An appeal on a decision on an arbitral award can only lie to the Court of Appeal where the High Court, in setting aside the award, steps outside the grounds set out in section 35 of the Arbitration Act.

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Children born of a Muslim father and a non-Muslim mother who were not formally married can inherit the estate of their deceased father.
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Supreme Court affirms the Court of Appeal decision declaring sections 7 and 10(4) of the Work Injuries Benefits Act, 2007, inconsistent with both the repealed Constitution and the Constitution of Kenya, 2010

Need to harmonize the regulations under the Environmental Management and Coordination Act, Survey Act and Physical Planning Act to take into consideration high and low water marks when measuring and defining riparian reserves.

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This edition of the Bench Bulletin highlights a significant array of ground breaking jurisprudence from the Kenyan Courts.

From the Supreme Court, we highlight the precedent setting decisions in the cases of Nyutu Agrovet Ltd v. Airtel Networks Kenya Ltd & Another and Synergy Industrial Credit Limited v. Cape Holdings Ltd. The two petitions before the Apex Court dealt with whether a party can appeal a decision of the High Court arising from an application seeking to set aside an arbitral award under section 35 of the Arbitration Act. In the Nyutu case, the court in its judgment held that there was a limited avenue for appeal only in exceptional circumstances. The court, in these decisions has set precedence in the arbitration practice area. This is because it had been presumed that a party aggrieved by the decision of the High Court on an application seeking to set aside an award, had no right of appeal to the Court of Appeal. The Supreme Court has now settled the issue by returning a finding that an appeal may lie from the High Court to the Court of Appeal on a determination made under section 35 of the Arbitration Act (an application to set aside an award) where the High Court, in setting aside an arbitral award had stepped outside the grounds set out in the said section and thereby made a decision so grave, so manifestly wrong and which had closed the door of justice to either of the parties. The Supreme Court, however, clarified that not every decision of the High Court under section 35 is appealable to the Court of Appeal.

From the Court of Appeal, we highlight the novel issue on whether children born of a Muslim father and a non-Muslim mother who were not formally married could inherit the estate of their deceased father. This was seen in the case of CKC and another (Suing through their mother and next friend JWN) v ANC, where the Court of Appeal in Mombasa had to determine the weighty issue on whether the High Court, as opposed to the Kadhi’s Court, had the jurisdiction to hear and determine succession disputes where some of the parties had not submitted to the jurisdiction of the Kadhi’s Court and did not profess the Islamic faith.

These are just a few of the jurisprudential decisions highlighted in this issue of the Bench Bulletin and it is our sincere hope that you will find the publication both enlightening and useful. Happy reading

Long’et Terer
Editor/CEO
Good morning! I am delighted to join you in this 7th Edition of the East Africa International Arbitration Conference. I note that this is the second time the conference is taking place in Kenya, the first time being in 2014. Let me also add my voice to those who have spoken before me in welcoming back to Nairobi our brothers and sisters from across borders and beyond. It also warms my heart to see several Honourable Judges (both serving and retired) among the delegates in this room, and to note their interest in international arbitration. Let me say at this point that I am a proud member of the Chartered Institute of Arbitrators – Kenya Branch and its Patron.

The theme of this Conference, “Government Contracting and Investment Disputes: Lessons for States and Investors”, will explore the full spectrum of government contracting from procurement, tender disputes; dispute mitigation in government contracts; investment arbitration; and arbitration with governments in African Centres. The focus will clearly be on the African seats of arbitration of disputes arising from commercial contracts between investors and governments of East African States. That calls for an examination of the arbitration legal frameworks of a number of African countries. I will not attempt that examination in these opening remarks. It is practical even if I was an expert on the subject, which I must confess, I am not. From the Conference programme as well as the list of prominent experts the organizers have lined up to facilitate the discussions, I have no doubt you will do justice to the subject. With that disclaimer, let me make a few remarks on the global legal framework recommended for adoption in the resolution by arbitration of disputes in international trade. In the mid-twentieth century, challenges in international arbitration heightened.

Disparities amongst national laws with mandatory rules of procedure in various jurisdictions and, in some instances, the applicable law, became a major impediment in the conduct of international arbitration in accordance with parties’ agreements not to mention the difficulties experienced in the enforcement of arbitral awards. To overcome those challenges, nations came together under the aegis of … and undertook extensive discussions with broad stakeholder participation, as well as the involvement of seasoned arbitration experts highly experienced in international arbitration. The result was the harmonisation of national laws into an excellent international arbitration framework, UNCITRAL Model Law that was adopted in February 1985 which became a unified legal framework for a fair and efficient settlement of disputes arising in international commercial contract.” The adoption of the UNCITRAL model law was followed by clarion calls from legal commentators and academia on the importance of various nations to adopt the instrument. With its adoption, in the last twenty years, starting with the US and Australia, followed by the UK and the rest of Europe, the growth of ADR has been astronomical. With increased globalisation, arbitration has now become the preferred mechanism for settling international disputes. Actually, it has been argued that international arbitration should grow in tandem with the globalisation of trade. Arbitration has thus gained popularity over time amongst the business community due to its advantages over litigation.

Generally, Arbitration refers to “the submission of a dispute to an independent non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard. Arbitration, as a method
of resolving dispute, has unique advantages that stand out even against the other known alternative dispute resolution processes (mediation, negotiation, etc.) One, arbitration provides a distinct advantage of allowing private parties to choose their forum, and a neutral tribunal whose qualifications can be tailored to suit the complexity of the dispute thus providing the parties with the opportunity to carve their own tailor-made solutions that suit their circumstances. Secondly, arbitration offers parties the confidential cover that is not afforded in courts of law. While court procedures can, to some limited extent, offer protection of privacy of parties, most of the judicial disputes are open to public scrutiny and evidence has to be submitted and argued in open court. The open, compulsory, and public disclosure of information can, at times, affect the interests of parties. Therefore, for parties who dread humiliation or condemnation or for those who simply do not want sensitive information to be disclosed, Arbitration allows settlement of disputes without exposure.

As commercial transactions become increasingly complex with the expansion of international trade, it has become practical to include dispute resolution mechanisms in contracts. Arbitration is one such mechanism. By agreeing to arbitrate, parties submit their dispute to a private tribunal, under substantive and procedural laws chosen by the parties, resulting in a binding and final award reviewable only on limited grounds; it is a private dispute resolution process that produces legal force and effect through an award that courts of most countries will likely enforce. Kenya, seeking to position itself as an international investment destination found that it’s Arbitration Act of 1968 had no application in international disputes. It enacted the Arbitration Act of 1995, which largely adopted the United Nations Commission on International Trade Law (UNCITRAL) model law. The Kenya Constitution, 2010, further institutionalized the practice of arbitration in Kenya. Article 159(2)(c) obliges courts to promote “alternative forms of dispute resolution including … arbitration.” Our support for arbitration and ADR is therefore not merely because it is a desirable way of addressing disputes in international trade but also a positive fulfilment of normative provisions in the Constitution. This calls on the Judiciary to ensure that we have measures in place to promote ADR, including arbitration.

Kenya has now a robust legislative foundation for Arbitration, both commercial and investor-state, that is based on international best-practices. The pronouncements by Kenyan courts reflect this progressive view about the role of Arbitration. As the High Court stated in the case of *Evangelical Mission for Africa and another v Kimani Gachubi and another*: “An arbitration process is itself an embodiment of justice. People go to arbitration because they believe that it is a process that delivers justice fast, and at least cost.” A number of provisions in the Arbitration Act create a complimentary relationship between judicial adjudication and arbitration. The Act requires (under Section 6) a stay of court proceedings until the matter that is under arbitration is concluded. This is an example where judicial adjudication is required to cede space for arbitration to take its course before the court proceeds to make any orders or conclusions on a matter. The Act also limits interventions by courts in arbitral proceedings to instances that are only covered under the Act. In particular, Section 35 of the Act provides for limited grounds under which a court can intervene. The grounds of intervention are generally limited to curial of procedural infractions as opposed to the content or substance of arbitration. In terms of substance, courts of law can only set aside arbitral awards in fairly extreme circumstances such as when an arbitral award is contrary to public policy in Kenya. The Act also provides (under section 14) that a decision of the High Court on a suit challenging the suitability of an arbitrator is final and not subject to appeal. This is an important provision as it reduces the risk of the arbitration process being bogged down by endless litigation in courts of law. Finally, the Act recognizes the need for complementarity between Kenyan courts and international arbitrators.

The jurisprudence emerging from the Kenyan courts on the place and status of arbitration is encouraging in this respect. As stated, courts have ceded ground for arbitration to grow and flourish and have generally intervened on limited occasions as is strictly provided in the Arbitration Act. Kenya is also a party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, having ratified the Convention in 1989. The requirements for recognition and enforcement of arbitral awards and grounds for refusal in Sections 35 to 37 of the Kenyan Arbitration Act are similar to those in Article 5 of the New York Convention. Ladies and Gentlemen, The Kenyan courts have consistently been supportive of arbitration. The retired Justice Aaron Ringera’s observation in the case of *Christ for All Nations v Apollo*: “the public policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act” is testament to this. Needless to say that this decision has been followed in numerous subsequent cases. Many of you know about our unrelenting fight against case backlog. As part of the Judicial Transformation
initiative, in April 2016, the Kenyan Judiciary launched a pilot project for court annexed mediation in the commercial division and family division. In just three years since we started its implementation of court annexed mediation, more than KES. 6.1 Billion in assets has been released to the economy with the successful conclusion of matters through mediation. In one signature case handled by one of our mediators, a dispute that was in court for 15 years was resolved in just 30 days of mediation, and the protagonists walked out of the final session holding hands, laughing, and posing for happy photographs. Currently other cases with assets worth more than KES.32 Billion are going through the mediation process. In January 2017, just a few months after taking over as the Chief Justice, I launched the Sustaining Judiciary Transformation blueprint for speedier, more efficient and technologically-advanced service delivery. Great emphasis is placed in resolving disputes through arbitration.

On average, our arbitrations take about 69 days to conclude against a target of 60 days. The ICC Arbitration Rules provide for a period of 18 months from the date of the terms of reference for an arbitrator to issue their award. It goes without saying that ADR mechanisms such as arbitration and mediation would go a long way in lessening the burden of the courts. Ladies and gentlemen, As I have pointed out, the theme of this conference revolves around government contracting and the resolution investor-state disputes. In government contracting, an investor is mostly concerned about the proper performance of its contract to earn a return on its investment. In the event of a dispute, an investor is primarily concerned about the enforceability of its contracts. The World Bank Doing Business Rankings has 10 main topics under which country performance is ranked. One of those is enforcement of contracts. In the latest World Bank Doing Business Report, Kenya was ranked Position 61 among 190 economies globally. This was a 21-place improvement from Position 80 in 2017, and the country's best performance in 15 years.

Aside from the efficiencies in digitisation of business registration and permitting, I am proud to say that the improved efficiency in commercial dispute resolution generated through ADR has a lot to do with this impressive score. As a country, Kenya aims to be in the top 50 countries in 2020. To achieve this, the Judiciary needs to play its part by staying on the path of strengthening arbitration as the preferred mode of dispute resolution. Kenya already has leading international arbitrators under CIArb-Kenya and other associations and we have a leading international arbitration centre, the Nairobi Centre for International Arbitration or NCIA.

With all this in mind, it goes without saying that the Kenyan courts have to work harder to improve efficiencies in determining not just court cases, but more specifically, cases relating to recognition and enforcement of arbitral awards. It is not effective for a party to obtain an international arbitration award in 16 months, only to experience a two-year delay in court enforcement. Enforceability of an award is a determinant on parties selecting a seat of arbitration in their arbitration clauses, and indeed, in parties selecting the governing law of a contract. There is no reason why parties should opt for seats of arbitration in foreign jurisdictions, or for a foreign governing law, when Kenya has the ability to be a leading seat of arbitration.

Let me conclude by reiterating the commitment of the Judiciary to supporting and fostering arbitration and ADR in order to position Kenya as an international arbitration destination and to play our part in improving Kenya's global doing business rankings while also attracting foreign direct investment. As the Chief Justice of Kenya, I want to assure you and the public at large that I have and I will continue to lend my unwavering support to resolution of disputes by arbitration and other forms of ADR. In this regard, I wish to report that I have been in talks with the Presiding Judge Commercial Division of the High Courts with a view of singling out fast-tracking cases relating arbitral proceedings. I wish you all the very best as you explore the lessons in government contracting, investor-state disputes and commercial arbitration in on the African continent. To the organisers of this conference, I thank you most sincerely for putting together such a wholesome programme. Let us take full advantage of our time here, strive to make new connections and learn from each other. With those few remarks, it is now my singular pleasure to declare this conference officially open. God bless you all.

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

Supreme Court Judges - DK Maraga, CJ & P; MK Ibrahim, SC Wanjala, N Ndung’u & I Lenaola, SCJJ in Synergy Industrial Credit Limited v Cape Holdings Limited - Petition No. 2 of 2017
Per MK Ibrahim, SC Wanjala, N Ndung’u & I Lenaola, SCJJ (majority decision)

“Not every decision of the High Court under Section 35 is appealable to the Court of Appeal. It also follows therefore that an intended appeal, which is not anchored upon the four corners of Section 35 of the Arbitration Act, should not be admitted. In this regard, an intended appellant must demonstrate (or must be contending) that in arriving at its decision, the High Court went beyond the grounds set out in Section 35 of the Act for interfering with an Arbitral Award.”

Per DK Maraga, CJ & P (dissenting opinion)

“Because the Kenyan Arbitration Act of 1995 puts emphasis on the concept of finality in arbitration and the above stated public policy to promote arbitration as encapsulated in Article 159(2)(c), save as stated in the Arbitration Act, awards should be impervious to court intervention as a matter of public policy. Unwarranted judicial review of arbitral proceedings will simply defeat the object of the Arbitration Act. The role of courts should therefore be merely facilitative otherwise excessive judicial interference with awards will not only be a paralyzing blow to the healthy functioning of arbitration in this country but will also be a clear negation of the legislative intent of the Arbitration Act.”

Court of Appeal Judges – DK Musinga, SG Kairu, AK Murgor, JJA, in TSJ v SHSR - Civil Appeal 119 of 2017

“Despite that background and the considerations that informed the enactment of the Arbitration Act 1995, there is nothing in the Act itself that limits the application of arbitration process to commercial disputes. Furthermore, the Constitution of Kenya, 2010 has extended the application of arbitration beyond the traditional (in a western sense) commercial sphere. Beyond the command under Article 159(2) of the Constitution that courts should promote arbitration and other dispute resolution mechanisms when exercising judicial authority, there is for instance recognition, under Article 189 of the Constitution, of arbitration and other alternative dispute resolution mechanisms in settlement of intergovernmental disputes.

Court of Appeal Judges – DK Musinga, SG Kairu, AK Murgor, JJA, in TSJ v SHSR - Civil Appeal 119 of 2017

“Just as the Islamic law allows a husband to release his wife by way of pronouncement of talaq, a wife has also the right to release herself from the marriage by way of khulu… Khulu therefore indicates the dissolution of marriage by the consent of the wife who pays or agrees to pay a consideration to the husband for releasing her from the marriage tie by refunding the bride price or making any other agreement for the husband’s benefit… It would be more consistent with the letter and spirit of the Qur’an which places the husband and the wife on an equal footing to construe the classical incident of Sabit bin Qais as meaning that the person in authority, including the judge, can order separation by khulu’ even if the husband is not agreeable to that course. … Khulu is not therefore per se the refund of bride price or any gift to a wife, as parties argued before us, but the process of divorce initiated by a wife.”
Feature Case

An appeal on a decision on an arbitral award can only lie to the Court of Appeal where the High Court, in setting aside the award, steps outside the grounds set out in section 35 of the Arbitration Act.

Synergy Industrial Credit Limited v Cape Holdings Limited
Petition No. 2 of 2017
Supreme Court of Kenya

D K Maraga; CJ & P; M K Ibrahim, S C Wanjala, N Njoki & I Lenaola, SCJJ
December 6, 2019
Reported by Long’et Terer

The parties entered into a partly oral and partly written sale agreement in which the petitioner offered to purchase office blocks and parking spaces from the respondent. The parties disputed on aspects of the agreement. The agreement had set out arbitration as the dispute mechanism tool. According to the terms of the agreement, a sole arbitrator was to be appointed to resolve it. By the time the dispute arose, the petitioner had disbursed a significant amount of money to the respondent, even though the said office blocks and parking spaces were still undergoing construction.

By an award dated January 30, 2015, the arbitrator ordered the respondent to pay the petitioner a sum of Kshs.1,666,118,183.00 being the amount of money advanced to the respondent, accruing interest, loss of income opportunity, exchange fluctuations and costs. Dissatisfied by the award, the respondent filed an application at the High Court under section 35 (2)(a)(iv) & (b)(i) of the Arbitration Act (the Act) seeking to set aside the award. The petitioner on its part filed an application at the High Court seeking to enforce the award.

Upon considering the matter, the High Court by a ruling found that all the issues addressed by the arbitrator fell outside the scope of the reference of the arbitrator and so it set aside the award in its entirety and dismissed the petitioner's application for the enforcement of the award. Dissatisfied by the High Court decision, the petitioner filed an appeal at the Court of Appeal. In response, the respondent sought to strike out the petitioner's notice of appeal as well as the record of appeal on the grounds that there was no right of appeal from a decision of the High Court arising under sections 10, 35, 36 and 37 of the Act.

The Court of Appeal upheld the respondent's application and struck out the notice of appeal and the record of appeal. It specifically held that save for what was provided in section 39, there was no right of appeal from decisions of the High Court made pursuant to section 35 of the Act. Aggrieved by that finding, the petitioner filed the instant petition of appeal.

The issues before the instant Court centered around finality of arbitration proceedings; in particular, whether there was a right of appeal to the Court of Appeal following a decision by the High Court under section 35 of the Act on recourse to High Court against an arbitral award and whether the general right of appeal implied in article 164(3) of the Constitution was restricted in arbitration proceedings.

The majority of the court (M K Ibrahim, S C Wanjala, N Njoki & I Lenaola, SCJJ) made reference to the UNCITRAL Model Law and section 35 of the Arbitration Act in a bid to set out the purpose and the benefits that accrued after the enactment of the Arbitration Act. Arbitration was an attractive way of settling commercial disputes by virtue of the perceived advantages it brought beyond what was generally offered by the normal court processes, which were often characterised by formalities and delays. In addition, arbitration regime was meant to ensure that there was a process, distinct from the courts, of effectively and efficiently solving commercial disputes, the law also recognised that such a process was not absolutely immune from courts’ intervention. Courts of law remained the ultimate guardians and protectors of justice and
hence, they could not be completely shut off from any process of seeking justice.

There was no unrestricted right of appeal under article 164(3) of the Constitution in all instances. The jurisdiction of the Court of Appeal under section 39 of the Arbitration Act could be invoked when the Court determined of questions of law arising in the cause of arbitration proceedings. Section 39, did not prescribe or affect the jurisdiction of any other court as provided in any of the other provisions of the Act. The purpose was to ensure that determination of a question of law particularly where issues of general public importance arose, were subject to appeals. And even though section 35 provided that recourse to the High Court against an award could be made only by an application for setting aside, section 39 provided further circumstances when an award could be set aside either by the High Court or the Court of Appeal hence the use of the term notwithstanding section 10 and 35. Section 39 could not be justifiably interpreted so as to oust the jurisdiction of the Court of Appeal, if at all, in any other section of the Act.

Once parties agreed to settle their disputes through arbitration, the arbitral tribunal should be the core determinant of their dispute. Once an award was issued, an aggrieved party could only approach the High Court for setting aside the award, only on the specified grounds. And hence, the purpose of section 35 of the Act was to ensure that courts were able to correct specific errors of law, which if left alone would lead to a miscarriage of justice. Therefore, even in promoting the core tenet of arbitration which was a quicker and efficient way of settling commercial disputes that should not be at the expense of real and substantive justice. In the interest of safeguarding the integrity of the administration of justice and particularly in the absence of an express bar the Court of Appeal should have residual jurisdiction but only in exceptional and limited circumstances.

Not every decision of the High Court under section 35 was appealable to the Court of Appeal. An intended appeal, which was not anchored upon the four corners of section 35 of the Act, should not be admitted. An intended appellant had to demonstrate or had to be contending that in arriving at its decision, the High Court went beyond the grounds set out in section 35 of the Act for interfering with an arbitral award.

In applying the above criteria, it would be expected that the Court of Appeal would jealously guard the purpose and essence of arbitration under article 159 (3) of the Constitution on judicial authority so that floodgates were not opened for all and sundry to access the appellate mechanism. Similarly, it would be expected that a leave mechanism would be introduced into the laws by the Legislature to sieve frivolous appeals and not create backlogs in the determination of appeals from setting aside of award decisions by the High Court.

The circumstances of the instant case raised questions. A substantial amount of money had been advanced to the respondent by the appellant, money which was the subject of the arbitral award. The award was overturned in its entirety by the High Court. This left the appellant in a precarious situation. Would a judgment that left a party in such a precarious position be said to create confidence in the administration of justice? Would the principle of minimal courts’ intervention in arbitration matters supersede the need to correct an injustice? Where allegations of such manifest unfairness had been made, they should not be left incapable of a higher Court’s review. The Court of Appeal should have assumed jurisdiction to hear the petitioner’s appeal arising from the decision of the High Court under section 35 of the Act limited to the relevant consideration as expressed.

However, the Chief Justice and President of the Supreme Court DK Maraga SCJ dissented. He made reference to the UNCITRAL Model Law and noted that it provided that appeals could lie to a higher court against decisions on arbitral proceedings in limited circumstances as UNCITRAL Model Law could be determined by each State in its adaptive legislation. Under the Arbitration Act, appeals were allowed only under section 39 of the Act and by the consent of the parties. He further noted that none of the arbitration legislations of the countries mentioned in the majority’s judgment was in exact pari materia with the Act. The English, Canadian and Singaporean Arbitration Acts permitted appeals, albeit with leave, against High Court decisions setting or declining to set aside arbitral awards. For instance section 67 of the English Arbitration Act which, like section 35, provided for the setting aside of an arbitral award if, inter alia, the arbitrator acted without jurisdiction, allowed appeals from decisions made thereunder. Section 69(1) and (2) of that Act provided that with the agreement of all the other parties to the proceedings, or with the leave of the court, a party to arbitral proceedings could appeal to the court on a question of law arising out of an award made in the proceedings. Section 69(8) allowed further appeals with leave of the court considered that the question was one of general importance or was one which for some other special reason should
be considered by the Court of Appeal.

In Kenya, arbitral proceedings governed by the Act, an appeal lay to the Court of Appeal only under section 39(3). In the instant matter, the parties never consented on the issue of appeal. The court was dealing with the issue of whether there was a right of appeal, not against the High Court decision made under section 39(2), but from the High Court decision on an application made under section 35 of the Act. Section 39 of the Act had no relevance to the issues at hand.

The principle of finality in arbitral proceedings, and in particular the caution in the failure to uphold it, had attracted considerable scholarly comments. If an arbitral process was treated as if it merely added one layer to the hierarchy of potential decision-making then the system was self-defeating. If courts were free to intervene more liberally in the arbitration process, the advantage of a speedy and less costly resolution of disputes by private arbitration mechanisms would certainly disappear.

Awards should be impervious to court intervention as a matter of public policy. Unwarranted judicial review of arbitral proceedings would simply defeat the object of the Act. The role of courts should therefore be merely facilitative otherwise excessive judicial interference with awards would not only be a paralyzing blow to the healthy functioning of arbitration in the country but would also be a clear negation of the legislative intent of the Act.

In commercial transactions, disputes were often about money, and more often than not, large sums of money. Where money was concerned there were not many good losers. In an adversarial system as Kenya’s, to open unwarranted doors to court intervention in arbitral proceedings, would lead to appeals on literally all issues disguised and presented as challenges to process failures during the arbitration. Arbitral awards or decisions on them would be subject to court challenges on every issue. Arbitration would therefore be an extra cog in the gears of access to justice through litigation or a precursor to litigation. By the time the court determined the issue, the matter would have dragged in court for years. Arbitrations would thus prolong dispute resolution and be self-defeating. In such a scenario, it would be more efficacious to abandon arbitration altogether and litigate all disputes in courts of law.

Timelines in the performance of contracts and speed in the disposal of disputes were the hallmarks of the current competitive commercial environment. The importance of arbitration as an alternative dispute resolution mechanism could not be over-emphasized. Parties entered into arbitration agreements for the very reason that they did not want their disputes to end up in court. The common thread that ran through most arbitration statutes based on the Model Law was the restriction of court intervention except where necessary and in line with the provisions of the Acts of various jurisdictions.

