



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

PETITION NO. 2 OF 2017

IN THE MATTER OF CHAPTER FOUR OF THE CONSTITUTION

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER CHAPTER FOUR OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ARTICLES 24, 27, 28, 32, 33, 36, 37, 38, 99, 137 AND 180 OF THE
CONSTITUTION**

AND

IN THE MATTER OF SECTION 22 OF THE ELECTIONS ACT NO. 24 OF 2011

AND

**IN THE MATTER OF CITIZENS OF THE REPUBLIC OF KENYA BEING DENIED THEIR
CONSTITUTIONAL RIGHT TO PARTICIPATE IN FREE AND FAIR ELECTIONS DUE TO
THEIR EDUCATIONAL LEVEL**

JOSEPH NGACHA KARANI (Petitioning on his own behalf and on behalf of the

WANJIKU AWARENESS FORUM.....PETITIONER

-VERSUS-

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE HON. THE SPEAKER, NATIONAL ASSEMBLY.....2ND RESPONDENT

THE NATIONAL ASSEMBLY.....3RD RESPONDENT

THE HON. THE SPEAKER, SENATE.....4TH RESPONDENT

THE SENATE.....5TH RESPONDENT

JUDGMENT

1. The Petitioner, petitioning on his own behalf and on behalf of **Wanjiku Awareness Forum** brought this petition against The Hon. Attorney General 1st Respondent; the Hon. The Speaker, National Assembly, 2nd Respondent; The National Assembly, 3rd Respondent; The Hon. The Speaker, Senate, 4th Respondent; The Senate, 5th Respondent and the Independent Electoral & Boundaries Commission, 6th Respondent seeking the following reliefs:

(i) A declaration that the Petitioner's constitutionally enshrined rights and freedoms under Chapter Four of the Constitution and in particular Articles 27, 28, 32, 33, 36, 37, 38, 99, 137 and 180 of the said constitution have been grossly and blatantly violated and denied by the provisions of section 22 of the Election Act No. 24 of 2011 and in particular the declaration by the 6th Respondent as to the disqualification and/or ineligibility of the petitioners to run for the position of President, Deputy President, Governor, Senator and Member of the National Assembly.

(ii) A declaration that the Petitioner has been unlawfully and unconstitutionally discriminated against by the said section 22 of the Election Act, No. 24 of 2011 and the declaration by the 6th Respondent that the Petitioner and members of the WANJIKU AWARENESS FORUM be disqualified or ineligible to run for the elective positions of President, Deputy President, governor, Senator and Member of the National Assembly is UNCONSTITUTIONAL, thus NULL and VOID.

(iii) A DECLARATION that section 22 of the Elections Act No. 24 of 2011 and the decision by the 6th Respondent to bar, disqualify and/or declare the ineligibility of the Petitioner and members of the WANJIKU AWARENESS FORUM to contest for the position of President, Deputy President, Governor, Senator and Member of the National Assembly for the 2017 General Elections to be UNCONSTITUTIONAL thus NULL and VOID.

(iv) A DECLARATION that the Petitioner and members of the WANJIKU AWARENESS FORUM are entitled to the payment of damages and compensation for the gross and blatant violation of their constitutionally enshrined rights and freedoms as above outlined.

(v) GENERAL, exemplary and aggravated damages for unlawful violation of constitutional rights.

(vi) Costs of this Petition and interest at court rates.

(vii) Any other further alternative or better relief this honourable court may deem just and fit to grant.

2. The petition is brought under **Articles, 24, 27, 28, 32, 33, 36, 37, 38, 99, 137 and 180 Constitution of Kenya Section 22 of the Elections Act, No. 24 of 2011** and all other enabling provisions of law.

3. The petitioner claims to be acting on his own behalf as a citizen of the Republic of Kenya and on behalf of the Wanjiku Awareness Forum which is itself a lawful citizens' lawful group principally carrying on the operations of advising and educating citizens of the Republic of Kenya as to their constitutional and other legal rights including the right to participate in general elections which participation includes being registered as a voter and contesting for any political seat lawfully provided for by the Constitution and other statutory provisions.

4. The Petitioner's case against the Respondents is that he was a presidential candidate in the 2002 and 2007 General Elections under the Kenya Patriotic party; that he and all the other members of the Wanjiku Awareness Forum participated in the 2007 elections as voters but were denied their constitutional rights

to contest the position of President, Deputy President, Governor, Senator and Member of the National Assembly due to the provisions of **Section 22 of the Elections Act No. 24 of 2011** and are constitutionally entitled to fully participate in all aspects of the 2017 General Elections.

5. The petitioner and members of the Wanjiku Awareness Forum were informed by the 6th respondent that they do not qualify to contest for any political position in the 2017 General Elections since they are technically barred by the provisions of **Section 22 of the Elections Act No. 24 of 2011** which requires candidates to be holders of a degree recognised by the Republic of Kenya; that the said statutory provision is unconstitutional and discriminatory and thus null and void as it denies them the right to participate in all aspects of the general elections. That they were neither accorded a hearing nor did they participate in enactment of **Section 22** of the **Elections Act No. 24 of 2011** contrary to the fundamentals of natural justice. That had it been the intention of Parliament to qualify the constitutional fundamental rights in **Article 38** of the Constitution, to be holders of a university degree, nothing would have been easier than for the legislature to publicly declare so.

6. The 1st to 5th respondents did not enter appearance though they were duly served. The 6th respondent, the Independent Electoral and Boundaries Commission filed a replying affidavit sworn on 31st March, 2017 by **Mahamoud Jabane**; that they state that they have the mandate to register candidates for election under the law and in registering it follows the law provided for in the Constitution and other acts of Parliament. For any citizen to qualify to contest any elective position in the General Elections of the 2017 he or she must fulfill the requirements put in place by the Constitution and any other written law. In that regard they have not discriminated the petitioner in any way and if he has issues with the laws pertaining to the elections he ought to lobby members of Parliament to make the necessary amendments.

7. The petitioner was represented by **Gacheche wa Miano** advocate while the 6th respondent was represented by Joe Kathungu advocate. For the petitioner it was submitted that full participation of the petitioners is as enlisted in **Articles 38 and 81A of the Constitution**. That the provision of **Section 22 of the Elections Act** which stipulates that for one to be eligible to contest for the stated position of president, one must hold a lawfully recognised university degree is discriminatory, unfair and unconstitutional since it purports to limit their absolute fundamental constitutional rights which it is averred cannot be qualified by ordinary legislation. That the Petitioner seeks to impugn the stated **Section 22 of Elections Act** and have the same declared unconstitutional. That since the 1st to 5th respondents have not opposed or challenged the petition is it therefore not correct to believe that it is they who have discriminated the petitioner by disqualifying him and members of the Wanjiku Awareness Forum from fully participating in general elections as provided under the Constitution based on a legislative provision which is inferior and inconsistent in the Constitution? That the answer must be in affirmative. That had it been the intention of Parliament to qualify the rights of **Article 38** of the **Constitution** to holders of university degree, nothing would have been easier than for the legislature to expressly declare so. That **Section 22** of the **Elections Act** must subject itself to the provisions of **Article 2 (1), (2) and (4) of the Constitution**. That the section must be declared unconstitutional.

8. On its part the 6th respondent submits that **Section 22 of the Elections Act** is not unconstitutional and does not limit the petitioners' fundamental constitutional rights as alleged. Further that the petitioners are mis-interpreting **Section 22 of the Elections Act** and does not disclose any constitutional provisions that have been violated or threatened with violation. That the deferential treatment accorded to various groups under the **Elections Act** is necessary to give effect to **Article 27 (6) (7) and (8)** of the **Constitution** and cannot be said to be unconstitutional. That **Article 99 (1) (b)** of the **Constitution** provides that a person is eligible for election under the Constitution if the person satisfies any educational, moral and ethical requirements prescribed by the Parliament or by any act of Parliament. This article gives power to the people elected representatives to enact and/or make laws setting an educational criteria. **Section 22 of Elections Act** which was enacted by Parliament pursuant to the provisions of **Section 89 (1) (b)** of the Constitution cannot be unconstitutional.

9. **Determination:**

The Constitution guarantees the democratic rights of the citizens to participate in their governance. The legislature which is vested with the power to enact legislation must exercise the power in a manner that does not contravene the Constitution. The **Constitution** under **Article 99** mandates parliament to enact legislation making provisions for the education, moral and ethical requirements to be met by those aspiring for elective office. **Article 99** of the **Constitution** provides:

“1. Unless disqualified under clause (2), a person is eligible for election as a member of parliament if a person:-

(a) Is registered as a voter.

(b) Satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an act of parliament.”

10. **Article 193 of the Constitution** makes provision with regard to members of county assemblies. The issue for determination in this petition is whether **Article 22 of the Elections Act** is unconstitutional as it purports to limit the rights of the petitioners to participate fully in all aspects of the 2017 General Elections. **Article 24** of the **Constitution** provides:

(1) 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 including;

(a) the nature or the right of fundamental freedom

(b) the importance of the purpose of the limitation and (c) the nature and extent of the limitation and d.....

So the Constitution itself allows legislature to limit enjoyment of certain rights. Section 22 of the Elections Act provides:-

“(1) A person may be nominated as a candidate for an election under this act only if that person:

(a) Is qualified to be elected to that office under the Constitution and this act and;

(b) Holds a certificate diploma or other post secondary qualification acquired after a period of at least 3 months study, recognised by the relevant ministry and in such manner as may be prescribed by the commission under this act.

(2) Notwithstanding Section 1 (b) a person may be nominated as a candidate for election as president, deputy president, county governor or deputy county governor only if the person is a holder of a degree from a university recognised in Kenya.

2A. For the purposes of first elections under the Constitution, Sections 22 (1) (b) and Section 24 (1) (b) shall not apply for the offices of parliament and county assembly representatives.”

11. Courts in Kenya have dealt with this issue as to whether **Section 22 of Elections Act** is unconstitutional. In the case of **Hon. Johnstone Muthama MP Vs Minister for Justice and Constitutional Affairs and Attorney General** Justice Mumbi Ngugi held that **Section 22 (1) (b)** of the **Elections Act** is discriminatory and offends the provisions of **Article 27 of the Constitution** which provides:-

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment including the right to equal opportunity in political economic, cultural and social spheres.”

That it also violates **Article 25 of the International Covenant on Civil and Political Rights** by limiting the rights set out under **Article 38 (1)** which provides:-

“(1) Every citizen is free to make political choices which includes the right:

(a) To form or participate in forming a political party.

(b) To participate in the activities or recruit members for a political party or

(c) To campaign for a political party or cause.”

Article 25 supra provides:

“The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidate any restrictions to stand for elections such minimum age must be justifiable on objective and reasonable criteria. Persons who are other eligible to stand for elections should not be excluded by unreasonable or discriminatory requirements such as education residence or decent or by reason of political affiliation”

Hon. Justice Ngugi however, found that **Section 22 (2) of the Elections Act** are not in violation of the petitioner’s rights or inconsistent with the Constitution. They are reasonable and justifiable. She held as follows:

“The petitioners have also impugned the provisions of Section 22(2) of the Elections Act with regard to the nomination for election as President, Deputy President, governor and Assistant Governor.....In considering the above provision in light of the test set out above and the constitutionally permitted limitations, I take the view that the educational requirements for the positions are reasonable and justifiable. The number of positions required is reasonably small, the nature of the duties and functions to be performed by those holding the positions is such as would require higher educational qualifications and skills and wider exposure which higher education allows a person to acquire. I therefore find and hold that the provisions of Section 22 (2) are not in violation of the petitioners’ rights or inconsistent with the Constitution”

Thus the judge found **Section 22 of the Elections Act** to be unconstitutional while others reasonable and justifiable.

12. This issue was also considered in the case of **John Harun Mwau Vs Independent Electoral and Boundaries Commission & Anor. 2013 (eKLR)** where it was held (Lenaola J., (as he then was) :

“It is against the background of Mumbi J’s. judgment (in the Johnstone Muthama case) that the Petitioner now contends that even the requirement to hold post-secondary education is unreasonable and that any academic qualification would be sufficient. I am unable to accept his argument for two reasons. First, the nature of the duties and functions, skills and wide exposure which is gained through higher education. It is important that a representative to either of the House understands the proceedings, nature of business being carried out and most important be in a position to make his/her contribution to the various and many at times complex motions and debates in Parliament. It must also be understood that the elected persons represent the people who appointed them and they should therefore be able to execute that duty without any difficulties.

