

Manoeuvring Through Legal Ambiguity: Dispersing of Unlawful Protests in Kenya

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Introduction

Article 37 of the Constitution of Kenya 2010 provides for the freedom of citizens to assemble, demonstrate, picket and present petitions to public authorities peacefully and unarmed. The right can only be limited by law to the extent that the limitation is reasonable and justifiable for democracy. Article 24 outlines factors that should be considered and these include: the nature of the right, purpose of the limitation, nature of the limitation, the rights of others and the availability of less restrictive means to achieve the purpose of the limitation.

The 2010 Constitution and international human rights instruments point to a clear establishment of a presumption in favour of peaceful assemblies where the term ‘peaceful’ enjoys a broad interpretation that includes conduct that may annoy or give offence or temporarily hinders, impedes or obstructs the activities of third parties (Constitution of Kenya 2010: Article 37; OSCE 2010:15). These are buttressed by provisions that call for protection of life, individual criminal responsibility for protesters who behave violently as opposed to holding organisers criminally liable for the conduct of other demonstrators, and minimal restrictions on the endurance of the protest even in the face of imminent danger like the presence of offensive weapons among the protesters (KNCHR 2017, ACHPR 2017:31). The National Police Service Standing Orders (2017: Chapter 58) also mandate police officers to conduct themselves in a manner that respects the rights and freedoms of all people.

Pursuant to the Public Order Act (Cap 56: Section 5 (8) (a) & (b)), the power to disperse a gathering by police is based on two conditions; if the organisers have not notified the Officer Commanding Station (OCS) of the intended gathering and if there is a clear, present or imminent danger of a breach of the peace or public order. This chapter is concerned with the second condition: Looking at the judicial interpretation of incidents where police have stopped a public gathering in light of breach of the peace. In practice, the resulting judgements have a bearing on police comprehension of their role in maintaining public order during demonstrations.

When it comes to managing protests, the law affords wide discretion to police officers. First, they determine when a peaceful assembly turns riotous and thus, unlawful. Public order laws rely almost absolutely on the subjective view of a police officer to render a

public gathering by three or more individuals a breach of the peace. Similar to ‘peaceful’ in the context of a protest, the meaning of ‘breach of the peace’ could be anything that disrupts the orderly conduct of society as interpreted by the officer. Second, their broad powers to disperse a peaceful assembly have in some instances, escalated to the use of lethal force especially when protesters defy orders to disperse. Third, they have power to arrest, without a warrant, persons who they believe to have committed a breach of the peace in their presence.

Jude McCulloh (2017:324) notes that the “police are the law on the street using their discretion in ways that either uphold or undermine human rights”. A similar perspective surmises that, “police are the street-level face of the government of the day” and as such “in places where the government is viewed with public hostility, the police are seen as its extension” (Mutahi and Ruteere 2019:7). It then follows that police discretion—being a combination of pre-existing attitudes, personality traits, prejudices and police experiences on the job—could be likened to a pendulum swinging between over-enforcement and under enforcement of the law at any given moment (Burke 2013:1003-1005).³² Contextually, this begs the question of what informs police perceptions of public order and the steps taken to address instances of unlawful behaviour during protests.

After this introduction, the paper assesses the current legal framework with regard to freedom of assembly and the attendant duty of police officers to disperse unlawful assemblies. Here, some shortcomings of putting the legal framework into effect by the courts and police are highlighted together with possible remedial measures drawn from the global human rights framework and insights on policing before making a conclusion.

An Assessment of the Legal Framework on Right to Assembly

Police have a duty to disperse public gatherings which in their view do not fall within the constitutional ambit of peaceful or unarmed. Their duty is also informed by laws such as the Public Order Act (Cap 56), Penal Code and National Police Service Act (NPSA). According to the Penal Code, unlawful assembly is: “Where three or more persons, being assembled with the intent to carry out some common purpose, conduct themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such assembly needlessly and without reasonable occasion provoke other persons to commit a breach of the peace” (Penal Code: Section 78(1)).

