REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 244 OF 2014

IN THE MATTER OF ARTICLE 22(1), CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND OR FUNDAMENTAL FREEDOMS UNDER THE CONSTITUTION OF KENYA INCLUDING ARTICLES 20, 21(1), 22, 10, 27(1), 27(2), 28, 40, 47, 57

BETWEEN

JUSTICE PHILIP K TUNOI.....…….1ST PETITIONER

JUSTICE DAVID A. ONYANCHA..... 2ND PETITIONER

AND

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

THE JUDICIARY.....…2ND RESPONDENT

RULING

1. The Petitioners in this petition are senior judges of the Superior Courts of Kenya. The first Petitioner is a Judge of the Supreme Court of Kenya while the 2nd Petitioner is a Judge of the High Court.
2. What provoked these proceedings were letters dated 28th April, 2014 addressed to the Petitioners by the Chief Registrar of the Judiciary. The terms of the said letters were that the Judicial Service Commission had deliberated on the Judges' retirement age and resolved that all Judges retire at the age of seventy years. According to the records of the Judiciary, it was contended, the 1st Petitioner would be attaining the said compulsory retirement age on 2nd June, 2014 while the 2nd Petitioner would be attaining the said age on 1st December, 2013, which is already past. At the end of the letter, the Petitioners' services were appreciated and they were wished well in their retirement.
3. In this petition the Petitioners intend to challenge the constitutionality and legality of the said retirement in light *inter alia* of the provisions of Section 31 of the Sixth Schedule to the Constitution.

4. However, on 21st January, 2015, the Respondents through their learned counsel, **Mr Mansur Issa**, made an oral application that pursuant to Article 165(4) of the Constitution this Court ought to certify that the issues raised in the petitions disclose substantial questions of law warranting the empanelling by the Hon. Chief Justice of a bench consisting of uneven number of judges of not less than three.
5. It was submitted by **Mr Issa** that the petition revolves around the retirement age of judges appointed before 2010. According to learned counsel, the petition touches on a majority of judges apart from the petitioners herein.
6. It was further submitted that it is only the judges of the Superior Courts who have retirement ages since non of the other office holders under the Constitution such as the Attorney General, the Controller General, the Auditor General have retirement ages. It was therefore submitted that the position of the judges is unique and the issue to be decided is whether the consequential provisions of section 31of the 6th Schedule to the Constitution are applicable to the circumstances of the petitioners.
7. It was further submitted that the other issue that will fall for determination is whether the Judicial Service Commission, the 1st Respondent herein (hereinafter referred to as the Commission) has issued two conflicting interpretations of the provisions in question and whether the two interpretations would create a bar to its discharge of its mandate under Article 172 of the Constitution.
8. According to **Mr Issa** the foregoing disclose substantial questions and affect more than the parties before the Court. In support of his submissions, **Mr Issa** relied on **Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314.**
9. It was submitted that the instant petition meets the threshold for substantial question of law and reliance was further placed on **Martin Nyaga & Others vs. The Speaker County Assembly of Embu & 4 Others & Amicus Curiae [2014] eKLR.**
10. The application was however opposed by **Mr Ngatia**, **SC** learned counsel for the petitioners.
11. According to learned senior counsel, at the time the petitioners joined the judiciary the retirement age of judges was 74 years. While appreciating that the 6th Schedule has saving provisions it was submitted that the issue is whether the said age of 74 years was saved. It was submitted that the circular in question will not advance or reduce the legal issue which in learned counsel's view does not raise any substantial question of law.
12. Citing the decisions of this Court, learned senior counsel submitted that there are a number of cases in which the Court has not followed the decision in **Chunilal V. Mehta vs Century Spinning and Manufacturing Co.** (supra). It was submitted that in **Batiko Mohoko & Another vs. Deputy Prima Minister and Minister for Local Government [2012] eKLR**, the Court declined to certify a matter revolving around appointment which is similar to issues in this petition.
13. It was submitted that the burden is high on the person seeking certification to satisfy the Court that the certification ought to be done since the mere fact that he matter is weighty does not necessarily require certification. In any case, it was submitted that a decision of a single judge has the same weight as a decision of a numerically superior bench of the High Court.
14. Relying on **Royal Media Services Ltd & Others vs. Attorney General & Others Petition No. 557 of 2013**, it was submitted that the matter was able to move from the High Court, the Court of Appeal and the Supreme Court within the year due to the fact that it was expeditiously determined without the same being certified under Article 165(4). Since there was in learned counsel's view no substantial question, it was submitted that the matter ought to be expeditiously determined by a single judge so that any party dissatisfied therewith can exercise his automatic right of appeal all the way to the Supreme Court. To certify the matter as sought, it was submitted would introduce other factors beyond the control of the parties including the constitution of a larger court when there is no justification for the same. According to learned counsel the issue of identification of substantial question ought to be easily discernible and should not be arrived at after a laborious argument.
15. In his rejoinder, **Mr Issa** submitted that the issue of certification is grounded on the Constitution and if the issue of expediency was at the core of the administration of justice the Constitution would not have provided for Article 165(4). In his view the fact that the petition comprises of 94 paragraphs shows that the matter the matter is not as simple as submitted. To the contrary the

petition raises a number of substantial issues of law and issues of public interest which must be balanced against expediency. In his view, the time a single judge would take to determine the matter is the same as the time that would be required by a numerically superior bench.

