



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.182 OF 2017

JACK MUKHONGO MUNIALO & 12 OTHERS.....PETITIONERS

-VERSUS-

ATTORNEY GENERAL.....RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND INTERESTED PARTY

JUDGMENT

Introduction

1. This petition challenges the Constitutionality of section 14(2) of the Election Offences Act, 2016. Parliament enacted this Act in 2016 to provide for a consolidated legal framework for election offences with a view dealing with offences relating to general elections other elections and referenda. The Act was assented to on 13th September 2016 and came into force on the 4th October 2016. The Act was to apply for the first time in the general elections that were held in August 2017. The petitioners view the section as violating the Constitution as well as the Bill of Rights and contend that it is constitutionally invalid.

The Petition

2. On 4th May 2017 **Jack Mukhongo Munialo** and 11 other petitioners, filed a petition dated the same day and supported by an affidavit sworn on the same day by **Jack Mukhongo Munialo**, against the **Attorney General** and Principal Legal adviser to Government, the respondent, **The Independent Electoral and Boundaries Commission**, a Constitutional Commission established under **Article 88(1)** of the Constitution with mandate to preside over elections and referenda, and the Director of Public Prosecution an independent Constitutional office with mandate to undertake public prosecutions, as the interested parties.

3. From both the petition and depositions in the affidavit, the petitioners state that **Section 14(2)** of the Act which prohibits the Government from publishing and advertising achievements in both electronic and print media as well as through banners or hoardings during election period, is unconstitutional.

4. The petitioners state that in the case of the current election, **IEBC** through various Gazette Notices notified of election period for Presidential, governors, senators, members of national Assembly, women representatives and county assemblies to be from 17th may 2017 and to determine after elections on 8th august 2017. The petitioners state that **Section 14(2)** of the Act proscribes publication of any information of the government's achievements during this period. The petitioners further state that the manner of enactment of **section 14(2)** capriciously prevents the government from publishing information of its achievements to the public and in turn denies Kenyans the right to establish what the government had done thus infringes on the right to information contrary to **Article 35 (1) (a) and (3)** of the **Constitution**.

5. The petitioners contend that **Section 14(2)** as enacted prohibits publication of information by the government on how it has applied public resources for the benefit of the country, creates a limitation of the right of access to information and therefore, violates **Article 24(1)** of the **Constitution**. They aver that election period is not one of the constitutional justifications for limitation of rights under **Article 24** of the **Constitution**.

6. The petitioners further contend that national values and principles of governance enshrined under **Article 10 (1), 10(2), (c) and (d)** of the **Constitution** are clear that the government's policy decisions, good governance, integrity, transparency and accountability must be maintained. They therefore state that limiting publication of information by **Section 14(2)** hinders the values and principles contained in **Article 10** regarding transparency and accountability even during election period.

7. They contend that the government should showcase its achievements at the end of its term, election period notwithstanding, as an element of good governance, transparency and accountability thus inform the public of its achievements in the programmes and projects undertaken during the term.

8. The petitioners' position is that this form of accountability demonstrates projects initiated and accomplished as well as the stage of implementation for others which is for public good given that citizens can establish what the government has done and or achieved.

9. The petitioners also contend that for **Section 14(2)** to be legally sound, Parliament should have provided guidelines on what the government can publish during the election period, the content thereof and only limit such information that would have undue political advantages. They state that **Section 14(2)** as enacted is so expansive and ambiguous to the extent that government officials can be criminally culpable for publishing information in the public interest.

10. They aver that the impugned **Section** violates **Articles 35, 10(1), 10 (2) (c) 24(1) and 201** of the **Constitution**, and now seek orders declaring the section inconsistent with the Articles of the constitution and therefore invalid to the extent of the inconsistency.

Responses

11. The respondent filed grounds in support of the petition dated 28th July 2017. According to the respondent, **Article 2** decrees the Constitution as the supreme law, He contended that section 14(2) contravenes **Articles 35, 10 and 24** of the **Constitution** and concluded that the section ought to be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the **Constitution**.

