



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HUMAN RIGHTS AND CONSTITUTIONAL DIVISION

PETITION NO 522 OF 2017

BONIFACE MUTUNGI NZIOKA.....1<sup>ST</sup> PETITIONER

STEPHEN OJOTH OMONDI.....2<sup>ND</sup> PETITIONER

VERSUS

ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT

SENIOR PRINCIPAL MAGISTRATES COURT

MACHAKOS LAW COURTS.....3<sup>RD</sup> RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....4<sup>TH</sup> RESPONDENT

JUDGMENT

1. *Boniface Mutungi Nzioki and Stephen Okoth Omondi*, the petitioners, were officers of the Independent electoral and Boundaries commission, the 4<sup>th</sup> respondent herein during the 2017 General Elections in their capacity as presiding officers. They were arrested and charged with the offence of breaching official duty without reasonable cause. The facts of the charges facing them stated that as members of staff of the 4<sup>th</sup> respondent, they presented unsecured used and unused ballot papers to the Constituency Returning Officer at the **National Industrial Training Authority** (NITA) in Athi River in breach of their official duty contrary to section 6(j) of the Election Offences Act, No 37 of 2016.

2. The petitioners felt aggrieved by this action and moved to challenge the constitutional validity of section 6(j), the provision under which they were charged. The petitioners averred and deposed that the 2<sup>nd</sup> respondent's action of charging them was discriminatory for cherry picking persons to be charged and prosecuted for election offences given that the Supreme Court had found in the election petition filed by Raila Odinga challenging the Presidential election results ***Raila Amolo Odinga & Another v Uhuru Kenyatta & Others petition No 1 of 2017[217]eKLR*** that there were systematic failures in the organization and conduct of that year's general elections.

3. The petitioners contended that section 6(j) relied on by Director of Public Prosecutions, the 2<sup>nd</sup> respondent, is ambiguous and too broad to the extent that it cannot be consistently interpreted leading to arbitrary and subjective interpretation. The petitioners further contended that although they were brought to court on 28<sup>th</sup> and 29<sup>th</sup> September 2017, they were only admitted to bail on 2<sup>nd</sup> October on what they termed unreasonable argument that there was no Gazetted Magistrate to handle their case. In their view, this amounted to unreasonable, capricious and factual limitation of their rights under Articles 49(a)(b) and Article 49(3) of the constitution.

4. The petitioners contended that their prosecution amounts to abuse of the criminal justice process to achieve extraneous results, and that the respondent's actions continue to violate the petitioners' constitutional right to secure and equal protection of the law and constitutional entitlement to fair administrative action. They therefore averred that the action is a contravention of Articles 27(1)(2) and 29(1) of the Constitution, that the impugned section is void with vagueness that words such as "**Member of Commission**", "**Staff**" and "**any other person**" and "**official**" are not defined in the Act; that section 9(1) has not pegged the commission of the offence on **mens rea** according to the criminal law principles and Article 50(2)(n) of the Constitution.

5. They therefore sought the following reliefs:-

a. An Order of declaration that section 6(j) of the Election Offences Act No 27 of 2016 as currently enacted is imprecise, vague, unreasonable, equivocal, prone to abuse, inordinately broad and is thus unconstitutional and invalid.

b. An order of declaration that the holding of the petitioners in remand together with persons serving sentences was unlawful and unconstitutional.

c. An order of declaration that the admission of the petitioners to bail after 4 days of their arrest was a violation and/or factual limitation of the petitioners' right to reasonable bond or bail was breached.

d. An order of certiorari to remove to this Honourable Court to be quashed the charges and the proceedings in Election Criminal Case No 3 of 2017 in the Senior Principal Magistrate's Court at Machakos.

e. General damages for unlawful and unconstitutional detention and breach of the petitioners' right to bail or bond.

f. Costs of the petition.

#### **1<sup>st</sup> and 3<sup>rd</sup> Respondents' Responses**

6. The 1<sup>st</sup> and 3<sup>rd</sup> respondents filed grounds of opposition dated 16<sup>th</sup> February 2018 and filed in Court on 19<sup>th</sup> February 2018. The two respondents contended that the petitioners had not shown which law had been breached by the 1<sup>st</sup> respondent or the trial Court to warrant intervention by this court; that the petition does not disclose any constitutional violations by the 1<sup>st</sup> respondent, that the jurisdiction of the Court has been prematurely invoked; that the petition has been instituted in bad faith given that the criminal case was lawfully instituted; and that the petition has been brought to defeat the cause of justice.

#### **4<sup>th</sup> Respondent's Response**

7. The 4<sup>th</sup> respondent on its part filed grounds of opposition on 30<sup>th</sup> October 2017. It was contended that both the petition and application are premature in that there is no demonstration of violation of the petitioners' constitutional rights; that they are an abuse of the court process; that the impugned section 6(j) is not ambiguous and that the petition and application are presumptive and speculative.

#### **Petitioner's Submissions**

8. Mr Mwamba, learned counsel for the petitioners, submitted highlighting their written submissions, that section 6(j) of the election Offences Act is unconstitutional on several grounds. First, that the offence created – "**without reasonable cause**" is ambiguous. Learned counsel contended that the Act does not define "**official duty**" and so are other statutes dealing with elections. According to counsel, election duties are both statutory and non-statutory. Counsel pointed out for instance, that polling clerks appointed by the 4<sup>th</sup> respondent under section 6 of the Election Regulations 2012, have no official duties but perform duties as assigned to them from time to time by the 4<sup>th</sup> respondent.

9. Mr Mwamba contended that section 6(j) or any other section of the Act does not define the word "**Official Duty**" to be performed by election officials which means criminal liability will be determined by statute on statutory duties. He argued that there was no authority from Parliament to determine the ambit of official duty. Counsel relied on the case of **Joseph Kaberia Kahinga & 11 Others v Attorney General [2016]eKLR** for the submission that the court has to look at both the purpose and effect of a legislation to determine its constitutional validity.

10. Learned counsel further relied on the case of **Antony Njenga Mbuti & 5 others v Attorney General & 3 Others [2015]eKLR** for the submissions that in construing a legislation in determining its constitutionality and that the object and purpose of the statute can be discerned from the statute itself. Further reliance was placed on the case of **Re The Matter of Interim Independent Electoral and Boundaries Commission Constitutional Application No 2 of 2011[2011]eKLR** on the principles to guide the court in constitutional interpretation.

11. Learned Counsel, went on to contend that if criminal liability is left to the reasonability test, instances of several election offences across the country would be left to the subjective application of the law, and relied on the decision of **Joseph Kaberia Kahinga & 11 Others v Attorney General** (supra). It was submitted that in criminal offences, one has to be able to appreciate at the time of omission or commission that the intended action would attract sanctions. It was contended that in the case of section 6(j), criminal liability is subject to the reasonability test which is improper in law.

12. Regarding who employees of the commission are, learned counsel referred to section 11 of the Independent Electoral and Boundaries Commission Act, (No. 9 of 2011), to submit that the section deals with the definition of staff of the Commission. Learned counsel argued that according to Article 88(3) of the Constitution, a member of the commission is not supposed to hold any other public office. Counsel contended that in so far as section 11 of the IEBC Act allows secondment of public officers to the commission, that section is unconstitutional for violating Article 88(3) of the Constitution. In learned Counsel's view, the petitioners could not act as presiding officers with the 4<sup>th</sup> respondent unless they had first resigned from their previous positions in the public service otherwise they could not be properly considered officers of the 4<sup>th</sup> respondent.

13. Mr Mwamba argued that the petitioners served as presiding officers and have been charged with failure to secure election materials. He submitted that in enacting section 6(j), Parliament created a normal offence but substituted the requirement of **mens rea** with the reasonability test. Counsel relied on the case of **Lim Chin Aik v the Queen [1963]** for the submission that proof of the existence of quality intent is an essential ingredient of a crime at common law. He argued that if section 6(j) creates an offence requiring a guilty mind, then the

offence created extends liability beyond what is known in criminal law when it replaces the requirement of mens rea with the reasonable test. Mr Mwamba argued that a Kenyan going about his business cannot determine what conduct it is that section 6(j) regulates and in what manner to bring about criminal certainty.

14. Counsel further contended that the act of charging of the petitioners amounted to an abuse of the court process. He referred to the Supreme Court decision in **Raila Odinga & another v Uhuru Kenyatta & Others** (*supra*) which had found that the 2017 presidential election was conducted in a manner that violated constitutional principles and there were both illegalities and irregularities thus rendering the presidential election unlawful in that it could not be said to have been simple accurate and verifiable. Counsel argued that the petitioners were charged with what amounts to irregularities yet other officials including the commissioners who even defied the Supreme Court order were left, terming their prosecution an abuse of the court process.

15. Reliance was placed on the case of **Jag v District Court (NSW) 106** for the submission that abuse of court process occurs when the process of the court is put in motion for a purpose which, in the eyes of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve, and **George Joshua Okungu & another v Chief Magistrate's Court Anti-Corruption Court Nairobi & Another [2014]eKLR** where it was stated that it is an abuse of the process of the court where the prosecution has been commenced or is being conducted in an arbitrary and selective manner.

16. It was therefore contended that the prosecution of the petitioners was not only an abuse of the court process but also violated **Article 27(1)** on equality before the law due to the selective prosecution. He asked that the petition be allowed.

#### **1<sup>st</sup> and 3<sup>rd</sup> Respondents' Submission**

17. Miss Chiringa, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents submitted both orally and through written submissions, that the petitioners have not shown how section 6(j) is unconstitutional and that there is no demonstration how constitutional provisions, if any, have been violated. Learned counsel contended that the impugned section is constitutional and that the Election Offences Act was intended to provide penalty for election related offences. Learned counsel relied on a number of authorities to demonstrate that the impugned provision is constitutional, including **Benard Murage v Fine Serve Africa Limited & 3 Others [2015]eKLR** for the submission that where in a constitutional litigation, a person seeks redress from the High Court for an alleged violation of the Constitution, he must set out with a reasonable degree of precision that of which he complains of, the provisions said to have been infringed and the manner of infringement.

18. Reliance was also placed on among others, the case of **Anarita Karimi Njeru v republic [1979]154** and **Mumo Matemo v Trusted Society of Human Rights Alliance & 5 Others [2013]** for similar proposition.

#### **4<sup>th</sup> Respondents' Submissions**

19. Mr Olale, Learned Counsel for the 4<sup>th</sup> respondent, also submitted both orally and through written submissions that the petitioners admit that they were presiding officers; that section 6(j) stipulates offences against election officials and that the petitioners were acting in their official capacity as officers of the 4<sup>th</sup> respondent. In learned counsel's view, the petitioners violated section 6(j) in the performance of their duties. In that regard, learned counsel submitted, section 6(j) is constitutional and relied on a number of authorities including **Mugambi Imanyara and Attorney General [2017]** for the submission that the burden is on the petitioners to prove unconstitutionality or ambiguity of the impugned provision which they have failed to do.

#### **Determination**

20. I have considered this petition, responses thereto and submissions by counsel for the parties. I have also considered the authorities relied on by both sides. This petition invokes the jurisdiction of this Court under **Article 165(3)(d)(i)** of the Constitution to determine the question of whether section 6(j) of the Election Offences Act is inconsistent with the constitution and is, to that extent, unconstitutional.

21. The petitioners were presiding officers in the 2017 general elections in which they presided over polling stations. They were charged with the offence of failing to safely lock election materials in violation of the impugned section 6(j) of the Election Offences Act. They have therefore contended that the provision under which they were charged violates Articles 50(2)(n) and 2(4) of the Constitution and is thus constitutionally invalid. They have also contended that their prosecution was selective, violated Article 27(1) of the constitution and is an abuse of the court process.

22. When validity of a statute or statutory provision is called to question, that requires laying the provision concerned against the constitution and in particular the offended Articles of the constitution in order to determine its constitutional validity. This principle was stated in **US v Butler 297 US 1[1936]** thus:

***“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the constitution which is invoked besides the statute which is challenged and decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the constitution; and having done that, its duty ends.”***

23. That act of laying the impugned provision against the concerned Article of the Constitution calls for interpretation of the Constitution. That being the case and before considering whether or not the impugned section 6(j) is inconsistent with the constitution, it is necessary first to consider the principles underlying constitutional interpretation.

24. Whenever interpretation of the Constitution becomes necessary, the starting point is Article 259(1) of the Constitution itself which lays the basic principles of interpreting it. These principles were stated in the case of *Katiba Institute & 3 Others v Attorney General & 2 Others* Petition No 548 of 2017 [2018]eKLR and I do no better than reproduce them here as follows:-

***“[24]Article 259(1) provides that (1) This constitution shall be interpreted in a manner that (a) promotes its purposes values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance. The values and principles of the constitution that is; the rule of law, human rights and fundamental freedoms development of the law and good governance must permeate the process of constitutional interpretation.*”**

Courts have also over the years developed principles of constitutional interpretation through judicial pronouncements which are useful aids in the exercise of constitutional interpretation. First; as was stated in *State V Acheson 199 20 SA SOS*;

***“The Constitution of a nation is not simply a statute which mechanically defines the structures of governance and the relationship between the government and the governed. It is a mirror reflecting the” national soul’ the identification of ideals and aspirations of a nation, the articulation of the values biding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the process of juridical interpretation and juridical discretion.”***

Second, the Constitution should not be given a rigged or artificial interpretation to avoid distorting the spirit, ideals and aspirations of the people, in the case of *The Government of Republic of Namibia v Culture 2000, 1994(1)SA 407 at 418* the Court stated that;

***“A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the austerity of tabulated legalism and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation.”***

This principle was enunciated in the case of *Njoya & 6 Others v Attorney General & Another [2004]eKLR* where the court stated;

***“Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the constitution, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document.”***

Third, a Constitution has various provisions which should be given a holistic interpretation. It should be read as one document and not as several and or separate provisions. Each provision should be read as supporting the other and not one provision destroying the other. They should be given a harmonious reading as one document. In the case of *Tinyefuze v Attorney General of Uganda Constitutional (Petition No 1 of 1996 [1997]3 UGCC)* the Constitutional Court put it thus;

***“The entire constitution has to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness. And exhaustiveness.”***

The Court of Appeal of Tanzania while agreeing with this view in the case of *Attorney General of Tanzania v Rev. Christopher Mtikila [2010]EA 13* observed that the principle of harmony requires that the entire constitution be read as one entity. The Supreme Court also advocated a holistic interpretation of the Constitution. In the matter of *Kenya National Human Rights Commission*, (Supreme Court Advisory Opinion Ref. No 1 of 2012) stating;

***“But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions in each other, so as to arrive at a desired result.”***

Fourth, there is a general but rebuttable presumption that statutes enacted by parliament are constitutional, until the contrary is proved. This view is based on the fact that as peoples’ representative, parliament usually enacts laws to serve people and therefore, parliament understands why such laws are enacted and the problems they are intended to solve. Advancing this view in the case of *Hambardda Dawakhana v Union of India Air (1960)AIR 554*, the Supreme Court of India stated;

***“In examining the constitutionality of a statute, it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and, the elected representatives in a legislature and it enacts laws which they consider to be reasonable for purposes for which they were enacted. Presumption is therefore in favour of the constitutionality. In order to sustain the presumption of constitutionality, the court may take into account matters of common knowledge, the history of the times and may assume every state or facts as existing at the time of legislation.”***

It was stated in *Ndyanabo v Attorney General of Tanzania[2001]EA 495*, that it is the duty of the person alleging constitutional invalidity of a statute or statutory provision to prove that invalidity.

*Fifth, the court must also consider the cause – effect in interpreting the Constitution. The purpose of enacting a statute and the effect of implementing the statute will also determine the constitutionality of a statute. In the case of R v Big M Drug Mart Ltd [1985] 1SCR 295, the Supreme Court of Canada observed;*

*“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation’s object and thus the validity. “(See Olum and another v Attorney General [2002] 2 EA 508).*

*And in Ng Ka Ling & Another v The Director of Immigration (1999) 1 HKLRD 315 the court stated;*

*“It is generally accepted that in the interpretation of a constitution such as the Basic Law, a purposive approach is to be applied. The adoption of a purposive approach is necessary because the Constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.”*

25. With the above principles in mind, we now turn to consider whether or not section 6(j) of the Election Offences Act is inconsistent with the Constitution as to render it constitutionally invalid.

