



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.382 OF 2014

BETWEEN

REFUGEE CONSORTIUM OF KENYA.....1ST PETITIONER

N T

(suing on behalf of D L(Minor) & 47 Others).....2ND PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE CABINET SECRETARY MINISTRY OF INTERIOR

AND NATIONAL CO-ORDINATION.....2ND RESPONDENT

THE COMMISSIONER OF REFUGEE AFFAIRS.....3RD RESPONDENT

AND

CRADLE – CHILDREN FOUNDATION.....INTERESTED PARTY

JUDGMENT

1. The Petition dated 30th July 2014 asks this Court to navigate the tensions between measures taken to heighten national security and the protection of the rights of minor refugees.
2. The 1st Petitioner is the **Refugee Consortium of Kenya (RCK)**, a Non-Governmental Organization whose mission is to promote and protect the rights and dignity of refugees, asylum seekers, internally displaced persons and other forced migrants in Kenya and the wider East African region.
3. The 2nd Petitioner is a Congolese National and a registered refugee who was residing within the Kasarani area in Nairobi County before she was forcefully relocated to Dadaab Refugee Camp. She is also the biological mother of six children under the age of 15 and brings this Petition on behalf of her own children and other affected refugee children.

4. The 1st Respondent is the Attorney General while the 2nd Respondent is the Cabinet Secretary in charge of among other issues, refugee affairs, while the Commissioner of Refugees is an office created by the **Refugee Act, 2006**.

5. The Court admitted **Cradle – Children Foundation**, a Civil Society Organization which works towards the protection of children’s rights and litigates in constitutional matters affecting children, as an Interested Party.

Factual Background

6. The 2nd Respondent designated specific areas that would be recognized refugee camps by **Gazette Notice No.1927**, dated 17th March 2014 and published on 28th March 2014.

7. On 26th March 2014, the 2nd Respondent issued a press statement informing the public of the decisions made by the Government with regard to refugees and national security issues. Among the decisions was the directive that all refugees residing outside designated refugee camps as specified in **Gazette Notice No.1927** must return to their designated camps immediately.

8. Consequently, it was ordered that all refugee registration centres in urban centres were to be closed.

9. On or about 5th April 2014, the Government launched an internal security operation called “**Operation Usalama Watch**” which was carried out by the National Police Service around Eastleigh Estate and other areas perceived to be “hideouts” for illegal immigrants. The purpose of this Operation, as was noted in the **Independent Policing Oversight Authority’s Report** dated 14th July 2014, was to “**flush out Al-Shabaab adherents/aliens and search for weapons, improvised explosive devices (IEDs)/explosives and other arms so as to detect disrupt and deter terrorism and other organized activities ...**”

10. On or about 4th May 2014, the 2nd Petitioner, as well as parents of other minors, were arrested at Antioch Church in Kasarani and detained at Kasarani Police Station for three days. At the time of arrest, most of the parents had left their children at home to attend a Church service. The 2nd Petitioner and the other parents while at the Church were informed that they were going to the police station to have their refugee status documents verified. This was done, but they were detained despite pleading that they had young children who needed their care. They were then forcefully taken to Daadab Refugee Camp leaving their minor children behind. It is the above actions that triggered the present Petition.

Case for the Petitioners

11. The case for the Petitioners is contained in their Petition, the Supporting Affidavit of Lucy Kiama and the Supplementary Affidavit of the 2nd Petitioner as well as in submissions by their Counsel.

12. In the Supplementary Affidavit dated 29th January 2015 the 2nd Petitioner, N T, depones that she was arrested on 4th May 2014 together with parents of other minors at Antioch Church in Kasarani and detained at Kasarani Police Station for three days before being forcefully taken to Daadab Refugee Camp. That she produced her refugee status documents for verification upon her arrest and detention at the police station, which indicated that she had minor dependants but she was not given a chance to make a formal complaint to the Respondents before being taken to the camp. She states that she left her children at home, including the youngest who was still breastfeeding and her daughter, D L, was taken in by a friend and her attempts to seek reunification with the child were futile and the child developed health problems associated with pre-mature interruption of breastfeeding.

13. Further, that the 1st Petitioner wrote to the Commissioner for Refugee Affairs on 11th July 2014 requesting information about the refugee children who had been separated as a result of the Directive issued on March 25 2014 and the subsequent security operation but no response to this letter was ever received.

14. It is also contented that the 1st Petitioner conducted several home visits to ascertain the welfare of the minors and compiled a report that details how the children, other than the children of the 2nd Petitioner, have been suffering since their parents were taken away from them by the Respondents. The report was annexed to the Supporting Affidavit of Lucy Kiama, the Executive Director of the 1st Petitioner. To summarise this report the facts that emerge are the following;

