Osiemo v National Transport and Safety Authority & 4 others (Petition 48 of 2020) [2024] KEHC 2817 (KLR) (Constitutional and Human Rights) (15 March 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 48 OF 2020

LN MUGAMBI, J

MARCH 15, 2024

BETWEEN

GERALD ANYEGA OSIEMO .... PETITIONER

AND

NATIONAL TRANSPORT AND SAFETY AUTHORITY .... 1ST RESPONDENT

CABINET SECRETARY FOR TRANSPORT .... 2ND RESPONDENT

CABINET SECRETARY FOR INTERIOR .... 3RD RESPONDENT

ATTORNEY GENERAL .... 4TH RESPONDENT

NATIONAL ASSEMBLY .... 5TH RESPONDENT

JUDGMENT

Introduction

1. The petition dated 27th January 2020 is supported by the petitioner's affidavit in support sworn on even date. The the petition challenges the constitutionality of the *National Transport and Safety Authority Act* and the legality of the 1st respondent's existence. Accordingly, the petitioner seeks the following relief against the respondents:

    i. That the 1st respondent doesn't meet the constitutional threshold and so should be disbanded.

    ii. The court orders the functions of the 1st respondent to revert to their biological mothers, who are alive and kicking, namely:

        a. The motor functions revert to the Ministry of Transport.

        b. The licensing functions to revert to the Kenya Revenue Authority.

iii. That the movement of the 1st respondent to the new entities would move with about one quarter of the huge budget allocated to the 1st respondent for sheer wastage.

iv. The move will be an effort in ensuring that the money so saved can be channeled into other essential projects like repairing roads, in an economically ailing country like ours.

v. Costs of this petition.

vi. Any further order or orders that this Court may deem just and appropriate to grant.

Petitioner's Case

2. The petitioner describes himself as a road safety expert. He asserts that the *National Transport and Safety Authority Act* was enacted without observance of the public participation principle. He as well contends that the 1st respondent's enacted Rules and Regulations are unconstitutional denying the public the freedom to enjoy convenient and safe transport.

3. The petitioner further challenges the 1st respondent's conduct in exercise of its mandate for a number of reasons which he says is in violation of the *Constitution*. Firstly, that the 1st respondent wasted public funds in purchasing the alcohol testing kits (Alco blow). He takes issue with this, since despite procuring this Kits, the 1st respondent is said to have failed to utilize them on all the roads. He avers that the 1st respondent selects random roads to use the kit and primarily uses the exercise as an opportunity to obtain bribes.

4. Additionally, the petitioner asserts that the 1st respondent has failed to educate PSV Saccos and Companies on how best to prevent robbery hijacks despite the numerous incidents so far. Thirdly, the petitioner is concerned at how loosely the 1st respondent regulates driving schools. In fact, he asserts that these schools draft their own Rules yet it is the mandate of the 1st respondent. He also takes issues with reduction of the eligibility age of a PSV driver from 35 years to 22 years.

5. It is likewise contended that the 1st respondent utilizes the motor vehicle inspections as a tool to harass drivers. He notes that this topic was even the subject of an investigative expose titled "air motor vehicle inspections" by KTN which exposed the illegal undertakings within the 1st respondent in this regard. Moreover, that the 1st respondent's illegal dealings also involved its participation in the Dusit terror attack.

6. The petitioner equally takes issue with the 1st respondent's act of cancelling a number of PSV operating licenses for the reason of offending its Rules and Regulations. This he says has caused dire economic loss for the operators and the country. For instance, he states that the 1st respondent cancelled operating licenses of 85 Coast Bus Company vehicles as 2 of its vehicles were involved in an accident. Tahmeed Bus Company is also said to have almost fell victim to the same. Further 1st respondent threatened to revoke a driver's license for life after causing an accident. In his view the 1st respondent's action is geared toward assassinating these Companies character instead of ensuring compliance with the law.

