



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Petition 538 of 2012

WASHINGTON JAKOYO MIDIWO PETITIONER

AND

THE MINISTER, MINISTRY OF

INTERNAL SECURITY 1ST RESPONDENT

THE MINISTER, MINISTRY

OF DEFENCE..... 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Introduction and Background

1. At the time material to this case, the petitioner was a Member of Parliament. He brings the petition in public interest. The petition concerns the deployment and use the Kenya Defence Forces (“KDF”) in enforcement of National laws in particular, the maintenance of law and order including the quelling of civil unrest in the country.

2.The KDF is established under **Article 241(1)** of the Constitution and comprises the Kenya Army, the Kenya Air Force and the Kenya Navy. **Article 241(3)** provides for the functions of KDF as follows;

(a) are responsible for the defence and protection of the sovereignty and territorial integrity of the Republic;

(b) shall assist and cooperate with other authorities in situations of emergency or disaster, and report to the National Assembly whenever deployed in such circumstances; and

(c) may be deployed to restore peace in any part of Kenya affected by unrest or instability only with the approval of the National Assembly.

3.The petitioner’s case revolves around the events taking place in November and December 2012 involving raids and counter raids between communities residing in Turkana and Samburu County. In one of the incidents occurring in Baragoi, Samburu County, 28 police officers and 8 police reservists were

killed. At about the same time, officers of the KDF were killed in Garissa in what was considered a terrorist attack. The petitioner disputes the decision of the National Security Council to deploy the KDF to parts of Samburu, Turkana and Garissa Counties. He claims that the deployment of KDF was contrary to **Article 241(3)(c)** which demands parliamentary approval prior to the deployment of KDF in any part of Kenya.

Petitioner's Case

4. The petitioner argues that since the military forces are usually not trained on maintenance of law and order in situations that do not entail external aggression, their use usually results in untold suffering to the people followed by gross human rights violations. It is the petitioner's argument that the military force can only be deployed in extreme cases of anarchy and lawlessness.

5. The petitioner further avers that while police officers are trained to de-escalate civil unrest, military involvement in situations of civil unrest often escalate rather than de-escalate the same. On this, he adds that historically, the use of military force to quell civil unrest has led to gross violation of human rights of ordinary citizens leading to a sharp increase in cases of unresolved crimes such as murder, rapes and even mass displacement of populations.

6. The petitioner contends that the use of military forces within the country must be authorized by Parliament following a full and extensive debate on the propriety of deployment in which debate the merits and demerits must be delicately weighed against each other hence the provisions of **Article 241(3)(c)**.

7. In his petition dated 22nd November 2012 supported by the petitioner's affidavit, the petitioner seeks the following reliefs from this court;

a) *A declaration that the 1st, 2nd and 3rd respondents have contravened the provisions of Article 241(3)(c) of the Constitution of the Republic of Kenya by deploying the Kenya Defence Forces to Baragoi, Samburu, Turkana and Marsabit areas without obtaining Parliamentary approval for the deployment.*

b) *A declaration that the 1st, 2nd and 3rd Respondents have contravened the provisions of Article 241(3)(c) of the Constitution of the Republic of Kenya by deploying the Kenya Defence Forces to Baragoi, Samburu, Turkana and Marsabit areas in the absence of any evidence of actual unrest, instability or civil disobedience in those areas as to justify the use of military force.*

c) *A prohibitory injunctive order restraining the 2nd Respondent from spending any public funds to support the illegal military operations in Samburu, Baragoi, Turkana and Garissa areas.*

d) *A mandatory injunctive order compelling the said 1st, 2nd and 3rd Respondents to immediately remove, or to facilitate the immediate removal of the Kenya Defence Forces from the said regions.*

e) *Any other order that this Honourable Court deems fit to grant.*

Respondents' Case

8. The petition is opposed by the respondents through the replying affidavit of Brigadier Alex Kinyangi Angongo, the Chief of Operations at the KDF sworn on 7th December 2012.

9. The respondents avers that the Constitution does not give Parliament the mandate to deploy the Kenya Defence Forces to restore peace in any part of Kenya affected by civil unrest or instability but gives that mandate to the Defence Council established under **Article 241(7)** subject to the approval of the National Assembly. Further that the National Assembly does not commence the process but either gives approval or disapproval to a decision of the Defence Council.

10. The respondents deny deployment of KDF as alleged by the petitioner and aver that on 13th November 2012, the National Security Council directed all security organs to liaise closely in restoring peace and security in the affected areas in Samburu County. At the material time, Parliament was not in session. According to the affidavit, KDF was not deployed in Garissa for any specific reason and that its activities were necessary some of its personnel came under fire from suspected *Al Shabaab* militia as a result of which they were pursued.

11. The respondents deny claims that the KDF had historically been known to cause gross human rights violations adding that the National Assembly is a debating chamber and not all statements made by members of Parliament are necessarily accurate.

Analysis and determination

12. The provisions of **Article 241(3)** need no more than a literal interpretation as it is self-evident that there is no requirement for approval by the National Assembly where KDF acts under **sub-article (3)(b)** unlike the circumstances set in **sub-article (3)(c)**.

13. The issue of deployment of the KDF within the country to deal with the incidences subject of the petition was raised by the petitioner in the National Assembly. In order to support his case the petitioner annexed excerpts of the Parliamentary Hansard Report for 21st November 2012 to his supporting affidavit to buttress his argument that there was no parliamentary approval for the deployment of KDF officers in the affected areas.

14. On 21st November 2012, the Minister of State for Provincial Administration and Internal Security in a Statement reported to the National Assembly that on 13th November 2012, the President chaired the National Security Council meeting which directed, *inter alia*, that, “[A]ll security organs to liaise closely in restoring peace and security in the area. In this connection, the Council authorised the Kenya Defence Forces to be deployed in Samburu County and other area alongside the Kenya Police Services, to assist in apprehending bandits and recovering stolen animals and arms. This was pursuant to Article 241(3)(b) of the Constitution So far, from the Military we have only utilized aerial surveillance, comprising two helicopters.”

15. It is this Ministerial Statement that prompted the petitioner to question why the authority of the National Assembly had not been sought before deployment of KDF. Thereafter a debate in the National Assembly ensued as to the nature of KDF deployment and security related incidents in Baragoi, Eastleigh and Garissa. In view of the gravity of the matter, the Deputy Speaker directed that a Joint Committee, comprising the Departmental Committee on Administration and National Security and the Departmental Committee on Defence and Foreign Relations, investigate these incidents including the activities of KDF and report to the House.

16. Unfortunately, the petitioner did not annex the entire parliamentary proceedings relating to the KDF issue or file a further affidavit to update the Court on action taken by the National Assembly to enable the court consider the context of the debate. I therefore appraised myself of the relevant parliamentary proceedings. After investigation, the Joint Committees prepared a report, ***The Report of the Joint Committee Investigating Adverse Security Situation, Loss of Property, Loss of lives of Security Personnel and Civilians in Garissa and Eastleigh Towns and Baragoi Environs*** (“the Report”) which was tabled in the National Assembly on 20th December 2012 and duly adopted as a report of the National Assembly.

17. In regard to the incident at Baragoi, the Joint Committee at paragraph 5.4.1 of the Report noted that, ***“There was no evidence of actual direct deployment of the KDF in Baragoi in support of the National Police Service. KDF was responsible for providing logistical support.”*** Paragraph 5.1.11 of the Report which dealt with KDF in Garissa stated that, ***“There was no formal deployment of the KDF in Garissa County on 19 and 20 November 2012 as KDF is permanently stationed in Garissa since independence.”*** The Committee also in its General Observations and Recommendation at paragraph 6.0

(10) of the Report stated that, ***“The Government should only consider deploying the KDF in aid of civil authority when necessary and in line with Article 241(1)(c) of the Constitution.”***

18. The role of the National Assembly is set out in **Article 95**. Under **Article 95(2)**, the National Assembly, *“deliberates on and resolves issues of concern to the people.”* The matters raised by the petitioner in the National Assembly were debated upon on 21st and 22nd November 2012 and a Committee formed to look into the matter. Since the petitioner, as a member of the National Assembly, raised the issue of deployment of the KDF, it was within the province of National Assembly to address and resolve it. Indeed the National Assembly resolved the issue by investigating the matter and accepting a report by its Committees and the recommendations and observations I have made above.

19. This case also brings to fore the issue of separation of powers. ***In the Matter of the Interim Independent Electoral Commission SCK Constitutional Application No. 2 of 2011 [2011] eKLR*** the Supreme Court dealt with the principal of separation of powers contained in the Constitution. The Court observed, *“The Effect of the Constitution’s detailed provision for the rule of law in processes of governance, is the legality of executive or administrative actions to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that non of the several government organs functions in splendid isolation.”*

20. As the court noted in the case of ***Trusted Society of Human Rights Alliance v The Attorney General and Others, Nairobi Petition No 229 of 2011 [2012] eKLR***, *“The Constitution consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two....this must mean that the Courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet...the courts have an interpretive role-including the last word in determining the constitutionality of all governmental actions. That, too, is an incidence of the doctrine of separation of powers.”*

21. The facts presented by the petitioner are drawn directly from the proceedings of the National Assembly. Members of the National Assembly in these debates express various views and it is not for the Court to judge the quality of the debates. What is clear is that the issue of whether and to what extent KDF can be deployed in the country was a matter within the competence of the legislature. In effect what the petitioner wants is for the Court to evaluate the debate in the National Assembly and on that basis issue the declarations sought in the petition. I decline to adopt this course as this would be interfering with what is clearly within the mandate of the legislature.

22. I am aware that under **Article 165(3)(d)(ii)**, the High Court has jurisdiction to hear any question respecting the interpretation of the Constitution including the, ***“question whether anything said to be done under authority of this Constitution or of the law is inconsistent with, or in contravention of, this Constitution.”*** Article 258 (1) grants, ***“Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”*** (See generally ***Federation of Women Lawyers of Kenya (FIDA – K) and Others v Attorney General and Others Nairobi Petition No. 102 of 2011 (Unreported)***, ***Trusted Society of Human Right Alliance v Attorney General Nairobi Petition No. 299 of 2012 (Unreported)*** and ***Jeanne W. Gacheche and 6 Others v Judges and Magistrate’s Vetting Board and Others Nairobi Judicial Review No. 295 of 2011, 433, 434 and 438 of 2012 (Unreported)***).

23. The provisions and the authorities I have cited firmly establish the jurisdiction of the High Court to examine the legality of any act done pursuant to the Constitution and any law. But the Court does not apply these provisions in a vacuum. It does so in a real or live dispute bearing in mind the key competences of State organs. This court has no authority to deal with hypothetical and abstract issues as its jurisdiction in interpreting or applying the Constitution is not to be exercised in the absence of a real dispute. This was the holding in ***John Harun Mwau and Others v Attorney General and Others***,

Nairobi Petition No. 65 of 2011(Unreported) where the Court observed as follows, '***We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3) (d) does not exist in a vacuum. We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3)(d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy.***' (See also ***Peter Kaluma v Attorney General Nairobi*** Petition No. 79 of 2011 (Unreported), ***Jesse Kamau and 25 Others v The Attorney General***, Nairobi Misc. App. No. 890 of 2004 (Unreported)and ***Andrew Okiya Omtata Okoiti and Others v Attorney General Nairobi*** Petition No. 351 of 2012 (Unreported)).

24. I have also considered the petitioner's case and I am at a loss to what dispute is presented for the Court's determination. I do not think statements made in Parliament can, by themselves, give rise to a cause of action as suggested by the petitioner. These statements lack the necessary probative value for the court to make a finding of breach of the Constitution as alleged by the petitioner.

25. Although the court, in the spirit of checks and balances and in order to ensure adherence to Constitution, has the last word on what the Constitution and the law is, I am satisfied that this is one situation where the exercise of authority by this Court in the matter would be superfluous.

26. I decline to grant the prayers sought in the petition. Consequently, the petitioner's case is dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 5th day of April 2013.

D.S. MAJANJA

JUDGE

Mr Ligunya instructed by Rachier and Amollo Advocates for the petitioner.