REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.298 OF 2014

BETWEEN

THE COUNCIL OF COUNTY GOVERNORS…….....…..……...PETITIONER

AND

THE INSPECTOR GENERAL OF NATIONAL POLICE SERVICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS..…….....…..……..2ND RESPONDENT

THE NATIONAL ASSEMBLY…….....…….……...…….3RD RESPONDENT

ATTORNEY GENERAL…….....……...…….4TH RESPONDENT

JUDGMENT

Introduction

1. This Petition challenges the constitutionality of **Section 4A** of the **National Flag, Emblems and Names (Amendment) Act 2014** which prohibits all persons save those named in it from flying the national flag in their official cars. **Section 4A** was inserted immediately after **Section 4** of the **National Flag, Emblems and Names Act (Chapter 99 Laws of Kenya)** and the Amendment was assented into law by the President of the Republic of Kenya on 26th June, 2014 having been enacted by the National Assembly. County Governors are aggrieved with the amendment as it affects them.

2. The impugned **Section 4A** provides as follows;

> ***"(1) A person shall not fly the national flag on any motor vehicle.***
>
> ***(2) Notwithstanding subsection (1), the President, the Deputy-president, the Chief Justice, the Speaker of the National Assembly and the Speaker of the Senate may fly the national flag on a motor vehicle.***
>
> ***(3) A person who contravenes subsection (1) commits an offence and shall be liable, on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding five years, or both."***

3. In its Petition dated 2nd July 2014, the Petitioner claims that the **National Flag, Emblems and Names (Amendment) Act** does not accord to the letter and spirit of the Constitution more particularly the provisions relating to devolution and national values established under **Article 10** of the **Constitution** and is therefore unconstitutional to that extent.

4. It has therefore sought this Court's intervention for a determination of the following questions;

> ***"(1) Whether the National Flag, Emblems and Names (Amendment) Bill 2014 that was later signed into law, was a bill that concerns Counties within the meaning of Article 110 of the Constitution.***
>
> ***(2) Whether the National Assembly is bound by the provisions of Articles 6(2) of the Constitution to conduct its legislative powers and other business within the framework of consultation and co-operation.***
>
> ***(3) Whether the National Assembly is bound by the provisions of Article 189 of the Constitution to conduct its legislative powers and other functions in a manner that respects the functional and institutional integrity of County Governments, and respects their constitutional status and institutions.***
>
> ***(4) Whether the provisions of the National Flag, Emblems and Names (Amendment) Act 2014, that prohibits Governors from flying the national flag in their official cars contravene Articles 6(2) and 189(1) (a) of the Constitution.***
>
> ***(5) Whether within the intendment of Articles 1(1), 1(4), 2(1), 2(2), 3(1), 6(2), 9(1) 10 and 189(1)(a) of the Constitution, the national flag is a symbol that can be exclusively appropriated by the National Government.***
>
> ***(6) Whether within the intendment of Articles 1(1), 1(4), 9(1), 174(b) of the Constitution a County Government can enact legislation to allow a County Governor to fly the national flag in the County for purposes of promoting national unity.***
>
> ***(7) Whether within the intendment of Articles 1(1), 1(4), 9(1), 174(b) of the Constitution a County Government can enact legislation to allow a County Governor of another County to fly the national flag where he is visiting another County for purpose of promoting national unity."***

5. Upon the above questions being answered, the Petitioner has sought the grant of the following orders;

> ***"(a) A declaration that within the intendment of Article 1(1), 1(4), 2(1), 2(2), 3(1), 9(1) and 10 of the Constitution and resonating the intention of Article 6(2) AND 189(1) (a) of the Constitution, the provisions of the National Flag, Emblems and Names (Amendment) Act 2014 that prohibits Governors from flying the national flag in their official cars in the Republic of Kenya contravene is unconstitutional and are to the extent of the inconsistency null and void.***
>
> ***(b) A permanent injunction be issued to prohibit the Inspector General of the National Police Service and the Director of Public Prosecutions from initiating investigations and commencing criminal proceedings against County Governors on account of breach of the provision of the National Flag, Emblems and Names (Amendment) Act 2014 that prohibits Governors from flying the national flag in their official cars.***
>
> ***(c) There be no order as to costs."***

<u>The Petitioner's case</u>

6. The Petitioner is a statutory body established under **Section 19 (1)** of the **Intergovernmental Relations Act, 2012.** It consists of the forty-seven Governors in all the Counties in the Republic of Kenya. Its functions are stipulated under **Section 20(1)** of that **Act**.

7. Its case was presented by Mr. Wanyama, Learned Counsel. He submitted that when the Governors were sworn into office on 27th March 2013, the Transition Authority which is established by the **Transition to Devolved Government Act, 2012** to provide a framework for the transition to devolved Government pursuant to **Section 15** of the **Sixth Schedule** to the **Constitution,** allowed the Governors to fly the national flag in their official cars.

8. It was his further submission that a national flag is a symbol of Kenya and unites the people by creating visual, verbal or iconic representations of the national values, goals or history. That it reflects independence and autonomy of a State and is designed to be inclusive and representative of all the people of the national community. In that regard, the National Government cannot appropriate to itself exclusive powers to determine the use of the National Flag.

9. Mr. Wanyama further submitted that the actions of the National Government through the 3rd Respondent in enacting the impugned law are a violation of **Article 189(1)** of the **Constitution** which provides that the two levels of Government ought to perform their obligations and exercise their powers in a manner that respects the functional and institutional integrity of each other. That the impugned provisions therefore show disrespect to the office of the Governors of each County by imposing a punishment on the office holder for using the National Flag.

10. It was Mr. Wanyama's other position that the first obligation of the two levels of Government is mutual respect not only for the functional and institutional integrity of each other, but also the constitutional status of each other. That **Article 189(1)(a)** of the **Constitution** envisions a situation where; firstly, one sphere of Government or one organ of State may not use its powers in such a way as to undermine the effective functioning of another sphere or organ of State. Second, the actual integrity of each sphere of Government and organ of State must be understood in light of the powers and purposes of that entity. That therefore, there is a non-encroachment obligation requiring the two levels of Government not to encroach on the domain of the other. The Petitioners' therefore opined that the acts of the Respondents are aimed at undermining the offices of the County Governors by imposing a punishment on Governors for flying the National Flag on their cars.

11. Mr. Wanyama also contended that **Article 6** of the **Constitution** provides that the two levels of Government ought to conduct their mutual relations in the basis of consultations and co-operation. That the two levels are also independent, distinct and autonomous of each other and that interdependence in essence works hand in hand with distinctness and imposes an obligation upon the two levels to work together in cooperation.

12. Further, that sovereign power belongs to the people of Kenya and is exercised both at the National and County level and that it may be inferred to mean that the two Governments operate as co-operative Governments embracing a dual system of governance. That the National and County Governments exist to compliment each other and none is regarded as superior in nature to the other.

13. The Petitioner therefore submitted that it is imperative that the National Assembly or the Senate, in passing any legislation, should consider the effect that it will have on the Counties and that there should be need to consult so as to avoid the two levels of Government acting at cross-purposes. That if one level of Government legislates so as to impede the functioning of the other, such action should be deemed as unconstitutional.

14. Mr. Wanyama further contended that the Constitution has not set out that the National Government has the function of determining who can fly the National Flag. Further that **Article 9** of the **Constitution** has set out national symbols of the Republic of Kenya namely; the national

flag, the national anthem, the coats of arms and the public seal and that those symbols have not been characterized as symbols of National Government and as such they belong to both the National and County Governments. That they are intended to unite all Kenyans as a nation under one flag, coat of arms, and national anthem despite the fact that the territory of Kenya is divided into 47 distinct Counties.

15. It was the Petitioners further contention that under **Article 33** of the **Constitution**, freedom of expression includes the freedom to seek, receive or impart information or ideas, freedom of artistic creativity and academic freedom and scientific research and that under the said **Article** therefore, the intention of the freedom of expression is to foster national unity and cohesion. They claimed specifically that the exercise of the right is not limited but includes the flying of the national flag on any car, house or building. That the right to express oneself by way of the national flag has been appreciated in other jurisdiction and reliance was placed on the United States cases of ***Smith vs Gougen 415 U.S 566 (1974), Schacht vs United States, 398 US 58 (1970), Texas vs Johnson, 491 U.S 397 (1989)*** and ***Stromberg vs California 283 U.S 359 (1931);*** all in which the Court held that the National Flag is part of the freedom of expression and seeks to uphold national values such as national unity and patriotism. It was the Petitioner's contention in that regard that curtailing the right of Governors to fly the National Flag on their cars was a violation of their freedom of expression as provided for under **Article 33(2)** of the **Constitution.**

16. Lastly, Mr. Wanyama submitted that the members of the National Assembly are State officers and are required when exercising their power to observe the principles set out under the Constitution and that when they exercise their power in bad faith then their actions are amenable to judicial review. On that point the Court was referred to the case of ***Marbury vs Madison 5 U. S 137 (1803)*** where it was held that actions of members of the legislature are amenable to judicial review orders.

17. For the above reasons, the Petitioner sought orders elsewhere set out above.

The 1st and 4th Respondents case

18. The 1st and 4th Respondents did not file any response to the Petition but Mr. Moimbo appearing for them made legal arguments in opposing the Petition as follows;

19. Firstly, that a statute as is enacted by the legislature is constitutionally sound and that the Petitioner has improperly invited the Court to superintend the work of Parliament which is tantamount to challenging the legislative wisdom of Parliament. In that regard he referred the Court to the decisions in ***Ndyanabo vs Attorney General (2001) EA 495*** and ***Pearlberg vs Varty (1972) 1 WLR 534*** where it was held that a legislation should be presumed to be constitutional unless otherwise strictly proved. He also relied on the case of ***Mount Kenya Bottlers Ltd & 3 Others vs Attorney General & Others (2012) e KLR*** where it was stated that a Court of law should not act as a regent over what is done in Parliament because such an authority does not exist.

20. Secondly, that the Petitioner has not followed the procedure provided for under **Article 119(1)** of the **Constitution** before filing its Petition as it ought to have petitioned Parliament for purposes of amending or repealing the impugned amendment..

21. Mr. Moimbo therefore claimed that the Petition has no merit and should be dismissed.

The 2nd Respondent's case

22. The 2nd Respondent similarly did not make any arguments on the Petition but opposed it through grounds of opposition dated 21st July 2014 which can be summarized as follows;

23. Firstly, that the requirement for equal protection of the law does not mean that all laws passed by the Legislature must apply universally to all persons and that laws so passed can actually create differences as to the persons to whom they apply and the territorial limits within which they should be enforced.

24. Secondly, that the Transition Authority had no mandate in law to allow Governors fly the National Flag and even if it had, the same had been overtaken by events through the enactment of the impugned amendment.

25. Thirdly, the **National Flag, Emblems and Names Act** has made provision to prevent the improper use of the National flag, certain emblems, names and words and that the said limitation was necessary and justifiable in a democratic society as envisaged under **Article 24** of the **Constitution.**

26. Fourthly, that the National Flag is the property of the National Government as it reflects the national identity of the Republic of Kenya and not of any county within Kenya and that the Constitution has conferred the National Government the constitutional authority to manage the use and abuse of the national flag. Further, that under **Article 186** of the **Constitution,** a function not assigned by the Constitution or National Legislation to a County is a function of the National Government. In any event, the **County Government Act** authorizes County authorities to develop their own county symbols; i.e Coat of Arms, Flags and Seal.

27. Fifthly, that the impugned amendment accords with the spirit of the Constitution for various reasons namely; the National Government is distinct from a County Government and the two governments do not share the same status. That **Section 4** of the **County Government Act** has mandated the County Governments to create their own flags, coat of arms and seals independent and unique from those of the National Government for that reason.

28. Sixthly, that the amendment does not concern Counties under the meaning of **Article 110** of the **Constitution** but is a national concern. To that extent therefore the National Assembly was fulfilling its legislative mandate and properly so in enacting the impugned amendment.

29. Lastly, that flying of a flag on a motor vehicle is not one of the devolved functions within the ambits of the devolution services from the National to County Government and the Petition is therefore misguided and should be dismissed.

The 3rd Respondent's case

30. The 3rd Respondent opposes the Petition through the affidavit of Hon. Adan Keynan, Member of Parliament for Eldas Constituency and the sponsor of the impugned amendment in the National Assembly.

31. Hon. Keynan deponed that the use of the National Flag must be regulated so as to ensure its dignity is maintained that the original Bill he had sought to introduce in the National Assembly had proposed that Governors and Speakers of County Assemblies should be among the State Officers authorized to fly the National Flag in their official cars but during the pre-publication scrutiny of the Bill, the Committee on Administration and National Security deliberated upon the issue and agreed that Governors and Speakers of County Assemblies should not be among the State Officers permitted to fly the National Flag.

