



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 45 OF 2011**

**THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION) AND PROTECTION OF FUNDAMENTAL RIGHT IN THE BILL OF RIGHTS CHAPTER 4 ARTICLES 2,3,10,19,20,21,22,23,27,28,36,47 AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE IMPLEMENTATION OF THE CONSTITUTION AND IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19,20,21,22,23,27,28,36 AND 259 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**KEROSI ONDIEKI.....PETITIONER**

**VERSUS**

- 1. THE PUBLIC SERVICE COMMISSION**
- 2. THE MINISTER FOR FINANCE**
- 3. THE HON. ATTORNEY GENERAL.....RESPONDENTS**

**AND**

**THE CONSTITUTION IMPLEMENTATION COMMISSION.....INTERESTED PARTY**

**JUDGMENT**

**I INTRODUCTION.**

1. This petition before us was filed on 10<sup>th</sup> July 2011 at the High Court of Kenya at Kisii, by Kerosi Ondieki (herein referred to as the Petitioner), an advocate of the High Court of Kenya, a citizen of Kenya.

2. The Petitioner alleges that the three respondents herein being the Public Service Commission, the Minister for Finance and the Attorney General have refused, failed, ignored and or neglected to pay the commissioners and staff of the Constitution Implementation Commission their salary in order to discharge their duties of implementing the Constitution.

3. The petitioner states that the Constitution Implementation Commission (herein referred to as the CIC) was established under the 6<sup>th</sup> schedule of the Constitution of Kenya 2010 whose function we note, inter alia is to :

***“monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the constitution.”***

4. The petitioner was concerned and was of the view as a Kenyan citizen who had fought hard for the Constitution of this country, that the implementation process of the Constitution was key. The CIC was one of the commissions established under Article 248 to 254 as well as the 6<sup>th</sup> schedule of the Constitution Section 5(1) and the object of the said commission so established is to :

***a) Protect the sovereignty of the people***

***b) Secure the observance by all state organs of democratic values and principles and***

***c) To preserve constitution***

5. Mandate was therefore given to the commissions and the holders of the independent offices to exercise their functions and be subject only to the constitution and the law. They are to *“be independent and not subject to directions or control by any person or authority.”*

6. The constitution thus specifically provided that *“Parliament shall allocate funds to enable each commission and independent office perform its functions and the budget of each commission and independent office shall be a separate vote.”*

7. The petitioner states that a section of the media showed that a dispute had arisen between the members of the CIC and the government as to their remuneration.

8. It was the petitioner’s further concern that if the commission and staff of CIC are not paid their remuneration it would affect the implementation of the Constitution to the detriment of the people of Kenya.

9. The petitioner therefore filed this petition and sought the following orders:

***A declaration that the respondents by failing to pay the commissioners and staff of the commission for the implementation of the constitution have and continued to act unconstitutionally and therefore illegally and unlawful.(sic)***

***An order in the nature of a mandatory injunction directing all the respondents severally or jointly to ensure that the provisions of Article 249 and 250 (7) and (8) as read with Section 5 of the 6<sup>th</sup> schedule of the Constitution of Kenya are given effect forthwith.***

***That an order for compensation to issue to the petitioner***

***That costs of this petition be provided for, and awarded to the petitioner.***

II PROCEDURE

10. Together with the petition, the petitioner filed a Notice of Motion dated 13<sup>th</sup> July 2011 seeking a mandatory injunction directing respondents jointly and severally to forthwith pay the commissioners and staff of CIC.

11. When this file was placed before the Resident Judge at Kisii (Sitati J), she directed under Section 165 (3)(b), Section 165(4) of the Constitution that the file be placed before the Hon. The Chief Justice. Directions by Hon. The Chief Justice were given that the petition be heard in Nairobi before the present bench (20<sup>th</sup> July 2011.)

