**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Constitutional Petition 1 of 2010**

**MS. PRISCILLA NYOKABI KANYUA.....PETITIONER**

**AND**

**ATTORNEY GENERAL.....1ST RESPONDENT**

**INTERIM INDEPENDENT ELECTORAL COMMISSION...2ND RESPONDENT**

## JUDGMENT

M/s Priscilla Nyokabi Kanyua acting on instructions of Kituo cha Sheria's Board of Directors, which authorized Kituo's Advocates to represent the prisoners, filed this petition on behalf of the said inmates after her letter dated 20th April 2010, as Kituo cha Sheria's Executive Director petitioning the Chairman of the Interim Independent Electoral Commission demanding that prisoners be registered was not acted upon by the Interim Independent Electoral Commission. (hereinafter called the IIEC).

M/s Kanyua set out the following prayers in her petition dated 20th May, 2010:-

1. *That the Honourable Court makes a finding that S.43 of the Constitution of Kenya does not exclude prisoners from voting in a referendum but only explicitly provides for their exclusion in voting for Presidential and National Assembly elections.*
2. *That the Honourable Court makes a finding that the IIEC's exclusion of prisoners from its voter registration exercise was illegal given their mandate under S. 41A(d) of The Constitution of Kenya to undertake fresh registration of voters and create a new*

*voters' register for the upcoming referendum without expressly prescribed limitation to exclude any category of people.*

3. *That the Honourable Court makes a finding that the disqualification of prisoners to register to vote under the current exercise of the Interim Independent Electoral Commission should not be implied within the meaning of this section S. 43 of the Constitution of Kenya.*
4. *That the Honourable Court makes a declaration that prisoners are eligible to be registered to vote participate in the upcoming referendum.*
5. *That the Honourable court instruct the Interim Independent Electoral Commission (IIEC) to move urgently to:-*
6. *Make a public announcement that prisoners can participate in the Referendum and register to vote.*
7. *Set eligibility criteria of prisoners to vote in the referendum as follows:*

   *All prisoners must:*

   *2.1 Not be excluded from voting by any other provision of the laws of Kenya.*

   *2.2 Currently possess a national identity card.*
8. *Facilitate registration of prisoners as voters by setting up registration and polling points in all prisons. Electronic registration would accommodate larger numbers of people in shorter periods.*
9. *Identify the nearest gazette centres to prisons to facilitate immediate registrations.*
10. *Liaise with prison authorities for prisoners to be allowed access to their identity cards for the limited purpose of registration as voters.*
11. *Liaise with Prison authorities for the safe keeping of the voters' cards upon registration of prisoners.*
12. *The respondents are liable to pay the costs of this petition.*
13. *All such orders, writs and or direction as the Honourable Court my deem fit, just and appropriate to safeguard the fundamental rights of prisoners under the Constitution of Kenya.*

Thereafter M/s Kanyua filed an application dated 21st May, 2010 praying for orders that:-

1. That this matter be certified urgent

2. That the Court do instruct the Interim Independent Electoral Commission (IIEC) to create a new voters register for the up-coming referendum and do so by including the inmates in prison for the purpose of upcoming referendum on 4th August, 2010.
3. That the Interim Independent Electoral Commission (IIEC) do extend the period for voter registration for the purposes of including the excluded inmates.

When the case came up for hearing on 21st May, 2010, the Court certified the application urgent in terms of Prayer No. 1 but declined to grant other prayers and ordered, M/s Kanyua to serve the respondents.

The application was duly served on the respondents. When the matter came up for hearing interparties on 25th May, 2010 the parties agreed that the issues in the application should be canvassed in the petition.

The Attorney General, the first respondent herein filed a Memorandum of Appearance on 25th May 2010 but did not file any other pleadings.

The Interim Independent Electoral Commission (IIEC) filed a statement of response on 31st May, 2010 under Rule 24 of the Interim Independent Constitutional Dispute Resolution Court (Practice and Procedure) Rules 2010. In its response, the IIEC stated that the reliance by M/s Kanyua on Section 6 of the Constitution of Kenya Review Act and Section 41A (d) of the Act and the guide lines therein cannot supersede the express provisions of Section 43 of the Constitution of Kenya.

That the Constitution of Kenya Review Act No. 9 of 2008 is a creation of the Constitution and it cannot supersede Section 3 of the Constitution of Kenya.

The IIEC states that Section 40 of the Constitution of Kenya Review Act 2008 is clear on who has the right to vote and that Section 43 of the Constitution and the National Assembly and Presidential Elections Act Cap. 7 Laws of Kenya are the written law on who can be registered and who can vote.

The IIEC further avers that the petition is time-barred since Section 39(3) of the Constitution of Kenya Review Act mandates the IIEC to suspend the registration of voters once it has published the referendum question an event which has occurred. In its view, reopening the voter registration process would throw the entire review process into a fatal spin as the Constitution of Kenya Review Act puts the review in a strait jacket timetable, which, if interfered with would scuttle the entire process.

