Aura v Attorney General & 6 others (Petition E102 of 2023) [2024] KEHC 7031 (KLR) (Constitutional and Human Rights) (13 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7031 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E102 OF 2023

LN MUGAMBI, J

JUNE 13, 2024

BETWEEN

ENOCH JOSEPH AURA ..... PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

CHIEF JUSTICE OF KENYA ..... 2ND RESPONDENT

KENYA LAW REFORM COMMISSION ..... 3RD RESPONDENT

LAW SOCIETY OF KENYA ..... 4TH RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 5TH RESPONDENT

PUBLIC SERVICE COMMISSION ..... 6TH RESPONDENT

NATIONAL COUNCIL FOR LAW REPORTING ..... 7TH RESPONDENT

RULING

ENGLISH AND KISWAHILI VERSION

Introduction

1. By a Notice of Motion application dated 27th March 2024, the Petitioner herein seeks orders that:

    a. That this Application should be certified as urgent and should be heard in the first instance before service upon the Respondents.

    b. The Honourable Court be pleased to certify that the Applicant's request raises serious and new legal issues and on the Constitution, and urgently submit the request to the Honourable

Chief Justice of Kenya for the Appointment of unequal number of Judges, at least three, in particular who are knowledgeable in Kiswahili language.

c. The costs of this motion to be borne by the Applicant)

Petitioner's Case

2. The application is supported by the Petitioner's supporting affidavit of even date and grounds on the face of the application.

3. According to the Petitioner, the Petition seeks the use of Kiswahili language in the conduct of court proceedings as an enabler of access to justice and enforcement of constitutional rights hence raises substantial questions of law. The Petitioner identifies the pertinent questions as follows:

   a. Regarding the use of Kiswahili, which is the national language in judicial proceedings from the Lower Court to the Supreme Court in the light of Article 7 of the Constitution of Kenya; an issue that has never been raised or resolved before.

   b. This request raises new issue of whether the motion or pleadings in Court that are initiated/ registered in Kiswahili language should be directed and transcribed in Kiswahili language only or will they involve use of the English language as well and be interpreted.

   c. Alongside the issues mentioned, the applicant also requests the drafting of the by-laws/ subsidiary legislation in Kiswahili language that are to guide judicial processes in Kiswahili language as an official policy and the involvement of the Law Society to fulfil the expectation of Article 7 of the Constitution by training the lawyers in continuing legal education in Kiswahili language.

   d. Again, the new issue requiring resolution highlighted by the Petitioner, includes enacting of the subsidiary legislation in the Kiswahili language to guide and classify judicial processes in the Kiswahili language for the Supreme Court, because, unlike the High Court and the Court of Appeal, the Supreme Court does not have a main law that authorizes the use of Kiswahili language.

   e. The Petition also highlights the action of the Second Respondent, the Honourable the Chief Justice of directly blocking access to Court services through the approved by-laws without following the guide for drafting by-laws by which authorized online court proceedings without public participation, which is a new issue.

   f. In addition, the issue related to that mentioned is if the lawyers offices, cars (private and public) on the street and on the side of the road, and even private residences where online court sessions are held through the instructions of the Chief Justice, which is opposed in the applicant's request regarding proceedings and by-laws of the online court, complies with the constitutional satisfies requirement that disputes should be heard in Court" ... a Court established under the 'Constitution' within the meaning of Article 50 (2) (d) of the Constitution of Kenya, and its goal in general.

   g. It is clear the by-laws for providing court services through the internet as the Petitioner has mentioned are expected to be designed under Section 63A (2) of the Law of Evidence, so the Petitioner prays that the axe of Section 11(4) of the Statutory Instruments Act to fall and cut from the roots of rules by the Chief Justice because they are invalid and they should not be enforced by the Courts or any Kenyan).

h. Further, the Honourable Chief Justice has violated Section 6 of the Statutory Instruments Act and it is obvious that the Honourable Chief Justice did not follow the provisions of the said section of the Statutory Instruments Act, but violated and ignored the procedure and dictated that her orders be followed to date,)

i. Hon. The Chief Justice has violated the Constitution of Kenya by arbitrarily delegating the responsibility assigned to the Central Bank of Kenya under Article 231 (2) of the Constitution of Kenya when she imposes a policy of exclusively paying for Court services (only through the Internet), and arbitrarily without permission has banned payments of cash to pay for Court service.

j. In accordance with Article 231 (2) of the Constitution of Kenya, the Central Bank of Kenya is the only one entrusted with the authority to create Kenya's monetary policy.

k. Until now, the Monetary Policy in Kenya for the use of money has not prohibited the use of cash as an officially recognized form of money to pay for any services in the country, (such as Court Services).

l. These policies (including the Policy mentioned in Article a nab above) did not have any consultation with any stakeholders in Kenya, contrary to what is specified in Article 232(1)(d) of the Constitution of Kenya; which indicates that Kenyans must be involved in the process of creating any policy in the country.

m. All this Hon. The Chief Justice has acted contrary to Article 201 (d) of the Constitution of the Republic of Kenya. Thus, the High Court has been entrusted with the responsibility of protecting the Constitution of Kenya which Hon. The Chief Justice has violated through his said orders, as the Prayer contained in the Motion has mentioned).

4. In light of this, the Petitioner asserts that the Petition presents weighty and substantial questions of law of public importance. For that reason, the Petitioner is certain that his application is justified and as such urges the Court to allow it.

