



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 327 OF 2019

IN THE MATTER OF RULE 3, 4, 13, 23(1) AND (2) OF THE CONSTITUTION (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS OF THE INDIVIDUAL) PRACTICE AND PROCEEDURE RULES, 2013 LEGAL NOTICE 117 OF 2013

AND

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLES 19, 20, 21, 22, 23, 35, 48, 73, 159 AND 165 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010

AND

IN THE MATTER OF THREATENED CONTRAVENTION AND VIOLATION OF ARTICLES 1, 2, 3, 4, 6, 10, 19, 20, 21, 22, 23, 35, 48, 73, 129 AND 187 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 3, 4, 16, 17 AND 30 OF THE STATISTICS ACT 2006;

AND

IN THE MATTER OF THE 2019 POPULATION AND HOUSING CENSUS (KPHC) SCHEDULED TO BE CONDUCTED ON THE 24TH/25TH AUGUST, 2019 RUNNING TILL 31ST AUGUST, 2019

BETWEEN

HASSAN AHMED IBRAHIM.....PETITIONER

AND

KENYA NATIONAL BUREAU OF STATISTICS.....1ST RESPONDENT

CABINET SECRETARY NATIONAL

TREASURY & PLANNING.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

The Petition

1. The Petitioner who is a citizen of the Republic of Kenya and a resident of Mandera County; brings this Petition on his own behalf and on behalf of the general public of the people of Kenya as envisaged under Articles 22 and 23 of the Constitution 2010. The 1st Respondent is a state corporation duly established under Section 3 of the Statistics Act 2006 Laws of Kenya and is the principal agency of the Government for collecting, analyzing and disseminating statistical data in Kenya and in the custodian of official statistical information. The 2nd Respondent is the Cabinet Ministry responsible for leadership and coordination of national and sectoral planning for advancing Kenya's transformative agenda or sustainable development among others within the Republic of Kenya. The 3rd Respondent is the Attorney General of the Republic of Kenya, the principal legal adviser to the Government of the Republic of Kenya.

2. On 16th August 2019, the Petitioner file a Petition of even date, which was supported by an affidavit he swore on the same date. He also relied on a supplementary affidavit he swore and filed in Court on 23rd August 2019. The crux of the Petition is the sixth Kenya Population and Housing Census scheduled to be carried out by the Government of Kenya on 24th/25th August, 2019, and the Enumerator's Instruction Manual & Census CAPI User Guide (DataCollectionApp) published by the 1st Respondent in June 2019 in preparation for the same.

3. According to the Petitioner, the said Enumerator's Instruction Manual contains the instructions to be applied and used by the enumerators in carrying out the 2019 Population and Housing Census Exercise, including and not limited to the list of Tribe Codes contained at Appendix 2 of the Manual. At the heart of this Petition is the Petitioner's concern and/or dissatisfaction with the way in which the said manual has assigned ethnic/tribal codes to the Kenyan Somali tribes.

4. The Petition therefore seeks to have the following prayers granted:

a) That a declaration do issue that the list of tribe codes as published by the 1st Respondent in Appendix 2 of the Enumerator's Instruction Manual & Census CAPI User Guide (DataCollectApp) June, 2019 in the column of the Kenyan Somali tribes namely Gurreh code 509 and Garre Code 512 and Murile Code 537; CORNER TRIBES CODE 534; CORNER TRIBES (Shegal, Warabey, Gabaweih, Sharmuge, Shabelle, Leisah, Marehan, Hawadhi, Asraaf) CODE 542 and Leisah code 535 are untrue, misleading, conflicting, confusing and a violation of the constitution and the law.

b) That an order do issue, directing and compelling the Respondents to delete and correct and the list of tribe codes in respect of the affected Kenyan Somali Tribes namely Gurreh code 509 and Garre code 532; WAAT code 517; AWEER/WATTA code 524 and WATTA code 530; MERILE CODE 537; CORNER TRIBES CODE 534; CORNER TRIBES (Shegal, Warabey, Gabaweih, Sharmuge, Shabelle, Leisah, Marehan, Hawadhi, Asraaf) CODE 542 and Leisah code 535 as published in Appendix 2 of the Enumerator's Instruction Manual & Census CAPI User Guide (DataCollectApp) June, 2019 and come up with an accurate, transparent and accountable list of tribe codes that reflects the true position of the Kenyan Somali tribe/ethnic group to be used in the forthcoming 2019 Kenya Population and Housing Census (KPHC).

c) That costs be provided for.

