IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: WAKI, AZANGALALA & KIAGE, JJ.A)

CIVIL APPEAL NO. 108 OF 2014

BETWEEN

THE HON. ATTORNEY GENERAL .....APPELLANT

AND

KITUO CHA SHERIA ..... 1ST RESPONDENT
ABEBE DADI TULLU & 6 OTHERS ..... 2ND RESPONDENT
COMMISSIONER FOR REFUGEES ..... 1ST AMICUS CURIE
KATIBA INSTITUTE ..... 2ND AMICUS CURIE

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Majanja, J.) dated 26th July, 2013

in

H.C. Petition No. 19 of 2013
CONSOLIDATED WITH
H.C. Petition No. 115 of 2013)
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JUDGMENT OF THE COURT

The litigation leading to this appeal was triggered by a decision of the Government of Kenya communicated through a press release by the Department of Refugee Affairs on 18th December 2012, conveying as follows:

Daily Nation

Tuesday December 18, 2012

DEPARTMENT OF REFUGEE AFFAIRS

PRESS RELEASE

The Government of Kenya has decided to stop reception, registration and close down all registration centers in the urban areas with immediate effect. All asylum seekers/refugees will be registered and hosted at the refugee camps.

All asylum seekers and refugees from Somalia should report to Dadaab refugee camps while asylum seekers from other countries should report to Kakuma refugee camp.

UNHCR and other partners serving refugees are asked to stop providing direct services to asylum seekers and refugees in the urban areas and transfer the same services to the refugee camps.

Badu S. Katelo
Ag. COMMISSIONER FOR REFUGEE AFFAIRS

In furtherance of that decision, the Permanent Secretary in charge of Provincial Administration and Internal Security by a letter dated 16th January, 2013 addressed his counterpart at the Ministry of Special Programmes thus:

OFFICE OF THE PRESIDENT

Telegraphic address: "Rais" *P.O. BOX 30510-00100*
Telephone: 227411 ***PROVINCIAL ADMINISTRATION*** *Nairobi*
When replying please quote ***AND***
Ref No. OP PA. 41/1A ***INTERNAL SECURITY***

Mr. Andrew A. A. Mondoh, CBS
Permanent Secretary
Ministry of Special Programmes
NAIROBI

Dear Mr. Mondoh

RELOCATION OF URBAN REFUGEES TO OFFICIALLY DESIGNATED CAMPS

The Government intends to move all the refugees residing in Urban areas to the Dadaab and Kakuma Refugee Camps and ultimately, to their home countries after the necessary arrangements are put in place

The first phase which is targeting 18000 persons will commence on 21st January, 2013. The security officers will start by rounding the refugees and transporting them to Thika Municipal Stadium which will act as the holding ground as arrangements for moving them to the Camps are finalized. We do not intend to hold any of the refugees for more than two days at the stadium.

The purpose of this letter is to request you to extend humanitarian assistance both at the holding ground and during the transportation. This includes food, water, tents and health care.

Yours Sincerely

E. MUTEA IRINGO, CBS
PERMANENT SECRETARY

Those two communications were preceded by others like the letter dated 10th December, 2012 by which the Department of Refugee Affairs instructed its Refugee Officers in Dadaab, Kakuma, Mombasa, Malindi and Isiolo as follows:

10th December 2012

[Officer In –Change of
Various Refugee Camps]

Following a series of grenade attacks in urban areas where many people were killed and many more injured, the government has decided to stop registration of asylum seekers in urban areas with immediate effect.

All asylum seekers should be directed to Dadaab and Kakuma refugee camps for reception, registration and refugee status determination, issuance of movement passes for non-resettlement cases should also stop immediately.

In addition, the government shall put in place necessary preparation to repatriate Somali refugees living in urban areas.

Please take necessary action accordingly.

Signed
COMMISSIONER FOR REFUGEE AFFAIRS

The same Department penned a letter on the same day addressed to the Kenya County Representative of the United Nations High Commission for Refugees (UNHCR) referring to the decision by the Government and also advising on the various Guidelines arrived at for the relocation of urban refugees to camps.

That decision by the Government of Kenya and the various steps towards its implementation were challenged by way of two suits filed at the High Court against the Attorney-General which were later consolidated as they raised similar issues. The first was by Kituo Cha Sheria which, by self-description, is a non-Governmental Organization that works towards entrenchment of the principles of constitutionalism, the rule of law, human rights and good governance and has specific programmes on the rights and welfare of refugees and asylum seekers; while the second was by a group of seven individuals who described themselves as refugees and asylum seekers from Somalia, Ethiopia, Rwanda and the Democratic Republic of Congo who fled to save their lives from various atrocities in their counties of origin and have since lived in Nairobi for **invariable periods**

of time in locations as diverse as Eastleigh, Umoja, Kayole and Ongata Rongai where they had established homes and families, taken children to school and participated in church and other community activities.

The petitions both sought various declarations against the Government's decisions for violation of rights and the law and also prayed for various orders of *certiorari* to quash the decisions, *prohibition* to prevent the implementation of those decisions and of *mandamus* to compel the Government to take certain steps to safeguard the petitioners' rights and freedoms. To both petitions the Attorney-General filed papers in opposition. In the course of the proceedings the UNHCR and Katiba Institute were admitted as *amici curiae* and they filed briefs speaking to international obligations and interpretation of the Constitution before the High Court (Majanja, J) which, after hearing the case and the submissions of counsel, rendered its judgment on 26th July, 2015 granting the petitioners' prayer as captured in the decree as follows;

> ***"1. That the Government directive, contained in the Press Release and correspondence dated 18th December 2012 and 16th January 2013 respectively, threatens the rights and fundamental freedoms of the petitioners and other refugees residing in urban areas and is a violation of the freedom of movement under Article 39, right to dignity under Article 28 and the right to fair administrative action under Article 47(1) and violates the State's responsibility towards persons in vulnerable situations contrary to Article 21(3).***
>
> ***2. That the proposed implementation of the Government Directive, contained in the Press Release and correspondence dated 18th December 2012 and 16th January 2013, respectively, is a threat to the***

non-refoulement principle contained in section 18 of the Refugee Act, 2006.

