



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 104 of 2019

LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA & 63 OTHERS.....PETITIONERS

VERSUS

THE CABINET SECRETARY, MINISTRY OF EDUCATION.....1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF INTERNAL

SECURITY AND COORDINATION OF NATIONAL GOVERNMENT....2ND RESPONDENT

THE INSPECTOR GENERAL, NATIONAL POLICE SERVICE.....3RD RESPONDENT

GARISSA UNIVERSITY.....4TH RESPONDENT

THE CABINET SECRETARY, MINISTRY OF DEFENCE.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

INDEPENDENT POLICING AND OVERSIGHT AUTHORITY.....7TH RESPONDENT

COMMISSION ON ADMINISTRATIVE JUSTICE.....8TH RESPONDENT

RULING

1. Through a Notice of Motion application dated 14th November, 2019 supported by the affidavit sworn by **John Mwariri** of even date, the Petitioners are seeking the following orders:

- a) That this Honorable Court be pleased to certify that the Petition herein raises substantial questions of law and forthwith refer the case to the Hon. Chief Justice for appointment of a bench of an uneven number of judges being not less than three (3).
- b) That this Honorable Court be pleased to direct the 7th and 8th Respondents to furnish the Petitioners and the Honorable Court with the reports that they hold touching on the Garissa University Terrorist Attack case.
- c) That there be no orders as to costs.

2. The application is premised on the grounds that there are substantive legal issues touching on gross violation of human rights during a terrorist attack and the remedies available in the circumstances. Further, they argued that the petition raises novel questions of law on whether there is an obligation on the part of the state to provide security in times of a terrorist attack. Accordingly, the petition is touching on terrorism, human rights and national security which have not been considered in any other forum in the country. Furthermore, the application is predicated on the 7th and 8th Respondents furnishing investigatory reports as the petitioners view the report as key to their protections and exercise of their rights in the constitution.

3. Indeed, they urged that there is a greater public interest in disclosure of the information in ensuring the Petitioners obtain a remedy from

the court and further promoting accountability by public bodies and servants. Be that as it may, they averred that the national security of the country will not be prejudiced if the reports are made available. In any case, they contend that the court can apply various measures to ensure protective disclosure is made to the Honorable Court itself or to the advocates. Moreover, they state that issues of national security do not fall beyond the jurisdiction of this Honourable Court and the court ought to be furnished with such reports in exercise of its judicial authority as provided in our Constitution. It was also their averment that the right to information is a constitutionally guaranteed right and is the hallmark of any effective democracy.

4. In response to the application, the 6th Respondent filed grounds of opposition dated 22nd January, 2020. They stated that Article 163(4) of the Constitution provides for the right to appeal to the Court of Appeal. Furthermore, Article 159(2)(b) of the Constitution would be imperiled as judicial resources would be burdened unnecessarily. They further stated that Article 165 vests the High Court with authority to determine any matter that is within the jurisdiction of the High Court and complex issues of fact and/or law do not necessarily translate to substantial issues of law for empaneling a numerically enlarged bench. In their view, Article 165(4) of the Constitution is an exception rather than the rule.

5. Dr. Khaminwa and Mr. Mwariri appearing for the Petitioners highlighted their written submissions dated 29th January, 2020. They submitted that the amended petition raises substantial issues of law that go beyond the Petitioners as individuals for the reason that there are greater public interests considerations in the wake of numerous terrorist attacks the country has experienced. Accordingly, they cited the case of **Eric Gitari v Attorney general & Anor (2016) eKLR** where Lenaola J (as he then was) while relying of the Supreme Court of India case of **Sir Chunilal and Sons Ltd v Century Spinning and Manufacturing CO. Ltd 1962 SC 1314** opined that a substantial issue of law is one which is of general public importance or which directly affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy or the Federal court or which is not free from difficulty or which calls for discussion of alternative views.

6. It was further their submission that what constitutes a substantial question of law is dependent on the circumstances of a particular case which position was highlighted by the Court of Appeal in the case of **Okiya Omtatah Okiiti & Anor v Anne Waiguru, CS Devolution and Planning & 3 Others (2017) eKLR**. The Court of Appeal while relying on the holding of Lenaola J in **Okiya Omtatah Okiiti v President Uhuru Kenyatta and 4 Others, Petition No. 531 of 2015** held that the presiding judge has to exercise his or her discretion on whether, on his or her appraisal of the factual and legal matrix, a substantial question of law arises. The Court of Appeal went ahead to hold that whenever a certification is sought under Article 165(4) of the Constitution, a parallel has to be drawn with the certification required under Article 163(4)(b) of the Constitution.

7. On the issue of general public importance, the court observed that 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 significant bearing on the public interest. Furthermore, the applicant must show that there is a state of uncertainty in the law, must fall within the terms of Article 165(3)(b) or (d) of the Constitution. Lastly, 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. The Court of Appeal in the above case went ahead to say that the issue of certification of a matter as raising substantial question of law has to be determined on a case by case basis and that the factors to be taken into account cannot be fully exhausted. The Court of Appeal further noted the importance of the effect of the orders sought by a party to the suit in determining whether it merits certification for purposes of Article 165(4) of the Constitution.

8. Accordingly, counsel submitted that the circumstances of this particular case are unique as they touch on terrorism and merit certification as they raise substantial questions of law. In their view, the balance between national security and the public interest in the petitioners accessing information held by state security agencies in order for them, to obtain remedy in court as contemplated in Article 48 of the Constitution are substantial issues of law that the court ought to determine. Further, counsel argued that the question of human rights violations particularly the killing of innocent lives where the state has information or useful intelligence of a likely attack raises the question of whether the state should be held accountable for violations of the right to life and security of a person. Further in their view, the question of the amount of compensation that should be given to each of the petitioners is also fundamental considering that young lives were lost.

9. They further cited the case of **Okiya Omtatah Okiiti & Anor v Attorney general & 3 Others (2016) eKLR** where Lenaola J (as he then was) while relying on a number of decisions held that a substantial question of law arise if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents and involves a debatable legal issue. This position was also upheld by the Environment and Land Court at Nakuru in **Luo Council of Elders & 7 others v Cabinet Secretary Water & Irrigation & 13 others (2017) eKLR**. Accordingly, counsel argued that the issues raised in the petition have never been the subject of judicial pronouncements by the highest court of the land neither have the issues of human rights violations in a terrorist attack been determined by the courts in Kenya. In their view therefore, the issue of whether disclosure of information by state security agencies in cases of a terrorist attack is important and whether such non-disclosure will affect accountability and the right of petitioners to seek or obtain remedy as weighed against the national security of the country are novel issues that have not been determined.

10. Counsel also submitted that where there is a greater public importance attached to the determination of a particular constitutional question, the balance should tilt in favor of certification pursuant to Article 165(4) of the Constitution as was held by the late Onguto J in **Del Monte Kenya Limited v County Government of Murang'a & 2 Others (2016) eKLR**. Further, they argued that the subject matter herein is complex, the effects of the prayers sought are so grave and the levels of public interest generated by the petition are so monumental. Counsel appreciated the fact that single judge decisions and a decisions made by a bench of uneven number of judges of the same court have the same jurisprudential value however, it was their submission that the constitution places due recognition to the importance of an uneven number of judges hearing and determining a particular matter as was captured by Odunga J in **Republic v Law Society of Kenya & 3 Others Ex-Parte Nelson Havi (2017) eKLR** which decision resonated with that of Ohungo J in **Luo Council of Elders case (supra)**.

11. Guided by the judicial decisions cited herein above and taking the totality of the averments in the petition and the responses thereto, counsel submitted that the instant petition is one such matter with peculiar circumstances and which raises substantial questions of law that warrants being heard and determined by an uneven number of judges. It was further their submission that no prejudice will be occasioned to the parties herein if the hearing and determination of the instant petition is done by tasking more judicial minds of this court to it. Accordingly, they urged the court to allow the application.

12. Ms. Mutindi appearing for the 1st, 2nd, 3rd, 4th and 6th Respondents highlighted her written submissions dated 22nd January, 2020. Counsel while relying on the case of **J. Harrison Kinyanjui v Attorney General & Anor (2012) eKLR** submitted that the Constitution of Kenya does not define ‘substantial question of law’ and it is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine the matter. Counsel further submitted that in a ruling on an application such as the instant one, the court in **Wycliff Ambetsa Oparanya & 2 Others v Director of Public Prosecutions & 7 Others (2016) eKLR** stated that the decision whether or not to empanel a bench of more than one judge ought to be made only where it is absolutely necessarily and in strict compliance with the relevant constitutional and statutory provisions.

13. Counsel further submitted that the Supreme Court of India from which our jurisprudence largely borrows from developed certain tests in the cases of **Chunilal v Mehta v Century Spinning and Manufacturing Co. AIR 1962 SC 1314** and **Santosh Hazari v Purushottam Tiwari (2001) 3 SCC 179** for determining whether a matter raises a substantial question of law. The tests include whether, directly or indirectly, it affects substantial rights of the parties, whether the question is of general public importance, whether it is an open question in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council of the Federal court, the issue is not free from difficulty or it calls for a discussion for alternative view. Accordingly, she submitted that on a strict application of the above test, every case dealing with the interpretation of the constitution or application of the bill of rights would be a substantial question of law as it affects the rights of the parties, is fairly novel and has not been the subject of pronouncement by the highest court. However, in her view, counsel argued that such strict application would occasion grave burden to the already threatened judicial resources to the extent that the value of obtaining justice without delay under Article 159(2) (b) of the constitution would never be realized.

14. Counsel further submitted that in seeking a certification under Article 165(4) of the Constitution, it is not enough for the Petitioners to claim that their rights and fundamental freedoms in the Bill of rights have been denied, violated, infringed or threatened or that their amended petition raises issues of interpretation of the Constitution but the court should satisfy itself that the issues at hand which in counsel’s view largely seeks compensation for the victims of the terrorist attack at Garissa University College does not raise a substantial question of law for empanelment of a bench of an uneven number of judges. She further argued that the single judges have rendered decisions in matters involving the question of compensation where the right to safety and security of individuals and their property were infringed as a result of the 2007/2008 and cited the cases of **HCCC No. 298 of 2009 Intraspeed Logistics Ltd & 15 Others v Commissioners of Police & Anor (2018) eKLR** and **HCCC No. 221 of 2012 Paul K. Waweru & 4 Others v Attorney General & 2 Others (2016) eKLR**.

15. Counsel further cited the case of **County Government of Meru v The Ethics and Anti-Corruption Commission Petition No. 177 of 2014** where the court held that substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or fact or even one that is complex. The court continued to hold that many provisions of our constitution are untested and bring forth novel issues yet it is not every day the Chief Justice is called upon to empanel a bench of not less than three judges. In counsel’s view therefore, compensation, be it general, special or exemplary does not qualify as a matter of general public importance or form or raise a substantial question of law to empanel an numerically enlarged bench. Accordingly, she urged that the amended petition does not meet the scale under 165(4) of the Constitution.

16. I have considered the application, the responses and the rival submissions thereto and in my view, the only issue for determination is:-

(a) Whether the amended petition raises substantial question of law that warrant empanelling of an uneven number of judges to hear and determine the same?

17. Article 165(4) 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.”

18. My interpretation of the above provision is that Clause 3(b) is in reference to the jurisdiction of the High Court to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened while under Article 165 (3)(d) is in reference to the jurisdiction of the High Court to hear any question respecting the interpretation of the Constitution including the question whether any law is inconsistent with or in contravention of the Constitution; the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution; 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 a question relating to conflict of laws under Article 191 of the constitution. Therefore, for a matter to be referred to the Chief Justice for the said purpose the High Court must certify that the matter raises a substantial question of law.

19. This duty obliges the court either on its own motion or by application of the parties to identify the issues which in its view raise substantial questions of law and whereas parties may agree that the threshold under Article 165(4) of the constitution be considered, the court is not bound by such concurrence. Be that as it may, this court has had occasion to consider what constitutes “a substantial point of law” for purposes of Article 165(4) of the Constitution. In **Eric Gitari v Attorney General & Another [2016] eKLR**, the court examined what constitutes a substantial question of law as follows:

“21. In the case of Sir Chunilal V. Mehta and Sons Ltd v Century Spinning and Manufacturing Co Ltd 1962 SC 1314 the Supreme Court of India determined the term thus:

“A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be substantial.”

22. Similarly, in *Martin Nyaga and Others v Speaker County Assembly of Embu and 4 Others and Amicus* [2014] eKLR, the Court articulated that the principles applicable when making a declaration under Article 165(4) include: whether the matter is complex; whether the matter raises a novel point; whether the matter by itself requires a substantial amount of time to be disposed of; the effect of the prayers sought in the Petition and the level of public interest generated by the Petition.

23. Regarding the above, this Court in *Okiya Omtatah Okoiti v Independent Electoral and Boundaries Commission & 3 others* [2016] eKLR held thus:

“...although factors such as the novelty of the question, complexity, public importance of the matter are generally accepted to be some of the indicators of the existence of a substantial question of law, the Courts have also indicated that none of these factors is singly decisive and that the list is not exhaustive.”

24. In addition, Lesiit J in *Amos Kiumo & 2 others v Cabinet Secretary Ministry of Interior & Coordination of National Government & 3 others* [2014] eKLR opined 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.”

I also note that although one may be in agreement with the above descriptions, as I am, they only serve to offer appropriate guidance. That is why Onguto J in *Del Monte Kenya Limited v County Government of Muranga & 2 others* [2016] eKLR held thus:

“the question as to whether there exists a substantial question of law, even if one adopted the definition in the *Chunilal Mehta* case, is left to the individual judge to determine depending on the circumstances and unique facts of each case.”

20. Similarly in *Okiya Omtatah Okoiti & another v Uhuru Muigai Kenyatta & 7 others* [2016] eKLR Lenaola, J. (as he then was) had this to say;

“The different approaches taken by the High Court as shown above would make it clear that whether a substantive question of law arises under 165(4) is dependent on the circumstances of a particular case. Furthermore, that the list of relevant factors is not exhaustive and that the presence or absence of one is not necessarily decisive in a particular case. Ultimately, the presiding judge has to exercise his or her discretion on whether, on his or her appraisal of the factual and legal matrix, a substantial question of law arises.”

21. The Court of Appeal in *Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR also held as follows:

“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) Applicant must show that there 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.”

22. I am in agreement with the above expositions of the law. The above considerations offer proper guidelines and an insight in determining whether or not a matter raises “a substantial question of law” for the purposes of Article 165(4) of the Constitution. However in my view, the court may also consider whether the matter is moot in the sense that the matter raises a novel point; whether the matter is complex; whether the matter by its nature requires a substantial amount of time to be disposed of; the effect of the prayers sought in the petition and the level of public interest generated by the petition.

23. From a closer consideration of the amended petition presented by the Petitioners, I resolve that the issues in the Amended Petition include but are not limited to:

- a) **Gross violations of human rights particular the right to life, education, information and security of person during a terrorist attack and the extent of remedies available in the circumstance.**
- b) **Whether there is an obligation on the part of the state to provide security in times of a terrorist attack and whether there are qualifications for the obligation to apply?**
- c) **Issues touching on terrorism and national security of the country.**
- d) **Whether there is a public interest in disclosure of information which information is key to the petitioners exercising their rights?**
- e) **Whether the national security of the country will be prejudiced if such disclosures are made?**
- f) **Whether the state contravened the provisions of Article 241(3) of the Constitution of Kenya in deploying military officers in the terrorist attack?**
- g) **Whether there is need for an approval from Parliament and whether terrorist attack meets the threshold of unrest and instability as contemplated by law?**

24. These issues, in my view, raise several questions and especially regarding the national security of the country. With the loss of lives in the recent terrorist attacks in the country, this is a serious human rights concern. Furthermore, apart from their weightiness, which is evident in the amended petition, I note that the identified issues have not been determined by any other court in Kenya as this is a unique aspect of national security and in particular terrorist attacks, is not one that has been determined by courts in the past, especially in light of the previous constitutional dispensation and there are therefore no ready and available answers, therefore these issues clearly raise substantial questions of the law.

25. I am from the Petitioners/Applicants application satisfied that they have demonstrated that there are substantive legal issues touching on gross violation of human rights during a terrorist attack and remedies available in the circumstances. I note further the petition raises novel questions on whether there is an obligation on the part of the state to provide security in times of a terrorist attack and further the issues raised in the petition are novel touching on terrorism, human rights and national security which in my view has not been considered in any other forum in the country. The application is the first one of its kind and is predicated on the 7th and 8th Respondents furnishing investigating reports to the Petitioners/Applicants as key to their protection and exercise of the rights in the constitution.

26. The Petitioners/Applicants have demonstrated that there is greater public interest in disclosure of the information in ensuring petitioners obtain a remedy from the court and further in promoting accountability by public bodies and servants. I find that the National Security of country will not be prejudiced if the reports are made available, as in any case the courts can apply various measures to ensure protective disclosure is made to the court or the advocates. I should add that it has not been shown that the issue of national security does fall beyond the jurisdiction of the Honourable Court, hence I find the court ought to be furnished with such reports in exercise of its judicial authority as provided in the constitution.

27. I note from the petition herein that the same raises substantial issues of law that go beyond the petitioners as individual for reasons that there are greater public interests considerations in the wake of numerous terrorist attacks which have occurred in the country; which has been a substantial issue of law, and which is of general public importance, which directly affects the rights of the parties and which has not been finally settled by the Supreme Court, the privy or Federal court and which is not free from difficulty and which calls for discretion of alternative view. It should be borne in mind that the Presiding Judge is entitled to exercise discretion on whether or his or her appraisal of factual and legal matrix, a substantial question of law arises. I find from the facts of this petition that the issue to be canvassed is one for which its determination will affect the parties and will significantly have a bearing on the public interest. I also find as of now there is a state of uncertainty in the law. I find that the circumstances of this particular case are unique, being the first of its kind and touching on terrorism and no doubt, the same meets the criteria set for certification as raising substantial question of law.

28. I have considered the rival submissions by the counsel for 1st, 2nd, 3rd, 4th and 6th Respondents that the Petitioners/Applicants application do not meet the conditions set out in **Sir Chunilal vs Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314 and Santosh Hazari vs Purushottam Tiwari (2001) 3 SCC 179** for determining whether the matter raises a substantial question of law, which include whether, directly or indirectly, it affects substantial rights of the parties; whether the question of general public importance, whether it is an open question in the sense that the issue has not been settled by pronouncement of Supreme Court or Privy Council of the Federal Court and that the issue is not free from difficulty or it calls for a discretion of alternative view. I have to the contrary found that the application has met the above test and find no basis of the 1st, 2nd, 3rd, 4th and 6th Respondents objection. I further find contrary to their submissions that the matter is purely seeking compensation, that is not so. Considering the prayers in this petition which I have already captured under paragraph 22 of this ruling.

29. To the extent of my findings and observations in this ruling; I find that the Petitioners/Applicants have satisfied the threshold laid down by the constitution and decided cases for certification under Article 165(4) of the Constitution for the Hon. The Chief Justice to empanel a bench of uneven number of Judges to hear and determine this petition.

30. I accordingly allow the application dated 14th November 2019 in the following terms:-

a) The Hon. The Chief Justice to empanel a bench of uneven number of Judges to hear and determine this petition.

b) The 7th and 8th Respondents be and are Hereby directed to furnish the petitioners and the Honourable Court with the Response that they hold touching on Garissa University Terrorist attack case.

c) Costs of the application to abide the outcome of the petition.

Dated at Nairobi this 23rd day of April, 2020.

Delivered on 29th day of April 2020.

J .A. MAKAU

JUDGE