REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Petition 199 of 2007

IN THE MATTER OF: SECTION 84 OF THE CONSTITUTION OF KENYA

E MATTER OF: IMMIGRATION ACT CHAPTER 172 OF THE LAWS OF KENYA AND THE ANTI-CORRUPTION AND ECONOMIC CRIME ACT, NO.3, 2003

IN THE MATTER OF: THE CONTRAVENTION AND/OR APPREHENDED FURTHER CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS

DEEPAK CHAMANLAL KAMANI.....PETITIONER

VERSUS

PRINCIPAL IMMIGRATION OFFICER.....1ST RESPIONDENT

KENYA ANTI=-CORRUPTION COMMISSION.....2ND RESPONDENT

CHIEF MAGISTRATE'S COURT, KIBERA..... 3RD RESPONDENT

CONSOLIDATED WITH PETITION NO. 200 OF 2007

JUDGMENT

Two Petitions were filed by the Petitioners, namely Petition 199/2007, in which the Petitioner is Deepak Chamalal Kamani and Petitioner 200/2007 in which the Petitioner is Rashmi Chamalal Kaman. The Petitions were filed on 7th March 2007. A consent order of consolidation in respect of the hearing of the two petitions was recorded on 21st March 2007. An amended Petition was filed on 11th May 2007 incorporating the third Respondent. Both petitions shall be dealt with under Petition 199/2007.

The Petitioners have relied on the affidavits sworn by them in support of the applications including affidavits in reply by D.C. Kamani and also on the skeleton arguments and oral submissions of Counsel. Two separate lists of authorities have been filed.

The first Respondent has filed an affidavit in reply sworn by one David Odhiambo Wanda on 22nd March 2007 while the second Respondent has filed a replying Affidavit sworn by one Henry Mureithi Mwithia on 20th March 2007 and filed on 21st March 2007. Respondents 1 and 2 have also filed skeleton arguments with lists of authorities. At the outset we would like to state that we have considered all the authorities cited by the parties.

The Petitioners make several complaints against the Respondent jointly and severally. The complaints fall under three broad headings:

(a) Cancellation of the Petitioners Passports A892542 and A372941 by the 1st Respondent acting at the behest of the 2nd Respondent violates the right of personal liberty under s 72 of the constitution and the right of movement under s 81 of the Constitution. The 1st Respondent is the Principal Immigration Officer and the second respondent is the Kenya Anti Corruption Commission

(b) That s 31 of the Anti-Corruption and Economic Crimes Act is unconstitutional

(c) That due to the various constitutional violations and the .pervasive publicity, the Petitioner cannot reasonably expect a fair trial.

The Petitioners seek the following declarations and orders:

(a) A declaration that the fundamental purpose of a passport is to enable the Petitioners to enjoy their constitutional rights to enter Kenya and to leave Kenya;

(b) A declaration that the 1st Respondent does not possess unbridled discretion to cancel and invalidate the Petitioners' passport;

(c) A declaration that cancellation of the Petitioners passport without due process is unconstitutional and void;

(d) An order to annul and/or quash the cancellation of the Petitioner's passport by the 1st Respondent as communicated in the 1st Respondent's letter dated 30th March 2006;

(e) An order to restrain the 1st Respondent from interfering with the Petitioners' passports number A892542 and A372941 and/or the Petitioner's constitutional right to enter Kenya and to leave Kenya;

(f) A declaration that the publication made by the 2nd Respondent of and concerning the Petitioners as wanted persons is unlawful and in breach of the Petitioners' constitutional rights;

(g) A declaration that in view of the adverse publicity, the Petitioners cannot have a fair trial;

(h) A declaration that the proceedings before the trial magistrate in ***Chief Magistrate Misc Application No. 06 of 2006*** and the ex-parte order issued by that court on 28th February 2006 are unconstitutional, null and void;

(i) An order directed to the 2nd Respondent not to harass, arrest or prefer criminal charges against the petitioners arising from the Anglo Leasing affair or otherwise;

(j) Any order directed to the Respondents to forthwith delete from the websites and/or manuals and/or publication of whatsoever nature reference to the Petitioner as a wanted person in relation to Anglo Leasing investigations or otherwise;

(k) A declaration that section 31 of the Anti Corruption and Economic Crimes Act (Act 3/2003) is unconstitutional, null and void; and

(l) Costs of and incidental to his suit be awarded to the petitioners.

(A) CANCELLATION OF THE PETITIONERS' PASSPORTS

The substantive arguments on behalf of the Petitioner on this are:

(a) The cancellation of the Petitioners' passport was instigated by the 2nd Respondent and this is clear from para 12 of Mr Wanda's affidavit in reply. The Petitioner submits that the instigation is an improper exercise of power. The Petitioner's Counsel Mr Ngatia has cited ***JUDICIAL REVIEW HANDBOOK by Michael Fordhan 4th Edition para 50.1 at page 560*** which states:

"A public body's basic statutory functions powers and duties are inalienable. It must "own" its functions and actions. Bodies are not entitled to surrender or ignore their powers and duties nor "fetter" their discretion by over committing themselves to a particular course or approach"

(b) The Immigration Act does not confer any power upon the 1st Respondent to cancel a passport;

(c) The cancellation of the Petitioner's passports was communicated to all foreign missions in Kenya as admitted in 1st Respondent's affidavit;

(d) A passport is a necessary document in inter statetravel;

(e) The Petitioners were not accorded any opportunity to be heard regarding the cancellation.

(B) SECTION 31, ANTI CORRUPTION AND ECONOMIC CRIMES ACT

On this topic the following grounds and facts have been relied on by the Petitioner

(a) Deepak Kamani (Petitioner in No. 199/07) recorded statements with the first Respondent on 6th May 2004 and 9th May 2005 and that no charges were preferred against him

(b) It was not disclosed to the third Respondent The Resident Magistrate – Kibera that the Petitioner had willingly recorded the statements referred to in (a) above when the 2nd Respondent sought and obtained an ex-parte order for the surrender of the Petitioner's passport which was granted on 27th January 2006 in Criminal Application No. 7 of 2006;

(c) That the Petitioner in P 200/07 Mr Rashmi Kamani has never been requested to record any statements and that this fact was not disclosed to the Resident Magistrate when the 2nd Respondent sought an order for the Petitioner to surrender his passport in ***Misc Criminal Case No. 06 of 2006***. the order in respect of Rashmi was issued on 28th February 2006

(d) That the Petitioners had left the country on 9th January 2006 and they have never been served with the ex-parte orders;

(e) That the proceedings in the Resident Magistrate's Court are criminal in nature and should therefore be compliant with the relevant provisions of the Constitution. The applicant contends that the natural meaning of the words "charge" and "proceedings" confirm that in the lower court at Kibera there were accusations and procedural steps intended to seek redress.

"To charge" – is to accuse someone of something especially an offence under the law. "Proceedings" means any procedural means for seeking redress from a tribunal.

(C) PERVASIVE PUBLICITY

The Petitioners attack on this ground is centred on

(a) The wording of the letter of cancellation dated 3oth March 2006 which reads as follows:

"Following the decision by the government to commence investigations on a number of persons relating to matters of national interest, it has been decided that Kenya Passport A 892542 issued to you on 17th November, 2004 be and is hereby cancelled and has no validity. You are hereby advised to surrender the same to the nearest immigration officers for physical cancellation"

(b) The national interest alluded to is simply investigations which commenced early 2004

(c) It is erroneous to say that it is the Government which cancelled the passports whereas the truth is that it is the 2nd Respondent who instructed the 1st Respondent to cancel the passports

(d) The 1st Respondent conveyed to all foreign missions in Kenya, numbering in excess of 90 missions who in turn must have communicated the same to their respective Governments

(e) The 2nd Respondent posted the Petitioners' photographs in its website with the following narration:-

(i) The Petitioner "is implicated in the on going investigations into the Anglo Leasing affair and related security contract"

(ii) The Petitioner "has evaded investigations from Kenya Anti-Corruption Commission"

(iii) A reward of Kshs 100,000 would be paid by the 2nd Respondent to any person who would provide information as to the Petitioner's location.

(f) At the instigation of the 2nd Respondent, the above narrative was posted in Kenya Police website and in the website are serial murderers, rapists and persons who are alleged to have committed heinous crimes against the society

(g) The 2nd Respondent did cause the false publication to be printed in the print media which has wide circulation in the country and abroad

(h) That it is beyond argument that the Petitioners have been portrayed as fugitives who are evading arrest and prosecution.

