



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CONSTITUTIONAL PETITION NO. 8 OF 2017

IN THE MATTER OF ARTICLES 19, 27, 32 & 44 OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF SECTIONS 5, 19, 20 & 21 OF THE PROHIBITION OF FEMALE GENITAL MUTILATION ACT
(NO. 32 OF 2011)**

AND

IN THE MATTER OF THE EQUALITY AND FREEDOM FROM DISCRIMINATION

AND

IN THE MATTER OF THE RIGHT TO PARTICIPATE IN THE CULTURAL LIFE OF THE PERSON'S CHOICE

BETWEEN

DR. TATU KAMAU.....PETITIONER

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

ANTI- FEMALE GENITAL MUTILATION BOARD.....2ND RESPONDENT

THE OFFICE FO THE DIRECTOR OF PROSECUTION.....3RD RESPONDENT

EQUALITY NOW.....1ST INTERESTED PARTY

NATIONAL GENDER & EQUALITY COMMISSION..... 2ND INTERESTED PARTY

FEDERATION OF WOMEN LAWYERS.....3RD INTERESTED PARTY

SAMBURU GIRLS FOUNDATION.....4TH INTERESTED PARTY

MSICHANA EMPOWERMENT.....5TH INTERESTED PARTY

KENYA WOMEN PARLIAMENTARY ASSOCIATION.....6TH INTERESTED PARTY

CENTRE FOR RIGHTS EDUCATION & AWARENESS.....7TH INTERESTED PARTY

MEN FOR EQUALITY OF MEN & WOMEN..... 8TH INTERESTED PARTY

AMREF..... 9TH INTERESTED PARTY

JOHN KIPLANGAT ARAP KOECH.....10TH INTERESTED PARTY

KATIBA INSTITUTE.....1ST AMICUS CURIAE

KELIN & ISLA.....2ND AMICUS CURIAE

RULING

1. The Petitioner herein filed this petition dated 18th July, 2017 and amended on the 20th November, 2017 and is brought pursuant to the provisions of Articles 19, 27,32 and 44 of the Constitution of Kenya 2010. The petition also seeks to rope in Sections 5, 19, 20 and 21 of the Prohibition of Female Genital Mutilation Act No.32 of 2011. The petition is brought against the Honourable Attorney General, the Anti – Genital Mutilation Board as well as the Director of Pubic Prosecution as the Respondents. The Petitioner has proposed a raft of questions intended for interpretation during the hearing hereof and are as follows:-

(a) Whether or not the Enactment and coming into force of the Prohibition of Female Genital Mutilation Act was in contravention of Articles 19, 27, 32 and 44 of the Constitution''

(b) Whether or not the rights of women to uphold and respect their culture has been violated in enacting the prohibition of Genital Mutilation Act''

(c) Whether or not the prohibition of Female Genital Mutilation Act is unconstitutional''

(d) Whether or not the 2nd Respondent was illegally created and serves to infringe the rights of women as enshrined in the Constitution''

2. The Petitioner in the end seeks the following reliefs namely:-

(a) A declaration that the legislature contravened the provisions of Articles 19, 28, 32 and 44 of the Constitution in enacting the Prohibition of Female Genital Mutilation Act.

(b) A declaration that the Prohibition of Female Genital Mutilation Act is unconstitutional and thus invalid.

(c) A declaration that the numerous provisions of the Act that violate the Constitution cumulatively render the entirety of the Act untenable and therefore constitutionally invalid ab initio.

(d) A declaration that the 2nd Respondent purportedly established by this Act is illegal as it was created without the authority of the law.

(e) Any other relief that the court deems fit and just to grant.

(f) Costs of the suit.

3. As soon as the petition got onto the public domain, several parties sought to be enjoined into these proceedings. This court received their Applications and allowed them to come on board. They consisted of ten interested parties representing diverse interests. Two amici were also allowed to participate in these proceedings. All these entities filed and exchanged replying affidavits as well as various documents and briefs and once this task was accomplished, the parties herein agreed to team up as clusters and thereafter filed written submissions on whether this matter ought to be certified as raising substantial question of law and therefore ought to be heard by an uneven number of judges in accordance with the provisions of Article 165(4) of the Constitution of Kenya. Mr. Machogu filed submissions on behalf of the Respondents while Miss Christine Kungu filed submissions on behalf of 1st – 9th Interested Parties. The Petitioner and the 10th Interested Party who are acting in person and who appear to share the same views opted to rely on their affidavits in support of the petition.

4. Mr. Machogu for the three Respondents submitted that this petition raises a substantial question of law as there are constitutional issues implicating the rights under Articles 19, 27, 32 and 44 of the Constitution as well as Sections 5, 19, 20 & 21 of the Prohibition of Female Genital Mutilation Act which deal with rights of a person to enjoy the highest attainable standard of health including reproductive health which issues have not yet been dealt with by any superior court and therefore its pronouncement will not only affect the women but also young girls who are below the age of maturity.

Learned counsel further submitted that the matter is of great public importance because the fight against female Genital Mutilation presently occupy a big part of national discourse. It was also submitted that the rights of girls and women will be greatly impacted by whatever decision to be made after the hearing and determination of the substantive issues raised in the petition which may have a great bearing on policy and statutory implications on the right to health, culture and non discrimination to the public generally. According to the said learned Counsel, the issues raised in the petition qualify as substantial questions of law as contemplated in Article 165(4) of the Constitution read in conjunction with Article 165(3) (b) or (d) and hence the matter should be referred to the Chief Justice to constitute a bench of judges under Article 165(4) to hear and determine the issues in contest. Several cases were relied upon namely **Community Advocacy Awareness Trust & Others =Vs= Attorney General & Others [2012] eKLR**, **Solomon Gichira =Vs= The Attorney General & Another – Pet No. 313 of 2015**, **Chunilal V. Mehta =Vs= Century Spinning and Manufacturing Co. AIR 1962 SC 1314**.

5. Miss Kungu for the 1st – 9th Interested Parties submitted that the Petition raises a substantial question of law to be referred to the Chief Justice to constitute an uneven bench of judges. Reliance was placed in the case of **Katiba Institute =VS=IEBC [2017] eKLR** where a substantial question of law was described as one that raises question of law that has not been fully settled and has a significant impact to the public and is likely to persist if not fully and finally settled. She submitted that the issues are complex and will have a bearing on rights of women and girls as well as regional and international instruments that Kenya has ratified in the context of the Constitution and again it raises a novel question of law which has never been tackled by other courts in Kenya. It was also submitted that the petition raises a matter of general public importance affecting rights of parties and other individuals in that it seeks an interpretation whether the existence of the Act directly violates the Petitioner and women at large which are fundamental rights under the Constitution. It also affects the balance between cultural practices and rights and freedoms of individuals.

It was also submitted that the petition raises a complex and novel question which has not been determined by another court and which requires a final adjudication. Reliance was placed in the case of **Law Society of Kenya =Vs= The Attorney General & 10 others [2016] eKLR** where Lenaola J stated that in deciding whether or not to refer a matter, the court exercises a discretion and in doing so the court should consider whether the matter is complex, raises a novel point whether the matter requires substantial amount of time to be disposed of and the level of public interest generated by the petition.

6. I have considered this petition and the submissions presented on behalf of all the parties. The issue to be determined herein is whether the petition discloses a substantial question of law to merit a certification to the effect that the same qualifies to be heard by an uneven number of judges as may be determined by the Honourable the Chief Justice. The certification sought is pursuant to Article 165(4) of the Constitution which provides as follows:-

“Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an even number of judges being not less than three, assigned by the Chief Justice.”

A substantial question of law must be one which is set apart and weighty and which directly and substantially affects the rights of the parties. In the authority cited herein namely **Community Advocacy Awareness Trust & Others =Vs= The Attorney General**

& others [2012] eKLR the court held as follows:-

“It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine the matter.”