- i. S C is taking care of his three children along with the four children of his sister after his wife, M I, was arrested at Antioch Church at Kasarani on 4th May 2014. She was detained for three days and then taken to Daadab Refugee Camp. The last born was still breastfeeding when her mother was taken away and one of the other children has to stay home from school in order to look after the infant. Charles is not employed and is not able to provide for the whole family. His wife was the one who has been providing for the family by selling clothes.
- ii. K I is currently taking care of five of his brothers' children. Kazungu's brother and his wife were both arrested at Antioch Church at Kasarani and taken to Daadab Refugee Camp. Kazungu has been forced to move from his single room house into a larger house. He works at a barber shop and is struggling to make ends meet. Currently, none but one of the children are going to school due to lack of funds. Prior to their parents' arrest, the children were enrolled at **[particulars withheld]** Academy. Kazungu requested support from RCK to enroll the children in school. He is a registered refugee himself.
- iii. E K A is an 18 year old who was in Muthurwa Islamic Academy Boarding School but had dropped out after the arrest of his parents. Without their parents, Elias and his two younger brothers could not afford their house rent and had been locked out by their landlord. They are now moving from family to family. The youngest boy attends Eastleigh Airport Primary School but the two older boys had to leave school in order to do odd jobs to get something to eat.
- iv. Two parents were at the Church at Kasarani on the material day. The father, R R, was arrested and taken to Kasarani stadium where he stayed for 3 days before being taken to Daadab Refugee Camp. The mother, V N, was also at the Church and she requested the officers to let her go back home and pick up her 1 year old daughter. She did not return to the Church. Robert maintained the family with the shop that he ran in town and Veronica now has to work as a casual labourer in order to maintain their six children. She has been unable to pay rent for the month of July and is in constant worry of being evicted. She does not want to move because the people in her neighbourhood are willing to assist her with food and work. Two of the sons, aged 20 and 18, who are in Form 2, have been kept out of school because she does not have bus fare for them to attend school in town. Her other sons, aged 14 and 9, who are enrolled in a private school have also been kept at home because Veronica has been unable to pay a balance of Kshs.10,500.00 which she owes the school. She has been able to keep her daughter, who is 12, in class 4 in a public primary school.
- v. N K and her 17 year old son, E, were also arrested at Antioch Church on 4th May 2015. They were both taken to Daadab Refugee Camp even though E was able to produce documents showing that he was enrolled in school. After N's arrest, her four other children stopped attending St. Dominic's Primary School for one week. The Congolese refugee community

intervened and appointed a caregiver to take care of the children at their home. The children reported back to school after the headteacher agreed to provide them with lunch at school. N maintained her family by running a small business. The children had since been evicted from their house and the community had to contribute rent for a cheaper house for the caregiver and four children. N has had to spend the last of her savings so that her children could get food and go to school.

vi. M S and S K, the parents of two minor children, were arrested at the Church in Kasarani on 4th May 2014 and taken to Daadab Refugee Camp. The two children are now under the care of a 22 year old guardian who lives in Kitengela and is struggling to make ends meet while also taking care of the children. The oldest child was enrolled in school in Kasarani but has dropped out since moving to Kitengela.

vii. E M, a 24 year old, and his wife have been taking care of his four younger siblings ever since their parents had been arrested at the Church in Kasarani on 4th May 2014. He decided to move the family to a smaller and cheaper house in Rongai but had subsequently lost his job in Kasarani. The three minor children are attending public school and the family depends on help from their church and social assistance.

viii. A N, a mother of 5, was arrested at Church in Kasarani and taken to the Dadaab Refugee Camp. Her 21 year old nephew has been taking care of her children since her arrest. He has, however, lost his job because he did not attend work during the swoop out of fear of being arrested. The children have stopped going to school due to the trauma of the arrest of their mother. The family depends on support of their church and community. The two youngest children, who are infants, are suffering from malnutrition.

ix. Di M N and E N, the parents of two infantile children, were arrested at the Kasarani Church on 4th May 2014. The 21 year old aunt of the children, Chantal Ritanga, has been taking care of the children. Chantal is unemployed and depended financially on her brother who has also been arrested. On 3rd August 2014, the parents returned from Daadab. Erick is struggling financially as he has had to offset rent arrears, paid for the transport from Daadab to Nairobi and sustained the family while in detention. Their youngest son was still breastfeeding at the time of the arrest and Chantal could not afford to provide him, or the other slightly older child, with special food in the three months while their parents were away.

15. The Petitioners submit that the Respondents have failed to apply the “**best interests of the child**” standard in terms of **Article 53(2)** of the **Constitution** in the implementation of the Directive and press statement. That this standard is repeated in **Section 4(2)** of the **Children Act**, which provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

16. The Petitioners further submit that the Respondents have infringed upon the Constitutional rights of the minor refugees cited in the Petition, in particular the refugee children’s rights to fair administrative action (**Article 47(1)**), freedom and security of the person which includes the rights not to be subjected to physical or psychological torture or be treated or punished in a cruel, inhuman or degrading manner. That (**Article 29(d)** and (**f**) also protect the child’s right to be protected from abuse, neglect and inhuman treatment (**Article 53(1)(d)**). They also base the Petition on the Petitioners’ inherent dignity and the prohibition against unfair discrimination (**Articles 27 and 28**).

17. The Petitioners furthermore submit that the implementation of the Directive and press statement had breached the **Children Act, 2010**. In particular, that **Section 6(1)** which provides that a child shall have a right to live with and to be cared for by his parents and **Section 7** which provides for every child's right to education which shall be the responsibility of the Government and the parents. **Section 13(1)** of the Act is also cited and which provides for the protection of every child from physical and psychological abuse, neglect and any other form of exploitation as well as **Section 18** which provides that no child shall be subjected to torture, cruel treatment or punishment or unlawful arrest.

18. The Petitioners also base their Petition on numerous conventions and international treaties such as the **United Nations Convention on the Rights of the Child (CRC)**, the **African Charter on the Rights and Welfare of the Child (African Children's Charter)**, the **Universal Declaration of Human Rights (UDHR)**, the **International Covenant on Civil and Political Rights (ICCPR)**, the **African Charter on Human and Peoples' Rights (ACHPR)**, the **1951 Convention Relating to the Status of Refugees**, the **1967 Protocol Relating to the Status of Refugees** and the **1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa**.

