



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 501 OF 2017

UNIVERSITY ACADEMIC

STAFF UNION (UASU).....PETITIONER

VERSUS

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

CHIEF OF STAFF & HEAD OF THE

PUBLIC SERVICE.....2<sup>ND</sup> RESPONDENT

JUDGMENT

1. University Academic Staff Unions, (UASU), the petitioner herein, is a Trade Union for the Academic Staff of the Public Universities in Kenya. It filed the present petition against the Attorney General, the 1<sup>st</sup> respondent, who is the principal legal advisor to the national government, with the constitutional mandate to represent the national government in civil suits and the defender of public interest. The 2<sup>nd</sup> respondent is the Chief of staff in the Office of the President and Head of Public Service, and the author of a circular dated 13<sup>th</sup> September 2017, the subject matter of this petition.

2. The petitioner avers that its member who are in the academia, are by the very nature of their duties, often required to travel outside the country to participate in regional and international collaborative research workshops, specialized conferences and seminars; that they regularly seek grants from their collaborative institutional and other support in aid of their professional research and development which occasionally involves frequent travels and as a result of these engagements, the higher education and more so University education benefits tremendously.

3. The petitioner also contends that its members occasionally travel in their individual capacities exercising their fundamental rights and freedoms guaranteed by the Constitution; that on or about 13<sup>th</sup> September 2017, the 2<sup>nd</sup> respondent authored, signed and published letter referenced SH/1/6/XIV addressed to all Cabinet Secretaries, the first respondent and all Principal Secretaries, under the caption “***Circular to all Parastatals under your respective Ministries.***” The Circular was to the effect that from the date of the letter, no government official would travel outside the country without clearance by the President. According to the petitioner, those targeted included Cabinet Secretaries, Principal Secretaries and Officers in Ministries; Chief Executive Officers of Parastatals and their officers and board of directors of parastatals.

4. The petitioner went on to contend that prior to issuance of the impugned circular, no notice was given to the petitioner; that the petitioner’s members were not consulted; no opportunity was afforded to them to make their representations and that rules of natural justice were violated. The petitioner further contends that the decision was made whimsically and arbitrarily thus discriminates against the petitioner’s members some of whom are professors, scholars, lecturers, teachers as well as researchers in public as well as private institutions who may not be affected by the letter yet there is no distinction in teaching requirements across universities.

5. The petitioner avers that on 27<sup>th</sup> September 2017, its Secretary General, ***Constantine Wasonga Opiyo***, wrote to the 2<sup>nd</sup> respondent seeking to have the circular modified to safeguard travel outside the country by academic staff of public universities and showing how the circular was negatively impacting on the country without success.

6. The petitioner states that as a result, many of its members had been physically prevented from boarding their flights out of the country and or denied clearance for such flights either deliberately or through delays in processing such clearance and are likely to continue to be

adversely affected. The petitioner avers that the circular is unlawful and contravenes Articles 10, 27, 28, 29, 33, 39, 43, 47 and 48 of the Constitution. It is contended that the Circular was not issued in good faith and that it is neither reasonable nor justifiable in an open and democratic society in terms of Article 24(1) of the Constitution.

7. The petitioners therefore sought the following reliefs:-

**(a) A declaration that the letter from the second respondent bearing reference No SH/1/6/X1V addressed to all Cabinet Secretaries, the first respondent and all Principal Secretaries, with directive to “circulate to all parastatals under your respective Ministries” is issued in contravention of Articles 10, 27, 28, 29, 33, 35, 38, 39, 43, 47 and 48 the Constitution in so far as it relates to the petitioner’s members and is accordingly null and void to that extent.**

**(b) An order do issue consequent to the above declaration directing all the officers to whom the said letter is addressed not to take any steps to enforce the same on the members of the petitioner’s union.**

**(c) Costs.**

**(d) Any other relief that this court may deem fit and just to grant the petitioner.**

#### **Respondent’s response**

8. The respondents filed grounds of opposition dated 23<sup>rd</sup> March 2016 and filed in Court on the same day, contending that the petitioner had not demonstrated how the respondents had violated its members’ constitutional rights; that the petition is not supported by any substantial evidence to show that the respondents had violated the petitioner’s members’ rights; that the petitioner’s interpretation of the Constitution is misleading and misplaced; that the petitioner’s members’ rights are not absolute under Article 24(1) of the Constitution and that the petition lacks a factual basis; that it raises no constitutional issues, either for enforcement of fundamental rights or interpretation of the Constitution. The respondents termed the petition frivolous and one that does not raise a cause of action against the respondents.