7. The petitioner in view of these averments urges the Court to interrogate the purpose and object of creating the 1st respondent. According to him however, the 1st respondent's existence is an unnecessary wastage of public resources as it has failed to achieve its mission and vision.

1st Respondent's Case

8. In response, the 1st respondent filed a replying affidavit by George Njao, the Director General sworn on 28th December 2020. He stated that the 1st respondent was established under the *National Transport*

and Safety Authority Act in 2012 due to the challenge in coordinating road safety matters by the various government agencies that handled the docket previously. The 1st respondent was created thus to harmonize the key road transportation aspects.

9. He states that its Rules and Regulations are primarily geared towards provision of safe and reliable transport. He stated that the 1st respondent does not conduct the alcohol blow exercise as the same is now carried out by the police as provided under the *Traffic Act* and its *Regulations*. On the escalated vehicle hijacks, he contended that the 1st respondent's sole responsibility is to register the Saccos and Companies. However, the responsibility to ensure the passengers safety is for the Saccos and Companies.

10. He further opposes the allegation that driving schools make their own Rules as alleged. Moreover, he notes that its mandate to inspect vehicles is discretionary and done to ensure road worthiness of vehicles. The 1st respondent as well denied the allegations of unjustly revoking Bus companies licenses and the Dusit attack which is a matter pending in court.

11. In a nutshell, contrary to the petitioner's allegations, he affirms that since its inception, the 1st respondent has had numerous gains on road safety and still working to improve the same.

12. That said, he attacks the eligibility of the petition since he claims that the petitioner has not cited any constitutional provisions alleged to have been violated as guided in *Anarita Karimi v Republic* (1979) eKLR. He also notes that the petitioner's averments are unfounded general statements and perceived apprehensions. He for this reason beseeches the Court to dismiss- the petition with costs to the respondents.

2nd, 3rd and 4th Respondents' Case

13. The 2nd respondent's Principal Secretary, Solomon Kitungu on behalf of these respondents filed a relying affidavit sworn on 19th March 2021. He depones that contrary to the petitioner's allegation the *National Transport and Safety Authority Act* was enacted in accordance with the law.

14. The 2nd respondent avers that the genesis of the *Act* was as a result of numerous complaints from the public on the regulation of the road aspect. In response the 2nd respondent formulated the Transport Policy. This is said to have been subjected to rigorous public participation. This process was summarized in the Integrated National Transport Policy Review documents. The engagement concluded and recommended that the Government do establish an appropriate institutional framework for the coordination and management of road traffic safety. This is what led to the development of the National Transport and Safety Authority Bill.

15. He makes known that the 2nd respondent received comments from various stakeholders both in the private and public sector on the policy. A stakeholder's Conference meeting was held between November and December 2010 at the Bomas of Kenya. Further the 2nd respondent invited various government institutions and stakeholders to validate the draft Sessional paper at a workshop held on 28th April 2010 at Utalii Hotel and 17th June 2011 at Intercontinental Hotel. In like manner, provisional public hearings on the review of the Integrated National Transport Policy were held in Nyanza, Eastern, Western, Central and the Coast. The Integrated National Transport Policy was later discussed in Parliament and approved.

16. He contends in view of this that the petition is riddled with unfounded conjectures that lack any legal or factual basis and so an abuse of the Court process. He for this reason urges the court to dismiss the petition.

5th Respondent Case

17. Michael Sialai, the then Clerk of the National Assembly in reply filed a replying affidavit sworn on 30th March 2022.He informs that the *National Transport and Safety Authority Act* was assented to by the President on 12th October 2012 and came in force on 1st December 2012.

18. On the claim of unconstitutionality of the *National Transport and Safety Authority Act* for lack of public participation, the 5th respondent contends that Article 2(1)(b) of Sixth Schedule of the *Constitution* suspended the application of Article 118(1)(b) of the *Constitution* until the first elections for Parliament under the 2010 *Constitution* were conducted and results announced.

