An advocate acting for the victim can actively participate in criminal proceedings to safeguard their constitutional and statutory rights.

- Kenya Revenue Authority could not impose a penalty and also undertake criminal prosecution with respect to the same tax liability  
- Factors examined in a transnational guardianship case while considering a child's best interests
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### Laws of Kenya Volumes

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Whether courts would determine or cap the amount of fees charged by private schools. Pg 35

The Constitution does not contemplate the withholding of salaries and allowances of commissioners of independent commissions in situations of illness. Pg 48
Devolution as laid out in the Constitution of Kenya 2010 is just but a skeleton. The way the devolved system of governance works today, the flesh, nerves, parts and senses that fill the skeleton, is a result of numerous judgements from the Courts. If you want to understand how the Devolved Government works, the 2015 Devolution Law Report is the best place to start.

Kshs. 5,500.00
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The Bench Bulletin is the definitive intelligence briefing for Kenya’s Judicial officers, the practitioners, managers and the business fraternity. It is a quarterly magazine of recent developments in law, particularly case law, new legislation in the form of Acts of Parliament, rules and regulations, pending legislation contained in Bills tabled before Parliament and selected Legal Notices and Gazette Notices.

This edition of the Bench Bulletin highlights a significant range of ground breaking jurisprudence from the superior courts of record in Kenya.

From the Supreme Court, we highlight the precedent setting decisions in the case of Joseph Lendrix Waswa v Republic [2020] eKLR. The appeal before the Supreme Court dealt with whether an advocate acting for the victim could be permitted to actively participate in criminal proceedings to safeguard the victim’s constitutional and statutory rights; whether allowing an advocate acting for the victim to actively participate in the criminal proceedings would violate the accused right to a fair trial by exposing them to double prosecution; what were the guiding principles in determining whether a victim or his legal representative could participate in a trial and the manner and extent of the participation; whether a victim or his legal representative could prosecute crimes on behalf of the Director of Public Prosecutions; whether a party in a criminal trial could appeal against an interlocutory ruling, and if so, at what time should the appeal be made (what were the circumstances in which an interlocutory appeal could be allowed) and what were the circumstances in which an appellate court could interfere with the exercise of discretion of a trial court.

The Supreme Court held mainly that the emerging picture from other jurisdictions was that the criminal justice processes should empower victims and their voices should be heard, not only as witnesses for the prosecution but as rights holders with a valid interest in the proceedings and the outcome of the case. The court further found that article 259(1) and (3) of the Constitution was instructive on how to construe their rights under article 50(9) of the Constitution. Articles 20(3) and 50(9) of the Constitution read together with the Victims Protection Act affirmed that victims had rights in Kenya’s criminal justice system. Those rights were stipulated in section 9 of the Victims Protection Act. Article 27 of the Constitution also provided that every person was equal before the law and had the right to equal protection and equal benefit of the law.

From the Court of Appeal, we highlight the issues on whether the exhibition of a medical scheme beneficiary form in court amounted to wrongful invasion of the contributors’ right to privacy as well as that of the two beneficiaries and also whether a medical scheme beneficiary form which revealed the relationship between the contributor and beneficiaries was a medical record. This was seen in the case of TOS v Maseno University & 3 others (Civil Appeal 112 of 2016) where the Court of Appeal in Nairobi held that the material complained about by the appellant was not a medical record. What was exhibited was a medical scheme beneficiary form that revealed the relationship between the appellant and the 1st respondent’s legal officer. Below the name of the appellant’s wife were the names of their two children, who were also named as beneficiaries of the 1st respondent’s medical scheme, courtesy of their relationship with the appellant’s wife, which was factually correct. It also found that the trial court erred in finding that the exhibition of the medical scheme beneficiary form amounted to wrongful invasion of the appellant’s right to privacy as well as that of the two minors.

These are just a few of the jurisprudential decisions highlighted in this issue of the Bench Bulletin. Kenya law is committed to continue keeping pace with the changes in legal developments both locally and internationally notwithstanding the global challenges that has affected operations of many organizations due to COVID-19 pandemic. It is our hope that you will find the publication both enlightening and beneficial.
CJ’s Message

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

CONFERENCE & COMMEMORATION OF THE SILVER JUBILEE
Key Note Address by Hon. Justice David K. Maraga, EGH, Chief Justice and President of the Supreme Court of Kenya on October 28, 2020.

The Chief Registrar of the Judiciary, Hon. Council Members, Development partners; Stakeholders The CEO & Deputy CEO, Kenya Law, Kenya Law Staff;

Distinguished guests; Ladies and Gentlemen;

I am very pleased to welcome you all to this ceremony. Not only are we here for the Annual Staff Conference during which we recognise and reward exemplary employees, we are also marking the 25th Anniversary of the Council’s establishment.

This, therefore, is an opportunity for us to not only reflect on the past year but to also evaluate the successes we have achieved and challenges we have encountered since we started the work of providing unfettered access to public legal information.

Let me say at the onset that there are many things that, as the Chair of the Kenya Law Council, it makes me proud and confident that we are on the right path in the pursuit of the objectives for which we were established on January 27, 1995.

For example, slightly over a year ago, we launched the Strategic Plan for 2018–2022 which outlined various commitments centered on increased use of technology in the execution of our mandate. As you are aware, the Judiciary has identified technology as one of the principle tools for enhancing access to justice. I am glad that among Kenya Law’s most notable achievements in the past year are ICT-based innovations that have helped to resolve the perennial challenge of providing access to real-time, up-to-date Laws of Kenya and case law to the public. These systems are customized to suit the different needs of different users, making them highly adaptable and within reach.

Ladies and gentlemen,

This event is also significant to me personally as it enables me to reflect on my tenure as the Chairman of the Council since 2017. During this time, we have made many significant achievements. Please allow me to talk about some of them. We have collected and uploaded onto the Kenya Law website a total of 69,874 decisions from the superior courts of record during this period, and also published 12 Kenya Law Reports and Four specialized digests on various topical issues of the law. Of these, the most memorable publication is the compendium of rulings on Bail and Bond that tracks decisions on the implementation of the Bail and Bond Policy Guidelines to guide the police and judicial officers in the application of laws that provide for bail and bond. This publication was launched by the Bail and Bond Implementation Committee in February 2020.

Another notable publication is the Arbitration Case digest, which highlights the emerging jurisprudence in arbitration practice and has taken a comprehensive approach to its examination of significant court decisions on legal issues in key areas of arbitral practice, including legislation, rules and procedure. This case digest provides a significant framework for contemplation of the current state of arbitration as well as its future direction.

Other notable publications include 31 Bench Bulletin containing decisions from all our superior Courts, that is; the High Court, Environment and Land Court, Employment and Labor Relations Court, Court of Appeal and the Supreme Court. Kenya Law has also been undertaking the revision, consolidation and updating of the Laws of Kenya. Among our notable achievements in this regard has been the uploading of all legislations within 48 hours of receipt; provision of 500 up-to-date pieces of legislation on the Laws of Kenya database including the flagging of provisions of law declared unconstitutional; publication of 1,400 pieces of County Legislation; publication of eight Sectoral Laws and specialised publications, as well as the Electoral Laws in preparation for the 2017 elections. In addition, three service issues, which are amendments filed to existing publications, have been published on the Grey Book Service Issue; Land Laws Service Issue and Public Finance Service Issue.

Interestingly, we have noted that the pocket-sized Constitution of Kenya booklet is the most popular and widely disseminated publication of the Laws of Kenya. This tells us that interest in legal information is not just the preserve of the legal fraternity; the people out there are yearning to have the Constitution in their pockets as well.

The two ICT systems for publishing the Laws of Kenya and judicial decisions stand out as the first of their kind to be...
implemented in Africa. Kenya Law identified the need to capture and manage rich, structured data and metadata for Kenyan case law. The database will assist in capturing, structuring, researching, analyzing and publishing this data and its derivative products.

The Case law database will no longer be just a collection of case reports, but a valuable, rich, structured data set of Kenyan jurisprudence that enables the creation of new value-adds for Kenya Law and its stakeholders. The Kenyan Legislative Database will address the challenges faced during revision of the Laws of Kenya and enable real-time publication of the Laws; efficient point in time functionality and address various needs of the different users of the Laws of Kenya content.

I am also happy that the Council’s budget has continued to grow over the years in tandem with its growing activities. For example, it has grown from Sh.255 million in the 2016/2017 – Financial Year to Sh.321.3 Million in 2020/2021, a 26 per cent growth. To add to this, the Council mobilised funding totaling Sh.41.58 Million from Development Partners such as the World Bank and the International Development Law Organisation (IDLO).

The Council regards corporate governance as critical to the success of Kenya Law. Through the corporate governance framework, commercial and operational risks were identified and controlled; proper systems of checks and balances were put in place without inhibiting the efficient running of the organization. The operations of Kenya Law are therefore conducted in accordance with the best practices anchored in principles of accountability and transparency as well as compliance with relevant laws and regulations. To this end and in line with statutory obligations as well as the dictates of good corporate practices, the organisation tracked and monitored the implementation of the Kenya Law Strategic Plan 2018-2022; Developed and disseminated the Citizens Service Delivery Charter while regular legal and compliance audits were also carried out.

To entrench the culture of quality management, Kenya Law attained the ISO 9001:2015 Certification in September 2019 after implementing the necessary quality systems throughout the organisation. Congratulations Mr. CEO and the entire Kenya Law Staff.

Ladies and Gentlemen,

As we mark the 25th Anniversary of Kenya Law, I am very happy that this institution has grown in leaps and bounds, earning accolades from far and wide. For example, it was named the Best Public Sector Legal Department at last year’s Law Society of Kenya Nairobi Branch Legal Awards. The LSK jury noted that Kenya Law had surpassed their expectation and became the first-ever recipient of this award;

Further afield, Kenya Law also won the Free Access to Law Award at a ceremony held in South Africa where the Council was named the “leading publisher of public legal information on the continent of Africa.” This success has been possible due to the dedication and hard work of the Kenya Law Staff as well as the Kenya Law Council. Once again, Congratulations Mr. CEO and the entire Kenya Law Staff.

Ladies and gentlemen,

Let me conclude with one of the highlights of the day: recognition of the best performance. In this regard, I wish to congratulate all of you who have been recognized and given awards today. Your passion and determination to excel in your areas of work has set you apart. Keep it up!

To the Council and the Secretariat, I salute your unwavering support over the years. As you know, I will be leaving the Judiciary in a short while. As I do, I am confident that you will continue to drive this institution to greater heights.

Many individuals and institutions have been instrumental in the growth of Kenya Law since its launch. The Office of the Attorney-General & Department of Justice; the Government Printer; Development Partners such as the African Legal Information Institute, Laws.Africa; Netrix; IDLO; the United Nations Conference on Trade and Development; and the World Bank. I wish to sincerely thank them all. Their support has made us what we are today.

Once again distinguished guests, I thank you for finding time to be with us today.

May God bless you all.

HON. JUSTICE DAVID K. MARAGA,
EGH CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT OF KENYA
What they said

Supreme Court Judges – DK Maraga CJ & P; MK Ibrahim, SC Wanjala, NS Ndungu & I Lenaola, SCJJ, in Joseph Lendrix Waswa v Republic - Petition No. 23 of 2019

“…Although the adversarial criminal trial process is a contest between the State, represented by the DPP, and the accused, usually represented by defence counsel and the traditional role of victims in a trial is often perceived to be that of a witness of the prosecution, it is without doubt, that flowing from both the Constitution and the VPA and in particular section 9(2)(a) of the VPA, that a victim too, has the right to participate in criminal proceedings. The participation of victims in criminal trial proceedings, though a novel trend in our laws, is in accord with international developments that have embraced the place of victims in the trial process. Our Constitution under Articles 2(5) and (6) permits us to apply the general rules of international law and also provides that any treaty or convention ratified by Kenya forms part of the law of Kenya...”

Supreme Court Judges – DK Maraga, CJ and P; PM Mwilu, DCJ and VP; MK Ibrahim, SC Wanjala and SN Ndungu, SCJJ, in Hussein Khalid and 16 others v Attorney General & 2 others - Application No. 32 of 2019

“… Section 200 of the CPC which seeks to secure the rights of parties in a trial once a Judicial Officer hearing a case ceases to exercise jurisdiction over the matter. Even though it is a Criminal Law principle it has been applied across the board in most of the hearings in furtherance of the constitutional right of fair hearing.”

Court of Appeal Judges – W Karanja, H Okwengu & F Sichale, JJA, in Okiya County Government of Garissa & another v Idriss Aden Mukhtar & 2 others - Civil Appeal No 294 of 2019

“It is not lost on us that the Governor is the political leader of the county, and that he is aligned to a specific political party. It is natural that he would identify for appointment as members of his county executive committee, persons who are committed to his cause and whom he has confidence in. Section 31(a) would therefore come in handy where the Governor has reason to lose confidence in an executive committee member due to sabotage or such like activity that would hamper proper governance of the county. This means that there must be reasons upon which it can be concluded that the powers of the Governor have been exercised in good faith and for proper reasons and not arbitrarily or capriciously. It cannot be as the appellants appear to contend, that the Governor is entitled to fire the respondents at will without any reason and without due process. That would be contrary to the respondents’ constitutional rights to fair labour practices and the right to fair hearing.”

High Court Judge – JA Makau, J, in Law Society of Kenya & 7 others v Cabinet Secretary for Health & 8 others; China Southern Co. Airline Ltd (Interested Party) - Petition 78, 79, 80 & 81 of 2020 (Consolidated)

“the Respondents’ contention as regards averments that a “structural interdict” can only be issued as a final order or judgment would bleed Article 23(3) of the Constitution of all meaning.”

“From the Provisions of Article 20(3)(a) and (b) of the Constitution this Court is bound to adopt the interpretation that most favours enforcement of rights claimed and to develop the law on structural interdict. The structural interdict as an appropriate relief can be available at interlocutory stage.”
High Court Judge – GV Odunga, J, in Geoffrey K. Sang v Director of Public Prosecutions & 4 others - Petition No. 19 of 2020

“In my view, the discretion to be exercised by the DPP is not to be based on recommendations made by the investigative bodies. Therefore, the mere fact that the DPP’s decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he/she believes that he/she has in his/her possession evidence on the basis of which a prosecutable case may be mounted and as long as he takes into account the provisions of Article 157(11) of the Constitution as read with section 4 of the Office of Public Prosecutions Act, No. 2 of 2013.”

High Court Judge – RPV Wendo, J, in JKM v Republic - Criminal Appeal No 54 of 2018

“Section 20(1) is clear that, a male person must commit the incest with a female relative. There is no provision in the Sexual Offences Act where a male is deemed to commit incest with male relative. An offence of incest was not disclosed as no such offence exists under Section 20(1) of the Sexual Offences Act.”

High Court Judge, W Korir, J – CIS v Directors, Crawford International School & 3 Others - Petition No. 162 of 2020

“The market dictates the cost of a product or service and the consumer purchases the product he or she can afford. It would be unjust for parents who willingly and voluntarily enroll their children in private schools to demand a reduction of school fees on the ground that the fees charged violates the constitutional right to free and basic education. I appreciate that the constitutional rights of children should be given special attention by this Court. This, however, should be balanced with the rights of those who invest in provision of private education to make profits from their investments.”

Employment and Labour Relations Court Judge – MA Onyango, J, in Kenya Magistrates and Judges Association v Judicial Service Commission & 2 others - Petition 150 of 2019

“Paragraphs 16(1), 17(1) and (2) (of the Regulations under the Judicial Service Act) are clear that the only role the Chief Justice performs under those paragraphs is to remove the officer from exercising the powers of the office where proceedings have been commenced that may lead to the removal of the officer. There is separation of roles between the Chief Justice and JSC, the former being to remove from performing the functions of the office and the latter being to hear and determine the disciplinary case. It is evident that there is no disciplinary role in those sections. The Chief Justice does not hear the disciplinary case. He does not remove a judicial officer from office. His role is limited to receiving a complaint, considering the complaint and if it does not in his opinion as Head of Judiciary, constitute misconduct, he rejects the complaint. However, if it constitutes a misconduct, he only removes the officer from performing the duties of the office then refers the charges against the officer to JSC for hearing.”
The appellant was charged with the offense of murder in the trial court. After nine witnesses for the prosecution had testified, counsel for the family of the deceased (the victim) made an oral application for leave to actively participate in the proceedings. The trial court observed that the law had shifted the traditional parameters of a victim in a criminal case and therefore a victims' counsel could no longer be considered a passive observer in criminal proceedings. However, the trial court noted that the counsel for the victim could not be active and parallel to that of the prosecutor.

Consequently, the trial court allowed the participation of the counsel watching brief limited to the following instances: on submission at the close of the prosecution case whether there was a case to answer; final submission should the accused be put on his defence; on points of law should such arise in the course of trial, and upon application at any stage of the trial for the consideration by the court.

Aggrieved by the trial court's ruling, the appellant lodged an appeal to the Court of Appeal. The Court of Appeal being satisfied that the impugned rights given by the trial court to the victim of the offence (the father of the deceased) were in conformity with the Constitution of Kenya, 2010 and the Victim Protection Act, 2014 (VPA), upheld the ruling of the trial court and dismissed the appeal in its entirety. Aggrieved by the decision of the Court of Appeal, the appellant filed the instant appeal.

The Issues for determination were whether an advocate acting for the victim could be permitted to actively participate in criminal proceedings to safeguard their constitutional and statutory rights; whether allowing an advocate acting for the victim to actively participate in the criminal proceedings would violate the accused right to a fair trial by exposing them to double prosecution; what were the guiding principles in determining whether a victim or his legal representative could participate in a trial and the manner and extent of the participation; whether a victim or his legal representative could prosecute crimes on behalf of the Director of Public Prosecutions; whether a party in a criminal trial could appeal against an interlocutory ruling, and if so, at what time should the appeal be made (what were the circumstances in which an interlocutory appeal could be allowed) and what were the circumstances in which an appellate court could interfere with the exercise of discretion of a trial court.

The Supreme Court found that as the overriding element of State control inevitably pit the power of the State against the accused, the necessity of protecting the accused's rights within that power imbalance arose to ensure that there was equality of arms. However, that could inadvertently eclipse the recognition of the victim's inherent interest in the response by the criminal justice system to the crime. Kenya's progressive Constitution had captured and addressed all those scenarios.

The court noted that the right to fair hearing was provided for under article 50(1) of the Constitution and the attendant rights of an accused person were set out in article 50(2). The Constitution also recognized victims of offences. In addition to the constitutional underpinning, the Victim Protection Act was enacted deliberately in 2014 to give effect to article 50(9). Thus, the rights of victims in a trial process also had statutory underpinning.

The court held that although the adversarial criminal trial process was a contest between the State, represented by the Director of Public Prosecutions (DPP), and the accused, usually represented by defence counsel and the traditional role of victims in a trial was often perceived to be that of a witness of the prosecution, that flowing from both the Constitution and the Victim Protection Act and in particular section 9(2)(a) of the VPA, a victim too, had the right to participate in criminal proceedings.
The Supreme Court found that participation of victims in criminal trial proceedings, though a novel trend in Kenyan laws, was in accord with international developments that had embraced the place of victims in the trial process. Kenya's Constitution under articles 2(5) and (6) permitted the court to apply the general rules of international law and also provided that any treaty or convention ratified by Kenya formed part of the law of Kenya.

The Supreme Court held that the role of a victim in a criminal trial was recognized in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985). In that Declaration, in the context of the criminal justice system, it was a central obligation of governments to comply with the victim's rights to access to justice and fair treatment, restitution, compensation and assistance.