1st, 3rd and 7th Respondents' Case

5. In response to the application, the above-named Respondents filed grounds of opposition dated 16th April 2024 on the premise that:

i. This court, as presently constituted, is vested with unlimited original jurisdiction to determine the question as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and the jurisdiction to hear any question respecting the interpretation of this Constitution.

ii. By dint of Article 165(4) of the Constitution, the Application is not demonstrative of any substantial or novel question of law, or a matter of general public importance, capable of being referred to the Chief Justice for constitution of an uneven number of judges to hear and determine the issues.

iii. Notwithstanding the provisions of Article 165(4) of the Constitution, the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction.

iv. Article 163 (3) of the Constitution provides for the right of appeal all the way to the Supreme Court, a court whose decisions are binding on all other courts of the land.

v. Complex issues of fact and/or law, if any, in the instant petition, do not necessarily translate to substantial issues of law for empanelment of an uneven number of judges to hear and determine the issues.

vi. The Application imperils Article 159(2) (b) of the Constitution on the principle that justice shall not be delayed, and the principle on prudent use of judicial resources.

vii. The Application is an afterthought and a tactic to delay the hearing and determination of the Petition. The petition has substantively progressed before a single judge and the court firmly issued substantive directions that upon filing and service of submissions by all parties, the submissions shall be highlighted on 22nd May, 2024.

2nd, 4th, 5th & 6th Respondents' and Interested Parties Case

6. The 2nd, 4th, 5th and 6th Respondents did not file any response to the Application or submissions.

Petitioner's Submissions

7. On 19th January 2024, J. Harrison Kinyanjui and Company Advocates filed written submissions.

8. To begin with, the lawyer submitted that the applicant contends that Hon. The Chief Justice has violated the principles of the Constitution as the Kiswahili language is never used to serve Kenyans in the delivery of Court services despite Article 7(1) of the Constitution of Kenya specifying that Kiswahili is the national language. In addition, it was argued that the regulations that were approved by Hon. Chief Justice 2016 were not lawful.

9. For this reason, the lawyer insisted that it is obvious that the issues in the raised in the Petition by the applicant are new, and there is no objection to the proposition that they have not been previously dealt with by the High Court, hence motion is properly merited under Article 165(4) of the Constitution of Kenya.

10. Reliance was placed on the case of Del Monte Kenya Limited v County Government of Muranga & 2 others (2016) eKLR where the high court held as follows:

> " If the Petition raises or deals with an issue of public importance, then the balance is more in favor of the appointment of the Judge, especially if it is an issue, a decision that may affect the rights of both parties, whether they are individuals or the Public in general or it is an issue that has not yet been decided and resolved by this court or a higher court at higher levels."

11. Similar reliance was also placed on the case of Kalpana H Rawal v Judicial Service Commission & 3 Others (2015) eKLR and Eric Gitari v Attorney General & another (2016) eKLR.

12. Counsel emphasized that the petitioner's case is brought in public interest. This is because there is great public need in Kenya for the use of the Kiswahili language in judicial proceedings and the judiciary in general. Reliance was placed on the case of MAK & another v Board of Directors Oshwal Academy Ltd & 2 others; National Gender & Equality Commission & 2 others (Interested parties) (2020) eKLR where the high court stated as follows:

> " 24. In my opinion.... This petition certainly raises a serious question of law that will require the interpretation of various articles of the constitution. It has also been found that the results of this request will affect the entire education sector and thus it is a matter of great interest to the public."

13. In conclusion, the Counsel argued that the applicant in the Constitutional Petition has raised serious and new issues of law and the Constitution and has thus satisfied the requirement for this Court to grant the Petitioner's request in the Notice of Motion. Reliance was placed on the case of Martin Nyaga and others versus speaker of the County Assembly of Embu & 4 others and Amicus (2014) eKLR.

1st, 3rd and 7th Respondents' Submissions

14. State Counsel Gracie M. Mutindi in the submissions dated 16th April 2024, submitted that a substantial question of law under Article 165(4) of the Constitution, although not defined was discussed in Community Advocacy Awareness Trust & Others v The Attorney General & Others (2012)eKLR as follows:

> " It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine the matter."

15. It was submitted however that exercise of this discretion must take into account multiple factors as has determined in a plethora of cases. For instance in Wycliff Ambetsa Oparanya & 2 Others vs Director of Public Prosecutions 7 Anor (2016) eKLR the Court opined as follows:

> " As has been held by this court before, the decision whether or not to empanel a bench of more than one judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant constitutional and statutory provisions. Despite appreciably great strides made in the expansion of the judiciary in the recent past, there is definitely much more to be done with respect to achieving the spirit of Article 48 of the Constitution on access to justice. Accordingly, this country still does enjoy luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are still very scarce and although the time taken for hearing a petition by a single judge may not be any different from that taken by a bench empaneled pursuant to Article 165 (4) of the Constitution, it must be appreciated that the empaneling of such a bench invariably leads to delays in determining cases already in the queue hence worsening the backlog crisis in this country."

16. Similar reliance was placed in J. Harrison Kinyanjui V Attorney General & Another [2012] eKLR.

17. For this reason, Counsel urged the Court to consider the test set out in Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314 and Santosh Hazari vs. Purushottam Tiwari (2001) 3 SCC 179 by the Supreme Court of India as follows:

> " a) whether, directly or indirectly, it affects substantial rights of the parties.
>
> b) whether the question is of general public importance.
>
> c) whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council or by the Federal Court.
>
> d) the issue is not free from difficulty.
>
> e) It calls for a discussion for alternative view."

18. In counsel's view, it is not enough for the Petitioner to allege that his rights and fundamental freedoms have been denied or threatened or that his petition raises issues of interpretation of the Constitution. This is since a plethora of authorities have already answered similar questions. As such, Counsel asserted that it is the Petitioner who had the onus to prove that indeed, a substantial question of law exists in his case. In this regard, Counsel submitted that this burden has not been discharged.

19. In the same manner, Counsel submitted that although the Petitioner avers that the Petition raises matter of public importance, the application does not qualify as one. Reliance was placed in County Government of Meru vs the Ethics and Anti-Corruption Commission Milimani Law Courts Petition No. 177 of 2014 held as follows:

> " The grant of a certificate under Article 165(4) of the Constitution is an exception rather than the rule. Many provisions of our Constitution are untested and bring forth novel issues yet is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges. Public interest may be considered but is not necessarily a decisive factor. It is in the nature of petitions filed to enforce the provisions of the Constitution to be matters of public interest generally. The court ought to take into account other provisions of the Constitution, the need to dispense justice without delay having regard to the subject matter and the opportunity. "

20. To this end, Counsel urged the Court to find that the Petition does not raise any substantial questions of law to warrant application of Article 165(4) of the Constitution.

Analysis and Determination

21. In my view, this application brings to the fore a singular issue for determination, namely:

> Whether the Petition dated 31st March 2023, later amended on 21st July 2023 raises substantial questions of law meriting certification to the Chief Justice to empanell an uneven Judges to hear and determine.

22. The general guide for the Court to consider in determining whether it should certify the matter to the Chief Justice for empanelment of a bench is contained in Article 165 (4) of the Constitution which provides:

> Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
>
> Article 165 (3) (b) or (d) of the Constitution state as follows:
>
> (3) Subject to clause (5), the High Court shall have—
>
> a. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
>
> b. .....
>
> c. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

iv. a question relating to conflict of laws under Article 191; and

(e) .....

23. The Constitution is however silent on the meaning of 'substantial question of law' but as submitted by Counsels in this matter, Courts have given meaning to this phrase as evidenced by many judicial precedents. In the case of Harrison Kinyanjui (supra) the Court stated:

> " 10. A matter may raise complex issues of fact and law but this does not necessarily imply that the matter is one that raises substantial issues of law. Judges are from time to time required to determine complex issues yet one cannot argue that it means that every issue is one that raises substantial questions of law. Thus, there must be something more to the "substantial question" than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts or the application of well-settled principles to the facts of a case."

24. Likewise, the Court in Philomena Mbete Mwilu vs Director of Public Prosecution & 4 Others (2018) eKLR held:

> " 24. .....a question of law would be a substantial question of law if it directly or indirectly affects the rights of parties; there is some doubt or difference of opinion on the issues raised and that the issue is capable of generating different interpretations. If, however the question has been well settled by the highest court or the general principles to be applied in determining the question before court have been well-settled, the mere application of those principles to a new set of facts presented in a case before the court would not on their own constitute a substantial question of law. There must be the possibility of the matter attracting different interpretations or opinion in its interpretation or application of the principles espoused in the matter to make it a substantial question of law. All this notwithstanding, it is up to the individual judge to decide whether the matter raises a substantial question of law for purposes of reference."

25. The Court of Appeal in Okiya Omtatah Okoiti & Another vs Anne Waiguru - Cabinet Secretary, Devolution and Planning and 3 Others (2017) eKLR set out the principles to be applied when considering such applications. The Court opined as follows:

> " 42. There are, in our view, parallels to be drawn between certification for purposes Article 163(4)(b) of the Constitution and certification for purposes of Article 165(4) notwithstanding that the drafters of the Constitution, in providing for certification of matters for purposes of appeal to the Supreme Court under Article 163(4)(b) stipulated that a matter should be of "general public importance", The word, "substantial" in its ordinary meaning, means "of considerable importance". There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4)(b). In Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:
>
> "(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
>
> (ii) The applicant must show that there is a state of uncertainty in the law;
>
> (iii) The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the Constitution;
>
> (vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought."
>
> 43. It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of Article 165(4) of the Constitution is a matter for determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed."

26. The questions that this Court needs to resolve therefore is whether the applicant has satisfied this Court that this matter raises substantial questions of law to be certified as such and be referred to the Chief Justice for the empanelment of an uneven number of Judges to hear and determine the Petition.

27. I have very carefully examined and weighed all the 13 questions (a to m) that the Petitioner/Applicant summarized as being demonstrative of the substantial issues that define his Petition and hence the need to certify the same to the Honourable Chief Justice for the empanelment of a bench.

28. For instance, one of the issues he described as raising a new issue is "...whether the motion or pleadings in Court that are initiated/registered in Kiswahili language should be directed and transcribed in Kiswahili language only or will they involve use of the English language as well and be interpreted...".

29. Others are, whether Kiswahili should be the language of the Court all the way from the Lower Court to the Supreme Court, whether legislation including subsidiary legislation should be drafted in Swahili to guide judicial proceedings, whether the Chief Justice published rules for on-line Court proceedings without undertaking public participation, whether an online proceedings are conducted within the context and the meaning of the Court as defined by the Constitution, whether the online Court rules are an affront to the provisions of Section 63 A (2) of the Evidence Act and Section 11 of the Statutory Instruments Act, whether the Chief Justice violated Section 6 of the Statutory Instruments Act, whether the Chief Justice is in violation of Article 231 (2) of the Constitution for barring cash payment and adopting on-line or cashless payment. These matters, in brief summarize the Petitioners concerns in this Application that seeks certification to the Chief Justice for empanelment of a bench.

30. With due respect and guided by the precedents referred to in the foregoing as to as what amounts to a substantial question of law, it is my considered view that the issues raised herein are not complex, novel or weighty. I am not persuaded that any of the issues identified would necessitate a referral of this Petition to the Chief Justice for empanelment of a bench. The Petitioner's application under Article 165(4) of the Constitution is thus declined and dismissed.

Utangulizi

1. Kwa Notisi ya Ombi la Hoja la tarehe 27 Machi 2024, Mlalamishi hapa anaomba maagizo kwamba:

    a) Hoja hii ithibitishwe kuwa ya dharura, jinsi uharaka wake umedhihirishwa, na isikilizwe mara ya kwanza kabla washiriki Walalamikiwa kusambazwa stakabadhi za Maombi.

    b) Mahakama Tukufu iwe radhi kuthibitisha kwamba Ombi lake Mwombaji linaibua masuala mazito na mapya ya kisheria na yaliyomo chini ya Katiba, na kwa dharura kuwasilisha Ombi hili kwake. Hakimu Mkuu wa Kenya kwa uteuzi wa Hakimu ya idadi isiyo sawa, wasiopungua watatu (3) hususan ambao wana ujuzi wa lugha ya Kiswahili.

    c) Gharama za Hoja hii ziwe chini ya Ombi Ike Mwombaji.

Kesi ya mwombaji

2. Maombi yanaungwa mkono na hati ya kiapo ya Mlalamishi ya tarehe na misingi hata iliyowekwa kwenye Ombi la Mwombaji.

3. Kwa mujibu wa Mwombaji, Ombi linataka matumizi ya lugha ya Kiswahili katika uendeshaji wa mashauri mahakamani kama kuwezesha upatikanaji wa haki na utekelezaji wa haki za kikatiba hivyo kuibua maswali makubwa ya sheria. Mwombaji anabainisha maswali muhimu kama ifuatavyo:

    a) kuhusu matumizi ya Lugha ya Kiswahili kama Lugha ya Taifa katika wigo wa Mashauri ya Kimahakama kutoka Mahakama ya Chini hadi Mahakama ya Juu chini ya Ibara ya 7 ya Katiba ya Kenya, ambalo ni suala halijawahi kuibuka wala kutatuliwa hapo awali;

    b) Ombi hili pia linaibua suala la jipya la iwapo Hoja au Tetesi Mahakamani zinazoanzishwa/sajiliwa kwa lugha ya Kiswahili zinapaswa kuelekezwa na kunakiliwa katika lugha ya Kiswahili pekee, au zitahusisha lugha ya Kiingereza pia na kutafsriwa;

    c) Pamoja na suala taji ni kuhusu suluhu Mwombaji ameomba, ikiwa ni pamoja na utunzi wa Sheria Ndogo/tanzu katika lugha ya Kiswahili iii kiongozi na kuainisha michakato ya Kimahakama katika lugha ya Kiswahili kama sera rasmi na kukihusisha Chama Cha WanaSheria wa Kenya kutimiza tegemeo lao. Ibara ya 7 ya Katiba iii kuwahusisha Wakili wote nchini Kenya katika mafunzo ya uendelezaji wa Lugha ya Kiswahili;

d) Tena, suala jipya ni suluhu zinazoangaziwa na Mwombaji, ikiwa ni pamoja na kutunga sheria tanzu katika lugha ya Kiswahili ili kiongozi na kuainisha michakato ya Kimahakama katika lugha ya Kiswahili kwa Mahakama ya Upeo, manake tofauti na Kuu na Mahakama ya Rufaa, Mahakama. ya Upeo haina Sheria Kuu inayoidhinisha utumizi wa lugha ya Kiswahili;

e) Ombi pia linaangazia suala la Mlalamikiwa wa Pili Mhe. Hakimu Mkuu akifunga moja kwa moja wa huduma za Mahakama za ana kwa ana kupitia Sheria Ndogo zake zilizoidhinishwa bila maagizo ya utenzi wa Sheria Ndogo na akaelekeza mashauri ya Mtandaoni bila ushiriki wa umma, ambalo ni suala jipya;

f) Aidha, Suala shikamana na lililotajwa ni ikiwa hakika Vyumba vya Mawakili, Magari (ya hakika na ya abiria), vivhovhoro na kando ya barabara, na hata makazi ya watu binafsi ambapo vikao vya Mahakama vya mtandaoni kupitia maagizo ya Mhe. Hakimu Mkuu yaliyopingwa katika Ombi lake Mwombaji kuhusu mashauri na Sheria Ndogo za Mahakama ya mtandaoni, yanajumuisha matakwa ya Kikatiba kwamba hoja na Tetesi Mahakamani zisikilizwe "... Mahakama iliyoanzishwa chini ya [Katiba]" ndani ya dhamira ya Ibara ya 50(2)(d) ya Katiba ya Kenya, na lengo lake kwa ujumla.

g) Ni wazi kwamba Sheria Ndogo za kutoa huduma za Mahakama kupitia mtandao jinsi Hoja yake Mwombaji imetaja zitatarajiwa zitabuniwa chini ya Kifungu cha 63A(2) cha Sheria ya Ushahidi (Evidence Act), hivyo Mwombaji ameomba shoka la Kifungu cha 11 (4) katika Sheria ya Hati za Kisheria (Statutory Instruments Act), liangukie na kukata hadi mizizi ya Maagizo yake Mhe. Hakimu Mkuu, kwani ni batili, na hazipaswi kutekelezwa na Mahakama au mKenya yeyote nchini Kenya.

h) Zaidi ya hayo, Mhe. Hakimu Mkuu amekiuka Kifungu cha 6 cha Sheria ya Hati za Kisheria (Statutory Instruments Act), na ni dhahiri, Mhe. Hakimu Mkuu hakutekeleza masharti ya Kifungu tajwa cha Sheria ya Hati za Kisheria (Statutory Instruments Act), manake alikiuka na kulipuuza agizo hilo na kushinikiza Maagizo yake tajwa kufuatiliwa kwa udikteta, hadi leo.

i) Mhe. Hakimu Mkuu amekiuka Katiba ya Kenya kwa kujikasimu kiholela lililokabidhiwa Benki Kuu ya Kenya chini ya Ibara 231 (2) ya Katiba ya Kenya analazimisha Sera ya ulipiaji kwa njia ya huduma za Mahakama (kupitia mtandao pekee), na kiholela bila idhini amepiga malipo. ya fedha taslimu kulipia huduma za Mahakama

j) Kwa mujibu wa Ibara ya 231 (2) ya Katiba ya Kenya, Benki Kuu ya Kenya ndiyo pekee iliyokabidhiwa mamlaka ya kuunda Sera ya fedha ya Kenya.

k. Hadi sasa, Sera ya Fedha nchini Kenya ya utumizi wa pesa haijaharamisha matumizi ya pesa taslimu kama aina ya fedha inayotambulika rasmi kulipia huduma zote nchini,(kama vile Huduma za Mahakama).

l) Sera hizi (pamoja na Sera tajwa katika Kifungu cha a nab juu) hazikuwa na mashauriano yoyote na wadau wowote nchini Kenya, kinyume na ilivyoainiwa katika Ibara ya 232(1)(d) ya Katiba ya Kenya; Sera inayoelekeza ni lazima waKenya wahusishwe katika mchakato wa kuunda Sera yoyote nchini

m) Haya yote Mhe. Hakimu Mkuu ametenda ni kinyume na Ibara ya 201 (d) ya Katiba ya Jamhuri ya Kenya Hivyo, Mahakama Kuu imekabidhi jukumu la kuilinda Katiba ya Kenya ambayo Mhe. Hakimu Mkuu amekiuka kupitia maagizo yake tajwa, jinsi Maombi yaliyomo katika Hoja yametaja.

4. Kutokana na hili, Mwombaji anadai, kwamba Ombi linawasilisha maswali mazito na makubwa ya sheria yenye umuhimu kwa umma. Kwa sababu hiyo na maslahi makubwa ya umma ndani yake, Mwombaji ana hakika kwamba maombi yake yana uhalali na hivyo anaitaka Mahakama kuruhusu.

Kesi ya walalamikiwa wa 1, 3 na 7

5. Kwa kujibu maombi hayo, Wajibu hawa waliwasilisha sababu za upinzani za tarehe 16 Aprili 2024 kwa msingi kwamba:

    i. Mahakama hii, kama ilivyoundwa sasa, imepewa mamlaka isiyo na kikomo ya kuamua swali kama haki au uhuru wa kimsingi katika Sheria ya Haki imenyimwa, imekiukwa, imekiukwa au kutishiwa na mamlaka ya kusikiliza swali lolote kuhusu tafsiri ya Katiba hii.

    ii. Kwa mujibu wa Ibara ya 165(4) ya Katiba, Maombi hayaonyeshi swali lolote muhimu au jipya la sheria, au suala la umuhimu kwa umma, linaloweza kupelekwa kwa Jaji Mkuu kwa katiba kushughulikia suala la idadi isiyo sawa ya majaji kusikiliza na kuamua masuala haya.

    iii. Uamuzi wa jopo la Majaji watatu una nguvu sawa na ule wa jaji mmoja mwenye mamlaka sawa.

    iv. Kifungu cha 163 (3) cha Katiba kinatoa haki ya kukata rufaa hadi kwenye Mahakama ya Juu, mahakama ambayo maamuzi yake ni ya lazima kwa mahakama nyingine zote za nchi.

    v. Masuala changamano ya ukweli na/au sheria, kama yapo, katika ombi la papo hapo, si lazima yafafanue masuala makubwa ya sheria kwa ajili ya kushughulikia idadi isiyo sawa ya majaji kusikiliza na kuamua masuala.

    vi. Ombo hili linahatarisha Kifungu cha 159(2) (b) cha Katiba kwamba haki haitacheleweshwa, na busara ya kutumia rasilimali za mahakama.

    vii. Maombi ni mawazo ya baadaye na mbinu ya kucheleweshe kusikilizwa na uamuzi wa Ombi. Ombi hilo limeendelea kwa kiasi kikubwa mbele ya jaji mmoja na mahakama ilitoa maagizo madhubuti kwamba baada ya kuwasilisha na kuwasilisha mawasilisho na wahusika wote, mawasilisho yataangaziwa tarehe 22 Mei, 2024.

Kesi ya walalamikiwa 2, 4, 5 na 6 na wahusika

6. Wajibu wa 2, 4, 5 na 6 hawakuwasilisha majibu yoyote kwa maombi au mawasilisho.

Mawasilisho ya Mwombaji

7. Mnamo tarehe 19 Januari 2024, J.Harrison Kinyanjui na Mawakili wa Kampuni hiyo waliwasilisha mawasilisho kwa maandishi mahakamani.

8. Kwa kuanzia, mwanasheria alidai kuwa mwombaji anadai kuwa Mhe. Jaji Mkuu amekiuka kanuni za Katiba kwani lugha ya Kiswahili haitumiki kamwe kuwahudumia Wakenya katika utoaji wa huduma za Mahakama ingawa Kifungu cha 7(1) cha Katiba ya Kenya kinabainisha kuwa Kiswahili ni lugha ya taifa. Aidha, ilitolewa hoja kwamba hakukuwa na kanuni halali ambazo zilipitishwa na Mhe. Jaji Mkuu 2016.

9. Kwa sababu hiyo, wakili huyo alisisitiza kuwa ni dhahiri kwamba masuala yaliyowasilishwa katika ombi la mwombaji ni mapya, na hakuna pingamizi kwamba hayajashughulikiwa hapo awali na Mahakama Kuu hivyo basi hoja hiyo ni ya msingi. Kifungu cha 165(4) cha Katiba ya Kenya.

10. Utegemzi uliwekwa kwenye kesi ya Del Monte Kenya Limited v County Government of Murang'a & others 2 (2016) eKLR ambapo mahakama kuu ilisema hivi:

> " Kama Ombi linaibua au kushughulikia suala lenye umuhimu kwa umma, basi mizani inapendelea zaidi uteuzi wa Jaji, hasa ikiwa ni suala, uamuzi unaoweza kuathiri haki za pande zote mbili, iwe ni watu binafsi. au Umma kwa ujumla au ni suala ambalo bado halijaamuliwa na kutatuliwa na mahakama hii au mahakama ya juu katika ngazi za juu."

11. Utegemezi kama huo pia uliwekwa kwenye kesi ya Kalpana H Rawal dhidi ya Tume ya Huduma ya Mahakama & Wengine 3 (2015)eKLR na Eric Gitari v Mwanasheria Mkuu wa Serikali & mwingine (2016) eKLR.

12. Wakili huyo pia alisisitiza kuwa kesi ya mleta maombi inaletwa kwa maslahi ya umma. Hii ni kwa sababu kuna haja kubwa ya umma nchini Kenya kwa matumizi ya lugha ya Kiswahili katika kesi za mahakama na mahakama kwa ujumla. Utegemezi uliwekwa kwenye kesi ya MAK & another v Board of Directors Oshwal Academy Ltd & others 2; Tume ya Kitaifa ya Jinsia na Usawa na wengine 2 (Wahusika) (2020) eKLR ambapo Mahakama kuu ilisema hivi:

> " 24. Kwa maoni yangu... Ombi hili kwa hakika linaibua swali zito la sheria litakalohitaji tafsiri ya ibara mbalimbali za katiba. Pia imebainika kuwa matokeo ya ombi hili yataathiri sekta nzima ya elimu na hivyo ndivyo ilivyo. jambo lenye maslahi makubwa kwa umma."

13. Kwa kumalizia, wakili huyo alidai kuwa mwombaji katika Ombi la Katiba ameibua masuala mazito na mapya ya sheria na Katiba na hivyo amekidhi matakwa ya Mahakama hii kuridhia ombi la Mleta maombi katika Notisi ya Hoja. Kesi ya Martin Nyaga na wengine dhidi ya Spika wa Bunge la Kaunti ya Embu na wengine 4 (2014) eKLR, ilitegemewa na mwombaji.

Mawasilisho ya walalamikiwa wa 1, 3 na 7

14. Wakili wa Serikali Gracie M. Mutindi katika mawasilisho ya tarehe 16 Aprili 2024, aliwasilisha kwamba swali kubwa la sheria kwa kuzingatia Kifungu cha 165(4) cha Katiba ingawa halijafafanuliwa lilijadiliwa katika Dhamana ya Uhamasishaji wa Utetezi wa Jamii na Wengine dhidi ya Mwanasheria Mkuu wa Serikali. & Others (2012)eKLR kama ifuatavyo:

> " Inaachwa kwa jaji mmoja mmoja kujiridhisha kuwa suala hilo ni kubwa kiasi kwamba inamtaka Jaji Mkuu kuteua idadi isiyo sawa ya majaji wasiopungua watatu ili kuamua suala hilo."

15. Hata hivyo iliwasilishwa kwamba utekelezaji wa uamuzi huu lazima uzingatie vipengele vingi kama ilivyobainishwa katika wingi wa kesi. Kwa mfano katika Wycliff Ambetsa Oparanya & Wengine 2 dhidi ya Mkurugenzi wa Mashtaka ya Umma 7 Anor (2016)eKLR Mahakama ilitoa maoni kama ifuatavyo:

> " ...Kama ilivyowahi kufanywa na mahakama hii hapo awali, uamuzi wa kuhusisha au kutojumuisha jopo la zaidi ya majaji mmoja unapaswa kufanywa pale tu inapobidi kabisa na kwa kufuata kikamilifu masharti ya kikatiba na kisheria. Licha ya hatua kubwa zilizopigwa katika upanuzi wa mahakama katika siku za hivi majuzi, bila shaka kuna mengi zaidi ya kufanywa kuhusiana na kufikia ari ya Kifungu cha 48 cha Katiba kuhusu upatikanaji wa haki. Kwa hivyo, nchi hii bado inafurahia anasa ya kutoa maagizo kama haya kwa matakwa ya vyama. Rasilimali za kimahakama kwa upande wa maafisa wa mahakama nchini bado

ni adimu sana na ingawa muda unaotumika kusikiliza ombi la jaji mmoja unaweza usiwe tofauti na ule uliochukuliwa na benchi iliyounganishwa kwa mujibu wa Ibara ya 165 (4) ya Katiba. ni lazima ithaminiwe kwamba kuunganishwa kwa benchi kama hiyo mara kwa mara kunasababisha ucheleweshaji wa kuamua kesi ambazo tayari ziko kwenye foleni na hivyo kuzidisha mzozo wa nyuma katika nchi hii..."

16. Utegemezi kama huo uliwekwa katika J. Harrison Kinyanjui V Mwanasheria Mkuu wa Serikali & Mwingine [2012] eKLR.

17. Kwa sababu hiyo, Wakili aliitaka Mahakama kuzingatia kigezo kilichowekwa katika kesi ya Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314 na Santosh Hazari dhidi ya Purushottam Tiwari (2001) 3 SCC 179 na Mahakama Kuu ya India kama ifuatavyo:

> " a) iwe, moja kwa moja au kwa njia isiyo ya moja kwa moja, inaathiri haki kubwa za wahusika.
>
> b) kama swali ni la umuhimu kwa umma.
>
> c) iwapo ni swali la wazi, kwa maana kwamba suala hilo halijatatuliwa kwa tangazo la Mahakama ya Juu zaidi au Baraza la Faragha au na Mahakama ya Shirikisho.
>
> d) suala sio huru kutokana na ugumu.
>
> e) Inahitaji mjadala kwa ajili ya mtazamo mbadala."

18. Kwa maoni ya wakili, haitoshi kwa Mleta maombi kudai kwamba haki zake na uhuru wake wa kimsingi umenyimwa au kutishiwa au kwamba ombi lake linaibua masuala ya tafsiri ya Katiba. Hii ni kwa vile idadi kubwa ya kesi tayari zimejibu maswali kama hayo. Kwa hivyo, Wakili alidai kuwa ni Mleta maombi ambaye alikuwa na jukumu la kuthibitisha kwa kweli kwamba suala kubwa la sheria lipo katika kesi yake. Katika suala hili, Wakili aliwasilisha kwamba mzigo huu haukutekelezwa.

19. Vilevile, Wakili alidai kuwa ingawa Mlalamishi anadai kwamba Ombi hilo linaleta umuhimu kwa umma, ombi hilo halistahili kuwa hivyo. Alitegeme uamuzi uliowekwa katika Serikali ya Kaunti ya Meru dhidi ya Tume ya Maadili na Kupambana na Ufisadi katika Mahakama ya Milimani Ombi nambari 177 la 2014 ilioamua kama ifuatavyo:

> "... Kutolewa kwa cheti chini ya Ibara ya 165(4) ya Katiba ni ubaguzi badala ya kanuni. Vifungu vingi vya Katiba yetu havijajaribiwa na vinaleta maswala mapya lakini sio kila siku tunamtaka Jaji Mkuu kuunga mkono benchi la majaji wasiopungua watatu. Maslahi ya umma yanaweza kuzingatiwa lakini si lazima yawe sababu ya kuamua. Ni katika hali ya maombi yaliyowasilishwa ili kutekeleza masharti ya Katiba kuwa masuala ya maslahi ya umma kwa ujumla. Mahakama inapaswa kuzingatia masharti mengine ya Katiba, haja ya kutoa haki bila kukawia kwa kuzingatia mada na fursa..."

20. Kwa ajili hiyo, Wakili aliitaka Mahakama kuona kwamba Ombi hilo haliibui maswali yoyote ya msingi ya kisheria ili kuthibitisha matumizi ya Ibara ya 165(4) ya Katiba.

Uchambuzi na Uamuzi

21. Kwa maoni yangu, maombi haya yanaleta mbele suala moja, nalo ni:

> Ikiwa Ombi la tarehe 31 Machi 2023 lilokebishwa baadaye tarehe 21 Julai 2023 linaibua maswali makubwa ya uidhinishaji wa kisheria ndio liweze kutumwa mbele yake Jaji Mkuu kwa ajili ya kuidhisha benchi ya Majaji isiyo na usawa kusililza na kuamua.

22. Mwongozo wa jumla wa Mahakama kuzingatia katika kuamua iwapo inapaswa kumwidhinisha Jaji Mkuu kwa kuwateua jopo la majaji upo katika ibara ya 165(4) ya Katiba inayoeleza:

> Suala lolote lililothibitishwa na mahakama kuwa linaibua swali kubwa la sheria chini ya ibara ya (3) (b) au (d) litasikilizwa na idadi isiyo sawa ya majaji, wasiopungua watatu, watakaoteuliwa na Jaji Mkuu.

Kifungu cha 165 (3) (b) au (d) cha Katiba kinaelezea kama ifuatavyo:

163 (3) Kwa kuzingatia ibara ya (5), Mahakama Kuu itakuwa na-

a. mamlaka ya kuamua swali kama haki au uhuru wa kimsingi katika Mswada wa Haki umenyimwa, umekiukwa, umekiukwa au kutishiwa;

b. .....

c. mamlaka ya kusikiliza swali lolote kuhusu tafsiri ya Katiba hii ikiwa ni pamoja na uamuzi wa--

(i) swali kama sheria yoyote haiwiani na au inakiuka Katiba hii;

(ii) swali iwapo jambo lolote linalosemwa kufanywa chini ya mamlaka ya Katiba hii au sheria yoyote ni kinyume na, au kukiuka, Katiba hii;

(iii) jambo lolote linalohusiana na mamlaka ya kikatiba ya vyombo vya Serikali kuhusiana na serikali za kaunti na jambo lolote linalohusiana na uhusiano wa kikatiba kati ya ngazi za serikali; na

(iv) swali linalohusiana na mgongano wa sheria chini ya Kifungu cha 191; na

(e) .....

23. Katiba hata hivyo iko kimya kuhusu maana ya 'suala kubwa la sheria' lakini mawakili waliweza kulizungumzia suala hili katika mawasilisho waliyoyatoa mbele ya Mahakama. Mahakama zimetoa maana kwa kifungu hiki neno hiki kama inavyothibitishwa na mifano mingi ya kesi zilizofika mbele ya mahakama. Katika kesi ya Harrison Kinyanjui (supra), Mahakama ilisema hivi:

> " 10. Jambo linaweza kuibua masuala tata ya sheria lakini hii haimaanishi kuwa jambo hilo ndilo linaloibua masuala makubwa ya sheria. Majaji mara kwa mara huhitajika kuamua masuala magumu lakini mtu hawezi kubisha kwamba ina maana kwamba kila suala ni lile linaloibua maswali makubwa ya sheria. Kwa hivyo, lazima kuwe na kitu zaidi kwa "swali kubwa" kuliko tu utata wa suala mbele ya mahakama. Inaweza kuwasilisha mambo ya kipekee ambayo hayajashughulikiwa kwa uwazi na vitangulizi vinavyodhibiti. Huenda pia ikahusisha maswali muhimu kuhusu upeo na maana ya maamuzi ya

mahakama za juu au matumizi ya kanuni zilizotatuliwa vizuri kwa mambo ya hakika ya kesi."

