**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA AT NAIROBI**
**CONSITUTIONAL AND HUMAN RIGHTS DIVISION**
**PETITION NO. 120 OF 2020 (COVID 025)**

**LAW SOCIETY OF KENYA……PETITIONER**

**-VERSUS-**

**HILLARY MUTYAMBAI, INSPECTOR GENERAL NATIONAL POLICE SERVICE……1ST RESPONDENT**
**FRED MATIANGI, CABINET SECRETARY FOR INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT…..…2ND RESPONDENT**
**ATTORNEY GENERAL……3RD RESPONDENT**
**THE HON. CHIEF JUSTICE……..4TH RESPONDENT**
**MUTAHI KAGWE, CABINET SECRETARY FOR HEALTH……..5TH RESPONDENT**

**-AND-**

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS……1ST INTERESTED PARTY**
**FIDA-KENYA…….....2ND INTERESTED PARTY**
**INDEPENDENT POLICE OVERSIGHT AUTHORITY (IPOA)……3RD INTERESTED PARTY**
**LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA.....4TH INTERESTED PARTY**

**JUDGEMENT**

1. Sometime in November 2019 a virus which has since been baptised novel coronavirus reared its ugly head in Wuhan, Hubei Province in China. Once the virus enters the human body it causes a disease known as Covid-19. Due to its highly communicable nature, the virus rapidly spread in Wuhan before crossing international borders.

2. Kenya reported its first case of the disease on 13th March, 2020. According to Worldometer (https://www.worldometers.info) as at 19.40GMT on 15th March, 2020, the infections were 2, 069,246. 133, 359 persons had died from the Covid-19 disease. By that time, Kenya had recorded 225 infections, 10 deaths and 53 recoveries.

3. The Kenyan Government has put in place various measures in an attempt to halt or slow the relentless march of the virus. One of steps taken is the imposition of a night curfew published as Legal Notice No. 36 - The Public Order (State Curfew) Order, 2020 under the Public Order Act, Cap. 56. The Legal Notice, which will henceforth be referred to as the Curfew Order, is the subject of these proceedings.

4. The Petitioner, the Law Society of Kenya, is a statutory body established under Section 3 of the Law Society Act, 2014 and mandated by Section 4, *inter alia*, to protect and assist the public in Kenya in all matters touching, ancillary or incidental to law; and to assist the Government and the courts in all matters affecting legislation and the administration and practice of law in Kenya. The Petitioner has approached this court through the petition dated 30th March, 2020 and an application by way of notice of motion filed together petition.

5. Hillary Mutyambai, Inspector General National Police Service is the 1st Respondent. Fred Matiang'i, Cabinet Secretary for Interior and Coordination of National Government is the 2nd Respondent. The 3rd Respondent is the Attorney General and the 4th Respondent is the Chief Justice. Mutahi Kagwe, Cabinet Secretary for Health is the 5th Respondent. The Kenya National Commission on Human Rights (KNCHR), FIDA-Kenya, Independent Police Oversight Authority (IPOA), and Legal Advice Centre T/A Kituo Cha Sheria are the respective 1st to 4th interested parties.

6. It is noted for record purposes that the 4th Interested Party joined these proceedings upon application and with the consent of all the parties on 2nd April, 2020. It is further noted that although on the face of the pleadings FIDA-Kenya is named as the 2nd Interested Party, the Petitioner at the first paragraph 10 of the petition (the petition has two paragraphs 10) states that Katiba Institute is the 2nd Interested Party. Be that as it may, FIDA-Kenya was swerved as the 2nd Interested Party and robustly participated in the proceedings and I have no doubt in my mind that FIDA-Kenya is indeed a necessary party in these proceedings.

7. When the application for conservatory orders was placed before the court on 30th March, 2020, the court allowed a few of the prayers *ex parte* and listed the application for *inter partes* hearing on 2nd April, 2020. On 2nd April, 2020, the advocates for the parties agreed that the application be subsumed under the petition so that the court could directly proceed to hear and determine the petition.

8. The reliefs sought in the petition are:-

**a) A DECLARATION be and is hereby issued that the *Public Order (State Curfew) Order, 2020* dated *26th March, 2020* is unconstitutional and of no legal effect:**

**b) A DECLARATION be and is hereby issued:**

**(i) that the 1st Respondent's unreasonable use of force in enforcing the curfew is unconstitutional and;**

**(ii) holding the 1st Respondent personally liable for the unreasonable use of force in the enforcement of the curfew order.**

***c)* A DECLARATION be and is hereby issued that pursuant to *article 43 of the Constitution,* Kenyans and every other person are entitled to the highest attainable standard of health and**

**consequently, an ORDER is hereby issued directing the Cabinet Secretary in Charge of Health to exercise his powers under section 36 of the Public Health Act, and issue proper guidelines for curfew, quarantine, containment of COVID-19 Coronavirus that specifies *inter alia:***

i. **Testing kits: Numbered by type, percentages by turnaround time or technology used e.g. point of care and how many testing kits have been delivered to various designated testing facilities, within the Republic of Kenya;**

ii. **Facilities: Number of designated COVID-19 management facilities, distribution around the country, capacity to manage severe cases (number of beds, oxygen availability), capacity to manage critical cases (ICU capacity to serve cases of COVID-19, ventilator numbers), laboratory capabilities e.g. blood gas analysis, full metabolic screen and full electrolyte screen;**

iii. **Health workers: Number trained in each designated COVID-19 facility by cadre, evidence of team-based approaches in COVID-19 facilities e.g. number of ICU teams with nurses, general physicians and critical care**

**specialists. Number of health care workers deployed in every county;**

iv. **Resources: Publication of allocated, issued and expended financial and non-financial resources for COVID-19 responses, including resources from private, bilateral and multilateral sources;**

v. **Publication of previous and current COVID-19 response plans in newspapers of national circulation and ministry of health website;**

vi. **Clarity on strategic goals of current approaches, e.g. isolation, quarantine and testing strategies; for example, whether and why at risk populations are being urged to self-isolate; why quarantined persons are not being offered tests; and why tests are not available on a voluntary basis to all who have symptoms as done in other progressive jurisdictions;**

vii. **Information on the working conditions for persons providing essential health services, including health care workers, staff in quarantine facilities, and home-based care providers. This should include updates on training**

**provided; measures taken to mitigate occupational safety and health risks, insurance coverage; and availability of frontline healthcare worker shelters;**

viii. **Information on how communities will be included in efforts to reduce health risks, access care, and participate in prevention and treatment to slow down COVID-19 spread without undermining the critical role of biomedical and epidemiological interventions that have so far been implemented;**

ix. **The Ministry of Health utilises a neutral SMS platform that will extend to users outside of Safaricom. Communication is tailored to meet the needs of underserved populations, including people with disabilities;**

x. **Prioritise the information and communication needs of children and adolescents;**

xi. **The information listed under this ORDER should be published in newspapers of national circulation, ministry of health website and circulated in an easily accessible way.**

***d)*** **A DECLARATION be and is hereby issued that access to justice by Kenyans or the public vide the courts, the institution of the Judiciary and its processes, even in instances of public curfews or a state of emergency is necessary in a free and democratic society;**

***e)*** **A DECLARATION be and is hereby issued that, even in cases of a state of emergency or public curfews, the courts must operate so as to check against any excesses by the executive or any lawful body and reinforce the principles that there is no temporary suspension of the rule of law, nor does it authorise those in power to act in disregard of the principle of legality by which they are bound at all times;**

***f)*** **Any other relief that this Honourable Court may deem fit and just to grant in the interests of justice and/or that may become apparent and necessary in the course of these proceedings;**

***g)*** **The COSTS of this Petition be personally paid by the 1st and 2nd Respondents.**

9. In the notice of motion application the Petitioner seeks orders as follows:-

a) **THAT this APPLICATION and the annexed PETITION be certified URGENT and one that 'absolutely cannot wait' for resumption of regular court proceedings to commence;**

b) **THAT pending hearing and determination of this APPLICATION, a CONSERVATORY ORDER be and is hereby issued suspending the *Public Order (State Curfew) Order, 2020;***

c) **THAT in the alternative to b) above, pending the hearing of the APPLICATION and the PETITION a CONSERVATORY ORDER be and is hereby issued:**

i. **Extending the time of the start of the curfew from 7pm to 10:00pm or as the court may direct;**

ii. **Compelling the 1st Respondent, within 24 hours herewith, to publicize in newspapers of national circulation, and concurrently file in court for scrutiny, Guidelines on conduct of police officers enforcing the curfew order;**

iii. **Prohibiting the 1st Respondent from using unreasonable force in enforcing the curfew order; and holding the 1st Respondent personally liable for unreasonable use of force in enforcement of the curfew order against members of the public;**

iv. **Prohibiting the 1st Respondent from interfering with media coverage of the curfew; and**

v. **Including the justice system and legal representation in the list of essential services providers.**

**d) THAT pending the hearing and determination of the APPLICATION and the annexed PETITION, the 4th Respondent, *to wit*, the Chief Justice of the Republic of Kenya be ORDERED to, *inter alia*, appoint Judges and magistrates, as the case may be, to hear extremely urgent matters.**

**e) THAT pending the hearing and determination of this APPLICATION and the annexed PETITION, the 4th Respondent, *to wit*, the Chief Justice of the Republic of Kenya be ORDERED to, issue Practice Directions on Video or Audio Hearings during the Corona-virus Pandemic, and issue directions that proceedings are to be conducted wholly as video or audio proceedings and where it is not practicable for the hearing to be broadcast in a court building, the court may direct that the hearing take place in private where it is necessary to do so to secure the proper administration of justice.**

**f) THAT pending the hearing and determination of this APPLICATION and the PETITION, an ORDER be and is hereby issued directing the 5th Respondent, *to wit* the Cabinet Secretary in Charge of Health to exercise his powers under section 36 of the *Public Health Act* and all relevant legislation, and issue proper guidelines for the curfew, quarantine and/or containment of COVID-19 Coronavirus; which Guidelines specify, *inter alia*:**

**i. Testing kits: Numbered by type, percentages by turnaround time or technology used e.g. point of care and how many testing kits have been delivered to various designated testing facilities, within the Republic of Kenya.**

**ii. Facilities: Number of designated COVID-19 management facilities, distribution around the country, capacity to manage severe cases (number of beds, oxygen availability), capacity to manage critical cases (ICU capacity to serve cases of COVID-19, ventilator numbers), laboratory capabilities e.g. blood gas analysis, full metabolic screen and full electrolyte screen.**

**iii. Health workers: Number trained in each designated COVID-19 facility by cadre, evidence of team-based approaches in**