12. This court then directed the petitioner to serve all interested parties and that the CIC as an interested party be enjoined to this petition. The matter was to be mentioned on 5<sup>th</sup> September 2011 to confirm compliance. On that day, the compliance was partially done on the issue of service. The hearing of the petition was initially set down for 13<sup>th</sup> September 2011. The first respondent, the Public Service Commission filed a replying affidavit. The second respondent, the Minister for Finance had filed no papers. An amended petition enjoining the CIC as an interested party as directed dated 6<sup>th</sup> September 2011 was filed. The new date for hearing was set for 20<sup>th</sup> September 2011. On the day hearing date, there was no appearance for CIC nor had papers been filed on their behalf.

### III SUBMISSIONS

13. Counsel for the petitioner submitted that the petitioner wishes this court to take judicial notice that the respondents had openly declared that they would not pay the commissioners and the staff of the CIC, as illustrated in the media. This means that the heavy task the CIC have to discharge their constitutional mandate would not be implemented.

14. According to the Constitution, “*all sovereign power belongs to the people of Kenya and excisable in accordance to the constitution.*” Those powers have been delegated to the respondents who have now failed to excise their mandate.

15. The constitutional issues, argued the petitioner, concerns articles 2, 248,250(7), 250(8) of the Constitution:

*Article 2 covers the sovereign power of the people, delegated to the respondent. Article 248 of the Constitution provides for the establishment of the Constitutional commissions and independent offices. The CIC was constitutionally established under Section 5 of the 6<sup>th</sup> schedule while the provisions on the commissions and independent offices are contained at Chapter 15 Article 248 to 254. Article 250(7) and (8) of the Constitution also applies to the CIC.*

16. Article 250(7) deals with the remuneration payable to members of a commission or the holder of an independent office. Such remuneration and benefits are chargeable to the Consolidated Fund. Such payments are not to be varied to the disadvantage of that person during their respective terms of office.

17. The petitioner therefore concluded that because the Constitution has specifically enacted the provisions for the payments of the commissions and holders of independent offices, then the respondents are duty bound to pay.

18. The question the petitioner asked, now arises as for who is responsible to making such payments to the commissioners.

19. The petitioner appreciated that the Constitution provided under Article 248, that there would be established the Salaries and Remuneration Commission. Whereas this Commission had not been established, the Commission for the Implementation Of the Constitution Act 2010 in section 17 provides:

**1) *The salaries and allowances payable to, and other terms and conditions of service of the chairperson and other members shall pending the establishment of the Salaries and Remuneration Commission be determined by the Public Service Commission in consultation with the Treasury.***

2) ***The salaries and allowances provided for under Section (1) shall be charged on the Consolidated Fund.***

20. Therefore, the Public Service Commission in the absence of the Salaries and Remuneration Commission was mandated to take up the role and determine the remuneration and benefits of the CIC in consultation with the Treasury.

21. The petitioner noted that the replying affidavit of the 1<sup>st</sup> respondent the Secretary to the Public Service Commission, duly authorized to depone to the affidavit, stated that indeed the first respondent had made recommendations as required by the Constitution in consultation with the Treasury, but the first respondent had no mandate to make payment.

22. Conceding to this, the petitioner faulted the affidavit on grounds that there was no proof annexed thereon to show the actual amounts agreed to be paid.

23. The second respondent, the Minister of Finance had not filed any response to the petition. This action, the petitioner argued amounted to impunity.

24. It was argued that the Constitutional issue before this court is found under Article 159(1). It is the duty of this court to ensure that the purpose and principles of the constitution are protected and preserved. This obligation is also placed on all persons under Article 3(1) to uphold and defend the Constitution of Kenya.

25. It was therefore the further arguments by the petitioner that Article 165 confers upon the High Court jurisdiction to hear any question respecting the interpretation of the constitution “including the determination of 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.”

26. It was emphasized that Article 259(3) states that “every provision of this constitution shall be construed according to the doctrine of interpretation that the law is always speaking and therefore among other things:

3) ***A function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office,***

27. It follows that the power to pay the remuneration and benefits to the CIC commissioners is specifically placed on the respondents because the mandate to pay the commissioners of CIC had not been discharged. The respondents are therefore in contravention of the Constitution.