By agreeing to submit disputes to arbitration, a party relinquished his courtroom rights including the appellate process in favor of arbitration with all of its well-known advantages and drawbacks. The dispute in the matter had been raging for over 10 years. That alone was clear testimony of the danger arbitration would be exposed to in the country if unwarranted court intervention was allowed. Failure to adhere to the prescriptions in the Act would hinder investment, as foreign firms and their agents would not be assured of an expeditious clear-cut dispute resolution mechanism in line with international standards. The Chief Justice would have disallowed the appeal.

Orders

i. The petition of Appeal dated February 13, 2017 was allowed on terms that:
   a) the ruling of the Court of Appeal dated December 20, 2016 was set aside.
   b) The petitioner’s notice of appeal dated March 15, 2016, and the record of appeal dated April 22, 2016 filed in the Court of Appeal in Civil Appeal No. 81 of 2016 were re-instated.
   c) Court of Appeal directed to expeditiously and on a priority basis proceed to determine on merits the petitioner’s appeal in Civil Appeal No. 81 of 2016.

ii. Each party bore its own costs.
Supreme Court

There is a limited right of appeal against a High Court decision made under section 35 of the Arbitration Act.

Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)

Petition No 12 of 2016

Supreme Court of Kenya at Nairobi

D K Maraga, CJ & P, M K Ibrahim, S C Wanjala, Njoki Ndungu & I Lenaola, SCJJ

December 6, 2019

Reported by Beryl Ikamari

Alternative Dispute Resolution - arbitration law - arbitral award - court intervention in arbitration - application for setting aside an arbitral award before the High Court - appealability of a decision of the High Court relating to an application to set aside an arbitral award - whether there was a right of appeal against a High Court decision for an application for the setting aside of an arbitral award under section 35 of the Arbitration Act - Arbitration Act (Cap 49), sections 10, 32A and 35.

Jurisdiction - jurisdiction of the Court of Appeal - right of appeal - appealability of High Court decisions made under section 35 of the Arbitration Act - whether article 164(3) of the Constitution provided for an automatic right of appeal for decisions from the High Court - Constitution of Kenya 2010, articles 164(3) and 159(2)(c).

Constitutional Law - fundamental rights and freedoms - rights of access to justice and fair trial - concept of finality in arbitration proceedings - limits placed on court intervention in arbitration proceedings - whether sections 10, 32A and 35 of the Arbitration Act, to the extent that they recognized the concept of finality in arbitration, violated rights of access to justice and fair trial - Constitution of Kenya 2010, articles 48 & 50; Arbitration Act (Cap 49), sections 10, 32A and 35.

Brief facts

Under a distribution agreement, the petitioner contracted to distribute telephone handsets on behalf of the respondent. A dispute arose when the respondent made delivery for orders placed by the petitioner's agent. The value of the order was eleven million Kenya shillings. It turned out that the order was made fraudulently. To resolve the dispute a sole arbitrator was appointed. The arbitrator was to adjudicate on any dispute or claim arising out of or relating to the contract and/or alleged breach thereof. The arbitration proceedings culminated in the delivery of an award of Kshs. 541,005,922.81 in favour of the petitioner. The awarded sum mostly related to the tort of negligence.

The petitioner filed the case of Nyutu Agrovet Ltd v Airtel Network Kenya Ltd Nairobi H.C.C.C. No.350 of 2009 for orders for the setting aside of the arbitral award. The grounds for the setting aside of the award were that it contained decisions for matters that were outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties. The High Court set aside the arbitral award.

The petitioner successfully obtained leave to appeal to the Court of Appeal. An application by the respondent for the striking out of the appeal was allowed on grounds that the decision of the High Court under section 35 of the Arbitration Act was final and no appeal could be lodged at the Court of Appeal against such a decision. The petitioner lodged a further appeal at the Supreme Court. The appeal was certified as one that raised a matter of general public importance under article 163(4)(b) of the Constitution.

Issues

i. Whether there was a right of appeal against a High Court decision relating to the setting aside of an arbitral award under section 35 of the Arbitration Act.

ii. Whether article 164(3) of the Constitution provided for a right of appeal applicable to decisions of the High Court made under section 35 of the Arbitration Act.

iii. Whether sections 10, 32A and 35 of the Arbitration Act to the extent that they recognised the concept of finality in arbitration proceedings, were unconstitutional on grounds that they violated rights of access to justice and fair
hearing as provided in articles 48 and 50 of
the Constitution.

Relevant provisions of the Law

Constitution of Kenya 2010

Article 159(2)(c);

(2) In exercising judicial authority, the courts
and tribunals shall be guided by the following
principles—

... (c) alternative forms of dispute resolution including
reconciliation, mediation, arbitration and
traditional dispute resolution mechanisms shall be
promoted, subject to clause (3);

Section 164(3);

(3) The Court of Appeal has jurisdiction to hear
appeals from—

(a) the High Court; and
(b) any other court or tribunal as prescribed by an
Act of Parliament.

Arbitration Act (Cap 49)

Section 10;

10. Extent of court intervention

Except as provided in this Act, no court shall
intervene in matters governed by this Act.

Section 32A

32A. Effect of award

Except as otherwise agreed by the parties, an arbitral
award is final and binding upon the parties to
it, and no recourse is available against the award
otherwise than in the manner provided by this Act.

Section 35

35. Application for setting aside arbitral award

(1) Recourse to the High Court against an arbitral
award may be made only by an application for
setting aside the award under subsections (2) and
(3).

(2) An arbitral award may be set aside by the High
Court only if—

(a) the party making the application furnishes proof—(i)that a party to the arbitration
agreement was under some incapacity; or
(ii) the arbitration agreement is not valid under the
law to which the parties have subjected it or, failing
any indication of that law, the laws of Kenya; or
(iii) the party making the application was not given
proper notice of the appointment of an arbitrator or

of the arbitral proceedings or was otherwise unable
to present his case; or

(iv) the arbitral award deals with a dispute not
contemplated by or not falling within the terms of
the reference to arbitration or contains decisions on
matters beyond the scope of the reference to
arbitration, provided that if the decisions on matters
referred to arbitration can be separated from
those not so referred, only that part of the arbitral
award which contains decisions on matters not
referred to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the
arbitral procedure was not in accordance with the
agreement of the parties, unless that agreement was
in conflict with a provision of this Act from which the
parties cannot derogate; or failing such agreement,
was not in accordance with this Act; or

(vi) the making of the award was induced or
affected by fraud, bribery, undue influence or
corruption;

(b) the High Court finds that—

(i) the subject-matter of the dispute is not capable of
settlement by arbitration under the law of Kenya; or

(ii) the award is in conflict with the public policy
of Kenya.

(3) An application for setting aside the arbitral
award may not be made after 3 months have elapsed
from the date on which the party making that
application had received the arbitral award, or if
a request had been made under section 34 from the
date on which that request had been disposed of by
the arbitral award.

(4) The High Court, when required to set aside
an arbitral award, may, where appropriate and if
so requested by a party suspend the proceedings to
set aside the arbitral award for such period of time
determined by it in order to give the arbitral tribunal
an opportunity to resume the arbitral proceedings or
to take such other action as in the opinion of the
arbitral tribunal will eliminate the grounds for
setting aside the arbitral award.

Held

1. Jurisdiction was defined as the court’s power to
entertain, hear and determine a dispute before
it. It was also defined as the sphere of the court’s
operations. Article 164(3) of the Constitution
stated that the Court of Appeal had jurisdiction
to hear appeals from the High Court and
any other court or tribunal as prescribed by
legislation. However that jurisdiction did not
amount to a right to appeal to the Court of
Appeal. Article 164(3) of the Constitution
confined the powers of the Court of Appeal by
delimiting the extent to which a litigant could
approach it.

2. Article 164(3) of the Constitution did not provide direct access to the Court of Appeal by all and sundry. The provision only defined the extent of the powers of the Court of Appeal. Section 3(1) of the Appellate Jurisdiction Act, was to the effect that a right of appeal was not automatic but rather it was a creation of the law. A right of appeal could be conferred by the Constitution or a statute.

3. Unhindered access to courts was one of the components of the right of access to justice. However statutory limits relating to appeals did not necessarily infringe on that right. Each case had to be evaluated on its own circumstances.

4. A proper basis had not been laid for the court to make a finding that there was a denial of the right of access to justice and therefore the plea to declare sections 10 and 35 of the Arbitration Act unconstitutional could not be upheld. Additionally, the issue of constitutionality was wrongfully introduced as it was pleaded at the Supreme Court in the first instance.

5. Section 10 of the Arbitration Act provided that except as provided by the Act, no court should intervene in matters governed by the Act. That provision was enacted to ensure predictability and certainty in arbitration proceedings by specifically providing for instances when the court could intervene. Therefore parties to arbitration proceedings would know with certainty about instances when the jurisdiction of the courts could be invoked.

6. Section 10 of the Arbitration Act did not explain whether an appeal could lie against a decision of the High Court confirming or setting aside an award. Assumption of jurisdiction by the High Court under section 35 of the Arbitration Act would be in conformity with section 10 of the Act. However, the question as to whether an appeal could be lodged against a High Court decision made under section 35 of the Arbitration Act was not answered. Neither section 10 nor section 35 of the Arbitration Act answered that question.

7. Section 35 of the Arbitration Act should be interpreted in a way that promotes its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. It allowed an aggrieved party to apply for the setting aside of an arbitral award on certain grounds. The court had the opportunity to correct specific errors of law that could taint the process of arbitration. There was need to shield arbitral proceedings from unnecessary court intervention but there was also need to acknowledge that there could be legitimate reasons for seeking to appeal against High Court decisions.

8. Considering that there was no express bar to appeals under section 35 of the Arbitration Act, an unfair determination by the High Court should not be absolutely immune from appellate review. In exceptional circumstances the Court of Appeal had residual jurisdiction to enquire into such unfairness. However, care should be taken to avoid opening a floodgate of appeals and thereby undermining the very essence of arbitration. Such appeals should address process failures as opposed to the merits of the arbitral award itself.

9. The interested party proposed that an issue of general public importance should deserve an appeal but because such an issue was not capable of being identified with precision due to the many underlying dynamics, the proposal could not be allowed.

10. The interested party’s proposal that an issue substantially affecting one or more of the parties should warrant an appeal, needed something more to be added to it. Generally, the usual result of a court decision was that it would affect the parties and that alone did not mean that the issue warranted an appeal. It was necessary for there to be something beyond a decision that affected the parties. An example of that was a constitutional issue.

11. Where the High Court set aside an arbitral award on constitutional grounds, to prevent it from being the first and final determinant in constitutional issues, an opportunity to appeal should be given. However, alleged breaches of the Constitution were not capable of being litigated by way of an application to set aside an arbitral award but were properly governed under articles 165(3) and 258 of the Constitution.

12. An appeal could only lie to the Court of Appeal against a High Court determination under section 35 of the Arbitration Act where in setting aside an award, the High Court stepped outside the grounds set out in the said section 35 and thereby made a decision so grave and so manifestly wrong that it denied the parties
justic. The Court of Appeal should only assume jurisdiction in the clearest cases.

13. Courts had to distinguish between legitimate claims which were within the ambit of exceptional circumstances necessitating an appeal and claims where litigants wanted an undeserved opportunity and would completely negate the essence of arbitration as an expeditious and efficient way of delivering justice. A mechanism for granting leave to appeal would be a solution to the process of discarding frivolous, time wasting and opportunistic appeals.

14. The Court of Appeal did not determine the substantive complaint as to whether the High Court properly considered the grounds for setting aside an award under section 35 of the Arbitration Act. Without such a Court of Appeal determination, all that the Supreme Court could do was to remit the matter back for a Court of Appeal determination. The Court of Appeal would also have to determine in limine whether the threshold for admitting the appeal had been met and whether the appeal should be heard at all in light of the determinations of the Supreme Court on the circumstances under which such an appeal could be lodged.

D K Maraga, CJ & P [Dissenting]

1. Article 64(1) of the repealed Constitution provided that there would be a Court of Appeal which would be a superior court of record and would have jurisdiction and powers in relation to appeals from the High Court as conferred on it by law. That provision left the jurisdiction of the Court of Appeal and ancillary powers like the right of appeal to be conferred by other legislation. However, article 164(3) of the Constitution provided that the Court of Appeal had jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by legislation. The right of appeal was subsumed in the appellate jurisdiction conferred by that provision. However, an issue as to whether it provided a universal right of appeal arose.

2. Article 159(2)(c) of the Constitution entrenched arbitration in the Kenyan legal system. Further, one of the main objectives of the Arbitration Act was to limit court intervention in arbitral proceedings. The question that arose was whether as related to the issue of court intervention, articles 159(2)(c) and 164(3) of the Constitution were contradictory.

3. In constitutional interpretation, the principle of harmonization was to the effect that the entire Constitution had to be read as a whole and one particular provision would not destroy the other but each provision sustained the other without subordination of one provision to the other.

4. Articles 159(2)(c) and 164(3) of the Constitution did not contradict each other. They were actually complimentary. While article 164(3) provided for the appellate jurisdiction of, and the right of appeal to the Court of Appeal, article 159(2)(c) entrenched arbitration in Kenya as an alternative dispute resolution mechanism with its strictures. Read together they meant that court intervention including appellate intervention in arbitral proceedings, had to be provided for by the Arbitration Act.

5. Sections 10, 32A and 35 of the Arbitration Act, when read together, limited the appellate court’s intervention to domestic arbitrations and only by the consent of the parties, could not be said to run counter to article 164(3) of the Constitution. Consequently, they were not unconstitutional.

6. The Arbitration Act was silent as to whether a High Court decision under section 35 of the Act was appealable. The Court of Appeal, however, had appellate jurisdiction under section 39 of the Arbitration Act in domestic arbitrations and by the consent of the parties. The parties to the appeal did not consent to an appeal. Sections 10 and 32A of the Arbitration Act and the overall objective of the Act, did not allow for an implication that the silence in section 35 of the Act in relation to the right of appeal meant that there was a tacit right of appeal.

7. Arbitration did not deny litigants access to courts but instead provided an alternative mode of dispute resolution that was expressly provided for in article 159(2)(c) of the Constitution. Litigants could select a mode of dispute resolution that suited them. Once a choice to arbitrate had been made, it could not be argued that the right of access to justice had been denied or limited.

8. The principle of finality in arbitration was recognized in section 32A of the Arbitration Act. The import of the provision was that an arbitral
award was final and it could only be challenged in ways provided for under the Act. Sections 10 and 35 of the Arbitration Act restricted judicial intervention in the arbitral process to expedite dispute resolution while maintaining the sanctity of the principle of finality in the entire arbitral process. If the principle of finality was limited to the arbitral awards only and not to any court proceedings founded on them, the objectives of arbitration would be defeated and arbitration would be a precursor to litigation.

Petition of appeal allowed.

Orders:-

i. The order of the Court of Appeal made on March 6, 2015 was set aside in its entirety.

ii. The notice of motion application dated May 3, 2012 in Civil Appeal No. 61 of 2012 Nyutu Agrovet Limited v Airtel Networks Kenya Ltd was dismissed.

iii. Civil Appeal No. 61 of 2012 was to be heard and determined by the Court of Appeal on an expeditious basis.

iv. Each party would bear its own costs.

Supreme Court affirms the Court of Appeal decision declaring sections 7 and 10(4) of the Work Injuries Benefits Act, 2007, inconsistent with both the repealed Constitution and the Constitution of Kenya, 2010


Petition 4 of 2019

Supreme Court of Kenya

D K Maraga, CJ & P; M Ibrahim, S Wanjala, S N dung’u & I Lenaola, SCJJ

December 3, 2019

Reported by Moses Rotich

Constitutional Law – constitutional validity of statutes – principles guiding determination of constitutional validity of statutes – whether the historical context of a statute was a relevant factor in determining its constitutional validity

Constitutional Law – fundamental rights and freedoms – rights to property, access to justice, fair trial and equality and non-discrimination – whether sections 16 and 23(1) of the Work Injury Benefits Act (WIBA) limited access to courts and deprived courts of its judicial mandate while vesting it on the Director of Occupational Safety and Health Services – whether section 25(1) and (3) of WIBA unfairly differentiated between persons and thus unconstitutional – Constitution of Kenya, 2010, articles 40, 48, 50 & 27; Constitution of Kenya, repealed, sections 25(1) and (3) and 82; Work Injury Benefits Act, section 25(1) and (3)

Constitutional Law – legitimate expectation – where section 58(2) of Work Injury Benefits Act (WIBA) provided that pending disputes relating to workplace injuries and diseases be deemed to have been instituted under WIBA – whether that provision violated litigants’ legitimate expectation to have the disputes determined and concluded under the invoked legal system – Work Injury Benefits Act, 2007, sections 52 and 58(2); Employment and Labour Relations Court Act, section 33

Legal Systems – Judiciary – hierarchy of courts – where the High Court pronounced itself on an issue that was pending before the Supreme Court – effect of such pronouncement – whether a High Court decision which was decided during the pendency of Supreme Court proceedings and dealing with similar issues could be allowed to stand

Words and Phrases – discrimination – definition – the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion or handicap – Black’s Law Dictionary, 8th edition, page 500

Brief facts

The High Court declared sections 4, 7(1) and (2), 10(4), 16, 21(1), 23(1), 25(1) and (3), 52(1) and (2), and 58(2) of the Work Injuries Benefits Act, 2007 (WIBA) unconstitutional for contravening certain sections of the repealed Constitution. The Attorney General (1st respondent) was aggrieved by
that decision and appealed against it. The Court of Appeal allowed the appeal only to the extent that it set aside the High Court orders declaring sections 4, 16, 21(1), 23(1), 25(1) and (3), 52(1) and (2) and 58(2) of WIBA to be inconsistent with the repealed Constitution and the Constitution of Kenya, 2010 (the Constitution). It however found that section 7 of WIBA, in so far as it provided for the Minister's approval or exemption of insurers, and section 10(4) thereof were inconsistent with both the repealed Constitution and the Constitution of Kenya, 2010. The Court of Appeal found that the High Court had intended to nullify section 7(4) of WIBA instead of its section 4.

Aggrieved by the Court of Appeal's decision, the petitioner/appellant filed the instant appeal and sought various orders including setting aside the entire order of the Court of Appeal and affirming the High Court decision.

Issues
i. What was the test guiding determination of constitutional validity of statutes or their provisions?
ii. Whether the historical context of a statute was a relevant consideration when determining constitutionality of its provisions.
iii. Whether sections 16 and 23(1) of WIBA were unconstitutional for:
   a. limiting the right to access the courts;
   b. purporting to deny employees the right to file a claim for compensation for workplace injuries and diseases thus violating the right to property; and,
   c. depriving courts of judicial power and conferring them on the Director of Occupational Safety and Health Services.
iv. Whether section 16 of WIBA, which had the effect of preventing an employee from instituting a suit in relation to injuries arising from an accident or disease, amounted to an ouster clause.
v. Whether section 25(1) and (3) of WIBA, requiring an employee who sought compensation to submit to medical examination whenever required to do so by the employer or the Director of Occupational Safety and Health Services unfairly differentiated between persons and thus unconstitutional.
vi. Whether sections 58(2) of WIBA, providing that all claims instituted prior to its coming in force, should be deemed to have been lodged under WIBA were unconstitutional for being retrospective in application and infringing the principle of legitimate expectation.

vii. Whether a High Court decision which was decided during the pendency of Supreme Court proceedings and dealing with similar issues could be allowed to stand.

Relevant provisions of the law

Work Injury Benefits Act

Section 16

No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise under the provisions of this Act in respect of such disablement or death.

Section 21

Notice of accident by employee to employer

Written or verbal notice of any accident provided for in section 22 which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or a notice of the verbal notice shall be sent to the Director within twenty-four hours of its occurrence in the case of a fatal accident.

Section 23

(1) After having received notice of an accident or having learned that an employee has been injured in an accident, the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act.

(2) An inquiry made under subsection (1) may be conducted concurrently with any other investigation.

(3) An employer or employee shall, at the request of the Director, furnish such further particulars regarding the accident as the Director may require.

(4) A person who fails to comply with the provisions of subsection (3) commits an offence.

Section 25

Employee to submit to medical examination

(1) An employee who claims compensation or to whom compensation has been paid or is payable, shall when required by the Director or the employer at the case may be, after reasonable notice, submit himself at the time and place mentioned in the notice to an examination by the
medical practitioner designated by the Director or the employer with the approval of the Director.

(2) ……

(3) An employee shall be entitled at his own expense, to have a medical practitioner of his choice present at an examination by a designated medical practitioner.

Section 52

(1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.

(2) An objector may, within thirty days of the Director’s reply being received by him, appeal to the Industrial Court against such decision.

Section 58(2)

Savings

(2) Any claim in respect of an accident or disease occurring before the commencement of this Act shall be deemed to have been lodged under this Act.

Held

1. There existed principles that underlined the determination of constitutional validity of a statute or its provisions because it was the function of the courts to test ordinary legislation against the Constitution. At the forefront of those principles was a general but rebuttable presumption that a statutory provision was consistent with the Constitution. The party alleging inconsistency had burden of proving such a contention. Therefore, in construing whether statutory provisions offended the Constitution, courts ought to subject the same to an objective inquiry as to whether or not they conformed to the Constitution. Further, it had to be presumed that the legislature understood and appreciated the needs of the people and the laws it enacted were directed to problems which were made manifest by experience and that the elected representatives enacted laws which they considered reasonable for the purpose for which they were enacted. Presumption, therefore, was in favour of the constitutionality of an enactment.

2. To fully comprehend whether a statutory provision was constitutional or not, its true essence ought to be considered. There should be a determination of the purpose and effect of a statutory provision. Intention was construed by scrutinising the language used in the provision which inevitably disclosed its purpose and effect. It was the task of a court to give a literal meaning to the words used and the language of the provision ought to be taken as conclusive unless there was an express legislative intention to the contrary. In seeking for the purpose of a statute or its provision, therefore, it was legitimate to identify the mischief sought to be remedied. The historical background of the legislation was one of the factors to consider in that regard as it allowed the provision(s) to be understood within the context of the grid of other related provisions and the Constitution as a whole.

3. WIBA defined itself as an Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes. Its historical context was relevant to understand its purpose. In May 2001, the Attorney General appointed a tripartite taskforce comprising of members from the government, the Central Organisation of Trade Unions (COTU) representing the trade unions, and the Kenya Federation of Kenya Employers (FKE) representing the employers. Its terms of reference were, inter alia, to consolidate existing labour laws and to make recommendations on proposals for reform or amendment of labour laws to ensure that they were consistent with the conventions and recommendations of the International Labour Organisation to which Kenya was a party.

4. The taskforce proposed five new statutes, one being the Work Injury Benefits Act (WIBA). WIBA was meant to provide for compensation to employees for injuries suffered and occupational diseases contracted in the course of employment. Until the enactment of WIBA, the Workmen's Compensation Act (repealed) was the only Act of Parliament enacted to provide for compensation for injuries suffered by a worker in the course of his or her employment. WIBA also sought to provide for insurance of employees and related matters. It further incorporated the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work ensuring basic human values vital to social and economic development.
5. While the repealed Workmen’s Compensation Act only provided for compensation to workers for injuries suffered in the course of their employment, WIBA provided for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes. WIBA also made it compulsory for every employer to provide an insurance cover for all their employees against bodily injury, disease or death sustained and arising out of and in the course of their employment. Therefore, it was evident that WIBA’s purpose was a noble one. It was meant to offer protection to employees should they get injured or contracted disease(s) in the course of their duties. In addition, its reach was far wider than its predecessor, the Workmen’s Compensation Act.

6. Paragraph 7 of the Sixth Schedule to the Constitution provided that all law in force immediately before the effective date continued in force and should be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. Therefore, all legislation prior to the year 2010 were not necessarily rendered unconstitutional, they ought, in their application and interpretation, to be brought into conformity with the Constitution. The impugned sections of WIBA ought to be addressed in that context.

7. The intention of section 16 of WIBA was not to limit access to courts but to create a statutory mechanism where any claim by an employee under the Act was subjected, initially, to a process of dispute resolution starting with an investigation and award by Director of Occupational Safety and Health Services (the Director). Thereafter, under section 52 of WIBA an appeal mechanism to the Industrial Court (defunct) was provided. Where the Constitution or any other law established an organ, with a clear mandate for the resolution of a given genre of disputes, no other body could lawfully usurp such power, nor could it append such organ from the pedestal of execution of its mandate. To hold otherwise, would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly.

8. Section 16 of WIBA could not be read in isolation so as to create the impression that it curtailed the right to immediately access the courts, because by looking at its intention, the purpose it fulfilled was apparent. That purpose was revealed in section 23 of WIBA which called for initial resolution of dispute via the Director and that could be deemed as an alternative dispute resolution mechanism. Where one was still aggrieved by the decision of the Director, section 52 of WIBA allowed him or her to seek redress in a court process. In the circumstances, access to justice could not be said to have been denied.

9. By granting the Director authority to make inquiries that were necessary to decide upon any claim or liability in accordance with WIBA, the jurisdiction of the High Court to deal with constitutional questions and violations that could arise from such claims under article 165 of the Constitution was not ousted at all. Similarly, the appellate mechanism to the Industrial Court, in the circumstances, could not be legitimately questioned. The Director’s inquiries were also essentially preliminary investigations. Such mechanisms, set out by statute ought to be left to run their full course before a court intervened. Not only did that simplify procedures to ensure that courts focus on substantive rather than procedural justice, it also potentially addressed the problem of backlog of cases, enhanced access to justice, encouraged expeditious disposal of disputes, and lowered the costs of accessing justice.

10. The Director was in essence performing quasi-judicial functions under section 23 of WIBA, and by dint of article 165(6) of the Constitution fell under supervisory jurisdiction of the High Court. The Director’s actions and decisions, even without review or appeal, were therefore still subject to the over-riding authority of the High Court.

11. With regard to section 52 of WIBA, both the High Court and the Court of Appeal correctly determined that it was not the intention of the Legislature to limit appeals from a decision of the Director to the Industrial Court but was a case of unrefined drafting. Accordingly, such inelegance should be left to the Attorney General to take appropriate action.

12. Ouster clauses were provisions in the Constitution or a statute that took away or purported to take away the jurisdiction of a competent court of law. They denied the litigant any judicial assistance in the relevant matter, and at the same time denied the courts the scope for
making any arbitral contribution with respect to the relevant matter. In short, ouster clauses curtailed the jurisdiction of the courts, as the relevant matter was rendered non-justiciable before the courts. Section 16 of WIBA could not be read in isolation because if read with sections 23 and 52 of WIBA, it provided for legal redress to the Industrial Court (replaced with the Employment and Labour Relations Court), and therefore judicial assistance could be sought by aggrieved parties from decisions of the Director and the court could make a determination with respect to all relevant matters arising from those decisions. Therefore, it could not be the case that section 16 of WIBA amounted to an ouster clause. It was merely facilitative of what could eventually end up in court.

13. Considering the nature and extent of the limitation placed under section 16 of WIBA, it did not permanently limit the right to access courts by an aggrieved party. It was only the initial point of call for decisions in workers’ compensation. When section 16 of WIBA was read in whole with sections 23 and 52 of WIBA, a party was not left without access to justice nor did employees or employers have to result to self-help mechanisms. The section allowed the use of alternative dispute resolution mechanisms to be invoked before one could approach a court. That system had been operational without complaint from employees for over a decade. There was no reason to interfere with an already efficient system. As such, sections 16, 23, and 52(1) of WIBA could not be said to be inconsistent with the repealed Constitution or the Constitution of Kenya, 2010.

14. A thorough perusal of WIBA established that section 21(1) did not exist. Section 21 dealt with the notice of an accident by an employee to an employer. Section 21 was never contested at the High Court. The High Court erroneously reproduced a non-existent section 21(1) in its judgment. Accordingly, as the Court of Appeal found, the High Court erred in law by declaring it inconsistent with the repealed Constitution. What the High Court pointed out as being section 21(1) and (3) of WIBA were actually the provisions of section 25(1) and (3) of WIBA. That section provided that an employee who sought compensation or who had been compensated had to submit to a medical examination when required by the Director or the employer.

15. Discrimination entailed the unjust or prejudicial treatment of different categories of people in the same circumstances. There was no prejudicial treatment in the manner medical examinations were conducted as provided by section 25(1) and (3). That was so because, firstly, while the Director could designate a medical practitioner to examine an employee, he or she was a neutral adjudicating party who acted neither for the employer nor for an employee in doing so. Secondly, and as a safeguard against the Director’s arbitrary use of that power, the employer, with the approval of the Director, could refer the employee to its own medical practitioners. Lastly, an employee, at his or her own expense, was at liberty to have a medical practitioner of his or her choice present at the time of the examination. Therefore, the effect of section 25 of WIBA was to ensure that the medical examination and the ensuing report was objective, fair, accurate and sound. That section consequently secured the interests of both employees and employers, advanced equality and did not accord differential treatment to any party. Thus, it neither contravened the repealed Constitution or the Constitution of Kenya, 2010.

16. The legislative practice where a new judicial forum was created to replace an existing system was meant to ensure finalization of all pending proceedings before the forum where they were commenced. For instance, upon the establishment of the Employment and Labour Relations court (ELRC), section 33 of the ELRC Act provided that all pending proceedings should continue to be heard and determined by the Industrial Court until the ELRC came into operation or if and when the Chief Justice or Chief Registrar of the Judiciary so directed. Prior to the enactment of WIBA, litigation relating to work-injuries had gone on and a number of suits had progressed up to decree stage; some were still being heard; while others were still at the preliminary stages. All such matters were being dealt with under the then existing and completely different regimes of law. Claimants in those pending cases had legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA not being unconstitutional and being an even more progressive statute, it was best that all matters were finalized under its
17. Retrospective operation of statutes was not illegal *per se* or in contravention of the Constitution. Indeed, section 58(2) of WIBA clearly expressed the intention that the Act should apply retrospectively. The effect of section 58(2) of WIBA was not to take away the right to legal process, extinguish access to the courts and to take away property rights without due process. Even if so, all matters pending resolution under the previous legal regime were to be continued under WIBA and there was no evidence of denial of any right by that fact alone. Indeed, courts and quasi-judicial tribunals had routinely applied the law in such a manner as to protect existing rights. Therefore, while the Court of Appeal correctly held that a party had the legitimate expectation to have a dispute resolved under the invoked legal regime, there was nothing unconstitutional in WIBA being applied in a manner that was consistent with its provisions but taking into account the invoked legal regime.

18. The petitioner/appellant was a collectivity of advocates and whose statutory mandate included ensuring the fair administration of justice. It could well be said however that it filed the original petition to protect its members who practice law in Kenyan courts and might not have audience before the Director. However, that matter was unimportant and while costs followed the event, there was no reason to burden the petitioner with costs as the dispute related to a wide pool of citizens called employees and employers. Public interest would thus preclude an order of costs against the petitioner.

19. On June 10, 2019, while the instant matter was awaiting determination by the Court, the High Court at Mombasa in the case of *Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party [2019] eKLR)*, Constitutional Petition No. 196 of 2018, rendered a decision whose issues included a determination on the constitutionality of WIBA. The High Court in that decision failed to take judicial notice of the pendency of the instant appeal despite being aware of it. That court ought to have acknowledged the hierarchy of the courts and await the Supreme Court to pronounce itself before rendering itself, if at all. That judgment had created unnecessary confusion in the application of WIBA and could not be allowed to stand as it could be or was contrary to the instant decision. Therefore, the findings and orders expressed in that judgment should be read in the context of the decision of the Court of Appeal and the instant decision.

*Appeal dismissed; each party to bear their own costs.*
Children born of a Muslim father and a non-Muslim mother who were not formally married can inherit the estate of their deceased father

The appellants contended that children born of a Muslim father and a non-Muslim mother, who were not formally married, could inherit the estate of their deceased father because being non-Muslim, Islamic law had no application to them. They also contended that the law was discriminatory and unconstitutional under article 27 of the Constitution of Kenya, 2010 to the extent that it prohibited a non-Muslim wife from inheriting from her Muslim husband and children born out of wedlock from inheriting from their Muslim father.

On the other hand the respondent contended that Islamic law applied to the estate of the deceased by virtue of the constitutional and statutory provisions and that under the law, children born out of wedlock were not entitled to inherit from their Muslim father.

Issues

i. Whether children born of a Muslim father and a non-Muslim mother who were not formally married could inherit the estate of their deceased father.

ii. Whether in succession disputes Islamic law could qualify as part of the limitations to fundamental rights and freedoms set out under the Constitution.

iii. What was the difference between article 24 of the Constitution of Kenya, 2010 and section 82 of the repealed constitution in limiting fundamental rights and freedoms when applying Islamic law?

iv. What were the pre-requisite conditions that needed to be satisfied before application of Islamic law to disputing parties?

v. Whether the High Court, as opposed to the Kadhi’s Court, had the jurisdiction to hear and determine succession disputes where some of the parties had not submitted to the jurisdiction of the Kadhi’s Court and did not profess the Islamic faith.

Brief facts
Relevant Provisions of the Law

Constitution of Kenya, 2010

Article 170(5)

“The jurisdiction of a Kadhi’s court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi’s courts.”

Kadhi’s Court Act

Section 5

“A Kadhi’s court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”

Law of Succession Act

Section 2(3)

“(3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.

(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.”

Held

1. There were a number of constitutional and statutory provisions that actualized and gave full effect to article 27 as read with article 24(4) of the Constitution of Kenya, 2010 (Constitution). The first was article 169 of the Constitution, which created the Kadhi’s court as a subordinate court in Kenya. The second was article 170(5), which conferred jurisdiction on the Kadhi’s court. As regards the statutory provisions, section 5 of the Kadhi’s Court Act reiterated the jurisdiction of the Kadhi’s Court.

2. The Law of Succession Act mirrored the constitutional compromise written in article 27 as read with article 24(4). Section 2(1) of the Law of Succession Act declared the Act to constitute the universal law of Kenya in respect of all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of the Act and to the administration of their estates. However, section 2(3) delivered a qualification.

3. The singular handicap faced in the appeal was that the record did not show the Islamic school of thought that the deceased belonged to. The principal Kadhi held that according to the Islamic law that was applicable to him, children born out of wedlock were not entitled to inherit from their father, which of course seemed to be diametrically at variance with the principles of justice and kindness.

4. In support of the view that the appellants could not inherit from the estate of the deceased because they were born out of wedlock, the High Court relied heavily on its previous judgment In the Matter of the Estate of Ishmael Juma Chelanga (Deceased) [2002] eKLR. The decision was rendered on May 24, 2002 under the Constitution of Kenya, 1963 (repealed) which expressly provided in section 82 that the prohibition of discrimination by the repealed Constitution did not apply to any law making provision for adoption, marriage, divorce, burial, devolution of property on death or other matter of personal law. Although it could be contended that article 24(4) of the Constitution closely mirrored section 82 of the repealed Constitution, there were significant differences.

5. The Constitution had laid great emphasis on respect, enjoyment and protection of rights and fundamental freedoms of all persons. Unlike the repealed Constitution, it did not readily admit to derogation from those rights and freedoms, except in clear, exceptional and tightly controlled circumstances. For example, right from the Preamble, the Constitution adverted to the aspiration of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Article 10, which set out the national values and principles of governance that bound all state organs, state officers, public officers and all persons whenever they applied or interpreted the Constitution, enacted, applied or interpreted the law or made or implemented public policy, expressly recognised human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and
protection of the marginalized among those core values and principles.

6. As for the Bill of Rights, which guaranteed among others, the right to equality and freedom from discrimination, article 19 of the Constitution declared it to be an integral part of Kenya’s democratic state and the framework for social, economic and cultural policies for the purpose of preserving the dignity of the individuals and communities and to promote social justice and the realization of the potential of all human beings. The Constitution further emphasized that the rights and fundamental freedoms guaranteed in the Bill of Rights belonged to each individual and were not granted by the State and were subject only to the limitations allowed by the Constitution. Those rights and freedoms bound and had to be respected by all persons including state organs and were to be enjoyed to the greatest extent possible consistent with the nature of the right or fundamental freedom.

7. Addressing the courts directly, the Constitution demanded that in applying a provision of the Bill of Rights, they had to develop the law to the extent that it did not give effect to a right or fundamental freedom and adopt the interpretation that most favoured the enforcement of a right and fundamental freedom. The courts also had to promote the values that underlay an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and object of the Bill of Rights.

8. As regards implementation of rights and fundamental freedoms, article 21 of the Constitution made it the obligation of all state organs and all public officers to address the needs of vulnerable groups within society, including women and children and members of particular ethnic, religious or cultural communities. Next, article 22 gave all persons a broad and unrestricted right of access to the courts for the purposes of enforcement of rights and fundamental freedoms. Lastly, on the interpretation of the Constitution, article 259(1) laid down important guidelines on how it had to be interpreted. The Constitution was to be interpreted in a manner that promoted its purposes, values and principles; advanced the rule of law, and human rights and fundamental freedoms in the Bill of Rights; permitted the development of the law and contributed to good governance.

9. Article 24 of the Constitution, which provided the circumstances under which rights and fundamental freedoms could be limited, prohibited limitation of rights and fundamental freedoms except by a law which was clear and specific on the right and fundamental freedom to be limited and the nature and extent of the limitation. In addition such law had to state expressly its intention to limit the right or fundamental freedom in question. The limiting law was further subject to strict controls that were intended to avoid facile or casual derogation. The burden was on the person seeking to justify limitation of a right or fundamental freedom to satisfy the court that the limitation in question satisfied the conditions for derogation set by the Constitution.

10. The court set out the provisions to demonstrate the centrality of rights and fundamental freedoms in Kenya’s constitutional set up and the fact that derogation was a strict exception to the rule. Specifically as regards the right to equality and freedom from discrimination, which was implicated in the instant appeal, it could be noted that section 82 of the repealed Constitution allowed derogation from the right to equality and freedom from discrimination in issues of adoption, marriage, divorce, burial, devolution of property on death or other matter of personal law. That derogation was allowed for all communities in Kenya.

11. Article 24(4) of the Constitution had narrowed down the possibility of derogation and allowed that limitation of the right to equality and freedom from discrimination in matters relating to personal status, marriage, divorce and inheritance, only to the extent strictly necessary for the application of Muslim law before the Kadhi’s courts, to persons who professed the religion. Although application of customary law in Kenya was recognised by section 3(2) of the Judicature Act, article 2(4) of the Constitution explicitly provided that any law, including customary law, which was inconsistent with the Constitution, was null and void to the extent of the inconsistency.

12. A reading of article 24(4) together with article 170(5) of the Constitution showed strict conditions that had to be satisfied before a person could invoke Islamic law to derogate from or limit the right to equality and freedom from discrimination:
a. the derogation had to be only to the extent strictly necessary;
b. the derogation had to relate to matters of personal status, marriage, divorce and inheritance;
c. the persons involved had to be persons who professed the Muslim faith; and
d. as regards jurisdiction of the Kadhi’s court, all the parties to the dispute had to profess the Muslim faith and submit to the jurisdiction of the Kadhi’s court.

The conditions had to be strictly satisfied before Islamic law, which the Kadhi’s court and the High Court found did not recognize the appellants as the deceased’s heirs purely on the basis of their status as children born out of wedlock, could apply to them.

13. That the appellants were born out of wedlock following a prolonged and open relationship between the deceased and the appellant was not a fault of theirs. The fault, if it be a fault at all, fell squarely on the shoulders of the deceased and the appellant. It was common ground that the appellants did not profess the Islamic faith and had not submitted themselves to the jurisdiction of the Kadhi’s court. Professing the Islamic faith and voluntarily submitting to the jurisdiction of the Kadhi’s court were absolute preconditions for application of Islamic law to the appellants. If it were otherwise, the words “in proceedings in which all the parties professed the Muslim religion and submitted to the jurisdiction of the Kadhi’s courts” in article 170(5) of the Constitution would be utterly meaningless. The court could not adopt an interpretation of the Constitution that rendered otiose some of its clear provisions. Those preconditions had not been satisfied in the appeal and therefore the principles of Islamic law could not be applied to the appellants.

14. The fact that only one of the parties to the dispute professed the Islamic faith was neither the only, nor the weightiest consideration, in determining the forum and the law applicable to a dispute of the nature. In light of the foregoing, it was not necessary to make any pronouncements, as invited by the appellants, on the presumption of marriage or the alleged unconstitutionality of the implicated principles of succession under Islamic law, save to note that where all the strict conditions adverted to were satisfied, the Constitution allowed application of Islamic law even though it could be perceived as discriminatory. In the same vein, it was not necessary to enter into the discourse on application of international treaties and instruments for the simple reason that they formed part of the law of Kenya, which had to be consistent with the provisions of the Constitution of Kenya.

15. It was the High Court that had to determine the succession to the deceased’s estate under the Law of Succession Act because not all claimants to his estate were Muslims, and the appellants in particular, had not submitted to the jurisdiction of the Kadhi’s court. If there were any other persons who claimed to be dependants of the deceased and entitled to inherit from his estate, their claims would be heard by the High Court together with that of the appellants.

Appeal allowed with each party to bear own costs.

Efficacy of the remedy of reinstatement to a work place where public trust was lost
Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR
Civil Appeal No 66A of 2017
Court of Appeal at Nairobi
P N Waki, M Warsame & F Sichale, JJA
October 11, 2019
Reported by Kadzo Jali

Labour Law – employment - termination and dismissal - summary dismissal of an employee - procedural fairness - where the appellant did not appoint a committee to hear the appeals of the respondents as required by statute -whether the dismissal of the respondents without being given a chance to appeal was procedurally unfair-Kenya Revenue Authority Code of Conduct.

Civil Practice and Procedure - remedies – reinstatement - where the respondents' acts contributed to their termination - where trust had irretrievably
broken down between the employer and employee - whether the court could issue an order of reinstatement where the trust between the employer and employee had broken down

Brief facts

The 1st, 2nd and 3rd respondents were employees of the appellant, Kenya Revenue Authority (the appellant), who had been served with letters of suspension alleging that they had defrauded the appellant through deletion of receipts duly paid for by taxpayers and were dismissed under article 6 B (iv) of the Code of Conduct. Dissatisfied with their dismissal, the three appealed to the Commissioner General (CG) and at the same time, went before the Employment and Labour Relations Court (ELRC) and filed the claim which gave rise to the instant appeal where the trial court found, inter alia, that in failing to supply documents relevant to the defence of the respondents despite requests and a court order to do so, the appellant had engaged in unfair conduct amounting to unfair labour practice contrary to section 45 of the Employment Act (the Act) and article 41 of the Constitution; that the hearing before the disciplinary committee was procedurally flawed since the provisions of section 41(2) of the Act were not complied with and that summary dismissal was wrongful as there was no substantive reason to warrant the sanction of such dismissal. The trial court granted the orders sought by the respondents.

The appellant, aggrieved by that decision, filed the instant petition seeking to challenge the orders of the ELRC declaring that the employment of the three respondents was unfairly terminated and that the respondents were to be reinstated to their former ranks without loss of rank; back salaries, bonuses and allowances.

Issues

i. Whether summary dismissal was unlawful when there was no proof of any substantive reason to warrant a summary dismissal.

ii. What were the elements that had to be discernable during the termination of an employee's employment on the grounds of misconduct?

iii. Whether by not appointing a committee to hear the appeals of the respondents rendered their dismissal by Kenya Revenue Authority procedurally unfair.

iv. Whether the remedy of reinstatement to a work place where public trust was lost was efficient.

Held

1. The court had a duty under rule 29 (1) (a) of the Court of Appeal Rules to re-appraise the evidence and to draw its own inferences of fact on a first appeal. The decision of the trial court was entitled to some measure of deference unless the conclusions made on the evidential material on record were perverse or the decision as a whole was bad in law. Section 17(2) of the Industrial Court Act no longer restricted first appeals to matters of law only as it was deleted by Act No. 18 of 2014.

2. The Employment Act, 2007 placed heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer had to prove the reasons for termination/dismissal; prove the reasons were valid and fair; and prove that the grounds were justified, amongst other provisions. A mandatory and elaborate process was then set up under section 41 requiring notification and hearing before termination. Those provisions were a mirror image of their constitutional underpinning in article 41 of the Constitution which governed rights and fairness in labour relations.

3. The trial court applied a skewed standard of proof, and certainly not the one provided for under section 43 (1) of the Act. It was improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it could take appropriate action subject to the requirements of procedural fairness that were statutorily required.

4. The standard of proof was on a balance of probability, not beyond reasonable doubt, and all the employer was required to prove were the reasons that it genuinely believed to exist, causing it to terminate the employees' services, which was a partly subjective test.

5. The employer was able to show that it genuinely believed that there were reasonable grounds and sufficient grounds to suspect that the respondents had committed gross misconduct in their employment and had done acts which were substantially detrimental to the appellant. It was not for the court to substitute its own reasonable grounds for those of the employer. The dismissal of the respondents was substantively justified and the trial court was in error in finding otherwise.

6. There were conflicting decisions from the court of appeal on the construction and application
of section 41 of the Act. The main conflict was whether the hearings before a disciplinary committee were to be oral or not and whether the employee had to have another employee of their choice, or a shop floor representative, to be present and be heard on the allegations. Section 41 provided the minimum standards of a fair procedure that an employer ought to comply with when terminating the employment of an employee by providing for notification and hearing before termination on grounds of misconduct. The four elements that had to be discernible for termination to pass muster were:

a) an explanation of the grounds of termination in a language understood by the employee,
b) the reason for which the employer was considering termination,
c) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination was made; and
d) hearing and considering any representations made by the employee and the person chosen by the employee.

7. The appellant substantially complied with its code of conduct but the code did not require the presence of another employee or shop floor attendant at the disciplinary proceedings. To that extent, the Code was not consonant with the statute and had to give way and the four elements decanted by the courts were not complied with. So was the appellate procedure which the Code of Conduct provided, that a committee ought to have been appointed to hear the appeals of the respondents but none was appointed. The appeals were summarily dismissed. The disciplinary process did not pass muster.

8. The trial court ordered a reinstatement of the respondents upon the finding that there was no substantive reason for their termination and further, because of procedural unfairness. The trial court had the discretion to make such order, and the instant court had no business interfering if the discretion was judiciously exercised. However, reinstatement was not the only appropriate and effective remedy in the circumstances of the instant case.

9. The appellant was a public body bestowed with the important duty of collecting revenue for running Government services, which activity had to attract public scrutiny. As such, the employees of the appellant had to have utmost trust and integrity. When trust had irretrievably broken down, due to acts and omissions of the respondents, it would be foolhardy to force the employer and the employee to stick together. There was no doubt that the respondents contributed to the acts leading to their termination as envisaged under section 49(4)(b) (c) and (k). The termination, though flawed due to procedural lapses, was lawful and justified. In the circumstances of the case and in consideration of public interest, the remedy that commended itself to the court was that the services of the respondents stood terminated.

Appeal partly allowed with no orders as to costs

Order:

The termination of the respondents’ employment by summary dismissal was changed to termination.

The provisions of the Arbitration Act or any other law does not preclude disputes of a personal nature, including marital disputes and custody of children, from being resolved under the framework of Arbitration Act

TSJ v SHSR [2019] eKLR
Civil Appeal 119 of 2017
Court of Appeal at Nairobi
DK Musinga, SG Kairu, AK Murgor, JJA
November 8, 2019
Reported by Moses Rotich

Alternative Dispute Resolution – arbitration – disputes capable of settlement by arbitration – disputes which were not of commercial nature – disputes relating to custody of children, divorce and distribution of matrimonial property – where the H.H. The Aga Khan Shia Imami Ismailia National Conciliation and Arbitration Board, Nairobi issued an arbitral award with orders relating to custody of children, divorce and distribution of matrimonial property – whether disputes relating to divorce, maintenance, custody of children and distribution of matrimonial property were capable of settlement by arbitration – whether only disputes of commercial nature, as opposed to disputes of personal nature, were envisaged for resolution under the regime of Arbitration Act, 1995

Alternative Dispute Resolution – arbitration – arbitral awards – enforcement of awards emanating from arbitration of marital disputes and custody of children – whether there was a need for a law to provide for enforcement of arbitral awards emanating from settlement of disputes of personal nature

Brief facts

The parties belonged to the Shia Imami Ismailia Muslim faith. They got married on May 2, 1992, in accordance with the principles of that faith, the Islamic law and rites, and were duly issued with a marriage form certifying the marriage by The Aga Khan Shia Imami Ismailia Provincial Council. Prior to the marriage, they had each taken an oath of allegiance affirming that they were true Shia Imami Ismaillia and affirming their entire and complete faith, devotion and loyalty in His Highness the Aga Khan. The marriage was blessed with two children, ZS, who was born on July 26, 1994, and SM, who was born on April 9, 2003.

The marriage was troubled and the husband (respondent) applied to the H.H The Aga Khan Shia Imami Ismailia National Conciliation and Arbitration Board, Nairobi (the Arbitration Board) for prayers that the wife (the appellant) should leave the matrimonial home on grounds of irreconcilable differences. In the alternative, he applied for the dissolution of the marriage. After the hearing the parties and the children, the Arbitration Board published an arbitral award in which it ordered, *inter alia*, that the marriage be dissolved; that the parties provided for arbitration in the event of any matrimonial dispute and that the award of the Arbitration Board fell within the meaning of an arbitral award under section 36 of the Arbitration Act and rule 4 of the Arbitration Rules, 2007, seeking to enforce the award. In dismissing the application, the High Court further held that disputes envisaged to be resolved by arbitration under the Arbitration Act were essentially disputes of a commercial nature and not of a personal nature.

Aggrieved, the appellant lodged the instant appeal. She faulted the High Court for, *inter alia*, failing to appreciate that the marriage contract between the parties provided for arbitration in the event of any matrimonial dispute and that the award of the Arbitration Board fell within the meaning of an arbitral award under section 3 of the Arbitration Act and was therefore enforceable.

Issues

i. What was the genre of disputes envisaged to be resolved under the Arbitration Act?

ii. Whether disputes relating to divorce, maintenance, distribution of matrimonial property and custody of children were capable of settlement by arbitration.

iii. Whether the H.H. The Aga Khan Shia Imami Ismailia National Conciliation and Arbitration Board had jurisdiction to grant divorce, give orders on custody of children and make orders relating to matrimonial property.

iv. Whether there was a need for a law to provide for enforcement of arbitral awards emanating from settlement of disputes of personal nature.

Held

1. The Arbitration Act (the Act) came into force in January 2, 1996. The Bill preceding it provided in the memorandum of objects and reasons that the object of the Bill was to repeal the Arbitration Act, chapter 49 of the Laws of Kenya, which had become outdated and out of step with the contemporary trends in international commercial arbitration and replace it with a new Arbitration Act providing for both international and domestic arbitrations. The memorandum further stated that the Bill would adopt substantially the Model Law on International Commercial Arbitration of the United Nations Commission of money paid by the groom to the bride at the time of marriage) in the amount of Kshs. 300,000.
on International Trade Law (UNCITRAL). During Parliamentary debates deliberating the Bill, the Attorney General hoped that advocates and people in private sector who were involved in commercial disputes would try to make use of the arbitration process to ease congestion in courts. The High Court was right that the disputes that were envisaged for resolution under the regime of the Arbitration Act were disputes of a commercial nature.

2. Despite the background and the considerations that informed the enactment of the Arbitration Act, 1995, there was nothing in the Act itself that limited the application of arbitration process to commercial disputes. The Constitution of Kenya, 2010, (Constitution) had extended the application of arbitration beyond the traditional (in a western sense) commercial sphere. Beyond the command under article 159(2) of the Constitution that courts should promote arbitration and other dispute resolution mechanisms when exercising judicial authority, there was, for instance, recognition of arbitration and other alternative dispute resolution mechanisms in settlement of intergovernmental disputes under article 189 of the Constitution. In the context of matrimonial disputes, section 72 of the Marriage Act recognized that the power to dissolve an Islamic Marriage could reside outside of the courts. The Arbitration Board had jurisdiction because Ismailis submitted to it in respect of their personal law.

3. In relation to children matters, the Constitution gave arbitration and other alternative dispute resolution mechanisms the pride of place. It could not be said that the use of arbitration in the sphere of personal law disputes was either against the law or against public policy. The converse was indeed true. It could not be concluded, as the High Court did, that personal law disputes fell exclusively within the domain of the courts to resolve. Arbitration was no longer an unwelcome stepchild in the courts. Judicial jealousy and mistrust of the arbitration process had been replaced by an era in which arbitration was embraced as an effective and efficient mechanism for resolving disputes.

4. It was not apparent why, despite reference having been made by counsel to the decision in case of Nurani v Nurani [1981] KLR 87, the High Court gave it a wide berth. Despite the fact that it was decided long before the 2010 Constitution of Kenya, it represented the state of the law. There was nothing in the Arbitration Act that would prevent disputes of a personal nature being resolved under the framework of that Act.

5. The Arbitration Board was an organ established under the Constitution of Shia Imami Muslims by which Shia Imami Ismaili Muslims, including the instant parties, were ordained by their spiritual leader to be bound and governed. Under article 13 of that constitution, the Arbitration Board was empowered to act as an arbitration and judicial body and to hear and adjudicate upon domestic and family matters including those relating to matrimony, children of a marriage, matrimonial property, and testate and intestate succession. Under its constitutive agreement, therefore, it was within the mandate of the Arbitration Board to adjudicate on all aspects of matrimonial disputes.

6. Arbitration was underpinned by the principle of party autonomy that, as long as it did not offend the strictures imposed by law, parties in a relationship had the right to choose their own means of resolving disputes without recourse to the courts. Indeed, the High Court appeared to have been alive to that principle when it expressed, in contradictory terms to what it concluded, that its decision did not preclude a body such as the Arbitration Board from arbitrating over disputes relating to custody and maintenance of children where both parties submitted to the authority of such a body by agreement. The High Court appeared to have overlooked that the parties had indeed submitted to the authority of the Arbitration Board by dint of their religious edict under their constitution. The Arbitration Board exercised its powers in accordance with its mandate under its constitutive instrument. The High Court erred in holding that the Arbitration Board exceeded its mandate.

7. Section 73 of the Children Act established children courts for the purpose, inter alia, of conducting civil proceedings on matters set out thereunder; hearing any charge against a child (subject to exceptions); hearing a charge against any person accused of an offence under the Children Act; and exercising any other jurisdiction conferred by that Act or other written law. There was no stipulation in that provision that such jurisdiction was exclusive. Part VII of the Children Act provided that a court could,
on application, make orders regarding custody, care and control, maintenance of children but again without stipulation that such jurisdiction was exclusive.

8. There was nothing in the Arbitration Act that would prevent a body such as the Arbitration Board from arbitrating over disputes of personal nature where both parties submitted to the authority of such a body. However, with regard to the enforcement of such arbitral awards, there was an argument for law reform. Perhaps an amendment to part VI of the Civil Procedure Act, on Special Proceedings or enactment of specific rules to expressly provide for the recognition and enforcement of such decisions, in the same way settlements arising from other alternative dispute resolution mechanisms were recognized, registered and enforced by the court, could provide a more direct process for recognition and enforcement of the same. In the meantime, there was no reason why such awards could not be recognized and enforced under the existing procedural machinery under either the Civil Procedure Act and the Rules or under the Arbitration Act. The role of the court when considering such application was not to merely rubberstamp decisions of such bodies. Such decisions ought to accord with the law to be recognized and enforced.

Appeal allowed; costs awarded to the appellant.

Legal requirements relating to Islamic law divorce proceedings instituted by the wife.

SYT v TA
Civil Appeal 87 of 2016
Court of Appeal at Mombasa
W Ouko (P), Asike-Makhandia, K M’inoti, JJA
September 26, 2019
Reported by Beryl Ikamari

Family law – divorce - dissolution of a marriage under Islamic law - petition for divorce by a wife- khulu-where the husband, in an Islamic marriage divorce petition, raised a counterclaim for the return of property but did not provide evidence in relation to the property-whether in every case, where a wife in an Islamic marriage petitioned for divorce, it was necessary for the court to order the wife to return the bride price and/or other property that she received from the husband- Constitution of Kenya 2010, article 170(5).

Civil Practice and Procedure- assessors – role of Chief Kadhi, while serving as an assessor, in Islamic divorce proceedings – whether the High Court was bound by the opinion of an assessor – Civil Procedure Act (Cap 21), section 87

Brief facts
At the Kadhi’s Court, the respondent filed a divorce petition against the appellant on grounds of cruelty and infidelity. In turn, the appellant filed a counterclaim at the Kadhi’s Court in which he accused the respondent of infidelity and sought orders for the return of household goods taken by the respondent from the matrimonial home and other documents including property ownership documents. He also sought orders for the respondent to account for rent collected since May 2014 from a shop at the matrimonial home. The appellant asserted that upon satisfaction of the counter-claim he would accept the prayer for the dissolution of the marriage.

The Kadhi’s Court allowed the prayer for dissolution of the marriage. It dismissed the counterclaim while stating that the matter before it was about dissolution of marriage and not matrimonial property. That court added that the appellant had not provided evidence in relation to the property. The appellant’s appeal at the High Court was dismissed. The High Court made the finding that the decision of the Kadhi’s Court could not be faulted and that the appellant’s prayer for khulu and property, which was rejected by the trial court, remained unsubstantiated as no evidence was tendered to support it. The Chief Kadhi, serving as an assessor, was of a differed view. The Chief Kadhi favoured the grant of orders for a retrial.

Issues
i. What were the Islamic law requirements relating to situations where divorce proceedings were initiated by the wife?
ii. Whether in Islamic law divorce proceedings khulu could be effected without the husband’s consent.
iii. Whether in Islamic law divorce proceedings initiated by a wife, the court had to order for the return of bride price and other property given by the husband to the wife, in spite of the husband’s failure to provide proof relating to the property.
iv. What was the role of the Chief Kadhi as an assessor in Islamic marriage divorce proceedings?
v. Whether the High Court was bound by the opinion of assessors.

**Held**

1. The appeal was a second appeal and the Court’s mandate was limited to considering questions of law. Unless it was shown that the lower court considered matters it should not have considered or it did not consider matters that it should have considered or that the decision was perverse, the Court of Appeal would not interfere with its findings of fact.

2. Article 170 (5) of the Constitution provided that the jurisdiction of the Kadhi’s Court was limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties professed the Muslim religion and submitted to the jurisdiction of the Kadhis’ courts. The appeal was about what should happen to the bride price after the dissolution of the marriage between the appellant and the respondent.

3. The High Court did no concur with the opinion of the Chief Kadhi who was sitting as an assessor. The role of assessors under section 87 of the Civil Procedure Act was to assist the trial court in cases of questions relating to the laws or customs of any tribe, caste or community. The assessor’s opinion was important but the court retained the ultimate power to determine the outcome of a case. As a matter of good practice, where the court’s views differed from those of the assessor, the court should provide reasons for that difference.

4. Islamic law allowed a husband to release a wife from marriage by way of pronouncement of *talaq* and it allowed a wife to release herself from the marriage by way of *khulu*. *Khulu* was a procedure of divorce in Islam initiated by a wife on condition that she returned the bride price or something else that she received from the husband. A wife had to have a reasonable and valid reason to ask for *khulu* and it was not acceptable for the husband to receive more than the amount of bride price paid to the wife.

5. Islamic law jurisprudence showed that *khulu* could be obtained even if the husband did not agree to it. If a married couple was unable to maintain the limits set by the Holy Quran, *khulu* could be effected without the husband’s consent.

6. The Kadhi’s Court granted *khulu* in terms of dissolving the marriage but it did not give orders relating to the return of property as sought in the appellant’s counterclaim. The respondent’s grounds for divorce, including cruelty and infidelity, were not challenged by the appellant. The appellant did not provide evidence that would support orders for the property to be returned and the rule of evidence was that he who made an assertion had to prove it.

7. Aside from making the finding that no proof relating to property claims had been tendered, the trial court dismissed a preliminary objection while asserting that the claim related to dissolusion of a marriage and issues about matrimonial property were beyond its jurisdiction. No appeal had been lodged against that finding of the Kadhi’s Court on jurisdiction.

*Appeal dismissed.*
Constitutional Law—fundamental rights and freedoms—rights to equality and freedom from discrimination—right to fair administrative action and freedom of expression—enforcement of fundamental rights and freedoms—where a county assembly applied a standing order that deemed a bill seeking to amend the Constitution by popular initiative withdrawn because of a lack of a seconder of the bill—claims that the county assembly violated the stated articles of the Constitution on Bill of Rights by adopting the wrong procedures when considering and approving the Punguza Mizigo Bill—Constitution of Kenya, 2010, articles 27, 28, 29(d), 33, 38, 43, 47, 53, 54, 55, 56 & 57.

Constitutional Law—county assembly—separation of powers—doctrine of separation of powers—where county assembly Standing Orders application on a Bill was alleged to have infringed on constitutional rights—what was the role of the High Court in interpreting county assembly Standing Orders alleged to have infringed on constitutional rights and whether it amounted to usurpation of county assembly legislative mandate—Constitution of Kenya, 2010, articles 23(1), 47, 159 (e) & 165.

Jurisdiction—jurisdiction of the High Court—supervisory jurisdiction—judicial review jurisdiction—whether the High Court’s supervisory and judicial review jurisdiction included reviewing the circumstances under which a county assembly set aside a bill before it—Constitution of Kenya, 2010 articles 47 & 165(6).

Constitutional Law—national values and principles of governance—public participation—threshold to be met in the fulfilment of public participation—role of the county assemblies in facilitating public participation to Bills intended to amend the Constitution by popular initiative—whether the Court could rule on the lack of public participation in a draft bill to amend the Constitution by popular initiative without the bill having undergone the double decision making processes required to take place at the county assemblies and parliament—what were the stages at which a draft Bill amending the Constitution by popular initiative was to be subjected to public participation—Constitution of Kenya, 2010, articles 10, 196 & 257.

Brief Facts

The applicants contended that the unconstitutional application of Standing Order 54 excluded the 1st applicant and constituents of Kirinyaga County from airing their views on the Bill, and the Members of the 1st respondent’s county assembly from debating and voting on the Bill. That was discriminatory and contrary to article 27, as they would not have the same chance constituents of other counties had in making a decision on the Bill. They also cited violation of their right to dignity under article 28 of the Constitution in the manner in which they as worthy members of society were denied a chance to comment on the Bill.

The respondents averred that article 257(5) of the Constitution called upon the county assembly to consider a Bill submitted to the assembly and did not prescribe a procedure to be used by the county assembly in its consideration. The 1st and 2nd respondents complied fully with the Standing Orders of the 1st respondent. And that a member of county assembly was under no obligation to second a Motion and any other member of the county assembly present was at liberty to second the Motion and the 2nd respondent denied none the opportunity to second the Motion.

Issues

i. Whether the High Court’s supervisory and judicial review jurisdiction included reviewing the circumstances under which a county assembly deemed a bill as withdrawn.

ii. Whether a county assembly actions of applying Standing Order aimed at defeating the consideration and approval of a (Constitution
of Kenya Amendment) Bill were illegal, unlawful and procedurally unfair.

iii. Whether a county assembly actions of applying Standing Order that deemed (Constitution of Kenya Amendment) Bill withdrawn infringed on the applicants’ constitutional right of equality and freedom from discrimination, right to dignity and freedom of expression.

iv. What were the conditions precedent for a judgment to apply in rem?

v. Whether the court could rule on the lack of public participation in a draft bill to amend the Constitution by popular initiative without the bill having undergone the double decision making processes required to take place at the county assemblies and parliament.

Relevant Provision of the Law

Constitution of Kenya 2010

1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters.

2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.

3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.

4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.

5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.

6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it.

7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.

8) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.

9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Article 256(4) and (5).

10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in Article 255(1), the proposed amendment shall be submitted to the people in a referendum.

11) Article 255(2) applies, with any necessary modifications, to a referendum under clause (10).

Kirinyaga County Standing Orders

Order 54

(1) The question on any Motion shall not be proposed unless it shall have been seconded and any Motion that is not seconded shall be deemed to have been withdrawn and shall not be moved again in the same Session.

(2) Despite paragraph (1), a Motion made in Committee shall not require to be seconded.

Order 118

No Bill shall be introduced unless such Bill together with the memorandum referred to in Standing Order 114(Memorandum of objects and reasons), has been published in the county Gazette and the Kenya Gazette (as a Bill to be originated in the County Assembly), and unless in the case of a County Revenue Fund Bill, an Appropriation Bill or a Supplementary Appropriation Bill, a period of seven days, and in the case of any other Bill a period of fourteen days or such shorter period as the County Assembly may resolve with respect to the Bill, has ended.

Held

1. The court as a judicial review court exercised supervisory jurisdiction pursuant to the provisions of articles 47 and 165(6) of the Constitution, particularly when any contravention and/or violation of constitutional and statutory provisions by a public body or unfair action by an administrator was alleged, and intervened to protect and redress the rights of the affected party. Article 165 (6) of the Constitution provided that the High Court had supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. The impugned actions arose out of the exercise of the respondents’ constitutional and statutory powers and functions as legislative bodies, and their decisions clearly affected the applicants’ rights and interests. Therefore, amenable to the court’s supervisory jurisdiction to ensure that the exercise of their powers was legal, rational and compliant with the principles of natural justice.
2. An ordinary interpretation of article 257 was that a draft Bill to amend the Constitution by popular initiative was required to be approved by majority of the county assemblies before transmission to parliament for approval by a majority, or approval by a referendum as the case would be. There was no provision in the said article as to the procedures for consideration and approval of Bill to amend the Constitution by popular initiative, and it was therefore left to the county assemblies to employ their procedures for consideration and approval of Bills. The court had to restrain itself as the power and mandate was specifically given to the legislatures under the Constitution.

3. Article 185 of the Constitution provided that a county assembly would make any laws that were necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule. Section 14 (1) of the County Governments Act gave the county assemblies powers to make Standing Orders consistent with the Constitution and the Act that regulate their procedure, including the proper conduct of proceedings and establishment of committees. Section 21 of the Act also provided for the procedure for the exercise of their legislative powers, which should be through Bills passed by the county assembly and assented to by the governor. The Bills would be introduced by any member or committee of the county assembly, but a money Bill would only be introduced by the relevant committee.

4. The court was not in a position to determine which of the two procedures was the correct or wrong procedure, save to state that the 1st respondent was at liberty to employ the procedure it felt was appropriate in the circumstances in the exercise of its constitutional and statutory mandate. The only finding the court could make was as regard the propriety and rationality of the procedure employed by the respondents. The procedure of motions, which were proposals made for the purposes of eliciting a decision by a legislative body was an accepted method of debate and consideration by legislative bodies. The essential stages in obtaining a decision in the process of debate were the moving of a motion, the proposing of a question by the Chair or Speaker, the putting of the question and the collection of voices or division on the motion.

5. Motions were provided for in Standing Orders 43 to 66 and 224 of the 1st respondent's Standing Orders which showed that such a motion on the Bill was tabled for consideration, it was exempted from notice under Standing Order 224(1). A question on the same put by the speaker, and when the motion was not seconded by any of the county assembly members present before being debated upon, it was deemed to have been withdrawn pursuant to the provisions of Standing Order 54. Therefore, to the extent that motions were an accepted norm and tradition of consideration of matters before legislative bodies and expressly provided for by the 1st respondent's Standing Orders, the court could not make a finding of unconstitutionality or illegality in the procedure employed by the respondents.

6. The alternative procedure proposed by the applicants in Part XIX of the 1st respondent's Standing Orders dealt exclusively with Bills that were generated by the members or committees of the 1st respondent, and which, in line with article 185 of the Constitution, were in relation to the functions of the counties. It did not address the circumstances of the Bill or Bills initiated by way of popular initiative. In addition, the procedures of Part XIX of the 1st respondent's Standing Orders provided for the main stages of passing of Bills through first reading, second reading, committee stage and the third reading, with one of the main purposes being of debating and making proposals on amendments to the Bills.

7. In the case of a constitutional amendment Bill by way of popular initiative, a gray area was whether any such amendments could be proposed or made during consideration by the county assemblies, which traditionally was not the case with constitutional amendment bills. The court therefore found the reasons given by the respondents in not adopting the procedure in Part XIX of their Standing Orders were rational and had a legal basis.

8. Article 196 of the Constitution required the 1st respondent to facilitate public participation and involvement in its legislative and other business, and that included the Bill. Indeed, the whole purpose of a constitutional amendment by popular initiative was to involve public in the decision making on such amendments. The effect of such lack of public participation could only be determined upon the conclusion
of the process envisaged in article 257 of the Constitution, given the double decision-making processes that were required to take place at the county assemblies and parliament. It would be premature to make a decision as to the effect of such lack of public participation at that stage and in the circumstances of the application, given the different actors in the promotion and passage of a Bill to amend the Constitution by popular initiative.

9. The procedure employed by the 1st respondent was provided for in its Standing Orders, and was one of the procedures it could employ in the consideration of the Bill, it was not a procedure that should be encouraged in light of the democratic and good governance values enshrined in the Constitution, and the legal and political objectives of an amendment to the Constitution by popular initiative as a means of direct democracy.

10. Since the passage of a constitutional amendment by popular initiative was a national exercise that affected the Independent Electoral and Boundaries Commission, all county assemblies, and parliament, the National Parliament needed to develop and enact a law to ensure uniformity in the procedures of consideration and approval by county assemblies of Bills to amend the Constitution by popular initiative, and to ensure the inclusion and insulation of key constitutional and democratic requirements and thresholds in the said procedures. The law should also address the other procedural aspects demanded by article 257 of the Constitution.

11. The arguments by the applicants that the application of Order 54 of the 1st respondent’s Standing Orders excluded the applicants and other constituents of Kirinyaga County from airing their views, and the members of the 1st respondent from debating and voting the Bill, hence denying them equal chance as other counties in the decision making on the Bill, and violating various other constitutional rights in the process. It was evident that the alleged violations were dependent and pegged on a finding that Order 54 was the wrong procedure that was utilized by the respondents. Since the court had found that the procedure in the 1st respondent’s Standing Order 54 was properly utilised despite its outcome, it followed that the ground failed.

12. There were certain conditions that had to be met for a judgment to operate in rem. Firstly, the court had to have jurisdiction and control over the thing that was the subject of the judgment. Secondly, notice was required to be given to persons whose interests were to be so affected, and lastly a hearing had to be granted. The applicants wanted the judgment to apply to all forty-seven county assemblies. However, the facts giving rise to the court’s judicial review jurisdiction over the said forty-seven county assemblies were not given by the applicant.

13. The judicial review application was about the procedure adopted by the county assemblies in the consideration and approval of the Bill, it had not been shown if a similar procedure as that adopted by the 1st respondent was adopted by all the forty-seven county assemblies, and indeed what procedure was adopted by the other county assemblies. It was also not evident that the said county assemblies applied the same Standing Orders as the 1st respondent to regulate their procedure, and the said Standing Orders were not brought in evidence. Even though, the court directed that the said county assemblies be served with notice of the application, due to the constitutional time limits explained, it was not possible to give a hearing to all the county assemblies. The judgment would only apply to the applicants and respondents and should operate in rem to all forty-seven county assemblies.

Application dismissed with no orders as to costs.

Order:

Deputy Registrar ordered to forward a copy of the judgment to the Speakers of the National Assembly and Senate, for noting of the recommendations on enactment of appropriate legislation on the procedures for transmission, consideration, approval and enactment of Bills to amend the Constitution by popular initiative under article 257 of the Constitution.
Section 66(1) of the Marriage Act on petition for separation or dissolution of civil marriages only after three years declared unconstitutional for being discriminatory and violating the right to human dignity and access to justice
Tukero ole Kina v Attorney General & another [2019] eKLR
Petition 6 of 2018
High Court at Malindi
R Nyakundi, J
September 23, 2019
Reported by Kakai Toili

Statutes – interpretation of statutes – interpretation of section 66(1) of the Marriage Act – where section 66(1) of the Marriage Act limited parties to a civil marriage to a three year waiting period before any of them could petition for separation or dissolution of the marriage – whether section 66(1) of the Marriage Act was discriminatory and violated the right to human dignity and access to justice – Constitution of Kenya, 2010, articles 27, 28 & 48; Marriage Act, 2014, section 66

Statutes – interpretation of statutes – interpretation of legislative provisions alleged to have infringed on constitutional rights - what was the proper way of interpreting a legislative provision alleged to have infringed on constitutional rights - Constitution of Kenya, 2010, articles 23(1), 159 (e) & 165

Constitutional Law – constitutionality of statutes - presumption of constitutionality of statutes – rebuttal of the presumption of constitutionality of statutes - under what circumstances could the presumption of constitutionality of statutes be rebutted

Constitutional Law – separation of powers - doctrine of separation of powers – rationale – where a legislative provision was alleged to have infringed on constitutional rights - what was the role of the High Court in interpreting a legislative provision alleged to have infringed on constitutional rights and whether it amounted to usurpation of Parliament’s legislative mandate

Constitutional Law – fundamental rights and freedoms – right to equality and freedom from discrimination – determination of discrimination - guiding principles - what were the factors to be considered in determining whether discrimination was unfair - Constitution of Kenya, 2010, article 27

Brief Facts
The petitioner filed the instant petition seeking a declaration that section 66(1) of the Marriage Act, 2014 (the Act) was unconstitutional, null and void for running afoul of among other attendant rights and freedoms such as article 27 of the Constitution of Kenya, 2010 (the Constitution) on the right to equality and freedom from discrimination. Section 66 (1) of the Act provided that a party to a civil marriage could not petition the court for the separation of the parties or for the dissolution of the marriage unless three years had elapsed since the celebration of the marriage.

Issues
i. Whether section 66(1) of the Marriage Act, which limited parties to a civil marriage to a three year waiting period before any of them could petition for separation or dissolution of marriage was discriminatory and violated the right to human dignity and access to justice.

ii. What was the proper way of interpreting a legislative provision alleged to have infringed on constitutional rights?

iii. Under what circumstances could the presumption of constitutionality of statutes be rebutted?

iv. What was the rationale for the doctrine of separation of powers?

v. What was the role of the High Court in interpreting a legislative provision alleged to have infringed on constitutional rights and whether it amounted to usurpation of Parliament’s legislative mandate?

vi. What were the guiding principles in determining whether there was discrimination and what were the factors to be considered in determining whether discrimination was unfair?

Relevant Provisions of the Law
Constitution of Kenya, 2010
Article 27

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.

2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

4. The State shall not discriminate directly or
indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

Article 28 - Human dignity

Every person has inherent dignity and the right to have that dignity respected and protected.

Article 259

(1) This Constitution shall be interpreted in a manner that—

(a) Promotes its purposes, values and principles;

(b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) Permits the development of the law; and

(d) Contributes to good governance.

Marriage Act, 2014

Section 66

(1) A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.

Held

1. The Court was constitutionally mandated under article 23(1) of the Constitution of Kenya, 2010 (the Constitution) to hear and determine applications for redress of a denial, violation or threat to a right or fundamental freedom in accordance with article 165 of the Constitution. When the violation or threat stemmed from a clause contained in a statute, it behooved the court to lay side by side the impugned provision of statute and articles of the Constitution it was alleged to have offended and see whether the former squared with the latter.

2. Article 2 of the Constitution ordained the Constitution as the supreme law of the land and further avowed that any law that failed to resonate with the Constitution was invalid to the extent of its inconsistency. Article 10 of the Constitution on the other hand was premised on the basis that the national values and principles were binding to all and ought to be considered when enacting, applying and interpreting any law. Those principles, especially as they related to the instant petition included human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

3. The spirit and tenor of the Constitution ought to reverberate throughout the approach towards the interpretation of the Constitution in relation to the question at hand. In addition, the interpretation ought to be holistic rather than restrictive. In construing the impugned provisions, the Court was enjoined to go further than avoiding an interpretation that clashed with the constitutional values, purposes and principles. The Court had to also seek a meaning of the provisions that promoted constitutional purposes, values, principles, and which advanced rule of law, human rights and fundamental freedoms in the Bill of Rights. The interpretation ought to permit development of the law and contribute to good governance. The purposes and principles of the Constitution as required by the provisions of article 159 (e) of the Constitution had to be promoted and protected.

4. There was a very heavy burden cast on any person challenging the validity of any piece of legislation since there was a presumption that the legislature understood and correctly appreciated the needs of the people and that its laws were directed to problems made manifest by experience. The court would only declare a statute invalid if it conflicted with the Constitution and so the onus was on anyone seeking to impugn a statute to show that in the circumstances which existed at the time it was passed, the legislation violated rights enshrined in the Constitution.

5. The presumption of constitutionality of a statute was rebuttable. Parliament could not evade a constitutional restriction by a colourable device. In order to rebut the presumption, the court would have to be satisfied that Parliament in so declaring was either acting in bad faith or had misinterpreted the provisions of the Constitution under which it purported to act.

6. The principle of separation of powers developed as a political idea and was intended to enhance liberty and restrict tyranny by ensuring that all power in a governance system was not concentrated in the same person or group of persons. According to the classical doctrine of
the separation of powers, the power of enacting laws (legislative power) should be separated from the power of administering the State (executive power) and the power of interpreting and applying the laws to particular cases (judicial power). However, constitutions adhering to that doctrine such as Kenya do not typically keep the branches of Government entirely separate. The doctrine allowed for each of the three branches of Government to have some involvement in, or control over, the acts of the other two. That partial mixture of mutually controlling powers was known as a system of checks and balances.

7. The doctrine of proportionality stated that all laws enacted by the legislature and all actions taken by any arm of the State, which impacted a constitutional right, ought to go no further than was necessary to achieve the objective in view. The test of proportionality stipulated that the nature and extent of the State’s interference with the exercise of the right had to be proportionate to the goal it sought to achieve. Put differently, proportionality involved the court taking into consideration both the purpose and effect of the legislation.

8. Both purpose and effect were relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect could invalidate legislation. All legislation was animated by an object the legislature intended to achieve. That object was realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, were clearly linked, if not indivisible. Intended and achieved effects had been looked to for guidance in assessing the legislation’s object and thus the validity.

9. It was the duty of the Court to scrutinize allegations of rights infringement, that duty was germane to the edicts of constitutional interpretation and was no way a usurpation of the mandate of Parliament. Where the purpose or the effect of an impugned provision went against the grain of the Constitution, or where there was no discernible link between the legislation and the purpose, then the Court could not shirk its constitutional fiat to call the offending provision into question.

10. In determining discrimination, the guiding principles were clear:
   a. The first step was to establish whether the law differentiated between different persons.
   b. The second step entailed establishing whether that differentiation amounted to discrimination.
   c. The third step involved determining whether the discrimination was unfair.

Section 66(1) of the Act denied parties desirous of dissolving their union under the umbrella of civil marriage the opportunity to do so unless and until a three year period had lapsed since the celebration of that union. That was *prima facie* discriminatory.

11. Whether or not the discrimination was unfair could be assessed by considering the following:
   a. Whether the provision differentiated between people or categories of people. If so, whether the differentiation could stand a rational connection to a legitimate purpose. If it did not then there was a violation of the Constitution. Even if it bore a rational connection, it could nevertheless amount to discrimination.
   b. Whether the differentiation amounted to unfair discrimination, that required a two-stage analysis:
      i. Firstly, whether the differentiation amounted to discrimination. If it was on a specified ground, then discrimination would have 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.
      ii. If the differentiation amounted to discrimination, whether it amounted to unfair discrimination, if it had been found to have been on a specified ground, then the unfairness would be presumed. If on an unspecified ground, unfairness would have 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.
   c. 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 of the Constitution.

12. The discrimination in the instant case was on an unspecified ground, it was upon the complainant to establish the same. The test for that focused primarily on the impact of the discrimination on the situation of the complainant. The policy argument fronted by the respondents as a basis for the differential treatment of persons desirous of dissolving a marriage fell short, a cursory observation of the underpinnings of that argument revealed that the same was wholly based on the position in England. Further reliance was placed on the position in Singapore. However, scarce effort was expended by the respondents to prove that in passing the impugned provision, the drafters of the Act paid any mind to public policy. If the imposition of the three year limitation was indeed a public policy consideration, all the parliamentary draughts men had to do was to express their said intention uniformly across all the regimes of marriage contemplated under the Act. After all, it was provided in section 3 (3) of the Act that all marriages had the same legal status. None of the following questions were answered to the Court's satisfaction or answered at all by the respondents:

a. Why there was no such limit imposed on the four other regimes of marriage envisioned under the Act.

b. What informed the decision to pick three years and not two or four?

c. The reasoning that was used to arrive at the conclusion that the three year period was sufficient enough to make a fledgling marital union stable.

13. The position of civil marriage as one of the five regimes recognised in Kenya could not be understated. Christian Marriages as per section 17 of the Act were restricted to parties that professed the Christian faith. Per section 43(1) of the Act, customary marriage was entered into in observance of the customs of the communities of one or both of the parties. Respectively, sections 46 and 48 of the Act dictated that only parties that professed the Hindu or Islamic faith could enter into such unions. Inverse to the foregoing was the position of civil marriages, there was no limitation as to creed or community. All that was required was the intention of consenting adults. The umbrella of civil marriages sheltered not only the persons that did not fit the specific restrictions of faith and community but also persons that though having those options, for one reason or the other chose to celebrate a civil marriage.

14. It was clear that not only did the three year limit affect a wide classification of people but also that the respondents’ notion that, that wide category could simply resort to the other available regimes of marriage recognised under the law was patently false. The only logical conclusion left to draw was that the decision to limit the presentation of petitions for separation and dissolution of civil marriages until after the lapse of three years since the celebration of the union was arbitrary and with no backing whatsoever. Section 66(1) of the Act was discriminatory and in violation of article 27(4) of the Constitution to the extent that it arbitrarily limited parties that had celebrated a union under the auspices of a civil marriage to a three year wait period before such a union could be dissolved.

15. The right to form a marriage union should not be subjected to such restrictions as could be presented by law that infringed on the fundamental rights and freedoms. A look at the provisions of section 66(1) of the Act as enacted by the Legislature and assented to, read together with other relevant provisions on forms of systems of marriage the aforesaid provision attaching a three year limit amounted to discrimination and a violation to the right on equality in terms of article 27 of the Constitution.

16. By imposing the three year limitation, the impugned section had the effect of forcefully keeping parties in a situation they no longer wished to be part; so that while section 66 (2) of the Act contemplated cruelty and exceptional depravity as a ground for dissolution of marriage, a petition could not be entertained until the time limit was reached. That prima facie was a case of an affront to a person's human dignity preserved by article 28 of the Constitution.

17. By parties being unreasonably proscribed from enjoying the right to petition for a divorce before the lapse of three years, their right to access to justice guaranteed under article 48 of the Constitution was infringed upon.

18. The petitioner had amply rebutted the presumption of constitutionality of the Act.
From scanning the length and breadth of the Hansard Reports and the material presented by the respondents, there was no evidence of a discussion on the effect of section 66(1) of the Act and neither was there any evidence on efforts to seek out stakeholders views and comments from the public at large who were affected by the imposition of the three year limit. In view of the impact of section 66(1) on the public, it was prudent for the National Assembly to actively engage the public. Had such an exercise been undertaken, the likelihood of the impugned provision being retained would have been minimal.

19. The only part of section 66(1) of the Act that was unconstitutional was the three year period pre-requisite. It would have been possible for section 66(1) to be enacted without the offending requirement. Striking it down would not be a disservice to the operation of the entire section 66 of the Act and neither would it jeopardise the application of the rest of the Act.

Petition allowed; no order as to costs

Order

Section 66(1) of the Marriage Act, 2014 was unconstitutional, null and void to the extent that it limited the presentation of a petition for separation or divorce in a civil marriage until the expiry of three years.

The multiple publication rule in defamation is not applicable in Kenya as a bar to the limitation period set in section 4(2) of the Limitation of Actions Act

Royal Media Services Ltd v Valentine Mugure Maina and another
Civil Appeal 19 of 2018
High Court at Nyeri
Ngaah J, J
October 18, 2019
Reported by Ian Kiptoo

Tort Law – defamation – libel – elements of libel – publication – multiple publication rule – applicability of – claim that each access to a defamatory statement online was a new publication – claim that it was not barred by the Limitations of Actions Act - whether the multiple publication rule in defamation was applicable in Kenya as a bar to the limitation period set in section 4(2) of the Limitation of Actions Act - Limitation of Actions Act, section 4(2)

Civil Practice and Procedure – suits - institution of suits – defamation suits – extension of time - court’s discretion - under what circumstances could a court extend time within which to file a suit for damages in a defamation claim

Brief Facts

The instant matter was an appeal from the ruling and order in Nyeri Chief Magistrates Court that held that every visit to the site where defamatory words was published constituted a fresh cause of action notwithstanding the date the words were first published. That as long as the offensive words remained on the appellant’s website and were accessible to all and sundry, there was a continued publication constituting a cause of action.

The appellant’s grounds for appeal were that: the trial court erred in not holding that the suit before it concerned an action for libel which could not be brought after the end of 12 months from such date which the cause of action accrued as provided for by section 4(2) of the Limitation of Actions Act; that each individual publication gave rise to a separate cause of action subject to its own limitation period.

Relevant Provisions of the Law

Limitation of Actions Act
Section 4(2)

(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:
Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

Issues

i. Whether the multiple publication rule in defamation was applicable in Kenya as a bar to the limitation period set in section 4(2) of the Limitation of Actions Act.

ii. Under what circumstances could a court extend time within which to file a suit for damages in a defamation claim?

Held

1. A cause of action in defamation suits arose as soon as the defamatory words were published. Indeed, strictly speaking, what was alleged to be libelous or slanderous only assumed that
description, upon the defendant relaying the words complained of to a party other than the party to whom they referred; only then could it be said that there was publication. It followed that publication, of itself, was an essential and a necessary element in proof of defamation.

2. The multiple-publication rule which, as its name suggested, allowed for a new and separate cause of action each time a defamatory statement was published. In the off-line world, that meant that each copy of a book or a newspaper was a separate, actionable case of defamation with its own limitation period. It did not necessarily follow that the same litigant could take multiple actions arising from the same defamatory statement; it only meant that in the case where the rule applied, any limitation period would run from the date of the last publication as opposed to the first.

3. Until the Defamation Act, 2013 of United Kingdom, the multiple publication rule applied to England, amongst a few other commonwealth jurisdictions; it was succinctly explained in the United Kingdom Government Consultation Paper on Multiple Publications. Some jurisdictions had found the rule as being unsuited to modern era, in particular, where statements could be uploaded to the internet in an instant, viewed in multiple jurisdictions, endlessly republished and existed indefinitely if not removed. The effect of the rule on internet free speech, so it had been argued, was disproportionate to the interests being protected.

4. In the United States, it was rejected as early as 1948 while in Ireland it was abolished by the Defamation Act 2009 which had adopted a single publication rule which, contrary to the multiple publication rule, set the clock ticking on eligible claims being brought from the date the material was being published publicly. The English legislature had also followed suit and had, in its Defamation Act 2013, deviated from the decisions of the English courts which had hitherto embraced the multiple publication rule and instead introduced the single publication rule in section 8 of that Act.

5. The 1st respondent had not demonstrated that the multiple publication rule was applicable to Kenya. The English court decisions cited by the 1st respondent were of persuasive authority and not binding on Kenyan courts; but more importantly, the English themselves had abandoned the multiple publication rule upon which those decisions were based. It would be foolhardy for Kenya to follow those decisions when their very basis had been found wanting to such an extent that a legislative intervention in the form of section 8 of the English Defamation Act 2013 had been found necessary.

6. There were technological achievements in media communication the prominent of which was, invariably, the internet, and which by their very nature had some bearing on such torts as slander and libel in a way that could not have been foreseen. No doubt it was necessary that the law should be equally dynamic and keep pace with those advancements as need arose, it was the policy makers that needed to take the initiative and act accordingly; the most courts could do was to point out the deficiencies in the law hoping that the legislative arm of the Government would rise to occasion and take appropriate steps to mitigate those deficiencies. In the absence of legislative acts, courts could do nothing more than apply the law as it was.

7. The Limitation of Actions Act, in particular section 4(2), had never been amended as to vary the point in time when a cause of action from libel or slander accrued. As far as libel was concerned, the cause of action accrued when the defamatory material was published and in the present case the alleged defamatory material was published more than a year before she filed her suit. In short, her suit was filed out of time and the trial court ought to have held so and struck it out.

8. Section 4(2) was couched in such terms that the trial court was left with discretion to extend the time within which a claimant could file suit for damages in defamation claims. It could be that the claimant was under disability of some sort and therefore he could not, for that reason, file the claim within the statutory period. It could also be equitable that the action should be allowed to proceed if the statutory time limit prejudiced the plaintiff. Either way, the court had also to be cautious that the defendant was not prejudiced by its order.

9. Where the court was inclined to extend time, it had to have regard to all the circumstances of the case and in particular to such circumstances as the length of, and the reasons for, the delay on the part of the plaintiff; where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not
become known to the plaintiff until after the expiry of the statutory limitation period. In the latter instance the court, in making its decision, would consider the date on which any such facts did become known to him; and the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action.

10. The court would also consider the extent to which, having regard to the delay, relevant evidence was likely to be unavailable, or to be less cogent than if the action had been brought within the statutory limitation period. Whatever the case, the court had to be moved by way of an application for leave for extension of time. That, however, was not the case. The 1st respondent was of the firm position that she could file her suit outside the limitation period from the date the offensive post was first published on the appellant’s website. The position adopted was legally untenable.

**Appeal allowed with costs awarded to the appellant.**

**Orders:**
1. The appellant’s notice of preliminary objection dated December 15, 2017 was sustained.
2. The 1st respondent’s suit was struck out with costs.

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**The sentence for gang rape or gang defilement for a term of not less than fifteen years which could be enhanced to life imprisonment vis-à-vis the sentence of life imprisonment for defilement is unreasonable for issuing a lighter sentence.**

Francis Matonda Ogeto v Republic [2019] eKLR
Criminal Appeal 49 of 2017
High Court at Machakos
GV Odunga, J
October 3, 2019
Reported by Kakai Toili

**Criminal Law** – sexual offences – gang rape or gang defilement under section 10 of the Sexual Offences Act – whether the sentence for gang rape or gang defilement for a term of not less than fifteen years which could be enhanced to life imprisonment vis-à-vis the sentence of life imprisonment for defilement was unreasonable for issuing a lighter sentence – Sexual Offences Act, sections 8(2) & 10

**Criminal Law** - sexual offences – gang rape or gang defilement - ingredients for proving the offence of gang rape or gang defilement – association or common intention with others - where the accused did not defile the victim - whether committing defilement in association or with a common intention with others notwithstanding that the accused did not defile the victim amounted to gang rape or gang defilement - Sexual Offences Act, section 10

**Criminal Law** – sentences - minimum and maximum sentences – where a court opted for a maximum sentence but failed to give reasons - what was the effect of failure of a court to give a reason in opting for the maximum prescribed sentence where the law provided for a minimum and maximum sentence

**Evidence Law** – evidence – medical evidence - where an accused was charged with a sexual offence - whether it was mandatory to subject accused persons to medical examinations to prove that they committed the alleged sexual offence where the complainant could identify the accused

**Statutes** – interpretation of statutes – interpretation of section 10 of the Sexual Offences Act - whether the use of the phrases “shall be liable” and “not less than” in section 10 of the Sexual Offences Act gave room for the exercise of judicial discretion - Sexual Offences Act, section 10

**Brief Facts**

The appellant was charged at the trial court with the offence of gang defilement contrary to section 10 of the Sexual Offences Act. He was alternatively charged with the offence of indecent act contrary to section 11(1) of the Sexual Offences Act. The trial court found that the evidence adduced by the prosecution placed the appellant at the **locus quo** and hence the offence of gang defilement was committed and found the appellant guilty and convicted him. The trial court then sentenced the appellant to 15 years’ imprisonment. Aggrieved by the trial court’s decision the appellant filed the instant appeal.

**Issues**
1. Whether the sentence for gang rape or gang defilement for a term of not less than fifteen years which could be enhanced to life imprisonment vis-à-vis the sentence of life imprisonment for defilement was unreasonable
for issuing a lighter sentence.

ii. Whether committing defilement in association or with a common intention with others notwithstanding that the accused did not defile the victim amounted to gang rape or gang defilement.

iii. What was the effect of failure of a court to give a reason in opting for the maximum prescribed sentence where the law provided for a minimum and maximum sentence?

iv. Whether it was mandatory to subject accused persons to medical examinations to prove that they committed the alleged sexual offence where the complainant could identify the accused.

v. Whether the use of the phrases “shall be liable” and “not less than” in section 10 of the Sexual Offences Act gave room for the exercise of judicial discretion.

Relevant Provisions of the Law

Sexual Offences Act, No. 3 of 2006

Section 8

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

Section 10

any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life.

Held

1. The instant court was a first appellate court; an appellant on a first appeal was entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court had to itself weigh conflicting evidence and draw its own conclusion. It was not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the trial court’s finding and conclusion; it had to make its own findings and draw its own conclusions. Only then could it decide whether the trial court’s findings should be supported. In doing so, it should make allowance for the fact that the trial court had had the advantage of hearing and seeing the witnesses.

2. Under section 10 of the Sexual Offences Act, the ingredients of gang rape were:

   a. Rape or defilement under the Act;
   b. committed in association with others; or
   c. committed in the company of another or others who commit the offence of rape or defilement with common intention.

   It was therefore clear that defilement which was committed in association with others or with common intention notwithstanding the fact that the accused could not have defiled the victim amounted to gang rape according to the section 10. It mattered not whether the offence was rape or defilement as long as the conditions under section 10 were found to exist.

3. There was overwhelming evidence both oral and documentary that the complainant was 17 years old hence a child under the Children Act. Accordingly, the offence ingredient would be that of defilement. For the accused to be convicted of the offence of defilement, certain ingredients had to be proved:

   a. Whether there was penetration of the complainant’s genitalia;
   b. whether the complainant was a child; and finally,
   c. whether the penetration was by the appellant.

4. There was no doubt about the age of the complainant which was proved both by oral and documentary evidence to have been 17 years at the time of the offence. The first encounter between the complainant and the assailants was at Utawala Bus Stage and it was during the day. The appellant himself in his evidence did not dispute the fact that the complainant knew him. The next encounter was at the gate of the place where the assault occurred. Accordingly, there was sufficient opportunity for the complainant to properly identify her assailants. It was evident that subjecting an accused to a medical examination to prove that he committed the offence was not a mandatory requirement of law.

5. Both from the oral evidence and the documentary evidence it was clear that there was penetration of the complainant’s genital organs with a male genital organ since there was infection in her genitalia. From the evidence of
the complainant, it did not come out clearly that the appellant penetrated the complainant. In the circumstances one could not conclusively find that there was penetration of the complainant’s genital organs by the appellant’s genital organs for the purposes of defilement.

6. If the defilement of the complainant by the person who escaped was committed in association with the appellant or with common intention of both, the appellant would still be guilty of gang rape. In the instant case, while the other person was defiling the complainant, the appellant was guarding the place. It was clear that the appellant knew the intention of the other person and assisted and abetted the same. Considering the definition of gang rape, the appellant was properly convicted of the offence and the said conviction could not be faulted.

7. Section 10 of the Sexual Offences Act stated that a person convicted of the offence of gang rape was liable to imprisonment for a term of not less the fifteen years but which could be enhanced to imprisonment to life. In the instant case, however, the relevant provisions used the phrases “shall be liable” and “not less than” in the same breath. As a result, the provision suffered from the malady of poor legal draftsmanship since the two phrases implied, in legal terms, diametrically opposed positions. In criminal law, where there was an ambiguity in phraseology of sentencing, the accused was entitled to the benefit of the least severe of the prescribed punishments for an offence. Section 10 had to be read as if the sentence provided was the maximum sentence. The use of the words “shall be liable to imprisonment” in section 10 gave room for the exercise of judicial discretion.

8. Section 10 of the Sexual Offences Act under which the appellant was charged provided for \textit{prima facie} mandatory minimum sentence. Under the constitutional dispensation, mandatory minimum sentences ought to be looked at in light of article 27 of the Constitution as read with clause 7 of the transitional and consequential provisions of the Constitution. Such sentences did not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the Court was deprived of the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. Therefore, such provisions did not meet the constitutional dictates.

9. The opinion of the Supreme with respect to mandatory sentences applied with equal force to minimum sentences or non-optional sentences. That was in fact supported by the Kenya Judiciary Sentencing Policy Guidelines where it was appreciated that: whereas mandatory and minimum sentences reduced sentencing disparities, they however fettered the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders. Therefore, the provisions of a legislation that was in force before the Constitution such as the Sexual Offences Act had to be construed with the said adaptations, qualifications and exceptions when it came to the mandatory minimum sentences and particularly where the said sentences did not take into account the dignity of the individuals as mandated under article 27 of the Constitution.

10. There were several degrees of defilement; the Sexual Offences Act itself recognised so in section 8 when it prescribed different sentences for each set of ages of the victims concerned. In doing so, the Act applied the principle of proportionality and gravity of the offences in prescribing the sentence. However, it failed to take into account the fact that even within a particular set, the gravity of the offences could not be same. Some offences of defilement were committed in very gruesome circumstances while others were committed after occasioning serious bodily injuries to the victim. Others were committed in the very site of other members of the victim’s family while others were committed by persons who were almost the age groups of the victims in circumstances that if the law did not presume lack of consent was such offences, it could well be concluded that there could have been connivance.

11. The Court did not condone offences against minors and vulnerable persons. However, to treat offences as the same notwithstanding the aggravating circumstances, clearly violated the right to dignity as the offenders were thereby treated as a bunch rather than as individuals. That did not mean that the court ought not to mete out what appeared as \textit{prima facie} mandatory minimum sentence. What it meant was simply that the circumstances of the offence had to be considered and having done so nothing barred the court from imposing such sentence.

12. There was some unreasonableness in the
sentencing under section 8(2) of the Sexual Offences Act vis-à-vis section 10 of the said Act. The unreasonableness was due to the fact that where a person who, for all intent and purposes committed an offence under section 8(2) could well get away with a lighter sentence simply because he was in the company of other persons. On the converse a lone ranger who committed an act which for all intent and purposes amounted to an offence under section 10 faced a prima facie mandatory life sentence. Such sentencing could well be challenged on the ground of unfairness.

13. The appellant was a first offender. He was not the principal defiler of the complainant. He was sentenced to the maximum prescribed sentence. No reason was given for that option. Though the Sexual Offences Act permitted the court to enhance the sentence to imprisonment to life, in opting for the maximum prescribed sentence where the law provided for a minimum and maximum sentence, the court ought to give a reason for so doing. In the absence of such a reason such a sentence had to be deemed to have been arbitrarily meted.

Appeal partly allowed.

Order:

Sentence set aside and substituted with ten (10) years imprisonment to run from the date of his sentence in the lower court. However, the said sentence would, be inclusive of the period when he was in custody pursuant to section 333(2) of the Criminal Procedure Code.

Paragraph 23 of the Third Schedule to the Judicial Service Act that took away judicial officers’ entitlement to reports or recorded reasons for decisions rendered against them declared unconstitutional

Simon Rotich Ruto v Judicial Service Commission & another [2019] eKLR
Petition 48 of 2019
Employment and Labour Relations Court at Nairobi
B Ongaya, J
November 1, 2019
Reported by Moses Rotich

Constitutional Law - constitutionality of statutory provisions - constitutionality of paragraph 23 of the Third Schedule to the Judicial Service Act - whether paragraph 23 of the Third Schedule to the Judicial Service Act denying judicial officers facing disciplinary proceedings copies of office orders, minutes, reports or recorded reasons for decisions against them, infringed on their constitutional rights - Constitution of Kenya, 2010, articles 10, 35 and 47

Constitutional Law - fundamental rights and freedoms - enforcement of fundamental rights and freedoms - doctrine of waiver - whether the doctrine of waiver could apply to an employee who participated in his own disciplinary hearing, admitted some or all of the charges leveled against him and raised no issue of procedural impairment

Statutes - interpretation of statutory provisions - hierarchy of laws - subsidiary legislation - nature of legislation that would constitute subsidiary legislation - whether the Third Schedule to the Judicial Service Act was a form of subsidiary legislation.

Labour Law – employment - employment contract - disciplinary action - interdiction of judicial officers - where a senior principal magistrate was interdicted by the Chief Registrar to the judiciary - whether the Chief Registrar to the Judiciary had the mandate to draw a charge and interdict a senior principal magistrate - Judicial Service Act, Third Schedule, paragraph 16(1), 17(2) and 25(1)

Brief facts

The petitioner was serving as a Senior Principal Magistrate in the Judiciary. He was interdicted from duty on January 17, 2015 for being habitually drunk during working hours. His interdiction was, however, lifted on July 8, 2015, and the petitioner was sternly warned against involving himself in acts of gross misconduct or conducting himself in a manner that did not portray proper decorum of an officer of the court.

On September 2, 2016, the Chief Registrar of the Judiciary accused the petitioner of reporting for duty while under influence of alcohol forcing his removal from the cause list. The petitioner, in a written reply, denied the charge. On January 19, 2016, the Chief Registrar informed the petitioner that the Judicial Service Commission Human Resource Management Committee (the Committee) had deliberated his response to the show cause notice and directed the petitioner to attend a disciplinary hearing before the Committee on January 25, 2016. At the hearing, the petitioner admitted to have been drunk during office hours and while attending to court users in
his chambers. The petitioner further admitted that he had a drinking problem but was undergoing treatment. On February 9, 2017, the Judicial Service Commission dismissed the petitioner in a letter signed by the Chief Justice.

Aggrieved, the petitioner filed the instant petition and sought various declarations, inter alia, that the Chief Registrar of the Judiciary (2nd respondent) had no jurisdiction under the law to draw and commence a charge and interdiction of a judicial officer. He also asked the court to find that the proceedings leading to his dismissal were unprocedural, illegal and unconstitutional for contravening articles 171(2)(c) and 236(b) of the Constitution and section 32 (3) of the Judicial Service Act.

Issues

i. Whether the Chief Registrar of the Judiciary had powers to draw a charge and interdict a judicial officer in the rank of a senior principal magistrate.

ii. Whether paragraph 23 of the Third Schedule to the Judicial Service Act that took away judicial officers’ entitlement to reports or recorded reasons for decisions rendered against them was inconsistent with:
   a. article 47 of the Constitution entitling every person to a written reason to every administrative action that adversely affected them;
   b. article 35 of the Constitution providing for the right to access of information; and,
   c. principles of rule of law, transparency and accountability provided under article 10(2)(a)(c) of the Constitution;

iii. Whether the doctrine of waiver could apply to an employee who participated in his own disciplinary hearing, admitted some or all of the charges leveled against him and raised no issue of procedural impairment.

Relevant provision of the law

Judicial Service Act

Third Schedule

23. Copies of proceedings

(1) An officer in respect of whom disciplinary proceedings are to be held under this Part shall be entitled to receive a free copy of any documentary evidence relied on for the purpose of the proceedings, or to be allowed access to it.

(2) The officer may also be given a copy of the evidence (including documents tendered in evidence) after the proceedings are closed, on payment of five shillings per page of each document tendered in evidence:

Provided that they shall not be entitled to copies of office orders, minutes, reports or recorded reasons for decisions.

Held

1. The power to interdict a judicial officer such as the petitioner who held the position of Senior Principal Magistrate was vested in the Chief Justice under paragraph 16(1) of the Third Schedule to the Judicial Service Act and within the circumstances or safeguards mentioned in that section. The power to suspend a magistrate was vested in the Chief Justice under paragraph 17(2) of the Third Schedule and within the prescribed safeguards. The power to draw charges against a magistrate or judicial officer was vested in the Chief Justice under paragraph 25(1) of the Third Schedule to the Judicial Service Act. Accordingly, the Chief Registrar (2nd respondent) acted ultra vires those provisions by issuing the charge and interdiction against the petitioner. The charge and interdiction were invalid.

2. To the extent that the interdiction was empty of the requisite authority and was ultra vires, and invalid, the petitioner was entitled to the withheld pay during the interdiction. The invalid interdiction could not operate to validly withhold the petitioner’s half salary during the interdiction period. The legal basis of withholding the pay was not established.

3. Paragraph 23 of the Third Schedule to Judicial Service Act purporting to take away judicial officers’ entitlement to reports or recorded reasons for decisions rendered against them was unconstitutional and inconsistent with article 47(2) entitling every person to a written reason to every administrative action that adversely affected them; article 35 providing for the right of access to information; and article 10(2)(a)(c) of the Constitution on principles of rule of law, transparency and accountability. Paragraph 23 of the Third Schedule to Judicial Service Act further contravened principles of public service under article 232(1)(e) and (f) of the Constitution on accountability for administrative acts, transparency and provision to the public of timely, accurate information.

4. The provisions of the Third Schedule to the Judicial Service Act were enactments by Parliament and were not subsidiary legislation. They could not be found ultra vires section 6 of the Fair Administration Action Act and section 4 of Access to Information Act, 2016 as urged for the petitioner because they ranked at parity in the hierarchy of legislation and law.
5. The petitioner had a helpless problem of drunkenness which seriously affected his performance. The 1st respondent had given him a chance to improve and allowed him to attend a rehabilitation centre on full monthly pay when a previous interdiction was lifted in that regard. Consequential to the lifting of the interdiction, the petitioner promised to improve and he did so in his personal written undertaking to the Chief Justice. The petitioner appeared not to have been able to uphold his personal and written undertaking and hence the disciplinary and the subsequent dismissal. The 1st respondent had taken all necessary steps to assist and reasonably support the petitioner but he failed to improve. In that sense, the respondents had a valid reason to dismiss the petitioner as at the time of the dismissal and as envisaged in sections 43, 45 and 47(5) of the Employment Act, 2007.

6. Despite delegation of certain aspects of disciplinary control to the Chief Justice under the Third Schedule to the Judicial Service Act, nothing precluded the 1st respondent by itself taking appropriate steps and by itself undertaking the disciplinary proceedings. Thus, paragraph 20 of the Third Schedule provided that, subject to the Constitution and the Schedule, the Commission could regulate its own procedure and the procedure of any of its Committees. Nothing in the Schedule limited or otherwise affected the inherent power of the Commission to make such decisions as was necessary for the ends of justice or to prevent abuse of the process of the Commission. Thus, even if the charge and the interdiction were ultra vires, and invalid, the 1st respondent exercised the inherent power as was conferred.

7. The petitioner admitted the gross misconduct before the Committee of the 1st respondent and the 1st respondent, at a full house meeting, deliberated the Committee's findings and made the decision to dismiss the petitioner. Throughout the hearing, the petitioner did not advance the issue of procedural impairment in the manner the charge and interdiction had been imposed. The doctrine of waiver applied. It could not be said that the petitioner had not been accorded fairness or due process in terms of article 236 of the Constitution because he attended the hearing; he was informed and he knew the case that confronted him; he answered the case by admitting the leveled gross misconduct; and, he requested to be given another chance to improve so that all his testimony was taken while having subjected himself to an oath before the Committee.

8. Despite the ultra vires, and invalid charge and interdiction as imposed by the 2nd respondent, the 1st respondent by itself, in its Committee proceedings read the allegations to the petitioner; the petitioner understood the allegations; made a reply; and, was heard extensively. There was no omission or action to impair the petitioner’s capacity to present his case towards exculpation, the Committee was well constituted and suffered no deficiency, and the petitioner admitted the charge (which was straightforward and not requiring documents and detailed background material to reply) and he requested another chance to improve despite having previously squandered such a chance. In such circumstances, the petitioner failed to establish a case for breach of rules of natural justice or denial of due process. Moreover, nullifying the dismissal of the petitioner would serve no purpose as the petitioner admitted the gross misconduct and offered no plausible line of action to improve his future behaviour in view of the identified alcoholic addiction.

9. The decision in Kenya Aviation Workers Union – Versus- Kenya Airways Limited [2019] eKLR, was distinguishable in that the employer had failed to afford the employee the prevailing employee assistance programme leading that court to find that that failure amounted to unfair labour practice and thus unfair termination of employment. In the instant case, the respondents embraced the best human resource practice towards work-life balance when they gave the petitioner a chance for rehabilitation and to resume work after the initial interdiction. After lifting of that interdiction, the petitioner did not deny that he continued to have impaired performance resulting from continued alcoholic addiction.

10. Once an employer has afforded a needy employee a reasonable chance to benefit out of the prevailing employee assistance programme but the employee fails to improve, the employer’s obligation for fair labour practice in that respect should thereby get discharged. The tenets of justice and proportionality demanded that such an employer was, thereby, freed accordingly from the burden of continued retention of an employee who had shown that he could not benefit and help himself to improve from such employer’s assistance and support. Accordingly, the petitioner’s constitutional rights were not breached as alleged and the petitioner was
undeserving of compensation and reinstatement.
Petition partly allowed.

Orders:-
i. A declaration that the 2nd respondent acted ultra vires the provisions of paragraph 16 and 25 of the Third Schedule to the Judicial Service Act, 2011 by issuing the charge and the interdiction both dated on September 9, 2016 against the petitioner; and the charge and interdiction declared null and void ab initio.

ii. A declaration that paragraph 23 of the Third Schedule to Judicial Service Act, 2011 was unconstitutional for being inconsistent with articles 47(2), 35, 10(2)(a)(c) and 232 (1) (e) (f) and (e) of the Constitution of Kenya, 2010.

iii. Petitioner directed to serve the Judgment upon the Attorney General within seven (7) days of the date of delivery of Judgment.

iv. The respondents ordered to pay the petitioner a sum of Kshs.1,275,501.00 (less PAYE) by December 12, 2019, failure to which interest would be payable thereon at court rates from the date of judgment until payment in full.

v. Half of the petitioner’s costs were to be borne by the respondents.

Need to harmonize the regulations under the Environmental Management and Coordination Act, Survey Act and Physical Planning Act to take into consideration high and low water marks when measuring and defining riparian reserves
Milimani Splendor Management Limited v National Environment Management Authority and 4 others
Environment and Land Court at Nairobi
Petition No. 61 of 2018
K Bor, J
October 11, 2019
Reported by Ian Kiptoo

Environmental Law – riparian reserve – protection of riparian reserves – measurement of riparian reserves – considerations to be taken into account - what were the considerations that ought to be considered when determining the boundaries of privately held land that was adjacent to rivers and water bodies

Statutes – interpretation of statutes – interpretation of regulations on the measurement of riparian reserves – where there were conflicting legal provisions on the measurement of the riparian reserves - whether there was need to harmonize the regulations under Environmental Management and Coordination Act, Survey Act and Physical Planning Act to take into consideration high and low water marks when measuring and defining riparian reserves - Survey Regulations of 1994, rule 111; Environmental Management and Coordination (Water Quality) Regulations, 2006, rule 6(c); Physical Planning (Subdivision) Regulations of 1998, regulation 15

Words and Phrases – watermark – definition of - the highest or lowest point to which water rises or falls - Black’s Law Dictionary, 10th edition

Brief Facts
The petitioner sought a declaration that the respondents had violated its right to property guaranteed under article 40 of the Constitution of Kenya, 2010 (Constitution) and an order to quash the decision of the 1st respondent (National Environment Management Authority) which it issued an improvement notice to the petitioner together with an order to restrain the respondents from demolishing, destroying, evicting or in any way interfering with the quiet possession of the petitioner’s property.

The petitioner stated that the multiple laws on the size of the riparian reserve were not in harmony and that it should not therefore be condemned in light of the differences in the riparian reserves provided by the different pieces of legislation. It submitted further that it would be an illegality to use any other measurement to assert an encroachment on its part on the riparian reserve when it had complied with its deed plan by keeping the 10 metres from the centre of the Kirichwa Kubwa River.

On the other hand, the respondents contended that the process leading to the marking of properties constructed on riparian land for demolition was done under the Nairobi Regeneration Program and that restoration of riparian reserves was in compliance with Chapter 3 (3.16 (ii) of Sessional Paper No. 7 of 2017 of the National Land Use Policy. In addition, that a riparian reserve was deemed to be a way leave or reserve along any river, stream or watercourse of not less than 10 metres in width on each bank except in areas prone to flooding.

Issues
i. What were the considerations that ought to be considered when determining the boundaries of privately held land that was adjacent to rivers and water bodies?

ii. Whether there was need to harmonize the regulations under Environmental Management
and Coordination Act, Survey Act and Physical Planning Act to take into consideration high and low water marks when measuring and defining riparian reserves.

**Held**

1. A local authority such as the 3rd respondent could serve an enforcement notice on the owner or occupier of land under section 38 of the Physical Planning Act when it came to the attention of the local authority that the development of land was carried out without the required development permission or if the conditions for the grant of the development permission were not complied with. The provisions of the Physical Planning Act showed that the 3rd respondent had a role to play in the approval of the petitioner’s development and was therefore a necessary party in the proceedings.

2. The petitioner neither produced any survey records to show where the river originally flowed nor did it attempt to demonstrate that the river had actually changed its course. A river included the bed, the banks, the adjacent land as well as the flood plain. The flood plain included the portion of the river valley that was covered with water when the main river channel overflowed during floods. The risk of the river flooding during heavy rains justified the need for a buffer zone or verge. Rivers were of different sizes and widths and the width of a river also varied at different points of its flow.

3. Geographical factors affected the size, shape and course of a river which could also change over time. A river could be narrower upstream while lowland streams which were prone to meandering could have broader valleys. In determining the riparian reserve, one of the factors for consideration was whether the river had a well-defined channel. For the protection and rehabilitation of the riparian ozone, it would be helpful if there was a base map and other cadastral drawings mapping out the river channel and the riparian reserve in respect of Kirichwa River.

4. Section 9 of Environmental Management and Coordination Act (EMCA) enjoined the 1st respondent to co-ordinate the various environmental management activities being undertaken by lead agencies and to promote the integration of environmental considerations into development policies, plans, projects and programmes to ensure the proper management and use of environmental resources. Sections 108 and 111 of EMCA empowered National Environment Management Authority (NEMA) and the court respectively to issue an environmental restoration order to any person to prevent the person from taking any action that was reasonably likely to cause harm to the environment. The court and NEMA were placed on the forefront in the protection of the environment and lent credence to the preamble to the Constitution that the people of Kenya were respectful of the environment and were determined to sustain it for the benefit of future generations.

5. Section 42 of EMCA made provision for the protection of rivers, lakes, seas and wetlands including prohibiting any person from erecting any structure or part of it in or under the river or disturbing the river without the approval of NEMA. Rivers and the riparian reserves formed part of the environment under the definition in section 2 of EMCA.

6. Section 29 of the Physical Planning Act empowered local authorities, which referred to county governments, to prohibit or control the use and development of plots within its area. The section mandated the local authority to consider and grant development permissions. It could also prohibit the subdivision of existing plots into smaller areas. One of the conditions to be complied with in a scheme of subdivision under regulation 15 of the Physical Planning (Subdivision) Regulations of 1998 was that way leaves or reserves along any river, stream or water course should be of not less than 10 metres in width on each bank except in areas which flood.

7. Rule 111 of the Survey Regulations of 1994 provided for a reservation of not less than 30 metres in width above high-water to be made for Government purposes but allowed the Minister to direct that a lower width of the reservation be made in special circumstances. It was not clear from the regulation how the riparian reserve was to be measured considering that rivers varied in sizes and could also meander in their course as they flowed downstream. Regulations 40 and 88 of the Survey Regulations of 1994 stipulated where and how line and river beacons were to be placed by the surveyor. Rule 6(c) of the Environmental Management and Coordination (Water Quality) Regulations, 2006 prohibited any person from cultivating or undertaking any development activity within the full width of a river or stream to a minimum of six metres and maximum of thirty metres on either side based on the highest recorded flood level.

8. Rivers and all land between the high and low watermarks constituted public land pursuant to...
article 62 of the Constitution. The dictionary defined the high watermark in a river not subject to tides as the line that the river impresses on the soil by covering it long enough to deprive it of agricultural value and the low watermark as the point in a river to which the river recedes at its lowest stage. The Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations 2009 defined the high watermark as the historical recorded point of the highest level of contact between the water and the bank while the low watermark was defined as the historical recorded point of the lowest level of contact between the water and the bank. The river bank was defined as the rising ground from the highest normal watermark bordering the river in the form of rock, mud, gravel or sand; and in case of flood plains would included the point where the water surface touched the land which was not the bed of the river.

9. The Regulations under EMCA came into force later than those made under the Survey Act and Physical Planning Act. In defining the riparian reserve, all those pieces of legislation did not take into consideration the land between the high and low watermarks stated in the Constitution of 2010. From the definition of the high and low water marks in the Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations 2009, it was evident that the measurement of the riparian reserve was to be pegged on the riverbank and the highest point on the land which water got to during flooding. The riparian reserve was not to be measured from the centre of the river as the petitioner contended. There were conflicting legal provisions on the measurement of the riparian reserves in Kenya and there was need for Parliament to harmonise the different laws to guide the surveyors in determining the boundaries of privately held land that was adjacent to rivers and other water bodies.

10. From the definition of the high and low watermarks in the Regulations made under EMCA, it was evident that the measuring of the 10 metre riparian reserve from the middle of River Kirichwa to the petitioner’s suit land was erroneous as it did not take into account the high and low watermarks which were determined with reference to the level of contact between the water and the bank and not from the centre of the river. There was no evidence to show that the highest recorded flood level for Kirichwa Kubwa River was taken into consideration when the survey of the riparian reserve adjacent to the petitioner’s land was done.

11. Article 69(1) of the Constitution enjoined the State to meet several responsibilities in relation to the environment, some of which were to ensure the sustainable exploitation, utilisation, management and conservation of the environment and natural resources and to eliminate activities that were likely to endanger the environment. Sustainable development was one of the national values and principles of governance under article 10 of the Constitution which bound all state organs, public officers and all persons whenever they applied or interpreted any law or when they made or implemented public policy decisions. Those constitutional imperatives should not only guide the respondents, but also the Nairobi Regeneration Committee and the Multi-Agency Team, as they reclaimed the riparian reserves in Nairobi.

12. It behoved every person to play an active role in environmental protection in light of the article 69(2) of the Constitution which placed the duty on every person to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development. Construction of buildings on a riparian reserve would have a deleterious effect on the flow of the river with serious consequences for the ecology and the court was enjoined to apply the prevention principle in preventing activities that could cause damage or harm to River Kirichwa.

Petition dismissed with each party to bear own costs.

Orders:

i. The 1st, 2nd and 3rd respondents directed to undertake a survey of Kirichwa Kubwa River from its source all the way downstream within 90 days of the date of the judgment to determine the boundary between the river and the adjacent land owners whose land abut the riparian reserve and with a view to restoring the riparian reserve for Kirichwa Kubwa River.

ii. The measurement of the riparian reserve would be based on the high and low watermarks and not the centre of the river in conformity with the definition of the high and low watermarks under the Regulations made under EMCA.
“CaseBack” is a service provided by Kenya Law to Judicial Officers alerting the judicial officer when his or her decision has been considered by a court of higher jurisdiction or where the case or any aspect of it has been substantially considered by any other court. A judicial officer whose decision has been considered receives an alert along with the decision of the higher court or the court considering it immediately that decision is received by the Council.

Thank you for these awesome Feedback! A case I handled over 10 years plus and with such feedback this goes a long way on progressive Jurisprudence! Thank you for the Case back! Regards,

Hon. Dolphina Alego - SPM
Kapsabet Law Courts

Thank you for the feedback. Thank you caseback for having our back. In this way, we learn from history and avoid pitfalls in judicial decisions we make daily.

Hon. Dennis Kiprono Matutu - SRM
Kilgoris Law Courts

Greetings Kenya law! Thanks for this invaluable feedback! More please! Baraka tele!

Hon. Zipporah Wawira Gichana - SRM
Kikuyu Law Courts

Thank you for the heads up. This is a very good initiative.

Hon. Leah Nekesa Kisabuli - SRM
Kilifi Law Courts
The parental status of ‘mother’ is the status afforded to a person who undergoes the physical and biological process of carrying a pregnancy and giving birth irrespective of their legal gender.

The Queen (on the application of TT) v Registrar General for England and Wales; Secretary of State for Health and Social Care & 3 others (Interested Parties)
Case No FD18F00035
High Court of Justice
Family Division and the Administrative Court
A McFarlane, J & P
September 25, 2019

Constitutional Law- fundamental rights and freedoms - rights of a child - best interests - what was the scope of a child’s best interests?

Health Law - reproductive health law-parthood-mother-where a person with a different legal gender carried a pregnancy and gave birth to a child-whether the term ‘mother’ was exclusively female or whether it was a free-standing term which, in the context of a birth applied to the person who carried a pregnancy and gave birth to a child, irrespective of their legal gender.

Gender Recognition Act 2004, section 12; Human Fertilisation and Embryology Act 2008, section 33

Gender Law- gender identity-trans-males-what was the status of a trans-male who had become pregnant and given birth to a child- Gender Recognition Act 2004, section 12

International Law- international human rights - rights to respect for private and family life and non-discrimination-where a trans-male who had given birth was registered as the mother of the child-whether the court could issue a declaration of incompatibility in relation to the alleged breach of the rights-whether failure to be registered as the son’s father, breached the claimant’s and his son’s rights of respect for private and family life and non-discrimination under European Convention on Human Rights to the extent that the court should issue a declaration of incompatibility under section 4 of the Human Rights Act 1998 - European Convention on Human Rights, 1950, articles 8 and 14; Human Rights Act 1998, section 4

Brief Facts

The claimant (TT) had been registered as female at birth but transitioned to live in the male gender at the age of twenty two years. He began medical transition with testosterone therapy in 2013, and in 2014, he underwent a double mastectomy. His passport and NHS records were amended to show his gender as male. In September 2016 the claimant, under medical guidance, suspended testosterone treatment and later commenced fertility treatment in England and Wales at a clinic which was registered for the provision of such treatment. The aim of the treatment was to achieve the fertilisation of one or more of the claimant’s eggs in his womb.

A certificate confirming his gender as male was issued on April 11, 2017. On April 21, 2017, the claimant underwent intrauterine insemination (IUI) fertility treatment at the clinic during which donor sperm was placed inside his uterus. The process was successful and conception occurred with the result that the claimant, a registered male, became pregnant. The claimant carried the pregnancy to full-term and, in January 2018, he gave birth to a son, (YY).

The issue in the proceedings related to the registration of the claimant’s son’s birth. Upon communication with the Registry Office, the claimant was informed that he would have to be registered as the child’s ‘mother’, although the registration could be in his current (male) name. The claimant wished to be registered as ‘father’ or, if not ‘father’, then ‘parent’ and thus on April 3, 2018 he brought a claim in judicial review to quash the decision of the Registrar General. The claimant also contended that that outcome represented a breach of his and the son’s rights under the European Convention on Human Rights (ECHR) to the extent that the court should issue a declaration of incompatibility under section 4 of the Human Rights Act 1998.