The court held that under article 68(3) of the Rome Statute, of the International Criminal Court (ICC) victims before the ICC were granted far-reaching rights. In light of the large degree of discretion accorded to the judges conducting the trial, the practice of the ICC had developed to allow victims:-

a) to make an opening and closing statement (that was also in consonance with rule 89(1) of the ICC Rules of Procedure and Evidence);
b) to attend and participate in hearings and status conferences through written submissions and oral argument;
c) to introduce evidence and challenge admissibility of evidence with leave of the court; and
d) to question witnesses and/or the accused under the strict control of the court. Where there were a large number of victims admitted to participate in the proceedings, the court could limit the number of lawyers representing them pursuant to rule 90(2)-(4) of the ICC Rules of Procedure and Evidence.

The Supreme Court found that the emerging picture from other jurisdictions was that the criminal justice processes should empower victims and their voices should be heard, not only as witnesses for the prosecution but as rights holders with a valid interest in the proceedings and the outcome of the cause.

The court further found that article 259(1) and (3) of the Constitution was instructive on how to construe their rights under article 50(9) of the Constitution. Articles 20(3) and 50(9) of the Constitution read together with the Victims Protection Act affirmed that victims had rights in Kenya's criminal justice system. Those rights were stipulated in section 9 of the Victims Protection Act. Article 27 of the Constitution also provided that every person was equal before the law and had the right to equal protection and equal benefit of the law. Both the Constitution and the Victims Protection Act sought to ensure the fairness of justice procedures applied to both the victims and accused particularly on the right to a fair hearing, timeliness, respect, dignity, and neutrality.

The Supreme Court noted that the trial court being an impartial entity that oversaw the progress of a case had the ultimate function of determining the accused's guilt or innocence. Its aim was to establish the truth. The purpose of criminal proceedings, generally, was to hear and determine finally whether the accused had engaged in conduct which amounted to an offence and, on that account, was deserving of punishment. Thus, the rights of the accused could not be considered in isolation without regard to those of the victim. Victims too had a legitimate interest in the court's exercise of its jurisdiction. The criminal justice system should cultivate a process that inspired the trust of both the victim and the accused.

The Supreme Court also noted that considering the rights of the accused, the victim and society as a whole in a criminal trial was not only fair, pragmatic but also constitutionally viable. The trial court had to protect the rights of all parties involved in criminal proceedings. There was a public interest in ensuring that trials were fair. That interest could be served by safeguarding the rights of the accused, the objectivity of the prosecution and, by acknowledging the victim's interest. The rights of the accused and the public interest should be secured and fulfilled. The rights of victims did not undermine those of the accused or the public interest. The true interrelationship of the three was complementary. The participatory rights of the victim did not violate the fair trial rights of the accused. A victim could participate in a trial in person or via a legal representative.

The court held that once a victim or his legal representative made an application to participate in a trial, it was the duty of the trial court to evaluate the matter before it, consider the victim's views and concerns, their impact on the accused person's right to a fair trial, and subsequently, in the trial court's discretion, determine the extent and manner in which a victim could participate in a trial. Since participatory rights were closely related to the rights of the accused and the right to a fair and expeditious trial, they should be granted in a judicious manner which did not cause undue delay in the proceedings and thus prejudice the rights of the accused.

The Supreme Court noted that discretionary pronouncements of a court formed an integral part of a court's jurisdiction and should not be interfered with unless an appellate court was satisfied that the exercise of that discretion was improper and, therefore, warranted interference. A court had to be satisfied that the trial court in exercising discretion misdirected itself and had been clearly wrong in the exercise of the discretion and
that as a result, there had been injustice. In the instant case, there was no need to interfere with the trial court's discretionary pronouncements.

The court also noted that article 157(1) of the Constitution established the office of the DPP. The State's prosecutorial powers were vested in the DPP under article 157 of the Constitution. That office, under article 157(10), neither required the consent of any person to institute criminal proceedings nor was it under the direction or control of any person or authority. Those provisions were also replicated in section 6 of the Office of the Director of Public Prosecutions Act, 2013. The office of the DPP was the sole constitutional office with the powers to conduct criminal prosecutions.

The Supreme Court held that the victim had no active role in the decision to prosecute, or the determination of the charge upon which the accused would finally be tried. That was the sole duty of the DPP. While the victim of a crime could participate at any stage of the proceedings as deemed appropriate by the trial court, a victim or his legal representative did not have the mandate to prosecute crimes on behalf of the DPP. The DPP had to at all times retain control of, and supervision over the prosecution of the case. As such, the constitutional and statutory power of the DPP to conduct the prosecution was not affected by the intervention of the victim in the process.

The Supreme Court also held that a victim could not and did not wear the hat of a secondary prosecutor. When victims presented views and concerns in accord with section 9(2) (a) of the Victim Protection Act, victims were assisting the trial court to obtain a clear picture of what happened (to them) and how they suffered, which the trial court could decide to take into account. Victim participation should meaningfully contribute to the justice process. However, that did not mean that the court's judgment would follow the wishes of the victim. The trial court would take into account the law, facts, all the different interests, and concerns, including the rights of the defence and the interests of a fair trial to arrive at a sagacious decision.

The Supreme Court held that the following guiding principles would assist the trial court when it was considering an application by a victim or his legal representative to participate in a trial and the manner and extent of the participation:-

a) the applicant had to be a direct victim or such victim's legal representative in the case being tried by the court;
b) the court should examine each case according to its special nature to determine if participation was appropriate, at the stage participation was applied for;
c) the trial court had to be satisfied that granting the victim participatory rights should not occasion an undue delay in the proceedings;
d) the victim's presentation should be strictly limited to the views and concerns of the victim in the matter granted participation;
e) victim participation should not be prejudicial to or inconsistent with the rights of the accused;
f) the trial court could allow the victim or his legal representative to pose questions to a witness or expert who was giving evidence before the court that had not been posed by the prosecutor;
g) The trial court had control over the right to ask questions and should ensure that neither the victim nor the accused were not subjected to unsuitable treatment or questions that were irrelevant to the trial;
h) the trial court should ensure that the victim or the victim's legal representative understood that prosecutorial duties remained solely with the DPP;
i) while the victim's views and concerns could be persuasive; and in the public interest that they were acknowledged, those views and concerns were not to be equated with the public interest;
j) the court could hold proceedings in camera where necessary to protect the privacy of the victim;
k) while the court had a duty to consider the victim's views and concerns, the court had no obligation to follow the victim's preference of punishment.

The court found that the right to have a trial commence and conclude without unreasonable delay was an accused person's constitutional guarantee under article 50(2) (e) of the Constitution. A victim also had the right to have the trial begin and conclude without unreasonable delay under section 9(1)(b) of the Victim Protection Act. In addition, article 159(2)(b) of the Constitution obligated courts not to delay justice. Further, treaties and international instruments that Kenya had ratified such as the African Charter on Human and People's Rights, Rome Statute of the ICC, and the International Covenant on Civil and Political Rights (ICCPR) contained similar provisions, that bound the court in all criminal justice procedures and processes.

The court also found that the benefits of an expeditious trial could not be gainsaid. A speedy trial ensured that the rights of the accused person were secured; it minimized the anxiety and concern of the accused; it prevented oppressive incarceration; and protected the reputation, social and economic interests of the accused from the damage which flowed from a pending charge. It also protected the interests of the public, including victims and witnesses, and ensured the effective utilization of resources. Additionally, it lessened the length of the periods of anxiety for victims, witnesses, and their families and increased public trust and confidence in the justice system.
The Supreme Court held that in conformity with the Constitution, courts should shun situations where an accused’s right to a fair trial was prejudiced by virtue of undue delay. Courts possessed the power to take appropriate action to prevent injustice. That power was derived from the public interest that trials were conducted fairly and that as far as possible the accused was tried without unreasonable delay. The end goal being to achieve prompt justice in criminal cases.

The court noted that there was no provision in both the Constitution and the Criminal Procedure Code (CPC) for interlocutory criminal appeals. The Constitution under article 50(2)(q) provided that every accused person had the right, if convicted, to appeal to, or apply for review by, a higher court as prescribed by law. Similarly, the CPC under sections 347 and 379(1) only allowed appeals by persons who had been convicted of an offence.

The court also noted that the delay of over six years defeated the intention of the framers of the Constitution and of Parliament to have criminal trials concluded expeditiously. The guarantee to have a criminal trial conducted without undue delay related not only to the time by which a trial should commence but also the time by which it should end, judgment rendered and any applicable appeals or reviews completed. Therefore, although criminal trials were not time bound like election petitions, there was need to have them determined expeditiously in line with the constitutional prescriptions.

The Supreme Court finally held that the right of appeal against interlocutory decisions was available to a party in a criminal trial but should be deferred, and await the final determination by the trial court. A person seeking to appeal against an interlocutory decision had to file the intended notice of appeal within 14 days of the trial court’s judgment. However, exceptional circumstances could exist where an appeal on an interlocutory decision could be sparingly allowed, these included:-

a) where the decision concerned the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;

b) when the decision was of sufficient importance to the trial to justify it being determined on an interlocutory appeal; and

c) where the decision entailed the recusal of the trial court to hear the cause.

The Supreme Court thus dismissed the petition.

Orders

i. For the avoidance of doubt, the determination in Criminal Appeal No. 132 of 2016 was upheld.

ii. In view of the inordinate delay of the original murder trial, occasioned by appeals relating to an interlocutory matter, the substantive matter was directed to be heard and determined on the basis of priority.
Supreme Court

Section 200 of the Criminal Procedure Code, that secured the rights of parties in a trial once a judicial officer hearing a case ceased to exercise jurisdiction over the matter, applied to civil proceedings.

Hussein Khalid and 16 others v Attorney General & 2 others
Application No. 32 of 2019
Supreme Court of Kenya
DK Maraga, CJ and P; PM Mwilu, DCJ and VP; MK Ibrahim, SC Wanjala and SN Ndungu, SCJJ
September 4, 2020
Reported by Ribia John

Civil Practice and Procedure – review – a court reviewing its own decision — what principles should a court consider when determining whether to review its own decision

Criminal Law – de novo hearings — what principles ought to be applied during de novo trials - whether introducing new evidence after hearing was concluded was against the principles of de novo hearing – Constitution of Kenya, 2010 article 50(1); Criminal Procedure Code, section 200.

Statutes – interpretation of statutes – interpretation of section 200 of the Criminal Procedure Code – de novo hearings - whether section 200 of the Criminal Procedure Code sought to secure the rights of parties in a trial once a judicial officer hearing a case ceased to exercise jurisdiction over the matter applied to civil proceedings – Constitution of Kenya, 2010 article 50(1); Criminal Procedure Code, section 200.

Criminal Procedure Code – consent orders – suspension of a judicial officer – where a judicial officer was suspended before issuing judgment — where consent directions were ordered as a result of the suspension — where the judicial officer was reinstated before the consent orders were effected - whether consent directions issued after the suspension of a judicial officer still applied when the judicial officer was reinstated.

Issues

i. What principles should a court consider when determining whether to review its own decision.

ii. Whether section 200 of the Criminal Procedure Code applied to civil proceedings by securing the rights of parties in a trial once a judicial officer ceased exercising jurisdiction over the matter.

iii. What principles applied during de novo trials?

iv. Whether introducing new evidence after hearing was concluded was against the principles of de novo hearing.

v. Whether consent directions issued after the suspension of a judicial officer still applied when the judicial officer was reinstated.

Brief Facts

The applicants had been arrested for participating in demonstrations outside parliament gates dubbed, 'occupy parliament'. They were detained and released on police bond and were required to report to the Chief Magistrate's Court. They requested for particulars to be availed before arraignment before the magistrate. They were each given a charge sheet containing three offences. The applicants contended that the charges lacked sufficient detail to enable them to plead. They therefore objected to plea taking and demanded that the same awaits supply of evidence and better particulars. The court, however, overruled the objection and ordered them to take plea. They filed a Constitutional appeal against the ruling. The High Court dismissed the appeal. They appealed to the Court of Appeal; the Court of Appeal similarly dismissed the appeal as unmerited. Aggrieved by the Court of Appeal decision, the applicants filed an application for review before the Supreme Court.

The application for review was heard on July 10, 2018. Judgment was reserved for delivery on notice. On March 29, 2019, a member of the bench that had heard the appeal, was suspended. After the suspension, the applicants sought for re-hearing of the appeal de novo. Directions were taken on May 9, 2019.

The applicants faulted the Supreme Court for rendering its judgment without setting aside the consent orders for de novo hearing the parties had recorded which allowed them to file a supplementary record to include in the courts record the Magistrates Courts record.

Held

1. The Supreme Court had the jurisdiction to review its own decisions when;
   a. the judgment, ruling, or order was obtained by fraud or deceit;
   b. the judgment, ruling, or order was a nullity, such as, when the court itself was not competent;
   c. the court was misled into giving judgment,
ruling, or order under a mistaken belief that the parties had consented thereto;
d. the judgment or ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.

2. The power of review was exercised sparingly because a trial had several implications once a judgment was delivered; litigation had to come to an end; there was need for finality in court decisions; the court was functus officio after delivery of decision sought to be reviewed; and that review should not substantially alter the decision sought to be reviewed. The review window was to be exercised sparing and only deserving cases had to be allowed.

3. Under the de novo principle, once a judicial officer trying a matter ceased to exercise jurisdiction over a matter during pendency of trial, through transfer of jurisdiction, his successor in jurisdiction gave the parties right to elect how to proceed. Either to proceed from where the hearing had reached or start de novo. A Judicial officer who heard the case was the one preferred to decide on it, unless parties elected otherwise, so that the accused was not prejudiced by having a successor in jurisdiction, who never had the opportunity to appreciate the evidence of witnesses by observing their demeanor, credibility, emotions and the like, deciding based on record, where such aspects of evidence could not be recorded in a detailed manner as required under section 199 Criminal Procedure Code (CPC).

4. Section 200 of the CPC entrenched the accused person's rights to a fair trial as provided for under article 50(1) of the Constitution, and it applied to the High Court also in addition to Magistrates Courts.

5. De novo hearings should not be taken as an opportunity to fill in gaps noted during the hearing by bringing a new set of evidence for the repeat trial. A de novo hearing was a continuation of a trial and not a second trial.

6. During hearing of the appeal, the applicant was specifically asked why he had not availed the Magistrates Court record despite orders from the Registrar directing that and his reasons was that the court file was not available. The applicants' complaint against the court's decision was that it turned on the very same documents they intended to avail through a supplementary record. They averred that if they had been allowed to avail them as per the consent order, the court would have been afforded an opportunity to consider their contents and maybe arrive at a different decision. The applicants contended that the supplementary record was intended to mend a crucial gap they noted during the hearing to be a likely tipping point of the case if it were to be decided on the strength of the concluded hearing awaiting judgment.

7. Introduction of new evidence after hearing was concluded was against the principles of de novo hearing whether it was ordered in review or in revision jurisdiction of a court. It muted the trial continuation intention signaling a second trial. In some instances additional evidence could be tendered but in very exceptional circumstances. Unless hearing was concluded and judgment reserved, new evidence could be availed in course of a criminal trial, as long as the defence was afforded time to defend their case.

8. There was need to render substantial justice even though the error was inadvertence and could have been corrected easily by just having the right judges sign the judgment since they were all based in the same station. That was one of the exceptional circumstances when a review power could be exercised in the residual jurisdiction of the court. In the instant case, one of the judges signing the judgment was the same, who with others heard the appeal, only that parties had agreed that the concluded hearing to be set aside when the status of the initial bench changed temporarily.

9. Section 200 of the CPC sought to secure the rights of parties in a trial once a judicial officer hearing a case ceased to exercise jurisdiction over the matter. Even though it was a Criminal Law principle it had been applied across the board in most of the hearings in furthurance of the constitutional right of fair hearing.

10. Upon return of the Judge to the original bench after he was cleared, his jurisdiction in the appeal was restored as before with lifting of suspension. He was the very same judge who sat in the hearing of the appeal, the very same judge who participated in the writing of the judgment, noting judgment had been reserved for delivery on notice. The notice would be issued once the bench which heard the matter was ready to deliver its judgment. His return to the bench, by operation of law under section 200 CPC had the effect of nullifying/voiding the consent of the parties so entered. His return signaled restoration of the status existing prior to the consent entered by the parties, meaning judgment would be delivered as earlier directed. The consent therefore crumbled and stood vacated by operation of law even without further order vacating it.

11. No amount of consent by the parties could confer jurisdiction where there existed none, on a court of law nor could one divest a court of jurisdiction
which it possessed under the law.

Application dismissed; no order as to costs.

The ELC does not have the jurisdiction to determine issues that could be determined by other tribunals even when some of the issues raised elements that were within the ELC’s jurisdiction

Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others 
Petition No. 3 of 2020 
Supreme Court of Kenya 

DK Maraga CJ and P; PM Mwilu DCJ and VP; MK Ibrahim, SC Wanjala and SN Ndungu, SCJJ 
August 4, 2020 
Reported by Ribia John

Jurisdiction

jurisdiction – jurisdiction of the Environment and Land Court – jurisdiction over matters were not within its jurisdiction and which could have been effectively determined by another legislatively established tribunal where the matter was intertwined with matters within the jurisdiction of the ELC – whether the ELC had the jurisdiction to determine such a matter – Constitution of Kenya, 2010 article 162(2)(b); Environment and Land Court Act, 2011 sections 4 and 13; Environmental Management and Coordination Act sections 129(1), (3), 130, 130(5)

Issue

Whether the Environmental and Land Court (ELC) had the jurisdiction to determine issues which were not within its jurisdiction and which could have been effectively determined by another legislatively established tribunal where the matter was intertwined with matters within the jurisdiction of the ELC.

Held

1. A court’s jurisdiction flowed from either the Constitution or legislation or both. A court of law could only exercise jurisdiction as conferred by the Constitution or other written law. It could not arrogate to itself jurisdiction exceeding that which was conferred upon it by law.

2. Whilst it could be argued that the issue of jurisdiction of the Environment and Land Court (ELC) was a constitutional question given that the court was established by dint of article 162(2)(b) of the Constitution, and through legislative enactment of the sections 4 and 13 of the Environment and Land Court Act, 2011, that was however not the issue in contention before the superior courts.

3. There was no determination made by any of the superior courts with regards to the jurisdiction of the ELC in reference to the Constitution. In both their determinations on the issue of jurisdiction, they relied solely on the provisions of the Environmental Management and Coordination Act, with peripheral reference to the Constitution to buttress their
decisions. Where the interpretation or application of the Constitution had only but a limited bearing on the merits of the main cause, then the jurisdiction of the instant court could not be properly invoked.

4. Both superior courts made determinations primarily on an interrogation and adjudication of statutory provisions and minimal reference to the Constitution. It could not thus be said that the issues were determined in consideration and pursuant to the interpretation or application of the Constitution to therefore warrant an appeal to the Supreme Court under article 163(4)(a) of the Constitution.

5. The issue of jurisdiction and discretion were nonetheless inextricably intertwined; it would seem incongruous to discuss one without referring to or including the other. Such was the extent that those two quite seemingly innocuous terms were referred to quite often, and rather mistakenly, interchangeably. Jurisdiction, as referred to by the petitioners, would denote whether the adjudicatory body had the power to entertain the proceedings and, discretion, to be whether such, upon determination that it had such powers, chose to exercise such powers or not.

6. The ELC determined quite incorrectly that it had the power or jurisdiction to hear and determine the petition, which although raised issues that were clearly within its purview, were also intertwined with other issues which were rather obviously not within its jurisdiction, and which could have been effectively determined by another legislatively established tribunal, in this instance two bodies, the National Environmental Tribunal and the National Environmental Complaints Committee.

7. The trial court and the appellate Court correctly determined that the petition was multifaceted, and presented issues in an omnibus manner. The point of divergence between the two superior courts was where the trial court then went further to determine that those multifaceted issues could be determined by the court in the interests of justice. The ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues, but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the petition.

8. Judicial abstention, as with judicial restraint, was a doctrine not founded in constitutional or statutory provisions, but one that had been established through common law practice. It provided that a court, though it could be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as could be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.

9. The more favourable relief that the superior court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of environmental impact assessment licenses by the 4th respondent to the 1st, 2nd and 3rd respondents. The court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under article 50 of the Constitution was protected.

