



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NO. 267 OF 2009

GILBERT MWANGI NJUGUNA.....PETITIONER

V E R S U S

THE ATTORNEY GENERAL.....RESPONDENT

RULING

1. In his Amended Petition dated 15th June, 2011, the petitioner alleges violation of his fundamental rights under Sections 71, 73, 74, 75, 77 82 and 84 of the former Constitution. The alleged violations arose with regard to the petitioner's removal from his position as a magistrate in the Kenyan judiciary.
2. By a Notice of Motion dated 19th December 2011, the petitioner sought various orders and directions with regard to the hearing of the matter. Prayers 1, 2, 3, 4 and 6 of the Notice of Motion were granted on the 14th of February 2012. Prayer 5 of the application sought an order that the Honourable Court do refer the file to the Chief Justice for the purpose of setting up a three (3) judge bench to hear the petition. This prayer was urged before me on the 27th of February, 2012 by Ms. Mwangi for the petitioner. Written submissions dated 24th February 2012 had also been filed on behalf of the petitioner. There was no representation for the state at the hearing and no submissions were filed on its behalf.
3. Ms. Mwangi submitted that the petitioner was seeking prayer 5 of the application for the Chief Justice to constitute a 3 judge bench to hear the petition in which the petitioner is seeking redress under sections 71,73,74, 77, 82 and 84 of the Constitution. She referred the court to an article by Former Chief Justice F.K Apaloo carried in the Nairobi Law Monthly of January 1995 on the circumstances in which the Chief Justice should appoint a 3 judge bench to hear a matter under section 84 of the former Constitution as being where complex issues of determinations of constitutional issues are raised, it is better to have more than one judge to hear the matter. She submitted that the issues that the petitioner was raising should be considered by more than one judge as they include a challenge of the former Judicial Service Commission (JSC) in the manner in which it terminated his employment. The petitioner also raises issues pertaining to the nature and content of judicial independence both under the former and the current Constitution. The petitioner, she argued, was raising an important issue on the independence of judicial officers particularly of magistrates whose manner of removal is not covered by section 168 of the Constitution and which was overlooked by the JSC in the termination of his employment.
4. The petitioner argued also that the considerations for appointment of a 3-judge Bench were now set out in Article 165(4) of the constitution and submitted that the petition raises serious constitutional issues and merited constitution of a 3-judge Bench.

5. Ms. Mwangi also submitted that the law on the remedies available to the petitioner is not yet settled and the petitioner seeks a liberal interpretation of the Constitution. She referred to the case of **Samuel Kamau Macharia & Joseph Gilbert Kibe –v-The Attorney General & Another High Court Misc. Case No. 356 of 2000** in which the former Chief Justice Bernard Chunga in appointing a 3-judge bench to hear the matter sets out the matters to be considered in appointing a 3-judge bench. She submitted that the matters in this petitions are not just complex but are of public interest and urged the court to refer the matter to the Chief Justice for appointment of a -3- judge Bench.

Findings

6. Article 165(4) of the Constitution now sets out the benchmarks for referral of a matter to the Chief Justice to constitute a bench of an uneven number of judges to hear a matter. It provides as follows.

‘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.’

7. Past judicial thinking as illustrated by the authorities referred to by the petitioner in his submissions alluded to the *‘conventional wisdom that many heads are better than one’* as opined by Chief Justice Apaloo or to the fact that the subject of a matter before a court is such as cannot escape arousing public interest. However, recent court decisions have taken a different view of the matter in interpreting the requirements of Article 165(4) of the constitution with regard to what a *‘substantial question of law’* that merits reference to such a bench means.

8. In **Community Advocacy Awareness Trust & Others –v- The Attorney General & Others High Court Petition No. 243 of 2011**, the High Court, observed as follows:

‘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 a matter.

9. The court then went on to cite the decision of the Supreme Court of India in **Chunilal V. Mehta v Century Spinning and Manufacturing Co. AIR 1962 SC 1314**, where the court, after considering a number of decisions on what the term meant, stated as follows:

“the proper test for determining whether a question of law raised in the case is substantial would in our opinion, be whether it is of general public importance or whether it directly or substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by the Supreme Court or by the Privy Council or is not free from difficulty or calls for discussions 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 question of law.”

10. Taking the above observation into account, the court in **Community Advocacy Awareness Trust & Others –v- The Attorney General (supra)** observed that in view of the fact that Kenya has a new constitution with an expanded Bill of Rights which came into force only a year or so ago,

‘.....then it would follow, that every question concerning our Constitution..... would be a substantial question of law. Each case that deals with the interpretation of the Constitution..... would be a substantial question of law as it is a matter of public interest, affects the rights of the parties, is fairly novel and has not been the subject of pronouncement by the highest court.’

In such circumstances, the court observed that the objective of expeditious justice set out in **Article 159(2) (b)** of the Constitution would be defeated. The court would therefore have to consider each case

on its merits and determine whether, in the particular circumstances of the case, it merited reference to the Chief Justice for constitution of a three judge bench to hear it.

11. I have considered the issues that this petition raises with regard to the removal of the petitioner from his position in the judiciary and the alleged violation of his constitutional rights in the process of removal. I have also considered the submissions of the petitioner with regard to the remedies sought. Weighed against the yardstick of what constitutes a '*substantial question of law*' the issues may indeed be substantial and of great public interest. However, in my view, they do not merit hearing by an uneven number of judges and can be adequately dealt with by a single judge. Should any party to the matter not be satisfied with the decision of the single judge, the appeal process in which the matter falls for consideration before a bench of 3 appellate judges in the Court of Appeal and where there is the option of further appeal to the Supreme Court will be open to the party.

12. I therefore decline to refer the matter to the Chief Justice for constitution of a bench of an uneven number of judges and direct the parties to take a date for hearing of the matter before a single judge.

Dated at Nairobi this 16TH day of March 2012

Mumbi Ngugi
Judge