory requirements expressed in the *Fair Administrative Action Act* of making a decision that was likely to be prejudicial to the parties affected by it.

112. As to whether the respondent can be held criminally responsible for the acts of officers under his command in violently disrupting KMPDU members' peaceful assembly, demonstration or picketing or other forms of expression consistent with the exercise of their rights under articles 36, 37 and 41 of the *Constitution* as result of which Dr. Devji Atelu was injured, the answer is in the affirmative. The respondent could, and can properly be subjected to a criminal trial for the acts or omissions of the officers under his command if those acts or omissions fit the description of offences as defined in law.

113. Except for the prayer for the structural interdict which demands of this Honourable Court, in exercise of its judicial review jurisdiction, to supervise certain actions to be taken by the Inspector General; and, the prayer for damages to be paid to Dr, Atela as compensation for the injuries he sustained but which this Honourable Court cannot grant for the reason it is not able to assess the damages payable in the absence of any evidence of the extent of the injuries sustained, the rest of the applicants' prayers are allowed, more particularly in the following terms:

    1. A Prohibition order is hereby issued restraining the Inspector General of the National Police Service, or any other officer subordinate to him, from enforcing the respondent's decision of

14 April 2024 purporting to suspend Articles 36, 37 and 41 of the *Constitution* by cancelling KMPDU members' right to strike and to picket peaceably and unarmed.

2. The order of certiorari is hereby granted removing to this Honourable Court for purposes of being quashed the respondent's decision dated 14 April 2024 purporting to suspend articles 36, 37 and 41 of the *Constitution* by cancelling KMPDU members' right to strike and to picket peaceably and unarmed. For the avoidance of doubt, the decision is hereby quashed.

3. A declaration is hereby made that, under articles 238,239(3) and 245(2)(b); and, sections 8,8A and 10(4) of the *National Police Service Act*, cap. 84, the Inspector General of National Police Service, is accountable and personally liable for the acts or omissions of officers under his command infringing on the rights of the individual under articles 36, 37 and 41 of the *Constitution* and, in particular:

    a) in issuing unconstitutional orders and directives to officers under his command to use unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets under Articles 36, 37, and 41 of the *Constitution*.

    b) abdicating effective control of police officers under his command by failing to investigate and discipline officers who violate the *Constitution* by using unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets contrary to articles 36, 37, and 41 of the *Constitution*.

4. The applicants will have the costs of the suit which shall be paid by the respondent, personally, from his own sources.

It is so ordered.

DATED, SIGNED AND UPLOADED ON CTS ON 31 DECEMBER 2024

NGAAH JAIRUS

JUDGE