10. The Court of Appeal gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial court in hearing and determining the petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the petition, the appellate court should at that juncture have issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio, and that the appellate court therefore and with respect failed to properly exercise its discretion and supervisory mandate.

Preliminary objections by the 1st, 2nd, 3rd, 5th and 6th respondents were upheld; the petition was struck out save that, noting the nature of the matter, the petitioners were at liberty to pursue their claims at the appropriate forum, taking guidance from the instant judgment and the judgment of the Court of Appeal; each party was to bear its own costs.
Court of Appeal

The pleasure doctrine vis-a-vis the doctrine of due process in terminating appointees of the county governor.

County Government of Garissa & another v Idriss Aden Mukhtar & 2 others

[2020] eKLR

Civil Appeal No 294 of 2019

Court of Appeal at Nairobi

W Karanja, H Okwengu & F Sichale, JJA

July 10, 2020

Reported by Beryl Ikamari & George Kariuki

Labour Law – employment – public officers – termination of employment contracts - applicability of the Employment Act to public officers – whether public officers could seek redress through the Act for unlawful termination claims – whether the Constitution and the County Governments’ Act gave leeway for the governor to exercise the pleasure doctrine in terminating the employment of his appointees - Constitution of Kenya, 2010, articles 27, 28, 41, 47, 48,73, 174, 179(6) and 236; County Governments Act, No 17 of 2012, sections 30(2)(a), 31(a), 34, 39 and 40; Employment Act, 2007, sections 41 and 45(2).

Devolution law – County Government – powers of the county governor – powers to terminate the employment contract of county government staff - whether governors could dismiss their appointees at will in line with the pleasure doctrine - County Governments Act, No 17 of 2012, sections 31(a) and 39.

Brief facts

The appeal arose from the decision of the Employment and Labor Relations Court in Constitutional Petition No. 46 of 2015. In that petition, the respondents had sued the county government of Garissa and the governor for violating their constitutional rights and freedoms by dismissing them from employment unprocedurally. They sought orders of certiorari to quash the decision to relieve them of their duties and orders of prohibition to stop the appointment of fresh nominees to their positions. In the alternative they sought monetary compensation for the period for which they would have served which included their full tenure in office had they not been terminated.

The 1st and 3rd petitioner were terminated allegedly for travelling outside the country without the proper sanction of the governor and also for hampering service delivery by being absent from office without authorization. The 2nd respondent was terminated allegedly for failure to implement key policy decisions relating to his department, including provision of adequate supervision.

The respondents were successful in making their claim for unlawful termination. They were not reinstated but they were awarded a decretal sum which was subjected to amendments and it amounted to Kshs.15,736,562/50.

Aggrieved by that judgment, the respondents moved the court of appeal. Their main grounds of appeal were that the trial judge misinterpreted and misapplied the Employment Act, the learned judge misdirected himself in finding that section 31(a) of the County Governments Act was unconstitutional, that the petition did not meet the threshold set in the Anarita Karimi case and on who should bear the costs of a suit in an Employment and labor relations matter.

Issues

i. Whether the termination of the employment contract of members of the county executive committee by the governor allegedly unprocedurally violated the constitutional rights of those employees.

ii. Whether the Employment Act and the County Government Act were applicable to state officers, including members of the county executive committee.

iii. Whether a governor had power to dismiss members of the county executive committee under the pleasure doctrine.

iv. When would the Court of Appeal interfere with a decision of the Employment and Labour Relations Court to award damages?

Held

1. The appellants and the respondents had an employer-employee relationship. The respondents opted to anchor their petition on the Constitution rather than the employment contract. The fundamental rights and freedoms enshrined in the Constitution included the right to fair labour practices and the right to fair administrative action both of which the respondents sought to enforce. In enforcing those rights, they had to set out their claim with a reasonable degree of precision. They had to set out what they complained of including the constitutional provisions infringed
and the manner in which they were alleged to be infringed.

2. The question as to whether a county governor could dismiss from employment members of the county executive committee under the pleasure doctrine, lay in a proper interpretation of section 31(a) of County Governments Act and the interpretation had to conform to the spirit and letter of the Constitution. All laws had to be interpreted and applied in accordance with the supreme law of the land.

3. On the interpretation of section 31(a) of the County Governments Act as to whether it allowed the county governor to dismiss a member of a county executive committee at his pleasure, they were different views offered by the Court of Appeal. One was that the power to dismiss such an appointee could be exercised at the governor’s pleasure but it had to be done reasonably and not arbitrarily or capriciously and the other was that the pleasure doctrine was not compatible with the spirit and letter of the existing Constitution.

4. The governor misinterpreted his powers under section 31(a) of the County Governments Act, as giving him a free hand to dismiss the respondents at his pleasure, and he therefore did not give them any hearing before terminating their employment contracts.

5. In the termination of their employment contracts, there had been a clear breach of the respondents’ rights to fair labor practices under article 41(2) of the Constitution and right to fair administrative action under article 47 of the Constitution. There was also a breach of natural justice and therefore, the respondents’ dismissal from employment was unfair termination.

6. The pleasure doctrine was not compatible with the spirit and letter of the Constitution of Kenya 2010. The doctrine was inimical to the national values of human rights, good governance, transparency and accountability which were the hallmark of the delegated sovereign power and position of public trust as recognized in the Constitution. Therefore, the appointment of state officers ought to be insulated from political or any untoward interference.

7. If section 31(a) of the County Governments Act was interpreted as a provision that gave a governor the unfettered discretion to dismiss a county executive member at any time, if they so wished, the yardstick would be personal and without transparency or accountability and that would be contrary to the principles and values espoused in the Constitution.

8. The governor was the political leader of the county, and he was therefore aligned to a specific political party. It was therefore natural that he would identify for appointment as members of his county executive committee, persons who were committed to his cause and whom he had confidence in. Section 31(a) of the County Governments Act would therefore come in handy where the Governor had reason to lose confidence in an executive committee member due to sabotage or such like activity that would hamper proper governance of the county.

9. There ought to be reasons upon which it could be concluded that the powers of the governor had been exercised in good faith and for proper reasons and not arbitrarily or capriciously, in order for the termination to be procedural. A governor was not entitled to fire county executives at will without any reason and without due process.

10. The trial court had correctly expressed itself on the issue of the pleasure doctrine as enshrined under section 31(a) of the County Governments Act. The section was deemed repugnant to the Bill of Rights in relation to employment and therefore unconstitutional.

11. The issue of unregulated foreign trips as well as other unregulated expenditure which informed the termination of the respondents’ employment was before the Garissa County Assembly and it was therefore irregular for the governor and the county to short-circuit a process that was before the County Assembly, by purporting to act under section 31(a) of the County Governments Act.

12. The award of damages by the trial court was not improper. It was done under section 49 of the Employment Act. In terms of the award itself, counsels for both sides had been in agreement on the decertal amount as evidenced by records of the trial court.

Orders:-

i. The appeal failed and was dismissed for lack of merit.

ii. The decision of the trial court was upheld.

iii. The petitioners were ordered to pay costs of the appeal.
The exhibition of a medical scheme beneficiary form as evidence in court does not amount to wrongful invasion of the right to privacy

TOS v Maseno University & 3 others
Civil Appeal 112 of 2016
Court of Appeal at Kisumu
DK Musinga, SG Kairu & F Sichale, JJA
August 7, 2020
Reported by Sharon Sang & Kakai Toili

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms - right to privacy – where a medical scheme beneficiary form was produced in court as an exhibit – where the form showed the relationship between the contributor and the beneficiaries – whether a medical scheme beneficiary form was a medical record – whether the exhibition of the medical scheme beneficiary form in court amounted to wrongful invasion of the contributor's and beneficiaries' right to privacy – Constitution of Kenya, 2010, article 31.

Jurisdiction – jurisdiction – jurisdiction of the Court of Appeal – jurisdiction as a first appellate court - what was the role of the Court of Appeal as a first appellate court.

Jurisdiction – jurisdiction of the Court of Appeal – jurisdiction to interfere with the High Court's exercise of discretion to award costs – what were the circumstances in which an appellate court could interfere with the exercise of discretion of the trial court in awarding costs.

Words and Phrases – medical records – definition of medical records - a chronological written account of a patient's examination and treatment that includes the patient's medical history and complaints, the physician's physical findings, the results of diagnostic tests and procedures, and medications and therapeutic procedures - Dictionary.Com

Brief facts

The appellant filed a petition at the trial court on behalf of two children, one who was his child and the other one was under his guardianship. The children were beneficiaries of the 1st respondent's medical scheme, being dependants of the appellant's wife who was the 1st respondent's legal officer. In July 2014 the 4th respondent filed a suit against the 1st respondent (where the appellant was a director), and the Public Procurement Oversight Authority. The suit was about alleged interference with a procurement contract that had been awarded to the 4th respondent by the 1st respondent. Among the documents exhibited by the 4th respondent in that suit were papers containing names and photographs of the two children and the appellant's wife.

The appellant contended that the information was private medical record and was not open to the 4th respondent or the general public and that publication of the information was a violation of various provisions of the Constitution. The trial court held that the consent of the appellant or his wife was not sought before the documents were exposed to third parties and that there was wrongful invasion of the children's right to privacy. However, the trial court held that the appellant had failed to demonstrate how the 1st, 2nd and 3rd respondents were involved in the leakage of the information and proceeded to dismiss the petition with costs. Being aggrieved by the trial court's decision, the appellant preferred the instant appeal.

Issues

i. Whether the exhibition of a medical scheme beneficiary form in court amounted to wrongful invasion of the contributors' right to privacy and that of beneficiaries.

ii. Whether a medical scheme beneficiary form which revealed the relationship between the contributor and beneficiaries was a medical record.

iii. What was the role of the Court of Appeal as a first appellate court?

iv. What were the circumstances in which an appellate court could interfere with the exercise of discretion of the trial court in awarding costs?

Relevant provisions of law

Constitution of Kenya, 2010

Article 24 – Limitation of rights and fundamental freedoms

1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

   a. the nature of the right or fundamental freedom;
   b. the importance of the purpose of the limitation;
   c. the nature and extent of the limitation;
   d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
   e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
**Article 31 – Privacy**

*Every person has the right to privacy, which includes the right not to have* –

a. their person, home or property searched;
b. their possession seized;
c. information relating to their family or private affairs unnecessarily required or revealed; or
d. the privacy of their communications infringed

**Held**

1. Being a first appeal, the court’s primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the trial court were to stand or not and give reasons either way.

2. Article 53(1)(d) of the Constitution of Kenya, 2010 (Constitution) stipulated that every child had the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour. Under article 53(2) a child’s best interests were of paramount importance in every matter concerning the child. The appellant had not demonstrated any violation of article 53(1)(d) and (2).

3. The right to privacy was not absolute; it could legitimately be limited by interests of others as well as public interest.

4. The material complained about by the appellant was not a medical record. What was exhibited was a medical scheme beneficiary form that revealed the relationship between the appellant and the 1st respondent’s legal officer. Below the name of the appellant’s wife were the names of their two children, who were also named as beneficiaries of the 1st respondent’s medical scheme, courtesy of their relationship with the appellant’s wife, which was factually correct.

5. The 4th respondent’s objective in annexing that document to his statement in the 4th respondent’s suit against the 1st respondent was to prove that the legal officer who had advised the 1st respondent to terminate the security contract that had been awarded to the 4th respondent was the wife of the appellant, a director of a rival company that had earlier been awarded a similar contract, and was competing against the 4th respondent for renewal of the lucrative contract. That relationship was not denied by the appellant.

6. Article 31(c) of the Constitution provided that a person’s right to privacy included the right not have information relating to their family or private affairs unnecessarily required or revealed. In the circumstances, it was necessary to annex the said document to the 4th respondent’s statement in support of the suit filed as long as it was correct and truthful. There were certain constitutional rights that were not absolute and could be limited in certain instances as provided for under article 24(1) of the Constitution.

7. What article 31(c) of the Constitution prohibited was unnecessary revelation of information relating to one’s family or private affairs. Accurate and truthful documents that were filed by parties in court for purposes of proving issues or questions in dispute in order to enable a court reach a fair determination could not be said to amount to violation of articles 31(c).

8. The trial court erred in finding that the exhibition of the medical scheme beneficiary form amounted to wrongful invasion of the appellant’s right to privacy as well as that of the two minors.

9. Costs followed the event except where for good reasons the trial court ordered otherwise. The appellant had filed the petition for the benefit of both himself and the two children. It was not demonstrated that the trial court in ordering the appellant to bear the costs of the suit exercised his discretion injudiciously.

*Appeal dismissed with costs to the 4th respondent.*
A structural interdict can be issued as an appropriate relief for a violation or a threat of violation of fundamental rights and freedoms at an interlocutory stage

Law Society of Kenya & 7 others v Cabinet Secretary for Health & 8 others; China Southern Co. Airline Ltd (Interested Party) [2020] eKLR
Petition 78, 79, 80 & 81 of 2020 (Consolidated)
High Court at Nairobi
JA Makau, J
August 3, 2020

Constitutional Law – remedies - remedies for violations of fundamental rights and freedoms - structural interdicts – nature and elements of structural interdicts – claim where remedies of structural interdict was issued at an interlocutory stage - whether a structural interdict could be issued at an interlocutory stage - what were the factors to be considered in determining whether inherent powers of a court should be exercised for the ends of justice - Constitution of Kenya, 2010, articles 22 and 23.

Civil Practice and Procedure – injunctions – mandatory injunctions – issuance of mandatory injunctions at an interlocutory stage - what were the circumstances in which mandatory injunctions could be issued at an interlocutory stage.

Civil Practice and Procedure – orders – conservatory orders – what was the nature and role of conservatory orders.

Brief facts

Following the outbreak of the coronavirus (COVID-19), in China and which was later declared by the World Health Organisation (WHO) as a global health pandemic, Kenya continued to allow flights from China. The petitioners were aggrieved and filed the instant an application. The petitioners were granted ex parte orders after the court was satisfied that the conduct of the Cabinet Secretary for Health (1st respondent) posed a threat to the right to life and that unless ex parte conservatory orders were issued, Kenyans would continue to be exposed to COVID-19.

The court also granted temporary ex parte orders which included a conservatory order suspending the respondent’s decision to allow resumption of non-essential flights from China to Kenya and a conservatory order in the form of structural interdict compelling the 1st respondent to prepare and present to the court for scrutiny, a contingency plan on prevention, surveillance, control and response systems to COVID-19 outbreak in Kenya. The respondent subsequently filed a report on measures put in place by the Government to deal with the COVID-19 threat in Kenya (report).

Aggrieved by the ex parte orders the respondents filed the instant application seeking among others orders that; pending the determination of the application, a stay of the implementation of the court’s orders to the extent that the same was in the form of a structural interdict compelling the 1st respondent to prepare and present to the court for scrutiny, a contingency plan on prevention, surveillance, control and response system to COVID-19 outbreak in Kenya. The respondents claimed that the impugned orders were in the nature of a mandatory injunction and were granted contrary to the principles of issuance of injunctions. The respondents further claimed that a structural Interdict could only be issued as a final order or judgment and not at interlocutory stage.

Issues

i. Whether a structural interdict could be issued at an interlocutory stage.

ii. What was the nature and elements of structural interdicts?

iii. What were the circumstances in which mandatory injunctions could be issued at an interlocutory stage?

iv. What was the nature and role of conservatory orders?

v. What were the factors to be considered in determining whether inherent powers of a court should be exercised for the ends of justice?

Held

1. In considering the question whether inherent powers should be exercised for the ends of justice, the court was under duty to take into account relevant consideration;

   a. the existing circumstances;
   b. the injustice caused to the applicant;
   c. the remedy that could be available to the aggrieved party; and
   d. inconvenience and unnecessary expenses likely to be bundled on the parties.

   The court was required to take care that the act of
the court did no injury to any of the litigants and in doing so the main concern was to do substantial justice in the administration of justice.

2. The High Court in its ruling specifically gave the reasons and explanation for its decision. The Attorney-General had a duty to promote, protect and uphold the rule of law and defend public interest. The respondents in seeking the lifting of the structural interdict sought to invoke the court's inherent powers but chose not to say anything about the court's constitutional duty to grant an appropriate relief in the circumstances of a matter as provided under article 23 of the Constitution to preserve fundamental rights and freedoms. That went against the Attorney-General's mandate under article 156(6) of the Constitution.

3. Under article 23(3) of the Constitution, the court was entitled to grant any appropriate relief in any proceedings brought under article 22 of the Constitution. Appropriate relief would be in essence the relief that was required to protect and enforce the Constitution depending on the circumstances of each case. The relief could be a declaration of rights, an interdict, a mandamus or such other relief as could be required to ensure that the rights as enshrined in the Constitution were protected.

4. Mandatory injunctions at interlocutory stage would only be granted in clear cases or where special circumstances existed. The petitioner's case was strong and clear and brought under special circumstances regarding protecting Kenyans due to the threat of the COVID-19 pandemic and due to special circumstances in existence.

5. Article 22 of the Constitution entitled persons, like the Law Society of Kenya, to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed and was threatened. A threat to a right or fundamental freedom, invoked the court's jurisdiction to issue conservatory orders.

6. Conservatory orders bore a more decided public-law connotation: for those were orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, were not, unlike interlocutory injunctions, linked to such private-party issues as the prospects of irreparable harm occurring during the pendency of a case; or high probability of success in the supplicant's case for orders of stay. Conservatory orders should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.

7. One of the remedies which was recognized in jurisdictions with similar constitutional provisions as Kenya's article 23 of the Constitution was a structural interdict. In essence, structural interdicts (also known as supervised interdicts) required the violator to rectify the breach of fundamental rights under court supervision. Five elements common to structural interdicts had been isolated in that respect;

a. the court issued a declaration identifying how the Government had infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations.

b. The court mandated Government compliance with constitutional responsibilities.

c. The Government was ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. That report, which should explicate the Government's action plan for remedying the challenged violations, gave the responsible State agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan was typically expected to be tied to a period within which it was to be implemented or a series of deadlines by which identified milestones were to be reached.

d. Once the required report was presented, the court evaluated whether the proposed plan in fact remedied the conditional infringement and whether it brought the Government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the Judiciary and the other branches of Government in the intricacies of implementation could be initiated. That stage of structural interdict could involve multiple Government presentations at several check-in hearings, depending on how the litigants responded to the proposed plan and whether the court found the plan to be constitutionally sound. Structural interdicts thus provided an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders.

e. The chance to assess a specific plan, complete with deadlines, was especially valuable in cases involving the rights of poorest of the poor, who had to make the most of rare and costly opportunities to litigate. After court approval, a final order (integrating the Government plan and any court ordered amendments) was issued. Following that step, the Government's failure to...
9. The structural interdict as an appropriate relief could be available at interlocutory stage. The court had jurisdiction to grant a structural interdict including at the interlocutory stage, as was the case herein, if that was the appropriate relief.

10. From the conduct of the respondents and in view of the fact that an ex parte order had been given, no prejudice was suffered by the respondents nor were they denied rights to fair hearing. The application filed on April 8, 2020 was an afterthought as the respondents filed their replying affidavit on March 6, 2020 and on March 18, 2020 filed a report on the measures put in place by the Government to deal with COVID-19 threat in Kenya. The application to set aside and/or review or vacate the ex parte orders of February 28, 2020 was filed after expiry of 40 days which was dated April 8, 2020 raising the issue as regard the structural interdict. The delay was unexplained and without any basis.

11. Under article 2 of the World Health Organization Constitution (WHO Constitution), the World Health Organization (WHO) had the following functions relevant to the instant petition; to act as the directing and co-coordinating authority on international health work; to stimulate and advance work to eradicate epidemics, endemics and other diseases, to propose public conventions, agreements and regulations and to make recommendations with respect to international health matters. On regulations, article 21(a) and 22 the WHO Constitution empowered the World Health Assembly to adopt regulations, designed to prevent the international spread of disease. Once adopted by the World Health Assembly, the regulations entered into force for all WHO members states that did not affirmatively opt out of them within a specified time period. Having been adopted by the fifty eight World Health Assembly on May 23, 2005, the International Health Regulations, 2005 (the Regulations) entered into force on June 15, 2007.

