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2019 has been a great year so far at Kenya Law. This year, Kenya Law scooped the “Public Sector Legal Department of the Year Award” at the 2019 Nairobi Legal Awards by the LSK, Nairobi Branch. The awards sought to recognize excellence in legal practice and were meant to promote bench-marking of best practice standards in the Kenyan legal profession. Kenya Law was recognized for outstanding standards of practice and legal service delivery in an effort towards encouraging excellence in practice. This was no mean feat as Kenya Law beat other legal departments in the public sector to become the first ever recipient of the award. We do not take it for granted and as we seek to scale the heights of provision of information, we promise you a diverse range of products and services that will keep you legally informed.

As is the norm, this edition of the Bulletin delivers legal information on a wide range of topics. One issue that has been gaining traction globally is the criminalization of same-sex relations. In this edition, we highlight two cases on criminalization of same-sex relations at different points of the spectrum from Kenya and Botswana. The feature case in this issue is a decision where the High Court of Kenya ruled that section 162 (a) (c) of the Penal Code on unnatural offences and section 165 on indecent practices between males were constitutionally compliant and in conformity with the principles of legality. Further afield, within a span of a month, Botswana’s High Court while dealing with a similar issue held that sections 164(a), (c) and 165 of the Botswana Penal Code criminalizing homosexual acts between two adults in private were unconstitutional as they violated the right to liberty, privacy, dignity and non-discrimination; the reasoning of the judges in both decisions is captured in the Bulletin for your information.

As always, Kenya Law stays true to its commitment to engage with its readers and deliver a bulletin that continuously updates you on recent judicial and legislative developments. Enjoy the read!

Long’et Terer

Long’et Terer

I am delighted to welcome you all for the launch of the 3rd cycle Judiciary Performance Management and Measurement Evaluation Report. This is an important occasion when we in the Judiciary showcase our achievements at an institutional and individual level as we strive to improve the delivery of services to the people of Kenya. Performance Management was introduced in the Judiciary in 2015 with the aim of enhancing access to Justice; improving Court User satisfaction; increasing public confidence in the Judiciary and, equally important, increasing employee productivity and satisfaction. This is in line with my blue print, “Sustaining Judiciary Transformation: A service Delivery Agenda” which shifted focus away from institutional building and capacity enhancement to upscaling service delivery. We have come a long way in the institutionalization of performance management in the Judiciary and through the system, individual courts and administrative units now set clear targets and commitments each financial year which are implemented and evaluated at the end of each year.

This therefore is more than just a ceremony to receive a report; it is an opportunity to evaluate and account to the Kenyan people about how we have fared in the execution of our core mandate, using a number of variables that are key to the delivery of justice. For example, one of the agreed targets to be achieved in Performance Understanding is Trial and Delivery Date Certainty. According to the Report on Institutionalizing Performance Management in the Judiciary, this indicator measures “… the certainty with which mentions, hearings and delivery of judgments are held and scheduled”.

For there to be enhanced public confidence in judicial services, certainty that matters will proceed on the date fixed for hearing is an absolute imperative. Equally important is the date of delivery of judgments. Once a case is heard, a judgment must be delivered. Without a judgment, the case remains unresolved, and continues to be a cause of the backlog. It also becomes what is now commonly referred to as a “delayed judgment”, a phenomenon that as a Judiciary we cannot condone.

Although there was a slight improvement in Trial and Delivery Date Certainty in the financial year 2017/2018, I urge all judges, magistrates and judicial officers to strive for a higher score as this remains a key concern for litigants and others who have to wait for an inordinately long time for conclusion of their matters. We are all familiar with the old adage, Justice delayed is Justice Denied.

The Sustaining Judiciary Transformation (SJT) blue print identified elimination of case backlog as one of the key targets for the Judiciary. In January 2017, I gave a commitment that the Judiciary would clear all cases that were five years and above by end of December 2018. At that time, there were 170,186 cases which were more than five years old. By end of March this year, a total of 154,184 cases, or 91 per cent of the back log, had already been resolved,
along with the hearing of other cases. Within the same time, some 45,000 cases transited into the 5-year band, meaning that about 1,667 cases were transiting into 5 years backlog every month. It took a lot of effort to achieve this - prioritizing cases over 5 years old in cause listing, conducting service weeks; adhering to pre-trial rules and use of other dispute resolution mechanisms. I thank you profoundly for a job well done.

Over the same period the results show that on average, the productivity of High Court judges increased from 311 cases per judge to 446 cases, while in magistrates’ courts, productivity increased from 646 cases to 745 cases per magistrate. Across the courts, resolved cases increased from 304,166 in 2016/2017 to 370,449 cases in 2017/2018. This is an indication that the performance of the Judiciary in the dispensation of justice is improving consistently and soon we shall be seeing a situation where cases are resolved in real time.

These results provide a basis that can help us reflect on where we are, what challenges we are facing, and what areas to improve or focus on. The main questions to ask at this point are: is this the best we could do; the best service we could offer? How do our customers rate us? Could we have done better? And what is holding us back? What resources do we need and how will they be deployed effectively in order to drive our justice delivery indicators to world-class levels?

In as far as infrastructure is concerned, we are continuing with our aggressive court construction programme as a way of enhancing access to justice. We are constructing new courts, renovating old ones and installing important facilities such as boreholes while also upgrading the furniture as necessary. In this respect, there are more than 70 courts currently under construction in various parts of the country, and we continue to launch new ones as we have recently done in Ruiru and Msambweni. The construction and establishment of these courts will ensure that justice is taken as close to the people as possible.

We, however, very well understand that the buildings on their own, no matter how magnificent they might be, will not translate into effective delivery of services unless we put in place mechanisms that make us more efficient, more people focused and more dedicated to the ideals that our Judiciary stands for.

I am happy to note that our efforts to entrench performance management have been widely recognized by other judiciaries and public institutions in many places. In November last year, we received a delegation of a neighbouring country headed by the Deputy Chief Justice who visited us to learn about our performance management system with the aim of introducing a similar system in their country. This is a positive gesture and I am optimistic that if we sustain this momentum we will soon be a point of reference globally.

Despite these achievements, we must continue improving in all aspects of our work. Through the feedback we regularly receive from our stakeholders, we want to continually build and sustain a robust performance management architecture, which provides a standardized platform for assessing the performance of all courts and administrative units.

The Judiciary is facing various challenges despite the high performance being witnessed today as highlighted in this report. Some of these challenges include inadequate infrastructure, shortage of judges, magistrates and judicial staff, inadequate resources and inadequate equipment and vehicles. We will continue to find solutions to these challenges.

Indeed, we are in the process of recruiting more judges, magistrates, other judicial officers and staff in areas of critical shortfalls. To enhance productivity, there will be continuous improvements in the working environment, tools and equipment in the courts. We still emphasize the urgency in upgrading our uptake and deployment of ICT solutions in case management to speed up case processing.

As I have already stated, today’s event is not merely about the launch of the 2017/18 performance evaluation report and recognition of best performing courts. It provides us
with the opportunity to re-affirm our commitment towards ensuring high performance among all courts and administrative units. We need to demonstrate results daily so as to reach high performance levels whereby any one can tell what a well performing court looks like in practice even without going through the various metrics. In the wise words of William Faulkner “...do not bother to be better than your contemporaries or predecessors. Try to be better than yourself”.

With that, I appreciate the crucial role the judges, magistrates, other judicial officers and staff are playing in the delivery of justice, sometimes under immense pressure and extremely difficult circumstances. They are not always appreciated for the excellent work that they do. But they must continue to selflessly serve our people and to deliver justice to all without fear or favour. At this point I would like to thank all the stakeholders - the courts and the administrative - units for their role in making this event a success. We must continue working together to improve the services we offer to the public.

Allow me also to appreciate the Performance Management and Measurement Steering Committee for successfully steering the process of institutionalization of performance management in the judicially with the technical support of the Directorate of Planning and Organizational Performance.


Hon. David K. Maraga, EGH,
Chief Justice and President of the Supreme Court of Kenya
What they said

Supreme Court Judges - D K Maraga, CJ & P; M K Ibrahim, S C Wanjala, N Njoki & I Lenaola, SCJJ in Town Council of Awendo v Nelson O Onyango and 192 others - Petition 37 of 2014

“Un-utilized portions of compulsorily acquired land may be used for a different public purpose, or in furtherance of a different public interest, including the allocation of such portions to private individuals or entities, at the market price, in furtherance of such public interest.”

Court of Appeal Judges – P N Waki, S G Kairu & J Otieno-Odek JJA in Stanley Mombo Amuti v Kenya Anti-Corruption Commission - Civil Appeal 184 of 2018

“Sections 26 and 55 (2) of the Anti-Corruption and Economic Crimes Act do not violate the right to property as enshrined in Article 40 of the Constitution. In any event, constitutional protection of property does not extend to property that has unlawfully been acquired.”

Court of Appeal Judges – P N Waki, M K Koome, R N Nambuye, D K Musinga & M S Asike Makhandia, JJA in Non-Governmental Organizations Co-Ordination Board v EG & 5 others - Civil Appeal 145 of 2015

Per P N Waki, JA Per M K Koome JA, (concurring with the Majority)

“Like everyone else, LBGTIQ persons are subject to the law and will be subjected to its sanctions if they contravene it. Convicting such persons before they contravene the law would, in my humble view, be retrogressive. As it is, according to their stated objectives, they intended to register the NGO to, among other things, conduct accurate fact finding, urgent action, research and documentation, impartial reporting, effective use of the media, strategic litigation and targeted advocacy in partnership with local human rights groups on human rights issues relevant to the gay and lesbian communities living in Kenya. On the face of it, there is nothing unlawful or criminal about such objectives.”

High Court Judge – M Thande, J in Shakeel Ahmed Khan & another v Republic & 4 others - Miscellaneous Criminal Application 56 of 2019

“The Chief Justice as head of the Judiciary has power under Section 16 of the High Court (Organization and Administration) Act to establish sub-registries of the ACEC Division and indeed full ACEC divisions outside Nairobi. The failure to do so has in my view the net effect of stripping the High Court in stations outside Nairobi of the jurisdiction conferred upon it by the Constitution.”
Per A Makhandia JA, (concurring with the majority decision)

“Article 36 of the constitution extends to every person’s right to form an association of any kind. This right can only be limited in terms of law to the extent that the limitation is reasonable and justifiable in an open and democratic society as provided for in Article 24(1) of the Constitution. Subject to the limitations, a person’s rights under Article 36 extends to all human beings without discrimination, whatever their ethnicity, religion, sex, place of origin or any other status such as age, disability, health status, sexual orientation or gender identity. I agree with the High Court’s finding that Article 36 extends to all individuals and juristic persons and that sexual orientation does not in any way bar an individual from exercising his right under Article 36 of the constitution.”

Per M K Koome JA, (concurring with the Majority)

“The issue of persons in the society who answer to the description lesbian, bisexual, gay, transsexual, intersex and queer (LBGTIQ) is rarely discussed in public. The reasons for such coyness vary. But it cannot be doubted that it is an emotive issue. The extensive and passionate submissions made in this matter before the High Court, and before us, is testimony to the deep rooted emotions that the issue can easily arouse. It is possible for the country to close its eyes and hearts and pretend that it has no significant share of the people described as LGBTIQ. But that would be living in denial. We are no longer a closed society, but fast moving towards the ‘open and democratic society based on human dignity, equality, equity, and freedom’ which the Constitution envisages. We must therefore, as a nation, look at ourselves in the mirror. It will then become apparent that the time has come for the peoples’ representatives in Parliament, the Executive, County Assemblies, Religious Organizations, the media, and the general populace, to engage in honest and open discussions over these human beings. In the meantime, I will not “.. be the first to throw a stone at her [LBGTIQ]”.

High Court Judge – B Ongaya, J in Erastus K Gitonga & 4 others v National Environmental Management Authority & another - Cause 547 of 2018

The Court considers that the circular of 09.10.2012 appears to apply to all lawyers in the public service and for so long as the claimants established that they were in public service with similar professional legal duties, it is the Court’s opinion that they would be entitled to the allowance even without their being gazetted as prosecutors. The Court has carefully revisited the circular and the wide ranging categories of the officers it applies to and returns that use of “prosecutorial allowance” was meant to simply designate the allowance and not to have it paid exclusively to those involved in criminal prosecutions.”
Section 162 (a) (c) of the Penal Code on unnatural offences and section 165 of the Penal Code on indecent practices between males was constitutionally compliant and in conformity with the principles of legality

EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)
Petition 150 & 234 of 2016
High Court at Nairobi
R Aburili, E C Mwita & J M Mativo, JJ
May 24, 2019
Reported by Long et Terer

The consolidated petitions challenged the constitutionality of sections 162(a) (c) and 165 of the Penal Code. Additionally, petition 150 of 2016 attacked the said provisions on grounds of vagueness and uncertainty. Petition 234 of 2016 sought a declaration that sexual and gender minorities were entitled to the right to the highest attainable standards including the right to health care services as guaranteed in article 43 of the Constitution. The petitioners also sought an order directing the State to develop policies and adopt practices prohibiting discrimination on grounds of sexual orientation and gender identity or expression in the health sector.

In determining the matter, the court dealt with, inter alia, the following issues:

i. Whether failure by section 162 (a) (c) of the penal to define the phrases, “unnatural offences,” and “against the order of nature” rendered the section vague, ambiguous, and thus unconstitutional.

ii. Whether the phrases “indecency with another male person” and “any act of gross indecency with another male person” in section 165 of the Penal Code was unclear, vague, and ambiguous hence rendered the section unconstitutional.

iii. Whether differential treatment would amount to unfair discrimination.

iv. Whether sections 162(a) and(c) and 165 of the Penal Code were unconstitutional for infringing the following rights of the petitioners:

a. right to equality and freedom from discrimination under article 27
b. right to the highest attainable standards of health under article 43 of the Constitution.
c. right to a fair trial under article 50 of the Constitution.
d. right to freedom and security of the person protected under article 29 of the Constitution.
e. right to freedom of conscience, religion, belief and opinion under article 32 of the Constitution.
f. right to human dignity and privacy protected by articles 28 and 31 of the Constitution.

In its ruling, the court reiterated that the guiding principles in interpretation of the Constitution and the social and historical background of legislation ought to be considered during interpretation. It stated that the Constitution gave prominence to national values and principles of governance which included human dignity, equity, social justice, inclusiveness, equality, human rights and rule of law, leadership and integrity, values and principles of public service, entrenchment of exercise of judicial authority in the Constitution and independence of the Judiciary and conferred sovereignty to the people of Kenya to be exercised on their behalf by State organs to perform their functions in accordance with
the Constitution.

Article 259(1), the Court noted, obligated courts to promote the spirit, purposes, values and principles of the Constitution, advance the rule of law, and the human rights and fundamental freedoms in the Bill of Rights, permit the development of the law and contribute to good governance. The court had a duty to adopt an interpretation that conformed to article 259. Constitutional provisions had to be construed purposively and in a contextual manner. Accordingly, courts were constrained by the language used. Courts might not impose a meaning that the text was not reasonably capable of bearing. In other words, the interpretation should not be unduly strained but should avoid excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene, which included the political and constitutional history leading up to the enactment of a particular provision.

Further, it was noted that the enforcement of penal statutes had an impact on constitutionally guaranteed rights. The litmus test was whether such limitation would pass constitutional muster. Penal statutes had to be understood purposively because the Penal Code had to be umbilically linked to the Constitution. The court had to seek to promote the spirit, purpose and objects of the Constitution. It had to prefer a generous construction over a merely textual or legalistic one in order to afford the fullest possible constitutional meanings and guarantees. In searching for the purpose, it was legitimate for the court to seek to identify the mischief sought to be remedied. In part, that was why it was helpful, where appropriate, to pay due attention to the social and historical background of the legislation. The court had to understand the provision within the context of the grid, if any, of related provisions and of the Constitution as a whole, including its underlying values. Although the text was often the starting point of any statutory construction, the meaning it bore had to pay due regard to context. That was so even when the ordinary meaning of the provision to be construed was clear and unambiguous.

A holistic interpretation of the Constitution meant that the Constitution had to be interpreted in context. The court held that this would be the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation, the court explained, did not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result. It was an elementary rule of constitutional construction that no one provision of the Constitution was to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject were to be brought into view and be interpreted so as to effectuate the greater purpose of the instrument.

According to the court, it was the duty of a court of law to try to determine how a statute should be enforced. The court noted that there were numerous rules of interpreting a statute, but, and without demeaning the others, the most important rule was the plain meaning rule. The starting point of interpreting a statute was the language itself. In the absence of an expressed legislative intention to the contrary, the language had to be given its ordinary, literal and grammatical meaning and if by so doing it
was ascertained that the words were clear and unambiguous, then effect should be given to their ordinary meaning unless it was apparent that such a literal construction fell within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction; such as where it led to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.

The Court further held that courts generally assumed that the words of a statute meant what an ordinary or reasonable person would understand them to mean. If the words of a statute were clear and unambiguous, the court need not inquire any further into the meaning of the statute. Parliament intended its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. The court, as an independent arbiter of disputes, had fidelity to the Constitution and had to be guided by the letter and spirit of the Constitution. Similarly, in interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.

The phrase “against the order of nature”, the court explained, had been judicially defined as sexual intercourse. There had to be penetration, however slight, and emission of semen was not necessary. With particular reference to the offence of sodomy, penetration per se had to be proved. The other party involved in the intercourse might be a man or a woman. It was the penetration through the anus that made the intercourse “against the order of nature” and therefore provided the other element of the offence.

While dealing with the issue of vagueness, the Court held that a statute was void for vagueness and unenforceable if it was too vague for the average citizen to understand. There were several reasons a statute might be considered vague. In general, a statute might be called void for vagueness when an average citizen could not generally determine what persons were regulated, what conduct was prohibited, or what punishment might be imposed. A statute was also void for vagueness if a legislature’s delegation of authority to administrators was so extensive that it would lead to arbitrary prosecutions. The doctrine of void for vagueness established specific criteria that all laws or any legislation had to meet, to qualify as constitutional; the Law had to state explicitly what it mandated, and what was enforceable and provide definitions of potentially vague terms. Vagueness was the imprecise or unclear use of language, which contrasted with clarity and specificity.

According to the Court, the impugned phrases were clearly defined in law dictionaries and in a catena of judicial pronouncements; lack of definitions in the statute per se did not render the impugned provisions vague, ambiguous or uncertain. The impugned provisions could not be declared unconstitutional on grounds of vagueness, uncertainty, ambiguity and over broadness because:

i the phrases used in the sections under challenge were clear as defined above;
ii the provisions disclose offences known in law;
iii a person accused under the impugned provisions would be informed of the nature, particulars and facts of the offence;
iv there was a real danger that in reading down an overbroad statute, the High Court would simply substitute the vice broadness with the equally fatal infirmity of vagueness.

The Court noted that indisputably, there existed a presumption as regards constitutionality of a statute. The rule of presumption in favour of constitutionality, however, only shifted the burden of proof and rested it on the shoulders of the person who attacked it. It was for that person to demonstrate that there had been a clear transgression of constitutional principles. However, that rule was subject to the limitation that it was operative only until the time it became clear and beyond reasonable doubt that the legislature had crossed its bounds. The guiding principles in a case of such nature were that the court had to establish:

i whether the law differentiated between different persons;
ii whether the differentiation amounted to discrimination; and,
iii whether the discrimination was unfair.

Discrimination meant treating differently,
A natural and literal construction of those words left no doubt that the section did not target any particular group of persons. Similarly, section 165 used the words “any male person.” A plain reading of the section revealed that it targeted male persons and not a particular group with a particular sexual orientation. The wording of that section left no doubt that in enacting that provision, Parliament appreciated that the offence under the said section could only be committed by a male person. In fact, the short title to the section read “indecent practices between males.” The operative words therein were “any male person” which clearly did not target male persons of a particular sexual orientation.

The Court held that a party pleading violation of constitutional rights was at the very least expected to give credible evidence of the said violation and it was not enough to merely plead and particularize a violation. Even where a party cited articles of the Constitution alleging that they had been violated, he or she was duty bound to adduce convincing evidence to prove the alleged violations. In the instant case, save for the allegations made in the petition and the affidavits, no tangible evidence was given to support the allegations. No iota of evidence was tendered to establish any of the cited acts of discrimination. There was no basis at all upon which the court could uphold any of the alleged violations. In the end, the petitioners had failed to establish that the impugned provisions were discriminatory.

In the court’s view, constitutional analysis under the Bill of Rights took place in two stages. First, the applicant was required to demonstrate his or her ability to exercise a fundamental right had been infringed. If the court found that the law, measure, conduct or omission in question infringed the exercise of the fundamental right, or a right guaranteed in the Bill of Rights, the analysis might move to the second stage. In the second phase, the party seeking to uphold the restriction or conduct would be required to demonstrate the infringement or conduct was justifiable in a modern democratic state and satisfied the article 24 test. Cases were decided on the legal burden of proof being discharged (or not). The legal burden of proof was consciously or unconsciously the

The Court noted that the language of section 162 was clear. It used the words “any person.”

without any objective and reasonable justification, persons in similar situations. When determining whether a claim based on unfair discrimination should succeed, the stages of inquiry were:

i. Whether the provision differentiated between people or categories of people. If so, whether the differentiation bore a rational connection to a legitimate purpose. If it did not, then there was a violation of the constitution. Even if it did bear a rational connection, it might nevertheless amount to discrimination.

ii. Whether the differentiation amounted to unfair discrimination;

iii. If it was on a specified ground, then discrimination had been established. If it was not on a specified ground, then whether or not there was discrimination would depend upon whether, objectively, the ground was based on attributes and characteristics which had the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

iv. If it was found to have been on a specified ground, then the unfairness would be presumed. If on an unspecified ground, unfairness would have had to be established by the complainant. The test of unfairness focused primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of that stage of the enquiry, the differentiation was found not to be unfair, then there would be no violation.

v. If the discrimination was found to be unfair then a determination would have to be made as to whether the provision could be justified under the limitations clause.

vi. Mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason was a most reprehensible phenomenon. But where there was a legitimate reason, then, the conduct or the law complained of could not amount to discrimination.
or persons on whose behalf the instant petition was brought, had demonstrated that they had been charged under the impugned provisions before any court or had a pending complaint against them before a police station to warrant the invocation of article 50(2). Accordingly, the petitioners’ argument that their right to a fair trial had been denied, violated, infringed or was threatened failed. The Court held that article 29 combined the right to freedom and security of the person with the right to be free from bodily and psychological harm. It was essentially intended to protect the physical integrity and dignity of an individual. The right not to be subjected to torture in any manner or not to be treated or punished in a cruel or degrading manner were components of the right to freedom and security of the person. Those components were inviolable under article 25(a) of the Constitution, and therefore, no law could stand if it sought to limit such right or freedom. Weighing the petitioners’ alleged infringements, violations and threat vis-à-vis article 29, the impugned provisions did not apply exclusively to the petitioners. The petitioners in petition 234 of 2016 cited violation of article 32 which guaranteed the right to freedom of conscience, religion, thought, belief and opinion. However, no evidence was led or submission made in support of that allegation. The Court noted that article 28 provided for the right to inherent dignity and the right to have that dignity respected and protected. The article did not define the word “dignity.” The importance of dignity as a founding value of the constitution could not be overemphasized. Recognizing a right to dignity was an acknowledgment of the intrinsic worth of human beings: human beings were entitled to be treated as worthy of respect and concern. The right was therefore the foundation of many of the other rights that were specifically entrenched in Chapter 4. Human dignity informed constitutional adjudication and interpretation at a range of levels. It was a value that informed the interpretation of many, possibly all, other rights. Human dignity was also a constitutional value that was of central significance in the limitations analysis. Dignity was not only a value fundamental to the Constitution; it was a
justiciable and enforceable right that had to be respected and protected. In many cases, however where the value of human dignity was offended, the primary constitutional breach occasioned might be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour. So important was the right not to be subjected to cruel, inhuman or degrading treatment or punishment that under article 25 of the Constitution, it was one of the non-derogable rights.

Article 31 on its part, the court explained, guaranteed the right to privacy of the person, home or property not to be searched. It had been settled, insofar as privacy was concerned, that that right became more powerful and deserving of greater protection, the more the intrusion it was into one's intimate life. There was a connection between an individual's right to privacy and the right to dignity. Privacy fostered human dignity insofar as it protected an individual's entitlement to a sphere of private intimacy and autonomy. The right to equality and dignity were closely related, as were the rights of dignity and privacy. In that regard, the Constitution placed human dignity and equality as the central theme to Kenya's constitutional order. The determination of whether an invasion of the common law right to privacy had taken place was a single enquiry. It essentially involved an assessment as to whether the invasion was unlawful.

According to the Court, when it was confronted with a claim of violation of a fundamental right, and a contention was made that there was no violation or that the right was limited, it was important to determine whether indeed there was an infringement, or a limitation, which was justifiable under article 24. That was because under article 165(3)(b)(d) as read with article 23, the mandate of the court was to determine the question whether a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or threatened, or, whether any law was inconsistent with or in contravention of the Constitution.

On the issue of foreign jurisprudence placed before the court, it was noted that such jurisprudence was of persuasive value because it showed how courts in other jurisdictions have dealt with the issues before the court. However, the court opined that when developing local jurisprudence in matters that involved constitutional rights, the court should exercise caution in referring to foreign jurisprudence and develop its common law in a manner that promotes the values and principles enshrined in the Constitution. The court was of the view that whereas citation and reliance on persuasive foreign jurisprudence was valuable, foreign experiences and aspirations of other countries should rarely be invoked in interpreting the Kenya Constitution. The progressive needs of the Kenyan Constitution were different from those of other countries.

In the instant matter the question was whether criminalization of sodomy between adults in private infringed the right to privacy and dignity. The court provided that section 162 and 165 of the Penal Code prohibited unnatural offences in the form of carnal knowledge against the order of nature and indecent practices between males, whether in public or in private. The petitioners' case was hinged on the interpretation of articles 28 and 31 of the Constitution. The court provided that Article 259(1) required the courts to interpret the Constitution in a manner that promoted its purposes, values and principles; advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights; permitted the development of the law; and contributed to good governance. The rights under articles 28 and 31 were not absolute. Article 24(1) of the Constitution permitted limitation by law; the limitation should however be reasonable and justifiable in an open and democratic society. It was undeniable that the limitation was by law. The question was whether the limitation was reasonable and justifiable.

The Court noted that the values and principles articulated in the preamble to the Constitution, article 10, 159 and 259 reflected the historical, economic, social, cultural and political realities and aspirations that were critical in building a robust, patriotic and indigenous jurisprudence for Kenya. The Constitution was the point of reference in any determination. The preamble to the Constitution acknowledged ethnic, cultural and religious diversity, the nurturing and
protection the wellbeing of the individual, the family, communities and the nation, a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Article 4(2) provided that the Republic of Kenya was a multi-party state founded on the national values and principles of governance in article 10. Accordingly, the court stated that this affirmed that the progress of the Kenyan nation and the realization of the aspirations of its citizens were predicated on the institutionalization and infusion of these values into all segments of the Kenyan society. In that regard, article 11 further recognized culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and the nation. Article 19 appreciated that the Bill of Rights was an integral part of Kenya's democratic state and was the framework of social, economic and social policies.

The Court further noted that any interpretation regarding the petitioners' rights would not exclude other values recognized in the Constitution. A holistic reading of the Constitution, the Final Constitution of Kenya Review Commission (CKRC) and Committee of Experts (CoE) Reports left no doubt that those values and principles informed the constitution making process and ultimately the Constitution which was endorsed by Kenyans in the referendum. It was common ground that during the Constitution making process, the issue of same sex marriage was one of the issues that arose, discussed, and a recommendation was made outlawing same sex marriage. The Final CKRC Report recommended the recognition of marriage only between individuals of the opposite sex and the outlawing of same sex unions.

It was the court’s view that deliberations culminated in article 45 which provided that the family was the natural and fundamental unit of society and the necessary basis for social order, and should enjoy the recognition and protection of the State; and, that every adult had a right to marry a person of the opposite sex, based on the free consent of the parties. In interpreting the Constitution, the article should not be unduly strained and the court should avoid excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene, which included the political and constitutional history leading up to the enactment of a particular provision.

The petitioners advanced the argument that sexual orientation was innate, that they were born that way and that was the way they expressed themselves and therefore they should be allowed to express themselves the way they knew best. However, it was the court’s view that the expert evidence tendered by both sides was unanimous that there was no conclusive scientific proof that LGBTIQ people were born that way. If the petitioners were born that way, they had rights like everyone else.

On the issue of violation of the Constitution, the Court found that the impugned provisions had not violated the Constitution or the petitioner’s rights to dignity and privacy. The court held that if it was persuaded that the petitioners’ rights were violated or threatened on grounds of sexual orientation, it would be difficult to rationalize that argument with the spirit, purpose and intention of article 45(2) of Constitution. Article 45(2) only recognized marriage between adult persons of the opposite sex. Based on this, the court held that decriminalizing same sex grounds that it was consensual and was done in private between adults, would contradict the express provisions of article 45(2). In the court’s view, the petitioners’ argument that they were not seeking to be allowed to enter into same sex marriage was immaterial given that if allowed, it would lead to same sex persons living together as couples. Such relationships, whether in private or not, formal or not would be in violation of the tenor and spirit of the Constitution.

Section 3(1) of the Marriage Act defined marriage as the voluntary union of a man and a woman. Even where there was no formal marriage, the Act recognized cohabitation as an arrangement in which an unmarried couple lived together in a long-term relationship that resembled a marriage. The constitutionality of that section had never been challenged. Therefore, the court held, decriminalizing the impugned provisions would indirectly open the door for unions among persons of the same sex. If that were to be allowed, it would be in direct conflict
with article 45(2). Numerous decisions from different foreign jurisdictions had decriminalized provisions similar to Kenya’s. However persuasive those decisions could be, the court reiterated that they were not binding to the High Court. Courts across the world were divided on the issue. Even where it had been allowed, the court noted, it had not been unanimous. The court provided that a country that had a provision the equivalent of Kenya’s article 45(2) and had decriminalized similar provisions was not found.

All laws in existence as at August 27, 2010 had to be construed with alterations, adaptations, qualifications and exceptions necessary so as to conform to the Constitution. Nonetheless, the court held that the issue before it was alive during the constitution making process, and, therefore, if Kenyans desired to recognize and protect the right to same sex relationships, nothing prevented them from expressly doing so without offending the spirit of article 45. The Court also held that inasmuch as the Court of Appeal in the Non-Governmental Organizations Coordination Board v EG & 5 others (2019) eKLR agreed with the High Court that sexual orientation could be read into article 27(4) of the Constitution as one of the prohibited grounds for discrimination, the Court was emphatic that the reading in would depend on the circumstances of each case. According to the court, the circumstances of the instant case did not permit the reading in because to do so would defeat the purpose and spirit of article 45(2) of the Constitution.

The Court held that the desire of Kenyans, whether majoritarian or otherwise were reflected in the Constitution. The views of Kenyans could not be ignored given the clear and unambiguous provisions in article 45 (2). While courts could not be dictated to by public opinion, they would still be loath to fly in the face of such opinion. Where the will of the people was expressed in the Constitution, it represented societal values, which had to always be a factor in considering constitutional validity of a particular enactment where such legislation sought to regulate conduct, private or public. In Kenya, those views were clearly expressed in article 45(2).

The Court therefore ruled that looking at the impugned provisions vis-à-vis article 45(2), the provisions had not offended the right to privacy and dignity espoused in articles 28 and 31 of the Constitution. The court held that Articles 28 and 31 could not be read in isolation from article 45(2). Unless article 45(2) was amended to recognize same sex unions, it was difficult to agree with the petitioners’ argument, that, there could be safe nullification of the impugned provisions, whose effect would be to open the door for same sex unions and without further violating article 159 (2)(e) which enjoined the court to protect and promote the purpose and principles of the Constitution.

In conclusion, the Court held that the petitioners’ attack on the constitutional validity of sections 162 and 165 of the Penal Code was not sustainable and that the impugned sections were not unconstitutional. Accordingly, the consolidated petitions had no merit.

Petition dismissed and each party to bear their own costs.
Land acquired through compulsory acquisition does not revert back to its original owners if unutilized

Town Council of Awendo v Nelson O Onyango and 192 others[2019] KLR - SCK

Supreme Court of Kenya
Petition 37 of 2014
D K Maraga, CJ & P; M K Ibrahim, S C Wanjala, N Ndung’u & I Lenaola, SCJJ
April 30, 2019
Reported by Ian Kiptoo

Land law - compulsory acquisition- rights of reversion- radicle title vis-à-vis fee simple title - where the Government utilized a certain portion of the land it compulsorily acquired-claim by the original owners that they had reversionary interests to the un-utilized portions – whether a proprietor whose land had been compulsorily acquired retained some reversionary interest in or, pre-emptive rights over the un-utilized portions - Constitution of Kenya, 2010, articles 40 and 68 (c) (ii); Constitution of Kenya, 1963 (Repealed), section 75; Land Acquisition Act (repealed), sections, 6 and 19 (1)

Land law - compulsory acquisition - public purpose – where compulsorily acquired land remained un-utilized – where the repealed Constitution and Land Acquisition Act (repealed) remained silent on use of un-utilized compulsorily acquired land - guiding principles applicable to compulsorily acquired land -what amounted to un-utilized land that had been compulsorily acquired - how could land that had been compulsorily acquired but remained unutilized be used - what were the guiding principles applicable to land compulsorily acquired

Land law - compulsory acquisition - pre-emptive rights vis-à-vis reversionary interests - where compulsorily acquired land remained unutilized - what was the distinction between pre-emptive rights and reversionary interest in regards to compulsorily acquired land – Land Act, section 110(2)

Brief facts
The instant matter was an appeal where the appellants urged that the Court of Appeal erred in fact in finding that the suit land was not acquired for purposes of the expansion of the appellant; that it erred by reasserting the 1st to 13th respondents’ titles over the suit land, despite the said titles having extinguished upon completion of the process of compulsory acquisition by the government; that the impugned judgment by the 1st Appellate Court had the effect of divesting the third party allottees (interested parties) of their property, including schools, hospitals, churches and financial institutions, in breach of articles 40, 48 and 50 (2) of the Constitution of Kenya, 2010 (Constitution)

Issues
i. Whether a proprietor whose land had been compulsorily acquired retained some reversionary interest in or, pre-emptive rights over the unutilized portions.
ii. What amounted to unutilized land that had been compulsorily acquired?
iii. How could land that had been compulsorily acquired but remained unutilized be used?
iv. What was the distinction between pre-emptive rights and reversionary interest in regards to compulsorily acquired land?
v. What were the guiding principles applicable to land compulsorily acquired?

Relevant Provisions of the Law
Constitution of Kenya, 1963 (Repealed)
Section 75
(1) “No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied:

(a) the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and county planning or the development or
utilization of property so as to promote the public benefits; and

(b) the necessity thereof is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation..."

Constitution of Kenya, 2010

Article 40

(3) “The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that:

i. requires prompt payment in full, of just compensation to the person; and

ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.”

Land Act

Section 110

(1) “Land may be acquired compulsorily under this Part if the Commission certifies, in writing, that the land is required for public purposes or in the public interest as related to and necessary for the fulfillment of the stated public purpose.”

(2) “If, after land has been compulsorily acquired, the public purpose or interest justifying the compulsory acquisition fails or ceases, the Commission may offer the original owners or their successors in title pre-emptive rights to re-acquire the land, upon restitution to the acquiring authority the full amount paid as compensation.”

Land Acquisition Act (repealed)

Section 19

(1) “After the award has been made, the Commissioner shall take possession of the land by serving on every person in the land notice that on a specified day which shall not be later than sixty days after the award has been made, possession of the land and title the land will vest in the Government.”

(4) “Upon taking possession, the land shall vest in the Government absolutely free from encumbrances.”

Held

1. The suit land was compulsorily acquired by the Government of Kenya, pursuant to the provisions of section 75 of the Constitution of Kenya, 1963 (repealed) and section 6 (2) of the Land Acquisition Act 1968, (repealed). Further, the proprietors of the land, including the 1st to the 13th respondents, were fully compensated in accordance with the applicable law. The compulsory acquisition was actualized vide the two Gazette Notices No. 2996 of October 8, 1976 and No. 3737 of December 24, 1976. However, while it was clear that the parcels of land were acquired for a public purpose, what remained in contention was the specific nature of the purpose for which some of the parcels were acquired.

2. Both purposes for which the various land parcels were acquired fell within the rubric of public purpose, within the meaning of section 75 (1) of the repealed Constitution. Section 6 of the Land Acquisition Act (repealed) replicated the above provisions of the repealed Constitution. Therefore, on the face of the two Gazette Notices, the suit lands in question were acquired, on the one hand for town and county planning and on the other hand, for the development of, or utilization of the said lands so as to promote the public benefit.

3. The proper basis for determining the specific nature of the purpose for which the suit lands were acquired, was the language used in the two Gazette Notices. Towards that end, Gazette
Notice No. 2996 stated that the specified parcels of land were to be acquired for the South Nyanza Sugar Scheme while Gazette Notice No. 3737 stated that the specified parcels were to be acquired for the South Nyanza Sugar Scheme (Awendo Township Expansion) in South Nyanza District.

4. The Gazette Notices were distinct and referred to different parcels of land. Land title no. North Sakwa/Kamasonga/1193 (Plot No. 1193) in respect of the 7th respondent was not on the list of parcels of land acquired by the two Gazette Notices. The tentative conclusion regarding the said title therefore was that it was never compulsorily acquired. In addition, land title No. North Sakwa/ Kamasonga/ 46 (Plot No. 46) in respect of the 1st respondent and Land Title No. North Sakwa/ Kamasonga/168 (Plot No. 168) in respect of the 13th respondent were acquired vide Gazette Notice No. 2996. A perusal of the record revealed the fact that some of the respondents, to wit, the 3rd, 9th, 10th, 11th and 12th were not the original proprietors of the parcels in question. However, they referred to themselves in their supporting affidavits as beneficial owners.

5. A plain reading of Gazette Notice No. 2996 clearly indicated that the intention of acquiring the land parcels was for establishing the South Nyanza Sugar Scheme. That had to be taken to refer to all that it entailed to establish such a scheme, including the factory, sugar plantations, offices, plant and machinery and all necessary infrastructure. Towards that end, there was no dispute regarding the establishment of South Nyanza Sugar Scheme. As for Gazette Notice No. 3737, it was stated that the listed parcels were to be acquired for the South Nyanza Sugar Scheme (Awendo Township Expansion) in South Nyanza District. The operative words were the bracketed ones.

6. The two Gazette Notices, although linked in material particulars, could not have been referring to the same purpose for the compulsory acquisition. The inclusion of the words Awendo Township Expansion had to be taken to mean that there was another purpose other than, but related to, the actual establishment of the South Nyanza Sugar Scheme. That other purpose was the expansion of the Awendo Township. The establishment of the South Nyanza Sugar Scheme within the vicinity of Awendo Township meant that the latter, had to be expanded to accommodate the functionality of the former. The need to expand the Township necessitated the further acquisition of extra land, for that purpose, as was clearly stated in the brackets. The words Awendo Township Expansion had to surely be taken to mean something; otherwise they would not have been included in Gazette Notice No. 3737.

7. The purpose for which all that land, comprised in Gazette Notice No. 2996, i.e., the establishment of South Nyanza Sugar Scheme in South Nyanza, had been fully accomplished by the time of filing Civil Case No. 133 of 2005 at the High Court. That being the case, there were no unutilized portions of land in the block to which the said Gazette Notice applied.

8. A reversion was that interest in land that survived the expiry or extinction of an estate in the said land. It was called a reversion because upon the extinction of the estate, that interest reverted to the person or entity from whose superior title the estate was originally created. An estate on the other hand, was a time bound bundle of rights over land or stated at common law, an estate was a time in the land or a land for a time. Thus a holder of a fee simple estate retained interest in that land for as a long as there would be an heir to inherit the same. Where no heir remained to inherit the estate, then the land reverted to the State.

9. The State held a superior title to the land called the radical title. The fee simple estate also became extinguished upon a compulsory acquisition by the State in exercise of its powers of eminent domain. By the same token, in a landlord and tenant relationship, the tenant held the leasehold estate while the landlord retained the reversion which, upon the expiry of the leasehold, was surrendered.
back to the landlord, since the latter held a superior title from which the lease was created.

10. The respondents did not retain any interests in the land, capable of protection or resuscitation by the law as provided for in section 19 (1) of the Land Acquisition Act (repealed). The respondents did not have any reversion in the acquired lands since whatever reversion that had existed, could only have been a reversion in favour of the State, and not vice versa. The suit lands all became vested in the Government of Kenya.

11. For purposes of the Appeal, unutilized land referred to any residual portion of land which had been compulsorily acquired, but which remained unused after the realization of the public purpose for which it had been acquired. Neither the repealed Constitution, nor the Land Acquisition Act, provided any direction as to what should happen to land that remained unutilized after the public purpose for which it was compulsorily acquired became spent.

12. Land which had been compulsorily acquired had to be used for the purpose for which it was acquired. If for example, after compulsorily acquiring land, the Government or any of its agencies proceeded to allocate the said land to individuals or other entities, for their own private benefit, in total disregard of the public purpose, such allocation would not confer good title to the allottees.

13. Under the law as it then stood, the original owners of compulsorily acquired land had no reversionary rights in that land. In Niaz Mohammed v Commissioner for Lands & 4 Others (1996) eKLR, it appeared to suggest that such land would legally revert to the original owners through equity. The fallback to equity was compelling, given that what was involved was land, a subject that unendingly continued to generate emotive disputes among all and sundry. Indeed, equity grew out of the interstices of common law rigidity. The doctrines that had catapulted it into the cosmos of law were themselves handmaidens of justice and fairness. But even equity, in all its splendor, followed the law, lest it be deformed, by judicial caprice or whim. Therefore, in the face of clear constitutional and legal provisions, that extinguished private title to compulsorily acquired land, not even equity could resuscitate such title to unutilized portions thereof.

14. The public purpose, for which the land was compulsorily acquired, could have been spent, but the unutilized portions thereof remained public land. Therefore, such land as remained unutilized could only be applied to a public purpose, or be utilized to promote the public interest, even if the said interest was not such as had been originally envisaged. Unutilized portions of land, could in the instant case, be allocated to private entities, including those from whom the land was acquired, at a price, provided that, the land was to be put to such use as would promote the public interest.

15. The provisions relating to the doctrine of eminent domain as were enshrined in article 40 of the Constitution of Kenya, 2010 (Constitution), and Part VIII, of the Land Act (sections 107 to 133), mirrored those of section 75 of the repealed Constitution, and section 6 of the Land Acquisition Act (repealed) with a few modifications. Article 68 (c) (ii) of the Constitution provided that Parliament would enact legislation to regulate the manner in which any land could be converted from one category to the other.

16. Section 110 (2) of the Land Act introduced the concept of pre-emptive rights over compulsorily acquired land. Where the purpose justifying the compulsory acquisition failed or ceased, then the original owners or their successors in title had the pre-emptive rights to re-acquire the land upon payment of the full amount received as compensation. However, a pre-emptive right was not the same as a reversionary interest. The former arose, consequent upon the failure or cessation of the purpose justifying the compulsory acquisition; while the latter reposed in the holder of a superior title and became exercisable
upon the expiry of an estate.

17. It could not be said that the land over which the pre-emptive right of re-acquisition arose upon failure or cessation of the public purpose, was the same as unutilized land or portion of land that remained once the public purpose became spent. In the former case, there was a total failure of the public purpose, meaning that the acquired land could not be used as earlier envisaged. The wording of section 110 (2) of the Land Act was permissive (the Commission may offer) in the sense that the acquiring authority, was not necessarily barred from applying the land to another public purpose. However, should it decide to abandon the land to private purchase, then the original owners had the pre-emptive rights to re-acquire the land upon restitution of the full sum that was paid in compensation.

18. The land to be re-acquired in the instant case was the whole as opposed to a portion thereof. That explained why the sum of money to be restituted by the original owners was the full amount paid in compensation. In the latter case, the public purpose had been realized, but the acquired land had not been utilized in full, leaving a portion thereof. In that instance, neither the original owners, nor their successors in title had pre-emptive rights to re-acquire the unutilized portions.

19. On the basis of the analysis, the following guiding principles were issued:

a. where the Government, pursuant to the relevant constitutional and legal provisions, compulsorily acquires land, such land, would only be used for the purpose for which it was compulsorily acquired;

b. the allocation of compulsorily acquired land, to private individuals or entities, for their private benefit, in total disregard of the public purpose or interest for which it was compulsorily acquired, would be incapable of conferring title to that land in favour of the allottees;

c. a person whose land had been compulsorily acquired in accordance with the relevant constitutional and legal provisions did not retain any reversionary interest in the said land; and

d. unutilized portions of compulsorily acquired land could be used for a different public purpose, or in furtherance of a different public interest, including the allocation of such portions to private individuals or entities, at the market price, in furtherance of such public interest.

20. Consequently, flowing from the analysis and guiding principles:

a. through the instrumentality of Gazette Notices Nos. 2996 and 3737 of 1976, all parcels of land whose land titles were listed respectively, were compulsorily acquired and vested in the Government of Kenya;

b. the appellant (or its successor in title) held that land in trust for the residents of the area, and as the Implementing Agency of the public purpose for which the land was compulsorily acquired;

c. The letter written by the Land Registrar, directing the appellant to re-survey the land and allocate the same to the original owners or their successors in title had no legal basis;

d. the 1st and 13th respondents had no reversionary interest in the parcels of land listed in the two Gazette Notices, since titles thereto were extinguished through the compulsory acquisition of the same;

e. the purpose for the acquisition of all those lands listed in Gazette Notice No. 3737 of 1976 (the suit land) was for the expansion of Awendo Township in South Nyanza District. Such expansion was necessitated by the establishment of South Nyanza Sugar Scheme, through Gazette Notice No. 2996;

f. the land comprised in Gazette Notice No. 3737 was not unutilized land given the fact that the expansion of Awendo Township was an on-going process;

g. the allocation of various parcels of land comprised within Gazette Notice No. 3737, at a price, to the interested parties, for the establishment of residential, commercial and other
amenities such as churches, etc., was in furtherance of the expansion of Awendo Township; and
h. by purchasing the said plots, and using them for residential, commercial and other purposes in consonance with the public interest, and in the absence of any proof of fraud on the part of the interested parties, the latter acquired valid title which could not be defeated by the claims of the respondents.

Petition of appeal allowed with no orders as to costs.

The 7th respondent would be fully compensated by the Government of Kenya for the loss of his Land Title No. North Sakwa/Kamasonga/1193.

Supreme Court overturns the acquittal of two Iranian nationals convicted of terrorism related offences.
Republic v Ahmad Abolfathi Mohammed & another [2019] KLR - SCK
Petition 39 of 2018
Supreme Court of Kenya at Nairobi
D K Maraga, CJ & P, M K Ibrahim, J B Ojwang, S C Wanjala, W N Ndungu & I Lenaola, SCJJ
March 15, 2019
Reported by Mathenge Mukundi

Evidence Law—confession and admission—difference between an admission and a confession—information obtained from an accused person during police interrogations—discovery of exhibits and further evidence from information offered to the police by an accused person—whether that information was either a confession or admission, which had to be taken in accordance with the law for it to be admissible—Evidence Act (Cap 80), sections 17 & 25.

Evidence Law—production and effect of evidence—burden of proof—burden of proving circumstances which included facts especially within the knowledge of an accused person, that entailed an exception, exemption or qualification in relation to an offence—whether the burden of proving such circumstances was different or similar to the making of a confession or an admission—Evidence Act (Cap 80), sections 17, 25A & 111(1).

Evidence Law—circumstantial evidence—probative value of circumstantial evidence—claim that the finding of explosives in an open golf course, in which the accused persons were spotted, included an co-existing circumstances wherein any other person could have accessed the golf course and placed the explosives there—whether circumstantial evidence showed a complete chain of events which pointed to the guilt of the accused persons.

Brief Facts:
The respondents were Iranian nationals who came to Kenya on June 12, 2012 on a tourist/business survey visa. During the tour they stayed in a hotel in Mombasa for five days, where they visited various places at the coast, they later travelled to Nairobi and spent a few days. While on their way back to Iran, they were arrested by the Anti-Terrorist Police Unit on allegations of being in the country on a terrorism mission.

The respondents were later charged before the Chief Magistrate’s Court, at Nairobi with the following offences: committing an act intended to cause grievous harm contrary to section 231(f) of the Penal Code, preparation to commit a felony contrary to section 308 (1) of the Penal Code and being in possession of explosives namely Cyclotrimethylenetrinitramine (RDX) contrary to section 29 of the Explosives Act. The respondents pleaded not guilty to all the charges but upon trial, they were convicted as charged and sentenced to life imprisonment on the first offence, 10 and 15 years to the second and third offences respectively. The sentences were ordered to run concurrently.

Aggrieved by that conviction and the sentence imposed upon them by the Magistrate’s Court, the respondents appealed to the High Court, as the first appellate court. Upon re-evaluation of the evidence on record, the High Court upheld the findings of the trial Court on the respondents’ conviction. It, however, allowed their appeal against sentence holding that the respondents, having been charged with what essentially constituted inchoate offences in that their intentions were nipped in the bud, the sentence of life imprisonment was excessive.
Consequently, the Judge set aside that sentence and substituted it with a composite term of fifteen years’ imprisonment.

The respondents were still aggrieved by the High Court's findings and moved to the Court of Appeal on a second appeal. Before that Court, they raised 19 grounds of appeal which their counsel condensed into six broad grounds, the Court of Appeal allowed their appeal, quashed their conviction and set aside the sentence. It was that decision which provoked the Supreme Court appeal by the State.

Issues:

i. Whether the information given to the police by an accused person that led to the recovery of the RDX explosives was admissible only under section 25A or also under the provisions of section 111(1) of the Evidence Act;

ii. Whether evidence emanating from a suspect leading to discovery of further evidence should be equated with a confession under section 25A of the Evidence Act.

iii. Whether there was an apparent conflict between sections 25A and 111(1) of the Evidence Act, with respect to evidence obtained by the police from an accused person; and

iv. Whether the fact that any person other than the accused persons had access to a crime scene where explosives were placed, broke the chain of the circumstantial evidence on record and meant that anyone else could have committed the crime.

Relevant Provisions of the Law:

Evidence Act (Cap 80)

Section 17;
Admissions defined generally

An admission is a statement, oral or documentary, which suggests any inference as to a fact in issue or relevant fact, and which is made by any of the persons and in the circumstances hereinafter mentioned.

Section 25;
Confession defined

A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

Section 25A;
Confessions generally inadmissible

(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice.

(2) The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.

Section 111(1);  
Burden on accused in certain cases

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

Held:

1. It was a common practice and standard operating procedure in the criminal investigations for the police to confront the suspects with any report they received about the suspects' commission or involvement in the commission of a crime and demand an explanation. If the explanation the suspect gave led to the discovery of further evidence or exhibits,
the evidence should be admitted though with corroboration for a conviction to be sustained. Hence, the information that was volunteered by the 1st respondent that led the police to the recovery of the RDX explosive was generally admissible without invoking section 25A or section 111(1) of the Evidence Act.

2. Where there was a confession an accused person would acknowledge the commission of an offence and could be convicted on the basis of that acknowledgement alone but in the case of an admission the accused person would acknowledge a fact from which guilt could be inferred but additional evidence would be needed to prove the commission of an offence.

3. The Court of Appeal noted, quite aptly, that it was never the appellant’s case that the respondents had confessed to committing the offences that they were charged with. The Appellate Court therefore, could not rely on section 25A of the Evidence Act because the respondents did not make a confession in terms of sections 25 and 25A of the Evidence Act. Hence, the Court of Appeal erred in equating the information given by the 1st respondent that led to discovery of RDX explosives to a confession in terms of sections 25 and 25A of the Evidence Act.

4. There was no apparent conflict between sections 25A (1) and 111(1) of the Evidence Act. The two sections related to different scenarios and would result in different effects. Section 25A (1) of the Evidence Act was applicable only to the information obtained by the prosecution during the interview and interrogations of the suspects during criminal investigations, whereas, section 111 (1) of the Evidence Act dealt with the burden of proof and only came into play in the trial when the prosecution had proved, to the required standard of beyond reasonable doubt, that the accused person had committed an offence and part of the prosecution case comprised of a situation only “within the knowledge” of the accused person so that if he did not offer an explanation, he risked conviction.

5. Circumstantial evidence was like any other evidence. Though, its probative value should be reasonable, and not speculative, inferences ought to be drawn from the facts of a case. In contrast to direct testimonial evidence, it was conceptualized in circumstances surrounding the disputed questions of fact. Circumstantial evidence should never be given a derogatory tag. For a conviction to be sustained on the basis of circumstantial evidence, the chain of events had to be so complete that it established the culpability of the respondents, and no one else, without any reasonable doubt.

6. There had to be no other co-existing circumstances weakening the chain of circumstances relied on and the circumstances from which the guilt inference was drawn had to be of definite tendency and to precisely point toward the guilt of the respondents. The appellant proved that the respondents visited the country on a tourist/business survey visa and upon their short stay in the country they neither visited any tourist destination nor met with any investor. The only place they visited thrice was where the RDX explosives were recovered in a freshly dug hole, at which, they had been seen at dusk by golfers at a spot where it was rare to find members of the public at that time. Upon being asked by the golfers what they were doing there at that time, they casually stated that they were “looking”. The golfers left them there at around 6:30pm in the evening.

7. Although the golf course was not fenced or guarded and it was possible for any member of the public to have entered it and to place the RDX where it was found, that did not break the chain of events. The respondents did not offer any plausible explanation for their three visits at the spot where the RDX explosives were recovered or on how the 1st respondent obtained the information that he volunteered to the police and led to the recovery of the explosives.

8. The respondents vehemently dismissed the alleged admission as a fairy tale concocted by the police to incriminate
them. However, upon consideration of the record, and particularly the trial Court’s finding that there was no evidence on record to support the accused’s claim that after his arrest he was drugged and that he only came to his senses while in Court, as well as the statement by the 2nd respondent that the police treated them well, the trial Court and the first appellate court’s finding that the 1st respondent indeed led the police to the discovery of the RDX explosives, was correct. The act of the 1st respondent that led the police to where the RDX explosive was discovered was an admission of the respondents’ possession of that explosive. The police did not know the respondents. The police said that they acted on intelligence information. The use of intelligence or informers’ reports was standard and common practice and the police were not obliged to disclose their informers as that would hamper crime detection in the country.

9. All the aspects of the evidence on record corroborated the appellant’s case that the 1st respondent led the police to the scene where the RDX explosives were dug out. That considered alone precisely pointed to the respondents as the people who planted the RDX explosives at the scene where they were found. There was no evidence of anyone else having previously planted anything in the Mombasa Golf Course and more specifically in the vicinity of Hole No. 9 where the RDX explosive was discovered. The respondents visited that spot at least thrice, the last visit having been a day before the recovery of the RDX explosive. Had the Court of Appeal considered all these factors, it would have come to a different conclusion.

10. The Court of Appeal erred in holding that any admission made outside section 25A of the Evidence Act was inadmissible. It also erred in holding that the conviction in the case was based solely on circumstantial evidence. The 1st respondent’s act of leading the police to Hole No. 9 on the Mombasa Golf Club course where the RDX explosive was dug out, was an admission of a material fact which, coupled with the circumstantial evidence on record sealed the respondents’ guilt. In the circumstances the appeal had merits.

Per M K Ibrahim, SCJ (dissenting)

1. It was imperative that the rationale for the enactment of section 25A of the Evidence Act was not lost. The reason behind its enactment showed why it was not in conflict with section 111 of the Evidence Act. The enactment was clearly prompted by the raging debate at the time of enactment which brought serious concerns as to the capability of the police to extract confessions without resorting to means that led to gross miscarriage of justice and grave human rights violations. Generally, confessions made by the accused person were not admitted in evidence unless they were made strictly in accordance with the law.

2. The 1st respondent had special knowledge of where the substance was buried. The substance was buried in a hidden place. The only inference that the court could draw from the evidence adduced by the appellant was that it was the respondents who had buried the said substance in the place where it was found. That was circumstantial evidence. The law regarding circumstantial evidence was that the Court had to consider whether the exculpatory evidence adduced by the prosecution was inconsistent with the innocence of the accused and pointed to no one else other than the accused as the persons who committed the offence. The appellant established that it was the 1st respondent who escorted the police to the specific spot at the golf course where the explosive substance was recovered.

3. In reaching at its decision, the High Court drew conclusions from the circumstantial evidence adduced by the prosecution and not the accused’s confession, for no confession was on record. The High Court concluded that both direct and circumstantial evidence placed the respondent within the proximity of the area where the RDX was buried and later recovered.

4. The Court noted that the evidence of the appellants’ possession of the RDX was
purely circumstantial because no witness saw them in possession of the substance or placing the same in the golf course. The evidence was emphatic that other than being at the golf course, the appellants were not in physical possession of any luggage or parcel. There was no other circumstantial evidence tying or linking the appellants to the RDX, the easy accessibility, without let or hindrance, of the golf course entailed strong co-existing circumstances that were capable of destroying the inference of guilt on the part of the appellants.

5. The evidence was purely circumstantial and was not enough to prove the case as against the respondents to the required standard, which was proof beyond reasonable doubt. It was also imperative to note that while the police evidence was that the 1st respondent was the one who led them to the spot at Mombasa Golf Club where the RDX was discovered, that evidence was used to equally convict the 2nd respondent. That aspect was not picked up by either of the Superior Courts and was another reason militating against the case against the respondents. The prosecution evidence was never water-tight.

6. With respect to public interest, it was a fact that the country had been a victim to several terrorist attacks, with the recent one being the ‘Dussit Hotel Complex Attack’. As a result, public interest and awareness in matters concerning terrorism had increased. Any alleged association of individuals with acts of terrorism was a matter that the public really frowned upon. Hence as expected, the matter attracted a lot of public interest and media coverage. To the public, the fact that the respondents were Iranians charged with acts of terrorism was enough to have them convicted and sentenced.

7. The Court was required to strike a balance between the public’s interest and expectations on one hand, and the constitutional principles applicable within the criminal justice system on the other, the most fundamental principles being the presumption of innocence and the Rule of Law. The public’s perception on the seriousness of an offence should never be a factor in determining the guilt of an accused or his acquittal. There was a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important constitutional protections of the accused persons became.

8. The presumption of innocence served not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore did not add anything new or special to the balancing exercise. Although, the public resented and abhorred the respondents’ acquittal by the Court of Appeal, in determining the matter, the Court should only focus on issues that were before the Court of Appeal and the law. The gravity of the offence and the public sensitivity of the issue(s) ought not to be given emphasis to the exclusion of very important constitutional provisions and fundamental rights and freedoms, which the Constitution guaranteed to all persons, especially within the criminal justice system.

9. The Court of Appeal correctly found that the chain of circumstantial evidence was broken and the evidence on record was not watertight or conclusive enough to sustain a conviction of the two respondents. The fact that the Golf Course was an open area, was not fenced and was accessible to any member of the public created a reasonable doubt as to the guilt of the two respondents in respect of the offence in question.

S C Wanjala, SCJ (dissenting)

10. The High Court and Court of Appeal interpreted sections 25A and 111(1) of the Evidence Act, as if they dealt with the same genre of evidence; confessions and admissions. The superior courts perceived a conflict between the two, in terms of the admissibility of certain evidence obtained from a suspect during investigations. However, the two sections of the Evidence Act did not deal
with the same family of evidence. In fact, they were so unrelated, that there could hardly be any conflict between them.

11. A correct reading of sections 25A and 111 of the Evidence Act clearly showed that the two did not address similar, or even related evidentiary issues. Section 25A of the Evidence Act dealt with the process of searching for, collecting and admissibility of evidence. The process took place before a person was formally charged with a criminal offence, hence the requirement that a confession or admission should be made before a judge, a magistrate or a police officer not being an investigating officer of the rank of Inspector. Once charged, then the question of whether his confession or admission of fact was admissible arose. Section 25A of the Evidence Act mainly regulated the investigative process. Once a person was formally charged, he became an accused person, but the information he could have given, or a confession or admission he could have made during investigations, had to be subjected to the requirements of section 25A and any other related provisions of the Evidence Act, dealing with questions of admissibility of evidence, be it a confession or an admission.

12. Section 111 (1) of the Evidence Act, did not address the process of searching for, collecting, or admissibility of evidence. The section dealt with the question of burden of proof in certain circumstances. The opening words of the section read “when a person is accused of any offence, the burden of proving....” In other words, the section placed the burden of proving that an accused person was exempted from, or fell within an exception to the offence with which he was charged on him. For example, an accused person could have pleaded the defence of diplomatic immunity, and consequently, that he was exempted from the criminal charge. It had nothing to do with a confession or an admission of a fact, tending to the guilt of an accused. It was actually the other way round, meaning facts that would have brought an accused person within an exception, or qualification to, or exemption from, the law creating that charge.

13. Information provided by a suspect, which led to the discovery of material evidence did not fall within the provisions of section 111 (1) of the Evidence Act. Such information was of course relevant to the process of collecting evidence. However, if the information had the character of an admission or confession, it had to fall under the provisions of section 25A of the Evidence Act, for the latter, regulated the admissibility of “a confession or any admission of a fact intending to the proof of guilt...”

14. It was no longer in question that for circumstantial evidence to justify the inference of guilt, it had to be watertight, in that the exculpatory facts had to be incompatible with the innocence of the accused. The circumstances taken cumulatively, should form a chain so complete that there was no escape from the conclusion that within all human probability, the crime was committed by the accused and none else. The burden of proving the completeness of the chain always remained on the prosecution, it never shifted to the accused.

15. As the Court of Appeal observed, the evidence on record indicated that the golf course was not fenced or guarded and that it was possible for any member of the public to have entered it and placed the RDX where it was found. In the absence of any other circumstantial evidence tying or linking the appellants to the RDX, the easy accessibility, without let or hindrance, of the golf course was strong co-existing circumstance that was capable of destroying the inference of guilt on the part of the appellants. All that the Court ought to have done was to satisfy itself whether, the evidence on record supported the finding of guilt beyond any reasonable doubt. The evidence relied upon by the prosecution was not water-tight enough to prove the guilt of the accused beyond reasonable doubt.

Appeal allowed, the respondents were to serve the remainder of their imprisonment term after which they would be repatriated to their country.
Court of Appeal

The threshold for determining unexplained assets in corruption cases
Civil Appeal 184 of 2018
Court of Appeal at Nairobi
P N Waki, S G Kairu & J Otieno-Odek JJA
May 10, 2019
Reported by Kakai Toili

Statutes - interpretation of statutes - interpretation of section 26 of the Anti-Corruption and Economic Crimes Act - notice to furnish the Kenya Anti-Corruption Commission with a statement of a suspect's property - what was the nature of the notice to furnish the Kenya Anti-Corruption Commission with a statement of a suspect's property - whether evidence recovered pursuant to a notice to furnish the Kenya Anti-Corruption Commission with a statement of a suspect's property could be used in criminal proceedings - Anti-Corruption and Economic Crimes Act, 2003, sections 26, 30 and 55

Jurisdiction – jurisdiction of the Court of Appeal – appellate jurisdiction – jurisdiction to interfere with the exercise of a trial court’s discretion - what was the role of the Court of Appeal as a first appellate court and when would the Court of Appeal could interfere with a trial court’s exercise of discretion

Evidence Law - burden and standard of proof - burden and standard of proof in determining unexplained assets - where a person was alleged to have assets disproportionate to his/her legitimate sources of income - who bore the burden of proof where a person was alleged to have assets disproportionate to his/her legitimate sources of income - what was the threshold for determining unexplained assets where a public servant had assets disproportionate to his/her legitimately known sources of income - Anti-Corruption and Economic Crimes Act, 2003, sections 2 & 55; Evidence Act, section 112

Evidence Law – witnesses - calling of material witnesses to testify - failure of calling material witnesses to testify - effect of - what was the effect of failure to call a material witness to testify in a corruption case - Anti-Corruption and Economic Crimes Act, 2003, section 55; Evidence Act, section 112

Constitutional Law - rights and fundamental freedoms - right to property - nature of - where a person was asked to explain the source of assets disproportionate to his/her legitimately known sources of income - what was the nature of the right to property where a person was asked to explain the source of assets disproportionate to his/her legitimately known sources of income - Constitution of Kenya, 2010, article 40; Anti-Corruption and Economic Crimes Act, 2003, sections 26 & 55(2)

Brief Facts
The respondent issued a notice under section 26 of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA) requiring the appellant to furnish a statement of his property. The respondent in the said notice claimed that the appellant’s various assets were estimated at tens of millions of Kenya Shillings and were disproportionate to his salary. Considering that the appellant’s salary from employment in the public service was his only source of income during the period within which he acquired the said assets, the respondent suspected the appellant of engaging in corruption and economic crimes. The appellant was required to explain the source of cash deposits made to his accounts. The notice required the appellant to explain his wealth for 16 years being the period 1992 to 2008. It was contended that the respondent unlawfully altered the period of investigation and inquiry to 10-months namely from September 2007 to June 2008.

The respondent complied with the notice and gave explanation for his wealth and assets. Dissatisfied with the explanation, the respondent moved to the Trial Court seeking orders for forfeiture of the unexplained assets. The Trial Court held that the appellant was in possession of unexplained assets valued Ksh.
A decree was issued that the appellant was liable to pay the Government of Kenya the sum of Ksh. 41,208,000/=.

Aggrieved by the Trial Court’s decision, the appellant lodged the instant appeal.

**Issues**

i. What was the threshold for determining unexplained assets where a public servant had assets disproportionate to his/her legitimately known sources of income?

ii. What was the nature of the notice to furnish the Kenya Anti-Corruption Commission with a statement of a suspect’s property under section 26 of Anti-Corruption and Economic Crimes Act?

iii. Whether evidence recovered pursuant to a notice to furnish the Kenya Anti-Corruption Commission with a statement of a suspect’s property could be used in criminal proceedings.

iv. What was the role of the Court of Appeal as a first appellate court and when would the Court of Appeal interfere with a trial court’s exercise of discretion?

v. What was the nature of the right to property where a person was asked to explain the source of assets disproportionate to his/her legitimately known sources of income?

vi. Who bore the burden of proof where a person was alleged to have assets disproportionate to his/her legitimate sources of income?

vii. What was the effect of failure to call a material witness to testify in a corruption case?

**Relevant Provisions of the Law**

**Anti-Corruption and Economic Crimes Act**

**Section 2**

unexplained asset “means assets of a person:

(a) acquired at or around the time the person was reasonably suspected of corruption or economic crime; and

(b) whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.

**Section 26**

(1) If, in the course of investigation into any offence, the Secretary is satisfied that it could assist or expedite such investigation, the Secretary may, by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the Secretary and with regard to such specified property:

(a) enumerating the suspected person’s property and the times at which it was acquired; and

(b) stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

(2) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years, or to both.

(3) The powers of the Commission under this section may be exercised only by the Secretary.

**Section 55**

(5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.

(6) If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct.

**Evidence Act (Cap 80 of the Laws of Kenya)**

**Section 112**

In civil proceedings when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him.

**Held**

1. The scourge of money laundering,
economic crimes and corruption was threatening the moral and social fabric of society. In Kenya, one of the legislative instruments designed to deal with the scourge was the ACECA. In its preamble, ACECA sought to provide for prevention, investigation and punishment of corruption, economic crimes and related offences. ACECA established the Kenya Anti-Corruption Commission (respondent) as a body corporate whose Chief Executive Officer was the Secretary/Director to the Commission.

2. Entrenched in ACECA was the concept of unexplained assets which was a legal innovation to combat the vice of doubtful source of wealth, money laundering and suspicious corrupt practices. Underlying the concept was the theme, you failed to satisfactorily explain the lawful source of assets, you forfeited it.

3. A notice issued under section 26 of ACECA was a civil investigatory tool aimed at collecting information and data from a person suspected of corruption or economic crime. By virtue of section 55 (9) of ACECA, the provisions of section 55 ACECA were retroactive and a section 26 notice could issue regardless of when the property was acquired. The notice could issue in relation to property acquired before ACECA came into force.

4. Evidence recovered pursuant to section 26 of the ACECA on unexplained assets was for civil recovery only. Pursuant to section 30 of ACECA, the material received pursuant to the notice could not be used in criminal proceedings against the respondent (except in certain limited circumstances including prosecution for perjury, or on a prosecution for another offence where the respondent had provided inconsistent evidence).

5. The Court's primary role as a first appellate court was namely: to re-evaluate, re-assess and re-analyze the evidence on the record and then determine whether the conclusions reached by the trial court were to stand or not and give reasons either way.

6. The 10-month period from September 2007 to June 2008 was within the 16-year timeline of 1992 to June 2008 stated in the notice dated July 9, 2008. The notice required the appellant to furnish details of the enumerated property and cash deposits for the 16-year period. The greater period included the lesser period and no fresh or new notice was required for the 10-months between September 2007 and June 2008. That lesser period was already within the longer 16-year time-frame. Further, the originating summons at paragraph 4 thereof and at paragraph 10 of its supporting affidavit expressly identified and informed the appellant the period under investigation was September 2007 to June 2008.

7. It was not the duty of the Trial Court to identify the period of investigation. Under section 26 of ACECA as read with section 55 of the ACECA, it was the duty of the respondent to identify the period under investigation. The evidence on record identified the period of investigation to be September 2007 to June 2008. Accordingly, the ground and submission that the Trial Court erred in failing to identify the period of investigation had no merit. Likewise, the contestation that the originating summons as filed was fatally defective for being grounded on a 10-month period had no merit.

8. The appellant's right to fair hearing under article 50 of the Constitution as well as his right to be accorded reasonable opportunity to explain the source of the monies recovered as required by section 55 (2) of the ACECA were not violated. The appellant was required to explain the source of cash deposits in his various bank accounts for the period under investigation. It was the appellant who identified the assets in explanation of sources of cash flows in his bank accounts. The appellant had an opportunity to explain the source of those cash assets.

9. An appellate court should be very hesitant to assume jurisdiction in cases where a litigant was challenging the exercise of discretion by another court. In the instant matter, under section 55 (5) and (6) of the ACECA, the Trial Court had discretion to decide if the
The respondent had tendered evidence on balance of probability establishing the appellant had unexplained assets.

10. The Trial Court had discretion to let the appellant satisfactorily explain the source of his assets. Interfering with an exercise of discretion on the part of the trial court would be tantamount to directing a court on how to exercise its powers, in essence restraining its liberty. An appellate court could only interfere with exercise of discretion if the appellant could show that in exercise of its discretion:
   a. the court acted on a whim or that;
   b. its decision was unreasonable and
   c. it was made in violation of any law or that;
   d. it was plainly wrong and had caused undue prejudice to one party.

11. In the instant appeal, the appellant had not demonstrated that the Trial Court in permitting the appellant to testify exercised its discretion under section 55 (5) and (6) of ACECA unreasonably, whimsically or injudiciously or that an injustice had occurred or violation of any law had taken place. Accordingly, there was no reason to interfere with the exercise of the discretion by the Trial Court.

12. The threshold for determining unexplained assets was provided for in sections 2 and 55 (2) of the ACECA. A reading of section 2 and 55 (2) established the threshold for existence of unexplained assets to be:
   a. there had to be set time period for the investigation of a person;
   b. the person had to be reasonably suspected of corruption or economic crime;
   c. the person had to have assets whose value was disproportionate to his known sources of income at or around the period of investigation, and
   d. there was no satisfactory explanation for the disproportionate asset.

13. The evidence on record revealed that another offer was made by the appellant to sell the suit property which had already been sold to another person; it was improbable that the appellant would knowingly sell the same property to two different persons. In contract law, when there was total failure of consideration, refund of any monies paid under the contract was due and owing. In the instant matter, if at all the sale did not go through, there was no evidence of refund by the appellant of the cash installments paid as deposit. The two people who wanted to purchase the suit property were not called to testify and throw light on the nature of the cash transactions with the appellant. The appellant neither addressed nor contradicted the specific reasons given by the Trial Court for finding that the sale agreement was suspect and not authentic. There was no reason to interfere with the evaluation of evidence and findings of the Trial Court in relation to the sale agreement with the two people who wanted to purchase the suit property.

14. Section 362A of the United Kingdom’s Proceeds of Crime Act 2002 (POCA) on unexplained wealth order was in pari materia to section 55 (2) of the ACECA which lay emphasis on assets being disproportionate to an individual’s known legitimate sources of income. Section 55 (2) embodied the concept of income requirement guaranteed whereby an individual’s assets should be proportionate to his/her legitimate known source of income.

15. The protection of the right to property had socio-political, moral, ethical, economic and legal underpinning. The right protected the sweat of the brow; it did not protect property acquired through larceny, money laundering or proceeds of crime or any illegal enterprise. There was no violation of the right to property if an individual was requested to explain the source of his assets that was disproportionate to his legitimate source of income.

16. In the instant matter, the provisions of sections 26 and 55 (2) of the ACECA did not violate the right to property as enshrined in article 40 of the Constitution. In any event, constitutional protection of property did not extend to property
that had unlawfully been acquired. If it were to be held that the requirement to explain violated the right to property under article 40 of the Constitution, enforcement of a notice issued under section 26 and the requirement to explain the source of disproportionate assets would be rendered nugatory.

17. The concept of unexplained assets and its forfeiture under sections 26 and 55 (2) of ACECA was neither founded on criminal proceedings nor conviction for a criminal offence or economic crime. Sections 26 and 55 were non-conviction based civil forfeiture provisions. The sections were activated as an action in rem against the property itself. The sections required the respondent to prove on balance of probability that an individual had assets disproportionate to his/her legitimately known sources of income. Section 55 (2) made provision for evidentiary burden which was cast upon the person under investigation to provide satisfactory explanation to establish the legitimate origin of his/her assets. That evidentiary burden was a dynamic burden of proof requiring one who was better able to prove a fact to be the one to prove it. Section 55 (2) was in sync with section 112 of the Evidence Act.

18. Under section 55 (2) of ACECA, the theme in evidentiary burden in relation to unexplained assets was to prove it or lose it. In other words, an individual had the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset. The cornerstone for forfeiture proceedings of unexplained assets was having assets disproportionate to known legitimate source of income. Tied to that was the inability of an individual to satisfactorily explain the disproportionate assets.

19. A forfeiture order under ACECA was brought against unexplained assets which was tainted property; if legitimate acquisition of such property was not satisfactorily explained, such tainted property risked categorization as property that had been unlawfully acquired. The requirement to explain assets was not a requirement for one to explain his innocence. The presumption of innocence was a fundamental right that could not be displaced through a notice to explain how assets had been acquired.

20. In the instant matter, the appellant was given reasonable opportunity to explain his disproportionate assets. He gave evidence on oath and tabled documentary evidence, however he did not discharge his evidential burden to offer satisfactory explanation as required under section 55 (2) of the ACECA. A person with lawful income had no trouble proving the legal origin of his or her assets. The law protected only the rights of those who acquired property by licit means. Those who acquired property unlawfully could not claim protection provided by the legal system. It was in that context that article 40 (6) of the Constitution provided that protection of the right to property did not extend to property that had been unlawfully acquired.

21. Whereas the appellant was under no obligation to call any witnesses to testify on his behalf, there were three crucial individuals that he ought to have called to testify. Those individuals were crucial to corroborate the appellant’s testimony that the named individual lawfully gave him cash in form of friendly loan or installment towards purchase of plot/houses. In civil as in criminal proceedings, the plaintiff (prosecution) was solely responsible for deciding how to present its case and choosing which witnesses to call. In the instant case, the respondent alone bore the responsibility of deciding whether a person would be called as a witness in its case. A court could not ordinarily direct a party to call any witness. In exceptional circumstance, a trial court could not call any witness. In the instant case, the appellant’s contestation that the respondent should have called the three individuals as witnesses had no legal foundation. In law, the appellant could not compel the respondent to call a witness to support or rebut the respondent’s case; all that the respondent was obligated to do was call credible and
material witnesses to prove its case to the required standard.

22. The failure to call a particular witness or voluntarily to produce documents or objects in one’s possession was conduct evidence. In principle, failure by a party to call a material witnesses could be interpreted as an indication of knowledge that his opponent’s evidence was true, or at least that the tenor of the evidence withheld would be unfavorable to his cause. An inference would not be allowed if a party introduced evidence explaining the reasons for his conduct and reason for failure to call a witness and if the evidence was truly unavailable or shown to be immaterial.

23. In the instant case, section 55 (4) of the ACECA stipulated that the person whose assets were in question had to be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the respondent and, had to have and could exercise the rights usually afforded to a defendant in civil proceedings. In the instant matter, the appellant did have opportunity to cross-examine the respondent’s witnesses.

24. The appellant did not offer satisfactory explanation as to the source of admitted sum of Ksh. 15.5 million from the alleged Sudanese National; the source of Ksh. 1,000,000/= allegedly for community electricity project; the source of Ksh. 10.9 million and the source of Ksh. 9.5 million for sale of properties. The contestation that the Trial Court erred in applying and interpreting sections 26 and 55 of ACECA had no merit. The Trial Court did not err in holding that the admitted cash monies received were part of the appellant’s unexplained assets that should be paid over to the Kenya Government.

Appeal dismissed, no order as to costs.

Court of Appeal upholds High Court’s decision ordering the Non-Governmental Organizations Co-ordination Board to Register Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) Community Rights Group

Non-Governmental Organizations Co-Ordination Board v EG & 5 others [2019] KLR - CAK
Civil Appeal 145 of 2015
Court of Appeal at Nairobi

P N Waki, M K Koome, R N Nambuye, D K Musinga & M S Asike-Makhandia, JJA
March 22, 2019.
Reported by Kakai Toili

Constitutional Law-interpretation of constitutional provisions-interpretation of article 36 of the Constitution-whether members of the lesbians, gays, bisexuals, trans genders, intersex and queer community were ‘persons’ as used in article 36 of the Constitution on the freedom of association-Constitution of Kenya, 2010, article 27(4), 36 & 259

Civil Practice and Procedure-suits-institution of suits-where the Constitution or an Act of Parliament provided for a procedure of resolving a dispute-whether one could file a suit in court where there was a procedure for redress presented by the Constitution or an Act of Parliament before exhausting the procedure provided- Fair Administrative Actions Act, section 9 (4)

Constitutional Law-fundamental rights and freedoms- freedom of association-limitation of freedom of association-where a person sought to register a non-governmental organization(NGO)-where the Executive Director of the Non-Governmental Organizations Co-ordination Board refused to approve the reservation of the name of a proposed NGO-where the Non-Governmental Organizations Co-ordination Board refused to register the said organization-procedure to be followed an aggrieved party-whether an aggrieved party could appeal against a decision of the Executive Director of Non-Governmental Organizations Co-ordination Board to refuse to approve a proposed name of an NGO to the Minister in charge-Constitution of Kenya, 2010, article 24,27(4), 36 & 259; Non-Governmental Organizations Co-ordination Act, section 10, 14 & 19; Non-Governmental Organizations Coordination Regulations, regulation 8 & 9
Constitutional Law—fundamental rights and freedoms—freedom of association—limitation of freedom of association—under what circumstances could the right to form, join and participate in non-governmental organizations, associations or groups be limited—whether a person could be denied fundamental rights and freedoms based on his or her sexual orientation—Constitution of Kenya, 2010, article 24,27(4), 36 & 259

Criminal Law—unnatural offences and indecent practices between males—whether it was an offence for one to be a gay or a lesbian without more action—Penal Code, section 162 & 165

Constitutional Law—fundamental rights and freedoms—human dignity—concept of dignity—what was the nature of the concept of dignity in human rights—Universal Declaration of Human Rights, article 1

Jurisdiction—jurisdiction of the Court of Appeal—jurisdiction to interfere with findings of fact made by the High Court—what were the circumstances in which the Court of Appeal could interfere with the findings of fact by the High Court

Brief Facts

The 1st respondent floated three names under which he sought to register a non-governmental organization (proposed NGO) with the appellant, seeking to address human rights abuses and violations suffered by the Lesbian, Gay, Bisexual, Transgender, Intersex and Queer persons (LGBTIQ) in Kenya and which request was rejected by the appellant’s Executive Director (Director) precipitating the 1st respondent to file a petition at the High Court on the ground that his right to freedom, dignity, equality and right not to be discriminated against had been violated among other grounds. The High Court allowed the petition and held that the right to equality before the law would not be advanced if people were denied the right not to be discriminated against based on their sexual orientation. The appellant was aggrieved by the High Court’s decision and thus filed the instant appeal.