The IIEC contends further, that the petition is defective since the petitioner has no *locus standi* to bring the action as she has not alleged that any particular individual right guaranteed by the Constitution has been violated with respect to her. It argues that the petitioners attempt to bring a representative suit falls in its face because she has not shown what rights of any particular individual have been infringed.

Finally that M/s Kanyua has not demonstrated that a specific person or persons applied for registration and such person(s) were denied registration and the IIEC contends that in the absence of such evidence M/S Kanyua the petitioner is not entitled to file a representative suit. IIEC requests the court to dismiss the petition with costs.

*KITUO CHA SHERIA*

Kituo cha Sheria, is a Non-Governmental Organization. Its objective is well set out in its constitution as follows:-

a) *The Centre exists to empower Kenyans to understand, respect, promote, demand and effectively access their human and people's rights and obligations in pursuit of a just and equitable society through self-governance.*
b) *The Centre is committed to the empowerment of marginalized peoples of Kenya to achieve justice for all.*
c) *The Centre shall be committed to:*
    *(i) Respect for human rights*
    *(ii) Justice and equity for all*

*(iii) Solidarity with pro-people individuals and agencies*

*(iv) Courage in the promotion of social transformation and empowerment of the marginalized*

*(v) Volunteerism*

*(vi) Obligations to equity, transparency and accountability*

Kituo cha Sheria was registered as Legal Aid Centre under Section 10 of the Non-Governmental Organization Coordination Act No.19 of 1990 on 11th March, 1993.

M/s Kanyua stated that Kituo cha Sheria, in the recent past, has been working with the inmates of Shimo la Tewa Prison, with the objective of reducing overcrowding in the prison and improving human rights in the prison system.

The petition asserted that the inmates of Shimo la Tewa prison acting through the Chairman of the Shimo la Tewa Paralegals Association authorized Kituo cha Sheria to petition the relevant authorities tasked with the responsibility of registering voters for upcoming referendum to consider the need for the prisoners to participate in the exercise. The authorization was contained in an unsigned letter dated 24th April, 2010 by one Dismus Omondi who wrote in his capacity as the Chairman of the said Prisoners Paralegal Association.

THE ISSUES

The petition raises the following issues for determination:-

a) *Does the Court have jurisdiction?*
b) *Does the petitioner herein have locus standi to file the Petition?*
c) *Is a referendum distinct from "National Assembly and Presidential Elections"?*
d) *Does the Constitution of Kenya disqualify the inmates from voting in a referendum?*
e) *Can the voters register be reopened under Section 39 of the Constitution of Kenya Review Act No. 9 of 2008?*

Does the Court have Jurisdiction?

The issue of jurisdiction was raised by Mr. Onyiso, Learned State Counsel. In his submissions, he argued that this Court does not have jurisdiction because section 7, 8 and 9 of the National Assembly and Presidential Elections Act, Cap 7 sets out the mechanism as to the determination of questions of registration of voters. He argued that these matters of registration are supposed to be dealt by registration officers as set out in Cap. 7 aforesaid, and that an appeal from a decision from those registration officers is appealable in the High Court.

This Court is established under Section 60 A (1) of the Constitution. The Court has exclusive original jurisdiction on matters arising out of the Constitutional Review process. The court is empowered to rule on its own jurisdiction under Rule 10(1) of this Court's (Practice and Procedure) Rules 2010. There is no doubt in the Courts mind that, the non registration of inmates by the IIEC, in the just concluded registration of voters for the August 4th referendum is a matter of Constitutional making process. The court is empowered by Section 60A aforesaid to entertain disputes that emanate from such a process. This is such a dispute. The issues herein are therefore clearly within the mandate of the court. This petition is clearly within the mandate of this Court and section 7, 8 and 9 of the National Assembly and Presidential Elections Act cannot apply to this petition. The procedure set out for the determination of questions concerning registration under Cap. 7 do not apply to a referendum. The referendum has its own rules set out under Legal Notice No. 66 of 10th May, 2010. The objection by the Attorney General in this respect cannot be upheld or even sustained and it is rejected by the Court. We therefore rule that the court has jurisdiction to hear and determine this petition.