19. Therefore, he argues that the 5th respondent was exempted from carrying out public participation during the enactment of the *Act* in 2012. He for this reason argues that the petition lacks merit and so should be dismissed.

Parties' Submissions

Petitioner's Submissions

20. The petitioner filed submissions dated 21st May 2021, 18th March 2022 and subsequently, 18th October 2023.

21. The petitioner on the 2nd, 3rd and 4th respondents' averment that public participation was carried out, challenged the respondents to demonstrate this allegation. This is by adducing the documents that contained the names of government institutions, private and public sectors in the hotel meetings, letters inviting each participant, the written submissions and the minutes of proceedings. Further, the newspaper advertisements inviting persons for the engagement meetings, the participants register and transport industry key stakeholders' details. He maintained that the principle of public participation had not been upheld in enactment of the impugned *Act* as required under Article 118 of the *Constitution*.

22. The petitioner in his submissions was further aggrieved at the delay occasioned by the respondents in filing their responses urging the Court to take note of the same. He also pointed out that not being a lawyer his pleadings were not up to par with the required procedural standards.

23. The petitioner relying on the averments in his petition submitted that the 1st respondent in carrying out its mandate had abused its power. This is because of the immoral methods of enlisting police to intimidate motorists, suspending operating licenses and threatening to revoke a driver's license for causing an accident.

24. He urged the Court to admit the newspaper cuttings highlighting these facts. He stressed that these can be adduced as evidence by virtue of Section 86 of the *Evidence Act*.To this end, the petitioner urged the Court to find that the impugned *Act* is offensive to the *Constitution*.

1st Respondent's Submissions

25. On 5th May 2021, Counsel, Judith Opili – Sirai, filed submissions for the 1st respondent. Counsel highlighted the issues for determination as whether the legitimacy of the 1st respondent can be challenged now having been in existence since 2012; whether the petitioner has raised sufficient grounds to disband the 1st respondent; whether there was public participation and whether its functions should be reverted back to the former government agencies.

26. On the first issue, Counsel submitted that the 1st respondent has been in existence for 9 years and so the petitioner ought to have brought this challenge at the onset. Nonetheless, it was noted that the 1st respondent had carried out its mandate as envisaged under the *National Transport and Safety Authority Act* and further enacted various Rules and Regulations to aid in fulfilling its mandate. Counsel stressed that these Rules had undergone public participation before they were implemented. For this reason, the petition is labelled as an afterthought and not filed in good faith.

27. Counsel on the second issue, submitted that the 2nd, 3rd and 4th respondents in their affidavit had demonstrated that adequate public participation had been conducted before enactment of the *National Transport and Safety Authority Act* given the circumstances. Reliance was placed in *Commission for the Implementation of the Constitution v Parliament of Kenya and others* (2013) eKLR where it was held that:

> " The National Assembly has a broad measure of discretion on how it achieves the object of public participation. How this is effected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public."

28. Like dependence was placed in Kiambu Constitutional Petition 48 of 2018 *Okiya Omutata v County Government of Kiambu*.

29. Moving to the third issue, Counsel stated that the 1st respondent as is discernible from its replying affidavit, has attained great milestones since its commencement. Counsel argued further that it was impossible at this juncture to revert back the 1st respondent's duties governed by the impugned *Act* to the former agencies. In like manner, Counsel in the fourth issue, argued that the petitioner had failed to raise sufficient grounds as to why the 1st respondent should be disbanded.

30. Counsel was certain that the instant petition fails to meet the test of a constitutional threshold. This argument was based on the fact that the petitioner had not set out with particularity the provisions alleged to have been breached by the respondents as guided in the *Anarita Karimi Case.* In fact, Counsel stated that the petition comprises of general averments and apprehensions not in line with the rule of drafting constitutional provisions.

