



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. 74 OF 2018

MAK [suing on behalf of and as the
next friend of MK and RK (minors).....1ST PETITIONER
CHAIRMAN SUPREME COUNCIL OF KENYA MUSLIMS.....2ND PETITIONER

VERSUS

THE BOARD OF DIRECTORS OSHWAL ACADEMY LTD.....1ST RESPONDENT
THE CABINET SECRETARY MINISTRY OF EDUCATION.....2ND RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

AND

NATIONAL GENDER & EQUALITY COMMISSION.....1ST INTERESTED PARTY
KENYA NATIONAL COMMISSION
ON HUMAN RIGHTS.....2ND INTERESTED PARTY
NATIONAL COHESION AND INTEGRATION
COMMISSION.....3RD INTERESTED PARTY

RULING

1. The 1st Petitioner, MAK (suing on behalf of and as the next friend of MK and RK (minors)), and the 2nd Petitioner, the Chairman of the Supreme Council of Kenya Muslims are through the application dated 3rd May, 2019 seeking a certification under Article 165(4) of the Constitution that this petition raises a substantial question of law under Article 165(3)(b) and (d) warranting the assignment of the matter by the Chief Justice for hearing by an uneven number of judges not being less than three.
2. The 1st Respondent, the Board of Directors Oshwal Academy Limited; the 2nd Respondent the Cabinet Secretary Ministry of Education; and the 3rd Respondent, the Honourable Attorney General are opposed to the application.
3. The 2nd Interested Party, Kenya National Commission on Human Rights and the 3rd Interested Party, the National Cohesion and Integration Commission support the application. The 1st Interested Party, National Gender and Equality Commission did not participate in the application.
4. The basis of the application as stated on the grounds in support of the application and the supporting affidavit of the 1st Petitioner are that the finding or judgment in this matter will greatly affect how schools, private or public, relate with their pupils or students in matters religion across the country; that the petition raises substantial issues as concerns freedom of worship, conscience and religion as articulated under Article 32 of the Constitution; that the petition raises an underlying threat to the right to education; that the matter raises a novel issue in terms of the right to worship at private schools and other institutions providing basic education vis-a-vis the right to compulsory basic

education; that the petition has so far generated a lot of public interest; that the issue of observance of Islamic prayers (salah) in schools or other learning institutions in the country has never been adjudicated by the High Court; and that no party will suffer any prejudice if the application is granted.

5. The 3rd Interested Party's support of the application is through the replying affidavit of its Chief Executive Officer, Hassan S Mohamed sworn on 29th July, 2019. His averment is that the petition raises substantial issues on the extent of enjoyment of rights of equality and freedom from discrimination, and freedom of conscience, religion and beliefs in private schools which are not simple issues of interpretation of the Constitution. Further, that the 3rd Interested Party has been receiving several complaints of religious discrimination in private schools particularly where the sponsor is of different religion from that of the victims. It is therefore the 3rd Interested Party's case that the court should provide clear guidelines on the role of a sponsor under Section 27 of the Basic Education Act, 2013 on the regulation of religious practices.

6. Additionally, the 3rd Interested Party avers that the issues raised herein are substantial in that the decision of the court will affect the relationship between students who practice a different religion from the sponsor.

7. The 1st Respondent opposed the application through a replying affidavit sworn by its Academic Consultant, Jyotsna Chotai on 30th May, 2019. It is the 1st Respondent's averment that no substantial question of law has been raised in the pleadings to warrant certification under Article 165(4) of the Constitution. According to the 1st Respondent, the dispute between it and the petitioners is one of private nature where no public interest is at heart.

8. It is further the 1st Respondent's case that even assuming that there was a substantial question of law raised in the pleadings, the question of manifestation of religion has been substantively dealt with by the courts including in **Petition No. 41 of 2015 ABH v The Board of Management Bura Girls High School & others; Civil Appeal No. 172 of 2014 Seventh Day Adventist Church East Africa Limited v The Minister of Education & others;** and **Nairobi Petition No. 82 of 2012 Nyakamba Gekora v Attorney General & 2 others.**

9. Additionally, the 1st Respondent asserts that certification under Article 165(4) of the Constitution is the exception rather than the rule and the power ought to be exercised sparingly. Further, that the empanelment of a bench imperils the prudent and efficient use of judicial resources and thus the exercise under Article 165(4) is a matter of judicial discretion as opposed to an automatic right.

10. The 2nd and 3rd respondents opposed the application through grounds of opposition dated 25th October, 2019. When the matter came up for hearing on 22nd January, 2020 Ms Mutindi for the Attorney General indicated that the 2nd and 3rd respondents were relying on the submissions of the 1st Respondent in opposition to the application.

11. In an application like the one before this court, the parties usually do not disagree on the applicable law. The disagreement arises on how the law is to be applied to the facts of the case. For that reason, I do not deem it necessary to recite the submissions of the parties. Mine is to just to apply the law to the facts and determine whether this matter meets the threshold for certification under Article 165(4) of the Constitution.

12. The basis for exercising the power granted to the court under Article 165(4) of the Constitution is that the matter should raise a substantial question of law under clause 3(b) and (d) of Article 165. Clause 3(b) and (d) gives the High Court:-

“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.

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;”

13. In **Hermanus Phillipus Steyn v Giovanni Gnechichi –Ruscoe [2013] eKLR** the Supreme Court was called upon to interpret the term “*matter of general public importance*” under Article 163(4)(b) of the Constitution. The Court observed that the general phraseology used in laws of most jurisdiction is “*a point of law of general public importance.*” The Court went ahead and laid down the governing principles as follows:-

“[60] In this context, it is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts

below. Where the said point of law arises on account of any contradictory decisions of the Courts below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions. 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.”*

14. In **J Harrison Kinyanjui v Attorney General & another [2012] eKLR**, Majanja, J highlighted the factors to be taken into account in considering an application such as the one before this court. He stated that:-

“8. Therefore, giving meaning to “*substantial question*” must take into account the provisions of the Constitution as a whole and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges.

9. We must also not lose sight of the fact that the High Court does not have the last word on the interpretation of the Constitution or the enforcement of the Bill of Rights. There is a right of appeal to the Court of Appeal and by virtue of Article 163(4) of the Constitution, an appeal as of right to the Supreme Court on Constitutional matters.

10. A matter may raise complex issues of fact and law but this does not necessarily imply that the matter is one that raises substantial issues of law. Judges are from time to time required to determine complex issues yet one cannot argue that it means that every issue is one that raises substantial questions of law. Thus, there must be something more to the “*substantial question*” than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts or the application of well-settled principles to the facts of a case.”

15. In **Wilbert Kipsang Choge v Attorney General & 2 others [2016] eKLR**, the late Onguto, J observed that the fact that a petition raises issues of public importance is not a sufficient ground for certification. This is what he said:-

“12. The parties themselves are in agreement that the question of dissolution of Parliament and the ramifications therein raises substantial a question of law. Further, it was urged that the Petition raises issues of public importance. However, and as stated in **Kevin Turunga Ithagi vs. Hon. Justice Hedwig Ongudi and 7 Others (supra)**, 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. This does not then necessarily mean that the same ought to be heard by an uneven number of judges as constituted by the Chief Justice. However, there is also need to holistically look at the Petition and the issues raised.”

16. The Court of Appeal has had occasion to address the question of certification under Article 165(4) of the Constitution in the case of **Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR**. In that case, the Court allowed an appeal against a decision declining an application for certification under Article 165(4). In doing so, the Court held, *inter alia*:-

“41. The position we take whilst embracing the test by the Supreme Court of India in Sir Chunilal V. Mehta and Sons Ltd vs. The Century Spinning and Manufacturing Co. Ltd is that each case must be decided on its own facts and circumstances. No factor alone is decisive. A party seeking certification must lay a basis for the certification. Further, certification under Article 165(4) of the Constitution is a matter in the judicial discretion of the court. Such discretion must however, be exercised on sound basis.

42. There are, in our view, parallels to be drawn between certification for purposes Article 163(4)(b) of the Constitution and certification for purposes of Article 165(4) notwithstanding that the drafters of the Constitution, in providing for certification of matters for purposes of appeal to the Supreme Court under Article 163(4)(b) stipulated that a matter should be of “general public importance”, The word, “substantial” in its ordinary meaning, means “of considerable importance”^[2]. There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4)(b). 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.”

17. It is therefore clear from the cited authorities that the answer as to whether to allow an application for certification under Article 165(4) lies in the facts of each case.

18. The petitioners submit that their amended petition questions the effects of two policies introduced by the 1st Respondent. It is their case that the policies infringe on the rights of the minors, on whose behalf this suit is brought, under Articles 27, 32 and 43 of the Constitution.

19. The 2nd Interested Party holds the view that the petition raises issues of enforcement of fundamental rights and the interpretation of the Constitution and particularly, the form, content and extent of religious freedom as guaranteed under Article 32 of the Constitution.

20. The 1st Respondent asserts that the question of manifestation of religion and interpretation of Article 32 of the Constitution have been substantively addressed in **Petition No. 41 of 2015 ABH v The Board of Management of Bura Girls High School & others** (ABH case); **Civil Appeal No. 172 of 2014 Seventh Day Adventist Church East Africa Ltd v Minister for Education others** (SDA case); and **Nairobi Petition No. 82 of 2012 Nyakamba Gekara & 2 others** (Nyakamba Gekara case)

21. In rejecting this argument, the petitioners contend that the issues raised are yet to be settled as the **ABH** and **Nyakamba Gekara** cases found no violation of Article 32 of the Constitution whereas the **SDA** case did. Further, that the three cases are distinguishable in the sense that they relate to government sponsored schools whereas the present case relates to a private school.

22. It is true that all rights in the Bill of Rights are equally important. Nevertheless, the 3rd Interested Party has correctly observed that there is a continuing tension as to the practice of religion by pupils and students in schools whose religious inclinations are different from those of the pupils and students. This, in my view, is a substantial question of law that must be addressed by this Court with finality so that the pupils and students on the one hand and the educational institutions on the other hand can clearly understand what the Constitution expects of them.

23. There is the argument normally raised by those opposing constitution of benches to the effect that a single judge is equal to the task. That argument was rebutted by the Court of Appeal in **Attorney General v Okiya Otatah Okoiti & another [2019] eKLR** as follows:-

“The applicant contends that the petition raises substantial issues of law that call for an enlarged bench of more than 3 judges. In *Okiya Omtata Okoiti & Another vs. Anne Waiguru* (supra), this court stated:

“The question therefore arises as to whether the jurisprudence arising from a determination of a question of law by a court comprising three or more judges would be of equal weight as a question of law that is determined by a court comprising of just one judge.

Our preliminary view in answer to this question is that while both the courts envisaged would be exercising the same jurisdiction, the decision of three or more judges would have more jurisprudential weight than the decision of a single judge. To our minds, the inclusion of Article 165(4) of the Constitution, requiring that a matter of substantial importance

be heard by a bench of more than three judges, infers that a substantial question will yield a substantial decision, and as such that decision would bear more weight.”

24. In my view, where a matter that requires certification, like this one, is placed before the court, the court has a duty to exercise its discretion and certify the matter under Article 165(4) of the Constitution. This petition does indeed raise a substantial question of law that will require interpretation of various constitutional provisions. It is also noted that the outcome of this petition will affect the entire education sector and is therefore a matter of great public interest.

25. The importance attributed to religious matters was noted by the Supreme Court in **Methodist Church in Kenya v Mohamed Fugicha & 3 others [2019] eKLR** as follows:-

“[59] In the same breadth, we recognize that the issue as contained in the impugned cross petition is an important national issue, that will provide a jurisprudential moment for this Court to pronounce itself upon in the future. However, to do so, it is imperative that the matter ought to reach us in the proper manner, so that when a party seeks redress from this court, they ought to have had the matter properly instituted, the issues canvassed and determined in the professionally competent chain of courts leading up to this Apex Court. In view of this, it is our recommendation that should any party wish to pursue this issue, they ought to consider instituting the matter formally at the High Court.”

26. In short, the petitioners’ application dated 3rd May, 2019 finds favour with this court and is allowed. This petition is therefore certified under Article 165(4) of the Constitution as raising a substantial question of law under clause 3(b) or (d) of the said Article. The Deputy Registrar of the C & HR Division is directed to transmit this file to the Chief Justice for the purpose of appointment of an uneven number of judges, being not less than three, to hear the petition

Dated, signed and delivered through email at Nairobi this 30th day of 2020.

W. Korir,

Judge of the High Court