The Petition

The petition filed herein raises many procedural issues. The petition is filed by M/s Kanyua on behalf of the Paralegal Convicts of Shimo la Tewa Prison. The affidavit verifying the petition is by M/s Priscilla Nyokabi Kanyua. M/s Kanyua is the Executive Director of Kituo cha Sheria. She swears the affidavit as Executive Director of the said Kituo. The petition itself starts with these words "*The humble petition of Kituo cha Sheria"*. Kituo cha Sheria is not a

party to this petition. Kituo cha Sheria being a registered Non-Governmental Organization, has capacity to sue and be sued under the Non-Governmental Organization Coordination Act of Kenya No.19 of 1990 Sec. 12 (3)(a). There was no reason why this matter should not have been instituted in the name of Kituo cha Sheria and an affidavit sworn by the M/s Kanyua its Executive Director. The authority to file the petition is by the Director of Kituo cha Sheria one Kamotho Waiganjoa Director of Kituo cha Sheria. The petition arose out of the interaction of Kituo cha Sheria and the inmates following Kituo's setting up of a Paralegal Training in the Prison. The alternative procedure would have been for M/s Kanyua to file the petition and a verifying affidavit by herself on behalf of paralegals inmates of the said prisons. The letter of authority to Kituo cha Sheria from the Chairman of the paralegal inmates one Omondi is not signed. The explanation given for the letter not being signed was that it was sent by electronic mail to the petitioner. There seems to be a confusion of who can sue in this petition, between M/s Kanyua as a person and her, as Director of Kituo cha Sheria.

There can be no denying that the inmates are in an unprivileged position and that they would have to rely on other people like M/s Kanyua or Kituo cha Sheria to ventilate their legal grievances, whether those grievances are issues of registration to vote in a referendum or on other legal matters. It is also likely that therefore, such basic legal requirements like signing of documents may pose a challenge. Be that as it may, this petition and its verifying affidavit should have been better drafted. Sadly it was not.

Should this court therefore strike out the petition for not complying with the Civil Procedure Rules and the (Practice and Procedure) Rules of this court? We think not. Rule 10 of this Court's (Practice and Procedure) Rules mandates the Court to interpret the Court Rules in a manner that promotes the principle of substantial justice without undue regard to technicalities. We think the issues raised herein for the inmates are substantial and a decision on the issues raised is imperative.

Locus Standi

Does M/s Kanyua, the petitioner herein have *Locus Standi*? Does she have sufficient interest to sustain her standing to petition this court?

Mr. Muhoro Learned Counsel for the 2nd respondent argued that Section 43(2)(c) as applied by Section 47A 5(a) of the Constitution of Kenya Review Act No. 10 of 2008 completely bars inmates from voting. Mr. Osoro Learned Counsel for the petitioner stated that inmates are not barred by Section 43(2)(c) in the exercise of their rights in voting for a referendum.

M/s Kanyua, the petitioner is a busy body and that she is not actually representing anybody else and that it should be found by the Court that she is representing an amorphous body and that those particular persons she was representing have an avenue. He argued that if the petitioner was instructed through an unsigned letter by one Dismus Otieno Omondi there was a procedure to be followed. He further argued that the petitioner has not shown who she is petitioning for that she said there were 53,000 prisoners but forgot to tell the Court that there are juvenile prisoners and he wondered whether the Court was being asked to allow juveniles to vote.

The Court must therefore now make a finding as to whether the inmates in prisons in Kenya are disqualified from voting by the said Section 43(2)(c) of the Constitution.

Mr. Osoro Learned Counsel for the petitioner argued in reply that in their prayers they were not asking the voter registration to be abandoned. He argued that the suggestion that they were asking juveniles to be registered was erroneous because it was a question of law and it is already predetermined. He argued that all they wanted was for the Court to restate that inmates have a right to vote and that they have not been excluded from voting in a referendum.

He argued that Priscilla Nyokabi Kanyua has *locus standi*. He cited the Indian jurisdiction where a post card sent to the President of the Court or Chief Justice is sufficient to petition the Court even when the card is not sent by the person whose rights are violated.

For a long time in this country, for a person to have *Locus Standi* in a matter, one must have had an interest either vested or contingent in the subject matter before the Court, which

interest must have been a legal one. Such interest must be above that of other members of the public in general.[1]

The issue of *locus standi* has shackled public law litigants for a long time. The Courts usually held that if the issue was a public one, the litigant should show that the matter complained of had injured them over and above the general population.[2] Otherwise public interest matters were to be litigated by the Attorney General or any other body the law set out in that regard.

This would appear to have been the position in the United Kingdom in the late 1970s. This position was well stated in *Gouriet Vumon V Post Office Workers and others*[3] as follows:

> *"… It can be properly said to be a fundamental principle of English law that private rights can be asserted by individuals, but, that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has a right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out."*

The same position was pertaining in *India*, *see S.P. Gupta V Union of India*[4]Bagwati J[5]. In his judgment stated as follows:

> *"The traditional rule in regard to locus standi is that judicial redress is available only to a person who has suffered a legal injury of violation of his legal right or legally protected interest by the impugned action of the state or a public authority or any other person or who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action. The basis of entitlement to judicial redress is personal injury to property, body, mind or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress."*

However and overtime, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach.