#### **Petitioner’s submissions**

9. **Mr. Nyamumbo**, learned counsel for the petitioner, submitted highlighting their written submissions dated 25<sup>th</sup> October 2017, that the directive contained in the impugned circular is unconstitutional and illegal. Learned counsel contended that by demanding that any public official going outside the country must seek the President’s permission, the circular is unconstitutional.

10. Learned counsel argued that the petitioner’s members are academicians who are required to travel outside the country from time to time for research, conferences and related activities hence the directive will curtail their right of movement. Counsel relied on their written submissions for the contention that the Constitution protects fundamental rights and freedoms; that the petitioner’s members are entitled to protection of their rights of equality; from discrimination; expression, movement, education and fair administrative action. It was further contended that the inherent dignity of people is a core value recognized under the Constitution and that Article 24 protects the right to inherent dignity.

11. Referring to Article 20(2) of the Constitution, it was submitted that the Article protects every ones enjoyment of rights and fundamental freedoms to the fullest extent consistent with the nature of the right and fundamental freedoms. It was contended that Article 259 requires the Court to interpret the Constitution so as to advance the rule of law and human rights and fundamental freedoms. Further submission was to the effect that the circular discriminates against the petitioner’s members from other Kenyans. It was contended that the respondents violated the petitioner’s members’ right to fair administrative action in violation of Article 47 of the Constitution.

12. The petitioner relied on the case of **Republic v Kenya School of Law & 2 Others ex parte Juliet Wanjiru Njoroge & Others** [2014]eKLR for the submission that the right to be heard is a fundamental human right that is not given by the state since human rights are generally universal and inalienable rights of human beings.

13. Reference was also made to the decisions in **Onyango Oloo v Attorney General** (1986-89) EA 456 for the submission that Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character and that denial of the right to be heard renders any decision made null and void ab initio: **Justice Amraphael Mboghohi Msagha v Chief Justice of the Republic of Kenya & 7 others** [2006]eKLR for the proposition that a decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision and **Naboline Miriam & others v Council of Legal Education & 5 Others** [2016]eKLR for similar submission.

#### **Respondents’ submissions**

14. **Miss Mwangi**, learned counsel for the respondent, submitted also highlighting their written submissions, that the petition is based on Article 39 which is not one of those rights that cannot be limited. According to learned counsel, the impugned circular did not state that the petitioner’s members cannot go out of the country but that they require clearance as members of public universities. Learned counsel submitted that under Article 260, Universities are public bodies hence their employees are state officers.

15. With regard to Article 24(1), learned counsel submitted that the Article states that a right can be limited but that the limitation must be stated. **Miss Mwangi** argued that the directive is specific and stated the extent of the limitation, that is; one can travel, but with clearance. She contended that there was no proof that any of the petitioner’s members had failed to travel or had been denied the chance to travel.

16. Counsel held the view that no public officer should travel without clearance and that none of the petitioner’s members had suffered

prejudice due to the impugned circular. It was submitted that the President is the head of state and government and therefore, he has power under Article 132(3) of the Constitution, to direct and coordinate functions of ministries and government departments.

17. It was contended that the directive is constitutional and does not derogate from its core essential contents. According to the respondents, the petitioner's members can still enjoy their freedom of movement both inside and outside the country just as it was before the impugned circular, but on being cleared. It was also contended that the 2<sup>nd</sup> respondent acted in good faith and in accordance with his mandate.

### ***Determination***

18. I have considered this petition; the response thereto; submissions by counsel for the parties and the authorities relied on. The issue raised in this petition is whether the impugned circular of 13<sup>th</sup> September 2017 violates the petitioner's members' fundamental right and freedom of movement.

19. The petitioner has contended that it does; that it was issued without consultation; that it was done in violation of the constitutional provisions which allow free movement and that it will prejudice the petitioner's members' right to move and attend conferences including collaborative research seminars. The respondents on their part have argued that there is no violation of the petitioner's members' rights; that members will still enjoy their rights save that they have to seek clearance and that the right to movement is not absolute and certainly not one of those rights that cannot be limited.

20. The impugned circular was issued on 13<sup>th</sup> September 2013 directed at Ministries and their departments. The circular was written and signed by the 2<sup>nd</sup> respondent, referenced "***Travel outside the Country.***" and notified the recipients, including the 1<sup>st</sup> respondent, that it had been decided that no government official would travel outside the country without clearance from the President. The circular targeted Cabinet Secretaries, Principal Secretaries, officers in Ministries, Chief executive officers of parastatals, and their officers as well as boards of directors of parastatals.

21. Pursuant to that circular, the Ministry of Education issued its own letter dated 20<sup>th</sup> September 2017 addressed to the Vice Chancellors and Principals of constituent colleges notifying them that there would be no travel outside the country without clearance as advised in the circular of 13<sup>th</sup> September 2017. The petitioner has therefore challenged the two circulars contending that they violate its members' fundamental right and freedom of movement guaranteed under Article 39 of the Constitution and, further, that the circular violates Articles 10, 27, 28, 33 and 47 of the Constitution. The petitioner also contends that the circular is discriminative and was issued without consultation.

22. The right of movement is one of those fundamental rights and freedoms guaranteed by the Constitution. It is not a right granted or grantable by the state. The state's duty is to respect, protect and promote fundamental rights and freedoms in the Bill of Rights. Article 20(1) of the Constitution provides that ***every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedoms.***

23. Article 39 provides with regard to freedoms of movement that ***every person has the right to freedom of movement and the right to leave Kenya.*** The right to movement is thus recognized and guaranteed by the Constitution to all persons without exception and or conditions. Article 12.3 of the ICCPR also provides that ***freedom of movement shall not be subject to any restriction except those which are provided by law, are necessary to protect national security, public health or morals or the right to freedom of others and are consistent with other rights recognized in the convention.***

24. ***Miss Mwangi***, learned counsel for the respondents, submitted quite correctly, that the right to movement is not one of the absolute rights in Article 25 of the Constitution and can, therefore, be limited. However, limitation of fundamental rights and freedoms in the Bill of Rights can only be done in accordance with the Constitution itself. To that extent, Article 24(1) of the Constitution provides that ***a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.*** The factors to be taken into account are: the nature of the right or fundamental freedom; the importance and purpose of limitation; the nature and extent of the limitation and the need to ensure that enjoyment of rights and fundamental freedoms by an individual does not prejudice rights and fundamental freedoms of others.

25. Article 24(1) advocates for the need to have a relationship between the limitation and its purposes and use of less restrictive means other than limitation to achieve that purpose. The limitation in so far as the impugned circular is concerned is on right of movement. The circular does not, however, state the importance and the purpose of the limitation except that the extent of limitation is that one has to get clearance from the president before travelling outside the country.

26. The Constitutional demand that a limitation of fundamental rights and freedoms in the Bill of Rights be not only by law but also reasonable and justifiable in an open and democratic society cannot be over emphasized. Anything short of that constitutional dictate would be a violation of the constitution. The reason for demanding that limitation be reasonable is to subject the objective of the law to the legitimate test of proportionality. That is, the Court would have to determine whether a law that interferes with freedom of movement is reasonable and justified.

27. I have perused the impugned circular dated 13<sup>th</sup> September 2017 and that of 20<sup>th</sup> September 2017. They do not refer to any law limiting the petitioner's members' right of movement, including the right to leave Kenya. The circulars simply state that it has been decided henceforth that no government official will travel outside the country without clearance by the President. The circular does not disclose who decided but it can be assumed that the decision was made by the President since those to obtain clearance to travel outside the country would require such clearance from him. There was need, therefore, for the circular to refer to the law limiting the petitioner's members' right of movement to leave the Country without clearance, to enable the Court weigh the legitimate objectives of the law against the Constitution and determine whether such a law is reasonable and justifiable in a democratic society in terms of Article 24(1) of the Constitution.

28. The respondents have not stated in their response to the petition the rationale behind the requirement that the petitioner's members seek clearance from the President before travelling outside the country. It is not clear whether the circular was issued for reason of state security, public health or any other reason. The fact that the circular states that it has been decided, would imply that there was no such requirement previously and, therefore, introducing the requirement now had to be explained and justified in the current constitutional dispensation. There is neither explanation nor justification for the impugned circular in so far as the petitioner's members are concerned.

29. Limitation of the petitioner's members' right of movement is an impediment to their fundamental right in Article 39 which can only be limited by **law and to the extent only that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors** as required by Article 24(1). Article 20(1) of the Constitution makes it plain that **the Bill of Rights applies to all law and binds all State organs and all persons**. Any action that tends to negate, impede or derogate a fundamental right or freedom guaranteed in the Bill of Rights has to be measured for its conformity with Article 20(1) of the Constitution because the Bill of Rights applies to **all law and binds all state organs and persons** including their actions and deeds as they relate to fundamental rights and freedoms. That would be the case with regard to the impugned circular when it falls upon the Court to measure it against any of the Articles of the Constitution.

30. Article 10(1) of the Constitution is also clear that national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them— (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. National values and principles in Article 10(2) include the **rule of law, democracy and human rights**. At the same time, Article 259 decrees that **the Constitution be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.** Interpretation of the Constitution as against the impugned circular must not only promote but also advance human rights and fundamental freedoms in the Bill of Rights.

31. The petitioner has contended that its members often attend both regional and international conferences and seminars some of them on short notice. It argues that its members were not consulted when the circular was issued and have not been told why they should seek clearance from the President before traveling outside the country.

32. The petitioner represents professors and lecturers in Universities who have a fundamental right to movement. They also need academic freedom that enables them do collaborative research and attend conferences, either to further knowledge or for the sake of their institutions. It is also true as submitted by counsel for the petitioner that Professors and lecturers teach across universities both public and private and may, in such a case, be invited to attend seminars and conferences from either end. For that reason, the circular is vague when it comes to those members who teach across the universities and would want to travel outside the country.

33. Article 39 guarantees the right to movement as a fundamental right in the Constitution and when interpreting it, the Court is to do so in a liberal and flexible manner that allows its expansion rather than constriction. In this regard, it was stated in **Ndyanabo v Attorney-General** [2001] 2 EA 485, (at page 493) that; **“the Constitution...is a living instrument, having a soul and consciousness of its own... 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... 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...”**(emphasis)

34. In the case of **Okello Okello John Livingstone and 6 others v The Attorney General & another**, (Constitutional Petition No. 1 of 2005(CA)), the Court observed that **“A constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given a dynamic, progressive, liberal and flexible interpretation, keeping in view the ideals of the people, their socio economic and political cultural values so as to extend the benefit of the same to the maximum possible.”**

35. The Court of Appeal addressed itself on the value attached to our Bill of Rights in the case of **Attorney General v Kituo cha Sheria & 7 others** [2017] eKLR, stating;

**“...the Bill of Rights in Kenya's constitutional framework is not a minor peripheral or alien thing removed from the definition, essence and character of the nation. Rather, it is said to be integral to the country's democratic state and is the framework of all the policies touching on the populace. It is the foundation on which the nation state is built. There is a duty to recognize, enhance and protect the human rights and fundamental freedoms found in the Bill of Rights with a view to the preservation of the dignity of individuals and communities.... rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.”**(emphasis)

36. Quite frankly, the Bill of Rights in our Constitutional architecture is the framework of our socio economic, political and cultural values whose benefit must be extended to the maximum possible. Social policies, actions and decisions must not devalue fundamental rights and freedoms in the Bill of Rights. In that context, the respondents have not explained why it was found necessary to limit the petitioner's members' right of movement when travelling outside the country. When the petitioner's members plan to travel outside the country, they would most certainly inform their Vice Chancellors, Deans of Faculties, Schools or Principals of Colleges of their absence and perhaps make arrangements respecting their classes and or lessons. It is not that they would just walk out of lecture halls and travel out of the country without such arrangements knowing, as they certainly do, that they owe a duty to their students. That in, my view is all they need to do without the necessity of limiting their fundamental right of movement.

37. Where one seeks to limit fundamental rights and freedoms in the Bill of Rights, he has a constitutional duty to justify the limitation in the current constitutional dispensation. This is because fundamental rights and freedoms are sacrosanct and are to be enjoyed to the greatest extent because rights are for enjoyment and not curtailment. Any limitation must be by law, reasonable and justifiable. The petitioner's members' fundamental rights and freedoms cannot be limited through circulars or at whims without complying with the constitutional

dictates. There must be a reasonable justification since the government's duty is to recognize, enhance, protect and respect fundamental freedoms in the Bill of Rights but not to curtail the rights it does not grant.