**COVID-19 facilities e.g. number of ICU teams with nurses, general physicians and critical care specialists. Number of health care workers deployed in every county.**

iv. **Resources: Publication of allocated, issued and expended financial and non-financial resources for COVID-19 responses; including resources from private, bilateral and multilateral sources.**

v. **Publication of previous and current COVID-19 response plans in newspapers of national circulation and Ministry of Health website.**

vi. **Clarity on strategic goals of current approaches, e.g. isolation, quarantine and testing strategies; for example, whether and why at risk populations are being urged to self-isolate; why quarantined persons are not being offered tests; and why tests are not available on a voluntary basis to all who have symptoms as done in other progressive jurisdictions. In addition the 5th Respondent should provide:**

a) **Information on the working condition for persons providing essential health services, including health care workers, staff in quarantine facilities, and home-based care providers. This**

**should include updates on training provided; measures taken to mitigate occupational safety and health risks, insurance coverage; and availability of frontline healthcare worker shelters.**

**b) Information on how communities will be included in efforts to reduce health risks, access care, and participate in prevention and treatment to slow down COVID-19 spread without undermining the critical role of biomedical and epidemiological interventions that have so far been implemented.**

**c) A neutral SMS platform that will extend to users beyond Safaricom subscribers. Communication is tailored to meet the needs of underserved populations, including people with disabilities.**

**d) Prioritisation of information and communication needs of children and adolescents.**

**e) That the information listed under this ORDER should be published in newspapers of national circulation, ministry of health website and circulated in an easily accessible way.**

**g) THAT in the view of the circumstances, service of the APPLICATION and the PETITION herewith be allowed through electronic means to wit, *e-mail* and *WhatsApp*, and the Court registry does inform the affected Parties on the directions and orders issued through the same means.**

**h) That the 1st and 2nd Respondents to personally bear the costs of these proceedings.**

10. The Petitioner's case is expressed through the petition; the notice of motion application; the supporting affidavit of Mercy Wambua; and submissions.

11. The Petitioner asserts that the Curfew Order is **"illegal, illegitimate and un-proportionate"** as it is **"blanket in scope and indefinite in length".** The Petitioner also contends that the Curfew Order does not contain any reasons or rationale for the curfew. Further, that it limits rights and ascribes penal consequences without any legitimate aim.

12. The Petitioner also asserts that the curfew order is *ultra vires* as it was established pursuant to Section 8 of the Public Order Act, Cap. 56 ("POA"), yet **"public health emergencies"** are governed by Section 36 of the Public Health Act, 2012 ("PHA").

13. Additionally, the Curfew Order is criticised for contravening Section 8 of the POA by failing to expressly provide for written permits and thus penalising vulnerable persons and persons who venture out strictly to perform essential services, obtain essential goods or services, or who seek emergency, lifesaving or chronic medical attention. It is alleged that the curfew has resulted in the arrest or terrorisation of persons performing or seeking essential services.

14. The Petitioner therefore faults the Curfew Order on three grounds: firstly, that there is no indication of the rationale for the curfew on its face hence failing the test under Article 24 of the Constitution that limitation of rights should be **"reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom"**; secondly, that it does not demonstrate what legitimate public health or other interest it seeks to achieve and the link between it and the legitimate aim; and thirdly, that it is blanket in scope and indefinite in length and is not the least restrictive measure. It is thus the Petitioner's case that the Curfew Order fails the three part test under Article 24 of the Constitution which requires any limitation of rights to be by law, in pursuit of a legitimate aim and proportionate. Further, that the respondents had the option under

Article 58 of the Constitution of declaring a state of emergency which will be subject to legislative and judicial oversight.

15. The Petitioner also contends that the coronavirus pandemic is not a *'crime'* or *'public order'* question but a *'public health emergency'* issue exclusively governed by Section 36 of the PHA. It is the Petitioner's case that issuing a curfew order under Section 8 of the POA as opposed to issuance of rules under Section 36 of the PHA has the purpose and effect of subjecting medical professionals and health workers to the direction and control of untrained police officers at great risk to public health. It is claimed that medical professionals and health workers who were on their way to and from work were among those teargassed and assaulted by the police.

16. The Petitioner states that while Section 8 of the POA contemplates exemption of persons **"in accordance with the terms and conditions of a written permit granted by an authority or person specified in the curfew order"**, this is not the case in the impugned Curfew Order. The Petitioner avers that as a result of this omission, the Curfew Order penalises vulnerable persons and persons who venture out strictly for purposes of performing an essential service, obtaining an essential service or item, or seeking emergency medical attention. Further,

that it makes no constitutional sense to exempt essential services like food retailers, pharmacies and supermarkets when public transport enabling the public to access these essential services is not included in the exemptions.

17. It is the Petitioner's case that the Curfew Order is contrary to Articles 49 and 50 of the Constitution as legal representation has been omitted from the list of essential services despite the fact that those arrested under the Curfew Order require legal representation.

18. It is the Petitioner's case that the Curfew Order has been abused. In support of the assertion it is averred that police officers had, in pursuance of the Curfew Order, violently assaulted vulnerable persons like pregnant women; bludgeoned providers of exempted services such as watchmen, supermarket workers, food truck drivers and medical personnel who were on the way from or to work; and recklessly congregated large crowds contrary to the advice by the World Health Organisation (WHO) on the need for social distancing in order to avoid coronavirus infection.

19. The Petitioner further asserts that the 1st Respondent prevented the media from monitoring the movement of police officers and assaulted journalists covering the operation.

20. The Petitioner deposes that it is impractical to comply with the curfew as 82.7% of Kenyans work in the informal sector and live from hand to mouth and have to work between 5.00am to 6.00pm. Further, that due to the poor public transport system, it is not possible for these Kenyans to shop for essentials, find transport and get home by 7.00pm.

21. It is the Petitioner's position that the respondents' actions and omissions have threatened the rights to health and life and that the orders sought will preserve the constitutional rights to fair trial, dignity, freedom from cruel and degrading treatment, life, health and limb.

22. It is the Petitioner's case that Kenyans are entitled to the highest attainable standards of health pursuant to Article 43 of the Constitution. According to the Petitioner, the primary objective of the scientific response to the Covid-19 outbreak is stopping human-to-human transmission of the virus and caring for those affected. Further, that the World Health Organisation (WHO) has urged countries to prepare for the detection, diagnosis and prevention of the further spread of the virus but it is not clear how the Curfew Order intends to achieve this objective.

23. The Petitioner avers that the Curfew Order also violates the rights of arrested persons under Article 49 of the Constitution as well as the right to fair hearing and fair trial under Article 50 of the Constitution as it excludes legal representation from the list of exempted services even though persons arrested during the curfew require legal representation. It is the Petitioner's position that persons arrested or detained as a result of the enforcement of the Curfew Order have no access to legal representation.

24. The Petitioner also contends that the teargassing, beating and use of unreasonable force on the public is a violation of the right to dignity under Article 28 of the Constitution as well as the right to security of the person and freedom from cruel and degrading treatment under Article 29 of the Constitution.

25. It is also important to highlight the averments contained in the affidavit sworn by the Petitioner's Chief Executive Officer in support of the petition and the application. In her affidavit which takes the form of submissions, Ms Wambua deposes that the first question that the court should consider is whether the Covid-19 outbreak is a public order question falling under the POA, or a public health question exclusively governed by Section 36 of the PHA. It is her

averment that if it is found that the pandemic is a public health concern then the impugned Curfew Order would be *ex facie* illegal as there would be no power to issue it under the POA.

26. Ms Wambua refers to the holdings in **Law Society of Kenya v Inspector General Kenya National Police Service & 3 others [2015] eKLR** (the **Lamu Curfew case**) and **Muslims for Human Rights (MUHURI) & 4 others v Inspector General of Police & 2 others [2014] eKLR** in support of her deposition that a curfew is one of the police devices for preventing and combating crime, and that it is a temporary "*stop gap measure*" used to enable security personnel to enter an area affected by crime and operate smoothly and calm the situation.

27. The Petitioner's Chief Executive Officer deposes that Section 8 of the POA legislates for the provision of a written permit from an authority specified in the curfew order, which requirement has not been complied with by the impugned Curfew Order. It is her view that this omission may result in the arrest of providers of essential services.

28. In support of the Petitioner's contention that the impugned Curfew Order is issued for unspecified reasons and is limitless in duration, Ms Wambua cites the case of **National Super Alliance (NASA) Kenya v**

**Cabinet Secretary for Interior and Co-ordination of National Government & 3 others [2017] eKLR** for the holding that a night time curfew cannot be indefinite. The fact that a state of emergency declared under Article 58 of the Constitution is time-bound is also cited in support of the proposition that since a constitutionally declared state of emergency is limited, then a curfew order cannot operate indefinitely. Further, that according to Article 58(7), the State cannot perform unlawful acts or omissions during a state of emergency. Ms Wambua consequently urges the court to allow the petition.

29. Since all the interested parties support the petition and the application, it is necessary to highlight their pleadings before stating the position taken by the respondents.

30. Dr. Bernard Mogesa, the Secretary/Chief Executive Officer of the 1st Interested Party swore an affidavit on 1st April, 2020 in support of the petition and the application. He starts by clarifying that KNCHR's support of the petition is to **"the extent that it seeks orders against interference with media coverage of the Curfew, the use of excessive force and demands accountability for use of such force in the enforcement of the Curfew."**

31. It is Dr. Mogesa's averment that the 1st Interested Party is empowered by Article 59(1)(d) of the Constitution to **"monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs."** Further, that the 1st Interested Party is empowered under Article 249(1)(b) & (c) of the Constitution to secure the observance by all State organs of democratic values and principles and to promote constitutionalism. It is also deposed that among the core functions of the 1st Interested Party is the investigation of complaints about abuse of human rights and securing of appropriate redress for any violations.

32. Turning to the substance of the petition, Dr. Mogesa avers that KNCHR had documented numerous instances of alleged violation of human rights by police officers under the command of the 1st Respondent. Further, that the violations had resulted in grievous injury and actual fatalities in Mombasa, Nairobi, Kwale and Migori.

33. Dr. Mogesa avers that KNCHR had specifically documented an incident in which a member of the public succumbed to injuries sustained as a result of assault by the 1st Respondent's officers along Ukunda-Likoni Road on 27th March, 2020. Further, that the deceased,

whose post-mortem report is annexed to the affidavit, was on his way back from hospital where he had taken a pregnant lady in need of emergency medical attention during the curfew hours. Dr. Mogesa additionally deposes that owing to the police brutality witnessed in the enforcement of the curfew, the deceased had suffered a slow and painful death as his relatives were afraid of rushing him to hospital within the curfew period.

