



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 398 of 2012

**INTERNATIONAL CENTRE FOR POLICY AND CONFLICT
PETITIONER**

AND

**THE ATTORNEY GENERAL 1ST
RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND
RESPONDENT**

JUDGMENT

Introduction

1. The petitioner is a non-governmental organisation incorporated in Kenya and it is engaged in advocating for human rights, increased democratic space and good governance in Kenya and across the great lakes region. It presents this petition on its own behalf and in public interest in the context of rights to information by the electorate as part of realizing effective and informed public participation in elections.

Petitioner's Case

2. The petitioner's case set out in the petition dated 10th September 2012 is straightforward. It has sued Independent Electoral and Boundaries Commission (IEBC) which is established under **Article 88** of the Constitution to conduct and supervise referenda and elections to any elective body or office established under the Constitution and any other elections as prescribed by an Act of Parliament.

3. The petitioner avers that the supervision of elections includes guaranteeing effective and informal participation of the citizenry and coordinating proper disclosure by candidates for different elective positions as prerequisites for eligibility. The IEBC is bound by **Articles 10** and **35**.

4. The petitioner's case is founded on four grounds. First, the IEBC has failed to develop compulsory rules and regulations requiring candidates to produce their background information on oath to enable the citizens have a chance to genuinely scrutinize candidates that may be elected to public offices. This failure, the petitioner contend, undermines the realisation of the provisions of **Chapter Six** of the Constitution which sets minimum standards for leadership and integrity.

5. Second, the IEBC has failed to give compulsory directions attracting criminal sanction against

persons presenting themselves for elections by failure to provide the necessary information about themselves. The petitioner argues that failure to provide for these directions and sanctions violates **Article 88** of the Constitution.

6. Third, the petitioner avers that the IEBC has not developed rules and regulations to facilitate public information and audit of the Constitution thereby frustrating universal attainment of the national values contained in **Article 10**.

7. Fourth, the IEBC has failed to facilitate honest and public disclosure and scrutiny of candidates for elections contrary to the national values and Kenya's obligation to ensure universal suffrage and political rights under international instruments.

8. The petitioner prays for the following reliefs from the court;

(a) *A declaration that the right to access information under Article 35 of the Constitution in circumstances of elections extends to the right of the relevant voting public to be given sufficient and accurate information concerning the backgrounds of the candidates including their criminal history or pending cases, financial probity including tax compliance and assets and sources thereof and liabilities of their spouses and immediate family, sources of income and candidates educational background before elections as part of public scrutiny and to help in making conscious and informed decisions about candidates presenting themselves.*

(b) *An order directing that failure to so declare amounts to criminal offence of which a person shall be declared ineligible to contest for elections besides attracting commensurate criminal sanctions.*

(c) *An order directing the 2nd respondent to immediately develop rules and regulations outlining the process and manner in which the declarations are to be made and disseminated to the relevant electorate prior to election of candidates in the forthcoming and all subsequent elections in the Republic of Kenya.*

(d) *Or that such other orders as this Honourable Court shall deem just.*

Directions and issues

9. As there were no factual issues in contention, when this matter came up for directions, I directed the parties to agree on issues for determination. The parties framed the following issues for determination;

(1) *What is the extent of the right granted by Article 35 of the Constitution.*

(2) *Does the right to vote extend to the right of free expression created by Article 33 of the Constitution.*

(3) *Is a state organ pursuant to the right established by Article 35 of the Constitution obliged at the request of the citizen to collect information it does not already hold.*

(4) *Do the 1st and 2nd respondents' constitutional mandate include the collection of information as sought by the petitioner in the petition.*

(5) *What orders should issue in the matter.*

10. The petitioner's case is founded on the provisions of **Article 35**. The petitioner's argument is that the respondents are obliged to collect and make available information that will enable the citizen make informed choices as to the candidates to elect at the election as captured in prayer (1) of the petition. This calls for a consideration of **Article 35**.

