



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 181 OF 2010

**THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS IN THE**

**BILL OF RIGHTS CHAPTER 3 ARTICLE 19, 20, 21, 22, 23, 27, 28, 36, 259 OF THE
CONSTITUTION OF KENYA 27TH AUGUST 2010**

AND

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

AND 259 OF THE CONSTITUTION OF KENYA

AND

KEROSI ONDIEKI PETITIONER

VERSUS

MINISTER OF STATE FOR DEFENCE 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

RULING:

The petitioner herein is an Advocate of the High Court of Kenya. On 15th September 2010 he filed a petition brought under the provisions of **Articles 19, 20,21,22,23,27,28,36,** and **259** of the **Constitution of Kenya**. Together with the petition the petitioner also filed an application by way of chamber summons pursuant to the aforesaid provisions of the Constitution. The application seeks the following orders:

“(i) That the honourable court be pleased to certify the application herein as urgent and the same be heard ex-parte on priority basis.

(ii) That pending the hearing of this application inter parties the honourable court be pleased to issue a temporary injunction to restrain the 1st respondent from recruiting service men/women and constabularies into the armed forces in contravention of the Constitution of Kenya as contained in an advertisement in the Standard Newspaper Edition of Tuesday the 14th day of September 2010.

(iii) That pending the hearing and determination of this application the honourable court be

pleased to issue a temporary injunction to restrain the 1st respondent from recruiting service men/women and constabularies into the armed forces in contravention of the Constitution of Kenya as contained in an advertisement in the Standard Paper Edition of Tuesday the 14th day of September 2010.

(v) The costs of this application be provided for and awarded to the petitioner/applicant in any event.”

The application was made on grounds that:

“1. That the conditions set out for recruiting service men/women and constabularies into the armed forces manifestly and grossly contravene, threaten, deny, infringe and/or violate the Bill of Rights as contained in Chapter 3 of the Constitution of Kenya.

2. The advertisement in its entirety is unconstitutional. 3. The petitioner/applicant is a citizen of the Republic of Kenya who abhors impunity.

4. If the application is not granted as prayed there will be a breakdown of law and order leading to suspension of the rule of law and anarchy.”

In his petition, the applicant stated that on the 14th day of September 2010, while reading “**The Standard**” newspaper he came across an advertisement by the Ministry of State for Defence entitled:

“ADVERTISEMENT FOR RECRUITMENT OF SERVICE MEN/WOMEN AND CONSTABULARIES INTO THE ARMED FORCES”

The petitioner, having thoroughly read the new Constitution of Kenya and more particularly the Bill of Rights, formed an opinion that

“the fundamental rights of Kenya citizens have been manifestly and grossly contravened, threatened, denied, infringed and/or violated as provided in Chapter 3 of the esteemed Constitution of Kenya.”

In particular, he was of the view that vulnerable Members of society referred to in conditions 2, 4, 6, 7, and 8 of the advertisement had been denied their constitutional rights. In the same advertisement the conditions for recruitment are stated as hereunder:

“CONDITIONS FOR RECRUITS

(1) Must be Kenyan Citizens. Membership in boy scouts and girl guides will be an added advantage.

(2) Age – Between 18 and 26 years old.

(3) Education – a minimum of mean grade D (plain) in KCSE.

(4) Be medically fit.

(5) Have no criminal record.

(6) Minimum Height – 5 ft 3 in (5’ 3”).

(7) Minimum Weight:

(a) Men – 54.55 Kg (120 lb)

(b) Women – 50.00 Kg (110 lb).

(8) Women candidates must NOT be pregnant.

(9) Potential candidates must turn up in appropriate running gear.”