32. It was his position in any event that there is nothing unconstitutional about the impugned provision as the State Officers who are permitted to fly the National Flag are State officers of the National Government while the devolved Government has the powers to determine through their respective legislations the officers permitted to fly the County flag. He stated for instance that the Nairobi County has enacted the **Nairobi City County Flag** and **Other Symbols Act, 2013,** under which the only officers permitted to fly the county flag are the Governor and the Speaker of its

County Assembly. It was his contention therefore that by encouraging Counties to develop their own flags and other symbols, the 3rd Respondent had in essence promoted the independence of Counties in forging their identities and as such the impugned amendment does not impede on the distinctness or the autonomy of County Governments as alleged by the Petitioner.

33. On the question whether the amendment was subject for consideration by the Senate, Hon. Keynan deponed that the same was a matter of determination by the two speakers of Parliament as provided for under **Article 110 (3)** of the **Constitution** and further claimed that he believed that the two Speakers deliberated on that issue and resolved that it was not a bill concerning Counties and therefore did not require to be considered by the Senate.

34. He stated further that it was upon the Petitioner to prove that the Statute as enacted violates the Constitution, a duty he claims it has failed to discharge and in the absence of such proof, the Court should not interfere with the legislative mandate of the 3rd Respondent.

35. Hon. Keynan lastly contended that the impugned amendment does not infringe on the constitutional mandate of County Governments or the performance of their constitutional functions as alleged.

36. In addition, Mr. Mwendwa who presented the 3rd Respondent's case submitted that the Petitioner has not discharged the burden of demonstrating that the impugned amendment is unconstitutional. That every law is presumed constitutional unless otherwise proven and on the submission, he relied on the cases of ***Lacson vs Executive Secretary, 301 SCRA 298 (1999), Andres Sarmiento et al vs The Treasurer of the Philippines G. R No. 125680 & 126313 (2001)*** and ***Ndyanabo vs Attorney General (supra).***

37. He also submitted that a Court would not nullify a statute or parts of it merely because it is thought that such law is in bad taste or unconscionable or is inconvenient as was held in ***Mount Kenya Bottlers Ltd vs Attorney General (supra)***.

38. It was Mr. Mwendwa's further submission that a person who alleges a violation of the Constitution must establish particulars of the alleged violation and the manner in which the fundamental right and freedom has been violated as was held in ***Annarita Karimi Njeru vs Republic (1976-980) 1 KLR 1272.*** On that issue, he further submitted that the Petitioner had failed to state how the provisions of **Article 6(2)** and **189(1)** of the **Constitution** had been violated.

39. Lastly, Mr. Mwendwa contended that the Petitioner does not have the *locus standi* to institute the present proceedings because it is not a juristic person capable of suing and being sued in its own name.

Determination

40. From the pleadings and parties submissions made in the Petition, I am of the view that there are only two issues for determination namely; whether the **National Flag, Emblems and Names Amendment Act, 2014** is unconstitutional and whether as a corollary, the **National Flag, Emblems and Names Amendment Act, 2014** was a Bill concerning Counties and that without the participation of the Senate, it was rendered unconstitutional.

41. However, before I determine the above issues, I recall that there are two peripheral but important issues that were raised by the 3rd Respondent; that the Petitioner has no *locus standi* to institute this Petition and also that the Petition does not meet the constitutional threshold established in the case of ***Anarita Karimi vs Republic (supra),*** I shall pause here to address those issues.

42. Firstly, on the issue of *locus standi,* **Article 258(2)** of the **Constitution** is to the effect that;

"Every person has the right to institute Court proceedings claiming this Constitution has been violated or is threatened with contravention". **Article 260** of the **Constitution** has then defined a person as, "***includes a company, association or other body of person whether incorporated or unincorporated".*** A person in a juristic sense needs not be incorporated as the 3rd Respondent seemed to argue.

43. In any event, the Petitioner, the Council of Governors, has been established under **Section 19 (1)** of the **Intergovernmental Relations Act** in the following terms; ***"There is established a Council of Governors which shall consist of the governors of the forty-seven counties".*** **Section 20** then sets out the functions of the Petitioner and it is clear therefore that the Petitioner is a statutory body established under an Act of Parliament. Further, given the definition of a person as provided for under **Article 260** of the **Constitution** the Petitioner it is a body of persons and therefore has the requisite *locus standi* to institute a claim for alleged violation of the Constitution. The 3rd Respondent's argument to the contrary is therefore misguided.

44. Secondly, the Petitioner has filed this Petition claiming a violation of **Articles 1, 6, 9, 10** and **189** of the **Constitution** and in that regard, it is now an established principle in constitutional litigation that where a person is seeking redress from the High Court for an alleged violation of the Constitution, he must set out with a reasonable degree of precision the Article (provision) of the Constitution that he alleges to have been violated, the manner in which it has been violated, the facts in support of that allegation and the reliefs he is seeking from the Court. See ***Annarita Karimi Njeru vs Republic (supra).*** I say this well aware that under the Constitution of Kenya (Enforcement of Fundamental Rights and Freedoms) Practice and Procedure Rules 2013, formalistic pleadings are not strictly required.

45. In that context, in the present Petition, the Petitioner has at paragraphs 13 to 23 set out the legal foundations of the Petition, at paragraph 24 to 27 it has set out the facts relied upon; from paragraph 28 to 38 it has set out the manner in which it claims that the Constitutition has been violated and has also stated the remedies it seeks from the Court. It is thus clear to me that the Petitioner has fulfilled the rule established in ***Anarita Karimi Njeru (supra***). In any event, the Respondents did not seem to have any difficulty in understanding the allegations of violation of the Constitution made by the Petitioner against them and they have on that understanding replied to the Petition and answered all the allegations made against them. See also ***Trusted Society of Human Rights vs Mumo Matemu and Another (2013) e KLR.***

46. Having so found, I must at this stage, point out, as Courts have always done that in interpreting a legislation, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise - See ***Ndyanabo vs Attorney General of Tanzania*** **(supra).** I therefore reiterate that it is not the role of this Court to interrogate the wisdom or otherwise of enacted laws and as the Indian Supreme Court stated in ***Re Application by Bahadur [1986] LRC 545 (Const.)***;

> ***"I would only emphasize that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown."***

Further at page 304 it was stated that;

> ***"It is not the function of the Court to form its own judgment as to what is fair and then to "amend or supplement it with new provisions so as to make it conform to that judgment."***

47. I agree and would add that it is also not the business of this Court to distill what it thinks should have been the law as this Court stated in the case of ***Mount Kenya Bottlers Limited & 3 others vs Attorney General & 3 others, Petition No. 72 of 2011,*** the Courts cannot act as "regents" over what is done in Parliament because such an authority does not exist.

48. Further, the US Supreme Court in ***U.S vs Butler,* 297 U.S. 1[1936]** had this to say on the same subject;

> ***"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."***

49. In addition to the above clear exposition of the law, in examining whether a particular statutory provision is unconstitutional, the Court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the ***R vs Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295** enunciated this principle as follows;

> ***"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."***

I adopt all the above holdings as applicable to this case.

50. In the above context, the Petitioner's case as I understand it is that the **National Flag, Emblems and Names (Amendment) Act, 2014** is unconstitutional because it contravenes **Articles 4, 6** and **10(1)** and **(2)** of the **Constitution.** It also allegedly violates the provisions of **Article 6** and **189(1)** of the **Constitution** by disregarding the fact that the National and County Governments are distinct, inter-dependent and must conduct their relations on the basis of consultation and cooperation. It also claims that the impugned amendment is unconstitutional as it violates the Petitioners' rights to freedom of expression. I shall address those issues herebelow.

Whether Section 4A violates constitutional provisions

51. The starting point is **Article 1(1)** of the **Constitution** which vests all sovereign power in the people of Kenya. **Article 1(4)** then allows the exercise of the people's sovereign power at both National and County levels of the Government. There is therefore no doubt that the County Governments exercise of that sovereign power of the people. That being so, how then has **Section 4A** curtailed the exercise of the sovereign power?

52. It is indeed true that under **Article 6(2)** of the **Constitution**, the two levels of Government are distinct and inter-independent and conduct their mutual relations on the basis of consultation and co-operation. Under **Article 189(1)** of the **Constitution**, the Government at either level shall;

> ***"(1) (a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;***
>
> ***(b) …***

(c) …

(2) …

(3) …

(4) …"

53. Further to the above, **Article 10** of the **Constitution** sets out the national values and principles of governance. Of most importance to this Petition are the values and principles of; patriotism, national unity, sharing and devolution of power.

54. **Article 9** of the **Constitution** has then specifically set out set out the national symbols and the National Flag has been outlined as one of those national symbols. Mr. Wanyama contended that the National Flag intends to unite people by creating visual, verbal or iconic representations of the values and history of the Republic. It was also his case that the National Government cannot appropriate itself the exclusive powers to determine the use of the said flag.

55. While I agree with Mr. Wanyama that the National Flag is a symbol often waved around as part of celebrations of patriotism or aspiring nationalism and is representative of all the people of Kenya, I do not see how that fact is negated by the provisions of **Section 4A.**

56. I say so because, firstly, it cannot be said that the National Government has unlawfully and exclusively appropriated the use of the National Flag to itself. In my understanding, under **Article 94(1)** of the **Constitution**, the legislative authority of the people of Kenya is vested on Parliament. It is also now a well laid down principle that the legislature does not enact laws in vain and that it knows the needs of the people and all laws enacted serve a particular need in the society. In saying so, the words of the Supreme Court of India in the case of ***Hambardda Wakhana vs Union of India Air (1960) AIR 554*** remain true. The Court observed that;

> ***"In examining the constitutionality of a Statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enact laws which they consider to be reasonable for the purpose for which they are enacted."***

In the same breath, this Court in ***Commission for the Implementation of the Constitution vs Parliament of Kenya Petition No.496 of 2012 (supra)*** stated that;

> ***"Parliament does not legislate in a vacuum but within an overall framework of existing laws and institutional framework and unless it is clear that a latter statute intends to repeal or otherwise replace the corresponding existent legislation, each legislative enactment continues to have the full force of law and is enforceable accordingly. As such, an Act of Parliament must be considered with reference to the state of law subsisting when it came into operation.***

I reiterate the above sentiments.

57. In that regard therefore, I do not see any wrong doing on the part of the 3rd Respondent in enacting a law that would govern the use of the National Flag as an important national symbol because it is within the mandate of the National Assembly to enact such a law. This Court has not seen the need question the wisdom or reason as to why the 3rd Respondent restricted the State Officers authorized to fly the National Flag in their official cars and mere displeasure by the petitioner is no reason to do so.

58. Moreover, I must add that it has been held in various cases that a law may not apply uniformly

across all persons. For instance the Court in ***State of Kerala and Another vs N. M. Thomas and Others,*** **Civil Appeal No.1160 of 1974** had the following to say on that aspect;

> "***The principle of equality does not mean that every Law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its Laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category."***

60. I wholly agree with the Court and in my view any Court may uphold a law that targets to benefit a class in this case the President etc, so long as the legislative classification bears a rational relation to some independent and legitimate legislative end. That is why the Court in ***Lindsley vs National Carbonic Gas Co 220 US 61 (1911)*** at pp.76-79 addressed itself to the principle of reasonableness delivering itself in the following terms:

> ***"A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality."***

Similarly, in the case of ***Romer, Governor of Colorado et. all vs Evans et al (94-1039) 517 U.S 620 1996*** the Court stated as follows;

> ***"In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group or if the rationale for it seems tenuous."***

59. From the above, it follows that the submission made by Mr. Wanyama that in enacting the impugned provision, the 3rd Respondent punished the County Governments is neither here or there. I have also read through the National Flag, Emblems and Names (Amendment) Act and I have not seen anything in the impugned amendment that has limited the use of the National Flag to the National Government only and to the exclusion of County Governments. The amendment merely limited the flying of the flag to certain State Officers and not to the exclusion of County Governors specifically.

Violation of freedom of expression

60. Mr. Wanyama strenuously argued that the impugned provision violates **Article 33** of the **Constitution. Article 33** provides thus;

> ***"(1) Every person has the right to freedom of expression, which includes—***
>
> ***(a) freedom to seek, receive or impart information or ideas;***
>
> ***(b) freedom of artistic creativity; and***
>
> ***(c) academic freedom and freedom of scientific research.***
>
> ***(2) The right to freedom of expression does not extend to—***

(a) propaganda for war;

(b) incitement to violence;

(c) hate speech; or

(d) advocacy of hatred that—

(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or

(ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others."

61. The importance of the right to freedom of expression and of the media cannot be disputed. It is a right that is essential to the enjoyment of other rights because implicit in it is the right to receive information on the basis of which one can make decisions and choices. In the words of **Ronald Dworkin** in **Freedom's Law (1996) 200** cited in **Iain Currie & Johan de Waal's Bill of Rights Handbook**, page 360:

> ***"(F)reedom of speech is valuable, not just in virtue of the consequences it has, but because it is an essential and 'constitutive' feature of a just political society that government treat all its adult members … as responsible moral agents. That requirement has two dimensions. First, morally responsible people insist on making up their own minds what is good or bad in life or in politics, or what is true and false in matters of justice or faith. Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to head opinions that might persuade them to dangerous or offensive convictions.***
>
> ***We retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us of the ground that we are not fit to hear and consider it."***

62. I am persuaded by the above reasoning but looking at the provisions of the impugned amendment I do not think they violate the Petitioners members freedom of expression. I say so because, the Statute does not prohibit County Governments from flying the National Flag in their respective Counties in any way nor does it make the use of the national flag within the Counties unlawful. All the law has sought to do in my view is limit the flying of the national flag in the official cars and restrict the same to a few State Officers. I reiterate that I do not find that provision to be unconstitutional to that extent.

63. In addition to the above, I am aware that Parliament has enacted the **County Governments Act.** At **Section 4** of that **Act**, County Governments have been given the mandate to develop their own symbols. The Section reads as follows;

> ***(1) Every County shall enact legislation prescribing the following County symbols-***
>
> ***(a) the County flag;***
>
> ***(b) County Coat of Arms; and***
>
> ***(c) the County public seal.***

(2) The County Executive shall develop the symbols of the County through a consultative process for approval the County Assembly by legislation.

(3) The County legislation enacted under subsection (1) shall provide for the use of the County symbols in the same manner as provided for in the National Flag, Emblems and Names Act.

(4) A County symbol shall not be the same as, or bear a likeness or similarity to a national symbol .

64. It is clear to me that by mandating Counties to develop their own symbols, including a County flag, the National Assembly in essence promoted the principle of distinctness and independence of a County in forging its own identity. It has also promoted the freedom of expression of Counties as well as their uniqueness, creativity and purpose. I have already stated that Counties have not been excluded in the use of the National Flag in any way within the Counties. For example, nothing stops Counties from flying the National Flag in the County Executive or County Assembly Offices. I therefore do not find any violation of the freedom of expression as alleged in that context.

65. As a corollary to the above issue and as to whether a County Government can enact a legislation mandating a County Governor to fly the National Flag on his car, such an action would in essence defeat the purpose of the **National Flag, Emblems and Names (Amendment) Act**. The same reasoning would apply to any County legislation that has authorized a County Governor to fly the National Flag while visiting another County. This is because under **Section 4** of the **County Governments Act**, the County Government can only legislate on its own County flag and not on the National Flag and I have said why.

Who has the function to determine who flies two National Flag?

66. I now turn to determine the submission made that the National Flag is not a function of the National Government. I do not intend to spend much time on this issue for the reason that the **Fourth** and the **Sixth Schedules** to the **Constitution,** which deal with distribution of functions between the National Government and the County Governments, have not assigned the enactment of legislation on national symbols to any of the two levels of Government. However, **Article 186(3)** of the **Constitution** is clear that a function not assigned specifically to a County is a function of the National Government. For avoidance of doubt, that provisions reads as follows;

A function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government.

67. Moreover, **Article 186(4)** has mandated Parliament to legislate for the Republic on any matter and in that regard, Parliament has done so by regulating the use of the National Flag on motor vehicles and I have found nothing unconstitutional about that.

68. I also heard the Petitioner to claim that the Transition Authority had authorized its members to fly the National Flag on their official cars. I do not know which law the Transition Authority was executing in that regard and that is all there is to say on that issue.

Whether the amendment to the Act affects Counties

69. Lastly, I pause to determine whether the amendment is one that affects Counties and as such whether it was subject to consideration by the Senate before enactment. In response to that submission, Hon. Keynan the sponsor of the Bill in the 3rd Respondent contended that the amendment was not one that concerned Counties and therefore was not subject to be considered by the Senate because it was resolved by the Speakers of the two Houses of Parliament that the

Act did not concern Counties.

70.In that regard**, Article 109(3)** and **(4)** of the **Constitution** provides:

> ***(1)*** ***…***
>
> ***(2)*** ***…***
>
> ***(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.***
>
> ***(4) A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.***

Under **Article 110(1)** of the Constitution, ***"a Bill concerning county government"*** means;

a. ***A Bill containing provisions affecting the functions and powers of the County Governments set out in the Fourth Schedule***

b. ***A Bill relating to the election of members of a county assembly or a county executive; and***

c. ***A Bill referred to in Chapter Twelve affecting the finances of county governments.***

Article 110(3) of the **Constitution** then provides for the procedure for enacting a legislation concerning counties in the following terms;

> ***"Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a Special or an ordinary Bill."***

As to whether a Bill is one that concerns county or not, the Supreme Court in ***The Speaker of the Senate Case Advisory Opinion Reference No.2 of 2013*** at para 102 cited the ***Final Report of the Task Force on Devolved Government*** Vol. 1: **A *Report on the Implementation of Devolved Government in Kenya*** [page 18] which stated as follows;

> ***"The extent of the legislative role of the Senate can only be fully appreciated if the meaning of the phrase 'concerning counties' is examined. Article 110 of the Constitution defines bills concerning counties as being bills which contain provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule; bills which relate to the election of members of the county assembly or county executive; and bills referred to in Chapter Twelve as affecting finances of the county governments. This is a very broad definition which creates room for the Senate to participate in the passing of bills in the exclusive functional areas of the national government, for as long as it can be shown that such bills have provisions affecting the functional areas of the county governments."***

71.The Supreme Court in ***The Speaker of the Senate Case (supra)*** stated as follows in respect to classification of Bills by the Speakers of the Houses;

> ***Where the Speakers determine that a Bill is not one "concerning county government", such a Bill is then rightly considered and passed exclusively by the National Assembly, and then transmitted to the President for assent. The emerging, broader principle is that both Chambers have been entrusted with the people's public task, and the Senate, even when it has not deliberated upon a Bill at all the relevant stages, has spoken through its***

Speaker at the beginning, and recorded its perception that a particular Bill rightly falls in one category, rather than the other. In such a case, the Senate's initial filtering role, in our opinion, falls well within the design and purpose of the Constitution, and expresses the sovereign intent of the people, this cannot be taken away by either Chamber or either Speaker thereof.

72. Accordingly it is clear that if the Speaker of the Senate signifies concurrence that a Bill falls within one category or another, it may well be said that would be the end of the matter. However, in the case of ***Institute for Social Accountability & 3 Others vs Attorney General & 4 Others (2015) e KLR*** this Court stated as follows;

> ***"The issue whether the matter is one for county government is of constitutional importance and the decision of the respective speakers, while respected, cannot be conclusive and binding on the court whose jurisdiction it is to interpret the Constitution and as the final authority on what the Constitution means. Participation of the Senate in the legislative process is not just a matter of procedure, it is significant to the role of the Senate in our constitutional scheme as the Senate's legislative role is limited to matters concerning county governments. Through its participation in the legislative process, the Senate is seized of the opportunity to discharge its primary mandate which is, to protect the interests of the counties and county governments as mandated under Article 96(1) of the Constitution. It is a means of ensuring that the county voice is heard and considered at the national forum and the interests of counties and their governments secured. This way, the sovereign power of the people is duly exercised through their democratically elected representatives. Therefore, when the speakers of both chambers classify bills under Article 110, they are essentially resolving on the question as to whether and to what extent provisions of a particular Bill affect the interests of county governments, and consequently whether county input ought to be invited."***

73. I am in agreement and reiterate the same sentiments in the instant Petition and applying the above principles in the present Petition, it is clear to my mind that the issue of any national symbol is not an issue that concerns Counties in any way so that it would be a matter for concurrences of the Speakers within the meaning of **Article 110(1)** of the **Constitution**. It is also not a matter that is within the functions of a County Government as provided for under the Fourth and Sixth Schedule. In addition, the **National Flags, Emblems and Names (Amendment) Act** does not concern money and I am therefore satisfied that it did not require the participation of the Senate in its enactment.

Conclusion

74. The National Flag is one of the symbols of the Republic of Kenya under **Article 9(a)** of the **Constitution**. In other Countries like the United States of America, it is openly waved, raised and allowed to fly and flitter in the wind in any place at any time
75. Our National Assembly in its wisdom had limited its use on motor vehicles and I have said that in the context of the Petition before me, I am unable to invalidate that decision. I have also said that County Governors have the option of flying their County Flags if they are minded to do so. That is the end of the matter.

Disposition

76. Having determined all the questions raised for determination by the Petitioner in the negative, it means that none of the Prayers sought can be granted.

77. In the circumstances I will dismiss the Petition.

78. As for the costs, I am aware that all the Parties in this Petition are State and Government agencies and I see no reason to overburden any of them with costs.

79.Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF SEPTEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kazungu – Court clerk

Mr. Ateka holding brief for Mr. Wanyama for Petitioner

Miss Thanji for 3rd Respondent

No appearance for other Respondents.

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

11/9/2015