Gachuri v Attorney General & another; Kenya Judges Welfare Association & another (Interested Parties) (Constitutional Petition E0304 of 2023) [2024] KEHC 1632 (KLR) (Constitutional and Human Rights) (23 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1632 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E0304 OF 2023

EC MWITA, PM NYAUNDI & LN MUGAMBI, JJ

FEBRUARY 23, 2024

BETWEEN

PETER MWANGI GACHURI ..... PETITIONER

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

SALARIES AND REMUNERATION COMMISSSION ..... 2ND RESPONDENT

AND

KENYA JUDGES WELFARE ASSOCIATION ..... INTERESTED PARTY

THE JUDICIAL SERVCE COMMISSION ..... INTERESTED PARTY

RULING

Background/Introductoin

1. The petition dated 23rd August 2023, was instituted against Salaries and Remuneration Commission (SRC) and the Attorney General (AG) by the petitioner as a public interest litigation.

2. The petition primarily contests the constitutionality of a decision taken by SRC on 12th July 2021 which stopped taxable car allowance (the allowance) hitherto enjoyed by judges. The petitioner asserts that the decision is a contravention of Article 160(4) of *the Constitution* and a threat to the independence of the Judiciary which is protected under Article 160 of *the Constitution*.

3. Closely related to the main issue, the petitioner avers, is an opinion rendered by the AG to SRC to the effect that the allowance should only be paid to the Judges who were in office on 27th August 2010 when *the Constitution* of Kenya 2010 was promulgated (the promulgation date). The petitioner contests the

constitutionality of that opinion on the basis that it amounts to discrimination against the Judges appointed after the promulgation date hence a violation of Articles 27 and 41 of *the Constitution*.

4. Directions were issued and timelines set on 23rd November 2023 on filing of responses and skeleton submissions and oral highlighting of submission scheduled for 2nd February 2024. However, SRC filed the instant application for recusal.

Application

5. The recusal application is dated 14th December 2023. SRC seeks recusal of not only members of this bench, but also all judges in the country from hearing this petition, due to what SRC says is conflict of interest and institutional bias.

6. In the alternative, SRC asks the Court to refer the dispute for mediation before a panel of 3 retired judges from the Commonwealth, to be appointed by the President, or 3 arbitrators to be appointed by the Chartered Institute of Arbitrators. A report on the outcome (on the mediation or arbitration) should then be filed in court within 4 months. This, SRC argues, is in the spirit of Article 159 of *the Constitution* on alternative disputes resolution.

7. The main ground on which the recusal is sought is that the issue in the petition relates to the constitutionality of taxable car allowance for purchase of vehicles for judges. This being a financial benefit for all judges, judges in this bench and all other judges in the country have a direct pecuniary interest in the outcome of the petition and should not, therefore, sit to hear this petition.

8. SRC takes the position that it is not proper for judges to determine a matter where they are the ultimate beneficiaries of the final outcome. According SRC, this is a clear case of conflict of interest and judges are likely to issue a subjective and biased judgment that promotes their pecuniary interest.

9. SRC maintains that there is potential public perception of bias which cannot be ignored if judges are allowed to hear a matter in which they have a direct financial interest.

10. SRC cites Articles 73(2) and 75(1)(a)(b) of *the Constitution* as requiring judges to behave in a manner that avoids conflict between personal and official duties.

11. SRC also cites to paragraph 20(1) of the Judicial Service Code of Conduct and Ethics (the code) to argue that judges have to use the best effort to avoid being in situations where personal interests conflict or appear to conflict with their official duties.

12. SRC further relies paragraph 21 of the code to argue that a judge may recuse himself or herself from proceedings in which impartiality might reasonably be questioned if the judge has actual bias or prejudice concerning a party and or has a personal interest in the outcome of the matter.

13. It is SRC's further argument, that value 2.5 of the Bangalore principles of Judicial Conduct (Bangalore Principles) requires judges to disqualify themselves from participating in proceedings in which they may appear to a reasonable observer unable to act impartially. One of such instance, SRC argues, is where the judges have an economic interest in the outcome of the matter.