31. Equally, it is stated that although the petitioner speaks to the 1st respondent's Regulations, he failed to ascertain the specific Regulations and Sections challenged. Accordingly, Counsel submitted that the petition is baseless and devoid of merit.

2nd, 3rd and 4th Respondents' Submissions

32. These respondents through State Counsel, Betty Mwasao filed submissions dated 11th March 2022. Counsel discussed whether there was public participation, whether the petitioner's rights were violated and if so whether the petitioner was entitled to the prayers sought.

33. Counsel first urged the Court to take judicial notice that at the time of enacting the impugned *Act*, the threshold for public participation by Parliament had not been laid down. However despite this lacuna, these respondents as is evident in their replying affidavit made sure to engage the public before the impugned *Act* was enacted thus making it participatory, transparent and inclusive. In this regard

Counsel relied in *Law Society of Kenya v Attorney General & 2 others* (2013)eKLR where it was held that:

> "In order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute."

34. Like dependence was also placed in *Barbra Georgina Khaemba v Cabinet Secretary, National Treasury & another* (2016) eKLR.

35. On whether the petitioner's rights were violated, Counsel submitted that the petitioner's allegations were mere outbursts devoid of cogent and reliable evidence to justify invocation of this Court's jurisdiction. Counsel contended thus that the petitioner had not proved his case of the alleged violations against the respondents. Reliance was placed in *Christian Juma Wabwire v Attorney General* (2019) eKLR where it was held that:

> "It is incumbent upon the Petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The Petitioners' allegations ought to have been supported by further tangible evidence such as medical records and witnesses."

36. Counsel also attacked the adduced newspaper articles submitting that they are not admissible neither conclusive evidence in a court of law. Dependence was placed in *Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education, Science and Technology & 5 others* (2015) eKLR where it was noted that:

> "I have little doubt in my mind that newspaper reports should not constitute evidence upon which a court of law should solely rely to make a determination. They ordinarily do not satisfy and are not covered under the provisions of Section 35 of the *Evidence Act* (Cap 80) Laws of Kenya. Print media articles have no evidential value and the court should not rely on the same as a basis for determining any matter."

37. Counsel in conclusion argued that since the petitioner had not demonstrated that the 1st respondent in fulfilling its mandate had violated the *Constitution*, was not entitled to the reliefs sought. Further Counsel stressed that this Court has no jurisdiction to grant Prayers (b) and (f) – in the petition as it has no legislative mandate.

38. In this regard Counsel cited the case of *Apollo Mboya v Attorney General & 2 others* (2018) eKLR where it was held that:

> "The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself."

5th Respondent's Submissions

39. Counsel, Mbarak Awadh Ahmed for the 5th respondent filed submissions dated 12th April 2022 where he sought to discuss whether there was public participation before the *National Transport and Safety Authority Act* was enacted and whether the petition was drafted with specificity.

40. On the first issue, Counsel relying in Section 2(1)(b) of the Sixth Schedule of the *Constitution*, argued that the impugned Act was passed during the transitional period following the enactment of the *Constitution*, 2010. In essence, Articles 10 and 118(1)(b) of the *Constitution* were suspended until the first elections for Parliament were conducted and results announced.

41. Reliance was placed in *Public Service Commission & 4 others v Cheruiyot & 32 others* (Civil Appeal 119 & 139 of 2017 (Consolidated) [2022] KECA 15 (KLR) where the Court of Appeal held that:

> " The provisions of Article 118 (1)(b) of the *Constitution* having been suspended by operation of the provisions of section 2 (1)(b) of the Sixth Schedule to the *Constitution*, it is our view that public participation was not a constitutional prerequisite in the enactment of *Elections Act*. 2011 which was assented to by the President on 27th August, 2011, more than one year before the first general election under the new Constitution."

