



**Were & another v Cabinet Secretary Ministry of Education & 2 others; Abuto
(Interested Party) (Constitutional Petition 236 of 2019) [2022] KEHC 13233 (KLR)
(Constitutional and Human Rights) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 236 OF 2019**

HI ONG'UDI, J

SEPTEMBER 30, 2022

BETWEEN

SILAS SHIKWEKWE WERE 1ST PETITIONER

ONESMUS MBOYA ORINDA 2ND PETITIONER

AND

CABINET SECRETARY MINISTRY OF EDUCATION 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

EDGAR ABUTO INTERESTED PARTY

RULING

1. Before court for determination is the 1st petitioner's application dated November 26, 2021 brought pursuant to article 165(3) (b) (d) and 165(4) of the [Constitution of Kenya 2010](#). It seeks for orders that:
 1. Spent
 2. This honourable court be pleased to certify that the petition herein raises substantial constitutional questions of general public importance and questions of law on the denial, violation, infringement and threatened infringement of rights and fundamental freedoms in the bill of rights under the [Constitution](#) and therefore refer the petition herein to her Ladyship, the Chief Justice for appointment of a bench of an uneven number of judges being not less than three (3) pursuant to article 165(4) of the [Constitution of Kenya, 2010](#).



3. The honourable court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders if granted.
4. Each party bears its own costs for the application.
2. The application is premised on the grounds on its face and the 1st petitioner's supporting affidavit sworn on November 26, 2021. The summary of the grounds are, that;
 - a. The petition raises substantial questions of law on the denial, violation, infringement and threatened infringement of articles 50(2)(c), 32(2), 33(1)(a) and (b), 47, 48, 50(1), 50(2), 53(1)(b), (e) and 53(2) of the Constitution.
 - b. The petition raises questions on whether sections 2, 30, 30(2), 31(1), 31(2) and 43 of the Basic Education Act and section 20 of the Children Act, 2001 are inconsistent with or in contravention of the Constitution.
 - c. The petition raises the question whether the actions of the 2nd respondent for instituting criminal proceedings against the 1st petitioner and his children pursuant to the provisions of section 7 and 20 of the Children Act, 2001 and section 31(2) of the Basic Education Act are consistent with or in contravention of the Constitution.
 - d. The above questions in this petition, are of general public importance and necessitate that they be heard by an uneven number of High Court judges, being not less three, assigned by the Chief Justice pursuant to article 165(4) of the Constitution.
3. In the affidavit, the 1st petitioner reiterates the facts and the grounds on the face of the application.

Background of the case

4. The petitioners filed an application and petition dated June 17, 2019. They are parents who have been offering home education to their children. On February 18, 2019, the 1st petitioner and his children were arrested and incarcerated in police cells overnight and criminal charges preferred against them. To wit, Butali Criminal Case No 133 of 2019- Republic v Silas Shikwekwe Were, Butali Criminal Case No 4 of 2019, Butali Criminal Case No 5 of 2019 and Butali Criminal Case No 6 of 2019. The children were subsequently released on condition that the 1st petitioner enrolls them at a school which he did.
5. According to him, his prosecution for non-enrollment of a child infringes on the sacrosanct right to freedom of conscience, belief and opinion as well as discrimination against parents and children who choose to offer and / or acquire home education.
6. In the petition, they pray for: -
 - a. A declaration that home schooling does not contravene or infringe the right to education as enshrined under article 43 (f) of the Constitution.
 - b. A declaration that home schooling does not contravene or infringe the right to free and compulsory basic education as enshrined under article 53 (1) (b) of the Constitution.
 - c. A declaration that the definition of "school" under section 2 of the Basic Education Act should include "home" as an avenue for educating a child.
 - d. A declaration that the definition of "basic education" under section 2 of the Basic Education Act should include "home" as an avenue for offering basic education.