14. SRC relies on Metropolitan Properties Company (FGC) Ltd v Lannon and others [1968] EWCA Civ J0711-2; [1969]1 QB 577 that appearance of bias is inferred where reasonable people might think the Court was likely biased.

15. SRC posits, relying on the above decision, that impartiality is essential for the proper discharge of judicial duties, a principle that not only applies to the decision itself but also to the process leading to decision making.

16. It is the view of SRC, that because of conflict of interest on the part of the judges, it is apprehensive that justice will not be administered in a fair and impartial manner, a violation of Article 50(1) of *the Constitution* which protects the right to fair hearing before an impartial tribunal, so that justice is not only be done but should also be seen to have been done.

17. SRC maintains that Judges are held to highest ethical standards, thus the present circumstances raise ethical concerns regarding their duty to act in a manner that upholds public confidence in the judiciary and maintains the highest level of integrity.

18. SRC argues, therefore, that it is "utterly wrong, legally problematic and openly unconstitutional" for judges to determine a matter in which they have pecuniary interest as the ultimate beneficiaries of that outcome. In that respect, SRC urges that all judges recuse themselves from hearing this matter.

19. SRC argues, in the alternative, that in the spirit of Article 159 of *the Constitution*, the bench should stay these proceedings and refer the dispute to mediation by a panel of 3 retired judges from the Commonwealth appointed by the President, or 3 arbitrators to be appointed by the Chartered Institute of Arbitrators.

20. SRC relies on several other decisions in support of this application,

21. he Attorney General (AG) supports the application and associates itself with the arguments by SRC. The AG adds that the withdrawal of the allowance affected judges appointed after the impugned decision. And since the petition seeks to confer a benefit to judges appointed after 2021 and within the bench, are members appointed after 2021, this is one of the grounds for recusal.

22. According to the AG, Article 50 gives the right to a fair hearing by an independent and impartial body and judges hearing the matter ought not to have an interest in its outcome.

23. It is the AG's further argument that the judiciary functions within public confidence and where there is perception of bias, judges ought to recuse themselves to protect the integrity of the judiciary so that justice is not only done, but is seen to been done. If the petition is allowed, it will confer a direct benefit to judges and, therefore, there is need for recusal.

Responses

24. The application is opposed by the petitioner; Kenya Judges Welfare Association (KJWA) and Judicial Service Commission (JSC). The petitioner argues that the petition is a public interest litigation filed in defence of *the Constitution*; that he has the right Articles 258(1) to defend Article 160(4) and that he has invoked Article 165(3) seeking the Court's interpretation on whether the decision by SRC contravene *the Constitution*.

25. The petitioner contends that petition is before the right forum as it seeks interpretation of *the Constitution* under Article 165(3) and there is no reason for recusal. According to the petitioner, the petition was certified as raising substantial questions of law and once a matter certified under Article 165(4), it must be heard by an uneven bench of judges appointed by the Chief Justice, as is the case here.

26. The petitioner takes the position that the application for recusal of the bench and all judges to allow another body to hear the petition, if allowed, would contravene *the Constitution*.

27. Relying on paragraph 21(3)(a) of the code, the petitioner contends that the paragraph recognizes that under the doctrine of necessity, a judge may not recuse himself or herself from a matter if there is no other judge to hear the case. in that respect, if the bench recuses itself from this petition, no other judge will hear the petition given the position taken by SRC.

28. On whether the bench should refer the matter to mediation, the petitioner takes the position that mediation being court mandated and subject to the supervision by the Court, the Court cannot supervise a matter it cannot hear. Further, if parties disagree during mediation they will have nowhere to go. Parties cannot also be forced to go to mediation.

29. It is the petitioner's case that *the Constitution* confers obligations and privileges on judges and the people of Kenya did not find it necessary to exempt these rights, obligations and privileges from the application of Articles 258, 22, 23 and 165(3) of *the Constitution*. It is therefore constitutionally in order to have the situation we presently have and judges have to hear the petition.

30. The petitioner urges that judges are not expected to run away their duty to deal with issues such as those in court now and should find the application devoid of merit.

31. KJWA associates itself fully with the petitioner's argument and relies on its written submissions, urging that the application for recusal be dismissed.

