Ndegwa v Attorney General & another (Petition 121 of 2019) [2024] KEHC 9991 (KLR) (Constitutional and Human Rights) (12 August 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 121 OF 2019

LN MUGAMBI, J

AUGUST 12, 2024

BETWEEN

HUMPHREY KARIUKI NDEGWA ..... PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

KENYA CITIZENS AND FOREIGN NATIONALS MANAGEMENT SERVICE ..... 2ND RESPONDENT

The Severe Punishment Imposed on Kenyan-born Dual Citizens by the Kenya Citizenship and Immigration Act, rendered it Unconstitutional.

The petition challenged the constitutionality of section 8(4) of the Kenya Citizenship and Immigration Act for violating articles 16, 19, 24, 27, 28, 29 and 39 of the Constitution. The court held that it was the duty of the State to demonstrate that there were no less restrictive means to enforce the duty to disclose one's dual citizenship. In the absence of any justification provided by the respondent, the court was unable to satisfy itself that the choice of heavy criminal sanction as enforcement machinery for the legal duty to disclose dual citizenship was based on a reasonable assessment of all the relevant facts. The punishment imposed by section 8(4) of the Kenya Citizen and Immigration Act for non-disclosure of dual citizenship was an unreasonable and unjustifiable limitation on the right of dual citizenship and by extension an unnecessary fetter to the freedom and the security of the person and freedom of movement hence unconstitutional.

Reported by Robai Nasike

Constitutional Law *– fundamental rights and freedoms – non-discrimination – differentiation viz-a-viz discrimination – claim that the requirement of Kenyan citizens registered as dual citizens disclose their dual citizenship status was discriminatory since foreigners were treated differently – whether section 8 (3) and (4) was discriminatory against Kenyan citizens by birth since it directed them to disclose their dual citizenship at the risk of severe penal consequences if they failed to do so while letting off the foreigner – Constitution of Kenya, 2010, articles 27 (1) & (2); Kenya Citizenship Immigration Act, section 8 (3).*

Constitutional Law *- fundamental rights and freedoms – the limitation of rights – reasonable and justifiable limitation of rights – claim that penal sanction imposed on Kenyan-born dual citizens who failed to disclose their dual citizenship status was an unreasonable and unjustifiable limitation of the right of dual citizens – whether the punishment imposed for non-disclosure of dual citizenship was a disproportionate and an unjustifiable limitation of Kenyan-born dual citizen's rights to dual citizenship, freedom and security of persons and freedom of movement– Constitution of Kenya, 2010, article 16, 19 (2), 29 and 39.*

Constitutional Law *– the constitutionality of statutes – the constitutionality of section 8 (4) of the Kenya Citizenship and Immigration Act – claim that the punishment imposed by section 8 (4) on Kenyan-born dual citizens who failed to disclose their dual citizenship status, was unreasonable and unjustifiable – whether the punishment imposed by section 8 (4) for non-disclosure of dual citizenship was a disproportionate and an unjustifiable limitation of Kenyan-born dual citizen's rights and fundamental freedoms, hence unconstitutional – Constitution of Kenya, 2010, article 259 (1); Kenya Citizenship and Immigration Act, section 8 (4).*

Brief facts

The petition challenged the constitutionality of section 8(4) of the Kenya Citizenship and Immigration Act for violating articles 16, 19, 24, 27, 28, 29 and 39 of the Constitution. According to the petitioner, section 8 (4) created a strict liability and an absolute offence, without any room for defence where a dual citizen failed to disclose the dual citizenship within 3 months. Accordingly, the limiting effect of the impugned provision in essence violated articles 16, 19(2), 24, 27, 29 and 39 of the Constitution. Upon being convicted, the custodial sentence deprived the citizen of liberty and freedom of movement. Further, the custodial sentence, which was a criminal conviction, became a restriction to travel, as most countries would not issue a visa to a person with a criminal offence. The punitive charge was deemed excessive, disproportionate and unreasonable in light of article 24 of the Constitution.

The petitioner argued that article 24 of the Constitution was the proportionality test in determining whether a limitation of fundamental rights was justified and reasonable. The impugned provision did not comply with the dictates of article 24. Furthermore, the respondents had failed to justify the limitation imposed by that section and had not placed any material evidence or policy considerations in light of the section. According to the petitioner, sections 8 (3) & (4) were discriminatory for imposing a very severe criminal sanction that targeted Kenyan dual citizen holders who did not disclose their dual citizenship status while appearing to let off foreign nationals who did not disclose and were deemed dual citizens by operation of law as per section 20.

Issues

i. Whether Section 8 (3) and (4) was discriminatory against Kenyan citizens by birth since it directed them to disclose their dual citizenship at the risk of severe penal consequences if they failed to do so while letting off the foreigner.
ii. Whether the punishment imposed for non-disclosure of dual citizenship was a disproportionate and unjustifiable limitation of Kenyan-born dual citizen's rights to dual citizenship, freedom and security of persons and freedom of movement.
iii. Whether the punishment imposed by section 8 (4) for non-disclosure of dual citizenship was a disproportionate and unjustifiable limitation of Kenyan-born dual citizen's rights and fundamental freedoms, hence unconstitutional.

Relevant provisions of the Law

Kenya Citizenship and Immigration Act, CAP 170, Laws of Kenya

Section 8 (3) & (4)

8. Dual citizenship

(3) Every dual citizen shall disclose his or her other citizenship in the prescribed manner within three months of becoming a dual citizen.

(4) A dual citizen who fails to disclose the dual citizenship in the prescribed manner commits an offence and shall be liable, on conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both.