11. Counsel for the petitioner, Mr Lempaa, supported the case by reference to two cases decided by the

Supreme Court of India which deal specifically with the relief the petitioner seeks. I think it is necessary to appreciate the two cases. The first case is ***Union of India v Association for Democratic Reforms and Another*** AIR [2002] 5 SCC 294 and the second one is ***Union for Civil Liberties (PUCL) and Another v Union of India and Another*** AIR[2003] SC 2363. The Supreme Court of India in the two cases adopted a creative approach to the freedoms of expression guaranteed by **Article 19(1) (a)** of the Constitution of India by holding that freedom of expression included the right to know about the antecedents of a candidate for election in order to make an informed choice when voting.

12. In the ***Association of Democratic Reforms (Supra)*** case, the High Court considered whether or not an elector, as a citizen of the country, had a fundamental right to receive the information regarding criminal activities of a candidate to the Lok Sabha or Legislative Assembly for making an estimate for himself as to whether the person who is contesting the election has a background making him worthy of his vote, by peeping into the past of the candidate. The Association of Democratic Reforms filed a writ petition in the High Court to implement the recommendations made by the Law Commission recommending changes to the election rules regarding debaring candidates who have charges against them. It was suggested that candidates furnish a true and correct statements of assets owned by the candidate which should be disclosed. After considering the submissions and the reports of the Law Commission and Commission of Inquiry, the High Court held that in order to make a right choice, it is essential that the past of the candidate should not be kept in the dark as it was not in the interest of the democracy and well-being of the country. The court directed the Election Commission to secure to voters the following information pertaining to each candidates contesting election to Parliament and to the State Legislature and the parties they represent;

- (1) Whether the candidate is accused of any offence(s) punishable with imprisonment? If so, the details thereof.
- (2) Assets possessed by a candidate, his or her spouse and dependant relations.
- (3) Facts giving insight to candidate's competence, capacity and suitability for acting as a parliamentarian or legislator including details of his/her educational qualifications.
- (4) Information which the election commission considers necessary for judging the capacity and capability of the political party fielding the candidate for election.

13. The order directing the Election Commission to make rules was appealed to the Supreme Court. The Supreme Court affirmed the decision of High Court bench on the grounds that the Commission had the jurisdiction or reservoir of power to do all that was necessary to organise a free and fair election and where the legislature had not acted, the Commission could make rules and issue necessary directions to govern the conduct of any aspect of the election. Such directions included the requirement that information necessary for decision making could be issued including information about the candidates' past record. The court concluded that the High Court was justified in issuing directions to the Commissions to make such regulations.

14. In its decision the Court noted, "*Under our Constitution Article 19(1)(a) provides for freedom of speech and expression. Voters' speech or expression in case of election would include casting of votes, that is to say, voters speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is a must. Voter's (little man-citizen) right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. The little man may think over before making his choice electing law breakers as law makers.*"

15. The case of ***Peoples Union for Civil Liberties (Supra)*** arose after the legislature enacted provisions to accord with the directions issued by the Supreme Court in the ***Association of Democratic Reforms (Supra)***. The contention in that case was whether the legislature by enacting the legislation providing disclosure complied with the Court's direction. The Court held that the right to vote would be meaningless unless citizens are well informed about the antecedents of a candidate and that the amended

law was deficient in this respect. Shah J. discussing the right to information observed, “ ... *the right to participate by casting their vote at the time of election would be meaningless unless the voters are well informed about all sides of the issues, in respect of which they are called upon to express their views by casting their votes. Disinformation, misinformation, non-information all equally create an uninformed citizenry which would finally make democracy a mobocracy and farce.*”

16. I agree with the principle elucidated at length in the two cases decided by the Supreme Court of India. Nothing is more important for the nourishment of our democracy than an informed and intelligent citizenry making rational choices based on information provided. But this case must not only be decided on its own facts but also on the basis of the words of our Constitution and the rights and obligations that flow from.

17. In the case of ***Republic v Truth Justice and Reconciliation Commission and Another ex parte Augustine Njeru Kathangu and Others Nairobi Misc. App. No. 490 of 2009 (Unreported)*** the court held that **Article 22** as read with **Article 258** obliges every applicant to clearly set out the acts and/or omissions that, in his or her view, contravene the Constitution and also specify the provisions of the Constitution that those acts or omissions contravene and the prayers or reliefs he or she seeks.

