



Katiba Institute (On its Own Behalf and on Behalf of all Individuals Arrested, Charged or Convicted of Robbery with Violence or Attempted Robbery With Violence Since 15th March, 2018) v Office of the Director of Public Prosecutions & 5 others; National Commission on Human Rights & 6 others (Interested Parties) (Petition E036 of 2024) [2024] KEHC 9417 (KLR) (Constitutional and Human Rights) (2 August 2024) (Ruling)

Neutral citation: [2024] KEHC 9417 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E036 OF 2024
LN MUGAMBI, J
AUGUST 2, 2024

BETWEEN

KATIBA INSTITUTE (ON ITS OWN BEHALF AND ON BEHALF OF ALL INDIVIDUALS ARRESTED, CHARGED OR CONVICTED OF ROBBERY WITH VIOLENCE OR ATTEMPTED ROBBERY WITH VIOLENCE SINCE 15TH MARCH, 2018) PETITIONER

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
JUDICIARY OF THE REPUBLIC OF KENYA 3RD RESPONDENT
PARLIAMENT 4TH RESPONDENT
NATIONAL COUNCIL ON ADMINISTRATION OF JUSTICE 5TH RESPONDENT
KENYA LAW REFORM COMMISSION 6TH RESPONDENT

AND

THE NATIONAL COMMISSION ON HUMAN RIGHTS . INTERESTED PARTY
KENYA PRISONS SERVICE INTERESTED PARTY
NATIONAL POLICE SERVICE INTERESTED PARTY
ALL INDIVIDUALS WHO FROM 15TH MARCH, 2018, HAVE BEEN A VICTIM OF A CRIME FOR WHICH AN ACCUSED HAS BEEN CHARGED



WITH ROBBERY WITH VIOLENCE OR ATTEMPTED ROBBERY WITH VIOLENCE INTERESTED PARTY
LAW SOCIETY OF KENYA INTERESTED PARTY
INTERNATION COMMISSION OF JURISTS – KENYA .. INTERESTED PARTY
KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY

RULING

1. By a notice of motion application dated 23rd May, 2024 filed under Certificate of Urgency of even date and supported by affidavit of Emily Kinama sworn on 23rd May, 2024; the Applicant/Petitioner seeks the following orders: -
 1. Spent
 2. An order that the court be pleased to certify the petition raises substantial questions of law warranting empanelment of an uneven bench of judge, (not less than three) to determine the matter under Article 165 (4) of the Constitution .
 3. Costs be in the cause. In the alternative, each party to bear their own costs considering the public interest in the litigation.

Background

2. The petitioner filed the present petition to challenge the continued arraignment and charging of suspects with Robbery with Violence under Section 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code yet a three Judge Bench in the case of Joseph Kaberia Kabinga & 11 Others v Attorney General HC Petition 618 of 2020 (2016) eKLR declared the said Section unconstitutional for ambiguity thus violating an accused’s right to a fair trial under Article 50(2) (b) of the Constitution . The decision was never appealed against.
3. The Petitioner/Applicant alleged that as at the time of filing the petition persons who have charged or detained on these provisions are in excess of over 10,000/-
4. The Petitioner stated that it has met the threshold for empanelment of a bench to hear the present petition based on the following reasons:
 - i. The respondents have violated or threaten to violate the rights and fundamental freedoms of more than 10,000/- people by charging, determining, trying, convicting or imprisoning them based on unconstitutional provisions.
 - ii. The continued use of unconstitutional provisions is a violation of rule of law principle under Article 10 and principle of legality under Article 50(2) (h).
 - iii. That the matters in issue are of general public importance, transcending the circumstances of a particular case and significantly bearing on public interest.
 - iv. The law is uncertain because Supreme Court has not settled these questions.
5. The Petitioner filed brief submissions in support of the empanelment application in which it contended that the test under Article 165(4) has been met in that the petition raises “Substantial



question of Law”. In demonstrating this assertion, the petitioner referred to and amplified the grounds relied upon in the application.

6. The petitioner relied on various authorities to argument its submission. The cases included *Harrison Kinyanjui v Attorney General* (Petition No. 74 of 2011 (2012) eKLR on the meaning of ‘substantial question of law’.
7. The Petitioner posited that the Supreme Court has not yet determined the matter conclusively hence the law cannot be said to have been settled with finality. The Petitioner relied on the case of *Okuya Omtatab & Another v Ann Waiguru, Cabinet Secretary Devolution & Planning & 3 others* (Civil Appeal No. 4 of 2015) 2017 eKLR, in which the Court of Appeal held that one of the requirements for certification is for the applicant to show there is a state of uncertainty in the law.
8. The Petitioner contended that it is imperative that the Supreme Court settles the matter with finality and clarify the remedies especially when a court finds a law to be unconstitutional but the said law continues to be applied as in this case, where there is violation of Article 50 of the *Constitution* which cannot be limited under Article 25 (c).

6th Interested Party’s Submissions on Empanelment

9. The 6th interested party supports the empanelment application. It submitted that the original subject matter was determined by a Three-Judge Bench.
10. Further, the provisions of law that the present petition is challenging their continued application relate to serious offences and the consequences that may result from the outcome of this petition might bear hugely on National Security and the General Administration of Justice across the entire country since it affects the fair trial rights of thousands of accused persons and the interests of millions of Kenyans.
11. The 6th Respondent thus submitted that the matters raised in the petition are matters of general public interest and should be taken as such by the court.
12. The 6th respondent relied on number of Judicial authorities – including *Republic v Public Service Commission & Keriako Tobiko ex parte Nelson Havi* (2017) eKLR, *Santosh Hazari v Purushottam Tiwari (Dead)* (2001) 35CC 179, *Wycliffe Ambetsa Oparanya & 2 Others v Director of Public Prosecution & Another* (2016) eKLR, *Esther Awour Adero v Cabinet Secretary, responsible for matters relating to Basic Education & 7 Others; Kenya Private Schools (KPSA) & 4 others (Interested Party)* (2021) eKLR and *John Kaberia Kabinga & 11 Others v Attorney General* (2016) eKLR.
13. The 1st interested party did not submit on the application for empanelment.
14. The 2nd respondent did not file submissions but Mr. Thande Kuria briefly made oral comments on 4th July, 2024 in regard to the empanelment application as follows:

“The foundation of the Petition was another bench matter *Joseph Kaberia Kahinga v Attorney General*, Order No. 5 was to the effect that if the respondents do not comply, petitioner were at liberty to apply for further orders of the court. The Attorney General Position is that file that it is still open and no party has activated Order No. 5...”

15. He then proceeds to state:

“We support the empanelment of Bench given the foundation of the matter was a bench...”



Analysis and Determination

16. There is only a single issue for determination, namely,
- “Whether or not this petition meets the legal threshold for certification to the Chief Justice for the empanelment of uneven number of Judges to hear and determine it.”
17. The threshold is set out in Article 165 (4) of the Constitution as follows:
- “Any matter certified as raising a substantial question of law under Clause 3(b) or (d) shall be heard by uneven number of Judges, not being less than three, assigned by the Chief Justice...”
18. The above article has two critical components or conditions that the court must be satisfied are present before allowing the matter for certification.
- i. The matter must be one that falls under Clause 3(b) or (d) of Article 165, and,
 - ii. The court must be satisfied that it raises a substantial question of law.
19. On the first limb, does the matter fall under Article 165(3) (b) or (d) of the Constitution ?
20. Looking at this petition, it is apparent that it emanates from another petition that was decided by a three Judge Bench, i.e. the Joseph Kaberia Kabinga & 11 Others v Attorney General (2016) eKLR in which the court was required to determine the constitutionality of Section 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code vis-a-vis Article 50(1) and 2 of the Constitution .
21. The court in that matter returned the verdict the said Sections were vague and did not meet the constitutional threshold that specifies that particulars of the offence be set out with sufficient detail and precision to enable the accused answer to the charges.
22. The court, however, suspended the declaration of unconstitutionality for 18 months to give a chance to the Attorney General and Kenya Law Reform Commission to amend the non-compliant statutory provisions to bring them into tandem with the Constitution .
23. According to the Petitioner, nothing was done to give effect to that judgment and to date, the Respondent continues to charge accused persons under these impugned provisions.
24. The question, therefore is, is this a matter that falls within Articles 165(3) (b) or (d)?
25. The said Article states:
- Article 165(3) subject to Clause (5) the High Court shall have:
- b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated or threatened.
 - d) Jurisdiction to hear any question respecting to interpretation of this Constitution including 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
26. In my view, the issue of constitutionality of impugned statutory provisions of the *Penal Code* is now a done deal. That was settled by the Three Judge Bench in Kahinga Case which has not been appealed at all hence the decision stands.
 27. The issue raised by this petition is the implication or the consequence of non-compliance with the decision in Kahinga case following the expiry of 18 months that the court had suspended to allow the Attorney General address the ambiguity in the said provisions through the initiation of the process of amendment.
 28. The Petitioner alleges that has neglected or refused to abide by the court decision which has resulted in continued violation of the rights of persons that continue to answer charge premised on the impugned Penal Code provisions.
 29. My view is that the issue raised falls under Article 165(3) (b), but is it a substantial matter of law that requires a three-judge bench to decide? That is the next issue.
 30. In *Wycliffe Oparanya & 2 Others v DPP & Another* (2016) eKLR, the court opined as follows: -

“Since the determination of such issue is a judicial one, the Court is obliged either on its own motion or on an application of the parties to cause to identify the issues which in its view raise substantial questions of law. Therefore the mere fact that parties are of the view that the matter falls under Article 165(4) does not necessarily bind the Court in issuing the said certification.”
 31. As to the meaning of the phrase, “Substantial Question of Law” the *Constitution* has not given any definition. However, courts have pronounced themselves in various precedents. In the celebrated Indian Case of *Sir Chunilal Mehta and Sons, Ltd v The Century Spinning And Manufacturing* (1962) SC 1314 the court stated:

“A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which has not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the highest court or general principles to be applied in determining the questions are well settled and that there is a mere question of applying those principles or that the plea raised is probably absurd, the question would not be substantial....”
 32. Applying the above reasoning to the present set of facts, it is apparent that a three-judge bench determined the issue of constitutionality of Section 295, 296(1), 296(2), 297(1) and 297(2) of the *Penal Code* and found the Sections wanting for ambiguity. This petition has been filed primarily because the Judgment has not been complied with by the Respondents. In other words, “the primary question was settled, what remains is enforcement/application of the principles in that judgment”
 33. This in my view, and with all due respect, does not amount to substantial question of law.



34. My position is buttressed by the decision of *Philomena Mbete Mwilu v Director of Public Prosecution & 4 Others* (2018) eKLR where the court held:

“... if, however, the question has been well settled by the highest court or the general principles to be applied in determining the question before the court have been well settled, the mere application of these principles to a new set of facts presented in a case presented before the court would not on their own constitute a substantial question of law....”

35. It is the position of this Court that this petition is all about the implementation of Kahinga Judgment following the alleged inaction by the Respondents to act as directed in the Judgment. That by any means is not a substantial question of law. It is a question of addressing the omission and the resultant consequences of that have continued as a result of that failure.

36. The Petitioner’s application for empanelment is thus declined. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF AUGUST, 2024.

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L N MUGAMBI

JUDGE