3. ***That the Government Directive, contained in the Press Release and correspondence dated 18th December 2012 and 16th January 2013 respectively, be and is hereby quashed.***
4. ***That there shall be no orders as to costs".***

The Attorney-General was aggrieved by that decision and duly filed a notice of appeal against it in whole. A memorandum of appeal was eventually filed with the record of appeal. It raised a whopping twenty-six grounds of appeal. As the said grounds are in the main long in narrative and often repetitive, we shall not set them out herein especially because the true grievances are in essence quite few, indeed four in number, as **Mr. Moimbo Momanyi** the Litigation Counsel intimated and demonstrated in argument before us. The first issue counsel addressed us on was the interpretation of **Article 39(3)** of the Constitution of Kenya 2010 and specifically whether the right of every citizen to enter, remain and reside anywhere in Kenya extends to refugees as well. He argued that the right is reserved to citizens only and that by quashing the Governments' decision to close the urban refugee centres in Nakuru, Nairobi, Mombasa and Eldoret, the learned Judge erred by opening up the right to foreigners which, moreover, violated **Section 6** of the Refugees Act that required refugees to reside within gazetted refugee camps which are in Daadab and Kakuma.

The next issue the learned counsel identified and addressed us on was the interpretation of **Article 2(5)** and **(6)** of the Constitution. **Mr. Moimbo** criticized the learned judge for importing the provisions of the 1951 **United Nations Convention**

Relating to the Status of Refugees (the 1957 Convention) which recognizes the right of a refugee to freely move and reside within the country of refuge without paying due deference to the Constitution, which at **Article 39(3),** limits the said right. In doing so, argued counsel, the learned judge departed without cause or explanation from his own correct position in the earlier case of ***BEATRICE WANJIKU & ANOR vs. ATTORNEY GENERAL & ANOR*** [2012] eKLR that international conventions and treaties are subordinate to and ought to be in compliance with the Constitution.

Next, the learned Litigation Counsel contended that in so far as the orders to close the urban refugee centres were issued by the Directorate of Refugee Affairs in accordance with **Sections 6** and **7** of the Refugee Act, they were executive directives properly made and the learned Judge ought to have deferred to them in the spirit of separation of powers. For the Judge to order that the centres remain open, he was intruding upon a matter within the proper scope of the Executive and therefore acted outside jurisdiction. When we pressed him on whether he was propounding a theory to the effect that 'executive orders' are not amenable to judicial enquiry and review, counsel replied that they are but on narrow grounds, and that in the present case they had been properly made and did not qualify for challenge.

Appearing for the 1st respondent in this appeal, Kituo Cha Sheria, learned counsel **Miss Barasa,** elected not to address us but intimated that she relied entirely on the submissions filed by the 2nd respondent.

For the 2nd respondent, learned counsel **Mr. Magina,** first answered the issue of deference by submitting that the Bill of rights binds all state organs including the executive

and therefore enquiry can be made where there is a claim that fundamental rights have been or are in imminent danger of being violated. He referred to **Article 21(3)** to state that state policies must meet the needs of the vulnerable members of society. He conceded that refugees are not expressly stated as a vulnerable group in the Constitution but nevertheless contended that they are, by the very reason of having been forced to flee their home countries to seek refuge elsewhere. Counsel then submitted that contrary to the charge that the learned Judge intruded into an area in the exclusive competence of the executive, the learned Judge did not establish refugee centres: he only reversed an executive attempt to close them. What is more, the Judge did not issue a blanket order against closure but rather required that any closure of registration centres be done in accordance with the laid down law. That would have required public participation and consultation with stakeholders and those who would be affected by the contemplated closure, but this did not occur.

On another issue raised in the appeal, namely whether the respondents had pleaded their case and identified the affected rights and the precise manner in which they were violated, counsel contended that the petitioners did clearly plead the rights implicated and violated including the right of dignity and movement and that the requirement for precision as stated in ***ANARITA KARIMI NJERU vs. REPUBLIC*** **1KLR** and restated by a 5-Judge bench of this Court not too long ago in ***MUMO MATEMU vs. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE*** ***Civil Appeal No. 290 of 2012,*** was satisfied.

On his part Mr. Waikwa, learned counsel for Katiba Institute the 2nd Amicus commenced by stating that the Government directive that led to the legal challenge

required all refugees to be rounded up and transported to Thika Municipal Stadium as a holding ground before they were to be moved to the camps. The directive essentially required that all refugees be indiscriminately removed yet the petitioners before the High Court were individuals who had resided in Kenya for up to twenty years and had careers and children and therefore needed to remain in the urban centres for basic but important reasons. Counsel by way of context emphasized that the reasons that led the learned judge to quash the directives were that;

(a) The notion that refugees cannot enjoy the right to movement and residence within Kenya is not supported by the Constitution, international law or statutes.

(b) There was violation of fair administrative action and the right to dignity under **Articles 47** and **28,** respectively, of the Constitution.

(c) Even on an application of **Article 24** on the limitation of rights, the reasons given by the Government did not pass constitutional muster.

Turning to the three main issues identified by the appellant, **Mr. Waikwa** started by asserting that it was a fallacy to argue, as does the appellant, that **Article 39** of the Constitution applies exclusively to citizens because whereas the letter of the provision refers to citizens enjoying the right of movement and residency, it does not mean that no one else can enjoy those rights. He pointed out that under **Article 19(3) (b),** the rights in the Bill of Rights do not exclude other rights and fundamental freedoms that are recognized or conferred by law. So saying, he contended that under international law, specifically **Article 12** of the ***Refugee Convention*** and **Article 12** of ***International Covenant in Civil and Political Rights (ICCPR)***, do provide that everyone in a territory

should, to the fullest extent possible, enjoy the right of movement. He added that the **Refugee Act** does not in fact state that every refugee must reside in a camp but rather is a permissive provision allowing the minister power to designate camps.