34. It is further Dr. Mogesa's evidence that KNCHR also recorded incidences where police officers went into people's homes and brutally assaulted the occupants therein for being awake during the curfew hours. The 1st Respondent also refers to a directive to the 1st Respondent by the Director of Public Prosecutions to investigate the case of a 13 year old minor allegedly killed by police officers.

35. Dr. Mogesa cites Articles 10, 21(1) and 238(2)(1) of the Constitution in support of his averments that State officers and public officers are obligated to, *inter alia,* respect, protect and fulfil the rights and fundamental freedoms in the Bill of Rights; that it is a fundamental duty of the State and every State organ to, *inter alia,* respect, protect and fulfil the rights and fundamental freedoms in the Bill of Rights; and, that national security should be pursued in compliance with the

law and with utmost respect for the rule of law, democracy, human rights and fundamental freedoms. His position is that the Constitution has not been suspended and the respondents being State officers should comply with its provisions.

36. It is Dr. Mogesa's deposition that the incidences of police brutality and bludgeoning of helpless members of the public witnessed while implementing the curfew amounts to use of illegal, disproportionate and completely unnecessary force. Further, that the actions violate the inviolable and absolute rights to freedom from torture and cruel, inhuman or degrading treatment or punishment.

37. Dr. Mogesa avers that the 1st Interested Party does indeed understand and appreciate the unprecedented dilemma facing the entire international community and the need to comply with all reasonable measures taken by the government to protect the public from the coronavirus pandemic. The 1st Interested Party, nevertheless objects to the serious breach of the Constitution by police officers during the enforcement of the curfew.

38. The 2nd Interested Party supports the petition through the affidavit of its Executive Director, Anne W. Ireri. She commences by clarifying that FIDA-Kenya is not Katiba Institute as pleaded at paragraph 10

of the petition. Her averments are limited to the alleged use of excessive, unreasonable and unnecessary force by the police in the enforcement of the Curfew Order.

39. It is the 2nd Interested Party's case that officers from the National Police Service inhumanely handled women and children during the enforcement of the curfew. Incidents are highlighted as: the dispersal of crowds at the Likoni Channel before the curfew hours; the ordering of members of the public to lie down on the ground; and the brazen assault of defenceless women using whips and batons. These actions, she avers, not only endangered the health of the people by neglecting the social distancing directive issued by the Ministry of Health but also violated the victims' dignity.

40. Ms Ireri avers to the documentation by the 2nd interested Party's Mombasa office of the collapse of a woman by the name Khadija Hussein during the chaos at the Likoni Ferry Channel on 27th March, 2020. Further, that the woman has since developed high blood pressure. She also deposes to an incident in which one Yassin Moyoyo, a 13 year old boy succumbed to gunshot injuries sustained on 30th March, 2020 while police officers were enforcing the curfew at Kiamaiko area in Mathare, Nairobi City County. She further testifies

to other incidents of violation of the rights of women, children and persons with disabilities as reported in the press and as captured in a statement released to the press by the 3rd Interested Party.

41. Ms Ireri states that FIDA-Kenya is alive to the challenges that the Covid-19 pandemic has presented to the country but it is disturbed by the blatant disregard of fundamental human rights, especially of women, children and persons with disabilities. According to her, it is imperative that specific measures or guidelines be provided for the protection of women and children during the implementation of the curfew. Further, that the said measures should address the welfare of pregnant women who will need pre-natal and post-natal health care services during the curfew period.

42. Ms Ireri specifically highlights the need for the 5th Respondent to provide and share information and guidelines for pregnant women during the Covid-19 pandemic as required by the WHO. Further, that pregnant women should be issued with permits so that they can easily access health care services during the curfew period. According to Ms Ireri, the 1st Respondent should issue crowd management modalities for the Likoni Channel which should provide for separate queuing systems for pregnant women, children and

persons with disabilities. She further demands immediate action against police officers who take advantage of the curfew to use excessive and unnecessary force.

43. The 3rd Interested Party supports the petition through the affidavit sworn on 1st April, 2020 by its Director/Chief Executive Officer, Maina Njoroge. Maina Njoroge deposes that the 3rd Interested Party is a statutory body established to hold the police accountable to the public in the performance of their functions; give effect to the provisions of Article 244 of the Constitution; and, ensure independent oversighting of the handling of complaints by the National Police Service. Further, that among other functions of the 3rd Interested Party is to investigate any complaints related to crimes committed by any member of the National Police Service, monitor and investigate policing operations affecting members of the public, and make recommendations to the National Police Service or any State organ.

44. Maina Njoroge deposes that the 3rd Interested Party has written to the 1st Respondent to issue guidelines for disposal of offenders arrested during the Covid-19 pandemic as per the directive of the National Council on Administration of Justice (NCAJ) issued on 15th

March, 2020. It is his averment therefore that the 3rd Interested Party supports the Petitioner's prayers for publication of guidelines on the conduct of police officers during the curfew; the prohibition of the use of unreasonable force by police officers in the enforcement of the Curfew Order; and the prohibition of interference with media coverage of the curfew.

45. It is Maina Njoroge's further deposition that the 3rd Interested Party is carrying out investigations into various allegations of use of excessive force by police officers in the enforcement of the curfew with a view to recommending disciplinary or criminal proceedings where there is sufficient evidence. In that regard he seeks the inclusion of the justice system, legal services and police oversight services in the list of essential service providers. According to Maina Njoroge, Articles 22, 23, 49 and 50 of the Constitution envisages a functional justice system which includes legal representation. Further, that the Chief Justice should issue practice directions that would allow hearings to proceed either by way of video or audio or any other format in order to ensure the justice system continues functioning.

46. The 4th Interested Party supported the petition through a replying affidavit sworn on 8th April, 2020 by its Co-ordinator of the Legal Aid

and Education Department, John Mwariri. The deponent discloses the objective of the 4th Interested Party as the protection and promotion of the rights of the vulnerable and marginalized individuals and communities in Kenya.

47. The 4th Interested Party's position as disclosed in the affidavit of John Mwariri is that upon the declaration of the curfew, police officers enforced it in the most un-proportionate and brutal manner despite the fact that most people in informal settlements were not aware of the curfew. Support for the alleged brutality is backed by reference to media reports that some people had been killed and others brutalised in Nairobi and Mombasa by police officers who were enforcing the Curfew Order. This, according to the 4th Interested Party, is clear demonstration of the error of criminalising a pandemic rather than treating it as a public health concern. It is therefore the 4th Interested Party's position that the Covid-19 pandemic is a public health issue governed by the PHA and not the a public order question under the POA.

48. The 4th Interested Party comes out in support of Prayer (c)(ii) of the Petitioner's application which seeks the publication in newspapers of national circulation, and the concurrent filing in court, of

guidelines on the conduct of police officers enforcing the Curfew Order. According to the 4th Interested Party, the guidelines should entail names of officers conducting an operation, their service numbers, operation area, the firearms issued and details of any bullets discharged in the operation. Referring to past experience, the 4th Interested Party discloses that it is always difficult to obtain justice for victims of police brutality due to the secrecy and obscurity attached to police operations.

49. The 4th Interested Party also deposes about forced quarantine for Kenyans returning from foreign countries and the injustice visited upon those returnees. It is the 4th Interested Party's case that in order to alleviate the sufferings and injustices visited upon the returnees, the 5th Respondent should issue guidelines under Section 36 of the PHA for curfew, quarantine and containment. The 4th Interested Party therefore supports the grant of an order directing the 5th Respondent to issue guidelines on Covid-19 pandemic under Section 36 of the PHA.

50. The 1st, 2nd, 3rd, and 5th respondents filed three affidavits and grounds of opposition in response to the application. At the hearing, their counsel indicated that he was adopting those pleadings in response

to the petition. The first affidavit was sworn on 1st April, 2020 by the 1st Respondent, Hilary Mutyambai who is the Inspector General of Police. It is his averment that the affidavit sworn in support of the petition and the application is based on hearsay evidence not admissible under the Evidence Act.

51. The Inspector General of Police avers that he did not issue any order to the National Police Service to unleash the so-called campaign of terror on members of the public. He, nevertheless, deposes that no evidence has been adduced to support the allegations in the Petitioner's affidavit. It is also his averment that he cannot act upon the allegations of abuse of power by police officers as no complaint has been lodged in his office.

52. It is further the averment of the Inspector General of Police that his office has issued Service Standing Orders providing for the general control, administration, good order, direction and information of the Service under Section 10(1) of the National Police Service Act. Relying on the provisions of the 5th and 6th Schedules of the National Police Service Act, the 1st Respondent asserts that there already exists adequate and elaborate rules and regulations on how the National Police Service undertakes its duties and there is therefore

no need for the addition of special guidelines. He avers that due to the size of the Service Standing Orders which run up to 1181 pages, it would be expensive to cause the same or large portions of it to be printed in commercial newspapers.

53. The Inspector General of Police contends that the prayer that he personally bears the costs of the petition and the application is without legal basis and will contravene his fundamental rights.

54. Dr. (Eng) Karanja Kibicho, the Principal Secretary, State Department of Interior, Ministry of Interior and Co-ordination of National Government, swore the second affidavit on 1st April, 2020. He takes the same position with the Inspector General of Police that the affidavit sworn in support of the petition and the application is primarily based on inadmissible hearsay evidence. He also states that in the majority of the paragraphs of the affidavit, there is no indication whether the deponent is deposing to matters on belief or information, and neither does she disclose the sources of her information.

55. Dr. Karanja Kibicho avers that the Curfew Order exhibited by the Petitioner is not the one that was signed by the 2nd Respondent. He proceeds to exhibit a Curfew Order with different text from that of

the Petitioner and deposes that the Curfew Order annexed to his affidavit is the one signed by the 2nd Respondent.

56. The Principal Secretary for the State Department of Interior deposes that he has been advised by the Solicitor-General that Section 8 of the POA enjoys presumption of constitutionality and is *prima facie* legal and effective in Kenya. Further, that the constitutionality of the said provision had indeed been determined in the affirmative in **Voi HC Constitutional Petition No. 11 of 2017 (Formerly Malindi HC Constitutional Petition No. 18 of 2017), National Super Alliance (NASA) Kenya v Cabinet Secretary for Interior and Co-ordination of National Government, Inspector General of Police & 2 others.**

57. Additionally, it is deposed that the Curfew Order is not *ultra vires* the provisions of Section 8 of the POA as it was held in the stated case that the proviso thereto does not apply in circumstances where the curfew does not fall within the hours of daylight as in the present circumstances. Further, that the Court had also held that the imposition of a curfew is a stop-gap measure and cannot be compared to a state of emergency which is declared under Article 58 of the Constitution as the two relate to distinct scenarios.