42. Additional reliance was placed in *Dennis Mogambi Mong'are v Attorney Geneml & 3 others* [2011] eKLR.

43. Counsel in the second issue argued that the petition failed to meet the constitutional petitions threshold. Counsel states that, the respondents due to the lack of precision and particularity found it difficult to ascertain the petitioner's allegations so as to respond effectively. Reliance was placed in *Dr. Rev. Timothy Njoya v The Hon. Attorney General and Kenya Review Authority* HC Constitutional and Human Rights Division Petition No. 479 of 2013 where it was noted that:

> " The Petitioner cannot come to court to seek justice and information he intends to use to prove the case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which the *Constitution* has been violated by and even state the Article of the *Constitution* that has been violated and the manner in which it has been violated."

Analysis and Determination

44. The key issues that arise for determination in this matter are as follows:

    i. Whether the public participation principle under Article 10(2)(a) and 118 (1)(b) of the *Constitution* was violated by the respondents;

    ii. Whether Section 2(1)(b) of the Sixth Schedule of the *Constitution* is applicable in the circumstances of this case;

    iii. Whether the respondents violated the petitioner's constitutional rights; and

    iv. Whether the petitioner is entitled to the reliefs sought.

Whether the public participation principle under Article 10(2)(a) and 118 (1)(b) of the *Constitution* was violated by the respondents.

45. The main issue in this Petiton is the contention hat the *National Transport and Safety Authority Act* is unconstitutional on the basis that public participation as required under the *Constitution* prior to its enactment. The the 2nd, 3rd and 4th respondents disputed this allegation and asserted that adequate public participation was carried out although there no guidelines in place to guide the process then.

46. Public participation is captured under Article 10(2)(a) and Article 118 (1) (b) of the *Constitution* as follows:

Article 10:

(2) The national values and principles of governance include –

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

Article 118:

Parliament shall-

b) Facilitate public participation and involvement in the legislative and other business of Parliament and its Committees.

47. This principle has been upheld by Courts in various decisions. In *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* (2015) eKLR the Court noted as follows:

> " ... Article 10 makes public participation a national value as a form of expression of that sovereignty. Hence, public participation is an established right in Kenya; a justiciable one – indeed one of the corner stones of our new democracy. Our jurisprudence has firmly established that Courts will firmly strike down any laws or public acts or projects that do not meet the public participation threshold ..."

48. Concerning the manner of carrying out public participation, a three-judge bench in *Institute of Social Accountability & another v National Assembly & 4 others* (2015) eKLR held thus:

> " ... How public participation is given effect will vary from case to case but it must be clear, upon examination of the legislative process, that a reasonable level of participation has been afforded to the public...What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case..."

49. The Supreme Court laid down the guiding principles on public participation in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* (2019)eKLR. The Court outlined those principles as follows:

> " Guiding Principles for public participation

i. As a constitutional principle under Article 10(2) of the *Constitution*, public participation applies to all aspects of governance.

(ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring andfacilitating public participation.

(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.

(v) Public participation is not an abstract notion; it must be purposive and meaningful.

(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

(ix) Components of meaningful public participation include the following:

a. clarity of the subject matter for the public to understand;

b. structures and processes (medium of engagement) of participation that are clear and simple;

c. opportunity for balanced influence from the public in general;

d. commitment to the process;

e. inclusive and effective representation;

f. integrity and transparency of the process;

g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."

50. The Petitioner asserted that public participation did not take place and insisted that the Respondents could not provide proof of the same such as documents containing names of government institutions, private sector participants, letters of invitation of the applicants, the venues, or written submissions and minutes of the proceedings.

51. In rebuttal, Mr. Simon Kitungu, the the Principal Secretary of in the Ministry of Transport refuted these allegations in the replying affidavit sworn on 19th March, 2021. He referred to the engagements that were held with stakeholders among them the Stakeholders Conference held between November and December 2010 at the Bomas of Kenya. Others included the workshop of the stakeholders held at Utalii Hotel on 28th April, 2010 to validate the draft sessional paper and another held on 17th June, 2011 at Intercontinental Hotel. He swore that there were public hearings carried out in Nyanza, Eastern, Western, Central and Coast. Among the documents exhibited in support of his deposition were- (a copy of the report, recommedations in integrated National Transport Policy, February 2004- annexure SK 1; copies of letters inviting stakeholders dated 20th April, 2010 and 15th June, 2011- SK 6 and SK 7; copy of list of attendees involved in public particiapation- SK 8; letter evidencing Kenya Private Alliance participation in the drafting of the Bill dated 14th Septmember, 2012).

52. The Respondent has established by way of tangible evidence that public participation was extensively carried out and stakeholders were actively involved in the process that led to the establishement of the 1st Respondent. I am satisfied that this answers the allegations made by the Petitioner fully. I thus find that there was public particiapation.

Whether Section 2(1)(b) of the Sixth Schedule of the *Constitution* is applicable in the circumstances of this case

53. The 5th respondent's opposed the petitioner's argument of lack of public participation arguing that the contention was untenable in light of Section 2(1)(b) of the Sixth Schedule of the *Constitution*. This is because the *National Transport and Safety Authority Act* was assented to on 12th October 2012 and came into force on 1st December 2012 hence was not subject to the principle of public participation in view of the transitional provision.

54. Section 2(1)(b) of the Sixth Schedule of the *Constitution* provides as follows:

> Suspension of provisions of this Constitution
>
> 2.
>
> (1) The following provisions of this Constitution are suspended until the final announcement of all the results of the first elections for Parliament under this Constitution--
>
> a. ...
>
> b. Chapter Eight, except that the provisions of the Chapter relating to the election of the National Assembly and the Senate shall apply to the first general elections under this Constitution; and
>
> c. ...

55. The nature of the transitional and consequential provisions in the *Constitution* was discussed as follows by the 5-judge bench in *Kalpana H. Rawal v Judicial Service Commission & 4 others* (2015)eKLR as follows:

> "278. The nature, function and place of transitional and consequential provisions in the *Constitution* of Kenya 2010 is well set out in the CoE's Report of 2010 as follows:
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> > "When a new constitution is introduced, a range of provisions are needed to ensure that the move from the old order to the new order is smooth, and, in particular, that the changes expected by the new constitution are implemented effectively and those institutions that are retained under the new constitution continue to function properly....The "transitional" provisions that do this are usually not included in the body of the *Constitution* because they have a temporary lifespan..."

56. Equally, the Court in *Timothy Njoya & 17 others v Attorney General & 4 Others* (2013) eKLR observed as follows:

> "Transitional provisions are included in legislation in order to facilitate a change from the old regime to a new regime, or from an old law to a new law. Transitional provisions contain special arrangements or structures that will apply, for a limited period of time, as the changes brought about in the new law are being implemented and appreciated.
>
> In the *Constitution* of Kenya 2010, Article 262 gives effect to the Transitional and Consequential Provisions that are set out in the Sixth Schedule. These provisions are therefore a part of the *Constitution*..."

57. The Supreme Court in *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others* (2014) eKLR discussing the transitional constitutional provisions with regards to vetting of Judges and Magistrates process opined as follows:

> "... Such provisions are usually considered technical, though they may have significant policy implications. Some of the transitional provisions provide that existing obligations, laws and rights will remain in force, until other laws or amendments to laws are enacted; and others provide that existing public offices will continue to function and operate, so as to prevent situations of gaps or vacuums in the discharge of the functions of these offices..."

58. In the instant case, it is was contended by the 5th Respondent that the cited transistional clause under the sixth schedule of the *Constitution* had suspended the operation of Chapter eight which provides for public participation until the first general election under the *Constitution* was held.

59. Faced with similar claims, the Court of Appeal in *Public Service Commission & 4 others v Cheruiyot & 20 others* (supra) reasoned as follows when it was called upon to determine the constitutionality of the *Elections Act*,2011 in regard to the issue of public participation:

> "The fourth issue for our determination is whether the debate and enactment of section 43(5) and (6) of the *Elections Act*, 2011 was preceded by public participation as contemplated by article 118 of the *Constitution*... The argument by the 1st to 3rd appellants before the trial court was that the provisions of article 118(1)(b) of the *Constitution* at the time the *Elections*

Act, 2011 was being enacted had been suspended by the provisions of section 2 (1)(b) of the Sixth Schedule of the *Constitution* on Transitional and Consequential Provisions. The trial court noted that this argument had been countered by an argument by the 1st to 4th respondents in this appeal that article 10(2)(a) of the *Constitution* placed an obligation on Parliament to partake in public participation in the enactment of *Elections Act*, 2011... We respectfully disagree with the findings of the trial judge on this issue. Section 2 (1)(b) of the Sixth Schedule on Transitional and Consequential Provisions provides as follows:

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(1) The following provisions of this Constitution are suspended until the final announcement of all the results of the first elections for Parliament under this Constitution-

(a) ...;

(b) Chapter Eight, except that the provisions of the Chapter relating to the election of the National Assembly and the Senate shall apply to the first general elections under this Constitution."

87. It is clear that the provisions of section 2(1)(b) of the Sixth Schedule of the *Constitution* had effectively suspended the application of article 118(1)(b) of the *Constitution* until the first elections for Parliament under the 2010 Constitution were conducted and final results announced. The provisions of section 2(1)(b) of the Six Schedule of the *Constitution* are not in conflict with the provisions of article 10(2)(a) of the *Constitution*. We find that the trial judge in interpreting and applying the provisions of section 2(1)(b) of the Sixth Schedule of the *Constitution* vis-à-vis the provisions of article 10(2)(a) of the *Constitution* adopted a narrow interpretation as opposed to a purposive approach of the *Constitution* as contemplated under article 259(1) of the *Constitution*.

88. In *Dennis Mogambi Mong'are v Attorney General & 3 others* [2011] eKLR, the High Court expressed itself as followson the transitional provisions:

> "The transitional provisions contained in the Sixth Schedule are intended to assist in the transition into the new order but are limited in time and in operation and are to remain in force for the period provided in order to achieve the aspirations of Kenyans in moving into the new order. The transitional provisions are as much part of the *Constitution* and as much an expression of the Sovereign will of the people as the main body."

89. In *Executive Council of the Western Cape Legislature & others v President of the Republic of South Africa & 40 Others* (CCT27/95) [1995], the South African Constitutional Court expressed itself as follows on transitional provisions:

> "...Section 232(4) is not conclusive on the issue of the exact status of the Constitutional Principles in relation to other provisions in the current Constitution. The section is of general application to all Schedules to the Constitution. It ensures that they are treated

for all purposes as if they formed part of the main body of the Constitution, and makes it clear that they do not have a lesser status than provisions located elsewhere in the Constitution."

90. The provisions of article 118(1)(b) of the *Constitution* having been suspended by operation of the provisions of section 2(1)(b) of the Sixth Schedule to the *Constitution*, it is our view that public participation was not a constitutional prerequisite in the enactment of *Elections Act*, 2011 which was assented to by the President on August 27, 2011, more than one year before the first general election under the new Constitution."

59. This Court is bound by the principle of stare decisis. The issue raised in this case is not in any way different from what the Court of Appeal dealt with in the case of *Public Service Commission & 4 others v Cheruyoit & 20 others* above. It held in no uncertain terms that public partitipation was not a requirement in the enactment of legislation before the first General Elections were held under the new Constitution upon applying the purposeful approach principle of interpretation and finding that Section 2 (1) (b) of the Sixth Schedule and Article 10 (2) (a) of *Constitution* were not in conflict. In the present case, the Statute in question was passed and assented to before the first General Election. The Act having been assented to on 12th October, 2012 and coming into force on 1st December 2012 was exempted taking judicial notice the 1st General Elections under the current Constitution were held on 4th March, 2013. Therefore, even if public participation had not been done, which is not the case as it was the finding of this Court that it was in fact done, this ground alone would not have invalidated the *National Transport and Safety Authority Act*.