In *Inland Revenue Commissioner V National Federation of Self-Employed and Small Businesses Ltd*[6] Lord Diplock stated:

> *"It would in my view be a grave lacuna in our system of public law if a pressure group like the federation or even a single spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped."*

A similar position emerged in India where a liberal purposeful approach was applied in *Janata Dal V H.S. Chowdhary*[7] where the Court stated:-

> *"…the strict rule of locus standi applicable to private litigation is relaxed and a broad rule is evolved which gives the right locus standi to any member of the public acting bona fide and having sufficient interest in instituting an action for redressal of public wrong or public injury by who is not a mere busybody or a meddlesome interloper; since the dominant object of PIL is to ensure observation of the provision of the Constitution or the law which can be best achieved to advance the cause of the Community … or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, bona fide and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in; motion like action popularis of Roman Law whereby any citizen could bring such an action in respect of public delict."*

In Tanzania in *Rev. Christopher Mtikila V The Attorney-General* Lugakingira,J[8] stated:

> *"I hasten to emphasize, however, that standing will be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy."*

This purposeful approach has also been embraced by the Kenyan Courts. In *MJ. Mohammed V Commissioner for Lands*[9] where the Commissioner of Lands argued that if there was public interest to protect on a piece of land, he had registered, it was the Attorney General and not the plaintiff, therein, as an individual, who had the *locus standi* to bring the suit. The Court, Waki J., (as he then was) rejected that position.

In *Albert Ruturi , J.K. Wanywela & Kenya Bankers Association V The Minister of Finance & Attorney General and Central Bank of Kenya*[10], the position of *locus standi* in relation to the application of a purposeful approach as against a contextual one was finally put to rest by the Court. The Court emphatically stated that what gives *locus standi* is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population.[11] The Court equally recognized that organizations have rights similar to that of an individual private member of the public. The court therefore clearly recognized representative approach by organizations[12].

A new dawn of Public Law was then ushered in and the domination of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and the shuckles of inhibition in the name of *locus standi* were broken the law was liberalized and a purposeful approach took the driving seat in the area of Public Law. Justices Mbaluto and Kuloba in the Albert Ruturi case emphatically stated:

> *"In our very considered opinion carefully reached, what is this like in human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed on the altar of technicality. This court has vast powers under Section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental human rights, and broad public interest*

> *protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. We state with a firm conviction, that as a part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right of access to justice entails a liberal approach to the question of locus standi. Accordingly in constitutional questions, human rights cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In this type of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not insist on such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception."*

In the interest of the realization of effective and meaningful human rights, the common law position in regard to *locus standi* has to change in public interest litigation. As Loots[13] explains, that many people…whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which then remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organization being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become more accessible to the metaphorical man or woman in the street. Accessibility to injustice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to locus standi is required to fulfil the Constitutional court's mandate

to uphold the Constitution. This would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled.

In *Republic V Minister for Information and Broadcasting and Ahmed Jibril Ex-parte East African Television Network*[14] Khamoni J. has reiterated the position in the Kenya Bankers Case[15] and stated that in judicial review applications, an applicant only needs to demonstrate that he or she has "sufficient interest" in the matter before the Court and comply with the procedural requirements of order 53 of the Civil Procedure rules in order to be granted standing.

The IIEC asserts that M/s Kanyua the petitioner herein lacks standing since she has not demonstrated that any specific right guaranteed to her by the Constitution has been violated, or that she is acting on behalf of any particular individual(s) who applied to be registered as voters and were denied registration. The IIEC therefore argues that in absence of such claims the petition is academic or moot.

While it might be argued that the petitioners claim to represent the interests of inmates at Shimo la Tewa prison is tenuous on the absence of a signed letter authorizing representation, M/s Kanyua claim to standing on the basis of being an officer of an organization which champions the interests of the public in matters concerning human rights of the poor and marginalized such as prisoners demonstrates she is entitled to bring this case. The court therefore holds that M/s Kanyua has standing to bring this suit.

*Is the Referendum Distinct from National Assembly and Presidential Elections?*

*Referendum*

Mr. Osoro Learned Counsel for the petitioner urged the Court to consider referendum differently. He urged us to rely on *Njoya & 6 Others V AG and 3 Others*[16]to find that the people's constituent power vests in the people. That the Court should not take the constituent power from the people (inmates). He stated that the Constitution Review Act of 2008 allows full participation of the people in decision making.

Mr. Muhoro Learned Counsel for the 2nd respondent argued that the question of who is qualified to be registered as a voter in an election, to which Section 43 of the Constitution applied, shall be determined in such a manner as may be prescribed by Parliament. He argued that Parliament prescribed Cap. 7 and that Cap. 7 does not include the inmates.

Black's Law Dictionary Eighth Edition at page 13 defines a Referendum thus,

> *"The process of referring state Legislative act, a state constitutional amendment, or an important public issue to the people for final approval by popular vote."*

Black's Law Dictionary defines Elections thus,

> *"The exercise of choice; especially, the act of choosing from possible rights or remedies in a way that precludes the use of other rights or remedies. The doctrine by which a person is compelled to choose between accepting a benefit under a legal instrument and retaining some property rights to which a person is already entitled…"*

The difference in definition from the dictionary point of view between a referendum and elections is world apart and telling.

Section 47A of the Constitution states:

> *"(1) Subject to this section, this Constitution may be replaced.*
>
> *(2) Notwithstanding anything to the contrary in this Constitution-*
>
> *(a) the sovereign right to replace this Constitution with a new Constitution vests collectively in the people of Kenya and shall be exercisable by the people of Kenya through a referendum, in accordance with this section;*
>
> *(3) …*
>
> *(4) …*
>
> *(5) (a) section 43 shall apply with necessary modification with respect to the referendum."*

From the wording of section 47 A (2)(a) it is quite clear that the right to replace the Constitution with a new one vests collectively on the people of Kenya through a referendum.

Section 43 of the Constitution is imported in regard to a referendum on a draft constitution with *necessary modifications (emphasis ours).*

The sovereignty of the people and their constituent power to replace a Constitution was well settled in the celebrated case *of Njoya & 6 Others V Attorney-General and 3 Others*[17] where Ringera J.stated:

> *"With respect to the juridical status of the concept of the constituent power of the people, the point of departure must be an acknowledgment that in a democracy, and Kenya is one, the people are sovereign. The sovereignty of its people. The Republic is its people, not its mountains, rivers, plains, its flora and fauna or other things and resources within its territory. All Government power and authority is exercised on behalf of the people. The second stop in the recognition that the sovereignty of the people necessarily betokens that they have a constituent power – the power to constitute and/or reconstitute, as the case may be, their framework of government. That power is a primordial one. It is the basis of the creation of the Constitution and it cannot therefore be conferred or granted by the Constitution. Indeed it is not expressly textualized by the Constitution and, of course, it need not be. If the makers of the Constitution were to expressly recognize the sovereignty of the people and their constituent power, they would do so only ex abundant cautela (out of an excessiveness of caution).*

The people's constituent power is therefore above the Constitution itself. This is the power that enables the people to take part in a referendum. This power cannot be legislated upon by Section 43 of the Constitution to disenfranchise the very sovereign people from using their constituent power exercisable only through a referendum. There can be no doubt therefore that a referendum is clearly distinct from National Assembly and Presidential Elections. A referendum only comes and applies when the Constitution is to be made, altered or replaced. Indeed, in some cases it may never come in one's lifetime.

Section 43 clearly and plainly refers to the National Assembly and Presidential elections in regard as to who is qualified and disqualified from voting. This section is imported to a

referendum by section 47 A5 (a). The said Section 43 is imported with necessary modifications *(emphasis ours).*

Section 47A 5(a) of the Constitution does not categorize the area to be modified in Section 43 of the Constitution. The court is left free to modify any category on registration of voters' qualification or disqualification. The area of concern in this case is the disqualification of inmates to vote in a referendum. The courts hands are freed by the Constitution itself to make that finding by Section 47A 5(a) of the Constitution.

Derogation from a Constitutional provision, allowed by the Constitution itself has been done before in Tanzania. In *Mbushuu & Another V the Republic*,[18] it was held that death sentence amounted to cruel and degrading punishment, which is prohibited under Tanzanian Constitution, but that despite this finding, it was not unconstitutional. The constitution authorized derogation to be made from basic rights for legitimate purposes and a derogation was lawful if it was not arbitrary and was reasonably necessary for such purpose.

The necessary modification allowed in Section 47A 5(a) of the Constitution is a Constitutional derogation allowed by the Constitution itself. The derogation here must therefore be made for legitimate purpose and without arbitrariness.

If "the people" who have primordial power cannot be disenfranchised in Constitution making through a referendum, then who are "the people?" Are inmates included in "the people"? And if inmates are included in "the people" are all inmates to be registered including juveniles, insane inmates and sound inmates? What would be the criteria to be applied?"

To be able to answer whether inmates are part of the "people" one has to look at the International Conventions that Kenya is a signatory to.

The International Covenant on Civil and Political Rights (ICCPR)[19]

Kenya is a signatory to IICPR. Article 25 of the same states as follows:-

*"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

*(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*

*(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*

*(c) To have access, on general terms of equality, to public service in his country."*

Article 25 does not completely ban voting restrictions. It permits "reasonable restrictions" on the right to vote and take part in public affairs.

