



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.132 OF 2013

BETWEEN

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....PETITIONER

AND

THE ATTORNEY GENERAL..... 1ST RESPONDENT

EMILIO MWAI KIBAKI.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Kenya National Commission on Human Rights (KNHCR) is an independent Commission established under **Article 59** of the **Constitution** and **Section 3** of the **Kenya National Commission on Human Rights Act No.14 of 2011**. In its Petition dated 21st June, 2013, it claims that the **Presidential Retirement Benefits (Amendment) Act of 2012** is unconstitutional on two fronts; Firstly, that in enacting the said Statute, the Legislature contravened the provisions of **Articles 10, 73(2) (c) (ii) and (d), 75(1) (a) and (b) and 230 (4) (a)** of the **Constitution**. Secondly, that in assenting into law the impugned statute, the 2nd Respondent violated the provisions of **Articles 10, 73(2) (c) (ii) and (d), 75(1) (a) and (b) and 230 (4) (a)** of the **Constitution**.

2. It has therefore sought the following orders;

“(a) A declaration that the Legislature contravened the provisions of Articles 10, 73(2) (c) (ii) & (d), 75(1)(a) &(b) and 230 (4) (a) of the Constitution in enacting the Presidential Retirement Benefits (Amendment) Act No. 9 of 2013.

(b) A declaration that the 2nd Respondent contravened the provisions of Articles 10, 73(2) (c) (ii) & (d), 75(1)(a) &(b) and 230 (4) (a) of the Constitution in assenting into law, the Presidential Retirement Benefits (Amendment) Act No. 9 of 2013.

(c) A declaration that the Presidential Retirement Benefits (Amendment) Act No. 9 of 2013 is unconstitutional and thus invalid.

(d) Any other relief that the Court deems fit and just to grant.”

The Factual background

3. The factual background to this Petition can be summarized as hereunder;
4. On 9th January, 2013 Parliament passed two Bills being the **Presidential Retirement Benefits (Amendment) Bill 2012** and the **Retirement Benefits (Deputy President and Designated State Officers) Bill 2012**, approving retirement benefits for the President, Deputy President and other senior State Officers.
5. Amendments were introduced to the Retirement Benefits (**Deputy President and Designated State Officers) Bill** to include the Director General of the National Intelligence Service, Inspector General of the National Police Service, the Secretary to the Cabinet and the Director of Public Prosecutions. The principal object of the **Retirement Benefits (Deputy President and Designated State Officers) Bill** was to make provisions for benefits which are to be provided to holders of the office of the Deputy President and Designated State offices. It included provisions for financial benefits in form of winding up allowances.
6. The **Presidential Retirement Benefits (Amendment) Bill** sought to amend the **Presidential Retirement Benefits Act** so as to take into account the inflation trends in the computation of the benefits payable *inter alia* to a retired President. It therefore amended **Section 5** of the **Act** which provides for the pension and other benefits that a retired President is entitled to by setting the monthly amounts payable as housing allowance, fuel allowance, utilities allowance and entertainment allowance to a percentage of the monthly salary paid to the President.
7. President Emilio Mwai Kibaki, now retired, declined to assent into law the **Retirement Benefits (Deputy President and Designated State Officers) Bill** on grounds *inter-alia* that it had failed to comply with the Constitution. However, on 14th January, 2013 the said President assented to the **Presidential Retirement Benefits (Amendment) Bill** which entered into force on 26th January, 2013.

The Petitioner's case

8. The Petitioner case is clear and straightforward. It contends that the National Assembly violated the Constitution in enacting the **Presidential Retirements Benefits (Amendment) Act** as it failed to involve the **Salaries and Remuneration Commission (SRC)** as provided for under the provisions of **Article 230 (4) (a) and (b)** of the **Constitution**. It stated that in failing to involve the SRC in the process of enacting the impugned Act, the National Assembly and the President also usurped the mandate of the SRC.
9. It claimed further that it is within the mandate of the SRC to advise the National and County Governments on the remuneration and benefits of all State Officers and other public officers and that the President, Deputy President, Members of Parliament, the Director of National Intelligence Service and Inspector General are State Officers whose salaries and remuneration is subject to the jurisdiction of the SRC.
10. It was also the Petitioner's case that under **Section 11** of the **Salaries and Remuneration Commission Act**, the Commission has powers to make recommendations on the review of pensions payable to holders of public office and that reviewing pensions and benefits for holders of public office is the preserve of the SRC. That the fact that the SRC was not consulted in that regard is unconstitutional and also casts doubt on its justification, equity and fairness.
11. It was its submissions therefore that in passing and assenting into law the **Presidential Retirement Benefits (Amendment) Act, 2012** Parliament and the President's actions were inconsistent with the Constitution and as such the impugned statute is void to the extent of its inconsistency with the Constitution.

12. The Petitioner therefore urged the court to declare the Act as unconstitutional for violating the provisions of the Constitution. It relied on the cases of; ***Coalition for Reforms and Democracy and Another vs the Attorney General & Others*** *Petition No. 628 of 2014*; ***Macharia vs Murathe (2008) 2 KLR (EP) 189*** and ***Republic vs Public Procurement Administrative Review Board & Another ex parte Selex Sistemi Integrati (2008) KLR 728***; all which upheld the supremacy of the Constitution.

The Respondents' case

13. The Respondents opposed the Petition by filing points of law made in their written Submission filed in Court on 2nd December 2014.

14. Firstly, it was the Respondents' position that this Court should not assume that what the Legislature has enacted in a lengthy process is unconstitutional. That it was upon the Petitioner to prove that the Constitution has been violated and on that point, they relied on the cases of; ***Ndyanabo vs Attorney General (2001) EA 495***, ***Pearlberg v Varty (1972) 1 WLR 534*** and ***Mount Kenya Bottlers Ltd & 3 Others vs Attorney General & others (2012) e KLR***.

15. Secondly, it contended that the Court should not question the wisdom of Parliament in enacting the impugned Statute and thirdly, it submitted that the Petitioner had not utilized the provisions of **Article 119(1)** of the **Constitution** which provides that every person has the right to Petition Parliament to consider any matter within its authority including enacting, repealing or amending any legislation.

16. The Respondent therefore urged the Court to dismiss the Petition.

Determination

17. At the fore of this Petition is the issue of the constitutionality of the **Presidential Retirement Benefits (Amendment) Act, 2013**. In that context, the Petitioner's case is simple; that the process leading to the enactment of the said Statute was flawed as it was enacted without the participation and consultation of the SRC in violation of **Article 230(4) (a)** of the **Constitution**. Notably, the Respondents did not make any arguments on the said process but made arguments on points of law only.

18. In that regard, I will start by stating as this Court has stated in the past that there is a general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise as was held in ***Ndyanabo vs Attorney General of Tanzania (supra)*** and ***Pearlberg vs Varty (supra)***.

19. I am also aware of the principle that where both the process and the substance of legislation have been challenged, it is prudent for a Court to begin by examining the impugned process before proceeding to its substance. This is because if the process leading to the enactment of an Act is constitutionally flawed, then the resulting legislation would also be flawed and that would be the end of the matter.

20. Having said so, the Petitioner contends that in enacting the **Presidential Retirement Benefits (Amendment) Act**, the Respondents acted in excess of their powers as they usurped the powers of the SRC and failed to involve the SRC in the legislative process.

21. The SRC is a constitutional Commission established under **Article 230(1)** of the **Constitution**. Its functions are set out under **Article 230(4)** and are; ***to set and regularly review the remuneration and benefits of all state officers and advise the national and county government on the remuneration and benefits of all other public officers***. Further to this provision, Parliament enacted the **Salaries and Remuneration Commission Act No. 10 of 2011** (SRC Act) which expounded on the powers and duties of SRC. The preamble to this Act states that it is;

An Act of Parliament to make further provision as to the functions and powers of the Salaries and Remuneration Commission, the qualifications and procedures for the appointment of the Chairperson and members of the Commission and for connected purposes.

22. **Section 11** of the SRC Act further provides for the functions and powers of the Commission as follows;

- a. *Inquire into and advise on the salaries and remuneration to be paid out of public funds;*
- b. *Keep under review all matters relating to the salaries and remuneration to be paid out of public funds;*
- c. *Advise the national and county Governments on the harmonisation, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector;*
- d. *Conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices;*

- (e) *Determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;*

- (f) *Make recommendations on matters relating to the salary and remuneration of a particular State officer.*

- (g) *Make recommendations on the review of pensions payable to holders of public offices; and*

- (h) *Perform such other functions as may be provided for by the Constitution or any other written law.*

23. Looking at the provisions of **Article 230** of the **Constitution** as well as the provisions of Section 11 of the SRC Act, it is clear that the SRC has the mandate of setting and regularly reviewing the remuneration and benefits of all state officers. However, the issue I must determine is whether Respondents violated the Constitution by failing to involve the SRC in the enactment of the impugned Statute.

24. In that regard, **Article 93** establishes Parliament comprising the National Assembly and the Senate. Each of these Houses is enjoined to, **“perform their respective functions in accordance with [the] Constitution”** and where the Constitution prescribes a procedure that ought to be followed in enacting a law, that procedure must be followed. Thus, while the National Assembly is the legislative authority of the Republic, the legislation enacted must conform to the Constitution both procedurally and in its substance. As was observed in the *Doctors for Life International v Speaker of the National Assembly and Others (CCT 12/05) 2006 ZACC 11*;

“[208] It is trite that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid. And courts have the power to declare such legislation invalid ... this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid.”

I am in agreement and I adopt the same words in this Petition as they were mine.

25. In the present Petition the National Assembly enacted the **Presidential Retirement Benefits (Amendment) Act, 2013** and in its preamble states as follows;

“An Act of Parliament to make amendments to the Presidential Retirement Benefits Act to take into account inflation trends and for connected purposes.”

The Statute has therefore made provisions relating to retirement packages for a retired President and the Petitioner in that regard contends that the SRC should have been consulted since the President is a State Officer.

26. In the above context, has not been contested that the SRC was not involved in the process leading to the enactment of the impugned Statute. It has also not been controverted that the President is a State Officer and therefore his salaries and remuneration is subject to the mandate of the SRC. I have already found that **Section 11(g)** of the **SRC Act** gives the Commission sole power to make recommendation on matters relating to salaries and remuneration of a particular State Officer. In addition, **Section 11(f)** makes it clear that it is only the SRC that can make recommendation on the review of any pension payable to holders of public offices. It is therefore my finding that the law gives the SRC powers to set and review the remuneration and benefits of a State Officers including a retired President.

27. Further, I have already found that the National Assembly has powers under **Article 94(1)** and **186(4)** of the **Constitution** to legislate on any matters for the Republic. However, I have also found that it must legislate within the four corners of the Constitution as it is the supreme law of the land. In that regard, the words of Mbogholi Msagha J in *Macharia vs Murathe & Another (supra)* when he expressed himself as follows linger in my ears where he stated thus;

“In a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign...It is no doubt true that the Constitution itself makes provision in that behalf...Legislators, Ministers and Judges take an oath of allegiance to the Constitution for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe their allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature...in the literal absolute sense.”

28. I am also in agreement with the Respondent subject to what I shall say later that it is not the place of this Court to question the legislative wisdom of Parliament for Parliament does not legislate in a vacuum and there is a presumption that it knows the needs of its people while legislating. It was stated in US Supreme Court in *U.S vs Butler, 297 U.S. 1 (1936)* that ;

“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 beside the statute which is challenged and to 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.”

I am in agreement with the above erudite expression of the law.

29. To my mind however, while I do not question the legislative power of the National Assembly, I am certain that the law mandated it to seek the input of the SRC as it is the body mandated in reviewing the salaries and remuneration of State officers including the pension of a retired President. It ought at the very least to have obtained its recommendation or consult it before embarking on its legislative mandate. I do not know why and I do not have the reasons as to why it failed to follow that simple and constitutionally important step. This Court does not therefore have any other option but to fault the **Presidential Retirement Benefits (Amendment) Act** for the failure of Parliament to involve the SRC.

30. Before I conclude the judgment on this Petition, I recall the submission made by the Respondent that the Petitioner ought to have invoked the provisions of **Article 119(1)** of the **Constitution** in having its issue addressed.

31. **Article 119 (1)** states as follows;

“(1) Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.

(2) Parliament shall make provision for the procedure for the exercise of this right.

The law above is clear and requires no more than a literal interpretation. While the Petitioner had the right to petition Parliament, I do not know if Parliament has made provisions on how the Petitioner can exercise that right.

32. In any event, the right to petition Parliament itself does not in my view oust the power of this Court under **Article 165(3)(d)** to hear any question regarding the interpretation of the Constitution. The Court must therefore interrogate any impugned legislation and decide whether or not it is inconsistent with or in contravention of the Constitution. I have done so in this Petition.

Conclusion

33. Apart from the core issue addressed above, the Petitioner claimed that the impugned Statute is unconstitutional for having violated the provisions of **Articles 73 (2) (c) (ii)** and **75 (1) (a) and (b)** of the **Constitution**. I did not hear it plead or make submissions on how those provisions of the Constitution have been violated and yet it is a cardinal rule in constitutional litigation that a party must plead with reasonable precision the manner in which the Constitution has allegedly been violated - See ***Annarita Karimi Njeru vs Republic (1976-1980) 1 KLR 14***. That is all to say on those Articles of the Constitution which are titled, **“Responsibilities of Leadership”** and **“Conduct of State Officers”**, respectively.

34. It is also obvious that the Petitioner failed to plead the manner in which the 2nd Respondent had violated the Constitution and in that regard I do not find any wrong doing on his part. He ought not to have been sued in any event.

Disposition

35. What then is the consequence of non-compliance with the Constitution by the National Assembly? As was stated in **Commission for the Implementation of the Constitution vs The Attorney General and Anor, Nairobi Civil Appeal No.351 of 2012**.

“As we have already stated earlier in this judgment, Parliament in enacting the legislation under review clearly had in mind considerations other than those spelt out in the Constitution and the Hansard Reports on their debates on the same are clear testimony to the fact. The question that then falls to be determined is whether, in the face of such constitutional failures on the part of Parliament, the Courts should adopt a passive and aloof attitude. We think not.”

The Court further stated;

“In the above matter the Court of Appeal held that the debate around Parliamentary sovereignty in Kenya has long since been clarified – with the enactment of a transformed Constitution. The honorable Judge cited the judgment of the South African Constitutional Court in the State vs Makwanyane 1995 (3) SA 391 (CC) which emphasized the duty of Courts to uphold the Constitution in a constitutional democracy. This swiftly dispels the respondent’s second argument because a Court interpreting the Constitution should not be assumed to be superimposing its will on Parliament as the elected representatives of the people.”

Further, that;

“At Article 165(3)(d)(i), this Court is given the jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution. The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the Constitution, which pronounces its supremacy at Article 2 by proclaiming, at Article 2(4), that “Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

I am duly guided and it is therefore unconstitutional to bring into law, legislation concerning the benefits of State Officers without the involvement of the Salaries and Remuneration Commission and it follows that the **Presidential Retirement Benefits (Amendment) Act** to the extent of its inconsistency with the Constitution should be declared void. I so find.

36. In the circumstances, the following orders shall issue;

- a. ***It is hereby declared that the Legislature (read the National Assembly) contravened the provisions of Article 230 (4) (a) of the Constitution in enacting the Presidential Retirement Benefits (Amendment) Act No. 9 of 2013.***
- b. ***It is hereby declared that the Presidential Retirement Benefits (Amendment) Act No.9 of 2013 is unconstitutional and is thus invalid.***
- c. ***Each party shall bear its own costs.***

37. Orders Accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF SEPTEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kazungu – Court clerk

Mr. Kamau, Mr. Kiprono and Miss Kabaya for Petitioner

Mr. Kuria for 1st Respondent

No appearance for 2nd Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE

11/9/2015