As to **Article 2(5)** and **(6)** of the Constitution, counsel supported the view expressed by the learned Judge that there is no customary law or other express provision of law positing that refugees must reside only in certain places. The Minister's actions amounted to constructive *refoulement* of the refugees in violation of Kenya's obligation under international law to give effect to the principle of *non-refoulement* under **Article 29** of the **Refugee Convention**. Such violation would, moreover, expose the refugees to persecution and other cruel and unusual treatment in their countries of origin. It was therefore necessary to go beyond a mere hierachization of norms and consider the character of the violation and take action to avoid it. So regarded, urged counsel, the learned judge did not contradict himself apropos the **BEATRICE WANJIKU** decision (supra).

Counsel concluded by submitting that under **Article 24** of the Refugee Convention, the State has an obligation to promote the welfare of refugees and the Judge was perfectly entitled to hold that he could not see how rounding up refugees and confining them to the tents would be to their benefit. It was merely speculative and unproven that the directive was a necessary response to security considerations. At any rate, the indiscriminate nature of the directive on the face of it failed the rationality test and called for its quashing. In all the circumstances of the case the learned Judge properly found that the directive was not in conformity with the Constitution and the **Refugee Act.**

Making a brief reply to these submissions, **Mr. Moimbo** reiterated that the registration of refugees was a function of the Directorate under **Section 6** and **7** of the Refugees Act and that **Sections 17 (f)** and **25(f)** as read with **Rule 35** of the **Refugees Reception and Adjudication Regulations,** 2009 which all requires that all refugees be in the designated areas and camps so that the directive by the Government was lawful and ought not to have been quashed.

As this is a first appeal, we have considered and re-evaluated the entire case presented before the learned Judge and have analysed the same in a fresh and exhaustive manner so as to arrive at independent findings and conclusions as enjoined by Rule 29(1) of the **Court of Appeal Rules** and as has been pronounced on in many cases including ***SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD*** **[1968] EA123**.

From our consideration of the record, the submissions made and the authorities cited before us, we distil as falling for determination the following issues;

(a) Whether the learned Judge misapprehended the provisions of Article 39 of the Constitution as they relate to Refugees.

(b) Whether the learned Judge misinterpreted the provisions of Article 2(5) and (6) on the applicability of international refugee law to Kenya.

(c) Whether the learned Judge erred in holding that the State had not satisfied the criteria for limitation of rights under Article 24.

(d) Whether the learned Judge erred in quashing the directive.

We shall deal with the issues sequentially.

(a) Applicability of Article 39 of the Constitution

The learned Judge's interpretation and application of the right to freedom of movement and residence forms the crux of the appellant's complaint in this appeal and is the subject of grounds 1, 2, 3, 4, 13, 14, and 15 of the memorandum of appeal. The central argument advanced by the Attorney General is that the constitutional text makes a clear distinct between citizens on the one hand and aliens or non-citizens on the other in so far as enjoyment of freedom of movement and residence is concerned and that the learned Judge committed a patent error of law in essentially collapsing and conflating the distinction and thereby extending rights reserved to citizens to embrace refugees who are non-citizens. **Article 39** of the Constitution provides as follows;

> ***"Freedom of Movement and residence***
>
> ***39 (1) Every person has the right to freedom of movement***
> ***(2) Every person has the right to leave Kenya***
> ***(3) Every citizen has the right to enter, remain in and reside anywhere in Kenya".***

On the face of the constitutional text, it is clear that freedom of movement is a right that belongs to every person without any distinction based on citizenship. Equally applicable to all is the right to leave Kenya, meaning that no person should be compelled to remain in the country. With regard to entry into Kenya and remaining is Kenya or residing in any part of it, however, there is a clear distinction between citizens and non-citizens. A citizen needs no permission to enter Kenya. Nor can a citizen be expelled from the country and indeed is at liberty to reside anywhere in Kenya. The question that arises

is whether the express application of entry, remaining and residence rights to citizens means that non-citizens cannot enter, remain or reside anywhere in Kenya. We think at once that such a conclusion would on the face of it be absurd and is not borne out by the text itself.

The argument made by counsel for the Attorney General both before the learned Judge and before us is essentially that since refugees and asylum seekers, all non-citizens, have no right to reside anywhere in Kenya, then the Government was perfectly within rights to order, direct, require and enforce their being rounded up and confined to designated camps at Kakuma and Dadaab. In fact, counsel posited that to do so would be in fulfillment of a statutory duty flowing from **Section 17** of the **Refugee Act, 2006**. That provision is in these terms;

> **17. There shall be a refugee camp officer, for every refugee camp whose functions shall be to-**
>
> **(a) manage the refugee camp**
>
> **(b) receive and register all asylum seekers and submit to the Committee all applications for the determination of their refugee status;**
>
> **(c) ensure refugees in the camps are issued with refugee identity cards or refugee identification passes;**
>
> **(d) manage the camps in an environmentally and hygienically sound manner;**
>
> **(e) co-ordinate the provision of overall security, protection and assistance for refugees in the camp;**
>
> **(f) issue movement passes to refugees wishing to travel outside the camp; and**

(g) protect and assist vulnerable groups, women and children;

(h) ensure treatment of all asylum seekers and refugees in compliance with national law.

With respect, we do not discern from that section of the Act a requirement, express or implied, that all refugees and asylum seekers must reside in refugee camps. Had that been the intention of Parliament, nothing would have been easier than for it to say so in plain language. Our understanding of the section is that it makes provision for a person to be in charge of such refugee camps as exist and lists his duties and functions. It is an administrative checklist at most, and definitely not a normative statement of where refugees should reside.

The lack of express prohibition or exclusion of entry, remaining or residence anywhere in Kenya for refugees apart, it must be recalled that the right of freedom of movement and residence is provided for within the Bill of Rights. As such, our interpretation of the provision relating thereto has to accord with the interpretative guidance which, fortunately for us, is provided by the Constitution itself. **Article 259(1)** enjoins courts to interpret the Constitution in a broad and purposive as opposed to a narrow and mechanistic manner. It decrees that the Constitution shall be interpreted in a manner that-

"(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill or Rights;

(c) permits the development of law; and

(d) contributes to good governance".