The Petitioner's summary of the case is as follows:

(a) There are numerous infringements of the Petitioners constitutional rights

(b) The infringements were made deliberately and calculated to achieve maximum damage to the Petitioner

(c) Any court action subsequently initiated at the behest of the 2nd Respondent would be founded on the infringements already carried out

(d) The cumulative effect of the infringements is to deprive the Petitioners of a fair trial

(e) And that for the above reasons the Petitioner is entitled to all the declarations and orders sought

THE 1ST AND 3RD RESPONDENTS CASE

Perhaps before we set out the case for the two respondents, we would like to commend the learned DPP Mr Tobiko for the candour, intellectual and professional honesty demonstrated by him when he made his submissions on behalf of the two Respondents. It will shortly be appreciated that the DPP made important concessions based on his understanding of the Kenya Constitution. We are of course quick to add that the DPP did embody the standard this Court expects from that high office in our criminal justice system. He submitted as follows:

(A) PASSPORT

(a) Under the English common Law, Passports are issued under the royal prerogative. The secretary of State has a discretion to accede to or refuse an application for a passport;

(b) A passport once issued on behalf of the Crown remains the property of the Crown;

(c) A Passport may also be revoked or impounded in the discretion of the Crown;

(d) The early English position was that there appeared to be no formal machinery for appeal or any judicial means of review of a refusal to grant a Passport;

(e) However in recent times the English Courts have taken the position that although the issue of a Passport involves the exercise of a prerogative power, the court has jurisdiction to review the decisions and to inquire whether the Passport has been wrongly refused;

(f) The Kenya position as in the United Kingdom is that, there is no specific statutory provision governing the issuance or cancellation of passports;

(g) The High Court (Justice Simpson as he then was) in the Mwau Case which appears in the list of authorities held as follows:

"…. In the absence of any statutory provisions regulating the issue of passports the issue and withdrawal of passports is the Prerogative of the President and it is open to the Minister responsible to decide on each application whether or not to make a request in respect of the applicant. If the Minister thinks it would be open to him to refuse to issue a passport. Subject to the direction of the President, it is a matter entirely within the discretion of the Minister and being purely in the exercise of Presidential Prerogative is not subject to judicial review"

(h) Section 81(1) of the constitution confers upon every citizen of Kenya the right to freedom of movement which includes the right to enter and to leave Kenya. Kenya citizens thereof have the constitutional right to leave and enter Kenya;

(i) The possession of a Passport is required by the Immigration authorities to enable a person to leave and (re)enter Kenya;

(j) The issue of passport is necessary to enable Kenya citizens to exercise their constitutional rights under section 81(1) in order to leave and to re-enter Kenya;

(k) The right to freedom of movement is not absolute and such right may be restricted or limited on any of the grounds envisaged in section 70 and 81(3) of the Constitution;

(l) The limitation to be constitutionally permissible it must be done:-

a. under the authority of any law (which includes the application of a common law rule);

b. Based on any of the grounds in sections 70 and 81(3) of the constitution;

c. For the purpose of advancing a legitimate objective;

d. In accordance with a procedure or process which is;

i. Reasonable and demonstrably justified,

ii. Is fair and just,

iii. Accords with due process including observance of the rules of natural justice,

(m) The learned DPP concluded by submitting that the immigration authorities have the power to refuse to issue and revoke or cancel a passport but such power is not unbridled and must be exercised in accordance with the principles enumerated in (L) above.

CONSTITUTIONALITY OF SECTION 31 OF THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT (NO 3 OF 2003)

On this the learned DPP submitted as under:

(a) A "proceeding" under section 31 of the Act is not a criminal proceeding or a "criminal trial". Accordingly the provisions of sections 77(1) and 77(2)(a)(f) of the Constitution do not apply;

(b) The procedure provided in section 31 of the Act accords with the requirements of section 77(9) of the Constitution;

(c) An order for surrender of passport issued under Section 31(1) of the Act is not a final order as the same may be discharged or varied and the passport ordered to be returned upon the application of the affected person under section 31(3);

(d) Ex-parte orders issued in the course of and to assist the conduct of investigations, are a common phenomena in our Criminal Jurisprudence and in the jurisprudence of other civilised and democratic jurisdictions and that such orders are issued in the public interest to ensure speedy and effective detection, prevention, investigation and punishment of crime and for the common good of society;

(e) An Order meant to prevent persons under investigation for corruption or economic crimes from fleeing the country and thereby frustrate the investigations or evade justice;

(f) The ex-parte orders under S 31 are not granted on the suspicion and/or whim of the Commission, but the following preconditions must be met:-

i. the person affected is reasonably suspected of corruption or economic crime; and

ii. the corruption or economic crime is being investigated;

(g) On the principles of equality of arms and equality before the law, he submitted as under:

(a) the Commission and the petitioners were not similarly circumstanced and their positions would necessarily be different;

(b) The "different" and "advantageous" position accorded to the Commission is justified, reasonable and rational and it is for a legitimate purpose;

(c) The power granted to the Commission to decide the "conditionalities" for the return of passport to the affected person is rational and reasonable and is at any rate amenable to the supervisory jurisdiction of the High Court;

(h) The right to freedom of movement under section 81 is not absolute and is subject to the limitations in s 70 and 81(3) of the Constitution which include public order or public interest which include detection, prevention, investigation and punishment of crime generally and corruption and economic crimes in particular;

(i) S 31 is constitutional, valid and effectual since it accords with due process, is reasonable, rational and proportional and serves a legitimate objective or purpose;

(j) There is a presumption of constitutionality which applies to all legislative enactments including the impugned section and the Petitioners have not discharged the presumption;

(k) The proceedings conducted in the subordinate court pursuant to s 31 are valid for the same reasons as set out in the DPP's earlier submissions.

PERVASIVE PUBLICITY AND ITS EFFECT ON PETITIONER'S RIGHT TO A FAIR TRIAL

The DPP's submissions on this are:

i. The contention is purely speculative as Petitioners have not been charged with any offence;

ii. The publicity as alleged is not likely to have any prejudicial effect on the petitioners' rights to a fair trial;

iii. The petitioners must not only prove adverse publicity but they must also establish that, the publicity has caused prejudice which is so widespread and so indelibly impressed on the minds of potential trial Magistrates that it is unlikely that there is no magistrate in Kenya whose mind has not been affected by such prejudice;

iv. There is no proof that Kenya does not have a magistrate capable of rendering an impartial judgment based on the evidence to be adduced during the trial. Our Magistrates are professionals as opposed to lay magistrates and jurors and they are all capable of adjudicating on any matter on the basis of evidence, procedure and counsels' submissions;

v. The Petitioner's rights to a fair hearing has not been compromised in the circumstances.

THE SECOND RESPONDENT'S CASE

Intelligence reports received by the second respondent pointed to the Petitioner's probable flight from the jurisdiction of Kenya hence the application to the lower court for the surrender of the passport.

Due process was undertaken in that:

i. The Petitioners were reasonably suspected of having committed a corruption or economic crime;

ii. It was quite evident that they were under investigation having recorded some statements in 2004 and 2005;

iii. It is in the public interest to act with speed during the investigation stage and ex-parte orders is a way of achieving this so as to avoid evasion and the requirements of the rules of natural justice are sufficiently met by any hearing under s 31(3) of the Anti Corruption and Economic Crimes Act;

iv. Section 31 of the Act does not violate section 77(2), 72(2) a to f, 77(1), 77(9), 81 and 82(1) for the reason that, in all the provisions, the aggrieved person must have been charged with a criminal offence and this is not the case with s 31. Thus s 77(1) commences "***If a person is charged with a criminal offence ...***"

Section 77(2) reads:-

"***Every person who is charged with a criminal offence shall ...***"

S77(1) & (2) raise the issue of protection of an accused person during trial or hearing of his case.

S77 (9) deals with adjudication of civil rights and obligations by an independent and impartial court or authority

S 81(1) has limitations under s 81(3) c

v. The application to the subordinate court under s 31 by a Notice of Motion was proper and had the Petitioner not absconded, he could have been served with the order;

vi. The second Respondent only investigates and recommends to the Attorney General who decides whether or not to prosecute. The restraining orders sought against the Government are therefore incompetent. Part IV of the Act deals with investigations;

vii. The Petitioners chose to abscond and they have therefore chosen to operate outside the laws of Kenya and are an "Out law" and it was in order to have ordered the distribution of posters and bounty on their heads and since there has been great technological leap since the "Wild west" days it was prudent that their photographs be placed on the second Respondent's website and a reward given to whoever gives information on their whereabouts. The website does not impute that the Petitioners are criminals and neither does it implicate them in any crime save that they are required to assist in the investigation involving the Anglo Leasing type of contracts.

The allegation that the publicity breaches the Petitioners right to a fair trial is premature and far fetched as it is not clear whether the Petitioners will ever be charged. Any such breach may be raised in a trial when they are charged (if ever).

ANALYSIS FINDINGS AND HOLDINGS

We think it is important to set out the relevant provisions which constitute the substance of this case and in particular the relevant parts:

S 7 2(1) of the Constitution provides;

"No person shall be deprived of his personal liberty save as may be authorized *by law* in any of the following cases -

a. .....

b. .....

c. .....upon reasonable suspicion of his having committed or being about to commit a criminal offence under the law of Kenya;

(3) A person who is arrested or detained -

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed or being about to commit a criminal offence, and who is not released shall be brought before a court as soon as is reasonably practicable and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death the burden proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall be upon any person alleging that the provisions of the subsection have been complied with.

(5) If a person arrested or detained as mentioned in sub-section 3(b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

It is clear from the above provisions that the Constitution provides in a specific manner protection of the right to personal liberty and also defines permissible limitations.

Protection of freedom of movement is taken care of by section 81 of the Constitution as follows:-

81(1) "No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya.

(2) Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision;

(a) for the imposition of restrictions on the movement or residence within Kenya of any person or on any persons right to leave Kenya that are reasonably required in the interest. of defence, public safety or public order;

(b) for the imposition of restrictions on the movement or residence within Kenya or on the right to leave Kenya of persons generally or any class of persons that are reasonably required in the interests of defence, public safety, public order, public morality, public health or the protection or control of nomadic peoples and except so far as the provision or as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;

(c) for the imposition of restriction by order of a court on the movement or residence within Kenya of any person or on any persons right to leave Kenya either in consequence of his having been found guilty of a criminal offence under the law of Kenya or for the purpose of ensuring that he appears before a court at a later date for trial of such a criminal offence or for proceedings preliminary to trial or for proceedings relating to his extradition or lawful removal from Kenya."

What has emerged from the above provisions is a description of limitations capable of limiting or restricting each of the two fundamental rights. These are:

(1) Under 72(1) the limitation of the fundamental right must be authorized ***by law***.

Under s 81(1) the limitation of the substantive right must be done under the authority of ***any law***

(2) As regards section 81(1);

(a) restriction involved in a person's lawful detention is not a contravention of the section;

(b) restrictions on movement or residence within Kenya can only be authorized by law in the interest of defence, public safety or public order;

(c) restrictions on movement or residence within Kenya or on the right to leave Kenya ***must be reasonably*** required in the interests of defence, public safety, public order, public morality, public health or the protection or control of nomadic peoples and any such provision or the thing done under the authority thereof, must reasonably be justifiable in a democratic society.

