Refugee Survey Quarterly, 2024, **43**, 169–189
https://doi.org/10.1093/rsq/hdad025
Article

OXFORD

Securitisation of Refugee Protection: The Judiciary's Role in the Protection of the Rights of Refugees

Attorney General v. Kituo Cha Sheria & 7 others

Samuel Berhanu Woldemariam* and Muhizi Pacifique**

ABSTRACT

This judgment rewriting is a tale of three Kenyan judicial decisions regarding refugees and asylum-seekers. The judgment rewritten is the 2017 Court of Appeal's decision in *Attorney General v. Kituo Cha Sheria & 7 others* (*Kituo Cha Sheria II*) which upheld a 2013 decision of the High Court in *Kituo Cha Sheria & 7 others v. Attorney General* (*Kituo Cha Sheria I*) quashing a Government Directive issued to relocate refugees living in urban areas to refugee camps. The petitioners challenged the Government Directive alleging it violated the rights of refugees living in Kenya. A third decision from 2014, *Samow Mumin Mohamed & 9 others v. Cabinet Secretary Ministry of Interior Security and Co-Ordination & 2 others* (*Samow*), ostensibly abrogated the protections afforded in *Kituo Cha Sheria (I)*. The securitisation of refugee protection is a major theme across these decisions. Securitisation was briefly addressed in the *Kituo Cha Sheria* decisions as a technical matter requiring procedural precision for its validity. However, in their scrutiny of securitisation, the Courts neglected to highlight the human rights concerns and the vulnerability of refugees. Placing *Kituo Cha Sheria II* in the context of the two decisions and using a human rights-based analysis, the rewrite challenges existing notions that portray securitisation as the inevitable consequence of a volatile security environment and the dogmatic embrace of civil procedure even at the expense of the impact on human rights protection. It emphasises the role of the judiciary in the protection of the rights of vulnerable groups, such as refugees. This judgment rewriting contributes to the international refugee law scholarship by centring a human rights-based approach to refugee policymaking and critically analysing the role of courts in safeguarding and enforcing the rights of refugees. *Kituo Cha Sheria* lays the foundations for a human rights-based review of refugee policymaking that this rewrite seeks to amplify.

* Lecturer, Newcastle School of Law and Justice, University of Newcastle, NSW, Australia. Email: samuel.woldemariam@newcastle.edu.au
** A refugee and Advocate of the High Court of Kenya practicing as an Associate at Wamae & Allen Advocates, Kenya. Email: pacific630@gmail.com
The authors would like to thank Kate Ogg and the team leading the "Rewriting Jurisprudence: Centring Refugee and Migration Lived Experience" project for their invaluable assistance and guidance in the development of this article.

KEYWORDS: refugees, securitisation, human rights, protection, Kenya

1. INTRODUCTION

A volatile security environment characterised the post-2012 election period in Kenya. Being the first presidential election since the 2007 post-election violence[1] and scheduled to take place in March 2013, the nation was under a heightened security concern. The country faced various episodes of terrorist attacks including in urban centers, schools, malls, and refugee camps.[2] Most of these attacks were perpetrated by *Al-Shabaab*, a terrorist group operating in Somalia. *Al-Shabaab* declared war on Kenya following the latter's military operation in Somalia that sought to uproot the terrorist group from its "safe haven".[3] The frequent attacks that followed elevated security into a top political agenda and led to the adoption of stringent security laws including Government Directives targeting refugees and asylum-seekers residing in urban areas.[4] Two such directives issued in 2012 and 2014 in respect of refugees and asylum-seekers formed the subject matter of two separate litigations before the High Court of Kenya in 2012 and 2014 respectively. A third case, which is the judgment rewritten in this piece, entertained an appeal on the 2012 case. This judgment rewriting piece is therefore a tale of three judicial decisions that demonstrate the impact of the discourse of securitisation on the protection of the rights of refugees and in refugee policymaking and enforcement.

The 2012 High Court case, *Kituo Cha Sheria & 7 others v. Attorney General (Kituo Cha Sheria (I))*,[5] heralded as a "landmark"[6] and the "first Kenyan forced encampment case",[7] involved a Government Directive issued to stop reception and registration of refugees and asylum-seekers in urban areas. According to the UNHCR, more than 55,000 refugees lived in urban areas in 2012.[8] The Directive also sought to relocate all refugees and asylum-seekers living in urban areas to the existing refugee camps. The petitioners challenged the Government Directive and its implementation alleging it violated the rights and fundamental freedoms of refugees living in Kenya as enshrined in the Constitution of Kenya, the Refugee Act, and in the 1951 Refugee Convention.[9] The High Court agreed with the petitioners and quashed the Government Directive in its 2013 judgment.[10]

[1] The 2007 election led to massive violence in Kenya that claimed the lives of at least 1,200 people and displaced more than 268,000 people. See United Nations High Commissioner for Human Rights (OHCHR), *Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008*), 8, available at: https://www.ohchr.org/sites/default/files/Documents/Press/OHCHRKenyareport.pdf (last visited 25 Aug. 2023). The violence also instigated an investigation from the International Criminal Court that led to the indictment of, among others, then Deputy President Uhuru Kenyata and Minister of Education William Ruto. See *In the Case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (International Criminal Court, Case No. ICC-01/09-02/11, 23 Jan. 2012); *In the Case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (International Criminal Court, Case No ICC-01/09-01/11, 23 Jan. 2012).

[2] A comprehensive list of terror attacks in Kenya can be found in the Global Terrorism Database of the University of Maryland at: *Global Terrorism Database* https://www.start.umd.edu/gtd/search/Results.aspx?chart=overtime&casualties_type=&casualties_max=&country=104 (last visited 25 Aug. 2023).

[3] George Nderitu, *The Dilemmas Faced by the Kenyan Government in the Fight Against the Al-Shabaab Terrorist Group*, International Institute for Counter-Terrorism (ICT), Working Paper No. ICTWPS Mar. 2015, 1.

[4] For a review and analysis of the move towards securitisation in respect of refugees see generally, B. Agwanda, "Securitization and Forced Migration in Kenya: A Policy Transition from Integration to Encampment", *Population and Development Review*, 48(3), 2022, 723–743.

[5] *Kituo Cha Sheria and Others v. Attorney General* (2013) eKLR 1.

[6] L. Juma, "Protection of Rights of Urban Refugees in Kenya: Revisiting Kituo Cha Sheria v The Attorney General", *Southern African Public Law*, 33(2), 2018, 1–2.

[7] K. Ogg, *Protection from Refuge: From Refugee Rights to Migration Management*, Cambridge, United Kingdom, Cambridge University Press, 2022, 58.

[8] H. Elliott, *Refugee Resettlement: the View from Kenya—Findings from Field Research in Nairobi And Kakuma Refugee Camp* (Research Report No. KNOW RESET RR 2012/01, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute, available at: https://www.ecre.org/wp-content/uploads/2013/05/www.know-reset.eu_files_texts_00695_20130530121940_carim-knowresetrr-2012-01.pdf (last visited 26 Nov. 2023).

[9] *Kituo Cha Sheria and Others v. Attorney General*, paras. 8–13.

[10] *Ibid.*, para. 100.

In reaching that conclusion, the High Court briefly addressed the concern over securitisation which was later affirmed by the Court of Appeal with no further analysis. The Attorney General's argument that the rationale behind the Government Directive was the protection of refugees and asylum-seekers and the promotion of their welfare prompted the High Court's analysis on the point.[11] The High Court, after reviewing the manner in which the Directive was issued, the plan for its implementation, and the impact it would have on the lives of the refugees to be relocated from the urban areas to refugee camps, concluded that the alleged objective of protecting refugees was fictitious. On the contrary, the High Court determined that the real motive behind the Directive was addressing a security concern facing the country following grenade attacks in urban areas.[12]

Analysis of the post-judgment literature on the *Kituo Cha Sheria (I)* case reveals that the main importance attached to the case relates to its vindication of refugee rights,[13] the role of the judiciary in the enforcement of human rights,[14] and the use of domestic constitutional frameworks to protect the human rights of refugees and asylum-seekers.[15] Scholars also hailed the decision for its ostensible opposition to an encampment policy.[16] However, though the decision of the High Court, and its later confirmation by the Court of Appeal, has wide-reaching implications for the overall policy of encampment and the protection of the human rights of refugees and asylum-seekers, a close reading of the decisions reveals that the policy of encampment in general was not on trial *per se*. Rather, on trial was the legality of a Government Directive that sought to relocate urban refugees to camps. This distinction is key to understanding the fundamental erosion of the ruling in the *Kituo Cha Sheria (I)*[17] that resulted from a later decision of June 2014 in *Samow Mumin Mohamed & 9 others v. Cabinet Secretary Ministry of Interior Security and Co-Ordination & 2 others* (*Samow*).[18] The same judge that ruled in *Kituo Cha Sheria (I)* in the High Court made the ruling in *Samow*.

Samow involved a Government Directive[19] designating certain areas as refugee camps (hereinafter the 2014 Directive). The Cabinet Secretary of the Ministry of Interior Security and Coordination issued the 2014 Directive relying on its powers under Section 16(2) of the Refugees Act.[20] A subsequent directive was issued by the Cabinet Secretary in the form

[11] *Ibid*., para. 81.

[12] *Ibid*, para. 84.

[13] R.D. Nanima, "An Evaluation of Kenya's Parallel Legal Regime on Refugees, and the Courts' Guarantee of their Rights", *Law, Democracy and Development*, 21, 2017, 59: "By its nature this decision evaluated the effect of the directive on the rights of refugees"; A. Wirth, "Reflections from the Encampment Decision in the High Court of Kenya", *Forced Migration Review*, 2014, available at: https://www.fmreview.org/faith/wirth (last visited 2 June 2023).

[14] Juma, "Protection of Rights of Urban Refugees in Kenya", 2: "A combination of factors that have unfolded since the adoption of the new Constitution in 2010 indicate that the role of the judiciary in rights enforcement is becoming more pronounced."

[15] E. Lester, "National Constitutions and Refugee Protection", in Cathryn Costello, Michelle Foster and Jane McAdam (eds.), *The Oxford Handbook of International Refugee Law*, Oxford, UK, Oxford University Press, 2021.

[16] A. Maina, "Securitization of Kenya's Asylum Space: Origin and Legal Analysis of the Encampment Policy", in Johannes Dragsbaek Schmidt, Leah Kimathi and Michael Omondi Owiso (eds.), *Refugees and Forced Migration in the Horn and Eastern Africa: Trends, Challenges and Opportunities*, Cham, Switzerland, Springer, 2019, 88; A.B. Mongare, "When the Victim Stings the Good Samaritan: Legal Implication on Refoulement of Refugees, a Kenyan Perspective", *International Journal of Current Innovations in Advanced Research*, 1(6), 2018, 76.

[17] For example, in *Samow Mumin Mohamed & 9 others v. Cabinet Secretary Ministry of Interior Security and Co-Ordination & 2 others*, para. 23, the High Court pushed back against its alleged objection to encampment policy in the *Kituo Cha Sheria (I)* case noting:

> While the court expressed the view that the closure of urban refugee registration centres was likely to have a deleterious effect on urban refugees particularly the petitioners in that case, the decision did not affect the existence of refugee camps which are provided for under the law.

[18] *Samow Mumin Mohamed & 9 others v. Cabinet Secretary Ministry of Interior Security and Co-Ordination & 2 others* (2014) eKLR 1.

[19] Issued in the Gazette Notice No. 1927.

[20] *The Refuge Act 2006* (Kenya). Section 16(2) of the Act stated:

> The Minister may, by notice in the Gazette, in consultation with the host community, designate places and areas in Kenya to be –

of a press release directing "[a]ll refugees residing outside the designated refugee camps of Kakuma and Dadaab [...] to return to their respective camps with immediate effect".[21] The directive expressly referred to "the emerging security challenges in urban centres and the need to streamline the management of refugees" as the rationale of the directive.[22] It also requested Kenyans to report to the police any refugee and or illegal immigrants found outside the designated refugee camps.[23] Moreover, the Government deployed "an additional 500 police officers" to enhance security and surveillance in Nairobi, Mombasa and their environs.[24]

A group of refugees brought action against the Government challenging the constitutionality of the 2014 Directive. The petitioners argued that the 2014 Directive violated their fundamental rights and freedoms and ran counter to the 2013 decision of the High Court in the *Kituo Cha Sheria (I)* case. The High Court framed the issues for determination as to whether the 2014 Directives violated the petitioners' rights and fundamental freedoms under the constitution[25] and whether the designation of certain areas as refugee camps under *Gazette Notice No. 1927* is unconstitutional.[26]

In a significant departure from the approach in *Kituo Cha Sheria (I)*, the High Court focused on procedural issues in *Samow* and dismissed the case in favour of the Respondents holding that the Directives did not occasion a violation of the rights of refugees.[27] The High Court stated that the petitioners "have not established a basis for persecution if they return to the refugee camps" and questioned the refugee status of the petitioners despite this being admitted by the State.[28] The High Court did not entertain the substantive claims made by the petitioners. Most importantly, unlike in the *Kituo Cha Sheria (I)* case where the High Court proactively identified the security-related dimension to the 2012 Directive despite it not being made public by the Government, the Court failed to engage with the same issue in *Samow* despite the security-driven rationale being apparent and expressly stated in the Directives.

As some scholars have done, it is tempting to dismiss the decision in *Samow* as inconsequential for the finding in *Kituo Cha Sheria (I)* because the reasoning in *Samow* is based on "technical and procedural matters that have little to do with rights per se".[29] However, considering the striking similarity of the circumstances leading to the two court cases, the substantive claims made, the vulnerability of the petitioners, and the implications to the protection of the human rights of refugees, one wonders as to how procedural rules should be construed in such circumstances and what the role of the judiciary should be in these instances.

It is also worth reflecting on the impact that securitisation has had on the Kenyan judiciary itself. The 2014 Directives challenged in *Samow* were issued in a heightened security environment and on the back of the September 2013 shootings at the Westgate shopping

(a) transit centres for the purposes of temporarily accommodating persons who have applied for recognition as refugees or members of the refugee's family while their applications for refugee status are being processed; or
(b) refugee camps.

[21] *Samow Mumin Mohamed & 9 others v. Cabinet Secretary Ministry of Interior Security and Co-Ordination & 2 others*, para. 3.
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*
[25] The specific provisions alleged to have been violated by the government Directives were Arts. 25, 27, 28, 29, 31, 39, 47, 49, and 50 of the Constitution of Kenya.
[26] *Samow Mumin Mohamed & 9 others v. Cabinet Secretary Ministry of Interior Security and Co-Ordination & 2 others*, para. 15.
[27] *Ibid.*, para. 30.
[28] *Ibid.*, paras. 25–26.
[29] Juma, "Protection of Rights of Urban Refugees in Kenya", 2.

mall in Nairobi that left 67 people dead and about 200 injured.[30] The terror attack received a wider international attention and *Al-Shabab* claimed responsibility for the attack.[31] Following the attack, the Kenyan Government enacted tougher security laws including in relation to refugees.[32] Analysing the departure of the *Samow* decision from *Kituo Cha Sheria (I)* in the overall context of the heightened security discourse in Kenya at the time, Maina argued that "the change in judicial decision on the freedom of movement of refugees is a result of the process of securitisation orchestrated by the national government".[33] In other words, by dismissing the *Samow* petition on procedural grounds, the High Court was expressing its unreadiness to position itself as a custodian of refugee rights in the midst of a wave of securitisation.

It is in the context of the *Kituo Cha Sheria (I)* and *Samow* decisions that we seek to rewrite the 2017 judgment of the Court of Appeal of Kenya in *Attorney General v. Kituo Cha Sheria & 7 others* (*Kituo Cha Sheria (II)*).[34] The case involved an appeal from the Attorney General on the decision of the High Court in *Kituo Cha Sheria (I)*. The appeal gave the Court of Appeal the opportunity to solidify the findings in *Kituo Cha Sheria (I)* and clarify the confusions created by *Samow*. However, in upholding the High Court's decision in *Kituo Cha Sheria (I)*, the Court of Appeals failed to do exactly that.

2. SITUATING THE JUDGMENT REWRITE

The decision to rewrite *Attorney General v. the Kituo Cha Sheria & Others* is influenced by our firm interest in human rights law and in particular the rights and fundamental freedoms of refugees and asylum-seekers. In deciding to rewrite a case that upheld a decision that is widely lauded by scholars and practitioners, we anticipated a challenging task. Given the progressive jurisprudence adopted in the judgment, the first challenge for us was to explore what more could be added to enrich an already positive judgment. However, we strongly felt that the issue of refugee rights and protection in *Kituo Cha Sheria (I)* was under threat from a discourse of securitisation that was looming large in the country at the time, and certainly in subsequent years after the decision.[35] Therefore, as a progressive judgment that vindicated the rights and fundamental freedoms of refugees and asylum-seekers, we firmly felt that the vigour shown in that respect also needed to capture and address the issues of securitisation of refugee and asylum-seeker protection. We further noticed the legal uncertainty the *Samow* decision created by rejecting the claims of refugees and asylum-seekers who were similarly placed as those in *Kituo Cha Sheria I* but for certain procedural failures the High Court identified. These include failure to plead their case with particularity, to adduce evidence in support of their refugee status, how their business would be affected if they renewed the documents and permits at the camps and how they would be persecuted if they returned to the designated refugee camps. Analysing the three decisions as part of the rewrite therefore offered an opportunity to harmonise the seemingly contradictory approaches in *Kituo Cha Sheria I* and *Samow*.

[30] L.P. Blanchard, "The September 2013 Terrorist Attack in Kenya: In Brief" No. 7-5700 (Congressional Research Service, 14 Nov. 2013) 1, available at: https://sgp.fas.org/crs/row/R43245.pdf (last visited 25 Aug. 2023).

[31] J. Lind, M. Patrick and O. Marjoke, '"Killing a Mosquito with a Hammer': Al-Shabaab Violence and State Security Responses in Kenya" (Pt Routledge), *Peacebuilding*, 5(2), 2017, 118–135, 125.

[32] F. Onditi et al., *Contemporary Africa and the Foreseeable World Order*, Lanham, Maryland, Lexington Books, 2019, 320. For a critique on the effectiveness of the security measures, see generally, J. Lind, M. Patrick and O. Marjoke, '"Killing a mosquito with a hammer"'.

[33] Maina, "Securitization of Kenya's Asylum Space", 89.

[34] *Attorney General v. Kituo Cha Sheria and 7 Others* (2017) eKLR 1 (*Attorney General v. Kituo Cha Sheria and 7 Others*).

[35] J. Hyndman and W. Giles, *Refugees in Extended Exile: Living on the Edge*, Taylor & Francis, 2016, 44; S. Diepeveen, *Searching for a New Kenya: Politics and Social Media on the Streets of Mombasa*, Cambridge University Press, 2021, 184.

Therefore, while the Court of Appeal affirmed a human rights-based approach, its review of the 2012 Government Directive should have extended to comprehensively address the issue of the securitisation of refugee and asylum-seeker protection. Doing so would have not only vindicated the rights of refugees but also secured their rights from a constant encroachment by the executive under the guise of security narratives. In this regard, a fundamental contention of the rewrite is the need for the judiciary to step up its role as a custodian of refugee rights.

There are several reasons why the judiciary is the appropriate organ of the government to play the key role of protecting refugee rights. Primarily, the judiciary is the only organ of the government that enjoys a measure of freedom in its decision-making unencumbered by high politics. Unlike the legislature and the executive which routinely carry political baggage and engage in political calculations in law and policy making, the loyalty and accountability of the judiciary is ostensibly to the law. This places the judiciary of constitutional democracy in a unique position to evaluate laws and policies and render rational decisions that protect rights against encroachment. This unique position is what enables the judiciary to ensure the protection of the fundamental freedoms and rights of vulnerable groups, such as refugees.

Second, from the unique position the judiciary holds in the national legal system flows the opportunity to be a voice of reason to counter the charged rhetoric of the executive organ. As M.H. McHugh, a former justice of the Australian High Court, stated:

> A judicial decision is not merely the resolution of a case in favour of one party or another, but a decision based upon articulated reasons which are consistent with established principle. … This articulation of reasons also serves a separate, but related function. Although unelected, the judiciary remains accountable to the community for its decisions. The provision of written reasons facilitates that accountability. It provides practising lawyers, academic lawyers, the media and other interested members of the public with an opportunity to engage in informed debate.[36]

One of the impacts of the securitisation discourse in relation to refugees is its potential to fuel hatred against refugees. The repeated portrayal of refugees as security risks progressively alienates them from the community in which they find refuge. The executive, armed with the mass communication media which enables it to broadcast its message much more easily, is inclined to use refugees as scapegoats for political failures.[37] The voice of the judiciary is therefore much needed in as much as it carries weight in countering the unfounded narratives of the executive and putting things in perspective. This is a significant responsibility that the judiciary carries in protecting refugees from vilifying narratives.

Third, the post-Second World War development of international human rights law has placed the judiciary at the centre of human rights enforcement.[38] International human rights law grew to counter the abuse of human rights by the State apparatus which traditionally

[36] Hon Justice M.H. McHugh AC, "The Judicial Method" (5 July 1998) https://www.hcourt.gov.au/assets/publications/speeches/former-justices/mchughj/mchughj_london1.htm#FOOTNOTE_1 (last visited 25 Aug. 2023).

[37] For analysis on the use of refugees as scapegoats in the context of terrorist attacks or security breakdown in a host State, see generally B. Savun, and C. Gineste, "From Protection to Persecution: Threat Environment and Refugee Scapegoating", *Journal of Peace Research*, 56(1), 2019, 88–102; S. Polo and J. Wucherpfennig, "Trojan Horse, Copycat, or Scapegoat? Unpacking the Refugees-Terrorism Nexus", *The Journal of Politics*, 84(1), 2022, 33–49.

[38] For the experiences of African courts in the enforcement of human rights, see generally M.E. Adjami, "African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?", *Michigan Journal of International Law*, 24(1), 2002, 104. For the experiences of European courts in the enforcement of human rights, see generally B. Conforti and F. Francioni, *Enforcing International Human Rights in Domestic Courts*, The Hague, The Netherlands, Springer Netherlands, 1997. For analysis on the turf war better the judiciary and the executive in the context of Australia's migration law, see generally M. Crock, "Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law", *Sydney Law Review*, 26(1), 2004, 51.

enjoyed impunity for actions within its territory owing to the principle of non-interference in the internal affairs of States.[39] The human rights abuses that took place during Second World War, in particular the holocaust, spearheaded the international community's recognition and adoption of the human rights legal regime that prescribed obligations on States regarding the treatment of people in their territories.[40] The international human rights regime also operates as a parallel regime that continually interacts with and relies on the domestic legal system for its adoption, interpretation and enforcement. In this regard, the judiciary plays a key role serving as the link between the international and the domestic human rights regimes.[41]

It is against this background that we seek to underscore the crucial role of the judiciary in the protection of refugee rights and argue for an actively involved judiciary as opposed to a passive one. In their treatment of the issue of securitisation, the focus of both the High Court and the Court of Appeal was the procedural requirements for a sound policy grounded on national security. In other words, the Courts outlined what the State needed to effectively justify its measures based on security. The Courts highlighted the principles that national security policies are subject to the Constitution, that such policies need to comply with the law, democracy, and human rights and that they need to be narrowly tailored to achieve a proposed objective. While the authors agree with the conclusion of the Courts, we noted that in discussing the issue of securitisation, the Courts approached it as a purely technical matter requiring procedural precision and abandoned the human rights lens and the particular vulnerability of refugees to the whims and caprices of the executive in this regard.

We are aware of the security issues experienced by refugees in Kenya especially those who are easily identifiable as refugees by the security agencies. The second author's first-hand account was important as he reflected on the fact that security agencies tend to treat refugees adversely especially during riots and demonstration by nationals or whenever there is any disturbance of peace. The security personnel lack sufficient understanding of the rights and freedoms of refugees. Most of them hold the perception that refugees belong to the camps and therefore any refugee in urban areas and public places other than in schools and hospitals is likely to be mishandled and regarded as a threat to security. To avoid escalation of the matter, most refugees are asked to bribe the security officers and comply with such requests to secure their freedoms.[42] As a cautionary measure, some refugees in urban areas restrict

[39] L. Brilmayer, "International Law in American Courts: A Modest Proposal", *The Yale Law Journal*, 100(8), 1991, 2277, 2287. The principle of non-intervention and its implications for human rights protection in a State continues to be a point of debated. For a brief summary of these debates see M. Jamnejad and M. Wood, "The Principle of Non-intervention", *Leiden Journal of International Law*, 22(2), 2009, 345, 375–377.

[40] J. Ife, *Human Rights from Below: Achieving Rights through Community Development*, Port Melbourne, Victoria, Cambridge University Press, 2009, 78. But see M. Duranti, "The Holocaust, the Legacy of 1789 and the Birth of International Human Rights Law: Revisiting the Foundation Myth" *Journal of Genocide Research*, 14(2), 2012, 159–186; S. Moyn, *The Last Utopia: Human Rights in History*, USA, Harvard University Press, 2010, 7, 214.

[41] See generally the example of how US courts have given application to international human rights law: Brilmayer, "International Law in American Courts"; A.C. Helton, "The Mandate of U.S. Courts to Protect Aliens and Refugees under International Human Rights Law", *Yale Law Journal*, 100(8), 1991, 2335.

[42] The problem of corruption in the Kenyan security apparatus and its implication is a well-researched topic. See for example K.R. Hope, "Police Corruption and the Security Challenge in Kenya", *African Security*, 11(1), 2018, 84–108 (discussing the implications for national security of police corruption in Kenya); K.R. Hope, "Kenya's Corruption Problem: Causes and Consequences", *Commonwealth & Comparative Politics*, 52(4), 2014, 493 (noting "[c]orruption has therefore become recognised as embedded in the political economy of Kenya and … that corruption in Kenya is a major governance problem with deleterious effects on development"); G. Onyango, "The Art of Bribery! Analysis of Police Corruption at Traffic Checkpoints and Roadblocks in Kenya", *International Review of Sociology*, 32(2), 2022, 311 (providing an empirical analysis of corruption by traffic police). For research with respect to corruption involving refugees and security apparatus specifically, see B.J. Jansen, "Between Vulnerability and Assertiveness: Negotiating Resettlement in Kakuma Refugee Camp, Kenya", *African Affairs*, 107 (429), 2008, 569, 575 (arguing "corruption should be viewed not as exceptional but as a very mundane given, not only in Kenya, but also in the camp environment, among refugee leaders, police, and humanitarian workers"); J. Crisp, "A State of Insecurity: The Political Economy of Violence in Kenya's Refugee Camps", *African Affairs*, 99(397), 2000, 601, 627 (noting how "some refugees make their way out of the camps, often bribing their way through any checkpoints that stand in their way").

their movement to specific places. It is in this context that we seek to address securitisation of refugees as one of the key issues and motives behind the Government Directive that the Court of Appeals should have confronted head on.

Another critical discussion that we seek to prompt through this rewrite relates to the impact of procedural rules on the protection of human rights. The *Kituo Cha Sheria (I)* and *Samow* cases both involved similar, if not identical, issues. Both involve a Government Directive that sought to relocate refugees and asylum-seekers from urban areas to refugee camps. The underlying objective of both Directives was security related and both Directives stood to impact the lives of tens of thousands of refugees and asylum-seekers. Accordingly, the violation of human rights that would be occasioned by the implementation of these Directives was serious. However, while the High Court quashed the Government Directive vindicating the rights of refugees and asylum-seekers in the *Kituo Cha Sheria (I)*, it confirmed the Government Directive in the *Samow* case thereby failing to protect refugees and asylum-seekers. In *Samow*, the High Court invoked the petitioners' failure to establish that the Government Directive and its proposed implementation had violated their rights and fundamental freedoms under the Constitution. In other words, the High Court ruled that the petitioners did not plead their case with requisite precision and that their challenge of the concerned Government Directive was based on "a bare allegation".[43] This meant that the fate of tens of thousands of refugees and asylum-seekers lay in the satisfaction of the rules of civil procedure.[44]

The Courts are generally dogmatic about parties to a dispute meeting the procedural requirements in a civil dispute. These procedural requirements relate to a wide range of issues such as the observance of time frames for various actions and compliance with formalities in outlining the case to a court. These requirements aim to provide structure and order to litigations which may otherwise become unmanageable.[45] As such, courts are ordinarily justified in dismissing claims on procedural grounds. But what about cases that involve bigger human rights questions such as the fate of thousands of refugees who are ordered to relocate from their abodes to refugee camps immediately? What should be the role of the judiciary in these instances? We make a point in this rewrite that the judiciary should not be passive and tied by procedural dogmas in instances where doing so would potentially occasion human rights violations upon parties before it. We do this by briefly remarking on *Samow* in our rewrite of *Kituo Cha Sheria (II)*.

3. REFLECTION ON REWRITING METHODOLOGY

Aside from the legal education we received, our analysis in this rewrite is informed by our local knowledge of the state of affairs in the East African region. The region is one of the hotspots of forced displacement both in terms of origin of displacement and destination for displaced persons. The first author was previously a legal officer and diplomat at the Ethiopian Foreign Ministry and constantly monitored the political situation in the Horn of Africa. The second author's presence and lived experience of being a refugee in Kenya brought a first-hand account of the situation in Kenya. Our professional and lived experiences therefore became beneficial during our deliberation for the rewrite. It certainly shaped the perspectives we brought into the rewrite.

[43] *Samow Mumin Mohamed & 9 others v. Cabinet Secretary Ministry of Interior Security and Co-Ordination & 2 others*, para. 29.

[44] Civil procedure refers to "the body of law that sets out the process that courts will follow when hearing cases of a civil nature (a 'civil action', as opposed to a criminal action) and its object is to facilitate and not to obstruct the administration of justice". S. Ouma, *A Commentary on the Civil Procedure Act*, Nairobi, Kenya, Law Africa Publishing Limited, 2013, 8.

[45] D. De Saulles, *Reforming Civil Procedure: The Hardest Path*, Oxford, UK, Bloomsbury Publishing, 2019, 3.

Our professional and lived experiences brought benefits as well as challenges to a judgment rewriting project. One benefit was the knowledge of the refugee experience in Kenya. The second author's lived experience as a refugee in Kenya provided us with a special insight into the vulnerability of refugees and asylum-seekers, the challenges they face and the overall protection environment in Kenya. While the experience of one refugee is not representative of the experience of all refugees, it certainly places one in an environment where knowledge and experience is continually shared between refugees and asylum-seekers. This enables one to draw on the experiences of others, relate that to one's experiences and be able to speak from a position of actual knowledge.

With actual knowledge comes certain inconvenient truths. We for example openly discuss the maltreatment of refugees and asylum-seekers by security forces and the practice of bribing officials in the rewritten judgment. Political correctness may impose on a judiciary to shy away from this topic. But we do not because it is one of the pertinent issues that refugees and asylum-seekers in Kenya face and it exacerbates their vulnerability and seriously affects their rights. While rectifying this situation is beyond the reach or the task of the judiciary, calling the practice out will certainly draw the executive's attention, if not the nation's attention.

A question may be asked as to whether the perspectives expressed in the rewrite necessarily required professional and lived experience (i.e., whether it is only because of professional and lived experience that a judgment from this perspective could be rewritten)? While professional and lived experience certainly gives unique insights and perspectives, a judge does not necessarily require those to be able to express similar perspectives or reach similar conclusions. Where the case is complex and requires expert input or personal experience is lacking, at the disposal of the judiciary is the ability to summon those who hold the required professional and lived experiences. Listening to them and meaningfully engaging with their testimony will enable the judiciary to consider perspectives that it may not be readily exploring.

One challenge that professional practice brought into the rewrite is what we would like to call "thinking to the box", the opposite of the popular call to "think outside the box". Our legal training and professional practice has transformed our default thinking to focus on what fits to or complies with the *status quo* as regards legal doctrines. The discussion as to whether and how we could address the inconsistency between the *Kituo Cha Sheria I* and *Samow* decisions in our rewrite led to engaging conversations among the collaborators. The second author, a practising lawyer well versed in the procedural rules in Kenyan Courts, was of the view that as per the rules of civil procedure, the appellate court cannot pronounce itself on a decision not before it no matter how egregious the same is. The first author's initial concern was the same. The rules of civil procedure were against us. Our default position was therefore thinking to fit our proposed arguments to the existing civil procedure box.

Once we identified the predicament we find ourselves in, we began thinking outside the box. Could not the Court of Appeals refer to *Samow*, if only as a previous decision, to distinguish its judgment from what the High Court held in *Samow*? Is it proper for a court to insist on a civil procedure rule where fundamental human rights are at stake? What should be the role of the court in such scenarios? These questions prompted a major contention in the rewrite. Both authors were in agreement regarding the supremacy of the protection of the human rights of refugees and asylum-seekers and the need for Courts to revisit their dogmatic embrace of procedural rules on occasions where there are likely to be irreparable harms to the protection of rights.

Apart from the substance of the rewrite, there were several technical issues that we had to navigate during the collaboration. Issues like whether the rewrite is constrained by the procedural rules of the jurisdiction where the decision is from, whether the format of the rewrite needs to accord with the format of the Court and the latitude we have as the rewriting

judges to go beyond the issues originally framed in the judgments were some of the technical issues we had to reflect on.

CASE NAME: *ATTORNEY GENERAL V. KITUO CHA SHERIA & 7 OTHERS*

Court: Court of Appeal at Nairobi
Date of Judgment: 17 February 2017
Judgment rewritten by Samuel Berhanu Woldemarian and Muhizi Pacifique in 2024

4. JUDGMENT OF THE COURT

Introduction

[1] This appeal from the Attorney-General is lodged against the judgment of the High Court quashing a Government Directive that was issued to stop reception and registration of asylum-seekers and refugees in urban areas with immediate effect. The Government of Kenya issued the said Directive on 18 December 2012 and the substance of the directive was inferred from a series of inter-governmental communications and press releases. On the said date, a press release from the Department of Refugee Affairs, confirming the substance of the directive, communicated the decision of the Government of Kenya "to stop reception, registration and close down all registration centers in the urban areas with immediate effect". The communication further revealed that all asylum-seekers and refugees were to be registered and hosted in the existing refugee camps. Accordingly, the Directive ordered all asylum-seekers and refugees from Somalia to report to *Dadaab* refugee camps and all others to report to *Kakuma* refugee camp.

[2] Moreover, an official correspondence of 16 January 2013 between the then Permanent Secretary in charge of Provincial Administration and Internal Security and the Ministry of Special Programmes revealed the Government's plan to move "all the refugees residing in Urban areas to the *Dadaab* and *Kakuma* Refugee Camps and ultimately, to their home countries" after making the necessary arrangements. Regarding the implementation of the Directive, the official correspondence stated:

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

[3] An earlier official communication of 10 December 2012 from the Department of Refugee Affairs to Refugee Officers in *Dadaab*, *Kakuma*, *Mombasa*, *Malindi*, and *Isiolo* stated that the Government's decision to stop registration of asylum-seekers in urban areas came "following a series of grenade attacks in urban areas where many people were killed and many more injured". This communication ordered the Refugee Officers to stop issuing movement passes for non-resettlement cases and announced the Government's intention to "put in place necessary preparation to repatriate Somali refugees living in urban areas".

[4] Two suits, one by a non-governmental organisation and another by a group of seven refugees and asylum-seekers who have lived in Nairobi for invariable periods of time, were filed before the High Court challenging the legality of the Government Directive and its proposed implementation. The High Court consolidated the two suits under *Kituo Cha Sheria and Others v. Attorney General* (2013) eKLR 1 (*Kituo Cha Sheria (I)*). The Petitioners

prayed to the Court for declarations "of *certiorari* to quash the decisions, *prohibition* to prevent the implementation of those decisions and of *mandamus* to compel the government to take certain steps to safeguard the petitioners' rights and freedoms". The High Court ruled in favour of the Petitioners and found that the Government Directive:

a) is a threat to the rights and fundamental freedoms of the Petitioners and other refugees residing in urban areas;
b) a violation of the freedom of movement, the right to fair administrative action, and the responsibility of the State towards vulnerable persons; and
c) its implementation would breach the non-refoulement principle contained in the Refugee Act 2006.

Accordingly, the High Court quashed the Government Directive.

[5] The Attorney-General appealed the judgment of the High Court and raised 26 grounds of appeal. The substance of these grounds of appeal concerned three issues. First, the appeal challenged the High Court's interpretation of Article 39(3) of the Constitution of Kenya regarding the applicability to refugees of the right to enter, remain, and reside in the country. We note that this constitutional interpretation was audacious considering the severe restrictions imposed on the movement of refugees, particularly those residing in refugee camps. Second, the Appellant argued that by upholding the right of refugees to freely move and reside within the country as enshrined under the 1951 Refugee Convention, the High Court failed to pay due deference to the limitations imposed on rights under the Constitution of Kenya. Third, the Appellant contended that by quashing a duly passed executive Directive and ordering that the refugee centres in urban areas remain open, the High Court was intruding upon executive functions and acting in violation of the principle of separation of powers.

[6] Consequently, the Appellant sought this Court to overrule the High Court's decision.

Issues for determination

[1] First, this Court seeks to pronounce itself in respect of the third objection above of the Appellant regarding the power of the judiciary to quash an executive decision and prohibit its implementation. The High Court has elaborated on the constitutional and administrative law principles governing the power of the judiciary to review and, where appropriate, quash, an executive order. This Court will not repeat that legal analysis in volume here. Rather, we believe that exploring this specific objection of the Appellant is important in the context of refugees because, unlike citizens, they have limited agency in the domestic law-making and enforcement procedures. This renders refugee communities vulnerable to the whims and caprices of the executive branch of the Government and the consequences of its rushed decisions and policies. The use of national security as justification for the adoption of the Directive at issue in this case is one example of that. Such tendencies make it even more important that the judiciary steps up its scrutiny of executive policies and decisions where there is a perceived risk of the violation of the fundamental rights and freedoms of vulnerable groups of communities such as refugees and asylum-seekers.

[2] Second, this Court is cognisant of the 2014 decision of the High Court in the case *Samow Mumin Mohamed & 9 others v. Cabinet Secretary Ministry of Interior Security and Co-Ordination & 2 others* (2014) eKLR 1 (*Samow*) and its implications for the finding in *Kituo Cha Sheria (I)*. We seek to evaluate the seemingly contradictory nature of the findings

in the two cases and assess the impact of the *Samow* decision on the decision of the High Court in *Kituo Cha Sheria (I)*.

[3] This being a first appeal, this Court has a duty to review the evidence presented before the High Court and evaluate whether the decision was well founded. This approach is enjoined by Rule 29(1) of the Court of Appeal Rules and is employed in many cases including *Selle v. Associated Motor Boat Co. Ltd* [1968] EA123. Accordingly, in entertaining this appeal, we have re-considered and re-evaluated the case thoroughly as presented before the learned Judge and reached an independent finding and conclusion.

Background and legal analysis of the circumstances surrounding the Government Directive

The circumstances surrounding the issue of the Government Directive

[4] Before directly addressing the issues for determination, we outline below the circumstances leading to the issuance of the Government Directive and the procedural irregularities involved in the issuance of the same. This provides the background to assess the merits of the case.

[5] The Government Directive at issue was not contained in a single promulgation. The substance of the Directive is rather to be found in a press release and a series of communications between various governmental institutions. A close look at the Directive and the manner of its issuance clearly shows that the same was adopted without duly considering its implications on refugees at large or following the procedures prescribed under the Constitution.

The constitutional requirement for a just and fair administrative action

[6] A concurrent reading of Articles 10 and 47 of the Constitution is proper to outline the framework of values and principles that bind State organs, State officers, public officers when taking actions, and the rights that persons have in the context of administrative actions. Article 10 of the Constitution stipulates:

1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
   a) applies or interprets this Constitution;
   b) enacts, applies, or interprets any law; or
   c) makes or implements public policy decisions.
2) The national values and principles of governance include—
   a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy, and participation of the people;
   b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalised;
   c) good governance, integrity, transparency, and accountability; and
   d) sustainable development.

[7] Article 47, on the other hand outlines the rights of persons to a fair administrative action. It reads:

1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.

2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
   a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
   b) promote efficient administration.

[8] A review of the Government Directive at issue in light of the requirements under Articles 10 and 47 reveals that it was neither issued in compliance with the values and principles of governance outlined in Article 10 nor in keeping with the procedural requirement under Article 47. The actors involved in the issuance and proposed implementation of the Government Directive, the Department of Refugee Affairs through the Commissioner for Refugees Affairs and the Permanent Secretary in charge of Provincial Administration and Internal Security are public officials within the meaning of Article 10 of the Constitution. As such, their exercise of administrative power must conform to the values and principles enshrined under Article 10 of the Constitution. The Directive to stop reception, registration and to close down all refugee registration centres in urban areas, to relocate all urban refugees to camps and the order to NGOs to transfer refugee programs to refugee camps amounts to making and implementing a public policy decision under Article 10(1)(c) of the Constitution. Consequently, in doing so, the said Government departments ought to have complied with the principles and values of participation, transparency and accountability, human dignity, human rights, and most importantly the protection of the marginalised.

[9] The concerned Government departments also did not comply with the requirements of a fair administrative action under Article 47 of the Constitution. This right is not limited to 'citizens'. The provision is clear that "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair". Accordingly, noting that the Directive would adversely affect the rights and freedoms of urban refugees, the Government has a constitutional obligation to hold consultation or give an opportunity to the urban refugees to express themselves on the proposed policy and its implementation (*Kenya Ports Authority v. Industrial Court of Kenya* [2014] KLR 299; *Republic v. Registrar of Companies ex parte Githungo* [2001] KLR 299).

[10] Apart from those who would be directly impacted by the Directive, the Government must also extend the consultation to stakeholders and interested parties. This latter step is very important in the context of refugees and asylum-seekers particularly because refugees and asylum-seekers lack agency in the domestic political process. They are often considered low-ranking foreigners to be offered proper consultation on issues that affect them. Even when such consultations are on offer, the uncertainty involved in refugee and asylum claims and the unique position of refugees and asylum-seekers in the domestic legal order means that they are likely to be reticent to freely sharing their views. It is therefore crucial that Government departments invite interested parties to participate in consultations on matters affecting refugees and asylum-seekers. These interested parties fill the gap in advocacy created by the unique relationship between Government departments and refugees and asylum-seekers. The petition of *Kituo Cha Sheria* which gave rise to this court case in the High Court is a good example that underscores the need to consult and engage with interested parties. *Kituo Cha Sheria* is a non-governmental organisation providing free legal services to vulnerable members of the community with a view to ensure equity and access to

justice. It is through their legal action that the rights of refugees and asylum-seekers were vindicated at the High Court.

[11] A further requirement under Article 47 of the Constitution is for administrative actions to be reasonable. Reasonableness of administrative action is partly a function of addressing the concerns and views expressed at the consultations phase. These consultations should be more than a tick-the-box exercise and should be convened with the genuine goal of enhancing the participation of affected communities in decision-making. Once that participation is secured, the Government must then give due consideration to the views and representations of the persons who would be affected by its policy and action. Article 47 of the Constitution also requires the Government to give persons whose rights or fundamental freedoms have been or are likely to be adversely affected by administrative action of written reasons for contemplated actions.

[12] Our review of the circumstances of the issuance of the relevant Government Directive indicates that the process was beset with procedural irregularities. Proper and adequate consultations did not take place at the initiation, development, and implementation phases of the Directive; affected community members were not given written reasons for planned actions; and the Directive was issued as a blanket and indiscriminate rule affecting the entire body of refugees and asylum-seekers residing in urban areas. Accordingly, the Directive was procedurally unfair and substantively unreasonable. This "illegality, irrationality and procedural impropriety" therefore renders the Government Directive subject to control by judicial review (*Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410).

[13] Article 24(1)(e) of the Constitution provides:

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

The Government Directive at issue intended to limit the rights and fundamental freedoms of refugees in urban areas. Therefore, the concerned Government departments were under constitutional obligation to consider whether there were less restrictive means to achieve the purpose of the impugned Directive. As the judge of the High Court noted, it was incumbent upon the concerned Government departments to consider whether "the protections and promotion of the welfare of refugees [could] be achieved by less restrictive means other than sending all urban refugees irrespective of their individual circumstances to camps?" Regardless of the reason and circumstances behind the issuance of the Directive, the Government opted for a shortcut which has no place in our modern democratic society.

Purpose of the Government Directive

[14] The reference to "purpose" in Article 24(1)(e) of the Constitution is foundational. Apart from the procedural irregularities we outlined above, perhaps the biggest concern surrounding the Directive at issue is the lack of transparency from the concerned Government departments regarding its purpose. Secrecy pervades the objective for the issuance of the Government Directive. The inter-governmental communications did not specify what the overall objective of the Directive was. In the High Court hearing, a deposition of one Edwin

K. Ngetich noted that the Directive was issued "in the interest of promoting the welfare and protection of asylum-seekers and refugees".

[15] However, on evaluation of the overall circumstances of the issuance and planned implementation of the Directive, we agree with the High Court's assessment that a more vivid rationale of the Directive was security related. The High Court noted that the operation envisaged under the Directive was to be carried out as a security operation. This was evident from the way the Government sought to implement the Directive. The letter from the Permanent Secretary in charge of the Provincial Administration and Internal Security to the Permanent Secretary of the Ministry of Special Programs written on the 16th of January 2013 outlined the first phase of the Directive's implementation as targeting 18,000 refugees residing in urban areas. The letter stated that security forces will round up the refugees and transport them to a temporary location pending removal to camps.

[16] The security-related objective of the Directive was more explicit in the letter of the Department of Refugee Affairs of 10 December 2012 written to officers in charge of Refugee Offices in the various refugee camps. The Department's letter acknowledged that the Government's decision "to stop registration of asylum-seekers in urban areas with immediate effect" was prompted by "a series of grenade attacks in urban areas where many people were killed and many more injured".

Security and refugees and asylum-seekers

[17] The implication of refugee protection to the security of the receiving State has always been considered in devising refugee policies and their implementation. We now proceed to briefly outline the broader context in which the question of security is invoked in international law in relation to refugees and asylum-seekers. The refugee laws pertinent to this case, primarily the 1951 Convention relating to the Status of Refugees (Refugee Convention), the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention), and the Refugees Act of 2006, all address various aspects pertaining to the protection of national security in the context of refugee protection.

[18] Under the 1951 Refugee Convention, there are five distinct circumstances that justify a State taking measures in relation to refugees in the context of national security. We highlight these five circumstances under the 1951 Refugee Convention below together with a review of how these have been embedded in the regional 1969 OAU Convention and in the domestic Refugees Act of 2006.

[19] First, Article 1(F) excludes the Refugee Convention's applicability to any person with respect to whom there are serious reasons for considering has committed "a crime against peace, a war crime, or a crime against humanity" or "a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee". Article 4 of the Refugees Act of 2006 also enumerates five grounds that exclude a person from being considered for refugee status. Three of the five grounds relate to the commission of a crime. Moreover, under Article 19 of the Refugees Act of 2006, the status of any refugee may be revoked "where there are reasonable grounds for regarding that person as a danger to national security or to any community of that country".

[20] Secondly, Article 9 of the Refugee Convention grants States the power to take provisional measures in the case of a particular person where such measure is essential to protect national security. The provision envisages derogation from the obligations contained in the Convention. However, these provisional measures are justified "in time of war or other grave and exceptional circumstances" and are expected not to be blanket orders applying to groups but should rather be individualised to a "particular person".

[21] Thirdly, Article 28 of the 1951 Refugee Convention requires States to issue travel documents to refugees lawfully residing in their territory "unless compelling reasons of national security … require". A similar rule is contained in Article 6 of the 1969 OAU Convention. Pursuant to these rules, States may withhold the issuance of travel documents to refugees where there are national security risks to be managed or avoided by the action.

[22] Fourthly, Article 32 of the Refugee Convention states that "States shall not expel a refugee lawfully in their territory save on grounds of national security or public order". The article provides procedural safeguards to ensure the expulsion order is given in accordance with due process of law including the right of the refugee to submit evidence to clear himself or herself, to appeal and be represented before the competent authority. A similar rule under Article 21 of the Refugees Act of 2006 provides that an expulsion order may be made against any refugee or member of their family on the grounds of national security or public order.

[23] Lastly, Article 33 of the Refugee Convention limits the benefits of the *non-refoulement* provision from being claimed by "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country". In addition to the above, it is also a standard practice witnessed among States that refugees and asylum-seekers are often subjected to rigorous security vetting procedures before or upon arrival in the host State.

[24] While most of the security-related provisions focus on protecting the State against the perceived security risks that refugees potentially pose, the 1969 OAU Convention addressed one important aspect of security: that of protecting refugees from attacks. In this respect, Article 2(6) of the 1969 OAU Convention urges States to "settle refugees at a reasonable distance from the frontier of their country of origin" for security reasons. Similarly, Article 17(e) of the Refugees Act of 2006 gives the Refugee Camps Officers the responsibility of coordinating "the provision of overall security … for asylum-seekers and refugees in the designated areas".

The legitimate interest of the Government to protect the State

[25] We outlined above the various ways in which security is invoked in relation to refugees and asylum-seekers, the processing of their asylum claims and in decisions pertaining to their continued protection by the host State. In this respect, we recognise the legitimate interest of the host State, and therefore the duty of the Government, to ensure the international obligation of the protection of refugees and asylum-seekers is conducted in a manner that does not put the security of the host State in danger. In *Randu Nzai Ruwa and Others v. Minister, Internal Security and Another ('Randu Nzai Ruwa')*, we stated that "the executive arm of the government is charged with the responsibility of ensuring national security" and that "it must be given some margin of appreciation" in exercising this responsibility.

[26] The security of the State and its population and the safeguarding of the sovereignty of the Republic is one of the core functions of the executive arm of the Government. We underscore the fact that this function is tangible for a country like ours. Located in one of the most volatile regions of the world, Kenya faces the continued threat of terrorism, armed conflict, and political instability. The frequency and gravity of the terrorist attacks of the past few years is enough to demonstrate the importance of the executive function of protecting national security. Accordingly, it is within the purview of the Government to oversee all aspects of the running of the country, including the reception, protection and the search for durable solutions to refugees and asylum-seekers, identify potential threats to security, and act to respond to those threats.

Securitisation of refugee protection and constitutional limitation

[27] Throughout the history of the development of the international regime governing refugee protection, States have applied a security lens in dealing with refugees and asylum-seekers. Considering the regime's formal development began in the aftermath of First World War, States expressed scepticism towards refugees who fled from enemy territories and presented themselves seeking protection.[46] This prompted special vetting procedures to ensure refugees and asylum-seekers were genuine protection seekers and did not pose security risks to the State.

[28] What were genuine security concerns aimed at the protection of the State have in the process of time become policies aimed at limiting access to protection. One approach used in this later effort is the securitisation of refugees and asylum-seekers. The securitisation rhetoric became prominent during the Cold-War but became a strong concern in the aftermath of the September 11, 2001 terrorist attacks in the United States. The securitisation of refugee and asylum issues essentially brings the protection of refugees and asylum-seekers into the realm of security. The obligation to provide refugee protection is a humanitarian call at its core. States freely embraced this obligation even before the adoption of international covenants and extended protection to individuals from the persecution of the State. That humanitarian ideal should continue to define State action and policies regarding refugees and asylum-seekers. Policies that unduly invoke security as a reason to deny protection betray the foundation of the refugee regime.

[29] The constitutional function of securing the State is however subject to constitutional limitations. The tendency of the executive branch to capitalise on security issues as a need for safeguarding rights and fundamental freedoms is crucial considering the volatility of the political environment. The principles of national security outlined in Article 238 of the Constitution state that "national security is subject to the authority of this Constitution and Parliament" and that it "shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms". Under Article 59(2), the Constitution also gives the Kenyan National Human Rights and Equality Commission the function of monitoring, investigating, and reporting "on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs".

[30] Article 129 of the Constitution further stipulates that in exercising its functions, the executive authority must act in a manner compatible with the principle of service to the people of Kenya and for their well-being and benefit. Moreover, Article 131(2) of the Constitution obligates the President, as the Head of the Executive, to ensure the protection of human rights, fundamental freedoms, and the rule of the law.

[31] Therefore, the Government must comply with the law and demonstrate utmost respect for the rule of law, democracy, human rights, and fundamental freedoms. These principles set a hedge of protection around human rights and impose constitutional limitations on actions premised on national security. Failure to comply with the principles of human rights and democracy subjects any action or decision made in advancement of national security to judicial scrutiny. The judiciary will thus intervene where an action by the executive contravenes the letter and spirit of the Constitution.

[46] Scholars have noted the sudden shift towards securitisation in the approach of European States to migration, free movement, and refugee protection in the aftermath of First World War. G. Loescher and J. Milner, "Security Implications of Protracted Refugee Situations", *The Adelphi Papers*, 45(375), 2005, 23; C.M. Skran, *Refugees in Inter-war Europe: The Emergence of a Regime*, Clarendon, 1995, 28; S. Heilbrunn, J. Freiling and A. Harima, *Refugee Entrepreneurship: A Case-based Topography*, Cham, Switzerland, Springer International Publishing, 2018, vii.

The power of the judiciary to inquiry into executive policies

[32] While we noted in *Randu Nzai Ruwa* that the executive is owed deference and a margin of appreciation in the exercise of its security-related functions, we also noted that where "national security has been wrongfully invoked to take away a fundamental right the court needs to be judicially satisfied that the action of the State is reasonable and justifiable". The concerned Government department is also required to adduce evidence enough to demonstrate that its decisions and actions have complied with the Constitution. In this respect, *Randu Nzai Ruwa* notes that:

> Although the State is not required to give a detailed account of its action it must do more than to merely assert that the action has met the threshold set by the Constitution. It must place some evidence before [the] court that will enable the court [to] make a judicial assessment. If that evidence is classified or sensitive then it can be received behind closed doors.

[33] As separate and different as the functions of the three branches of Government are, this constitutional democracy of ours also provides mechanisms of checks and balances to ensure power is exercised in accordance with the law. To this end, the Constitution under Article 165(3) has granted the judiciary the power to review the constitutionality of laws and actions said to have been taken pursuant to the law.

[34] The judiciary is established under Article 161 of the Constitution as an independent arm of the Government. Article 160 of the Constitution clearly provides that the judiciary is subject only to the Constitution and the law and shall not be subject to the control or direction of any person or authority. Consequently, the judiciary is thus not a department of the executive arm of the Government. By virtue of Article 2(4) and Article 165(3)(d) of the Constitution, the High Court is empowered to annul and quash any act or omission that is incompatible and conflicting with the Constitution. This power is unlimited and as such the court can inquire and review any action or omission regardless of the maker, including executive actions or omissions. This Court in *Martin Nyaga Wambora v. Speaker County Assembly of Embu & 6 others* [2014] eKLR made the following dispositive order:

> The political question doctrine and the concept of separation of powers cannot oust the jurisdiction of courts to interpret the Constitution or to determine the question if anything said to be done under the authority of the Constitution or of any law is consistent with or in contravention of the Constitution as per Article 165(3)(d)(iii).

[35] As noted in *Law Society of Kenya v. Office of the Attorney General & another; Judicial Service Commission (Interested Party) (Constitutional Petition 203 of 2020)* [2021] KEHC 454 (KLR), it is trite that the Court can only interfere with the exercise of the executive and the legislature's mandates, if it is alleged and shown that they have threatened to act or have acted in contravention of the letter and spirit of Constitution. Article 23(3) of the Constitution bequeaths the Court with power to issue reliefs, including an order of judicial review, to uphold and enforce the Bill of Rights.

Determination

[36] We provided the extended background and legal analysis above to lay the foundation for our findings in this review. We also outlined the procedural irregularities involved in the issuance and proposed implementation of the Directive at issue. Here, we outline the

substantive failure of the Directive which relates to its effort to securitise refugee and asylum-seeker protection.

[37] The findings of the High Court and our own interrogation of the case have revealed that security concerns were the motivation for the issuance of the Directive. The effort of the concerned Government departments to actively hide this motivation is only an indication that there is no solid foundation that supported the concern. The mere occurrence of attacks and the mere suspicion of the involvement of refugees and asylum-seekers in those attacks do not meet the constitutional threshold to justify the restrictions on rights and freedoms contemplated under the Directive. More than mere suspicion is required to achieve a proper security response to which we owe deference.

[38] Even where the Government has confirmed the involvement of refugees and asylum-seekers in the stated attacks and can provide adequate evidence to that effect, it is yet under obligation not to use that as a springboard to introduce wider and restrictive policies of refugee protection that are indiscriminate. The Directive at issue is a victim of this tendency to introduce an overriding policy framework that deteriorates the rights and freedoms of refugees and asylum-seekers outlined in the Kenyan Bill of Rights, international conventions, and domestic legislations.

[39] Kenya is a host to refugees from across the East Africa and beyond. Refugees in Kenya, to a great extent, enjoy their rights as provided for under the 1951 Refugee Convention and under the domestic Acts. However, one of their biggest challenges is securitisation. We are live to the fact that security agencies tend to treat refugees adversely especially during riots and demonstrations by nationals and whenever there is any disturbance of peace. The security personnel lack sufficient understanding of the rights and freedoms of refugees. Most of them hold the perception that refugees belong to the camps and any refugee in an urban area and public places other than schools and hospitals is more likely to be mishandled and regarded as a threat to security. To avoid escalation of the matter, most refugees are asked to bribe the security officers and comply with such requests to secure their freedoms. This has led to refugees in urban areas restricting their movement to specific places.

[40] In this respect, the Government needs to take great/serious care not to feed, through its policies, the negative sentiments that exist regarding refugees and asylum-seekers. The consistent depiction of refugees and asylum-seekers as security risks for the local community and their frequent association, through the voice of the Government, with security problems is likely to arouse animosity towards them. This rhetoric essentially places refugees in the state of persecution while in the State of refuge. The rhetoric also endangers them and exacerbates their vulnerability. Accordingly, the Government that is supposed to provide protection to them should refrain from actively fuelling hatred against them.

[41] Where proper justifications exist for introducing the restrictions envisaged in the Directive at issue, the concerned Government departments must adhere to the procedural tenets of a fair and just administrative action embedded in the Constitution. Proposed actions must also be narrowly tailored to achieve an objective that is constitutionally supported. The Petitioners have the right to fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair under Article 47(1) of the Constitution. Furthermore, any person who is likely to be affected by an administrative action has the right to be given written reasons for the action. The Petitioners, being the affected persons, have the right to be furnished with reasons for the Government Directives.

[42] The High Court is the guardian of the Bill of Rights and has jurisdiction to interrogate the Government Directives in light of Article 47 of the Constitution and the other applicable provisions of the law. The executive action is not carried out in a vacuum and the

same are subject to the provisions of the Constitution and other laws. Any action or omission by the executive which leads to denial, violation, or infringement of rights or fundamental freedoms in the Bill of Rights should be viewed through the legal lenses and the High Court is the bearer of such duty. Hence, the High Court's findings are proper and its decision to quash the Government Directive is justified.

[43] One important issue to clarify in this respect pertains to the implication of the *Samow* case on the decision of the High Court in *Kituo Cha Sheria (I)*. This Court is cognisant of the decision of the High Court confirming a Government Directive, similar in substance and effect to the Directive on appeal here. In finding for the respondents, the judge in the *Samow* case pointed to the failure of the petitioners to meet the procedural requirements of pleading a civil case. The refusal of the High Court to review the substantive claims in *Samow* not only confirmed the constitutionality of the concerned Directive but also left the refugees and asylum-seekers that found protection under the *Kituo Cha Sheria (I)* decision vulnerable to the effects of a securitised refugee policy.

[44] The judiciary is the custodian of human rights. It is the last gatekeeper in defence of the rights and fundamental freedoms of vulnerable groups, such as refugees and asylum-seekers who are outside of their country of origin and reliant on the protections of the host State. Accordingly, the judiciary should tame the tendency to be dogmatic about procedural rules when there are greater values at harms way. The observance of procedural norms is a key aspect of our legal system. It should however never obtain priority to the protection of rights and fundamental freedoms.

[45] In conclusion, therefore, we are satisfied that the Petitioner's challenge of the Government Directive before the High Court was justified, and that the High Court's finding is anchored in law. We applaud the High Court for its detailed analysis of the law and reasoning. Consequently, we find that the appeal is unmeritorious and dismisses the same with costs. We uphold the decision of the High Court dated 26th day of July 2013 quashing the relevant Government Directive. The Appellants will bear the costs of the appeal as well as the costs of the proceedings before the High Court.

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

[S.B. Woldemariam] (P)

.....

Judge of Appeal

[P. Muhizi]

5. CONCLUSION AND REFLECTIONS

This refugee judgments rewriting project brought into collaboration two lawyers from East Africa. The first author is a lawyer from Ethiopia. Currently, he is a lecturer at the Newcastle School of Law and Justice, the University of Newcastle, Australia. While the first author does not have a lived experience of being a refugee, he is passionate about refugee issues and researches in the area. The second author is a lawyer in Kenya. He is originally from Rwanda and has been a refugee in Kenya from 2008 to date. He studied law and got admitted to the Bar as an advocate of the High Court of Kenya. He is currently practising law before Kenyan courts. As previously mentioned in section 3, our professional and lived experience informed the perspectives reflected in the rewritten judgment.

The main goal of the rewritten judgment is to assert the position and role of the judiciary in the protection and promotion of the rights of refugees and asylum-seekers. The judiciary is often sidelined by the executive branch of the Government on matters involving refugees and asylum-seekers. Without the judiciary's active role, the policies set and implemented

remain unchecked for their constitutionality and compliance with human rights obligations. These policies also negatively impact refugees who are vulnerable on many grounds such as being outside of their country of origin, being unable to avail themselves of the protections of their country, being disconnected from their social networks and being unable to work and support themselves unless allowed by the authorities of the host country to mention a few. The judiciary is therefore the last frontier of justice for refugees and asylum-seekers.

Another important point that we need to make is to caution readers against construing this judgment rewriting piece as a broad-brush criticism of the Kenyan refugee protection system. Kenya has been and remains one of the generous host countries for refugees and asylum-seekers in the East African region. The regulatory restrictions that refugees and asylum-seekers face in Kenya, such as encampment and limited opportunities to engage in wage-earning activities, are not an exception but typical of many host countries in the region. In that sense, the perspectives expressed in the rewrite are equally relevant to other host countries. Irrespective of in which host country it happens, the concerned judiciary needs to be active to put to check laws and policies that unduly securitise refugee protection.

Refugee Survey Quarterly, 2024, 43, 169–189
https://doi.org/10.1093/rsq/hdad025
Article