However proportionality of competing interest plays a central role in determining the reasonableness of criminal disenfranchisement laws. In 1993, the Human Rights Council considered a Luxembourg Law that mandated voting disenfranchisement for any convicted person of a "serious crime" such as murder or rape and permitted enfranchisement for anyone convicted of a minor crime. The human rights council thought this law was a "principal subject of concern as it constituted a deprivation of the right to vote as a further sanction of criminal cases" and suggested that Luxembourg should consider abolishing this law.[20]

In 2006, the Human Rights Council considered laws of the United States which disenfranchise most incarcerated criminals and many criminals who have been released from prison. The Council concluded that "the general deprivation of the right (to) vote for persons who have received a felony conviction, and in particular those who are no longer deprived of liberty, do not meet the requirements of [the ICCPR]."[21]

In 2005, in the case of *Hirst V United Kingdom,[22]* theGrand Chamber of the European Court of Human Rights considered the legality of the United Kingdom's disenfranchisement law, which deprived all incarcerated individuals of the right to vote. On the premise that criminal disenfranchisement must pursue a legitimate aim by proportionate measures, the court ruled that the UK's criminal disenfranchisement law violated the European Convention

for the protection of Human Rights and Fundamental Freedoms. In the court's view, this law failed theproportionality test since it applied indiscriminately to incarcerated individuals.

In 2002, in the case of *Suave V Canada*,[23] the Supreme Court of Canada held that Canada's blanket criminal disenfranchisement law, which deprived all incarcerated individuals of the right to vote, violated the Canadian Charter of Rights and Freedoms because it failed to meet the necessary proportionality standard.

Having found that the people's constituent power to vote and usher in a Constitution is above the Constitution, would there be a reason to argue that inmates do not constitute "the people" and then should not be included in the exercise of that "Constituent Power?"

At the level of political theory there are two justifications for criminal disenfranchisement. The Lockean social contract theory and the Republican citizenship theory.[24]

The Lockean theory asserts that criminals have broken the "Social Contract" and should consequently lose the right to participate in the political process. The first objective of denying the inmates the right to vote is enhancing civic responsibility and respect for the law. The social rejection of serious crime reflects a moral line which safeguards the social contract and rule of law and bolsters the importance of nexus between the individual and the community. Republican citizenship theory argues that criminals are less virtuous than other citizens and should therefore be deprived of the right to vote in order to maintain "purity of the ballot box".

In addition it is argued that the disenfranchisement of serious criminal offenders serves to deliver a message to both the community and offenders themselves that serious criminal activity will not be tolerated by the community.[25] The social rejection of serious crime reflects a moral line which safeguards the social contract and rule of law and bolsters the importance of the nexus between individuals and the community.[26]

However, there are those who contend that criminal disenfranchisement isnot justified because they do not contribute to, and may in fact impede, the reformation and social rehabilitation of prisoners. They argue that such action may actually serve to make recidivism more likely. Denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the rule of law and democracy than messages that enhance values. The legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility.[27] This view point frowns upon blanket criminal disenfranchisement laws which disenfranchise all incarcerated inmates without focusing on the specific crime committed or length of the prisoner's sentence.[28]

Whereas the court recognizes that on one hand there is a legitimate public interest to ensure that serious crime does not undermine the social contract and the rule of law on the one hand, the commitment of human right mandates government to minimally impair the right of prisoners to vote or otherwise take part in public affairs on the other hand. This approach has been adopted in many cases.[29] These cases demonstrate a strong judicial opposition to blanket laws that disenfranchise all incarcerated offenders.

There are those who would argue that public opinion plays a significant role on determining whether inmates in prison can have a right to vote. The argument being that the framers of the Constitution and indeed Parliament in its wisdom was a representative of the people when the prohibition of inmates to vote under Sec.43 2(c) of the Constitution was promulgated.

The Constitutional Court of the Republic of South Africa in replying to such a challenge stated in; *The State V T.Makwanyane & Mchunu*[30]

> *"Public opinion may have some relevancy in this enquiry, but itself is no substitute for the duty vested in Courts to interpret the Constitution and uphold Constitutional provisions without fear or favour. If public opinion were to be decisive there would be no need for Constitutional adjudication. The protection of rights could be left to parliament which has mandate from the people and is answerable to the public for the way the mandate is exercised but this would be a return to parliamentary sovereignty … The very reason for establishing a new legal order and vesting power of Judicial*

*Review of all legislation in Courts was to protect the rights of minorities and others who cannot protect their rights adequately through a democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people in our society. It is only if there is willingness to protect the worst and weakest among us, that all of us can be secure that our own rights will be protected."*

*Does the Constitution of Kenya disqualify the inmates from voting in a referendum?*

Mr. Muhoro Learned Counsel for the 2nd respondent argued that Section 43(2)(c) as applied by Section 47A 5(a) of the Constitution completely bars inmates from voting while Mr. Osoro Learned Counsel for the Petitioner stated that inmates are not barred by Section 43(2)(c) of the Constitution in the exercise of their rights in voting for a referendum.

This Court must therefore now make a finding as to whether the inmates in prison in Kenya are disqualified from voting by the said Section 43(2)(c) of the Constitution.