26. Although only section 6(1) is challenged, it is important to reproduce the entire Section 6 which provides as follows:-

*“A member of the Commission, staff or other person having any duty to perform pursuant to any written law relating to any election who-*

*(a) makes, in any record, return or other document which they are required to keep or make under such written law, an entry which they know or have reasonable cause to believe to be false, or do not believe to be true;*

*(b) permits any person whom they know or have reasonable cause to believe to be able to read or write to vote in the manner provided for persons unable to read or write;*

*(c) permits any person whom they know or have reasonable cause to believe not to be visually impaired or a person with disability to vote in the manner provided for persons who are visually impaired or persons with disability, as the case may be;*

*(d) willfully prevents any person from voting at the polling station at which they know or have reasonable cause to believe such person is entitled to vote;*

*(e) willfully rejects or refuses to count any ballot paper which they know or have reasonable cause to believe is validly cast for any candidate in accordance with the provisions of such written law;*

*(f) willfully counts any ballot paper as being cast for any candidate which they know or have reasonable cause to believe was not validly cast for that candidate;*

*(g) interferes with a voter in the casting of his vote in secret;*

*(h) where required under the Elections Act (No 24 of 2011) or any other law to declare the result of an election, fails to declare the results of an election;*

*(i) except in the case of a member, officer or person authorized to do so, purports to make a formal declaration or formal announcement of an election result;*

*(j) without reasonable cause does or omits to do anything in breach of his official duty;*

*(k) colludes with any political party or candidate for purposes of giving an undue advantage to the political party or candidate;*

*(l) willfully contravenes the law to give undue advantage to a candidate or a political party on partisan, ethnic, religious, gender or any other unlawful considerations; or*

*(m) fails to prevent or report to the Commission or any other relevant authority, the commission of an electoral offence committed under this Act, commits an offence and is liable on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding five years or to both.”*

27. It is clear from the reading of the entire of section 6 that it covers a wide range of election related offences. Prior to the enactment of the Election Offences Act, election offences were contained in the Elections Act 2011. However, in 2016, the National Assembly enacted a legislation to specifically govern election offences. In that regard, the Election Offences Act, as its title suggests, it a legal framework that creates offences relating to elections and provides penalties thereof. This is also discernible from the preamble to the Act.

28. The Act contains various election offences such as those relating to the register of voters; multiple registration by voters, offences relating to voting; offences committed by staff of the Commission; offense that are likely to jeopardize maintenance of secrecy of the elections, with a view of preserving the essence of secret ballot; offences relating to personation; bribery; undue influence, use of force or violence during election; use of national security organs during election; offences relating to actual election and use of public resources during election period; participation of public officers in elections and prohibition of unlawful expenditure. There are other offences such as those relating to misuse of technology during elections, as well as aiding and abetting. As a matter of fact therefore, the Act covers a broad spectrum of offences relating to elections to ensure there is free, fair and credible election that are in accord with the principles set out in Article 81 of the Constitution.

29. The purpose of enacting this piece of legislation was well explained in the memorandum of objects and reasons when the Bill was tabled in parliament. In that regard, the reasons were stated thus:-

***“The Bill seeks to consolidate the offences relating to elections into one Act in order to enhance the administration of elections and prosecution of offences relating to elections. The Bill also seeks to ensure clarity with respect to some of the existing provisions which, as currently set out in the Elections Act, make it difficult to prosecute. The Bill sets a time limit within which the Director of Public Prosecutions may commence proceedings in relation to an election offence.***

***In particular, the Bill prohibits the use of public resources by candidates during elections and empowers the commission to demand a full account of all public resources ordinarily at the disposal of the candidates, where the candidates are members of parliament, county governors, deputy county governors, or members of county assemblies. The Bill also provides for offences related to the use of Information and Communication Technology in elections. It further generally enhances penalties for election offences in order to make them more deterrent.”***

30. The National Assembly in enacting this legislation was motivated by the fact that it wanted to codify election offences which hitherto had been part of the Elections Act into a single legal regime – to enhance administration of elections; prosecution of election offences; ensure clarity of the law, remove any hindrance to effective prosecution, set time limits for prosecution of election offences and prohibit use of public resources by candidates during elections. Above all, Parliament wanted to enable the Commission, the 4<sup>th</sup> respondent, to take full account of public resources during election period.

31. The petitioners were election officials during the 2017 general elections and acted as presiding officers. They were therefore deemed to be officers of the 4<sup>th</sup> respondent, an independent constitutional Commission established under Article 88(1) of the Constitution. Article 88(4) assigns the commissions its functions stating that (4) ***“The commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this constitution, and any other elections as prescribed by an Act of parliament.”*** Article 81 provides for the principles of our electoral system which include **free** and **fair election**. It makes it clear in Article 81(e) that free and fair elections are (i) by secret ballot; (ii) free from violence, intimidation, improper influence or corruption, (iii) conducted by an independent body. (iv) Transparent; and (v) Administered in an impartial neutral, accurate and accountable manner.

32. Parliament was entrusted with the duty of enacting legislation to implement Articles 81 and 88 of the Constitution and duly discharged that mandate by enacting the IEBC Act, the Elections Act and Election Offence Act for purposes administering free and fair elections. The 4<sup>th</sup> respondent, as a Commission has the constitutional mandate to administer free and fair election as required by the Constitution. In that regard, it has the mandate to employ persons to assist her execute this mandate. Some of the officers are presiding officers who are in charge of polling stations.

33. The position of presiding officer which the petitioners held, is one recognized under the Constitution. Functions of presiding officers are therefore constitutional functions given that the same Constitution states what they should do in that capacity. Article 86 provides that ***at every election, the Independent Electoral and Boundaries Commission shall ensure that –(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent, (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials*** (emphasis)

34. The election offences enumerated in section 6 of the Election Offences Act, relate to acts of omission or commission that have the potential of derailing the holding of free, fair accurate transparent and accountable elections that meets the constitutional standards set in Article 81. That is why Parliament enacted the Election Offences Act with a view to ensuring that human frailties do not in any way compromise elections.

35. The petitioners were charged with failing to secure election materials. That is used and unused ballot papers were not sealed and therefore unsecured. The petitioners have argued that the law under which they were charged is vague and ambiguous and that rather than apply the criminal element of ***mens rea***, section 6(j) applies the subjective test of reasonability.

36. It is true that a law can be invalidated on grounds of vagueness or ambiguity. Speaking of vagueness as a ground for invalidating legislation the Supreme Court of Canada observed in ***Osbourne v Canada (Treasury Board)***[1991]2 SCR 69, 1991 that:

***“Vagueness can have constitutional significance; one such significance is that a law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. That uncertainty may arise either from the generality***

*of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools”.*

37. Lord Diplock, on his part Commented in *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffensberg AG*[1975]AC 591,638 that:

*“The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.”*

38. The petitioner’s contention that the impugned provision leaves culpability to a subjective consideration is, in my respectful view, unsustainable. Presiding officers have a constitutional duty to perform. They are in charge of polling stations, the primary place where actual voting takes place. All election materials are under their custody. They are required to discharge their duties to the required standard. When the 4<sup>th</sup> respondent assigned the petitioners duties of presiding officers, they took up the duties after they understood their responsibilities as presiding officers and undertook to discharge their mandate without fear or favour. In that case, the petitioners had a responsibility to ensure that elections in their respective polling stations were conducted in a free and fair manner and that the elections were secure, accurate, transparent and accountable to meet the constitutional requirements.

39. Once elections are over, it is the responsibility of the presiding officer to ensure that election materials at his/her disposal are accounted for. This is necessary, first; to ensure that only election materials from the 4<sup>th</sup> respondent were used, and second; that there will be accountability in the event of a dispute including election petitions. This eliminates possible malpractices. In that case, the petitioners had an obligation as agents of the 4<sup>th</sup> respondent to ensure that *appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.*

40. One of the canons of statutory interpretation is to read a statute as a whole to avoid distorting the intention of the legislature when enacting a particular legislation. This principle was well stated in the case of *The Engineers Board of Kenya v Jesse Waweru Wahome & Others* Civil Appeal No 240 of 2013) where the Court of appeal stated;

*“One of the canons of statutory interpretation is a holistic approach... no provision of any legislation should be treated as ‘stand - alone’. An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act.”*

41. The court is also required to consider the language of the statute, and where the language used in the statute or provision of a statute is clear and unambiguous, the words should be given their ordinary and natural meaning. In the words of *Kasliwal, J.* the rule of interpretation is that words should be read in their ordinary, natural and grammatical meaning (see *St Stephen’s College v University of Delhi (1992) 1SCC558.*

42. Looking at the Election Offences Act holistically and in particular, section 6 as a whole, the petitioners cannot successfully isolate subsection (j) thereof and term it unconstitutional without considering the purpose of enacting the legislation and the effect of implementing its provisions including section 6(j). The election laws require election officials to perform certain functions including securing election materials after election unless there are reasonable grounds which the presiding officer will have to explain in the event there was such default. That is a question of fact and evidence which, in my view, cannot be a basis for mounting challenging constitutional validity of the provision.

43. Furthermore, I am unable to see any vagueness or ambiguity in the impugned section to the extent of rendering it constitutionally invalid. For a law to be declared invalid on grounds of vagueness or ambiguity, it must be so vague or ambiguous as to result into different interpretations. However, that is not the case with section 6(j) of the Act. It must be appreciated that the Election Offences Act is a special legislation intended for a particular class of offence hence it cannot be put together with the Penal Code which is a general purpose law.

44. In that context, there is the necessity to read the statute or statutory provision in a harmonious manner that renders it in accord with the constitution rather than make it constitutionally invalid. In that regard, the supreme Court of Ireland stated in the case of *Philip Tormey v Ireland and the Attorney General (1985) 11R 289*, that;

*“The rule of literal interpretation, which is generally applied in the absence of ambiguity or absurdity in the text, must here give way to the more fundamental rule of constitutional interpretation that the Constitution must be read as a whole and that its several provisions must not be looked at in isolation, but be treated as interlocking parts of the general constitutional scheme. This means that where two constructions of the provision are open in the light of the Constitution as a whole, despite the apparent unambiguity of the provision itself, the court should adopt the construction which will achieve the smooth and harmonious operation of the Constitution. A judicial attitude of strict construction should be avoided when it would allow the imperfection or inadequacy of the words used to defeat or pervert any of the fundamental purposes of the Constitution. It follows from such global approach that, save where the Constitution itself otherwise provides, all its provisions should be given due weight and effect and not be subordinated one to another. Thus, where there are two provisions in apparent conflict with one another, there should be adopted, if possible, an interpretation which will give due and harmonious effect to both provisions. The true purpose and range of a Constitution would not be achieved if it were treated as no more than the sum of its parts.”*

45. Adopting the above principles in construing the Election Offences Act and its provisions, I am unable to find constitutional fault with section 6(j) of the Act as contended by the petitioners.

46. The petitioners also contended that their prosecution was selective and discriminatory. According to them, the election had been found by the Supreme Court to have been conducted in violation of the law and regulations. In other words, there were illegalities and irregularities

yet they were selectively picked for prosecution. Well I am unable to find favour with this contention. The petitioners face specific charges which they are required to answer as the presiding officers of particular polling stations. For that reason, the fact that they alone have been charged cannot be said to be selective and discriminatory prosecution. They have not pointed out who in their stations has not been charged although he also did or failed to do what the petitioners are accused of. Where one relies on Article 27(1) of the constitution to allege discrimination, he/she has the onus to demonstrate by way of evidence that indeed there was open discrimination. It is not enough to merely allege discrimination without evidential proof.

47. Lastly the petitioners contend that they were presiding officers and not staff or members of the 4<sup>th</sup> respondent contemplated in section 11 of the IEBC Act. According to them, only staff or members of the Commission are subject to the section 6(j). As already adverted to in this judgment, the petitioners were election officials having been recruited by the 4<sup>th</sup> respondent for that exercise. They were, therefore, subject to election laws and regulations including the Election Offences Act. In any case, the 4<sup>th</sup> respondent holds elections periodically at intervals of every five years or whenever a by-election becomes necessary. It does not necessarily require full time presiding officers as this would be uneconomical. However, having been recruited even if temporarily, trained and assigned election duties, they were for the time of their engagement with the Commission, staff of the Commission and subject to laws regulating elections.

48. In the end, therefore, having given due consideration of the pleadings, submissions and the law, I do not find merit in this petition. Consequently, the petition dated 17<sup>th</sup> October 2017 is declined and dismissed with no order as to costs.

**Dated, Signed and Delivered at Nairobi this 6<sup>th</sup> Day of June 2018**

**E C MWITA**

**JUDGE**