



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

PETITION NO. 3 OF 2018

SAMMY KHAEMBA1ST PETITIONER

MARK WAFULA.....2ND PETITIONER

VERSUS

HON. ATTORNEY GENERA.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

R U L I N G

1. The petitioners, Sammy Khaemba and Mark Wafula filed this petition on 9th April 2018 in which they sued the Respondents for various Constitutional violations after they were charged with the offence of conducting holiday tuition contrary to Section 37 of the Basic Education Act, No. 14 of 2013. The Petitioners prayers are for a declaration that Sections 37 of the Basic Education Act, No. 14 of 2013 is unconstitutional.

2. The 1st Respondent contends that the Petitioners are seeking to question the rationale of Section 37 of the Basic Education Act and whether or not it infringes on the best interest of the child, and that what the court has to grapple with is whether or not it fundamentally affects the interest of the child.

3. According to the 1st Respondent, the Petition falls within the meaning of Article 165(4) of the Constitution of Kenya which provides inter alia;

“ 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”.

4. To the 1st Respondent, the Petition raised novel and substantial questions of Law and is therefore desirable that the file be referred to the Honourable Chief Justice for Constitution of a bench to hear and determine the petition.

5. The 1st Respondent further contends that the petition raises questions of general public importance that will only affect the Petitioners herein but will have far reaching effect in so far as education policy is concerned within the nation at large.

6. While relying on ***Okiyo Omtatah Okoiti & Another Vs Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 others (2017) eKLR*** it was submitted that where a fundamental constitutional interpretation question is raised then there is need to constitute a three judge bench.

7. The application was however opposed by the 2nd Respondent.

8. According to the 2nd Respondent, the fact this petition is based on the petitioners being charged with the offence of conducting holiday tuition and that their complaint being 'holiday tuition' has not been defined in the Act does not raise any substantial, novel or of great public interest to warrant referring the file to the Chief Justice.

9. Citing ***Anthony Njenga Mbuti & 5 others Vs Attorney General and 3 others (2015) eKLR***, it was submitted that single judges have made several decisions in regard to legislation with great public interest with far reaching implications.

10. The 2nd Respondent contends that referring the Petition to the Chief Justice will cause unnecessary delay in determination of the criminal case in court.

Determination

11. The key issue for determination is whether or not the Petition raises a substantial questions of law under Article 165(3) (b) or (d) for the empanelment of a three bench by the Chief Justice.

12. The general rule in such cases was laid down by the *Court of Appeal in Peter Ng'ang'a Muiruri Vs Credit Bank Limited & Another Civil Appeal No. 203 of 2006*, where the court held that any single judge of the High Court in this country has jurisdiction and power to handle a constitutional question. The decision whether or not to certify a matter as raising a substantial question of law is an exercise of judicial discretion as opposed to a right. However, like all discretion, that power must be exercised judicially and not on caprice, whim, likes or dislikes. In many view, the issue for determination is what constitutes a substantial question of law.

13. In, *Harrison Kinyanjui Vs A.G. & Another (2012) Eklr, Majanja J.* observed that, when determining what the term means, the court must take into account the provisions of the Constitution as a whole and need to dispense justice without delay particularly given specific fact situation. In other words, each must be considered on its merits by the judge certifying the matter. It must 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.

14. In *Chunilal V Mehta Vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314*, it was held that:

“ 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 Council 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 High 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 in palpably absurd, the question would not be a substantial.”

15. 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.

16. In the current case, the Petitioners are seeking declaration that Sections 37 of the Basic Education Act, No 14 of 2013 is unconstitutional. It is also evident that this petition was brought to court pursuant to the Petitioners being charged with the offence of subjecting students to holiday tuition contrary to Section 37(1) as read with (2) of the Basic Education Act, No. 14 of 2013 vide Kitale Chief Magistrate's Court Criminal case No. 4817/2016. According to the Petitioners, unless the ingredients for the offence of “holiday tuition” is conclusively defined, then the charge sheet as drawn and as informed by Section 37 of the Basic Education Act infringes on their right to a fair trial. To the 1st Respondent, this Petition is bound to have a wide and lasting effect on the public at large and national policy will be fundamentally altered. The question that comes to mind is whether the said Petition raises a substantial question of law with regards to what holiday tuition entails.

17. In my view , the fact that the term holiday tuition has not been defined in the Act and therefore being ambiguous does not raise a substantial question of law to warrant reference of this Petition to the Chief Justice as required under Article 165(4) of the Constitution. Although the 1st Respondent invoked public interest by contending that the matter is bound to have a wide and lasting effect on the public hence is of national importance it is not in my opinion necessarily a ground for the empanelling of a bench of not less than three judges as these are matters which the court deals with on a daily basis. The application is hereby disallowed. Costs will abide the outcome of the Petition.

Delivered, signed and dated at Kitale this 22nd day of January, 2019.

H.K. CHEMITEI

JUDGE

22/1/19

In the presence of:

Kiarie holding brief for Ndarwa for the Applicant

No appearance for Attorney General

Court Assistant – Kirong

Ruling read in open court.