58. Dr. Karanja Kibicho avers that the Curfew Order does not mention essential services but instead provides for specified services, personnel or workers who are exempted from the requirements of the Curfew Order. Further, that the restriction of movement of members of the public is a public order issue and the Petitioner has not in any case demonstrated the prejudice to be suffered as a result of the order being issued under the POA as opposed to the PHA.

59. It is Dr. Karanja Kibicho's averment that the Covid-19 disease has been declared a global pandemic. Further, that the court should take judicial notice of the fact that in countries where human interaction was not limited, massive loss of human lives occasioning great economic loss had occurred thus leading to threats to national security and public order.

60. According to Dr. Karanja Kibicho, the principal aim of the Curfew Order is to minimise and mitigate the spread of coronavirus and thereby protect human rights which is a constitutional responsibility of all governments in the world including the Government of Kenya. It is additionally deposed that the virus has distorted social, economic and political order of countries the world over hence impacting on public order.

61. It is the averment of Dr. Karanja Kibicho that comparable jurisdictions around the world have imposed total lockdowns as opposed to night time curfew as is the case in Kenya. India, Rwanda, Italy and South Africa are cited as some of the democratic countries that have imposed lockdowns in order to tame the spread of the virus. He therefore deposes that the night time curfew is proportionate and is the least restrictive means in the present circumstances. It is his position that members of the Petitioner like other Kenyans can carry out their trade during the hours of daylight and that in any event courts operate during daytime.

62. Dr. Karanja Kibicho states that the executive has through the expression of the Kenyan voter obtained the constitutional mandate to formulate and implement government policies which mandate should not be undemocratically and unjustifiably subordinated to alternate populist, subjective and self-serving interests of entities such as the Petitioner. It is his opinion that instead of advancing the public interest, the Petitioner has chosen to pursue a collateral populist agenda at a grave time when the entire world is facing a monumental threat to the survival of humanity.

63. The third affidavit filed on behalf of the 1st, 2nd, 3rd and 5th respondents is the one sworn on 1st April, 2020 by Mwenda Njoka, the Chief Executive Officer of the Government Press. He annexed to his affidavit the Public Order (State Curfew) Order, 2020 being Legal Notice No. 36 published on 26th March, 2020 in Kenya Gazette Supplement No. 30 and avers that the same is the only notice received from the 2nd Respondent and published by his office. He avers that the document exhibited by the Petitioner is not a true copy of the Legal Notice No. 36 of 2020 published in the Kenya Gazette.

64. The 3rd Respondent filed grounds of opposition dated 1st April, 2020 which were specifically targeted at the application for conservatory orders. Through the grounds of opposition it is contended that the Petitioner has not demonstrated a *prima facie* case with any likelihood of success and the petition would not be rendered nugatory if orders are not granted. It is further asserted that there is no evidence to show that the grant of conservatory orders would enhance the constitutional values and objects specific to the rights and freedoms under the Bill of Rights; and that the consideration of

public interest and the principle of proportionality would militate against the issuance of conservatory orders.

65. According to the 3rd Respondent the application seeks to challenge the rationality of purely executive and legislative policy decisions which is contrary to the separation of powers and exercise of sovereignty. Further, that the Petitioner was seeking final orders at the interlocutory stage. The 3rd Respondent further contends that the order to compel the Cabinet Secretary to exercise his discretion under Section 36 of the PHA goes beyond the jurisdiction of the court.

66. The 4th Respondent did not file any response to the petition and the application and neither did he participate in the proceedings.

67. Through its submissions, the Petitioner reiterates its position that the impugned Curfew Order is unconstitutional on the grounds that it is illegal, illegitimate and un-proportionate because it is blanket in scope and indefinite in length; that although it limits rights, no justification has been made out in accordance with Article 24 of the Constitution; that it is *ultra vires* Section 8 of the POA; and that the 1st Respondent when implementing it violated the people's rights to

dignity, freedom and security of the person, and the right not to be treated in a cruel, inhumane or degrading manner.

68. The Petitioner urges that a reading of Section 8 of the POA will disclose that a curfew order can only issue if it is considered necessary in the interests of public order. It is the Petitioner's case that the provision should, in accordance with Paragraph 7 of the 6th Schedule of the Constitution, be read with necessary alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution. This assertion is supported by the finding in the **Lamu Curfew case** that a curfew should not be indefinite.

69. The Petitioner cites the decision in **Muslims for Human Rights (MUHURI)** (supra) as confirming that a curfew order is one of the devices used by security personnel to prevent and combat crime and that its use should accord with the Bill of Rights. The Petitioner submits that the 2nd Respondent is aware of importance of issuing a determinate curfew order as confirmed by the issuance of such an order for the period 27th October, 2016 to 27th December, 2016 in respect of Mandera County. It is therefore urged that an indefinite curfew order

renders the same un-proportionate and arbitrary thus violating the test set in Article 24 of the Constitution.

70. On its contention that the PHA and not the POA is the appropriate law to invoke in a public health emergency, the Petitioner points to Section 36 of the PHA as giving a wide array of powers to the Cabinet Secretary for Health whenever any part of Kenya appears to be threaten by any formidable epidemic, endemic or infectious disease. It is the Petitioner's submission that since the Covid-19 disease has been declared a pandemic, the 5th Respondent should, in the performance of his obligation under Article 43 of the Constitution issue guidelines or rules under Section 36 of the PHA for the management of the pandemic. The Petitioner contends that the inadequacy of the 5th Respondent's actions coupled with the disproportionate Curfew Order is a threat to lives of persons living in Kenya, particularly due to the absence of **"scientific–based intervention measures."**

71. In the oral highlights, counsel for the Petitioner reiterated the written submissions and added that the Judiciary is the only arm of government that has abdicated its constitutional mandate during the Covid-19 pandemic by closing courts. According to the

Petitioner, the 4th Respondent had through the communique issued on 15th March, 2020 by the National Council on the Administration of Justice (NCAJ), ceded to police officers the power to enforce and implement the rights of arrested persons.

72. In the course of writing this judgement, the Petitioner filed two decisions from other jurisdictions. The decisions are that of the Constitutional Court of the Republic of Kosovo in **Case No. KO54/2020-President of the Republic of Kosovo (Applicant)-Constitutional Review of the Decision No. [Government] 15/01, 23 March 2020** (hereinafter simply referred to as the **Kosovo case**) and that of the High Court of Malawi in **Judicial Review Cause No. 19 of 2020- The State (on application of Lin Xiaoxiao, Liu Zhigin, Wang Xia, Tian Hongze, Huang Xinwang, Zheng Zhouyou, Zheng Yourong, Jia Huaxing, Lin Shiling and Lin Tingrong) v the Director General-Immigration and Citizenship Services & another** (hereinafter simply referred to as the **Malawi case**).

73. It is the Petitioner's case that in the **Kosovo case,** the government's decision to curtail movement of citizens and private vehicles, prohibit gatherings and enforce social distancing was successfully challenged for violating various constitutional provisions. The

pronouncements in the case are referred to extensively in order to demonstrate that the Curfew Order is unconstitutional for failing to meet the threshold set by Article 24 of the Constitution. It is the Petitioner's submission that the **Malawi case** highlights the various pillars on the rule of law.

74. All the interested parties filed submissions in support of the petition. Like the others parties, the 1st Interested Party mainly confined its submissions to the application. I will, however, consider arguments that are relevant to the petition. It is the 1st Interested Party's submission that in the enforcement of the order the police violated absolute and inviolable rights under Article 25 of the Constitution.

75. It is the 1st Interested Party's assertion that the Curfew Order does not provide for any monitoring or accountability mechanisms. It accordingly urges that there is need for proper guidelines for the implementation of the Curfew Order otherwise the enforcement officers will be left with wide discretion thereby creating an environment that will promote arbitrariness and lack of accountability. Such a situation, the 1st Interested Party submits, will expose the public to further potential human rights violation.

76. The 2nd Interested Party through submissions dated 1st April, 2020 identify and seek five orders that are separate from any of the orders sought by the Petitioner. A perusal of the orders disclose that their aim is to humanise the implementation of the Curfew Order, particularly in reference to women, especially pregnant ones, and children. According to the 2nd Interested Party, the orders sought will advance and protect the rights under Articles 26, 28, 43(1)(a) and (2), and 53(2) of the Constitution. The guidelines issued by the WHO, and the Centre for Disease Control and Prevention for tackling the Covid-19 pandemic in relation to pregnant and breastfeeding women are cited in support of the 2nd Interested Party's position.

77. The submissions of the 3rd Interested Party were essentially limited to the application for conservatory orders. The 3rd Interested Party stresses the point that limitation of rights can only be done in compliance with Article 24 of the Constitution. According to the 3rd Interested Party, lack of guidelines for the enforcement of the curfew leaves the public at the whims and caprice of individual police officers.

78. It is the 3rd Interested Party's firm view that the declaration of a curfew does not suspend constitutional rights protecting persons

against unreasonable use of force by the State or lessen the obligation by police officers to adhere to the legal strictures on the use of force and firearms by police officers. This loaded statement is backed by the decision in the already cited case of **Muslims for Human Rights (MUHURI)** wherein it was stated that a curfew is **"subject to observation of the demands of human rights as prescribed under Article 244(c) and to the extent permitted by the provisions on limitation to rights under Article 24 of the Bill of Rights".** The 3rd Interested Party concludes its submissions by asserting that sections 49, 59 and 61 of the National Police Service Act, as read with the fifth and sixth schedules of the Act and the National Police Service Standing Orders, which clearly set out the circumstances when police officers may use force and firearms, have not been suspended.

79. The 4th Interested Party's submissions were largely on the constitutionality and the legality of the Curfew Order. It is the 4th Interested Party's case that the powers given to the 2nd Respondent by Parliament through Section 8 of the POA can only be used to promote Parliament's purpose. That purpose, it is submitted, is for the maintenance of public order and nothing more. The preamble of

the POA which states that it is an **"Act of Parliament to make provision for the maintenance of public order, and for purposes connected therewith"** is cited to firm up this argument.

80. It is the 4th Interested Party's submission that as was held in **Padfield v Ministry of Agriculture [1968] eKLR,** the court has power to overturn the decision of a Minister who misconstrues an Act of Parliament so as to thwart the policy and objects of the Act. The 4th Interested Party's firm position is that the power donated to the 2nd Respondent by Parliament through the POA is for control and maintenance of public order and has nothing to do with health. Anything to do with health, the 4th Interested Party asserts, is governed by the PHA whose preamble discloses that it is an **"Act of Parliament to make provision for securing and maintaining health."** It is further the 4th Interested Party's submission that Covid-19 is an infectious disease and the measures provided by Section 18 of the PHA for the containment of infectious diseases does not include curfews.

81. The 4th Interested Party urges that the Curfew Order runs counter to the policy and objects of the POA and is therefore an illegality deserving to be quashed by way of judicial review as per the decisions in **Council for Civil Service Unions v Minister for Civil Service**

**[1985] A.C. 374** and **Republic v Chairman Amagoro Land Disputes Tribunal & another Ex-parte Paul Mafwabi Wanyama [2014] eKLR.** Several curfew orders issued in the past by the 2nd Respondent are cited to demonstrate that curfew orders are only issued to tame criminal activity.

82. It is the 4th Interested Party's case that although the 2nd Respondent can indeed declare a curfew under Section 8 of the POA, the exercise of that power in this instance was irrational and outrageous. **Padfield** (supra) is cited for the proposition that it is the duty of the judiciary to ensure that the executive acts lawfully. The decision in the case of **R v Secretary of State for Foreign and Commonwealth Affairs ex-parte World Development Movement Ltd [1994] EWHC Admin 1** is identified as holding that the use of powers for a purpose not envisaged in the enabling statute amounts to acting in excess of statutory power. It is therefore the 4th Interested Party's case that the 2nd Respondent acted outside the jurisdiction of Section 8(1) of the POA as he is not authorised or qualified to provide adequate and proper medical care.

83. The 4th Interested Party also asserts that the Curfew Order violates various international laws. The 4th Interested Party admits that rights,

can by dint of Article 4(1) of the International Covenant on Civil and Political Rights ("ICCPR"), be limited in time of public emergency which threatens the life of the nation. It, however, proceed to clarify that as stated in chapter six of Oliver De Schutter's book titled *'International Human Rights Law',* the State has to meet six conditions before invoking that power. It is the 4th Interested Party's case that in order for Article 4(1) of the ICCPR to be properly invoked, it must be established that a public emergency which threatens the life of the nation actually exist; that there is necessity to invoke the provision; that no discriminatory element is present; that there is compliance with other international obligations; that rights which are not subject to derogation are not affected; and, that there is international notification of the emergency.

84. The 4th Interested Party states that a curfew order curtails, among other constitutional rights and fundamental freedoms, the freedom of movement (Article 39(1)); the freedom of association (Article 36); freedom of assembly (Article 37); and, the right to work which is protected by Articles 1 and 2 of the International Covenant on Economic, Social and Cultural Rights, 1966 as applied by Article 2(6) of the Kenyan Constitution. It is therefore the 4th Interested Party's

case that Section 8 of the POA must meet the constitutional threshold set by Article 24 of the Constitution with regard to the limitation of rights and freedoms granted to the people of Kenya in the Bill of Rights.

85. The 4th Interested Party advances the view that the fact that the President has not declared a state of emergency under Article 58(1) of the Constitution confirms that the Covid-19 pandemic is not a public emergency which threatens the life of the nation. The 4th Interested Party opines that although a curfew and a state of emergency have a similar effect of suspending rights and fundamental freedoms, a state of emergency is the better option as it is open to scrutiny and challenge by the Judiciary and the Legislature.

86. The 4th Interested Party quotes Oliver De Schutter's statement at page 518 that **"derogation from rights recognised under international law in order to respond to a threat to the life of the nation is not exercised in a legal vacuum"**, and proposes that the rule of law should prevail even during the curfew.

87. The 1st, 2nd, 3rd, and 5th respondents filed written submissions dated 1st April, 2020 in opposition to the application for conservatory orders.

Their counsel indicated during the hearing of the petition that those submissions would also apply to the petition.

88. It is the position of the 1st, 2nd, 3rd and 5th respondents that the Petitioner has no valid grievance before this court. Their case is that the document attached as "MW-1" to the affidavit sworn on 30th March, 2020 by Mercy Wambua is not the Public Order (State Curfew) Order, 2020 which was published by the 2nd Respondent as Legal Notice. 36 of 2020. They stress that the document they have exhibited is the only Legal Notice No. 36 of 2020 published by the 2nd Respondent. It is therefore the 1st, 2nd, 3rd and 5th respondents' case that the petition is misguided and falls apart irredeemably as the legal instrument being challenged before this court is not authentic. The said respondents contend that Petitioner is not entitled to any orders before this court as its cause of action was non-existent *ab initio*. They support their arguments with the decisions in the cases of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR; St. Patrick Hill School Ltd v National Hospital Insurance Fund [2019] eKLR; Jennifer Shamalla v Law Society of Kenya, Interested Party Independent Electoral & Boundaries Commission & 11 others [2016] eKLR**; and **Samuel Kamau**

**Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR.**

89. The 1st, 2nd, 3rd and 5th respondents further submit that in light of the principles laid down by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** as well as the High Court in **Jennifer Shamalla** (supra), the public interest lies in saving Kenyan lives and protecting their wellbeing against the coronavirus. Further, that the course adopted by the government should take precedence over the unsubstantiated allegations by the Petitioner. The case of **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR** is also cited to firm up the argument on the importance of bowing to public interest.

90. The 1st, 2nd, 3rd and 5th respondents further contend that it is not in the public interest to allow the prayers sought in the application and the petition as suspending or quashing the Curfew Order will result in the rapid spread and exposure of Kenyans to coronavirus. Additionally, that such a declaration will harm the majority of Kenyans and is not proportionate to any mischief, if at all, which the Petitioner proposes to cure.

91. The 1st, 2nd, 3rd and 5th respondents contend that the doctrine of presumption of constitutionality of statutes, statutory instruments and other laws applies to the impugned Curfew Order and Section 8 of the POA. They support this argument by citing the decisions in the cases of **Katiba Institute & another v Attorney General & another [2017] eKLR**; **Transparency International (TI Kenya) v Attorney General & 2 others [2018] eKLR;** and **National Super Alliance (NASA) Kenya v Cabinet Secretary for Interior and Co-ordination of National Government & 3 others [2017] eKLR.**

92. The 1st, 2nd, 3rd and 5th respondents hold the opinion that the application and the petition are premature as the Petitioner has not exhausted the mechanisms provided by the statutes for the resolution of the dispute. According to them, the petition is improperly before this court as the issues herein are, in the first instance, for consideration by the Independent Policing Oversight Authority (IPOA) as per Section 6 of the Independent Policing Oversight Authority Act, 2011, and the Internal Affairs Unit of the National Police Service established under Section 87 of the National Police Service Act. They also rely on the decisions in **MN (suing as the mother and the next friend of CW) v Director of Public Prosecutions;**

**Geoffrey Werumbe (Interested Party) [2019] eKLR** and **Born Bob Maren v Speaker Narok County Assembly & 3 others [2015] eKLR** in support of their position.

93. The 1st, 2nd, 3rd and 5th respondents further contend that the Petitioner has not placed any material before this court of identifiable persons whose rights have been violated or evidence of violation of any provisions of the Constitution. They criticise the Petitioner's reliance on newspaper cuttings and unauthenticated online documents. The decision of the Court of Appeal in the case of **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** is referred to in support of the assertion that such evidence has no evidential or probative value.

94. Additionally, the 1st, 2nd, 3rd and 5th respondents contend that Article 24 of the Constitution recognises that a right or fundamental freedom in the Bill of Rights may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society taking into account all relevant factors. They submit that in the present instance, the right which has been restricted is the right of movement at night, which restriction was informed by the serious threat posed to national security and public order by the spread of

the Covid-19 pandemic. They assert that the restriction also mitigates the spread of coronavirus and prevents potential resultant deaths. They also submit that such a restriction is proportionate and reasonable in an open and democratic society, and within the constitutional mandate of the government. They rely on the case of **National Super Alliance (NASA) Kenya v Cabinet Secretary for Interior and Co-ordination of National Government & 3 others [2017] eKLR.**

95. On the Petitioner's prayer for an order directing the 5th Respondent to issue guidelines for curfew, quarantine and containment of Covid-19 disease, the 1st, 2nd, 3rd and 5th respondents submit that the Petitioner seems to have failed to appreciate the fact that under the PHA, there are relevant complementary substantive provisions on among others, notification of infectious diseases. It is their position that the PHA sets out the relevant legal framework under which all the issues raised by the Petitioner have been addressed by the relevant government agencies. Additionally, it is submitted that almost on a daily basis, the government has been publicising through media, the status of the pandemic, measures being taken, as well as guidelines to address the pandemic.

96. The 1st, 2nd, 3rd and 5th respondents state that the Petitioner has not requested information from the government agencies on the issues it seeks to have the 5th Respondent compelled to address. It is therefore their case that had the Petitioner sought the relevant information through the laid down framework under Article 35 of the Constitution as well as the Access to Information Act, it would have most likely come to the appreciation that its petition on this ground is without basis. Reliance is placed on the case of **Saniako N. Kibiwot v Land Control Board, Marakwet Division & 2 others [2019] eKLR** to bolster this submission.

97. It is the 1st, 2nd, 3rd and 5th respondents' contention that the Petitioner has failed to appreciate that the principal aim of the Curfew Order is to minimize and mitigate the spread of the virus and thus protect human lives which is a legitimate constitutional responsibility of the Government of the Republic of Kenya and in line with the provisions of the POA. Moreover, it is asserted that the POA may be applied in particular instances and complementary to other laws.

98. On the prayer by the Petitioner to have legal services listed as essential services, it is submitted that the Curfew Order has not made any mention of essential services as it simply provides for specified

services, personnel or workers who are exempted from the requirements of the order. It is therefore the 1st, 2nd, 3rd and 5th respondents' view that individual members of the Petitioner can be exempted from the operation of the curfew on a case by case basis pursuant to Clause 4 of the Curfew Order.

99. On the alleged use of excessive force in the enforcement of the Curfew Order, it is submitted that the Petitioner made generalised unsubstantiated allegations on use of excessive force by members of the National Police Service. Reliance is placed on the averment of Hillary Mutyambai that he did not authorise the use of excessive force, to rubbish the Petitioner's claim that the use of excessive force was authorised by the respondents. It is further asserted that the Standing Orders, and the fifth and sixth schedules of the National Police Service Act, are clear on how the arrest and detention of persons is executed. The 1st, 2nd, 3rd and 5th respondents opine that the Petitioner has not demonstrated or even alleged that these laws are inadequate.