Held

1. The objective of sections 8 (3) and 8 (4) was universal. The effect was that sections 8 (3) & 8 (4) ensured that Kenyan dual citizens disclosed their dual citizenship. That was because a foreigner applying for Kenyan citizenship had to, as a natural consequence of that application, disclose their other citizenship. That was not the case for Kenyans applying for citizenship of another country, because there was no obligation on that other country to notify Kenya about their dual citizenship. The effect, therefore, was that despite the wording, sections 8 (3) and 8 (4) tend to have been directed to Kenyan dual citizens.
2. It was not every differentiation, that amounted to discrimination. The duty to disclose imposed on Kenyan dual citizenship holders was understandable in that for foreigners, it would become automatically known/disclosable by the fact of registration of Kenyan citizenship itself and where they did not renounce their citizenship, they became dual citizens. However, for Kenyans who were already citizens by birth, when they sought another citizenship elsewhere, that fact may never be known unless they disclose it. It was logical to require Kenyans to disclose dual citizenship and not foreigners. The importance of disclosure could be traced from the Constitution itself. There could be some lawful restrictions that could arise out of dual citizenship, such as restrictions under article 78 (2).
3. Making that fact known was critical to the country's governance. The duty to disclose that applied to Kenyans who were dual citizens only would not, *per se*, be discriminatory. To that extent, there was nothing wrong with section 8 (3) of the Citizenship and Immigration Act. It was rationally connected to the objective.
4. The petitioner's attempt to link the requirement under section 8 (3) with the provisions of section 20 which dealt with renunciation of citizenship by foreigners to establish a discriminatory effect because of section 8 by attempting to show that Kenyan dual citizens and foreigners were treated differently was misleading. Sections 8 and 20 were distinctly dealing with two different subject matters. For comparative purposes, the appropriate section to compare section 20 with would have been section 19 which dealt with voluntary renunciation of Kenyan citizenship of which neither section 19 nor section 20 attracted a criminal sanction. There was a clear distinguishing characteristic. The reason for imposing the duty to disclose dual citizenship on Kenyan dual citizenship holders under section 8(3) of the Citizenship and Immigration Act could be justified rationally and hence did not amount to discriminatory treatment in violation of article 27 of the Constitution.
5. The responsibility of the High Court in the instant petition was not to decide on the appropriateness of the length of a sentence imposed by the failure to abide by the legal duty to disclose the dual citizenship but to examine if it amounted to unjustified limitation on a right conferred by law, in the instant case, article 16 of the Constitution. Article 259 (1) required that the Constitution be interpreted in a manner that advanced the rule of law, and the human rights and fundamental freedoms in the Bill of Rights. Article 20 (3) (b) on the other hand required that in applying the Bill of Rights, a court shall adopt an interpretation that most favored the enforcement of a right or fundamental freedom.
6. It was the Constitution that allowed a Kenyan-born citizen to acquire citizenship of another country without losing their Kenyan citizenship. Parliament was given the mandate to enact legislation under article 18 to give effect to the provisions of the Chapter on Citizenship and hence it enacted the Kenya Citizenship and Immigration Act where among other provisions it imposed a legal duty for dual citizens to disclose their dual citizenship. To enforce compliance with the legal duty, it provided that failure to disclose amounted to an offence under section 8 (4) punishable with a fine of five million shillings or imprisonment for a maximum term of 3 years.

7. Reasonableness evoked considerations of proportionality between the aim and the means adopted to achieve it. Although human rights principles did not dictate the appropriate length or scope of any sentence for a particular offence there were human rights standards for punishment. For instance, Parliament could not legitimize cruel and degrading punishment through legislation for it would not pass the human rights standard on punishment.
8. The purpose of criminal law was to protect society for the welfare of all. Offences that carried moral blameworthiness ordinarily attracted stiffer penal consequences. Hence, criminal law was stigmatizing, as it was associated with morality and ethical wrongs. Nevertheless, within the spectrum of criminal law, there was a category of offences that arose from regulatory/administrative breaches that did not arise out of moral value blameworthiness and thus did not require proof of *mens rea*. The penalties that attach to them were just but a means of ensuring compliance. That was the nature of the offence that was created by section 8 (4) of the Kenya Citizenship and Immigration Act.
9. If such an offence was framed in such a manner as to attract demonstrably high penal consequences, the court had a duty to interrogate the rationale behind it from a human rights point of view considering the stigmatization that comes with criminal conviction. The court should be satisfied that there were no other less restrictive administrative interventions that could be applied for such punishment may in effect take the benefit that the right and fundamental freedoms intended to achieve.
10. The State did not demonstrate the policy consideration behind fixing such extortionate penalties for omission to disclose a lawfully acquired dual citizenship. Things were made worse by the fact that the offence created by section 8 (4) did even not require any proof of mental culpability since it was a strict liability offence. There was a specific provision that directly addressed a situation where one was to use dual citizenship for criminal purposes, that was, section 8 (5) of the Kenya Citizenship and Immigration Act.
11. It was the duty of the State to demonstrate that there were no less restrictive means to enforce the duty to disclose one's dual citizenship. No such evidence of any such administrative interventions that were considered and found ineffective or incapable was tendered. In the absence of any justification provided by the respondent, the court was unable to satisfy itself that the choice of heavy criminal sanction as enforcement machinery for the legal duty to disclose dual citizenship was based on a reasonable assessment of all the relevant facts.
12. The punishment imposed by section 8(4) of the Kenya Citizen and Immigration Act for non-disclosure of dual citizenship was an unreasonable and unjustifiable limitation on the right of dual citizenship and by extension an unnecessary fetter to the freedom and the security of the person and freedom of movement hence unconstitutional.

Petition allowed.

Orders

No orders as to costs.

