



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**PETITION NO. 65 OF 2017**

**IN THE MATTER OF: ARTICLES 258 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ARTICLE 23 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THREATENED CONTRAVENTION OF ARTICLES 3, 27**

**AND**

**43 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**NOAH MIKA ANGOYA.....PETITIONER**

**VERSUS**

**THE KENYA SECONDARY SCHOOLS**

**SPORTS ASSOCIATION (KSSSA).....1<sup>ST</sup> RESPONDENT**

**CHAIRMAN, KSSSA.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**The Petition**

1. By Amended Petition dated 4<sup>th</sup> October, 2018 the Petitioner prays for the following orders:

a. A declaration that clause 17 of the Kenya secondary schools Sports Association (KSSSA) is unconstitutional and repugnant to the *Grund Norm*.

b. An order from this Honourable Court directing that the Respondents strike off and remove the unconstitutional clause 17 from its constitution thereby allowing all students access to participate in all secondary school games of their choice.

c. Any other relief deemed expedient in the circumstances.

d. Costs be borne by the Respondents

2. The petition is supported by affidavit by the Petitioner sworn on 4<sup>th</sup> October, 2018.

3. The Petitioner brings the petition on his own behalf as a citizen of Kenya and on the behalf of his daughter, a student in secondary school. He has however, not named the said daughter.

4. The 1<sup>st</sup> Respondent is the Kenya Secondary School Sports Association herein after referred to as KSSSA. It is the umbrella body for all secondary school sports under the Ministry of Education mandated with organizing all sport related activities for secondary schools.

5. The 2<sup>nd</sup> Respondent is a duly elected official of the 2<sup>nd</sup> Respondent and compose the management arm of the 1<sup>st</sup> Respondent. The 3<sup>rd</sup> Respondent is the Attorney General of the Republic of Kenya. He is joined to this petition as the 3<sup>rd</sup> Respondent pursuant to the provisions of Article 156 of the Constitution of Kenya in his capacity as:

a) The legal advisor of the Government of the Republic of Kenya.

b) The person authorized by law to represent the Government in court pursuant to S. 12 of the Government Proceedings Act, Chapter 40, Laws of Kenya.

c) The Officer of Government under a duty to promote, protect and uphold the rule of law and the defender of public interest.

### **Historical Background**

6. The 1<sup>st</sup> Respondent has a constitution whose aims, objectives, membership and affiliation is as follows:

#### 1. Name

The name of this Association shall be The Kenya Secondary Schools Sports Association (KSSSA), here in after referred to as The Association.

#### 2. Aims and Objectives

(a) To promote and encourage games and sports within secondary schools in Kenya.

(b) To coordinate and organize all secondary schools sports activities in conjunction with Regional Secondary Schools Sports Association.

(c) To liaise, organize and execute all international sports competitions involving all secondary schools in Kenya through the approval and cooperation of the Ministry of Education, Science and Technology.

(d) To promote regional and international competitions involving secondary schools.

(e) To be responsible for maintenance of all international Rules and Procedures laid down by the respective International Associations/Federations covering all the games and sports undertaken in Kenya.

(f) To work under the overall supervision of the Directorate, Quality Assurance and Standards, Ministry of Education, Science and Technology and liaise with the Kenya Secondary Schools Heads Association.

(g) To identify, nurture and promote sporting talent in students and teachers.

(h) To raise funds and solicit for sponsorship for the achievements of the objectives stated above.

(i) To organize National Championships in sports.

(j) To promote National cohesion and integration.

(k) To empower Coaches, Referees and Officials through capacity building.

#### 3. Membership

All secondary schools in Kenya registered with the Ministry of Education, science and Technology are eligible for membership of this Association through affiliation with the regional branches.

#### 4. Affiliation

All secondary schools are affiliated to KSSSA through their Ward, Sub-County, County and Regional Secondary Schools Sports Associations. However, private secondary schools will have to pay an affiliation fee to their respective Sub-County/County Secondary Schools Sports Associations. The Regional bodies are directly affiliated to The Association. These regions are:

- a) Aberdares
- b) Metropolitan
- c) Mombasa
- d) Nakuru
- e) Northern
- f) Nzoia
- g) Lake
- h) Garissa

7. Section 11 of the Association regulates eligibility of participation, while Section 17 deals with situation where a participant would be banned from participation. See 17 Ban:

**“Reasons warranting a tem/player to be banned shall include:**

- (i) ...
- (ii) ...
- (iii) **Not meeting the age rule – 19 years and under”.**

8. This means that every team or player must be 19 years and under in order to participate in the activities of the Association of the 1<sup>st</sup> Respondent.