100. Looking at the pleadings and submissions, I flag out the following issues for determination:-

a) Whether the Curfew Order is constitutional and legal;

b) Whether the National Police Service violated the Constitution in the enforcement of the Curfew Order;

c) Whether the Cabinet Secretary for Health should be ordered to issue guidelines under Section 36(m) of the Public Health Act;

d) Whether the Judiciary has abdicated its constitutional mandate; and

e) Who should meet the costs of the proceedings?

101. A review of the pleadings and submissions will clearly disclose that this petition almost entirely revolves around the constitutionality and legality of the impugned Curfew Order. Several sub-issues arise under this issue.

102. The Petitioner submits that this court has jurisdiction to hear and determine this matter by virtue of the powers given to it by Articles 23 and 165 of the Constitution. Those provisions, it is asserted, grants this court jurisdiction over matters concerning the infringement or violation of rights and fundamental freedoms, including the power to grant reliefs. Reliance is placed on the decision in the case of **The Centre for Human Right and Democracy & 2 others v the Judges and**

**Magistrates Vetting Board & 2 others [2012] eKLR** in support of this assertion.

103. I have perused the pleadings and the submissions of the respondents and I do not find any objection to this court's jurisdiction. I will therefore proceed to delve into the merits of the petition.

104. The Petitioner's case on the alleged unconstitutionality and illegality of the impugned Curfew Order is premised on the grounds that the Curfew Order does not comply with the provisions of Section 8 of the POA and that the POA is inapplicable to a public health emergency such as the Covid-19 pandemic. The court was also urged to pronounce that the Curfew Order fails the test of Article 24 of the Constitution.

105. The Petitioner submits that the failure by the 2nd Respondent to provide the period of the Curfew Order contravenes Section 8 of the POA. The Petitioner contends that a curfew order under Section 8 of the POA cannot be open-ended considering that where a state of emergency is declared under Articles 58 and 132 of the Constitution, time limits are imposed. Reliance is placed on the decision in the **Lamu Curfew case** in support of this proposition.

106. The 1st, 2nd, 3rd and 5th respondents hold the view that the instrument published as Legal Notice No. 36 of 2020 is fully compliant with the requirements of the Constitution and Section 8 of the POA.

107. I do not wish to address the issue of the constitutionality of Section 8 of the POA because from the submissions of the parties I discern something close to unanimity on the constitutionality of the provision. I also hold the view that the constitutionality of the provision was upheld by this Court (Kamau, J) in **National Super Alliance (NASA) Kenya v Cabinet Secretary for Interior and Co-ordination of National Government & 3 others [2017] eKLR** and it is not necessary to reopen that battlefront.

108. A new issue has, however, arisen in this case. The Petitioner, with the full backing of the 4th Interested Party contends that the Curfew Order is illegal as a curfew can only be issued for purposes of fighting crime and not disease. It is, however, the 1st, 2nd, 3rd and 5th respondents' contention that the Petitioner fails to appreciate that the principal aim of the Curfew Order is to minimize and mitigate the spread of the virus and thus protect human lives which is a legitimate constitutional responsibility of the Government of Kenya and in line with the provisions of the POA. Further, that the engagement of the

POA in the fight against Covid-19 pandemic is meant to complement the provisions of the PHA.

109. I did not hear counsel for the Attorney General utter a word against the submission by the Petitioner and the 4th Interested Party that the POA is an instrument for the enforcement of law and order. Any attempt to submit otherwise would have indeed been preposterous. It is clear as was respectively held by Chitembwe, J and Murithi, J in the **Lamu Curfew case** and **Muslims for Human Rights (MUHURI)** (supra) that a curfew order is a tool for fighting crime. This statement of law was put across succinctly by Chitembwe, J when he held in the **Lamu Curfew case** that:-

**"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…"**

110. I therefore agree with the Petitioner that the POA is a law that was specifically tailored for combating criminal activities. Its purpose is to bring law and order to areas visited by turmoil that is generally caused by man. This, however, does not answer the question as to whether the POA can be applied to other disasters and emergencies

including containment of disease. It should be appreciated that the judges in the **Lamu Curfew case** and the **Muslims for Human Rights (MUHURI) case** were not invited to consider the applicability of the POA to circumstances other than the restoration of law and order.

111. There is indeed merit in the statement of Lord Reid in **Padfield** that **"…the policy and objects of the Act must be determined by construing the Act as a whole, and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be defective if persons aggrieved were not entitled to the protection of the court."** It is indeed correct that an Act of Parliament cannot be used for a purpose for which it was not made. In my view, there are statutes which cannot under whatever circumstances be applied to any other situation other than what they were enacted for. However, some laws are multipurpose in nature. They fit all situations and can be invoked to address various circumstances.

112. The question then is whether the PHA is self-sufficient to the extent that no other Act of Parliament needs to be engaged in matters health. Counsel for the Attorney General submitted that the POA may be used to complement other laws. This submission has merit for it is observed that Section 16 of the PHA creates room for the application of other laws to health matters. The provision states:-

**"16. Provisions of Act in relation to other Acts**

**(1) Except as is specially provided in this Act, the provisions of this Act shall be deemed to be in addition to and not in substitution for any provisions of any other Act which are not in conflict or inconsistent with this Act.**

**(2) If the provisions of any earlier Act are in conflict or inconsistent with this Act, the provisions of this Act shall prevail."**

113. In view of the stated provision, it cannot be said that the POA is not applicable to health emergencies like the one posed by the Covid-19 pandemic. It is possible that the provisions of the PHA may need to be supplemented by those of the POA. Panic and fear can sometimes lead to disorder and a curfew may be needed to reinforce the provisions of the PHA. I therefore decline to agree with

the Petitioner that a curfew order cannot be used to address a public health emergency.

114. I did not hear any submission that a curfew order is not appropriate in the circumstances of the Covid-19 pandemic. I, however, heard some of the parties argue in support of the petition that the Curfew Order should have been issued under the PHA. They, however, did not identify any specific provision of the PHA that allows the Cabinet Secretary for Health to declare a curfew. The Petitioner and the interested parties indeed agree that the declaration of a curfew is not a small matter. It is my observation that a curfew is heavy artillery that should be deployed with circumspection. Since it affects constitutional rights and fundamental freedoms, it ought to be premised on a substantive law. I therefore doubt whether the Cabinet Secretary for Health can use the powers granted to him under Section 36 of the PHA to declare a curfew.

115. It is important to appreciate that a curfew does not only upset the people's way of life, but it also negatively impacts constitutional rights and fundamental freedoms. As correctly pointed out by the 4th Interested Party, some of the rights limited by a curfew are the

freedom of movement, the freedom of association, and the freedom of assembly. Even without the curfew, the insidious nature of coronavirus has *suo moto* robbed us of some aspects of the rights of association and assembly. It is also obvious that curfews limit the hours for earning a living hence limiting socio-economic rights, especially for the vulnerable members of society. It is therefore important to identify the likely negative impacts of a curfew beforehand and put mitigation measures in place. It is also important for those empowered to impose curfews to swiftly lift them if the damage they cause to society far outweighs the benefits.

116. In the case before me, I find no merit in the argument by the Petitioner that the 2nd Respondent exceeded his statutory power by invoking Section 8 of the POA to address a public health emergency. Whether the curfew meets the constitutional threshold is another issue altogether. I therefore find that the 2nd Respondent did not err in issuing the Curfew Order to address the Covid-19 crisis.

117. The next issue is the legality and the constitutionality of the text of the Curfew Order. Section 8 of the POA provides that:-

**"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 conditions of a written permit granted by an authority or person specified in the curfew order, remain indoors in the premises at which he normally resides, or at such other premises as may be authorised 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.**

**[Act No. 53 of 1960, s. 6, L.N. 402/1963, L.N. 153/1965, Act No. 19 of 2014, s. 4.]"**

118. Based on the copy of the Legal Notice No. 36 of 2020 exhibited through the supporting affidavit of Ms Mercy Wambua, it does not require much persuasion to agree with the Petitioner that the notice does not comply with the requirements of Section 8 of the POA. The said notice is in the following text:-

**"LEGAL NOTICE NO. 36**

**THE PUBLIC ORDER ACT**

**(Cap. 56)**

**THE PUBLIC ORDER (STATE CURFEW) ORDER, 2020**

**IN EXERCISE of the powers conferred by section 8(1) of the Public Order Act, the Cabinet Secretary for Interior and Co-ordination of National Government makes the following Order:—**

**THE PUBLIC ORDER (STATE CURFEW) ORDER, 2020**

**1. This Order may be cited as the Public Order (State Curfew) Order, 2020.**

**2. This Order shall apply to the entire territory of the Republic of Kenya.**

**3. This Order shall apply during the hours of darkness between seven o'clock in the evening and five o'clock in the morning with effect from the 27th March, 2020.**

**4. Under this Order, there shall be no public gatherings, processions or movement either alone or as a group during the period of the curfew.**

**5. Notwithstanding the provisions of this Order, the Order shall not apply to services, personnel or workers specified in the Schedule hereto."**

119. Looking at the said notice it is clear that the period of the curfew is not specified. In my view this is a clear breach of Section 8(3) of the POA which, *inter alia,* states that a curfew order "**shall remain in force for the period specified therein".** In my view therefore the period that the curfew will last should be specified in the instrument declaring the curfew. Failure to do so will render a curfew order illegal. In this regard I agree with the holding in the **Lamu**

**Curfew case** that a curfew order cannot last forever. An instrument that restricts rights and freedoms should be clear as to how long the limitation will last.

120. The second defect in the notice displayed by the Petitioner is that it does not, as required by Section 8(1) of the POA, specify the authority or person to grant written permit for persons who for good reason cannot remain indoors during the curfew hours.

121. The 1st, 2nd, 3rd and 5th respondents hold the view that the document placed before the court is fake. Indeed during the hearing counsel for the Attorney General accused one of the advocates for the Petitioner for telling lies to the court. Such strong language in my view was not necessary and not merited. On top of the Petitioner's Legal Notice No. 36 is Legal Notice No. 35 which is titled: "The Value Added Tax Act, 2013" and made on 25th March, 2020 by Ukur Yatani, the Cabinet Secretary for the National Treasury and Planning. Legal Notice No. 35 which comes before Legal Notice No. 36 in the document exhibited by Mwenda Njoka, the Government Printer, is word for word with the Legal Notice No. 35 in the document presented by the Petitioner. It is apparent that the contents of Legal Notice No. 35 agree but there is a variance in the

contents of Legal Notice No. 36. I highly doubt that Ms Mercy Wambua, an advocate of this court would generate her own Legal Notice No. 36 in order to create a cause of action against the respondents. I also note that Dr. Bernard Mogesa in the affidavit sworn on 1st April, 2020 at paragraph 12 attaches Legal Notice No. 36 which is in the same text with what is exhibited by the Petitioner. It follows that the dishonest party in these proceedings is obvious and I need say no more.

