



**Mwangi v Attorney General & 2 others; Independent Policing
Oversight Authority & 6 others (Interested Parties) (Petition
E262 of 2023) [2024] KEHC 10524 (KLR) (3 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
PETITION E262 OF 2023
LN MUGAMBI, J
SEPTEMBER 3, 2024**

BETWEEN

BONIFACE MWANGI PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

**CABINET SECRETARY, MINISTRY OF INTERIOR & CO-ORDINATION OF
NATIONAL GOVERNMENT 3RD RESPONDENT**

AND

**INDEPENDENT POLICING OVERSIGHT AUTHORITY INTERESTED
PARTY**

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS INTERESTED
PARTY**

KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY

DEFENDERS COALITION INTERESTED PARTY

KATIBA INSTITUTE INTERESTED PARTY

KENYA UNION OF JOURNALISTS INTERESTED PARTY

AZIMIO LA UMOJA ONE KENYA ALLIANCE INTERESTED PARTY



RULING

Introduction

1. By a Notice of Motion application dated 18th July 2023, the Petitioner herein seeks orders that:
 - i. Spent.
 - ii. The Court be pleased to certify the instant Petition as raising substantial questions of law under Article 165 sub-clause (3) (b) and (d) of *the Constitution* and to transfer the file to the Chief Justice for empanelment of a bench of an uneven number of Judges to hear and determine the same.
 - iii. Pending the hearing and determination of this application an Order be issued summoning the Inspector-General of the Police and the official convener of the Azimio la Umoja One Kenya Coalition protests, the Hon. Wycliffe Ambetsa Oparanya, to this Court for purposes of accounting to the Court the cause of the impasse in order that it may give appropriate directions in keeping with its authority under Article 159(2)(c) of *the Constitution* and the right to assembly under Article 37 of *the Constitution*.
 - iv. Pending the hearing and determination of the Petition herein an Order be issued summoning the Inspector-General of the Police and the official convener of the Azimio la Umoja One Kenya Coalition protests, the Hon. Wycliffe Ambetsa Oparanya, to this Court for purposes of accounting to the Court the cause of the impasse in order that it may give appropriate directions in keeping with its authority under Article 159(2)(c) of *the Constitution* and the right to assembly under Article 37 of *the Constitution*.
 - v. Any other Order that the Court deems fit and just.
 - vi. The costs of this application be provided for.
2. During the Court proceedings, the Petitioner informed the Court that it had abandoned Prayers 3 and 4 in the application for the reason that they had been overtaken by events. As a result, the Petitioner only seeks to proceed with Prayer 2 herein above.

Petitioner's Case

3. The application is supported by the Petitioner's affidavit of even date and grounds on the face of the application.
4. According to the Petitioner, the Petition which broadly seeks to address the right to assembly, demonstrate, picket and petition under Article 37 of *the Constitution* on one hand and police power in administration of such protests on the other hand, raises a number of substantial questions of law that require the Court's determination. He sets out these issues as follows:
 - a. What is the role of the President of the Republic of Kenya vis-à-vis that of the Inspector-General of the Police in matters internal security.
 - b. The delineation of the roles of the Cabinet Secretary for Interior and Coordination of National Government vis-à-vis that of the Inspector-General of the Police in critical matters of internal security.



- c. Where, amongst the aforementioned offices does the buck stop in terms of deep internal security crises.
 - d. Whether or not there has been a systematic and unjustifiable limitation by the State on Kenyans' right to assembly, demonstration, picketing and petition under Article 37 of the Constitution;
 - e. Who, between the National Police Service and the demonstrators bears the biggest responsibility for safety and peace during demonstrations and assemblies.
 - f. Whether the National Police Service Act and the National Police Service Standing Order and its operational manuals as enacted are effectively checking on the perpetual vice of the excessive use of force by the Police.
5. He asserts in view of this, that the matters raised in the Petition present weighty and substantial questions of law that Wanjiku grapples with. This is with reference to their ability to live a life of dignity and safety in Kenya. For that reason and the great public interest therein, the Petitioner is certain that his application is justified and thus should be allowed.

1st Respondent's Case

6. In response, the 1st Respondent in opposition to both the Petition and application filed grounds of opposition dated 14th September 2023 on the premise that:
- i. The Petitioner's Petition on declarations on Section 5 of the Public Order Act is frivolous and abuse of the process of court by dint of the principle of Res Judicata since was dealt with in Nairobi Civil Appeal No. 261 of 2018 Haki na Sheria Initiative Vs. IG Police & 3 Others (2020) eKLR and Nairobi Civil Appeal No. 1 of 2015 Hussein Khalid & 16 Others Vs Attorney General & 2 Others (2017) eKLR.
 - ii. Article 24 (1)(d) of the Constitution is clear that certain rights or fundamental freedoms in the Bill of Rights may be limited to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.
 - iii. The Petitioner's allegation that there was no public participation in the enactment of the National Police Standing Orders, Legal Notice No. 100 of 2017 and its accompanying Operational Manual is a matter of fact that must be proved by adducing evidence.
 - iv. A declaration cannot be used to curtail or stop public officers from lawful exercise of power within their statutory mandates as stipulated under Chapter 14 of the Constitution (Article 240) and Section 4 of the National Security Council Act No 23 of 2012.
 - v. The application of the precautionary principle is not absolute and can be subject to exceptions based on the specific circumstances of each case as seen in Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others (2017) eKLR.
 - vi. The allegation by the Petitioner on the use of tear gas as a crowd control method lies bare, with no scientific evidence or findings to support the same.
 - vii. Seeking to direct the police on the methods for crowd control, would be a blatant infringement on the exercise of police independent professional discretion in the discharge of their duties contrary to the dictates of the Constitution.



- viii. The Petition is bad in law, mischievous, misconceived and made for selfish ulterior motives thus should be dismissed with costs to the Respondents.

2nd & 3rd Respondents' and Interested Parties Case

7. These parties did not file any response to the application.

Petitioner's Submissions

8. On 19th January 2024, Arende Oriri & Associates Advocates filed submissions in support of the application. Counsel relying in *Maina Kiai & 2 others vs Independent Electoral and Boundaries Commission & another* (2016) eKLR submitted that what constitutes a substantial question of law has not been defined in *the Constitution* hence it is left to the Judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice. As such the Court in *Okiya Omtatah Okoiti and another vs President Uhuru Muigai Kenyatta and 4 Others, Petition No. 531 of 2015* observed as follows:

“The different approaches taken by the High Court as shown above would make it clear that whether a substantive question of law arises under 165(4) is dependent on the circumstances of a particular case. Furthermore, that the list of relevant factors is not exhaustive and that the presence or absence of one is not necessarily decisive in a particular case. Ultimately, the presiding judge has to exercise his or her discretion on whether, on his or her appraisal of the factual and legal matrix, a substantial question of law arises.”

9. Similar reliance in this regard was placed in *Martin Nyaga and Others vs Speaker County Assembly of Embu and 4 Others and Amicus* (2014) eKLR.
10. Counsel in light of this argued that the Petition's effect is far reaching as seeks to cause changes to significant parts of our democratic system being: the conduct of the police and in particular regard to the lawful use of force and firearms; a sense of orderliness in the Republic in matters division of roles amongst key state offices in as far as matter internal security is concerned and to have a more peaceful, organized and least destructive culture of demonstrations, pickets, petitions and assemblies in the country. Consequently, Counsel emphasized that these pertinent issues warrant grant of the order sought in the instant application.

1st Respondent's Submissions

11. Counsel Jackline Kiramana in the submissions dated 18th October 2023, submitted that a substantial question of law in view of Article 165(4) of *the Constitution* was discussed in *J. Harrison Kinyanjui vs Attorney General & Another* (2012) eKLR as follows:

“*The Constitution* of Kenya does not define, „substantial question of law.# 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...Therefore, giving meaning to “substantial question” must take into account the provisions of *the Constitution* as a whole and need to dispense justice without delay particularly given a specific fact situation.”

12. These sentiments were also echoed in *Wycliff Ambetsa Oparanya & 2 Others vs Director of Public Prosecutions and 7 others* (2016) eKLR which was also cited in support.



13. Ms. Kiramana further submitted that the Supreme Court of India in *Chunilal vs. Mehta vs Century Spinning and Manufacturing Co.* AIR 1962 SC 1314 and *Santosh Hazari vs. Purushottam Tiwari* (2001) 3 SCC 179 in answering what a substantial question is set out the elements to be considered 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.”
14. Consequently, Ms. Kiramana submitted that the issues raised in the Petition are not novel and been dealt with extensively such as the question of constitutionality of a statute. Further she argued that although public interest can be considered as a substantial issue, the same is not a necessarily decisive factor in determining a substantial question of law as held in *County Government of Meru vs the Ethics and Anti-Corruption Commission Milimani Law Courts Petition No. 177 of 2014*. As a consequence, it is asserted that the Petitioner’s application has not met the threshold of a substantial question and hence does not require empanelment of an uneven Judge bench to be determined.

Analysis and Determination

15. The only issue that arises for determination is:
- Whether the Petition dated 18th July 2023 raises substantial questions of law meriting certification before the Chief Justice for the empanelment of an uneven Judge bench.
16. Article 165 (4) of *the Constitution* makes provision that serves as a general guide on matters concerning empanelment of a bench. It provides as follows:
- 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.
17. Article 165 (3) (b) or (d) of *the Constitution* which are mentioned in Article 165 (4) the ones that may possibly yield substantial issues that could call for composition of a bench and state as follows:
- (3) Subject to clause (5), the High Court shall have--
 - a.
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c.
 - d. 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)

18. As was ably submitted by the parties, the phrase ‘substantial question of law’ is not defined in *the Constitution*. Court have however given meaning to the same in various judicial precedents. In the case of Harrison Kinyanjui (supra) the Court opined as follows:

“ 8. Therefore, giving meaning to “substantial question” must take into account the provisions of *the Constitution* as a whole and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of *the Constitution*, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges.”

19. The Court went on to note that:

“ 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.”

20. Likewise, the Court in *Philomena Mbeti Mwilu vs Director of Public Prosecution & 4 Others (2018)* eKLR observed as follows:

“ 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.”

21. 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 an application. 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.”

22. I have looked at the issues raised by the Petitioner/Applicant which are: What is the role of the President of the Republic of Kenya vis-à-vis that of the Inspector-General of the Police in matters internal security; The delineation of the roles of the Cabinet Secretary for Interior and Coordination of National Government vis-à-vis that of the Inspector-General of the Police in critical matters of



internal security; Where, amongst the aforementioned offices does the buck stop in terms of deep internal security crises; Whether or not there has been a systematic and unjustifiable limitation by the State on Kenyans' right to assembly, demonstration, picketing and petition under Article 37 of the Constitution; Who, between the National Police Service and the demonstrators bears the biggest responsibility for safety and peace during demonstrations and assemblies; Whether the National Police Service Act and the National Police Service Standing Order and its operational manuals as enacted are effectively checking on the perpetual vice of the excessive use of force by the Police.

23. The role of the President of Kenya vis-à-vis the Inspector General of Police in matters of internal security cannot with all due respect be a complex issue for determination considering that the Constitution as well as the National Police Service Act has clearly delineated those responsibilities. This therefore is neither novel or a substantial question of law that should require the Chief Justice to empanel a bench to determine. The delineation of roles of the Cabinet Secretary for Interior and Coordination of National and the Inspector General, does not require 3 Judges to separate policy issues and operational mandate, matters that are spelt out in the Constitution and the enabling Statute. Where the buck stops in the midst of deep security crises, the Constitution has created National Security Organs and vested them with various mandates, I do not think take a whole three member bench of the High Court should be constituted to make that determination. As for who between the demonstrators and police bear greatest responsibility for safety and peace during demonstrations and assemblies; there is already a Constitutional standard on demonstrations, picketing and assemblies which I do not think will require the effort of three Judges to locate and restate. Finally, whether the National Police Service Act and the National Police Service Standing Order and its operational manuals as enacted are effectively checking on the perpetual vice of the excessive use of force by the Police. That means asking the Court to review the said standing orders to confirm if they are conformity with the Constitution. It is the responsibility of whoever is alleging non-conformity with the Constitution to demonstrate the unconstitutionality so that the Court can make a determination on the issue. This Court routinely exercises this jurisdiction as a single Judge and nothing has so far been demonstrated to be so unique in regard to the said standing orders to require empanelment a three Judge bench to undertake such a task.
24. With due respect and guided by the precedents already cited as to what constitutes a substantial question of law, it is my considered opinion that the issues raised herein are neither 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.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF SEPTEMBER, 2024

.....

L N MUGAMBI

JUDGE