5. On 22nd August 2019, the Respondents filed a Replying Affidavit opposing the Petition, which was sworn on 21st August 2019 by Zachary Mwangi, the 1st Respondent's Director General. When this matter first came up for *inter partes* hearing on 20th August 2019, this Court directed that the Petition proceeds to full hearing by way of oral submissions. The parties consequently made oral submissions during a hearing held on 23rd August 2019. Due to the urgency of this matter, given that the subject matter of the Petition was the Kenya Population and Housing Census which was due to be held one day after the hearing on 24th and 25th August 2019, and the limitations of time in preparing a detailed judgment, this Court only delivered a summary of the Petition and its final orders on 23rd August 2019, and directed that the full and detailed judgment with the reasons for the orders would be availed on 6th September 2019.

6. This judgement therefore contains the more detailed account of the parties' respective cases and the findings of this Court on the issues raised in this Petition.

The Petitioner's Case

7. The Petitioner contends that the 2nd Respondent is mandated, through the 1st Respondent to carry out a country wide Population and Housing Census after every ten (10) years, which mandate is conferred to the 1st and 2nd Respondents under sections 16 and 17 of the Statistics Act 2006. That in preparation for the 2019 Kenya Population and Housing Census (KPHC) set to be conducted on the days 24th/25th August, 2019, the 1st Respondent published the Enumerator's Instruction Manual & Census CAPI User Guide (DataCollectionApp) in June 2019. The Petitioner raises various concerns with the manner in which the aforesaid manual has assigned ethnic/tribal codes to the Kenyan Somali tribes, and contends that there are conflicting and duplicity in the tribal/ethnic codes assigned to four (4) Kenyan Somali sub-tribes, namely the Garre, Murulle, Wata & Corner sub tribes.

8. As regards the Garre sub-tribe, it is the Petitioner's case that there is only one tribe called Garre/Gurreh within the Kenyan Somali ethnic group. The Applicant contends that this tribe has been split into two and given two different, conflicting and confusing codes, namely Gurreh sub tribe which has code 509 and Garre sub-tribe with code 532. According to the Petitioner, these two names, spellings notwithstanding, refer to one and the same tribe and cannot therefore be allocated two distinct codes. The Petitioner contends that in similar manner, the tribes christened as Waat (code 517); Aweer/Watta (code 524) and Watta (code 530) refer to one and the same tribe within the Kenyan Somali ethnic group. Further, that the tribe christened as Merile code 512 and Murile Code 537 refer to one and the same tribe which cannot have more than one code.

9. The Petitioner also contends that there is an ethnic group christened as Corner Tribes (code 534), and yet another ethnic group of Corner Tribes of code 542 which is broken down into smaller sub-tribes being Shegal, Waraey, Gabaweih, Sharmuge, Shabelle, Leisah, Marehan, Hawadhi, and Asraaf, and which refer to one and the same ethnic group. It is the Petitioner's further contention that the sub-tribe known as Leisah, despite being classified as one of the sub-tribes under Corner Tribes of code 542, also stands alone as an independent tribe under code 535. According to the Petitioner, the 1st Respondents act of allocating more than one code to one and the same tribe is misleading and will create confusion during the census exercise.