12. The purpose and scope of the Regulations was to prevent, protect against, control and provide a public health response to the international spread of disease in ways that were commensurate with and restricted to public health risks, and which avoided unnecessary interference with international traffic and trade. On issue of public health contingency planning under international law, article 5 of the Regulations required each state party, to develop, strengthen and monitor as soon as possible, but not later than five years from the entry into force of the Regulations for that state party (not later than June 16, 2012). The capacities to detect, assess, notify and report events in accordance with annex 1 of the Regulations. The obligation in annex 1 was reiterated in article 13 of the Regulations on public health responses.

13. Article 22(1) of the Regulations required competent authorities like the respondents to have effective contingency arrangement to deal with an unexpected public health event. The WHO guidelines on contingency planning (Guidelines) indicated the rationale for contingency planning in protecting public health. The report of March 18, 2020 arose out of an ex-parte courts’ order on interim basis. The court’s order was served on March 2, 2020 and the respondents filed a report on March 18, 2020 within a period of 16 days from the date of service. The report was to be prepared and presented to the court for scrutiny and to satisfy itself with the compliance with the court’s order. The report was lacking in specifics but looking at it and being an interim report as of March 18, 2020 and not being a final report, the National Government had through the Ministry of Health put in place a contingency plan on prevention, surveillance, control and responsive systems to COVID-19 outbreak.

14. The report had a detailed plan on maintaining a heightened surveillance system at all points of entry, health facilities and communities across Kenya. The report indicated that the ministry had continued to provide prompt and regular updates to the members of public regarding COVID-19. The report of March 18, 2020 was not a final report from the National Government but an interim report that was ordered to be prepared and filed.

15. The respondents complied with the court’s order of February 28, 2020 and prepared an interim contingency plan and did not violate the right to health under the Constitution and international law. The court was alive to the fact that the report of March 18, 2020 was not the final report on the contingency plan. The report in question was an interim report in pursuance of interim orders of the court pending hearing and determination of the application inter partes and the petition.

Application dismissed; no orders as to costs.
Constitutional law – powers to prosecute persons for criminal offences – role of the Director of Public Prosecutions (DPP) - duties and powers of the Directorate of Criminal Investigations (DCI) and the Inspector General of Police vis-à-vis those of the DPP – demarcation in duties and powers between the two offices – whether the DCI may prefer criminal charges against individuals without the consent of the DPP – Constitution of Kenya, 2010, article 157(11).

Employment and Labor Law – unlawful termination – removal of a CEO by the board of a parastatal – where the CEO was not given an opportunity to be heard or notice of the deliberations of the Board in which his removal was considered – whether the High Court in a constitutional petition could make determinations as to whether the CEO faced unlawful termination of his employment contract - Employment Act, 2007, Sections 5, 45 & 46.

Jurisdiction – jurisdiction of the High Court – jurisdiction to interpret the Constitution – difference between territorial jurisdiction and constitutional jurisdiction – Civil Procedure Act, (cap 21), sections 12 and 15.

Brief facts

The petitioner moved the court seeking declaration orders against the manner in which he was ousted from the position of CEO at the National Water Harvesting and Storage Authority citing discrimination and abuse of powers by the board. The board failed to inform him of his intended ouster and he was not invited to the meeting in his capacity as an ex officio member (secretary to the board).

The petitioner also sought orders prohibiting the offices of the DCI and the DPP from investigating and prosecuting the matter in question alleging that the charges were malicious and an abuse of the court process. The petitioner submitted that his constitutional rights to a fair trial as well as a fair administrative process were botched by the action of the board colluding with the investigative agencies to institute unsubstantiated charges against his person so that he would be deemed unfit to hold the position of CEO.

In supporting his claim of malicious prosecution, the petitioner submitted that all appointments made during his tenure had been above board and that one of the officers he had allegedly hired unprocedurally was deceased and the other officers not on the authority's payroll. Among the officers he was alleged to have hired unprocedurally, only one was on the payroll.

As for the respondents, the DPP argued that it was well within their mandate to decide upon what matters to investigate and prosecute by dint of Article 157. They also disputed the jurisdiction of the High Court in Machakos to listen to and determine the issues raised, seeing that the bone of contention arose in Nairobi.

The DCI, on its part, argued that the petitioner had failed to demonstrate specifically the constitutional rights violated against his person and the manner in which they had been violated.

The Board of Directors as well as the Chairman relied chiefly on the Mwongozo principles of corporate governance to defend the ouster of the petitioner from the position of acting CEO. As per the First Schedule to the Water Act, a properly constituted meeting ought to have been attended by a third of the members and that requirement had been duly met. Additionally, the same had been done to safeguard public interest in the construction of the construction of Turkana Peace Dam (Naku’etum site) in Turkana where the CEO was alleged to have misappropriated some funds.

Issues

i. Whether the High Court was clothed with the jurisdiction to hear and determine a dispute about the termination of a CEO's employment contract and the institution of a criminal suit against the CEO.

ii. Whether the Inspector General of Police or the Directorate of Criminal Investigations could undertake public prosecutions without the consent of the Directorate of Public Prosecutions.

iii. Whether a constitutional petition could be heard in a court that was not within the territory in which the constitutional cause arose.

Held:

1. The court had constitutional jurisdiction to hear the matter since the questions raised related to
constitutional interpretation. In appropriate cases, the court could direct proceedings to be heard and determined in a particular place. That, however, was a different thing from alleging that the court had no jurisdiction in the matter.

2. Any provision that purported to limit the jurisdiction of the High Court to interpret constitutional questions ought to derive its validity from the Constitution expressly and not by implication.

3. There had been a futile attempt by the DCI to levy charges against the petitioner without the consent of the DPP. The discretion to be exercised by the DPP was not based on recommendations made by the investigative bodies and the mere fact that the DPP’s decision differed from the opinion formed by the investigators was not a reason for interfering with his constitutional and statutory mandate. The DPP was allowed to exercise his mandate as long as he believed that he had in his possession evidence on the basis of which a prosecutable case could be mounted and as long as he took into account his mandate as per constitutional and statutory provisions.

4. The mere fact that the investigators believed that there was a prosecutable case did not necessarily bind the DPP given that the powers and mandate of the two offices was well demarcated in the Constitution.

5. Both the DPP and the DCI were independent and each ought to stay in its lane. Therefore, no public prosecution ought to have been undertaken by or under the authority of either authority without the consent of the Director of Public Prosecutions.

6. Adherence to the rule of law was not optional. Every state officer from the top to the bottom and every state organ acquired his or its powers from the Constitution. He or it could not therefore purport to exercise powers outside the Constitution. Any action he or it undertook had to therefore be constitutionally underpinned.

7. The court was clothed with the powers and the constitutional duty to supervise the exercise of the DPP’s and DCI’s mandate, whether constitutional or statutory as long as the discretion fell afoul of constitutional and statutory provisions. The DPP could not be allowed to arbitrarily exercise his constitutional mandate based on ulterior criminal motives.

8. The essence of abuse of powers to prosecute was that the proceedings complained of had to have been instigated, instituted and/or maintained for a purpose other than that for which they were designed or exist or to achieve for the person instigating or instituting them some collateral advantage beyond that which the law offers, or to exert pressure to effect an object not within the scope of the process.

9. Having failed to remove the petitioner from his position as a result of the court’s intervention, the chairman and board colluded with the DCI to maliciously levy criminal charges against him with a view to having him step aside.

10. The petitioner’s arrest by officers of the DCI, his interrogation and subsequent decision to charge him with the offence of abuse of office was maliciously instigated by individuals at the authority who were colluding with officials of the DCI to have him take a plea as a public officer in order to remove him from office to pave way for a preferred candidate.

11. There could have been some malicious reasons for the petitioner’s removal from office. However, the court sat as a constitutional court as opposed to the Employment and Labor Relations Court and could not therefore determine that issue.

12. The constitutional court was constrained to determine whether the decision makers in question had jurisdiction, whether the persons affected by the decision were heard before it was made, whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters, whether the decision to commence the criminal charges went contrary to the applicant’s legitimate expectation and whether the respondents’ decision to charge the applicant was irrational.

13. Allowing criminal proceedings to continue where it was clear that there was no evidence at all or where the prosecution’s evidence even if it were to be correct would not disclose any offence known to law would amount to the court abetting abuse of the court process by the prosecution.

14. The respondents in their replying affidavit did not disclose any reasonable grounds to undertake investigations against the petitioner.

15. The issue of the illegal and irregular ouster of the petitioner by the chair and board of the authority from his position as CEO was a matter which would be best dealt with by the Employment and Labor Relations Court as opposed to the constitutional court.

Orders:-

i. It was declared that the 2nd respondent, the Director of Criminal Investigations (DCI) had no power and authority to institute criminal proceedings before a court of law without the prior consent of the Director of Public Prosecutions (DPP) and any proceedings so commenced would be unconstitutional, illegal, unlawful, null and void ab initio.

ii. It was declared that the intended prosecution of the petitioner in the manner proposed by the 2nd respondent was ultra vires the powers of the 2nd respondent (DCI)
and was therefore unconstitutional and unsustainable.

iii. The DCI, 2nd respondent, was issued with prohibitory orders against instituting criminal proceedings against the petitioner unless the same was instituted through the 1st respondent, the DPP.

iv. The costs of the petition were awarded to the petitioner against the DCI (2nd respondent).

Kenya Revenue Authority could not impose a penalty and also undertake criminal prosecution with respect to the same tax liability

Republic v Kenya Revenue Authority & 2 others ex parte Kungu Gatabaki & 4 others; Jacaranda Hotel Limited (Interested Party) [2020] eKLR
Judicial Review Miscellaneous Application No. 336 of 2018
High Court at Nairobi
P Nyamweya, J
July 17, 2020
Reported by Chelimo Eunice

Tax Law – administration of tax – collection and recovery of tax - recovery of unpaid tax – recovery of unpaid tax by suit - whether Kenya Revenue Authority was precluded from recovery of tax by other legal means, other than by civil suit, once there was a default in the payment of tax due on installment terms - whether Kenya Revenue Authority was precluded from recovery of tax through criminal prosecution – whether Kenya Revenue Authority could impose a penalty and also undertake criminal prosecution with respect to the same tax liability – where Kenya Revenue Authority had elected to make a tax demand and had entered into negotiations with a tax defaulter for the payment of the tax liability, including interest and penalties – whether Kenya Revenue Authority could proceed to undertake criminal proceedings in the circumstances - Tax Procedure Act, section 80.


Jurisdiction – jurisdiction of the High Court – exhaustion doctrine and alternative statutory dispute resolution mechanisms – exceptions to the exhaustion doctrine – what courts could consider in determining whether exceptions to the exhaustion doctrine applied - where a matter had progressed from merely being a tax liability and payment dispute, to one of criminal prosecution – whether the internal dispute resolution process was applicable in the circumstances – whether the High Court had jurisdiction to determine a matter challenging the processes involved and the law applied to charge a tax defaulter – Constitution of Kenya, 2010, articles 47 and 165(6); Fair Administrative Action Act, section 9.

Judicial Review – certiorari and prohibition - judicial review orders sought to challenge a decision to prosecute and to stop criminal proceedings – principles and circumstances under which courts granted orders prohibiting the commencement or continuation of a criminal trial process - whether merits of the case was one of the grounds for halting criminal proceedings – whether the concurrent existence of criminal proceedings and civil proceedings constituted an abuse of the process of the court - claim that the decision to prosecute was tainted with illegality and procedural impropriety – whether such a decision to prosecute would be quashed and further criminal proceedings stopped.

Legitimate Expectation – rationale for the doctrine of legitimate expectation – application of the doctrine of legitimate expectation - exception to the application of the doctrine of legitimate expectation - requirements for successful reliance on the doctrine of legitimate expectation – emerging principles on the doctrine of legitimate expectation – whether Kenya Revenue Authority by entering into negotiations with a tax defaulter to pay tax due in instalments amounted to a promise not to prosecute.

Constitutional Law - office of the Director of Public Prosecution – powers of the Director of Public Prosecution – whether courts could interfere with powers of the Director of Public Prosecution to investigate and undertake prosecution – what were the circumstances in which courts could intervene in a criminal prosecution.

Judicial Review – application for judicial review – grounds for grant of judicial review remedies - illegality, irrationality and procedural impropriety – when could a decision or act complained of be said to be tainted with illegality - when could a decision or act complained of be considered irrational - when could a decision maker be said to have engaged in a procedural impropriety.

Judicial Review – basis for judicial review – powers of courts in judicial review - whether judicial review could include aspects of merit review of administrative action – whether a reviewing court in judicial review had the mandate to substitute its own decision for that of the administrator - Constitution of Kenya, 2010, articles 47 and 165(6); Fair
Administrative Action Act, section 7.

Brief facts

The *ex parte* applicants sought judicial review orders against the respondents arguing that after the 1st respondent issued the interested party with an enforcement notice to immediately settle tax arrears in the sum of Kshs. 197,581,802/-, the interested party engaged the 1st respondent on a payment plan to offset the arrears. That after extensive negotiations, the interested party agreed with the 1st respondent on a settlement plan. That the interested party had paid a total sum of Kshs. 127,735,232/- pursuant to the said agreement.

That despite demand, the 1st respondent had failed to give credit to the interested party for the sum of Kshs. 45,000,000/- paid in PAYE, and in an unconscionable turn of events, and without any proper basis, the 1st respondent instituted proceedings against the *ex parte* applicants for alleged non-payment of Kshs. 153,359,181.50/-.

The *ex parte* applicants contended that having accepted the interested party’s proposal, the 1st respondent was estopped from using the criminal justice system to coerce the interested party to pay the entire amount demanded once. They, thus, challenged, among others, the institution of the criminal proceedings.

In response, the 1st respondent argued, among others, that failure by the interested party to pay taxes due rendered them liable for prosecution and that since it was a company, the offence was to be treated as having been committed by an individual who at the time was a director or other similar officer in the company. That having established that the *ex parte* applicants were directors of the interested party, they were lawfully charged with the offence of failure to pay taxes by the due date. It argued that the *ex parte* applicants had not demonstrated that their prosecution was actuated by malice, neither had they demonstrated that the actions by the prosecution were unlawful or in excess of authority. It contended that the resolution of the dispute, if any, would not be by way of judicial review but through a constitutional petition. It further argued that the mere fact that there were pending civil proceedings on the same subject matter did not *ipso facto* warrant the halting or quashing of criminal proceedings and that power had to be exercised sparingly.

Issues

i. What were the grounds for grant of judicial review remedies?

ii. What was the exhaustion doctrine, what were its exceptions and what did courts consider in determining whether the exceptions applied?

iii. Whether internal tax dispute resolution process was applicable in a matter which had progressed from merely being a tax liability to one of criminal prosecution.

iv. Whether High Court had jurisdiction to determine a matter challenging the processes involved and the law applied to prosecute a tax defaulter.

v. Whether Kenya Revenue Authority was precluded from recovery of tax by other legal means, other than by civil suit.

vi. Whether Kenya Revenue Authority could impose a penalty and also undertake criminal prosecution with respect to the same tax liability.

vii. What were the principles and circumstances under which courts granted orders prohibiting the commencement or continuation of a criminal trial process?

viii. What were the requirements for successful reliance on the doctrine of legitimate expectation?

Relevant provisions of the Law

Tax Procedures Act

Section 3;

Appealable decision mean an objection, decision and any other decision made under a tax law other than-

(a) a tax decision;

(b) or (b) a decision made in the course of making a tax decision.

Tax decision means-

(a) an assessment;

(b) a determination of the amount of tax payable or that will become payable by a taxpayer;

(c) a determination of the amount that a tax representative, appointed person, director or controlling member is liable for;

(d) a decision on an application by a self-assessment taxpayer;

(e) a refund decision;

(f) a decision requiring repayment of a refund; or

(g) a demand for a penalty.

Section 33

“(1) A taxpayer may apply in writing to the Commissioner for an extension of time to pay a tax due under a tax law.

(2) When a taxpayer applies for an extension the Commissioner may, if the Commissioner is satisfied that there is reasonable cause—

(a) grant the taxpayer an extension of time for payment of the tax; or

(b) require the taxpayer to pay the tax in such instalments as the Commissioner may determine.

(3) The Commissioner shall notify the taxpayer in writing of the decision regarding the application for extension of time, within 30 days of receiving the application for extension of time.

(4) Where a taxpayer who has been permitted to pay a tax by instalments under subsection (2) defaults in the payment of an instalment, the whole balance of the tax outstanding at the time of default shall become
immediately payable.

(5) Despite being granted an extension of time to pay a tax or permission to pay a tax due by instalments by the Commissioner, a taxpayer shall be liable for any late payment interest arising from the original date the tax was due for payment.

Section 39:

(1) Despite any other written law for the time being in force, the Commissioner may recover an unpaid tax as a civil debt due to the Government and, where the amount of unpaid tax does not exceed one hundred thousand shillings, the debt shall be recoverable summarily.

(2) In any suit for the recovery of an unpaid tax, the production of a certificate signed by the Commissioner stating—

(a) the name and address of the person who is the defendant in the suit; and (b) the amount of tax and late payment interest (if any) due by the person, shall be conclusive evidence that the amount stated on the certificate is due from that person.

Section 51:

“(1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.

(2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.”

Section 52:

“(1) A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013 (No. 40 of 2013).

(2) A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.”

Section 80:

(1) A person shall not be subject to both the imposition of a penalty and the prosecution of an offence in respect of the same act or omission in relation to a tax law.

(2) If a person has committed an act or omission that may be liable under a tax law to both the imposition of penalty and the prosecution of an offence, the Commissioner shall decide whether to make a demand for the penalty or to prosecute the offence.

(3) If a person has paid a penalty under a tax law and, in respect of the same act or omission for which the penalty was paid, the Commissioner commences a prosecution, the penalty shall be repaid to the person as a refund of tax under section 48, and the person shall not pay a penalty, in the case of a prosecution, unless the prosecution is withdrawn.

Held

1. In order to succeed in an application for judicial review, an applicant had to show that the decision or act complained of was tainted with illegality, irrationality and procedural impropriety. Illegality was when the decision making authority committed an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles were instances of illegality. Irrationality was when there was such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision was usually in defiance of logic and acceptable moral standards. Procedural impropriety was when there was failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness would be in non-observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It would also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercised jurisdiction to make a decision.

2. Judicial review was entrenched as a constitutional principle pursuant to the provisions of article 47 of the Constitution, which provided for the right to fair administrative action, and section 7 of the Fair Administrative Action Act, which granted any person aggrieved by an administrative action or decision an opportunity to apply for review of the administrative action or decision. Those provisions revealed an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court had no mandate to substitute its own decision for that of the administrator. Article 165(6) of the Constitution also gave the court supervisory jurisdiction over any person, body or authority that exercised a quasi-judicial function or a function that was likely to affect a person's rights.

3. Regarding tax disputes, section 51(1) and (2) of the Tax Procedures Act (the Act) made provisions on the dispute resolution process. A taxpayer who wished to dispute a tax decision was required to first lodge a notice of objection against the tax decision with the Commissioner of Tax before proceeding under any other written law. If dissatisfied with an appealable
decision, section 52 of the Act had another avenue for appealing to the Tax Appeal Tribunal (Tribunal). Section 3 of the Act defined what amounted to an appealable decision and a tax decision. Further, section 12 of the Act also provided that a person who disputed the decision of the Commissioner of Tax on any matter would also appeal to the Tribunal.