19. The Petitioners in addition allege that the Directive and press statement in issue are unconstitutional in that during the police operations, minors were separated from their parents and that the effect of the forceful relocation of the parents of the minors herein was that the minors were stripped of the parental care they are entitled to under the law and which they enjoyed prior to the security operation. That the children were taken in by relatives and friends who had since been struggling to take care of them and on the strength of their legal and valid registration, refugees had integrated themselves in the community in several ways such as enrolling their children in schools and it therefore had the effect of disrupting the integration, education and well-being of refugees, especially minors, who were already enjoying the social amenities available in the urban centres. The actions of the Respondents therefore exposed them to psychological and mental torture and unnecessary distress and the Respondents' conduct has caused the children and their caregivers to fear that they will be forcibly relocated in the same manner as their parents.

20. The Petitioners also submit that the decision to relocate urban refugees to the designated camps was done without proper planning towards ensuring that the rights and interests of the refugees are catered for and more so those of the minor children. The directives were implemented hurriedly without due regard to the rule of law and the right to fair administrative action by the Respondents. That the Petitioners had legitimate expectation that the Respondents would adhere to due process before separating and/or removing the guardians of the minors from their homes. The Petitioners refer to a report by the Independent Policing Oversight Authority in which it was concluded that the operation was not conducted in compliance with the law, respect for the rule of law, democracy, human rights and fundamental freedoms as envisaged under **Article 238** of the **Constitution**.

21. The Petitioners further contend that the directive failed to take account of the fact that both adult and minor refugees were registered in urban centres and had therefore never been to any refugee camp, designated or otherwise. Furthermore, that upon registration in urban centres, refugees are issued with **UNHCR** mandate certificates which were still valid at the time that "**Operation Usalama Watch**" was conducted.

22. In a Supplementary Affidavit dated 30th January 2015 and sworn on behalf of the Petitioners by Leila Muriithia-Simiyu, Senior Programme Officer of the 1st Petitioner, it was stated that the directive was discriminatory in that it only targeted refugees living outside refugee camps in spite of the fact that most of them had legal mandate issued by **UNHCR** with the Government's authority to live outside the refugee camps.

23. It was also deponed that the Respondents had not shown a justifiable nexus between security threats in the County and the presence of refugees in the urban centres. That the Respondents' decision exceeded their mandate and led to the indiscriminate relocation of all refugees to the camps irrespective of their registration status and individual circumstances. That therefore this is a clear violation of refugees' rights under **Article 47** of the **Constitution**.

24. Further, that no evidence had been provided that the Respondents listed with **UNHCR** for the provision of adequate facilities and services for the protection, reception and care of refugees as envisaged under **Section 7(2)(d)** of the **Refugees Act** had breached their terms of entry into Kenya. Although the Respondents submit that there are facilities available in the camps, the Petitioners submit that these are in deplorable condition and far from what the children were used to in urban centres. They refer to the **UNCHR Kenya Comprehensive Refugee Programme, 2015** in this regard.

25. It is also the Petitioners' case that **Article 39** of the **Constitution** ought to be read together with **Article 26** of the **1951 Refugee Convention** which obligates Kenya to accord refugees the right to choose their place of residence or to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances. That decision to qualify the right for refugees to choose their place of residence or exercise their freedom of movement was done without taking into consideration cases that would lead to family separation and interfere with family unity and the best interest of the children.

26. Further, that the limitation and interference with the rights and welfare of refugee children during "**Operation Usalama Watch**" is unreasonable and unjustifiable as no connection has been shown between the urban refugees and insecurity in the Country and that under **Article 24(1)(d)** and **(e)**, the 2nd Respondent ought to have explored other less restrictive means to heighten the security in the County.

27. The Petitioners in addition submit that it is in the best interest of the children to allow them to access social services in urban areas and to relocate the children to the camps would be to deny them the life they had adapted to and the right to education that they have been getting. That no prejudice will be occasioned to the Respondents if the minors remain in urban centres with their parents as no evidence has been produced that the proliferation of security threats is directly related to the presence of registered refugees in urban centres.

28. The Petitioners for the above reasons now seek the following orders;

(a) An order of mandamus to compel the Government to re-unite the parents with their children in urban areas;

(b) An order of mandamus to compel the Government to allow refugee children to access social services in urban areas;

(c) An order nullifying the directive to relocate refugees and asylum seekers to the refugee camps, dated 26th March 2014, to the extent that it infringes upon the best interests of the minors;

(d) An order barring the Respondents (jointly and severally) from taking the children to refugee camps or any other place without consultation and agreement with the relevant families that are currently taking care of the minors;

(e) A declaration that the Respondents are in contravention of Article 29(d) and (f); 53(1)(d) and 53(2) of the Constitution of Kenya in respect of the Petitioners;

(f) *An order compelling the Respondents to compensate each of the (minors) Petitioners for the infringement of their rights;*

(g) *An order compelling the Respondents to pay the costs of this Petition;*

(h) *Further, other and consequential orders as the Court may make.”*

Respondents' case

29. A Replying Affidavit, sworn by Haron Komen who is the Acting Commissioner for Refugee Affairs, was filed on 7th October 2014. The Respondents also filed written submissions on 20th April 2015.

30. The Respondents admit that the impugned Directive was issued in Gazette Notice No.1927 of 2014 and the press statement was issued of 6th March 2014, but deny that the Directive is being implemented discriminatorily by the Respondents since it is directed towards all refugees resident in Kenya and is not only targeting urban refugees.