32. JSC also associates itself with the submissions by the petitioner. JSC adds that the contention that all judges are inherently conflicted and cannot objectively hear this petition is not legally correct.

33. JSC takes the view, that if SRC's position that all judges recuse themselves is to be accepted, it will mean that any of SRC's decisions cannot be challenged in a court of law. This will go against the values and principles of *the Constitution* that all persons including commissions, are subject to *the Constitution*. Decisions by SRC are not, therefore, immune to judicial scrutiny.

34. JSC points out that Article 230 does not confer immunity on SRC; Article 230(5) requires SRC to be transparent and fair in its actions while Article 165(3) gives the Court powers to check whether decisions by SRC are transparent, fair and in conformity with *the Constitution*.

35. According to JSC, there can be no issue of conflict of interest that would disqualify all judges in the country from hearing this petition, given that judges have previously heard cases involving colleagues, including during the vetting process.

36. JSC asserts that where a litigant challenges a decision of a constitutional organ, the Court has power to check the constitutionality of that decision, Article 73 notwithstanding. Reliance is placed on the Supreme Court decision in Gladys Boss Sholei v Judicial Service Commission & 2 others [2018] eKLR on the duty of a judge when confronted with disputes.

37. It is JSC's position, therefore, that the application is a request to the Court to subvert *the Constitution* by refusing to hear the petition presented before it for resolution.

38. Regarding the alternative request for mediation/arbitration, JSC argues that mediation is not viable because the dispute requires interpretation of *the Constitution* under Article 165(3) which is not the purpose of mediation. Similarly, disputes before the Court cannot be sent to the President for him to appoint a panel from the Commonwealth to hear a litigant's dispute that has been submitted to court for resolution.

Test for recusal

39. We have considered the arguments by parties and the decisions relied on.

40. In recusal application where a party alleges apprehension or likelihood of bias, the Court must consider the issue and make a determination on the request for recusal. In doing so, the Court does not have to determine that indeed there is bias but applies the objective test of reasonableness based on the consideration of the correct facts of the case.

41. The onus is on the party seeking recusal to establish the usually high standard because the request for recusal impugns the integrity of the judge who has taken an oath to do justice without fear or favour.

42. The test for recusal has been stated in may decisions in various jurisdictions. In the case of the President of the Republic of South Africa & others v South African Rugby Football Union (Case No 16/1998) 1999 (4) SA 147; 1999 (7) BCLR 725 (CC) (Surf case), the Constitutional Court of South Africa, after reviewing several decisions on the subject, stated that the approach to an application for recusal is objective and the onus of establishing it rests upon the applicant.

43. The Court then formulated the test as follows:

> (48) ...The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.

44. This test was applied in South African Commercial Catering and Allied Workers Union & others v Irvin & Johnson Ltd Sea Foods Division Fish Processing (CCT 2/2000) [2000] ZACC 10; 2000 (3) SA 705; 2000 (8) BCLR 886 (9 June 2000), where the same Court emphasized that not only must the person apprehending bias be a reasonable person, but the apprehension itself must, in the circumstances, be reasonable and be based on reasonable grounds.

45. The Court opined that "mere apprehensiveness on the part of a litigant that a judge will be biased, even a strongly and honestly felt anxiety is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable".

46. In Ashok Kumar Yadav & others v State of Haryana & others 1987 AIR 454, 1985 SCR Supl. (1) 657, the Supreme Court of India had the following to say:

> It is one of the fundamental principles of our jurisprudence that no man can be a judge in his own cause and that if there is a reasonable likelihood of bias it is in "accordance with natural justice and common sense that the justice likely to be so biased should be incapacitated from sitting". The question is not whether the judge is actually biased or in fact decides partially, but whether there is a real likelihood of bias. What is objectionable in such a case is not that the decision is actually tainted with bias but that the circumstances are such as to create reasonable apprehension in the mind of others that there is likelihood of bias affecting the decision.

47. In Porter v Magill [2002] 1 All ER 465 the House of Lords also opined that the question is whether fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

> 48. Lord Denning also stated in Metropolitan Properties Co (FGC) Ltd v Lannon and others (supra) that "The Court will not inquire whether the [judge] did,

> in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidences and confidence is destroyed when right-minded people go away thinking: 'The Judge was biased' ".