4. Section 9(2) and (3) of the Fair Administrative Action Act required the exhaustion of statutory and other internal review or appeal mechanisms before a party could seek judicial review. Under section 9 (4) of the Fair Administrative Action Act, the court could, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

5. Where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it was only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception could be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the real issue, was to be determined and whether the statutory appeal procedure was suitable to determine it. In reaching a decision as to whether an exception applied, courts would undertake an analysis of the facts, regulatory scheme involved, the nature of the interests involved, including level of public interest involved and the polycentricity of the issues and the ability of a statutory forum to determine them.

6. Even though a tax assessment and demand was made by the 1st respondent to the interested party, and they engaged in negotiations on the payment terms, the matter had since progressed from merely being a tax liability and payment dispute, to one of criminal prosecution of the ex parte applicants. The decision by the 1st respondent to prosecute the ex parte applicants was the primary decision that was being challenged. The tax refunds due to the interested party had been raised by the ex parte applicants to augment their arguments on the legality of their prosecution, and was therefore secondary and incidental to the decision under challenge.

7. The statutory remedies provided by section 51 and 52 of the Act were not only inapplicable in the circumstances, but had also been overtaken by events. The ex parte applicants had demonstrated that judicial review was a more effective and convenient remedy than the statutory laid down dispute resolution mechanism, as they were not disputing the amount of tax due for the interested party but the processes involved and the law applied to charge and prosecute them. The court had inherent and wide jurisdiction under articles 47 and 165(6) of the Constitution to supervise the respondents in that respect. Thus, the matter was properly before the court.

8. The interested party owed tax and various provisions of the Act were applicable as regards its payment of the tax liability. In addition, the Act provided for various methods of collection and enforcement of tax payment by the 1st respondent, including by civil suit, preservation of funds by issuing of third party agency notices, distress, search and seizure of goods and assets, production of documents and criminal prosecution.

9. The ex parte applicants brought evidence of correspondence between the interested party and the 1st respondent regarding the payment of tax arrears due in instalments. Section 33 of the Act allowed for an arrangement to be made as regards extension of time to make such payment. Section 39 of the Act on the other hand provided for the recovery of unpaid tax by suit. It was evident from a reading of the provisions that the 1st respondent was not precluded from recovery of tax by other legal means once there was a default in the payment of tax due on instalment terms. In addition, it was evident from the sections that the recovery of tax by a civil suit was additional to, and irrespective of other collection methods provided for by the law. Thus, the section did not preclude criminal prosecution, where such criminal prosecution was permissible.

10. Part XII of the Act provided for penalties and prosecution for criminal offences in relation to payment of tax, including the offence of failure to pay tax when due, subject to the principles set out in section 80 of the Act. Section 80 of the Act was an illustration of the constitutional principle in article 50(2)(o) of the Constitution that a person could not be convicted or punished for the same offence more than once. The penalty regime under the tax laws was premised predominantly on the culpability of a taxpayer for non-payment of tax and potential loss of revenue, which formed the basis for calculating the penalty due. It was thus a form of punishment meted out on a taxpayer for non-compliance with his or her tax obligations and responsibilities. The 1st respondent was specifically required by section 80 of the Act to elect whether to impose a penalty or undertake criminal prosecution with respect to a tax liability, and was expressly prohibited from undertaking both methods of enforcement as that would amount to double jeopardy.

11. There was imposition of penalties on the interested party with respect to its tax liability. The ex parte
applicants’ averments that the interested party had paid a total sum of Kshs 127,735,232/= pursuant to the negotiations on the payment of the said liability as at the date of commencing the instant judicial review proceedings was not disputed by the 1st respondent. The 1st respondent did not provide any evidence to show the defaults in the payment of the agreed instalments, or of the breakdown of the payments made by the interested party to support its averments on the nature of the said payment in terms of the principal sum and penalties of the sum of tax that was demanded, and that was the subject of the prosecution of the ex parte applicants.

12. The tax liability for which the ex parte applicants were being prosecuted was that of the interested party, and it was the same tax liability that was the subject of the aforesaid negotiations and part payment. Therefore, the 1st respondent having elected to make a tax demand, to and entered into negotiations with the interested party for the payment of the tax liability, including of interest and penalties, which the interested party had partly paid, was prohibited by section 80 of the Act from undertaking criminal prosecution of the interested party’s directors for the same tax liability. Thus, the prosecution of the ex parte applicants was not only manifestly illegal for being contrary to section 80 of the Act, but also unconstitutional.

13. Courts ought not to usurp the constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The merits of the case, and particularly whether the criminal proceedings had a likelihood of success, or that the applicant had a good defence was not a ground for halting criminal proceedings by way of judicial review.

14. However, if an applicant demonstrated that the criminal proceedings constituted an abuse of process, courts would not hesitate in putting a halt to such proceedings. The concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings was meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim.

15. The police had a duty to investigate on any complaint once a complaint was made. The police would be failing in their constitutional mandate to detect and prevent crime. The police only needed to establish reasonable suspicion before preferring charges. The rest was left to the trial court. The predominant reason for the institution of the criminal case could not be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge acted in a reasonable manner, courts would be reluctant to intervene.

16. An order of prohibition was an order from the High Court directed to an inferior tribunal or body which forbade that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lay, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It did not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. Equally so, the High Court had inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considered himself to be a victim of oppression. If the prosecution amounted to an abuse of the process of the court and was oppressive and vexatious, the court had the power to intervene and had the inherent power and the duty to secure fair treatment for all persons who were brought before the court or to a subordinate court and to prevent an abuse of the process of the court.

17. The role of the court in a judicial review application was to ensure that an applicant was not dragged willy-nilly into court on criminal charges when there was no substantial evidence to sustain an indictment. The DPP had the authority and discretion to decide who, when and how to prosecute within the bounds of legal reasonableness. That role could not be usurped by the court. If the DPP acted outside the bounds of legal reasonableness, however, he acted ultra vires and the court could intervene.

18. A criminal prosecution which was commenced in the absence of proper factual foundation or basis was always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there ought to be in existence material evidence on which the prosecution could say with certainty that they had a prosecutable case. A prudent and cautious prosecutor had to be able to demonstrate that he had a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution would be malicious and actionable.

19. There were various scenarios that would require interrogation to warrant a review of the unfettered discretion of the DPP:-

(a) where there was an abuse of discretion;
(b) where the decision-maker exercised discretion for an improper purpose;
The prosecution of the *ex parte* applicants was unlawful and unconstitutional. In addition, sections 104 to 110 of the Act which provided for the procedure and manner of prosecution of offences, were found in Part XII of the Act, and could only be read and applied subject to the overriding principle applicable to that Part which was in section 80 of the Act. To that extent, the 1st respondent overstepped its legal boundaries, and acted unlawfully and in abuse of the legal process in prosecuting the *ex parte* applicants.

Legitimate expectation was based not only on ensuring that legitimate expectations by the parties were not thwarted, but on a higher public interest beneficial to all, which was, the value or the need of holding authorities to promises and practices they had made and acted on and by so doing upholding responsible public administration. That in turn enabled people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. Public authorities had to be held to their practices and promises by the courts and the only exception was where a public authority had a sufficient overriding interest to justify a departure from what had been previously promised.

A person would have a legitimate expectation of being treated in a certain way by an administrative authority even though he had no legal right in private law to receive such treatment. The expectation would arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice.

In proceedings for judicial review, legitimate expectation applied the principles of fairness and reasonableness, to the situation in which a person had an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise. A party that sought to rely on the doctrine of legitimate expectation had to show that it had *locus standi* to make a claim on the basis of legitimate expectation.

The emerging principles on legitimate expectation were:

- a) there had to be an express, clear and unambiguous promise given by a public authority;
- b) the expectation itself had to be reasonable;
- c) the representation had to be one which it was competent and lawful for the decision-maker to make; and
- d) there could not be a legitimate expectation against clear provisions of the law or the Constitution.

It was difficult to adopt the *ex parte* applicants’ argument that the conduct of the 1st respondent of entering into negotiations with the interested party to pay the tax due in instalments amounted to a promise not to prosecute the *ex parte* applicants. That was because, if there was any express statement or promise made by the 1st respondent whether to the *ex parte* applicants or interested party, it was to accept payment of the due tax in instalments. No express representation was made that it would not commence criminal proceedings against the *ex parte* applicants.

Further, as to whether such a promise could be implied by the provisions of section 80 of the Act and conduct of the 1st respondent in relation thereto, the statutory framework of the tax compliance laws prevented such an implication, as criminal prosecution for tax evasion was expressly provided for by the said laws. In addition, even if such an implication could arise as a result of the conduct of the 1st respondent in entering negotiations with the interested party on the payment of the due tax and penalties, the contested issue of whether the *ex parte* applicants were directors of the interested party at the material time would had to be resolved first, for them to rely on such an implied representation.

To resolve the dispute on the status of the *ex parte* applicants at the time of the alleged non-payment of tax by the interested party, the dispute would require the court to handle conflicting evidential matters and to establish the existence of certain facts at the material time, which entailed delving into the merits of the case. That would be overstepping the judicial review mandate vested upon the court, and was a matter that needed to be decided by a trial court, whether criminal or civil.

Prohibition looked to the future. However, where a decision had been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition could not quash a decision which had already been made. It could only prevent the making of a
contemplated decision. Only an order of *certiorari* could quash a decision already made and an order of *certiorari* would issue if the decision was without jurisdiction or in excess of jurisdiction, or where the rules of natural justice were not complied with or for such like reasons.

29. The prosecution of the *ex parte* applicants was found to be unlawful and unconstitutional, and the order sought of *certiorari* to quash the said prosecution was thus merited. Consequently, an order of prohibition stopping any further prosecution of the *ex parte* applicants was also merited to ensure that the court did not act in vain.

30. The outstanding orders of prohibition and mandamus sought by the *ex parte* applicants could not, however, be granted for two reasons. Firstly, the court could not prohibit the 1st respondent from undertaking its statutory duties without any justifiable basis. Secondly, given the limits of the court’s judicial review jurisdiction, the orders sought that touched on the merits of the dispute could not be granted.

*Application partly allowed.*

**Orders**

i. An order of *certiorari* issued to bring into the High Court for purposes of being quashed the charge sheet and proceedings in Nairobi MCCR/1338/2018 - Republic vs Kung’u Gatabaki & Others instituted by the 1st and 2nd Respondents against the *ex parte* applicants.

ii. An order of prohibition issued directed at the 3rd respondent prohibiting him/her and any other Magistrate’s court of similar jurisdiction from trying, hearing or further hearing and determining MCCR/1338/2018 - Republic vs Kung’u Gatabaki & Others.

iii. The 1st and 2nd respondents order to meet the *ex parte* applicants’ costs of the application.

**A man cannot commit the offence of incest with a male relative under the Sexual Offences Act**

*JKM v Republic*  
*Criminal Appeal No 54 of 2018*  
*High Court at Nyahururu*  
*RPV Wendo, J*  
*July 30, 2020*  
*Reported by Sharon Sang & Kakai Toili*

*Criminal law – sexual offences – incest - incest by a male person – elements constituting the offence of incest by a male person – whether a man could commit the offence of incest on a male relative - Sexual Offences Act,(No. 3 of 2006), section 20 and 22.*

*Criminal law – sexual offences – defilement and incest – where the charge of incest by a male person was substituted with that of defilement – where the accused had defiled a 9 year old child – where both offences bore a similar sentence which was life imprisonment – whether it would be prejudicial to substitute the offence of incest by a male person to the offence of defilement under the Sexual Offences Act – Sexual Offences Act, (No. 3 of 2006), section 8 and 20.*

**Jurisdiction** – jurisdiction of the High Court – appellate jurisdiction - role of the High Court as an appellate court.

**Brief facts**

The appellant had been convicted for the offence of incest contrary to section 20(1) of the Sexual Offences Act (the Act) by the trial court. The particulars of the charge were that the appellant intentionally caused his genital organs to penetrate the genital organs of his son (the complainant) a child aged 9 years. In the alternative, the appellant was charged with the offence of indecent act with a child, contrary to section 11(A) of the Act in that he intentionally caused his genital organs to come into contact with the genital organs of the complainant. Upon conviction, the appellant was sentenced to serve 20 years imprisonment. The appellant was aggrieved by the judgment of the trial court and thus filed the instant appeal. The appellant prayed that the conviction be quashed and the sentence set aside.

**Issues**

i. What were the elements that constituted the offence of incest by a male person?

ii. Whether the offence of incest by a male person could be established if committed on a male relative under the Sexual Offences Act.

iii. Whether it would be prejudicial to substitute the offence of incest by a male person to the offence of defilement under the Sexual Offences Act which bore similar sentence if convicted.

**Relevant provisions of law**

*Sexual Offences Act, No 2 of 2006*  
*Section 2*

“*indecent act*” means an unlawful intentional act which causes—

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another,
but does not include an act that causes penetration;
(b) exposure or display of any pornographic material to any person against his or her will;

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

Section 20 – Incest by male persons
1. Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

Section 22 – Test of relationship
1. In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.
2. …
3. An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.
4. In cases where the accused person is a person living with the complainant in the same house or is a parent or guardian of the complainant, the court may give an order removing the accused person from the house until the matter is determined and the court may also give an order classifying such a child as a child in need of care and protection and may give further orders under the Children Act (No 8 of 2001)

Held
1. The court had a duty to exhaustively examine all the evidence tendered in the trial court, evaluate and analyze it and arrive at its own findings and conclusions. However, the court had to make allowance for the fact that it neither saw nor heard the witnesses testify whereas the trial court had the opportunity to, and to assess the witnesses’ demeanor.

2. The offence of incest by a male person was created by section 20(1) of the Sexual Offences Act. To establish a case under section 20, the prosecution had to prove the elements of the offence which were that there had to be;
(a) an indecent act or an act that caused penetration;
and
(a) the victim had to be a female person who was related to the perpetrator in the degrees set out in section 22 of the Act.

3. There was overwhelming evidence on record that the complainant was aged about 8 years old. The complainant was a child of tender age and had undergone a voire dire examination. PW6 who examined the complainant, assessed his age at 8 years, at the time he was in nursery school.

4. There was no evidence on record as to suggest why the complainant, a child of tender age, could have framed the appellant with such a serious offence and given such candid details of the incident. The complainant was a truthful witness, he gave his evidence on oath and was subjected to cross-examination and his testimony was not shaken. The appellant was therefore the perpetrator of the offence that caused anal penetration of the complainant.

5. The complainant was a male person and did not fall within the category listed in section 20(1) of the Act. Under section 20(1), a male person committed the incest with a female relative. There was no provision in the Act where a male person was deemed to commit incest with male relative. An offence of incest had therefore not been disclosed as no such offence existed under section 20(1).

6. The evidence on record disclosed an offence of defilement under section 8(1) as read with section 8(2) of the Act. The trial court erred in convicting and sentencing the appellant under section 20(1) of the Act. The appellant was thus guilty of the offence of defilement contrary to section 8(1) as read with section (2) of the Act.

7. The appellant would not suffer any prejudice for being found guilty for the offence of defilement because the sentence under section 20 of the Sexual Offences Act was similar to the sentence under section 8(1) and (2) which was, life imprisonment.

8. The appellant behaved like a beast. The complainant was a young boy of tender age, his own son upon whom he inflicted serious injuries by his bestial acts. Instead of being his protector, he was the molester until the young boy had to run for his life and find refuge in the bathroom. The appellant did not deserve mercy.

9. The Rules Committee needed to reconsider section 20(1) of the Sexual Offences Act, whether a man
could commit incest on a male relative.

Appeal partly allowed; appellant sentenced to serve 30 years imprisonment under section 8(2) of the Sexual Offences Act which sentence would run from the date the appellant was sentenced.

Requirements for admissibility of documents from non-commonwealth countries in Kenyan courts

Techno Service Limited v Nokia Internation Oy-Kenya & 3 others [2020] eKLR
Civil Suit No. 118 of 2018
High Court at Nairobi
MM Kasango, J
July 29, 2020
Reported by Kakai Toili

Evidence Law – admissibility of evidence – admissibility of documentary evidence from non-commonwealth countries – where an affidavit in support of an application was sworn in a non-commonwealth country - what were the requirements to be met for documents from non-commonwealth countries to be admissible in Kenyan courts – Evidence Act, Cap 80, section 88.

Civil Practice and Procedure – advocates – notice of appointment of advocates – where an advocate filed an application in a suit without filing a notice of appointment - what was the effect of failure of a firm of advocates filing an application in a suit before filing a notice of appointment - Civil Procedure Rules, 2010, Order 9 rule 1.

Civil Practice and Procedure – affidavits – affidavits in support of applications – where an earlier dated affidavit was filed in support of a later dated affidavit - whether an earlier dated affidavit could support a later dated application - Civil Procedure Rules, 2010, Order 19 rule 8.

Civil Practice and Procedure – suits – institution of suits – institution of suits by companies – requirements – resolution of the board of directors or general meeting of members - whether it was mandatory for a board of directors or a general meeting of members of a company to resolve to instruct counsel to file a suit on behalf of the company before the suit could be filed.

Civil Practice and Procedure – suits - summons to enter appearance – extension of validity of summons – requirement of filing an application to seek extension of validity - whether a court could extend the validity of summons without an application being made to that effect – Civil Procedure Rules, 2010, Order 5 rule 2.

Civil Practice and Procedure – judgments – entering of judgments as prayed in a plaint – where judgment was entered as prayed in a plaint which sought declaratory orders – where the judgment was entered without formal proof - whether a judgment could be entered without formal proof where there were prayers in the plaint seeking declaratory orders.

Brief facts

The plaintiff through a notice of motion application sought an order to serve summons and a plaint on the 1st defendant by way of substituted service, through a newspaper advertisement in a Kenyan newspaper. After an ex parte hearing of that application the court granted the plaintiff leave to serve the 1st defendant by substituted service through newspaper advertisement. On October 9, 2019, the plaintiff served the 1st defendant as ordered by the court. In default of appearance, the court entered judgment against the 1st defendant as prayed in the plaint.

The instant application, the defendants sought among others orders that the court set aside the default judgment entered against the 1st defendant and that the court stay the hearing of the suit and direct that the dispute be referred to arbitration. The application was premised on among other grounds that; all the four defendants were foreign companies; that the service of summons through the Daily Nation newspaper did not get the attention of the 1st defendant but rather it was later that a local counsel for the 1st defendant found that advertisement; and that the summons served through newspaper advertisement had expired having been issued by the court on July 2, 2018.

Issues

i. What were the requirements to be met for documents from non-commonwealth countries to be admissible in Kenyan courts?

ii. What was the effect of failure of a firm of advocates filing an application in a suit before filing a notice of appointment?

iii. Whether an earlier dated affidavit could support a later dated application.

iv. Whether it was mandatory for a board of directors or a general meeting of members of a company to resolve to instruct counsel to file a suit on behalf of the company before the suit could be filed.

v. Whether a court could extend the validity of summons without an application being made to that
effect.

vi. Whether judgment could be entered without formal proof where there were prayers in the plaint seeking declaratory orders?

Relevant provisions of the law

Civil Procedure Rules, 2010

Order 5

Rule 1

(1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein

Rule 2

(1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons. 2 (1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.

(7) Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.

Held

1. Order 9 rule 1 of the Civil Procedure Rules required an advocate acting for a party be appointed to so act. There was no notice of appointment of the firm of advocates which filed an application on behalf of the 1st defendant (the firm). That lack of notice of appointment by the firm was contrary to the provision of the law for them to file an application when they had not been appointed by the 1st defendant to act for it. The only way an advocate could prove he/she was an authorized agent of a party was by filing a notice of appointment. Having failed to file that notice the firm had no legal basis to file the notice of motion application under consideration; the firm was thus a stranger in the suit.

2. The first document filed by the 1st defendant in the action was the application under consideration. Section 6 of the Arbitration Act required a party seeking stay of proceedings and referral to arbitration to promptly file that application before the court. The 1st defendant did not take any other steps in the proceedings other than the application under consideration. Therefore, there was no basis for the plaintiff to argue that the 1st defendant’s prayer for stay of proceedings and referral to arbitration was contrary to section 6 of Arbitration Act.