Citations

Cases

Kenya

1. *Alai, Robert v Attorney General & another* Petition 174 of 2016; [2017] KEHC 6090 (KLR); [2017] eKLR - (Explained)
2. *Centre for Rights Education and Awareness (CREAW) & another v Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 101 (KLR); [2012] eKLR; [2012] 2 KLR 261 - (Explained)
3. *Federation of Women Lawyers Kenya (Fida-K) & 5 others v Attorney General & another* Petition 102 of 2011; [2011] KEHC 2099 (KLR); [2011] eKLR - (Explained)
4. *Kituo Cha Sheria v Attorney General* Petition 19 of 2013; [2013] KEHC 5406 (KLR); [2013] eKLR; [2013] 2 KLR 245 - (Mentioned)

5. *Okuta, Jacqueline & Jackson Njeru v Attorney General, Director of Public Prosecution & Article 19 of East Africa* Petition 397 of 2016; [2017] KEHC 8382 (KLR); [2017] eKLR - (Mentioned)
6. *Randu Nzai Ruwa & 2 others v Internal Security Minster & another* Miscellaneous Application 468 of 2010; [2012] KEHC 5466 (KLR); [2012] 2 KLR 176 - (Mentioned)

South Africa

Speaker of National Assembly v De Lille & Another (297/98) [1999] ZASCA 50; [1999] 4 All SA 241 (A) (26 August 1999) - (Explained)

United Kingdom

Pearlberg v Varty [1972] 1 WLR 534 - (Explained)

India

1. *Hamdard Dawakhana v Union of India Air* 1960 AIR 554, 1960 SCR (2) 671,358 - (Explained)
2. *State of Kerala and another v NM Thomas and Others* 1976 AIR 490, 1976 SCR (1) 906 - (Explained)

United States

1. *Romer, Governor of Colorado et al v Evans et al* 517 US 620 (1996) - (Applied)
2. *United States v Butler* 297 US 1 (1936) - (Explained)

Canada

1. *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 - (Explained)
2. *R v Oakes* [1986] 1 SCR 103 - (Explained)

Philippines

Republic v Marelyn Tanedo Manalo GR No 221029 - (Mentioned)

Regional Court

1. *Ndyanabo v Attorney General* [2001] EA 495 - (Explained)
2. *Olum and another v Attorney General* [2002] 2 EA - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 2(4); 16; 19; 19(2); 19(3); 20(1); 20(2); 20(3); 20(4); 24; 27; 27(1); 27(2); 27(4); 28; 29; 39; 94; 95(3); 159(2)(e);186(4); 259 - (Interpreted)
2. Kenya Citizenship And Immigration Act (cap 170) section 8(4)- (Unconstitutional)
3. Kenya Citizenship And Immigration Act (cap 170) sections 8(3); 19; 20- (Interpreted)

South Africa

Constitution of the Republic of South Africa, 1996 In general- (Cited)

Canada

Canadian Charter of Rights and Freedoms, 1982 In general - (Cited)

Advocates

None mentioned

JUDGMENT

Introduction

1. The petition dated March 22, 2019is supported by the petitioner's affidavit in support of even date. The Petition challenges the constitutionality of section 8(4) of *Kenya Citizenship and Immigration Act* for being in violation of articles 16, 19, 24, 27, 28, 29 and 39 of the *Constitution*.

2. The petitioner seeks the following relief against the respondents:

i. A declaration that section 8(4) of the *Kenya Citizenship and Immigration Act* is unconstitutional.

ii. An order be issued in terms of article 2(4) of the *Constitution* that section 8(4) of the *Kenya Citizenship and Immigration Act* is void.

iii. The courtbe pleased to issue a permanent conservatory order, in public interest and in the end of justice, suspending and/or staying the continued implementation of action under prosecution under or any act enforcing section 8(4) of the *Kenya Citizenship and Immigration Act* against the petitioner or any other Kenyan citizen in Kenya or in the diaspora who has acquired dual citizenship.

iv. Any other just or expedient order or relief the court may deem fit to make or grant.

v. Costs of and incidental to this petition.

Petitioner's Case

3. The petitioner, a Kenyan citizen by birth, holds dual citizenship in Kenya and Cyprus. The petitioner obtained citizenship in Cyprus through naturalization in 2016. He avers that he is a businessman, investor and venture capitalist who is a law-abiding citizen and has never been involved in any criminal activity. The petitioner states that he has openly used his Cyprus passport approximately 19 times during his travel out and into the country and has never encountered any problem with the Department of Immigration.

4. On February 13, 2019, the Director of the Directorate of Criminal Investigations through a press release, summoned the petitioner to their headquarters on February 14, 2019. The reason for the said summon was his failure to disclose his dual citizenship which is an offense in Kenya. He avers that although not aware of this provision, he immediately sought to comply by filing the requisite form. However, even after doing so, he was threatened with an impeding prosecution.

5. The petitioner, questions the legitimacy of section 8(4) of *Kenya Citizenship and Immigration Act* which provides that

> "a dual citizen who fails to disclose the dual citizenship in the prescribed manner commits an offence and shall be liable, on conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both."

He asserts that this provision is in violation of articles 16, 19(2) and (3), 20(1),(2)(3) and (4), 24, 27(1),(2) and (4), 28, 29 and 39 of the *Constitution* hence unconstitutional.

6. The petitioner estimated that over three million Kenyans living in the diaspora with dual citizenship might face similar problems with immigration. He is also pained that the provision does not give room for extension of time when the 3 months expire or provide any chance for any excusable circumstance.

7. He further complained that the punitive measure is unjustifiable, arbitrarily, excessively and disproportionate limitation of articles 27(1),(2) and (4), 28, 29 and 39 of the *Constitution* which does not accord with principles under article 24. That it converts an administrative issue into a criminal offense that attracts excessive and punitive penal consequences for failure to comply.

8. He equally asserts that the impugned provision is a threat to the right of dual citizenship under article 16 of the *Constitution*. This is because the provision seeks to impose a custodial sentence yet in most cases persons acquiring a second citizenship will be required to reside in that country for a period of

time after they are granted the citizenship. He moreover contends that this Section threatens article 39 of the *Constitution* as most countries will deny a person with criminal record a visa.

9. It is his argument in a nutshell that that Kenyan citizens should not be subjected to the limitations and restrictions set out in the impugned provision yet the same conditions are not imposed to foreign nationals who acquire dual citizenship in Kenya.