Issues

i Whether the term ‘mother’ was exclusively
female or whether it was a free-standing term which, in the context of a birth applied to the person who carried a pregnancy and gave birth to a child, irrespective of their legal gender.

ii What was the status of a trans-male who had become pregnant and given birth to a child?

iii What was the scope of the best interests of a child?

iv Whether failure to be registered as the son’s father, breached the claimant’s and his son’s rights of respect for private and family life and non-discrimination under ECHR to the extent that the court should issue a declaration of incompatibility under section 4 of the Human Rights Act 1998 (the 1998 Act)

Relevant Provisions of the Law

European Convention on Human Rights, 1950

Article 8- right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14-prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Gender Recognition Act, 2004

Section 1-Applications

(1) A person of either gender who is aged at least 18 may make an application for a gender recognition certificate on the basis of—

(a) living in the other gender, or

(b) having changed gender under the law of a country or territory outside the United Kingdom.

(2) In this Act “the acquired gender”, in relation to a person by whom an application under subsection (1) is or has been made, means—

(a) in the case of an application under paragraph (a) of that subsection, the gender in which the person is living, or

(b) in the case of an application under paragraph (b) of that subsection, the gender to which the person has changed under the law of the country or territory concerned.

(3) An application under subsection (1) is to be determined by a Gender Recognition Panel.

Section 9 - General

(1) Where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman).

Human Fertilisation and Embryology Act, 2008

Section 33 - Meaning of “mother”

(1) The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.

Held

1. At common law a person whose egg was inseminated in their womb and who then became pregnant and gave birth to a child was that child’s ‘mother’; The status of being a ‘mother’ arose from the role that a person had undertaken in the biological process of conception, pregnancy and birth. Being a ‘mother’ or a ‘father’ with respect to the conception, pregnancy and birth of a child was not necessarily gender specific, although until recent decades it invariably was so. It was now possible, and recognised by the law, for a ‘mother’ to have an acquired gender of male, and for a ‘father’ to have an acquired gender of female. Gender Recognition Act 2004 (GRA 2004), section 12 on parenthood could be both retrospective and prospective. If that was so then the status of a person as the father or mother of a child was not affected by the acquisition of gender under the GRA 2004, even where the relevant birth had taken place after the issue of a gender recognition (GR) certificate.

2. Article 3(1) of the United Nations Convention of the Rights of a Child (UNCRC) on the best interests of the child being a primary consideration was a binding obligation in international law, and the spirit, if not the
precise language, had also been translated into the national law. Section 11 of the Children Act 2004 placed a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. When a child’s article 8 rights on respect for private and family life under ECHR were engaged, they had to be looked at through the prism of UNCRC, article 3(1) on the rights of a child, so that article 8 had to be interpreted in such a way that children’s best interests were a primary consideration, although not always the only primary consideration and not necessarily the paramount consideration.

3. A child’s best interests was a threefold concept:

(a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests were being considered in order to reach a decision on the issue at stake, and the guarantee that the right would be implemented whenever a decision was to be made concerning a child, a group of identified or unidentified children or children in general.

(b) A fundamental, interpretative legal principle: If a legal provision was open to more than one interpretation, the interpretation which most effectively served the child’s best interests should be chosen. The rights enshrined in UNCRC and its Optional Protocols provided the framework for interpretation.

(c) A rule of procedure: Whenever a decision was to be made that would affect a specific child, an identified group of children or children in general, the decision-making process had to include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child required procedural guarantees. The justification of a decision had to show that the right had been explicitly taken into account. In that regard, States parties would explain how the right had been respected in the decision, that was, what had been considered to be in the child’s best interests; what criteria it was based on; and how the child’s interests had been weighed against other considerations, be they broad issues of policy or individual cases.

4. Although the object of article 8 of ECHR was essentially that of protecting the individual against arbitrary interference by the public authorities, it did not merely compel the State to abstain from such interference: in addition to that primarily negative undertaking, there could be positive obligations inherent in an effective respect for private life. Those obligations could involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The boundaries between the State’s positive and negative obligations under article 8 of ECHR did not lend themselves to precise definition. The applicable principles were nonetheless similar. In particular, in both instances regard had to be had to the fair balance which had to be struck between the competing interests, and in both contexts the State enjoyed a certain margin of appreciation.

5. The very essence of ECHR was respect for human dignity and human freedom. Under its article 8 in particular, where the notion of personal autonomy was an important principle underlying the interpretation of its guarantees, protection was given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings. In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society could not be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. The unsatisfactory situation in which post-operative transsexuals lived in an intermediate zone as not quite one gender or the other was no longer sustainable.

6. If an event occurred where the claimant’s son’s full birth certificate had to be produced, that was very likely to be an occasion of exquisite embarrassment and confusion for both parent and child. More than that, even if such an occasion never arose, the fact that it might arise was a legitimate cause for significant anxiety and distress on the part of the claimant, and probably his son when he was older, to the extent that that on its own was an interference with their right to respect for private and family life. The focus of consideration therefore moved to whether insistence on registration as ‘mother’ was necessary, that was to say, was it proportionate to a pressing social need and did it strike a fair balance between the needs of society and the rights of others set against the admitted interference with the claimant’s and his son’s article 8 rights under ECHR?

7. The starting point in measuring proportionality was to evaluate the importance of the rights that were the subject of interference. In approaching the issue of proportionality, a weight of a high order had to therefore attach to those rights for both the claimant and his son, such as to require
clear and substantial grounds before it could be said that any interference was justified and proportionate. In assessing proportionality with respect to the claimant’s son’s article 8 rights, the position was more complicated as there were other aspects of article 8 which could themselves, in part, pull in the other direction and point towards justification. Firstly, there was the right of a child to establish the substance of his or her identity. A core element of that right had to normally include the right to know who gave birth to them. The developing case law of the European Court on Human Rights (ECtHR) also indicated that, not only was a child’s right to know their origins acknowledged, but it was also growing in importance when set against the rights of a mother who could be insistent on remaining anonymous.

8. In the present case the outcome sought by the claimant meant that his son would not have, and would never have had, a ‘mother’ as a matter of law, he would only have a father. Although there was no extant ECtHR authority on that point, the outcome, which, at present, would mark the claimant’s son out from all other children under UK law, had to be seen as a detriment and contrary to a child’s best interests.

9. The best interests of the child had to be a primary consideration in the overall ECHR evaluation. It was not argued that the claimant’s son was in any special category that would make his circumstances in that regard different from the general cohort of children born to a transgender male. The issue had to be looked at, therefore, in general, high level and non-case specific terms. The approach to ‘best interests’ in the evaluation had to be based on matters of principle rather than factual, case-specific, detail. When considering ‘best interests’ the fact that the court was considering the scheme as a whole affected the extent to which it was possible to determine the best interests of children in general.

10. In establishing the scheme of registration, and in holding by GRA 2004, section 12 that the fact that a person’s gender had become the acquired gender following the issue of a GR certificate did not affect the status of the person as the father or mother of a child. Parliament had made a social and political judgment as to how the competing interests should be accommodated. In doing so, it had afforded priority to the need for clarity as to parental status. There were sound child-focused reasons in favour of striking the balance in that way. The fact that it was possible to identify other factors which might, in particular cases, be to the detriment of a child, did not mean that the outcome promoted by Parliament was not in the best interests of children or that their best interests had not been a primary consideration in striking the policy balance as it had been struck.

11. The human existence was marked by birth at the first moment of life, and death at the last. The importance of a modern society having a reliable and consistent system of registration of each of these two events was clear. In terms of birth registration, the birth was the event that was subject of record and a birth occurred when a baby was born to the parent who had carried him or her during pregnancy. The aim of the UK birth registration scheme in requiring the identity of the person who gave birth to a child to be recorded as such was, therefore, entirely legitimate and of a high order of importance in the context of social policy. In almost all the countries within the Council of Europe a transman who gave birth would be registered as the ‘mother’.

12. The number of occasions when a full birth certificate could be produced and the claimant’s status as his son’s mother, and therefore the fact that he was transgender, would be disclosed, would be small. The adverse impact upon the claimant, significant though it would be were it to occur, was very substantially outweighed by the interests of third parties and society at large in the operation of a coherent registration scheme which reliably and consistently recorded the person who gave birth on every occasion as ‘mother’. Despite the admitted interference with the article 8 rights of ECHR of the claimant and his son, such interference was justified as being in accordance with the law, for a legitimate purpose and otherwise necessary, proportionate and fair.

13. In the context of article 14 of ECHR, a registration scheme that required each and every person who gave birth to be registered as the child’s mother did not discriminate between or against any one group or another. Examples were given in submissions of other same sex or transgender parents who were registered in specific ways, but none of those examples related to the registration of the person who had given birth. It was that feature, and the need to register that crucial piece of information, that marked registration of the ‘mother’ out from other categories of parental relationship.

14. The case under article 14 of the ECHR was, in reality, an assertion that the GRA 2004 should have made an exception from the universal requirement to register as ‘mother’ for transgender males following the grant of
a GR certificate and that, by stipulating that a GR certificate did not affect the status of a parent as ‘mother’, section 12 of GRA was discriminating against the claimant and those in like circumstances. Looked at in that way, the claim was untenable in terms of article 14 of ECHR. There was no breach of article 14. The application for a declaration of incompatibility failed.

15. There was a material difference between a person's gender and their status as a parent. Being a ‘mother’, whilst hitherto always associated with being female, was the status afforded to a person who underwent the physical and biological process of carrying a pregnancy and giving birth. It was now medically and legally possible for an individual, whose gender was recognised in law as male, to become pregnant and give birth to their child. Whilst that person's gender was ‘male’, their parental status, which derived from their biological role in giving birth, was that of ‘mother’.

16. The impact of the UK legislative scheme on the claimant and his son, whilst interfering with the right to respect that they each had in relation to private and family life, was justified in ECHR terms with the consequence that there was no breach of article 8 in relation to either parent or child. There was no separate breach under article 14 in either case. In law the claimant was his son's ‘mother’ for the purposes of the registration of the son's birth under the Births and Death Registration Act 1953.

Application for judicial review dismissed.

Orders:

i A Declaration of Parentage under Family Law Act 1986, section 55A would be issued confirming that the claimant was his son's mother.

ii As his son's mother, the claimant would automatically have parental responsibility for his son under Children Act 1989, section 2(2)(a).

Relevance to the Kenyan Situation

Kenya does not have a statute similar to the Gender Recognition Act of the UK on application for a gender recognition certificate. Neither has it developed laws specific to LGBTIQ persons and specifically transgenders as is the case in the UK jurisdiction.

That's not to say the Courts have not been apt in addressing this problem as need arises. As far as gender recognition goes, there have been cases of intersex persons and how to register their sexes. In Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others [2014] eKLR, the petitioner was born with both male and female genitalia and a Lab Report had a question mark in the column indicating the Petitioner's gender. The petitioner alleged that that offended the petitioner's rights to legal recognition, human dignity and freedom from inhuman and degrading treatment. The court held that there was an obvious lack of guidelines and regulations, in the case of intersex children, on how medical examinations and eventual corrective surgery, if needed, would be carried out.

In Republic v Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 others [2014] eKLR, the applicant, Transgender Education and Advocacy, an NGO formed with the aim and objective of advocating for human rights and preventing stigma facing transsexual people in Kenya sought for an order of mandamus to compel the 1st respondent (The NGO Co-ordination Board) to register the applicant as an NGO. The court held that to discriminate persons and deny them freedom of association on the basis of gender or sex was clearly unconstitutional and contravened the provisions of article 27(4) of the Constitution of Kenya, 2010. The 1st respondent was thus ordered to register the applicant.

In Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu [2014] eKLR, the applicant was diagnosed and treated for gender identity disorder (G.I.D) and depression at Mathari hospital and was still undergoing treatment for the two conditions. The applicant then changed his name from Andrew Mbugua Ithibu to Audrey Mbugua Ithibu. Thereafter he embarked on changing the particulars on his national identity card, passport and academic papers so as to reflect his gender from male to female. Specifically in the instant matter, the applicant sought the removal of the gender mark from his KCSE certificate so that the certificate did not have any gender mark. The court held that the imposition of a candidate's gender mark was not a requirement of the law under rule 9 of the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examinations) Rules 2009. A KCSE certificate was complete without a gender mark. Examinations and marks in Kenya were not administered based on the gender of the candidate. Removal of the gender mark could not therefore dilute the quality of the certificate.

As seen above, Kenya still has a long way to go before its laws fully identify with transgender persons. Given that these are emerging issues, the UK judgment therefore acts as a judicial precedent in common law when deciding on matters relating to transgender persons.
Legal Supplements

By Rachel Muriithi, Laws of Kenya Department

This is a synopsis of legislation in the form of Bills and Acts of Parliament that have been published in the period between July and December 2019.

A. ACTS OF PARLIAMENT

<table>
<thead>
<tr>
<th>ACT</th>
<th>APPROPRIATION ACT, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Act No.</td>
<td>No. 10 of 2019</td>
</tr>
<tr>
<td>Commencement</td>
<td>1st July 2019</td>
</tr>
<tr>
<td>Objective</td>
<td>This Act authorizes the issue of a sum of money out of the Consolidated Fund and its application towards the service of the year ending on the 30th June, 2020 and to appropriate that sum and a sum voted on account by the National Assembly for certain public services and purposes.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ACT</th>
<th>COPYRIGHT (AMENDMENT) ACT, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Act No.</td>
<td>No. 20 of 2019</td>
</tr>
<tr>
<td>Commencement</td>
<td>2nd October, 2019</td>
</tr>
<tr>
<td>Objective</td>
<td>The principal objective of this Act is to amend the Copyright Act, 2001. The amendment seeks to align Copyright Act, 2001 with the technological developments that continue to affect the exploitation and protection of copyright works. The amendments will ensure that authors of Copyright works get value for their property in the digital environment.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ACT</th>
<th>FINANCE ACT, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Act No.</td>
<td>No. 23 of 2019</td>
</tr>
<tr>
<td>Commencement</td>
<td>The Act has two commencement dates as shown below- (a) sections 7, 8, 10, 14 and 49, on 1st January, 2020; and (b) all other sections, on the assent of the Act.</td>
</tr>
</tbody>
</table>
### ACT

**DATA PROTECTION ACT, 2019**

<table>
<thead>
<tr>
<th>Act No.</th>
<th>No. 24 of 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commencement</td>
<td>25th November, 2019</td>
</tr>
<tr>
<td>Objective</td>
<td>This Act of Parliament gives effect to Article 31(c) and (d) of the Constitution, 2010. It establishes the Office of the Data Protection Commissioner to make provision for the regulation of the processing of personal data and to provide for the rights of data subjects and obligations of data controllers and processors.</td>
</tr>
</tbody>
</table>

### B. NATIONAL ASSEMBLY BILLS

#### NATIONAL ASSEMBLY BILL

**PUBLIC FINANCE MANAGEMENT (AMENDMENT) BILL, 2019**

<table>
<thead>
<tr>
<th>Dated</th>
<th>2nd August, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objective</td>
<td>The main objective of this Bill is to put into place interim measures to allow county governments to access their minimum share of revenue already guaranteed and granted to them by Article 206(2) of the Constitution. This will enable county governments to offer services to the public pending enactment of the Division of Revenue Bill in the event the Bill is not enacted before the commencement of the next financial year.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Kimani Ichung’wah, Chairperson, Budget and Appropriations Committee, National Assembly</td>
</tr>
</tbody>
</table>

#### NATIONAL ASSEMBLY BILL

**PUBLIC FUNDRAISING APPEALS BILL, 2019**

<table>
<thead>
<tr>
<th>Dated</th>
<th>17th September, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objective</td>
<td>This Bill seeks to regulate public collections or harambees or public fundraising appeals. The Bill seeks to repeal the Public Collections Act, (Cap. 106) which has several limitations including non-alignment to the provisions of the Constitution of Kenya, 2010.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Jeremiah Kioni, Chairperson, Constitutional Implementation Oversight Committee, National Assembly</td>
</tr>
</tbody>
</table>

#### NATIONAL ASSEMBLY BILL

**SUGAR BILL, 2019**

<table>
<thead>
<tr>
<th>Dated</th>
<th>2nd October, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objective</td>
<td>The principal object of this Bill is to reinstate the Sugar Act, which was repealed through the enactment of the Crops Act, 2013 (No. 16 of 2013). Enactment of the Bill shall restore the roles of the Kenya Sugar Board currently granted to the Sugar Directorate of the Agriculture and Food Authority established under the Agriculture and Food Authority Act, 2013 (No. 13 of 2013).</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Wafu Wamunyinyi, Member of Parliament, National Assembly</td>
</tr>
</tbody>
</table>

#### NATIONAL ASSEMBLY BILL

**ALCOHOLIC DRINKS CONTROL (AMENDMENT) BILL, 2019**

<table>
<thead>
<tr>
<th>Dated</th>
<th>4th October 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objective</td>
<td>The principal object of this Bill is to amend the Alcoholic Drinks Control Act, 2010 (No. 4 of 2010) to empower the Cabinet Secretary to prescribe the hours within which electronic advertisement of alcoholic drinks shall be done.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Silvanus Osoro Onyiego, Member of Parliament, National Assembly</td>
</tr>
</tbody>
</table>
### NATIONAL BILL

**Objective**
The principal purpose of this Bill is to give effect to Articles 10(2)(a), 69(1)(d), 118, 174(c), 184(1)(c), 196(1)(b), 201(a) and 232(1)(d) of the Constitution of Kenya, 2010 regarding public participation. The Bill sets out the principles governing public participation, obligations of state organs and public offices in conducting public participation, the role of the National Assembly and the Senate in conducting public participation, the rights of a member of public in public participation and designates public participation officers. The Bill also seeks to enhance public participation by creating a framework for informed, effective and efficient engagement of the public in decision-making processes.

**Sponsor**
Chris Wamalwa, Member of Parliament, National Assembly

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### NATIONAL BILL

**Objective**
The principal object of this Bill is to amend the Anti-Corruption and Economic Crimes Act (No. 3 of 2003) to hold managers, Chief Executive Officers, Directors of public institutions personally liable for running down institutions. Further, it seeks to completely bar anyone convicted of an offence under the Act from holding office as a public or state officer.

**Sponsor**
Silas Kipkoech Tiren, Member of Parliament, National Assembly

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### NATIONAL BILL

**Objective**
This Bill proposes to provide for the establishment of the Waqf Commission and the administration of waqf property in Kenya and for connected purposes. It also seeks to repeal the Waqf Commissioners Act (Cap. 109).

**Sponsor**
Aden Duale, Leader of the Majority Party, National Assembly

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### NATIONAL BILL

**Objective**
The principal object of this Bill is to amend the Law of Succession Act (Cap. 160) to give legitimate dependants of a deceased person a claim and a right in the deceased's intestate estate. The Bill seeks to provide clarity on who a dependant of a deceased person is. The Bill further seeks to repeal section 29 of the principal Act and introduces a new meaning of the term “dependants”.

**Sponsor**
George Peter Kaluma, Member of Parliament, National Assembly

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### NATIONAL BILL

**Objective**
The principal object of this Bill is to amend the Constitution, 2010 to delete reference to the term Cabinet Secretary and substitute with the term Minister as was the case with the repealed Constitution and provide for appointment of Ministers from among the Members of Parliament.

**Sponsor**
Vincent Kemosoi Mogaka, Member of Parliament, National Assembly

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### C. SENATE BILLS

**SENATE BILL**

**Objective**
The principal object of this Bill is to provide a framework to regulate the business of street vending in the country. The regulation of the trade will therefore ensure that street vendors are able to transact business in favorable conditions.

**Sponsor**
R.C. Kibiru, Chairperson, Standing Committee on Tourism, Trade and Industrialization, Senate

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**SENATE BILL**

**Objective**

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<table>
<thead>
<tr>
<th>Date</th>
<th>20th June 2019.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objective</td>
<td>The principal object of the Bill is to provide a framework for the registration and licensing of children and homes so as to ensure the provision of care and protection to neglected children found in every County.</td>
</tr>
</tbody>
</table>

**SENATE BILL**  
**ALTERNATIVE DISPUTE RESOLUTION BILL, 2019**

<table>
<thead>
<tr>
<th>Date</th>
<th>14th August 2019.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objective</td>
<td>The principal object of the Bill is to put in place a legal framework for the settlement of certain civil disputes by conciliation, mediation and traditional dispute resolution.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Sylvia Kasanga, Senator.</td>
</tr>
</tbody>
</table>

**SENATE BILL**  
**ELECTION (AMENDMENT) BILL, 2019**

<table>
<thead>
<tr>
<th>Date</th>
<th>14th August 2019.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objective</td>
<td>The purpose of this Bill is to amend the Elections Act, 2011 (No. 24 of 2011), to allow a candidate to be presented to the electorate on party primary or election ballot papers in the way in which the candidate has chosen to familiarize himself or herself to the electorate. This Bill therefore seeks to provide for the inclusion of a candidate's popular name on a ballot paper while at the same time safeguarding the sanctity of the electoral process.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Ephraim Maina, Senator</td>
</tr>
</tbody>
</table>

**SENATE BILL**  
**LIFESTYLE AUDIT BILL, 2019**

<table>
<thead>
<tr>
<th>Date</th>
<th>6th September, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objective</td>
<td>This Bill seeks to provide a legal framework for lifestyle audit whilst incorporating the values and principles of governance under Article 10 of the Constitution into the public or state officers' public work.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Farhiya Ali Haji, Senator</td>
</tr>
</tbody>
</table>

**SENATE BILL**  
**FISHERIES MANAGEMENT AND DEVELOPMENT (AMENDMENT) BILL, 2019**

<table>
<thead>
<tr>
<th>Date</th>
<th>11th October, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objective</td>
<td>The principal object of this Bill is to amend the Fisheries Management and Development Act, 2016 (No. 35 of 2016) on the appointment of the Chairperson and Chief Executive Officer of the Fish Marketing Authority to align their appointment with best practice on appointment of Chairpersons and Chief Executives of Corporations as enunciated in the Mwongozo Code for State Corporations.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Moses Otieno Kajwang', Senator.</td>
</tr>
</tbody>
</table>

**SENATE BILL**  
**REPRODUCTIVE HEALTHCARE BILL, 2019**

<table>
<thead>
<tr>
<th>Date</th>
<th>20th November, 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objective</td>
<td>This Bill proposes to impose obligations on each level of government to ensure availability of reproductive health care services including requiring both levels of government to provide adequate financial resources in their budgets to meet their obligations. The Bill further provides a framework for assisted reproduction services. The Bill also seeks to provide the framework for access to reproductive health services by adolescents.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Susan Kihika, Senator.</td>
</tr>
</tbody>
</table>
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 9th August, 2019 and 6th December, 2019.