3. Order 19 rule 8 of the Civil Procedure Rules provided that unless otherwise directed by the court an affidavit would not be rejected solely because it was sworn before the filing of the suit concerned. The plaintiff was therefore in error to argue that the earlier dated affidavit could not support the later dated application.

4. Section 88 of the Evidence Act permitted, as admissible in the Kenyan courts, documents which were admissible in the English court. For any documents from a non-commonwealth country, such as the subject affidavit in the instant matter, needed to have the notary’s signature and seal attested, proved or authenticated by affidavit or otherwise. The affidavit of the assistant general counsel of the 1st defendant was sworn before a notary public in the state of Washington but there was no authentication of that notary.

5. It did not require a board of directors or even the general meeting of members of a company to sit and resolve to instruct counsel to file proceedings on behalf and in the names of the company. Any director, who was authorized to act on behalf of the company, unless the contrary was shown, had the powers of the board to act on behalf of that company. The affidavit of the assistant general counsel was incompetent because the notary’s signature was not authenticated. Consequently, the defendants’ application was unsupported by affidavit and it thereupon could not stand.

6. The court had power to strike out the suit because the summons even at the time they were served on the 1st defendant had expired. The court at the instant stage did not have the power to extend the summons. Order 5 rule I(1) of the Civil Procedure Rules showed the preeminence that summons played in a suit. Although a suit was filed against a defendant it was the summons which ordered the defendant to appear within a specified time, that was what Order 5 rule I(1) demonstrated.

7. The plaintiff’s summons was issued on July 2, 2018; from the reading of Order 5 rule 2(1) of the Civil Procedure Rules, those summons expired on July 2, 2019. Under Order 5 rule 2(2) the court had power to extend, on an application being made, the summons from time to time. No application was made to extend the validity of the summons. When the summons were served on the 1st defendant, through the newspaper advertisement they were already expired. The summons having expired could not be extended.

8. The court was empowered under Order 5 rule
2(7) of the Civil Procedure Rules to dismiss a suit where summons had not been extended for twenty-four months. The plaintiff's summons having been issued on July 2, 2019, expired after twenty-four months as at July 2, 2020. The summons served on the 1st defendant on October 9, 2019 were expired, invalid and of no effect. They could not invite the 1st defendant to enter an appearance in the instant matter. The judgment entered against the 1st defendant on November 26, 2019, was therefore invalid.

9. The judgment was invalid because the Deputy Registrar entered judgment as prayed in the plaint yet the prayers in the plaint needed formal proof because they were prayers seeking declaratory orders. The Deputy Registrar's error in entering judgment as prayed in the plaint was prompted by the plaintiff's request for judgment application dated October 28, 2019. By that request for judgment, the plaintiff requested for judgment in terms of the prayers prayed in the plaint. What the plaintiff should have requested for was interlocutory judgment as per Order 10 rule 6 of the Civil Procedure Rules. The judgment entered by the Deputy Registrar could not stand because it was final judgment and not interlocutory as it ought to have been.

Notice of Motion application dated March 12, 2020 dismissed with no order as to costs; suit dismissed with no order as to costs.

An order for forfeiture of goods cannot be issued automatically after conviction and sentencing of an accused
Jones Nzioka & another v Republic [2020] eKLR
Criminal Appeal No. 18 & 19 of 2020
High Court at Malindi
R Nyakundi, J
June 30, 2020
Reported by Kakai Toili

Criminal Procedure - forfeiture – forfeiture of property to the State – where the accused persons were convicted and sentenced for selling assorted alcoholic drinks in contravention of the Public Health Act and the directions issued by the Cabinet Secretary for Health on prevention, control or suppression of COVID-19 – where the trial court forfeited the inventory of exhibits to the State for final destruction - where the property in question did not belong to the accused - whether an order for forfeiture of goods could be issued automatically after conviction and sentencing of an accused – whether it was mandatory for an accused to be heard before an order of forfeiture was issued - Constitution of Kenya, 2010, article 50; Criminal Procedure Code, Cap 75, section 385A; Public Health Act, Cap 242, sections 36(m) and 164.

Appeals – criminal appeals – role of appellate courts - role of a first appellate court in conducting a review of a trial court’s decision - circumstances in which a decision of a lower court could be reviewed - illegality, procedural impropriety and proportionality - nature of illegality, procedural impropriety and proportionality - what were the circumstances in which an appellate court could interfere with the exercise of a trial court’s discretion.

Brief facts
The appellants were charged, with two counts of contravening provisions, control or suppression of COVID-19 directions issued by the Cabinet Secretary pursuant to section 36(m) as read with section 164 of the Public Health Act. The particulars of the indictments were that in March 2020 the accused was found selling assorted alcoholic drinks in contravention of directions issued by the Cabinet Secretary for Health (Cabinet Secretary) on prevention, control or suppression of COVID-19. At the trial court the appellants on their own plea of guilty were convicted and sentenced to a fine of Kshs. 20,000/= each in default one (1) month imprisonment. Further, the trial court forfeited the inventory of exhibits which comprised of assorted soft and alcoholic drinks to the State for final destruction under the supervision of the court. Aggrieved by the order on forfeiture, the appellants filed the instant appeal.

Issues
i. Whether an order for forfeiture of goods could be issued automatically after conviction and sentencing of an accused?
ii. Whether it was mandatory for an accused to be heard before an order of forfeiture was issued?
iii. What was the role of a first appellate court in conducting a review of a trial court’s decision?
iv. What were the circumstances in which a decision of a lower court could be reviewed by an appellate court?
v. What was the nature of illegality, procedural impropriety and proportionality in an application seeking to review a trial court’s decision?
vi. What were the circumstances in which an appellate court could interfere with the exercise of a trial court’s discretion?
Relevant provisions of the law

Criminal Procedure Code

Section 389A

Where, by or under any written Law other than Section 29 of the Penal Code, any goods or things may be but are not obliged to be forfeited by a Court, and that Law does not provide the procedure by which forfeiture is to be effected, then, if it appears to the Court that the goods or things should be forfeited, it shall cause to be served on the person believed to be their owner notice that it will, at a specified time and place, order the goods or things to be forfeited unless good cause to the contrary is shown, and at that time and place or on any adjournment, the Court may order the goods or things to be forfeited unless cause is shown by the owner or some person interested in the goods or things provided that, where the owner of the goods or things is not known or cannot be found, the notice shall be advertised in a suitable newspaper and in such other manner if any as the Court thinks fit.

Held

1. In appeals against conclusions of a trial court, the first appellate court approach was by way of a rehearing and examination of the evidence afresh, giving due regard to greater advantage, the trial court could have had as a primary court. The appeal court conducting a review of the trial court decision would not conclude that the decision was wrong simply because it was not the decision the appellate court would have made had he or she been called upon to make it in the court below. Something more was required than personal unease and something less than perversity has to be established.

2. The plea of guilty to the charges offered by the appellants for the respective offences and after the facts had been read was in consonant with the principles of entering a guilty plea. There was therefore no irregularity to render the plea of guilty and subsequent conviction and sentence defective. Furthermore, the grounds in each memorandum of appeal were not in any sense on the illegality of the plea of guilty, conviction or sentence. The appeals were mainly on the ground that the trial court misdirected itself in holding that the goods were liable for forfeiture and breach of the due process before the final order. A material irregularity could arise in the course of a trial where there had been misdirection or an erroneous decision by the court on a matter relating to the evidence.

3. The general principles on forfeiture should follow the procedure set out under section 389A of the Criminal Procedure Code. From the record, the trial court though seized of jurisdiction erred in not giving the appellants an opportunity to be heard before an order of forfeiture was made after conviction and sentence. That radical conclusion required the trial court to enter on the inquiry and to decide that particular issue distinctively with that of conviction and sentence. Furthermore, COVID-19 directions by the Cabinet Secretary pursuant to section 36(m) as read with section 164 of the Public Health Act did not provide automatic forfeiture of exhibits produced in support of the commission of the offence.

4. Even where there was automatic forfeiture on the proceeds of crime or a vessel and article used in the commission of the offence both sides should be heard to form a base for the decision. The trial court resolved that question without a fair hearing and due process of the law as contemplated in article 50 of the Constitution. Further, a conclusion on that point was ultimately disposed of without the duty of giving reasons by the trial court. A crucial issue to the resolution of issues between the parties ought to be founded on reasons in support or against the decision.

5. The duty to exercise jurisdiction called for the obligations on the part of the trial court to give reasons according to law. Though the appeal as the law stood was governed under the Criminal Procedure Code and the Public Health Act, the tide on its resolution could be deprived where a decision of an inferior court could be reviewed on grounds of illegality, irrationality and procedural impropriety.

6. Illegality meant that the decision-maker had to understand correctly the law that regulated his decision making power and had to give effect to it irrationality. Wednesbury unreasonableness applied to a decision which was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Procedural impropriety covered failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who would be affected by the decision, as well as failure to observe procedural rules that were expressly laid down even where such failure did not involve denial of natural justice.

7. The courts would quash exercise of discretionary power in which there was not a reasonable relationship between the objective which was sought to be achieved and the means used to that end or where punishment imposed by the administrative bodies or inferior courts were wholly out of proportion to the relevant misconduct. The principle of proportionality was well established in law and was regarded as one indication of manifest unreasonableness weighing the actual purpose that was identified by the trial court, the range of permissible alternatives ought to have been scrutinized before an order for forfeiture was determined in accordance with the law. There had to be a fair balance being struck between the
rights of the appellants and the interests of society which was inherent in the whole Constitution.

8. Bearing in mind the facts and circumstances of the cases at the trial court as well as the State appreciation to control or suppression of COVID-19, the trial court failed to achieve a fair balance between the sentence of Kshs. 20,000/= in default one year imprisonment, and subsequent forfeiture of the goods seized from the scene of crime. Moreover, the factors under COVID-19 pandemic taken together and non-compliance by the appellants had to be considered against the adverse economic effect that the seizure and confiscation of the property would occasion the owners who had a legitimate expectation on return of investment.

9. Deprivation of private property by way of a penalty was incompatible with the proportionality test in sentencing of an offender in the case. Where there was no fault at all on the part of the owner, it was fair that the goods be returned after conviction and sentence of the accused in a criminal case. The discretion to impose both a fine of Kshs.20,000 in default one year imprisonment and in addition an order for forfeiture of the property proven to be goods used for the commission of the crime was in the context of the appeal irregular, illegal and wrong exercise of discretion.

10. An order of forfeiture was in contradiction with section 389A of the Criminal Procedure Code and to make them subject for forfeiture was inevitably against the principles of fairness or natural justice. The properly seized could not be classified as property from the proceeds of crime obtained or derived directly or indirectly as a result of the commission of a designated offence under section 164 of the Public Health Act. To address that concern Parliament provided an avenue under section 389A which permitted any person with an interest in the property, including accused persons to apply for a restoration order or authorization of the release of the seized and forfeited property.

Appeal allowed; the goods and items identified by the appellants in the inventory attached to the record of appeal claimed as recoverable to be returned as a whole with no costs as to storage or handling charges.

Whether courts would determine or cap the amount of fees charged by private schools
CIS v Directors, Crawford International School & 3 Others [2020] eKLR
Petition No. 162 of 2020
High Court at Nairobi
W Korir, J
September 3, 2020
Reported by Chelimo Eunice

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms - right to education, rights of children and consumer rights – claim that virtual learning program introduced by a private school was substandard, expensive and was introduced without consultation – whether virtual learning program was substandard and inferior to physical learning – whether failure by a private school to reduce school fees upon the change of the mode of teaching from physical to virtual learning program violated the right to education, rights of children and consumer rights - Constitution of Kenya, 2010, articles 43, 46 and 53; Basic Education Act, 2013, section 2; Consumer Protection Act, 2012, sections 12 and 13.

Contract Law – contracts between private parties – privity and sanctity of contracts – whether courts would interfere with contractual agreements between private parties – situations when courts would interfere with contractual agreements between private parties – whether courts could determine the prices of goods and services in the market - whether contracts that sought to regulate the fundamental educational rights of children under the Constitution could be equated with standard commercial contracts – a claim that virtual learning program introduced by a private school was expensive – whether courts would determine or cap the amount of fees charged by private schools; Consumer Protection Act, 2012, sections 12 and 13.

Constitutional Law – constitutional petition – content of a constitutional petition - particulars to be pleaded in a constitutional petition – requirement that a litigant in a constitutional petition had to set out with reasonable degree of precision in particular how the alleged acts amounted to infringement of the litigant’s constitutional rights - matters to be litigated through constitutional petitions – requirement to resolve disputes within the boundaries of the procedures provided for by statutes - disputes involving alleged breach of contract and alleged violation of constitutional rights - whether a constitutional petition could be used to litigate such a dispute.

Brief facts
The 1st and 2nd respondents introduced virtual learning program following closure of schools by the Government as a result of the reporting of the coronavirus disease
in Kenya. The petitioners alleged violation of their constitutional rights and those of their children through the introduction of the virtual program arguing, among others, that at the time of the admission of their children, there were various subjects and activities that were non-examinable, such as sports, which were not included in the virtual program yet the 1st and 2nd respondents continued to levy full fees and that the charging of full fees was unfair, unconscionable and unlawful and contravened their consumer rights protected under article 46 of the Constitution. They also averred that the 1st and 2nd respondents have irredeemably failed to offer educational services with reasonable care and skill.

The petitioners also sought, among others, for; orders directing the Cabinet Secretary for Education to inquire about the actions of the 1st and 2nd respondents in offering virtual program and whether the same met the basic education requirements under the Constitution and the Basic Education Act; orders directing the 4th respondent to come up with rules, regulations and policy to guide the 1st and 2nd respondents and all other schools with respect to virtual or online learning so as to meet the basic education standards under the Constitution, international conventions and the Basic Education Act; a structural interdict directed at the 4th respondent to develop a Bill, for consideration by the National Assembly, on the regulation and control of school fees charged by private schools and schools offering international curriculum in Kenya and an order compelling the 1st and 2nd respondents to establish a parents’ association.

The 1st and 2nd respondents opposed the petition arguing that it was incompetent, legally and factually unfounded, without merit, that it was simply to ensure that policies enacted by the executive met the constitutional standards and nothing more.

**Issues**

1. Whether and when would courts interfere with contractual agreements between private parties.
2. Whether contracts that sought to regulate the fundamental educational rights of children under the Constitution could be equated with standard commercial contracts.
3. Whether courts would determine or cap the amount of fees charged by private schools.
4. Whether failure by a private school to reduce school fees upon the change of the mode of teaching from physical to virtual learning program violated the right to education, rights of children and consumer rights.
5. Whether a constitutional petition could be used to litigate disputes involving alleged breach of contract and alleged violation of constitutional rights.

**Held**

1. A litigant seeking constitutional redress was required to set out with a reasonable degree of precision the complaint, the constitutional provisions said to be infringed and the manner in which they were said to be infringed. There ought to be a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened and the manifestation of contravention or infringement. Such a principle played a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

2. The petitioners alleged violation of the rights protected by articles 36, 43, 46 and 53 of the Constitution by the 1st and 2nd respondents’ act of introducing virtual or online classes (virtual program) without consulting them. They also accused the 3rd and 4th respondents of abdicating their constitutional mandates by failing to ensure compliance with the Basic Education Act. They had, therefore, established grievances and disclosed alleged injuries which had been linked to particular provisions of the Constitution. They had explained the manner in which their rights had been violated. The petitioners, therefore, had a solid claim that needed to be interrogated using the tools for determining constitutional disputes. The objection by the respondents to the petition on that ground failed for lack of merit.

3. Litigants were discouraged from using constitutional
petitions to prosecute matters which could be pursued through other statutory procedures. The Constitution ought not be engaged in all manner of litigations. The Constitution was to be resorted to only when it was necessary to do so. Otherwise, disputes ought to be decided within the boundaries of the procedures provided by the statutes applicable to those disputes.

4. At the core of the instant matter was the claim by the petitioners that the 1st and 2nd respondents breached the contracts entered between the 2nd respondent and petitioners for provision of education services. Nevertheless, the matter would not be fully resolved by the determination of the contractual dispute. The petitioners had also alleged violation of their consumer rights by the 1st and 2nd respondents. The issue of violation of consumer rights was one that could attract both statutory and constitutional remedies. There was alleged violation of the right to education and the principle of the best interests of the child. Through the prayers in the petition, the petitioners had opted for constitutional remedies. Although the issues placed before the court arose from contractual relationships, they also called for the interpretation of the Constitution.

5. There was also the matter of the 4th respondent’s alleged failure to discharge constitutional and statutory responsibilities. The orders sought against the 3rd and 4th respondents were best pursued through a constitutional petition. Thus, the matter was one of those cases in which the court was required to handle the matter as a constitutional petition since the other available remedies could not be adequate.

6. Courts ought not sheath the constitutional sword if the other available remedies were inadequate. A litigant was not be cast into the wilderness and left bereft of remedy. In the quest to do substantive justice as commanded by the Constitution, courts ought not unnecessarily deny litigants the constitutional route to the garden of justice. To deny a party who had outlined constitutional issues an opportunity to ventilate those issues would defeat the spirit of justice and fairness envisaged by the Constitution. In the circumstances, there was no basis established to warrant the abandonment of the petition by the court.

7. The rights of consumers found firm root in article 46 of the Constitution. Article 46(3) of the Constitution stipulated that the provisions of the article applied to goods and services offered by public entities or private persons. The Constitution therefore directly applied the obligations created therein to dealings between private persons.

8. The preamble of the Consumer Protection Act, which was an Act of Parliament contemplated under article 46(2) of the Constitution, provided that the enactment was meant to provide for the protection of the consumer and to prevent unfair trade practices in consumer transactions. The Consumer Protection Act in section 3(1) and (2) provided for interpretive principles, and in section 3(4), provided for purposes of the Act.

9. The Consumer Protection Act was, therefore, a law that sought to implement the rights created by article 46 of the Constitution and the lawmaker ensured that the manner of interpreting the law was provided. The term consumer was defined in section 2 of the Consumer Protection Act. There was a contract for provision of a service between the individual parents and the 2nd respondent. The 1st and 2nd respondents’ attempt to deflect the application of consumer rights to the dealings between them and the petitioners found no support in the evidence that was adduced. In the circumstances, article 46 of the Constitution and the Consumer Protection Act were applicable to the dispute.

10. There were certain situations where courts would interfere with a bargain between parties. A sense of fairness had to be infused into transactions between private persons. The strong party in a contractual relationship ought not be allowed to steamroll over the weaker party. That was in line with the prevailing jurisprudential trajectory that required constitutional values to be infused into contracts. If that was not so, the Kenyan people would not have found it necessary to include article 46 in the Constitution and follow it with the enactment of the Consumer Protection Act to specifically protect the rights of consumers. The arrival of the 2010 Constitution had shifted the ground.

11. Courts had authority to infuse fairness in unconscionable contracts. All contractual agreements between private parties were governed by the principle of *pacta sunt servanda*, unless they offended public policy. Where it was alleged that constitutional values or rights were implicated, public policy had to be determined by reference to the values embedded in the Constitution, including notions of fairness, justice and reasonableness. The application of public policy in determining the unconscionableness of contractual terms and their enforcement had, where constitutional values or rights were implicated, be done in accordance with notions of fairness, justice and equity, and reasonableness could not be separated from public policy.

12. Public policy took into consideration the necessity to do simple justice between individuals. What public policy was, and whether a term in a contract was
contrary to public policy, had to be determined by reference to those values. That left space for enforcing agreed bargains (pacta sunt servanda), but at the same time allowed courts to decline to enforce particular contractual terms that were in conflict with public policy, as informed by constitutional values, even though the parties would have consented to them.

13. Contracts that sought to impinge upon or regulate the fundamental educational rights of children under the Constitution could not be equated with standard commercial contracts such as a lease. Contracts specifically dealing with the education of children were of a different species in that there were markedly different considerations at stake.