.....it is thus crystal clear that the ultimate will of the people of Kenya is to be found in the Constitution. At Article 99(2)(b), the people of Kenya have envisaged, in passing the Constitution, that a person would not be eligible to run for certain offices if they did not meet the criteria set by Parliament. While the Constitution does not set an educational criteria, it imposes a duty on Parliament to enact legislation setting that criteria, and this is what has now been done in the Elections Act. In my view, the provisions of Section 22 of the Election Act were enacted by Parliament pursuant to the provisions of Article 99 (1) (b) of the Constitution. This Article envisages a situation where Parliament prescribes an educational threshold for those who seek to be elected as Members of Parliament. In its wisdom, Parliament prescribed the provision of a post-secondary qualification. I do not think this qualification is unreasonable or unattainable by all in Kenya. I am alive to the fact that each year, the tax payer spends billions of shillings in both free primary and secondary education. Every Kenyan from all walks of life there has in my view opportunity to gain this qualification. I therefore find the argument that any other academic qualification would be sufficient to even include Primary education cannot hold water. In any event, it does not reflect the ultimate will of the people of Kenya as can be seen from the requirements of Article 99(1)(b). I therefore find that post-secondary education as enshrined under Section 22 (1) (b) of the Elections Act is attainable, sufficient and constitutional. To hold otherwise would be absurd 50 years after independence.”

13. Further in the case of **Peter Gichuki King'ara Vs Independent Electoral and Boundaries Commission, James Mbai, Mary Wambui i.e. Pet NO. 3 of 2013 High Court Nyeri** it was held.

“In my humble view the courts declaration in the Johnstone Muthama case and the amendments to section 22 of the Elections Act had the same effect which is, candidates for parliamentary or county assembly seats could lawfully be nominated to contest for those seats without proof of academic qualifications envisaged in Section 22 (1) (b) of the Elections Act in the 4th March 2013 General Elections.”

These decisions are persuasive. They have established that candidates running for Parliament or county assembly seats could be nominated to contest for the seats without any limitations of their rights based on proof of their academic qualifications envisaged in **Section 22 (1) (b) of the Elections Act** in the first elections under the Constitution; Johnstone Muthama case. The will of the people as expressed in the Constitution is that there be set criteria by Parliament for a person aspiring for certain elective post to meet in order to be eligible. This is envisaged under **Article 99 (1) (b) of the Constitution**. This article donates power to the peoples' elected representatives to enact laws setting an education criteria. Parliament having enacted **Section 22 of the Elections Act** pursuant to **Article 99 (1) (b) of the Constitution** cannot be said to be unconstitutional and this also applies to the office of the county governor and deputy governor. The requirement under **Section 22 (1) (b) of the Elections Act** as held in the case of **John Harun Mwau V Independent Electoral and Boundaries Commission & Anor [2013]eKLR** is achievable and constitutional. I am persuaded to hold that these decisions have properly interrogated the provisions of **Section 22 of the Elections Act** against the constitutional provisions cited above. I have no reasons to deviate from the findings of my brother judges. The upshot is that **Section 22 of the Elections Act** is not unconstitutional. It is consistent with the provisions of the Constitution requiring that a person contesting for certain elective posts satisfies some educational standards in order to be eligible. These requirements are not only achievable but are also reasonable. I find that the petition lacks merit. I dismiss the petition. I make no orders as to costs as this was a matter of public interest.

Dated and delivered at Kerugoya this 29th day of June, 2017.

L. W. GITARI

JUDGE

Delivered in open court, Mr. Miano for Petitioner, Mr. Mwangi holding brief for Kathungu, parties – absent. Court Assistant Naomi Murage.

MR. MIANO: I apply for a copy of the Judgment.

MR. MWANGI: I apply for a copy of the Judgment

ORDER: Deputy Registrar to supply a certified copy of the Judgment.

L. W. GITARI

JUDGE

29.06.2017