10. The Petitioner avers that most of the population from these groups will be affected because their members will be counted under different tribal codes due to the aforesaid confusion, making it difficult to know their true and correct ethnic numbers and population thus misleading the whole Country. The Petitioner contends that the Respondents might have deliberately and by a well-choreographed scheme created duplicate codes for the aforementioned tribes for political gains. To this end, the Petitioner alluded to

fears that some enumerators may be used to manipulate figures to satisfy selfish gains of some unknown interested players working under the shadow.

11. It is the Petitioner's case that by creating numerous and conflicting code numbers for one particular tribe and subdividing one tribe by calling it different names, the Respondents have violated and disregarded the sovereignty of the people of Kenya as provided under Articles 1 and 2 of the Constitution, which sovereign power is delegated to state organs and is to be exercised in accordance with the Constitution. The Petitioner also cites violation of the national values and principles of good governance provided under Article 10, 20 and 27(6) & (7) of the Constitution. According to the Petitioner, the Respondents deviated from their conferred mandate of exercising their delegated powers in accordance with the constitution which upholds historical ethnicity and tribal groups anchored under the National Values and Principles of Governance.

12. The Petitioner also cited Article 6 of the Constitution which states that the territory of Kenya is divided into counties as specified under the 1st Schedule and that State organ shall provide reasonable access to its services in all parts of the Republic. Reference was also made to Article 73 which the Petitioner argued dictates that authority assigned to a state officer is a public trust to be exercised in a manner that is consistent with the purpose and objects of the constitution, demonstrates respect for the people, brings honour to the nation and dignity to the office among others. The Petitioner emphasizes the significance of a reliable population census for a country to enable it adequately plan growth, deliver services to its people and solve the country's problems. It was contended that under the new constitution dispensation, a population census and correct, reliable and accurate census data is important for distributing services, economic resources and assistance to local governments; and in appointments to the various public and state offices, in light of the constitutional dictates of ethnic and gender balance and protection of marginalized groups.

13. Lastly, the Petitioner averred that Article 35 of the Constitution gives every citizen the right of access to information held by the state, and more so the right to the correct information and deletion of untrue and misleading information that affects the public at large. The Petitioner avers that creation and publication of multiplicity of tribes and tribal codes to be used in the 2019 Kenya Population and Housing Census is intended to give wrong information and wrong impression to the people of Kenya, and is geared towards violating and undermining the constitutional requirements of a free, fair, accurate, transparent and accountable census exercise.

14. The above averments were reiterated by Mr. Ayieko, the counsel for the Petitioner, in the oral submissions he made during the hearing. The counsel further submitted that the Petitioner's concerns were raised with the 1st Respondent in a letter dated 1st August 2019 by the Senator of Mandera County, and has been debated in social media, and that the Petitioner had annexed a copy of the said letter and social media debates to his supplementary affidavit, but that the 1st Respondent took no action. The counsel also submitted that the Petitioner is a member of the Somali Community, and is therefore directly affected by the subject coding of the Somali tribes, and has a right to move the Court. In addition, that Article 35(2) of the Constitution gives a person the right to move this Court to correct or delete misleading information. Mr Ayieko also pointed out that the 1st Respondent had conceded in its replying affidavit that the sub tribes as coded may not be correct.

The Respondents' Case

15. The Respondents on their part cited section 4 of the Statistics Act No. 4 of 2006 which lays out the 1st Respondent's mandate. They averred that by dint of section 11 of Part I of the Fourth Schedule to the Constitution as read with the provisions of *inter alia* section 4(d) of the Statistics Act, No.4 of 2006 and other applicable laws, it is a legal requirement that the planned census be carried out in August as scheduled. It is contended that in the exercise of the above statutory mandate, and acting pursuant to section 17 of the Statistics Act, the Cabinet Secretary of the National Treasury and Planning, vide a Gazette Notice, ordered that the Kenya Population and Housing Census be carried out on the nights of 24th and 25th of August, 2019.