18. As this is a case that seeks to enforce fundamental rights and freedoms under the Constitution, I think it is proper to consider the right and fundamental freedom alleged to be breached before I consider the issues framed.

Freedom of information

19. The matter at hand deals with **Article 35** which provides as follows;

35. (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.

20. In the case of ***Famy Care Limited v Public Procurement Administrative Review Tribunal Board and Another Nairobi Petition No. 43 of 2012 (Unreported) eKLR 2012***, I stated that, “[16]The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in **Article 10** of the Constitution. It is based on the understanding that without access to information the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and **Article 10** cannot be achieved unless the citizen has access to information. [17] The right of access to information is also recognised in international instruments to which Kenya is party. **The Declaration of Principles on Freedom of Expression in Africa** adopted by the African Commission on Human and Peoples' Rights (32nd Session, 17 - 23 October, 2002: Banjul, The Gambia) gave an authoritative statement on the scope of **Article 9** of the **African Charter on Human and Peoples' Rights** which provides, “**Every individual shall have the right to receive information.**” The Commission noted that right of access to information held by public bodies and companies, will lead to greater public transparency and accountability as well as to good governance and the strengthening of democracy.

21. A reading of **Article 35** shows that the right of access contains three key elements. The first element is in **Article 35(1)** which is a guarantee of the right of access to information from the state or to information held by another person required for exercise or protection of a fundamental right and

freedom. The question that arises is whether the petitioner's right of access to information has been violated, breached or threatened by the respondents. The breach or threat of violation is the threshold requirement for an action under **Article 22(1)**.

22. In this case the petitioner has not shown that the respondents have done anything to prevent or interfere with the petitioner's right of access to information from the state. In the case of ***Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and Others Nairobi Petition No. 155A of 2011 (Unreported)***, the court stated, “[43] *I am not inclined to grant the application [under Article 35(1)] as the Petitioner has not requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order.*”

23. I have considered the petition and the supporting affidavit and it does not demonstrate that the petitioner sought for any information of the kind which is alleged to be necessary for voters to make an informed choice from the respondents. Since no information has been sought, how can it be said that the right is violated, breached or threatened.

24. Since no information has been sought, or such a request rejected, it is unnecessary for me to consider whether in fact there is an obligation for the State to positively collect information it does not have when a request has been made by a citizen. It is also not necessary for me to determine whether there is a responsibility on the IEBC to develop rules and regulations to gather information sought by the citizens.

25. The second element contained in **Article 35(2)** is the right to correction or deletion of untrue or misleading information that affects a person. There is no allegation that this aspect of the right to information has been violated.

26. **Article 35(3)** is the third element which imposes on the State the obligation on the State to publish and publicise important information. The nature, content and mode of dissemination of such information left to the discretion of the state through its various organs and entities. The IEBC is obliged to provide voter education and it has not been contended or demonstrated that the civic education or for that matter any information disseminated is inadequate to the extent that it falls below the standard prescribed by **Article 35(3)**.

27. I therefore find that there has been no breach or threatened breached of the provisions of **Article 35**.

Relationship and role of other state entities

28. I would be remiss if I did not consider the petitioner's case in light of the relationship and role of other state entities in fashioning rules and regulations for providing access to information on matters touching on election candidate's integrity. The gravamen of the petitioner's case is that the IEBC has failed to develop rules and regulations to facilitate access to information for voters to make informed choices on information. **Article 88(4)** sets out the responsibility of the IEBC as follows;

(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(a) the continuous registration of citizens as voters;

(b) the regular revision of the voters' roll;

- (c) the delimitation of constituencies and wards;*
- (d) the regulation of the process by which parties nominate candidates for elections;*
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;*
- (f) the registration of candidates for election;*
- (g) voter education;*
- (h) the facilitation of the observation, monitoring and evaluation of elections;*
- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;*
- (j) the development of a code of conduct for candidates and parties contesting elections; and*
- (k) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.*

29. These regulations require the IEBC to develop regulations on many aspects concerning elections. I take judicial notice of the fact that the IEBC as presently constituted is in the process of developing regulations to deal with various aspects of elections. It cannot be said that the IEBC has failed or refused to act on matters within its constitutional mandate.