122. The Curfew Order exhibited by the Government Printer is as follows:-

**"LEGAL NOTICE NO. 36**

**THE PUBLIC ORDER ACT**

**(Cap. 56)**

**THE PUBLIC ORDER (STATE CURFEW) ORDER, 2020**

**IN EXERCISE of the powers conferred by section 8(1) of the Public Order Act, and in view of the serious threat posed to national security and public order by the spread of the COVID-19 pandemic, the Cabinet Secretary for Interior and Co-**

**ordination of National Government makes the following Order—**

**THE PUBLIC ORDER (STATE CURFEW) ORDER, 2020**

**1. This Order may be cited as the Public Order (State Curfew) Order, 2020.**

**2. This Order shall apply to the entire territory of the Republic of Kenya.**

**3. This Order shall apply during the hours of darkness between seven o'clock in the evening and five o'clock in the morning with effect from the 27th March, 2020 and shall remain in effect for a period of thirty days thereof.**

**4. Under this Order, there shall be no public gatherings, processions or movement either alone or as a group during the period of the curfew except as shall be permitted, in writing, by a police officer in charge of the police in a county or a police officer in charge of a police division.**

**5. Notwithstanding the provisions of this Order, the Order shall not apply to the services, personnel or workers specified in the Schedule hereto."**

123. A perusal of the document produced by the Government Printer shows that it conforms to the provisions of Section 8 of the POA. It is a waste of the court's time to carry out an inquiry as to which of the two documents was first published. By exhibiting the document reproduced above, the 1st, 2nd, 3rd and 5th respondents bind themselves to the authenticity of that document and its contents. That is the document the court will rely on and it therefore follows that the curfew imposed by the 2nd Respondent will last for 30 days from 27th March, 2020. The Petitioner's argument that Legal Notice No. 36, the Public Order (State Curfew) Order, 2020, is unlawful for failing to state the period of the curfew and the authority or person to provide permits therefore fails.

124. That still does not answer the question of the constitutionality of the instrument. The Curfew Order is of itself a legal instrument which must independently pass the test in Article 24 of the Constitution. That test is provided at Clause (1) 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."**

125. The judges in the **Kosovo case** explained how the test to a constitutional provision similar to Article 24 of the Kenyan Constitution should be conducted. Let the judges speak for themselves:-

**"196. In this regard, it follows that the substance of the constitutional test of Article 55 of the Constitution is a four (4) step test which should be done in all cases when it is necessary to confirm whether we are dealing with a constitutional limitation of freedoms or rights or such a limitation is**

**unconstitutional. Before describing in detail all four steps of the test in question and how to apply them, it should be noted that the test in question is not cumulative. This means that in all instances where the condition or the first step of the test is not passed, the constitutional analysis ends there and it is not necessary to analyze the applicability of three, two, or another remaining step of the test. This interpretive approach, as will be explained below, is also used by the ECtHR itself in interpreting the limitations on freedoms and rights guaranteed by the ECHR.**

**197. The test of Article 55 of the Constitution means that immediately after determining whether we are dealing with a "limitation" of a freedom or right, namely whether we have "interference" with a freedom or right – which should be determined in each case - the following four (4) non-cumulative questions [special emphasis] should be given to Article 55 of the Constitution:**

**(1) Question 1 of the test: Was the limitation of a right or freedom guaranteed by the Constitution "prescribed by law"? If the answer is negative, then the constitutional analysis ends here - as no limitation of the rights and freedoms guaranteed by the**

**Constitution can be done otherwise than by "law" of the Assembly and to the extent permitted by law - always under the presumption that the latter is in accordance with the Constitution. If the answer is affirmative, then it is moved on the second question of the test because the requirement that the limitation was made by law or that the limitation was "prescribed by law" of the Assembly is met.**

**(2) Question 2 of the test: Has the limitation of a certain right or freedom followed a legitimate aim, namely through the limitation in question, is the purpose for which the limitation is permitted fulfilled? If the answer is negative, then the constitutional analysis ends here – as no limitation of the rights and freedoms guaranteed by the Constitution can be done without determining and legitimizing the legitimate aim of such a limitation and without fulfilling the purpose for which the limitation is made. If the answer is affirmative, that is, the test of legitimate aim is passed, then it is moved on the third question of the test.**

**(3) Question 3 of the test: Was the limitation of a certain right or freedom proportional, namely was the limitation made only to**

**the extent necessary? If the answer is negative, then the constitutional analysis ends here - as no limitation of the rights and freedoms guaranteed by the Constitution can be made beyond the extent of necessity and proportionality. If the answer is affirmative, then the proportionality/necessity test is passed, then it is moved on the fourth and final question of the four-step test.**

**(4) Question 4 of the test: Is the limitation made necessary in an open and democratic society? Regardless of whether the answer to this question is negative or affirmative, the constitutional analysis ends here. If the answer is negative, then it means that the limitation of that right or freedom is not constitutional because no limitation can be made if it is not necessary in an open and democratic society. If the answer is affirmative, that is, the test is passed, then it is considered that the limitation made was constitutional because all four steps of the test provided by Article 55 of the Constitution were affirmatively fulfilled.**

**198. In the abovementioned context and in the summary, the Court emphasizes that the test of Article 55 of the Constitution**

**stipulates that the limitation of a right or freedom: (i) may be done only by "law" of the Assembly; (ii) there should be a "legitimate aim"; (iii) it should be "necessary and proportional"; (iv) it should be "necessary in a democratic society"."**

126. The Curfew Order can only be deemed constitutional if it passes the Article 24(1) test. It is indeed true as submitted by the 4th Interested Party that the Curfew Order limits various constitutional rights and fundamental freedoms. In enacting a legal instrument that limits rights, the State is required to ensure that the instrument is backed by law. The limitation should be to the extent that is reasonable and justifiable in an open and democratic society. Some of the parameters for establishing whether a limitation is reasonable and justifiable are the need to ensure that the instrument preserves human dignity. The instrument should as much as possible ensure equality and freedom. Other factors to be considered are the nature of the right or fundamental freedom that is limited. Among the questions to be asked and answered are: What is the purpose of the limitation? How important is it? What is its nature and extent? Is the limitation meant to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights

and fundamental freedoms of others? Is there a less restrictive means for achieving the purpose of the limitation?

127. It has already been established that the Curfew Order is backed by law. The Curfew Order applies to each and every person in the Republic of Kenya except those who offer essential services. There is no dispute that the measures imposed are aimed at the containment of a novel infectious disease with no known cure or vaccine. Evidence from other countries show that some of those who have been infected by the disease have died as a result of the infection. The WHO has declared the disease a pandemic. The disease is therefore a threat to life which is a fundamental right protected by Article 26(1) of the Constitution.

128. It is the 1st, 2nd, 3rd and 5th respondents' position that the imposition of the curfew is aimed at reducing the spread of the disease. The Petitioner and the interested parties did not point out any other alternative course that would achieve the same objective with lesser restrictions on rights and fundamental freedoms. They instead urge for declaration of a state of emergency on the argument that a state of emergency is subject to legislative and judicial superintendence. This suggestion is faulted on two points,

namely that a curfew order is also subject to judicial oversight and in any event limits rights in the same way that a state of emergency will do.

129. The challenge with the application of the proportionality test in this case is that the objective the Curfew Order intends to achieve is unmeasurable. The court has been told that its main objective is to reduce transmission of coronavirus. No evidence was adduced by either side to show how the curfew will achieve this objective and whether the reduced transmissions, if any, outweighs the hardship visited on the populace by the curfew. It is appreciated that because of the novelty of the virus, statistics are not yet available. The 1st, 2nd, 3rd and 5th respondents did not explain the rationale for imposing the curfew from 7.00pm to 5.00am. On the other hand, the Petitioner failed to convince the court that it should interfere with the discretion of the 2nd Respondent in fixing the hours of the curfew.

130. In a crisis like the one facing the country, it can be presumed that the 2nd Respondent issued the Curfew Order in line with the 'precautionary principle' as was elucidated in the case of **Republic v Ministry & 3 others Ex-parte Kennedy Amdany Langat & 27 others [2018] eKLR** as follows:-

**"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."**

131. It was further held that:-

**"128. At the core of this precautionary principle are many of the attributes of public health practice including a focus on primary prevention and a recognition that unforeseen and unwanted consequences of human activities are not unusual.**

**"129. Additionally, where, in matters of public health, it proves impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted as was alleged by the applicants in this case, but the likelihood of real harm to**

**public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective."**

132. The government cannot be faulted for enforcing precautionary and restrictive measures in order to slow the spread of this novel disease in line with the precautionary principle. The use of a curfew order to restrict the contact between persons as advised by the Ministry of Health is a legitimate action. I am aware, although I cannot place my finger on the particular Gazette Notice, that the 2nd Respondent has ameliorated the effects of the curfew by changing the working hours in order to make it possible for the workers to comply with the curfew.

133. Although the Curfew Order meets the constitutional and statutory parameters, the Petitioner and the interested parties made a strong case for the retooling and remodelling of the instrument so that it can achieve its objectives with reduced impacts on the rights and fundamental freedoms of Kenyans. It is observed that the curfew was imposed for a public health purpose. The curfew is not meant to fight crime or disorder. I do not understand why the issuance of permits under the Curfew Order is solely reserved to

police officers. Why shouldn't a person in need of emergency care seek authority from a medical officer, the village elder, Nyumba Kumi, the local administrator or even the Member of the County Assembly? In order for the Curfew Order to achieve its objectives and to be embraced by the public it should not be seen as a tool of force but something that aims to protect the health of the people.

134. I think the main problem with the Curfew Order is the manner in which it has been implemented. The interested parties have correctly concentrated their firepower on that deficiency. It is, however, observed that unconstitutional and illegal acts that occur in the implementation of a legal instrument does not render that instrument unconstitutional. The problems that arise from the implementation must be addressed separately.