The intended recruitment is scheduled to begin on 21st September 2010, less than 24 hours from the date of arguing this application and delivery of this ruling. In the petitioner’s affidavit sworn in support of the application, he stated that the rights of the public as stipulated under the Constitution ought to be protected by this court and the only way of doing so was by restraining the respondents from conducting the intended exercise otherwise

“the Citizens of Kenya will suffer irreparable loss and damage as their constitutional rights would have been breached under Article 27.” But in paragraph 15 of the same affidavit the petitioner states as hereunder:

“15. THAT if the orders prayed for herein are not granted the petitioner will suffer irreparable loss and damage as their Constitutional Rights would have been breached with impunity.” (sic)

The respondents filed a Replying Affidavit and Notice of Preliminary Objection. The grounds stated in the Notice of Preliminary Objection were that:

“1. That the application is incompetent on the following grounds:

(a) The petition is not supported by an affidavit.

(b) The petition is not signed by the petitioner.

2. That the Applicant has not disclosed sufficient evidence in the matter and therefore lacks standing.

3. The Applicant has not disclosed any expectant person whose rights have been violated or likely to be violated by the recruitment exercise.

4. The Applicant has not demonstrated in his pleadings any public interest that has prompted this action.

5. The application offends public interest contrary to the requirements of Articles 22 (1) of the Constitution.”

The replying affidavit was sworn by **Lieutenant Colonel Philip Kiprotich Serem** who had been duly authorized by the Minister of State for Defence to swear the same. The deponent is a Commissioned Officer serving as Staff Officer I, Personnel Services at the Ministry of State for Defence at the Headquarters. As part of his duties he is engaged in the co-ordination of recruitment affairs of the Ministry.

I deem it appropriate to reproduce some paragraphs of his affidavit as hereunder:

“8. THAT during selection the recruits are subjected to vigorous physical examination and tests such as aptitude test, running and medical examination among others to confirm their suitability to serve in the Defence Forces.

9. THAT I am informed by Brig (Dr.) Arum, the Chief Medical Officer, which information I verily believe to be true that these tests cannot be applied on expectant women.

10. THAT after selection recruits and constables undergo basic military training at the Armed Forces Recruit Training School which training is physically intensive and demanding and cannot be undertaken by expectant women and medically unfit recruits.

11. THAT in view of the demands of basic training, the minimum physical conditions – requirement of age, height, weight, medical fitness and non-pregnancy, is to ensure that the recruit is able to undergo the basic training without injury to his/her health.

12. THAT it is my believe that the recruits shall be subjected to treatment that does not endanger his/her life (as) subjecting a recruit to such a treatment would be a violation to the recruits’ right to life.”

The deponent went on to state that the requirements of height and weight are intended to ensure that prospective recruits have the capacity and strength to operate various military hardware which are sometimes heavy and must be carried by personnel in battle conditions. In his view, the minimum conditions set for recruits are to enable the defence forces fulfill its mandate under **Article 241 (3)** of the **Constitution** which states that:

“(3) The Defence Forces-

(a) are responsible for the defence and protection of the sovereignty and territorial integrity of the Republic;

(b) shall assist and cooperate with other authorities in situations of emergency or disaster, and report to the National Assembly whenever deployed in such circumstances; and

(c) may be deployed to restore peace in any part of Kenya affected by unrest or instability with the approval of the National Assembly.”

He further stated that the aforesaid conditions are for the safety and well being of the recruits and are justifiable, reasonable and do not infringe on the provisions of the Constitution.

Arguing the application on behalf of the petitioner, Mr. Minda submitted that under **Article 22** of the **Constitution**, the petitioner, being a citizen of Kenya, has *locus standi* to institute these proceedings. The relevant portion of that Article provides as hereunder:

“22(1) Every person has the 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 clause I may be instituted by –

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.”

Mr. Minda further emphasized the provisions of **Article 27** which guarantees every citizen of Kenya equality and freedom from discrimination. He singled out the provisions of **clauses (4) and (5)** of **Article 27** which state that:

“(4) The State shall not discriminate directly or indirectly against any person on any ground,

including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)."

Counsel further submitted that the conditions as to age, medical fitness, minimum height, minimum weight and non-pregnancy of women candidates were discriminatory in nature and thus unconstitutional. For illustrative purposes he cited the case of a 26 year old woman candidate who meets all the other requirements but happens to be pregnant. In his view, such a woman should not be disqualified by reason of pregnancy only, which he stressed is not a disease, and said that she ought to be allowed to give birth and join the armed forces thereafter. This is because the age limit as set out in the said advertisement is between 18 and 26 years and if such a woman is disqualified by reason of her pregnancy she will have lost the opportunity of joining the armed forces for good. He stated that the recruitment can be rescheduled so that the requirements for recruits can be re-adjusted to conform with the provisions of the Constitution.

The respondents were presented by Mr. Ombwayo, Senior Principal Litigation Counsel. He argued the Preliminary Objections cited hereinabove within his reply to the submissions by Mr. Minda.

He submitted that the petitioner lacks legal standing to bring the application. This is because he had not shown that he has any personal interest in the intended recruitment and neither does he fall within the category of the persons referred to in **clause (2) of Article 22** of the **Constitution**. He added that the petitioner had neither shown any sufficient interest in the matter nor cited any pregnant woman who is likely to be affected by the intended recruitment.

Mr. Ombwayo attacked the petition saying that it was incompetent for lack of a supporting affidavit and the petitioner's signature. The same had been signed by the petitioner's advocates, Mr. Minda and Mr. Mogire on behalf of the petitioner. Although he conceded that **Article 22 (3) (b)** of the **Constitution** allows the court to entertain proceedings on the basis of informal documentation, in his view, leave of the court must first be sought before such an application can be allowed to be filed. He further submitted that the conditions set by the Armed Forces in the aforesaid advertisement had not violated any constitutional provision and in particular **Articles 19** and **27**. He said that rights are not absolute and in construing rights of an individual other peoples' rights must also be taken into account. Citing the example of a pregnant woman, he said that the court has to consider the right of the unborn child which also requires protection as stipulated under **Article 26** of the **Constitution**. He asserted that the conditions set by the Armed Forces for recruitment of service men/women and constabularies were in the interest of the recruits and referred the court to the contents of paragraphs 8, 9, 10, 11 and 12 of the replying affidavit by Lieutenant Colonel Philip Kiprotich Serem.

Mr. Ombwayo further submitted that since the application by the petitioner is for an interlocutory injunction, he had to demonstrate a *prima facie* case with a likelihood of success which he had failed to. Further, the balance of convenience was in favour of the respondents.

Lastly, counsel submitted that while this court had jurisdiction to hear and determine this application, it is not the business of civil courts to prescribe matters relating to military law or regulations particularly on issues of recruitment into the Armed Forces. He cited the Court of Appeal decision in **CAPTAIN J.N. WAFUBWA -VS- THE ATTORNEY GENERAL & 2 OTHERS**, Civil Appeal No. 278 of 2003 at Nairobi. I must however confess that upon perusal of the said authority, I did not find the same relevant in this application. In the said authority, the appellant was challenging a notice of retirement that had been served upon him and was also seeking a declaration that he was entitled to be promoted to the next rank and or to be given reasons for failure to promote him. After considering all the relevant issues the Court of Appeal held:

"We agree with the respondents that promotion in the Armed Forces is in the discretion and sole prerogative of the Defence Council. Being a discretionary power of the Defence Council

to promote or not to promote any of its officers, it is not for the courts to direct the Council on how to exercise its discretion in a particular manner i.e. to promote the appellant to the rank of Major.”

This application essentially relates to the issue of interpretation of various provisions in the Bill of Rights. **Section 259 (1)** of the **Constitution** stipulates the manner in which the Constitution ought to be construed. It provides as hereunder:

“259 (1) This Constitution shall be interpreted in a manner that-

- (a) promotes its purposes, values and principles;**
- (b) advances the rule of law, and the human rights and**
- (c) fundamental freedoms in the Bill of Rights;**
- (d) permits the development of the law; and**
- (e) contributes to good governance.”**

It is in the background of these requirements of interpretation that I will consider this application.

The respondents submitted that the petitioner has no *locus standi* to institute these proceedings. In my view, their interpretation of the provisions of **Article 22** is not correct. That Article has stretched to the fullest the scope of persons who have the right to come to court to enforce any right or fundamental freedom in the Bill of Rights. Gone are the days when a person had to demonstrate that he had a personal interest in bringing an application of this nature. As long as a person can demonstrate to a court that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened he meets the minimum threshold required under the law and therefore has *locus standi*. The provisions of **clause (1) and (2) of Article 22** must be read together. While this liberal interpretation of the Constitution is a welcome development in our constitutional jurisprudence, there is however a danger of opening up the floodgates of actions by various people seeking to protect or enforce rights and fundamental freedoms as provided under the Constitution. This is more so considering that no court fees is chargeable for commencing such proceedings. See **Article 22 (3) (c)**. I however believe that it is preferable to have citizens who are zealous in protecting their Constitutional Rights and freedom than a situation where the courts restrict enforcement of such rights.

The respondents attacked the petition and stated that it was lacking in various legal requirements as stated in the Notice of Preliminary Objection. While I agree that the petition ought to have been signed by the petitioner and not by his advocates, the provisions of **Article 159 (d)** of the **Constitution** states that:

“Justice shall be administered without undue regard to procedural technicalities.”

The defects pointed out by the respondents cannot cause this court to strike out the petition. I choose to determine the same on its merits.

The next issue that I will consider is whether the requirements stipulated by the 1st respondent for recruitment of service men/women and constabularies into the Armed Forces are discriminatory and thus contrary to **Article 27** of the **Constitution**.

In considering these requirements, the court must take into account the constitutional duties of our Defence Forces as outlined under **Article 241 (3)** which I have already quoted. Our Defence Forces must be enabled in every respect to fulfill their role which includes defence and protection of the sovereignty and territorial integrity of this Republic. One of the factors that determine the strength of a Defence Force is the quality of the people serving therein. Such service starts with recruitment. Our Defence Forces must be able to recruit Kenyans whom it believes are capable of competently undertaking the duties expected

of personnel in the force. As stated in the respondents' replying affidavit, selection of recruits is preceded by vigorous physical examination. Medical examination is also a mandatory requirement. Potential candidates are also required to compete in running as part of the selection criteria. A candidate who is physically or medically unfit would not only fail such a test but may also endanger his/her life in trying to pass the selection process.

In the case of a pregnant woman, the right of the unborn child would be threatened. **Article 26** recognizes that the life of a person begins at conception. Such rights must therefore be protected.

No right or fundamental freedom is absolute, it may be limited by the law or by other reasonable and justifiable considerations - see **Article 24**. It is therefore my view that the provisions of **Article 24** and **27** read together do not show that the conditions which must be met by recruits are discriminatory. The alleged discrimination is in the interest of the health of the recruits and in the case of pregnant women the rights of the unborn child.

While I agree that the conditions that are required to be met by recruits will of necessity cause several young men and women to be ineligible, it must be borne in mind that the work of our Armed Forces is not ordinary civil employment. Our Armed Forces must be given the liberty to recruit only those Kenyans who are fit for the job. The preamble of our constitution recognizes the Almighty God as the God of all creation. We must also acknowledge that the Almighty God grants different gifts, qualities and capabilities to different people so that they can excel in different jobs and/or occupations. Those who may not qualify to join the Armed Forces on the basis of the stipulated requirements may be eligible in other fields.

I find no merit in this application and dismiss the same. The intended recruitment of service men/women and constabularies shall go on as scheduled. Given the nature of this matter and the important constitutional issues raised therein, I will not make any order of costs as against the petitioner.

DATED, SIGNED AND DELIVERED AT KISII THIS 20TH DAY OF SEPTEMBER, 2010.

D. MUSINGA

JUDGE.

20/9/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Minda and Mr. Mogire for the Petitioner

Mr. Ombwayo for the Respondents

Court: Ruling delivered in open court on 20th September, 2010.

D. MUSINGA

JUDGE.