9. The Petitioner’s case is that the Respondents herein are *inter-alia* mandated to promote, encourage and regulate games and sports within secondary schools in Kenya. The 1<sup>st</sup> Respondent in undertaking its mandate, is guided by the constitution and any unanimous decisions made by the AGM as so constituted in the KSSSA constitution. The Petitioner states that the 1<sup>st</sup> Respondent in carrying out its regulatory role, has formulated rules and regulations to govern the various aspects in as far as Secondary School Sports and games are concerned. The Petitioner avers that the implication of clause 17 (iii) is that it essentially bars any student above the age of 19 from participating in games and/or sports organised by the KSSSA. By imposing that age limit, the Petitioner avers that the 1<sup>st</sup> Respondent fails to appreciate that though in the minority, some students begin their education at an advanced age for various reasons. Participation in school related activities does not only nurture positive attributes like discipline, but also a right that every student should freely enjoy by virtue of being a student. The Petitioner avers that every student has a right to education and sports consist part of education. Every student pays for sports as part of their school fees and hence every student is entitled to participate in any sport of their choice regardless of their age. Officials of KSSA, who include the 2<sup>nd</sup> Respondent are involved in making of the said rules that govern sports in Secondary schools in Kenya. The Petitioner avers that denying students above 19 years a chance to play is unconstitutional as the same amounts to discrimination on grounds of age.

10. The Petitioner provides the legal foundation of the petition and states that Article 2(4) of the Constitution of the Republic of Kenya provides among other things that any act or omission in **contravention of the Constitution is invalid. Article 12** provides that Every citizen is entitled to – (a) the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by the Constitution; **Article 10** sets out the National Values and Principles of governance that bind all state officers, state organs, public officers and all persons whenever they **apply or interpret the constitution, enact, apply or interpret any law, make or implement public policy decisions. Article 20 provides**

- (a) That The Bill of Rights applies to all law and binds all State organs and all persons.
- (b) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

11. The Petitioner pointed out to the Court that in applying a provision of the Bill of Rights, a court shall—

- (a) Develop the law to the extent that it does give effect to a right or fundamental freedom; and
- (b) Adopt the interpretation that most favors the enforcement of a right or fundamental freedom.

In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

- (a) The values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
- (b) The spirit, purport and objects of the Bill of Rights.

**Article 21 of the Constitution** provides materially that:

It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. **Article 23 of the Constitution of Kenya** provides The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. **Article 24** provides for a centralized limitation clause for the Bill of Rights and in particular it demands that a right or fundamental freedom in the Bill of Rights **shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors**, including—

- (a) The nature of the right or fundamental freedom;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

12. The Petitioner also referred to the following Articles of the constitution: 22(1), 25, 27, 47, 48, 50, 55, 258 and 259. These Articles uphold fundamental rights of a Petitioner against discrimination, unfair hearing and upholds due process of the law.

### **The Response**

13. The petition is not defended despite all the Respondents being served with the same. On 23<sup>rd</sup> July, 2018 this Court directed that the Attorney General be served with the petition. This was done, and the Attorney General through his Counsel Mr. Mkok appeared on 13<sup>th</sup> November, 2018 and sought the leave of Court to file a response and submissions to the petition. The said leave was granted and parties were to highlight submissions on 22<sup>nd</sup> January, 2019. On that day only M/S Kitoo learned counsel for the Petitioner was in Court. Mr. Mkok learned counsel for the Attorney General was not in Court. Neither had he filed submissions for the Attorney General. M/S Kitoo submitted that she relied on her submissions for the petition. The Court then reserved Judgment for 14<sup>th</sup> March, 2019. On that day the Judgment was not ready due to heavy workload of the Court, and a fresh date – 9<sup>th</sup> May, 2019 was reserved for Judgment.

### **The Determination**

13. I have considered the Amended Petition and submissions of M/S Kitoo learned counsel for the Petitioner. The issue I raise for determination is whether or not clause 17 (iii) of the Respondent's Constitution is unconstitutional.

12. Article 2(4) of the Constitution of the Republic of Kenya provides among other things that any act or omission in **contravention of the Constitution is invalid**. **Article 12 of the Constitution** provides that Every citizen is entitled to— (a) the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this Constitution; **Article 10 of The Constitution of Kenya** sets out the National Values and Principles of governance that bind all state officers, state organs, public officers and all persons whenever they **apply or interpret the constitution, enact, apply or interpret any law, make or implement public policy decisions**. **Article 20 of the Constitution** provides

- (c) That The Bill of Rights applies to all law and binds all State organs and all persons.
- (d) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

In applying a provision of the Bill of Rights, a court shall—

- (a) Develop the law to the extent that it does give effect to a right or fundamental freedom; and
- (b) Adopt the interpretation that most favors the enforcement of a right or fundamental freedom.

In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

- (a) The values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) The spirit, purport and objects of the Bill of Rights.

13. **Article 21 of the Constitution** provides materially that:

It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. **Article 23 of the Constitution of Kenya** provides The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. **Article 24** provides for a centralized limitation clause for the Bill of Rights and in particular it demands that a right or fundamental freedom in the Bill of Rights **shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors**, including—

- (a) The nature of the right or fundamental freedom;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose

14. Article 22(1) provides that every person has the **right to institute court proceedings claiming that a right or fundamental freedom in the Bill Of Rights has been denied, violated or infringed, or is threatened by-**

.....  
 .....  
 .....

**An association acting in the interests of one or more of its members**

Article 25 of the constitution of Kenya provides that.....” Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited...”(c) the right to a fair trial. **Article 27** of the Constitution of the Republic of Kenya provides for equality and freedom from discrimination and in particular provides that;

- a) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- b) .....
- c) The state shall not discriminate directly or indirectly against any person on any ground.....

**Article 47** of the Constitution guarantees every person a right to administrative action that is, among others, **lawful, reasonable and procedurally fair**. **Article 48** provides that, **The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice**. **Article 50(1)** of the Constitution provides that **Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body**. **Article 55** provides that **...The State shall take measures, including affirmative action programmes, to ensure that the youth.....**have opportunities to associate, be represented and participate in political, social, economic and other spheres of life; **Article 258 (1)** Every person has the right to institute court proceedings claiming that this constitution has been contravened, or is threatened with contravention.

- a) A person acting on behalf of another person who cannot act in their own name
- b) A person acting as a member of, or in the interest of a class of persons;
- c) A person acting in the public interest; or
- d) .....

Article 259 of the Constitution provides that the **Constitution must be interpreted** in a manner that promotes its purposes, values and principles; **advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance**

15. From the foregoing is it clear that the constitution of Kenya lays a very firm ground against any acts which may appear to be against the

constitution. The question to ask is this: A student who is in secondary school and who is over 19 years old, is he or she in that school lawfully? Is he or she entitled to secondary education? Is he or she entitled to participate in and enjoy both local and international sports competition? Does he or she pay for school fees which include sports activities? More paramount, is he or she an alien to the Constitution of Kenya such that he or she can be discriminated against by rules of the Association? Clearly, the answer must be in the negative. The above cited provisions of the constitution outlaw any discrimination in public bodies or institutions. The Respondents herein are managers of public institutions and are inter alia mandated to promote, encourage and regulate games and sports within secondary schools in Kenya. In carrying out that mandate they are guided by the Constitution of the Republic of Kenya. The Petitioner being aggrieved has rightfully come to this Court under Article 22 both to claim the novelty of that Article as a citizen of Kenya, and also for his daughter, and posterity. The Respondents cannot abrogate to themselves the arrogance of disobeying the Constitution of the Republic, which is the factual legal foundation of all their activities.

16. It is the finding of this Court that Section 17 (iii) of the 1<sup>st</sup> Respondent's Constitution breaches several articles of the Constitution of Kenya, is discriminatory, and falls short of the values established under the constitution, is unconstitutional and invalid and is hereby declared so.

17. Accordingly therefore the petition succeeds and orders are granted as prayed.

That is the Judgment of the Court.

**Dated, Signed and Delivered in Mombasa this 9<sup>th</sup> day of May, 2019.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Mr. Otieno holding brief Ms. Kitoo for Petitioner

Mr. Mkok holding brief Ms. Kiti for Attorney General

Mr. Kaunda Court Assistant