



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(Coram: A. C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E371 OF 2021

-BETWEEN-

ESTHER AWUOR ADERO ANG'AWA.....PETITIONER

-VERSUS-

CABINET SECRETARY RESPONSIBLE FOR MATTERS

RELATING TO BASIC EDUCATION.....1ST RESPONDENT

KENYA INSTITUTE OF CURRICULUM DEVELOPMENT.....2ND RESPONDENT

KENYA NATIONAL EXAMINATIONS COUNCIL.....3RD RESPONDENT

TEACHERS SERVICE COMMISSION.....4TH RESPONDENT

KENYA NATIONAL UNION OF TEACHERS.....5TH RESPONDENT

NATIONAL ASSEMBLY.....6TH RESPONDENT

DR FRED OKENGO MATIANG'I.....7TH RESPONDENT

PROF GEORGE ALBERT OMORE MAGOHA.....8TH RESPONDENT

-AND-

- 1. THE KENYA PRIVATE SCHOOLS ASSOCIATION (KPSA)**
- 2. THE KENYA PRIMARY SCHOOLS HEAD TEACHERS ASSOCIATION (KEPSHA)**
- 3. THE KENYA UNION OF POST PRIMARY EDUCATION TEACHERS (KUPPET)**
- 4. THE NATIONAL PARENTS ASSOCIATION (NPA)**
- 5. KATIBA INSTITUTE.....INTERESTED PARTIES**

RULING NO. 2

1. The application subject of this ruling is a Notice of Motion dated 16th September, 2021. It was taken out by the Petitioner.

2. The following orders are sought in the application: -

1. This Application be and is hereby certified as urgent.

2. An order be and is hereby made that the Petition herein dated 16th September, 2021 raises substantial questions of law under Article 165 (3) (b) and (d) and (4) of The Constitution of Kenya.

3. The Petition herein dated 16th September, 2021 be and is hereby referred to the Chief Justice for assignment of an uneven number of Judges, being not less than five to hear it.

4. Pending the hearing and determination of this Petition:

a. An order of injunction be and is hereby made restraining the 1st, 2nd, 3rd and 4th Respondents from further implementing the Kenya Competence Based Curriculum introduced through the Basic Education Curriculum Framework, 2017 and Sessional Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya in place of the existing system and structure of basic education (8-4-4) codified under Section 41 of the Basic Education Act No 14 of 2013 and the existing curriculum in respect thereto.

b. A conservatory order be and is hereby issued directed at the 1st, 2nd, 3rd and 4th Respondents staying further implementation of the Kenya Competence Based Curriculum for basic education introduced through the Basic Education Curriculum Framework, 2017 and Sessional Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya.

5. The costs of this Application be provided for.

3. The application is supported by the affidavits sworn by Nelson Andayi Havi and the Petitioner respectively on 16th September, 2021.

4. In view of the nature of the application, this Court directed that prayers 2 and 3 of the application be first dealt with. The said prayers are on the certification for empanelment of an expanded bench of this Court.

5. This ruling is, therefore, in respect of the said prayers 2 and 3 of the application.

6. The application is mainly unopposed save for the 5th Respondent and the 3rd Interested Party. The 1st, 2nd and 3rd Respondents together with the 7th Respondent left the matter to the discretion of the Court.

7. Parties filed submissions in support of their respective positions.

8. I have, with patience, considered the request, the grounds of opposition, the written submissions and the decisions referred to by the parties. In answer to the request, I will first look at the law governing applications for empanelment of expanded benches.

9. Applications for certification have a constitutional underpinning. The Constitution provides for certification in two instances in the superior Courts; that is under **Article 163(4)(b)** and **Article 165(3) and (4)** of the **Constitution**.

10. Article 163(4)(b) provides as follows: -

163(4) Appeals shall lie from the Court of Appeal to the Supreme Court—

a.

b. in any other case in which the Supreme Court, or the Court of Appeal, **certifies** that a matter of general public importance is involved, subject to clause (5).

11. Article 165 (3) and (4) states that: -

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(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; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(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.

(emphasis added)

12. The application under consideration relates to certification in the High Court; that is under Article 165 (3) and (4) of the Constitution. The manner in which a single Judge of the High Court certifies that a matter raises a substantial question(s) of law so as to warrant the empanelment of an expanded bench has, on several instances, been dealt with by the Superior Courts.

13. The Supreme Court of Kenya in *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone [2013] eKLR* established the principles for certification under Article 163(4)(b) of the Constitution. However, those principles were adopted, *with modification*, by the Court of Appeal in *Okiya Omtatah Okiiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR* when the Court of Appeal dealt with an appeal against a refusal by the High Court to certify a matter as raising substantial questions of law under Article 165(4) of the Constitution.

14. The Supreme Court summed up the principles as follows: -

In summary, we would state the governing principles as follows:

- i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
- ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;
- iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
- iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;
- v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution;
- vi. the intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance” which he or she attributes to the matter for which certification is sought;
- vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.

15. As said, the Court of Appeal applied the above principles in *Okiya Omtatah Okiiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR* and expressed itself thus: -

42. In *Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone [2013] eKLR* the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:

- 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.

43. It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of Article 165(4) of the Constitution is a matter for determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed.

16. The High Court has as well severally dealt with the matter. In **Republic v Public Service Commission & Keriako Tobiko Ex parte Nelson Havi [2017] eKLR** the Court stated that: -

42. Whereas this Court appreciates that the decision of an enlarged bench may well be of the same jurisprudential value in terms of precedent or stare decisis principles as a decision arrived at by a single High Court judge, the Constitution itself does recognise that in certain circumstances it may be prudent to have a matter which satisfies the constitutional criteria determined by a bench composed of numerically superior judges...

46. In the circumstances, I hereby certify that this matter raises a substantial question of law to warrant reference of the same to the Chief Justice as required under Article 165(4) of the Constitution.

17. In **Philomena Mbete Mwilu v Director of Public Prosecution & 4 others [2018] eKLR** the High Court had the following to say: -

29. I fully agree with the above views on the jurisprudential value of decisions by a bench or a single judge of this court. Although the present petition can be heard by a single judge of this court and also being fully aware that a bench would sometimes require resources both personnel and financial as well as more time to resolve a petition than if it were heard by a single Judge, the present petition is the kind of petition that this court should exercise its discretion in favour of an expanded bench due to its public importance and significance in our constitutional democracy. The issues sought to be decided are not mere questions of law, they are substantial questions of law and their resolution will have a material bearing on the 1st respondent's decision to arrest and prosecute the petitioner and the independence of the judiciary.

18. Earlier, the High Court had dealt with the matter in **Law Society of Kenya v Attorney General & Another** Petition No.3 of 2016, and identified the ingredients that may help a Court to determine whether a substantial question of law has been raised. They are: -

- a. Whether the matter is complex;
- b. Whether the matter raises novel points of law;
- c. Whether the matter by itself requires a substantial amount of time to be disposed of;
- d. The effect of the prayers sought in the Petition;
- d. The level of public interest generated by the petition.

19. Drawing from the foregoing, it comes to the fore that a Court dealing with a request for empanelment of an expanded must take into account the following considerations: -

- i. The matter to be certified must fall within the terms of Article 165(3)(b) or (d) of the Constitution.
- ii. The matter must raise substantial question(s) of law.
- iii. 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.
- iv. The applicant must show that there is a state of uncertainty in the law.
- v. 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.
- vi. The matter is of immense public importance and has unique significance in our constitutional democracy.
- vii. Whether the matter is complex.
- viii. Whether the matter raises novel points of law.

ix. Whether the matter by itself requires a substantial amount of time to be disposed of.

x. The effect of the prayers sought in the Petition.

20. This Court hereby agrees with the position in *Kalpna H. Rawal v Judicial Service Commission & 3 Others* Petition No. 386 of 2015 that a Court must consider the totality of the case and decide whether the foregoing considerations ought to be applied disjunctively or conjunctively.

21. I will now apply the above criterion in this case.

22. In the main, the Petition seeks the following prayers: -

a. A declaration be and is hereby made that the 1st, 2nd, 3rd and 4th Respondents acted in contravention of Section 41 of the Basic Education Act No 4 of 2013 in purporting to overhaul and replace the system and structure of basic education from: early childhood education; primary education; secondary education; and middle level institutions of basic education commonly known as 8-4-4 and substitute it with: early years education; middle school and senior school through The Basic Education Curriculum Framework, 2017 and Sessional Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya and thereby violated Articles 1(3) (a), 2(1) and (2), 3(1), 10, 21(1), (2) and (3), 24, 27(1), (2), (4) and (5), 33(1), 43(1)(f), 47(1) and (2), 53(b) and (d) and (2), 55(c), 56, 73 and 232 of The Constitution of Kenya.

b. A declaration be and is hereby made that the holders of the State Office of the 1st Respondent responsible for the contravention of Section 41 of the Basic Education Act No 4 of 2013 and violation of Articles 1(3) (a), 2(1) and (2), 3(1), 10, 21(1), (2) and (3), 24, 27(1), (2), (4) and (5), 33(1), 43(1)(f), 47(1) and (2), 53(b) and (d) and (2), 55(c), 56, 73 and 232 of The Constitution of Kenya namely Dr Fred Okengo Matiang'i and Prof George Albert Omoro Magoha being the 7th and 8th Respondents herein respectively are unsuitable to hold public office.