30. Mr Bitta, counsel for the Attorney General and Mr Nyamodi, counsel for the 2nd respondent, drew the court's attention to various pieces of legislation including the ***Political Parties Act, the Ethics and Anti-Corruption Act (Act No. 22 of 2011)*** and the ***Leadership and Integrity Act (Act No. 19 of 2012)*** which deal with aspects of the petitioner's grievances.

31. **Section 11** of the ***Ethics and Anti-Corruption Act*** provides in part as follows;

11. (1) In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall-

- (a) in relation to State Officers,-*
 - (i) develop and promote standards and best practices in integrity and anti-corruption;*
 - (ii) develop a code of ethics;*
- (b) work with other State and public offices in the development and promotion of standards and best practices in integrity and anti-corruption;*

32. **Section 4** of the ***Leadership and Integrity Act*** provides as follows;

- (1) Every person has the responsibility of implementing the provisions of this Act to the extent required by this Act.*
- (2) The Commission is responsible for overseeing and enforcing the implementation of this Act.*
- (3) In undertaking its mandate, the Commission may request a State organ to assist it in ensuring compliance with and enforcing Chapter Six of the Constitution and this Act.*
- (4) The Commission may require any public entity to carry out such functions and exercise such*

powers as may be necessary under this Act.

(5) Where a public entity has failed to comply with the requirements under subsection (3), the Commission may make an application before a High Court judge for appropriate orders requiring the public entity to comply.

33. The provisions I have cited show that there are other bodies that have the statutory duty to deal with matters of integrity. How these bodies relate to each other and to the IEBC is not a matter this Court can direct. I also think that at this stage, these relatively new institutions must develop their own mechanism and processes, guided by the principles and values of the Constitution. The Court cannot supervise or direct the daily minutiae of their work unless there is a breach of the Constitution and the law. The petitioner is at liberty to suggest or make recommendations to the legislature or other relevant bodies to consider the issues raised.

34. The right to access information may be also enforced against state entities like the Kenya Police Service, Kenya Revenue Authority are the repositories of the kind of information the petitioner or any citizen may seek.

35. The legislature, in the process of implementation of the Constitution, has enacted and continues to enact legislation to give effect to its provisions. These statutes deal with various aspects of integrity in the electoral process and will no doubt result in more information being available to the public. These processes by their nature require consultations to be carried out between various State Organs and agencies which are repositories of information. Public participation in making the rules and regulations is necessary to achieve the objective of a free and fair election. I think that intervention by the Court at this state would not be in the public interest.

36. Although the cases from the Supreme Court of India propound important principles, the cases must be seen in light of the circumstances in that country. First, the issue of integrity and information had been the subject of official studies in that country but the legislature had done very little to implement the substantial findings and recommendations of these Commissions. Secondly, the Election Commission of India has what is referred to as residual powers to act, by issuing directions, where the legislature has not passed legislation. Thirdly, the Court itself, had jurisdiction based on the Constitution to issue direction of the nature sought where the legislature had not acted and the Commission itself was required to act.

37. Prayers (b), (c) and (d) require the Court to take over the conduct of the affairs of the independent constitutional and statutory bodies when no infraction of the Constitution or law has been demonstrated.

Conclusion and Disposition

38. The questions framed by the parties raise important and fundamental issues about our electoral process but the Court cannot act in the absence of a real dispute between the petitioner and the respondents.

39. There has been no violation or the threat of violation of the petitioner's fundamental right and freedoms under the Bill of Rights under **Article 22** or a threat or contravention of the Constitution under **Article 258(1)**. I think the petition is premature and I decline to answer the issues framed for determination save the last issue.

40. My answer to last issue is that the petition is dismissed with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 26th day of October 2012.

D.S. MAJANJA

JUDGE

Mr V. Lempaa, instructed by Kenyariri and Associates Advocates for the petitioner.

Mr E. Bitta, Senior Litigation Counsel, instructed by the State Law Office for the 1st respondent.

Mr P. Nyamodi, instructed by V. A. Nyamodi and Company Advocates for the 2nd respondent.