Whether the respondents violated the petitioner's constitutional rights

60. The respondents contended that the petitioner did not specifically state the constitutional provisions that were alleged to have been violated and and the manner of violation. This is line with the threshold set out in the *Anarita Karimi case* (supra). On the flipside, the petitioner urged the Court to take note that he is not a legal Counsel in view of the procedural rules.

61. The Court of Appeal concurring with the threshold set in the *Anarita Karimi case* in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR guided as follows:

> " ...The principle in *Anarita Karimi Njeru* (*supra*) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:
>
>> "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."
>
> The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19,20 and 73 of the *Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of

the petition alleged that the Government of Kenya had overthrown the *Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the *Constitution* and the rule of law, without any particulars.

We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (Supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting," without requiring remedy by the 1st respondent..."

62. In *Kenya Pharmaceutical Association & another v Nairobi City County and the 46 other County Governments & another* [2017] eKLR emphasized the importance of pleading with specificity and clarity stating thus:

33. The core issue here is to understand the function of and purpose of good pleadings. In this regard, I recall the words of the Australian Court where Vickery J said this of the principles of good pleading:-

> "In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything.
>
> ... Elegance is the simplicity found on the far side of complexity.
>
> While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.
>
> Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.
>
> Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination.

34. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial; The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of

action (or defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action; a pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it..."

63. This Petition was drawn by a layman who is not trained on the rules of drawing pleadings. He nevertheless put across a case that all the Respondents ably and extensively responded to going by the expansive nature of their responses and submissions. He concisely defined his main ground of contention which was public participation. He may not have drafted a classical standard petition but his case did not embarrass of cause unnecessary confusion. He achieved what a pleading should do, to disclose your case to the opponent in the manner that the Respondent knows what he is require to respond to in answer to your case but this was basically on one ground alone, that of public particiapation.

64. The rest of the Petition was based on topsy-turvy up pieces of information which the Petitioner had collected from newspapers. Other claims such as the 1st Respondent using motor vehicle inspections to harass drivers and extort bribes were sprurious claims that the Petitioner did not even care to substantiate.

65. All said and done, there is absolutely no merit in this Petition.

    a. On costs, the Respondent urged that I should condemn the Petitioner to pay the costs of this Petition.

66. Costs are awarded at the discretion of the Court. In Constitutional matters involving violations of rights, it is important that Couts exercise some degree of caution in awarding costs lest they curtail people's quest to seek justice in matters pertaining rights violations. Rule 26 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 reasserts this principle by stating thus:

    26

    (1) The award of costs is at the discretion of the Court.

    (2) In exercising the discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.

67. The Petitioner in this case was exempted from paying Court fees and filed this Petition as a pauper. In an undated ruling delivered by C.A Muchoki the Deputy Registar of this Court, the Petitoner was allowed to institute the Petition as a pauper on the basis that:He was uuemployed and has no business to derive reasonable incomeHis wife and family are also unemployed and depend on casual jobs which hardly fetch a dollar a dayHe is above 60 years old and therefore cannot find some income generating activityHis intended Petition is of great public interest.

68. Having satisfied the Court as to his inability to even pay the Court fees prior to the institution of this Petition, it is pointeless to condemn the Petitioner to pay costs. Courts do not make orders in vain lest they are exposed to ridicule due to inability to enforce the same. Though Respondents as successful party may have been entitled to costs but given the circumstances case, I find no logic in making such orders.

69. The final order therefore is that this Petition is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH, 2024.

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L N MUGAMBI

JUDGE