14. The crucial issue was whether independent schools, by providing education to children, assumed constitutional duties and obligations that inhibited the free exercise of contractual rights. Those were the best interests of the child and the right to basic education. If independent schools did not have that duty, children would have no independent right to expect their constitutional educational rights to be enforced through inhibiting free exercise of contractual rights. But if a constitutional duty to provide basic education protected also those children who attended independent schools, then those schools could not evade those obligations by attempting to contract out of it.

15. There was no dispute about the constitutionality of online education. It would have been absurd for the petitioners to attempt to stand on the path of the unstoppable march of technology especially during the period of history when the Covid-19 pandemic had completely changed how human beings interacted. The deployment of ICT in teaching was legalized by section 2 of the Basic Education Act.

16. Since the petitioners were the ones who alleged violation of the Constitution by the respondents, they had a duty to prove their allegations.

17. The overwhelming evidence placed before the court by the 1st and 2nd respondents on the consultations undertaken before introduction of the virtual learning program was not challenged by the petitioners. Thus, there was adequate consultation and dissemination of information before and during the implementation of the virtual learning program. It was appreciated that the schools were shut down abruptly and the 1st and 2nd respondents had an obligation to meet their part of the bargain in the changed circumstances considering that they were offering international curriculum which was not affected by what was happening in Kenya.

18. The petitioners did not adduce any evidence in support of their claim that e-learning was inferior to face-to-face teaching. It was not sufficient for them to simply aver that online learning was inferior without backing the assertion with evidence. The 2nd respondent’s position that introduction of online teaching was in line with its recognition of use of technology for communication, teaching, learning and assessment, as expressed in its Digital Citizenship Guidelines was not disputed by the petitioners. The averment by the 2nd respondent that it was part of a global community of schools engaged in digital transformation to improve teaching, learning and assessment of students was also not challenged by the petitioners. It could, therefore, be inferred that the 2nd respondent had expertise in delivery of teaching through digital platforms.

19. The petitioners’ claim that virtual education was of poor quality could not be accepted considering that it was not the content of the curriculum that changed but the mode of its delivery. That was in addition to the 1st and 2nd respondents’ undisputed deposition that there was general consensus among the parents and the students that online classes were of substantial benefit to the students and that the quality of education delivered by the 2nd respondent met the standards promised to the parents at the point of admission.

20. The submissions by the 1st and 2nd respondents explained why it was difficult for the court to determine that the discount extended to the petitioners by the 2nd respondent was inadequate. The petitioners did not adduce any evidence in support of their claim that the discount offered was unreasonable. Further, it had to be appreciated that the decision as to the amount of fees to be levied was a complex one. Even where schools were said to be of the same status, the facilities and the caliber of the teaching staff could be different. Sometimes the price came with the brand name. One private school could provide the same quality of education with another private school but that did not mean the two schools had to impose uniform fees. Each school had its own budgets and traditions and that could explain why a parent would select one private school over another private school with similar facilities and results.

21. The prayer for an order directing the 2nd respondent to reduce its fees failed on two grounds. In the first place, the petitioners had not established a violation of their consumer rights by the 1st and 2nd respondents. Secondly, even if the petitioners had established a violation of their rights, they had not shown that the court had the authority of the law to determine the terms of a contract for parties to a contract. The appropriate remedy the court could provide once it was established that a contract was unconstitutional was to make a declaration to that
22. Courts could not determine the prices of goods and services in the market. In any case, courts were ill-equipped to find that a reduction of schools fees by a particular percentage was appropriate and fair to all the parties. The 1st and 2nd respondents’ averment that their fees were 50% less than that charged by other schools of the same parity before the pandemic was not disputed by the petitioners. The petitioners had therefore failed to convince the court that it could fix the fees chargeable by the 1st and 2nd respondents.

23. The product or service in the market belonged to the 1st and 2nd respondents and since it had not been proved that they made false and or unconscionable representations to any of the parents, they were at liberty to charge whatever fees they desired to charge. The market dictated the cost of a product or service and the consumer purchased the product he or she could afford. It would be unjust for parents who willingly and voluntarily enrolled their children in private schools to demand a reduction of school fees on the ground that the fees charged violated the constitutional right to free and basic education.

24. It was appreciated that the constitutional rights of children should be given special attention. That, however, had to be balanced with the rights of those who invested in provision of private education to make profits from their investments. There was need for private investors to assist the State in the fulfillment of its constitutional obligation to provide free and basic education. Although basic education was supposed to be free for all children, parents who opted to enroll their children in private schools were expected to meet the cost.

25. In order to succeed in their claim, the petitioners needed to provide evidence of false and or unconscionable representation on the part of the 1st and 2nd respondents. They needed to particularize in their pleadings the elements of the misleading representation made to them by the two respondents. Some of the grounds would need an averment by an individual parent in support of the claim. An example was where a parent alleged that he or she could not protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of the agreement or similar facts. Such weaknesses could not be applicable to all the parents and a claim based on such grounds had to be individualized. In such a situation, each claimant needed to particularize his or her claim and adduce evidence in support of the averment. That was made even more necessary by the fact that each parent had an individual contract with the School.

26. A contract could be invalidated on the ground of unconscionable representation where, as per section 13(2)(b) of Consumer Protection Act, the price grossly exceeded the price at which similar goods or services were readily available to like consumers. The petitioners did not establish that the fees they paid were grossly excessive compared to fees levied by schools offering similar standard of education. All the other factors provided by sections 12 and 13 of the Consumer Protection Act that courts could take into account in determining whether a contract was poisoned by false representation and unconscionable representation had not been established by the petitioners.

27. Since the petitioners had failed to establish that their rights as consumers were violated by the 1st and 2nd respondents, it followed that the right to free and basic education and the principle of the paramountcy of the best interest of a child had not been infringed. It was therefore not necessary for the court to consider the alleged violation of those other rights.

28. The coronavirus disease had disrupted economies and frustrated the delivery of services. The 1st and 2nd respondents’ efforts in ensuring that they delivered their part of the bargain had to be appreciated. They sought a solution immediately the Government ordered the closure of schools.

29. Although free and basic education was an important constitutional right, the responsibility of discharging that mandate rested on the State and not private entities. Private schools were not funded by the State and they charged fees in order to provide services. The onus of determining whether fees for private schools should be capped was an issue for the Executive and Parliament. Those who want levies payable in private schools to be capped should lobby Parliament to pass the necessary law. It was, however, observed that the implications of such a law were enormous and it was up to the people of Kenya and not the court to decide whether it was time to have such a law. Although the suggestion that the court had no authority to direct the Executive on policy formulation was incorrect, in the instant case, the petitioners had not convinced the court that it should issue an order directing the 3rd and 4th respondents to formulate such a Bill.

30. That applied to the prayer for formulation of regulations on online learning. It could, indeed be necessary to have regulations to guide the delivery of the curriculum through online platforms. However, that was a conversation to be had by all Kenyans and in particular the stakeholders in the education sector. It was not the business of courts to micromanage other State organs by telling them what to do and when to do it.
31. The petitioners had not indicated that they had knocked on the doors of the 3rd and 4th respondents seeking promulgation and enactment of the policies and laws they desired and they received no response. The compulsive orders the petitioners sought were in the nature of orders of mandamus. For the petitioners to succeed, they needed to establish that they had asked the two respondents to execute identifiable mandates and they had failed to do so hence the need for the court to step in.

32. The petitioners had not demonstrated that they had reported to the Ministry of Education that the 2nd respondent was offering substandard curriculum. That being so, the Cabinet Secretary could not be said to have failed in his duties thereby requiring some nudging through a court order. In any case, the petitioners had failed to demonstrate the inferiority of virtual learning. The petitioners had failed to make a case against the 3rd and 4th respondents and their claim against them failed in its entirety.

33. There was, however, merit in the prayer by the petitioners for the establishment of a parents and teachers’ association. Section 55(3) of the Basic Education Act did provide for the establishment of a parents and teachers’ association for every private school. The law in section 55(2) of the Basic Education Act provided for the constitution of a parents’ association for every school. Rule 1 of the Third Schedule of the Basic Education Act specified that there was to be a parents’ association for every public or private secondary school. Among the functions of the association was the discussion and recommendation of charges to be levied on pupils and parents. The 1st and 2nd respondents had indicated their willingness to establish a parents’ association as per the law.

34. Although it was found that the 1st and 2nd respondents did not fail to consult the parents prior to the introduction of online education, in order to attain the right of children to free and compulsory basic education under article 53(1)(b) of the Constitution, and in order to comply with the provision of article 53(2) of the Constitution that a child’s best interests were of paramount importance in every matter concerning the child, constant consultation between the School and the parents was very necessary. It was, therefore, important to restate that requirement through the issuance of a declaratory order as prayed by the petitioners.

Petition partially allowed.

Orders

i. A declaration issued that the petitioners were, by virtue of section 55(2) and (3) and the Third Schedule of the Basic Education Act, 2013 entitled to be members of an association of parents of the 2nd respondent.

ii. An order issued compelling the 1st and 2nd respondents to, not later than 120 days from the date of the judgement, establish a parents’ association which met the requirements of the provisions of the Third Schedule of the Basic Education Act, 2013.

iii. A declaration issued that the 1st and 2nd respondents were obliged by law and the Constitution to consider the best interests of the children in their schools whenever they made any policy decisions or changes that would affect the children’s schooling, and had to consequently consult and obtain consent of their parents before implementing policies or changes.

Distinctive role of the Chief Justice vis-à-vis the Judicial Service Commission in the disciplinary process of judicial officers
Kenya Magistrates and Judges Association v Judicial Service Commission & 2 others
Petition 150 of 2019
Employment and Labour Relations Court at Nairobi
MA Onyango, J
August 12, 2020
Report by Sharon Sang & Kakai Toili

Constitutional law – Judiciary – disciplinary process of judicial officers – functions of the Chief Justice vis a vis Judicial Service Commission in the disciplinary process of judicial officers - what was the role of the Chief Justice in the disciplinary process of judicial officers - whether interdicting and suspending judicial officers was part of the Chief Justice’s administrative functions - Constitution of Kenya, 2010, articles 171 and 172; Judicial Service Act, 2011, section 13, Regulations, paragraphs 16, 17, 19 and 20.

Constitutional Law – fundamental rights and freedoms – limitation of fundamental rights and freedoms – fundamental rights and freedoms that could not be limited – freedom from torture and cruel, inhuman or degrading treatment or punishment – claim that suspension of a judicial officer for an indefinite period without remuneration amounted to inhuman treatment - whether the suspension of a judicial officer for an indefinite period without remuneration amounted to inhuman or degrading treatment or punishment
Constitutional Law – constitutionality of statutory provisions – constitutionality of paragraph 15, 16 and 17 of the Third Schedule to the Judicial Service Act – where paragraph 15, 16 and 17 provided for delegation of disciplinary powers to the Chief Justice, interdiction and suspension of judicial officers and staff - whether the delegation of powers to suspend and interdict judicial officers and staff to the Chief Justice was constitutional – Constitution of Kenya, 2010, article 172(1)(c); Judicial Service Act (No. 1 of 2011), sections 5(2)(c), 13 and 14, Third Schedule, paragraphs 15, 16, 17, 25 and 26; Statutory Instruments Act (No 23 of 2013), section 24(2).

Evidence Law – doctrine of estoppels – doctrine of issue estoppels – what was the nature of issue estoppels.

Brief facts

The petitioner filed the petition seeking to have the provisions of paragraph 15, 16 and 17 of the Regulations under the Judicial Service Act (JSC Act) declared unconstitutional on the grounds of vagueness. These provisions provided for delegation of disciplinary powers to the Chief Justice, interdiction and suspension of judicial officers and staff. The petitioner claimed that the paragraphs failed to set out the limited circumstances under which the 3rd respondent (Chief Justice) could exercise his delegated power and the circumstances under which interdiction or suspension could be exercised and the validity period for interdiction for affected judicial officers.

The petitioner further averred that the provisions failed to prescribe the conduct or misbehaviour that qualified for interdiction or suspension or remuneration upon interdiction or suspension. Thus, the petitioner claimed that its members were susceptible to unfair and unjust treatment from the Chief Justice. It was also averred that paragraphs 15, 16 and 17 of the Regulations under the JSC Act were unconstitutional on the grounds of conflict of interest in that the powers to interdict and suspend a judicial officer ought to lie with the 1st respondent (JSC) and that any delegation of such powers ought to vest in an independent commission and not to the office of the Chief Justice.

The petitioner contended that the impugned provisions of the schedule were inconsistent with the substantive Act and thus urged the court to find that the impugned provisions were void to the extent of their inconsistency.

Issues

i. What was the distinctive role of the Chief Justice *via a vía* the Judicial Service Commission regarding the disciplinary process of judicial officers?

ii. Whether interdicting and suspending judicial officers was part of the Chief Justice’s administrative functions.

iii. Whether the suspension or interdiction of a judicial officer for an indefinite period on a reduced income amounted to inhuman or degrading treatment or punishment.

iv. What was the nature of issue estoppels and where were they applicable?

v. Whether the delegation of powers to suspend, and interdict judicial officers and staff to the Chief Justice under paragraph 15, 16 and 17 of the Third Schedule to the Judicial Service Act was unconstitutional.

Relevant provisions of law

Judicial Service Act, No 1 of 2011

Section 5 – Functions of the Chief Justice and Deputy Chief Justice

(1) The Chief Justice shall be the head of the Judiciary and the President of the Supreme Court and shall be the link between the Judiciary and the other arms of Government.

(2) Despite the generality of subsection (1), the Chief Justice shall –

(a) assign duties to the Deputy Chief Justice, the President of the Court of Appeal, the Principal Judge of the High Court and the Chief Registrar of the Judiciary;

(b) give an annual report to the nation on the state of the Judiciary and the administration of justice; and cause the report to be published in the Gazette, and a copy thereof sent, under the hand of the Chief Justice, to each of the two Clerks of the two Houses of Parliament for it to be placed before the respective Houses for debate and adoption;

(c) exercise general direction and control over the Judiciary.

Section 13 - Powers and functions of the Commission

(1) In addition to the powers of the Commission under Article 253 of the Constitution, the Commission shall have the power to—

(a) purchase or otherwise acquire, hold, charge and dispose of movable or immovable property;

(b) borrow and lend money;

(c) enter into contracts;

(d) do or perform all such other things or acts necessary for the proper performance of its functions under the Constitution and this Act, which may be lawfully done or performed by a body corporate.

(2) Members of the Commission shall be guided in the discharge of their responsibilities by the principles contained in the Constitution and in this Act.
Section 32 - Appointment, discipline and removal of judicial officers and staff

(1) For the purposes of appointment, discipline and removal of judicial officers and staff, the Commission shall constitute a Committee or Panel which shall be gender representative.

(2) Notwithstanding the generality of subsection (1), a person shall not be qualified to be appointed as a magistrate by the Commission unless the person –
   (a) is an advocate of the High Court of Kenya;
   (b) has high moral character, integrity and impartiality;
   (c) has demonstrable management skills;
   (d) has proficiency in computer applications; and
   (e) has no pending complaints from the Advocates Complaints Commission or the Disciplinary Committee.

(3) The procedure governing the conduct of a Committee or Panel constituted under this section shall be as set out in the Third Schedule.

(4) Members of the Committee shall elect a Chairperson from amongst their number.

(5) Subject to the provisions of the Third Schedule, the Committee or Panel may determine its own procedure.

Third Schedule – Provisions relating to the appointment, discipline and removal of Judicial Officers and Staff

Paragraph 15 – Delegation of Powers

(1) The following disciplinary powers vested in the Commission are delegated to the Chief Justice –
   (a) the power to interdict an officer under paragraph 17;
   (b) the power to suspend an officer under paragraph 18;
   (c) the power to administer a severe reprimand or a reprimand to an officer

(2) The Chief Justice, when exercising the powers delegated by this Schedule, shall act in accordance with the provisions of this Schedule and in accordance with any other appropriate regulation which may be in force.

Paragraph 16 – Interdiction

(1) If in any case the Chief Justice is satisfied that the public interest requires that an officer should cease forthwith to exercise the powers and functions of their office, the Chief Justice may interdict the officer from the exercise of those powers and functions, provided proceedings which may lead to their dismissal are being taken or are about to be taken or that criminal proceedings are being instituted against them.

(2) An officer who is interdicted shall receive such salary, not being less than half their salary, as the Commission may by regulations prescribe.

(3) Where disciplinary or criminal proceedings have been taken or instituted against an officer under interdiction and such officer is neither dismissed nor otherwise punished under this Schedule, the whole of any salary withheld under subparagraph (2) shall be restored to them upon the termination of such proceedings.

(4) If any punishment other than dismissal is inflicted, the officer may be refunded such proportion of the salary withheld as a result of their interdiction as the Commission shall decide.

(5) An officer who is under interdiction shall be required to comply with such conditions as may by regulations be prescribed.

(6) For the purposes of this paragraph and paragraph 18 of this Schedule, “salary” means basic salary and, where applicable, includes inducements or overseas allowances.

Paragraph 17 – Suspension

(1) Where an officer has been convicted of a serious criminal offence, other than such as are referred to in paragraph 28(2), the Chief Justice may suspend the officer from the exercise of the functions of their office pending consideration of their case under this Schedule.

(2) The Chief Justice may suspend from the exercise of the functions of their office against whom proceedings for dismissal have been taken if, as a result of those proceedings, he considers that the officer ought to be dismissed.

(3) While an officer is suspended from the exercise of the functions of their office they shall be granted an alimentary allowance in such amount and on such terms as the Commission may by regulations determine.

(4) An officer who is suspended shall be required to comply with such conditions as may, by regulations, be prescribed.

Held

1. Article 172(1)(c) of the Constitution empowered the JSC to appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in a manner prescribed by an Act of Parliament. The Judicial Service Act (JSC Act) was the Act of Parliament envisioned in article 172(1) (c) of the Constitution.

2. Section 24(2) of the Statutory Instrument Act provided that a statutory instrument should not be inconsistent with the provisions of the enabling legislation, or of any Act, and that the statutory
instrument would be void to the extent of the inconsistency. Section 2 of the Statutory Instrument Act defined a statutory instrument. Regulations made under the JSC Act were a statutory instrument under the Act.

3. Section 14 of the JSC Act referred to delegation of day-to-day administrative management of judicial activities. There was a difference between the functions of the Office of the Chief Justice and the JSC. The Constitution had outlined the duties of the JSC but had not defined the duties of the Chief Justice; those were defined in section 5 of the JSC Act.

4. The Chief Justice was the Chief Executive Officer of the Judiciary and therefore supervised the judges, judicial officers and staff of the Judiciary through the titular heads being the president of the Court of Appeal, the principal judges of the High Court and courts of equal status and the Chief Registrar of the Judiciary. As provided under section 5(2) (c) of the JSC Act, the Chief Justice exercised general direction and control over the Judiciary. On the other hand, the functions of the JSC were set out under section 13 of the JSC Act.

5. The Regulations were clear that the role of the Chief Justice was to establish if there was a *prima facie* case to warrant the reference of a disciplinary case involving an officer to the JSC. The role of the Chief Justice thereafter was to interdict or suspend an officer and then refer the matter to JSC for hearing. Under paragraph 16(4) and paragraph 19 of the Regulations, interdiction and suspension were not punishments. In the sense in which interdictions and suspensions were applied in paragraphs 16 and 17, they were administrative functions intended to remove the employee from the workplace while proceedings that could lead to the dismissal of the officer were being taken. Since the assignment of duties was an administrative function of the Chief Justice, the removal of a judicial officer from performing those duties was also a function of the Chief Justice as part of the administrative duties.

6. Interdiction and suspension gave the employer an opportunity to carry out investigations into possible misconduct. A suspension was ultimately a right due to an employer who on reasonable grounds suspected an employee to have been involved in misconduct, or poor performance or physical incapacity and wished to remove such an employee from the workplace to enable further investigation without subjecting the employee to further commission of more acts of misconduct, under performance or the conditions leading to incapacity.