49. See also Robert Tom Martins Kibisu v Republic [2018] eKLR, where the Court held that bias is a factor that may lead to a judge's recusal from a matter to safeguard the sanctity of the judicial process in tandem with the principle of natural justice that no man should be a judge in his own case.

50. The general principle emerging from the decisions cited by the parties and those we have consulted, is that a judge should recuse himself or herself if there is reasonable apprehension that in the circumstances of the case, it is likely that he will not do justice in the matter.

51. The authorities are also clear that for apprehension of bias to arise, it must be founded on the correct facts. In other words, if the factual foundation of bias is wanting, then the apprehension is also wanting and the application for recusal will be refused.

52. In the case before us, SRC's concern is that the dispute touches on judges' interest as the ultimate beneficiaries of the decision. For that reason, judges should not sit on the petition and make a decision in their fsvour.

53. The application before, us as we understand it, is not that this bench, as constituted, should recuse itself from hearing the petition. Rather, the broader argument discernable from the application and submissions by SRC and AG, is that no judge in this country should hear this petition. SRC and the AG hold a firm position, that all judges in this country are conflicted and should not, therefore, be the ones to hear a petition for their own benefit.

54. We must admit that the petition deals with an issue touching on the welfare of judges as it challenges a decision by SRC that seems to affect judges. In that respect, the recusal application is an unprecedented as it implicates not only each of the judges on this bench, but also all judges in this country, questioning their impartiality and impugning the integrity of the judiciary of this country, to hear and determine this petition.

55. We must however point out that the core of this petition is on interpretation of *the Constitution*, namely; whether the impugned decision (by SRC to stop the allowance) violates Article 160(4) of *the Constitution*. Even though the petition would appear to concern judges, the real issue is to interpret *the Constitution* against the decision by SRC. The rest of the reliefs will depend of the outcome of this core issue.

56. We must state the position, as a principle of law, that where the issue before the Court is on the interpretation of *the Constitution*, the mandate to determine the question falls on this Court by virtue of Article 165(3) (d) of *the Constitution* which confers on the Court jurisdiction to hear any question respecting the interpretation of *the Constitution*, including the determination of—(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, this Constitution".

57. The people of Kenya placed judicial authority on the courts and the courts are to discharge this mandate in accordance with *the Constitution* and the law only (Art 160). That is, judges are to discharge their duties in accordance with *the Constitution* and "their oath of office to do justice without fear or favour". In that regard judges discharge a constitutional mandate conferred on them by *the Constitution* itself.

58. That the petition calls for interpretation of *the Constitution* and, in particular, whether SRC's decision contravenes *the Constitution* is admitted by counsel for SRC when he submits that "the issue in the petition relates to the constitutionality of taxable car allowance for purchase of vehicles for judges".

59. Determining the constitutionality of the decision by SRC to terminate the allowance and the "constitutionality of taxable car allowance for purchase of vehicles for judges" as SRC puts it, calls for interpretation of *the Constitution* which is the core mandate of this Court in particular and judges in general at different levels of the hierarchical structure of the courts within the Judiciary.

60. In that respect, any suggestion that this bench and indeed any other judge(s) in this country cannot and should not hear this petition is not only strange but would also cause an injustice. This is so because the effect of such a move would be that the petition cannot be heard and as a result, it would never be known whether the impugned decision violates *the Constitution* or not.

61. The Court has a duty to sit on matters presented before it for resolution and should only recuse itself where circumstances permit but not where it will create an unconstitutional moment by refusing to hear a litigant's case because the opposite party apprehends bias.

62. For our part, taken in that context, and bearing in mind our duty to sit and discharge justice without fear or favour, uphold the rule of law and administration of justice in the country, we hold the position that this bench has a constitutional duty to sit in this petition and do justice in accordance with *the Constitution* and the individual judge's oath of office.

63. We take this position firmly aware, that authorities also show that there are situations when a judge may not recuse himself or herself if such a cause would lead to an injustice or an untenable situation.

64. In the Surf case (supra), where the application sought recusal of 5 justices of the Constitutional Court, recusal was declined because it would have left the Court without quorum to hear the appeal, leading to an injustice.

65. In Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2013] eKLR, an application for recusal was also declined because it would have resulted in the Supreme Court not being quorate, a situation that could not be reversed.

66. It was stated that:

> In circumstances in which all the members of the only tribunal competent to determine a matter are subject to disqualification, they may be allowed to sit and determine the matter under the doctrine of necessity to avoid a miscarriage of justice.

67. A similar view was taken in Gladys Boss Shollei v Judicial Service Commission & 2 others (supra) because recusal would have resulted into a quorum hitch in the Supreme Court. The Supreme Court emphasized that every judge has a duty to sit, in a matter which he has a duty to sit; recusal should not be used to cripple a judge from sitting to hear a matter and the duty to sit is buttressed by the fact that every judge takes an oath of office: "to serve impartially; and to protect, administer and defend *the Constitution*".

68. This view was also ably expressed in the Surf case, that the reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience.

Mediation

69. SRC has, in the alternative, urged, in the spirit of Article 159 of *the Constitution*, that the dispute be referred to mediation before a panel of 3 retired judges from the Commonwealth appointed by the President, or 3 arbitrators appointed by the Chartered Institute of Arbitrators, a position supported by the AG, but opposed by the petitioner, KJWA and JSC.

70. Mediation, is one of the alternative dispute resolution mechanisms recognized by *the Constitution* (Article 159(2)(c)). The Article calls for promotion of alternative forms of dispute resolution including, mediation, arbitration and traditional dispute resolution mechanisms.

71. To give effect to Article 159, the judiciary has incorporated Court Annexed Mediation within the court system as one of the dispute resolution mechanisms. Within this framework, parties are encouraged to seek resolution of their disputes before court annexed mediators-persons trained on mediation and accredited to the court.

72. Although mediation is up and running within the judiciary, the suggestion put forward by SRC is not without challenges. It must be appreciated that mediation is undertaken under the supervision of the court which refers the dispute to mediation. If parties agree, the mediation agreement is then adopted by the court. Where, however, parties do not settle the dispute before the mediator, the matter is remitted back to the court for hearing in the usual manner.

73. On the other hand, arbitration is a mode chosen by parties for resolving their dispute, and it is usually one of the terms of the contract executed between the parties. Arbitral process is governed by the *Arbitration Act*, but the Court may also implore parties to try and resolve their dispute through arbitration and may refer a matter to arbitration.

74. Whether mediation or arbitration, these modes do not deal with legal issues, let alone constitutional disputes. Furthermore, parties must be willing to take one of the two modes for resolving their dispute. The Court cannot force parties to go to either of the two modes to resolve their dispute.

75. As already pointed out, the issue before the Court is on the interpretation of *the Constitution*. That notwithstanding, SRC suggests that the President should appoint a panel of retired judges from the Commonwealth as mediators to dispose of the petition which has been brought under Article 22 as read with Article 165(3) of *the Constitution*.

76. Since the petition seeks the Court' exercise of its interpretative mandate, to request the Court to send parties to the President, the head of the executive, to appoint a panel of judges from outside the country to deal with what is purely a function of the judiciary to interpret *the Constitution*, if allowed, would amount to not only dereliction of duty, but also an extra juridical manoeuvre that is constitutionally unacceptable.

77. It is not also clear to us the source of power the panel of mediators or arbitrators will exercise to interpret *the Constitution* and the jurisprudential value of such interpretation, if any.

78. Aware of the apprehension by SRC and having assessed that concern in light of the oath of office taken by individual judges on this bench and in the country, to administer justice without fear or favour; our ability to carry out that oath to do justice without fear or favour, we hold the view, that we have the ability to disabuse our minds of any irrelevant personal beliefs and do justice as required of us by *the Constitution* for the benefit of all parties before us.

79. It is our respectful view therefore, that the Court, as the custodian of *the Constitution*, has the ultimate mandate to interpret *the Constitution* and resolve the dispute parties have presented before it.

80. In the circumstances and for the above reasons, the application for recusal is declined and dismissed.

81. We make no orders on costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2024

E C MWITA

JUDGE

M NYAUNDI

JUDGE

L. N. MUGAMBI

JUDGE