KENYA LAW
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Katiba Institute & another v Attorney General & another; Independent Policing and Oversight Authority & 3 others (Interested Parties) (Constitutional Petition 379 of 2017) [2022] KEHC 17072 (KLR) (Constitutional and Human Rights) (16 December 2022) (Judgment)

Neutral citation: [2022] KEHC 17072 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 379 OF 2017

AC MRIMA, J

DECEMBER 16, 2022

BETWEEN

KATIBA INSTITUTE .... 1ST PETITIONER

AFRICA CENTRE FOR OPEN GOVERNANCE (AFRICOG) .. 2ND PETITIONER

AND

ATTORNEY GENERAL .... 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE .... 2ND RESPONDENT

AND

INDEPENDENT POLICING AND OVERSIGHT AUTHORITY ... INTERESTED PARTY

INTERNATIONAL JUSTICE MISSION .... INTERESTED PARTY

KENYA HUMAN RIGHTS COMMISSION .... INTERESTED PARTY

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .... INTERESTED PARTY

Provisions of the law that granted the Police permission to use firearms to protect life, property and to prevent felonies from escaping lawful custody were not legally sustainable.

The case discussed the scope of the powers given to the police to use firearms to protect life, property and to prevent felonies.

Reported by John Ribia

Constitutional Law *– fundamental rights and freedoms – right to life – right to a fair hearing – right to human dignity – where paragraph 1(c), (d) and (e) of Part B of the Sixth Schedule to the National Police Service (Amendment) Act provided that the police could use firearms to protect life, property and to prevent felonies from escaping lawful custody – whether the impugned provisions contravened the rights to life, human dignity and fair hearing - Constitution of Kenya, 2010 2(1), (4), 10, 20(3), 21(1), 24, 24(1), 26, 26(3), 28, 29, 50(1)(2).*

Constitutional Law *– fundamental rights and freedoms – limitation of fundamental rights and freedoms – criterion utilized by the courts when determining whether a limitation on a fundamental right and freedom was justifiable - whether paragraph 1(c), (d) and (e) of Part B of the Sixth Schedule to the National Police Service (Amendment) Act that provided that firearms could be used to protect life and property on preventing felonies from escaping lawful custody were justifiable limitations to the rights to life, human dignity and the right to a fair hearing – Constitution of Kenya, 2010 articles 24(1), 2628, 29 and 50(1)(2); National Police Service (Amendment Act) No 11 of 2014, Sixth Schedule, Part B, paragraph 1(c), (d) and (e).*

Brief facts

The petitioners contended that paragraph 1(c), (d) and (e) of Part B of the Sixth Schedule to the National Police Service (Amendment) Act that provided that firearms could be used to protect life and property on preventing felonies from escaping lawful custody was a claw back from the gains made by the Constitution of Kenya, 2010 (the Constitution) as far as the protection of the right to life, dignity and fair hearing was concerned under articles 23, 28 and 50 of the Constitution. The petitioners claimed that the impugned amendments were unconstitutional for failing to provide for the necessary safeguards as articulated under article 24(2) of the Constitution and for failing to provide justification of the of the limitation that met the requirements of article 24(1) of the Constitution.

Issues

i. Whether paragraph 1(c), (d) and (e) of Part B of the Sixth Schedule to the National Police Service (Amendment) Act that provided that the police could use firearms to protect life, property and to prevent felonies from escaping lawful custody contravened the rights to life, human dignity and fair hearing.

ii. What was the criterion to be utilized by the courts in determining whether a limitation on a fundamental right and freedom was justifiable?

iii. Whether the use of firearms by the police to protect life and property on preventing felonies from escaping lawful custody was a justifiable limitation to the right to life.

Relevant provisions of the Law

National Police Service Act, Act No 11A of 2011

Sixth Schedule, Part B, Paragraph 1

B – CONDITIONS AS TO THE USE OF FIREARMS

1. Firearms may only be used when less extreme means are inadequate and for the following purposes—

(a) saving or protecting the life of the officer or other person;

(b) in self-defence or in defence of other person against imminent threat of life or serious injury;

(c) protection of life and property through justifiable use of force;

(d) preventing a person charged with a felony from escaping lawful custody; and

(e) preventing a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody.

Held

1. Constitutional interpretation or judicial interpretation was the legal creativity of attributing or assigning meaning to the provisions of the Constitution. The Constitution was a document *sui generis*; it was the supreme law of the land.
2. The Constitution had to be interpreted holistically in the way it was intended by the framers. The Constitution did not favour formalistic approaches to its interpretation. It was not to be interpreted as a mere statute. The Constitution was to be promoted in a manner that promoted its values and principles. In interpreting the Constitution, non-legal considerations were important to give its true meaning and values.

3. The right to life was not one of those rights which could not be limited under article 25 of the Constitution. The right to life could be limited in appropriate circumstances. The constitutional safeguard for the right to life under article 26(3) of the Constitution provided that the right to life was not absolute. It could be alienated, but to the extent that the Constitution or any other law authorised. For any limitation to a right or fundamental freedom in the Constitution to be sustainable, such had to be within the parameters set by article 24 of the Constitution.
4. Article 24(2) of the Constitution provided the confines within which legislation could limit a right and fundamental freedom. The provision called upon the legislation to ensure certain parameters were met for the limitation to be sustainable. Article 24 had a deliberate scheme to safeguard rights and fundamental freedoms in the Bill of Rights such that their limitation was only permissible within structured and strict parameters. Limiting a right or fundamental freedom was a delicate act of considering many parameters and such an undertaking should not be mechanical. The criterion for limiting a right was;
    1. whether the limitation had been specifically provided for by a legislation;
    2. the nature of the right or fundamental freedom to be limited;
    3. the importance or the purpose of the limitation;
    4. the nature and extent of the limitation;
    5. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual did not prejudice the rights and fundamental freedoms of others;
    6. the relation between the limitation and its purpose (the effect of the limitation); and
    7. whether there were less restrictive means to achieve the purpose.
5. The impugned amendments did not expressly and specifically express the intention to limit the right to life. However, the limitation could be strenuously construed from the impugned amendments. The permissive use of firearms may not necessarily mean that it would lead to loss or deprivation of life or to the limitation of the right to life in any manner whatsoever. There was need for a legislation to be crystal clear on its intention to limit any right or fundamental freedom provided for in the Constitution. An example was section 6 of the Access to Information Act that set limitations on the right of access to information; that was not the case with the impugned amendments.
6. The limitation had to be specific enough for the citizen to know the nature and extent of the limitation and that the limitation had to be easily accessible to the citizen. The impugned amendments could be used by police officers to deprive life, however, they lacked clarity of the intention to limit the right to life. The impugned amendments did not clearly state the nature of the right to be limited.
7. The amendments were couched in a manner that it forced one to vaguely infer or construe that the right to life under article 26 of the Constitution was threatened and likely to be limited by such amendments. Such a case ran contra to article 24(2)(b).
8. According to the Sixth Schedule to the National Police Service Act (NPS Act), the purpose of the alleged limitation of the right to life was to allow police office use firearms in instances where less extreme means was inadequate. The intent of the limitation was informed by the reality that there were some instances where the use of firearms on persons was necessary.
9. The purpose of paragraph 1(c) of Part B of the Sixth Schedule to the National Police Service (Amendment) Act was to justify the use of firearms in protection of life and property. Paragraph 1(d) was aimed at allowing police officers to use firearms in preventing a person charged with a felony from escaping lawful custody and paragraph 1(e) allowed police officers to use firearms in preventing a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody.
10. Whereas the right to life had a bearing to the rest of the rights and fundamental freedoms, that alone did not place the right to life at a higher pedestal than the rest of the rights and fundamental freedoms. It was a fact that firearms could be used in appropriate instances to protect property and in the process to suppress life.

11. The use of firearms on property and persons called for balance and exercise of restraint, but it could not be flatly held that life could not be suppressed in protection to property.
12. The extent of any limitation imposed by legislation was found in the wording or the text of the legislation. The extent of the limitation lacked clarity. It was not reasonably possible to deduce that the contemplated use of firearms in the impugned amendments had to lead to the limitation of the right to life. It was that ambiguity that deprived the impugned amendments the clarity on the extent of the limitation. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual did not prejudice the rights and fundamental freedoms of others. Although the nature of the proportionality test would vary depending on the circumstances, in each case courts would be required to balance the interests of society with those of individuals and groups.
13. There was a delicate balance to be struck between a person's right to property or the need to apprehend law breakers on one hand and on the other hand, such entitlement not be seen to be a justification to terminate another person's right to life.
14. The need to prevent persons in custody charged with felonies, from escaping from lawful custody, an act that protected the society at large and their attendant rights and fundamental freedoms, ought not be used a reason to threaten or potentially end such escapees' right to life whenever they try or were aided to flee from lawful custody.
15. The effect of the impugned amendments went beyond the intended purpose which was to protect life and property and to resist escape from lawful custody. The amendments were a potential avenue for gross abuse of other rights and fundamental freedoms. A police officer could casually shoot someone and allege that his life or property was in danger. Just like the fact that the extent of the limitation was not provided, the negative effects appurtenant from the use of the impugned amendments were limitless. The deleterious effects of the amendments surpassed the intended purpose of the amendments.
16. The objective of any legislation did not go beyond what was necessary to achieve its goals. It also made sure that the least severe or restrictive means were used to attain a legislative imperative. The provisions that preceded the impugned amendments (paragraph 1(a) and (b)) provided for the use of firearms in instances when less extreme means was inadequate in order to save or protect the life of the officer or other person and in self-defence or in defence of other person against imminent threat of life or serious injury.
17. Section 21(2) of the Criminal Procedure Code provided for the manner in which a person who resisted an arrest ought to be apprehended. If such provision was read together with paragraph 1(a) and (b) of Part B of the the Sixth Schedule to the National Police Service (Amendment) Act , then that accorded a lesser restrictive means to achieve the general purpose under Part B of the Sixth Schedule. The provisions coupled with other reasonable ways of protecting life, property and restraining those in lawful custody from escaping should be adequate to cover for the intended use of firearms in lesser ways than those contemplated in the impugned amendments. The impugned amendments tended to be too harsh and aggressive in attaining the intended purpose.
18. The impugned amendments variously impugned the Constitution. They infringed article 2(4) of the Constitution. The intended limitations to the rights and fundamental freedoms vide the impugned amendments were not in consonance with article 24 of the Constitution. They failed the limitation test.
19. Even though the right to life under article 26 of the Constitution was not among the rights which could not be limited, the impugned amendments were a potential threat the right to life as guaranteed in the Constitution. The right to human dignity under article 28 of the Constitution was out rightly threatened as well.
20. An offender who attempted to escape from lawful custody committed an offence that was punishable in law. Prior to being punished, the offender had to be taken through the criminal justice system. If

such an offender was executed summarily courtesy of the impugned amendments, then that was an affront the right to a fair trial under article 50 of the Constitution. The impugned amendments posed a potential danger of intruding into the sanctity of fair trials. The impugned amendments were not legally sustainable for being an affront to the Constitution.

21. Whereas the impugned amendments may have been well-intentioned, that alone did not make them pass the constitutional muster. They had to be in tandem with the Constitution. As long that bar was not attained, the amendments remained constitutionally infirm.

Petition allowed.

Orders

i. *Declaration issued that paragraph 1(c), (d) and (e) of Part B of the Sixth Schedule to the National Police Service Act of 2011, as amended by section 54 of the National Police Service (Amendment) Act 2014 contravened articles 2(4), 24, 26(1), 28 and 50 of the Constitution. To that end, the said provisions were null and void ab initio and had no legal effect whatsoever.*

ii. *Declaration issued that section 21(2) of the Criminal Procedure Code must be read to permit the use of firearms, if need be, and only in the circumstances construed in paragraphs 1(a) and 1(b) of Part B of the Sixth Schedule to the National Police Service Act 2011.*

iii. *Parties were to bear their respective costs.*

Citations

Cases

1. Buoga v Attorney General & another (Constitutional Petition E290 of 2022; [2022] KEHC 13214 (KLR)) — Applied
2. Center for Rights Education and Awareness & anothers v John Harun Mwau & 6 others (Civil Appeal 74 & 82 of 2012; [2012] KECA 101 (KLR)) — Applied
3. Haki Na Sheria Initiative v Inspector General of Police & 3 others (Civil Appeal 261 of 2018; [2020] KECA 566 (KLR)) — Explained
4. Kandie, Karen Njeri v Alassane Ba & another (Petition 2 of 2015; [2017] KESC 13 (KLR)) — Explained
5. Ndii v Attorney General (Petition E282, 397, E400, E401, E402, E416 & E426 (Consolidated) of 2020; [2021] KEHC 9746 (KLR)) — Applied
6. Njuguna v Attorney General ([1997] KLR 188) — Explained
7. Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others (Civil Appeal 172 of 2014; [2017] KECA 751 (KLR)) — Explained
8. Attorney General v Susan Kigula and 417 Others ([2009] UGSC 6) — Explained
9. Ex-parte Minister for Safty and Security and others: In Re S -vs- Walters & another ([2002] ZACC 6; 2002 (4) SA 613; 2002 (7) BCLR 663) — Mentioned
10. S v Makwanyane and Another ([1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1) — Explained
11. R v Big M Drug Mart Ltd. ([1985] 1 SCR 295) — Explained
12. R v Oakes ([1986] 1 SCR 103) — Applied
13. Leydi Dayán Sánchez v Colombia (Case 12.009, Report № 43/08) — Explained
14. Beckford v Queen ([1988] AC 130) — Mentioned
15. Tennessee v Garner (471 U.S. 1 (1985)) — Explained

Statutes

1. Access to Information Act, 2016 (Act No 31 of 2016) — Section 6 — Interpreted
2. Constitution of Kenya (2010) — Article 2 (1) (4); 10; 20 (3); 21 (1); 24 (1); 23; 26 (3); 28; 29; 50 (1) (2); 239; 244; Schedule Sixth; Section 7 — Interpreted
3. Constitution of Kenya (1969, Repealed) — Section 71 — Interpreted

4. Criminal Procedure Code (cap 75) — Section 21 (2) — Interpreted
5. Independent Policing Oversight Authority Act, 2011 (Act No 35 of 2011) — Section 5, 6 — Interpreted
6. National Police Service Act, 2011 (Act No 11A of 2011) — Section 3, 24(d); 27 (d); Schedule Sixth; Part B; Paragraph 1 (c) (d) (e) — Interpreted
7. National Police Service (Amendment) Act, 2014 (Act No 11 of 2014) — Section 54 — Interpreted
8. Police Act (cap 84 (Repealed)) — Section 28, 84 — Interpreted

International Instruments

1. African Charter on Peoples' and Human Rights (ACPHR), 1981
2. Code of Conduct for Law Enforcement Officials, 1979
3. European Convention on Human Rights, 1950
4. General Comment 3 of the African Charter on Human and Peoples Rights, 2015
5. International Covenant on Civil and Political Rights (ICCPR), 1966
6. UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990
7. Universal Declaration of Human Rights, 1948

Advocates

None mentioned

JUDGMENT

Introduction:

1. Katiba Institute, a constitutional research, policy and litigation institute and Africa Centre for Open Governance (AfriCOG), a non-profit organization with the mission to promote good governance and the implementation of the *Constitution*, (being the 1st and 2nd petitioners herein respectively) instituted the petition dated July 31, 2017.

2. The petition was supported by the affidavit of Yash Pal Ghai deposed to on an even date.

3. The petitioners challenged the constitutionality of paragraph 1(c), (d) and (e) of part B of the sixth schedule to the *National Police Service Act*, No 11 of 2014 as amended by section 54 of the *National Police Service (Amendment Act) No 11 of 2014* (hereinafter referred to as 'the impugned amendments').

4. The petition was opposed.

The Petition:

5. The petitioners contended that the introduction of the impugned amendments was a claw back from the gains made by the 2010 *Constitution* as far as the protection of the right to life, dignity and fair hearing is concerned under articles 23, 28 and 50 of the *Constitution*.

6. The petitioners averred that the impugned amendments set out the conditions for the use of firearms being to save and to protect life, self-defence, protection of property, preventing a person charged with felony from escaping lawful custody and preventing a person who attempts to rescue a person charged with a felony from escaping lawful custody.

7. The petitioners based their case on the basis of articles 2(1), (4), 10, 20(3), 21(1), 24, 24(1), 26, 26(3), 28, 29, 50(1)(2) of the *Constitution*.

8. They pleaded that while the *Constitution* permits the right to life to be limited by written law under article 26(3), that law must pass the tests set under article 24(1) of the *Constitution*.

9. They asserted that the impugned amendments were not reasonable and justifiable in an open democratic society based on human dignity.

10. It was their case that the impugned amendments did not indicate the intention to limit the right, the nature and extent of that limitation, which were cardinal requirements under article 24(2) of the *Constitution*.

11. In tracing the history of the right to life, the petitioner pleaded that the *1969 Constitution* (now repealed) provided for deprivation of life in certain circumstances as were provided in section 71 of the said *Constitution* a position which was reflected in section 84 of the repealed *Police Act*.

12. It was their case that the *2010 Constitution* did away with the exceptions under section 71 of the old *Constitution* and section 28 of the *Police Act* by defining the right to life as one that could not be deprived intentionally except as provided for under article 26(3).

13. The petitioners maintained that the whereas written law may authorize deprivation of life, it must be tested against the requirements of article 24(1) and (2) of the *Constitution* so as to be cleared as being justifiable and reasonable.

14. In respect to international instruments, the petitioners impugned the amendments hinging their arguments on provisions of article 4 of the *African Charter on Human and Peoples Rights*, article 6(1) of *International Covenant on Civil and Political Rights*, article 3 of *Universal Declaration of Human Rights*, article 3 of the *Code of Conduct for Law Enforcement Officials* and paragraph 9 of the *United Nations Basic Principles of on the Use of Force and Firearms by Law Enforcement Officials*.

15. The petitioners claimed that the impugned amendments were unconstitutional for failing to provide for the necessary safeguards as articulated under article 24(2) of the *Constitution* and for failing to provide justification of the of the limitation that meets the requirements of article 24(1) of the *Constitution*.

16. They reiterated that the impugned amendment was unconstitutional for authorizing shooting and potential killing of non-violent persons who pose no threat.

17. The petitioners posited that absent risk to life or serious injury, shooting and possibly killing a non-violent person in order to protect, prevent escape or to prevent a person from assisting in an escape is inherently arbitrary an incompatible with the right to life, dignity, freedom and security of a person as provided for in article 26, 28 and 29 of the *Constitution* respectively and incompatible with article 24 on the limitation of rights.

18. It was their case that the authority created by the impugned amendments empower the police to replace the criminal justice system with their own determination of guilt, passing judgment and imposing punishment instead of arresting the suspect and bringing them before court to face the law.

19. The petitioners took issue with the fact that the impugned amendments placed property above sanctity of life and to that extent does not meet the proportionality test and least restrictive measure test under article 24(1) of the *Constitution*.

20. The petitioners further averred that paragraph 1(c) was ambiguous for failing to define defence of property. It was claimed that it is incapable of giving the police or ordinary citizens sufficient guidance as what property justifies the use of firearm.

21. It was averred that the provision has inadequate guidance as when a police officer's is permitted to use the firearm and the citizen unclear as to the consequences of his or her behaviour.

22. The petitioner pleaded that the foregoing leaves the law open to abuse by police officers and seeking defence for negligence, recklessness and extra-judicial killings.

23. It was their case, therefore, that the foregoing would impede accountability for wrong doing by the police contrary to articles 10, 26, 28,29, 239 and 244 of the *Constitution*.

24. The petitioners urged further that the impugned amendment will result in arbitrary and inconsistent application of the firearms laws and consequently deprivation of equal protection of the law.

25. On the foregoing factual and legal matrix, the petitioners prayed for the following reliefs: -

    a. A declaration be and is hereby issued that paragraph 1(c), (d) and (e) of part B of the sixth schedule to the *National Police Service Act* of 2011, as amended by sections 54 of the *National Police Service (Amendment) Act* 2014 contravene articles 26(1), 28, 29 and 50 of the *Constitution*.

    b. A declaration be and is hereby issued that the aforementioned paragraph of part B of the sixth schedule to the *National Police Service Act* of 2011, as amended by sections 54 of the *National Police Service (Amendment) Act* 2014 contravene article 2(4) of the *Constitution* and is thus null and void.

    c. A declaration that section 21(2) of the *Criminal Procedure Code* must be read in conformity to section 7 of the sixth schedule of the *Constitution* so as to be construed to permit the use of firearms in circumstances construed in paragraphs 1(a) and 1(b) of part B of the sixth schedule to the *National Police Service Act* 2011.

    d. An order be and is hereby issued invalidating paragraph 1(c), (d) and (e) of part B of the sixth schedule to the *National Police Service Act* 2011.

    e. Any other just and expedient order the court may deem fit to make.

    f. Costs of and incidental to this petition.

The Petitioners' Submissions:

26. The 1st and 2nd petitioners filed joint written submissions dated February 9, 2018. From the outset, they reiterated that the petition sought to declare paragraph 1(c), (d) and (e) of part B of the sixth schedule to the *National Police Service (amendment) Act* No 11 of 2014 unconstitutional for derogating the strides made by the 2010 *Constitution*.

27. It was their case that the amendment violated articles 26, 28, 29 and 50(1) on the *Constitution* on the right to life, dignity, freedom and security of a person and right to fair hearing respectively.

28. Reference was made to report by the Commission of Inquiry into the Post-Election Violence of 2007-08(Waki Commission) where it was found that there was need for police to exercise use of firearms in a minimal and proportionate manner in view of the fact that the police accounted for 962 causalities out of whom 405 succumbed.

29. It was submitted that the 2010 *Constitution* did away with numerous exceptions allowed under the old *Constitution* and the *Police Act* where the right to life was one that could not be deprived intentionally other than under article 26(3).

30. In reference to the *National Police Service Act* of 2011, it was submitted that the changes therein were in compliance with the 2010 *Constitution* that reflected stronger protection of the right to life in line with modern conceptions of police power.

31. It was submitted that before the amendment, the *National Police Service Act* authorised police to use lethal force in clearly defined and circumscribed situations. The amendment thus, introduced two criteria that allowed firearm in less extreme measures.

32. The petitioners' position was that the police ought to only use firearm in instances where there was threat to life or threat of serious injury.

33. In buttressing the right to life, it was submitted that the right to life is the foundation of all other rights and its interpretation must be given the widest meaning. Reliance to that end was placed on the South African decision in *State -vs- Makwanyane & another* 1995 (3) Sa 391 (CC) 1995 where it was observed that: -

> "The right to life is more than existence – it is a right to be treated as a human being with dignity; without dignity, human life is substantially diminished. Without life there cannot be dignity."

34. Further reliance was placed on the Ugandan Supreme Court case in *Attorney General v Sussan Kigula & 417 others* (2009) UGSC 6 (20 January 20009) where it was observed thus: -

> "Life is sacrosanct and may only be taken away after due process up to the highest court, and after the President has had opportunity to exercise the prerogative of mercy."

35. In reference to the Colombian and United States Supreme Court decision in *Leydi Dayan Snachex -vs- Colombia* and *Tennessee v Garner* 471 US 1 11 (1985) respectively, it was argued that to shoot and possibly kill a non-violent person, running away from the police, rather than securing his arrest is inherently arbitrary and incompatible with the right to life and human dignity. In the latter case it was observed that: -

> "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does to justify the use of deadly force to do so."

36. It was their submission that parliament might have meant well but the amendment fails to provide guidance on the permissible use of firearms. It was claimed that lends itself to various interpretations thereby threatening the right to life.

37. In respect of use of firearms only when necessary and proportionally, support was found in the Court of Appeal in *Stephen Iregi Njuguna v Attorney General* (1997) eKLR where it was observed that: -

> "The police do not have an unqualified licence to resort to shooting. They are authorised to shoot only when necessary to do so and it is up to them to demonstrate that shooting was necessary."

38. On the foregoing arguments, the petitioners submitted that the amendments do not align to the limitation of rights under article 24 of the *Constitution*.

39. In his oral highlights, Miss Nkonge counsel for the petitioners submitted that the petition challenged the changes brought to *National Police Service Act*, through the amendment of section 54 of the *National Police Service Act* No 11 of 2014 which introduced of three paragraphs to the 6th schedule of part B.

40. Counsel stated that the amendments were not tied to protection of life or to the victim or of the police officer instead the provision contravened article 24 of the *Constitution* and as such they are regressive of the law in as far as protection of life is concerned.

41. It was submitted that the amendments can lead to arbitrariness by police and violation of rights and that the vague nature of the amendment can lead to loss of life, hence need for proper control.

42. Seeking to distinguish the decision in America case in *Bedford v Queen* 1988, counsel submitted that use of force is only justified in instances of self-defence.

43. In the end, counsel urged that the prayers sought for in the petition be granted.

44. All the interested parties supported the petition. As such, this court will, in the first instance, consider their respective cases.

The 1st Interested Party's Case:

45. In support of the petition, the Independent Policing Oversight Authority, (hereinafter referred to as 'the IPOA') filed a replying affidavit deposed to by David Njaga Nderitu on September 14, 2017, the Director Complaints Management and Legal Services.

46. While speaking to IPOA's objective to be accountable and provide security whilst observing the highest standard of professionalism as set out in section 5 of the *IPOA Act*, he deposed that under section 6, *IPOA* has an obligation to receive and investigate complaints related to disciplinary or criminal offences committed by any member of the National Police Service.

47. On the foregoing mandate, he deposed that between January and June 2016, the IPOA received 117 complaints regarding police shootings and deaths and 105 cases between July and December of the same year.

48. He further referred to IPOA's Report on police conduct during protests and gatherings to demonstrate incidences of misuse of firearms by police that resulted in serious injuries, maiming and deaths.

49. Based on the foregoing, he deposed that the impugned amendments broadening the circumstances under which police officers may use firearms is against police reforms.

50. It was his case that IPOA was created as a result of the challenges faced by Kenyans due to excessive force used by the police.

51. In highlighting the 1st interested party's written submissions dated February 6, 2018, Mr Kinoti, counsel for stated that the amendments took the country back to where it was before the promulgation of the 2010 *Constitution*.

52. He submitted that police shootings are rife and the amendments tend to limit key foundational rights that call for compelling of public interest invitation which the respondents have not done.

53. It was his case that the respondents have not discharged the burden that the amendments were within the limits set by article 24 of the *Constitution*.

54. It was his case that the right to property cannot be elevated to that of life. He submitted that the safeguards for the use of firearms will be rendered otiose where the law itself permits otherwise. Reference was made to the South African decision in *Ex-parte Minister for Safty and Security and others: In Re S v Walters & another* (CCT28/01 (2002) ZACC 6: 2002 (4) SA 613; 2002(7) BCLR 663.

55. It was further his case that the impugned amendments do not meet the mandatory constitutional threshold requirements for limitation as set out in article 24(1). Support was found in *Seventh Day*

Adventist Church (East Africa) Limited v Minster for Education & 3 others (2017) eKLR where it was observed that: -

> "The limiting law must be clear enough and devoid of ambiguity for if a guaranteed constitutional right is to be limited the limitation must be specific enough for the citizen to know that nature and extent of the limitation."

56. In denouncing the use of firearms in the protection of property, the 1st interested party referred to the United Nations Office Drug and Crime (UNODC) resource book on the use of force and firearms in law enforcement where it is stated that: -

> "A threat merely against property does not justify using firearms against a person......"

57. It was his case that the limitations imposed by the impugned amendments were disproportionate in view of the nature of the rights to be affected, the effect of the limitation on the rights and the justification given for the limitation.

58. On the basis of the foregoing, counsel urged the court to declare the impugned amendments unconstitutional.

The 2nd Interested Party's Case:

59. The International Justice Mission, an international human rights agency whose mission is to rescue millions, protect half a million and prove that justice is unstoppable, supported the petition through the affidavit of Wamathai Kimani, the Director System Reform, deposed to on September 25, 2017.

60. In giving examples on its mandate, the 2nd interested party deposed that it has over the years represented victims of arbitrary arrests and detention falling under the scope of the *National Police Service Act* and to that end, in the year 2017, it secured the release of 267 individuals wrongfully accused by the police.

61. It was his case that it represented David Makara in the Chief Magistrates Court at Nyahururu in Criminal Case No 34321 of 2002, Joseph Musyoka in Criminal Case No 4778 of 2010 among others who were all victims of excessive use of force by forearms by police.

62. He further gave the example of Douglas Tutu, Moses Wanyoike and Johnston Ndichu who had gone fishing in Crescent Island in Naivasha where, while being arrested, the said Moses Wanyoike was shot and killed by a policeman.

63. He deposed that the 2nd interested party is representing the families of the deceased unarmed persons who were victims of police killing.

64. It was his deposition that if the amendments were allowed to stand, it would create legal justification for police officers to kill more innocent people without cause, while also limiting probable accountability measures to the wrongful deaths by shootings.

65. It was his case that the impugned amendments were not in tandem with the limitation set in article 24 of the *Constitution* for being unreasonable and unjustifiable.

66. He urged the court to declare the impugned amendments as unconstitutional.

67. The 2nd interested party did not file written submissions, however, Mr Majani Counsel orally submitted stating that the purpose of the *National Police Service Act* is sacred and to that end, section 3 gives effect to various provisions of the *Constitution*.

68. It was his case that the amendments were unconstitutional for giving the police sweeping powers for the use of firearms which directly infringe on the right to life.

69. It was his case that the amendments cannot stand since the police are allowed to use firearm to protect property, a scenario that elevates property to life.

The 3rd Interested Party's Case:

70. Kenya Human Rights Commission, supported the petition in reliance to its written submissions dated December 3, 2017 and the deposition of the George Kegoro, its Executive Director.

71. In its written submissions, it was its case that the impugned amendments disproportionately increased the purposes for which police officers would use firearms in contravention of article 26(3) of the *Constitution* and article 1 of the *Universal Declaration of Human Rights*.

72. It was its case that deprivation of life must be evaluated under paragraph 7 of the General Comment 3 of the African Charter on Human and Peoples Rights which provides for appropriateness, justice, predictability, reasonableness, necessity and proportionality.

73. The 3rd interested party referred to section 21 of the *Criminal Procedure Code* which allows the police or a private person to use all means necessary to effect arrest where arrest is forcibly resisted. It was his case that the said section forbids the use of unreasonable force in effecting arrest by stating that nothing in the section justifies the use of greater force that is reasonable for the apprehension of the offender.

74. In his oral highlights, Mr Malenya, counsel for the 3rd interested party was emphatic that amendments are too broad and give police officers additional discretion to abuse power, hence unconstitutional.

75. It was his case that the right to life is *jus cogens* and according to article 4 of the *Human and Peoples Rights*, ratified by Kenya in 1992 and as such no state organ is permitted to derogate from.

76. He urged the court to declare the impugned amendments unconstitutional.

The 4th Interested Party's Case:

77. Kenya National Commission on Human Rights, (KNCHR) supported the petition.

78. It was deposed on its behalf that the impugned amendments created unfettered discretion for members of the police service to exploit, as a justification, the use of force in a manner that contravenes the right to life guaranteed under article 26(3) of the *Constitution*.

79. While referring to an audit report on the status of police reforms in Kenya and the extent of police abuse of firearms, it was its case that the report indicated that counter-terrorism operations at the Coast and in North Eastern had been abusive and depicted as discriminatory, with extrajudicial killings laced with ethnic and religious profiling that disproportionately targeted ethnic Somali and Muslim communities.

80. It was deposed further that the report showed that 141 persons were killed by the police in 2015 and 204 in 2016 and 80 as at June 2018. It was contended that some of the killings were as a result of premeditated murder, extra-judicial killings, of suspects, enforced disappearances and blatant execution of suspected persons.

81. Further deposed was that despite the requirement in part A of the sixth schedule for police officer to report to the superior explaining the circumstances that necessitated the use of force immediately, such

incidents are seldom brought to the attention of public despite the presence of Internal Affairs Unit established under section 87 of the *National Police Act* and IPOA.

82. It was also deposed that the impugned amendments were in contravention of international principles of use of lethal force which require that lethal force should not be used except in self-defence of to others against the imminent threat or death of serious injury.

83. It was reiterated that the amendments created unfettered discretion for the use of firearms in contravention of the right to life.

84. In its written submissions dated April 17, 2019, the KNCHR referred to *S v Walters & another* (CCT 28/01) (2002) ZACC6 where it was observed that: -

> ".... State ought to play an exemplary role in promoting a culture of respect for human life and dignity."

85. It was its case that the elevation of the right to property to that of life was opening up lives to be taken away in the protection of property and in violation of article 26 of the *Constitution*.

86. To disapprove of the impugned amendments, KNCHR referred to the Intercession Activity Report by the African Commissions on Human and People's Rights Working Group on Death Penalty and Extra-Judicial Killings in Africa where it observed its disappointment to observe that there were efforts in Kenya to undermine the progress of police reform and the strong protections of the right to life in the *National Police Service Act* 2011 by giving licence to use lethal force in defence of property.

87. According to KNCHR, the police should abide by principle 9 of the *United Nations Basic Principles* which only prohibits the use of force and firearms by law enforcement officials except "in self-defence or defence of others against the imminent threat of death or serious injury to prevent the perpetration of serious crime involving grave threat to life..."

88. On vagueness of the impugned amendments, it was its case that the use of the word "justifiable cause" rendered it open to interpretation by police officers without any guidance on the extent or degree of force that may be used.

89. In the end, the 4th interested party urged the court to declare the impugned amendments unconstitutional for being inconsistent with article 2(4) on supremacy of the *Constitution*.

90. Mr Abdikadir, counsel for the 4th interested party associated himself with the submission of the petitioner. It was his submission that the amendments added three more grounds to the police for use a firearm, a position which is a derogation from the article 244(c) of the *Constitution*.

91. It was his submission that the amendments equated life to property. Support was drawn from the United Stated Supreme Court in *Tennessee -vs- Garner*.

92. It was his position that it was unconstitutional for the amendments to allow the police to use firearm on escapees who are not armed.

93. Counsel called for the declaration of unconstitutionality of the impugned amendments.

The 1st& 2nd Respondents' Cases:

94. The 1st and 2nd respondents opposed the petition through the replying affidavit of Peter Wanyoike Thuku, the Legal Officer deployed at the Office of the Inspector General of Police, deposed to on December 4, 2017.

95. It was his deposition that in 2013, Parliament amended part (b) of the sixth schedule of the *National Police Service Act* to include 1(c), (d) and (e) in order to cater for circumstances where firearms may be used when less extreme measures are not effective.

96. He deposed that according to part A of the sixth schedule, the use of firearms is not carte-blanche, a police officer is required to always attempt to use non-violent means and force may be employed only when non-violent means are ineffective.

97. It as his deposition that under the impugned amendments, the officer intending to use firearms shall identify themselves and give a clear warning of the intention to use firearm with sufficient time for the warning to be observed.

98. He deposed that police officers in execution of the mandate of protecting life and property as provided for under section 24(d) and 27(d) of the *National Police Service Act*, often encounter dangerous situations when they are confronted by dangerous armed criminals.

99. It was his case that in order to apprehend offenders it is imperative to have firearms and use them to enforce arrest when less extreme measures are inadequate.

100. It was his case that police officers are trained and are guided by legislation to avoid use of firearms especially on children.

101. He deposed that where injury is caused by use of force and firearms by law enforcement officers, they have the duty to report the incident to their superiors.

102. It was his contention that declaring the impugned unconstitutional would in effect put the police in danger from felonies and hamper the effort to protect life and property thus putting the public in danger.

The Respondents' Submissions:

103. In reference to sections 24 and 27 of the *National Police Service Act* (hereinafter referred to as the '*NPS* Act'), it was submitted that the provision that establishes the functions of the Kenya Police and Administration Police gave effect to the *Constitution*.

104. It was their case that section 49(3) of the *NPS Act* gave the police the obligation to enforce and ensure compliance with the law and that according to section 49(5) of the *NPS Act*, police are required to be reasonable in use of firearms and are required to use non-violent means first.

105. It was submitted that the*NPS Act* does not allow for the uncontrolled use of firearms and that according to 6th schedule a victim whose rights are violated by a police officer is entitled to redress and compensation upon decision of a court, tribunal or other authority.

106. In demonstrating the mandatory safeguards in place, it was stated that police officers are to report on what necessitated the use of force and that firearm must only be used after giving proper notice.

107. It was further submitted that the amendments were constitutional since they were passed in Parliament after due process and it sought to address the genuine concern of terrorism, cattle rustling, robbery with violence among others in which police officers had been killed in the line of duty.

108. It was his case that the amendments are well crafted since they used the word 'may' as opposed to 'shall'.

109. In respect to use of firearms to protect property, it was their case that it is justified where non-violent means is inadequate. It was her case that police officers are also human beings and as such the right to life applies to them also.

110. It was maintained that police officers under section 87(1) of *NPS Act* are held accountable for the use of firearms by the Internal Affairs Unit.

111. In reference to article 2(2) of the *European Commission on Human Rights*, it was submitted that the use of firearms is justified for the protection of life and property the world over. Reliance to that end was placed on the case of *Bedford v Queen* 1988.

112. It was her case that there has to be neutrality, proportionality and precaution as the basis for use of firearms and that the amendments are not vague as they measure up to international standards.

113. He urged the court to strike out submissions by the interested parties as they introduced facts not in the petition.

114. In the end, it was submitted that the amendments were within the limits under article 24 of the *Constitution*.

115. The respondents further urged its case through written submissions dated October 29, 2018 and supplementary ones dated February 15, 2021.

116. It claimed that the rights alleged to have been contravened are not absolute rights and accordingly are subject to limitation. However, in reference to section 61 of the *NPS Act*, it was their case that the use of firearms is not permitted in absolute terms.

117. In conclusion, it was urged that the petitioner's and the interested parties cases be dismissed with costs.

Analysis:

118. Having carefully considered the material before court, two issues arise for the court's consideration. They are: -

    i. Principles of constitutional and statutory interpretation.

    ii. Whether paragraph 1(c), (d) and (e) of part B of the sixth schedule to the *National Police Service (Amendment) Act* No 11 of 2014 contravene articles 2(4), 24, 26(1), 28, 29 and 50 of the *Constitution*.

119. This court will, going forward, consider the issues sequentially.

Principles of constitutional and statutory interpretation:

120. Constitutional interpretation also referred to as judicial interpretation is the legal creativity of attributing or assigning meaning to the provisions of the *Constitution*.

121. The *Constitution* is a document *sui generis*. It is the supreme law of the land and its interpretation has over time been developed by courts and scholars both locally and internationally.

122. Locally, superior courts have made pronouncements on how the *Constitution* ought to be interpreted. In *David Ndii & others v Attorney General & others* [2021] eKLR, the learned judges, while referring to various decision of the apex court and the Court of Appeal spoke to the subject as follows: -

"399. One of the imports of recognition of the nature of the transformative character of our Constitution is that it has informed our methods of constitutional interpretation. In particular, the following four constitutional interpretive principles have emerged from our jurisprudence:

a. First, the Constitution must be interpreted holistically; only a structural holistic approach breathes life into the Constitution in the way it was intended by the framers. Hence, the Supreme Court has stated in *In the Matter of the Kenya National Commission on Human Rights*, Supreme Court Advisory Opinion Reference No 1 of 2012; [2014] eKLR thus (at paragraph 26):

But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.

b) Second, our Transformative Constitution does not favour formalistic approaches to its interpretation. It must not be interpreted as one would a mere statute. The Supreme Court pronounced itself on this principle *In Re Interim Independent Election Commission* [2011] eKLR, para [86] thus:

The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the preamble, in article 10, in chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.

c) Third, the Constitution has provided its own theory of interpretation to protect and preserve is values, objects and purposes. As the Retired CJ Mutunga expressed in his concurring opinion in In *In Re the Speaker of the Senate & another v Attorney General & 4 Others,* Supreme Court Advisory Opinion No 2 of 2013; [2013] eKLR. (paragraphs 155-157):

(155) In both my respective dissenting and concurring opinions, *In the Matter of the Principle of Gender Representation in the National Assembly and Senate*, Sup Ct Appl No 2 of 2012; and *Jasbir Singh Rai& 3 others v Tarlochan Singh Rai and 4 others* Sup Ct Petition No 4 of 2012, I argued that both the Constitution, 2010 and the Supreme Court Act, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.

(156) The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower Courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution

has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.

d) Fourthly, in interpreting Constitution of Kenya, 2010, non-legal considerations are important to give its true meaning and values. The Supreme Court expounded about the incorporation of the non-legal considerations and their importance in constitutional interpretation in the Communications Commission of Kenya case. It stated thus:

(356) We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on chapter four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145-163.

(357) We begin with the concurring opinion of the CJ and President in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No 2B of 2014 left off (see paragraphs 227-232). In paragraphs 232 and 233 he stated thus:

(232) ...References to *Black's Law Dictionary* will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts.

(233) It is possible to set out the ingredients of the theory of the interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of section 3 of the Supreme

Court Act, that introduce non-legal phenomena into the interpretation of the Constitution, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this court as the custodian of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the Supreme Court Act, is to "facilitate the social, economic and political growth" of Kenya.

400. With these interpretive principles in mind, which we will call the canon of constitutional interpretation principles to our transformative Constitution, we will presently return to the transcendental question posed in these consolidated petitions......"

123. The Court of Appeal also spoke to constitutional interpretation in the case of *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR when it made the following remarks: -

"(21) .... Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus: -

that as provided by article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.

that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.

that the Constitution must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism.

that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a such as presumption against absurdity – meaning that a court should avoid

> a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. …… The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution."

124. With respect to statutory interpretation, this court, in Petition No E290 of 2022, *Victor Buoga -vs- The Hon Attorney General & another*, (unreported) stated as follows: -

> "A court dealing with the statutory interpretation must also subject the statutory provision to the three tests developed in the Canadian case in *R vs Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103. The tests are the objective test which the limitation is designed to serve. Second, the means chosen to attain the objective must be reasonable and demonstrably justified. This is the proportionality test. Third, the effect of the limitation."

125. Having set out the parameters for constitutional and statutory interpretation, this court will now consider constitutionality of the impugned section.

Whether paragraph 1(c), (d) and (e) of part b of the sixth schedule to the National Police Service (Amendment) Act No 11 of 2014 contravene articles 2(4), 24, 26(1), 28, 29 and 50 of the Constitution:

126. For ease of this discussion, a reproduction of the impugned amendments as contained in paragraph 1(c), (d) and (e) of part B of the sixth schedule to the *National Police Service (Amendment) Act* is necessary. They provide as follows: -

> B - Conditions as to the use of firearms:
>
> 1. Firearms may only be used when less extreme means are inadequate and for the following purposes—
>
>   a. saving or protecting the life of the officer or other person;
>
>   b. in self-defence or in defence of other person against imminent threat of life or serious injury;
>
>   c. protection of life and property through justifiable use of force;
>
>   d. preventing a person charged with a felony from escaping lawful custody; and
>
>   e. preventing a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody.

127. This issue calls for an interrogation of article 26 of the *Constitution* which is the right to life and the extent to which that right may be limited. Perhaps it is of importance to note the right to life is not one of those rights which cannot be limited under article 25 of the *Constitution*.

128. It, therefore, means that the right to life may be limited in appropriate circumstances. This matter avails an opportunity to ascertain whether the impugned amendments are within the confines of permissible limitation to the right to life.

129. The constitutional safeguard for the right to life is found in article 26 of the *Constitution* which provides as follows: -

26. Right to life

(1) Every person has the right to life.

(2) The life of a person begins at conception.

(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

130. As stated above and according to article 26(3) of the *Constitution*, the right to life is not absolute. It can be alienated, but to the extent that the Constitution or any other law authorises.

131. For any limitation to a right or fundamental freedom in the *Constitution* to be sustainable, such must be within the parameters set by article 24 of the *Constitution*.

132. Article 24(1) of the *Constitution* starts it off as follows: -

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

133. Article 24(2) of the *Constitution* furthers the confines within which a legislation may limit a right and fundamental freedom. The provision calls upon the legislation to ensure certain parameters are met for the limitation to be sustainable. It provides as follows:

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom-

a. in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

b. shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

c. shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

134. Article 24(3) places the burden on any one seeking to limit any right or fundamental freedom to justify it while article 24(4) is on the application of the provisions on equality in the Bill of Rights to Muslim law. Article 24(5) provides for the specific rights and fundamental freedoms to persons serving in the Kenya Defence Forces and the National Police Service which may be limited by a legislation.

135. A closer look at article 24 of the *Constitution* reveals a deliberate scheme to safeguard rights and fundamental freedoms in the Bill of Rights such that their limitation is only permissible within structured and strict parameters.

136. The superior courts in Kenya have severally discussed the import of article 24 of the *Constitution*.

137. The Court of Appeal in Civil Appeal 261 of 2018, *Haki Na Sheria Initiative v Inspector General of Police & 3 others* [2020] eKLR while relying on decisions of the Supreme Court discussed the instant subject in some detail. The Learned Judges of Appeal had the following to say: -

> "47. Article 24 of the Constitution should also be read together with article 25, which provides for the rights that cannot be limited (non-derogable rights) as follows:
>
> Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—
>
> (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
>
> (b) freedom from slavery or servitude;
>
> (c) the right to a fair trial; and
>
> (d) the right to an order of habeas corpus".
>
> 48. The Supreme Court of Kenya in *Karen Njeri Kandie v Alassane Ba & another* [2017] eKLR stated as follows:
>
> "Kenyan courts have previously analysed the limitation test enshrined in article 24 of the Constitution; for example, in the case of *Attorney-General & another v Randu Nzai Ruwa & 2 others* Civil Appeal No 275 of 2012; [2016] eKLR, the Court of Appeal observed that the rights and freedoms in the Bill of Rights can only be limited under article 24 of the Constitution, and neither the State nor any state functionary can arbitrarily do so. The court further endorsed the holding of the trial court with respect to article 24, and stated thus:
>
> > "Our reading of article 24(1) is that not only must the law limiting a right or fundamental freedom pass constitutional muster but also the manner in which the law is effected or proposed. So both the law prescribing the limitation and the manner in which it is acted upon must satisfy the requirement of article 24."
>
> 49. The Supreme Court further stated as follows:
>
> > "77. After carefully considering article 24 of the Constitution and the above cases, we find that the test to be applied in order to determine whether a right can be limited under article 24 of the Constitution, is the 'reasonable and justifiable test', that must

not be conducted mechanically. Instead the court must, on a case-by- case basis, examine the facts before it, and conduct a balancing exercise, to determine whether the limitation of the right is reasonable and justifiable in an open and democratic society. The insertion of the word 'including' in article 24 also indicates that the factors to consider while conducting the balancing act are not exhaustive but a guide as to the main factors to be taken into account in that consideration.

79. Is this limitation reasonable and justifiable? It is important to consider the factors set out in the Constitution, that will assist us to answer this question including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, and the fact that the need for enjoyment of the right by one individual does not prejudice the rights of others, as well the consideration the relationship between the limitation and its purpose, and whether there is a less restrictive means to achieve that purpose. We will herebelow carry out an analysis on the rights that the appellant alleges were unjustifiably limited."

50. The limitation of fundamental rights and freedoms under article 24 of the Constitution was a question of inquiry by this court in *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* [2017 eKLR (Civil Appeal 172 of 2014) and the court held that:

> "While article 19(3)(c) recognizes that the rights and fundamental freedoms in the Bill of Rights are only subject to the limitations contemplated in the Constitution, Article 25 identifies only four rights and fundamental freedoms that cannot be limited. It follows that by article 24 the rest of the rights and fundamental freedoms under the Bill of Rights are enjoyed and guaranteed subject to strict terms of limitations.
>
> First, it must be demonstrated that the limitation is imposed by legislation, and even then only when it is shown that the limitation is reasonable and justifiable in an open democratic society. Further it must be based on dignity, equality and freedom, taking into consideration the nature of the right or fundamental freedom sought to be limited, the importance of the purpose of the limitation, its nature and extent, the enjoyment by others of their own rights as well as a consideration whether there are less restrictive means to achieve the purpose".

51. In that appeal, the court further reiterated that the first inquiry the court should delve into is whether there is a law that restricts the enjoyment of a fundamental right and whether the limitation was justifiable or reasonable in an open and democratic society. In considering this latter point, the court held that:

> "The limiting law must be clear enough and devoid of ambiguity, for if a guaranteed constitutional right is to be limited, the

> limitation must be specific enough for the citizen to know the nature and extent of the limitation, his or her rights and obligations under the right as limited and the law supplying the limitation must be easily accessible to the citizen."

52. This position was buttressed in *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR (Civil Appeal No 56 of 2014) wherein the court set out similar prescriptions for a law that would limit fundamental rights to ensure legal certainty. Applying the principles therein to the appeal at hand, the law in question is the Public Order Act. It is clear to us that the impugned provisions do constitute a limitation on certain fundamental rights.

53. In *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* (*supra*) this court noted that:

> Even after establishing the existence of a law limiting any specific right and accepting that it is reasonable and justified the means chosen to achieve the objective must pass a proportionality test by considering the parameters set out in article 24(1)(a)-(e)."

138. The foregoing buttresses the fact that limiting a right or fundamental freedom is not a walk in the park. It is a delicate act of considering many parameters and such an undertaking should not be mechanical.

139. To aid and guide the rest of the courts, the Supreme Court in *Karen Njeri Kandie v Alassane Ba & another* [2017] eKLR while concurring with the test laid in *R vs Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 developed a criterion in determining whether a right or fundamental freedom is appropriately limited.

140. From the reading of the said decision, the criterion may be summed up as under: -

(a) Whether the limitation has been specifically provided for by a legislation.

(b) The nature of the right or fundamental freedom to be limited;

(c) The importance or the purpose of the limitation;

(d) The nature and extent of the limitation;

(e) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;

(f) The relation between the limitation and its purpose (the effect of the limitation); and

(g) Whether there are less restrictive means to achieve the purpose.

141. This court will now apply the above criterion in determining whether the limitation to the right to life imposed by the impugned amendments meet the constitutional muster.

Whether the limitation has been specifically provided for by a legislation:

142. The impugned amendments in this matter do not expressly and specifically express the intention to limit the right to life. However, the limitation can be strenuously construed from the impugned amendments. This court says so because from the reading of the impugned amendments it may be correctly argued that the permissive use of firearms may not necessarily mean that it will lead to loss or deprivation of life or to the limitation of the right to life in any manner whatsoever.

143. There is need for a legislation to be crystal clear on its intention to limit any right or fundamental freedom provided for in the *Constitution*. A good example is the *Access to Information Act*, No 31 of 2016. The said Act expressly states in section 6 as follows: -

6. Limitation of right of access to information:

(1) Pursuant to article 24 of the Constitution, the right of access to information under article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—

144. Section 6 of the *Access to Information Act* leaves no doubt of its intention to limit the right of access to information. That is not, however, the case with the impugned amendments.

145. Further, the Court of Appeal frowned upon legislation that was not clear on the intention to limit rights. In *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* [2017 eKLR the court observed that the limitation must be specific enough for the citizen to know the nature and extent of the limitation and that the limitation must be easily accessible to the citizen.

146. In sum, the impugned amendments, though can be used by police officers to deprive life, lack clarity of the intention to limit the right to life.

The nature of the right or fundamental freedom to be limited:

147. The impugned amendments, once again, do not clearly state the nature of the right to be limited.

148. The amendments are couched in a manner that it forces one to vaguely infer or construe that the right to life under article 26 of the *Constitution* is threatened and likely to be limited by such amendments.

149. Such a case runs contra article 24(2)(b) of the *Constitution*.

The importance or the purpose of the limitation:

150. According to the sixth schedule to the *NPS Act*, the purpose of the alleged limitation of the right to life is to allow police office use firearms in instances where less extreme means is inadequate.

151. The intent of the limitation was informed by the reality that there are some instances where the use of firearms on persons becomes necessary.

152. In this case, the purpose of paragraph 1(c) is to justify the use of firearms in protection of life and property. Paragraph 1(d) is aimed at allowing police officers to use firearms in preventing a person charged with a felony from escaping lawful custody and paragraph 1(e) allows police officers to use firearms in preventing a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody.

153. This court must point out that the petitioners have strenuously argued that the impugned amendments wrongly placed the right to life at par with the right to property. The court has keenly considered the argument.

154. Whereas it can be argued, rightly so, that the right to life has a bearing to the rest of the rights and fundamental freedoms, that alone does not place the right to life at a higher pedestal than the rest of the rights and fundamental freedoms. This court so says since it is a fact that firearms may be used in appropriate instances to protect property and in the process, to supress life.

155. The use of firearms on property and persons, therefore, calls for balance and exercise of restraint, but it cannot be flatly held that life cannot be suppressed in protection to property.

The nature and extent of the limitation:

156. The extent of any limitation imposed by legislation is found in the wording or the text of the legislation.

157. At hand, the impugned amendments use permissive language. However, the extent of the limitation lacks clarity. It is not reasonably possible to deduce that the contemplated use of firearms in the impugned amendments must lead to the limitation of the right to life. It is that ambiguity that deprives the impugned amendments the clarity on the extent of the limitation.

The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others:

158. This is the proportionality test as discussed in *Queen v Big M Drug Mart Limited* [1985] 1SCR 295. The court held that '...although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups....'

159. In *R vs Oakes* case (*supra*) the Supreme Court held as follows: -

> "70. There are..... three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R v Big M Drug Mart Ltd, supra, at p 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

160. The Court of Appeal in *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* case (*supra*) also addressed the aspect of the proportionality of legislation that seek to limit rights and fundamental freedoms.

161. Having regard to the circumstances of the case herein, the foregoing constitutional edict requires a delicate balance to be struck between a person's right to property or the need to apprehend law breakers on one hand and on the other hand, such entitlement not be seen to be a justification to terminate another person's right to life.

162. With respect to persons in custody charged with felonies, the need to prevent them from escaping from lawful custody, an act that protects the society at large and their attendant rights and fundamental freedoms, ought not be used a reason to threaten or potentially end such escapees' right to life whenever they try or are aided to flee from lawful custody.

163. As said, it is all about a delicate act of balancing the interests at hand at any particular instance.

The effect of the limitation:

164. The effect of a provision in a legislation intending to limit a right and fundamental freedom was discussed in *R vs Oakes* case (*supra*) as follows

> "71. With respect to the third component, it is clear that the general effect of any measure impugned under S.1 will be the infringement of a right or freedom

> guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. ThE more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."

165. In this case, the effect of the impugned amendments goes beyond the intended purpose which is largely to protect life and property and to resist escape from lawful custody.

166. ThE amendments are a potential avenue for gross abuse of other rights and fundamental freedoms. A police officer may casually shoot someone and allege that his life or property was in danger. Just like the fact that the extent of thE Limitation is not provided, the negative effects appurtenant from the use of the impugned amendments are limitless.

167. The deleterious effects of the amendments, therefore, surpass the intended purpose of the amendments.

Whether there are less restrictive means to achieve the purpose:

168. Having discussed the purpose of the impugned sections, the foregoing constitutional provision ensures that the objective of any legislation does not go beyond what is necessary to achieve its goals. It also makes sure that the least severe or restrictive means are used to attain a legislative imperative.

169. The provisions that precede the impugned amendments [that is paragraph 1(a) and (b)] provide for the use of firearms in instances when less extreme means is inadequate in order to save or protect the life of the officer or other person and in self-defence or in defence of other person against imminent threat of life or serious injury.

170. Further, section 21(2) of the *Criminal Procedure Code*, cap 75 of the laws of Kenya provide for the manner in which a person who resists an arrest ought to be apprehended. If such provision is read together with paragraph 1(a) and (b) of part b of the sixth schedule, then that accords a lesser restrictive means to achieve the general Purpose under part b of the sixth schedule.

171. Those provisions [that is paragraph 1(a) and (b)] coupled with other reasonable ways of protecting life, property and restraining those in lawful custody from escaping should be adequate to cover for the intended use of firearms in lesser ways than those contemplated in the impugned amendments.

172. The impugned amendments, therefore, tend to be too harsh and aggressive in attaining the intended purpose.

Whether the impugned amendments are a derogation of articles 2(4), 24, 26(1), 28, 29 and 50 of the Constitution:

173. On the basis of the foregoing discussion, it comes to the fore that impugned amendments variously impugn the *Constitution*. To that end, they infringe article 2(4) of the *Constitution*.

174. Further, the intended limitations to the rights and fundamental freedoms vide the impugned amendments are not in consonance with article 24 of the *Constitution*. They fail the limitation test.

175. Even though the right to life under article 26 of the *Constitution* is not among the rights which cannot be limited, there is no doubt that the impugned amendments are a potential threat the right to life as guaranteed in the *Constitution*. That being the case, the right to human dignity under article 28 of the *Constitution* is outrightly threatened as well.

176. When it comes to apprehending an offender, who attempts to escape from lawful custody, the offender in making the attempt commits an offence. That offence is punishable in law. Prior to being punished, the offender must be taken through the criminal justice system. If such an offender is executed summarily courtesy of the impugned amendments, then that is an affront the right to a fair trial under article 50 of the *Constitution*. Therefore, the impugned amendments pose a potential danger of intruding into the sanctity of fair trials.

177. Deriving from the foregoing discussion, there is no doubt that the impugned amendments are not legally sustainable for being an affront to the *Constitution*.

Disposition:

178. Whereas the impugned amendments may have been well-intentioned, that alone does not make them pass the constitutional muster. They must be in tandem with the *Constitution*. As long that bar is not attained, the amendments remain constitutionally infirm.

179. That being the position in this matter, this court must take steps to ensure that the Constitution is duly defended and upheld.

180. To that end, this court finds the petition merited and hereby make the following final orders: -

    a. A declaration be and is hereby issued that paragraph 1(c), (d) and (e) of part b of the sixth schedule to the *National Police Service Act* of 2011, as amended by sections 54 of the *National Police Service (Amendment) Act* 2014 contravene articles 2(4), 24, 26(1), 28 and 50 of the *Constitution*. To that end, the said provisions are null and void ab initio and have no legal effect whatsoever.

    b. A declaration be and is hereby issued that section 21(2) of the *Criminal Procedure Code* must be read to permit the use of firearms, if need be, and only in the circumstances construed in paragraphs 1(a) and 1(b) of part b of the sixth schedule to the *National Police Service Act* 2011.

    c. As this matter is a public interest litigation, parties shall bear their respective costs.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 16TH DAY OF DECEMBER, 2022.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

xxxxxxxx, Learned Counsel for the Appellant.

xxxxxxx, Learned Counsel for the Respondent.

Kirong/Nawatola – Court Assistants.