12. The 1st interested party filed grounds of opposition dated 28th July 2017 and filed in Court on the same day opposing the petition. It was contended that the petition is founded on misinterpretation, misconception and or misunderstanding of the import and intent of **Section 14(2)** of the Act. The 1st interested party contended that there is presumption of constitutionality of the impugned provisions and that the whole Act must be read in order to discern the true legislative intent.

13. It was further contended that the mischief intended to be addressed by the impugned section was to

ensure that persons aspiring elective positions embrace and promote democratic values and principles consistent with the letter and spirit of the **Constitution** and protect public funds from being used to promote partisan political activities. According to the interested party, a statute cannot be unconstitutional because it contains provisions that are unpopular with a section of the society.

Submissions

14. Mr. Wanyama, learned counsel for the petitioners, submitted both orally and through written submissions that **Section 14(2)** of the Act is unconstitutional. First counsel submitted that the Section prohibits both National and County Governments from advertising their respective governments' achievements in print and electronic media during election period. Counsel submitted that **Article 35** of the **Constitution** creates an obligation on the government to ensure information in its possession is accessible to the people. Counsel contended that although the right to access information may be limited, the limitation must be by law and justifiable under **Article 24(1)** of the **Constitution**.

15. It was submitted that limiting **Article 35** without stating circumstances for the limitation is unconstitutional given that **Article 24(1)** is in mandatory terms. According to Counsel, it is important that a legislation states circumstances under which it seeks to limit enjoyment of rights.

16. Second, Counsel submitted that **Article 10** of the **Constitution** requires good governance which includes transparency and accountability in governance matters. Mr. Wanyama contended that when **Article 10** is read together with **Article 201** on public finance, it is clear that **Section 14(2)** is inconsistent with the two **Articles** of the **Constitution** in so far as transparency on public spending is concerned.

17. Mr. Wanyama further contended that leaders seeking re-election, have a duty to inform the public how they have spent public finances which promotes the exigencies of **Article 38** of the **Constitution** in making political choices. Counsel argued that the advertising sought to be prohibited by the impugned section does not in any way affect free and fair elections contemplated under **Article 81** of the **Constitution**.

18. In counsel's view, publication of information in the public portal, print and electronic media promotes the values and principles of governance envisaged under **Articles 10** and **201** of the **Constitution** and assists in the exercise of rights under **Article 38**, rather than impede free and fair elections. According to counsel, it cannot be assumed that advertisement and publication of information in the portal will influence people when exercising their right to vote. Counsel referred to a number of decisions including *Doctors for Life International v Speaker of National Assembly and others* (CCT 12/ 2005) 2006 ZACC11, *R v Big M Drug Mart Ltd* [1985] 1SCR 295 to support his position.

Respondent's Submissions.

19. Mr. Mutinda, learned counsel for the respondent associated himself with the petitioners' submissions. He also relied on his grounds in support of the petition and written submissions. According to counsel the impugned section limits rights in so far as it prohibits and criminalizes publication of information by the government.

20. Learned counsel submitted that Section 14(2) fetters the government's right to publish information yet it is a requirement under **Article 35** of the **Constitution**. Mr. Mutinda contended that **Article 2(3)** of the Constitution is clear on the supremacy of the **Constitution** which should never be under challenge. Counsel argued that although the Election Offences Act provides for offences and punishment, the government being a larger entity, cannot commit offences. In Counsel's view, a provision insinuating that a government can commit offences is unconstitutional.

1st Interested Party's Submissions

21. Mr. Lawi, learned counsel for the 1st interested party, submitted that **Article 82 1(b)** of

the **Constitution** required Parliament to enact laws to regulate elections and parliament duly enacted the Election Act, 2011 and Election Offences Act, 2016. Counsel submitted that **Article 24** provides for limitation of rights and as an exception to **Article 24**, Parliament enacted **Section 14(2)** to limit publication of achievements during election period.

22. Counsel submitted that the election period covers many activities including those in government and outside government, hence the section seeks to ensure that those in government do not have undue advantage over their competitors outside government. Counsel contended that the government is subject to the Constitution and the law and must act in accordance with the law including the Election offences Act.