- e. A declaration that section 43(2) of the *Basic Education Act* is unconstitutional to the extent that it does not recognize or include "home" as a basic educational institution.
- f. A declaration that section 30(2), and 31(2) of the *Basic Education Act* are unconstitutional to the extent that it criminalizes the act of parents who fail to take and/ or admit their children to "school" as defined under the Act.
- g. An order of mandamus be issued directing the 1st and 3rd respondent to, within a period be specified by the court to come up with policies, rules and / or guidelines to harmonize the provisions of the *Basic Education Act* so as to include home schooling as a form of education that meets the threshold of the right to education as enshrined in the *Constitution*.
- h. Costs of and incidental to this Petition.

2nd petitioner's case

- 7. The 2nd petitioner did not file a response and submissions to the application.

The respondents' case

- 8. The respondents did not file a response and submissions to the application.

Interested party's case

- 9. The Interested party filed a response dated July 9, 2022 in support of the 1st petitioner's application. He basically supported the 1st petitioner's case and added that the application meets the legal criteria for empanelment.

1st petitioner's submissions

- 10. The petitioner filed submissions dated January 11, 2022 raising the following issues;
 - i. Whether the determination of the issues raised in the instant petition affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest
 - ii. Whether there is a state of uncertainty in the law as to the issues raised in the petition
 - iii. Whether this matter falls within the terms of article 165(3)(b) or (d) of the *Constitution*; and
 - iv. Whether the applicant has identified and concisely set out the specific substantial question or questions of law which he attributes to the matter for which the certification is sought.
- 11. Relying on the Court of Appeal case in *Okiya Omtatah Okioti & another v Anne Waiguru- Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR and High Court case of *David Ndiu & 4 others v Attorney General & 3 others; Kenya Human Rights Commission & 2 others (intended Amicus Curiae)* [2020] eKLR, he submitted that the application fully satisfies the principles for certification stated therein.
- 12. On the first issue, he submitted that the petition raises substantial questions of law as enshrined under article 165(4) of the *Constitution*. To wit, it affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest; he has demonstrated as to how the issues raised affect him; that by determining the petition it will create a shift in the education sector, its laws, policies and it will create certainty in respect of home schooling in realizing the right



to education in Kenya; the said decision will affect parents with school going children and persons pursuing education in Kenya.

13. It will have a bearing on the constitutionality of the *Children Act 2001* and the *Basic Education Act* and will call on the Ministry of education to develop new policies; and, will have an impact on the criminal justice system redefining or affirming what actions constitute criminal conduct in Kenya. Also, that the determination of the petition will be a determination in rem thus of public importance and interest.
14. On the second issue, and while relying on the Supreme Court of India case in *Sir Chunilal v Mehta and Sons Ltd v The Century Spinning and Manufacturing Co Ltd* 1962 AIR 1314 1962 SCR Supl. (3) 549, he submitted that the issues raised in the petition are unsettled in law as the courts are yet to pronounce themselves on the issue of home schooling in the realization of the right to education as stipulated under article 43 of the *Constitution*.
15. On the third issue, he submitted that this matter falls within the terms of article 165(3) (b) and (d) of the *Constitution* as has been pointed out in the application.
16. Lastly he contends that he has set out the substantial questions of law under paragraphs (a) (b)(c) and (d) of the notice of motion dated November 26, 2021 which prompted this application. He urged the court to allow the application.

Interested party's submissions

17. The interested party filed submissions dated July 11, 2022 arguing that the basis for empanelment is where it is established that the case canvasses a substantial point of law. He relied on *Sir Chunilal v Mehta and Sons, Ltd v The Century Spinning and Manufacturing Co Ltd* 1962 AIR 1314 and *Santosh Hazari v Purushottam Tiwari* [2001] 3 SCC 179 on what a substantial question of law. He further relied on the case of *Okiya Omtatah Okioti & another v Anne Waiguru- Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR that set down the guidelines for certification under article 165(4) of the *Constitution*.
18. He thus submitted that the outcome of this court's decision will not only have an impact on the rights of the 1st petitioner and his children, but will also go a long way in shaping the landscape of the rights relating to education and children consequently the various aspects of development in Kenya into the distant future; the scope of parental rights regarding the freedom to determine the system of basic education that will suit their children's best interest have not been determined; the matter falls under article 165(3) (b) and (d) of the *Constitution*; and the applicant/ 1st petitioner has clearly and concisely set out substantial questions of law under paragraphs (a-d) of the application. He urged the court to allow the application

Analysis and determination

19. Having carefully considered the parties' pleadings and submissions, I find the issue arising for determination to be whether this matter should be certified as raising substantial questions of law necessitating the empanelment of an uneven number of judges assigned by the Chief Justice.
20. Article 165 (4) of the *Constitution* provides;
 - (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.