Issues

i. Whether one could file a suit in court where there was a procedure for redress presented by the Constitution or an Act of Parliament before exhausting the procedure provided.

ii. What was the procedure to be followed where a person was aggrieved by the decision of the Non-Governmental Organizations Co-ordination Board not to register a non-governmental organization?

iii. Whether an aggrieved party could appeal against a decision of the Executive Director of Non-Governmental Organizations Co-ordination Board to refuse to approve a proposed name of a non-governmental organization to the Minister in charge.

iv. Whether members of the Lesbians Gays Bisexuals Transgender Intersex Queer (LGBTIQ) community were ‘persons’ as used in article 36 of the Constitution on the freedom of association.

v. Whether it was an offence for one to be a gay or a lesbian without more action as provided for in sections 162, 163 and 165 of the Penal Code.

vi. Under what circumstances could the right to form, join and participate in non-governmental organizations, associations or groups be limited?

vii. What was the nature of the concept of dignity in human rights?

viii. Whether a person could be denied fundamental rights and freedoms based on his or her sexual orientation.

ix. What were the circumstances in which the Court of Appeal could interfere with the findings of fact by the High Court?

Held

Per P N Waki, JA (concurring)

1. The instant matter was not about the family unit, marriage or morals, legalization of same sex relationships, or the constitutionality of sections 162, 163 and 165 of the Penal Code. Indeed, the latter issue was pending determination before the High Court, and the less said about it the better.

2. The Constitution had ring-fenced its purpose and the manner it ought to be construed. After declaring its supremacy in article 2, the Constitution proceeded in article 10 to bind everyone who applied and interpreted it or any other law or made public policy, to the national values spelt out therein including: human dignity, equity, social justice, inclusiveness, equality, human rights,
non-discrimination and protection of the marginalized.

3. The principles of the rule of law, participation of the people, equity, inclusiveness, equality, human rights, transparency and accountability were binding. The Constitution opened up further space for application of other principles and values obtaining in the general rules of international law and the international instruments Kenya had ratified, such as, the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Political Rights (ICESCR).

4. The Constitution laid out an expansive Bill of Rights for the purpose of recognizing and protecting human rights and fundamental freedoms in order to preserve the dignity of individuals and communities, promote social justice and the realization of the potential of all human beings’. In articles 20 (3) and (4), it gave an edict to the courts as they applied the Bill of Rights to develop the law where it did not give effect to a right; adopt the interpretation that most favoured the enforcement of a right or fundamental freedom and promote the values that underlay an open and democratic society based on human dignity, equality, equity, freedom and the spirit, purport and objects of the Bill of Rights.

5. In article 259, the Constitution commanded the manner in which it should be interpreted. It also demanded that every provision of the Constitution be construed according to the doctrine of interpretation that the law was always speaking. The Constitution had to be interpreted in a manner that eschewed formalism, in favour of the purposive approach and in a holistic manner within its context and in its spirit.

6. Where there was a procedure for redress of any particular grievance presented by the Constitution or an Act of Parliament, that procedure should be exhausted before resort could be had to the courts. The Director was *ex officio* and had no vote at any meeting of the Board. The Board could make decisions on cancellation of registration certificates and on entry permits. On all the matters under part III of the Non-Governmental Organizations Co-ordination Act (Act) on registration of non-governmental organizations, where the Board made a decision, an appeal by the aggrieved organization went to the Minister under section 19 of the Act on appeals.

7. There was no application neither made under part III of the Act on registration of non-governmental organizations nor was a decision made by the Board. The Board as constituted under section 4 of the Act never met, the application as detailed in section 10 of the Act was never submitted. Consequently, one could not talk about refusal of registration under section 14 of the Act on refusal of registration which would attract the procedure of appeal under section 19 of the Act.

8. All that happened in the instant matter was an administrative procedure that was provided for in the Non-Governmental Organizations Coordination Regulations, 1992 (Regulations), which had to take place long before commencement of an application for registration under part III of the Act. The procedure was in regulation 8 of the Regulations and was referred to as approval of names. Without surmounting that step, there would be no application for registration under section 10 (2) of the Act, as provided for in regulation 9 on application for registration.

9. The application for approval of a name was made to the Director and it was the Director who made the decision to reserve or not to reserve it. The Board had nothing to do with that process and the rules did not provide for an appeal to the Board. The Board came in under part III of the Act which was covered in regulation 9 of the Regulations. Without a decision of the Board, there could be no appeal to the Minister.

10. The decision in question was not the decision contemplated in section 19 of the Act, on which appeal lay to the
Minister. The intention of the law in section 19 of the Act was for an appeal to lie in respect of substantive decisions such as refusal of registration or cancellation of registration. Section 19 of the Act was clear that an appeal only lay to the Minister when the Board had made a decision.

11. As the Board did not make the decision in terms of the Act, there was no appeal provided for the 1st respondent. Moreover, there was nothing in the Regulations that provided that an aggrieved applicant could appeal a decision made in terms of the Regulations to the Minister. As such, there was no statutory prescribed internal remedy, which was prescribed or available to the 1st respondent. The Court could not close its doors on the 1st respondent for failure to exhaust an internal remedy that did not apply to his circumstances. The grounds upon which the reservation of name was rejected were top-heavy with constitutional questions which deserved the interpretation of the High Court.

12. The people in Kenya who answered to any of the descriptions in the acronym LBGTIQ, were persons. Article 36 of the Constitution covered the persons in that group. Like everyone else, they had a right to freedom of association which included the right to form an association of any kind. That was the literal wording of article 36 (1) which had no hidden meaning. Article 260 of the Constitution provided further clarity to the definition of person. Construing 'person' to refer only to the sane and law abiding people would be unduly stretching the ordinary meaning of the words used in the Constitution.

13. The Penal Code did not criminalize the persons answering to the description LBGTIQ qua such persons. What it provided for were specific offences, more specifically, unnatural offences, attempts to commit unnatural offences, and indecent practices between males. Those were sections 162, 163 and 165 of the Penal Code, respectively. Like everyone else, LBGTIQ persons were subject to the law and would be subjected to its sanctions if they contravened it. Convicting such persons before they contravened the law would be retrogressive.

14. According to the proposed NGO’s objectives, the 1st respondent intended to register the NGO to among other things conduct accurate fact finding, urgent action, research and documentation, impartial reporting, effective use of the media, strategic litigation and targeted advocacy in partnership with local human rights groups on human rights issues relevant to the gay and lesbian communities living in Kenya. On the face of it, there was nothing unlawful or criminal about such objectives. However, they never reached the stage of proper consideration by the Board because the main gate to the boardroom was locked.

15. Article 36 of the Constitution granted every person the right to form an association of any kind. It also provided that an application to form an association could only be refused on reasonable grounds and no person could be compelled to join an association. That was the breadth of the right of freedom of association as provided for in the Constitution. It covered every person and any kind of association. It could only be limited in terms of law and only to the extent that the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. An individual human being, regardless of his or her gender or sexual orientation, was a person for the purposes of the Constitution.

16. The Constitution extended the definition of 'person' from only the natural, biological human being to include legal persons. Neither article 36 of the Constitution nor the definition of "person" in article 260 of the Constitution created different classes of persons. There was nothing that indicated that the Constitution, when referring to 'person', intended to create different classes of persons in terms of article 36 based on sexual orientation. Moreover, articles 20(3) and (4) of the Constitution provided that a court adopt the interpretation that most favoured the enforcement of a right or fundamental
freedom and promoted the values that underlay an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights.

17. Article 20(1) of the Constitution provided that the Bill of Rights applied to all persons. Article 259 of the Constitution provided that the Constitution had to be interpreted in a manner that advanced human rights and fundamental freedoms. The term “every person” in article 36 of the Constitution properly construed did not exclude homosexual person and the 1st respondent therefore fell within the ambit of article 36 which guaranteed to all persons the right to freedom of association. The right to freedom of association was also expressly recognised in international covenants to which Kenya was a party.

18. [Obiter Dicta] The issue of persons in the society who answer to the description lesbian, bisexual, gay, transsexual, intersex and queer (LBGTIQ) is rarely discussed in public. The reasons for such coyness vary. But it cannot be doubted that it is an emotive issue. The extensive and passionate submissions made in this matter before the High Court, and before us, is testimony to the deep rooted emotions that the issue can easily arouse. It is possible for the country to close its eyes and hearts and pretend that it has no significant share of the people described as LBGTIQ. But that would be living in denial. We are no longer a closed society, but fast moving towards the ‘open and democratic society based on human dignity, equality, equity, and freedom’ which the Constitution envisages. We must therefore, as a nation, look at ourselves in the mirror. It will then become apparent that the time has come for the peoples’ representatives in Parliament, the Executive, County Assemblies, Religious Organizations, the media, and the general populace, to engage in honest and open discussions over these human beings. In the meantime, I will not “. . . be the first to throw a stone at her [LBGTIQ].”

Per Koome, JA (concurring)

19. Arguments on morality, religion, culture were none issues in the instant matter as they were based on assumptions that if the proposed NGO were to be registered, it would run counter to religious, cultural and moral values of Kenya. The Court did not wish to delve on matters of morality because what formed the morality of Kenya was basically what was spelt out in various articles of the Constitution especially article 10 of the Constitution.

20. The Act and the Regulations had not provided an internal appeal mechanism for applicants to follow when a name was refused for reservation to register a non-governmental organization (NGO). If certainly there existed a procedure, the Board should have advised the 1st respondent to place an appeal before the Board or the Minister; since the procedure provided was for refusal of a registration and not a name.

21. The Board having made up its mind that the proposed NGO did not meet the test, sending the 1st respondent back to exhaust an appeal where the procedure was not even set up, where the Board had strongly expressed its prejudicial view against the proposed NGO would be an exercise in futility. Courts were the ultimate bastion and custodian of the Constitution. The matters of LBGTIQ’s right to associate invoked the interpretation of the Constitution, for determination by court. The matters raised transcended a mere administrative act and touched on constitutional interpretation by court.

22. It was not an offence for one to be gay or lesbian. What was detestable and an offence was engaging in carnal knowledge against the order of nature. In other words even if somebody stood on a high platform and declared that he or she was a gay or lesbian without more, they would not have committed an offence contrary to the provisions of section 162, 163 and 165 of the Penal Code which criminalised carnal knowledge against the order of nature.

23. Anybody was capable of committing unnatural offences; attempting to
commit unnatural offences and indecent practices between males under section 162, 163 and 165 of the Penal Code respectively. They could be gays, lesbians (LGBTIQ) and even heterosexuals. Reported cases abound where persons who were not LGBTIQ had been charged and convicted of heinous offences of rape, defilement and other sexual offences including beastiality. It was not fair to generalize and stigmatize LGBTIQ persons as the only ones who were prone or predisposed to commit the said offences. Every offender should be dwelt with as an individual.

24. If a homosexual person committed an offence, he would be arrested and dealt with according to the law, so was a heterosexual. Section 162, 163 and 165 of the Penal Code were neither enacted to criminalize homosexuality nor the state of being homosexual otherwise it would have stated so. Those offences in the Penal Code could be committed by anybody their sexual orientation notwithstanding and to say it was only gays and lesbians who committed them was to subject them to differential treatment.

25. Freedom of association where citizens were free to assemble and express their opinions in politics, religion and art was universally accepted as vital for a pluralist and open democratic society. The Board did not present any evidence to demonstrate that the evil that abound in the society, from corruption, to murders, rapes including within the families were brought about by LGBTIQ. Nor did the Board provide evidence to show persons who committed offences under sections 162, 163, and 165 of the Penal Code were LGBTIQ.

26. The institution of marriage could not be threatened by an association of LGBTIQ; marriage was anchored in the Constitution and it was an institution that one entered out of choice. Moreover there were many people who entered it and left it, not because they were LGBTIQ; others entered marriage and choose not to procreate and others did not enter marriage at all and they were not LGBTIQ. There were people who were heterosexuals and they did not engage in sex of any kind out of choice, it was also possible there were homosexuals or LGBTIQ people who did not engage in sex also out of choice.

27. As a defender of the human rights of the gay and lesbian community in Kenya, the 1st respondent had a right, as stated in the UN Declaration on Human Rights defenders and in accordance with the Constitution to form, join and participate in non- governmental organizations, associations or groups.

28. It was arbitrary to speculate and categorize LGBTIQ as persons who had the propensity to destroy a society by contravening the provisions of the Constitution or the Penal Code, or as a group bent on ruining the institution of marriage or culture. Overturning the impugned judgment would undermine the gains made over the years in promoting, protecting and building a culture of respect and tolerance of differences that abound in the society.

29. Allowing the appeal would be stereotyping people and expecting everybody to be the same size fits all. Kenyans were made from the same cloth but cut in different shapes and sizes. The Constitution was the equalizer, it allowed everybody to be and if some people were sinners, God would deal with them, no one could judge for Him. The Constitution was the ultimate guide and liberator from the shackles of all kinds of discrimination. Its bold provisions also domesticated the international human rights law which could be called to aid in the event of a gap within Kenya’s own indigenous and rich jurisprudence.

Per Asike-Mahandia, JA (concurring)

30. Article 1 of the Universal Declaration of Human Rights (UDHR) was in the context of the instant case apt. It recognized that all human beings were born free and equal in dignity. Thus, stripping someone of their dignity stripped off their essence of being a human being. Dignity since the beginning of the era of human rights had become the foundation of all other rights. It amounted to the recognition that the sole purpose for protecting,
promoting and fulfilling human rights was the acknowledgement that all human beings had to be accorded respect.

31. The concept of dignity for all men and women involved the development of opportunities which allowed people to realize full human potential within positive social relationships. It was the quest for dignity, equality and equal recognition and protection before the law that made the 1st respondent to file the petition.

32. Pursuant to rule 29(1) of the Rules of the Court, an appeal to the Court from a trial by the High Court was by way of a retrial except that the Court had not had the opportunity of seeing and hearing the witnesses. Just like in a retrial, the appellate court was required to reconsider the evidence on record, evaluate itself and draw its own independent conclusions.

33. The applicable provision was regulation 8 of the Regulations on approval of names as opposed to part III of the Act that dealt with the process and requirements for registration of NGOs. That was because the 1st respondent did not get an opportunity to make an application for registration of his proposed NGO to the Board. All he did was to apply to reserve the name of his proposed NGO.

34. The Board placed reliance on regulation 8(3)(b)(ii) of the Regulations and advised the 1st respondent that the names sought to be reserved for the registration of the proposed NGO were not acceptable in the opinion of the Director. There was nothing in the Regulations that provided an aggrieved applicant a right to appeal a decision made in terms of regulation 8(3)(b)(ii) for refusal of a name by which an organization could be registered.

35. Article 165 of the Constitution provided that the High Court had the jurisdiction to interpret the Constitution and determine a claim for the enforcement of fundamental rights and freedoms. The appellant’s officers advised the 1st respondent to seek the guidance of the court on whether the appellant could allow LGBTIQ associations to enjoy Government recognition on an equal basis with other associations through registration. The Minister did not have the power to enforce the Constitution or interpret whether any conduct was in violation of the Constitution. The respondent, in any event, was entitled to seek remedy that was efficacious and pursuing an appeal to the Minister would not have afforded the 1st respondent such remedy. Therefore the petition was properly before the High Court.

36. The instant appeal was not about sexual orientation and whether or not sexual orientation was innate or not. The High Court did not get into that arena of determining whether or not being LGBTIQ was an innate attribute. The instant Court did not propose to get in there as well.

37. Article 36 of the Constitution guaranteed freedom of association, it extended to every person’s right to form an association of any kind. That right could only be limited in terms of law to the extent that the limitation was reasonable and justifiable in an open and democratic society as provided for in article 24(1) of the Constitution. Subject to the limitations, a person’s rights under article 36 extended to all human beings without discrimination, whatever their ethnicity, religion, sex, place of origin or any other status such as age, disability, health status, sexual orientation or gender identity.

38. Article 36 extended to all individuals and juristic persons and sexual orientation did not in any way bar an individual from exercising his right under article 36 of the Constitution. The State had an obligation to refrain from interfering with the formation of associations and there had to be mechanisms that allowed citizens to join without State interference in associations to enable them attain various ends.

39. By refusing to accept the names for the proposed NGO, the appellant violated the 1st respondent’s freedom of association. It did not matter the views of the appellant that the name of the association was not desirable. In a society as diverse as Kenya, there was need for
tolerance. The preambular provisions in the Constitution acknowledged the supremacy of the Almighty God of all creation.

40. The Constitution recognized the right of persons to profess religious beliefs and to articulate such beliefs including the belief that homosexuality was a taboo that violated the religious teachings. However, the Constitution did not permit the people who held such beliefs to trod on those who did not or subscribed to a different way of life. They too had the right not to hold such religious beliefs. It could not therefore be proper to limit the freedom of association on the basis of popular opinion based on certain religious beliefs that the Board believed amounted to moral and religious convictions of most Kenyans. The Bible and Quran verses as well as the studies on homosexuality relied on by the appellant would not help its case. Religious texts were neither a source of law in Kenya nor formed the basis for denying fundamental rights and obligations.

41. The decision of the appellant to refuse to accept the proposed names of the NGO, amounted more to a statement of dislike and disapproval of homosexuals rather than a tool to further any substantial public interest. A constitution was to some extent founded on morals and convictions of a people, however a constitution was not founded on division and exclusion.

42. The instant case did not concern in any way article 45 of the Constitution. It had to be understood that the 1st respondent only sought to exercise his freedom to associate in an organization recognised by law.

43. In any democratic society, there would always be a marginalized group incapable of protecting their rights through the democratic process. Once a society understood there were people, whose sexual orientation was different from the norm and human rights belonged to all persons by virtue of them being human beings, it would be easier to respect their fundamental rights and freedoms.

44. The Bill of Rights was not meant to protect only the individuals that were liked and left unprotected those found morally objectionable or reprehensible. In any case, article 10 of the Constitution obliged the Court to protect the marginalized.

45. The appellant had not been able to prove that the alleged objects of the proposed NGO were not in accordance with the law. Accordingly, the 1st respondent’s right to form an association could only be limited within the parameters provided for in article 24 of the Constitution. The provisions of section 162 and 165 of the Penal Code did not criminalize the state of being homosexual but sexual acts that were against the order of nature. Section 162 and 165 of the Penal Code did not prevent people to form an association based on their sexual orientation.

46. The appellants had misapprehended the law in determining that sections 162 and 165 of the Penal Code criminalised gays and lesbians’ liaisons and therefore should not allow such persons to register an association. There was no connection between the activities prohibited by section 162 and 165 and the request by the 1st respondent to register an LGBTIQ organization that would promote the rights of people who belonged to that community. There was no law that limited the freedom of association. Therefore there was no need to undertake an inquiry on the remaining criteria established under article 24 of the Constitution.

47. Article 27 (4) of the Constitution did not include sexual orientation as a prohibited ground of discrimination. The word ‘including’ in article 27(4) was not exhaustive of the grounds listed there. Article 259(4) (b) of the Constitution defined the word ‘including’ as meaning included, but was not limited to. In the circumstances, the High Court was not guided by the South African Constitution that included sexual orientation as a prohibited ground. A purposive interpretation of the grounds listed in article 27(4) was to the effect that they were not exhaustive. The Court would therefore have to determine on a case to
case basis other grounds that could form part of article 27(4) whenever called upon to.

Per Nambuye, JA (dissenting)

1. The mandate of the Court was to re-appraise; re-assess and re-analyze the evidence on record and arrive at its own conclusions on the matter and give reasons either way. The Court should be slow in moving to interfere with a finding of fact by a trial court unless it was satisfied that it was not based on evidence, or it was based on a misapprehension of the evidence or the trial court had been shown demonstrably to have acted on a wrong principle in reaching the finding it did.

2. Jurisdiction was everything; without jurisdiction, a court had no mandate to proceed further with the determination of any matter before it. Where the issue of jurisdiction was raised, it had to be determined first and once a court came to the conclusion that it had no jurisdiction, it had to down its tools. Jurisdiction was donated either by a charter, constitution or legislation. Therefore, parties had no mandate to confer jurisdiction on a court where non-existent.

3. Section 14 of the Act was the substantive provision governing refusal of registration of an NGO. It only talked of three instances when the Board could refuse registration. Regulation 8(3) of the Regulations dealing with refusal of registration of an NGO under the Act was the one whose applicability was interrogated by the Board. There was no other provision donating power to the Director to act under section 14.

4. Absence of a specific provision in the Act donating distinct functions to the Director as opposed to those mandated to the Board on the one hand, and absence of regulation(s) under which the Board, could discharge its functions under section 14 of the Act, independently of that donated to the Director under regulation 8(3) of the Regulations, the only plausible inference that could be drawn was that, the action of the Director under regulation 8(3) fell under section 14 of the Act. They were therefore functions discharged under section 5 of the Act on behalf of the Board by the Director in his capacity as the executive officer of the Board. They were therefore amenable to the section 19(1) (2) & (3) of the Act procedures.

5. The words ‘any organization’ in section 19 of the Act referred to organizations that fell for registration under the Act namely NGOs. What was on record was the 1st respondents request for the registration of an NGO, that therefore fell into the definition in section 2 of the Act. What were in contest were the names and objectives of the proposed NGO. There was therefore nothing constitutional in issue as at that point in time. The constitutional issues only arose in the petition after the 1st respondent's request for the registration of the proposed NGO was turned down severally by the appellant.

6. The genesis of the 1st respondent's petition was a purely administrative action executed by the Director on behalf of the Board declining registration of the 1st respondent's proposed NGO with no constitutional underpinnings at that point in time. It was therefore amenable to section 19 of the Act which procedures ought to have been invoked and exhausted before seeking the court's intervention, notwithstanding, the undisputed constitutional mandate bestowed on the High Court. It was therefore tainted and had the High Court properly construed and applied the cited provisions, it would have downed its tools on account of the petition being premature, rerouted the 1st respondent to exhaust the procedures under section 19 of the Act before seeking a judicial pronouncement on the constitutional issues raised in the petition.

7. The issue of the appellant's failure to notify the 1st respondent of a right of appeal upon rejection of his request for registration of the proposed NGO did not arise as none was provided for either in the Act or in the Regulations.

8. The High Court bore in mind the correct threshold in the interpretation of the constitutional provisions they
were called upon to interpret. Issues as to whether being an LGBTIQ was innate or otherwise was never interrogated by the High Court, therefore the Court steered clear of it. However, the meaning to be ascribed to the word “person” should be as defined in article 260 of the Constitution. All human beings, subject to the Kenyan constitutional prescriptions were entitled to protection of the constitutional guarantees enshrined therein but subject to limitations provided for under the law.

9. Article 36 of the Constitution enshrined the right to freedom of association; the same was guaranteed to every person. It was a right to form, join and participate in the activities of an association of any kind whose registration could not constitutionally be refused, rejected or withheld arbitrarily or unreasonably, save that such withdrawal or withholding of registration was subject to the right of fair hearing.

10. Articles 20 of the UDHR and 22 of the ICCPR were properly applied to the proceedings pursuant to the provision of article 2(5) and 2(6) of the Constitution as Kenya had ratified both of them. The construction and application of those provisions as carried out by the High Court was in order as those instruments also provided that they applied to all persons. The word “person” used in the said instrument carried the meaning ascribed to it in article 260 of the Constitution. The right to associate was not selective and it applied to everyone, save that the enjoyment of the same was subject to the limitation provided for in the law of the land.

11. The duty of the Board was to act in accordance with the constitutional mandate bestowed upon it; what the 1st respondent sought to champion through the proposed NGO was the right to associate and not the right to champion criminal activities. The High Court ought to have made a definitive determination as to whether the acts provided for in sections 162, 163 and 165 of the Penal Code fell into the sexual orientation category or not because that had been the borne throughout the proceeding both before the High Court and the Court.

12. Kenya as a society, if it were to recognize that LGBTIQ persons were human beings. However, reprehensible the Board found their sexual orientation, it would be obligated to accord them human rights which were guaranteed by the Constitution by virtue of their being human beings in order to protect their dignity. Such according of human rights had to be within the limits permitted for either by the Constitution itself for the law. Such a protection fell for rights either crystalized or entrenched in the Constitution or laws made thereunder.

13. The right of association guaranteed to the 1st respondent under article 36 of the Constitution was not absolute, it could be limited. The test for limitation being;

a. that the limitation was by law,

b. that such limitation though by law had to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,

c. that such limitations had to take into consideration all the relevant factors namely the nature of the right, purpose of the limitation and the nature and extent of the limitation,

d. the need to ensure that the enjoyment of rights and fundamental freedoms by an individual did not prejudice the right and fundamental freedoms of others,

e. the need to examine closely the relation between the limitation and its purpose, and whether there were less restrictive means of achieving that purpose,

f. in the case of the limitation by statute, there had to be an express intention to limit that right or fundamental freedom and the nature and extent of the limitation. There was also the need for the provision to be clear and specific about the right and or freedom to be limited and the nature and extent of such limitation. Further such limitation had to ensure that there was no derogation from the core and essential content of the legislation. There was also an obligation placed on
the party wishing to limit the right to sufficiently demonstrate to the court or tribunal or some other authority that the requirement of article 24 of the Constitution had been complied with.

14. Sexual orientation was not one of the exceptions to limitation of rights under article 27(4) of the Constitution. Although, the guiding principle on interpretation was that it should favour the enjoyment of the right, such enjoyment had to be within the limits permissible in law. That meant that non-discrimination on account of sexual orientation could only be accorded and enjoyed on condition that what sexual orientation meant and what people who believed in it, practiced, did not fall within the acts prohibited in sections 162, 163 and 165 of the Penal Code. Enjoyment of the right of non-discrimination on account of sexual orientation, would only be dependent on a clear definition as to whether sexual orientation fell into the category of conduct against the order of nature legislated against in the aforesaid Penal Code provisions.

15. The High Court failed to distill the values of the freedom of religion guaranteed in article 32 of the Constitution and how those were either distinct or interfaced with those enshrined in article 10 of the Constitution before discounting their application to the issues in controversy.

16. The High Court laid basis that the provision on the interpretation of the Constitution, advocated for an interpretation that favoured the enjoyment of the right or fundamental freedom sought to be protected or enforced. It was however, necessary for the High Court to provide a basis for holding that the persons whose rights the 1st respondent sought to champion through the proposed NGO, fell into the category of the vulnerable within the context of the Kenyan society. In the absence of such demonstration, the appellant could not be faulted for holding the view that the LGBTIQ group did not fall into the category of the vulnerable in the context of the Kenyan society, but in the context of persons whose attributes were outlawed under the Penal Code.

17. The right of non-discrimination enshrined in article 27(4) of the Constitution applied to everyone and although sexual orientation was not explicitly indicated therein as a ground for non-discrimination, it could be read into those other categories by applying the word ‘includes’.

18. The word “includes”, in article 27(4) of the Constitution could be construed and applied to include sexual orientation as one of the categories for non-discrimination; save that, that was subject to the High Court making a definitive finding that sexual orientation, on the basis of which they had crystalized the right of association in favour of the LGBTIQ persons in Kenya, through a judicial pronouncement as one of the elements for non-discrimination under article 27(4) did not fall into the category of acts prohibited under sections 162, 163 and 165 of the Penal Code, namely, conduct against the order of nature.

19. Protection of a right or fundamental freedom was dependent on either an entrenchment of such a right in the Constitution or through legislation. The Constitution itself had provided for methods for such an entrenchment. Articles 255 (2) of the Constitution made provision for an amendment to the Constitution through a referendum, article 256 of the Constitution through legislation and article 257 of the Constitution through popular initiative. None of those covered a judicial pronouncement. The issue as to whether sexual orientation fell into the elements for non-discrimination enshrined in article 27(4) of the Constitution had to be put to the Kenyan people through any of the stated methods with a view to entrenching it in the Constitution in order for it to crystalize the right accorded to the 1st respondent by the impugned judgment. Short of that, it only amounted to an aspirational right.

Per D K Musinga, JA(dissenting)

20. The rejection of the proposed name was not purely administrative and was a Board decision contemplated under
part III, section 19(1) of the Act, against which an appeal lay to the Minister. Part III of the Act dealt with registration and licensing of NGOs. Part III of the Regulations under which regulation 8(3)(b) fell dealt with registration and exemption from registration of NGOs. The first step towards registration of an NGO was submission of its proposed name to the Director who was a member of the Board and by virtue of section 5(1) of the Act was responsible for the day to day management of the business of the Board. In rejecting the proposed name the Director did so for and on behalf of the Board. That was why the Board was sued.

21. Section 10(2) of the Act, which fell under part III, stipulated that applications for registration of proposed NGOs be submitted to the Director, also known as the executive director of the Bureau, which was defined as the executive directorate of the Board. Section 19(1) of the Act required any person aggrieved by a Board decision under part III of the Act, which was about registration and licensing of NGOs, to appeal to the Minister. Part III of the Act had to be read together with part III of the Regulations which also dealt with registration and exemption from registration of NGOs.

22. Regulations and statutory rules, which were part of statutory instruments as defined under section 2 of the Statutory Instruments Act, 2013, were the most common form of delegated legislation. Regulations and/or statutory rules contained many administrative details that were necessary for operationalisation of an Act of Parliament. The Interpretation and General Provisions Act required all statutory instruments to conform to the Act in regard to construction, application and interpretation. Therefore, the High Court erred in holding that the 1st respondent could not appeal to the Minister since the Regulations did not prescribe any internal remedy.

23. There was no evidence that the Board ever advised the 1st respondent to move to court to challenge its decision, instead of appealing to the Minister. The 1st respondent stated that it was a legal officer, who suggested that he should seek guidance from the court on the issue of registration. But even if it was the Board that had so advised, such advice could not contravene the provisions of the Act or confer jurisdiction upon the High Court, until the prescribed internal dispute resolution mechanisms had been exhausted.

24. In the matter that was before the High Court, the 1st respondent did not seek any exemption from the requirement to first exhaust the internal dispute resolution mechanism provided under the Act. The High Court, without any application, assumed jurisdiction on the basis that the issues raised in the petition were of significant public importance requiring authoritative judicial guidance. That could as well have been the case, but it did not mean that the statutory provisions for challenging the Board’s decision could be disregarded with impunity.

25. To the extent that the 1st respondent was well aware of, but did not comply with the mandatory provisions of section 19(1) of the Act which required him to appeal the Board’s decision to the Minister, whose decision was then appealable to the High Court as stipulated under section 19(3) of the Act, the High Court should have directed the applicant to first exhaust the statutory remedy. In that regard, the High Court had no jurisdiction to entertain the petition. A decision arrived at by a court that lacked jurisdiction was a nullity, even if the court would have arrived at the same decision had it determined the dispute procedurally and at the right time.

26. Section 162 of the Penal Code addressed itself to unnatural offences and prescribed lengthy custodial sentences to any person who committed such an offence. Section 163 of the Penal Code criminalized attempts to commit unnatural offences while section 165 of the Penal Code prohibited indecent practices between males. The appellant’s rejection of the proposed names was for the reason that the proposed names were inconsistent with the written law. Unless
and until the said sections of the law were finally declared unconstitutional they remained part of Kenya’s penal laws and had to be observed accordingly.

27. For as long as sections of Kenya’s penal law outlawed homosexuality and lesbianism, it would be unlawful to promote and give succor to any process or registration of any organization that could undermine the law. The law granted discretionary power to the Director to accept or reject a proposed name, it was not demonstrated that the Director exercised that jurisdiction in an injudicious manner.

28. Whether sodomy and lesbianism should be decriminalized or not was a very emotive issue that conjured deep seated constitutional, moral and religious ideologies. They were issues that at best, ought to be left to the people to decide, either directly through a referendum or through their elected representatives in Parliament, which manifested the diversity of the nation and represented the will of the people and exercised their sovereignty.

29. The appellant did not discriminate against the gay and lesbian community in rejecting the proposed names. Freedom of association that was guaranteed under article 36 of the Constitution was not absolute. It could be limited in terms of article 24(1) of the Constitution.

30. Sexual orientation simply referred to a person’s sexual identity or self-identification; in other words, the inclination of an individual with respect to heterosexual, homosexual and bisexual behaviour. There was scientific literature that showed that sexual orientation, as opposed to a person’s gender, was not fixed but fluid. Sections 162, 163 and 165 of the Penal Code referred to acts or offences that were committed by persons out of their preferred unnatural sexual orientation, and that was why they were referred to as unnatural offences.

31. Article 27(4) of the Constitution prohibited discrimination on the basis of a person’s sex (gender), not sexual orientation. There was a reason for the distinction. Other than gay and lesbian liaisons, there were other sexual orientations that were not permitted by Kenya’s law, for example paedophilia, that was, sexual attraction towards children.

32. The definition of sexual orientation according to Yogyakarta principles was quite different and unacceptable in Kenya. The Yogyakarta principles, a set of principles relating to sexual orientation and gender identity, defined sexual orientation as being understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

33. Kenya’s law did not permit homosexual and lesbian sexual practices, just as it outlawed sexual escapades between adults and children. It would be unthinkable, for example, for paedophiles to argue that they were entitled to freedom of association without discrimination on the basis of their sexual preferences and therefore demand registration of, for example a paedophiles human rights protection association. The appellant would not be right if it were to permit registration of such NGO.

34. The freedom of association of gays and lesbians in Kenya could lawfully be limited by rejecting registration of a proposed NGO, as long as Kenya’s laws did not permit their sexual practices. There were instances where the law permitted positive constitutional or statutory discrimination, for example, prohibition of child adoption by homosexual couples. Gender identity and sexual orientation were two different concepts.

35. Just like the freedom from discrimination and other constitutional rights, all rights or fundamental freedom, including freedom of association, were subject to the extent authorized by the Constitution or other written law. A democratic society was governed by laws. Kenya’s laws were based on the moral principles of Kenya’s society and had to be respected. It could not be right
that every person, including persons whose practices were not permitted by Kenya's laws, had unbridled right to form an association of whatever nature.

36. The words every person in article 36 of the Constitution in their proper context had to be taken to mean the right of any sane, law-abiding adult to form, join or participate in the activities of a lawful association that accorded with Kenya's Constitution and other laws. The appellant was not obliged to accept a name that it truly believed was repugnant to or inconsistent with the law. The proposed NGO had to have objectives that were not illegal according to any law.

37. The Kenyan Constitution protected family and Kenyan culture. There was a lot of pressure exerted from within and without to disregard some of Kenya's constitutional, moral, religious and cultural values and embrace practices that were seen as more trendy, progressive and modern, all in the name of protecting constitutional liberties. There was a danger in so doing. As a sovereign nation, the Constitution came after many years of agitating for it and was subjected to a referendum. The values and principles that it espoused had to be respected.

38. The Judiciary should act very circumspectively whenever it was called upon to pronounce itself on an issue that was argued, debated and eventually voted upon by millions of Kenyans. One such issue was that of the family, which was covered by article 45 of the Constitution. The Constitution recognized the family as the natural and fundamental unit of society and the necessary basis for social order. It was therefore recognized and protected by the State. The Constitution further recognized the right to marry a person of the opposite sex. By implication, any association that did not promote family values went against the spirit of article 45 and it was appropriate for the appellant to reject its registration.

Appeal dismissed, each party to bear own costs.
The Chief Justice Practice Directions cannot take away the High Court’s unlimited original jurisdiction in criminal and civil matters.
Shakeel Ahmed Khan & another v Republic & 4 others [2019] KLR - HCK
Miscellaneous Criminal Application 56 of 2019
High Court at Mombasa
M Thande, J
May 3, 2019

Brief facts

The applicants filed the application seeking anticipatory bail/bond pending arrest and/or charges in relation to any allegations concerning the acquisition and/or compensation in respect of a parcel of land. The applicants also sought that the respondents be restrained from arresting, detaining, harassing and intimidating them.

The application for bail/bond was opposed by the respondents. Additionally, the 4th respondent made an application seeking the transfer of the suit to the Anti-Corruption and Economic Crimes Division (ACEC Division) established in the High Court of Kenya at Nairobi. The application was premised on the ground that the Chief Justice made the Practice. According to the Practice Directions, it was in the interest of justice and consistency in the administration of justice and expediency that the application be heard and determined by the Anti-Corruption and Economic Crimes Division (ACEC) in Nairobi.

In support of their application for bail/bond, the applicants contended that the Ethics and Anti-Corruption Authority was not established as per the requirements of article 79 of the Constitution as the word ‘independent’ was missing in its name. According to the applicants the commission as established could not exercise power or authority. The applicants stated that the transfer of the suit to Nairobi would violate their rights of access to justice and fair trial.

Issues

i. Whether the Chief Justice Practice Directions took away the High Court’s unlimited original jurisdiction in criminal and civil matters by stating
in mandatory terms that Anti-Corruption and Economic Crimes suits should be filed in Nairobi.

ii. Whether the Ethics and Anti-Corruption Commission was rendered inoperative by the legislative amendment which removed the word “independent” from its name.


iv. Whether in the transfer of the suit from Mombasa High Court to the Anti-Corruption and Economic Crimes division in Nairobi the applicant’s rights of access to justice and fair hearing would be violated.

Relevant provisions of the law

Constitution of Kenya 2010

Article 79:

79. Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.

Held

1. The Chief Justice had no authority whatsoever to take away jurisdiction from any court or to confer jurisdiction to any court. The Chief Justice as head of the Judiciary had the powers under section 16 of the High Court (Organization and Administration) Act to establish sub-registries of the ACEC Division and indeed full ACEC Divisions outside Nairobi. The failure to do so had the net effect of stripping the High Court in stations outside Nairobi of the jurisdiction conferred upon it by the Constitution.

2. Article 79 of the Constitution required the Parliament to enact legislation to establish an independent ethics and anti-corruption commission. It had to be noted that the indefinite article “an” preceded the commission referred to. It meant that the commission to be established in the legislation to be enacted by Parliament did not necessarily have to be named the Independent Ethics and Anti-Corruption Commission. The Commission did not also have to have the word “independent” as part of its name. Indeed, Parliament could have called the commission “Tume ya Maadili na kupambana na Ufisadi” or any other name it deemed fit and still be in compliance with the requirement in article 79 of the Constitution. If article 79 of the Constitution had the definite article “the” preceding the name, and provided that Parliament should enact legislation to establish the Independent Ethics and Anti-Corruption Commission. Then Parliament would have had no discretion or option but to name it as such.

3. Parliament clothed the Ethics and Anti-Corruption Commission with independence from any person or authority. Section 28 of the Ethics and Anti-Corruption Commission Act, 2011 provided that the Commission should, in the performance of its functions, not be subject to the direction or control of any person or authority except as provided in the Constitution and the Act.

4. Direction 6 of the 2016 Practice Directions listed the matters that should be heard by the ACEC Division. It included cases relating to corruption and economic crimes filed under the Anti-Corruption and Economic Crimes Act, 2011. The matter herein related to corruption and economic crimes. Direction 2 of the 2016 Practice Directions required that all cases such as the instant which involved corruption and economic crimes should be filed in Nairobi.

5. The 2016 Practice Directions were amended vide Kenya Gazette Notice No. 7262 of 2018 being the 2018 Practice Directions. Direction 3 thereof provided that the Chief Justice would establish additional sub-registries outside Nairobi. Regrettably, no sub-registry was established in Mombasa.

6. Direction 4 of the Practice Directions laid down the overriding objective of the Practice Directions which was the
just, expeditious, proportionate and accessible adjudication of disputes related to corruption and economic crimes. To direct that the matter be transferred to the ACEC Division in Nairobi would delay the hearing of the same. The intention of the Practice Directions to facilitate the efficient and timely disposal of the matter would be defeated. As long as sub-registries or divisions were not established outside Nairobi, the Practice Directions would not enhance the overriding objective but would do the exact opposite including increasing the costs of justice. The Practice Directions would also fly in the face of the constitutional imperative that justice should not be delayed.

7. Allowing the application would militate against the overriding objective of the very Practice Directions of the just, expeditious, proportionate and accessible adjudication of disputes related to corruption and economic crimes.

Application for the transfer of the suit dismissed. Costs would be in the cause.

Advocates working in Public Service are entitled to a non-practising allowance or prosecutorial allowance
Erastus K Gitonga & 4 others v National Environmental Management Authority & another
[2019] KLR - HCK
Cause 547 of 2018
Employment and Labour Relations Court at Nairobi
B Ongaya, J
April 10, 2019
Reported by Beryl Ikamari & Mathenge Mukundi

Employment Law—discrimination in employment—what amounts to discrimination in employment—effect of pay of different wages for equal work or work of equal value—whether the denial of the non-practising allowance and prosecutorial allowance by the respondent amounted to discrimination and unfair labour practices—Employment Act, 2007, section 5.

Employment Law—contract of service—particulars of a contract of service—job description and remuneration—criterion to be used where an employee claimed an allowance and other benefits that were not in the written contract of service—whether advocates working in Public Service were entitled to a grading equivalent to those working at State Law Agencies when computing the non-practising allowances and prosecutorial allowances—Employment Act, 2007, section 10.

Employment Law—contract of service—terms in a contract of service—claim that a contract of service included a term that allowed for certain employees to be paid non-practising allowances—party that bore the burden of proving or disproving an alleged term of employment—Employment Act, 2007, section 10(7).

Issues:

i. Whether advocates working in public service were entitled to non-practising allowances and prosecutorial allowances.

ii. Whether an employer in public service was bound to comply with the law, regulations, and policies issued or emanating from the Public Service Commission in the exercise of its constitutional public service functions and powers.

iii. What was the criterion to be used where an employee claimed an allowance and other benefits that were not contained in the written contract of service?

iv. Whether the advocates were entitled to a grading equivalent to those working at State Law Agencies when computing the non-practising allowances and prosecutorial allowances.

Brief Facts:
The claimants were advocates of the High Court of Kenya employed by the respondent as legal officers on a full-time basis, and on permanent and pensionable terms of service. After working for some time they were appointed and gazetted as public prosecutors by the Director of Public Prosecutions for purposes of cases arising under the Environmental Management and Co-ordination Act. The claimants were claiming both non-practising allowances and prosecutorial allowances which they alleged to be entitled to after having worked as legal officers and public prosecutors for the respondent.
v. Whether the denial of the non-practising allowances and prosecutorial allowances amounted to discrimination and unfair labour practices.

Held:

1. The respondent was not one of the entities excluded from the Commission’s constitutional functions and powers. Although, the respondent was a body corporate established under the Environmental Management and Co-ordination Act, in exercise of its statutory functions and powers particularly recruiting, appointing, promoting, disciplining, removing public officers and any other human resource function, it was strictly bound to comply with the law, regulations and policies as would be in force and as issued or promulgated by the Commission.

2. The respondent’s exercise of human resource or employment functions and powers, as envisaged in section 16 and other provisions of the Environmental Management and Co-ordination Act, had to be construed and brought to conformity with the constitutional functions and powers of the Public Service Commission as amplified in the provisions of the Public Service Commission Act, 2017. The respondent and other public bodies or authorities falling under the Commission’s constitutional authority were bound to undertake their human resource functions in accordance with the provisions of the Public Service Commission Act, 2017 and the public service regulations and policies as would be put in place by the Commission from time to time.

3. Where an employer in public service experienced difficulties in implementing general public service regulations, policies, decisions, and directives as had been issued by the Commission, the employer should seek and obtain from the Commission, the variation or clarifications and alterations being sought.

4. The circular on payment of non-practising allowance to employees in the legal subsector of the public service applied to the claimants’ service because it clearly applied to the entire public service. It appeared to apply to all lawyers in the public service and for so long as the claimants established that they were in public service with similar professional legal duties, they would be entitled to the allowance even without being gazetted as prosecutors.

5. From the circular, the use of prosecutorial allowance was meant to simply designate the allowance and not to have it paid exclusively to those involved in criminal prosecutions. The circular was binding upon the respondent and if the respondent failed to specifically provide for the terms of the circular in the claimants’ contracts of service, the Court had jurisdiction to correct the unjustified omission.

6. Under section 10(1) of the Employment Act, 2007 particulars of a written contract of service included job description and remuneration. The ranks, grades or job groups were clearly part of the job description and applicable remuneration like in the instant case where the allowances were pegged on the grading by the circulars. Section 10 (7) of the Employment Act, 2007 provided that if in any legal proceedings an employer failed to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract should be on the employer. The respondent failed to discharge the statutory burden to disprove the equivalency of the job groups or ranks as urged by the claimants. The allowances as claimed applied to the claimants’ contract of service and the respondent failed to include the equivalency of its grading structure in consonance with the grading in the circulars so as to confer the claimants the two allowances in the issue. In absence of any other material before the Court on the equivalency of the grades, the claimants’ established that on a balance of probability, the equivalency of grades as urged were applicable.

7. Every person had the right to fair labour practices as per article 41 (1) of the Constitution. Article 41 (2) of the Constitution enumerated the rights of
every worker which included the right to fair remuneration. Articles 27(4) and (5) of the Constitution prohibited discrimination by the state or by any person. Section 5 of the Employment Act, 2007 provided that an employer should promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice. No employer should discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee. An employer had to pay his employees equal remuneration for work of equal value.

8. The Public Service Commission Human Resource Policy, 2016 provided for non-discrimination in employment and that the Government should promote equality of opportunity in employment and would not discriminate directly or indirectly against an employee on any ground. Article 2 of the International Labour Organisation Discrimination (Employment and Occupation) Convention, 1958 provided that each Member for which the Convention undertook to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

9. The failure to pay the claimants the two allowances amounted to adverse or disadvantageous treatment that was not equal to the other public officers holding similar offices. The respondent had subjected them to unequal pay by denying them the two allowances because persons holding similar positions in the public service continued to enjoy the allowances. The principle that equal work should receive equal pay in its true form would be extended to an analogous situation, namely, that work of equal value should receive equal pay. Those premises had not been enshrined as principles of law in the unfair labour practice definition. They were principles of justice, equity, and logic which would be taken into account in considering whether an unfair labour practice had been committed. For example, the payment of unequal pay for equal work or work of equal value in the context of unfair discrimination.

10. The respondent denied the claimants the two allowances that were payable to others in public service performing similar work or work of equal value as was performed by the claimants. The denial of the two allowances amounted to unequal treatment and therefore unfair discrimination that was founded upon arbitrary or unreasonable grounds. The respondent failed to show that the circulars were not intended to apply to the claimants. The intention in the circular was that the allowances applied to all in the legal subsector towards harmonisation of their terms of service.

Application allowed.

Orders:-

i. The declaration that the respondent subjected the claimants to unequal treatment amounted to discrimination and unlawful labour practice by denying them a non-practicing allowance and prosecutorial allowance.

ii. The declaration that the respondent’s action of not paying the 1st to 5th claimants a non-practicing allowance and prosecutorial allowance was unlawful, wrongful and unfair.

iii. The respondent to pay non-practising allowance accruing to the claimants from the date of filing the claim and for the duration of service of the claimants. The rate of the allowance should be as issued by applicable government circulars or otherwise as would be set by a lawful competent authority.

iv. The claimants should serve the judgment upon the Public Service Commission, within 7 days from the date of the judgment, towards the Commission’s consideration of issuing the relevant Gazette Notice under section 98 of the Public Service Commission Act, 2017 to harmonize prevailing grading levels and to provide for equivalency of job groups, grades, and ranks applicable in the public service or bodies under its constitutional and statutory functions and powers, the Commission to consider publishing the Gazette Notice not later than January 2, 2020.

v. The respondent to pay the claimants’ costs of the suit.
List of Statutes contained in this volume include:

1. Community Land Act (No. 27 of 2016)
2. Distress for Rent Act (Cap. 293)
3. Environment and Land Court Act (No. 19 of 2011)
5. Equitable Mortgages Act (Cap. 291)
6. Estate Agents Act (Cap. 333)
7. Land Act (No. 6 of 2012)
8. Land Acquisition Act (Cap. 254)
9. Land Consolidation Act (Cap. 265)
10. Land Control Act (Cap. 302)
11. Land Registration Act (No. 3 of 2012)
12. Landlord and Tenant Shops, Hotels and Catering Establishments Act (Cap. 501)
13. Mortgages (Special Provisions) Act (Cap. 304)
15. Physical Planning Act (Cap. 236)
16. Registration of Documents Act (Cap. 245)
17. Rent Restriction Act (Cap. 296)
18. Sectional Properties Act (No. 21 of 1987)
19. Stamp Duty Act (Cap. 450)
20. Survey Act (Cap. 299)
21. Trespass Act (Cap. 294)
22. Trustees of Land Act (Cap. 297)
23. Valuation of Rating Act (Cap. 266)
24. Valuers Act (Cap. 535)

@ KShs. 10,000.
Restating the Law

MAXIMS OF EQUITY

- Equity considers that done what ought to be done
- Equity will not suffer a wrong to be without a remedy
- Equity delights in equality/Equality is equity (Aequalitus est quasi equitas)
- One who seeks equity must do equity
- Equity aids the vigilant not the indolent
- Equity imputes an intent to fulfill an obligation
- Equity acts in personam (i.e. on persons rather than on objects)
- Equity abhors a forfeiture
- Equity does not require an idle gesture
- He who comes into equity must come with clean hands
- Equity delights to do justice and not by halves
- Equity will take jurisdiction to avoid a multiplicity of suits
- Equity follows the law
- Equity will not assist a volunteer
- Equity will not complete an imperfect gift
- Where equities are equal, the law will prevail
- Between equal equities the first in order of time shall prevail
- Equity will not allow a statute to be used as a cloak for fraud
- Equity will not allow a trust to fail for want of a trustee
- Equity regards the beneficiary as the true owner
Feedback For Caseback Service
By Emma Mwobobia, Ruth Ndiko & Patricia Nasumba, Law Reporting Department

Hon. Justice Fred A Ochieng
High Court of Kenya at Nairobi

Well received, thanks.
It is always a pleasure to know that you have been re-affirmed.
But even when your decision is upset, it is important to know, so that you can make the necessary adjustments.

Hon. Christopher Yalwala - DR
High Court of Kenya at Bungoma

Thank you for the feedback.

Hon. Barbara Ojoo - PM
Kibera law Courts

Received with thanks.

Hon. Justice Byram Ongaya
High court of Kenya at Nairobi

Thank you for the information.
Legislative Updates

By Christine Thiong’o & Rachel Muriithi, Laws of Kenya Department

This article presents a summary of Legislative Supplements published in the Kenya Gazette on matters of general public importance. The outline covers the period between 5th April, 2019 and 8th May, 2019.

<table>
<thead>
<tr>
<th>DATE OF PUBLICATION</th>
<th>LEGISLATIVE SUPPLEMENT NUMBER</th>
<th>CITATION</th>
<th>PREFACE</th>
</tr>
</thead>
</table>
| 5th April, 2019       | 11                            | Engineers Rules, 2019 (L.N 18/2019) | These Rules are made by the Engineers Board of Kenya, with the approval of the Cabinet Secretary for Transport, Infrastructure, Housing, Urban Development and Public Works, in exercise of the powers conferred by section 58 of the Engineers Act, 2011. The Rules provide for:  
  i. Registration of Engineers;  
  ii. Complaints and Discipline by the Board;  
  iii. Training and Continuous Professional Development; and  
  The Engineers Registration Regulations, 1971 (L.N. 196/1971) and Gazette Notices 5720/2004 and 5721/2004 are hereby revoked. |
  These Regulations shall apply to all matters relating to the financial management of the Fund. The administration of the Fund is vested in the Chief Registrar. The Regulations apply to a judicial officer or Judiciary staff in exercise of any powers and functions relating to the administration of the Fund whether in exercise of delegated authority or otherwise. The Regulations address the following matters:  
  i. Budget Preparation;  
  ii. Utilization of the Fund;  
  iii. Expenditure in Relation to Human Resources;  
  iv. Imprest Management;  
  v. Accounts And Reporting;  
  vi. Internal Audit and Risk Management; and  
<table>
<thead>
<tr>
<th>Date</th>
<th>Page</th>
<th>Citation</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>8th May, 2019</td>
<td>19</td>
<td>University of Embu Charter, 2016 (L.N. 64/2019)</td>
<td>This Charter is certified by the Cabinet Secretary Ministry of Education, Science and Technology in exercise of the powers conferred by section 19 of the Universities Act 2012 (No. 42 of 2012). The Charter establishes the University of Embu, which shall be a body corporate with perpetual succession and a common seal. The University is the successor of Embu University College constituted under the Embu University College Order, 2011 (L.N. No. 65 of 2011), which is now repealed. The Charter also lays out the following: i. Membership and Governance of the University of Embu; ii. Management of the University of Embu; iii. Financial Provisions; and iv. Miscellaneous Provisions.</td>
</tr>
<tr>
<td>31st May, 2019</td>
<td>23</td>
<td>Description of New Issue of Fifty, One Hundred, Two Hundred, Five Hundred and One Thousand Shillings Kenya Currency Notes (L.N. 72/2019)</td>
<td>This Notice is issued by the Central Bank of Kenya in exercise of the power conferred by Article 231 (2) of the Constitution of Kenya, 2010 and section 22 (2) of the Central Bank of Kenya Act (Cap. 491). It determines and notifies the denominations, inscriptions, forms, material and characteristics of the new fifty shillings, one hundred shillings, two hundred shillings, five hundred shillings and one thousand shillings currency notes to be issued by the Central Bank of Kenya. The front of all currency notes shall- a. bear the image of Kenyatta International Convention Centre, a skyline image of Nairobi, a rising sun, the Coat of Arms and a dove; and b. bear the signatures of the Governor of the Central Bank of Kenya, and of the Principal Secretary to the National Treasury. Further, this Legal Notice details the primary themes, reverse images and note sizes of the listed currency; including the main colours and features of each currency. The new banknotes shall circulate alongside those previously issued and not withdrawn.</td>
</tr>
</tbody>
</table>
LEGISLATIVE UPDATE: SUMMARY OF LEGISLATION ENACTED BY PARLIAMENT

By Christine Thiong’o & Rachel Muriithi, Laws of Kenya Department

This is a synopsis of legislation in the form of Bills and Acts of Parliament that have been enacted in the period between March-May, 2019.

A. ACTS OF PARLIAMENT

<table>
<thead>
<tr>
<th>ACT</th>
<th>PETROLEUM ACT, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Act No.</td>
<td>No. 2 of 2019</td>
</tr>
<tr>
<td>Commencement</td>
<td>28th March 2019</td>
</tr>
<tr>
<td>Objective</td>
<td>This Act provides for a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations, regulation of midstream and downstream petroleum operations. The Act repeals the Petroleum (Exploration and Production) Act (Cap 308).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ACT</th>
<th>URBAN AREAS AND CITIES (AMENDMENT) ACT, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Act No.</td>
<td>No. 3 of 2019</td>
</tr>
<tr>
<td>Commencement</td>
<td>28th March 2019</td>
</tr>
<tr>
<td>Objective</td>
<td>The Act amends the Urban Areas and Cities Act, 2011 (No. 13 of 2011) in order to review the criteria provided for classifying an area as a city, municipality, town or market centre.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ACT</th>
<th>ASSUMPTION OF THE OFFICE OF GOVERNOR ACT, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Act No.</td>
<td>No. 4 of 2019</td>
</tr>
<tr>
<td>Commencement</td>
<td>31st May, 2019</td>
</tr>
<tr>
<td>Objective</td>
<td>This Act provides for the procedure and ceremony for the assumption of the Office of Governor by the Governor-elect; and for connected purposes. The Act further amends the: i. County Governments Act (No. 17 of 2012); and ii. Elections Act (No. 24 of 2011).</td>
</tr>
</tbody>
</table>

B. NATIONAL ASSEMBLY BILLS

<table>
<thead>
<tr>
<th>NATIONAL ASSEMBLY BILL</th>
<th>NATIONAL COHESION AND INTEGRATION (AMENDMENT) BILL, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dated</td>
<td>13th March, 2019</td>
</tr>
<tr>
<td>Objective</td>
<td>This Bill seeks to amend the National Cohesion and Integration Act, 2008 (No. 12 of 2008) in order to align it with the Constitution. It amends the procedure for appointing Commissioners under the Act. This follows the judgment by the High Court to the effect that section 17 of the Act is unconstitutional. There is, therefore, need to amend the Act to align it with the Constitution. The Bill also seeks to provide for matters incidental to the review of the Act including providing certain clarifications relating to the qualification for appointment as a member of the Commission and their term of office.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Maina Kamanda, Member of Parliament, National Assembly.</td>
</tr>
<tr>
<td>NATIONAL ASSEMBLY BILL</td>
<td>PUBLIC ORDER (AMENDMENT) BILL, 2019</td>
</tr>
<tr>
<td>------------------------</td>
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</tr>
<tr>
<td>Dated</td>
<td>15th March, 2019</td>
</tr>
<tr>
<td>Objective</td>
<td>The principal object for this Bill is to amend the Public Order Act (Cap. 56) to make provision for organizers of public meetings or public procession leading to loss of property, life or earnings to take responsibility for the loss and compensate the affected persons.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Simon King’ara, Member of Parliament, National Assembly.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>NATIONAL ASSEMBLY BILL</th>
<th>EMPLOYMENT (AMENDMENT) BILL, 2019.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dated</td>
<td>15th March, 2019</td>
</tr>
<tr>
<td>Objective</td>
<td>The Principal objective of this Bill to amend the Employment Act, 2007 (No. 11 of 2007) in order to afford pre-adoptive leave to parents who apply for the adoption of children who are not their natural children born to them by birth.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Martha Wangari, Member of Parliament, National Assembly.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>NATIONAL ASSEMBLY BILL</th>
<th>PUBLIC SERVICE (VALUES AND PRINCIPLES) (AMENDMENT) BILL, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dated</td>
<td>15th March, 2019</td>
</tr>
<tr>
<td>Objective</td>
<td>The objective of this Bill is to amend the Public Service (Services and Principles) Act (No. 1A of 2015) to require all state organs in the national and county governments and state corporations to submit annual reports on details of the human resource in constitutional Commissions, independent offices and County Public Service Boards and County Assembly Service Board. The reports should contain details outlining the total number of employees and highlighting their gender, age, county of birth and county of residence.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Andrew Mwadime, Member of Parliament, National Assembly.</td>
</tr>
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<table>
<thead>
<tr>
<th>NATIONAL ASSEMBLY BILL</th>
<th>KENYA INFORMATION AND COMMUNICATIONS (AMENDMENT) BILL, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dated</td>
<td>15th March, 2019</td>
</tr>
<tr>
<td>Objective</td>
<td>The principal object of this Bill is to amend the Kenya Information and Communications Act (Cap. 411A) to enable persons operating a telecommunication system or providing a telecommunication service to engage in any other business and provide for the separation of such other businesses from the telecommunication business. The amendments will provide for a regulation framework for such businesses as the proposed amendment provides for reporting by the Communications Authority on compliance with the proposed provision and penalty for non-compliance. The amendment will further aid in control of anti-competitive practices by the large industries in the sector. The Bill further seeks to amend provisions of the Kenya Information and Communications Act to make provision for quality of service to consumers making calls by compelling licensees in the telecommunications industry to invest in infrastructure that will guarantee quality of service for consumers making calls.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Elisha Odhiambo, Member of Parliament, National Assembly.</td>
</tr>
</tbody>
</table>
The Statute Law (Amendment) Bill, 2019 seeks to make various amendments to the following statutes:
(i) Districts and Provinces Act, 1992 (No. 5 of 1992)
(ii) Microfinance Act, 2006 (No. 19 of 2006)
(iii) Merchant Shipping Act, 2009 (No. 4 of 2009)
(iv) Alcoholic Drinks Control Act, 2010 (No. 4 of 2010)
(v) Tourism Act, 2011 (No. 28 of 2011)
(vi) Public Finance Management Act, 2012 (No. 18 of 2012)
(vii) Kenya School of Law Act, 2012 (No. 26 of 2012)
(viii) Legal Education Act, 2012 (No. 27 of 2012)
(ix) Prevention of Terrorism Act, 2012 (No. 30 of 2012)
(x) Kenya Law Reform Commission Act, 2013 (No. 19 of 2013)
(xi) Value Added Tax Act, 2013 (No. 35 of 2013)
(xii) Wildlife Conservation and Management Act, 2013 (No. 47 of 2013)
(xiii) Companies Act, 2015 (No. 17 of 2015)
(xiv) Insolvency Act, 2015 (No. 18 of 2015)
(xv) Court of Appeal (Organization and Administration) Act, 2015 (No. 28 of 2015)

The principal objective of this Bill is to provide for the division of buildings into units to be owned by individual proprietors and common property to be owned by proprietors of the units as tenants in common. It also provides for the use and management of the units and common property and addresses the contemporary challenges associated with ownership of property in a sectional property environment. The Bill proposes to repeal the Sectional Properties Act (No. 21 of 1987).

The principal object of this Bill is to amend the First Schedule to the Independent Electoral and Boundaries Commission Act, 2011 (No. 9 of 2011) in order to provide for a mechanism of appointing members of the Independent Electoral and Boundaries Commission.

The principal object of the Bill is to amend the National Drought Management Authority Act, 2016 (No. 4 of 2016) by amending the sections providing for the establishment of the coordinating committees and establishment of the management of the National Drought Emergency Fund in the Act in order to enable the enactment of the National Drought Emergency Fund, Regulations under the Public Finance Management Act, 2012 (No. 18 of 2012).
<table>
<thead>
<tr>
<th>National Assembly Bill</th>
<th>Public Service Commission (Amendment) Bill, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Dated</strong></td>
<td>5th April, 2019</td>
</tr>
<tr>
<td><strong>Objective</strong></td>
<td>This Bill seeks to amend the Public Service Commission Act, 2017 (No. 10 of 2017) to prescribe the mandatory retirement age of sixty years in the Act, without any exceptions. The amendments are meant to increase the job vacancies available to Kenya Citizens below the age of sixty years. The Bill also intends to address the issue of an officer acting in a position for more than six months. The period of six months prescribed should provide adequate time for an organisation to recruit and substantively fill the position. Failure to comply with this provision will result in the officer not earning any acting allowances.</td>
</tr>
<tr>
<td><strong>Sponsor</strong></td>
<td>Benjamin Gathiru Mwangi, Member of Parliament, National Assembly.</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>National Assembly Bill</th>
<th>Traffic (Amendment) Bill, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Dated</strong></td>
<td>5th April, 2019</td>
</tr>
<tr>
<td><strong>Objective</strong></td>
<td>The principal object of this Bill is to amend the Traffic Act (Cap 403) to make provision for the standardization of the use of all roads classified as superhighways.</td>
</tr>
<tr>
<td><strong>Sponsor</strong></td>
<td>Jude Njomo, Member of Parliament, National Assembly.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>National Assembly Bill</th>
<th>County Governments’ Retirement Scheme Bill, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Dated</strong></td>
<td>5th April, 2019</td>
</tr>
<tr>
<td><strong>Objective</strong></td>
<td>The principal object of this Bill is to establish the County Governments’ Retirement Scheme as a mandatory Scheme for all County Government Officers; provide for the establishment of the Scheme’s Board of Trustees and provide for the Scheme’s management and administration. The Bill proposes to have the scheme offer lump sum payments as provident, periodic payments as pensions and income drawdowns. The proposed Scheme will provide one universal scheme for all the forty seven county governments besides being open to other person approved by the Board.</td>
</tr>
<tr>
<td><strong>Sponsor</strong></td>
<td>Chachu Ganya, Member of Parliament, National Assembly.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>National Assembly Bill</th>
<th>Independent Electoral and Boundaries Commission (Amendment) (No. 2) Bill, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Dated</strong></td>
<td>15th April, 2019</td>
</tr>
<tr>
<td><strong>Objective</strong></td>
<td>This Bill seeks to amend the Independent Electoral and Boundaries Commission Act (No. 9 of 2011) to address two issues. First, to address the lacuna in the law in terms of the appointment of commissioners when a vacancy arises since paragraph (2) of the First Schedule to the Independent Electoral and Boundaries Commission Act does not provide for the subsequent appointment of commissioners. Secondly, the Bill seeks to amend the Fifth Schedule that is already spent after the first review relating to the delimitation of boundaries of constituencies and wards.</td>
</tr>
<tr>
<td><strong>Sponsor</strong></td>
<td>Jeremiah Kioni, Chairperson, Constitutional Implementation Oversight Committee, National Assembly.</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>National Assembly Bill</th>
<th>Kenya Food and Drugs Authority Bill, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Dated</strong></td>
<td>15th April, 2019</td>
</tr>
<tr>
<td><strong>Objective</strong></td>
<td>The objective of this Bill is to establish the Kenya Food and Drugs Authority within National Government. The Bill provides for the regulation and management of food, drugs, chemical substances, medical devices and other health technologies. The Bill also proposes to repeal the Pharmacy and Poisons Board Act (Cap 244) and the Food, Drugs and Scheduled Substances Act (Cap. 254).</td>
</tr>
<tr>
<td><strong>Sponsor</strong></td>
<td>Robert Pukose, Member of Parliament, National Assembly.</td>
</tr>
<tr>
<td>NATIONAL ASSEMBLY BILL</td>
<td>CROPS (AMENDMENT) (NO. 2) BILL, 2019</td>
</tr>
<tr>
<td>------------------------</td>
<td>-------------------------------------</td>
</tr>
<tr>
<td>Dated</td>
<td>15th April, 2019</td>
</tr>
<tr>
<td>Objective</td>
<td>This Bill seeks to amend the Crops Act, (No. 16 of 2013) to ensure that for the purposes of a favorable balance of trade and balance of payment, coffee shall not be exported from Kenya in its raw form.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Moses Kuria, Member of Parliament, National Assembly.</td>
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<thead>
<tr>
<th>NATIONAL ASSEMBLY BILL</th>
<th>KENYA INSTITUTE OF CURRICULUM DEVELOPMENT (AMENDMENT) BILL, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dated</td>
<td>15th April, 2019</td>
</tr>
<tr>
<td>Objective</td>
<td>This Bill aims to amend the Kenya Institute of Curriculum Development Act (No. 4 of 2013) to enhance disaster risk reduction (DRR) in learning institutions. This is owing to the fact the school curricula do not provide the learners with education on safety, particularly on how to conduct security drills, evacuation, first aid, how to locate explosives, how to sense danger, among other safety-related things.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Joyce Emanikor, Member of Parliament, National Assembly.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>NATIONAL ASSEMBLY BILL</th>
<th>ASSISTED REPRODUCTIVE TECHNOLOGY BILL, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dated</td>
<td>15th April, 2019</td>
</tr>
<tr>
<td>Objective</td>
<td>This Bill seeks to regulate rights and obligations relating to assisted reproductive technology. It aims to regulate the use of assisted reproductive technologies to aid individuals or couples that have challenges conceiving due to factors associated with infertility. Furthermore, the Bill aims to regulate the qualifications of health practitioners who administer assisted reproductive technology in order to protect recipients of the services. The Bill contains provisions that define rights touching on, among others, issues relating to consents preceding assisted reproduction; handling of embryos resulting from assisted reproductive technology; protection of the identity, status and welfare of children borne out of assisted reproduction; and duties of persons who undergo assisted reproduction and their legal status as parents. The Bill establishes an Assisted Reproductive Technology Authority to regulate the processes, licensing, standards, research and infrastructure relating to assisted reproductive technology.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Millie Odhiambo Mabona, Member of Parliament, National Assembly.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>NATIONAL ASSEMBLY BILL</th>
<th>GAMING BILL, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dated</td>
<td>27th May, 2019</td>
</tr>
<tr>
<td>Objective</td>
<td>The objective of this Bill is to establish an Act of Parliament to provide for the control and licensing of betting, casinos and other forms of gaming; authorization of prize competitions and public lotteries, for the establishment of the National Lottery and the imposition of a tax on gaming.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Victor Munyaka, Chairperson, Departmental Committee on Sports, Tourism and Culture, National Assembly.</td>
</tr>
</tbody>
</table>

### C. SENATE BILLS

<table>
<thead>
<tr>
<th>SENATE BILL</th>
<th>PUBLIC FINANCE MANAGEMENT (AMENDMENT) BILL, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dated</td>
<td>15th April, 2019</td>
</tr>
<tr>
<td>Objective</td>
<td>The principal object of this Bill is to amend the Public Finance Management Act (No. 18 of 2012) to establish a collaborative framework for collection of revenues by the county governments and the National Treasury together with the Kenya Revenue Authority.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Agnes Zani, Senator.</td>
</tr>
<tr>
<td>SENATE BILL</td>
<td>CONTROL OF STRAY DOGS BILL, 2019</td>
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<tr>
<td>------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td><strong>Dated</strong></td>
<td>15th April, 2019</td>
</tr>
<tr>
<td><strong>Objective</strong></td>
<td>The principal object of this Bill is to repeal and replace the Rabies Act (Cap. 365) in order to effectively deal with stray dogs which pose serious human health, dog health and welfare problems. The Bill also seeks to provide for the power to seize, detain or destroy stray dogs or stray cats and regulations in case of outbreak or expected outbreak of disease. The Rabies Act enacted in 1932 was last amended in 1962 and has become outdated. It is has become necessary to overhaul the Act in order to, among other things, take into account the provisions of the Fourth Schedule to the Constitution on the functions of county governments.</td>
</tr>
<tr>
<td><strong>Sponsor</strong></td>
<td>Mary Seneta, Senator.</td>
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<table>
<thead>
<tr>
<th>SENATE BILL</th>
<th>COUNTY TOURISM BILL, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Dated</strong></td>
<td>15th April, 2019</td>
</tr>
<tr>
<td><strong>Objective</strong></td>
<td>The objective of this Bill is to amend the Tourism Act (No. 28 of 2011) in order to make provisions for local tourism and involve counties in the development, management, marketing and regulation of local tourism. The Bill also provides for the development, management, marketing, promotion and licensing of local tourism by county governments.</td>
</tr>
<tr>
<td><strong>Sponsor</strong></td>
<td>Agnes P. Zani, Senator.</td>
</tr>
</tbody>
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<thead>
<tr>
<th>SENATE BILL</th>
<th>COMMISSION ON ADMINISTRATIVE JUSTICE (AMENDMENT) BILL, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Dated</strong></td>
<td>15th April, 2019</td>
</tr>
<tr>
<td><strong>Objective</strong></td>
<td>The principal object of this Bill is to amend the Commission on Administrative Justice Act (No. 23 of 2011) to provide for the decentralization of the office of the Commission on Administrative Justice. The Bill seeks to ensure that the Commission establishes satellite offices in all counties to bring its services closer to the people. Under the Bill, all the counties shall have a branch of the office of the Commission on Administrative Justice which shall ensure that the members of the counties have easy access to the offices to report their grievances. The Bill also seeks to repeal the sunset clause on the possible merger of the Commission on Administrative Justice and the Kenya National Commission on Human Rights as it there is still need for a body that performs the functions of an Ombudsman in the public sector.</td>
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<tr>
<td><strong>Sponsor</strong></td>
<td>Petronila W. Lokorio, Senator.</td>
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<thead>
<tr>
<th>SENATE BILL</th>
<th>NATIONAL MUSEUMS AND HERITAGE (AMENDMENT) BILL, 2019</th>
</tr>
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<tr>
<td><strong>Dated</strong></td>
<td>15th April, 2019</td>
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<tr>
<td><strong>Objective</strong></td>
<td>The principal objective of this Bill is to amend the National Museums and Heritage Act (No. 6 of 2006). The Bill seeks to give effect to the Fourth Schedule of the Constitution on distribution of functions between the National Government and the County Governments.</td>
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<td><strong>Sponsor</strong></td>
<td>Alice Milgo, Senator.</td>
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<tr>
<th>SENATE BILL</th>
<th>COUNTY ALLOCATION OF REVENUE BILL, 2019</th>
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<tr>
<td><strong>Dated</strong></td>
<td>26th April, 2019</td>
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<tr>
<td><strong>Objective</strong></td>
<td>The principal objective of this Bill is to provide for the equitable allocation of revenue raised nationally among the county governments for the 2019/2020 financial year and the responsibilities of national and county governments pursuant to such allocation.</td>
</tr>
<tr>
<td><strong>Sponsor</strong></td>
<td>Mohamed M. Mahamud, Chairperson, Committee on Finance and Budget, Senate.</td>
</tr>
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</table>
East African Court of Justice declares several sections of the Tanzania Media Services Act, 2016 to be in violation of the Treaty for the Establishment of the East African Community for encroaching on the freedom of expression

Media Council of Tanzania & 2 others v the Attorney General of the United Republic of Tanzania
Reference No 2 of 2017
East African Court of Justice at Arusha
M K Mugenyi, PJ; F Ntezilyayo, DPJ; F Jundu, A Ngiye, & C Nyachae, JJ
March 28, 2019
Reported by Moses Rotich & Faith Wanjuiku

International Law – law of treaty – Treaty for the Establishment of the East African Community – admissibility of applications – conditions for exhaustion of local remedies – whether the applicants were required to exhaust available local remedies before filing the reference at the East African Court of Justice – Treaty for the Establishment of the East African Community, articles 23(1), 27(1) and 31.

International Law – law of treaty – Treaty for the Establishment of the East African Court of Justice – timeframe within which to file a reference at the East African Court of Justice – whether the application should be declared inadmissible on the ground that it was filed out of time – Treaty for the Establishment of the East African Community, article 30(2)

International Law – law of treaty – Treaty for the Establishment of the East African Community – res judicata – judicial estoppel – bar against bringing a suit in respect of which there were previous proceedings by similar parties regarding the same subject matter – whether an application at the East African Court of Justice could be declared res judicata for having been heard and determined by the national courts of Partner States


International Law – law of treaty – Treaty for the Establishment of the East African Community – interpretation of treaties – what was the test to apply to determine whether or not a national law contravened the provisions of a Treaty

International Law – law of treaty – Treaty for the Establishment of the East African Community – fundamental rights and freedoms – where a national law is in conflict with a Treaty – effect of – whether by enacting the East African Community Act, the United Republic of Tanzania conferred jurisdiction on its national courts and thus limited the jurisdiction of the EACJ – Treaty for the Establishment of the East African Community, articles 6(d), 7(2), 23(1), 27(1), 31 and 33(2); East African Community Act, cap 411

International Law – law of treaty – Treaty for the Establishment of the East African Community – fundamental rights and freedoms – freedom of expression – where a national law violated fundamental rights and freedoms – whether Media Services Act, 2016 of Tanzania violated the provisions of the EAC Treaty for encroaching on the freedom of expression – Treaty for the Establishment of the East African Community, articles 6(d), and 7(2); Media Services Act (Tanzania), sections 7(3)(a), (b), (c), (f), (g), (h), (i), and (U), 13, 14, 18, 19, 20, 21, 35, 36, 37, 38, 39, 40, 50, 52, 53, 54, 58, and 59

of freedom of expression – whether imposing criminal sanctions on sedition, defamation, libel and false news publication unduly restricted the exercise of freedom of expression – General Comment 34 of the United Nations Human Rights Committee; Treaty for the Establishment of the East African Community, articles 6(d), and 7(2); Media Services Act (Tanzania), sections 35, 36, 37, 38, 39, 40, 50, 51, 52, 53 and 54

Brief facts

The three applicants were non-governmental organizations registered and operating as such within the United Republic of Tanzania (the respondent). The reference was a challenge to the Media Services Act No 12 of 2016 (the Act) enacted by the Parliament of the United Republic of Tanzania on November 5, 2016 and received presidential assent on November 16, 2016. The applicants averred that the Act as it was, was an unjustified restriction on the freedom of expression which was a cornerstone of the principles of democracy, rule of law, accountability, transparency and good governance which the respondent State had committed to abide by, through the EAC Treaty and other international instruments.

Specifically, the applicants sought the East African Court of Justice (EACJ) to declare that sections 7(3)(a), (b), (c), (f), (g), (h), (i), and (j), 13, 14, 18, 19, 20, 21, 35, 36, 37, 38, 39, 40, 50, 52, 53, 54, 58, and 59 of the Media Services Act, No 12 of 2016 of the United Republic of Tanzania violated articles 6(d), 7(2) and 8(1) of the Treaty for the Establishment of the East African Community (the EAC Treaty).

The respondent opposed the application citing court’s lack of jurisdiction, admissibility of the application, and that the Act did not violate the EAC Treaty in any way. The respondent stated that the applicants had failed to exhaust available local remedies in the national courts before seeking redress at the EACJ. They indicated that the matter was res judicata for having been heard and determined by the High Court of the United Republic of Tanzania.

Issues

i. Whether by enacting the East African Community Act, cap 411, the United Republic of Tanzania conferred jurisdiction on its national courts and thus limited the jurisdiction of the EACJ.

ii. Whether article 33(2) of the EAC Treaty conferred jurisdiction on national courts of Partner States to interpret the provisions of the EAC Treaty.

iii. Whether under the EAC Treaty there was a requirement to exhaust available local remedies before filing a reference at the East African Court of Justice.

iv. Whether the matter was res judicata for having been heard and determined by the High Court of the United Republic of Tanzania.

v. Whether the reference was filed out of time and in violation of article 30(2) of the EAC Treaty.

vi. Whether sections 7(3)(a), (b), (c), (f), (g), (h), (i), and (j) of the Media Services Act, 2016 infringed on freedom of expression by restricting type of news content that could be aired by media houses without justification hence violating articles 6(d) and 7(2) of the EAC Treaty.

vii. Whether sections 13, 14, 19, 20 and 21 of the Media Services Act, 2016 which established and dealt with a system of accreditation of journalists and media houses violated articles 6(d) and 7(2) of the EAC Treaty.

viii. Whether sections 35, 36, 37, 38, 39 and 40 of the Act dealing with the offence of criminal defamation limited the freedom of the press in contravention of articles 6(d) and 7(2) of the EAC Treaty.

ix. Whether sections 50 and 54 of the Act dealing with offences relating to media services were in contravention of articles 6(d) and 7(2) of the EAC Treaty.

x. Whether the definition of ‘seditious intention’ in section 52 and creation of seditious offences under section 53 of the Act violated articles 6(d) and 7(2) of the EAC Treaty.

xi. Whether section 58 of the Act, which gave the relevant cabinet minister absolute discretion to prohibit importation of any publication where the minister was of the opinion that the importation of such publication would be contrary to public policy, violated articles 6(d) and 7(2) of the EAC Treaty.

xii. Whether section 59, which gave the relevant cabinet minister power to prohibit or otherwise sanction the publication of any content where the minister was of the opinion that such content jeopardized national security or
public safety, contravened articles 6(d) and 7(2) of the EAC Treaty.

Relevant Provisions of the Law

Treaty for the Establishment of the East African Community

Article 6(d)
“The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:
(a)......
(b)......
(c)......
(d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people’s rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.”

Article 7(2)
“2. The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.”

Article 8(1)(c)
1. The Partner States shall:
(a)....
(b).....
(c) abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of this Treaty.”

Article 23(1)
Role of the Court
1. The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.

Article 27(1)
Jurisdiction of the Court
1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty: Provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

Media Services Act No 12 of 2016 (Tanzania)

Section 7(3)
“1. A media House shall, in the execution of its obligations, ensure that information issued does not:
(a)undermine:
   i) The national security of the United Republic of Tanzania; or
   ii) Lawful investigations being conducted by a law enforcement agent;
   (b)impede due process of law or endanger safety of life of any person;
   (c)does not constitute hate speech;
   (d)disclose the proceedings of the Cabinet;
   (e)facilitate or encourage the commission of an offence;
   (f) Involve unwarranted invasion of the privacy of an individual;
   (g)infringe lawful commercial interests, including intellectual property rights of that information holder or a third party from whom information was obtained;
   (h)hinder or cause substantial harm to the Government to manage the economy;
   (i) significantly undermines the information holder’s ability to give adequate and judicious consideration to a matter of which no final decision has been taken and which remains the subject of active consideration; or
   (j) damage the information holder’s position in any actual or contemplated legal proceedings, or infringe professional privilege.”

Section 35
(1)Any matter which, if published, is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation, is a defamatory matter;
(2) The matter referred to under subsection (1) shall qualify to be a defamatory matter even when it is published against a deceased person; and
(3) The prosecution for the publication of defamatory matter concerning a person who is dead shall not be instituted without the written consent of the Director of Public Prosecutions.

Section 50
(1) Any person who makes use by any means of a media service for the purposes of publishing:
   (a)Information which is intentionally or recklessly falsified in a manner which:
      i Threatens the interest of defence, public safety, public order, the economic interests of the United Republic, public morality or public health; or
      ii Is injurious to the reputation, rights and freedom of other persons;
   (b)Information which is maliciously or fraudulently fabricated;
   (c)Any statement the content of which is:
      i Threatening the interest of defence, public safety, public order, the economic interests of the United Republic, public
morality or public health; or
ii Injurious to the reputation, rights and freedom of other persons.
(d) Statement knowingly to be false or without reasonable grounds for believing it to be true;
(e) A statement with maliciously or fraudulent intent representing the statement as a true statement; or
(f) Prohibited information, commits an offence and upon conviction, shall be liable to a fine of not less than five million shillings but not exceeding twenty million shillings or to imprisonment for a period not less than three years but not exceeding five years or both.

Section 52
(1) A “seditious intention” is an intention to:
(a) Bring into hatred or contempt or to excite disaffection against the lawful authority of the Government of the United Republic;
(b) excite any of the inhabitants of the United Republic to attempt to procure the alteration, otherwise with than by lawful means, of any other matter in the United Republic as by law established;
(c) Bring into hatred, contempt or to excite disaffection against the administration of justice in the United Republic;
(d) raise discontent or disaffection amongst people or section of people of the United Republic; or
(e) promote feelings of ill-will and hostility between different categories of the population of the United Republic.
(2) An act, speech or publication shall not be deemed as seditious by reason only that it intends to:
(a) Show that the Government has been misled or mistaken in any of its measures;
or
(b) Point out errors or defects in the Government of the United Republic in legislation or in administration of justice with a view to remedying such errors or defects.
(3) In determining whether the intention for which the act was done, any work spoken or any document published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and in the circumstances in which he conducts himself.

Held
1. The jurisdiction of the East African Court of Justice (EACJ) was drawn from the EAC Treaty and in particular articles 23(1) and 27(1). Article 23 provided that the EACJ was a judicial body mandated to ensure adherence to law in the interpretation and application of, and compliance with the EAC Treaty. In enacting the East African Community Act, the respondent State was fulfilling a specific obligation under article 8(2) of the EAC Treaty which required each Partner State to, within twelve months from the date of signing the treaty, secure enactment and effective implementation of such legislation as was necessary to give effect to the EAC Treaty. There was nothing in the clear wording of article 8(2) to suggest that the article conferred jurisdiction to interpret and apply the EAC Treaty on any state organ.

2. Article 34 of the EAC Treaty buttressed the position that the EACJ had exclusive jurisdiction to interpret and apply the treaty. That was consistent with article 33(2) which provided that decisions of the EACJ on the interpretation and application of the EAC Treaty had precedence over decisions of national courts on a similar matter. The purpose of articles 34 and (33)(2) was to ensure uniform interpretation and to avoid possible conflicting decisions and uncertainty in the interpretation of the same provision of the EAC Treaty. Article 33(2) appeared to envisage that in the course of determining a case before it, a national court might interpret and apply a treaty provision. Such envisaged interpretation, however, could only be incidental. The article neither provided...
for nor envisaged a litigant directly
referring a question as to interpretation
of a treaty provision to a national court.
There was no other provision that
directly conferred on the national courts’
jurisdiction to interpret the EAC Treaty.

3. In bringing the instant reference, the
applicants were exercising the right
granted to them as residents of a Partner
State of the Community, by article 30(1)
of the EAC Treaty which provided that
subject to the provisions of article 27, any
person who was a resident in a Partner
State could refer for determination by the
EACJ, the legality of any Act, regulation,
directive, decision or action of a Partner
State on the grounds that such Act,
regulation, directive, decision or action
was unlawful or was an infringement
of the provisions of the EAC Treaty.

4. Whereas the requirement for exhaustion
of domestic remedies rule was widely
upheld by international courts having
direct jurisdiction over individuals as
a treaty requirement and as a rule of
customary international law, the EAC
treaty recognized capacity of individuals
to seek redress for a breach of their rights
enshrined therein against any Partner
State or an institution of the Community.

5. For a matter to be res judicata, the matter
had to have been between the same
parties, in respect of the same subject
matter, and determined on merits by
another court of competent jurisdiction.
The litigant in the Tanzania High Court
case Union of Tanzania Press Clubs Case
(supra) was different from the applicants
in the instant case. Further, in the
Tanzania High Court, the matter at issue
was whether the provision of the Act
offended the Constitution of the United
Republic of Tanzania. In the instant case,
the question was whether the provisions
impugned by the reference violated
specific articles of the EAC Treaty. No
evidence was tendered on the question
of whether or not the Union of Tanzania
Press Clubs Case was actually concluded
on merit. Without even delving into what
transpired in the Tanzania High Court
proceedings, it was clear that the principle
of res judicata had no application to the
instant case.

6. On the question of whether the
application was filed out of time, article
30(2) of the treaty provided that the
proceedings should be instituted within
two months of the enactment, publication,
directive, decision, or action complained
of, or in the absence thereof, of the day
in which it came to the knowledge of the
complainant. The respondent appeared
to have placed undue emphasis on the
word ‘enactment’ in article 30(2). The
respondent, in its submission, proceeded
on the basis that in the legislative process,
‘enactment’ was equated to passing of a
Bill in parliament. Reading article 30(2)
of the treaty, it was clear that the law
known as Media Services Act, 2016,
became law after firstly, being passed
by the Parliament of the respondent on
November 5, 2016 and secondly, being
assented to by the President of the said
respondent State on November 16, 2016.
The passage of the Bill by Parliament
was only one step towards the making of
the law. Prior to the Act being assented
to by the President, there was no law in
respect of which there could have been
a complaint. Indeed, as regards article
30(2) of the EAC Treaty, the focus was
on ‘the action complained of.’ The action
complained of against the respondent
was the enactment of the Media Services Act, which became law on November 16, 2016 upon assent by the President. The applicants were well within time, in terms of article 30(2), in filing the reference on January 11, 2017.

7. The EACJ had jurisdiction under articles 23 and 27 of the EAC Treaty; the applicants were well within their right under article 30; the issue of res judicata did not arise; and in terms of article 30(2) the reference was filed within time.

8. In answering the question on what was the test to be applied by the EACJ in determining whether a national law met the expectations of the treaty, and finding no answer in the treaty itself, the courts had previously adopted a three part test set out as;
   a. the limitation that was prescribed by law had to have been part of a statute, and had to be clear, and accessible to citizens so that they were clear on what was prohibited;
   b. the objective of the law had to be pressing and substantial and important to the society; and
   c. the state, in seeking to achieve its objectives ought to have chosen a proportionate way to do so. That was the test of proportionality relative to the objectives or purpose it sought to achieve.

9. When subjected to the three tier test above, several impugned provisions of section 7(3) of the Act failed the first test as being vague, unclear and imprecise;
   a. Under section 7(3) (a), the word ‘undermine’ which formed part of the offence, was too vague to be of assistance to a journalist or other person, who sought to regulate their conduct within the law.
   b. The word ‘impede’ was vague and would not meet the United Nations Human Rights Committee’s guidance that laws had to contain rules which were sufficiently precise, to allow a person in charge of their application to know what forms of expression were unduly restricted.
   c. The Act did not define ‘hate speech’ and therefore, in the context, the term was vague and potentially too broad.
   d. ‘Unwarranted invasion’ also failed the test of clarity and precision.
   e. The phrase “infringe lawful commercial interests”, in subsection (g), “hinder or cause substantial harm” in subsection (h), “significantly undermines” in (i) and “damage the information holder’s position”, all, similarly fell short of clearly defining the scope and extent of the respective content restrictions, to enable journalists and other persons to properly appreciate the limitation to the right to freedom of expression or to be clear on what was prohibited.

10. On the second limb of the three tier test, the objective of the law had to have been pressing and substantial that it had to have been important to society. The aim of the content restrictions in section 7 of the Media Services Act was not self-evident. Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR) provided that free expression could be limited for respect of rights or reputation of others; or for the protection of national security or of public order, or of public health or morals. The respondent did not submit or otherwise sought to demonstrate to the court that the impugned sections of the Media Services Act contained restrictions which were necessary or appropriate to the legitimate aim sought to be achieved.

11. For the above reasons, the impugned provisions of section 7 of the Media Services Act, 2016 of Tanzania failed the first test of the three tier test. That failure was by reason of the broad and imprecise wording used in the sections, with the result that the provisions did not make it clear to citizens what was exactly prohibited such that they could regulate their actions. That failure alone constituted a violation of the right to press freedom and freedom of expression which in turn translated into a breach of the fundamental and operational principles set out in articles 6 and 7 of the EAC Treaty. Under article 6(d) and 7(2) of the EAC Treaty, the principles of democracy had to, of necessity, have included adherence to press freedom, and free press went hand in hand with principles of accountability and
transparency which were also entrenched in articles 6(d) and 7(2) of the Treaty.

12. The respondent failed to establish there was a legitimate aim being pursued by enacting the limitation in the impugned section of the Media Services Act, 2016, or indeed that the said limitations were proportionate to any such aim. Therefore, the cited provisions of section 7 of the Media Services Act were in violation of articles 6(d) and 7(2) of the treaty.

13. Sections 13, 14, 19, 20 and 21 of the Media Services Act established and dealt with a system of accreditation of journalists and media houses. Accreditation per se was not objectionable. In the instant reference also, there was nothing objectionable to either section 13 which dealt with functions of the Board or section 14 of the Act which dealt powers of the said Board when read with section 21(4), (5) and (6) of the Act.

14. In the context of section 19 of the Media Services Act, it was not clear what legitimate aim the accreditation requirement therein (as a limitation to the right to freedom of expression) pursued. A system of compulsory accreditation of journalists did not pursue the legitimate aim of public order, safety and protection of the rights and reputation of others. Sections 20 and 21 of the Media Services Act flew from section 19 and they stood or fell together. Sections 19 did not pass the three tier test. Sections 19, 20 and 21 of the Media Services Act, when read together, violated articles 6(d) and 7(2) of the Treaty.

15. Sections 35, 36, 37, 38, 39 and 40 comprised part V of the Media Services Act and dealt with the offence of criminal defamation. When applied to the three tier test, section 35, which defined defamation, was not sufficiently precise to enable a journalist or other person to plan their actions within the law. The definition made the offence continuously elusive by reason of subjectivity. An intending publisher, for the purposes of that section, would not have predicted that what they intended to publish concerning X was likely to expose X to hatred, contempt or ridicule and therefore injure X’s reputation. The offence created by section 35 fell short on clarity. With regard to the second tier of the test on legitimate aim, the respondent submitted that the restrictions in sections 35 and 40 of the Media Services Act were intended to ensure the rights, freedoms, privacy and reputation of other people or interest of public were not prejudiced by wrongful exercise of the rights and freedoms of individuals. That failed to meet the parameters set by the United Nations Human Rights Committee, in its General Comments 34, that the respondent ought to demonstrate a direct and immediate connection between the specific threat, and the specific action taken. The restriction by creation of the offence of criminal defamation also therefore failed on the second tier of the test.

16. On the third tier, General Comment 34 of the United Nations Human Rights Committee stated that the mode of restriction to be adopted to meet the criterion of proportionality should “be the least intrusive protective function.” The practice of imposing criminal sanctions on sedition, defamation, libel and false news publication had a chilling effect that could unduly restrict the exercise of freedom of expression of journalists. The application of such law would amount to a continued violation of internationally guaranteed rights of the applicants. Sections 35, 36, 37, 38, 39 and 40 of the Act violated the provisions of articles 6(d) and 7(2) of the EAC Treaty.

17. Section 50 of the Media Services Act created what were therein described as offences relating to media services while section 54 created the offence of publication of a false statement likely to cause fear and alarm. Applying the test above, and in particular the first limb thereof, section 50 seemed to be largely unobjectionable. However, subsection 1(c) failed the test in that “threatening the interests of defence, public safety, public order, the economic interests of the United Republic, public morality or public health”, was too broad and imprecise to enable a journalist or other person to regulate their actions. Similarly, in section 54, the phrase “likely to cause fear and alarm” to the public or to
disturb the public", was too vague and did not enable individuals to regulate their conduct. Therefore, sections 50(1)(c)(i) and 54 of the Media Services Act were in violation of article 6(d) and 7(2) of the Treaty.

18. Section 52 of the Media Services Act defined “seditious intention” and section 53 created what it described as seditious offences. Section 52(1) of the Act failed the test of clarity and clarity was required in the first limb of the test. The definitions of sedition in the said section were hinged on the possible and potential subjective reactions of audiences to whom the publication was made. That made it all but impossible, for a journalist or other individual, to predict and thus, plan their actions. Section 52(3) of the Act compounded that problem in that, “the consequences which would naturally follow” would be entirely dependent on the subjective reaction of the person or audience to whom the publication was made. The restrictions and vagueness with which those laws were framed and the ambiguity of the mens rea (seditious intention) made it difficult to discuss with any certainty what constituted the seditious offence.

19. Read together, sections 52 and 53 of the Media Services Act fell foul of the proportionality part of the three tier test. Section 53(d) imposed custodial sentences for the offences created therein. Apart from serious and very exceptional circumstances, for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the violations of laws on freedom of speech and the press could not be sanctioned by custodial sentences, without going contrary to Treaty provisions. For those reasons, and in the circumstance, sections 52 and 53 of the Tanzanian Media Services Act violated the provisions of articles 6(d) and 7(2) of the EAC Treaty.

20. The powers granted to the Minister in sections 58 and 59 of the Media Services Act were far reaching, and clearly placed limitations on the rights stated both in article 19 of the ICCPR as well as article 9 of the African Charter on Human and People’s Rights (ACHPR). Section 58 gave the minister absolute discretion while section 59 contemplated that it was the Minister who would determine that the content of a publication jeopardized national security or public safety, and prohibit or otherwise sanction such publication. A provision that gave a government power to prohibit a publication, invited censorship and seriously endangered the rights of the public to receive information, protected by article 9(1) of the ACHPR. Sections 58 and 59 of the Act contained provisions that constituted disproportionate limitations on the right to freedom of expression. The absolute nature of the discretion granted to the Minister, as well as the lack of clarity on the circumstances in which such Minister would impose a prohibition, made the provisions objectionable relative to the rights being restricted. Sections 58 and 59 of the Media Services Act were in violation of articles 6(d) and 7(2) of the EAC Treaty.

21. Sections 7(3)(a), (b), (c), (f), (g), (h), (i), and (j); sections 19, 20 and 21; sections 35, 36, 37, 38, 39 and 40; sections 50 and 54; sections 52 and 53; and sections 58 and 59 contravened articles 6 and 7 of the EAC Treaty.

22. Sections 13 and 14 were not in violation of the EAC Treaty.

Application partly allowed.

Orders
i. A declaration that the provisions of sections 7 (3) (a), (b), (c), (f), (g), (h), (i), and (j); sections 19, 20 and 21; Sections; 35, 36, 37, 38, 39 and 40; sections 50 and 54; sections 52 and 53; and sections 58 and 59 of the Media Services Act, 2016 of United Republic of Tanzania violated articles 6 (d) and 7 (2) of the Treaty for the Establishment of the East African Community,

ii. The United Republic of Tanzania was directed to take such measures as were necessary, to bring the Media Services Act, 2016, into compliance with the Treaty for the Establishment of the East African Community; and,

iii. Each party was to bear their own costs.
**Botswana High Court declares sections 164(a), (c) and 165 of the Botswana Penal Code criminalizing homosexual acts between two adults in private as unconstitutional as they violated the right to liberty, privacy, dignity and non-discrimination**

Letswetebeat Motshidiemang v Attorney General; LEGABIBO (Amicus Curiae)

MAHGB-000591-16

High Court of Botswana at Gaborone

M Leburu, A B Tafa, J Dube, JJ

June 11, 2019

*Reported by Linda Awuor & Faith Wanjiku*

**Constitutional Law** - fundamental rights and freedoms-right to liberty, privacy, dignity and non-discrimination- sexual orientation-consensual sex between adult same-sex couples in private-whether sections 164(a); 164(c) and 165 of the Penal Code on unnatural offences were ultra vires the Constitution, in that they violated the right to liberty, privacy, dignity and non-discrimination -Constitution of Botswana, sections 3, 9 and 15; Penal Code, sections 164 (a); (c) and 165

**Constitutional Law** - fundamental rights and freedoms- right to privacy-sexual orientation-consensual sex between adult same-sex couples in private -unconstitutionality of private indecency- where a court could sever a provision so as to remedy its unconstitutionality-nature and scope of the doctrine of severability-whether section 167 of the Penal Code, which sought to regulate conduct deemed grossly indecent, done in private was a violation of one's privacy or liberty and ought to be severed to remedy its unconstitutionality

**Statutes**- interpretation of statutes- interpretation of sections 164 (a); (c) and 165 of the Penal Code-unnatural offences- where the provisions of sections 164 (a);(c) and 165 were contested for being vague - presumption of validity or constitutionality of a provision of an Act- nature and scope of the doctrine of vagueness-whether section 164(a), section 164(c) and section 165 of the Penal Code should be struck down for being unconstitutional due to the vagueness of the said sections; particularly with respect to the meaning of “carnal knowledge” “against the order of nature”

**Brief Facts**

The applicant was a 24 year old student of the University of Botswana and a homosexual. According to him, being homosexual was something that he had learnt to live with whilst growing up since the age of ten. Whilst growing up, he knew that he was different and such difference had long been recognized by his parents.

The applicant was taunted and called degrading names because of his disposition. It was at junior school, after he had managed to summon his guts and courage that he expressed his feelings to another boy and informed him that he loved him. As an adult now, it was the applicant’s averment that nothing had changed, he still loved men and he was sexually attracted to men. Currently, he was in a sexually intimate relationship with a man.

The impugned sections 164(a),(c) and 165 of the Penal Code of Botswana ( Penal Code), according to the applicant, proscribed and prohibited him from exercising, enjoying and engaging in sexual intercourse with a man *per anum*; which as a homosexual was his only mode of sexual intercourse. He also alleged that they violated his right to privacy, liberty, dignity and non-discrimination.

**Issues**

i  Whether sections 164(a); 164(c) and 165 of the Penal Code on unnatural offences were *ultra vires* the Constitution, in that they violated the right to liberty, privacy, dignity and non-discrimination.

ii  Whether section 167 of the Penal Code, which sought to regulate conduct deemed grossly indecent, done in private was a violation of one’s privacy or liberty and ought to be severed to remedy its unconstitutionality.

iii  Whether section 164(a), section 164(c)
and section 165 of the Penal Code should be struck down for being unconstitutional due to the vagueness of the said sections; particularly with respect to the meaning of “carnal knowledge” “against the order of nature”.

Held

1. The Penal Code did not define what carnal knowledge and the order of nature were. As a matter of general proposition, it was prudent and logical that words used in an enactment, should be defined in the same piece of legislation. Where there were no definitions, the court as final arbiter, could provide a definition. The importance of a court-given definition could not be ignored because courts were sources of law.

2. In the case of Gaolete v State [1991] carnal knowledge was defined by the court as sexual intercourse, and the order of nature was defined as anal sexual penetration. The same definitions were embraced by the highest court of the land in Kanane v the State [2003] (Kanane case) and the instant court was thus bound by such definition. On that basis, the provisions of section 164 (a) and (c) were not vague, having regard to the definition accorded thereto.

3. The choice of a partner, the desire for personal intimacy, and the yearning to find love and fulfilment in human relationships had universal appeal, straddling age and time. In protecting consensual intimacies, the Constitution adopted a simple principle: the State had no business to intrude into those personal matters. Nor could societal notions of heteronormativity regulate constitutional liberties based on sexual orientation. Privacy recognised that everyone had a right to a sphere of private intimacy and autonomy which allowed everyone to establish and nurture human relationships without interference from outside the community. The way in which everyone gave expression to their sexuality was at the core of the area of private intimacy. If, in expressing their sexuality, they acted consensually and without harming one another, invasion of that precinct would be a breach of everyone's privacy.

4. Sexuality was a wonderful gift from God. It was more than genital behavior. It’s the way everyone embodied and expressed themselves in the world. But all could not love another person intimately without embodying that love; without using their bodies to love. And that did involve genital behavior. Sexual love was for the purpose of giving and receiving pleasure with one's most intimate partner. It was a means of deepening and strengthening the intimate union that existed. That could only be healthy and good if everyone’s behavior was consistent with who they were and with whom they loved, and when they were true to their own sexuality and orientation.

5. Anal sexual penetration and any attempt thereof were prohibited and criminalised by sections 164(a), (c) and 165 of the Penal Code. Effectively, the applicant’s right to choose a sexual intimate partner was abridged. His only mode of sexual expression was anal penetration; but the impugned provisions forced him to engage in private sexual expression not according to his orientation; but according to statutory dictates. Without any equivocation, his liberty had been emasculated and abridged.

6. Sexual intercourse was not just for purposes of procreation. It constituted an expression of love and intimacy. The impugned sections denied the applicant the right to sexual expression in the only way available to him. Such a denial and criminalization went to the core of his worth as a human being. Put differently, it violated his inherent dignity and self-worth. All human beings were born free and equal in dignity. Dignity acted as a core of a diverse but interrelated body of inalienable rights. Human dignity referred to the minimum dignity and belonged to every human being qua human. It did not admit of any degrees. It was equal for all humans.

7. Criminalising consensual same sex in private, between adults was not in the public interest. Such criminalisation, it had been shown by evidence availed by
the *amicus*, disproportionally impacted on the lives and dignity of LGBT persons. It perpetuated stigma and shame against homosexuals and rendered them recluse and outcasts. There was no victim within consensual same sex intercourse *inter se* adults. There was no compelling state interest that was there, necessitating such laws. Private places and bedrooms should not be manned by sheriffs to police what was happening therein. Such penal provisions exceeded the proper ambit and function of criminal law in that they penalised consensual same sex, between adults, in private, where there was no conceivable victim and complainant.

8. The impugned penal provisions oppressed a minority and then targeted and marked them for an innate attribute that they had no control over and which they were singularly unable to change. Consensual sex conduct, *per anus*, was merely a variety of human sexuality. Even if the respondent’s public interest or morality justification was to be subjected to the criterion of reasonable and justifiable in an open democratic society, such justification did not pass constitutional muster. The test of what was reasonably justifiable in a democratic society was an objective one. There was nothing reasonable and justifiable by discriminating against fellow members of a diversified society. The state had failed to single out the objective that was intended to be satisfied by the impugned provisions.

9. In the *Kanane case*, the Court of Appeal, in 2003, said time had not yet arrived to decriminalise homosexuals’ practices. With the greatest of respect and deference, the instant court said, *dies venit*, or simply put, time had come that private same sexual intimacy between adults had to be decriminalised, as it was thereby proclaimed. The retention of the sodomy provisions in the Penal Code, imposed unconstitutional burden on the applicant’s fundamental rights of privacy, dignity, liberty and equal protection of the law; taking into account that the applicant’s only available sexual avenue, was *per anum*.

10. The constitutional ethos of liberty, equality and dignity were paramount. The Constitution was a dynamic, enduring and a living charter of progressive rights; which reflected the values of pluralism, tolerance and inclusivity. Minorities, who were perceived by the majority as deviants or outcasts were not to be excluded and ostracized. Discrimination had no place in the world. All human beings were born equal. According to Nelson Mandela, a paragon and epitome of humility, dignity, sagacity and tolerance, in response to some divergent views that homosexuality was un-African he stated that homosexuality was just another form of sexuality that had been suppressed for years. It was something that was being lived with.

11. There had to remain a realm of private morality and immorality, which should not be the province of the law, particularly where there was no victim or complainant and when such conduct was consensual. In the event that there could be indecency with a minor and/or an adult, without the consent of the said adult, but done in private, there were adequate penal provisions to deal with such infraction. No justification had been given by the respondent as to why a person’s right to privacy and autonomy ought to be curtailed, relating to consensual acts done in private. In any event, such curtailment of fundamental rights could not be justified within the democratic dispensation, nor did such abridgment satisfy the proportionality test. It was accordingly ordered that the word “private” be and was thereby severed and excised from section 167 of the Penal Code.

Application allowed; costs to the applicant; no order as to costs in relation to the amicus curiae-LEGABIBO.

Orders:

(a) Sections 164(a), 164(c) and 165 of the Penal Code (Cap 08:01), Laws of Botswana be and were thereby declared ultra vires sections 3, 9 and 15 of the Constitution and were accordingly struck down;

(b) The word “private” in section 167
of the Penal Code was severed and excised therefrom and the section to be accordingly amended.

Relevance to the Kenyan Situation

The Constitution of Kenya, 2010 provides for the national values and principles of governance in article 10 (2) (b) to include human dignity, non-discrimination and equality.

Article 27 provides for equality and freedom from discrimination and that every person is equal before the law and has the right to equal protection and equal benefit of the law. Sub-article 4 provides further that the state shall not discriminate directly or indirectly against any person on any ground, including sex. Article 28 provides for human dignity and that every person has inherent dignity and the right to have that dignity respected and protected. Article 31 provides that everyone has the right to privacy which includes the right not to have their person, home or property searched.

The Penal Code Cap 63 Laws of Kenya provides in section 162 that any person who has carnal knowledge of any person or permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.

Section 165 provides that any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.

Article 1 of the Universal Declaration of Human Rights, 1948 provides that all human beings are born free and equal in dignity and rights. Article 2 provides that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind which includes sex. Article 7 provides that all persons are equal before the law and are entitled without any discrimination to equal protection of the law.

There has been case law in Kenya pertaining to issues to do with same sex adult couples. In Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others [2015] eKLR, the petitioner sought to register an NGO on protection of the human rights of those who belong to the LGBTIQ community. His application was made to the NGO Co-ordination Board which declined it contending that the Penal Code criminalized gay and lesbian liaisons as they went against the order of nature.

The Court however held that the Constitution of Kenya, 2010 in article 36 granted every person the right to form an association of any kind and that an application to form an association could only be refused on reasonable grounds. It went on further to state that the fact that the State did not set out to prosecute people who confessed to be lesbians and homosexuals in the country was a clear manifestation that such sexual orientation was not necessarily criminalized. More importantly, the Penal Code did not criminalize the right of association of people based on their sexual orientation, and did not contain any provision that limited the freedom of association of persons based on their sexual orientation.

The same case was followed by an appeal at the Court of Appeal by the respondents in Non-Governmental Organizations Co-Ordination Board v EG & 5 others [2019] eKLR. The Court of Appeal upheld the High Court’s decision in a majority decision and held that the Constitution extended the definition of ‘person’ from only the natural, biological human being to include legal persons. Neither article 36 of the Constitution nor the definition of “person” in article 260 of the Constitution created different classes of persons based on sexual orientation. It further held that it was arbitrary to speculate and categorize LGBTIQ as persons who had the propensity to destroy a society by contravening the provisions of the Constitution or the Penal Code, or as a group bent on ruining the institution of marriage or culture.

In Eric Gitari v Attorney General & another [2016]eKLR, the petitioner brought a petition before the High Court seeking inter-alia a declaration of sections 162 and 165 of the Penal Code, Cap 63 to be unconstitutional,
and accordingly void and invalid to the extent that they purport to criminalise private consensual sexual conduct between adult persons of the same sex, as mandated by articles 2 (4), and 23 (3)(d) of the Constitution of Kenya, 2010. The Court held that the matters raised in the Petition were weighty and had important consequences and raised substantial questions of law under article 165 (3) (d) of the Constitution that deserved the constitution of a bench of Judges by the Chief Justice for hearing and determination.

The bench was constituted in EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) and the three judge bench ruled that section 162 (a) (c) of the Penal Code on unnatural offences and section 165 of the Penal Code on indecent practices between males was constitutionally compliant and in conformity with the principles of legality. The High Court further held that unless article 45(2) was amended to recognize same sex unions, it was difficult to agree with the petitioners’ argument, that, there could be safe nullification of the impugned provisions, whose effect would be to open the door for same sex unions and without further violating article 159 (2) (e) which enjoined the court to protect and promote the purpose and principles of the Constitution.

Matters of the LGBTIQ are sensitive emerging issues currently globally and various international jurisdictions are decriminalizing homosexuality with Botswana, an African country, being the latest. The case will therefore serve as an important precedent should Kenya decide to also decriminalize homosexuality or when there are pending matters to be determined in courts on the rights of the LGBTIQ community.
LAW REFORM ISSUE
The failure to register the Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) Community Rights Group as an NGO by the Non-Governmental Organizations Board held to be unconstitutional

BRIEF FACTS & METADATA OF JUDGMENT
Non-Governmental Organizations Co-Ordination Board v EG & 5 others [2019] eKLR
Court of Appeal at Nairobi
Civil Appeal No. 145 of 2015
P N Waki, M K Koome, R N Nambuye, D K Musinga & M S Asike Makhandia, JJA
March 22, 2019

The 1st respondent floated three names under which he sought to register a non-governmental organization (proposed NGO) with the appellant, seeking to address human rights abuses and violations suffered by the Lesbian, Gay, Bisexual, Transgender, Intersex and Queer persons (LGBTIQ) in Kenya and which request was rejected by the appellant’s Executive Director (Director) precipitating the 1st respondent to file a petition at the High Court on the ground that his right to freedom of association, dignity, equality and right not to be discriminated against had been violated among other grounds. The High Court allowed the petition and held that the right to equality before the law would not be advanced if people were denied the right not to be discriminated against based on their sexual orientation. The appellant was aggrieved by the High Court’s decision and thus filed the instant appeal.

1. The Constitution had ring-fenced its purpose and the manner it ought to be construed. After declaring its supremacy in article 2, the Constitution proceeded in article 10 to bind everyone who applied and interpreted it or any other law or made public policy, to the national values spelt out therein including: human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

2. The principles of the rule of law, participation of the people, equity, inclusiveness, equality, human rights, transparency and accountability were binding. The Constitution opened up further space for application of other principles and values obtaining in the general rules of international law and the international instruments Kenya had ratified, such as, the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Political Rights (ICESCR).

3. The Constitution laid out an expansive Bill of Rights for the purpose of recognizing and protecting human rights and fundamental freedoms in order to preserve the dignity of individuals and communities, promote social justice and the realization of the potential of all human beings’. In articles 20 (3) and (4), it gave an edict to the courts as they applied the Bill of Rights to develop the law where it did not give effect to a right; adopt the interpretation that most favoured the enforcement of a right or fundamental freedom and promote the values that underlay an open and democratic society based on human dignity, equality, equity, freedom and the spirit, purport and objects of the Bill of Rights.

4. In article 259, the Constitution commanded the manner in which it should be interpreted. It also demanded that every provision of the Constitution be construed according to the doctrine of interpretation that the law was always speaking. The Constitution had to be interpreted in a manner that eschewed formalism, in favour of the purposive approach and in a holistic manner within its context and in its spirit.

5. The people in Kenya who answered to any of the descriptions in the acronym LGBTIQ, were persons. Article 36 of the Constitution covered the persons in that group. Like everyone else, they had a right to freedom of association, dignity, equality and right not to be discriminated against had been violated among other grounds. The High Court allowed the petition and held that the right to equality before the law would not be advanced if people were denied the right not to be discriminated against based on their sexual orientation. The appellant was aggrieved by the High Court’s decision and thus filed the instant appeal.

6. The Penal Code did not criminalize the persons answering to the description LGBTIQ qua such persons. What it provided for were specific offences, more specifically, unnatural offences, attempts to commit unnatural offences, and indecent practices between males. Those were sections 162, 163 and 165 of the Penal Code, respectively. Like everyone else, LGBTIQ persons were subject to the law and would be subjected to its sanctions if they contravened it. Convicting such persons before they contravened the law would be retrogressive.
7. According to the proposed NGO’s objectives, the 1st respondent intended to register the NGO to among other things conduct accurate fact finding, urgent action, research and documentation, impartial reporting, effective use of the media, strategic litigation and targeted advocacy in partnership with local human rights groups on human rights issues relevant to the gay and lesbian communities living in Kenya. On the face of it, there was nothing unlawful or criminal about such objectives. However, they never reached the stage of proper consideration by the Board because the main gate to the boardroom was locked.

8. Article 36 of the Constitution granted every person the right to form an association of any kind. It also provided that an application to form an association could only be refused on reasonable grounds and no person could be compelled to join an association. That was the breadth of the right of freedom of association as provided for in the Constitution. It covered every person and any kind of association. It could only be limited in terms of law and only to the extent that the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. An individual human being, regardless of his or her gender or sexual orientation, was a person for the purposes of the Constitution.

9. The Constitution extended the definition of ‘person’ from only the natural, biological human being to include legal persons. Neither article 36 of the Constitution nor the definition of “person” in article 260 of the Constitution created different classes of persons. There was nothing that indicated that the Constitution, when referring to ‘person’, intended to create different classes of persons in terms of article 36 based on sexual orientation. Moreover, articles 20(3) and (4) of the Constitution provided that a court adopt the interpretation that most favoured the enforcement of a right or fundamental freedom and promoted the values that underlay an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights.

10. Article 20 (1) of the Constitution provided that the Bill of Rights applied to all persons. Article 259 of the Constitution provided that the Constitution had to be interpreted in a manner that advanced human rights and fundamental freedoms. The term “every person” in article 36 of the Constitution properly construed did not exclude homosexual person and the 1st respondent therefore fell within the ambit of article 36 which guaranteed to all persons the right to freedom of association. The right to freedom of association was also expressly recognised in international covenants to which Kenya was a party.

11. [OBITER DICTA] The issue of persons in the society who answer to the description lesbian, bisexual, gay, transsexual, intersex and queer (LGBTIQ) is rarely discussed in public. The reasons for such coyness vary. But it cannot be doubted that it is an emotive issue. The extensive and passionate submissions made in this matter before the High Court, and before us, is testimony to the deep rooted emotions that the issue can easily arouse. It is possible for the country to close its eyes and hearts and pretend that it has no significant share of the people described as LGBTIQ. But that would be living in denial. We are no longer a closed society, but fast moving towards the ‘open and democratic society based on human dignity, equality, equity, and freedom’ which the Constitution envisages. We must therefore, as a nation, look at ourselves in the mirror. It will then become apparent that the time has come for the peoples’ representatives in Parliament, the Executive, County Assemblies, Religious Organizations, the media, and the general populace, to engage in honest and open discussions over these human beings. In the meantime, I will not "be the first to throw a stone at her [LGBTIQ]."
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<th>B. Court of Appeal recommends review of age of sexual consent under the Sexual Offences Act</th>
<th>Eliud Waweru Wambui v Republic Court of Appeal at Nairobi Criminal Appeal No 102 of 2016 R N Nambuye, D K Musinga &amp; P O Kiage, JJA March 22, 2019</th>
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<td>The appellant was arrested nearly a decade ago, arraigned before the Chief Magistrate's Court at Thika on a charge of defilement contrary to section 8(1)(4) &amp; an alternative charge of indecent act contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006 (Act). He was found guilty and sentenced to 15 years' imprisonment. The appellant relied on the following grounds;</td>
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<td>1. As the appeal was a second appeal, the Court’s jurisdiction was confined to a consideration of questions of law only by dint of section 361(a) of the Criminal Procedure Code. The memorandum of appeal framed raised questions of law. The Court’s interaction with those grounds could of course involve, as in the complaint that the Trial Court did not re-evaluate the evidence, a reference to the facts as they emerged from the evidence that was tendered before the Trial Court. Such reference was not the same as hearing an appeal on a matter of fact which the Court was statutorily debarred to do.</td>
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<td>2. The appellant’s complaint that the first Appellate Court did not subject the evidence to fresh scrutiny, analysis and re-evaluation was not an idle one. A first appeal always proceeded by way of re-hearing based on the evidence on record and an appellant was therefore entitled to expect that the first Appellate Court would go beyond a mere rehearsing of what was on record or a repetition of the findings of the Trial Court.</td>
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<td>3. The High Court was required to, and had to be seen to have consciously and deliberately subjected the entire evidence to thorough scrutiny so as to arrive at its own independent conclusions on the factual issues in contention, and to determine on its own, the guilt or otherwise of the appellant. The only limitation to its task being a remembrance that it was without the advantage, enjoyed by the Trial Court, of seeing and observing the witnesses as they testified, for which it had to make due allowance.</td>
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<td>4. The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence could not be gainsaid. It was not in doubt that the age of the victim was an essential ingredient of the offence of defilement and formed an important part of the charge because the prescribed sentence was dependent on the age of the victim.</td>
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<td>5. A Photostat copy of the alleged birth certificate produced, which copy was not certified as required by section 66 of the Evidence Act when permitting the production of secondary evidence if primary evidence, which was the document itself, was not produced for the inspection of the Court and the contents of the document were sought to be proved by secondary evidence, was not a document that could be relied on in proof of the complainant’s age. Further, the document itself purported to have been issued before the birth of the complainant, evidence of which it purported to be, was a logical impossibility. Therefore, the document as was, was of no probative value.</td>
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<td>6. There was no age assessment as such that was done on the complainant whereas the P3 Form that was produced indicated 17 years as the approximate age of the person examined, namely the complainant. The other evidence of age was that of the complainant herself which, other than being hearsay in character, was no more illuminating. The complainant stated that on November 14, 2009, she got married to the appellant and she was about 17 years having been born on October 3, 1991. Simple arithmetic showed that as at that date she would have been 18 years and one month old. She further stated that she conceived in May 2009 which would place her age at 17 years and 6 months at the time but, one could not speak competently on her date of birth as she could not have witnessed it and the only document that was produced of the same was of no probative value.</td>
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7. The totality of the evidence on age was that it did not possess the consistency and certainty that would have proved the exact date of the complainant’s birth beyond reasonable doubt. Therefore, had the Trial Court gone into an analysis of the evidence with the thoroughness that was required of it, it would probably have arrived at a different conclusion. In failing to engage in that exhaustive re-evaluation, it fell into error and the lingering doubts had to be resolved in favour of the complainant.

8. The conduct of the police raised doubts as to the bona fides of the prosecution which was made worse by the admitted demand by the complainant’s father, in a meeting at the Chief’s office, attended by two elders no less, for the sum of Kshs 80,000 from the appellant who, incidentally, had been his tenant. During cross examination PW2 stated that the Kshs 80,000 “was to take care of the education expenses” he had used on the complainant and not dowry, but the critical point was the admission that had it been paid the matter would have rested.

9. The picture that emerged was of a father righteously indignant that his daughter had been seduced and put in the family way, and who would have the culprit prosecuted unless he would pay some kind of compensation. That too, raised questions as to whether the prosecution was for the proper purpose of enforcing the law or settling a score. At any rate, the effect was to whittle the reprobate value of the father’s evidence and to lend credence to the appellant’s contention that both the father and chief did know that the girl was of age.

10. A witness in a criminal case upon whose evidence it was proposed to rely should not create an impression in the mind of the Court that he was not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicated that he was a person of doubtful integrity, and therefore an unreliable witness which made it unsafe to accept his evidence. The evidence of PW2, properly evaluated, would have been in the category of an unreliable witness.

11. Section 8 (5) of the Sexual Offences Act stated that it was a defence to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. Subsection (5) was a curious provision in so far as it was set in conjunctive as opposed to disjunctive terms which would seem to be more logical. Once a person had actually been deceived into believing a certain state of things, it added little to require that his belief be reasonably held.

12. A reading of section 8 (6) of the Sexual Offences Act seemed to add a qualification to subsection (5) (b) that separated it from the belief proceeding from deception in subsection (5) (a). Therefore, the elements constituting the defence should be read disjunctively if the two sub-sections were to make sense. Further, it stood to reason that a person was more likely to be deceived into believing that a child was over the age of 18 years if the said child was in the age bracket of 16 to 18 years old, and that the closer to 18 years the child was, the more likely the deception, and the more likely the belief that he or she was over the age of 18 years.

13. The burden of proving that deception or belief fell upon the appellant, but the burden was on a balance of probabilities to be assessed on the basis of the appellant’s subjective view of the facts. Thus, whereas indeed the complainant was still in school in Form 4, that alone would not rule out a reasonable belief that she would be over 18 years old. It was also germane to point out that a child need not deceive by way of actively telling a lie that she was over the age of 18 years. Had the two Lower Courts properly directed their minds to the appellant’s defence and the totality of the circumstances of the case, they would in all likelihood have arrived at a different conclusion on it. It was a non-direction that they did not do so, rendering the conviction unsafe.

14. [Obiter] “We need to add as we dispose of this appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of a younger age than 16 years. We think it is rather unrealistic to assume that teenagers and maturing adults in the sense employed by the English House of Lords in Gillick v West Norfolk And Wisbech Area Health Authority [1985] 3 ALL ER 402, do not engage in, and often seek sexual activity with their eyes
fully open. They may not have attained the age of maturity but they may well have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process, and not a series of disjointed leaps."

15. [Obiter] "Where to draw the line for what is elsewhere referred to as statutory rape is a matter that calls for serious and open discussion. In England, for instance, only sex with persons less than the age of 16, which is the age of consent, is criminalized and even then the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age. The same goes for a great many other jurisdictions. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation."

C. The High Court recommends a review of the Sexual Offences Act to create a section to deal with consensual/mutual sexual activities among children and a special system to handle such cases.

SNN v Republic
High Court at Nyeri
Criminal Revision 104 of 2018
TM Matheka, J
January 25, 2019

The accused person was facing the charge of attempted defilement with the alternative charge of committing an indecent act with a child. According to the attached certificate of birth the subject was 16 years old at the time of the alleged offence while the victim was 6 years of age. The applicant’s counsel argued that since both the accused person and the victim were minors, bringing the charges against the accused amounted to discrimination on the basis of sex contrary to article 27 (4) of the Constitution and article 2(5) of the United Nations Convention on the Rights of the Child which prohibited discrimination on the basis of sex. That any continued prosecution of the accused person was discriminatory and denied him the equal protection of the law.

1. It was not contested that the victim was 6 years of age and according to section 14 (1) of the Penal Code she could not be criminally liable. Therefore, she could not be charged alongside the applicant and leaving her out could not be said to be discriminative. There was no express or implied requirement that when two children were involved in sexual activity with each other, both of them should be charged with the offence of defilement. However, there was no legal bar to the prosecution preferring criminal charges against both children. In effect, if the prosecution had reasonable cause to charge both minors, they could do so.

2. The intentions of the Sexual Offences Act were to protect everyone from sexual violence and in particular the vulnerable members of the society who included children. However, the Act appeared to have overlooked the fact that children could involve themselves in various forms of sexual activity at different developmental stages, and that there was a need to provide for that.

3. Every sexual infraction that was committed by children and whose facts brought it within the Sexual Offences Act was dealt within the ambit of criminal law. Courts had struggled with efforts to have children who were of same age group and who indulged in consensual sexual activity treated as children in need of care and protection. The question as to whether sexual crimes committed by children should be dealt with in the same way as sexual crimes committed by adults needed to be dealt with through substantive review of the Sexual Offences Act to create a section that spoke to sexual activities among children who had to be protected from others and from themselves as well.

4. The charge sheet indicated the apparent age of the accused as juvenile and the lower Court throughout the proceedings had been treating the accused as a minor and even ordered for his custody at a juvenile home. On January 12, 2018, the lower Court noted that the accused was a student and gave him a personal bond of Kshs. 50,000/-. On February 26, 2018 when the matter came up for hearing, the prosecution indicated that the accused was a minor and sought for directions on him being represented by counsel. The Court consequently allowed a counsel to come on record for the accused. The entire conduct of the trial Court in relation to the applicant indicated that the lower Court was actually persuaded that the applicant was a minor. The record however did not indicate that the accused’s age was determined. The non-compliance with section 143 (1) of the Children Act did not occasion injustice to the minor.
5. The revisionary powers of a High Court were very wide. Such powers were intended to be used by the High Court to decide all questions as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed by a subordinate criminal court and even as to the regularity of any proceeding of any subordinate court. The object of conferring such powers on the High Court was to clothe the court with a jurisdiction of general supervision and superintendence in order to correct grave failure or miscarriage of justice arising from erroneous or defective orders. Section 364 (1) (a) of the Criminal Procedure Code conferred on the High Court with all the powers of an appellate court. The revisionary powers were entirely discretionary and there was no a vested right of revision in the same sense as there was a vested right of appeal. The sections did not create any right in the litigant, but only conserved the powers of the High Court to see that justice was done in accordance with the recognized rules of criminal jurisprudence and that subordinate criminal courts did not exceed their jurisdiction, or abuse the powers vested in them by the Criminal Procedure Code.

6. In the instant revision, the proceedings were at a preliminary stage as only one hearing had taken place. The Court would allow the proceedings at the lower Court to continue subject to the lower Court conducting an inquiry on the age of the accused before the hearing starts. The objections to the charges facing the applicant were unsustainable and there was nothing to revise at that stage. The matter was to be returned to the lower Court for hearing and determination.
D. The makers of the Insolvency Regulations should make it a requirement that a notice of appointment of an administrator be lodged with the Registrar of Companies too so that a with search on the company it can be found out whether or not it is in administration.

Midland Energy Limited v George Muiruri t/a Leakeys Auctioneers & another
High Court at Nairobi
Insolvency Notice No. E.014 of 2018
F Tuiyott, J
February 19, 2019

Midland Energy Limited (Midland) was granted credit facilities by African Banking Corporation Limited (ABC Bank). As security for those facilities, a fixed, floating and a supplementary debenture was registered in favour of ABC Bank. Synergy Industrial Credit Limited (Synergy) also advanced hire purchase facilities to Midland to assist it purchase 3 new motor vehicles. A term and condition of the Hire Purchase Agreement was that 5 motor vehicles which were already under various Hire Purchase Agreements between the two would be held as additional security for the credit facilities advanced.

Midland defaulted in its obligations to both ABC Bank and Synergy. The creditors took different paths in seeking relief for the default. Synergy repossessed the vehicles under Hire Purchase on December 20, 2018. ABC Bank on the other hand appointed 2 persons as joint administrators to Midland. Through a notice dated November 16, 2018 and filed on November 19, 2018, ABC Bank gave notice of the said appointment. On November 21, 2018, the joint administrators advertised the administration in a notice published in the classified page of the Star newspaper and published on November 23, 2018, a notice of their joint appointment in the Kenya Gazette. Via a letter dated November 22, 2018, they notified all creditors of Midland of the administration.

1. The devise of administration as an alternative to insolvency was a new feature in insolvency laws, provided for under part VIII of the Insolvency Act, 2015 (the Act). The instant proceedings demonstrated tensions that could arise between creditors of a company under administration.

2. The design of the insolvency laws was to give a second chance to financially distressed companies. A break from the past where the fate of an ailing company would invariably be a winding up or liquidation order. Administration was one of the alternatives to liquidation. The objectives of administration were set out in section 522 of the Act. To achieve those objectives, the company had to be insulated from aggressive creditors who could cause a run of the company assets. The statute contemplated that upon such protection, the company would not be distracted from precipitate action and so the administrator would be able to perform his function in the interest of all of the company’s creditors.

3. The insulation of the company was provided by way of a moratorium from other legal processes as provided for under sections 560 and 561(4) of the Act.

4. As to when the appointment of an administrator was deemed to take effect would depend on the nature of appointment of the administrator. In the instant matter, ABC Bank appointed the joint administrators in its capacity as a holder of a floating charge. The power to make that appointment was drawn from section 534 of the Act. The Court did not venture into the procedure in which the joint administrators were appointed because that had not been challenged.

5. Under the provisions of section 538 of the Act, the appointment of an administrator by a holder of a floating charge took effect when the requirements of section 537 of the Act were satisfied. Reading sections 534 and 537 of the Act, it meant that the appointment of an administrator took effect upon the appointer lodging with the Court a notice of appointment which was in compliant with the provisions of section 537 of the Act. The notice of appointment was lodged with the Court on November 19, 2018 and that was the day when the administrator’s appointment was deemed to take effect.

6. There was an obligation placed on the holder of the floating charge to give notice of the appointment to the administrators and other persons set out in the Insolvency Regulations as provided for in section 539 of the Act. The need to give that notice promptly was informed by the fact that certain legal implications flowed from the appointment of the administrator and so the persons prescribed in the Regulations and who had an interest in the company would need to know of the appointment as soon as it happened. The persons to whom the notice would be given as prescribed by regulation 109 were the Court, official receiver, the directors of the company, contributory of the company and the company creditors.
Aggrieved by the state of affairs, Midland filed the instant application seeking restraining orders against both creditors and the release of the attached vehicles. ABC Bank argued that by dint of section 560(1)(b) of the Insolvency Act, there could be no repossession and/or transaction in the property of a company under administration other than with the consent of the administrator or the approval of the Court. Synergy on the other hand argued that Midland breached the terms of the Hire Purchase Agreements and it was entitled to act as it did and that of the 4 vehicles attached, 3 were sold on December 29, 2018 and were in the possession of the third party purchasers.

7. By dint of regulation 108, the announcement of the administrators’ appointment should be published in the Kenya Gazette and one or more newspapers that were widely circulated within Kenya. ABC Bank published the announcement in the Star publication of November 21, 2018 and Kenya Gazette of November 23, 2018. Since the Court was not told that the Star newspaper did not widely circulate within Kenya, the Court took it that it satisfied the criteria set out in regulation 108. Thus, the appointment of the administrator took effect on November 19, 2018 and Synergy was deemed to have had notice of the appointment on November 21, 2018 and at the very least on November 23, 2018.

8. Once the appointment of the joint administrators took effect, then Synergy was barred by the provisions of section 560 of the Act from repossessing the vehicles without the consent of the administrators or approval of the Court and the repossession that happened on December 20, 2018 was therefore contra statute. If, however, Synergy was to be excused for lack of knowledge because the notice of appointment came on November 21, 2018 and November 23, 2018, the sale of the vehicles could not be excused because that happened on December 29, 2018. Synergy could not plead lack of knowledge because the notice was published as required by the law and Synergy was deemed to have been duly notified.

9. Sections 560 and 561 of the Act were explicit that the moratorium barred the repossession of goods in a company’s possession over a credit purchase transaction and/or hire purchase agreement. Under section 2 of the Act, a Credit Purchase Transaction meant a hire-purchase agreement, a conditional sale agreement, a chattel leasing agreement or a retention of title agreement. Synergy being the owner under the Hire Purchase Agreement did not have any special privilege over the other creditors of Midland.

10. If administration as an alternative remedy to insolvency was to be efficacious, then property of a company under administration ought to be protected as robustly provided in statute. So as to strike a blow for the new devise in insolvency laws, the Court would be making an order that either the possession of the 3 vehicles that had been sold and were in possession of the purchasers be restored to Midland or all monies received upon their sale be paid to Midland. However, before making those final orders, the Court thought it fit to hear the purchasers of the 3 vehicles.

11. [Obiter] “Before I turn to make the orders herein, I need to make an observation. Many people do not read the Kenya Gazette or classified pages of the newspapers and can run the risk of dealing with the property of a company under administration in a manner that is contrary to the law because of lack of knowledge that the company has been placed under administration. The makers of the Insolvency Regulations may wish to make it a requirement that a notice of appointment of an administrator be lodged with the Registrar of Companies. In this way, anyone who wishes to deal with a company’s property can simply do a search on the company so as to find out whether or not it is in administration.”
Kenya Law won the ‘Public Sector Legal Department of the Year 2019’ at the Nairobi Legal Awards held on 30th May 2019 in Nairobi. The Awards are an initiative of the Law Society of Kenya, Nairobi Branch which seeks to recognize excellence in legal practice and are meant to promote benchmarking of best practice standards in the Kenyan legal profession.

Kenya Law was honoured for its outstanding contribution to the development of law and legal practice through the execution of its unique mandate of Monitoring and Reporting on the development of Kenya’s jurisprudence through publication of the Kenya Law Reports; Revising, Consolidating and Publishing the Laws of Kenya.

Excellent Financial management and Kenya Law’s compliance with relevant statutory and regulatory requirements, leadership structures including human resource policies, training and mentorship of interns, pupils and young lawyers were also underscored at the awards.

It was also noted that Kenya Law had demonstrated high standards of legal services, and surpassed the jury’s expectation as far as corporate social responsibility as well as policy reform and law development were concerned.

Kenya Law CEO/Editor Mr. Long’et Terer, in his address to the staff, noted that the award would not have been possible without the hard work and contribution they make on a daily basis.

“We thank you for this and encourage you to continue to support the organisation in every way.” He said.

Kenya Law, is the first ever recipient of the Public Sector Legal Department Award. Hongera Kenya Law!
Kenya Law Awards the Winners of The African Regional Round of the 17th John H Jackson Moot Court Competition

The John H Jackson Moot Court Competition on WTO Law is a student-run moot court competition organised annually by the European Law Students’ Association (ELSA) in co-operation with the World Trade Organization (WTO).

The African Regional Round of the 17th John H Jackson Moot Court Competition on WTO Law was hosted by Kenya School of Law from 23th – 27th April 2019. The National Council of Law Reporting partnered with the Kenya School of Law and other bodies to sponsor the competition.


Kenya Law exhibit’s at the 4th Annual Legislative Summit, Kisumu City from 13th to 17th April 2019

The purpose of the summit was to strengthen inter and intra-governmental relations for effective implementation of devolution as well as identify the gaps and challenges in the legislation that impedes devolution and develop measures to address them.

The summit was themed “Accelerating devolution; assessing the achievements and addressing the gaps in policy and legislation” and sought to build on the gains of the first three legislative summits.

Kenya Law donated the Bench Bulletins and other legal publications to over 4,000 delegates in attendance.

Kenya Law showcases the new Laws of Kenya compendiums at the Kenya Magistrates and Judges Association (KMJA) held a Special General Meeting on 18th May 2019 at the Sarova Stanley Hotel, Nairobi.

Ms. Ivy Njoki interacts with a guest at the Kenya Judges and Magistrates Association during the association’s special general meeting 18th May 2019 at a the Sarova Stanley Hotel, Nairobi.
Kenya Law visits Thogoto home for the aged in Kikuyu as part of the Corporate Social Responsibility programme organized by Kenya Law welfare group.

Senior citizens of Thogoto home for the aged in Kikuyu had a reason to smile when Kenya Law staff paid them a visit, cooked, cleaned and donated mobility aids on 5th April 2019.

A simple smile is indeed the start of opening hearts and being compassionate to others.....
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