
**Mboya & another v Judicial Service Commission & another; Rawal - Deputy Chief Justice & 5 others (Interested Parties) (Petition 204 & 218 of 2016 (Consolidated)) [2016] KEHC 657 (KLR) (Constitutional and Human Rights) (7 December 2016) (Ruling)**

*Apollo Mboya v Judicial Service Commission & 6 others [2016] eKLR*

Neutral citation: [2016] KEHC 657 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 204 & 218 OF 2016 (CONSOLIDATED)**

**JL ONGUTO, J**

**DECEMBER 7, 2016**

**BETWEEN**

**APOLLO MBOYA ..... PETITIONER**

**AND**

**THE JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 2ND RESPONDENT**

**AND**

**JUSTICE KAPLANA RAWAL - DEPUTY CHIEF JUSTICE .... INTERESTED PARTY**

**JUSTICE PHILIP TUNOI ..... INTERESTED PARTY**

**JUSTICE MOHAMMED IBRAHIM ..... INTERESTED PARTY**

**JUSTICE JACKTON B OJWANG ..... INTERESTED PARTY**

**JUSTICE NJOKI SUSANNA NDUNG'U ..... INTERESTED PARTY**

**AS CONSOLIDATED WITH**

**PETITION 218 OF 2016**

**BETWEEN**

**HON LADY JUSTICE NJOKI S NDUNGU ..... PETITIONER**

**AND**

**THE JUDICIAL SERVICE COMMISSION ..... RESPONDENT**

**AND**

**APOLLO MBOYA ..... INTERESTED PARTY**

**RULING**

## Introduction

1. I have to deal with an objection raised by the 1st Respondent, the Judicial Service Commission (" the JSC") to evidence adduced through an affidavit by the 5th Interested Party, who is also the Petitioner in Petition No. 218 of 2016. I will for the purposes of this ruling refer to her as the Petitioner.

2. The issue is whether the copy of the minutes (of a meeting held by the Judges of the Supreme Court on 6th October 2015) annexed to the Petitioner's affidavit is admissible as evidence in these proceedings.

3. Objection is taken that the minutes constitute inadmissible evidence which may transgress, if admitted on judicial independence and also unnecessarily lead to a delay in finalizing the trial of the two consolidated Petitions.

## The claim

4. The two Petitions revolve around certain proceedings undertaken by the JSC which led to the JSC admonishing the five Interested Parties. All the five were then judges of the Supreme Court of Kenya. The Petitioner contends that the JSC could not administer any form of punishment but could only recommend the appointment of a tribunal under Article 168(4) & (5) of the Constitution to the President. The Petitioner also contends that the JSC exceeded its mandate and also failed to accord the Petitioner the requisite fair administrative action and additionally that there was absolutely no factual, constitutional statutory or legal basis for the JSC to arrive at the decision that the Petitioner misconducted herself and ultimately to admonish the Petitioner. The 3rd and 4th Interested Parties in these respects support the contention of the Petitioner.

5. Essentially, the Petitioner's case is to a large extent pegged on the provisions of Article 47 of the Constitution. There is also a question of the interpretation of Article 168 of the Constitution.

6. A case management session of this Petition was held on 7 June 2016.All the parties agreed that the claim be consolidated with Petition No. 204 of 2016 as the two Petitions raised substantially common issues of law and fact. I also made an order on directions that the parties do file their respective responses, in opposition or in support of the Petitions within seven (7) days. The parties complied. The parties, or at least some of them, also filed written submissions but when the matter came up for further directions on 11th July 2016, Mr. Anyona then appearing for the JSC raised an objection as to part of the affidavit evidence.

## Arguments on the objection

7. The JSC, through counsel contended and argued that admission of the impugned evidence will lead to a delay of the proceedings as the Petitioner will have to be cross-examined and that may take a while. Likewise, it was also argued that it will also be embarrassing for a sitting judge of the superior court to take the stand and be cross-examined on the contents of a document whose authenticity has been doubted.

8. Mr. C. Kanjama, advocating for the JSC, additionally argued that admitting the impugned minutes would affect judicial independence as the minutes touch on the judicial decision making process. Consequently, urged Mr. Kanjama, it would be appropriate to invoke the doctrine of judicial privilege, refuse to admit the impugned minutes and safeguard the independence of the judiciary.

9. The JSC's objection received muted support from the 2nd Respondent.

10. Mr. Mwangi Njoroge urged that as it appeared the document had been irregularly obtained it would be in the public interest that it was not admitted in evidence.

11. For the Petitioner, Mr. Musangi urged that the claim by the Petitioner was not simply anchored on Article 47 but went beyond the personal and private interests of the Petitioner. Mr. Musangi contended that the impugned document was relevant to the proceedings as it gave a clear background of the facts which led to the Petitioner's ultimate condemnation by the JSC. For completeness, Mr. Musangi submitted that it was always critical that a decision maker accesses all evidence.

12. Mr. Nani Mungai appeared for the 4th Interested Party.

13. Referring to the case of Kuruma s/o Kaniu v Republic [1955] AC 197, Mr. Mungai submitted that the test of admissibility of evidence was whether the contested evidence was relevant. Counsel submitted that the impugned document was relevant to the claim by the Petitioner as well as the 5th Interested Party. Further, counsel added, the impugned document could not be expunged by reason of confidentiality as Article 35 of the Constitution had effectively altered how evidence was to be treated whenever confidentiality was alleged. Counsel in this respects referred the court to the case of Mabel Muruli v Hon. Wycliffe Oparanya & 3 Others [2013] eKLR where the court overruled an objection to evidence on the basis of alleged confidentiality as Article 35 of the Constitution empowered Kenyans to access all information held by the State. Mr. Mungai urged the court not to be swayed by the fact that the Petitioner may have to be summoned for purposes of cross-examination.

14. Mr. Malonza who appeared for the 3rd Interested Party left the determination as to admissibility of the impugned document to the court while Mr. Mboya, appearing in person, submitted that it would be undesirable to have a sitting judge take the stand and be cross-examined.

**Relevance and admissibility generally**

15. In the modern law of evidence, relevance is the dominant consideration. There is need to appreciate what relevance stands for.

16. The central rule is that evidence is admissible only if it is relevant that is, if it tends to prove or negate, in the sense of making more or less probable any fact which requires proof: see Phipson on Evidence (17th Ed) at paras 7.08- 7.09 and also DPP vs. Kilbourne [1973] AC 729, 756 and Kanini –v- Republic . Conversely, evidence that is relevant (or of more than minimal relevance) is generally admissible. This emphasis on relevance is not new.

17. Thus is Hollington –v- Hewthorn [1943] 1 KB 587, 394 the English Court of Appeal said that:

> "Nowadays, it is relevance... that is the main consideration, and generally speaking, all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded".

18. Halsbury's Laws of England (4th Ed) Vol 17 at para 5 states that:

> "The prime requirement of anything sought to be admitted in evidence is that it is of sufficient relevance. What is relevant (namely what goes to the proof or disproof of a matter

in issue) will be decided by logic and human experience, and facts may be proved directly or circumstantially. But while no matter should be proved which is not relevant by the normal tests of logic may not be proved because of exclusionary rules of evidence. Such matters are inadmissible. Admissible evidence is thus that which is (i) relevant and (2) not excluded by any rule of law or practice. It may be that an item of evidence is admissible on one ground and inadmissible on others; if so, it will be admitted. Evidence may also be admissible for one purpose and not for another."(emphasis mine)

19. There is an important limit to this principle that evidence though relevant may be excluded by any rule of law developed to exclude evidence. Such common law exclusionary rules which have since found themselves as statutory provisions include the rule against hearsay evidence as well as rule against irregularly obtained evidence. Section 5 of the Evidence Act (Cap 80) embodies this principle of exclusion when it stipulates as follows:

> 5. General restriction of admissibility of evidence.
>
> Subject to the provisions of this Act and of any other law, no evidence shall be given in any suit or proceeding except evidence of the existence or non-existence of a fact in issue, and of any other fact declared by any provision of this Act to be relevant". (emphasis)

20. Of course from the onset I need point out that while the above principles would be equally applicable in constitutional litigation, Rule 20(4) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 extends a leeway to the court of its own motion to invite evidence it deems likely to assist it arrive at a decision, not necessarily to prove or negate a particular fact. Rule 20(4) states as follows:

> "(4) The court may on its own motion, examine any witness or call and examine or recall any witness if the court is of the opinion that the evidence is likely to assist the court to arrive at a decision".

21. Rule 20(4) is in line with the modern approach that judges and tribunals ought to be trusted to evaluate evidence in a rational manner. Their ability to find the true facts will be hindered and not helped if they are prevented from taking relevant evidence into account by exclusionary rules.

22. Mr. Kanjama for the JSC in the instant case insisted that the impugned minutes are not relevant and are consequently inadmissible.

23. Before examining the competing arguments, it is logical to consider first what relevance (if any) the impugned document has to the issues in the consolidated Petitions.

**Relevance of the minutes**

24. The impugned document contains statements of fact and opinion.

25. The facts are in the form of resolves by all the seven judges of the Supreme Court who attended the meeting of 6 October 2015. Fact is also presented that there was a meeting. The opinions range around views presented during the meeting which were also captured in the minutes.

26. There is evidence that the judges discussed the line of action that the JSC had taken in directing the 1st and 2nd Interested Parties from sitting as part of a quorate Supreme Court. There is evidence as well that a letter was to be written by the Supreme Court judges to the JSC and that it would be signed by three judges and be presented to the Supreme Court judges' representative to the JSC. There is also

evidence that the judges discussed a pending judgment before the court which also touched on the issue of the court's quorum.

27. The Petitions before me revolve around the finding of misconduct and subsequent admonishment of the Interested Parties by the JSC. The basis was a letter signed by three judges. The basis was also the alleged subsequent threats by the Supreme Court judges to down their tools. There are other complaints still pending.

28. In my view, there is obvious relevance in the evidence contained in the impugned minutes when I read Section 6 of the Evidence Act as to facts forming part of the same transaction. Section 6 of the Evidence Act stipulates as follows:

> " Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places".

29. The meeting of 6 October 2015 could have taken place after the letter of 24 September 2015 had been written to the JSC. The meeting of 6 October 2015 could have taken place before a decision was rendered by the Supreme Court in which the court's majority assailed certain action by the JSC. The meeting of 6 October 2015 cannot however be divorced from the letter of 24 September 2015.

30. It was argued by Mr. Kanjama that the Petition is all about Article 47 of the Constitution and that factual aspect as to substance or merits of the decision by the JSC is irrelevant as Article 47 deals only with procedural impropriety. I refuse to buy into the arguments of the JSC in these respects.

31. That Article 47 deals only with procedural impropriety is a position that may be subject to debate. On my part, I see no reason why the court entertains such concepts like legitimate expectations, proportionality, irrationality and reasonableness when it is expected to interrogate only procedural improprieties. There has to exist some intensity in the scrutiny and review under Article 47 as a substantive constitutional right is alleged to have been violated. It is for those reasons that, in my view, such concepts touch on and concern the merit of decisions. The principle of proportionality, for example, requires a reasonable and justifiable relation between the objectives of the decision and the facts of the decision. It is simply not about procedure. It guides the court on suitability and necessity.

32. Article 47 of the Constitution in my view is not only about procedural impropriety but also about substantive justice.

33. Besides, in the instant case, the Petitions are not limited to alleged violations of Article 47, the Petitions question the extent and scope of the powers of the JSC under the Constitution to deal with allegedly errant superior court judges. There is the context of the particular case and the general perspective. The instant case may only be fairly handled and determined when all evidence is brought forth and sieved after hearing the parties rather than at a preliminary stage.

34. I must also draw the parties' attention to the case of Anarita Karimi Njeru –v- Republic [1979] KLR 154. The decision in Anarita's case stood for the proposition that where a person is alleging a contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat. The decision also underscored the importance of proof by the Petitioner of all the allegations. It would not be in the interest of justice to start trimming the evidence sought to be relied upon by the Petitioner or any claimant when it is clear that such evidence has a nexus to the claim as in this case. The evidential burden is on the claimant and justice may not be served when the claimant's evidence is locked out and then a verdict is returned that the burden of proof has not been discharged.

**Judicial Privilege**

35. I now come to the question of judicial privilege.

36. Mr. Kanjama argued that allowing the impugned document would lead to a violation of the doctrine of judicial privilege and public policy would eschew such a course of action.

37. As I understand the doctrine of judicial privilege, it plays a dual role. First it is an open doctrine which applies to protect freedom of speech in court when it shields statements made in the regular course of judicial proceedings by judges and parties to the proceedings. It protects witnesses as well as judicial officers who are both immunized from civil proceedings.

38. Secondly, it is an obscure doctrine of evidentiary law which promotes the confidentiality of judicial communications. It will be invoked by courts to protect communications among judges and also between judges and their staffers like law clerks, and also to protect the substance of judicial deliberations: see United States –v- Nixon [1973] 418 U.S 683,708. In these respects it assists to preserve the independent functioning of the judiciary and in particular the judicial decision making process.

39. While I have my own doubts as to the necessity of the doctrine of judicial privilege within our current constitutional democracy and whether the privilege is necessary and justifiable within an open and democratic society, my review of the impugned document does not disclose that it contains evidence of a privileged decision making process. Nothing in the document is indicative of an adjudication process of an issue. The decisions seem to have been made and the question was whether or not to include the decision in the formal judgment. Nowhere in the document do the judges urge towards a judicial decision. I do not find any intrusion into confidential judicial communication.

40. Secondly, I do also hold the view that judicial privilege is not absolute and it will yield in appropriate circumstances if significant interests outweigh a judge's interest in confidentiality. In the circumstances of the instant Petitions, I would view it that the personal interests of the judges themselves who are parties to the petitions herein outweigh the encouragement of unlimited exchange of ideas amongst the judges themselves. This is one instant when the privilege ought to take a back seat.

41. The final line of argument advanced by the JSC was that it is indeed strange to have a judge take the stand and be cross-examined.

42. Uncanny it may be, but certainly when the judge has brought himself to court he must be ready to go through the ordinary process of adjudication. Truly, a judge does not hold a special place when he or she opts to be a litigant. S/he must be subservient to the rule of law and that includes all process including but not limited to Rule 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedural Rules 2013 which allows directions to be made that a Petition be heard by way of oral evidence and witnesses to be summoned for examination. All judges are expected to be aware of this rule. It is also expected that taking the witness stand would naturally invite cross-examination.

43. Even though the Petitioner's counsel readily admitted the petitioner's willingness to be subjected to cross-examination, I must point out that a basis for the same will still have to be laid out given the earlier case management directions that the hearing do proceed by way of written submissions and the affidavit evidence on record.

**Conclusion**

44. I come to the now rather obvious conclusion that the objection must fail and it does. The impugned evidence is not obviously irrelevant. Rather it is relevant. I would not disallow it.

45. I dismiss the objection and decline to exclude the impugned evidence.

46. There will be no order as to costs on the objection.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF DECEMBER, 2016.**

**J. L. ONGUTO**

**JUDGE**