21. It is evident from the above cited provision of the Constitution that for a matter to be considered for empanelment, it must raise a substantial question of law under clause (3) (b) or (d) of article 165 of the Constitution.
22. Clause (3) Subject to clause (5), the High Court shall have-
- a.
 - b. Jurisdiction to determine the question whether a right of fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c.
 - d. Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv a question relating to conflict of laws under article 191;
 - e.
23. In the case of Evangelical Mission for Africa & another -v- Kimani Gachibi & another [2014] e KLR Mwongo J held:
- “...empanelment of a bench under Article 165(4) arises when circumstances are special and jurisdiction to be exercised is not ordinary”.
24. The Court of Appeal case of Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR set out the principles for certification as follows;
- “(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
 - (ii) The applicant must show that there is a state of uncertainty in the law;
 - (iii) The matter to be certified must fall within the terms of article 165 (3)(b) or (d) of the Constitution;
 - (vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”
25. Other cases where courts pronounced themselves on this issue are:



- i. [*Chunilal Mehta v Century Spinning and Manufacturing Co*](#) AIR 1962 SC 1314,
 - ii. Meru High Court Petition No 16 of 2013 [*Amos Kiumo & others –v- Cabinet Secretary Internal and Coordination of National Court and others*](#),
 - iii. [*Martin Nyaga & others –v- The Speaker County Assembly of Embu*](#) Petition No 7 & 8 of 2014,
 - iv. [*Kevin Turunga Ithagi v Hedwig Ongudi & 6 others*](#) [2016] eKLR,
 - v. [*Wycliffe Ambetsa Oparanya & 2 others v Director of Public Prosecutions & another*](#) [2016] eKLR.
 - vi. [*Delmonte Kenya Ltd v County Government of Muranga & another*](#).
26. Onguto J in [*Kevin Turunga Ithagi v Hedwig Ongudi & 6 others*](#)(supra) stated further;

“ 16. Clearly factors which assist in the determination as to whether there is a substantial question of law must not be taken singularly and in isolation. The public interest may be considered but it is not necessarily the sole decisive factor as it is in the nature of constitutional petitions filed to enforce provisions of the Constitution to be matters of public interest: see *The County Government of Meru v The Ethics and Anti- corruption Commission* [2014] eKLR. Likewise, the novelty alone of a question raised in a Petition should not lead to the conclusion that there exists a substantial question of law. The Constitution 2010 is hardly out of its infancy and many novel questions including those involving interpretation are bound to arise. The totality of the circumstances always ought to be the ultimate determinant.”

27. The 1st petitioner’s case is fundamentally on breach of constitutional rights. To wit, articles 50(2), 25(c), 32(2); 33(1) (a) and (b), 43(1) (f), 47, 48, 50(1), 50(2), 53(1) (b) (e) and 53(2) of the [*Constitution*](#). It also raises questions on whether Sections 2, 30, 30(2), 31(1), 31(2) and 43 of the [*Basic Education Act*](#) and section 20 of the [*Children Act, 2001*](#) are inconsistent with or in contravention of the Constitution. Adding onto that is the question whether institution of criminal proceedings against him and his children was in contravention of the [*Constitution*](#) and that the petition raises questions of general public importance.
28. The issues raised by the petitioners touch on interpretation of various provisions of the law and the [*Constitution*](#).
29. The mere fact that home schooling has not been dealt with before does not make it a novel question to be determined by a bench of an uneven number of Judges. The issue being raised as to whether the 1st petitioner and his children were properly charged is an issue that has been decided on severally by the courts. The issues raised herein are capable of being determined by a single Judge. The upshot is that the petitioners and interested party have not demonstrated why a bench of an uneven number of Judges should be empanelled to hear this petition. The application is dismissed with no order as to costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER 2022 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. Ong’udi

Judge of the High Court

