REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 313 OF 2015

IN THE MATTER OF CHAPTER FOUR OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF RULES 11, 12, AND 13 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006

AND

IN THE MATTER OF CONTRAVENTION AND OR ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 31, 59, 258 (2) (C) AND 260 OF THE CONSTITUTION

AND

IN THE MATTER OF THE NATIONAL GENDER AND EQUALITY COMMISSION NO. 11 OF 2011

BETWEEN

PETER SOLOMON GICHIRA……..PETITIONER

VERSUS

THE ATTORNEY GENERAL ……..……..1ST RESPONDENT

NATIONAL GENDER AND

EQUALITY COMMISSION……...2ND RESPONDENT

RULING

1. **“Only last year and in our early maritime history we constructed a great ship and called it our new Constitution. In its structure we put in the finest timbers that could be found. We constructed it according to the best plans, needs, comfort and architectural brains**

available. We tried to address various and vast needs of our society as much as possible. We sent it to the people who ratified it. It was crowned with tremendous success in a referendum conducted on 4th August 2010. We achieved a wonderful and defining victory against the "REDS". We vanquished them. The aspirations and hope of all Kenyans was borne on 27th August 2010. We achieved a rebirth of our Nation. We have come to revere it and even have an affection for it. We accomplished a long tedious, torturous and painful chapter in our history. We all had extraordinary dreams. It is a document meant to fight all kinds of injustices. It is the most sophisticated weapon in our maritime history. As Kenyans we got and achieved a clean bill of constitutional health. However, the honeymoon is over, it is time to do battle with it. This case is a battle between competing interests over the provisions of the Constitution. One of the greatest challenges which has occurred as a result of the new Constitution is the remarkable and dramatic increased expectation people have in the institution of Government. People now expect their Government to not just maintain order but to achieve progress and development. People expect the Government to solve the problems of poverty, inequality, discrimination, unemployment, housing, education and health etc. This vast increase of expectation has given rise to huge anxiety and positive beliefs. The new situation has rekindled public awareness and interest in the role of the courts through which one seeks individual and collective justice and the sustenance of a democratic culture. We appreciate that men and women need support in their fight to claim and protect their liberties and their natural refuge and their protectors are the courts. The main impediment to the implementation and protection of Individual Rights is the prevailing social attitude. As they say, you can legislate equality all you want, but you cannot make people think it and live it particularly if they had been conditioned through inherited traditions and their own life experiences to the concept of inequality. Indeed, the first step, we believe, is to appreciate the common humanity of men and women. We are human beings first and foremost and only secondarily male and female. The new winds of change brought fundamental and dramatic Constitutional changes and awareness among citizens of this country. There is much euphoria and hope but the question that remains is whether the new Constitution as a popular and desirable document is a durable document that can help citizens achieve their aspirations. Whilst recognizing that even the most progressive Constitution cannot alone solve all the ills of society, the constitution that aspires to be legitimate, progressive, authoritative and to be accepted as a fundamental law must also address, inter alia, the fundamental rights of the people and ensure elimination of all forms of discrimination especially against women and disabled persons."

2. Those were the words of this Court in **Federation Of Kenya Women Lawyers (Fida-K) & Others vs. Attorney General & Others Nairobi HCCP No. 102 of 2011 [2011] eKLR**. Today marks the 5th anniversary of the promulgation of the Constitution of Kenya, 2010. In my view the words of the Court are more than ever relevant today as they were on 25th August, 2011 when the said decision was handed down.
3. The Petitioner herein, a member of the Kenyan public has instituted these proceedings pursuant to Article 26 of the Constitution according to him in the public interest. According to him, there are persons who suffer a gender identity order, a condition which in itself is not a disability but in which there is a disparity between a person's assigned sex and expressed gender identity. Further, there are persons that are born with both male and female biological traits, known as transgender and whose identity does not match their assigned sex at birth.
4. It was therefore the petitioner's case that the term "gender" does not necessarily mean only men and women but is wider enough in its spectrum and include the third gender or hermaphrodites. It was therefore contended that by restricting the term gender to men and women, the said third gender has ended up being denied enjoyment of their rights protected under the Constitution hence amounts to an abuse of their rights. Though the State is required by the Constitution to take legislative measures to redress the disadvantage suffered by individuals or groups, it was the petitioner's case that the only measure being presently taken in the implementation of the two-thirds affirmative action is to protect men and women to the prejudice of others.
5. In the foregoing premises the petitioner seeks the following orders:

    1. **That this Honourable Court be pleased to make a declaration that it is the right of every**

human being to choose their Gender as protected under the Kenya Constitution, 2010.

2. That this Honourable Court be pleased to make a declaration that the Government is bound to establish a Third Gender Category and to put in place the legal mechanisms necessary to establish quotas for the third-gender people including but not limited to registration of the gender as "Other".

3. That this Honourable Court be pleased to make a declaration that the Two Third Gender rule does not necessarily refer to men and women but includes 'Others'.

4. That That this Honourable Court be pleased to make a declaration that the State is bound to make the necessary legal amendments to the relevant statutes for allocation of Special Seats both in Elective and Appointive positions in order to protect the Third Gender and in full realization of the Two Thirds Gender Rule.

5. That the Honourable Court be pleased to grant any further orders it deems fit in protection of the constitution.

6. When the matter came up before me on 24th August, 2015, for the hearing of the Chamber Summons dated 28th July, 2015, **Mr Gachie**, learned counsel for the petitioner, informed the Court that instead of pursuing the said application, his client would rather fast-track the petition itself. He however sought an order that the said petition be certified pursuant to Article 165(4) of the Constitution as raising substantial questions of law warranting the empanelling by the Hon. Chief Justice of a bench consisting of uneven number of judges of not less than three.
7. It was submitted by learned counsel that the empanelling of such a bench was necessary in order to set the jurisprudence in the area of the third gender.
8. The application was not opposed by either **Mr Sekwe** for the 1st Respondent or **Mr Ateka** for the Interested Party.
9. I have considered the issues raised in this petition. In my view the decision whether or nor to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitutional and statutory provisions. This country, despite great strides made in the enlargement of the bench in the recent past still does not enjoy the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are still very scarce and although the time taken for hearing a petition by a single judge may not be any different from that taken by a bench empanelled pursuant to Article 165(4) of the Constitution, it must be appreciated that the empanelling such a bench invariably leads to delays in determining cases already in the queue hence worsening the problem of backlog crisis in this country. I therefore associate myself with the position taken by **Majanja, J** in **Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR** that:

"the meaning of 'substantial question' must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges."

10. The above position was appreciated by this Court in **Vadag Establishment vs. Y A Shretta & Another Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 559 of 2011** where the court held:

"It is also my considered view that a High Court whether constituted by one judge or more than one judge exercise the same jurisdiction and neither decision can be said to be superior

to the other. True, two heads are better than one, but in terms of the doctrine of *stare decisis* whether a decision is delivered by one High Court Judge or handed down by a Court comprised of more judges, their precedential value is the same."

11. **Article 165** of the Constitution provides as follows:

(1) There is established the High Court, which—

(a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

12. From the foregoing it is clear that the only constitutional provision that expressly permits the constitution of bench of more than one High Court judge is **Article 165(4).** Under that provision, for the matter to be referred to the Chief Justice for the said purpose the High Court must certify that the matter raises a substantial question of law:

1. **Whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; or**
2. **That it involves a question respecting the interpretation of the Constitution and under this is included *(i) the question whether any law is inconsistent with or in contravention of the Constitution; (ii) the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191*.**

13. That duty being a judicial one it behoves the Court to identify the issues which in its view raise substantial questions of law and whereas the fact that parties agree that the threshold under Article 165(4) may be considered, the Court is not bound by such concurrence.
14. Therefore it is not enough that the matter raises the issue whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or that it raises the issue of interpretation of the Constitution. The Court must go further and satisfy itself that the issue also raises a substantial question of law. As was appreciated in **Community Advocacy Awareness Trust & Others vs. The Attorney General & Others High Court Petition No. 243 of 2011**:

"The Constitution of Kenya does not define, 'substantial question of law.' It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine the matter."

15. The court went ahead to hold that the promulgation of the Constitution of Kenya, 2010 has brought into being a whole new law that in every respect raises substantial questions of law because the Constitution is new. The expanded Bill of Rights as set out in Chapter Four, the Citizenship issue in Chapter Three, the Leadership and Integrity issue in Chapter Six and Chapter Eleven dealing with Devolved Government are matters which need constant interpretation by the courts and if every such question were to be determined by a bench of more than two judges, other judicial business would definitely come to a stand still and if that were to happen, then the expectation of the public to have their cases decided expeditiously as provided under Article 159(2) of the Constitution and sections 1A and 1B of the ***Civil Procedure Act*** would never be realised.
16. In **Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314**, it was held that:

"a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial."

17. In **Santosh Hazari vs. Purushottam Tiwari** (2001) 3 SCC 179 it was held that:

"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any *lis*."

18. In India certain tests have been developed by the Courts as criterion for determining whether a matter raises substantial question of law and these are: (1) whether, directly or indirectly, it affects substantial rights of the parties, or (2) whether the question is of general public importance, or (3) whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, or (5) it calls for a discussion for alternative view.
19. In my view these holdings offer proper guidelines to our Court in determining whether or not a matter raises "a substantial question of law" for the purposes of Article 165(4) of the Constitution.
20. Other factors which the Court may consider in my view include: whether the matter is moot in the sense that the matter raises a novel point, whether the matter is complex, whether the matter by its nature requires a substantial amount of time to be disposed of, the effect of the prayers sought in the petition and the level of public interest generated by the petition.
21. However, since the Article employs the word "includes", to my mind the list is not exhaustive. Even before the promulgation of the current Constitution, it was appreciated in **Kibunja vs.Attorney General & 12 Others (No. 2) [2002] 2 KLR 6** that:

"in exercising that discretion, several factors have to be taken into account including, but not limited to the complexity of the case and the issues raised, their nature, their weight, their sensitivity if any, and the public interests in them, if any."

22. In this case it is true that the determination of what constitute "gender" under the Constitution is an issue whose determination either way is likely to have serious ramifications not only as to the rights of the so-called third gender, but may substantially affect the manner in which the constitutional provisions with respect to eligibility to appointive or elective posts is determined. In other words such a determination may substantially alter the current thinking with respect to the rights stipulated in the Constitution. Its determination is clearly therefore a matter of great public interest and is likely to affect not only the manner in which legislative instruments are interpreted and applied but also the manner of the interpretation and application of the constitutional provisions. Such an issue is clearly a weighty issue whose determination and ramifications ought to be considered with the seriousness it deserves.
23. Whereas this Court appreciates that the decision of an enlarged bench may well be of the same value as a decision arrived at by a single High Court judge, the Constitution itself does recognise that in certain circumstances it may be prudent to have a matter which satisfies the constitutional criteria determined by a bench composed of numerically superior judges and I have attempted to outline some of the issues for consideration hereinabove.
24. In my view the issues in this petition are not issues which arise before this Court on a daily basis. The issues to be decided by this Court raise fundamental and monumental issues of the interpretation of the Constitution. Therefore the inescapable conclusion that I come to is that taking into account the factors which this Court ought to consider in deciding whether or not to exercise the powers conferred upon it under Article 165(4) of the Constitution and considering the issues for determination, I am satisfied that the issues raised herein raise substantial questions of

law as contemplated under Article 165(4) as read with clause (3)(b) or (d) of Article 165 of the Constitution as to justify the empanelling of a bench of uneven number of Judges of this Court of not less than three, assigned by the Chief Justice. I so certify.

25. Accordingly, I direct that this Petition be transmitted to the Hon. the Chief Justice forthwith for the purposes of the empanelling of that bench.
26. Further directions will be given by the said bench as empanelled.

Dated at Nairobi this 27th day of August, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Gachie for the Petitioner

Mr. Obura for the Respondent

Cc Patricia