Section 43 2(c) excludes people in protective custody from voting. The said section is instructive in this matter. The section states:-

*"(2) a person shall be qualified to be registered as a voter in election in National Assembly and in elections of a Presidentif, and shall not be qualified unless, at the date of his application to be registered …*

*(a)* …

*(b)* …

*(c)* …

*2. No person shall be qualified to be registered as a voter in elections to which this section applies –*

*(a)* …

*(b)* …

*(c) If he is detained in lawful custody…"*

It is quite clear that section 43 of the Constitution refers to the National Assembly and Presidential elections. There is no mention of a referendum. The framers of the Constitution

were free to say that this section applies to a referendum had they wanted the referendum to be part of section 43 of the Constitution of Kenya.

In *Njoya & 6 Others V Attorney-General & 3 Others*[31] aforesaid,
The Court stated:-

> *"… The sovereignty of the people betokens that they have a constituent power – the power to constitute and/or reconstitute as the case may be their framework of Government. That power is a primordial one. It is the basis of a Constitution and it cannot be conferred or granted by the Constitution. Indeed it is not expressly textualised by the Constitution and it need not be. If makers of the Constitution were to recognize the sovereignty of the people and their constituent power they would do so only ex abundant cautela out of excessiveness of caution …"*

The sentiments of the Njoya Case were indeed heard and acknowledged by parliament in the Constitution of Kenya (Amendment) Act No.10 of 2008. Section 47 A (2) was couched in the following terms:-

> *"Notwithstanding anything to the contrary in this Constitution:-*
>
> *(a) the sovereign right to replace this Constitution with a new Constitution vests collectively in the people of Kenya through a referendum, in accordance with this section:"*

For the first time therefore, the sovereignty of the people was acknowledged in the Constitution. That position can no longer be inferred by courts. It is an integral part of our Constitutional provisions. The position of the people's primordial power expounded in the *Njoya Case* was cast in stone in our Constitution.

The said section 47A (5) (a) of the Constitution of Kenya imported the provisions of section 43 of the Constitution on the question of voting on a draft constitution in a referendum. However, section 47 A 5(a) left a window open on application of section 43 of the Constitution to a referendum on a draft constitution with the words "with necessary modification". (emphasis ours)

This clause leaves the court free to modify as the case may be on the various categories of qualifications and disqualifications to vote set out on the said section 43 of the Constitution aforesaid.

The criteria to be used in modification in the courts mind is that of proportionality. In the case of the prohibition under section 43(2) (c), what rational governmental objective or purpose does it serve to deny inmates the right to be registered as prayed herein by M/s Kanyua? In our view, we cannot, doing the very best we can, find any.

We hold that the Constitution of Kenya does not disqualify inmates from voting in a referendum. We also hold that section 43(2)(c) of the Constitution as applied to section 47A by section 47 A 5(a) does not prevent inmates from voting in a referendum. Further that our Constitution does not violate the IICPR and section 6 of the Kenya Review Act at all.

It is the courts considered view that the “people” can only apply to the people of sound mind and in control of their faculties. People of unsound mind cannot be able to take part in any function that requires exercise of choice due to their status. Whether or not they are in or out of prison they cannot be “the people” in respect of the exercise of their Constitutional Power to vote in a referendum. The inmates of unsound mind cannot be part of the “people” in that respect.

On the balance of proportionality we hold that there is no legitimate governmental objective or purpose that would be served by denying the inmates the right to vote in a referendum. The *Njoya Case* has demonstrated that the people’s constituent rights to vote in a referendum is a basic human right.[32] A right that ushers in or refuses to usher in a new Constitution. A constituent power higher than the Constitution and the National Assembly and Presidential Election Act. Can the Constitution and the National Assembly and Presidential Act Cap 7 prevent inmates from taking part in a referendum if the prisoners are deemed to be part of the people? In our view they cannot.

*Can all inmates therefore vote in a referendum?*

The contention of the Learned Counsel for the 2nd respondent was that the Court was being asked by the petitioner to allow all inmates to vote including juveniles. Counsel for the petitioner argued that the law on juveniles was settled and all they wanted was that the Court do order that inmates can vote in a referendum.

The Court will now answer the question whether or not all inmates can vote in a referendum.

Section 43 of the Constitution sets out the qualifications and disqualifications for voting in a National Assembly and Presidential Elections Cap. 7. People of unsound mind, undischarged bankrupts and people in lawful custody and people who have committed an electoral offence are disqualified from voting.

Having found that under Section 47A 5(a) of the Constitution that this Court can modify section 43 of the Constitution as to the qualification and disqualifications in a referendum, we shall then examine whether children in protective custody can vote.

Kenya is a signatory to the African Charter on the Rights and Welfare of the child. In this charter a child is defined in Article 2 as ‘a human being below the age of 18 years. The United Nations Convention on the Rights of the Child also defines a child as a person under 18 years. Kenya is a signatory to this Convention. The age of 18 therefore is the internationally accepted age of majority. There cannot therefore be anything abstract about that age. The Constitution of Kenya Section 43(a) sets out the voting age at 18 years. This is an age that applies to all Kenyans whether or not they are in prison or outside. In our view there cannot be any contradiction in saying that inmates under the age of 18 cannot vote in a referendum.

The rationality of the Constitution barring any Kenyan who is of unsound mind to vote need not be gain said. A person who is in prison and is of unsound mind is not in control of his faculties and may not be able to know the magnitude of any election let alone the referendum. The exclusion of that class of inmates is therefore obvious and self explanatory.

From the foregoing, it would be quite clear that inmates being litigated for by M/s Kanyua are those of sound mind over 18 years and who have not committed an electoral offence. The orders this Court will make refers to those inmates in that category.

*If the inmates can vote can the register be reopened under section 39(3) of the Constitution of Kenya Review Act No. 9 of 2008?*

Mr. Kimani Muhoro, Learned Counsel for the 2nd respondent argued that once the referendum question is published under section 37 of the Constitution of Kenya Review Act No. 9 of 2008, then under section 39(3) the Electoral Commission shall suspend the registration of voters. He argued that therefore the registration exercise cannot be reopened since such reopening of the register would "throw the entire process into a fatal spin as the Constitution of Kenya Review Act puts the review in a strait jacket timetable which if interfered with would scuttle the entire process."

It is true that the referendum question was published on 12th of May, 2010. According to the law[33] the voters register should have stopped with effect from 13th May 2010. Did the 2nd respondent stop the registration of voters on the 13th May 2010? It did not. Indeed the manual registration went on up to 16th of May, 2010. Indeed and previously, on the 26th March, 2010 the 2nd respondent advertised through a special issue of the Kenya Gazette of the said date that it would start an electronic register and replace old registers in eighteen selected constituencies and that all persons interested in voting in the National Assembly and Presidential Elections should apply. The advertisement was made under regulation 6 and 7 of Cap. 7 Laws of Kenya. The gazette notice said that applications may be made on or before 12th April, 2010 but not later than 21st May, 2010. The electronic registration of voters continued up to 21st May, 2010. This is nine (9) days after the date mandated by Law for the registration to stop.

Section 39(3) of the Constitution of Kenya Review Act No. 9 of 2008, says in subsection (3):-

> "The Electoral Commission shall on publication of the notice specified in paragraph (1) suspend the registration of voters."

The operative word in that section is "suspend". The word suspend is described in Black's Law Dictionary 8th edition thus:

> *"To interrupt, postpone, defer to temporarily … (a person) from performing a function, occupying an office, holding a job or exercising a right or privilege…"*

The readingof the section presupposes that the suspension can be lifted. The framers of subsection 3 of Section 39of the Constitution of Kenya Review Act No. 9 of 2008 seems to indicate that voters register can be suspended and reopened. This must be so because; if they wanted to close the register altogether they would have specifically said so. Secondly the 2nd respondent, itself despite the provisions of the said Section 39(3) continued to register people for voting way long after they published the referendum question. To our mind, section 39 of the Constitution of Kenya Review Act No. 9 of 2008 does not quite put the registration process of voters in a strait jacket timetable as alleged at all. The conduct of the IIEC itself is a testimony of that fact.

During the hearing the court was told that there are 90 prisons in Kenya with about 53,000 inmates. We do not think that registration of 53,000 inmates or less, in 90 institutions which institutions, nearly all, are near urban centres can pose such a challenge that can send the electoral process in a fatal spin as alleged by the 2nd respondent. In this era of electronic advancement, this should not pose a challenge in our view. This can be done well in advance of August 4th referendum. We further order that the registration for inmates aforesaid be done in such a way that it does not disrupt the ongoing referendum process.

<u>The Orders</u>

This court makes the following orders:-

1. That section 43 of the Constitution of Kenya does not in any way exclude inmates who are over 18 of sound mind and who have not committed an electoral offence from voting in a referendum.
2. That the Interim Independent Electoral Commission do gazette the prisons as polling stations and that they facilitate the registration of all eligible inmates within 21 days

from 24th June, 2010 to enable those who wish to vote in a referendum to do so without any hindrance.

3. That the Attorney General and the necessary Authorities do facilitate the accessibility of prisons and the prisoners' identification documents to enable the Interim Independent Electoral Commission to register those inmates who wish to do so in the time specified.

4. For the avoidance of doubt, the orders made by the Court herein relate only to the referendum.

5. That this being a public spirited petition for and on behalf of the inmates, this Court orders that the Petitioner and the Respondent do bear their own costs.

It is so ordered.

Dated and Signed at Nairobi by the Judges on this 23rd day of June, 2010.

**SAMUEL N. MUKUNYA**
**JUDGE.**

**JAMILA MOHAMMED**
**JUDGE.**

**SCHOLASTICA OMONDI**
**JUDGE.**

**SANKALE ole KANTAI**
**JUDGE.**

**MBURUGU N. KIOGA**
**JUDGE.**