Once they begin to conduct themselves as intended by “causing a breach of the peace and to the terror of the public”, this unlawful assembly is called a riot (ibid: Section 78 (3)). As per the Penal Code, a riot is a misdemeanour (one-year imprisonment) but the sanction

³¹ According to Alafair Burke, in the context of protests, over enforcement is manifested through over-criminalisation of the pettiest of offences, excessive force and custodial arrests even where less strict options are available. Contrastingly, the dangers of under enforcement could be enabling criminal conduct, thus undermining public safety and deteriorating expectations about police efforts to equally protect the public.

increases depending on the circumstances. For instance, rioters who demolish structures are liable to life imprisonment while those who injure structures can get a seven-year imprisonment term (ibid: Section 85-86).³²

Police powers to disperse a public gathering are based on two conditions; failure to notify the OCS of an intended gathering, and a clear, present or imminent danger of a breach of the peace or public order (Cap 56: Section 5 (8) (a) & (b)). The power to issue a dispersal order lies with the OCS. Second, the OCS is not limited to just issuing a dispersal order, they may give “any other reasonable order”. Third, irrespective of the order chosen, the disruption should take into account rights and freedoms of the participants and others (ibid: Section 5(8) (b))—which the author has taken to mean those within the vicinity of the gathering but are not involved in the protest.

Like Cap 56, the Penal Code also provides for how a proclamation to disperse a public gathering should be done. One, a proclamation (dispersal order) can be made by a magistrate or any commissioned officer of the military forces including naval and air forces. Two, the dispersal order can be made in any form or way that these listed officers see fit. Third, the proclamation is made where twelve or more persons are assembled or when they (the listed officers) apprehend that a riot by twelve or more people is about to take place (Penal Code: Section 81).

If these orders are defied, the Penal Code provides for the offence of rioting after proclamation which is felonious and carries a punishment of life imprisonment upon conviction. Section 82 of the Penal Code expressly refers to force as a legitimate method of dispersing a protest after dispersal orders and other means described as ‘all things necessary for dispersing the persons assembled’ fail:

“If upon the expiration of a reasonable time after such proclamation is made, or after the making of such proclamation has been prevented by force, twelve or more persons continue riotously assembled together, any person authorised to make a proclamation, or any police officer, or any other person acting in aid of such person or police officer, may do all things necessary for dispersing the persons so continuing assembled and for apprehending them or any of them, and, if any person makes resistance, may use all such force as is reasonably necessary for overcoming such resistance, and shall not be liable in any criminal or civil proceeding for having, by the use of such force, caused harm or death to any person”.

Further, the Service Standing Orders (2017: Chapter 47 (1) (d)) provide that lawful use of force may be applied “to suppress or disperse a riotous mob committing or attempting to commit serious offences against life or property”. Nonetheless, the police officer should “do everything possible to ensure that all demonstrations are conducted peacefully” (ibid: Chapter 58 (1)(7)). As per the Orders, “a police officer may only use force and firearm in

³² Injuring structures, according to Section 86 of the Penal Code, means unlawfully damaging any building, railway, machine or structures. This is a petty offence in comparison with demolishing structures as per Section 85 which means unlawfully pulling down or destroying or beginning to pull down or destroy a building, railway, machine or structures.

accordance with the rules laid down in the Sixth Schedule to the NPSA”.

The NPSA outlines comprehensively the situations in which the police can use force lawfully: *“A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result. The force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the Standing Orders”* (NPSA 2011: Sixth Schedule para. 1).

Some of these terms are vague. For instance, ‘no promise of achieving the intended result’ or ‘non-violent means are ineffective’ and are left to the subjective interpretation of the security officer in order to justify breaking up a public gathering. This wide discretion is problematic. To begin, the regulation of non-violent means needs to be more elaborated and backed by a clear statement that there should be progressive steps taken by police officers before resorting to violence. Moreover, it is unclear what non-violent means are and how their use can be lawfully justified. The Penal Code and Cap 56 refer to dispersal orders and any other orders that the police deem fit. It is not clear what these other orders are, whether their use can ever justify stopping an entire peaceful assembly and whether these envision singling out protesters whose conduct is unlawful.