c. A declaration be and is hereby made that the 1st, 2nd, 3rd and 4th Respondents cannot overhaul the existing system and structure of basic education (8-4-4) and curriculum thereto and replace it in the absence of a curriculum developed within the framework of Regulations made by the 1st and 2nd Respondents in consultation with stakeholders in terms of Section 73(4) of the Basic Education Act No 14 of 2013 and Regulations made by the 2nd Respondent in terms of Section 4 of the Kenya Institute of Curriculum Development Act No 4 of 2013 and any curriculum developed, rolled out and implemented by the 1 and 2 Respondents in the absence of Regulations is unlawful, null and void.

d. A declaration be and is hereby made that the introduction of the Kenya Competence(y) Based Curriculum through the Basic Education Curriculum Framework, 2017 and Sessional Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya by the 1st and 2nd Respondents to replace the existing system and structure of basic education (8-4-4) and curriculum thereto without a curriculum developed in accordance with Sections 73 and 74 of the Basic Education Act No 14 of 2013 and Section 4 of the Kenya Institute of Curriculum Development Act No 4 of 2013 violates Articles 2(1) and (2), 10, 47, 232 of The Constitution of Kenya.

e. A declaration be and is hereby made that Kenya Competence(y) Based Curriculum is based upon vocational education and training approaches conceptualized for specific use in training adults in vocational skills, in inapplicable for basic education of children in Kenya, is discriminatory and the introduction thereof by the 1st, 2nd, 3rd and 4th Respondents through the Basic Education Curriculum Framework, 2017 and Sessional Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya violates Articles 21 and 27 of The Constitution of Kenya on equality and freedom from discrimination, violates the right to education under Article 43(1)(f) of The Constitution of Kenya, violates every child's right to free and compulsory education under Article 53(1)(b) of The Constitution of Kenya, violates the right to freedom of expression under Article 33(1) (a), (b) and (c) and amounts to torture contrary to Article 29(d) and Article 53(1) (d) and (2) of The Constitution of Kenya.

f. An order of injunction be and is hereby made restraining the 1st, 2nd, 3rd and 4th Respondents from further implementing the Kenya Competence(y) Based Curriculum introduced through the Basic Education Curriculum Framework, 2017 and Sessional Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya in place of the existing system and structure of basic education (8-4-4) codified under Section 41 of the Basic Education Act No 14 of 2013 and the existing curriculum in respect thereto.

g. An order be and is hereby made directed to the 1st and 2nd Respondents to draw Regulations in respect to policy and guidelines on curricula in accordance with Sections 73 and 74 of the Basic Education Act No 14 of 2013 and Section 4 of the Kenya Institute of Curriculum Development Act No 4 of 2013 respectively and table the same before the 6th Respondent for approval within 90 days of the making of the order in that regard.

h. A conservatory order be and is hereby issued directed at the 1st, 2nd, 3rd and 4th Respondents staying further implementation of the Kenya Competence(y) Based Curriculum for basic education introduced through the Basic Education Curriculum Framework, 2017 and Sessional Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya.

i. Any other relief as the Court may deem fit to grant

23. There is no doubt that the Petition challenges the overhauling and replacement of the system and structure of basic education from early childhood running through to post-secondary commonly known as the 8-4-4 system. The former system had been in place for decades and

until the introduction of the new system over 8 Million children and young adults were going through it. Those children and young persons have now transitioned to the new system. Needless to say, parents and stakeholders are also affected in one way or the other.

24. In such a situation, the public importance and immense public interest generated including the public resources so far injected into the new education system cannot be gainsaid. In fact, the matter transcends the dispute between the parties before Court and has a significant bearing on the larger public.

25. The matter also raises questions of infringement of rights and fundamental freedoms under the Bill of Rights as well as whether the law is inconsistent with or in contravention of the Constitution. It also questions whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, this Constitution. The Petition, therefore, comes under the purview of Article 165(3)(b) or (d) of the Constitution and it raises substantial questions of the law under Article 165(4) of the Constitution.

26. Further, the certainty of the law is challenged in this Petition.

27. Again, there is no doubt that the matter involves voluminous documents. The Petitioner has so far filed over 1,700 pages of documents whereas the Respondents have cumulatively filed over 5,000 such pages. In such circumstances, a single Judge will require substantial amount of time to dispose of the Petition.

28. Having said so, this Court is now satisfied that the matter has attained the threshold required for certification.

29. As such, the following final orders do hereby issue: -

- a. It is hereby certified that the Petition dated 16th September, 2021 raises substantial questions of law;**
- b. This matter is hereby referred to the Honourable The Chief Justice of the Republic of Kenya to assign an uneven number of Judges, in terms of Article 165(4) of the Constitution.**
- c. The rest of the prayers in the Notice of Motion dated 16th September, 2021 shall be considered by the expanded Bench.**
- d. Any party yet to comply with the directions on filing of responses to forthwith do so.**
- e. Matter to be fixed for directions before the expanded Bench on 7th December, 2021.**

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2021

A. C. MRIMA

JUDGE