23. Mr. Lawi went on to contend that **Section 14(2)** notwithstanding, a citizen seeking information can still get it. In Counsel's view, **Section 14(2)** only limits publication for a short period and in the case of the current general elections limitation was between 17th March 2017 and 8th August 2017. Counsel reiterated the fact that there is a presumption of constitutional validity of a statute and the burden is on the person alleging otherwise to prove. He relied on the case of *Council of Governors v Attorney General. [20017]eKLR* on that proposition.

24. Counsel contended that publication or advertisement does not necessarily hold the government to account but in his view, agents such as Ethics and Anti-Corruption Commission (EACC) and The Auditor General's office hold the governments to account in public finance expenditure.

2nd Interested Party's Submissions

25. Mr. Ashimos, learned counsel for the 2nd interested party supported the 1st interested party's position and emphasized on the presumption of constitutionality of statutes or statutory provisions and the burden of proof regarding contrary assertion. Counsel submitted that in determining constitutional validity of a statute or statutory provision, the Court should consider the purpose and object of the impugned statute or provision, and also read the Act as a whole in order to discern the true legislative intent.

26. Counsel further contended that **Articles 10** and **35** have to be read in harmony with Article 81 (e) (ii) of the **Constitution** with regard to the principles of elections. Counsel submitted that the object and purpose of the impugned section is not to limit access to information but to minimize any advantage the government may have thus guarantee free and fair election. According to counsel, the impugned provision is in tandem with **Article 81(e)** of the **Constitution**.

27. In that regard, counsel submitted, the right to information is limited by law as required by **Article 24(1)** and that the limitation is reasonable and justifiable in a free and democratic society. According to counsel the limitation is necessary for purposes of achieving the principles amplified under **Article 81(e)** of the **constitution**.

Analysis and Determination

28. I have considered this petition, responses thereto submissions by counsel for the parties and authorities relied on. The petitioners supported by the respondent, have challenged the constitutional validity of **Section 14(2)** of the Elections Offences Act 2016. Their contention is that the section violates **Article 35** of the **Constitution** on the right to access information by prohibiting the government from publishing and advertising information on the achievement of its projects during election period. This they, argue, limits the right of the public to access information and the government to give that information. They contend therefore, that prohibition violates the principles of transparency and accountability contained in **Article 10** of the **constitution**.

29. The 1st and 2nd interested parties on their part have opposed the petition contending that the impugned section is in tandem with **Article 81 (e)** of the **constitution** on free and fair elections. In their view, the section outlaws certain actions during the election period in order to ensure that there is no advantage to

any of the political competitors or misuse of public resources during elections, and therefore, is consistent with **Article 24(1)** of the **Constitution**.

30. This being a constitutional challenge to a statutory provision, it is necessary to outline the principles guiding constitutional interpretation. **Article 259** of the **Constitution** provides that the constitution be interpreted 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; permits the development of the law and contributes to good governance. The court must pay special attention to the purposes, values and principles of the constitution when called upon to interpret any of its Articles.

31. In ***Re The Matter of the Interim Independent Electoral and Boundaries Commission***, Application No 2 of 2011, the Supreme Court addressed itself on **Article 259(1)** as follows;

“In Article 259(1) the Constitution lays down the rule of interpretation as follows: “This Constitution shall 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; and (c) contributes to good governance.”

32. This was reiterated in the case of ***Institute of Social Accountability & Another v National Assembly & 4 Others***, Petition No 71 of 2014 [2015] eKLR where the Court stated;

“The Court is enjoined under Article 259 of the constitution 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 that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 259(2) (e) of the Constitution to protect and promote the purpose and principles of the Constitution”

33. Where the constitutional validity of a statute or statutory provision is challenged on grounds that it violates the constitution, it becomes imperative to ascertain the true nature and character of the statute or statutory provision concerned. In that regard the Court should ascertain the subject matter of the statute, the area it is to operate, as well as determine the purpose and intent of the statute or statutory provision.

34. To do so, it is legitimate for the court to take into account all factors such as the history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intends to suppress, the remedy for the disease which the legislature intended to cure and the true reason for the remedy. (***Bengal Immunity Company Ltd v The State of Bihar***[1954] SCR 73).

35. There is also a general but rebuttable presumption of constitutionality of a statute or statutory provision. The reason attributed to this principle is that the legislature is assumed to understand the problems the electorate face and therefore the laws enacted are directed at solving such problems hence the need to assume the laws to be constitutional. (***Hambardda Dawakhana v Union of India*** ***Air*** [1960]AIR 554)

36. The burden of proving that the statute or statutory provision is unconstitutional is on the person alleging the constitutional invalidity. (***Ndyanabo v Attorney General of Tanzania*** [2001] EA 495). That being the case, a court should presume a statute or statutory provision to be constitutional unless the contrary is shown.

37. Further, the court has to look at the statute alongside the **provision** or **Article** of the **Constitution** alleged to be offended by the statute or statutory provision and determine whether the statute is in conformity with the constitution. The court while doing so, has to consider the purpose and effect of the implementation of the statute or statutory provision. If the purpose does not infringe the right guaranteed by the constitution, the court must go further and determine whether its implementation does infringe the constitutional right.

38. The position was aptly put by the Constitutional Court of Uganda in ***Olum and another v Attorney***

General of Uganda [2002] 2 EA 508 thus;

“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.”

39. The constitution should also be given a broad and liberal interpretation for it embodies the nation’s values, principles as well as aspirations of its people. In the case of Njoya & 6 Others v Attorney General & another [2004] eKLR, the Court emphasized on the need to give the constitution a broad and liberal interpretation when it stated:-

“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.”

40. Bearing in mind the above principles, and in order to address the question in this petition, it is necessary to set out the impugned provision and juxtapose it against the Articles of the **Constitution** said to be offended and determine whether it is in accord with and conforms to the Articles of the **constitution**.

41. **Section 14** of the Elections Offences Act provides as follows;

“(1) Except as authorised under this Act or any other written law, a candidate, referendum committee or other person shall not use public resources for the purpose of campaigning during an election or a referendum.

(2) No government shall publish any advertisements of achievements of the respective government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period.

(3) For the purposes of this section, the Commission shall, in writing require any candidate, who is a member of Parliament, a county governor, a deputy county governor or a member of a county assembly, to state the facilities attached to the candidate or any equipment normally in the custody of the candidate by virtue of that office.

(4) A person who is requested to supply information required under subsection (3) shall submit the information within a period of fourteen days from the date of the notice.

(5) The provisions of subsection (3) shall apply with necessary modifications, to an employee of a statutory corporation or of a company in which the Government owns a controlling interest.

(6) A person who fails to comply with the provisions of this section commits an offence and is liable on conviction to a fine not exceeding two million shillings or imprisonment for a term not exceeding six years or to both.

(7) A member of the Commission, any person designated by the Commission or any authorised agency shall have the power to impound or to order the impounding of any state resources that are unlawfully used in an election campaign.”(emphasis)

42. The impugned statutory provision prohibits both national and county governments from publishing advertisements on their achievements in print and electronic media or through banners or hoardings in public places during election period. **Section 2** of the Act defines “**elections**” to mean presidential,

parliamentary or county elections including by-elections. The same section defines “**election period**” as the period between the date of publication of a notice by **the Commission** for a presidential, parliamentary or county election under **Sections 14, 16, 17 and 19** of the **Elections Act, 2011**, and the gazettment of the election results.

43. **Section 14(1)** generally prohibits use of public resources during campaigns for election. The import of the entire section 14 is to prohibit use of public resources during election period. In support of their contention that **Section 14(2)** is unconstitutional, the petitioners have argued that the section violates **Articles 10, 35 and 24** of the Constitution. They hold the view that **Article 10** contains values and principles of governance one of which is transparency and accountability.

44. In the petitioners understanding, by prohibiting the government from publishing and advertising its achievements, the section contravenes the aspect of transparency and accountability provided for in the **Constitution**. It is the petitioners’ contention that by advertisement its achievements, the government is accounting to the people how it has utilized public resources by initiating and completing given projects. It has also been contended that the prohibition limits the public’s right to access information under **Article 35** of the **Constitution**, thus violate **Article 24(1) of the Constitution**.

45. **Article 35** provides ;

“(1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.”

46. The Constitution grants citizens the right to access information held by the state or information held by some other person but required for purposes of exercising or protecting a right and fundamental freedoms. Projects initiated or completed by the government are done openly and are known to citizens. It cannot have been the intention of the framers of our Constitution that be the basis of the information contemplated under **Article 35** of the Constitution.

47. The Elections Offences Act as its title suggests, is a legal framework that creates offences relating to elections and provides penalties for those offences. This is also clear from the **preamble** to the Act. The Act contains various election offences including those relating to the register of voters, multiple registration by voters, offences relating to voting, offences committed by staff of the Commission (IEBC members), offences that would jeopardize maintenance of secrecy of the elections, meant to preserve the essence of election by secret ballot, offences relating to personation, bribery, undue influence, use of force or violence during election, use of national security organs during election, offences relating to actual election and use of public resources during election period, Participation of public officers in elections, and unlawful expenditure is also prohibited . There are other offences such as those relating to misuse of technology during elections, as well as those against aiding and abetting. The Act therefore, covers a broad spectrum of offences relating to elections in general as a way of ensuring that the country holds free, fair and credible elections which are in accord with the principles set out in Article 81 of the constitution.

48. Whereas **Article 10** of the **Constitution** provides for national values and principles of governance, including transparency and accountability, and **Article 35** guarantees citizens the right to information, these **Articles** must be read together and in harmony with **Articles 81, 201 and 24(1)** of the Constitution. **Article 201 which contains principles of finance**, requires openness, transparency and

accountability in public finance in order to promote an equitable society.

49. **Article 81** of the **Constitution** on the other hand contains principle of electoral system in the Country. The **Article** provides-

“The electoral system shall comply with the following principles—

(a) freedom of citizens to exercise their political rights under Article 38;

(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;

(c) fair representation of persons with disabilities;

(d) universal suffrage based on the aspiration for fair representation and equality of vote; and

(e) free and fair elections, which are—

(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner.”(emphasis)

50. It is important to note that **Article 81(e)** decrees that elections be by secret ballot, free from violence, intimidation, improper influence or corruption. The Article further demands that elections be conducted by an independent body, they be transparent and administered in an impartial, neutral, efficient, accurate and accountable manner. At the same time **Article 82(1)** required parliament to enact legislation to provide for issues relating to elections and related matters. In this regard parliament enacted the Elections Act, 2011, Independent Electoral and Boundaries Act, 2011 and the Election Offences Act 2016. In this context, matters related to elections include election offences. A proper reading of section 14 of the Election Offences Act shows that the matters provided for in that section relate to the principles contained in **Article 81(e)** of the **Constitution**.

51. **Articles 10, 24, 35, 81** and **201** of the **Constitution** that the petitioners have relied on to argue that section 14(2) is constitutionally invalid, relate to general values and principles in the **Constitution**. Being constitutional principles, **Article 259** dictates that the Constitution be interpreted in a manner that promotes its purposes, values and principles. Moreover **Article 259 (3)** demands that each provision of the Constitution be construed according to the doctrine of interpretation that the law is always speaking.

52. It is important to appreciate the electoral system principles in **Article 81** include free and fair elections that are devoid of violence, intimidation, improper influence or corruption. That means elections must not only be transparent but also administered in an environment that is impartial, neutral, efficient, accurate and accountable. This constitutional decree cannot be realized if election offences are not dealt with firmly and decisively. In that case, the impugned section 14(2) cannot be interpreted against one or two **Articles** of the **Constitution** in isolation of the rest of the Articles which may lead to a distorted if not absurd interpretation. more importantly, too much attention should not be paid to words alone used in a provision which may result into a distortion of the legislature’s intention and purpose of enacting that particular statute.

53. As was observed by **M’ Inoti JA** in **Equity Bank Limited v West Link Mbo Limited** [2013] eKLR;

“Under Art 259, the words used in a provision are not the only or even the primary tools of interpretation of the Constitution. Certainly the words used are important. They are the starting point and oftentimes they may ensure promotion of the purpose, values and principles of the Constitution, advancement of the rule of law, the Bill of Rights and contribute to good governance. The drafters of the Constitution were also acutely aware that words used in a provision may admit to a meaning that does not, or that least promotes the ends set out in Art 259.”

54. Furthermore the canons of interpretation require that the Constitution be read and interpreted as an integrated whole with provisions of the constitution supporting each other instead of destroying one another. In the case of ***Tinyefuze v Attorney General of Uganda***[1997] UGCC3 the court put it thus;

“The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.”(see also ***Attorney General of Tanzania v Christopher Mtikila*** [2001] EA 13,)

55. In ***Philip Tormey vs. Ireland and the Attorney General***(1985) 1 IR 289, quoted in ***Equity Bank Limited v West Link Mbo Limited*** (supra) the Supreme Court of Ireland stated;

“The rule of literal interpretation, which is generally applied in the absence of ambiguity or absurdity in the text, must here give way to the more fundamental rule of constitutional interpretation that the Constitution must be read as a whole and that its several provisions must not be looked at in isolation, but be treated as interlocking parts of the general constitutional scheme. This means that where two constructions of the provision are open in the light of the Constitution as a whole, despite the apparent unambiguity of the provision itself, the court should adopt the construction which will achieve the smooth and harmonious operation of the Constitution. A judicial attitude of strict construction should be avoided when it would allow the imperfection or inadequacy of the words used to defeat or pervert any of the fundamental purposes of the Constitution. It follows from such global approach that, save where the Constitution itself otherwise provides, all its provisions should be given due weight and effect and not be subordinated one to another. Thus, where there are two provisions in apparent conflict with one another, there should be adopted, if possible, an interpretation which will give due and harmonious effect to both provisions. The true purpose and range of a Constitution would not be achieved if it were treated as no more than the sum of its parts.”

56. Similarly, **Justice Mahomed** cautioned against giving constitutional provisions rigid and artificial interpretation in the case of ***Government of Republic of Namibia v Gultura*** 2000 [1994] (1) SA 407, when he stated.

“A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the ‘austerity of tabulated legalism’ and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation.”

57. **Justice Mohamed** had also observed in the case of ***State v Achesoni*** [1991] 20 SA 505 an observation that was later echoed by the **Supreme Court** in ***Re The Matter of Interim Independent Electoral and Boundaries Commission*** (supra) that –

“[51] The Constitution of a nation is not simply a statute which mechanically defines the structures of governance and the relationship between the 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 over and permeate the process of judicial interpretation and judicial discretion”

And in the case of *Communication Commission of Kenya v Royal Media Services and 5 others* [2014] eKLR the Supreme Court observed;

“the Constitution should be interpreted in a holistic manner, within its context, and in its spirit. In the *Matter of the Kenya National Human Rights Commission*, Sup. Ct. Advisory Opinion Reference No. 1 of 2012;[2014] eKLR, this Court [paragraph 26] had thus remarked:

“...But what is meant by a holistic interpretation of the Constitution” It must mean interpreting the Constitution in context. It is the 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 into each other, so as to arrive at a desired result”

58. The jurisprudence flowing from the above decisions is that a Constitution being the foundation of the nation- state with a living soul, reflecting the aspirations of the people, binding the government and the governed, and containing values and principles is the embodiment of the peoples desires, and therefore should be accorded an interpretation that not only inspires but also broadens the peoples’ aspirations for only them it is intended to serve.

59. **Articles 10, 24, 35, 81 and 201** of the constitution should be read harmoniously so that the spirit of the constitution can preside over and permeate that interpretation. (*State v Achesoni supra*). In that context, **Articles 10, 35, 81 and 201** of the Constitution contain values and principles that support each other and must be read and interpreted together for they speak to one people and one nation as an open, democratic and progressive society.

60. The value and principles of accountability and transparency in **Article 10** do not relate to transparency and accountability in public finance alone. These values should also be taken to mean and include transparency and accountability in the electoral process under **Article 81** of the Constitution. In the same breath, the principles of public finance in Article 201 do not operate in isolation of the rest of the Articles in the Constitution. Equally, the right to information in **Article 35** is also not absolute and must be read in tandem with all other Articles of the constitution. **Article 81** emphasizes on the principles of open fair free and democratic elections which is in line with **Article 4 (2)** which declares Kenya a multi-Party Democratic state founded on the national values and principles of governance in Article 10. All these Articles must be interpreted so as to give due and harmonious effect to all the Articles of the constitution. Openness and accountability in governance, and finance must of necessity be replicated in the electoral process.