28. The failure to pay the CIC commissioners and staff would result in failure of implementing the Constitution.

29. An explanation by the respondents should be given, why there has been non payment to CIC and staff of their remuneration and benefits.

30. In reply to the submissions, the State argued that the issues raised in this petition are not Constitutional in nature but rather a matter of contractual obligations. The forum is not the Constitutional Court to deal with the issue but the Industrial Court under Article 162(2) of the Constitution.

31. It was argued that under the Constitution the procedure for obtaining moneys from the Consolidated Fund is elaborate. It is not disputed that under Article 250(7) of the Constitution, the payments of remuneration and benefits in respect of the Commissions are to be made from the consolidated fund. The procedure however is contained under Article 206(2) of the Constitution which provides:

206 1) *There is established the consolidated fund into which shall be paid all money raised or received by or on behalf of the national government, except money that*

a) .....

b) .....

2) *Money may be withdrawn from the Consolidated Fund only:-*

a) *In accordance with an appropriation by an Act of Parliament*

b) *In accordance with Article 222 or 223 or*

c) *As a charge against the fund as authorized by the Constitution or an Act of Parliament*

d)

3) *Money shall not be withdrawn from the national public Fund other than the consolidated fund unless the withdrawal of the money has been authorized by an Act of Parliament.*

4) *Money shall not be withdrawn from the consolidated fund unless the Controller of Budget has approved the withdrawal.*

32. The Act of Parliament for payments to the CIC is the Commission for the Implementation of the Constitution Act No. 9 of 2010. Section 17(2) provides that the funds be charged to the Consolidated Fund for salaries and allowances.

33. However the next step should have been a budget presented to the Controller of Budget by CIC. The respondents have seen no such evidence of a budget presented.

34. The respondents argued that all the commissioners were interviewed upon their recruitment. They relied on a salary of Ksh. 250,000/= to Ksh. 800,000/= per month as acceptable to them.

35. Act No. 9 of 2010 provides under Section 17 that if the CIC is established before the Salaries and Remuneration Commission is established then the Public Service Commission would set the terms and conditions of the payable remuneration and benefits.

36. To do this, the state submitted, that the Public Service Commission was guided by another Act, The Constitutional Offices (Remuneration Act) revised edition 2009 (1987).

37. Whereas CIC is not named in this Act that generally sets out the payments for the Constitution Office holder, the Public Service Commission used the general ground line and placed the salary of the CIC chairman at Ksh. 436,120/-. The vice chair at Ksh. 404,006/= and the Commissioners at Ksh. 366,698/= per month.

38. This was rejected and the remuneration suggested by the Commissioners was

The Chair                      Ksh. 849,360/=

Vice Chair                      Ksh. 782,220/=

And Commissioners      Ksh. 782,220/=

39. The State therefore concluded that as the suggested salary was outside the “Pay Policy Framework,” it was not sustainable. It was contended that CIC and the government are in consultation and negotiations are on-going to determine the appropriate salary levels that would be within the “pay policy framework” that is affordable and sustainable.

40. The State asked that the petition be dismissed. However as the matter is a “public interest litigation”, they would not ask for their costs.

#### IV FINDINGS AND DECISION

41. This is a public law matter. This High Court sitting as a Constitution bench took precaution and satisfied itself that all persons who should be served with the papers and any supporting documents to this petition, be served.

42. We also satisfied ourselves that there was an inclusive participation of those concerned. CIC were allowed to be made parties. The CIC chose not to participate.

43. The petitioner relied on the following Articles of the Constitution to support his petition:

- a) Article 2 (supremacy of this Constitution)
  - b) Article 3 (defence of this Constitution)
  - c) Article 10 (national values and principles of governance)
  - d) Article 19 (rights and fundamental freedom)
  - e) Article 20 (application of Bill of Rights)
  - f) Article 21 (implementation of rights and fundamental freedoms)
  - g) Article 22 (enforcement of Bill of Rights)
  - h) Article 23 (authority of courts to uphold and enforce the Bill of Rights)
  - i) Article 27 (equality and freedom from discrimination)
  - j) Article 28 (human dignity)
  - k) Article 36 (Freedom of association)
  - l) Article 47 (Fair administrative action)
  - m) Article 259 (construing this Constitution)
  - n) Article 249 (objects authority and funding of commissions and independent offices.)
  - o) Article 250 [4] (national values, composition, appointment and terms of office.)
44. Article 22(c) of the Constitution states:

**1) “Every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.**

**2.) In addition to a person acting in their own interest, court proceedings under clauses (1) may be instituted by:**

**a) .....**

**b) .....**

**c) A person acting in the public interest**

**d) .....**

**3.)**

45. In our view the petitioner has locus to file this Constitutional reference as a public interest matter.

46. The question that arises before us is whether there are Constitutional issues raised herein?

47. The petitioner has alleged the violation of his rights and the right of the public by the fact of non payment of the commissioners and staff of CIC. This amounts to frustration thereby occasioning a situation in which the implementation process of the Constitution fails.

48. The state on the other hand argued that what is before court was a mere complaint of a contractual complaint that should be handled in another forum. There is no Constitution issue raised.

49. Indeed, in the case of

**Anarita Karimi Njeru – Vs – Republic**

1(1979) KLR 154.

Trevelyan Hancox JJ.

Stated, inter alia that a Constitution reference must set out with a reasonable degree of precision that which he complains of the provisions said to be infringed and the manner in which they are alleged to be infringed.

50. The state had relied on the case of

**Meme – V – Republic & Another**

(2004) KLR 637

Rawal, Njagi JJ and Ojwang Ag J

which relied on the former above case on the issue of Constitutional matter being raised or whether a mere ordinary complaint was being made.

51. We are of the opinion that the court's position above is good law. It is correct to state that the commissions (CIC included) are set up by the provisions within the Constitution. It is also correct that a subsequent Act No. 9/2010 establishing the functions, powers qualification of appointment procedure for members of the CIC and for connected purposes, provides that pending the Salaries and Remuneration Commission being established, the Public Service Commission would so act in the interim.

52. We would therefore find from the affidavit filed by the Public Service Commission that they complied with the requirements of setting and proposing the salaries in consultation with the Treasury. Payments were therefore out of their hands.

53. The petitioner conceded that the Public Service Commission are not the ones who make payments.

54. The state prays that no Constitutional provision has been contravened. The CIC are meant to present their budget and table it, or an appropriation made by an Act of Parliament under Article 222 and 223 of the Constitution. These are expenditure made before the annual budget is passed or by a charge against the fund.

55. The budget has to first be approved by the Controller of Budget and then the funds withdrawn.
56. This process is incomplete as long as the CIC have failed to table their budget or agreed to the remuneration and benefits offered them according to public “pay policy framework.”
57. Parties are also said to be negotiating and it may be prudent to permit these negotiations to continue.
58. On the prayer for mandatory injunction sought as against the 3 respondents, we note that by dint of Article 249(3), the duty of allocating adequate funds to enable the Commission carry out its mandate is bestowed on parliament and not on the respondents. Reliance on Section 249 of the Constitution by the petitioner in his prayer (ii) is in our considered view utterly misplaced.
59. On the order for compensation, we aptly note that the petitioner did not pursue this prayer. He did not establish what wrong had been committed on his person by the respondents; or what loss he had suffered to entitle him to an order for compensation.
60. It is therefore our conclusion that the Petition raises no constitutional issue for the moment. It may have been prematurely made.
61. We dismiss this Constitutional reference with no orders as to costs as the Attorney General does not ask for costs.

DATED THIS 4<sup>th</sup> DAY OF October, 2011 AT NAIROBI

M.A. ANG’AWA            G. DULU            W. KARANJA

JUDGE                    JUDGE            JUDGE: