



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 12 OF 2015

BETWEEN

THE GOVERNOR BUNGOMA COUNTY.....APPELLANT

AND

JOHN MINING TEMOI.....1ST RESPONDENT

JOB ARNOLD CHEPKWESI.....2ND RESPONDENT

JOHN WEKESA KHAOYA (CHR).....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

THE SPEAKER COUNTY ASSEMBLY.....5TH RESPONDENT

THE COUNTY PUBLIC SERVICE BOARD.....6TH RESPONDENT

MURUMBA CHILU.....7TH RESPONDENT

EVANS FABWA.....8TH RESPONDENT

PETER MUKENYA.....9TH RESPONDENT

CONSOLATA WAKWABUBI.....10TH RESPONDENT

JOHN MUKWHANA.....11TH RESPONDENT

ROBERT SIMIYU.....12TH RESPONDENT

DAVID BARASA.....13TH RESPONDENT

CHRISTINE MURENGE.....14TH RESPONDENT

JACOB EKIRAPA.....15TH RESPONDENT

MONICA SALANO.....16TH RESPONDENT

CHRISPINUS BARASA.....17TH RESPONDENT

HERBART KIBUNG.....18TH RESPONDENT

MARTIN NDIWA.....19TH RESPONDENT

(Being an appeal from the Judgment of Kenya at Bungoma (**Alfred Mabeya, J.**) dated 5th May, 2014 in **Constitution Petition No. 2 & 2A of 2014 (Consolidated)**)

JUDGMENT OF J. MOHAMMED JA

[1] This is an appeal from the judgment of the High Court at Bungoma (**Mabeya, J.**) whereby, in essence, the appointment of thirteen persons (8th – 20th - (respondents herein) as Chief Officers of Bungoma County was quashed and in addition, Bongomek Community was declared a minority group and to be treated as such in the governance of Bungoma County.

[2] The proceedings in the High Court was commenced by two petitions. Petition No. 2 of 2014 dated 12th February, 2014 which was later amended, was filed by **John Mining Temoi** and **Job Arnold Chepwesi** as members of and on behalf of **Bungomek Community**. The petition (1st petition) was against the Governor of Bungoma County (**Appellant**), the Attorney General, the Speaker of County Assembly and Bungoma County Service Board (3rd, 4th and 5th respondents) **Murumba Chily** the County Secretary was joined as the interested party and thirteen nominated Chief Officers as 2nd to 14th respondents. The 1st petition was brought under various Articles of the Constitution and it alleged contravention of fundamental rights and freedoms under Articles 20(1); 20(2); 27 (1); 27(4); 47(1) and 56 of the Constitution. It was supported by the affidavit of **Job Arnold Chepkwesi** to which he annexed several documents.

[3] The second petition (2nd petition) No 2A dated 17th February, 2014 was filed by **John Wekesa Khaoya** (3rd respondent) a Chief Executive Officer of Centre for Human Rights Organization based in Bungoma County against appellant, 5th and 6th respondents joining the 8th to 20th respondents as interested parties. The petition was based on Article 22(1) (22(3) (c) and 22(4) of the Constitution.

[4] The petitioner in the 1st petition averred, *inter alia*, that on 31st July 2013; the County Secretary by an advertisement in the newspapers invited applications for various positions; that after the selection process, a number of applicants were short listed; the names of the shortlisted applicants and the positions for which they were invited for interviews were placed in the newspapers of 4th September 2013; that the shortlisted applicants were interviewed on various dates; that the Governor nominated the 14 interested parties and forwarded their names to the County Assembly for approval; that the nominees had been vetted and the County Speaker was about to cause the names of interested parties to be delivered for approval by the County Assembly; that five of the interested parties were nominated for the positions for which they had not been shortlisted and interviewed; that the petitioners petitioned the Governor and the Speaker to halt the process; that without considering the petition, the Speaker went ahead with the vetting process; that Bungomek Community is a minority community in Bungoma with a population of 3704 according to the 2009 population census; that the Community has a right to be included in the governance of Bungoma County; that none of the nominees comes from the Community and the Community has been discriminated against. The petitioners sought various declaratory orders including; an order that the process of recruitment was unconstitutional, null and void, an order that Bungomek Community is a minority group and ought to be treated as such in the governance of Bungoma County. The 1st petitioner sought an Order of certiorari to quash the decisions made in the recruitment process as well as orders of prohibition prohibiting the approval and appointment of the interested parties as County Chief Officers.

[5] The complaint in the 2nd petition was that six candidates among the 14 were not interviewed or shortlisted for any position for which they had applied and were interviewed. Two reliefs were sought in the 2nd petition – that the vetting committee be restrained from vetting the advertised candidates and that the vetted Chief Officers be restrained from taking up office pending the hearing of the petition

[6] **Hon. Kenneth Lusaka Makeko**, the then Governor; Murumba Chilku, the County Secretary; John Makali,, the Speaker of the County Assembly; Elizabeth Wanyonyi, Secretary to the County Public Service Board, filed replying affidavits. The Governor stated in essence that he nominated the Chief Officers and County Secretary and forwarded their names to the County Assembly in accordance with the law; that in nominating the officers, special consideration was placed on each sub county to reflect the image of Bungoma and their respective skills; that Bungoma has 42 tribes against 14 vacancies and it is improper for Bungomek to allege that they were sidelined and discriminated against in the nomination; that the petitioners had not demonstrated what competence they hold to be elevated above the other applicants; that consideration of the interests of marginal groups, people with disability apply in the membership of County Assembly and not in appointment of County Chief Officers and that Parliament had not passed legislation to define marginalized people.

[7] On her part, **Elizabeth Wanyonyi** stated in her replying affidavit, among other things, that; the County Government Act does not require that application for advertised jobs be done according to tribe or clan; that after the interviews three names were selected from each category of jobs and forwarded to the Governor with a recommendation for approval; that having interviewed the various applicants and having noted their skills and expertise, the Board recommended to the Governor that certain personnel could do better in certain dockets though having excelled in the area they applied for which is part of the recruitment exercise and within the Board’s mandate; **Protus Kirui** from Bungomek Community was No. 3 in the category of the job he applied for and that selection was based on sub counties to ensure that each region was represented and to reflect the image of Bungoma. She annexed the relevant documents including a report on the selection and recruitment to the Governor. The report shows the marks each candidate scored in each category, qualifications of each, the three names recommended in each category and the constituency each nominee came from. The Speaker in his replying affidavit in response to the petition stated, among other things, that he received the petitions from Bongomek Community and **John Wekesa Khaoya**, tabled them in the Assembly and forwarded them to the relevant committees to interrogate them during the vetting process and that due to the *sub judice rule*, the Assembly could not interfere with the proceedings before the court.

The two petitions were consolidated before the hearing.

[8] The trial court framed three issues thus:

(i) whether the 1st and 4th respondents were in violation of any provisions of the Constitution or any written law with regard to the nomination of the candidates for the position of the County Chief Officers.

(ii) whether the speaker as well as the County Assembly acted unconstitutionally in not considering or debating the petitions presented by the Bongomek Community and John Wekesa Khaoya.

(iii) whether the rights of the petitioners were violated by the respondents in the selection, nomination and vetting of the interested parties as county officers of Bungoma County.

The High Court in considering the first issue appreciated that section 65(1) of the County Governments Act (CGA) governed the nominations of the county Chief Officers.

The section provides:

“65(1) In selecting candidates for appointment, the County Public Service Board shall consider –

a. the standards, values and principles set out in Articles 10, 27(4); 56(c) and 232(i) of the Constitution;

b. the prescribed qualifications for holding or acting in the office;

c. the experience and achievements attained by the candidate;

d. the conduct of the candidate in view of any relevant code of conduct, ethics and integrity;

e. the need to ensure that at least thirty percent of the vacant posts at entry level are filled by candidates who are not from the dominant ethnic community in the county;

f. the need for open and transparent recruitment of public servants; and

g. individual performance.”

[9] The trial court made a finding that the County Public Service Board (Board) was required to follow the specified constitutional guidelines including the national values and affirmative action before recommending the nominees to the Governor for appointments.

[10] The court considered two matters under the first issue namely; whether the five named nominees were nominated for positions that they were neither shortlisted nor interviewed and whether the failure by the Governor to nominate a person from Bongomek Community as County Chief Officer was in violation of their rights as enshrined in the Constitution and other statutory provisions. After a detailed analysis of the recruitment process including the report on the selection and recruitment forwarded to the Governor, the court concluded that by moving candidates from the interviewed position to others, the Board breached the principle of competition, merit, accountability, equity and transparency and made a finding thus:

“In this regard the 3rd, 4th, 7th, 11th and 14th interested parties did not qualify as nominees for the post of county chief offices nominated for by the 4th respondent. With such glaring irregularity, how sure can one be that even the others were properly rated and nominated. It leaves a heavy doubt in the court’s mind. I therefore find and hold that the 4th respondent acted ultra vires the Constitution and County Governments Act in proposing to the 1st respondent, the 3rd, 4th, 7th, 11th and 14th interested parties as nominees for Chief Officers in the dockets shown in the report by the 4th respondent. Having made the foregoing findings, it then follows that the actions of the 1st respondent in nominating the 3rd, 4th, 7th, 11th and 14th interested parties and forwarding their names to the County Assembly was a nullity. Accordingly, and for the reason of the doubts the court has expressed above, I hold that the exercise of nominations was unconstitutional, illegal and therefore a nullity.”

[11] The court next considered the contention that Bongomek Community is a marginalised community. The court said in part;

“I agree with the respondents that neither the Constitution nor the County Governments Act define who the marginalised groups are. However, the Concise Oxford English Dictionary 12th Edition, page 87 has defined the term “marginalised” as “to treat as marginal or periphery” while marginal has therein been defined as “of secondary or minor importance.”

The court made a finding of fact that out of the various communities in Bungoma County, Bongomek Community is not represented in any sphere of governance such as County representatives, Parliament, Senate and in county jobs and concluded:

“To this end I am of the view and so held that Bongomek community is a marginalised group in Bungoma County and its rights under the Constitution to be treated as such had been violated.”

[12] As regards the second issue, the court considered the right to petition the County Assembly under Article 37 of the Constitution and sections 15 and 88 and 89 of the CGA and made a finding of fact that the Speaker did not table the petitions before the County Assembly for debate and resolution and that there was no evidence that the various committees of the County Assembly ever considered the grievances raised. Ultimately, the court concluded:

“I find that the right to petition the County Assembly under Article 37 and section 88 and to receive a response under section 89 had been breached by the 3rd respondent and County Assembly.”

[13] Lastly, the court briefly considered the third issue framed and made a finding thus:

“The court finds that the right of the Bongomek Community and Mr. Khaoya was breached by the 3rd respondent in failing to consider their petitions. Further, the court finds that the 1st, 3rd and 4th respondents violated the constitution and law as already set out above”.

[14] The court noted that the petitioners had fundamentally complained about the nomination exercise of positions of County Chief Officers and that there was no complaint about the position of the County Secretary. For that reason, the court stated that the judgment and orders do not affect the position of the 1st interested party. The reliefs granted included an order of certiorari quashing the decision of the Board and declaration that:

“Bongomek community is a minority group and ought to be treated as such in the governance of Bungoma county”

The court also held that the vetting and approval by the County Assembly of the 2nd to 14th interested parties and their ultimate appointment as Chief Officers was irregular, unconstitutional and a nullity. Each party was ordered to pay its own costs of the petition.

However, the proceedings show that the petitioners applied for review and on 24th November, 2014, a consent order was recorded between the advocates for the petitioners and the advocates for the Governor and the Board that the petitioners be paid costs of the petition in the sum of Shs. 5,000,000/-. It is also clear from the proceedings that the Court of Appeal granted a stay of execution of the judgment.

[15] The appeal is based on 30 grounds which relate to three broad areas – the process of recruitment of chief officers; the issue of marginalisation of Bongomek Community and the failure by the County Assembly to consider the petitions. The findings that the process of recruitment was unconstitutional, illegal, null and void is faulted on the grounds *inter alia*, that the 1st issue framed – that is, violation of any provision or any written law was open-ended and had no bearing on the petitions; that petitioners did not prove substantive defects in the procedure or fundamental omissions in the recruitment process to warrant nullification; the petitioners did not provide adequate particulars of violations of the Constitution; that the recruitment of the 2nd, 5th, 6th, 8th, 9th, 10th, 12th and 13th interested parties was nullified by extrapolation and that the court made contradictory findings. The finding that Bongomek a is marginalised community and was entitled to affirmative action is challenged on grounds, among others, that the issue was not pleaded; the finding is *per incurium* as the court failed to apply the definition of “*marginalised community*” and “*marginalised group*” in Article 260 of the Constitution; that the court erred in treating the process of recruitment as a communal collective process rather than an individual process and that the County Government had not taken legislative measures or affirmative action measures to address marginalisation. The appellant also avers that the court erred in framing the second issue as it was not among the prayers sought in the petitions.

[16] **Mr. Cyprian Wekesa**, learned counsel for the appellant relies on the written submissions which he orally highlighted at the hearing of the appeal. The firm of Ocharo Kehira & Co. Advocates filed written submission dated 23rd June, 2017 on behalf of the 1st and 2nd respondents. However, the 1st and 2nd respondents filed joint submissions dated 23rd July, 2019 and appeared in person at the hearing of the appeal. In addition, both made oral submissions opposing the appeal.

Mr. Kundu appeared for the 5th respondent and made oral submissions supporting the appeal. There was no appearance for the firm of A. W. Kituyi & Co. Advocates who appear for the 6th and 7th respondents. The firm of Wandabwa & Co. Advocates for the 8th to 20th respondents filed written submissions supporting the appeal. **Mr. Mungu** held brief for **Mr. Wandabwa** at the hearing and relied on the written submissions.

[17] At the hearing of the appeal, counsel for the appellant disclosed that the Chief Officers in question served their terms but stated that wrong findings were made against the appellant. In addition, the 2nd respondent submitted that the issue of employment has been overtaken by events as the Chief Officers served their respective five-year term. On 7th June, 2017, Mr. Wekesa informed the Court that the execution of the judgment was stayed and the affected Chief Officers were still in office and that there was a wide issue whether Bongomek Community was a marginalised community. On 21st November, 2017 **Mr. Ocharo**, counsel for the 1st and 2nd respondents informed the Court that the issue of Bongomek Community was resolved and a person from that community appointed a Chief Officer but the County Government appealed. On that occasion, the court ordered that the appeal be fixed for mention and directed the parties to seek an amicable solution on the outstanding matter. On the next mention date, **Mr. Kariuki**, counsel holding brief for **Mr. Wekesa** informed the Court that **Mr. Wekesa** had no instructions to withdraw the appeal and the Court ordered the appeal to be fixed for hearing.

[18] The report on selection and recruitment of Chief Officers indicated that the chief officers were to be employed on contract. The County Governments came into existence after the first election under the current Constitution, 2010, which was held in March 2013. Under the current Constitution, the term of the Governor, County Executive and County Assembly is five years (see Articles 177(4), 179(7) and 180(1)). The second election under the current Constitution was held in August 2017. From what the appellant’s counsel and the 2nd respondent has told the Court, it seems that the Chief Officers were employed on a five-year contract to coincide with the term of County Government. The petitions targeted a specific recruitment process and of specific officers. Similarly, the impugned judgment nullified the recruitment of specific officers. However, the execution of the judgment was stayed and the chief officers lawfully completed their respective terms. In the premises, save for the question of marginalisation of Bongomek Community, the appeal has become moot. It has no practical significance either to the appellant or to the chief officers. It is regrettable that the parties, though given an opportunity, did not save judicial time either by amicably resolving the outstanding issue or narrowing the scope of the appeal. Consequently, the Court will only deal with the appeal so far as it relates to the question of the marginalisation of Bongomek Community which issue outlives the impugned judgment.

[19] The petition in the High Court by Bongomek Community in essence alleged discrimination against the community in employment. The petition alleged that Bongomek Community is a minority in terms of population in Bungoma county and that the community has a right to be included in the governance of Bungoma and that the respondents have a constitutional obligation to uphold and defend the rights of the community. The petitioners averred that none of the nominees who were shortlisted and interviewed hailed from the Community. They averred that the community rights and freedoms stipulated in Articles 2(1) 3(1) 27(4); 56(c) and 232(1) were breached. The reliefs sought in the petition included a declaration that the;

“Bongomek community is a minority group and ought to be treated as such in the governance of Bungoma county”

In the petition filed before the County Assembly, the petition gave a brief history of the community and the factors or characteristics which made the community qualify as a minority group. The petition recommended that the list of chief officers be rejected; that the final list should include a member from the community and that the County Assembly should recognize the community as a legitimate indigenous minority.

It is clear that the main purpose of the petitions was to have a member of the community appointed as a Chief Officer in the specific recruitment. The dispute was in essence an employment dispute within the County Government.

[20] The staffing of the County Government is provided for in Article 235(1) of the Constitution. It provides:

“(1) A county government is responsible within a framework of uniform norms and standards prescribed by an Act of Parliament, for –

- a. establishing and abolishing offices in the public service;**
- b. appointing persons to hold or act in those offices and confirming appointments; and**
- c. exercising disciplinary control over and removing persons holding or acting in those offices”**

The County Governments Act provides “a framework of uniform norms and standards” stipulated by Article 235(1). By section 63 of CGA, the Board recruits Chief Officers. By section 45 of CGA the Governor nominates qualified and experienced chief officers from among the persons competitively sourced and recommended by the Board. By section 8 of CGA, the County Assembly vets and approves the nominees who are thereafter appointed by the Governor pursuant to section 45(1) (b). The matters that the Board is required to consider in selecting candidates for appointment are stipulated in section 65(1) already quoted in paragraph [8] above. In particular, the Board is required to ensure that at least thirty percent of vacant posts at any level are filled by candidates who are not from the dominant ethnic community. By section 65(2), the overriding factors in appointment is merit, fair competition and representation of the diversity of the county.

[21] The protection of the marginalised is a national value under Article 10(2) (b) of the Constitution. Article 27(4) prohibits the State from directly or indirectly discriminating any person on grounds, *inter alia*, ethnic or social origin, culture, language or birth. By Article 27(6), to give effect to realization of rights of equality and freedom from discrimination, the State is required “to take legislative and other measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individual or groups because of past discrimination”

Further, Article 56 requires the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups, *inter alia*, participate and are represented in governance and other spheres of life, are provided special opportunities in educational and economic fields and are provided special opportunities for access to employment. By Article 197(2) Parliament is required to enact legislation to –

“(a) ensure that the community and cultural diversity of a county is reflected in its county assembly and county executive committee; and

(b) prescribe mechanisms to protect minorities within counties”

[22] The Constitution in Article 260 defines “marginalised community” and “*marginalised group*”. According to the definition “*a marginalised community*” fall into four categories, viz;

- (a) a community that because of its relatively small population or for any other reason has been unable to fully participate in the integrated social and economic life of Kenya as a whole.
- (b) a traditional community that out of need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
- (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or
- (d) pastoral persons and communities, whether they are nomadic or a settled community that because of its relative geographic isolation was experienced any marginal participation in the integrated social and economic life of Kenya as a whole.

A “marginalised group” is defined as “a group of people who, because of laws or practices before on or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4)” The distinction between marginalised community and marginalised group is clear. A marginalised community suffers from deprivation of national social and economic resources because of its status. A marginalised group is disadvantaged by discrimination caused by laws and practices.

[23] In the Supreme Court of Kenya Advisory Opinion No. 2 of 2012, the Supreme Court interpreted Article 27(6) regarding affirmative action at paragraph [64] and [65] partly thus:

[64] ...since the task is expressed “to give effect” it follows that the rights in question, which are civil and political in nature are not capable of full realization unless the State takes “certain specified measures” such unspecified measures, it is clear to us can only be taken in stages over a period of time, and by means of positive and good faith exercise of government discretion.

[65] we take judicial notice that the passage of legislation [“legislative measures”] to redress an injustice, or to deliver public goods is not the single execution – oriented act that can be discharged immediately upon command; it is inherently, a process and must run over time, in the content of supportive measures and responsible exercise of discretion. It involves the conduct of studies and the development of legislative proposals.”

In addition, the Supreme Court at paragraphs [66] stated

“Affirmative action programmes require careful thought, multiple consultations, methodical design, coordinated discharge. Such measures cannot be in their very nature be enforced immediately.

[24] The current Constitution does not define “discrimination”. The repealed Constitution in Clause 82(2) provided that no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of public office or public authority and Clause 82(3) defined “discriminatory” as meaning “affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”.

Further, Clause 82(5) of the repealed Constitution provided, in essence, that a law is not discriminatory to the extent that it provides for standards or qualifications, not specifically relating to specified grounds, to be required of a person who is appointed to an office in public service; in a disciplined force; in the service of a local authority or in a body corporate established by law for public purposes.

The definition of “discrimination” in Clause 82(3) of the repealed constitution is a universal definition in human rights law and is contained in law dictionaries and applies to Article 27(4) with adaptation to the characteristics contained therein. Similarly, the principle in clause 82(5) of the repealed Constitution as to standards or qualification for employment has been expressed in the provisions of the Constitution. For instance, by Article 73(2), a guiding principle of leadership and integrity is that a State Officer is selected on the basis of personal integrity competence and suitability. By Article 232(1), values and principles of public service include fair competition and merit, subject to the principle of representation of Kenya’s diverse communities and affording equal opportunities for appointment to men and women, members of ethnic groups and persons with disabilities. By Article 235(1), staffing in the County Government is within a frame work of uniform norms and standards prescribed by an Act of Parliament

[25] Having analysed the petition and reliefs sought as indicated in paragraph [4] and [19] above, as well as the law, and having considered the findings of the learned judge with regard to Bongomek Community, the grounds of appeal and the submissions of the respective counsel, I find as follows:

- (i) The finding of the court that Bongomek Community is a marginalised community is inconsistent with the 1st petition and prayer in the petition which averred that it is a minority community and sought a prayer to that effect.
- (ii) The finding of the court is *per incuriam* as the court did not consider the technical meaning of the attributes or characteristics of a marginalised community or a marginalised group as defined in the Constitution should have.
- (iii) Moreover, the factors which the court considered as indicators of marginalisation such as absence of representation of the Community in any sphere of governance including county representatives, in Parliament, Senate and job opportunities, do not fall within the ambit of the meaning of “marginalised community” or “marginalised group” as defined in the Constitution.
- (iv) The final declaration that the community is a “minority group” is inconsistent with the finding in the judgment that the community is a marginalised community and the two are not synonymous.
- (v) The declaratory relief sought in the petition that Bongomek is a minority group was sought in the context of the appointment of Chief Officers of the county. As already stated the petition sought the appointment of a person from the Community as a chief Officer. It was alleged that failure to appoint a person from the Community amounted to discrimination under Article 27(4) of the Constitution. The 1st petitioner did not prove discrimination in the legal sense as it was not shown that a person from the Community competitively qualified on merit for appointment as a Chief Officer but was denied the appointment wholly or mainly because he hailed from the Community.
- (vi) The principle of inclusiveness as stated in Article 10 and section 65(2) of CGA applied only to Chief Officers who had met the appointment criteria.

(vii) The grievances that the Bongomek Community has raised, that is discrimination and deprivation of minority rights or even marginalisation, can only be progressively resolved through affirmative-action programmes, policies and legislation as provided in Articles 27(6), 56 and 197(2)(b) of the Constitution. There was no evidence that Parliament has enacted a legislation to prescribe mechanisms to protect minorities within counties.

(viii) In the absence of such national or county policies, mechanisms or legislation, courts of law are ill-equipped in the identification of minorities and marginalised communities or groups and in granting appropriate relief that would achieve a progressive realization of the rights.

(ix) The relief granted that Bongomek Community be treated as a minority group, is with respect, so vague and broad in its content and also beyond the employment discrimination in issue.

[26] For the foregoing reasons, I find the High Court erred in law and in fact in declaring Bongomek as a marginalised group or a minority group and entitled to right in the governance of Bungoma County. Accordingly, I would allow the appeal to that extent and set aside the declaration as well as the order of costs in the High Court and order each party to bear their own costs of the appeal and of the costs in the court below.

Dated and delivered at Kisumu this 30th day of December, 2019.

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF H. OKWENGU, JA.

I have read the draft Judgment of my sister Mohammed, JA. The facts relating to this appeal have been well captured and I do not therefore need to repeat them.

I am in entire agreement with the law and the analysis set out in the judgment. Under the Constitution a minority community is not synonymous with a marginalized community and clearly there was contradiction in the judgment of the lower court. Accordingly, I concur with the judgment of my sister that Bongomek community is not a marginalized group nor has it been discriminated against. Accordingly, the appeal is allowed, the judgment and orders made by the lower court are hereby set aside and the respondents' petition is dismissed. Each party shall bear its own costs of the appeal and costs of the court below.

This Judgment has been delivered in accordance with Rule 32(3) of the Court of Appeal Rules Githinji, JA having ceased to hold office by virtue of retirement from service.

Dated and delivered at Kisumu this 30th day of December, 2019.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR