



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO 235 OF 2019**

H.E. MIKE MBUVI SONKO.....1<sup>ST</sup> PETITIONER  
HON. MOSES KURIA.....2<sup>ND</sup> PETITIONER  
HON. SIMON MBUGUA.....3<sup>RD</sup> PETITIONER  
HON. KALEMBE NDILE.....4<sup>TH</sup> PETITIONER  
HON. REUBEN NDOLO.....5<sup>TH</sup> PETITIONER  
STANLEY LIVONDO.....6<sup>TH</sup> PETITIONER  
KEVIN BWIRE MUBADI.....7<sup>TH</sup> PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT  
CABINET SECRETARY THE NATIONAL TREASURY.....2<sup>ND</sup> RESPONDENT

**JUDGMENT**

1. In the Budget Statement read on 13<sup>th</sup> June, 2019 by the 2<sup>nd</sup> Respondent, the Cabinet Secretary for the National Treasury, there appeared the following statement:-

**“Mr. Speaker, boda-boda transport has become an important sector in our economy, it is one of the largest employers of our youth and also provides cheap and convenient transport for Kenyans. Despite the above benefits, Mr. Speaker, this mode of transport has proven to be very risky to the riders, passengers and even pedestrians. Further, Mr. Speaker, the accident victims, who are mostly from the lower cadres of the society, are left to seek financial assistance for treatment from friends and relatives since these boda bodas are not insured. In order to mitigate against these risks, Mr. Speaker, I propose to amend the Insurance (Motor Vehicle Third Party Risks) (Certificate of Insurance) Rules to require all passenger carrying boda bodas and tuk-tuks to have an insurance cover for passengers and pedestrians.”**

2. This statement is the genesis of the petition dated 17<sup>th</sup> June, 2019 in which Hon. Mike Sonko, Hon. Moses Kuria, Hon. Simon Mbugua, Hon. Kalembe Ndile, Hon. Reuben Ndolo, Stanley Livondo and Kevin Bwire Mubadi, the 1<sup>st</sup> to 7<sup>th</sup> petitioners respectively, seek reliefs against the 1<sup>st</sup> Respondent and the Attorney General (the 2<sup>nd</sup> Respondent) as follows:-

**“a) A declaration that section proposal that Boda Bodas and Tuk-tuks operators obtain Insurance cover for passengers and pedestrians is unconstitutional as it was enacted contrary to the mandatory provisions of Article 201 of the Constitution which requires public participation in financial matters and are therefore null and void.**

**b) A declaration that the proposal that Boda Bodas and Tuk-tuks operators obtain Insurance cover for passengers and pedestrians is inconsistent with Article 10 of the Constitution due to its contradictory nature and is therefore null and void.**

**c) A declaration that the proposal that Boda Bodas and Tuk-tuks operators obtain Insurance cover for passengers and pedestrians is unconstitutional as it constitutes a violation of the fundamental rights guaranteed by Article 40 of the Constitution and is therefore null and void.**

**d) An order restraining the Cabinet Secretary, National Treasury from commencing, instituting or proceeding with any enforcement in relation to and/or on account of their failure to obtain Third Party Insurance for Boda Bodas and Tuk-tuks operations. Any further order or relief that this court deems fit to make to meet the interests of justice.**

**e) The costs of this Petition be provided for.”**

3. A perusal of the pleadings and supporting documents filed by the petitioners disclose that the petition is grounded on Articles 10, 19, 20, 23 and 258 of the Constitution.

4. The impugned policy in the budget statement is said to have breached Articles 94, 201(a), 40, 24, 28, 29, 10, 19, 21, 27, 31, 33, 36, 43, 47, 46, 54 and 57 of the Constitution.

5. According to the petitioners, the impugned section of the budget statement has breached the constitutional rights of 1.2 million boda boda operators and 184, 200 tuk-tuk operators in that the decision to introduce third party insurance for boda boda and tuk-tuk transporters was made without public participation as required by Articles 10, 94 and 201(a) of the Constitution.

6. According to the petitioners, the challenged policy breached Article 47 of the Constitution which guarantees the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, in that the public was not given prior and adequate notice of the proposed administrative action, an opportunity to be heard and the reasons for the decision.

7. Further, that the boda boda and tuk-tuk operators were never given an opportunity to be heard and neither did the respondents give them any information or evidence relied upon in making the decision.

8. The petitioners through their petition highlight other constitutional rights and fundamental freedoms that have been breached, violated or threatened as the right to protection and full benefit of the law under Articles 20 and 27(1) & (2); the rights under Articles 21(1), (2) & (3); rights under Articles 19(1) and 22(1), (2), (3) and (4); the right to constitutional remedies under Article 23; the right to legitimate expectation under Articles 10 and 24(1), (2) and (3); the right to fair trial; prevention from inhuman and degrading treatment under Article 25(a) and (c); the right to life and livelihood under Articles 26(1), (2) and (3); the right to integrity and dignity pursuant to Articles 28 and 29; the right to privacy under Article 31; the right to freedom of speech under Article 33; the right to information under Article 35(1),(2) and (3); the right to freedom of association under Article 36; the right to demonstrate and picket under Article 37; the right to freedom of movement under Article 39; and the social, cultural and economic rights.

9. The petitioners aver that Article 55 of the Constitution enjoins the respondents to protect the rights of the youth and this includes creation of opportunities and employment. Further, that Article 56 protects the rights of minorities and the marginalized and that Article 57 obligates the 1<sup>st</sup> Respondent to protect older members of society and that some of the applicants are very old members of society.

10. The petitioners conclude by stating that the impugned decision is arbitrary, unreasonable, without basis in law not in the interests of justice and made in bad faith. They therefore urge the court to quash the impugned section of the budget statement.

11. Through their grounds of opposition dated 24<sup>th</sup> July, 2019, the respondents opposed the petition on the grounds:-

**“a) THAT the Budgetary Proposal or Statement is a long budget making statement that is strictly guided by both the Constitution and the Public Finance Management Act both laws infuse mandatory public participation.**

**b) THAT the process is strictly within the powers of the National Assembly and the Executive; and that unless there is sufficient demonstration of violation this court’s jurisdiction is ousted by the twin doctrines of deference and separation of powers.**

**c) THAT the issues raised in the petition are not ripe for determination. That the proposed amendment to the Insurance (Motor Vehicle Third Party) (Certificate of Insurance) Rules and the amendment of the Insurance Act, through the Insurance (Amendment) Bill, 2019 introduced by the Budgetary Proposal have not been passed into law. To the extent these amendments have not been effected into law, this petition is premature and not ripe for hearing.**

**d) THAT without prejudice to the foregoing, the petitioners [being persons in various leadership positions] have recourse under Article 119 of the Constitution, to lobby and petition Parliament not to pass into law the Insurance (Amendment) Bill, 2019 or to have appropriate amendments.**

**e) THAT in so far [as] the final orders being sought by the petitioners concern ‘proposals’, the same are conjecture, speculative, indeterminate and therefore incapable of espousing a constitutional cause of action.**

**f) THAT the Petition is otherwise incompetent, misconceived, misplaced and an abuse of the process of this Honourable Court as the Petitioners’ rights and fundamental freedoms have not been breached in any manner.”**

12. The petitioners filed submissions dated 22<sup>nd</sup> July, 2019. On alleged lack of public participation, counsel for the petitioners submitted that

public participation is a national value that is a principle of good governance within the meaning of Article 10 of the Constitution. It is counsel's position that although the 'proposed increase of insurance premiums for boda boda and tuk-tuk' is likely to affect the operators, passengers and the general public, no notices were issued regarding the proposed increase. Further, that no public views were obtained and neither were debates encouraged to interrogate the proposal.

13. According to counsel for the petitioners, the increment negates the philosophical, legal and constitutional underpinnings that inform the values and principles in Articles 10, 20, 21, 23, 24, 27 and 47 and 159 of the Constitution. Further, that the matter is of exceptional public interest within the meaning of Articles 3, 10, 22, 27, 201 and 258 of the Constitution.

14. It is the petitioners' case that they have brought this petition in the public interest in order to safeguard their legitimate expectation to be accorded a choice before they are forced to pay higher insurance premiums without the input of the public as required by Article 201 as read with Articles 10, 27, 3 and 258 of the Constitution.

15. The petitioners submit that Articles 10, 21, 22, 23, 24, 27, 47, 48, 50, 159 and 201 of the Constitution are not paper aspirations. They add that the values and principles of the Constitution are to prevent misconstruction, misinterpretation, abuse of power and to enhance public confidence in the government and its institutions.

16. It is the petitioners' case that the doctrine of implied jurisprudence donates all the necessary powers to the 2<sup>nd</sup> Respondent to do all that is necessary to ensure that the letter and spirit of the Constitution becomes a reality in the daily lives of Kenyans.

17. They also state that the Constitution reflects the hopes and aspirations of Kenyans based on the essential values and principles of human rights, equality, freedom, democracy, social justice and the rule of law.

18. They urge that the underpinning values and principles of the Constitution contemplate the participation of the people of Kenya in the designing or formulation and implementation of the policies and strategies of good governance in the content of human dignity, equity, social justice, equality, human rights, non-discrimination and protection of marginalized groups.

19. The petitioners observe that it is the duty of all State officers and State organs to protect, promote, observe and fulfil the constitutional values. Referring to Article 19(1) of the Constitution, counsel submitted that the Constitution has created several tools and devices to ensure that the rights are an integral part of the socio economic development of the people of Kenya. Further, that the Constitution requires that a culture is created which observes, respects, promotes, protects and develops human rights.

20. Stressing the importance of economic rights and pointing at Articles 21(2) and 43 of the Constitution, counsel submits that the State has an obligation to ensure that the economic rights are progressively realized. He urges that it is the duty of the court as commanded by Article 259 of the Constitution to ensure that the letter and spirit of the Constitution becomes a reality in the daily lives of the people of Kenya.

21. Turning to their allegation that the respondents have violated their property rights, the petitioners submit that the respondents have irregularly deprived them of their legitimate businesses by imposing restrictive and punitive taxes without following the due process of the law and the Constitution to the detriment of their constitutional rights.

22. Pointing to Article 19(1) of the Constitution, the petitioners urge that the provision makes the Bill of Rights an integral part of the Kenyan democratic State and is the framework for social, economic and cultural policies. They urge that the Constitution is a living document and the courts, within the meaning of Articles 19, 20, 201, 202 and 259 of the Constitution, are obligated to breathe more life into these constitutional provisions, notions and concepts in order to capture the spirit of social, economic, political and cultural growth.

23. Consequently, the petitioners assert that the courts have unlimited jurisdiction to grant orders that ensure constitutional violations or threats or infringements are remedied.

24. Counsel zeros in on Articles 165(3) and 23 as read with Article 2(4) of the Constitution and asserts that this court has power to declare the budgetary statement proposing increment of insurance premiums unconstitutional for breaching Articles 201 and 202 of the Constitution.

25. It is the petitioners' position that their right to a decent livelihood through legitimate business operations will be paralyzed. Further, that they will lose their jobs and this will lead to abject poverty and expose the society to security and safety risks.

26. Turning specifically to the claim that Articles 27(1), 28 and 29 of the Constitution have been violated, the petitioners urge that their rights to human dignity and full protection of the law have been breached as the respondents' action will render them destitute.

27. A passage from an undisclosed decision is cited in support of the statement that human dignity as a founding value of the Constitution cannot be overemphasized and that the said right is therefore the foundation of many other rights in the Bill of Rights. This court was therefore urged to allow the petition.

28. The respondents' submissions are dated 13<sup>th</sup> August, 2019. The respondents submit that this petition is premature and also violates the doctrine of separation of powers and ought to be dismissed.

29. On the claim that the petition is premature, counsel for the respondents submits that the proposal to amend the Insurance Act is simply a policy statement and the issues raised in the petition are thus not ripe for determination.

30. It is urged that the proposed amendments to the Insurance (Motor Vehicle Third Party) (Certificate of Insurance) Rules and the

Insurance Act, through the Insurance (Amendment) Bill, 2019 introduced by the Budgetary Proposal have not been passed into law and to the extent that these amendments are not yet law, this petition is premature and not ripe for hearing.

31. According to the respondents, given that the issues in question herein arise from a proposal, the petition is predicated on conjecture. Reliance is placed on the decision of the U. S. Supreme Court in **Roe v Wade, 410 U.S 113 (1973)** for the proposition that a complaint based on contingencies which may or may not occur is too speculative to present an actual case or controversy. For that reason, this court is urged to find this petition speculative and dismiss it.

32. Asserting that the doctrine of separation of powers bars this court from hearing the petition, counsel for the respondents posits that the budget-making process is strictly within the powers of the National Assembly and the Executive and unless there is clear demonstration of constitutional violation, the court's jurisdiction is ousted by the twin doctrines of deference and separation of powers.

33. Counsel asserts that the Budgetary Proposal or Statement is a culmination of a long process that is strictly guided by both the Constitution and the Public Finance Management Act and these laws infuse mandatory public participation.

34. Pointing to Articles 220 and 221 of the Constitution, counsel submits that the budget-making process is in the domain of the executive and legislative arms of government which have the necessary tools and capacity to determine the question whether funds should be raised through the contested insurance payments.

35. Counsel therefore urges that any attempt by this court to determine the petition will amount to unconstitutional interference with the functions of the other arms of government. The decisions of the U. S. Supreme Court in the cases of **Heyburn's case, 2 Dall. 409** and **Muscrot v United States (210 v 346 (1911))** are cited for the proposition that it is the duty of each branch of government **"to abstain from, and to oppose, encroachments on either."** The court is therefore urged not to descend into purely parliamentary or executive affairs for to do so will be tantamount to one arm of government encroaching on the responsibilities of the other arms of government.

36. It is further the respondents' position that allowing the petition will be tantamount to revisiting, reconsidering, reevaluating, reassessing and reviewing the proceedings leading to the preparation of the Budget Statement, without first establishing from the National Treasury the procedures already undertaken.

37. According to the respondents, were the court to allow the petition, it will be overstepping its judicial mandate and will be playing the role of an appellate forum over mandates already executed and reserved by both statute and the Constitution for other arms of government.

38. The court is urged to invoke the doctrines of separation of powers and deference and decline to exercise its jurisdiction. The respondents conclude that the petition is incompetent, misconceived, misplaced and an abuse of the process of the court and they urge its dismissal.

39. A perusal of the pleadings and submissions discloses that the respondents in the first instance contend that this court has no jurisdiction to hear the petition as it violates the doctrine of separation of powers. The second defence taken up by the respondents is that the petition is premature and thus speculative in nature.

40. Unfortunately, the petitioners did not address the issues raised by the respondents in their submissions. The issues raised by the respondents are intertwined and I will address them together.

41. The debate on the place of the doctrine of separation of powers in the Kenyan constitutional order continues unabated. The latest voice, and which position I shall adopt in this judgment, is that of the Supreme Court in the case of **Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR**, where after analyzing various decisions the Court formulated the following principles:-

**"[63] From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:**

***(a) each arm of Government has an obligation to recognize the independence of other arms of Government;***

***(b) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;***

***(c) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;***

***(d) for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;***

***(e) in the performance of the respective functions, every arm of Government is subject to the law."***

42. The Court after considering the facts of that case concluded that:-

**"[83] While bearing in mind such precious caution for sustaining judicial authority, we have addressed our minds to the uniqueness of the instant case, which is embodied in the express terms of a comprehensive, newly-formulated constitutional document: especially the fact that it bears express terms on the separation of powers. Interpretation of the Constitution calls**

for a delicate balance in the respective mandates of the different arms of government. While such refinements in the reserved governmental mandates had not elicited focused assessment at the High Court, *ex parte* conservatory Orders were made: the effect being to hamstring the due performance of the constitutional mandate of the County Assembly. Notwithstanding the conventional judicial perception of intimacy in judicial Orders, a question remains: what is the tenability of such Orders that directly abrogate the discharge of commanded legislative-agency process?

**[84] From the facts of this case, it is clear to us that the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of the Constitution allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate-allocation under the Constitution, is essential, as a scheme for circumventing conflict and crisis, in the discharge of governmental responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case.”**

43. My understanding of the law as espoused by the Supreme Court is that whereas this court is mandated to ensure compliance with the Constitution by all arms of government, the court must act with restraint in order to ensure that it draws its sword only when there is imminent and mortal danger posed to the constitutional order by the other arms of government. In my view the Supreme Court did not order courts to completely keep off the operations of the other arms of government for to do so would amount to abdicating the constitutional responsibility bestowed upon this court by Article 163(3) of the Constitution. It is therefore my view that the separation of powers card flashed on the face of this court by the respondents will not make this court abdicate its constitutional responsibility of ensuring compliance with the Constitution and the laws of the land. The respondents’ plea that I should stay away from the activities of the respondents is therefore without merit.

44. The question that then arises is whether the petitioners have laid a basis to warrant the issuance of the orders sought. The petitioners are challenging a policy statement issued by the 2<sup>nd</sup> Respondent in the performance of his duty. In the budget speech, he simply made a proposal to amend certain laws so as to make it compulsory for boda boda and tuk-tuk operators to take out third party insurance. He gave a valid reason for the proposal. Putting the proposal into action requires other steps to be taken and it cannot be said at the moment that the proposal violates or threatens the constitutional rights of the boda boda and tuk-tuk operators. It would indeed be speculative and preposterous to stop a process that is yet to start on the ground that it is going to be unconstitutional. I am therefore in agreement with the respondents that this petition is premature.

45. The petition offends the doctrine of ripeness considering that the Budget Statement is simply a policy statement to be actualized by taking further steps. No legal controversy can therefore be said to arise from such a statement. It is only the subsequent steps that may generate actionable controversies. The doctrine of ripeness was applied by the Court of Appeal in the case of **National Assembly of Kenya & another v Institute for Social Accountability & 6 others [2017] eKLR** when it held that:-

**“[73] Since there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the court. In reality, TISA and CEDGG invented a hypothetical dispute which was brought to court in the guise of unconstitutionality of CDFA.”**

46. Looking at the petition as drafted and taking into account the submissions made by the petitioners it is easy to conclude that no breach of the Constitution has been established. He who alleges violation of the Constitution has a duty to state the provision violated, pinpoint the violation and explain in what manner the Constitution has been violated. The injury occasioned by the alleged violation should also be established. It is not enough to point at constitutional provisions and claim violation of the same without any evidence being adduced to confirm such violation.

47. Considering what I have already stated, it follows that this petition is without merit. The consequence is that the same is dismissed with each party being directed to bear own costs of the petition.

**Dated, Signed and Delivered at Nairobi this 3<sup>rd</sup> day of October, 2019.**

**W. Korir,**

**Judge of the High Court**