38. In the words of the Court of Appeal, "**Article 20 is couched in wide and all-pervasive terms, declaring the Bill of Rights to apply to all law and to bind all state organs and all persons. None is exempt from the dictates and commands of the Bill of Rights and it is not open for anyone to exclude them when dealing with all matters legal,**" The Court was clear that "**rights and fundamental freedoms are to be enjoyed by every person to the greatest extent possible.**"- The theme should be "**maximization and not minimization; expansion, not constriction,**" (*Attorney General v Kituo Cha Sheria & 7 Others* (supra) The Court advised that when interpreting the Bill of Rights, Courts should adopt a pro-rights realization and enforcement attitude and mind set calculated to the attainment as opposed to the curtailment of rights and fundamental freedoms.

39. Guided by the above principles, I have looked at the impugned circular and weighed it against Article 39 as read with Articles 20(1) and (2) of the Constitution; considered the value of enjoyment of fundamental rights and freedoms espoused in Article 24; the constitutional dictates in Article 21 and the national values and principles in Articles 10. They all favour expansive interpretation of fundamental rights and freedoms in the Bill of Rights. Article 259 also decrees that human rights and fundamental freedom be promoted and enhanced as national values and principles. Taken in that context, the respondents have not, in any way justified the decision to limit the petitioner's members' fundamental rights and freedoms of movement guaranteed in the Bill of Rights taking into account the nature of their work, frequent travels and the need for academic freedom in our universities

40. In an attempt to offer some justification for the limitation, *Miss Mwangi*, contended that the President, as head of state and government, is empowered by Article 132(3) of the Constitution to direct and co-ordinate functions of ministries and government departments. Article 132 generally provides for the functions of the President. Article 132(3) states that the President shall— (a) chair Cabinet meetings; (b) **direct and co-ordinate the functions of ministries and government departments**; and (c) by a decision published in the *Gazette*, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament. Under Article 132(4) the President may perform any other executive function provided for in the Constitution or national legislation.

41. It is true that under Article 132(3)(b), the President may "**direct and co-ordinate the functions of ministries and government departments.**" The words "**direct and co-ordinate functions**" would, in my view, mean directing which ministry or department performs what functions and how they are to discharge those functions. The words cannot, however, be strained in meaning to imply limiting fundamental rights and freedoms of the petitioner's members guaranteed under Article 39 of the Constitution. An interpretation of Article 132(3) (b) such as the one proposed by *Miss Mwangi*, would not only bring tension between Article 132(3) (b) and Article 24(1) of the Constitution but also negate the requirement that limitation be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

42. Having considered the petition, the response, submissions and the authorities relied on and those considered by the Court, and also taking into account Articles of the Constitution concerned, it is my finding and I so hold, that the circular does not meet the threshold set in Article 24(1) in so far as limitation of the petitioner's members' fundamental rights and freedom of movement is concerned. The limitation is neither reasonable nor justifiable in an open and democratic state that we are. To that extent, therefore, I find that the impugned circular dated 13<sup>th</sup> September, 2017 and the subsequent letter of 20<sup>th</sup> September, 2017 in so far as they relate to the petitioner's members' right of movement are inconsistent with Article 39(1), (2) as read with Articles 10, 19, 20(1), (2), 21(1) and 24(1) of the Constitution.

43. Consequently, the petition dated 29<sup>th</sup> September 2017 is allowed and I make the following orders.

*(a) A declaration is hereby issued that the letter reference No SH/1/6/X1V dated 13<sup>th</sup> September 2017 by the 2<sup>nd</sup> respondent addressed to all Cabinet Secretaries, the first respondent and all Principal Secretaries, was issued in contravention of Article 39 as read with Articles 10, 19, 20(1),(2), 21(1) and 24(1) of the Constitution in so far as it relates to the petitioner's members' fundamental right to movement guaranteed under Article 39(1) and (2) and is, to that extent, null and void.*

*(b) An order of certiorari is hereby issued quashing the letter dated 20<sup>th</sup> September 2017 from the Ministry of Education, State department of University Education, addressed to Vice Chancellors and Principals of Constituent Colleges implementing the letter dated 13<sup>th</sup> September 2017 requiring the petitioner's members to seek clearance from the President before travelling outside the Country.*

*(c) For avoidance of doubt, this judgment shall only apply to the petitioner and its members.*

*(d) Costs to the petitioner.*

**Dated, Signed and Delivered at Nairobi this 15<sup>th</sup> Day of August 2018**

**E C MWITA**

**JUDGE**