135. The Petitioner and the interested parties have placed before court stories captured in the newspapers and social media on how police officers allegedly killed, maimed and beat up citizens in the course of implementing the Curfew Order. Counsel for the Attorney General dismisses the evidence on the ground that it has no probative value. He is correct that newspaper stories which are not backed by the sources quoted therein or the authors of the articles

are of no probative value in a court case. One of the cases in which this principle was pronounced is **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR,** where the Court of Appeal held that:-

> **"56. In the instant case, in an attempt to prove that a special relationship existed between the 2nd Respondent and the President of the Republic, the 1st Respondent was content to rely on newspaper cuttings that had no evidential or probative value. On what basis, then, could Section 115 of the Evidence Act be invoked to disprove a special relationship between the President of the Republic and 2nd Respondent" The 1st Respondent had not tendered relevant, admissible and probative evidence sufficient to activate Section 115 of the Evidence Act. Upon our re-evaluation of the evidence on record, we find that the 1st Respondent tendered newspaper cutting evidence that had little or no probative value and this was insufficient to invoke Section 115 of the Evidence Act and shift the evidential burden to the 2nd Respondent. Further, it is the 1st Respondent who made the allegation that during the meeting between the President of Kenya and the delegation**

**from Dubai Chamber of Commerce the contract for printing ballot papers was discussed. The 1st Respondent neither adduced any credible evidence to prove the allegation nor provided a credible source of the allegation. The allegation that the tender contract was discussed at the meeting is one that needed to be proved or a credible source proving that the tender contract was discussed had to be provided. The general rule of he who alleges must prove applies in this case and the legal burden of proof rests with the 1st Respondent."**

136. Nevertheless, a perusal of the pleadings will show that there is more to the Petitioner's case than the newspaper cuttings. At paragraph 17 of the affidavit in support of the petition, Dr. Bernard Mogesa, the Chief Executive Officer of the 1st Interested Party exhibits a post-mortem report of one Hamisi Juma Iddi which shows that the cause of death is haemorrhagic shock due to multiple perforations on the gut secondary to blunt abdominal trauma. On her part, Anne Ireri who is the Executive Director of FIDA-Kenya specifically avers to the attack of one Khadija Hussein at the Likoni Ferry Channel in Mombasa and the killing of a 13 year old boy by the name Yassin Moyo at Mathare within Nairobi City County. These

incidents in my view are sufficient, on a balance of probabilities, to prove the Petitioner's case that the police killed and brutalised the people of Kenya in the process of enforcing the Curfew Order. There is also evidence on record that the people of Mombasa were attacked by the law enforcement officers prior to the time for the commencement of the curfew.

137. It appears that in confronting the coronavirus, which is by all means a faceless enemy, the police brought the law and order mentality to the fore. Diseases are not contained by visiting violence on members of the public. One cannot suppress or contain a virus by beating up people. The National Police Service must be held responsible and accountable for violating the rights to life and dignity among other rights.

138. Although the Petitioner asked for a declaration holding Hillary Mutyambai personally liable for the unreasonable use of force in the enforcement of the Curfew Order, I find that a case has not made for the issuance of such an order. No evidence has been adduced to directly link the Inspector General of Police to the violation of rights and fundamental freedoms by individual police officers.

139. There is the prayer by the Petitioner for an order to direct the 1st Respondent to formulate guidelines for the implementation of the Curfew Order. The 1st, 2nd, 3rd and 5th respondents' reply is that the guidelines for police operations are already established by law and there is no reason for issuing special guidelines for this particular operation. The 3rd Interested Party is an expert on matters touching on the National Police Service. It is admitted by the 3rd Interested Party through pleadings and submissions that there are indeed rules and regulations that govern how the police work. There is express admission that there are specific guidelines on police operations. There are even rules on how deaths and injuries that occur during police operations should be treated. In light of this admission, I am not convinced that there is need to issue special guidelines for this particular Curfew Order. The challenge appears to be the implementation of the law already in place. Directing that other regulations be formulated and issued on top of what is already in place will not solve the underlying problem. The answer to that problem does not lie in this petition.

140. Two of the issues passionately submitted upon by the parties do not call for any determination by the court. One issue has been

overtaken by events and the other issue was not pleaded with specificity in order to enable this court address it.

141. In the course of the hearing of this petition, the 5th Respondent answered the Petitioner's request for rules under Section 36 of the PHA by making rules for the Covid-19 pandemic. The rules are found in Legal Notice No. 46: The Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020, published on 3rd April, 2020 in Kenya Gazette Supplement No. 39. It is therefore no longer necessary to address that particular issue because the Petitioner's prayer for an order directed at the 5th Respondent to make rules under Section 36(m) of the PHA has been overtaken by events. I only note that the Petitioner askes for the rules to contain particular items. I do not think it is in the province of the court to direct the 5th Respondent on how to exercise his power under Section 36 of the PHA. Another observation is that the Petitioner appears to be rooting for rules that will contain information on the procurements already done in preparation for the Covid-19 pandemic. I wonder if rules can be made in such a manner. If the Petitioner desires to have certain information from the 5th Respondent, then it has to follow the applicable law in seeking to access such information.

142. The Petitioner submitted at length on the alleged abdication of judicial authority by the Kenyan Judiciary. I have read and reread the Petitioner's pleadings and I do not find any averment to that effect. It is indeed true that the Petitioner states at paragraph 22 that Article 50(1) provides that every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. At paragraph 23 the Petitioner recites the principle of legality as enacted in Article 50(2) of the Constitution. The principles of judicial authority found in Article 159 of the Constitution are referred to in paragraph 28 of the petition. There is, however, no statement in the pleadings that these particular provisions have been violated and the nature of the violation. The body of the petition and the supporting affidavit of Mercy Wambua makes no mention of the 4th Respondent and does not allege dereliction of duty by him. The 4th Respondent is only mentioned in the reliefs sought by the Petitioner. The basis upon which the reliefs are sought against the 4th Respondent is therefore not established in the Petitioner's pleadings.

143. In the case of **Kenya Pharmaceutical Association & another v Nairobi City County and 46 other County Governments & another [2017] eKLR** the purpose of pleadings was expressed as follows:-

> **"34. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial; The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action; a pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it."**

144. The Court of Appeal in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** was clear that a petition that does not disclose a case should fail. The Court held as follows:-

**"(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point.**

**(42) However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in *Anarita Karimi Njeru (supra)* underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to**

**claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to *Article 159* of the Constitution and the overriding objective principle under *section 1A* and *1B* of the Civil Procedure Act (Cap 21) and *section 3A* and *3B* of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle….**

**(43) The petition before the High Court referred to *Articles 1, 2, 3, 4, 10, 19, 20* and *73* of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further,**

**paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.**

**(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* *(supra)*. In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting," without requiring remedy by the 1st respondent."**

145. Parties are bound by their pleadings and any case constructed outside the pleadings cannot be the subject of the court's determination. In **Independent Electoral and Boundaries**

**Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR,** the Court of Appeal extensively discussed the jurisprudence on the importance of pleadings in court disputes and concluded that:-

> **"As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score."**

146. The submissions made by the parties on the issue of the alleged abdication of constitutional duty by the Judiciary cannot assist the Petitioner. It has been held that submissions cannot take the place of evidence. I should think that submissions cannot replace pleadings and will not activate matters not raised in the pleadings. That submissions cannot take the place of evidence was confirmed by the Court of Appeal in the case of **Daniel Toroitich Arap Moi v**

**Mwangi Stephen Muriithi & another [2014] eKLR** where it was held that:-

**"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "*marketing language*", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."**

147. What I have stated is sufficient to show that no case was pleaded or proved by the Petitioner on the alleged abdication of constitutional mandate by the Judiciary.

148. On another issue, the Petitioner contends that its members should be included in the list of "services, personnel or workers" exempted from the Curfew Order. According to the Petitioner, the failure to exempt legal services from the Curfew Order violates the rights of arrested persons under Article 49 of the Constitution as well as the right to fair hearing and right to fair trial under Article 50 of the

Constitution. It is the Petitioner's averment that persons arrested during the curfew require legal services. Dr. Karanja Kibicho brushed off this prayer stating that courts operate during the day.

149. Dr. Karanja Kibicho is indeed correct that the Curfew Order has not closed courts. I do not seen how the curfew affects the right to fair hearing under Article 50 of the Constitution. However, the work of advocates is not limited to court work. They also attend to persons arrested by the police. There is therefore merit in the contention by the Petitioner that its members should have been exempted from the operations of the Curfew Order so that they can assist in the protection of the rights guaranteed by Article 49 of the Constitution whenever called upon to do so. The Petitioner's concern becomes more important when the manner in which the curfew has been enforced is taken into account.

150. It was correctly submitted by the Petitioner and the interested parties that in time of crisis the State tends to overreach itself. They have also rightly submitted that the Constitution and the law has not been suspended. I agree that it is only a few rights and fundamental freedoms that have been restricted by the operation of the Curfew Order. Those rights do not include the non-derogable rights under

Article 25 of the Constitution. It is necessary for defenders and upholders of the rule of law to be extra vigilant whenever the State exercises emergency powers.

151. The Petitioner has asked the court to issue any other order it deems fit and just. In my view a strong case has been established for the policing of the security personnel. In that regard, an order shall also issue exempting the police of the police service from the operations of the Curfew Order. Here, I am referring to the 3rd Interested Party.

152. The role of the media in informing the public on the effects of the Covid-19 pandemic and the actions of the State in addressing the pandemic cannot be gainsaid. It is noted that the 2nd Respondent recognises this fact and has indeed exempted licensed broadcasters and media houses from the operations of the curfew. The National Police Service should take cue and allow the media to do its work. I do not think there is any need to issue a specific order in respect of the operations of the media considering the fact that they have been allowed to operate during the curfew hours.

153. The Petitioner has specifically asked for the costs of the proceedings to be personally paid by the 1st and 2nd respondents.

No explanation has been given as to why these two respondents should be ordered to pay costs. There is therefore no merit in the request to isolate and punish the 1st and 2nd respondents with an order of costs. This is a time to stand together and face a common enemy in the fight for our survival. Each one of us should be engaged in this fight. Although the petition seeks to protect and promote public interest, there is no evidence on record that the Petitioner attempted to reach out to the respondents with a proposal to rectify the Curfew Order before filing this petition. In view of that finding, I will order each party to meet own costs of the proceedings.

154. In view of what has been stated in this judgement, the petition partially succeeds and orders are issued as follows:-

a) A declaration be and is hereby issued that the 1st Respondent's unreasonable use of force in enforcing the Public Order (State Curfew) Order, 2020 is unconstitutional;

b) An order of mandamus is issued compelling the 2nd Respondent to amend, within five days from the date of this judgement, the Schedule to the Public Order (State Curfew) Order, 2020 so as to include the 3rd Interested Party (IPOA) and the members of the Petitioner in the list of "services, personnel or workers"

exempted from the provisions of the Public Order (State Curfew) Order, 2020; and

c) Each party shall meet own costs of the proceedings.

**Dated, signed and delivered by email at Nairobi this 16th day of April, 2020**

**W. Korir,**
**Judge of the High Court**