31. Mr. Komen further deponed that the searches, arrests and detention of refugees and asylum seekers and their subsequent relocation to refugee camps were within the law since **Section 7** of the **Refugee Act, 2006** mandates the Commissioner to regulate refugee affairs in the Country and it has not been demonstrated how the Commissioner and/or the Cabinet Secretary have exceeded that mandate. That under **Section 16(2)** of the **Refugees Act, 2006**, the 1st Respondent is also clearly mandated to designate places and areas to be refugee camps and it has not been demonstrated that the Gazette Notice was not issued after consultation with the host community in Daadab and Kakuma. Furthermore, the 1st Respondent was justified in issuing **Gazette Notice No.1927 of 2014** and the press statement because it was done for the purposes of streamlining refugee management and the emerging security challenges.

32. Mr. Komen in addition deponed that although **Article 39(1)** and **(2)** of the **Constitution** provides that every person has freedom of movement and freedom to leave Kenya, this is not an absolute right and it can be limited in terms of **Article 25** of the **Constitution** while **Article 39(3)** is only applicable to Kenyan citizens. Furthermore, that under **Article 26** of the **1951 Refugee Convention**, the right to choose the place of residence in a host Country is qualified and is subject to the regulations of the host Country; **Article 2** of the **1951 Refugee Convention**, refugees are required to conform to the laws and regulations of the host state, including measures taken for the maintenance of public order.

33. Mr. Komen went on to depone that under the **Refugees Act** and its **2009 Regulations**, the Commissioner is mandated to arrest any refugee who is suspected of committing an offence contrary to the Act. With reference to this, he stated that all refugees who resided in the urban areas, without the required documents, committed an offence under **Section 25(f)** of the **Refugees Act, 2006** and were thus arrested and sent to the Camps.

34. It was also deponed on behalf of the Respondents that the decision to have all refugees moved to refugee camps was not taken arbitrarily and that no presentations or complaints were made to the 2nd Respondent that minors were separated from their parents for the necessary action to be taken. It was further submitted on behalf of the 2nd Respondent that it has always, in exercising its mandate of regulating refugee affairs, taken into account special circumstances which are placed before it and always considers special cases of persons in need of medical care which cannot be obtained in the designated areas and those pursuing education before making an adverse decision. The Respondents in that regard annexed certificates of exemption of some refugees from returning/going to the camps and

for instance, two minor Somali refugees along with their guardian who holds an asylum seekers permit were exempted from relocating to the camp because the minors suffer from haemophilia, which requires comprehensive care. The Respondents also added that parents of some of the children have obtained 30 day movement passes from their designated refugee camps so as to travel to Nairobi and reunite with their children. The Respondents attached a copy of the minutes of the Vetting Committee for issuance of movement passes in that regard.

35. The Respondents submit that the report the 1st Petitioner compiled which details how the children have been suffering since their parents were taken away, is not based on any allegation that the children were separated from their parents, but rather an observation and recommendation that the children should have been held separately from the adults during their initial incarceration.

36. It was deponed further on behalf of the Respondents that there are adequate facilities, humanitarian aid and assistance available to the refugees within the designated refugee camps and adequate security is provided to the camps and no proof has been provided to this Court to support allegation that the children should only enjoy the social amenities available in urban centres.

37. In response to the allegations that the Respondents had violated the provisions of various international instruments, the Respondents submitted that they are not expelling the Petitioners or any other refugees from Kenya or subjecting them to situations or measures that are similar to what they were experiencing in their Countries of origin. That the actions of the Respondents toward the Petitioners are also within the limits of the Constitution, International Law, the **Refugee Act, 2006** and all other applicable laws in Kenya. Moreover, that measures undertaken are in the public interest and national security principles enshrined in **Articles 238** of the **Constitution**.

38. The Respondents went on to submit that, in case some of the parents are still in designated areas, the Respondents are willing to issue movement passes to the affected parents of the alleged minors and with the assistance of the Director of Children Services, facilitate any child alleged to have been separated from their parents to move into the camp and join their parents. In that regard, it is their case that the Petitioners have not demonstrated or produced any evidence that they applied for the relevant movement passes and that these were denied.

39. The Respondents further submit that **Gazette Notice 1927 of 2014** and the press statement of 26th March 2014 were at issue in **Petition No.206 of 2014 Samow Mumin Mohamed vs the Cabinet Secretary Ministry of Interior & Co-ordination of National Government, Attorney General & Commissioner for Refugees** and the constitutionality of the gazette notice was affirmed by the Court.

40. The Respondents also contend that the Petitioners are only interested in bringing refugees to urban centres and not about the welfare of the minors. They submit that granting the Petitioners the reliefs they are seeking would be contrary to the public interest and principles of national security and will also contravene the Directive issued by the Government.

41. The Respondents fully submit that Kenya is committed to the principle of *non-refoulement* as shown in **Article 18** of the **Refugee Act** and that they are not returning the refugees to territories outside of Kenya that are hostile to them but submit that they have critically followed international instruments and local laws concerning immigration and protection of aliens in their territory in enacting the Directive. For the above reasons, the Respondents pray that the Petition should be dismissed with costs.

Interested Party's Submissions

42. The Interested Party is in agreement with the Petitioner's case and made written submissions on the best interests of the child standard. They averred that in a nutshell, while determining the best interest of a child in a particular situation is no easy task, this standard means that the best interests of the child has to be considered before a decision affecting his or her life is made.

Determination

43. The main point for determination is whether the Respondents' acts and/or omissions in executing the Directive infringed upon the rights of minor refugees and violated the provisions of the Constitution and other legal instruments to which Kenya is bound. If it is found that the implementation of the Directive infringes upon the rights of the Petitioners, it would subsequently have to be determined whether this limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.

44. In that regard, it has been submitted on behalf of the Respondents that **Gazette Notice 1927 of 2014** and the press statement of 26th March 2014 were considered by this Court in **Petition No.206 of 2014 Samow Mumin Mohamed vs The Cabinet Secretary Ministry of Interior & Co-ordination of National Government, Attorney General & Commissioner for Refugees** and that the constitutionality of the Directive was affirmed by the Court. It should be noted however that the Court did not in that case make a declaration that the Directive and press statement are constitutional, but held that the Petitioners in that case had failed to demonstrate how the Directive affects their individual circumstances and had also failed to show that their fundamental rights and freedoms had been violated. Subsequently, the Court then held that the press statement of 26th March 2014 did not violate the Petitioners' rights and fundamental freedoms and that **Gazette Notice No.1927** is not unconstitutional in the specific circumstances and pleadings in that case. In the matter at hand however, the Court is at liberty to consider the constitutionality of the Directive by firstly determining whether or not the Petitioners in this matter have made a convincing case that it infringes upon their rights and fundamental freedoms. The decision in **Samow Mumin** is therefore not binding on this Court to that extent.

45. In determining this case, it is crucial to consider the vulnerable position of refugee children. I say so because in **Petition No.19 & 115 of 2013 Kituo cha Sheria and Others vs Attorney General [2013] eKLR (Kituo case)** this Court held that refugees fall within the category of vulnerable persons recognized by **Article 20(3)** of the **Constitution** since they have been forced to flee their homes as a result of persecution, human rights violations and conflict. The Court also held that refugees or those close to them have been victims of violence on the basis of very personal attributes such as ethnicity or religion and that they are **"vulnerable due to lack of means, support systems of family and friends and by the very fact of being in a foreign land where hostility is never very far"**.

46. In addition to vulnerabilities which a person may face by virtue of being a refugee, the difficulties of a person's situation is extrapolated if that person is also a child and thus belongs to another group of **"vulnerable persons"**. The United Nations High Commission on Refugees has expressed in its guidelines on the protection and care of refugee children by stating that **"(r)efugee children are children, first and foremost, and as children, they need special attention"**. The guidelines further recognize that children are susceptible to disease, malnutrition and physical injury; are dependent on adults for their physical, psychological and social wellbeing and that their development should not be interrupted. It is also expressed in the guidelines that;

"Refugee children face far greater dangers to their safety and well-being than the average child. The sudden and violent onset of emergencies, the disruption of families and community structures as well as the acute shortage of resources with which most refugees are confronted,

deeply affect the physical and psychological well-being of refugee children. It is a sad fact that infants and young children are often the earliest and most frequent victims of violence, disease and malnutrition which accompany population displacement and refugee outflows. In the aftermath of emergencies and in the search for solutions, the separation of families and familiar structures continue to affect adversely refugee children of all ages. Thus, helping refugee children to meet their physical and social needs often means providing support to their families and communities.”

47. For the above reasons, myriad of international and regional instruments, Acts of Parliament and Constitutional provisions have been enacted in order to protect the rights of refugees and children, respectively. That is why Kenya is a signatory of the following relevant international and regional instruments;

- a. **The 1951 Convention Relating to the Status of Refugees (“1951 Convention”).**
- b. **The 1967 Protocol relating to the Status of Refugees.**
- c. **The 1969 Organisation of African Unity Convention Governing the Specific aspects of Refugee Problems in Africa (“AU Convention”).**
- d. **The 1989 United Nations Convention on the Rights of the Child (“UNCRC”)**
- e. **The 1990 African Charter on the Rights and Welfare of the Child (“ACRWC”)**

48. In addition, in terms of **Article 2(5)** and **(6)** of the **Constitution**, the general rules of international law and any treaty or convention ratified by Kenya form part of the law of Kenya under the Constitution. Kenya has further enacted the **Refugees Act, 2006**, to make provision for the recognition, protection and management of refugees and for connected purposes. In terms of **Section 16** of this **Act**, every recognized refugee and every member of his family living in Kenya is entitled to the rights, and be subject to the obligations, contained in the international conventions to which Kenya is party and is subject to all the laws in force in Kenya. Refugees are also entitled to the protections of the Constitution and the Bill of Rights. Kenya has further enacted the **Children Act, 2010** in order to give effect to the principles of the CRC and ACRWC.

49. The most important principle when dealing with the rights of children is that of the “**best interests of the child**”. This is a universal standard which has its origins in family law and is a guiding principle in decisions to be made about children. The **Constitution** of Kenya in **Article 53(2)** provides that a child’s best interests are of paramount important in every matter concerning the child and the **Children Act** in turn at **Section 4(2)** provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, Court of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

50. I also note that **Article 3(1)** of the **CRC** provides that; “**In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration**”. The **African Charter**, in turn provides in **Article 4(1)** that in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

These are the principles I shall apply in determining the Petition before me;

Have the Respondents violated the Petitioners' rights in terms of the Constitution, Children Act and International Conventions?

51. The Petitioners seek a declaration that the Respondents are specifically in contravention of **Articles 29(d) and (f) and Articles 53(1)(d) and 53(2) of the Constitution**. The Articles respectively protect the right to freedom and security of the person which includes the right not to be subjected to torture in any manner or treated or punished in a cruel, inhuman or degrading manner, and the rights of every child to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour and provides that a child's best interest is of paramount importance in every matter concerning the child. They furthermore base their Petition on **Article 27** which guarantees equality and freedom from discrimination; **Article 28** which protects the right to dignity and **Article 47(1)** which protects the right to fair administrative action. The Petitioner also submit that numerous provision of the **Children Act, 2010** had been violated and that the children had been separated from their parents in contravention of international and regional law.

52. In answering the question posed above, it is a settled principle that a party who approaches the Court for the enforcement of fundamental rights and freedoms under **Article 22 of the Constitution** must state his claim with some measure of precision in respect of the right allegedly violated and must demonstrate how it has been violated in relation to him or another person. In what follows, each of the rights and freedoms which the Petitioners allege have been infringed will be discussed in turn.

Prohibition against unfair discrimination

53. In the Supplementary Affidavit sworn on behalf of the Petitioner by Leila Muriithia-Simiyu, it was deponed that the directive in issue was discriminatory because it only targeted refugees living outside the refugee camps. In that context, generally, in my view, discrimination is differentiation on illegitimate grounds. Unfair discrimination further means that people are treated differently in a way which impairs their fundamental dignity as human beings. **Article 27(4) of the Constitution** thus provides that;

"The State shall not discriminate directly or indirectly against any person on any ground, including race, sex pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, dress, language or birth."

54. It must be noted that the Petitioners did not submit that the relocation of refugees to refugee camps amounted to unfair discrimination because refugees are treated differently from other people within Kenya's borders in a way which impairs their human dignity. Rather, it was argued that the Respondents have differentiated between refugees living in refugee camps and those living in urban areas by issuing impugned directive. Further, that the said action was taken to ensure that all refugees are eventually detained in camps and thus subjected to the same conditions. If that be so, it is not evident what any unfair impact which the Directive might have had on refugees living outside of the camps may be and the Petitioners have not made a compelling case in this regard. I say so because it has not been shown that is only the refugees involved in the present Petition who were targeted and which others were left out and why. In the circumstances, it is very difficult to find in their favour on this aspect of the Petition.

Right to freedom and security of a person

55. The Petitioners seek a declaration that the Respondents are in contravention of **Articles 29(d) and (f) of the Constitution**, which provides that;

"Every person has the right to freedom and security of the person, which includes the right not

to be-

- a. ...
- b. ...
- c. ...
- d. **Subjected to torture in any manner, whether physical or psychological;**
- e. ...
- f. **Treated or punished in a cruel, inhuman or degrading manner.”**

Apart from citing this provision, the Petitioners have not made an argument in either their written submissions, or in any of the Affidavits sworn in support of this case, as to how the Directive, press statement and subsequent acts and/or omissions of the Respondents have violated the Petitioners' rights under this Article.

In the circumstances, I am unable to address this issue one way or the other at all save that I am unable to find in favour of the Petitioners.

Right to dignity

56. Like the issue above apart from citing **Article 28** of the **Constitution**, the Petitioners have not made an argument in either their written submissions or in any of their Supporting Affidavits to show how the Directive, press statement and subsequent act and/or omissions by the Respondents have violated the Petitioner's right to dignity. That is all to say on the matter.

Right to fair administrative action

57. In terms of **Article 47** of the **Constitution**, the State is enjoined to take administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. In that context, the Petitioners submit that there was no adequate, proper and systematic planning or the development of a lawful, reasonable and procedurally fair policy by the state to cater for the welfare of refugee children and their parents before the Directive was issued and swiftly implemented. That the Petitioners had legitimate expectation that the Respondents would adhere to due process before separating and/or removing the guardians of the minors from their homes but that the Directive was implemented hurriedly without due regard to the rule of law.

58. I have taken into account the facts as set out elsewhere above and I am in agreement with the Petitioners that they were denied the right to fair administrative action. In saying so, I recall that in the matter of **Kituo cha Sheria and Others vs Attorney General [2013] eKLR** it was held that a policy that does not make provision for the examination of individual circumstances and anticipated exceptions is unreasonable and a breach of **Article 47(1)** of the **Constitution**. Likewise, in this case, it was unreasonable of the Respondents to indiscriminately relocate all the arrested refugees without considering their individual circumstances first. Infact the decision to grant exemptions to some refugees who were affected by the impugned actions were made several months after the fact and are an admission that the initial decision was hurried and not procedurally fair. I also agree with the Petitioners that this shows that the rights to fair administrative action and the best interests of the child were breached as the individual cases for consideration ought to have been dealt with before the relocation. That the affected parents were arrested while in Church, denied the opportunity to make arrangements for the care of their minor children, detained and moved to the Refugee Camps without any regard to all those fact is a clear breach of the expectations of fair administrative action and thence a breach of **Article 47** of the **Constitution**. I so find.

The rights of the child

59. The Petitioners submit that the Respondents failed to observe the principle of the best interests of the child during the implementation of the Directive, with the effect that many of the children cited in this Petition suffered the violation of their fundamental rights. The Petitioners cite a number of provisions of the **Children's Act** which they claim have been violated. In that regard, **Section 6(1)** of the **Children Act** provides that a child shall have a right to live with and to be cared for by his parents and **Section 7** provides for every child's right to education which shall be the responsibility of the Government and the parents. **Section 13(1)** of the **Act** mirrors **Article 53(1)(d)** of the **Constitution** and provides for the protection of every child from physical and psychological abuse, neglect and any other form of exploitation. The Petitioners furthermore submit that the children were separated from their parents, contrary to **Article 9** of the **CRC**.

60. Having taken into account the submissions by all Parties, it is not in dispute that the children cited in this Petition have been separated from their parents. In terms of **Article 9** of the **CRC** separation is only justified if it is necessary for the best interests of the child, which is clearly not the case in this matter. The Supporting Affidavit of the 2nd Petitioner along with the accounts recited in the 1st Petitioner's report makes it clear that "**Operation Usalama Watch**" was carried out abruptly; parents left their children behind for what they thought would be the few hours of a Church service, but never returned home. The Court has been informed of more than one case of breastfeeding infants who were separated from their mothers and consequently suffered malnutrition. The effect of the separation has been to deprive children of the right of family life and parental care which they had previously enjoyed. The children's lives have been therefore disrupted; many of them had no choice but to leave school because they have had to deal with the trauma of losing their parents and some no longer have the means to pay for school fees or transport and some had to move in with relatives who do not live near the schools where they had been enrolled.

61. As a result of the actions of the Respondents, it is obvious that many families have lost their only income-earning members and most of the children's guardians are very young and not in a financial position to look after them. Furthermore, most of the guardians who have taken the places of detained parents are refugees themselves, and were living with the risk of being detained in terms of the Directive and leave the children without a guardian once more.

62. It is my finding in the circumstances that the Respondents have taken retrogressive measures which has caused children lose of the parental care which they had before the Directive was implemented. The Respondents' defence that they issued exemption and movement passes to deserving refugees is not plausible in the face of the facts before me. I say so because almost all the parents of the children on whose behalf this Petition was brought were arrested on 4th May 2014. The certificates of exemption which the Respondents annexed were all issued more than a month after that date. Furthermore, the reasons for qualifying for a certificate of exemption were, according to the evidence provided, exclusively to continue with university studies and special medical needs. It is not evident that the Respondents have granted any exemptions from living in the camps on the basis that the refugee in question is a parent or guardian to a minor child and that it is in the best interest of that child to live outside of the camp and with his or her parent. Further, movement passes, vetted and approved in terms of the Respondents' system, were only issued from 31 July 2014 and only allowed a refugee to leave the camp for a limited time. Thus, according to the evidence provided, the best parents living in camps who want to reunite with their children can hope for is to be given a "**30 day movement pass**" by the Vetting Committee, 3 months or longer after the initial separation. The exemption and movement pass procedures are in such circumstances of little help to the children whose rights are infringed by the separation from their parents and who have lost their source of security, care, income and nutrition.

63. In addition to the above, the Respondents' suggestion that the children ought to be reunited with their parents in the camps is not a viable option because, apart from interfering with their educational and social integration, it also fails to take account of the individual circumstances of the children and their parents. The Respondents' claim that there are facilities like schools, health facilities (including a referral hospital), solar street lighting and security in the camps, yet provide no proof of the existence and adequacy of these facilities is not tenable nor convincing a solution. The Petitioners have on the other hand annexed a UNCHR Kenya Comprehensive Refugee Programme Report to their pleadings which indicates that only 40% of refugee children living in refugee camps are enrolled in school. While it may be in the best interest of an infant to be reunited with her mother in a refugee camp, the same will not necessarily be true for a 16 year old who might not be able to either work or go to school in a camp. As the Petitioners have correctly argued, the determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including his or her nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. In order to determine the best interests of a child therefore, an "**individualized examination of the precise real-life situation of the child**" has to be made. None has been made in the present case.

64. In that context, **Section 28(2)** of the **South African Constitution**, which is exactly the same as **Article 53(2)** of the **Kenyan Constitution**, has been interpreted by South African Courts to be a right and not just a guiding principle - See **Sonderup vs Tondelli and Anor 2001 (1) SA 1711**. It has also been interpreted to require the law to make the best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimize the consequent negative effect on children as far as it can.

65. Further, in the matter of **S vs M [2007] ZACC 18**, the Constitutional Court of South African considered the duties of a sentencing Court when the person being sentenced is the primary caregiver of minor children, while keeping in mind the constitutional protection of the best interests of the child. The Court held that;

"[F]ocused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing Court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing Courts."

The Court in the above case, however made it clear that the fact that the best interests of the child are paramount does not mean that they are absolute and considering the impact of a custodial sentence on a child does not mean that a primary caregiver will never be given a custodial sentence. Of importance however is the fact that even in a matter as serious as sentencing for a criminal conviction, the best interests of a child must be taken into account.

66. In the same way therefore that sentencing Courts were ordered to give effect to **Section 28(2)** of the **Constitution** by considering the interests of the children of the primary caregiver (who was to be sentenced) in the sentencing process, the Respondents ought to have paid attention to the interests of the children cited in this Petition, before proceeding to take their parents to refugee camps. I say so while also quite aware that the best interests of children cannot be an absolute bar against the implementation of legitimate national security and refugee control policies. However, had the best interests of the children been considered by the Respondents at the point where the parents of the Petitioners were taken to Kasarani Police Station for the verification of their documents, they could have been spared much anguish and suffering.

67. In my view, therefore, the Petitioners have succeeded in showing that the implementation of the Respondents' Directive and press statement infringed upon the childrens' rights to parental care, education and to be protected from neglect. The Petitioners have also showed that, far from their best interests being considered to be of "**paramount importance**", their interests were not considered at all. I so find.