Indeed it is the duty of every single judge to interpret the Constitution under Article 165 thereof and therefore it is at the discretion of the Judge to decide whether or not a matter placed before him or her for determination by parties raises a substantial question of law to deserve the matter being referred to the Chief Justice. In the Indian case of **Sir Chunilal V. Mehta =Vs= Century Spinning and Manufacturing Co. AIR 1962 SC 1314** the court laid down the test/guidelines in assessing whether a matter raises substantial question of law as follows:-

“A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme court: the privy council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial one.”

In the case of **National Gender and Equality Commission =Vs= Cabinet Secretary Ministry of Interior and Co-ordination of National Government and 2 others [2016] eKLR** Justice Lenaola (as he then was) laid down some of the relevant factors in deciding what constitutes a substantial question of law as:-

- (i) Whether directly or indirectly it affects the substantial rights of the parties.*
- (ii) Whether the question is of general public importance.*
- (iii) Whether it is an open question in the sense that the issues have not been settled by pronouncements of the Supreme Court.*
- (iv) The issue is not free from difficulty.*
- (v) It calls for a discussion of an alternative view.*
- (vi) The matter raises a novel point generating a high public interest.*

7. Looking at the questions framed by the Petitioner, in the petition to be interpreted as well as the reliefs sought, it emerges that there are important constitutional issues impacting the rights of the parties herein under Articles 19, 27, 32 & 44 of Constitution *vis a vis* Sections 5, 19, 20 & 21 of the Prohibition of Female Genital Mutilation Act. The Petitioner has clearly sought to assert or exercise the rights to equality and freedom from discrimination and a right to participate in the cultural practises of the Community in collaboration with other of like mind and to eventually enjoy the highest attainable standard of health including reproductive health. The petition raises weighty issues that are of public importance as they affect the rights of the parties, individuals and more specifically girls and women and that the determination of this petition will affect individual protection under the law and rights and freedoms of girls and women under the Constitution with regard to cultural practises. Hence it will set a precedent on the balance between cultural practises and rights and freedoms of individuals. In essence the Petitioner is seeking to enjoy her rights and freedoms enshrined in the Constitution namely right to culture and more specifically to make her own choice whether or not she and others of like mind should be allowed to conduct female genital mutilation as they deem fit and that the new law namely the Prohibition of Female Genital Mutilation Act should not affect them. Indeed this is a matter of public importance because the fight against female genital mutilation currently occupies a large part of our national discourse. Hardly a day passes without several Kenyans discussing this “*FGM*” subject. It seems the Petitioner has now taken the issue a notch higher by suggesting that adult women should be left to enjoy their rights to culture and to be allowed to conduct female genital mutilation. The freedom sought is akin to such expressions as “*my dress my choice*” “*my body my choice*” etc. This has generated a lot of public interest and therefore the determination that will eventually be made in this petition will greatly have an impact on the rights of girls and women and which will eventually affect the policies whether statutory or otherwise on the right to health, culture and non discrimination to the public generally. There is therefore need to have this matter heard by an uneven number of judges as the issues raised relate to substantial questions of law in which the rights and interest of the parties herein and a larger section of the public require a final

adjudication over the same.

8. I am therefore satisfied that the issues raised in this petition qualify as substantial questions of law as contemplated under Article 165(4) of the Constitution read in conjunction with Article 165 (3) (b) or (d). I hereby exercise my discretion and refer the matter to the Honourable the Chief Justice to constitute a bench of judges under Article 165(4) of the Constitution to hear and determine the issues raised in the petition.

Orders accordingly.

Dated and delivered at MACHAKOS this 14th day of June, 2018.

D.K. KEMEI

JUDGE

In the presence of

Dr. Tatu Kamau – the Petitioner

Machogu - for the Respondent

No appearance - for the interested parties

No appearance - for the Amicus Curiae

Josephine - Court Assistant



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