As far as the purposes, values and principles of the Constitution are concerned, it is germane to recall that they include, as set out in **Article 10(2);**

> **"(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized."**

A court must keep these values and principles in view when interpreting the Constitution and each provision falling for consideration must therefore be construed in a manner that gives full meaning to and aims for the achievement of the principles. It is noteworthy that human rights are an overarching theme in the interpretational guidelines with a view to their fullest realization.

Indeed, beyond the general peremptory guidance with regard to interpretation of the Constitution, the Bill of Rights itself has general provisions that shed further light on the central pride of place that it occupies in the Kenya judicial space.

Article 19 provides expressly as follows;

> **19. (1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.**
>
> **(2) The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.**
>
> **(3) The rights and fundamental freedoms in the Bill of Rights-**
>
> **(a) belong to each individual and are not granted by the State;**

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) are subject only to the limitations contemplated in this Constitution.

Quite beyond argument then, the Bill of Rights in Kenya's constitutional framework is not a minor peripheral or alien thing removed from the definition, essence and character of the nation. Rather, it is said to be integral to the country's democratic state and is the framework of all the policies touching on the populace. It is the foundation on which the nation state is built. There is a duty to recognize, enhance and protect the human rights and fundamental freedoms found in the Bill of Rights with a view to the preservation of the dignity of individuals and communities. The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, **all persons**, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.

The enumeration of various rights and fundamental freedoms in the Bill of Rights is indicated to be a guide as to the content of rights. It is not meant to be exhaustive, however, so that one cannot be heard to say that unless a right is expressly provided then it does not exist and cannot be claimed. So long as a right exists by recognition or is conferred by law, that right is equally valid and efficacious unless and to the extent only as it may be inconsistent with the Bill of Rights in chapter 4. We take that to mean that if

some right exists independent of the Bill of Rights but has the effect of undermining or compromising the constitutionally declared Bill of Rights, then the constitutional provision prevails. We shall shortly return to this theme when discussing the applicability of international law.

On the application of the Bill of Rights, **Article 20** is couched in wide and all-pervasive terms, declaring the Bill of Rights to apply to **all** law and to bind all state organs and **all** persons. None is exempt from the dictates and commands of the Bill of Rights and it is not open for anyone to exclude them when dealing with all matters legal. It is the ubiquitous theme unspoken that inspires, colours and weighs all law and action for validity. It is provided for in expansive terms declaring that its rights and fundamental freedoms are to be enjoyed by every person to the greatest extent possible. The theme is maximization and not minimization; expansion, not constriction; when it comes to enjoyment and, concomitantly facilitation and interpretation. What is more, courts, **all courts,** are required to apply the provisions of the Bill of Rights in a bold and robust manner that speaks to the organic essence of them ever-speaking, ever-growing, invasive, throbbing, thrilling, thriving and disruptive to the end that no aspect of social, economic or political life should be an enclave insulated from the bold sweep of the Bill of Rights. Thus courts are commanded to be creative and proactive so that the Bill of Rights may have the broadest sweep, the deepest reach and highest claims. Hence they are enjoined in their interpretative role to adopt a pro-rights realization and enforcement attitude and mind set calculated to the attainment as opposed to the curtailment of rights and fundamental freedoms. They must aim at promoting through their interpretations of the

Bill of Rights the ethos and credo, the values and principles that underlie and therefore mark us out as an open and democratic society whose foundation and basis is human dignity, equality, equity and freedom. It is the duty of every judge, magistrate, member of a tribunal or other body invested with judicial functions to deliberately and unrelentingly pursue, encourage, entrench, protect, jealously guard, educate and propagate Project Freedom and aim to advance openness, democracy, and ensure that liberty rings loud and true in every place and sphere of Kenyan's socio-political life. The Constitution demands that everything the Bill of Rights stands for in its text, its purport, its spirit, philosophy and intendment as a charter of liberty must be given full effect in a bold and unflinching manner. Judges must speak the language of rights and fundamental freedoms and do so with neither apology nor embarrassment. To fail to do so or to do otherwise would be to violate the express precepts of the Constitution.

Given those commands of the Constitution itself, did the learned Judge err in his interpretation of **Article 39** in respect of refugees? We respectfully think not. The learned Judges' treatment and finding on the matter are captured in paragraphs 56 and 57 of his judgment thus;

> **"56. The right protected in Article 39 of the Constitution makes a distinction between person and citizen (see Famy Cared Ltd v Procurement Administrative Review Board and Another Petition No. 43 of 2012 [2012] eKLR and Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company and 2 Others Petition No. 278 of 2011 [2013] eKLR). Freedom of movement under the Constitution relates to everyone, but the right to enter, remain and reside anywhere in Kenya is accorded only to citizens hence the State may impose reasonable condition upon the right to**

enter, remain in and reside anywhere in Kenya upon non-citizens. This approach, in my view, is consistent with General Comment No. 27 I have cited above.

57. As far as refugees are concerned, two conclusions may be drawn from Article 39 of the Constitution. First, although the right under Article 39(3) is limited to citizens, it does not expressly limit the right of refugees to move within Kenya guaranteed under Article 39(1). Second, it does not expressly recognize the right of refugees to reside anywhere in Kenya but more important the Constitution does not prohibit refugees from residing anywhere in Kenya. Such a right is readily available to refugees by reason of application of the 1951 Convention and application of Article 19(3)(b) of the Constitution which states that, *"The rights and fundamental freedoms in the Bill of Rights – (b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter."* It follows therefore that any limitations to these rights cannot be arbitrary and must comply with the standards set out in Article 24".