24. Vilevile, Mahakama katika kesi ya Philomena Mbete Mwilu dhidi ya Mkurugenzi wa Mashtaka na Wengine 4 (2018) eKLR ilisema:

> " 24. .....suala la sheria litakuwa swali kubwa la sheria ikiwa linaathiri moja kwa moja au kwa njia isiyo ya moja kwa moja haki za wahusika; kuna shaka au tofauti ya maoni juu ya masuala yaliyoibuliwa na kwamba suala hilo lina uwezo wa kutoa tafsiri tofauti. Iwapo, hata hivyo swali limetatuliwa vyema na mahakama ya juu zaidi au kanuni za jumla zitakazotumika katika kusuluhisha swali lililoko mahakamani zimetatuliwa vyema, matumizi ya kanuni hizo kwa kundi jipya la ukweli lililowasilishwa katika kesi mbele ya mahakama. mahakama haitakuwa na suala la kisheria peke yake. Lazima kuwe na uwezekano wa jambo hilo kuvutia tafsiri au maoni tofauti katika tafsiri yake au matumizi ya kanuni zinazopendekezwa katika suala hilo ili kulifanya kuwa suala kubwa la sheria. Pamoja na hayo yote, ni juu ya hakimu mmoja mmoja kuamua kama suala hilo linazua swali kubwa la sheria kwa madhumuni ya marejeleo."

25. Mahakama ya Rufaa katika Okiya Omtatah Okoiti & Another vs Anne Waiguru –Katibu wa Baraza la Mawaziri, Ugatuzi na Mipango na Wengine 3 (2017) eKLR iliweka kanuni za kutumika wakati wa kuzingatia maombi kama hayo.

26. Maswali ambayo Mahakama hii inatakiwa kutatua ni iwapo ombi hilo limeiridhisha Mahakama hii kwamba suala hili linaibua maswali makubwa ya kisheria ili kuthibitishwa hivyo na kupelekwa kwa Jaji Mkuu kwa ajili ya kujumuisha idadi isiyo sawa ya Majaji wa kusikiliza ombi hilo.

27. Nimechunguza na kupima kwa makini maswali yote 13 (a hadi m) ambayo Mwombaji aliyafupisha kama kielelezo cha masuala muhimu yanayofafanua Ombi hili na hivyo hitaji la kuthibitishwa sawa kwa Mheshimiwa Jaji Mkuu kwa ajili ya kujumuisha idadi isiyo sawa ya majaji.

28. Kwa mfano, mojawapo ya masuala ambayo Mwombaji anayaeleza kuwa yanaibua suala jipya ni "... ikiwa ni wakati ambapo hoja au mashauri yaliyowasilishwa Mahakamani yanayoanzishwa/kusajiliwa kwa lugha ya Kiswahili yaelekezwe na kunukuliwa kwa lugha ya Kiswahili pekee au iwapo yatahusika. matumizi ya lugha ya Kiingereza pia na kutafsiriwa..."

29. Nyingine ni pamoja na, iwapo Kiswahili kikubalike kuwa lugha ya Mahakama kutoka Mahakama ya Chini hadi Mahakama ya Juu, iwapo sheria ikiwa ni pamoja na sheria ndogo itungwe kwa Kiswahili ili itumike katika kesi za mahakama, iwapo Jaji Mkuu alichapisha kanuni za michakato ya Mahakama ya mtandaoni bila kushirikishwa kwa umma, iwapo kesi za mtandaoni zimo ndani ya muktadha na maana ya Mahakama kama inavyofafanuliwa Kikatiba; iwapo kanuni za Mahakama ya mtandaoni ni kinyume na masharti ya Kifungu cha 63 A (2) cha Sheria ya Ushahidi na Kifungu cha 11 cha Sheria ya Hati za Sheria, iwapo Jaji Mkuu alikiuka Kifungu cha 6 cha Sheria ya Hati za Sheria, iwapo Jaji Mkuu alikiuka Ibara ya 231 (2) ya Katiba kwa kuzuia malipo ya fedha taslimu na kuhimiza malipo kwa kutumia njia ya mtandao. Masuala haya, kwa ufupi, yanatoa muhtasari wa hoja zilizotolewa na Mwombaji katika kutaka nithibitishe suala hili kwa Jaji Mkuu kwa ajili ya kujumuisha idadi isiyo sawa ya majaji.

30. Kwa heshima inayostahili na kwa kuongozwa na kesi zilizoamuliwa hapo mbeleni, ni maoni yangu kwamba masuala yaliyotolewa hapa si tata, mapya au mazito. Kwa mfano, kuhusu suala la kushirikisha umma katika utunzi wa sheria, kuna wingi wa maamuzi ya mahakama, ikiwa ni pamoja na kutoka Mahakama ya Juu ambapo kanuni zinazotumika zimetatuliwa vya kutosha.

31. Nimeshawishika pia kwamba masuala haya yote yanaweza kutatuliwa bila ya ulazima wa kupeleka Ombi hili kwa Jaji Mkuu kwa ajili ya kusughulikiwa na idadi isiyo sawa ya majaji. Maombi ya Mwombaji chini ya Ibara ya 165(4) ya Katiba hivyo yamekataliwa na kutupiliwa mbali.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE, 2024.

UAMUZI HUU UMETOLEWA NAIROBI MNAMO TAREHE KUMI NA TATU JUNI, 2024.

L. N. MUGAMBI

JUDGE

JAJI WA MAHAKAMA KUU