16. It was submitted that the cases relied upon by the Petitioners do not come closer to the issues in the instant petition which deal with the closure of the curtain on the distinguished careers of judicial officers.

17. I have considered the foregoing. In my view the decision whether or nor to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitutional and statutory provisions. In this country we still do not have the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are very scarce. Although the time taken for hearing a petition by a single judge may not be any different from that taken by a bench empanelled pursuant to Article 165(4) of the Constitution, it must be appreciated that empanelling such a bench usually has the consequence of delaying the cases which are already in the queue hence worsening the problem of backlogs in this country. I therefore associate myself with the position taken by **Majanja, J** in **Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR** that:

> **"the meaning of 'substantial question' must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges."**

18. The above position was appreciated by this Court in **Vadag Establishment vs. Y A Shretta & Another Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 559 of 2011** where the court held:

> **"It is also my considered view that a High Court whether constituted by one judge or more than one judge exercise the same jurisdiction and neither decision can be said to be superior to the other. True, two heads are better than one, but in terms of the doctrine of *stare decisis* whether a decision is delivered by one High Court Judge or handed down by a Court comprised of more judges, their precedential value is the same."**

19. In my view the mere fact that there are conflicting decisions by the High Court does not necessarily justify a certification that the matter raises a substantial question of law. My view is informed by the fact that the mere fact that a numerically superior bench is empanelled whose decision differs from that of a single Judge does not necessarily overturn the single judge's decision. To overturn a decision of a single Judge one would have to appeal to the Court of Appeal. Similarly appeals from decisions of numerically superior benches go to the Court of Appeal.

20. **Article 165** of the Constitution provides as follows:

> ***(1) There is established the High Court, which—***
>
> ***(a) shall consist of the number of judges prescribed by an Act of Parliament; and***
>
> ***(b) shall be organised and administered in the manner prescribed by an Act of Parliament.***
>
> ***(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.***

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

21. From the foregoing it is clear that the only constitutional provision that expressly permits the constitution of bench of more than one High Court judge is **Article 165(4).** Under that provision, for the matter to be referred to the Chief Justice for the said purpose the High Court must certify that the matter raises a substantial question of law:

1. **Whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; or**
2. **That it involves a question respecting the interpretation of the Constitution and under this is**

included *(i) the question whether any law is inconsistent with or in contravention of the Constitution; (ii) the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191.*

22. That duty being a judicial one it behoves the Court to identify the issues which in its view raise substantial questions of law and whereas the fact that parties agree that the threshold under Article 165(4) may be considered, the Court is not bound by such concurrence.
23. Therefore it is not enough that the matter raises the issue whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or that it raises the issue of interpretation of the Constitution. The Court must go further and satisfy itself that the issue also raises a substantial question of law. As was appreciated in **Community Advocacy Awareness Trust & Others vs. The Attorney General & Others High Court Petition No. 243 of 2011**:

"The Constitution of Kenya does not define, 'substantial question of law.' It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine the matter."

24. The court went ahead to hold that the promulgation of the Constitution of Kenya, 2010 has brought into being a whole new law that in every respect raises substantial questions of law because the Constitution is new. The expanded Bill of Rights as set out in Chapter Four, the Citizenship issue in Chapter Three, the Leadership and Integrity issue in Chapter Six and Chapter Eleven dealing with Devolved Government are matters which need constant interpretation by the courts and if every such question were to be determined by a bench of more than two judges, other judicial business would definitely come to a stand still and if that were to happen, then the expectation of the public to have their cases decided expeditiously as provided under Article 159(2) of the Constitution and sections 1A and 1B of the ***Civil Procedure Act*** would never be realised.
25. Although it was submitted that the decision in **Chunilal V. Mehta vs. Century Spinning and Manufacturing Co. (supra)** has been ignored by the local courts, it is my view that position may not be entirely correct taking into account the appreciation by the Courts that each case must be decided on its own merits. In that case it was held that:

"a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial."

26. In **Santosh Hazari vs. Purushottam Tiwari** (2001) 3 SCC 179 it was held that:

"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case

whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any *lis*."