<table>
<thead>
<tr>
<th>DATE OF PUBLICATION</th>
<th>LEGISLATIVE SUPPLEMENT NUMBER</th>
<th>CITATION</th>
<th>PREFACE</th>
</tr>
</thead>
<tbody>
<tr>
<td>9th August, 2019</td>
<td>140</td>
<td>Intergovernmental Relations Act-Transfer of Library Functions (L.N. 142/2019)</td>
<td>The Intergovernmental Relations Technical Committee (IGRTC) approves the delineation of Library functions and distribution of libraries between the National Government and County Government as specified in the First and Second Schedule respectively, with effect from the 1st July, 2019. This is pursuant to section 15 of the Sixth Schedule to the Constitution, 2010 as read with section 12 (b) of the Intergovernmental Relations Act, 2012, and further to Legal Notices Nos. 16 and 137 to 183 of 2013 and Legal Notice No. 2 of 2016.</td>
</tr>
</tbody>
</table>
| 23rd August, 2019 | 149 | Small Claims Courts Rules, 2019 (L.N. 145/2019) | The Chief Justice makes these Rules in exercise of powers conferred by section 50 of the Small Claims Court Act, 2016. These Rules provide for *inter alia*:

- How to file a claim.
- Claims by or against minors, or persons of unsound mind.
- Claim against the estate of a deceased person.
- Service of Statement of claim.
- Service out of the Court’s jurisdiction.
- Power of court to enter or set aside default judgment.
- List of documents to be exchanged before hearing.
- Hearing Notice and procedure at hearing.
- Procedure in relation to settled claims.
- Effect of non-attendance at hearing.
- Effect of Settlement agreement.
- Form of hearing and expert report.
- Offer to settle.
- Procedure for enforcement of orders and decrees.
- Effect of non-compliance.
- Power of Court to order payment by instalments.
- Power of Court to stay execution of orders and decrees.
- Power to review decree or order.
- Appeals.
- Court not bound by strict rules of procedure or evidence.
- Assessment of costs. |
The Cabinet Secretary for Lands and Physical Planning makes these Regulations in exercise of the powers conferred by section 69 (3) of the Physical and Land Use Planning Act, 2019. These Regulations provide for:

- Types of projects.
- Strategic and Inter-county projects.
- Land transport.
- Railway corridors.
- Airports.
- Water transport.
- Industrialization.
- Museums and Archeological sites.
- Theatres and cultural exhibition centres.
- Stadia and sports centres.
- Education and training institutions.
- Resettlement and relocation.
- Metropolitan and city development.
- Land use programmes.
- Public forests.
- Ecologically sensitive and fragile areas.
- Wildlife conservation areas.
- Geologically unstable areas.
- Irrigation schemes.
- Strategic installations.
- Blue economy.
- Energy.
- Telecommunications.
- Mining, quarrying and sand harvesting.
- Oil and gas.
- Public utility areas.
- National Referral hospitals.
- Public purpose areas.
### Law Reform Compilation

<table>
<thead>
<tr>
<th>LAW REFORM ISSUE</th>
<th>BRIEF FACTS &amp; METADATA OF JUDGMENT</th>
<th>HOLDINGS PERTINENT TO LAW REFORM</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.</td>
<td>Tukero ole Kina v Attorney General &amp; another [2019] eKLR</td>
<td>1. The Court was constitutionally mandated under article 23(1) of the Constitution of Kenya, 2010 (the Constitution) to hear and determine applications for redress of a denial, violation or threat to a right or fundamental freedom in accordance with article 165 of the Constitution. When the violation or threat stemmed from a clause contained in a statute, it behooved the court to lay side by side the impugned provision of statute and articles of the Constitution it was alleged to have offended and see whether the former squared with the latter.</td>
</tr>
<tr>
<td></td>
<td>High Court at Malindi</td>
<td>2. Article 2 of the Constitution ordained the Constitution as the supreme law of the land and further avowed that any law that failed to resonate with the Constitution was invalid to the extent of its inconsistency. Article 10 of the Constitution on the other hand was premised on the basis that the national values and principles were binding to all and ought to be considered when enacting, applying and interpreting any law. Those principles, especially as they related to the instant petition included human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.</td>
</tr>
<tr>
<td></td>
<td>Petition No. 6 of 2018</td>
<td>3. The spirit and tenor of the Constitution ought to reverberate throughout the approach towards the interpretation of the Constitution in relation to the question at hand. In addition, the interpretation ought to be holistic rather than restrictive. In construing the impugned provisions, the Court was enjoined to go further than avoiding an interpretation that clashed with the constitutional values, purposes and principles. The Court had to also seek a meaning of the provisions that promoted constitutional purposes, values, principles, and which advanced rule of law, human rights and fundamental freedoms in the Bill of Rights. The interpretation ought to permit development of the law and contribute to good governance. The purposes and principles of the Constitution as required by the provisions of article 159 (2)(e) of the Constitution had to be promoted and protected.</td>
</tr>
<tr>
<td></td>
<td>R Nyakundi, J</td>
<td>4. There was a very heavy burden cast on any person challenging the validity of any piece of legislation since there was a presumption that the legislature understood and correctly appreciated the needs of the people and that its laws were directed to problems made manifest by experience. The court would only declare a statute invalid if it conflicted with the Constitution and so the onus was on anyone seeking to impugn a statute to show that in the circumstances which existed at the time it was passed, the legislation violated rights enshrined in the Constitution.</td>
</tr>
<tr>
<td></td>
<td>September 23, 2019</td>
<td>5. The presumption of constitutionality of a statute was rebuttable. Parliament could not evade a constitutional restriction by a colourable device. In order to rebut the presumption, the court would have to be satisfied that Parliament in so declaring was either acting in bad faith or had misinterpreted the provisions of the Constitution under which it purported to act.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>6. The principle of separation of powers developed as a political idea and was intended to enhance liberty and restrict tyranny by ensuring that all power in a governance system was not concentrated in the same person or group of persons. According to the classical doctrine of the separation of powers, the power of enacting laws (legislative power) should be separated from the power of administering the State (executive power) and the power of interpreting and applying the laws to particular cases (judicial power). However, constitutions adhering to that doctrine such as Kenya do not typically keep the branches of Government entirely separate. The doctrine allowed for each of the three branches of Government to have some involvement in, or control over, the acts of the other two. That partial mixture of mutually controlling powers was known as a system of checks and balances.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>7. The doctrine of proportionality stated that all laws enacted by the legislature...</td>
</tr>
</tbody>
</table>
and all actions taken by any arm of the State, which impacted a constitutional right, ought to go no further than was necessary to achieve the objective in view. The test of proportionality stipulated that the nature and extent of the State’s interference with the exercise of the right had to be proportionate to the goal it sought to achieve. Put differently, proportionality involved the court taking into consideration both the purpose and effect of the legislation.

8. Both purpose and effect were relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect could invalidate legislation. All legislation was animated by an object the legislature intended to achieve. That object was realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, were clearly linked, if not indivisible. Intended and achieved effects had been looked to for guidance in assessing the legislation’s object and thus the validity.

9. It was the duty of the Court to scrutinize allegations of rights infringement, that duty was germane to the edicts of constitutional interpretation and was no way a usurpation of the mandate of Parliament. Where the purpose or the effect of an impugned provision went against the grain of the Constitution, or where there was no discernible link between the legislation and the purpose, then the Court could not shirk its constitutional fiat to call the offending provision into question.

10. In determining discrimination, the guiding principles were clear:
   a. The first step was to establish whether the law differentiated between different persons.
   b. The second step entailed establishing whether that differentiation amounted to discrimination.
   c. The third step involved determining whether the discrimination was unfair.

   Section 66(1) of the Act denied parties desirous of dissolving their union under the umbrella of civil marriage the opportunity to do so unless and until a three year period had lapsed since the celebration of that union. That was prima facie discriminatory.

11. Whether or not the discrimination was unfair could be assessed by considering the following:
   a. Whether the provision differentiated between people or categories of people. If so, whether the differentiation could stand a rational connection to a legitimate purpose. If it did not then there was a violation of the Constitution. Even if it bore a rational connection, it could nevertheless amount to discrimination.
   b. Whether the differentiation amounted to unfair discrimination, that required a two-stage analysis:
      i. Firstly, whether the differentiation amounted to discrimination. If it was on a specified ground, then discrimination would have 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.
      ii. If the differentiation amounted to discrimination, whether it amounted to unfair discrimination, if it had been found to have been on a specified ground, then the unfairness would be presumed. If on an unspecified ground, unfairness would have 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.
   c. 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 of the Constitution.

12. The discrimination in the instant case was on an unspecified ground, it was upon the complainant to establish the same. The test for that focused primarily on the impact of the discrimination on the situation of the complainant. The policy argument fronted by the respondents as a basis for the differential treatment of persons desirous of dissolving a marriage fell short, a cursory observation of the underpinnings of that argu...
<table>
<thead>
<tr>
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|                  | men revealed that the same was wholly based on the position in England. Further reliance was placed on the position in Singapore. However, scarce effort was expended by the respondents to prove that in passing the impugned provision, the drafters of the Act paid any mind to public policy. If the imposition of the three year limitation was indeed a public policy consideration, all the parliamentary drafters had to do was to express their said intention uniformly across all the regimes of marriage contemplated under the Act. After all, it was provided in section 3(3) of the Act that all marriages had the same legal status. None of the following questions were answered to the Court's satisfaction or answered at all by the respondents: a. Why there was no such limit imposed on the four other regimes of marriage envisioned under the Act. b. What informed the decision to pick three years and not two or four? c. The reasoning that was used to arrive at the conclusion that the three year period was sufficient enough to make a fledgling marital union stable. 13. The position of civil marriage as one of the five regimes recognised in Kenya could not be understated. Christian Marriages as per section 17 of the Act were restricted to parties that professed the Christian faith. Per section 43(1) of the Act, customary marriage was entered into in observance of the customs of the communities of one or both of the parties. Respectively, sections 46 and 48 of the Act dictated that only parties that professed the Hindu or Islamic faith could enter into such unions. Inverse to the foregoing was the position of civil marriages, there was no limitation as to creed or community. All that was required was the intention of consenting adults. The umbrella of civil marriages sheltered not only the persons that did not fit the specific restrictions of faith and community but also persons that though having those options, for one reason or the other chose to celebrate a civil marriage. 14. It was clear that not only did the three year limit affect a wide classification of people but also that the respondents' notion that, that wide category could simply resort to the other available regimes of marriage recognised under the law was patently false. The only logical conclusion left to draw was that the decision to limit the presentation of petitions for separation and dissolution of civil marriages until after the lapse of three years since the celebration of the union was arbitrary and with no backing whatsoever. Section 66(1) of the Act was discriminatory and in violation of article 27(4) of the Constitution to the extent that it arbitrarily limited parties that had celebrated a union under the auspices of a civil marriage to a three year wait period before such a union could be dissolved. 15. The right to form a marriage union should not be subjected to such restrictions as could be presented by law that infringed on the fundamental rights and freedoms. A look at the provisions of section 66(1) of the Act as enacted by the Legislature and assented to, read together with other relevant provisions on forms of systems of marriage the aforesaid provision attaching a three year limit amounted to discrimination and a violation to the right on equality in terms of article 27 of the Constitution. 16. By imposing the three year limitation, the impugned section had the effect of forcefully keeping parties in a situation they no longer wished to be part; so that while section 66(2) of the Act contemplated cruelty and exceptional depravity as a ground for dissolution of marriage, a petition could not be entertained until the time limit was reached. That prima facie was a case of an affront to a person's human dignity preserved by article 28 of the Constitution. 17. By parties being unreasonably proscribed from enjoying the right to petition for a divorce before the lapse of three years, their right to access to justice guaranteed under article 48 of the Constitution was infringed upon. 18. The petitioner had amply rebutted the presumption of constitutionality of the Act. From scanning the length and breadth of the Hansard Reports and the material presented by the respondents, there was no evidence of a discussion on the effect of section 66(1) of the Act and whether there was any evidence on efforts to seek out stakeholders views and comments from the public at large who were affected by the imposition of the three year limit. In view of the impact of section 66(1) on the public, it was prudent for the National Assembly to actively engage the public. Had such an exercise
been undertaken, the likelihood of the impugned provision being retained would have been minimal.

19. The only part of section 66(1) of the Act that was unconstitutional was the three year period pre-requisite. It would have been possible for section 66(1) to be enacted without the offending requirement. Striking it down would not be a disservice to the operation of the entire section 66 of the Act and neither would it jeopardise the application of the rest of the Act.

1. Section 134 of the Criminal Procedure dealing with the framing of charges stated that every charge would contain, and would be sufficient if it contained, a statement of the specific offence or offences with which the accused person was charged, together with such particulars as could be necessary for giving reasonable information as to the nature of the offence charged.

2. The charge as framed was lucid, it disclosed the offence which the appellants were charged and it was one of vandalism contrary to section 64(4)(b) of the Energy Act (repealed). It met the terms of section 134 of the Criminal Procedure. Any errors did not detract from the substance of the charges as the facts or particulars for which the appellants were charged were clearly laid out. Further, an error concerning the 2nd appellant's residence or failure to stamp the charge sheet was not fatal to the charge as he was not thereby prejudiced nor was a failure of justice occasioned.

3. There was no doubt that the electric poles were vandalized as confirmed by PW 1, PW 2, PW 4 and PW 5. PW 1 who arrived at the scene found a post lying on the ground and saw a pick up speed off with another pole while PW 2 saw a stump and a fallen pole. Both witnesses confirmed that the stump and pole were the ones photographed by PW 4. Although the witnesses did not talk of aluminium conductors, that was not fatal to the charge. The term aluminium conductors referred to the electric wire which was vandalized as a result of cutting the poles. Therefore, the prosecution proved that 2 poles and aluminium conductors were vandalized.

4. The key witness, PW 1 placed both appellants at the locus in quo. He saw them organizing how to carry the post. There was a power saw and a pick-up which sped-off with one pole. There was nothing emerging from the testimony of PW 1 to show that he was lying or motivated by spite. Furthermore, the incident took place at daytime hence diminishing the opportunity for mistaken identity and both appellants were arrested at the scene. The appellants' defences when considered alongside the positive evidence of identification were an afterthought.

5. The offence of vandalism under section 64(4)(b) of the Energy Act, 2006 attracted a penalty prescribed of a fine of not less than five million shillings, or a term of imprisonment of not less than five years, or to both such fine and imprisonment. The sentence imposed by the trial court was the mandatory minimum sentence under the Energy Act 2006.

6. Mandatory minimum sentences had been under attack as it had been held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional as the mandatory nature deprived courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and that a mandatory sentence failed to conform to the tenets of fair trial that accrue to the accused person under article 50 of the Constitution. Enactment of a mandatory death sentence was a legislative intrusion into the judicial realm. Thereafter, the Court of Appeal applied the same principles in several cases where it held that the mandatory minimum sentences under the Sexual Offences Act were unconstitutional.

7. The inescapable conclusion was that the mandatory minimum sentences under the Energy Act, 2006 had to suffer the same fate as the Sexual Offences Act hence the mandatory minimum sentence prescribed under section 64 was unconstitutional. The Energy Act, 2006 was repealed by the Energy Act, 2019 which re-enacted the same offence and penalty at section 168.

8. Section 354 of the Criminal Procedure Code provided for the powers of the court upon hearing an appeal if it considered that there was no sufficient ground for appeal.
interfering, to dismiss the appeal or it could, under subsection 3(b), in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence. The offence of vandalism of the works of licensee was a serious matter as it affected a broad swathe of people and amounted to economic sabotage.

9. The trial court in imposing the sentence had the benefit of Social Inquiry Reports prepared by the Probation Department. As regards the 1st appellant, the report showed that he had been charged with vandalism of electric poles in other cases at the Mumias Magistrates Court and had committed the subsequent act when he was out on bond. While the 2nd appellant was an employee of the Kenya Power and Lighting Company and had been hired on contract until he committed acts of vandalism and was charged at the Mumias Magistrates Court. Given the propensity of the appellants to commit the same offences, a non-custodial sentence or a fine was out of the question.

Francis Matonda Ogeto v Republic [2019] eKLR
High Court at Machakos
Criminal Appeal No. 49 of 2017
G V Odunga, J
October 3, 2019
The appellant was charged at the trial court with the offence of gang defilement contrary to section 10 of the Sexual Offences Act. He was alternatively charged with the offence of indecent act contrary to section 11(1) of the Sexual Offences Act. The trial court found that the evidence adduced by the prosecution placed the appellant at the locus quo and hence the offence of gang defilement was committed and found the appellant guilty and convicted him. The trial court then sentenced the appellant to 15 years' imprisonment. Aggrieved by the trial court's decision the appellant filed the instant appeal.

1. The instant court was a first appellate court; an appellant on a first appeal was entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court had to itself weigh conflicting evidence and draw its own conclusion. It was not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the trial court's finding and conclusion; it had to make its own findings and draw its own conclusions. Only then could it decide whether the trial court's findings should be supported. In doing so, it should make allowance for the fact that the trial court had had the advantage of hearing and seeing the witnesses.

2. Under section 10 of the Sexual Offences Act, the ingredients of gang rape were:
   a. Rape or defilement under the Act;
   b. committed in association with others;
   c. committed in the company of another or others who commit the offence of rape or defilement with common intention.

   It was therefore clear that defilement which was committed in association with others or with common intention notwithstanding the fact that the accused could not have defiled the victim amounted to gang rape according to the section 10. It mattered not whether the offence was rape or defilement as long as the conditions under section 10 were found to exist.

3. There was overwhelming evidence both oral and documentary that the complainant was 17 years old hence a child under the Children Act. Accordingly, the offence ingredient would be that of defilement. For the accused to be convicted of the offence of defilement, certain ingredients had to be proved:
   a. Whether there was penetration of the complainant's genitalia;
   b. whether the complainant was a child; and finally,
   c. whether the penetration was by the appellant.

4. There was no doubt about the age of the complainant which was proved both by oral and documentary evidence to have been 17 years at the time of the offence. The first encounter between the complainant and the assailants was at Urawala Bus Stage and it was during the day. The appellant himself in his evidence did not dispute the fact that the complainant knew him. The next encounter was at the gate of the place where the assault occurred. Accordingly, there was sufficient opportunity for the complainant to properly identify her assailants. It was evident that subjecting an accused to a medical examination to prove that he committed the offence was not a mandatory requirement of law.

5. Both from the oral evidence and the documentary evidence it was clear that there was penetration of the complainant's genital organs with a male genital organ since there was infection in her genitalia. From the evidence of the complainant, it did not come out clearly that the appellant penetrated the complainant. In the circumstances one could not conclusively find that there was penetration of the complainant's genital organs by the appellant's genital organs for the purposes of defilement.

6. If the defilement of the complainant by the person who escaped was committed in association with the appellant or with common intention of both, the appellant would still be guilty of gang rape. In the instant case, while the other person was defiling the complainant, the appellant was guarding the place. It was clear that the appellant knew the intention of the other person and assisted and abetted the

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The sentence for gang rape or gang defilement for a term of not less than fifteen years which could be enhanced to life imprisonment vis-à-vis the sentence of life imprisonment for defilement is unreasonable for issuing a lighter sentence.
same. Considering the definition of gang rape, the appellant was properly convicted of the offence and the said conviction could not be faulted.

7. Section 10 of the Sexual Offences Act stated that a person convicted of the offence of gang rape was liable to imprisonment for a term of not less than the fifteen years but which could be enhanced to imprisonment to life. In the instant case, however, the relevant provisions used the phrases “shall be liable” and “not less than” in the same breath. As a result, the provision suffered from the malady of poor legal draftsmanship since the two phrases implied, in legal terms, diametrically opposed positions. In criminal law, where there was an ambiguity in phraseology of sentencing, the accused was entitled to the benefit of the least severe of the prescribed punishments for an offence. Section 10 had to be read as if the sentence provided was the maximum sentence. The use of the words “shall be liable to imprisonment” in section 10 gave room for the exercise of judicial discretion.

8. Section 10 of the Sexual Offences Act under which the appellant was charged provided for prima facie mandatory minimum sentence. Under the constitutional dispensation, mandatory minimum sentences ought to be looked at in light of article 27 of the Constitution as read with clause 7 of the transitional and consequential provisions of the Constitution. Such sentences did not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the Court was deprived of the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. Therefore, such provisions did not meet the constitutional dictates.

9. The opinion of the Supreme with respect to mandatory sentences applied with equal force to minimum sentences or non-optional sentences. That was in fact supported by the Kenya Judiciary Sentencing Policy Guidelines where it was appreciated that: whereas mandatory and minimum sentences reduced sentencing disparities, they however fettered the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders. Therefore, the provisions of a legislation that was in force before the Constitution such as the Sexual Offences Act had to be construed with the said adaptations, qualifications and exceptions when it came to the mandatory minimum sentences and particularly where the said sentences did not take into account the dignity of the individuals as mandated under article 27 of the Constitution.

10. There were several degrees of defilement; the Sexual Offences Act itself recognised so in section 8 when it prescribed different sentences for each set of ages of the victims concerned. In doing so, the Act applied the principle of proportionality and gravity of the offences in prescribing the sentence. However, it failed to take into account the fact that even within a particular set, the gravity of the offences could not be same. Some offences of defilement were committed in very gruesome circumstances while others were committed after occasioning serious bodily injuries to the victim. Others were committed in the very site of other members of the victim’s family while others were committed by persons who were almost the age groups of the victims in circumstances that if the law did not presume lack of consent was such offences, it could well be concluded that there could have been connivance.

11. The Court did not condone offences against minors and vulnerable persons. However, to treat offences as the same notwithstanding the aggravating circumstances, clearly violated the right to dignity as the offenders were thereby treated as a bunch rather than as individuals. That did not mean that the court ought not to mete out what appeared as prima facie mandatory minimum sentence. What it meant was simply that the circumstances of the offence had to be considered and having done so nothing barred the court from imposing such sentence.

12. There was some unreasonableness in the sentencing under section 8(2) of the Sexual Offences Act vis-à-vis section 10 of the said Act. The unreasonableness was due to the fact that where a person who, for all intent and purposes committed an offence under section 8(2) could well get away with a lighter sentence simply because he was in the company of other persons. On the converse a lone ranger who committed an act which for all intent and purposes amounted to an offence under section 10 faced a prima facie mandatory life sentence. Such sentencing could well be challenged on the ground of unfairness.

13. The appellant was a first offender. He was not the principal defiler of the complain-
ant. He was sentenced to the maximum prescribed sentence. No reason was given for that option. Though the Sexual Offences Act permitted the court to enhance the sentence to imprisonment to life, in opting for the maximum prescribed sentence where the law provided for a minimum and maximum sentence, the court ought to give a reason for so doing. In the absence of such a reason such a sentence had to be deemed to have been arbitrarily meted.
As part of its Corporate Social Responsibility (CSR), Kenya Law took part in a beach clean-up exercise at the Jomo Kenyatta Public Beach in Mombasa on 18th October, 2019. The beach cleanup initiative highlighted the pollution problem that ocean trash causes and its ill-effects to the public, wildlife and the tourism economy. Kenya Law joined in efforts to clean up the debris that washes up daily on the coastal shore and that which is left by visitors every day. The Kenya Wildlife Service (KWS) and County Government of Mombasa are charged with the task of daily clean-up of the public beaches.

Mr. John Wambua of Kenya Wildlife Service (KWS) emphasized the importance of conserving the environment and particularly keeping the coastline litter-free in an effort to save marine life. Further, he challenged members to create awareness about marine conservation and the need to reduce marine pollution by taking responsible action even in small steps such as properly disposing of waste.

At the clean-up, members were on the lookout for plastic bottles and other non-biodegradable matter such as glass, used syringes, used diapers and clothing. It was apparent just how much pollution of the beaches goes on. Overall, the Kenya Law team did a commendable job by collecting 509 Kilograms of plastic and other non-biodegradable waste in the morning cleanup session.

Kenya Law also sought to leave a long lasting impact after the cleanup by installing 5 garbage bins to encourage members of public – both residents and tourists- to keep the environment around the beach area litter-free. Further, a banner urging members of public to keep the beach clean was erected.

Finally, in keeping with its vision to be the lead provider of public legal information towards an enlightened society, Kenya Law distributed 500 pocket-size Constitutions to the public.

Kenya Law staff present copies of pocket-size Constitutions to Stakeholder representatives on 18th October, 2019 during the beach clean-up exercise.
Kenya Law engaged in Beach clean-up

Kenya Law staff posing with some of the waste collected at the beach

Kenya Law staff posing with some of the garbage bins installed at the public beach

Public receive copies of the Constitution from Kenya Law staff
KENYA LAW PARTICIPATES IN 5TH KAKAMEGA FOREST MARATHON

Kenya Law participated in the 5th edition of the Kakamega Forest Marathon, which was held on 30th November, 2019 in Kakamega Forest. The Marathon, dubbed ‘Ingo Marathon’ is an annual event that seeks to bring attention to the efforts to restore and conserve the only tropical rainforest in Kenya, Kakamega Forest.

The marathon is organized by the Kakamega Forest Heritage Foundation, a charitable organization founded in 2014 with the objective of complementing the efforts of the Kenya government of restoring and conserving Kakamega Forest. Kakamega Forest is Kenya’s only tropical rainforest and is said to be the furthest East remnant of the Guinea-Congolian rain forest. It has, over the years, been exploited and it is necessary that measures are put in place to save this important resource from extinction. The Kakamega Forest Marathon is part of wider efforts to bring attention to the need to protect indigenous forests.

The theme of 2019 Marathon was: Foot Prints in the Forest for the Forest. The Chief Guest was HE. (Dr.) Stephen Kalonzo Musyoka - Special Peace Envoy in the Republic of South Sudan and the Great Lakes Region. Also present was the Cabinet Secretary, Ministry of Sports, Culture and the Arts. Amb. (Dr.) Amina C. Mohamed. As part of its CSR and in keeping in line with government policy on afforestation, Kenya Law staff took part in the 15Km corporate team fundraising challenge. Further, Kenya Law distributed 300 copies of pocket-sized Constitutions to the participants and the general public.

Kenya Law team plant trees at Kakamega Forest after the Marathon
Kenya Law staff with the Chief Guest: HE Dr. Stephen Kalonzo Musyoka at the 15km “Ingo-Forest Challenge” race during the Kakamega Forest Marathon

Kenya Law staff with Ms Linda Murila at the start of the 15km “Ingo-Forest Challenge” race during the Kakamega Forest Marathon

Kenya Law team at the Kakamega Forest tree planting site after the Marathon
An appeal on a decision on an arbitral award can only lie to the Court of Appeal where the High Court, in setting aside the award, steps outside the grounds set out in section 35 of the Arbitration Act. There is a limited right of appeal against a High Court decision made under section 35 of the Arbitration Act.

Children born of a Muslim father and a non-Muslim mother who were not formally married can inherit the estate of their deceased father.