Whether the Directive can be justified under Article 24 of the Constitution

68. It is my finding and flowing from my holding above that the Petitioners have succeeded in showing that the Respondents have infringed upon the rights of children under **Article 47(1)** and **53** of the **Constitution** and have also breached **Section 6(1), 7** and **13(1)** of the **Children Act** and **Article 9** of the **CRC**. Having therefore concluded that the implementation of the Directive violates the fundamental rights and freedoms of the children, the next level of inquiry is whether the violation is justified under **Article 24** of the **Constitution**.

69. In that regard, **Article 24(1)** provides that;

"(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."***

70. In terms of **Article 24(3)** the State bears the burden of demonstrating that the Directive and press statement is reconcilable with the limitation clause. As was stated in the **Kituo case (supra)**, the five factors should not be applied mechanically as a mere checklist, but must rather be used in balancing different interests and determining the proportionality of rights' limitations. The Court in that case also held that the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be.

71. The 3rd Respondent in an attempt at justifying the limitation of rights submitted that the reason for issuing the Directive and press statement ordering the encampment of all refugees was to streamline refugee management and to address emerging security challenges. However, it is my finding as was also held in the **Kituo case** that any limitation based on national security considerations cannot be excluded from consideration under **Article 24**. The Court stated thus in that regard;;

"(w)here 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

areas is causing danger to the County 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 tarring a group of person 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.”

72. I agree and reiterate the above holding and would only add that the State has not provided any evidence whatsoever to show that the relocation of urban refugees, who are lawfully registered by itself, will address the current security challenges. No evidence has also been adduced to prove that there is a clear nexus between lawfully registered and law-abiding refugees and security challenges. I therefore agree with the Petitioners' submission in this regard. Further, the Directive and press statement, according to which all refugees were to be relocated to refugee camps, have not been shown to be related to the safeguarding of national security at all. Furthermore, beyond the assertion that less restrictive means might be available to achieve the purpose of improving national security, the Directive and press statement could have been implemented in a less restrictive manner. As stated elsewhere above, the Respondents could have prevented the infringement of the rights of children cited in this Petition by considering their best interests prior to detaining their parents in refugee camps and yet with its powerful state machinery, still managed any security challenges they were facing at the time. No every refugee is a security threat and the fact that refugees may be in a refugee camp is similarly not on assurance of safety. In fact, lessons from recent terrorist attacks would be that terrorists may not necessarily be a part of the refugee community contrary to popular thought in the public Court.

73. The limitation of the Petitioners' rights is therefore not justified under **Article 24** as no rational connection between the purpose of the Directive and the infringement of rights have been established.

Whether the Petitioners are entitled to the Reliefs sought

74. **Article 23(3)** provides that in any proceedings brought under **Article 22**, a Court may grant any appropriate relief. The kind of relief appropriate in the circumstances will safeguard the individual rights of the children in this Petition 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 including addressing security concerns in an insecure world.

75. The Respondents must by now be aware that the robust Bill of Rights in our Constitution has teeth and they must wake up to that reality. Important as the need to secure Kenyans is, haphazard, ill-thought out, knee-jerk reaction-like directives cannot be allowed to override the said Bill of Rights unless **Article 24** thereof is invoked and properly so. This, and other Courts, will not tire in stating so. I digress.

76. In the Petition, Prayer (a) seeks an order to compel the Government of Kenya to re-unite refugee children in urban areas with their parents. This Prayer has been partially admitted but is in any event warranted and shall be granted as prayed.

77. Prayer (b) seeks an order to compel the Government to allow refugee children to access social services in urban areas, no facts, context or submission with regard to this Prayer were given and so it is disallowed.

78. Prayer (c) relates to the fact that the Directive to relocate refugees to Refugee Camps did not take into account the best interests of children and I have shown why it must be granted.

79. Prayer (d) seeks an order to bar the Respondents from taking the children to refugee camps without consulting those taking care of them. The Prayer was not well canvassed and I am unable to grant it.

80. Prayer (c) seeks a declaration that **Articles 29(d) and (f), 53(1) (d) and 52(2) of the Constitution** have been breached by the Respondents.

81. I have shown that only **Article 53(1)(d) and 53(2)** have been violated and an appropriate declaration must be made in that regard.

82. Prayer (f) is for an order of compensation for breach of the rights aforesaid and the quantum thereof is at the discretion of the Court noting the circumstances of the case before me, I have agonized on the matter and to be fair to Parties, a sum of Kshs.50,000/- to each of the 48 affected children is adequate compensation.

83. Prayer (g) is for costs and it is warranted.

84. Prayer (h) is for other and consequential orders but I see none that I should grant.

Disposition

85. For the above reasons, the Orders to be granted are the following;

- a. An order of Mandamus doth issue to compel the Respondents, jointly and severally to reunite the 2nd Petitioner and other affected refugee with the 48 children on whose behalf the present Petition was brought.***
- b. An order is hereby issued nullifying the Directive dated 26th March 2014 to relocate the 2nd Petitioner and other affected refugees (parents of the 48 children aforesaid) to refugee camps in Kenya. The order is limited to the said persons only.***
- c. A declaration is hereby issued that the Respondents acted in contravention of Articles 53(d) and 53(2) of the Constitution in respect of the 48 children affected by the above Directive.***
- d. An award of Kshs.50,000/- shall be paid by the Respondents to each of the 48 affected children.***
- e. Cost of the Petition shall be paid to the 2nd Petitioner and the 48 affected children.***

86. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Miss Komo holding brief for Mr. Kaliuki for Petitioner

No appearance for Respondents

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE



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