Dispersal orders should be enforced as means of last resort because of the risk of escalating violence. Dialogue and negotiations are prevalent methods of maintaining order during protests. To illustrate, during the 2007/8 post-election violence, Joseph Ng’ethe, then acting superintendent of the General Service Unit (GSU), employed dialogue and negotiations four times, dissuading armed demonstrators from destroying property and convincing a group of Members of Parliament to call off a protest that could have escalated the ongoing violence (Momanyi 2008).

Comparatively, the South African Police Service (SAPS) lays emphasis on continuous negotiations between police and organisers of protests. The Regulation of Gatherings Act (RGA 1993: Section 4, 9) makes mandatory consultations on the terms and conditions of the protest within twenty-four hours of notification. Although these occur only if the police deem it necessary, the consultations should take place in good faith. The overall decision to deny or issue authorisation for the public assembly should, as per the RGA, be relayed by one of the following ways: *“newspapers circulating where the gathering is to be held; radio or television; distribution among the public or prominent places where the gathering is to be held; verbal announcement where the gathering is to be held”*. In addition, South Africa’s policy on policing of public protests (Ministry of Police 2011: 18), states that in the case of a planned gathering, the SAPS commanders must have negotiation skills to be used during gatherings while in spontaneous assemblies, SAPS should be able to identify key leaders from the group with whom to negotiate.

Reverting to powers by Kenyan police after protesters have defied a proclamation, Section 29 (b) of the NPSA gives police the power to arrest, without a warrant, a breach of the peace

committed in their presence. Even so, these arrests could culminate in charges of unlawful assembly, riot or the felonious offence of riot after proclamation. In some instances, the charges preferred are general public order offences such as idle and disorderly persons or offensive conduct conducive to breaches of the peace --which are not specific to protests -- or defying dispersal orders. Abu El Haj (2015:976) notes that the use of broad, catchall crimes—like the general public order offences—undermines the right of assembly. At the same time, *“it is the broad definitions of such crimes that make them particularly useful tools for order maintenance in the context of demonstrations”* (ibid).

Kenyan courts have maintained that there cannot be a linear legal interpretation of ‘breach of the peace’. Neither have judges adopted a direct approach to determine when it is ‘reasonable and necessary’ for police to disperse a protest. In their common view, it is up to police to discern whether a particular protest is unlawful and whether dispersal of the public gathering is reasonable and necessary to the point of employing force. The next sections not only assess how the courts have interpreted these ambiguous terms but calls attention to some possible consequences of the judgements on freedom of assembly and police duty to disperse illegal demonstrations.

Unclear Standard of (Mis)Conduct Meriting Dispersal Orders

According to Cap 56, the power to disperse is based on two conditions; failure to notify the OCS of an intended gathering and a clear, present or imminent danger of a breach of the peace or public order. The second condition triggers interpretation on what type of conduct police perceive as a danger to public order and therefore, meriting enforcement of dispersal orders.

The legal concept of breach of the peace originated from lay (untrained) perceptions and common sense, which was identical to common law concepts (Chowdhury 1993:13). Like most commonwealth States, its foundations in Kenya lie in common law and thus, its meaning has been retained by judicial precedent (case law). The concept has multi-dimensional relations with many other statutes which arouse public violence such as general public order offences like idle and disorderly persons or offensive conduct conducive to breaches of the peace.

There is neither a landmark judicial pronouncement defining unlawful assemblies and riots nor their relation to the concept of breach of the peace. In the cases *Ferdinand Waititu vs AG* (2016) and *Wilson Olal vs AG* (2017), the judges were of similar opinion that picket lines should be drawn by the police hence, determining the conduct of protesters. Yet still, outdoor (public) assemblies exist in a continuum from peaceful to disruptive, and further, that disruption involves acts that are principally inconvenient to other individuals (Abu El-Haj 2015:965). Such a range poses difficulties in defining consistent acceptable levels of disruption.

There was an attempt in the case of *Hussein Khalid vs AG (2017)* to give clarity to the concept of breach of the peace. This case centred on an alleged violation of the right to protest where the protesters released pigs and blood outside Parliament as a show of greed of the Members of Parliament. The police who had facilitated their peaceful procession and sit-in outside Parliament by securing the pathways and controlling traffic decided to disperse the crowd using teargas because the pigs ‘got out of hand’ and the protestors were too loud, disrupting the ongoing session in Parliament.

The petitioners who were charged with offences conducive to breaches of the peace, unlawful assembly, riot and cruelty to animals argued before the High Court that the concept of breach of the peace was “*vague and uncertain such that a person could be charged in contemplation of an offence or effectively doing nothing at all*”. Although Justice Lenaola did not directly address the ambiguity of breach of the peace, the case was dismissed on the basis that breach of the peace implies a reasonable limitation of the right to assembly where the protesters’ conduct interferes with the rights of others. The judgement read in part:

“The petitioners and others had all, at the beginning of the demonstration, been peaceful and were even under the escort of the police. It is their alleged acts of blocking a section of Harambee Avenue and thereby causing fear of terror to motorists, confining a pig with several piglets at the gate of Parliament, among others, that led to the stoppage of the demonstrations. Whether this fact created any offence with the petitioners as offenders is not for this court to determine” (Hussein Khalid vs AG 2014: para.74).

Aggrieved, the petitioners lodged their case at the Court of Appeal which reasoned that: “*the alleged lack of definition of what constitutes breach of peace is more apparent than real, granted the many cases that have set out what constitutes a breach of peace, such as Mule vs Republic and Tolley vs Republic*” (ibid:9). Indeed, the two cases which were decided in 1983 define what constitutes a breach of the peace but not in the (modern) context of freedom of assembly. *Mule vs Republic* is about a bar room brawl where the appellant (*Mule*) had been convicted for insulting a senior chief in a manner that created a disturbance in a manner likely to cause a breach of peace.³³

The *Tolley vs Republic* case involved an altercation between a lady (appellant) and some officials from the Ministry of Water who had been instructed to disconnect the appellant’s water supply because she was in arrears. When the appellant queried their appearance in her compound, she ordered them to leave by pointing a toy gun at them. Justice Sachdeva stated that “*the appellant’s conduct in threatening with a pistol, which only later was learnt to be a toy pistol, was likely to cause a breach of the peace*”.

The court, relying on the pronouncement of Lord Denning in *R vs Chief Constable of Devon and Cornwall ex parte Central Electricity Generating Board [1982]*, further held that: “*There is a breach of the peace whenever a person who is lawfully carrying out his [or her] work is unlawfully and physically prevented by another from doing it. He [or she] is entitled by law peacefully to go on with his [or her] work on his [or her] lawful occasions*”.

³³ The appellant had called the senior chief ‘Emperor Bokassa’ (which according to the trial judge referred to ‘a dictator and a killer of children several times’) and then challenged him to a fight by starting to remove his coat. The fight never took place as people intervened.

From the above, breach of the peace relies almost absolutely on a police officer's perception, which is circumstantial. The unrestrained extent of their perception then becomes problematic and the law offers narrow clues on the standard to be applied by the officers. Further, lack of clear guidance from the Kenyan Judiciary on parameters of police discretion is an unexceptional approach in common law countries. To illustrate, in 2012, the Commonwealth Human Rights Initiative published a brief on policing of public assemblies in Tanzania and found that there were no cases on the reasonable limitation of the right to protest (CHRI 2012:8). Strikingly, there were cases in Uganda and Zambia which directly critiqued the broadness of breach of the peace in the respective public order laws whose provisions allowed the police to refuse to issue a permit for a protest when, in their view, there was a likelihood of a breach of the peace (ibid:8-11). In both countries, the courts rendered such wide police discretion unconstitutional because the provisions were highly subjective and there were inadequate guidelines/insufficient controls to prevent arbitrary decisions (ibid:9).

Nevertheless, a report by Amnesty (2013:20) points out that *"not all unlawful behaviour requires police intervention -- for example if there are no further risks involved and if the police intervention is likely to make things worse"*. In similar vein, Kenyan law mandates police intervention through non-violent means and where these fail through use of force with the caveat being when reasonable and necessary. The next section looks into this caveat.

Vague Threshold for Use of Force after Proclamation

Judicial interpretation on the validation of dispersal orders and the consequences of defying them after the expiry of reasonable time or preventing the proclamation from being made by use of force by protesters is based on constitutional guarantees and circumstances of the case. In *Ferdinand Waititu vs AG* (2016: para.35), Justice Onguto held that Cap 56 gives police the power to stop an assembly *"where appropriate and where it is obvious it will not meet the constitutional objectives"* (emphasis added). Further, the fact that *"since it is not uncommon for protest processions to turn riotous, this should not in turn implicate freedom of assembly; an essential feature of any democratic society"* (ibid: para. 37). Rather, the focus should be on how to ensure the protests do not turn violent (ibid). As a result, the Inspector-General, who was a respondent in this case, was ordered to help in maintaining law and order because it is the police service which should facilitate peaceful demonstrations.

The extent of adjudging the resort to force as reasonable is circumstantial. According to Justice Mativo in *Wilson Olal vs AG* (2017):

"What is reasonably justifiable in a democratic society is an elusive concept – one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the decision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right".

In similar vein, ‘reasonable time’ before non-violent means and force can be employed to disperse a protest was defined as “the amount of time that is fairly required to do whatever is required to be done, conveniently under the permitted circumstances of a particular case”. However, this approach is too dependent on an aftermath evaluation where the damage is already done. Consequently, attempts to remedy the situation through awarding compensation, for instance, do little to address the problem holistically. The circumstances before the public gathering should also be put to scrutiny.

The final determination in *Wilson Olal vs AG (2017)* was that police did not act reasonably because they did not follow the law on dispersing public assemblies. According to the circumstances around the protest, first, the venue of the assembly had been cordoned off and guarded by armed police officers before the protesters arrived. Second, the protesters were informed that they could not proceed owing to national security concerns on the day of the protest. The organisers had notified the police service in advance and no rejection was communicated. Third, the proclamation was not made. Fourth, the police used tear gas to disperse the gathering. Fifth, some of the protesters were arrested and charged with rioting after proclamation and the trial court issued a cash bail of Ksh200,000 or bond of Ksh500,000. Additionally, they paid a police bond of Ksh10,000 on the day of their arrest.

The judgement took these circumstances into account, and the factors on limitation of rights in Article 24. The court noted that police could use less restrictive means such as providing security to facilitate the peaceful gathering in light of the national security concerns. In view of that, the use of force or violent means was not justified and amounted to a violation of the right to protest. Consequently, the four petitioners in the case were each awarded Ksh250,000.

Echoing Justice Onguto, the focus therefore, should be on how to ensure that protests do not turn violent and hence, guarantee right of peaceful assembly. In all, there should be an unbroken protection of the protesters’ rights even when charges of unlawful assembly and riot have been levied against them. Particularly, police and courts should issue reasonable bail.

Conclusion

This chapter has analysed how courts have interpreted the legal concept of breach of the peace within the context of dispersing unlawful assemblies. It noted that the law gives the police wide discretion to prevent or stop ongoing peaceful protests or declare an assembly unlawful. These however, as argued, are subjective terms, interpreted by police officers according to their own terms. Nevertheless, the courts have left the decision on what qualifies as disruptive or even violent conduct to the police on the ground as long as the Constitution is adhered to and the circumstances justify their decision.

Some of the remedial perspectives on policing practices in dispersing protests suggested in this chapter were dialogue and negotiations and issuance of reasonable bail by both

police and the courts. Pointedly, Kenya is yet to publish a policy on public order policing (IPOA 2017:29). The policy could address clearly the threshold for what makes a public gathering peaceful and what does not. Nevertheless, such a threshold should be flexible and adaptive to change. As Jerome Skolnick and James Fyfe (1993:120) assert, “hard and fast rules are of little assistance in the fluid discretionary situations that are the core of police work”.

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