We think that the learned judge properly directed himself first, on the distinction in Article 39 between citizens and non-citizens with regard to the right of entry and residence and second, on the Constitution's own declaration that the rights enumerated in the Bill of Rights are not exhaustive, do not exclude and, less, still extinguish, such other rights, not inconsistent with the Constitution, that may be provided by law. Given that by dint of **Article 2(6)** of the Constitution treaties and conventions ratified by Kenya form part of the law of Kenya under the Constitution, the learned judge cannot be faulted for holding, as he did, that the 1951 **Refugee Convention**, does recognize at **Article 26** the right of refugees to choose their place of residence and to freely move within the receiving state

but subject to any regulations applicable to aliens generally in the same circumstances. That provision is domesticated in **Section 168** of the Refugee Act and is also reflected in **Article 12** of the Inter-national Covenant on Civil and Political Rights (ICCPR) which, in language that eliminates any distinction between citizens and non-citizens, captures freedom of movement as follows;

1. ***Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.***
2. ***Everyone shall be free to leave any country, including his own.***
3. ***The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public) public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.***
4. ***No one shall be arbitrarily deprived of the right to enter his own country".***

We think that the learned judge properly relied on the U.N Human Rights Committee's **Comment No. 27** on this right under the Covenant and in particular on the restrictions that may properly and permissibly be imposed on it;

> ***"(1) Liberty of movement is an indispensable condition for the free development of a person. It interacts with several other rights enshrined in the Covenant***
>
> ....
>
> ***(4) Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence. In principle, citizens of a State are always lawfully within the territory of that State. The question whether an alien is 'lawfully' within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions,***

provided they are in compliance with the State's international obligations. In that connection, the Committee has held that an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within a State, any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under rules provided for by article 12, paragraph 3

...

Article 12, paragraph 3, provides for exceptional circumstances in which rights under paragraphs 1 and 2 may be restricted. This provision authorizes the State to restrict these rights only to protect national security, public order (order public), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant ...."

The learned Judge arrived at the conclusion, and we do not see how he is to be faulted for it, that under **Article 39** of the Constitution, freedom of movement relates to everyone but the right to enter, remain and reside anywhere in Kenya is accorded and reserved only to citizens and that therefore the State may impose reasonable conditions or restrictions on non-citizens. That conclusion accords with the text of the Constitution, and is also consistent with a proper interpretation of the text and finds support in the reasoning of the Human Rights Committee. We, too, agree with the conclusion he arrived at and would affirm it. We therefore answer the first issue, whether the learned judge misapprehended **Article 39**, in the negative.

(b) Misinterpretation of Article 2(5) and (6) on Applicability of International Refugee Law to Kenya

The appellant's complaint in this regard is the subject of grounds 12 to 15 of the memorandum of appeal which charge that the learned Judge elevated international

conventions and treaties above the Constitution and stripped the Directorate of Refugee Affairs of the power to execute its key statutory mandate of managing, the movement and/or residence of refugees in Kenya by importing international law granting refugees freedom of movement in absolute terms contrary to the Constitution. It is contended that the learned Judge did so while ignoring his own decision in ***BEATRICE WANJIKU & ANOTHER vs. AG & ANOTHER*** (supra) thereby offending the doctrine of precedent and undermining consistency, predictability and certainty of judicial decisions.

The constitutional provisions on which the learned judge is said to have stumbled and erred are plain enough;

> ***"Article 2. (5) The general rules of international law shall form part of the law of Kenya.***
>
> ***(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."***

They represent two distinct but interrelated regimes and sources of international law. The former, also known as customary international law is arguably the foundation of the whole system of international law (see Prof. Gregory Tirkin, ***"In General International Law Customary Law Only?"*** Is 4EJIL (1993) 534 – 54 at 534) and was all there was to it at the dawn of the science of international law. It refers to those norms that are discernible from the practice of States out of an appreciation that they have the binding force of law as *opinio juris* and apply to all the States of the world. The latter relates to particular international law which comes about as a result of the exercise by States of their treaty-making power. The two taken together represent the unity of international law and the obligations they import by virtue of constitutional

pronouncement are fully binding over and above the force of international law as the provisions declare them to be part of the law of Kenya.

The learned Judge saw and found **Article 2(5)** to be implicated on account of the principle of ***non-re-foulement***, which, he stated, ***"is the cornerstone of refugee protection and has gained the status of international customary [and is] a peremptory norm of international law."*** That principle, which protects a refugee from being expelled or returned to the country or frontiers of the very territories where his life or liberty is likely to be at risk on account of the very issues that led him to flee, is said to be the cornerstone of refugee protection. The 1951 Refugee Convention at **Article 33(1)** provides for it as follows:-

> ***33(1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."***
>
> ***(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is; or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".***

The **Refugee Act** at **Section 18** domesticates that convention norm in the following terms:-

> ***"No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or be subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where-***

(a) the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or whole of that country."

It is noteworthy that other international instruments, such as the regional 'African Union Convention Governing Specific Aspects of Refugee Problem in Africa provide for the principle of non-refoulement under **Article 2(3)** as follows;

> ***"No person shall be subjected by a Member State to measures such as rejection at the frontier return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1 paragraph 1 and 2."***

Regional treaties from far aspect reflect the same principle. See for instance **Article 22(8)** of the American Human Rights Convention adopted in 1969; the Resolution on Asylum to Persons in Danger of Persecution Adopted by the Committee of the Council of Europe and **Article 111(3)** of the Principles Concerning the Treatment of Refugees adopted by the Asian African Legal Consultative Committee during its Eighth Session in Bangkok, 1966.

At the global level it is worth emphasizing the principle of *non-refoulement* is one of the basic principles under the 1951 Convention to which no State party is permitted to enter a reservation. Further, the U.N. Declaration on Territorial Asylum which was unanimously adopted by the General Assembly [Res 2312 (XXII)] in 1967 at Article **3(1)** provided for it thus;

> ***"No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier, or, if has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."***

Given the widespread, even universal applicability, acceptance and practice of the principle of *non-refoulement* which States consider to be binding upon them as a matter of law, coupled with its further recognition and protection under international human rights law such as the ICCPR at Article 7; the European Convention for the Protection of Human Rights and Fundamental Freedoms and the 1984 U.N. Convention against Torture, there does exist a firm basis for the argument and conclusion that indeed the principle of *non-refoulement* is a norm of customary international law. The United Nations High Commission for Refugees, charged with the protection of refugees in its *Note on the Principle of Non-Refoulement* of November, 1997, stated as follows;

> ***"Because of its wide acceptance, it is the UNHCR's considered view, supported by jurisprudence and the work of jurists, that the principle of non-refoulement has become a norm of customary international law. This view is based on a consistent State practice combined with a recognition on the part of States that the principle has a normative character... the principle has been incorporated in international treaties adopted at the universal and regional levels to which a large number of States have now become parties. Moreover, the principle has also been systematically re-affirmed in Conclusions to the Executive Committee and in resolutions adopted by the General Assembly, thus demonstrating international consensus in this respect and providing guidelines for the interpretation of the aforementioned provisions."***

Having ourselves reviewed the international instruments, writings of scholars and practice of States in this regard, we are unable to accept the argument that the learned

Judge erred in his appreciation of the standing of the principle of *non-refoulement*. In concluding that the principle is so fundamental that it is considered a customary law norm, he was propounding what is quite self-evident from the materials available on the subject. We would endorse his conclusions without hesitation and even go as far as to say that without the scrupulous enforcement and observance of the principle of *non-refoulement*, humanity will show itself to have learned nothing from the tragedies of the past which have led to massive displacement of persons from territories where life, limb and liberty are in clear and present peril making the grant of asylum and refuge an imperative and compelling response. We think, in fact, that there is much merit in the argument made by the UNHCR and its Executive Committee that the principle of non-*refoulement* was in fact progressively acquiring the character and status of *jus cogens*, a peremptory norm of international law. (see Executive Committee Conclusion No. 25 para (b); U. N. docs. A/AC.96/694 para 21; A/AC.96/660 para 17; A/AC. 96/643 para 15; A/AC 96/609/Rev.1 para 5. See, also, Jean Allain; ***The Jus Cogens Nature of Non-refoulement*** Int. J Refugee Law (2001) 13 (4) 533-558 where the author notes that the principle of *non-refoulement* has acquired the status of *jus cogens*, as a peremptory norm of international law from which no derogation is permitted and is of critical importance in the contemporary world and is deserving of being maintained in the face of rising attacks on the right of people to seek asylum.

We accordingly answer the second issue whether the learned judge misinterpreted **Article 2(5)** and **(6)** on the applicability of international refugee law to Kenya in the negative.

(c) **Whether the State satisfied the Limitation Criteria under Article 24 of the Constitution.**

The appellant criticizes the learned judge for finding that the failure to examine and take into account the individual circumstances of each refugee was unreasonable and a breach of **Article 47(1)** of the **Constitution**. The contention is that whereas such individualized examination is the ideal procedure, ***"it is both impractical or unfeasible where most asylum seekers in urban centres are either on the run or running from authorities"*** and that there were no substantive defects or omissions on the encampment process to render the decision of the Directorate of Refugee Affairs unconstitutional considering especially that ***"the refoulement contemplated by the Director's directive is qualified and is intended to be carried out humanely***" so that it was wrong for the learned Judge to find that there was constructive *refoulement* yet the act of *refoulement* was remote and successful. See Grounds 20 to 22 of the memorandum of appeal.

It would seem, from the totality of the particular grounds of appeal we have cited and from the submissions made before us, that it is common ground that there was a threatened breach of the refugees' freedom of movement and residence. We have already indicated that both under the Constitution and under international refugee law, those rights are not absolute and are proper subjects of limitation but the said limitations are not at large and outside of the restraints of law. The rights can only be permissibly limited or restricted if provided by law, and are necessary for the protection of national security, public order, public health or morals or the rights and freedoms of others. See **Article 12** of the **ICCPR** and the **African Charter**.

The permissibility of limitations of rights and fundamental freedoms in our context is expressly provided for under **Article 24(1)** of the **Constitution** thus;

> ***"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***
> ***(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 the individual does not prejudice the rights and fundamental freedoms of others;***
> ***(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."***

In that provision the Constitution paints in bold writ the notion that rights and fundamental freedoms, so key, central and integral to our character as a State and a society, are not to be clawed back, limited or constricted willy-nilly on a whim. They are way too important for arbitrary interference and experimentation. Their limitation is therefore to be countenanced only as exceptional and not as a matter of course or a normal manner of conducting government business. And when any limitations must occur, there is a command that they be limitations, not by men but by law only, and even then if reasonable and justifiable as measured against an open and democratic society which is founded on human dignity, equality and freedom. In this the Constitution draws clear lines and espouses the kind of society the people of Kenya chose for themselves. It is not a closed society where people do not matter and their dignity accounts for little. Rather, they matter

greatly and their essential dignity is their crown. Any limitation therefore must be frowned upon in the first instance as a departure from the norm which calls for justification.

The justification has to come from the person defending the limitation and takes a rational evidence-based path demonstrating to the court, tribunal or other body enquiring into the limitation of the right that the requirements of **Article 24** have been satisfied. Our understanding of this is that the Constitution sets the bar deliberately high on any person who seeks to justify a derogation, limitation or constriction of a fundamental right or freedom for the simple reason that such limitations ought not to be lightly regarded. Nor should the proffered justification be without proper interrogation and the furnishing of proof that the high constitutional threshold for limitation has been met.

The rational path we espouse in the assessment of justification of a limitation of a right or fundamental freedom with the free, open and democratic society in view is based on reasonableness and proportionality, for which the learned Judge found support and persuasion in the sentiments of the South African Constitutional Court in ***SAMWEL MANAMELA & ANOTHER vs. THE DIRECTOR GENERAL OF JUSTICE*** - *CCT* 25/99, which he quoted as follows;

> ***"It should be noted that the five factors expressly itemized in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately the question is***

> ***one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected .... Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for proportionality, which calls for balancing of different interests. The proportionality of a limitation must be assessed in the context of this legislative and social setting."***

In the matter before the learned Judge, the State had in an attempt to justify the limitation, (and there is no doubt in our minds that it was for the State to discharge that burden of justification by evidence-based demonstration) filed a replying affidavit sworn by one Edwin K. Ngetich the Assistant Commissioner for Refugee Affairs on 27th March, 2013. At paragraph 10 he swore that the decision to roundup and encamp urban refugees "was taken in the interest of promoting the welfare and protection of asylum seekers and refugees," and at paragraph 20 thus:

> ***"That I am advised by the advocates on record, which advice I verily believe to be true and sound, that the right of movement of refugees within Kenya is not absolute. That under*** *Article 24* ***of the*** *Constitution,* ***the respondent is entitled to enforce the encampment policy in order to effectively undertake its statutory mandate as espoused by the*** *Refugee Act;* ***and in order to offer humanitarian assistance in a safe environment to refugees, the same cannot be guaranteed in urban centers."***

It is clear from those averments that the appellant knew that **Article 24** of the Constitution was implicated by its promulgation and enforcement of the policy. It is equally clear that the State was speaking from both ends of the mouth: in one breach it spoke, without elaboration, of the policy of roundup and encampment being, strange as it

may seem, "in the interest of promoting the welfare and protection of asylum seekers and refugees" and, in the next, characterized the same categories of people in the most unflattering and nefarious terms. That paradox may have been lost to the State but not to us or to the learned Judge who first questioned the humanitarian, if paternalistic, credentials of the policy thus;

> ***"How would relocation and encampment promote the welfare of the urban refugees like the petitioners who have settled in urban areas, are employed or have business, have children in schools and are undergoing medical treatment? The petitioners are persons who are independent and are in fact contributing to the economy. The implementation of the policy of relocation and encampment is clearly detrimental to the welfare of urban refugees. The State has not provided any evidence to show that the overall welfare of refugees will be promoted by implementation of the impugned directive."***

He then proceeded to find, and with justification, that even had the welfare of the refugees been the true intent of the policy and directive, (which he doubted), there certainly did exist less restrictive means of achieving the same policy ends other than the uprooting, rounding up and sending the target groups to refugee camps.

The learned judge then found, and with ample reason from our own assessment of the material on record, including from the excerpt of the replying affidavit that we have referred to above, that the real reason for the policy, far from being the welfare and protection of refugees and asylum seekers, was an attempt to secure or improve national security. The letter from the Commissioner of Refugee Affairs dated 10th December, 2012 directed its staff to stop the registration of asylum seekers in urban areas with immediate effect, a decision taken by Government ***"following a series of grenade attacks in urban***

areas where many people were killed and many more injured ...". No evidence was tendered to show that the said grenade attacks, worrisome and threatening to public security as they were, bore the imprimatur of refugee or asylum seekers. It was therefore wholly speculative and an exercise in official hysteria for the Government to have resorted to so sweeping and rights-negating a policy that tagged all refugees and asylum seekers 'dangerous criminals' without any nexus having been established between them and the criminal activities provoking the policy. We say this cognizant that international refugee law does not extend the protection of *non-refoulement* to refugees against who there are reasonable grounds for regarding as a danger to the security of the receiving country. A person convicted on a particularly serious crime poses such a danger. See **Article 33(2)** of the **Refugee Convention**. The same exception is reflected in **sections 4** and **16** of the **Refugee Act**.

It cannot be gainsaid that the provision of security for its citizens is one of the foremost functions and bases of government and the courts respect the fact that security is an Executive function. That does not, however, mean that the national security mantra can be unleashed and deployed to insulate governmental action from scrutiny given the centrality of the Bill of Rights, of which we have treated at length earlier in this judgment. In a democracy founded on a written Constitution that espouses freedom, liberty, accountable government and a system of checks and balances, there are no dark corners and crevices that the search- light of legality and constitutionality cannot reach. The Constitution itself speaks to this in unmistakable language. **Article 238(2);**

"The national security of Kenya shall be promoted and guaranteed in accordance with the following principles

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

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

...."

Clearly then, rights and fundamental freedoms cannot be suspended or abrogated by the Government in the name of national security and escape interrogation by the courts if moved. We think that the learned Judge struck the proper balance when he dealt with the delicate issue of national security in the following terms which we quote extensively and affirm.

"Where national security is cited as a reason for imposing any restrictive measures on the enjoyment of fundamental rights, it is incumbent upon the State to demonstrate that in the circumstances, such as the present case, a specific person's presence or activity in the urban area is causing danger to the country and that his or her encampment would alleviate the menace. It is not enough to say, that the operation is inevitable due to recent grenade attacks in the urban areas and targeting a group of persons known as refugees with a broad brush of criminality as a basis of a policy is inconsistent with the values that underlie an open and democratic society based on human dignity, equality and freedom. A real connection must be established between the affected persons and the danger to national security posed and how the indiscriminate removal of all the urban refugees would alleviate the insecurity threats in those areas. Another factor, connected to the first one is the element of proportionality. The danger and suffering bound to be suffered by the individuals and the intended results ought to be squared.

The State has not demonstrated that the proliferation of the refugees in urban areas is the main source of insecurity. Furthermore, confining some of the persons of independent means, those who are employed or carry on their businesses to refugee camps does not serve to solve the insecurity problem. While national security is important

and should not be compromised, the measures taken to safeguard the same must bear a relationship with the policy to be implemented. Security concerns must now be viewed from the constitutional lens and in this regard there is nothing to justify the use security operation to violate the rights of urban based refugees.

I find and hold that the respondent has not demonstrated a rational connection between the purpose of the policy and the limitation to the petitioners' fundamental rights. There is no evidence to show that the best way to protect and promote the welfare of refugees is through a blanket policy of relocation and encampment."

The learned Judge's reasoning accords with the sentiments of this Court in ***ATTORNEY GENERAL & ANOTHER vs. COALITION FOR REFORM AND DEMOCRACY & 7 OTHERS*** [2015] eKLR which are worth restating;

"It must always be borne in mind that the rights and fundamental freedoms in the Bill of Rights are not granted by the State and/or any of its organs cannot purport to make any law or policy that deliberately or otherwise takes away any of them or limits their enjoyment except as permitted by the Constitution. They are not low-value optional extras to be easily trumped or shunted aside at the altar of interests perceived to be of greater moment in moments such as this."

The answer to the issue raised is therefore in the negative.

d. **Whether quashing the Directive was an error.**

In light of our conclusions regarding issues a) to c) above, the issue of whether the Government directive issued vide the press releases dated 18th December 2016 and 16th January 2013 was improperly quashed presents little difficulty.

The learned Judge arrived at the conclusion that the Directive could not stand by reason of its being violative of various rights and fundamental freedoms of the refugees and asylum seekers and for violating international refugee law. We have already dealt

with those violations in some detail but we would like to point out in particular the fact that the directive was an assault on the principle of *non-refoulement*, which the State itself tacitly acknowledges. It is not open for the State to go against that peremptory norm of international law and its having done so is alone sufficient to justify the quashing of the directive.

Equally justifying the quashing is the patent violation of the right to dignity and to fair administrative action under **Article 28** and **47** respectively of the Constitution. In arriving at the policy in question, the relevant departments of Government did not engage in any discernible and meaningful consultation with the stakeholders, the persons who were to be directly and greatly affected by the decision arrived at. It was a classic case of paternalistic unilateralism on the part of Government which, out of the blue, made a decision ostensibly for the good and benefit of urban refugees. It was a decision made in a knee-jerk response to grenade attacks not rationally connected to refugees as such, and definitely not the six petitioners who constitute the 2nd respondent herein. It was a high-handed decision quite oblivious to and uncaring about the ensuing hardships that the target group of persons would thereby be exposed to. It is not difficult to see how the directive fell way short of the unequivocal requirements of **Article 47; (1)** and **(2)** and had to be struck down. The Article reads:

> ***47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedural fair,***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."***

We take the view that the learned Judge was right to reject the contentions by the State that it owed the stakeholders no obligation of consultation. We think that the State was clearly wrong to suppose that it is open to it to take any action it pleases, even when it affects the Bill of Rights, guarantees of individuals and groups, without involving and consulting them. We therefore find no fault with the learned Judge's reasoning in this regard which we accept;

> ***"The kind of relief appropriate in the circumstances will safeguard the individual rights of the petitioners while at the same time allowing the State and its agencies including the Refugee Department and other stakeholders to develop and implement policies that are consistent with the values of the Constitution. It is surprising that the respondent could argue consultation with stakeholders was unnecessary and indeed out of courtesy. Such an attitude is contrary to the national values and principles of governance set out in*** *Article 10* ***of the*** *Constitution.* ***I find and hold that there is a legal obligation to consult the public in making and implementing public policy affecting refugees. The values of transparency, good governance and public participation means that public and stakeholder engagement can no longer be wished away."***

We also harbour no doubts whatsoever that the Government Directive that some 18,000 persons be rounded up and transported to Thika Municipal Stadium as a holding ground before encampment was ominous in intent and demeaning in effect. These targeted persons were, unless the contrary was proved, innocent and their only crime ~~is~~ appears to be that they had fled for their lives and freedom and sought refuge in Kenya. That they should have been targets of rounding up by security agencies and thereafter be herded into a stadium awaiting processing, encampment and then repatriation to their countries of origin struck at the very heart of their dignity and worth, their self -respect and their essential humanity. We see in that policy and the manner of its planned

implementation a violation of the right to human dignity as provided under **Article 28** which ought to be respected and protected as of right. It is not a violation or threatened violation that the courts should countenance. This is especially so when it is considered, as expressed by Professor Christopher Mc Crudden in *"Human Dignity in Judicial Interpretation of Human Rights"* (EJIL,Vol. 19, No. 4, 2008) that it is clear that the idea of dignity has become a central organizing principle in the area of universal human rights and did supply the theoretical basis for the human rights movement, whose importance should not be underestimated.

The importance of dignity in human rights jurisprudence cannot be gainsaid. We are content to cite with approval the decision of the South African Constitutional Court in ***DAWOOD vs. MINISTER FOR HOME AFFAIRS*** [2000]5 LRC 147; 2000 (3) SA 936 (CC) where, O'Regan, J stated;

> ***"Human dignity ... informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel inhuman and degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitation analysis."***

We think that in the instant case that the learned Judge was perfectly entitled to employ the dignity discourse and analysis in deciding on the propriety of the impugned directive as follows;

> ***"The petitioners and other refugees have established roots in the country and are productive residents and if the policy is implemented they will be uprooted from their homes and neighbourhoods in what is intended to be a security operation. Mr. Masitsa, learned counsel for the petitioners, asked the court to consider the case and put weight on the fact that human dignity has to be understood against the backdrop of appreciating the vulnerability of refugees and the suffering they have endured, the trauma and insecurity associated with the persecution and flight, the need and struggle to be independent and the need to provide for themselves and their families and the struggle to establish normalcy in a foreign country. I agree with this submission. Weighed against exposure to arbitrary administrative action and abuse of their person in the host country, refugees who have established some normalcy and residence in urban areas will have their dignity violated in the event the directives are to be effected. Family, work, neighbours and school all contribute to the dignity of the individual. The manner in which the Government Directive is to be carried out undermines human dignity. I therefore find and hold that the Government Directive threatens to violate the right to human dignity under*** *Article 28".*

Upon a global and thorough re-appraisal of the entire record and a consideration of all the affidavits, submissions, case law and other authorities placed before the learned Judge, as well as those placed before us, we are in full agreement with the conclusion he reached as follows;

> ***"The proposed implementation of the Government Directive is that it is a threat to the rights of refugees. First, the policy is unreasonable and contrary to*** *Article 47(1).* ***Second, it violates the freedom of movement of refugees. Third, it exposes refugees to a level of vulnerability that is inconsistent with the States duty to take care of persons in vulnerable circumstances. Fourth, the right to dignity of refugees is violated. Fifth, the implementation of the Government Directive threatens to violate the fundamental principle of non-refoulement."***

We therefore answer the issue of whether the learned judge erred in quashing the Directive in the negative.

The upshot of our consideration of this appeal is that it is devoid of merit. We accordingly dismiss it in entirety but make no order as to costs.

Dated and delivered at Nairobi this 17th day of February, 2017.

P. N. WAKI

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR