



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 136 OF 2016**

**BRYSON MANGLA.....PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**KENYAN HUMAN RIGHTS COMMISSION.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Through an amended petition filed on 17<sup>th</sup> March 2017, the petitioner herein sued the respondents seeking orders that:

***1) The court declares that Sections 25(2) and 31 of the Supreme Court Act No. 7 of 2011; and Rule 13 of The Supreme Court (Presidential Election Petition) Rules 2013 are unconstitutional ab initio; and Section 4 of the Act is unconstitutional to the extent that it permits even bench of six.***

***2) The court orders General and Exemplary Compensation and any other reliefs to the petitioner for both the instant and long severe retaliatory harassment for his restitution and as deterrent of the respondents.***

2. The petitioner states that he brings this petition as a public interest litigation that is also intertwined with the issue of the agents of the 1<sup>st</sup> respondent who have inflicted what he refers to as “retaliatory harassments on him at every opportunity including acts intended to gag, humiliate and sabotage him socially, psychologically and economically.

3. The petitioner highlighted the issue for determination to be as follows:

***A. Section 25(2) of the Supreme Court Act No. 7 of 2011 is unconstitutional ab initio in permitting even bench of six judges as a properly constituted court contrary to Articles 163(1), (2) and (9) which may be extended to a bench of eight judges where a Chief Justice finishes his term of office but stays on for his unspent years to the mandatory retirement age of seventy vide Article 167(3 & 4).***

***B. Section 4 of the Act is unconstitutional and equivocate to the extent that it is capable of more than one meaning of which one may justify the unconstitutionality of Section 25(2) of the Act and the violation of Article 163(2) by persuasive case law of “arguably out of necessity” in the Rai case.***

***C. Rule 13 of the Supreme Court Presidential Election Petition Rules of 2013 L. N. 15/2013 is unconstitutional to the extent that it is equivocal and permits an illegal even bench of six and a possible bench of eight judges contrary to Articles 163(1), (2), (9) and 167(3 & 4) together with the practices of superior of other courts of same genus.***

***D. Section 31(a-g) of the Act is unconstitutional as it arrogates itself to insubordinate the Supreme Court Rules L. N. 123/2012 as the Supreme Court Presidential Election Petition rules 2013 L.N 15/2013 which mandatorily draw their authority from the Constitution in Article 163(8) whereas the Act may only supplement or be auxiliary to the Rules in accordance to the intent and object of the Constitution envisaged by Article 163(9).***

***E. Impacts of the said unconstitutionality are directly and indirectly consequential to the rule of law in their substances and their broadness in gravity in a manner that transcends your petitioner’s interests, and are openly bearing upon the public interest and perceived juridical impartiality and independence of the Supreme Court especially when handling a presidential dispute.***

### Issues entwining 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent

***F. Your petitioner required a legal technical assistance, hands own training and collaboration with KHRC (within its mandate) to bring his particular public interest petition to court. The 1<sup>st</sup> respondent through its intelligence logistics directly interfered with legitimate expectation and turned the 2<sup>nd</sup> respondent into a tool of impediment and severe harassment of your petition contrary to Articles 10(2) (a-c); 19(1-2); 20; 22(1 & 2c); 27(1-5); 28:32;35; 41(1-2 a & b) in a manner that have chain connections with the 1<sup>st</sup> respondents retaliatory acts and omissions of perennially persecuting your petitioner for whistle blowing on corruption. The most dramatic of was the fictitious internship interview that was organized to mock the petitioner on March 8, 2016 where interns who had been interviewed a week before reported on March 1, 2016 and were now on induction were paraded as if doing interview for the first time with your petitioner contrary to Article 20(4), 27(1-5), 28, 47(1 & 2).***

### Petitioner's submissions

4. At the hearing of the petition, the petitioner submitted that the Supreme Court is by virtue of Article 163(2) properly constituted and that this court should interpret the said Article as an express law that only 5 judges can sit. The petitioner relied on the decision of the case of **Samuel Munga Githunguri vs Republic [1986] eKLR** wherein the court made it clear that when there is a split decision of the judges then the case would have to start de novo. He submitted that his petition was intertwined with the issue of employment do that the court could decide both issues at the same time because he had been persecuted.

### 2<sup>nd</sup> respondent's case

5. The 2<sup>nd</sup> respondent opposed the petition through the replying affidavit of its Executive Director sworn on 14<sup>th</sup> July 2017 where he avers that the petition does not disclose any constitutional violation by the 2<sup>nd</sup> respondent and further denies the petitioner's claims that the 2<sup>nd</sup> respondent coerced or colluded with the 1<sup>st</sup> respondents agents, the National Intelligence Service (NIS), to interfere with the petitioner's enjoyment of his rights.

6. He further states that after working with the 2<sup>nd</sup> respondent as a volunteer for a period of 5 months, the petitioner was put through an interview alongside other shortlisted candidates for internship positions which interview the petitioner did not pass after which the internship position was given to the most deserving candidates.

7. He further avers that during the interviews the 2<sup>nd</sup> respondent complied with all the relevant provisions of the Employment Act especially Section 3(a) and 5(2). It is the 2<sup>nd</sup> respondent's case that the petitioner has not demonstrated any rights or any breach of the provisions of the constitution so as to entitle him to the orders sought in the petition.

8. At the hearing of the petition, Mr. Mumbo, learned counsel for the 2<sup>nd</sup> respondent listed the issues for determination to be:-

***a) Whether by failing to meet the requisite qualification for the advertised position for internship, the failure by the 2<sup>nd</sup> respondent to appoint the petitioner amounted to a violation of Article 41 of the Constitution.***

***b) Whether this court has the jurisdiction to hear and determine an employment.***

***c) Whether the petitioner proved that he was constantly ridiculed or persecuted by the 2<sup>nd</sup> respondent's employees.***

9. On the above issues, counsel submitted that the petitioner did not prove any violation of Article 41 of the Constitution. Counsel submitted that the due process was followed by the respondent during the recruitment of interns and that the mere fact that the petitioner did not qualify for the position does not amount to discrimination. Counsel referred to the decision in the case of **David Lei Soit –vs -The Independent Electoral and Boundaries Commission [2014] eKLR**.

10. On jurisdiction, counsel submitted that the petitioner's claim against him is unfounded on employment which is a matter which ought to be determined by the Employment and Labour Relations Court (ELRC) as Article 162(2) of the Constitution and Section 12 of Employment and Labour Relations Court Act are clear on the establishment of the Employment and Labour Relations Court with exclusive original and appellate jurisdiction to hear and determine employment related claims. For this argument, counsel cited the celebrated case of **Motor Vessel "Lilian S" vs Caltex Oil Limited [1989] KLR 1** wherein it was held that the court should down its told the moment it finds that it lacks jurisdiction to hear a matter.

11. On the petitioner's claim that he was subjected to ridicule and mental torture, counsel submitted that this claim was not proved as the mere fact that the petitioner did not qualify for the position advertised by the 2<sup>nd</sup> respondent does not mean that he was subjected to ridicule.

### The 1<sup>st</sup> respondent's case

12. The 1<sup>st</sup> respondent opposed the petition through grounds of opposition dated 15<sup>th</sup> October 2017 wherein it listed the following grounds:

***1. That the petition is lacking in substance and has no basis in law.***

***2. That the petitioner has failed to plead any particulars of how his rights and fundamental freedoms have been infringed.***

3. *That the petitioner has not properly articulated how Articles 28, 81, 19, 20 and 38 have been violated.*

4. *That the claim that the Attorney General enacted the Supreme Court Act is false since it is only parliament which is mandated to enact legislation.*

5. *That the petitioner has included the matter of his termination of volunteer ship and rejection for an internship position by the 2<sup>nd</sup> respondent which has no relation to the main subject of the petition and should be heard at the Labour and Employment Relations court.*

6. *That the petition is misconceived and an abuse of the court process since the petitioners rights and fundamental freedoms have not been violated in any manner as alleged.*

13. At the hearing of the petition Miss Irari, learned counsel for the 1<sup>st</sup> respondent submitted that the Supreme Court Act is not inconsistent with Article 163 of the Constitution in as far as he number of judges to sit in the Supreme Court is concerned and that the petitioners claim that the impugned Sections of the Act contravened the Constitution was misinformed and speculative owing to the fact that the petitioner was relying on a past incident in the 2013 Presidential election petition wherein an uneven number of six(6) judges sat during the Supreme Court proceedings.

14. Counsel explained that the circumstances that led to the said proceedings being undertaken by 6 judges following the dismissal of the then Deputy Chief Justice on allegation of gross misconduct. Counsel relied on the decision by Ibrahim SCJ in the case of **of Jasbir Singh Rai-vs Tarlochan Singh Rai & 4 Others 2013eKLR**, in a concurring opinion held as follows:

*“The total number of the Supreme Court Judges that this country can have at any given time under the Constitution is seven. The minimum that must sit and determine a matter is five. This means that the only allowance given by the Constitution, of the judges who may be away for whatever reason, including illness or worse still death, is two. If one of the remaining five is required to disqualify him/herself, it may be argued that out of necessity the judge would have to sit, to ensure that there will be no failure of justice due to the Bench being below the quorum set by the Constitution.”*

15. Counsel submitted that the setting of the cap on the minimum number of judges that may constitute a bench as provided for under Rule 13 of the Supreme Court Presidential Petition Rules is consistent with Article 163(2) of the Constitution and that the petition was therefore based on speculative hypothetical and academic postulations as there existed no dispute in which this court could exercise its jurisdiction. Counsel argued that the Presidential Election Petition of 2013 was a matter of public interest that warranted the intervention of the Supreme Court in a six judge bench irrespective of the vacancy that existed in one slot.

16. Counsel further submitted that the petition is frivolous and vexatious as the petitioner had not demonstrated how his fundamental rights and freedoms were violated as the main subject of the petition was the composition of the bench of the Supreme Court. For this argument counsel relied on the decision in the case of **Trust Bank Limited vs Amin Company Ltd & Another [2000] KLR 164** in which an action that is vexatious was defined as:

*“...when it is without substance of groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial or the action”.*

#### **Determination**

17. I have considered the instant petition, the respondents' response and the submissions of the parties together with the authorities that they cited. I note that the two main issues for determination are firstly; whether this court has the jurisdiction to determine the petition and secondly, whether the impugned Sections of the Supreme Court Act are unconstitutional.

18. The first issue on jurisdiction was raised in as far as the petitioner included a claim for unlawful termination of his volunteer ship and rejection of his application to be an intern in the 2<sup>nd</sup> respondent organization. The question that therefore arises is whether this court has the jurisdiction to hear and determine the claim on the subject of employment and recruitment of the petitioner as an intern. My finding is that this is a matter that falls squarely within the purview of the Employment and Labour Relations Court (ELRC) and not this court. In the celebrated case of **Motor Vessel “Lilian S” –vs Caltex Oil Ltd**,(supra) the court expressed itself on the issue of jurisdiction as follows:

*“....Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

19. Article 162(2) of the Constitution stipulates as follows:-

*(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to--*

*(a) employment and labour relations; and*

*(b) the environment and the use and occupation of, and title to, land.*

20. Section 87 of the Employment Act on the other hand grants jurisdiction on all employment grievances on the Industrial Court. My finding is that the petitioner allegation that he had an oral agreement with the 2<sup>nd</sup> respondent to offer him employment which agreement was voided is a grievance which ought to have been presented before the Employment and Labour Relations Court (ELRC) for determination.

21. My finding on the jurisdiction of this court to hear and determine this petition would have been sufficient to determine this petition but I am still minded to consider the other issues raised in this petition in order to make conclusive findings over the same.

22. The petitioner sought general and exemplary damages against the respondents for alleged violation of his constitutional rights. The petitioner's case was that he served as a volunteer with the 2<sup>nd</sup> respondent from October 2015 to February 2016 after which he applied to transit to the internship program. The facts of the case however, are that the petitioner was unsuccessful in the internship interview thereby leading to the internship position being awarded to someone else. The petitioner therefore contended that failure to award him internship position amounted to violation of his constitutional rights under Articles 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 38 and 48 of the Constitution.

23. In the celebrated case of Anarita Karimi Njeru –vs Republic [1976- 1980] KLR 1272 the court expressed itself on the threshold of proof in constitutional matters as follows:

*i. Constitutions violations must be pleaded with a reasonable degree of precision.*

*ii. The Articles of the Constitution which entitles rights to the petitioner must be precisely enumerated and how one is entitled to the same.*

*iii. The violations must be particularized in precise manner.*

*iv. The manner in which the alleged violations were committed and to what extent.*

24. In the case of Meme vs Republic & Another [2004] e KLR it was held:

*“ Where a person is seeking redress from the High Court in a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree or precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant’s instant application had not fully complied with the basic tests of constitutional reference; as it was founded on generalized complains without any focus, law or Constitution. Hence it had nothing to do with constitutional rights of the appellants”*

25. Applying the dictum of the above cited cases to the in the instant case, I find that apart from stating that his rights under the constitution were violated, the petitioner did not explain the manner of such violation. My finding is that the mere fact that petitioner was not offered the position of an intern in the 2<sup>nd</sup> respondent’s organization did not amount to a violation of this rights as this was an open recruitment process in which the 2<sup>nd</sup> respondent was entitled to pick the most suitable candidate and was not under any obligation to hire the petitioner even though he had worked with then as a volunteer.

26. Turning to the last issue for determination, this court has been called upon to determine the constitutionality of Sections 4, 25(2) and 31 of the Supreme Court Act (hereafter “the Act”) and Rule 13 of the Supreme Court Presidential Election Rules 2013 (herein after “the Rules”). The gist of the petitioner’s claim is that the said provisions of the Act and the Rules allow for an uneven number of judges to constitute a bench, a scenario which, according to the petitioner, violates the provisions of Article 163(2) of the Constitution.

27. Sections 4, 25(2) and 31 of the Act stipulates as follows:-

*A vacancy in the Supreme Court as constituted under Article 163(1) of the Constitution shall not affect the jurisdiction of the court*

*(2) If the judges are equally divided in opinion, the decision appealed from or under review shall be considered as having been affirmed.*

*Without limiting the generality of Article 163(8) of the Constitution, the rules made by the Supreme Court under that Article may make provision for-*

*a) Regulating the sittings of the Supreme Court and the selection of judges for any particular purpose;*

*b) Regulating the right of any person other than an advocate of the High Court of Kenya to practice before the Supreme Court and the representation of persons concerned in any proceedings in the Supreme Court;*

*c) Prescribing forms and fees in respect of proceedings in the Supreme Court and regulating the costs and incidental to any such proceedings;*

*d) Prescribing the time within which any requirement of the rules shall be complied with;*

*e) Empowering the Registrar, in order to promote access to justice, to waive, reduce, or postpone the payment of a fee required in*

connection with a proceeding or intended proceeding, or to refund, in whole or in part, such a fee that has already been paid, if satisfied on the basis of criteria prescribed under paragraph (f) that-

- i. The person otherwise responsible for payment of the fee is unable to pay or absorb the fee in whole or in part; or
- ii. Unless once or more of those powers are exercised in respect of a proceeding that concerns a matter of genuine public interest, the proceeding is unlikely to be commenced or continued;

f) Prescribing, for the purposes of the exercise of a power under paragraph (e), the criteria-

- i. For assessing a person's ability to pay a fee; and
- ii. For identifying proceedings that concern matters of genuine public interest; and

g) Any other matter required under the Constitution, this Act or any other written law.

28. Rule 13 of the Rules stipulate as follows:

**“An advisory opinion by the Supreme Court under Article 163(6) of the Constitution shall contain the reasons for the opinion and any judges who differ with the opinion of the majority shall give their opinions and their respective reasons”.**

29. Article 163(2) of the Constitution provides that :-

**2) The Supreme Court shall be properly constituted for the purposes of its proceedings if it is composed of five judges.**

30. I appreciate that determining the issues raised by the petitioner will involve the interpretation of the section of the said Act that is alleged to be unconstitutional and the relevant provisions of the Constitution. In order to effectively address the said issues, this court will be guided by the well settled principles governing the interpretation of the Constitution and statutes.

31. In interpreting the constitution, the starting point is *Article 259 of the constitution which enjoins the court to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. Further, in exercising its judicial authority, this court is obliged under Article 159 (2) (e) of the Constitution to protect and promote the purposes and principles of the Constitution.*

32. *Through case law, various courts in different jurisdictions have expressed themselves on the manner in which the provisions of the Constitution and Acts should be interpreted. In fact, one can say that case law is awash with decisions on the subject of the interpretation of the constitution and I therefore find that it will be necessary to highlight a few of those decisions in this judgment. In the case of **Paul Ssemogerere and Others vs. The Attorney General, Constitutional Appeal no. 1 of 2002 [2004] UGSC10** the Supreme Court of Uganda held that it is a cardinal rule in constitutional interpretation that provisions of a constitution concerned with the same subject should, as much as possible, be construed as complementing, and not contradicting one another. The court further held that constitution must be read as an integrated and cohesive whole.*

33. In the case of **Ndyanabo vs. Attorney General [2001] 2 EA 485** the Tanzania Court of Appeal held:-

**“We propose to allude to general provisions governing constitutional interpretation. These principles may, in the interest of brevity, be stated as follows; first, the Constitution of the Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. As Mr. Justice E.O Ayoola, former Chief Justice of Gambia stated..... “A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document.” Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our democracy not only functions but grows, and the will and dominant aspirations of the people prevail. Restrictions of fundamental rights must strictly be construed.”**

34. In **Kigula and Others vs. Attorney-General [2005] 1 EA 132** the Uganda Court of Appeal sitting as a Constitutional Court held that the principles of constitutional interpretation are as follows (1) that it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions and that the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; (2) that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; (3) that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; (3) that a Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realise the full benefit of the rights guaranteed; (4) that in determining constitutionality both purpose and the effect are relevant; and (5) that Article 126(1) of the Constitution of the Republic of Uganda enjoins Courts to exercise judicial power in conformity with law and with the values, norms and aspirations of the people. See also **Besigye and Others vs. The Attorney-General [2008] 1 EA 37** and **Foundation for Human Rights Initiatives vs. Attorney General HCCP NO. 20 of 2006 (CCU) [2008] 1 EA 120.**

35. Further, the Supreme Court in Re The Matter of the Interim Independent Electoral Commission [2011] eKLR, adopted the words of Mahomed J in the Namibian case of State v Acheson 1991(20 SA 805, 813) where he stated that;

***“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the “national soul” the identification of ideas and ...aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion”.***

36. While in the case of Njoya & 6 Others v Attorney General & Another [2004] eKLR the Court observed that ***“Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the constitution, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document.”***

37. A Constitution is a living instrument with several provisions that should be read as an integrated whole, reading one provision alongside others so that they are seen as supporting one another and not contradicting or destroying each other.(see Tinyefuze v Attorney General of Uganda Constitutional Petition No 1 of 1996 [1997]3 UGCC). In Re The Matter of Kenya National Human Rights Commission, (Supreme Court Advisory Opinion Ref. No.1 of 2012), the Supreme Court advocated a holistic interpretation of the Constitution stating;

***“But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions in each other, so as to arrive at a desired result.”***

38. And in Minister of Home Affairs v Fisher [1980] AC 319 the Privy Council stated at 329;

***“A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the requirement that rules of interpretation may apply, to take as a point of departure for the process of interpretation, a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.”***

39. The principles applicable in the construction of statutes, on the other hand, were outlined in the case Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR wherein at paragraph 63-64 Mativo, J. stated:-

***“There are important principles which apply to the construction of statutes such as:- (a) presumption against “absurdity” – meaning that a court should avoid a construction that produces an absurd result;(b) the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces “unworkable or impracticable” result; (c) presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an “anomaly” or otherwise produces an “irrational” or “illogical” result and (d) the presumption against artificial result – meaning that a court should find against a construction that produces “artificial” result and, lastly, (e) the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to “public interest,” “economic”, “social” and “political” or “otherwise.”***

40. This court could go on and on over the various court decisions on the principles of interpretation of the Constitution. Having regard to the foregoing jurisprudence on the interpretation of the Constitution, I hasten to add that courts are under an obligation, when interpreting the Constitution, to be conscious of the legal environment under which they operate and to take into account the contemporary situation of each age so as to attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms. In doing this, the court is under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.

41. In considering the constitutionality of the Act, one must bear in mind the rebuttable principle of presumption of constitutionality of statutes. The principle states that statutes should be presumed to be constitutional until the contrary is proved. The philosophy behind this principle is that Parliament as a peoples’ representative legislates laws to serve the people they represent and therefore, as legislators, they understand the problems people face and enact laws to solve these problems. This was the main contention by the respondents in this petition.

42. The Supreme Court of India aptly highlighted the principle of constitutionality of statutes in the case of Hambardda Dawakhana v Union of India Air (1960) AIR 554, thus;

***“In examining the constitutionality of a statute, it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and, the elected representatives in a legislature and it enacts laws which they consider to be reasonable for purposes for which they were enacted. Presumption is therefore in favour of the constitutionality. In order to sustain the presumption of constitutionality, the court may take into account matters of common knowledge, the history of the times and may assume every state or facts as existing at the time of legislation.”***

43. It is therefore the duty of the person alleging constitutional invalidity of a statute or statutory provision to prove that indeed the statute or any of its provision(s) are unconstitutional. (*Ndyanabo v Attorney General of Tanzania* [2001] EA 495).

44. The Court must also consider whether the purpose and effect of implementing the statute or statutory provision would result into unconstitutionality. In *Olum and another v Attorney General* [2002] 2 EA 508, the Constitutional Court of Uganda stated;

***“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...”***

45. Bearing in mind the principle of constitutionality of statutes and the requirement that that legislation must be read in conformity with the Constitution, I now turn to consider the issue of Constitutionality of the impugned sections of the Act. Applying the jurisprudence in the above cited cases to the instant case, I find that there is no conflict between the Constitution and the impugned Sections of the Act and Rules as all they do is reinforce the provisions of Article 163(2) of the Constitution which simply gives the minimum limits of the number of judges that can sit in Supreme Court to five (5) and the Sections and Rules go further to provide for what will happen in circumstances where an uneven number of judges sit on a matter.

46. In this regard, and having put a ceiling on the number of judges at the Supreme Court at 5, I find that nowhere in the Constitution is it provided that 6 or even the maximum number of 7 judges cannot sit on a matter before the Supreme Court.

47. In conclusion and having regard to my findings in this judgment, I find that the instant petition is not merited and the order that commends itself to me is the order to dismiss it with no orders as to costs.

**Dated, signed and delivered in open court at Nairobi this 24<sup>th</sup> day of January 2019.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Petitioner present

Mr Mumbo for the 2<sup>nd</sup> respondent

Court Assistant - Kombo