Respondents' Case

10. The respondents in response filed their grounds of opposition dated April 1, 2019on the basis that:

    i. Section 8(3) of the *Kenya Citizenship and Immigration Act, Act* No 12 of 2011 enjoys the presumption of constitutionality until it is substantively determined otherwise upon representations by the respondents.

    ii. The impeachment of an Act of Parliament, or a section thereof, on the basis of article 24 of the *Constitution* requires full-blown responses from the respondents, and a hearing, in order to determine its rationale, justification, the policy justifications behind it, the ramifications of the same being interdicted and whether or not there exists other lesser restrictive ways of limiting the right it seeks to limit.

    iii. Articles 2(4) and 24 of the *Constitution* shifts a heavy burden of proof to the respondent, to inter alia demonstrate that the limitation proffered by section 8(4) of the *Kenya Citizenship and Immigration Act* is:

        a. reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, considering all relevant factors;

        b. balanced in purpose that is it is not excessive and disproportionate; and

        c. the least restrictive means of achieving the intended purpose of the statute.

    iv. The foregoing can only be done after a full hearing of both sides in this petition.

    v. The petitioner's claim is speculative and therefore does not espouse a constitutional cause of action. Exhibit 'HKN 7', being a newspaper cutting, lacks the evidentiary value to constitute a violation of the *Constitution* to warrant this court's intervention.

    vi. The person threatening to prosecute the petitioner, in Exhibit 'HKN 7' lacks the legal mandate and jurisdiction in both statute and the *Constitution* to prosecute. The same is conferred on the office of the Director of Public Prosecutions under article 157 of the *Constitution*.

    vii. It is in the public interest that all Kenyans who have acquired the citizenship of another country, by exploiting article 16 of the *Constitution*, must notify the 2nd respondent.

    viii. Before being charged, there is no cause of action against the respondents herein and therefore no prima facie case, with a high chance of succeeding, has been established by the petitioner to warrant the issuance of the interim orders sought.

    ix. From the foregoing, and in the public interest, the respondents urge and pray that the orders sought herein, at this stage, be declined.

Parties' Submissions

Petitioner's submissions

11. In the submissions dated October 15, 2021, BM Musyoki and Company Advocates, sought to discuss whether section (4) of the *Kenya Citizenship and Immigration Act*, by purpose or effect of implementation limits, threatens or infringes the rights under articles 16, 19(2), 29, 27, and 39 of the *Constitution* and whether section 8(4) of the *Kenya Citizenship and Immigration Act* is in compliance with article 24 of the *Constitution*.

12. On the first issue, counselsubmitted that the impugned Section creates a strict liability and an absolute offence, without any room for defense where a dual citizen fails to disclose the dual citizenship within the prescribed period of 3 months. Counsel submitted that this courtwhile considering the constitutionality of statute ought to consider its purpose and effect as held in *Robert Alai v The Hon Attorney General & another* [2017] eKLR. The court stated as follows:

> "Both purpose and effect are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation."

13. Like dependence was placed in the Supreme Court of Philippines case of GR No 221029, April 24, 2018, *Republic v Marelyn Tanedo Manalo*.

14. Accordingly, Counsel submitted that the limiting effect of the impugned provision in essence violates articles 16, 19(2), 24, 27, 29 and 39 of the *Constitution*. This is because the custodial sentence, upon being convicted deprives the citizen's liberty and freedom of movement. Further, the custodial sentence which is a criminal conviction becomes a restriction to travel, as most countries will not issue a visa to a person with a criminal offence. The punitive charge under this section is for these reasons deemed to be excessive, disproportionate and unreasonable in light of article 24 of the *Constitution*.

15. On the second issue, counselsubmitted that article 24 of the *Constitution* is the proportionality test in determining whether a limitation of fundamental rights is justified and reasonable. In this matter, counsel argued that the impugned provision does not comply with the dictates of article 24. Furthermore that, the respondents had failed to justify the limitation imposed by this section and not placed any material evidence or policy considerations in light of the section.

16. In this regard reliance is placed in *R v Oakes* (1986) 1 SCR 103 where this test was explained as follows:

> "..... to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.
>
> The first criterion concerned the importance of the objective of the law. First, the objective, which the measures responsible for a limit on a constitutional right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Secondly, the means chosen for the law must be 'reasonable and demonstrably justified', which involves 'a form of proportionality test' with three components: First, the measures adopted must be carefully designed to achieve the objective in question. They must not

be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of -'sufficient importance."

17. Counsel equally submitted that the impugned provision in addition to limiting and infringing the cited constitutional rights is not designed to achieve the objective of disclosure under section 8(3) of the *Act*. Therefore, the measures adopted in this Section are not reasonably connected to the objective hence are arbitrary, unfair and not designed to achieve the purpose of disclosure of dual citizenship.

18. Counsel emphasized that where there are less restrictive means of achieving the objective without impairing the right, a measure that does not take this into account is typically found to be unconstitutional. Reliance was placed in *Jacqueline Okuta & another v Attorney General & 2 others* [2017]eKLR where it was observed that:

> " According to the above authors, four sub-components of proportionality, a limitation of a constitutional right will be constitutionally permissible if
>
> i. it is designated for a proper purpose;
>
> ii. the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;
>
> iii. the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally
>
> iv. there needs to be a proper relation ("proportionality stricto sensu" or "balancing") between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right.' It is my humble view that the tort of defamation provides a sufficient alternative by way of damages and in this regard, criminal defamation does not meet the third test."

19. To this end, counselis certain that the petitioner has proved his case and as such entitled to the reliefs sought.

Respondents' submissions

20. In support of their case, the respondents filed submissions dated March 8, 2022through Senior State Counsel, Dan Weche. Counsel on whether the impugned Section is discriminatory in view of section 20 of the *Kenya Citizenship and Immigration Act*, submitted that this argument amounts to a contention on differentiation by law and not discrimination as alleged. Further that Parliament under articles 94,95(3) and 186(4) of the *Constitution* are mandated to legislate hence their wisdom in passing a law should not be interrogated. In like manner, counsel pointed out that each Statute enjoys the presumption of constitutionality.

21. On whether the criminal sanction provided in the impugned section is excessive and disproportionate, relying on the opine in *Jacqueline Okuta- case*(*supra*) and *Kituo Cha Sheria & 8 others v Attorney*

General (2013) eKLR, Counsel noted that the test established in these cases on whether a legislation is disproportionate is as follows:

i. The legislative objective is sufficiently important to justify limiting a fundamental right;

ii. The measures designed to meet the legislative object are rationally connected to it; and

iii. The means used to impair the right or freedom are no more than is necessary to accomplish the objective.

22. According to counsel, the impugned provision meets this test. This is because there is a clear legislative objective to ensure governance of the dictates of the Act is easy. Likewise, that issues of nationality are substantial with dire consequences and so justifies the punitive measures in cases of breach. The Section moreover is said to promote good order and concurrence in the government handling dual citizens.

23. To that end, counselsubmits that the petition is primarily based on conjecture and documents adduced, lacking evidentiary value. Reliance is placed in *Randu Nzai Ruwa and 2 Others v Internal Security Minister and another* Mombasa HC Misc No 468 of 2010 [2012] eKLR. For this reason, counsel urges the court to dismiss the petition with costs.

Analysis and Determination

24. There is only one main issue for determination in this Petition which rests on two fronts. The issue is:

> Whether section 8(4) of *Kenya Citizenship and Immigration Act* is unconstitutional on grounds that:
>
> i. that the obligation to disclose dual citizenship whose failure attracts severe criminal sanction applies to Kenyan dual citizenship holders only and not to foreigners
>
> ii. that the imposition the excessively severe punishment for non-disclosure of dual citizenship violates the principle of reasonableness and proportionality, and is thus a disproportionate and an unjustifiable limitation of Petitioner's right under article 16, 19(2), 29 and 39 of the *Constitution*.

25. The contention raised by the petitioner calls for an exhaustive evaluation of the impugned section to ascertain its conformity or otherwise with the *Constitution*. In undertaking the task, the court must be guided by the relevant principles on Constitutional interpretation.

26. Article 259 of the *Constitution* provides a guide on the manner that the Constitution is to be interpreted by stating thus:

> Article 259 (1) :
>
> This *Constitution* shall be interpreted in a manner that-
>
> a. Promotes its purposes, values and principles
>
> b. Advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights
>
> c. Permits the development of the law; and
>
> d. Contributes to good governance

27. Additionally, in exercising judicial authority, the court, under article 159(2)(e) is obligated to protect and promote the purposes and principles of the *Constitution*.

28. The Court of Appeal in *Center for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR reiterated the above principles by holding thus:

> " a. It should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance as provided by article 259.
>
> b. The spirit and tenor of the *Constitution* must preside and permeate the process of judicial interpretation and judicial discretion.
>
> c. It must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism."
>
> d. The entire *Constitution* has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle)."

29. In this case, this court is required to determine the constitutionality of a statutory provision. Article 2(4) of the *Constitution* declares that:

> " Any law, including customary law, that is inconsistent with this *Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of this *Constitution* is invalid."

30. It is this court (the High Court) that the *Constitution* has assigned jurisdiction under article 165 (3) (d) (i) to determine

> " whether any law is inconsistent with or in contravention of the *Constitution*."

31. The court must however navigate through that task by applying the principles applicable that have developed over in considering the constitutionality of an Act of Parliament. First, there is the general presumption every Act of Parliament is constitutional unless the contrary is proved. This principle was enunciated by the Court of Appeal of Tanzania in *Ndyanabo v Attorney General* [2001] EA 495 citing with approval the English case of *Pearlberg v Varty* [1972] 1 WLR 534 where it was held that:

> " Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative"

32. There is also the recognition that the legislative authority vests on Parliament. Indeed, in Kenya this is specifically provided for under article 94(1) of the *Constitution*. Along with this, there is thus the principle that the legislature knows the needs of the people and thus all the laws it enacts have a particular purpose in the society. This principle was articulated by the Supreme Court of India in *Hamdard Dawakhana v Union of India Air* (1960) AIR 554, 1960 SCR (2)671 as follows:

> " In examining the Constitutionality of a statute, it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to

problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment."

33. The third is the need not only to examine the objective behind a particular statutory provision but also the effect arising from its application or implementation. The case of *R v Big M Drug Mart Ltd* 1985 CR 295 elucidated this principle as follows:

> "Both purpose and effect are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of legislation, object and its ultimate impact are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."

34. The Constitutional Court of Uganda applied the purpose and effect principle in *Olum and another v Attorney General* [2002] 2 EA holding thus:

> "To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the constitution, the impugned statute or section thereof shall be declared unconstitutional….. "

35. It is also important to underscore that the burden of proof lies on the person alleging the unconstitutionality. In *US v Butler* 297 US 1 (1936) the court opined:

> "When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."

36. I shall accordingly be guided by these principles in determining whether the impugned provision in the *Citizenship and Immigration Act* is inconsistent with the *Constitution*.

37. The entire section 8 deals with dual citizenship. It provides:

> Dual citizenship
>
> 8
>
> (1) A citizen of Kenyan by birth who acquires the citizenship of another country shall be entitled to retain the citizenship of Kenya subject to the provisions of this *Act* and the limitations, relating to dual citizenship, prescribed in the Constitution.
>
> (2) A dual citizen shall, subject to the limitations contained in the Constitution, be entitled to a passport and other travel

documents and to such other rights as shall be the entitlement of citizens.

(3) Every dual citizen shall disclose his or her other citizenship in the prescribed manner within three months of becoming a dual citizen.

(4) A dual citizen who fails to disclose the dual citizenship in the prescribed manner commits an offence and shall be liable, on conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both.

(5) A dual citizen who uses the dual citizenship to gain unfair advantage or to facilitate the commission of or to commit a criminal offence, commits an offence and shall be liable, on conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both.

(6) A dual citizen who holds a Kenyan passport or other travel document and the passport or other travel document of another country shall use any of the passports or travel documents in the manner prescribed in the Regulations.

(7) A dual citizen shall owe allegiance and be subject to the laws of Kenya.

38. According to the petitioner, section 8(3) & (4) is discriminatory for imposing a very severe criminal sanction that targets Kenyans dual citizen holders who do not disclose their dual citizenship status while appearing to let off foreign nationals who do not disclose and are deemed dual citizens by operation of law as per section 20.

Section 20 provides:

Voluntary renunciation of citizenship of another country

"20

(1) A foreign national who applies for registration as a citizen of Kenya shall indicate in the application whether he or she intends to renounce the citizenship of the other country.

(2) A foreign national who had indicated his intention to renounce the citizenship of the other country under subsection (1), shall, within ninety days after being registered as a citizen of Kenya, avail to the Cabinet Secretary evidence of renunciation of the citizenship of the other country.

(3) A person who does not avail the evidence of renunciation as required in subsection (2) shall be deemed to be a dual citizen.

(4) The Cabinet Secretary may refuse to register any such renunciation if it is made during any period of war in which Kenya may be engaged in with the country referred to in the

application or if, in his opinion it is otherwise contrary to public policy."

39. The petitioner contends that section 8(4) discriminatively applies to Kenyans who are dual citizens and not foreigners. However, besides section 8(1) which states that citizen of Kenyan by birth who acquires the citizenship of another country shall be entitled to retain the citizenship of Kenya subject to the provisions of the Act and the limitations, relating to dual citizenship, prescribed in the *Constitution*, a reading of the succeeding sub-sections in that section do not show they are confined to Kenyan dual citizen only and by their wording, they seem to apply universally to every dual citizen. The 'heading' of section 8 itself is reads "dual citizenship". The subsequent sub-sections in section 8; apart from section 8(1); are worded generally. To illustrate, sub-section 8(3) & 8(4) begin as follows:

> " Section 8(3) 'Every dual citizen}}' who fails to disclose....; and, section, 8(4) 'A dual citizen' who fails to disclose....."

40. I must, however proceed to check on the effect. The objective may be universal, but what of the effect? In reality, my view is that the effect is that the section 8(3) & 8(4) is to ensure that Kenyan dual citizens disclose their dual citizenship. This is because a foreigner applying for Kenyan Citizenship must as a natural consequence of that application disclose his other citizenship. That is not so for Kenyans applying for citizenship of another Country because there is no obligation on that other Country to notify Kenya about his/her dual citizenship.

41. The effect therefore, is that despite the wording, section 8(3) and 8(4) tends to have been directed to Kenyan dual citizens. Does this make this requirement discriminatory?

42. The right to equality and freedom from discrimination is protected under article 27 of the *Constitution* which *inter-alia* states:

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

43. Is this section discriminating against Kenyan citizens by birth by directing them to disclose their dual citizenship at the risk of sever penal consequences for the failure while letting off the foreigner?

44. It is important to start from the now established principle that it is not every differentiation that amounts to discrimination. A distinction that can be reasonably justified does not amount to discrimination. This was explained in *Federation Of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* [2011] eKLR where the court opined as follows:

> " ... At this stage, it is important to ask ourselves, "what is equality and what is freedom from discrimination?" The two terms have been largely defined under article 27(1) and (2). We

have also tried to state a general perspective of what the two words mean.... in the case of *Jacques Charl Hoffmann* Constitution Court of South Africa it was held;

> " At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in the society, must be accorded equal dignity.... the requirement of equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the law so passed cannot create differences as to the persons to whom they apply and the territorial limit within which they are enforced}}. We are aware that individuals in any society differ in many respects such as age, ability, education, height size, colour, wealth, occupation, race and religion. In our view any law made, must of necessity be clear as to the making of the choice and difference as regards its application in terms of persons, time and territory. Since the constitution can create differences, the question is whether these differences are constitutional. If the basis of the difference has a reasonable connection with the object intended to be achieved therefore the law which contains such a provision is constitutional and valid. On the other hand, if there is no such relationship, the difference is stigmatized as discriminatory and the provision can be rightly said to be repugnant to justice and therefore invalid. This is in our view what has been accepted in judiciaries as the doctrine of classification which is an integral part of the equal protection clauses in almost all written constitution in the world...."

45. Further, in the Indian case of *State of Kerala and another v NM Thomas and others* Civil Appeal No 1160 of 1974 the court opined as follows:

> " .... The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons of things in different circumstances. The circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances.
>
> The principle of equality does not mean that every law must have universal application for all persons who are not be nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category."

46. In yet another case, *Romer, Governor of Colorado et al v Evans et al* (94-1039) 517 US 620 1996 the court had held:

> "In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group or if the rationale for it seems tenuous...."

47. In my opinion, the duty to disclose imposed on Kenyan dual citizen holders is understandable in that for foreigners, it would become automatically known/disclosable by the fact of registration of Kenyan citizenship itself and where they do not renounce their citizenship, they become dual citizens. However, Kenyans who are already citizens by birth when they seek another citizenship elsewhere, that fact may never be known unless they disclose. It is thus logical to require Kenyans to disclose and not the foreigners. The importance of disclosure can be traced in the Constitution itself, there may be some lawful restrictions that might arise out of dual citizenship, for instance; under article 78(2),

> "A state officer or a member of the defence forces shall not hold dual citizenship with an exception of Judges, Members of Commissions and persons becoming citizens by operation of another country's law only."

Making the fact known is thus critical to the governance of the Country. The fact of the duty to disclose thus applying to Kenyans dual citizens only would not perse, without more be discriminatory and to that extent, I would find nothing wrong with section 8(3) of the *Citizenship and Immigration Act*. It is rationally connected to the objective.