27. In India certain tests have been developed by the Courts as criterion for determining whether a matter raises substantial question of law and these are: (1) whether, directly or indirectly, it affects substantial rights of the parties, or (2) whether the question is of general public importance, or (3) whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, or (5) it calls for a discussion for alternative view.
28. In my view these holdings offer proper guidelines to our Court in determining whether or not a matter raises "a substantial question of law" for the purposes of Article 165(4) of the Constitution.
29. Other factors which the Court may consider in my view include: whether the matter is moot in the sense that the matter raises a novel point, whether the matter is complex, whether the matter by its nature requires a substantial amount of time to be disposed of, the effect of the prayers sought in the petition and the level of public interest generated by the petition.
30. However, since the Article employs the word "includes", to my mind the list is not exhaustive. Even before the promulgation of the current Constitution, it was appreciated in **Kibunja vs.Attorney General & 12 Others (No. 2) [2002] 2 KLR 6** that:

"in exercising that discretion, several factors have to be taken into account including, but not limited to the complexity of the case and the issues raised, their nature, their weight, their sensitivity if any, and the public interests in them, if any."

31. In this case it is correct that the issues raised herein are issues which are likely to affect a large number of senior judicial officers in this country. In a not so dissimilar circumstances, **Mpagi-Bahigeine**, Judge of Appeal of the Court of Appeal of Uganda in the case of **Masalu and Others vs. Attorney-General [2005] 2 EA 165**, at 168 where faced with a matter revolving around allegations, made by members of the judiciary, of breach of the Constitution, sitting in the Constitutional Court of Uganda stated as follows:

"I would consider it regrettable that this matter has finally found its way before court, considering its nature and relation to all members of this Court. However, while we are aware that justice must not only be done but must be seen to be done, the court prides itself in its impartiality under the judicial oath. Most importantly, it is a fundamental fact that no other institution, except the Judiciary, can better discharge the task of resolving disputes impartially and independently, regardless of their nature. This caution should allay and or dispel any fears or scepticism that might otherwise throw this judgement under cloud".

32. Section 31(1) of the Sixth Schedule to the Constitution (Transitional and Consequential Provisions) provides:

Unless this Schedule provides otherwise, a person who immediately before the effective date, held or was acting in an office established by the former Constitution shall on the effective date continue to hold or act in that office under this Constitution for the unexpired period, if any, of the term of the person.

33. Article 167(1) of the Constitution on the other hand provides:

A judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty-five years.

34. In **Judicial Review Miscellaneous Application No. 190 of 2014 between Hon. Lady Justice Joyce N. Khaminwa vs. The Judicial Service Commission & Another,** this Court while dealing with the said provision pronounced itself as follows:

"In my view the transitional provisions were meant to ensure a smooth exit from the old constitutional order to the present constitutional order. The drafters of the Constitution must have appreciated that abrupt transit was bound to be bumpy and calamitous. This appreciation is much more serious for the institution of the Judiciary...*Prima facie,* the Applicant's case that she ought to continue holding office of a Judge for the unexpired period of her term, cannot be said to be frivolous at this stage in light of the foregoing provision. Accordingly, the contention that the Commission's decision to retire the Applicant before attaining the age of 74 is unconstitutional is a weighty legal issue warranting further forensic investigation...Apart from that a cursory reading of Article 172(1) of the Constitution does not on the face of it expressly grant powers to the Commission to retire a Judge. Without deciding this issue with finality, it is my view that the issue merits further investigation."

35. While this Court presided by a single judge is competent to decide the matters before this Court, just as was appreciated in **Masalu and Others vs. Attorney-General** (supra), it is regrettable that the issue of retirement age of judges appointed before the year 2010 could not be resolved by the Commission which itself seems not to be reading from the same script. That being the position, it falls on the lap of this Court to determine the issue. That issue in my view will revolve around the interpretation and harmonisation of Section 31(1) of the Sixth Schedule to the Constitution (Transitional and Consequential Provisions) on the one hand and Article 167(1) of the Constitution on the other.
36. In my view the issues in this petition are not issues which arise before this Court on a daily basis. The issues to be decided by this Court raise fundamental and monumental issues of the interpretation of the Constitution. Therefore the inescapable conclusion that I come to is that taking into account the factors which this Court ought to consider in deciding whether or not to exercise the powers conferred upon it under Article 165(4) of the Constitution and considering the unique circumstances posed by the aforesaid provisions, I am satisfied that the issues raised herein raise substantial questions of law as contemplated under Article 165(4) as read with under clause (3)(b) or (d) of Article 165 of the Constitution as to justify the empanelling of a bench of uneven number of Judges of this Court of not less than three, assigned by the Chief Justice. I so certify.
37. Accordingly, I direct that this Petition be transmitted to the Hon. the Chief Justice forthwith for the purposes of the empanelling of that bench. For avoidance of doubt the directions given herein unless varied by the said bench as empanelled will remain in force.

Dated at Nairobi this 12th day of February, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Ngatia, SC for the Petitioners.

Mr. Issa for the Respondents

Cc Patricia