

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**HCJR OF 2024**

**KENYA HUMAN RIGHTS COMMISSION.....1<sup>ST</sup> APPLICANT**  
**KATIBA INSTITUTE.....2<sup>ND</sup> APPLICANT**  
**KENYA SECTION OF THE INTERNATIONAL**  
**COMMISSION OF JURISTS (ICJ KENYA).....3<sup>RD</sup> APPLICANT**  
**TRANSPARENCY INTERNATIONAL KENYA (TI).....4<sup>TH</sup> APPLICANT**  
**THE INSTITUTE FOR SOCIAL**  
**ACCOUNTABILITY (TISA).....5<sup>TH</sup> APPLICANT**  
**AFRICA CENTER FOR OPEN GOVERNANCE.....6<sup>TH</sup> APPLICANT**  
**SIASA PLACE.....7<sup>TH</sup> APPLICANT**  
**TRIBELESS YOUTH.....8<sup>TH</sup> APPLICANT**  
**MUSLIMS FOR HUMAN RIGHTS (MUHURI).....9<sup>TH</sup> APPLICANT**  
**VERSUS**  
**JAPHET KOOME NCHEBERE.....RESPONDENT**  
**LAW SOCIETY OF KENYA.....1<sup>ST</sup> INTERESTED PARTY**  
**KENYA MEDICAL PRACTITIONERS,**  
**PHARMACISTS, AND DENTISTS’ UNION(KMPDU),2<sup>ND</sup> INTERESTED PARTY**  
**KENYA UNION OF CLINICAL OFFICERS.....3<sup>RD</sup> INTERESTED PARTY**

**CERTIFICATE OF URGENCY**

We, Ochiel Dudley and Aileen Imbosa, Advocates, certify this matter urgent because:

1. On 14 April 2024, the Inspector General of the National Police Service, Japhet Koome Nchebere (Nchebere) **suspended Articles 36, 37, and 41 of the Constitution** by cancelling medics rights to strike, assemble, protest, or picket peaceably and unarmed.
2. Applicants challenge Nchebere’s decision to suspend the Constitution. Based on the doctrine of command responsibility, they seek to hold him culpable for any harm by police officers under his command.
3. Nchebere threatens, meanwhile, to “deal decisively and firmly” with the striking and picketing medics. Applicants fear that this directive requires police officers to forcefully disperse peaceful and unarmed protests by the medics. This directive also imperils the rights and lives of the medics by motivating police officers to harm the striking and picketing medics on the pretext of enforcing the impugned order. This directive also has a chilling effect on the public’s right to strike or to picket peaceably and unarmed. The danger of violating the Constitution is real; the urgency to address the issue is self-evident.

Dated at Nairobi on 15 April 2024

Ochiel J Dudley  
Advocate for the Applicants

Jointly drawn and filed by:

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**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**HCJR \_\_\_\_\_ OF 2024**

**IN THE MATTER OF:**  
**ARTICLES 24, 36, 37, 41, 47, 238, 245, AND 258 OF THE CONSTITUTION**  
**AND**  
**FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**  
**NATIONAL POLICE SERVICE ACT,**  
**AND**

**JAPHETH KOOME NCHEBERE’S DECISION ON 14 APRIL 2024 TO SUSPEND**  
**ARTICLE 36, 37, AND 41 OF THE CONSTITUTION BY CANCELLING THE**  
**MEDICS’ RIGHT TO STRIKE OR TO PICKET PEACEFULLY AND UNARMED**  
**AND**

**THE DOCTRINE OF COMMAND RESPONSIBILITY**  
**AND**

**KENYA HUMAN RIGHTS COMMISSION.....1<sup>ST</sup> APPLICANT**  
**KATIBA INSTITUTE.....2<sup>ND</sup> APPLICANT**  
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**VERSUS**

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**KENYA MEDICAL PRACTITIONERS,**  
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**KENYA UNION OF CLINICAL OFFICERS.....3<sup>RD</sup> INTERESTED PARTY**

## CHAMBER SUMMONS

Let all parties concerned attend the court on the ..... day of .....2024 for hearing of this application for orders that:

1. This application be certified urgent for ex parte directions.
2. Under Article 23 of the Constitution and section 11 of the Fair Administrative Actions Act, 2015, Applicants be and are given leave to apply for judicial review orders of:
  - (a) Prohibition restraining the Respondent, Japhet Koome Nchebere, the Inspector General of the National Police Service, or any officer subordinate to him, from enforcing Nchebere's decision of 14 April 2024 to suspend Articles 36, 37, and 41 of the Constitution by cancelling medics' right to strike and to picket peaceably and unarmed.
  - (b) Certiorari quashing Nchebere's decision of 14 April 2024 to suspend Articles 36, 37, and 41 of the Constitution by cancelling medics' right to strike and to picket peaceably and unarmed.
  - (c) A declaration that the Inspector General of National Police Service, such as Nchebere, or other superior officer are personally liable under the doctrine of command responsibility for:
    - (i) issuing unconstitutional orders and directives to officers under their command to use unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets under Articles 36, 37, and 41 of the Constitution.
    - (ii) abdicating effective control of police officers under their command by failing to investigate and discipline officers who violate the Constitution by using unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets contrary to Articles 36, 37, and 41 of the Constitution.
  - (d) A structural interdict or supervisory mandamus be and is issued directing the Respondent to investigate and to discipline police officers who have violated the Constitution, by using unlawful force, to disperse peaceable and unarmed strikes, assemblies, protests, and pickets by the medics contrary to Articles 36, 37, and 41 of the Constitution.
    - (i) The investigation to include the OCPD of Capitol Hill Police Station and any other officer culpable for using unlawful force against Dr Davji Atela and other medics at a peaceable and unarmed strike,