Stated simply the preconditions for limitation under s 81 are

(i) limitations imposed by any law;

(ii) for specified interests namely defence, public safety,

public order, public morality etc a limitation must be for a legitimate purpose or objective which is reasonably required – or necessary;

(iii) the limitation must be reasonably justifiable in a democratic society.

As regards any limitation or restriction by a law imposing the restriction vide an order of the court, on the movement or residence within Kenya of any person or any person's right to leave Kenya the Constitutional pre-conditions are:

(i) in consequence of his having been found guilty of a criminal offence under the law of Kenya, or

(ii) for the purpose of ensuring that he appears before a court at a later date for trial of such a criminal offence or for proceedings preliminary to trial or for proceedings relating to his extradition or lawful removal from Kenya.

It is with the above constitutional setting, in view that we consider it critical to set out in ***extenso*** the impugned section 31 of the Anti Corruption and Economic Crimes Act which states:-

"31(1) On the ex-parte application of the Commission, a court may issue an order requiring a person to surrender his travel documents to the Commission if

(a) the person is reasonably suspected of corruption or economic crime; and

(b) the corruption or economic crime is being investigated.

(2) If a person surrenders his travel documents pursuant to an order under subsection (1) the Commission -

(a) shall return the documents after the investigation of the corruption or economic crime concerned is completed, if no criminal proceedings are to be instituted; and

(b) may retain the documents at its discretion either with or without conditions to ensure the appearance of the person.

(3) A person against whom an order under subsection (1) is made may apply to the court to discharge or vary the order or to order the return of his travel documents and the court may, after hearing the parties discharge or vary the order, or order the return of the travel documents or dismiss the application.

(4) If a person fails to surrender his travel documents pursuant to an order under subsection (1) the person may be arrested and brought before the court and the court shall unless the court is satisfied that the person does not have any travel documents, order that the person be detained pending the conclusion of the investigation of the corruption or economic crime concerned.

(5) A person who is detained pursuant to an order under subsection (4) shall be released if:

(a) he surrenders his travel documents to the commission;

(b) he satisfies the court that he does not have any travel documents, or

(c) the investigations of the corruption or economic crime concerned is completed and the court is satisfied that no criminal proceedings are to be instituted.

(6) A person who is detained pursuant to an order under subsection (4) shall be brought before the court at least every eight days or at such shorter intervals as the court may order to determine if the person should be released under subsection (5)".....

In view of the arguments revolving the application of s 70 of the Constitution it is essential to focus on the above provisions, in order to sort out the issues of the rights of others and the public interest and to pronounce on the relationship between this section and the other fundamental provisions relied on. Section 70 states:

"*Whereas every person in Kenya* **is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection political opinions, colour, creed or sex,** *but subject to respect for the rights and freedoms of others and for the public interest* **to each and all of the following, namely:-**

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection of the privacy of his home and other property and from deprivation of property without compensation."

The provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms ***subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."***

For now, the elements which emerge from the reading of the section are:

1. Whereas the section commences with the words "***every person in Kenya*** ..." the words have to be broadly construed and are not to be confined to only physical presence in Kenya but also to other forms of presence such as having one's property in Kenya although residing abroad or where a citizen of Kenya is abroad or expelled from Kenya and wants to assert his right of entry in Kenya. The argument that such persons though not resident in Kenya cannot

claim or are not entitled to the rights because of their physical absence, from Kenya would produce absurd results and we hold that what was contemplated was that the enforcement jurisdiction was territorial.

2. The section defines the fundamental rights and freedom conferred under the Chapter. This is the purpose of the section.

3. What affords protection in respect of each right are the provisions in each section.

4. The limitations set out in each section are designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

It follows therefore, that where in the past we have held that fundamental rights are not absolute, it is because the rights in some of the sections, are subject to the limitations (only when specified) and as set out in each provision and where those limitations appear in each section they have been designed to ensure, that the enjoyment by the individual does not prejudice the rights of others or the public interest. The significance of this interpretation will shortly emerge in this judgment.

Finally we would like to reflect on the learned DPP's powerful argument that the prerogative to issue and to revoke passports stems from the British Crowns prerogative which initially was not subject to judicial review but which following the leading case of ***CCSU v MINISTER FOR CIVIL SERVICE*** is reviewable if it passes the test of justiciability. In other words although there is no specific Act or statute regulating the issuance and revocation of passports their legality is based on a residual law, which is also a form of common law, and which law was received by this country by virtue of s 3 of the Judicature act Cap 8 of the Laws of Kenya. This explains the reason for reproducing section 3(1) of the Judicature Act which provides:

"The jurisdiction of the High Court, the Court of Appeal and all subordinate courts shall be exercised in conformity with

(a) the Constitution;

(b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the schedule to this Act modified with Part II of that schedule;

(c) subject thereto, and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897, and the procedure and practice observed in courts of justice in England as at that date;

but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary."

The above line of interpretation of the Bill of Rights provisions, even at this early stage in this judgment, must be the correct one, because it has the high support of some of the major international instruments the relevant provisions of which we set out as under:

1. Article 12(2) African Charter on Human rights stipulates

"Every individual shall have the right to leave any country including his own and return to his country. This right may only be subject to restrictions provided for *by law* **for the protection of national security, law and order, public health and morality."**

2. Article 13 Universal Declaration of Human Rights (UN General Assembly Resolution 21 (III)) of 10th December, 1948; declares:-

1) "Everyone has the right to freedom of movement

2) Everyone has the right to leave any country including his own and to return to his country"

3. Article 21, International Covenant on Civil and Political Rights (ICCPR) United Nations General Assembly Resolution 2200A (xxi) of 16th December 1966 provides:.....

i. "Everyone shall be free to leave any country including his own

ii. 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, public health or morals or *the rights and freedoms of others,* **and consistent with the other rights recognized in the present covenant.**

iii. No one shall arbitrarily be deprived of the right to enter his own country."

THE CASE OF RE APPLICATION BY MWAU 1985 LRC (Const) 444

Our immediate duty is an unequivocal departure from the holdings in this case for the following reasons:-

(a) The constitutional provisions relied on by the Petitioners namely S 72(1) and S 81(1) provide for the rights and any limitations on the fundamental rights conferred namely the right of personal liberty and of movement to be authorized ***by law or by any law*** respectively. We find that no limitation of a fundamental right can be done or effected without an enabling law Constitutional rights in a Constitutional democracy with a written Constitution can never be conferred by or regulated by a Prerogative;

(b) The decision did not appreciate, or acknowledge that Kenya, even in 1985 was and remains a constitutional democracy. It follows that the first test which the Mwau decision fails in its inability to place the Constitution first in the exercise of the courts jurisdiction as set out clearly under S 3 of the Judicature Act. Where a matter is provided for in the constitution it is a violation of the Constitution itself, and S 3 of the Judicature Act to purport to import the British Crowns prerogative. In that case, as in this case, the issues were the right of personal liberty and movement and both are expressly enshrined in S 72 and 81 of the Constitution

(c) Even under English law which the learned Judge in Mwau purported to apply line, hook and sinker, does recognize that where a statute is enacted in a matter previously regulated by the Prerogative power of the Crown, that power is fully exhausted and the prerogative power is automatically extinguished by statute. The state of law in the United Kingdom currently except in very few areas, is that even the law on travel documents is

governed by statute eg. The Human Rights Act 1998 and the European Convention on Human Rights.

By way of illustration, see the case of ***BLACK v CANADA 2001 CAN LII 8737.*** At page 7 of the Authority:

"Despite its broad reach, the Crown prerogative can be limited or displaced by statute. Once a statute occupies ground formerly occupied by the prerogative it goes into abeyance. The Crown may no longer act under prerogative but act under and subject to the conditions imposed by statute."

In the case of our great country it is not a statute which replaced the Crown prerogative on matters of personal liberty and the right of movement, it is the Constitution itself – and in particular S 72 and S 81 of the Constitution. We therefore find and hold that the validity of all Kenya Passports stems from the Constitution and are issued by the Executive pursuant to the Constitution. They are all valid pursuant to S 72 and 81 of the Constitution. This explains why the DPP's powerful contention that prerogative powers regulate the issue and revocation of Kenya passport cannot pass the first test. There is no way any prerogative power can supplant specific provisions of a written Constitution. The implication in the Mwau case that there can even remotely be a curtailment of the two rights without due process has no basis whatever since the rights have been specifically incorporated and the necessary procedural safeguards spelt out as well.

(d) We have no doubt whatsoever that in all the constitutional provisions whether of Kenya, South Africa or India, the curtailment, restriction or limitation of the fundamental rights and freedoms must be done by a law and not any prerogative power vested in the Executive after Uhuru or Independence. This position is clearly borne out by the wording of the provisions on fundamental rights and the limitations. The position is further supported by the wording of the international instruments as set out above, which unequivocally make reference to "law" as the instrument of curtailing, restricting or limiting the fundamental rights. In most of the instruments the term used in describing the "law" is "prescribed law".

(e) Our final observation based on the Mwau decision is that the Court failed to address the procedural due process set out in S 72(1) and 81(1) of the Constitution and further failed to recognize the right to a passport as part of the wider concept of liberty.

Most of the cases cited by the Respondents deal with the usefulness of the passports as travel documents and the court fully approves the usefulness of the passport as described in ***R v BRALLSFORD (1905) 2 K.B. 730*** at pg ***745***:

"It will be well to consider what a passport really is. It is a document issued in the name of the sovereign on the responsibility of a Minister of the crown to a named individual, intended to be presented to the Governments of foreign nation and to be used for that individual's protection as a British subject in foreign countries and it depends for its validity upon the fact that the Foreign Office in an official document vouches on respectability of the person named.

Passports have been known and recognized as official documents for more than three centuries, and in the event of war breaking out become documents which may be necessary for the protection of the bearer, if the subject of a neutral State, as against officials of the belligerents, and in time of peace in some countries, as in Russia, they are required to be carried by all travellers..."

The only qualification we make to the observation is that in the case of Kenya Passports their validity stems from the Constitution.

The same position is repeated in ***JOYCE v DIRECTOR OF PUBLIC PROSECUTIONS 1946 I All ER*** 186 at page 191 -

In the case of ***R v SECRETARY OF STATE ex-parte EVERETT 1989 All ER 615*** cited by the Respondents, the courts recognized and acknowledged the need to review the Secretary of State's refusal to issue a passport and to inquire whether a passport had been wrongly refused. In this case the court quoted Lord Diplock's leading judgment in the case of ***COUNCIL OF CIVIL SERVICE UNIONS v MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL ER 935*** when five years before THE MWAU decision, he had held that, the court had power to review the exercise of prerogative powers, where they were justiciable.

EVERETT also acknowledged the right of hearing, but held in the circumstances, that the applicant knew what he needed to have been told.

What emerges from the three cases is the source of authority to issue passports under the English law and the need for judicial review. This explains the context in which the ***MWAU*** decision was reached in 1989. Unfortunately the Mwau decision while "importing" the crown prerogative to Kenya and vesting it in the Executive, the Court did not acknowledge the need for judicial review in the exercise of the prerogative as recognized by Lord Diplock in the CCSU case above and perhaps even more importantly, in the circumstances, the court overlooked the fact that Kenya, unlike the United Kingdom was a constitutional democracy even in 1989! Had the court considered the relevant constitutional provisions, as we intend to do in this judgment, it could have reached a different decision. The decision failed miserably in acknowledging the fundamental rights of liberty and movement enshrined in the constitution and in particular, that the right to travel is part of liberty.

Following the ***MWAU*** decision, the Kenya authorities appear to have accepted it and organized their affairs on the basis of its holdings vesting prerogative powers as regards passports on the Executive. This explains the DPPs concern that in this case we are being asked to disturb a decade's old practice. However our first duty as a court, is to uphold the Constitution and we have no intention whatsoever of upholding a practice which has no basis under the Constitution.

The ***MWAU*** decision also overlooked that several decades earlier the United States Supreme Court in the case of ***KENT v DULLES***, 357 US 116 (1958) had recognized the right of travel as part of liberty under the 5th Amendment in the following terms:

1) "The right to travel is a part of the "liberty" of which a citizen cannot be deprived without due process of law under the Fifth Amendment pp 125-127

2) Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or to withhold it.

If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case .....

But that function (protection) of the passport is subordinate. Its crucial function today is control over exit. And as we have seen, the right of exit is a personal right included within the word "liberty" as used in the Fifth Amendment.

3) If that "liberty" is to be regulated it must be pursuant to *the law-making functions of the Congress* **and if that power is delegated the standards must be adequate to pass scrutiny"....**

Unlike the American position where the right of travel is by court held to be part of liberty, protection of freedom of movement in Kenya is in fact expressly provided for under S 81(1) in these words:

"No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely, throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya the right to leave Kenya and immunity from expulsion from Kenya."

In Kenya the right of travel is an expressed constitutional right, and its existence does not have to depend on a prerogative, inference or any implied authority. For it to be lawfully regulated this must be done by an Act of Parliament which in turn must be based only on the limitations expressly specified in the limiting provisions which are in turn designed to achieve a legitimate purpose defined in the relevant provision(s).

Turning to the issues in the matter before us in the case of S 72(1) on personal liberty, it must be shown that there is in existence, ***a law*** which limits the right pursuant to section 72 1 (e) which States:-

"Upon reasonable suspicion of his having committed, or being about to commit a criminal offence under the law of Kenya"

Since it is conceded that the Immigration Act does not empower the 1st Respondent to revoke the passport, the revocation of the Petitioners Passport must be unconstitutional, null and void

because there was no enabling or authorized law which was invoked in the revocation of the passport on 30th March 2006. The decision to revoke is void for violating the provisions of the Constitution. The decision should have been based on a law. In this regard only a Court of law may impose conditions such as the deposit of a passport as part of bail conditions pursuant to S 72(5) of the Constitution.

Similarly in the case of S 81 it has not been shown that there exists ***any law*** which authorized the cancellation in the interests of defence, public safety, public order, public morality, public health ... as set out in S 81(3). The limiting or enabling or authorising law cannot regulate anything beyond the interests specified in each section. Ordinarily the use of the phrase "any law" implies any law both written and unwritten but surely if we were to adopt this method of interpretation the rest of the section which clearly specifies the legitimate purposes such as defence etc. would cease to have meaning. The words must therefore be taken to mean a law based on the legitimate purposes set out in the section. Since the Immigration Act is silent, as regards the powers to regulate passports, the only other law in this case is the Anti Corruption and Economic Crimes Act, but even here the missing link is the fact that this obviously pressing social need of our times does not fit into any of the legitimate and specified purposes or objectives in S 81.

The immigration Department had no express or implied powers to revoke the passports. This point was well put in the case ***R v SOMERSET COUNTY COUNCIL, ex-parte FEWINGS & OTHERS [1995] I ALL ER 513 at page 524:***

..."A public body has no heritage of legal rights which it enjoys for its own sake at every turn, all its dealings constitute the fulfillment of duties which it does to others; indeed, it exists for no other purpose.

... But in every such instance, and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performance of the duties for whose fulfillment it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which defines its purpose and justifies its existence. Under our law, this is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them."

It is also quite clear from the provisions of S 81(3)(c) that the order issued under S 31 of the Anti Corruption and Economic Crimes Act was not issued pursuant to s 81(3)(c) of the Constitution because:

i. the order must be in consequence of his having been found guilty of a criminal offence under the law of Kenya or

ii. for the purpose of ensuring that he appears before a court at a later date for trial of such a criminal offence or for proceedings preliminary to trial

Even on the wording of S 81 3 (c) the ex-parte order though issued under the authority of a law, namely the Anti Corruption and Economic Crimes Act falls outside S 81(3)(c) in that it was neither issued in respect of a person who had committed a criminal offence nor issued for purpose of ensuring that the Petitioner appears before a court, instead, it was issued to ensure that investigations are undertaken and concluded. The category of interests set out in each section is what in our view constitutes the rights of others and/or the public interest. S 70 does not limit the enjoyment of fundamental rights and it clearly refers to the limitations to the fundamental rights set out in each section and further states that the limitations are designed to ensure that there is no prejudice to the rights of others and the public interest. In our view public interest consists of the specific limitations set out in each of the Chapter 5 provisions. For a limitation to be lawful it must be based on a law giving effect to each of the public interest categories set out in each provision.

DUE PROCESS

Our findings on this is that both S 72 and S 81 have specifically set out inbuilt procedural due process and perhaps a good starting point would be to define the phrase. ***Blacks Law Dictionary 8th Edition at page 539*** defines ***procedural due process*** -

"The minimal requirements of notice and a hearing guaranteed by the Due Process Clauses of the 5th and 14th Amendments especially if the deprivation of a significant life, liberty or property interest may occur. ....."

On the other hand the same dictionary defines ***substantive due process***:

"The doctrine that the Due Process Clauses of the 5th and 14th Amendments require legislation to be fair and reasonable in content and to further a legitimate governmental objective"

It is quite evident that both S 72 and 81 demand a due process of law, before any limitation or deprivation can take place. Deprivation or limitation must be under the authority of law. The word law in both sections must be an Act of Parliament firstly because the interests upon which the particular limitation may be designed have been specifically specified eg interest of defence, public morality, public order etc and only an Act of Parliament can regulate such limitations. It has not been left to the whim of policy makers, executive or the Judiciary. Secondly because such a law must be precise and specific to ensure certainty so that people can regulate their affairs in the confidence of certainty of law. Thirdly only acts of Parliament are capable of defining the legitimate objectives for each limitation and addressing such other requirements, as, "necessity", reasonableness and proportionality. The courts, in turn when considering, the validity of the limitation have to undertake the balancing act using the specified requirements. S 71 and 81 have specific due process requirements unlike the 5th and 14th Amendments of the U.S, as described above where due process was implied by the court. We therefore accept as good constitutional law, the holding in the leading United States authority of ***KENT v DULLES*** cited by Mr Ngatia the learned Counsel for the Petitioner that:

"the right to travel is part of the liberty which a citizen cannot be deprived without due process of law (under each provision) our added words."

In the case of Kenya as is the case in Nigeria there are express provisions requiring due process. In the Nigerian case of ***OLISA AQBAKOBA v THE DIRECTOR STATE SECURITY SERVICE & ANOTHER 1998 HRLRA 252,*** at page 281 of ***OLISA*** case (ibid) one of the holdings where a passport had been impounded was:-

"Both the United States and India do not have such express provisions as we have in our Constitution guaranteeing as part of freedom of movement the freedom of exit from the country. Notwithstanding that fact, the United states Supreme Court has interpreted and applied the due process clause of the 5th Amendment in order to provide a constitutional guarantee of freedom to travel abroad, and the Indian Supreme Court has inferred freedom of exit from Article 21 of the Constitution of India which guarantees

right to life and personal liberty. It would be an affront to all known human rights norms were the right to freedom of exit specifically guaranteed by our constitution to be drained of all effect by arrogating to the government a discretionary and almost arbitrary power to withhold, withdraw or revoke a passport"

The other relevant holding in the case which appears on the same page is:

"Where a statement in any document issued by the Government is in conflict with clear and unambiguous provision of the constitution or of any statute such statement is of no consequence and cannot define, extinguish or abrogate the right of a citizen."

To buttress the point, that a passport is part of liberty the Nigerian case of ***ATTORNEY GENERAL v GODWIN AJAYI [2000] 2 HRLRN*** at page 202 observed:-

"A necessity for the exercise of that natural right of a person particularly with respect to moving from one country to another is the possession of a passport."

While still on the same point the European Court of Human Rights in Strasbourg found a violation of the right in the case of ***NAPIJAB v CROATIA Application 66485/01:-***

"Accordingly the court considers that a measure by means of which an individual is dispossessed of an identity document such as for example a passport, undoubtedly amounts to an interference with the exercise of liberty of movement."

Perhaps it is appropriate to observe that the constitutional provisions in Nigeria and Zambia are almost identical to our S 72 and 81 – see ***CHIRWA v REGISTRAR GENERAL 1993 IZLR I and EDITH ZEWELANI NAWAWI v ATTORNEY GENERAL 1990-1992 ZR 112.*** In the later case the court observed:-

"**Talking about passports I think it is an opportunity to say here that the holding of a passport by a Zambian is not a privilege because he has a right of movement enshrined in the Constitution; Article 24 of the Constitution. In order to travel outside the country, A Zambian citizen needs a valid Zambian passport or travel document. Just as they do not get permission from the authorities to travel from one part of the country to another, so do they not need to get permission to travel outside the country. Since they**

cannot travel outside the country without passports, they are entitled to have them, unless legal restrictions attaching to the freedom of movement imposed by the constitution validly apply."

Same position prevailed in the Zambian case of ***NYIRONCO v ATTORNEY GENERAL 1993 3LRC 256.*** Yet another illustration is from the European case of ***BAUMANN v FRANCE 2001 ECK*** 340 where at page 7 it was held that the requirements of an investigation underway could not validly justify the decision not to return the applicants passport.

Finally we endorse the following holdings in the Canadian case of ***ABDURAHMAN KHADR v ATTORNEY GENERAL FOR CANADA 2006 FC 727.*** Para 34

"In today's world, the granting of a passport is not a favour bestowed on a citizen by the State. It is not a privilege or a luxury but a necessity. Possession of a passport offers citizens the freedom to travel and to earn a livelihood in the global economy. In Canada, the refusal to issue a passport brings into play Charter considerations; the guarantee of mobility under section 6 and perhaps even the right to liberty under Section 7. In my view the improper refusal of a passport should as the English courts have held, be judicially reviewable."

At para 67:

"Nor does the statement that a passport is property of the Government of Canada lessen the interest of a citizen in holding a passport; it does, however, prevent foreign governments from seizing the passport and gives a measure of security to Canada's citizens. ....."

"In my view the greater the importance of the right or interest, the higher the standard of fairness will be imposed. The importance of a passport means that the principle of fairness in which legitimate expectation is one must be closely and vigorously adhered to."

Liberty encompasses many aspects of a person's life and encompasses freedom from bodily restraint and punishment and although it has not been so contended here, the right to liberty

involves not only the right to travel and to enter one's country ("locomotion") but also the right to personal security. Thus in ***WISCONSIM v CONSTANTINEUH 400 U.S. 433 at page 437 (1971) Douglas J*** observed:-

"Where a person's good name, reputation honour, or integrity is at stake because of what the government is doing to him."

In all the situations where the right was threatened with curtailment, restriction or limitation there must be due process of law.

Arising from the above analysis we hold that since the due process was not followed before the cancellation decision, the same is void for this reason as well since the due process is a cog in all the Constitutional provisions in question.

MEANING OF THE WORD "LAW"

In the case of ***EUROPEAN COURT HR, THE SUNDAY TIMES CASE v THE UNITED KINGDOM,*** judgment of 26th April 1979 Series A No.30 page 27 para 38, the European Court of Human Rights interpreted "prescribed law" to cover not only statute law but also unwritten law. However "prescribed law" requires that "the law must be adequately ***accessible***" and "formulated with ***sufficient precision*** to enable the citizen to regulate his conduct." Thus in the case in question the law of contempt of court, in English law, satisfied the criteria of "accessibility" and "foreseability".

Although we have held that in the case of the Kenya Constitution, the "***law***" must be statute law for the reasons stated earlier in this judgment, even if we were mistaken on this, the curtailment or limitation of rights, by virtue of the Crowns prerogative, it would not be adequately accessible or sufficiently precise, for citizens of Kenya to regulate their conduct. The underlying prerogative and the accompanying common law could not reasonably be said, to be capable of curtailing fundamental rights under the Constitution because they cannot in our view, satisfy the two tests above of accessibility and precision. Moreover even in the case of the English Law as we have seen in the ***SUNDAY TIMES CASE*** above, curtailment under the Convention is not on the basis of the Crown's prerogative.

Finally, had the DPP's arguments on this not been defeated by the specific provisions of the Constitution including the need for due process, surely at this time and age, reasons of our sovereignty and national pride would militate against tying constitutional limitations on the crown's prerogative.

It should also not be forgotten, that the practice in Kenya so far has been to enact statutes or Acts to provide for limitations of fundamental rights. The illustrations are:

Freedom of expression – The Defamation Act Right to property – The Land Acquisition Act. Public Safety – Public Order Act and Preservation of Public Security Act. There cannot therefore be any good reason for subjecting the right to personal liberty and movement to an uncertain and imprecise Crown prerogative at this time and age.

LIMITATIONS ON THE EXERCSE OF RIGHTS

In our earlier analysis of the two rights we did examine the preconditions or the requirements for curtailment or limitation of fundamental rights and freedoms under both sections 72 and 81. As regards section 72 the only requirement is the limitation to be by law. However, as regards the right to freedom of movement under s 81 as is the case with regard to some of the other fundamental rights, there are several requirements, which tally with the similar requirements contained in the international instruments. The requirements are:

· limitation must be defined by law (principle of legality)

· be imposed for one or more specific legitimate purposes eg. Public order, public safety, public morality etc

· be necessary for one or more of these purposes in a democratic society – in other words satisfy the criteria of "proportionality"

Thus, limitations on the exercise of fundamental rights are the result of a careful balance between the individuals' interest or enjoyment and the public or general interest and in order for the limitation to be lawful it must meet the three requirements represented by the bullets above. With respect, a valid limitation of a fundamental right cannot be done on the basis of a footnote of what the law is at common law. It is also important to observe that in order to be

necessary the limitation both in general and as applied in the individual cases must respond to a clearly established social need. It is not enough for the limitation to be desirable, it must be necessary. Perhaps we should take the earliest opportunity to state that we think that detection, prevention, control and punishment of Corruption and economic crimes is a pressing social need, but we must add that its recognition as a pressing social need must be incorporated in the Constitution. It is outside the public interest categories currently specified.

In this judgment we shall use the above requirements as the yardstick of any limitation or restriction which the Respondents are alleged to have imposed.

Using the above yardstick in respect of the limitation by revocation of the petitioners passport by a letter from the Immigration Department, in view of the absence of any enabling Statute or Act authorizing revocation (the Immigration Act is silent) the limitation becomes automatically unlawful and unconstitutional because it does not satisfy the first requirement as per the first bullet above ie the principle of legality. Although in the circumstances it would not be necessary to go to the next bullet which is specific legitimate purpose no reason was stated in the revocation letter at all since national "interest" was not even explained. The expressed reason of national interest is not one of the legitimate purposes specified in S 81. Finally it would not satisfy the third bullet – proportionality the cancellation or revocation being for an indefinite period and the decision reached without adherence the due process.

We therefore find that the cancellation or revocation of the passport is both unlawful and unconstitutional and null and void. The decision as conveyed in the letter is quashed forthwith.

Again if we apply the same yardstick to the ex-parte order obtained pursuant to S 31 of the Anti Corruption and Economic Crimes Act, is limitation by way of surrender of the passport defined by law? The answer is yes, because the enabling Act is the Anti Corruption and Economic Crimes Act – Thus the order of surrender is imposed pursuant to a "law." Is it however imposed for one or more specific legitimate purposes set out in either S 72 or s 81 of the Constitution. Here the answer is "No" because investigations fall outside the specified purposes in the sections. Even if it had met the second criterion of legitimate purpose, can an indefinite order abridging, the right to liberty, be necessary in a democratic society , and can it

satisfy the criterion of proportionality? The answer would again be "No". The legitimate purpose of carrying on investigations could still be achieved by a surrender for say nine months as in Brunei or Lesotho – to allow completion of investigations. Surely, the adverse effects of an indefinite limitation of the enjoyment of a fundamental right far outweighs the end result of carrying on investigations and complete them within a reasonable period. It is neither necessary nor reasonable to hold a citizen's passport in this case for example for over 16 months with no end in sight! Such an order of surrender cannot meet the requirement of proportionality. Neither can it be justified in a democratic society such as Kenya which respects human rights.

The other reason why this court cannot sanction or leave at the mercy of an unspecified Crown prerogative, the enjoyment of the fundamental rights of liberty and movement including its curtailment or restriction or limitation, is that the principle of certainty of law is an important ingredient of the rule of law. Even the principle of accessibility of rules of law which has been addressed elsewhere in this judgment was beautifully stated in the case of ***R GILLAN & ANOTHER v COMMISSIONER OF POLICE OF THE METROPOLITAN & ANOTHER [2006] UKHL 12*** as follows:

"The exercise of powers by public officials as it affects members of the public must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, Caprice, malice, predilection or purpose other than for which the power was conferred.

THE SURRENDER ORDER MADE BY THE LOWER COURT

In this matter the Petitioner should in our view have joined the Attorney General instead of the Resident Magistrate because we have held elsewhere the Attorney General is the correct party, where judicial officers are challenged under the Bill of Rights provisions. However in the special circumstances of this case the omission is not fatal for the following reasons:

1) The Bill of Rights binds the judiciary – and every court must in exercise of whatever jurisdiction ensure that the Constitution is being adhered to in the discharge of all their functions.

2) The Attorney General's Principal Assistant, the DPP did attend in person and therefore did submit to this court's jurisdiction quite rightly in our view, because he detected far reaching findings and holdings in the matter and therefore wanted to personally articulate to the full, the wider implications of this court reaching certain conclusions.

3) Perhaps the most critical reason for holding that the omission to join the Attorney General in this case is not fatal is that every subordinate court is subject to the Constitution under S 65(1) of the Constitution. All courts including subordinate courts, must exercise their jurisdiction in accordance with the Constitution – see S 3 of the Judicature Act. More importantly, this Court has constitutional judicial review powers to supervise any civil or criminal proceedings before a subordinate court and it is not limited as to the relief it can give under S 65(2) of the Constitution. Thus, even without being prompted this court had the power to move on its own motion and consider the legality or the constitutionality of the impugned order made by the lower court.

In order to determine whether the order by the lower court is constitutional or not we consider it important to have some essential words which impact on the order defined. Just as the stars only shine at night, definitions do give us light or enlighten us when we are unclear or in the doubt. The terms to be defined are judicial proceedings, ex-parte proceedings, proceedings and charge. The source of the definitions is the ***BLACK LAW DICTIONARY*** 8th Edition cited earlier.

Judicial proceedings

"Any court proceedings; any proceedings initiated to procure an order or decree whether in law or in equity"

Proceedings

1. "The regular and orderly progression of a lawsuit including all acts and events between the time of commencement and the entry of judgment

2. any procedural means for seeking redress from a tribunal or agency

3. .....

4. the business conducted by a court or other official body; a hearing"

Ex-parte proceedings:

"A proceeding in which not all parties are present or given the opportunity to be heard.

Charge:

1. "A formal accusation of an offence as a preliminary step to prosecution

2. to accuse (a person) of an offence"

Because of the special position occupied **by the** specified constitutional purposes, upon which limitations are designed, it is also significant to define them. They include public interest, public order, public safety.

Public interest

1. "The general welfare of the public that warrants recognition and protection

2. Something in which the public as a whole has a stake; especially, an interest that justifies governmental regulation."

Public safety:

"The welfare and protection of the general public, usu, expressed as a governmental responsibility. This could include anti terrorist measures for example.

Public morality

1. The ideals or general moral beliefs of a society

2. The ideals or actions of an individual to the extent that they affect others.

Public order:

1) The arrangement or disposition of people or things according to a particular sequence or method

2) A state in which laws and rules regulating public behaviour are observed."

It is also important to define "judicial power" Griffith CJ in ***HUDDART, PARKER PTY LTD v MOORELARD (1908-09) 8*** C.I.R. 330 at p 357 defined" judicial power as follows:-

..."The power which every sovereign authority must of necessity have to decide controversies between its subject or between itself and its subjects whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

The learned DPP has pursuasively argued that this court has in at least two cases held that crime detection prevention and control are values under the constitution or that the interest constitutes public interest see ***R v THE CHIEF MAGISTRATE COURT ex-parte NAKUMAT and R v DIRECTOR OF C.I.D. ex-parte CARGO DISTRIBUTORS.***

Firstly the ***NAKUMATT*** case is distinguishable from this case in that, the right and freedom involved was under S 76. Under S 76(1)(b) there is a specific purpose of limitation entitled "***that is reasonably required for the purpose of promoting the right and freedoms of others***! The issue was that of bank/customer relationship and examination of bankers' books by the police. The Bank/customer relationship is contractual and examination of a bank account does not constitute a fundamental right and the court inferred that s 180 of the Evidence Act represented a public interest under this limitation. Values of the Constitution like directive policies under other comparable Constitutions, are not Constitutional rights ***strict sensu*** and they cannot possibly limit a fundamental right.

In the case of ***CARGO DISTRIBUTION LTD*** the court held:-

"In modern criminal justice systems, a constant seesaw between on the one hand the ideals of utility and efficient control of crime (including the ideal of a workable system for those, especially police, who actually have to operate it) and on the other hand the ideal of due process and respect for the rights of individuals."

Again in both cases, there was no question of a fundamental right being involved. In both cases, there was "a law" namely the Evidence Act which regulates some aspects of the public interest comprising of crime detection, prevention and control.

This nations ideals and values are embraced and reflected in Section 1A of the Constitution but such ideals and values cannot per se operate as limiting laws where fundamental rights are involved.

What is clear is that where public interest, as defined above is significant, and it touches on a fundamental right the government has to pass a law to regulate it as a limitation under any of the sections 71 – 83 because as stated in S 70 the design of the limitations does take into account the public interest and the rights of others. It is the defined purposes and limitations which protect the public interest. While some interests could be inferred by the courts under S1A, they cannot limit the enjoyment of fundamental rights. Strictly speaking the swearing of any affidavit before a magistrate, seeking permission, to conduct an inquiry into a bank account is not a proceeding or a charge.

THE STATUS OF SECTION 31

1) The proceedings by way of a Notice of Motion are in the view of the court accusations that there is reasonable suspicion that corruption and economic crimes or the offence of obtaining money by false pretences by the Petitioners have been committed – see para 3 of the affidavit of Scholastica Muriithi Mrs, in support of the application.

2) The business before the lower court was a "proceeding," as defined above. The Petitioners have been "accused" as per the second definition of the word "charge". The Nigerian case of ***CHIEF GANI FAWEHINMI v INSPECTOR OF POLICE*** [2000] NCLR I flies in the face of the above definition, viewed from the constitutional position in Kenya. When a proceeding is commenced under Kenya law it assumes a constitutional dimension with the accompanying due process safeguards.

1) The proceedings contemplated under the liberty provision of S 72 of the Constitution is under the law envisaged by S 72(1)(e) ie – "***upon reasonable suspicion of his having***

committed, or being about to commit an offence. "Under the law of Kenya, a suspect must be taken to court and charged.

a. Section 72(2)(b) demands that any person who upon reasonable suspicion has committed or is about to commit a criminal offence, must be taken to court as stipulated in the section and be detained or released upon conditions to be set by the Court. It was not contemplated that a person could be reasonably suspected of having committed a crime and the conditionalities of his liberty determined by the executive arm of the Government. The only conditions envisaged are provided for under S 72(5) of the Constitution and this must be imposed by the court. S 31 is therefore in direct conflict with this provision and a person's liberty can only be constitutionally curtailed or limited only in terms of the section. Any other law such as S 31 which conflicts with the Constitution must be found unconstitutional and void.

For liberty to be curtailed a person must swiftly be taken to court where there is reasonable suspicion of his having committed an offence or about to commit one and where bail conditions are available. It is not the case here. Similarly, freedom of movement under S 81 of the Constitution can only be limited by a law imposed in consequence of his having been found guilty of a criminal offence under the law of Kenya or for the purpose of ensuring he appears before a court at a later date for trial of such a criminal offence or for proceedings preliminary to trial ... as per S 81(3)(c) of the Constitution.

S31 of the Anti Corruption and Economic Crimes Act, which purports to have the freedom of movement limited or curtailed cannot possibly be constitutional because it is not the law described in S 81 (3)(c), the Petitioners not having committed any offence as at the date of the order. The order having been issued pursuant to a law or proceeding in conflict with S 81(3)(c) must be an unconstitutional and void order. S 31 is clearly inconsistent with the provisions of both S 72 and S 81 as specified above.

3. While it is acknowledged without hesitation that investigations of corruption and economic crimes is a matter of public interest this is not included as one of the purposes. There must be a constitutional provision to include this, as one of the purposes in S 72 and S 81 upon which the limiting Act would be based. S 31 literally floats in the air without a constitutional Limitation or purpose.

See CHIRWA v REGISTRAR GENERAL page 20 letter E to F

With respect, what the Executive should have done and should consider doing now is to have the Constitution amended to provide for a suitable limitations in S 72 and S 81 and perhaps also consider having an enabling Passport Act or a more detailed and embracing Immigration Act.

4. S 31 allows accusations or charges to be made in the absence of an accused person see ***MANEK GANDHI v UNION GOVERNMENT 1978 2 SCR 621.*** In this case the Court decided that no one can be prohibited from obtaining a passport and leaving India without the Government authorities using a procedure that is reasonable, fair and just, the applicant must be informed of the grounds on which the action has been taken and given an opportunity to challenge it by making representations. Right of hearing could be availed after the event but this has to be done expressly. Instead in this case, the onus has been placed on the Petitioner to move to set aside the offending order - see ***GANDHI*** case pg 56.

5. S 31 also denies the 'accused' person an opportunity to be heard see ***CHIRWA CASE*** (ibid) and Section 77 of the Constitution

6. S 31 allows the Court to make an "order" which violates S 71 and 81 of the Constitution by restricting the right or extinguishing it, without due process.

7. Section 31 cannot pass the proportionality test in that the need to have an indefinite limitation to a fundamental right at the discretion of the executive cannot be justified in a democratic country. Only a limited period could be justified. There is unnecessary encroachment on the substance of the right to personal liberty which cannot reasonably be explained – ie whether the ends justify the means. The indefinite deprivation we hold, is not a measure necessary, in a democratic society nor is it proportional to the aims pursued.

8. The indefinite detention or any detention of a suspect with appearance at intervals of eight days for review in our view violates S 72 and 81. The Constitution only contemplates bail conditionalities by a court of law. The indefinite "detention" of suspects is clearly unconstitutional.

<u>Comparable jurisdictions to that of Kenya</u>

By contrast in Botswana, Lesotho and Brunei, it is a notice which a magistrate issues to be served on the suspect after an application by the Director. It is the magistrate who on application, at any time, hears the application for the travel document's return.

In Botswana, like Kenya the Director sets conditions for the surrender and appearance. However, in the case of Botswana there is a significant safeguard which is a provision of appeal. This is a merit appeal. In contrast an application to set aside the ex-parte order, would not be a merit hearing.

In Lesotho, it is the court which sets the conditions and hears the application for return of the travel documents.

In Brunei the committal to prison for refusal to surrender cannot be for a period more than 28 days or until the person complies whichever is earlier. Again the travel documents may only be detained for 6 months from the date of surrender and may be detained for a further period of 3 months only, upon application to a magistrate by the Director and after being satisfied that the investigation could not have been completed during the earlier specified period of 6 months.

The essential differences which emerge from comparable jurisdictions are:

i. Upon application, the magistrates issue a notice in writing unlike Kenya where he issues an order. There are no proceedings in the other jurisdictions at this stage.

ii. It is the magistrate (court) who sets the conditions for surrender and not the Director, in all the other jurisdictions, except Kenya. In the other jurisdictions except Botswana and Kenya there is no surrender of judicial power, or the sharing thereof to or with the executive.

iii. A suspect may make an appeal to court for the return of documents in the other jurisdictions for a hearing on merit – whereas in Kenya he has to apply to set aside the order which review cannot be on merit

iv. In the case of Kenya the detention or committal is for indefinite period whereas in Brunei for example the maximum period is 28 days from date of committal or upon the surrender of documents whichever is earlier

v. In the case of Kenya the Commission may at its discretion retain the documents indefinitely or until the investigations are completed whereas in Brunei the travel documents may only be detained for 6 months – and a further period of 3 months upon the magistrate being satisfied that investigations could not have been completed during the first limited period. Travel documents cannot in any event be detained for more than 9 months in Brunei

vi. To illustrate the awkward transfer of judicial power inbuilt in the section 31, in a related case, ie that of the Petitioners' father in question, two separate judges of this court have done the following:

(a) Issued a mandamus to compel the Commission to set conditions for the release of the passport

(b) When the conditions were set by the Commission following the mandamus order they proved to be onerous and the father of this applicant, again filed a judicial review application for the conditions to be reviewed by the High Court on grounds of reasonableness and the Judge held that he could not review a merit decision by the Commission.

In the light of the above it is quite clear the unconstitutionality of S 31 of KACC arises from the section being in conflict with sections 72 and 81 of the Constitution. However from the above comparison the sections unconstitutionality also emerges from the following:-

i. The Kenya process starts with a proceeding in the absence of the suspect and a proceeding must start off with procedural due process

ii. It is an order which is issued against the suspect instead of a notice in writing

iii. The Commission sets the conditions for surrender of the passport instead of the court. The court's function ie judicial power is shared with the executive contrary to the Constitution

iv. The surrender order is indefinite with no provision for an appeal to court on merit. In Brunei the surrender is for the maximum period 9 months only

v. A suspect can be detained indefinitely without recourse to bail contrary to the constitution. Moreover keeping a suspect in indefinite detention without specifying a

reasonable period violates the right of liberty. In the case of Brunei it cannot be for more than 28 days or the deposit of documents whichever is earlier

vi. Section 31 is therefore draconian provision whose legitimate purpose or aim is to facilitate investigations, but it is evident that the same aim, could be achieved with less onerous provisions which would be necessary or justifiable in a democratic society. At the risk of repeating ourselves the court in ***HON MARTHA KARUA v AFRICA RADIO T/A KISS 100 HCC 288 OF 2004*** defined what a democratic society is and came up with the following hallmarks

(a) A society that respects human rights

(b) A society that embraces pluralism, tolerance and broadmindness.

The section cannot satisfy the proportionality or necessity tests. It cannot also be justified as per its current provisions in a democratic society for inter-alia unnecessarily curtailing the right to liberty. The Commission exists for no other purpose except to perform what it is lawfully authorized to do and in the circumstances of this case it is to carry out investigations and file a report with the Attorney General. It does not exist to curtail the right to liberty. In this regard we wish to borrow some useful observations from the case of ***R v SOMERSET COUNTY COUNCIL,*** (ibid) already referred to in this judgment.

As expressed in the United Nations – International Covenant on Civil and Political Rights General Comment No 27 of 2nd November 1999, it is no justification for the Commission, to claim that a Kenyan citizen would be able to return to Kenya without a passport. The Executive does not have any such unbridled and unreasonable discretion under our Constitution and as in the case of petitioners in ***KENT v DULLES,*** the Petitioner citizens, have neither been accused of crimes nor found guilty. Any such statement emanating from the Commission is unfortunate and has no basis under our Constitution.

9. The Bill of Rights binds the judiciary, as has been consistently stated in many recent constitutional cases. For this reason we endorse the holding in ***MANEKA GANDHI v UNION OF INDIA*** (ibid) as follows:

"Every order made under a statutory provision must not only be within the authority conferred by the statutory provision but must also stand the test of fundamental rights. Parliament cannot be presumed to have intended to confer power on an authority to act in contravention of fundamental rights. It is a basic constitutional assumption underlying every statutory grant of power that the authority on which the power is conferred should act constitutionally and not in violation of any fundamental rights"

.....

"It would thus be clear that though the impugned order may be within the terms of Section 10(3) it must nevertheless not contravene any fundamental rights and if does, it would be void."

It is not sufficient to say that there is a pressing social need for the offending legislation or that there is a specific provision such as S 31. All must conform to the Constitution. We approve the holding in the Indian case of ***BISHAMBER DAYAL CHANDRA MOGHANY v STAFF OF U.P [1982] AIR*** 3 at page 42:

"The Indian Constitution is a written constitution and even the legislature cannot override the fundamental rights guaranteed by it to the citizens. Consequently even if the acts of the executive are deemed to be sanctioned by the legislature, yet they can be declared to be void and in inoperative, if they infringe any of the fundamental rights of the Petitioner guaranteed under part III of the Constitution."

10. We hold that since there are no constitutional limitations under S 72(5), the provisions of S 31 requiring the passport holder, to be detained and brought to court, every eight days violates the Constitution. Creating an offence, whose penalty is indefite detention is out of this is world and patently unconstitutional.

11. Section 31 is also unconstitutional in donating judicial power to the Executive to impose conditions concerning the release of passports since this is a judicial function under the S 72(5) of the Constitution. Judicial function is the core business of the Judicature. The Judicature cannot abdicate its functions. The powers exercisable under the section which in our view are strictly judicial are being shared with an Executive body namely the

Commission. The High Court has unlimited jurisdiction in both criminal and civil matters and if the proceedings under S 31 are essentially criminal in view of the analysis above, they cannot be shared with the executive – it is a breach of the doctrine of separation of powers and a clear encroachment of the judicial powers.

In this respect, we endorse fully the holdings in the leading case on this topic namely ***LIYAGE v THE QUEEN*** [1967] AC 258 –

"The power of nomination conferred on the Minister is an interference with the exercise by the Judge of the Supreme Court of the strict judicial power of the State vested in them by virtue of their appointment in terms of section 52 of the ... (Constitution) Order in council, 1946 or is in derogation thereof, and ..... The power of nomination is one which has hitherto been invariably exercised by the Judicature as being part of the exercise of judicial power of the state and cannot be reposed in anyone outside the Judicature. Section 9 of the Criminal Law (special provisions) Act No. 1 of 1962 is ultra vires the Constitution.

Before exhausting this topic, it is important to clarify that what the court observed in ***NGUI v R [1985] KLR 268*** must be the correct position and all past decisions, we suggest should be read with this observation in view:-

"The limitations referred to in S 70 are limitations contained in the provisions of Chapter V and there is no limitation qualifying the mandatory provision of S 72(5). We hold that S 123(2) of Civil Procedure Code is inconsistent with the Constitution; not only S72 but also section 60(1) and is accordingly void to the extent that this is so."

Yes, the limitation if any in each of Chapter 5 provisions reflect, define and identify the public interest. Public interest, it must be stated, changes with time, age and circumstances, and it is for Constitution framers and lawmakers to constantly consider what is to be regulated as public interest and come up with the necessary Constitutional and statutory changes to entrench any new public interest. Public interest is not a cloud that hovers over Chapter 5 fundamental rights, but it is what is ingrained and reflected in the design of the limitations in each provision. The Executive cannot ask the court to take a wider view of the public interest, than what is reflected in the Constitution at any given time, in respect of anything that impacts

on fundamental rights. The courts work is to administer justice in accordance with the Constitution and the law. To illustrate the point the Judges in the ***MURUNGARU CASE*** (ibid) did recognize the central position which the anti corruption and economic crimes interest occupies in our thinking. It is one of the greatest modern threats to common good. It is certainly a public interest which should be regulated by law. The Nairobi bombing and the nine eleven incidents, have brought to the fore the need for all societies to firmly deal with terrorism for example; this is also in our view a public interest matter. However the truth is that all these new public interest issues have not and will not at any time we hope change the substance of the right of liberty and movement, instead, what the executive needs is to incorporate these new public interests in the Constitution and enabling laws, so as to have the necessary legal framework to limit the rights where necessary. The alternative would be to make public interest an unruly horse to be ridden by the executive and the courts whenever societal needs and values are threatened. Our law must develop in tandem with the country's visions and needs. We must observe that the national fight against corruption and related ills will be as strong as the laws which have been put in place and where they are shaky and not Constitutionally compliant the authorities must constantly go back to the drawing board to update them and the fight will also turn on the thoroughness and efficiency of investigations and speedy prosecution of suspects.

At this time and age Constitutional and statutory law reforms, must keep pace with the ever changing needs and demands of the Information and Technological Phase. It serves no useful purpose for the executive for example to express concern after a successful challenge in court. Law must deliberately be made to be a central part, in the vision and the overall development of the country. Our law especially in the areas of great national concerns must at all times, reflect competency, efficiency and Constitutional compliance.

While we salute the DPPs concern for the wider picture and the implications of a judgment such as this, we are of course, quite clear in one minds that, the necessary Constitutional and statutory changes should have been done years before the bolting of the horse.

The European Jurisprudence confirms the position we have held as above in the case of ***Re JJ Control orders) 2006 All ER (P) 330 (June).*** In this case the Secretary of State in the United Kingdom imposed non derogating control orders on the defendant asylum seekers who

were detained on national security grounds pursuant to S2 of the Prevention of Terrorism Act 2005. The non derogating orders were wide ranging in terms of limiting the personal liberty of the individuals. For example they included the confinement of the individuals for 18 hours per day in a designated residences and the electronic tagging of the individuals. In their responses to the making of the control orders, the respondents argued, that the orders were unlawful on a number of grounds. Pre-eminent among those grounds was the submission that the cumulative impact of the obligations imposed by the orders amounted to a deprivation of the respondents liberty in breach of Article 5(1). It was therefore contended that, the Secretary of State had made derogatory control orders, which he had no power to do (and which the court had no power to do in the absence of a designated derogation).

From the above analysis of the legal position the Resident Magistrate's court order is similar to the orders in Re JJ in that we have already said that there was no legitimate purpose designated in the relevant section 72 and S 81. The following findings and observations made by the court in the Re JJ and also made in specific cases by the European Court of Human Rights are therefore relevant and significant!

In ***KURT v TURKEY (1998) 27 EHRR 373*** the European Court observed at para 122 as follows:-

"The court notes at the outset the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy, to be free from arbitrary detention at the hands of the authorities. It is precisely for that reason that the court has repeatedly stressed in its case law that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the purpose of Article 5 namely to protect the individual from arbitrariness. This insistence on the protection of the individual against any abuse of power is illustrated by the fact that Article 5(1) circumscribes *circumstances* **in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation having regard to the fact they constitute exceptions to a most basic guarantee of individual freedoms."**

And in ***A v SECRETARY OF STATE FOR THE HOME DEPARTMENT*** [2004] UKHL 56 [2005] 2 AC 62 Lord Hope in paragraph 100-101 of his speech emphasized the point in these words:-

"It is impossible even to overstate the importance of the right to liberty in a democracy. In the words of Baron Hume, *Commentaries on the Law of Scotland respecting crimes 4th edition (1844) Vol 2, page 98***.**

'As indeed it is obvious, that, by its very constitution every court of criminal justice must have the power of correcting the greatest and most dangerous of all abuses of the forms of law – that of the protracted imprisonment of the accused, untried perhaps not intended ever to be tried, nay, it may not be informed of the nature of the charge against him or the name of the accuser!

These were not idle words. When Hume published the first edition of his commentaries in 1797 grave abuses of the kind he described were within living memory. He knew the dangers that might lie in store for democracy itself if the courts were to allow individuals to be deprived of their right to liberty indefinitely and without charge on grounds of public interest by the executive. The risks are greater now in our time of heightened tension as they were then.

The third principle which the court must also recognize when it is called upon to perform its control function, which is to strike the balance between the public interest and the right to liberty. It is that the right to liberty belongs to each and every individual. ..... Every one enjoys this right. It is a right not a privilege."

In paragraph 222 of the speech of Baroness Hale said:

"neither the common law, from which so much of the European Convention is derived, nor international human rights law, allows indefinite detention at the behest of the executive, however well – intentioned. It is not for the executive to decide who should be locked up for any length of time let alone indefinitely. Only the courts can do that and, except as a preliminary step before trial, only after the grounds of detaining someone

have been proved. Executive detention is the antithesis of the right to liberty and security of person."

At page 19 of ***Re JJ*** the Courts made an important finding in these words:-

"In the absence of a derogation under article 5 of the Convention, the respondents are entitled to the full protection of Article 5, and there is no justification for any attempt to water down the protection in respect to the threat of terrorism."

We say the same, that the Petitioners here are entitled to the full protection of S72 and 81 of the Constitution. The Executive has no business limiting the suspects right to liberty indefinitely by using the lower court or any other court. Asking them to report to court every eight days while still uncharged is relegating them to prisoners. The business of the executive is to conclude the investigations and to speedily charge the suspects in court and thereafter it is for the court to proceed as laid down in the Constitution. The extracted order of the lower court runs counter to the specific provisions of S 72 and 81 and for this reason we hold that it is unconstitutional and void.

Lord Jauncey in ***R v DEPUTY GOVERNOR OF PARKHURT PRISON***, ex parte Hague [1992] IAC 58 pg 176H had this to say about liberty:

"If one asks the question "deprived of liberty to do what"; the answer must be: deprived of the freedom to lead one's life as one chooses (within the law). That freedom is the antithesis of a life which is subject to the kinds of control to which a prisoner, whose "liberty to do anything is governed by the prison regime is subject."

In this case even the availability of the right to apply to set aside the courts ex-parte order does not help at all in that the court would not be able to conduct a merits review that takes into account the constitutional due process which is inbuilt in S72 and S 81. We hold that the impugned order constitutes a deprivation of liberty without due process as set out in the Constitution and for this reason it is up for quashing.

Section 31 imposes obligations that are not compatible with S72 and 81 of the Constitution in that, they limit the Petitioners right to liberty, whereas, that liberty can only be limited in the circumstances set out in S 72 and 81.

A court of law can by order demand from an accused the deposit of a passport in court, where there are good reasons that he could or intends to evade or flee justice and may impose such other conditions as may be necessary to ensure he does not evade justice.

PERVASIVE PUBLICITY

On this ground we deliberately wish to say as little as we can, for the reason, that the contention is premature in our view. Firstly, the observations of the court in the case of ***R v CITY HALL MAGISTRATES COURT OF ex-parte SENNIK, HIGH COURT MISC APPL 652 of 2005*** were made in the context of a trial that had commenced on a false step. We are of the view that the DR ***CHRISTOPHER NDARATHI MURUNGARU v THE KENYA ANTI CORRUPTION COMMISSION AND THE ATTORNEY GENERAL HC Misc App No. 54 of 2006 (OS)*** has at pages 125-126 aptly described the case law on the point as follows:-

PRE TRIAL PUBLICITY

"It is moot argument which the alleged pre trial adverse publicity orders orchestrated by the First Defendant and/or carried with the connivance or both electronic and print media is likely to contravene the right to a fair hearing as guaranteed under section 77(1) and 77(7) of the Constitution. It is moot because the Plaintiff has not been charged with any offence. There is no promise or assurance from any guarantee, that the Plaintiff will be charged with any offence. Besides ..... as it was held in *KAMLESH PATTNI v ATTORNEY GENERAL, media publicity per se does not constitute of itself a violation of a party's right to a fair hearing."*

The above is a good summary of the current jurisprudence in this country.

We find and hold that this is a matter for another day if at all. We cannot possibly put it better, than the court did in the Nigerian case, of ***CHIEF GANI FAWEHINMI v INSPECTOR GENERAL OF POLICE and 2 OTHERS [2000] 7 NCLR*** 1 at page 30:

"But it must always be remembered that no one has ever crossed the river and none will ever cross the river until he gets to the bridge"

In reaching our decision on this point we have taken into account the Petitioners own words in the affidavits in support of the application, to the effect that they were keen to come back and face their accusers: We therefore hold them to their express bargain.

Finally as we held, in the ***REFERENDUM CASE*** (2005), in respect of a prayer for security for costs, a constitutional court should never deal with speculative issues. This has proved us right. Our pronouncement was prophetic. The draft Constitution was rejected and the issue of security for costs evaporated in thin air and never came up for constitutional adjudication!

In the result this part of the claim is wholly disallowed.

In interpreting the Constitution, we think it is important to have in view the Constitution's broad objects and purposes. For this reason we would like to adopt a teleological approach so that we give effect to the object and purpose of the Bill of Rights. This in turn means we must interpret the Bill in such a way so as to make its safeguards or protections practical and effective. In addition we think that the general spirit of the Constitution as an instrument of governance and as an instrument that should reflect and promote the ideals of and values of the rule of law and of a democratic society is an important consideration. Finally as has been repeated, in leading constitutional judgments, both local and decisions from comparable jurisdictions elsewhere, a Constitution is a living instrument, and it must be interpreted in the light of the present-day conditions with a rider that clear constitutional provisions cannot and must not be ignored by the court At the same time, we think that the court should never ever, disregard its crucial role in harmonizing and balancing the purposes and objects mentioned above because we believe that, inherent in the entire Constitution and its framework is the need for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

And as expressed in this judgment the recognized public interests, have been regulated by law so that citizens can regulate their lives with a certain measure of certainty as to what the law is, at any given time. In this judgment we have found a big gap between the law and the some pressing social needs concerning, for example the right to liberty and freedom of movement. It is an area that calls for policy considerations by the executive in the many facets, that impact on these rights e.g. visa requirements, diplomatic considerations and

protection, international dimensions, the need to ensure self sustenance by travelling citizens and ability to raise return travel tickets and other wider state responsibilities such as needs of national security.

Arising out of the declarations and orders granted herein we commend the executive to consider, as we have stated above, taking urgent steps to have the Constitution amended and also to have supporting legislation in the form of a well structured Passport Act and/or an Immigration Act and an amended Anti Corruption and Economic Crimes Act all of which must be compliant with the Constitution and the requirements of due process, in relation to travel documents.

Declarations and orders shall forthwith issue in both Petitions 199/2007 and 200/2007, in terms of prayers (a),(b),(c), (d),(e)(h) and (k) only, as per the Petition dated 19th February 2007 and Amended on 23rd April 2007. Declarations and orders sought in (f)(g)(i) and (j) are refused or declined. We make no order as to costs due to obvious public law considerations and the novelty of this judgment in "transiting" from an era of prerogative power to that of Constitutional enforcement of rights, and its impact on the Constitutional landscape of our great country. What remains is for us to thank the learned DPP Mr Tobiko, his Junior Mrs Owino the 2nd Respondent Counsel Mrs Oduol and the learned counsel for the Petitioner Mr Fred Ngatia for making very enlightening submissions.

DATED and delivered at Nairobi this 22nd day of June, 2007.

J.G. NYAMU

JUDGE

R. WENDO

JUDGE

A. EMUKULE

JUDGE

Petitioners represented by Fred Ngatia

1st and 3rd Respondents – learned DPP

Mr Tobiko

Mrs Owino

2nd Respondent Mrs Oduol 101-115