61. This Court has been called upon to determine constitutional validity of the impugned provision, (section 14(2)) and bearing mind the canons of interpretation, the entire Act must be read to get the true legislative intent. It is also necessary to look at the historical circumstances leading to the enactment of the statute and the impugned provision as well as the mischief it was intended to cure. That means the court should look at the purpose for which the statute was enacted.

62. As seen earlier in this judgment, Article 81(e) requires that elections be free and fair, devoid of corruption, violence and undue influence. Parliament enacted legislations to regulate the electoral processes in order to achieve the principles of electoral system in Article 81. Parliament therefore enacted both the Elections Act and the Independent Electoral and Boundaries Commission in 2011. Initially electoral offences were contained in these two legislations.

63. However, enforcing these fragmented legislations presented a challenge and as a result, Parliament consolidated and amalgamated offences in these legislations into one statute, the Election offences Act 2016. The intention of the legislature in coming up with a single statute, was well captured in the memorandum of objects and reasons for the Bill thus.

“The Bill seeks to consolidate the offences relating to elections into one Act in order to enhance the administration of elections and prosecution of offences relating to elections. The Bill also seeks to ensure clarity with respect to some of the existing provisions which, as currently set out in the Elections Act, make it difficult to prosecute. The Bill sets a time limit within which the Director of Public Prosecutions may commence proceedings in relation to an election offence.

In particular, the Bill prohibits the use of public resources by candidates during elections and empowers the Commission to demand a full account of all public resources ordinarily at the disposal of the candidates, where the candidates are members of parliament, county governors, deputy county governors, or members of county assemblies. The Bill also provides for offences related to the use of Information and Communication Technology in elections. It further generally enhances penalties for election offences in order to make them more deterrent.”

64. The consolidation was intended to enhance administration and prosecution of election offences. It is on that basis that the Act provides for various offences relating to elections, ranging from voter registration to electronic devices. They also prohibit public officers from campaigning using public resources. The mandate to prosecute election related offences was also placed on the Director of Public Prosecution and time within which to prosecute these offences clarified. It is not lost that the Act was also intended to prohibit use of public resources by candidates during elections as a way of ensuring accountability on the part of those in charge of public resources.

65. The petitioners have isolated section 14(2) of the Act and contended that it is constitutionally invalid. In doing so they have only looked at one provision of the statute as opposed to the entire Act which is against the canons of statutory interpretation that the whole statute be looked into and be given a holistic interpretation. The **Court of Appeal** in the case of ***The Engineers Board of Kenya v Jesse Waweru Wahome & others*** Civil Appeal No 240 of 2013 that;

“One of the canons of statutory interpretation is a holistic approach.... no provision of any legislation should be treated as ‘stand-alone’ An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act.”(emphasis)

66. The Court is also required to consider the language of the statute and where the language used in the statute or provision of a statute is clear unambiguous, the court should give the words in the statute their ordinary and natural meaning. In the words of **Kasliwal J**, the golden rule of interpretation is that words should be read in their ordinary, natural and grammatical meaning.(***St. Stephen’s College v University of Delhi*** (1992) 1 SCC558. see also ***Saleh M. W Kamba & others v Attorney General of Uganda Constitutional Petition No 3 of 2003***).

67. Does section 14(2) violate the Constitution? The answer must be in the negative. The language of the entire section 14 is clear that it seeks to safeguard public resources from misuse by candidates or other persons during elections. The section prohibits persons both in the national and county governments from using public resources for political activities. This is clear right from sub section (1) through sub section (7). Prohibiting national and county governments from advertising and publishing their respective achievements during election period will prevent use of public resources for partisan political activities.

68. In my view, therefore, Article 35 is not absolute and cannot operate in isolation. It must be read harmoniously with other Articles of the constitution. Even with section 14(2), any citizen who wants information from the state can still get it under this Article as read with Access to information Act. Moreover, the law requires one to write to the state officer concerned and the state officer or organ has an obligation to supply the information in his (its) possession. **Article 35** does not require the government or its officers to publish such information for consumption by the general public. The Article is clear that information should be given for purposes of exercising or protecting a right or fundamental freedom. The Act (access to information Act) provides a clear process for seeking information and how that information should be processed. (see ***Nairobi Law Monthly v Kenya Electricity Generating Company & 2 others*** [2013] eKLR

69. Article 24(1) of the Constitution has been cited to justify the contention that section 14(2) unconstitutional for limiting the right to information. The Article is however permissive on limitation of rights and fundamental freedoms. The limitation is permissible on two conditions; first that a right or fundamental freedom in the Bill of Rights should only be limited by a law; and second, to the extent only that the limitation is reasonable and justifiable in an open and democratic society. Even where the right or fundamental freedom has been limited by law, the yardstick for determining reasonableness and justifiability of the limitation is whether such limitation is acceptable in an open and democratic society.

70. The court in considering the limitation under Article 24(1), must bear in mind that there is no superior right and take into consideration factors such as the nature of the right to be limited, the importance and purpose of the limitation, the nature and extent of the limitation and the need to ensure that enjoyment of rights and fundamental freedoms by one individual does not prejudice the rights of others. This calls for balancing of rights under the principle of proportionality because rights have equal value and therefore maintain the equality of rights.

71. That is why perhaps the Supreme Court stated in *Re The Matter of Interim Independent Electoral and Boundaries Commission* (supra) that

“Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.”

72. Bearing in mind the conditions set by **Article 24(1)**, first, the limitation under section 14(2) is a limitation by law, and second, it is a periodic limitation during the election period only. The period of concern in this petition was between 17th March to after the 8th August 2017 general elections results, and in the case of the Presidential election, up to 26th October 2017, The prohibition is for a short period of about five months, while the nature and extent of limitation is against advertising achievements by government in any forums during election period. And the importance of the limitation cannot be over emphasized. It is to protect public resources from being used in advancing partisan political interests.

73. In my view therefore, this limitation is reasonable and justifiable in the circumstances and meets the constitutionality test prescribed by **Article 24(1)**. It must also be appreciated that **Article 4(2)** of the Constitution declares Kenya as a multi-party democratic state which means there may be at any one time different political parties in government. Allowing the government of the day continue advertising and publishing information on its achievements and projects during election period using public resources, would be against the principles of public finance and would give the government and the political party in power not only undue advantage and influence, but also room to plunder public resources should it sense defeat in the election.

74. The framers of our Constitution included the provision in Article 81(e) requiring elections to be free and fair, free from violence, intimidation, improper influence or corruption. They were well aware of the history of elections in this country and wanted elections conducted by an independent body, transparently and administered in an impartial neutral, efficient, accurate and accountable manner. These words are not mere adjectives or platitudes. They are loaded with heavy legal meaning that Kenya must be a true democracy where elections are conducted in a democratic manner. Only then can our country be an open and democratic society comparable to other open and democratic societies in the world.

75. A holistic reading of the Election offences Act shows that it covers offences across the spectrum and encompass all areas that are likely to jeopardize a free, fair and accountable election desired by our Constitution. Without this Act and in particular the impugned section 14(2), achieving the principles of electoral system set out in **Article 81** of the Constitution would be impossible. I do not therefore see any constitutional invalidity in the impugned section 14(2) of the Election Offences Act.

76. The petitioners' contention that the government cannot commit election offences is, with utmost respect to counsel, unfortunate. Governments are lead by fallible human beings. The laws are made to control and regulate human actions including those of government. No legitimate government can operate

outside the law. The impugned section targets government officials whose conduct is deemed to be conduct of the government. The government through its officers can and does commit offences which must be checked, and that is the import of section 14(2).

In conclusion therefore, after juxtaposing the impugned section 14(2) of the Election Offences Act against Articles 10, 35, 81 and 201 of the constitution, and considering the manner of limitation of rights permitted under **Article 24(1)** and being guided by the principles that must underlie the interpretation of our constitution, as well as judicial pronouncements on the issue, I am persuaded that the petition is unmeritorious and must be declined.

77. Consequently the petition dated 4th May 2017 is dismissed with no order as to costs.

Dated Signed and Delivered at Nairobi this 13th Day of October 2017

E C MWITA

JUDGE