48. The petitioner's attempt to link this requirement with the provisions of section 20 which deals with renunciation of citizenship by foreigners to establish a discriminatory effect in view of section 8 by attempting to show that Kenyan dual citizens and foreigners are treated differently is misleading. Section 8 and 20 are distinctly dealing with two different subjects matters. For comparative purposes, the appropriate section to compare section 20 with would have been section 19 that deals with voluntary renunciation of Kenyan citizenship of which none of the neither section 19 or section 20 attract a criminal sanction. There is clear distinguishing characteristic. The reason for imposing the duty to disclose dual citizenship on Kenyan dual citizenship holders under section 8(3) of the *Citizenship and Immigration Act* which is can be justified rationally hence does not amount to discriminative treatment in violation of article 27 of the *Constitution*.

49. The next aspect that I must consider is the claim of unconstitutionality pegged on the imposition the very severe punishment for non-disclosure which the Petitioner challenges on the basis that it offends the principle of reasonableness, proportionality, is disproportionate and is thus an unjust limitation that runs afoul of article 24 hence a violation of Petitioner's rights under article 16, 19(2), 29 and 39 of the *Constitution*.

50. Article 16 guarantees that a citizen by birth may not be lost by acquiring citizenship of another country. Article 29 protects the right to freedom and security of the person while article 39 protects the freedom of movement. The petitioner argued that section 8(4) of the *Citizen and Immigration Act* prescribes disproportionately excessive punishment for non-disclosure of dual citizenship which includes a custodial sentence of 3 years or hefty fine of five million shillings as limitation on the freedom of movement which the *Constitution* guarantees under article 39 plus such conviction of criminal offence would have great ramifications on the integrity and the dignity of the person and would expose them to disability of even gaining citizenship of another country and denial of visas. Moreover, the petitioner pointed out that this law does even give room for extension of disclosure period after the

three months in which you will be liable to prosecution. The petitioner further contended that the law does not even take into account that some countries require one to remain in their jurisdiction beyond three months as a requirement for dual citizenship. Moreover, some are citizens by birth in those other jurisdictions and by virtual of being born of Kenyan parents, would also qualify to be Kenyan citizens by virtual of article 14(1) which provides that

> " A person is a citizen by birth if on the day of a person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen."

51. The petitioner argued that prescribing a severe penalty of five million shillings or three years imprisonment after lapse of 3 months of becoming a dual citizen without considering any other relevant circumstances does not conform to the principles specified under article 24 of the *Constitution* on limitation of rights and fundamental freedoms in that Parliament did not consider other less restrictive ways of ensuring Kenyans complied with the legal duty to disclose dual citizenship and still are able to enjoy the right instead of curtailing it by imposition of stringent criminal sanctions outlined by section 8(4) of *Citizenship and Immigration Act*.

52. The petitioner thus urged the court to find that implementation of section 8(4) is contrary to the principles of article 24 and is thus an unjustifiable limitation which violates articles 16, 19(2), 29 and 39 of the *Constitution*.

53. The respondent did not file any affidavit to indicate the policy considerations behind these stiff penal sanctions. However, the 1st respondent in its submissions cited articles 94, 95(3) and 186(4) and urged the court to defer to the National Assembly's mandate in legislation and refrain from interfering with National Assembly's legislative mandate under the *Constitution*. Further, the 1st respondent made submissions as follows:

> " .... requiring citizens by birth to declare allegiance to another sovereignty is to ease the governance burden. This is especially with the advent of money laundering, payment of taxes and terrorism issues that are at the rise every day and a crack at citizenship shall surely give offenders a free pass, the declaration is therefore to facilitate coordination between the two countries...."

54. This court acknowledges that the the duty to legislate, as correctly put by 1st Respondent, is vested in Parliament under article 94(1) of the *Constitution*. Further, as already observed, it is now a recognised principle of law that Parliament understands the needs of people and thus is aware of those needs when enacting any particular legislation. Under the separation of powers doctrine, Parliament must thus be accorded deference to execute its legislative mandate. That said, Parliament must act within the confines of the *Constitution.* article 2(1) declares the *Constitution* is the Supreme law of the Republic and binds all persons and all State organs. Parliament is thus not an exception. Moreover, article 3 enjoins everybody to respect, uphold and defend the *Constitution.* Additionally, 20(1) provides that the Bill of rights applies to all law and binds all State organs and all persons.

55. When an issue arises as to whether anything has been done within or without the *Constitution*, it is the High Court under article 165 that is granted the power to determine that particular question. Parliament is thus not immune from the court's supervisory mandate in a matter calls for determination of issue relating to constitutional observance. Parliament is only immune from this court's reach if acts in accordance with the *Constitution*. I am emboldened in this resolve by the South

African case of *Speaker of National Assembly v De Lille & Another* 297/298 (1999) (ZASCA 50) in which the Court, interpreting a similarly worded provision in the *South African Constitution*, ruled:

> " this inquiry must crucially rest on the *Constitution of the Republic of South Africa*. It is the ultimate source of all lawful authority in the country. No Parliament, however bonafide, or eminent in its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the *Constitution* expressly provides that law or conduct inconsistent with the *Constitution* is invalid... It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the *Constitution* is entitled to the protection of the courts. No Parliament, no official and no institution is immune from judicial scrutiny in such circumstances..."

56. The rights and fundamental freedoms under the Bill of Rights can be limited but the limitation must be in tune with article 24. In particular, the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and taking into account relevant factors including:

    a. The importance and purpose of limitation

    b. Nature and extent of limitation

    c. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedom of others; and

    d. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

57. It is worth noting that article 24(2)(c) also has a proviso which requires that despite the provision of clause (1) that permits limitation of a right or fundamental freedom, such limitation shall not limit the right or fundamental freedom so far as to derogate from the core or essential content.

58. Article 19(3)(b) of the *Constitution* provides that the rights and fundamental freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent they are inconsistent with the Chapter on the Bill of Rights. The right of Kenyans citizens by birth to a dual citizenship is provided for under article 16 of the *Constitution* and which is given effect through the provisions of Citizenship and Immigration Act hence can only be subject to restrictions that can pass the standards fixed by article 24 of the *Constitution*.

59. In the Canadian case of *R v Big M Drug Mart Limited*[1985] 1 SCR 295; The court explained the appropriate way to interpret the rights and freedoms guaranteed in the *Canadian Charter* was though purposive approach which it explained as follows:

> " .... The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. ... the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.

> The interpretation should be ...a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection. At the same time, it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore .... be placed in its proper linguistic, philosophic and historical contexts."

60. The petitioner argued that the stiff criminal sanction prescribed for non-disclosure of dual citizenship under section 8(4) cannot pass the threshold prescribed by article 24 since it is disproportionate, unreasonable and unjustifiable and no consideration was made of other less restrictive means for achieving disclosure of dual citizenship hence is a derogation of the right to dual citizenship, the right of movement, and the right to freedom and security of the person which detracts from the purpose behind the conferment of right of dual citizenship to Kenyans citizen by birth.

61. The responsibility of this court in the instant Petition is not to decide on the appropriateness of the length of a sentence imposed by the failure to abide by the legal duty to disclose the dual citizenship but to examine if it amounts to unjustified limitation on a right conferred by law, in this case, article 16 of the Constitution. Article 259(1) requires that the *Constitution* be interpreted in a manner that advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights. Article 20(3)(b) on the other hand requires that in applying the Bill of Rights, a court shall adopt an interpretation that most favours the enforcement of a right or fundamental freedom.

62. In the instant case, it is the *constitution* that allows a Kenyan born citizen to acquire citizenship of another country without losing his/her Kenyan Citizenship. Parliament is given the mandate to enact legislation under article 18 to give effect the provisions of the Chapter on Citizenship and hence enacted the *Citizenship and Immigration Act* where among others it imposed a legal duty for dual citizens to disclose their dual citizenship. To enforce compliance with the legal duty, it provided that failure to disclose amounts to an offence under section 8(4) punishable with a fine of five million shillings or imprisonment for a maximum term of 3 years.

63. The petitioner challenges this provision stating that it does not meet the constitutional threshold of reasonableness in an open and democratic society that is based on human dignity, equality and freedom. The Supreme Court of Canada in *R v Oakes* [1986]1 SCR 103 addressing the issue of limitation of fundamental rights and freedoms in the *Canadian Charter of Rights and Freedoms* explained thus:

> "…. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified}}..."

64. Reasonableness evokes considerations of proportionality between the aim and the means adopted to achieve it? Although human rights principles do not dictate 'the appropriate length or scope of any sentence for a particular offence' there are human rights standards to punishment. For instance, Parliament cannot legitimize cruel and degrading punishment through legislation for it will not pass the human rights standard on punishment.

65. The reasonableness or otherwise of a limitation that is based on a criminal sanction as a derogation of the right in question, a proper analysis cannot be achieved without interrogating the objective, albeit briefly, of criminal law. It is trite law that the purpose of criminal law is to protect the society for the welfare of all. Offences that carry moral blameworthiness ordinarily attract stiffer penal consequences. Criminal law thus stigmatizes as it is associated with morality and ethical wrongs. Nevertheless,

within the spectrum of criminal law, we also have a category of offences that arise from regulatory/ administrative breaches that do not arise out of moral value blameworthiness and thus do not require proof of mens rea. The penalties attaching to them are just but a means of ensuring compliance. This is the nature of the offence that is created by section 8(4) of the *Citizenship and Immigration Act*.

66. If such an offence is framed in such a manner as to attract demonstrably high penal consequence, the court has a duty to interrogate the rationale behind it from a human rights point of view considering the stigmatization that comes with criminal conviction, a person's dignity, freedom and freedom of movement to mention but a few. The court should be satisfied that there were no other less restrictive administrative interventions that could be applied for such punishment may in effect take the benefit that the right and fundamental freedoms intended to achieve.

67. In the instant case, the State did not demonstrate to this court the policy consideration behind fixing such extortionate penalties for omission to disclose a lawfully acquired dual citizenship. Things are made worse by the fact that the offence created by section 8(4) does even not require any proof of mental culpability since it is a strict liability offence. Mr Weche through submissions attempted to provide a justification by arguing it was purely for governance reasons with the intention being to deter crimes such as terrorism and money laundering.

68. I consider Mr Weche reason to be unsatisfactory on two grounds. One, there is a specific provision that directly addresses a situation where one is to use dual citizenship for criminal purpose, that is, section 8(5) which states:

> " A dual citizen who uses the dual citizenship to gain unfair advantage or to facilitate the commission of or to commit a criminal offence, commits an offence and shall be liable, on conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both."

The second reason is found in article 24(3). It was the duty of the State to demonstrate that there were no less restrictive means to enforce the duty to disclose one's dual citizenship. No such evidence of any such administrative interventions that were considered and found ineffective or incapable was tendered. In the absence of any justification provided by the respondent, the court is unable to satisfy itself that the choice of heavy criminal sanction as an enforcement machinery for the legal duty to disclose dual citizenship was based on reasonable assessment of all the relevant facts. Faced with a similar issue, the late Justice David Majanja in *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR remarked:

> " .... Under article 24(1)(e) there must be a relation between the limitation and its purposes and whether there are less restrictive means to achieve this purpose. Could the protections and promotion of the welfare of refugees be achieved by less restrictive means other than sending all urban refugees irrespective of their individual circumstances to camps Are there less restrictive administrative interventions that can be undertaken by the Department of Refugee Affairs to eliminate the administrative challenges it anticipates in processing refugees and asylum seekers in urban centres Unfortunately the court was not given the opportunity by way of evidence to interrogate this issue and satisfy itself that the constitutional threshold has been met...."

69. In the circumstances, I find that the punishment imposed by section 8(4) of the *Citizen and Immigration Act* for non-disclosure of dual citizenship is an unreasonable and unjustifiable on the right of dual citizenship and by extension an unnecessary fetter to the freedom and the security of the person and freedom of movement hence unconstitutional.

70. As this is a public interest litigation, I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MILIMANI THIS 12TH DAY OF AUGUST, 2024.

L N MUGAMBI

JUDGE