16. According to the Respondents, Kenya has over 42 tribes with numerous sub-tribes as identified by the National Gender and Equality Commission after extensive research and consultations with key stakeholders and interested parties, including the Ministry of Interior & Coordination of National Government. Further, that various codes have been assigned to the various tribes and sub-tribes, and are contained and published in the Enumerator's Instruction Manual & Census CAPI User Guide. The Respondents contended that the Petitioner has not demonstrated any expertise or special knowledge on the composition of the members of Somali communities in Kenya, and seems to be championing personal special interests as an individual and not on behalf of the Somali Community.

17. It is the Respondents' contention that the classification and coding of the Somali tribe as assigned by the 1st Respondent has been accepted and approved by a majority of the Kenyan Somali tribe. That in fact, the same coding was used during the 2009 Population and Housing Census. The Respondents terms as untrue the allegation that the codes assigned to the various sub-tribes of the Somali tribe are confusing and or conflicting. It is contended, on the contrary, that the same will ensure and enhance the effectiveness and accuracy of the statistical data collected during the planned Population and Housing Census. The Respondents contend that the Petitioner will not suffer any prejudice because all the sub-tribes of the Somali tribe shall be captured digitally, and all the respondents in the census data documents including the Petitioner, can only choose one option of the sub-tribe. Hence, there will be no possibility of duplicity.

18. The Respondents denied there is a scheme or ill-will on their part in the planned Population and Housing Census, and averred that the process will be above board, carried out in a fair and transparent manner and no Kenyan tribe will be prejudiced in any way. In this regard the Respondents aver there have been elaborate and comprehensive preparations, since the year 2016. Further, that public funds have been spent for the planned census exercise and therefore any activity geared towards its derailment goes against the overriding interest of the general public. It is the Respondents' case that they have complied with all the legal steps required in order to successfully carry out the planned census. That therefore, it is greater public interest to allow the census exercise to proceed as planned since it is in accordance with the Constitution as read together with the provisions of the Statistics Act.

19. The Respondents noted that the census comprises of several interrelated activities all of which require proper planning and timely implementation for its success. It is averred that implementation is done in three phases which are; i) pre-enumeration; ii) enumeration and iii) post-enumeration. It was contended that the 1st Respondent began implementing activities in the preparatory phase as early as September 2016 when the cartographic mapping was launched. That, the 1st Respondent had all the census preparatory activities and work plan approved by Cabinet and the activities have the support of national government that is mandated to carry out collection of data on population as per schedule 4 of the Kenyan Constitution, 2010.

20. Further, that the 1st Respondent prepared the data collection instruments (questionnaires) and arrived at the dates for the census in a consultative manner, and all relevant stakeholders in Kenya were consulted, within confines of the law and the Constitution and the provisions of the Statistics Act, No. 4 of 2006, and the 2018 Census legal notice. In addition, that the training of the various personnel has been concluded and what is remaining is enumeration.

21. The Respondents in this respect contended that the Petitioner did not air his grievances until mid-August 2019, when preparations for the census had already been done and completed. The Respondents therefore term the instant petition as an afterthought and clearly intended to derail the fulfillment of a constitutional and statutory requirement. It is averred that there will be a post-census data analysis wherein if it is confirmed that similar sub-tribes were enumerated under different or separate codes, the same will be corrected by easily and quickly merging the sub-tribes.

22. Lastly, the Respondents averred that the instant Petition has not been properly pleaded, and the same does not meet the threshold required of a constitutional petition. Therefore, that the orders sought should not be granted for reasons that:

- a) The Petitioner has not made out a case for a violation of the Constitution, the Statistics Act or any other law with the respect to the planned Population and Housing Census 2019.
- b) The efficacy of the orders sought can neither be ascertained nor obtained.
- c) The said orders, if granted, will throw the planned Population and Housing Census in to a complete disarray and jeopardy which will be against the greater interest of the public.

23. Mr. Bitu, the counsel for the 2nd and 3rd Respondents made oral submission during the hearing, which were supported by Ms. Mwangi, the counsel for the 1st Respondent. Mr. Bitu challenged the capacity of the Petitioner to bring the present Petition, and submitted that the Petitioner has not annexed any resolution to bring the Petition on behalf of the members of the Somali community, neither has he made any reference to his capacity to deal with the anthropological issues the petition raises. He also submitted that the Petitioner is culpable of delay as the Enumerator's Instruction Manual & Census CAPI User Guide was published in June 2019 and he is approaching the Court at the last minute, just days before the census.

24. The counsel also challenged the evidence relied on by the Petitioner and sought to have the documents annexed by the Petitioner's affidavits struck out. The electronic document annexed to the Petitioner's supporting affidavit were challenged for failure to meet the requirements of the Evidence Act as regards their production, while a copy of a letter annexed to the Petitioner's supplementary affidavit was alleged to be incomplete and not certified.

25. In conclusion, the Respondents submitted that the Petitioner has not proved any specific Articles of the Constitution which have been breached, and that individual differences of opinion cannot be the basis of deleting the sub-tribes in the Enumerator's Instruction Manual & Census CAPI User Guide, which have been used in previous census. On the alleged violation of Article 35 of the Constitution, the Respondents contended that they have not published any results of the 2019 census, and there is thus no information required to be corrected. Furthermore, that it is within the 1st Respondent's statutory and administrative powers to correct any errors in the information to be collected.

The Determination

26. There are three issues for determination raised by the pleadings filed and submissions made herein by the Petitioner and Respondents, which are as follows:

- a) Whether the instant Petition is competently filed before this Court.
- b) Whether the Petitioner has proved that the Respondents have infringed fundamental rights and freedoms.
- c) Whether the Petitioner is entitled to the reliefs sought.

27. In addressing these issues, this Court is guided by Articles 20 and 259 of the Constitution which require courts to promote *the spirit, purport, values and principles of the Constitution; advance and promote the rule of law, human rights and fundamental freedoms in the Bill of Rights; contribute to good governance; and promote the values of an open and open and democratic society and enforcement of rights. In addition, this Court is mindful that* constitutional provisions must be construed purposively and in a contextual manner.

On the Competency of the Petition

28. The first issue raised of the competency of the Petition arises from the arguments made by the Respondents on the *locus standi* of

the Petitioner, and in particular that the Petitioner has not discharged the onus to show that he speaks on behalf of the Somali community, and has not shown any expertise in the areas he raises in the Petition. The provisions of Article 22 (1) and (2) of the Constitution grant *locus standi* for a petitioner to sue on his or her own behalf, or on behalf of another who cannot sue, or in the public interest as follows:

“(1) 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.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

- 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 group or class of persons;**
- c) A person acting in the public interest; or**
- d) An association acting in the interest of one or more of its members.”**

29. Similar provisions are also provided by Article 258 of the Constitution in relation to proceedings **claiming that any other provision of the Constitution has been breached, contravened, or is threatened with contravention, and in Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013.** No specific procedural requirements are set by the Constitution or the Rules as regards the manner such proceedings shall be filed.

30. **The above-cited provisions have expanded** the horizons of *locus standi* in matters of enforcement of fundamental rights and freedoms. This was also the holding in **John Mining Temoi & Another vs Governor of County of Bungoma & 17 Others [2014] eKLR**, wherein Mabeya J., while construing Articles 22 and 258 aforesaid, held as follows:

“I am of the view that Article 22(1) and (2) of the Constitution has expanded the horizons of *locus standi* in matters of enforcement of fundamental rights and freedoms. A literal interpretation of Articles 22 and 258 in my view confers upon any person the right to bring action in more than two instances: firstly in the public interest, and secondly, where breach of the Constitution is threatened in relation to a right or fundamental freedom. Where one purports to enforce the rights of another, it is in my view that there must be a nexus between the parties. In this case, Mr. Khaoya has described himself as the “CEO/CO-ORDINATOR” of the organization and the Petition is about the alleged violation of the Constitution, Mr. Khaoya has in my view illustrated that there is a nexus between him and the organization.”

31. I am in agreement with the said holding, and it is notable in this respect that the Respondents in the present Petition did not dispute the Petitioner’s averments that he is a member of the Somali community and is therefore affected by the names and coding given to the Somali sub-tribes during the scheduled census. The manner that data will be collected during the 2009 Population and Housing Census is also a matter for public interest concern. I therefore find for these reasons that the Petitioner has the necessary *locus standi*, and that the present Petition is properly and competently filed before this Court.

On Infringement of Fundamental Rights and Freedoms

32. It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. In this regard, Section 107(1) of the Evidence Act provides that “*whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist*”. It is therefore the legal duty of the Petitioner to prove by credible evidence the infringement of rights by the Respondents, and in the manner he alleges. The required standard which applies in civil cases as the present one in this regard is that of proof on a balance of probabilities. The evidentiary threshold in constitutional petitions was also stated by the High Court in **Anarita Wairimu Njeru vs Republic [1979]eKLR** as follows:

“We would, however, again stress that if a person is seeking redress from the high Court on a matter which involves a reference to the constitution, it is important (if to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed, and the manner in which they are alleged to be infringed.”

33. This threshold was re-stated in the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR**. The court in that case found that the Petitioner therein had made general and broad allegations of violation without specifying the precise provision of the constitution violated and enumerating the particulars of the manner of the alleged infringement. Further that such pleading falls below the required threshold of a constitutional petition and it is prejudicial to the defence because it does set out the issues for litigation and adjudication to enable the opposing party to respond adequately.

34. In the present Petition, the Petitioner refers to various constitutional provisions he claims have been violated by the Respondent, and in particular that the Respondent, by creating untrue and duplicity of tribes with conflicting tribal codes, violated Articles 1 and 2 of the Constitution on the sovereignty of the people and supremacy of the Constitution, and Article 35 on the right to correct untrue and misleading information. In my view while the Petitioner cited specific articles alleged to have been violated, and also particularised the alleged duplicating of, and conflicting Somali sub-tribes in his Petition, he failed to establish the alleged infringement by way of credible evidence as explained in the following sections.

35. The Respondents submitted that the Petitioner had not proved his allegations to the required standard, and that the evidence he relied upon was either insufficient or inadmissible. The Petitioner in rejoinder in his submissions contended that evidential requirements should not be strictly applied to constitutional petitions. The Evidence Act is however clear on its application to constitutional petitions in section 2 thereof, and provides as follows:

“(1) This Act shall apply to all judicial proceedings in or before any court other than a Kadhi’s court, but not to proceedings before an arbitrator.

(2) Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.”

36. The hearing of petitions filed under Article 22 of the Constitution are also regulated by Rule 20 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013, which provides that such hearing shall be either by way of affidavits, written submissions or oral evidence, or as the court may direct. *The Petitioner in this respect relied on documents annexed to his affidavits to prove his case. The first were printouts of conversations on the internet on the “Facebook” page of one Mheshimiwa Kore, on the ethnic codes for Mandera County to be used during the census. This printout was annexed as Annexure “HAI 2” to the Petitioner’s supporting affidavit sworn on 16th August 2019.*

37. *The Respondents submitted that this evidence is inadmissible for reasons that it did not meet the evidential threshold as regards electronic evidence. Electronic evidence and digital material is admissible as evidence under section 78A of the Evidence Act, including copies thereof. Section 106B of the Act provides detailed rules on how documents containing electronic evidence are to be produced for the same to be admissible, and states that electronic evidence of a computer recording or output is admissible in evidence as an original document if the conditions mentioned section 106B(2) in the section are satisfied in relation to the information and computer. The said conditions are aimed at vouching for the authenticity and integrity of the electronic records sought to be produced.*

38. Section **106B** (1) and (2) of the Evidence Act provides as follows in this regard:-

“(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electromagnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

39. The Petitioner did not bring any evidence to show compliance with the above stated conditions which are couched in mandatory terms, and the evidence of the internet printouts *annexed as Annexure “HAI 2” to his supporting affidavit* is therefore inadmissible.

40. The second document relied upon by the Petitioner appears to be a screenshot or photograph of a letter dated August 1, 2019 from Senator Eng. Mohamed M. Mahamud of Mandera County. The letter is addressed to the Director General of the 1st Respondent, indicating which sub tribes should appear under the code of Somali tribes during the census. This letter was annexed as *Annexure “HAI 1” to the Petitioner’s supplementary affidavit sworn on 22nd August 2019.* Parts of the letter appear not to have been captured in the screenshot and are missing, lending credence to the Respondents’ submissions that the said letter is incomplete.

41. More fundamentally however, the said letter is also inadmissible for reasons of non-compliance with the rules as regards production of documentary evidence set out in section 35 of the Evidence Act, which provides as follows:

35. (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

(a) if the maker of the statement either—

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable”.

42. The Petitioner did not demonstrate or satisfy any of the above conditions, and therefore sought to rely on a statement of a person who was not a party to the suit without laying a basis for such production. The rules on the hearing constitutional petitions in this respect allow the Petitioner to either file an affidavit sworn by the maker of the document, or call him to give oral evidence, which he failed to do.

43. In addition, the said letter was a copy made from the original letter, and therefore secondary evidence within the meaning of section 66 of the Evidence Act, and the rules as regards proof of secondary evidence set out in section 68 of the Act where therefore applicable. Section 68 provides as follows:

“(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases—

(a) when the original is shown or appears to be in the possession or power of—

(i) the person against whom the document is sought to be proved; or

(ii) a person out of reach of, or not subject to, the process of the court; or

(iii) any person legally bound to produce it, and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;

(b) when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 79 of this Act;

(f) when the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;

(g) when the original consists of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

(2) (a) In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1), any secondary evidence of the contents of the document is admissible.

(b) In the case mentioned in paragraph (b) of subsection (1) of this section, the written admission is admissible.

(c) In the cases mentioned in paragraphs (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence, is admissible.

(d) In the case mentioned in paragraph (g) of subsection (1) of this section, evidence may be given as to the general result of the accounts or documents by any person who has examined them, and who is skilled in the examination of such accounts or documents.”

44. The Petitioner did not demonstrate the existence of any of the conditions or circumstances set out in section 68, neither did he produce a certified copy of the letter. On the whole therefore, the said letter cannot be admitted to evidence.

45. Lastly, it is also notable that the Petitioner did not provide any other evidence as to the existing Somali sub-tribes to support or proof his allegations as to duplicity and conflict in the Somali sub-tribes set out in the subject Enumerator’s Instruction Manual & Census CAPI User Guide, and did not show the expertise on the subject of Somali sub-tribes of the persons whose opinions he

sought to rely on in the above-mentioned annexures.

On the Reliefs Sought.

46. The upshot of the findings made in the foregoing is that the Petitioner has failed to prove his case, and is therefore not entitled to the reliefs sought. This Court also observes that in the even if the Petitioner had been able to prove his claims, there would still have been opportunity to address any prejudice caused during the process of either collection, collation and analysis of the census data. The only relief that this Court will consider in the circumstances is that of costs, and as the Petition herein raised issues of public interest, each party shall bear their own costs.

The Disposition.

47. I find that the Petitioner has not has not demonstrated to the required standard how his rights and fundamental freedoms have been violated infringed or are threatened to come within the ambit of Article 23(1) of the Constitution for redress, and has also not discharged the required evidentiary burden to be entitled to the declaratory relief sought.

48. In the premises the Petition dated 16th August 2019 is declined and dismissed with no order as to costs.

49. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 6th DAY OF SEPTEMBER, 2019.

P. NYAMWEYA

JUDGE