assembly, protest, or picket on 29 February 2024 at Afya House.

- (ii) The court further orders the Respondent to file an affidavit within 30 days of the court's order, outlining his steps to comply.
  
  - (e) The Respondent, from his personal funds, pays Dr Davji Atela, compensation in the form of general damages (under Article 23 of the Constitution and section 7(1)(j) of the FAA) for violating his rights while using unlawful force, to disperse the peaceable and unarmed picket at Afya House, Nairobi on 29 February 2024.
  
  - (f) A costs order requiring the Respondent to pay, from his personal funds, the costs of this litigation, to deter his future attempts to suspend Articles 36, 37, and 41 of the Constitution or his use or authorisation of the use of unlawful force, to disperse peaceable and unarmed strikes, assemblies, protests, and pickets contrary to Articles 36, 37, and 41 of the Constitution.
3. Grant of leave to operate as stay restraining the Respondent, Japhet Koome Nchebere, the Inspector General of the National Police Service, or any officer subordinate to him, from enforcing the Inspector General's decision of 14 April 2024 to suspend Articles 36, 37, and 41 of the Constitution by cancelling medics' right to strike and to picket peaceably and unarmed.

Which application is based on the grounds:

1. The current Inspector General of the National Police Service, Japhet Koome Nchebere (Nchebere) habitually acts with high impunity. He regularly directs subordinate police officers to disperse peaceable and unarmed protests forcibly and violently (sometimes lethally). At times, he personally participates in forcibly dispersing peaceful assemblies.
2. And he never investigates or disciplines police officers who forcibly, violently, or lethally disperse peaceable and unarmed protests. For example, he has failed to investigate or discipline the police officers (including the OCPD for Capitol Hill) who violently attacked Dr Davji Atela on 29 February 2024 at a peaceable picket at Afya House.
3. The few protests that Nchebere fancies he facilitates and watches over. Such was the case with the protest at Milimani Law Courts in support of the housing levy verdict. Nor did Nchebere disperse the protest through town and around the Supreme Court over the

same levy. Such open and glaring **bias** by an officer who should be neutral, is discriminatory and violates Article 27, 47 of the Constitution and the FAA.

4. Nchebere has thus neutered the citizen's rights in Articles 36, 37, and 41 of the Constitution. And he has grabbed for himself the sole privilege of determining who does, and who does not, enjoy the rights to assemble, picket, protest, or strike under Articles 36, 37, and 41 of the Constitution.
5. Yet under Article 19(3)(a), the rights and fundamental freedoms in the Bill of Rights are not granted by the State or any State officer. And the Bill of Rights applies to all law and binds all State organs and all persons. With Article 20(2) entitling every person to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
6. True to habit, on 14 April 2024, Nchebere claimed to suspend Articles 36, 37, and 41 of the Constitution by cancelling medics' right to strike, assemble, protest, or picket peaceably and unarmed. He disclosed that he had directed Police Commanders to "deal firmly and decisively" with the striking and picketing medics. To him, the medics had "become a public nuisance" by "blowing whistles and vuvuzelas during the demonstrations". Blowing whistles and vuvuzelas is exactly what striking and picketing workers do. Not just in Kenya.
7. By contrast, a State organ, the **Kenya National Commission on Human Rights** observes that the medics have in their strike been:

**peaceful** save for the **appalling act of violence and use of unnecessary and excessive force perpetrated** against members of the Kenya Medical Practitioners, Pharmacists, and Dentists Union (KMPDU) during their **peaceful demonstration** on 29 February 2024 in Nairobi during which the KMPDU Secretary General, Dr Davji Atela was **gravely injured by a teargas canister by the police.**
8. Thus, violating Articles 24 and 47, Nchebere's decision is disproportionate and intrusively limits the rights of the medics to strike, assemble, or picket under Articles 36, 37, and 41 of the Constitution.

9. The use of teargas or firearms, as a first option anyway, to disperse peaceable and unarmed medics on 29 February 2024 was unreasonable. First, the decision was illegal under international and local law (including this court's decisions). Second, the decision was so outrageous in its defiance of logic that no reasonable Inspector General of Police would replicate it.
10. Nchebere's actions, overall, are *ultra vires* Article 47 of the Constitution and section 4 of the FAA permitting only lawful, reasonable, and procedurally fair administrative actions.
11. So Applicants challenge Nchebere's decision to suspend the Constitution. Based on the **doctrine of command responsibility** they seek to hold Nchebere personally liable for:
  - (i) issuing unconstitutional orders and directives to officers under his command to use unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets despite Articles 36, 37, and 41 of the Constitution; and
  - (ii) abdicating effective control of police officers under their command by failing to investigate and discipline officers who violate the Constitution by using unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets despite Articles 36, 37, and 41 of the Constitution
12. Applicants thus seek leave to apply for judicial review on grounds including: **breach of rules of natural justice and bias, un-proportionality, unreasonableness, failure to perform a public duty, and illegality.**
13. On 14 April 2024 Applicants issued, and Nchebere ignored, a demand to retract the unlawful directive and to apologise for the violation of Dr Davji Atela's rights by the police. Applicants issued a notice expiring at 6:00pm on Sunday, 14 April 2024 because this matter concerns life and death.
14. This matter is urgent because of Nchebere's threat meanwhile to "deal decisively and firmly" with the striking and picketing medics. This threat imperils the rights and lives of the medics because police officers would enforce it by harming the medics under pretext of enforcing the impugned order. The decision also has a chilling effect on the right to strike, assembly, or to picket peacefully and unarmed. The danger of violating the Constitution is real; the urgency to address the issue is self-evident.

15. Unless leave operates as stay, Nchebere will render this matter **nugatory**. He would enforce his unconstitutional decision suspending Articles 36, 37, and 41 of the Constitution while this case is pending. The case would be nugatory too if police officers follow Nchebere's orders and harm the striking and picketing medics.
16. Such an outcome would distort this court's power to enforce the Bill of Rights through appropriate judicial review orders at every stage of the proceeding.

This application is supported by the statutory statement and verifying affidavit of Davis Malombe, and by submissions at the hearing of the main motion.

Dated at Nairobi on 15 April 2024

Ochiel J Dudley  
Advocate for the Applicants

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**STATUTORY STATEMENT**

**A. INTRODUCTION**

1. This application challenges the decision by Japhet Koome Nchebere (the Inspector General National Police Service to suspend Articles 36, 37, and 41 of the Constitution, by cancelling medics rights to strike, assemble, protest, or picket peaceably and unarmed. Applicants challenge Nchebere’s decision to suspend the Constitution. Based on the doctrine of command responsibility, they seek to hold him personally liable for the conduct of police officers under his command.
2. Applicants thus seek leave to apply for judicial review for: **breach of rules of natural justice and bias, un-proportionality, unreasonableness, failure to perform a public duty, and illegality.**

## **B. PARTIES**

### **(i) Applicants**

3. Kenya Human Rights Commission (KHRC), 1<sup>st</sup> Applicant, is a non-governmental organization whose objectives include promoting human rights and fundamental freedoms, good governance, and democracy.
4. The 2<sup>nd</sup> Applicant, Katiba Institute, the 1<sup>st</sup> Petitioner, is a constitutional research, policy, and litigation institute formed to further the implementation of Kenya's 2010 Constitution.
5. Founded in 1952, International Commission of Jurists-Kenya (ICJ Kenya), the 3<sup>rd</sup> Applicant, is an international, non-partisan, and non-profit registered professional society with long-established and well-recognised expertise in the rule of law.
6. Transparency International Kenya, the 4<sup>th</sup> Applicant, is a not-for-profit organisation founded in 1999 to develop a transparent and corruption-free society through good governance and social justice.
7. The Institute for Social Accountability (TISA), 5<sup>th</sup> Applicant, seeks to support active and meaningful citizen engagement by enhancing the effectiveness of transparency, accountability, and participation in governance processes.
8. Africa Centre for Open Governance (AFRICOG), the 6<sup>th</sup> Petitioner, is an independent, non-profit organisation. They provide cutting edge research and monitoring on governance and public ethics issues in both the public and private sectors. They aim to address the structural causes of the crisis of governance in East Africa.
9. Siasa Place, the 7<sup>th</sup> Applicant, promotes the people's participation in democratic processes through research, training, civic education, networking and strategic partnerships.
10. The 8<sup>th</sup> Applicant, Tribeless Youth, is a legal resident of Nakuru County. The organisation is a youth initiative started in 2016 to promote peaceful coexistence among the youth in Kenya.
11. Muslims for Human Rights (MUHURI) the 9<sup>th</sup> Applicant, is a human rights organization based in Kenya that works to promote and protect the *human rights of all* people.

**(ii) Respondent**

12. Japhet Nchebere Koome is the Inspector General of the National Police Service, sued in person under the doctrine of command responsibility. His office is a constitutional office established under Article 245 of the Constitution of Kenya, 2010 and mandated to superintend the investigation of offences or to enforce the law against any person or persons.

**(iii) Interested Party**

13. Law Society of Kenya, the 1<sup>st</sup> Interested Party, is Kenya's premier bar association directed by Law Society of Kenya Act, 2014 to uphold the Constitution of Kenya and to assist the courts and protect the public in legal matters.
14. Kenya Medical Practitioners Pharmacists and Dentists' Union (KMPDU), the 2<sup>nd</sup> Interested Party, is a union of medical practitioners, pharmacists, and dentists in Kenya.
15. Kenya Union of Clinical Officers (KUCO) is a trade union with the mandate to champion for the rights of clinical officers at both levels of government in Kenya.

**C. FOUNDING FACTS**

16. As Inspector General of the National Police Service, Japhet Koome Nchebere (Nchebere) habitually acts with high impunity. He regularly directs subordinate police officers to disperse, peaceable and unarmed protests, forcibly and violently (sometimes lethally). At times, he personally participates in forcibly dispersing peaceful assemblies.
17. And he never investigates or disciplines police officers who forcibly, violently, or lethally disperse peaceable and unarmed protests. For example, he has never investigated or disciplined the police officers (including the OCPD for Capitol Hill) who violently attacked Dr Davji Atela on 29 February 2024 at a peaceful and unarmed protest at Afya House.
17. The few protests that Nchebere fancies he facilitates and watches over. Such was the case with the protest at Milimani Law Courts in support of the housing levy verdict. Nor

did Nchebere disperse the protest through town and around the Supreme Court over the same levy.

18. Nchebere has thus neutered the rights in Articles 36, 37, and 41 of the Constitution. And has conferred on himself the sole privilege of determining who does, and who does not, enjoy the rights to assemble, picket, protest, or strike under Articles 36, 37, and 41 of the Constitution.
19. True to habit, on 14 April 2024, Nchebere claimed to suspend Articles 36, 37, and 41 of the Constitution by cancelling medics' right to strike, assemble, protest, or picket peaceably and unarmed. He disclosed that he had directed County Commanders around the country to "deal firmly and decisively" with the striking medics.
20. By contrast, a State organ, the **Kenya National Commission on Human Rights (KNCHR)** observes that the medics have in their strike been:

peaceful save for the **appalling act of violence and use of unnecessary and excessive force perpetrated** against members of the Kenya Medical Practitioners, Pharmacists, and Dentists Union (KMPDU) during their **peaceful demonstration** on 29 February 2024 in Nairobi during which the KMPDU Secretary General, Dr Davji Atela was **gravely injured by a teargas canister by the police**
21. Therefore, violating Articles 24 and 47, Nchebere's decision is disproportionate and intrusively limits the rights of the medics to strike, assemble, or picket under Articles 36, 37, and 41 of the Constitution.
22. Nchebere's actions are *ultra vires* Article 47 of the Constitution and section 4 of the Fair Administrative Action Act, 2015 permitting only lawful, reasonable, and procedurally fair administrative actions.
23. Applicants challenge Nchebere's decision to suspend the Constitution. Based on the **doctrine of command responsibility** they seek to hold Nchebere personally liable for:
  - (iv) issuing unconstitutional orders and directives to officers under his command to use unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets despite Articles 36, 37, and 41 of the Constitution; and

- (v) abdicating effective control of police officers under their command by failing to investigate and discipline officers who violate the Constitution by using unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets despite Articles 36, 37, and 41 of the Constitution
24. On 14 April 2024 Applicants issued, and Nchebere ignored, a demand to retract the unlawful directive and to apologise for violating Dr Davji Atela’s rights. The notice expired at 6:00pm on Sunday, 14 April 2024 leaving Applicants with no recourse than these court proceedings.
  25. The matter is urgent because Nchebere threatens meanwhile to “deal decisively and firmly” with the striking and picketing medics. This threat furthermore imperils the rights and lives of the medics because it may motivate police officers to harm the medics under pretext of enforcing the impugned order. The decision could also have a chilling effect on the right to strike or to picket peacefully and unarmed. The danger of violating the Constitution is real; the urgency to address the issue is self-evident.
  26. Unless leave operates as stay of the decision of 14 April 2024, Nchebere will render this matter **nugatory**. He would enforce his unconstitutional decision suspending Articles 36, 37, and 41 of the Constitution while this case is pending. The case would be nugatory too if police officers follow Nchebere’s orders and harm the striking and picketing medics.
  27. Such an outcome would distort this court’s power to enforce the Bill of Rights through appropriate judicial review orders at every stage of the proceeding.

## **D. LEGAL GROUNDING**

### **(i) Constitution of Kenya, 2010**

18. Under Article 36, every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.
19. Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities under Article 37 of the Constitution.
20. Article 41 grants fair labour rights, every person has the right to fair labour practices.

- (2) Every worker has the right—
  - (a) to fair remuneration;
  - (b) to reasonable working conditions;
  - (c) **to form, join or participate in the activities and programmes of a trade union;** and
  - (d) **to go on strike.**
- ....
- (4) Every trade union and every employers' organisation has the right—
  - (a) **to determine its own administration, programmes and activities:**
  - (b) to organise; and
  - (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

21. Article 244 demands that the National Police Service shall—

- (a) strive for the highest standards of professionalism and discipline among its members;
- (b) prevent corruption and promote and practice transparency and accountability;
- (c) comply with constitutional standards of human rights and fundamental freedoms;
- (d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and
- (e) foster and promote relationships with the broader society.

22. The Inspector-General, under Article 245(2), has independent command over the National Police Service, and performs any other functions prescribed by national legislation.

**(ii) National Police Service Act, 2011**

23. On the responsibility of the Inspector General for command and discipline of the service section 8A provides:

- (1) ... the Inspector-General shall be **responsible for all matters relating to the command and discipline of the Service subject to disciplinary control of the Commission.**
- (2) The Inspector-General shall **exercise Command over the National Police Service and lawfully administer,**

**control and manage the National Police Service as a disciplined Service.**

- (3) ...
- (4) The Inspector-General shall execute command by **issuing lawful orders, directives or instructions** to and through the Deputy Inspectors General;

24. Along with that, section 49 on the general powers of police officers states:

- (1) Subject to Article 244 of the Constitution and the Bill of Rights, a police officer may exercise such powers and shall perform such duties and functions as are by law imposed or conferred on or assigned to a police officer.
- (3) Police officers shall **make a report of all daily occurrences and incidents encountered** and make it available **to their superior**.
- (4) A police officer who performs an official duty or exercises police powers shall perform such duty or exercise such power in a manner that is lawful.
- (5) Where a police officer is authorized by law to use force, the officer shall do so in compliance with the guidelines set out in the Sixth Schedule.
- (10) **A police officer shall respect the law**, regulations and the Service Standing Orders, and **to the best of their capability, prevent and oppose any violations of them**.

**(iii) Fair Administrative Action Act, 2015**

- 25. Section 4(1) of the Fair Administrative Action Act, 2015 guarantees every person the right to administrative action that is *expeditious, efficient, lawful, reasonable and procedurally fair*.
- 26. Section 2 of the Act defines “administrative action” as “powers, functions and duties exercised by authorities”; or “any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person affected by the action”.
- 27. Under section 7 of the Fair Administrative Action Act, 2015 this court is entitled to review administrative action where:

**The administrator—**

- a. denied the person to whom the decision relates, a reasonable opportunity to state the person’s case
- b. unreasonably delayed or failed to act in discharge of a duty imposed under any written law
- c. was biased or may reasonably be suspected of bias

- d. acted in excess of jurisdiction or power conferred under any written law

**The administrative action:**

- a. is not proportionate to the interests or rights affected
- b. was materially influenced by an error of law;
- c. is unfair or procedurally unfair;
- d. is unreasonable or not informed by the reasons given for it.
- e. is taken or made in abuse of power

28. In turn, Article 23 and section 11 of the FAA empower judicial review courts to grant any order that is just and equitable, including an order:

- i. **declaring** the rights of the parties in respect of any matter to which the administrative action relates;
- ii. **restraining** the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant
- iii. **prohibiting** the administrator from acting in a particular manner;
- iv. **setting aside** the administrative action or decision
- v. **compelling** the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right
- vi. **granting** a temporary **interdict** or other temporary relief
- vii. for the **award of costs** or other **pecuniary compensation** in appropriate cases

29. That said, under section 11(2)(a) and (b) of the FAA, in proceedings for judicial review for failure to act, the court may grant any order that is just and equitable. The court may direct the taking of the decision or declare the rights of the parties in relation to the taking of the decision.

**E. GROUNDS OF REVIEW - PARTICULARS OF UNCONSTITUTIONALITY**

**(i) Breach of rules of natural justice and bias**

30. First, Nchebere's decision to cancel the medics right to strike and to picket peaceably and unarmed is a non-decision for violating the rules of natural justice under Articles 47 and 50 and sections 4(1), 7(2)(a)(v) and 7(2)(c) of the FAA. Nchebere heard none of the



medics' unions before deciding to suspend their right to strike, assemble, or picket peacefully and unarmed under Article 36, 37, and 41.

28. Besides the decision is actuated with bias because Nchebere cancels protests that he dislikes while facilitating and watching over the ones he fancies. Such was the case with the protest at Milimani Law Courts to support the Housing Levy by certain artisans. Or the march through the CBD and around the Supreme Court in support of the same levy. Nchebere did not interfere with either of these assemblies or pickets.
29. The open bias in selectively respecting the rights of groups Nchebere likes, while curtailing the rights of groups that he dislikes, is discriminatory and violates Article 27 of the Constitution. The bias also violates section 7(2)(a)(iv) of the FAA empowering the court to review an administrative action where the actor is biased or may reasonably be suspected of bias.

**(ii) Unreasonableness: an outrageous decision disconnected from the reasons given for it**

31. Second, Nchebere's decision is not only unreasonable for lacking reasons, but is also outrageous in its defiance of logic. No reasonable and informed Inspector General of the National Police Service would cancel the rights in Article 36, 37, and 41 on a whim.
32. Nchebere's decision is not informed by any reasons or is backed by implausible reasons. The decision to cancel the medics' right is not rationally connected to the reasons given for it under Article 47.
33. To the Inspector General, the medics had "become a public nuisance" by "blowing whistles and vuvuzelas during the demonstrations". But blowing whistles and vuvuzelas is exactly what striking and picketing workers do. Not just in Kenya. Again, a State organ, the **Kenya National Commission on Human Rights** observes that the medics have in their strike been:

**peaceful** save for the **appalling act of violence and use of unnecessary and excessive force perpetrated** against members of the Kenya Medical Practitioners, Pharmacists, and Dentists Union (KMPDU) during their **peaceful demonstration** on 29 February 2024 in Nairobi during which the KMPDU Secretary General, Dr Davji Atela was **gravely injured by a teargas canister by the police**

34. Thus, the decision to cancel the medics' right is not rationally connected to the reasons given for it despite Article 47 and section 7(2)(i)(iv) of the FAA. The decision also violates Article 24 requiring a rational connection between a limitation of rights and the purpose of the limitation. For all this, the decision is unreasonable hence unconstitutional and invalid.

**(ii) Un-proportionality**

35. Third, the decision to cancel the rights of medics to strike, protest, assemble, and picket is disproportionate and unlawful.

36. Article 24 demands a balance between any limitation and its purpose. The State must pick the less restrictive means to achieve that purpose. Under section 7(2)(l) of FAA, the court will equally review administrative action or decisions which are not proportionate to the interests or rights affected.

37. By these provisions, a limitation is only justified where that limitation is proportionate to the objective pursued. Even where the goal is of sufficient importance and those measures are rationally connected to the objective, the limitation may still not be justified because of the severity of its impact on individuals or groups.

38. In this case, cancelling the rights of medics who have “in their strike been **peaceful** save for the **appalling act of violence and use of unnecessary and excessive force perpetrated**” by police officers is disproportionate. Because the decision is disproportionate, it impairs the right to strike, assemble, or picket under Articles 36, 37, and 41 of the Constitution. The absence of proportionality renders the decision unconstitutional and invalid under Article 24 and section 7(2)(l) of FAA.

39. The other aspect of un-proportionality relates to the attack on Dr Atela by the police at a peaceful picket on 29 February 2024 at Afya House. There was no need to deploy the teargas canister. Nor need to shoot the canister directly at Dr Atela's head.

40. Under the law, where use of force is unavoidable, its use must be consistent with, first of all, the principle of legality; that is, the use of force is justified on the basis that it has a legitimate objective and it is within a regulatory framework that provides for it in the given situation.

41. Second, it must comply with the principle of necessity; that is, the use of force must be limited and only resorted to when other means are not available to achieve the legitimate objective. The principle of necessity has three components—qualitative, quantitative and temporary – that must be established: what force, how much force and when its use ends, which includes when an objective cannot be achieved.
42. Third, the principle of proportionality, whereby the means and methods employed must be commensurate with the resistance offered and the existing danger. In other words, law enforcement officials must not cause more harm than the harm they are seeking to prevent. For example, regarding lethal force, this should only be authorized for use to endanger a life if it is needed to save another life.
43. Furthermore, officials must always seek to minimize damage, protect life and physical integrity, and provide immediate assistance. In addition to the principles on the use of force, there is the obligation to ensure accountability. This means not only that individual police officers must be held accountable for their actions and omissions, but also all superiors who give orders to, supervise or otherwise command and control law enforcement officials, or who are responsible for the planning and preparation of law enforcement operations.
44. As far as possible, police officers must use non-violent means and, prior to the use of force, exhaust other means of negotiation and control and be suitably equipped so that, if necessary, force is used gradually and, in a manner, appropriate to the level of resistance encountered, depending on the “degree of cooperation, resistance or aggression” at any given moment.
45. Failing all the above, the violent attack on Dr Atela on 29 February 2024 was disproportionate and unnecessary in an open and democratic society governed by the rule of law. The attack constitutes an abuse of power and is therefore reviewable by this court on that ground.

(v) **Failure to perform a public duty**

46. Fourth, Nchebere has failed to perform the public duty of exercising discipline over the police force and issuing constitutional orders.
47. Under section 7(2)(j) of the FAA, unreasonable delay or failure to act in discharge of a duty imposed under any written law is a ground for review. Article 245(2)(b) requires the Inspector General to exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.
48. Section 8A(1) of the National Police Service Act, 2011 makes the Inspector General “responsible for all matters relating to the command and discipline of the Service subject to disciplinary control of the Commission”. He must exercise command over and **lawfully** administer, control, and manage the National Police Service as a **disciplined service** under section 8A(2) of the NPS Act. Section 8A(4) directs the Inspector General to “execute command by issuing lawful orders, directives, or instructions”. Under section 49(4) a “police officer who performs an official duty or exercises police powers shall perform such duty or exercise such power in a manner that is lawful”.
49. In this case, Nchebere did not “execute command by issuing lawful orders, directives, or instructions”, instead on 14 April 2024 he crafted and issued an unconstitutional directive suspending Articles 36, 37, and 41 by cancelling the rights of medics to strike and picket peaceably and unarmed. He has also abdicated effective control of police officers under his command by failing to investigate and discipline officers who violate the Constitution by using unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets contrary to Articles 36, 37, and 41 of the Constitution.
50. For example, he has not investigated or disciplined the police officers (including the OCPD for Capitol Hill) who violently attacked Dr Davji Atela on 29 February 2024 at a peaceable picket at Afya House.
51. Under section 49(4) any “police officer who performs an official duty or exercises police powers shall perform such duty or exercise such power in a manner that is lawful”. Nchebere therefore knew or ought to have known about the plan to attack Dr Atela. He did not stop the plan.

30. Besides, the court should impose personal liability to stop Nchebere’s habitual impunity. He often directs subordinate police officers to disperse peaceable and unarmed protests forcibly and violently (sometimes lethally). At times, he personally participates in forcibly dispersing peaceful assemblies.
31. The Respondent has thus failed in his duty to “execute command by issuing lawful orders, directives, or instructions” and to maintain “discipline of the Service”. The court has power to review this failure to perform and under section 11(1)(f) compel the administrator to perform a public duty owed in law and over which the applicant has a legally enforceable right. His habitual illegal directives and his unlawful omissions trigger his personal liability under the doctrine of command responsibility.

**(vi) Illegality**

32. Nchebere’s cancellation of the right to strike, assemble, protest, or picket peaceably and unarmed is illegal. No law allows him to cancel those rights. Nor can he limit anyone’s rights outside Article 24 of the Constitution.
33. Nchebere’s cancellation of the medics’ right to strike, assemble, protest, or picket peaceably and unarmed is illegal. No law allows him to cancel those rights. By cancelling, instead of facilitating the enjoyment of the rights, Nchebere acted more than the jurisdiction or power conferred on him by Article 244 and 245 of the Constitution.
34. Besides, Nchebere violated his duty to “execute command by issuing lawful orders, directives, or instructions” under section 8A(2) of the NPS Act and violated his duty under section 49(4) of the Act to perform his duties or exercise his powers in a manner that is lawful.

**F. RELIEFS**

38. As a result, invoking Article 23 of the Constitution and section 11 of the FAA, the Applicants seek the following or other appropriate reliefs:
  - (a) Prohibition restraining the Respondent, Japhet Koome Nchebere the Inspector General of the National Police Service, or any officer subordinate to him, from enforcing Nchebere’s decision of 14 April 2024 to suspend Articles 36, 37, and 41 of the Constitution by cancelling medics’ right to strike and to picket peaceably and unarmed.

- (b) Certiorari quashing Nchebere's decision of 14 April 2024 to suspend Articles 36, 37, and 41 of the Constitution by cancelling medics' right to strike and to picket peaceably and unarmed.
- (c) A declaration that the Inspector General of National Police Service, such as Nchebere, or other superior officer are personally liable under the doctrine of command responsibility for:
  - (i) issuing unconstitutional orders and directives to officers under their command to use unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets under Articles 36, 37, and 41 of the Constitution.
  - (ii) abdicating effective control of police officers under their command by failing to investigate and discipline officers who violate the Constitution by using unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets contrary to Articles 36, 37, and 41 of the Constitution.
- (d) A structural interdict or supervisory mandamus be and is issued directing the Respondent to investigate and to discipline police officers who have violated the Constitution, by using unlawful force, to disperse peaceable and unarmed strikes, assemblies, protests, and pickets by the medics contrary to Articles 36, 37, and 41 of the Constitution.
  - (i) The investigation to include the OCPD of Capitol Hill Police Station and any other officer culpable for using unlawful force against Dr Davji Atela and other medics at a peaceable and unarmed strike, assembly, protest, or picket on 29 February 2024 at Afya House.
  - (ii) The court further orders the Respondent to file an affidavit within 30 days of the court's order, outlining his steps to comply.
- (e) The Respondent, from his personal funds, pays Dr Davji Atela, compensation in the form of general damages (under Article 23 of the Constitution and section 7(1)(j) of the FAA) for violating his rights while using unlawful force, to disperse the peaceable and unarmed picket at Afya House, Nairobi on 29 February 2024.
- (f) A costs order requiring the Respondent to pay, from his personal funds, the costs of this litigation, to deter his future

attempts to suspend Articles 36, 37, and 41 of the Constitution or his use or authorisation of the use of unlawful force, to disperse peaceable and unarmed strikes, assemblies, protests, and pickets contrary to Articles 36, 37, and 41 of the Constitution.

Dated at Nairobi on 15 April 2024

Ochiel J Dudley  
Advocate for the Applicants

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violently attacked Dr Davji Atela on 29 February 2024 at a peaceable picket at Afya House.

4. The few protests that Nchebere fancies, he facilitates and watches over. Such was the case with the protest on 28 December 2023 at Milimani Law Courts in support of the housing levy verdict. Nor did Nchebere disperse the protest through town and around the Supreme Court over the same levy. Such open and glaring **bias** by an officer who should be neutral, is discriminatory and violates Article 27, 47 and the FAA.
5. Nchebere has thus neutered the citizen's rights in Articles 36, 37, and 41 of the Constitution. And he has grabbed for himself the sole privilege of determining who does, and who does not, enjoy the rights to assemble, picket, protest, or strike under Articles 36, 37, and 41 of the Constitution.
6. Yet under Article 19(3)(a), the rights and fundamental freedoms in the Bill of Rights are not granted by the State or any state officer. And the Bill of Rights applies to all law and binds all State organs and all persons. With Article 20(2) entitling every person to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
7. True to habit, on 14 April 2024, Nchebere claimed to suspend Articles 36, 37, and 41 of the Constitution by cancelling medics' right to strike, assemble, protest, or picket peaceably and unarmed. He disclosed that he had directed Police Commanders to "deal firmly and decisively" with the striking and picketing medics. To him, the medics had "become a public nuisance" by "blowing whistles and vuvuzelas during the demonstrations". Blowing whistles and vuvuzelas is exactly what striking and picketing workers do. Not just in Kenya. *I annex a copy of the press statement of 14 April 2024 marked as DM-1*
8. By contrast, a state organ, the **Kenya National Commission on Human Rights** observes that the medics have in their strike been:

**peaceful** save for the **appalling act of violence and use of unnecessary and excessive force perpetrated** against members of the Kenya Medical Practitioners, Pharmacists, and Dentists Union (KMPDU) during their **peaceful demonstration** on 29 February 2024 in Nairobi during which the KMPDU Secretary

General, Dr Davji Atela was **gravely injured by a teargas canister by the police**

*I annex a copy of the KNCHR statement of 15 April 2024 marked as **DM-2***

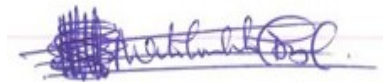
9. Thus, violating Articles 24 and 47, Nchebere's decision is disproportionate and intrusively limits the rights of the medics to strike, assemble, or picket under Articles 36, 37, and 41 of the Constitution.
10. The use of batons, teargas, or firearms, as a first option anyway, to disperse peaceable and unarmed medics on 29 February 2024 was unreasonable. First, the decision was illegal under international and local law (including this court's decisions). Second, the decision was so outrageous in its defiance of logic that no reasonable Inspector General of Police would replicate it.
11. Nchebere's actions, overall, are *ultra vires* Article 47 of the Constitution and section 4 of the FAA permitting only lawful, reasonable, and procedurally fair administrative actions.
12. So Applicants challenge Nchebere's decision to suspend the Constitution. Based on the **doctrine of command responsibility** they seek to hold Nchebere personally liable for:
  - (i) issuing unconstitutional orders and directives to officers under his command to use unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets despite Articles 36, 37, and 41 of the Constitution; and
  - (ii) abdicating effective control of police officers under their command by failing to investigate and discipline officers who violate the Constitution by using unlawful force to disperse peaceable and unarmed strikes, assemblies, protests, and pickets despite Articles 36, 37, and 41 of the Constitution
52. Applicants thus seek leave to apply for judicial review for: **breach of rules of natural justice and bias, un-proportionality, unreasonableness, failure to perform a public duty, and illegality.**
13. On 14 April 2024 Applicants issued, and Nchebere ignored, a demand to retract the unlawful directive and to apologise for the violation of Dr Davji Atela's rights by the police. Applicants issued a notice expiring at 6:00pm on Sunday, 14 April 2024 because this matter concerns life and death. *I annex a copy of our demand letter marked as **DM-3**.*

14. This matter is urgent because of Nchebere’s threat meanwhile to “deal decisively and firmly” with the striking and picketing medics. This threat imperils the rights and lives of the medics because police officers would enforce it by harming the medics under pretext of enforcing the impugned order. The decision also has a chilling effect on the right to strike, assembly, or to picket peacefully and unarmed. The danger of violating the Constitution is real; the urgency to address the issue is self-evident.
15. Unless leave operates as stay, Nchebere will render this matter **nugatory**. He would enforce his unconstitutional decision suspending Articles 36, 37, and 41 of the Constitution while this case is pending. The case would be nugatory too if police officers follow Nchebere’s orders and harm the striking and picketing medics.
16. Such an outcome would distort this court’s power to enforce the Bill of Rights through appropriate judicial review orders at every stage of the proceeding.
17. I swear this Affidavit from facts within my knowledge unless I have disclosed the source of the information.

Sworn in Nairobi on 15 April 2024 by Davis Malombe

Before me

Commissioner of Oaths



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Davis Malombe

**Drawn and filed by**

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