7. Under paragraphs 16(1), 17(1) and (2) of the Regulations under the JSC Act, the only role that the Chief Justice performed under those paragraphs was to remove the officer from exercising the powers of the office where proceedings had been commenced that could lead to the removal of the officer. There was separation of roles between the Chief Justice and JSC, the former being to remove from performing the functions of the office and the latter being to hear and determine the disciplinary case. There was no disciplinary role in paragraphs 16(1), 17(1) and (2).

8. The Chief Justice did not hear the disciplinary case. He did not remove a judicial officer from office. His role was limited to receiving a complaint, considering the complaint and if it did not in his opinion as Head of Judiciary constitute misconduct, he rejected the complaint. However, if it constituted misconduct, he only removed the officer from performing the duties of the office then referred the charges against the officer to JSC for hearing.

9. Paragraphs 25 and 26 of the Regulations provided for the procedure for the disciplinary hearing which was carried out by the JSC, not the Chief Justice. Regulations, 15, 16 and 17 of the Regulations only delegated the administrative functions of framing charges and removal of an officer from performing his duties to the Chief Justice while the substantive investigations were covered under paragraphs 25 and 26 and were carried out by the JSC. Regulations 16 and 17 did not delegate any functions of JSC to the Chief Justice and regulation 20 of the Regulations did not provide for roles of the JSC but of the Chief Justice as the supervisor of judicial officers.

10. Article 25 of the Constitution provided for rights and freedoms that could not be limited, among them were the freedom from torture, cruel, inhuman or degrading treatment, and the right to fair trial. Article 28 of the Constitution provided for protection of the inherent dignity of persons and the right to have that dignity respected and protected. Since during interdiction and suspension an employee was not remunerated as they were in limbo over whether or not they had a job, it would amount to inhuman treatment to subject them to the situation indefinitely.

11. Where an officer was placed on interdiction or suspension, the officer was prejudiced by reduction of income and removal from performing the functions of the office and in a way constituted punishment. It was therefore necessary to be specific on the duration of the suspension to create certainty so that there was accountability, and that interdiction or suspension were not imposed in a manner that inflicted punishment on the officer.

12. Under paragraphs 16 and 17 of the Regulations
under the JSC Act, on interdiction an officer was entitled to half of basic pay and all allowances while on suspension an officer was entitled to alimentary allowance. Further, should an officer be absolved of the charges against him or her, the withheld salary was released to them.

13. Paragraph 15 of the Regulations gave guidelines under sub paragraph 2 for the exercise of the delegated authority. The law could not be over prescriptive as doing so would remove discretion and could make the law too voluminous. It would further be impossible for the law to anticipate every situation and provide for it hence the grant of discretion with limits or guidelines on the exercise thereof.

14. An estoppel which had come to be known as issue estoppel could arise where a plea of res judicata could not be established because the causes of action were not the same. A party was precluded from contending the contrary of any precise point which having once already been distinctly put in issue, had been solemnly and with certainty determined against him. Even if the objects of the first and second actions were different, the finding on a matter which came directly (not collaterally or incidentally) in issue on the first action, provided it was embodied in a judicial decision was final and conclusive in a second action between the same parties and their privies. The principle applied whether the point involved in the earlier decision, and as to which the parties were estopped, was one of fact or one of law, or one of mixed fact and law.

15. The petitioner did not prove that letters of interdiction, suspension or reprimand by the Chief Justice were issued unilaterally or that, if any was issued, which had not been brought to the attention of the court, that the same offended articles 27(1) and 172 of the Constitution. No evidence was adduced of any letters of interdiction, suspension or reprimand issued unilaterally.

Petition partly allowed with no order for costs.

Orders

i. It was declared that JSC was the only body anticipated under article 172(c) of the Constitution to deal with the matters set out therein.

ii. There was no inconsistency between article 172 of the Constitution, sections 14, 20 and 32 of the Judicial Service Act and paragraphs 15, 16, 17, 20 and 25 of the Third Schedule to the Judicial Service Act.

iii. Prayer (c) which sought a declaration that the Chief Justice acted unilaterally in issuance of letters of interdiction, suspension or reprimand in the absence of the participation of the JSC offended article 172 of the Constitution and threatened the rights of the members of the petitioner’s association, to wit article 27(1) of the Constitution, to equal protection and equal benefit of the law failed for want of proof.

iv. The petitioner had not proved that paragraphs 16 and 17 of the Third Schedule were inconsistent with articles 47 and 50(2) of the Constitution.

v. Suspension per se did not violate articles 25(c), 28 and 50 of the Constitution.

vi. Indefinite suspension or interdiction amounted to a violation of article 25(a) and (c), 28 and 50 of the Constitution. It was recommended that, that was addressed administratively by the respondent by providing for the duration of any suspension or interdiction, and for extension thereof with reasons on a case by case basis.

Whether a public officer could hold two public offices
Nicholas Rono v County Secretary County Government of Bomet & 3 others [2020] eKLR
Petition No. 3 of 2019
Employment and Labour Relations Court at Kericho
M Mbaru, J
July 30, 2020
Reported by Chelimo Eunice

Constitutional Law – interpretation of constitutional provisions – interpretation of article 260 as read together with articles 10 and 77 of the Constitution on the meaning of a public officer - who was a public officer and what was the difference between a public officer and a state officer – whether article 77(1) of the Constitution, which barred a full time state officer from participating in any other gainful employment, was applicable to a public officer - whether a person holding the position of a municipal manager with a county government was a public officer - whether a public officer could hold two public offices – where a party held two public offices, as a municipal manager with a county government and a member of a county assembly service board – whether the functions of a municipal manager and a member of a county assembly service board were co-relating and reinforcing – Constitution of Kenya, 2010, articles 10, 77 and 260;

Civil Practice and Procedure – pleadings – constitutional petition – content of a constitutional petition - particulars to be pleaded in a constitutional petition – requirement that
a litigant in a constitutional petition had to set out with reasonable degree of precision in particular how the alleged acts amounted to infringement of the litigant's constitutional rights — whether a petition challenging the constitutionality of public officers holding two public service offices met the threshold of a constitutional case - Employment and Labour Relations Court (Procedure) Rules, rule 7.

Brief facts

The petitioner sought various orders, including a declaration that the appointment of the 4th respondent as a member of the Bomet Municipal Board (municipal manager) by the 1st respondent was unconstitutional; a declaration that the appointment of the 1st respondent as a member of the 2nd respondent's board (board member) was unconstitutional and an order of refund of all the salaries and/or allowances received by the 4th respondent as a result of his appointment to the above positions.

The petitioner argued, among others, that the 4th respondent was appointed to the position of a municipal manager on a 5 years' renewable contract vide an appointment letter dated September 10, 2018. Then, while still a municipal manager, he was appointed a board member of the 2nd respondent vide Gazette Notice No. 10671 dated October 11, 2018, hence occupying two public offices at the same time and earning two separate salaries from the public coffers contrary to law. He argued that those appointments were all targeted and aimed at the 4th respondent and no advertisement was done.

The 4th respondent opposed the petition arguing, among others, that the nomination as a board member was a part time responsibility and at no time was he paid salary for the nomination, that at the time of appointment as a municipal manager he was not in any other gainful employment as alleged by the petitioner, that he had never earned two salaries, that he had since terminated his contract as a municipal manager due to job dissatisfaction and that he was never a state officer. The 1st respondent supported the 4th respondent's arguments.

It was the 1st, 2nd and 3rd respondent's case that the 4th respondent was a public officer and not a state officer; and was hence not barred from holding and being in gainful employment while in the service of the 3rd respondent. That constitutional provisions relating to state officers did not apply to him.

The 2nd respondent on its part stated that through a regrettable oversight caused by misrepresentation and concealment of information by the 4th respondent, the 4th respondent was further appointed as a board member. That due process was followed, save the 4th respondent was deceitful and failed to disclose the fact that he was already employed by the 3rd respondent as a municipal manager.

Issues

i. Whether a petition challenging the constitutionality of public officers holding two public service offices met the threshold of a constitutional case.

ii. Who was a public officer and what was the difference between a public officer and a state officer?

iii. Whether article 77(1) of the Constitution, which barred a full time state officer from participating in any other gainful employment, was applicable to a public officer.

iv. Whether a person holding the position of a municipal manager with a county government was a public officer.

v. Whether a public officer could hold two public offices.

vi. Whether the two functions of a municipal manager and a member of a county assembly service board were co-relating and reinforcing.

Relevant provisions of the Law

Constitution of Kenya, 2010;

Article 77 - Restriction on activities of State officers

(1) A full-time State officer shall not participate in any other gainful employment.

Article 260 - Interpretation

"public officer" means-

(a) any State officer; or

(b) any person, other than a State Officer, who holds a public office;

Held

1. A person seeking redress from the court on a matter which involved a reference to the Constitution, had to set out with reasonable degree of precision in particular how the alleged acts amounted to infringement of the person's constitutional rights.

2. In the body of the petition, the petitioner had enumerated various articles of the Constitution which were said to have been contravened by the actions and conduct of the respondents and gave particulars. The foundation of each contravention was addressed with details.

3. At the core of the petition was the appointment of the 4th respondent. The court appreciated and understood the exact nature of the petitioner's case of public officers holding two public service jobs. The petition, thus, was properly before the court pursuant to rule 7 of the Employment and Labour Relations Court (Procedure) Rules, read together with the Constitution and the Rules thereto.

4. Article 10 of the Constitution bound all state organs, state officers, public officers and all persons whenever they applied or interpreted the Constitution, enacted, applied or interpreted any law, made
or implemented any public policy decision, to national values and principles of governance which included participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability and sustainable development.

5. Although the national values and principles of governance enshrined in article 10 of the Constitution were not on their own justiciable, they and the preamble of the Constitution had to be given effect wherever it was fairly possible to do so without violating the meaning of the words used.

6. Articles 260, 77 and 10 of the Constitution were all reinforcing. Whereas under article 260 of the Constitution, a public officer was any person other than a state officer who held public office, the fundamental connection was that of a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer. Being a public officer was all inclusive. For article 10 of the Constitution to bear fruit and have its full force, the provisions of articles 260 and 77(1) of the Constitution could not be read alone.

7. Strictly speaking, the proper meaning of public officer was that embodied in article 260 of the Constitution. The different definitions in other statutory provisions ought not take precedence over the constitutional provisions. Thus, the proper meaning of public officer was a state officer or any other person who held public office, an office within the national government, county government or public service, a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.

8. The 4th respondent was appointed as a municipal manager under the provisions of section 29 of the Urban Areas and Cities Act and issued with a 5 years’ contract. The position was full time and with a given salary. Employment commenced on September 10, 2018. The position of municipal manager was advertised in the print media. There was no breach of article 35 of the Constitution as alleged in the petition. However, while serving the 3rd respondent as a municipal manager under the 5 years’ contract, the 4th respondent accepted the nomination as member of the 2nd respondent.

9. According to the provisions of section 12 of the County Government Act, duties and functions of a board member included, providing services and facilities to ensure the efficient and effective functioning of the county assembly, constituting offices in the county assembly service, and appointing and supervising office holders and preparing annual estimates of expenditure of the county assembly service and submitting them to the county assembly for approval, and exercising budgetary control over the service.

10. On the other hand, under sections 28 and 29 and Second Schedule to the Urban Areas and Cities Act, the municipal manager was the principal manager of the municipal pursuant to article 184 of the Constitution. Such office was to provide for the classification, governance and management of urban areas and cities, to provide for the criteria of establishing urban areas, to provide for the principle of governance and participation of residents and for connected purposes.

11. The two functions of municipal manager and member of county assembly service board were not reinforcing. Each was an independent office with different functionalities and constituted under different legal regimes.

12. The respondents in the appointment of the 4th respondent as municipal manager and board member could not extricate themselves from the requirements of the Constitution and the law. Being a public officer carried with it an all overriding duty of integrity in a manner that maintained public confidence and professionalism within the organization being served whether it be county government or public service. The 4th respondent holding the public office of municipal manager held such an office and was being sustained in terms of remuneration and benefits from the public exchequer. He could not hold another public office, being sustained in terms of remuneration and benefits from the public exchequer whether on part time basis or full time. Both offices were hence held in conflict of interest.

13. Public officers ought to be appointed on the basis of the criteria set out in chapter 6 of the Constitution. They had, in addition, be appointed in accordance with the national values and principles set out in article 10 of the Constitution. The 4th respondent failed the test of the Constitution and the law.

14. To allow the 4th respondent to hold both offices was unconstitutional and went contrary to sections 13 and 26 of the Leadership and Integrity Act, which required the 4th respondent not to hold any other office for gainful employment while in the full time service of the municipal and the 3rd respondent.

15. To hold dual offices with the 1st and 2nd respondents without disclosure to the 2nd respondent was contrary to section 22 of the Public Officer Ethics Act. That depicted the 4th respondent as a liar, dishonest and person lacking integrity to hold public office. The overt acts of misrepresentation
before the 2nd respondent, the concealment of relevant information and leading to his holding dual positions in the public service placed him in conflict with the provisions of article 10 read together with article 77(1) of the Constitution, the Leadership and Integrity Act and the Public Officer Ethics Act. Such conduct made him unfit to hold public office.

16. It was regrettable that the 1st respondent took such a view that the 4th respondent while in the service of the municipal as manager could hold another position with the 2nd respondent since it was part time. That was absurd taking into account the position held by the officer in the administration of the 3rd respondent. To allow the 4th respondent hold dual offices remunerated from the exchequer whether directly or indirectly was to place an unnecessary burden on the taxpayer and contrary to article 226 of the Constitution.

17. The 4th respondent on his replying affidavit reinforced a background of deceit, falsehoods and one not to be trusted and relied upon as a public officer. The appointment as municipal manager came in first. During such appointment, he accepted appointment with the 2nd respondent. Yet his affidavit was tailored and couched to give an impression that while serving under the 2nd respondent, he applied for the position of municipal manager and later due to job dissatisfaction he terminated the contract. The 4th respondent was aware, at all material times, that while serving as municipal manager, he accepted another appointment and he hence became conflicted.

18. Whereas the 4th respondent accepted the appointment as municipal manager while he was not employed elsewhere and that was allowed under the law and pursuant to section 28 and 29 of the Urban Areas and Cities Act, on the same breath his appointment as a board member pursuant to section 12 of the County Government Act read together with articles 10 and 77(1) of the Constitution was null and void ab initio. The 4th respondent should not have been holding two public offices which did not co-relate.

19. Tax-payers ought not be unduly burdened by being compelled to shoulder the consequences of people whose actions contravened the Constitution, the social contract between the governors and the governed, and expect the people, the principals of the governors on whose behalf the governors exercise sovereign power, to pay for the governors’ sins. There were cases where public officers would be held personally liable.

20. The proceeds received from the 2nd respondent as remuneration, allowances and benefits ought to be quantified and he ought to refund the same to the 2nd respondent for use and in the public benefit. Such was to be applied in terms of article 226(5) of the Constitution, which provided for the personal liability of any holder of an office who caused misuse of public funds contrary to law.

21. In the circumstances, the misrepresentation and concealment of information by the 4th respondent for appointment as a board member being in breach of the Leadership and Integrity Act and also the Public Officer Ethics Act placed him in bad standing to hold any public office. Having put public resources and funds into waste by deception and concealment, the 4th respondent did not stand in good stead.

Petition allowed.

Orders

i. Declaration issued that the 4th respondent’s appointment as member of the Bomet County Assembly Service Board vide Gazette Notice No. 10671 was unlawful and unconstitutional, null and void.

ii. Declaration issued that actions of the 4th respondent contravened the Constitution, Leadership and Integrity Act and Public Officer Ethics Act and he stood unfit to hold public office.

iii. Gazette Notice No.10671 dated October 11, 2018 and published on October 19, 2018, appointing the 4th respondent as member Bomet County Assembly Service Board was revoked.

iv. The 4th respondent was ordered to refund all monies received from the 2nd respondent in form of remuneration, allowances and benefits for the entire duration he was a member of Bomet County Assembly Service Board and within ninety (90) days of the judgment.

v. The clerk to the 2nd respondent ordered to quantify all proceeds received from the 2nd respondent as remuneration, allowances and benefits for use and benefit of the 4th respondent for his refund and report to the court within ninety (90) days of the judgment.

vi. Failure to refund the monies as ordered, the 4th respondent would not hold office in any capacity as a public officer or in any public office.

vii. The 4th respondent ordered to pay the petitioner his costs together with costs incurred by the 2nd respondent and the attendant costs, but the 1st and 2nd respondents were to meet own costs.
The Constitution does not contemplate the withholding of salaries and allowances of commissioners of independent commissions in situations of illness.

Shadrack Mutia Muiu v National Police Service Commission & 2 others
Petition 115 of 2018
Employment and Labour Relations Court at Nairobi
ON Makau, J
July 2, 2020
Reported by Beryl Ikamari


Constitutional Law - independent commissions - removal of commissioner from office - applicable procedure - whether a commissioner’s salaries and allowances could be withheld in situations where the commissioner suffered an illness that affected his ability to perform his duties - Constitution of Kenya 2010, articles 236(b), 250(8) & 251.

Constitutional Law - constitutional petition - pleading violations of the Constitution with a reasonable degree of precision - effect of failure to set out the violation complained of, the constitutional provisions that had been violated and the manner in which they had been violated – whether the court could decline to consider allegations of violations of the Constitution due to failure to plead the violations with a reasonable degree of precision.

Brief facts

The petitioner was appointed a Commissioner at the National Police Service for a term of six years beginning on October 2, 2012 and ending on October 2, 2018. While on a European benchmarking tour in February 2013, he fell ill and was hospitalized for a number of days. He then flew back to Kenya and was hospitalized for two weeks and put on medication. He did not report back to work until his tenure as a commissioner ended. His salary and allowances were withheld starting from March 2014. The decision to withhold his salary and allowances had its basis on the 1st respondent’s letter addressed to the Principal Secretary, Treasury. The letter was dated February 10, 2014. The petitioner claimed that the withholding of his salary and allowances was a violation of rights to fair labour practices and discriminatory. He sought various reliefs from the court including an order of mandamus to compel the respondents to pay him his unpaid salary which amounted to Kshs. 35,145,000.

Issues

i. Whether the Code of Regulations for Civil Servants and section 30 of the Employment Act, which had provisions on how the pay of an employee on sick leave would be handled, were applicable to a commissioner of an independent commission established under the Constitution.

ii. What was the procedure applicable to the removal of a commissioner of an independent commission from office under the Constitution?

iii. Whether the Constitution contemplated the withholding of salary and allowances as a mode of dealing with an illness that affected the ability of a commissioner of an independent commission to perform his duties.

iv. What was the effect of failure to plead alleged violations of fundamental rights and freedoms with a reasonable degree of precision?

Held

1. The letter written by the 1st respondent and addressed to the Principal Secretary National Treasury, culminated in the withholding of the petitioner’s salary. Its effect included placing the petition on sick leave pursuant to regulation N(8) clause 1(i) of the Code of Regulations for Civil Servants. The letter was never served on the petitioner even though it had an adverse effect on him.

2. The Code of Regulations for Civil Servant was applicable to Civil Servants who were defined as employees of Public Service Commission of Kenya deployed in Ministries/Departments. As a state officer serving in an independent commission, the Code of Regulations was not applicable to the petitioner. The application of the code to the petitioner in order to stop the release of his salary and allowances was unlawful as it violated his right to protection from unfair disciplinary action as guaranteed by article 236(b) of the Constitution.

3. The stoppage of the salary was done while the petitioner was still in office and it was contrary to article 250(8) of the Constitution which protected his remuneration.

4. The petitioner’s employment contract had a constitutional underpinning as the terms of his appointed, remuneration and removal were expressly provided for under articles 250 and 251...
of the Constitution. The Constitution provided for the removal from office of a sick commissioner under article 251 of the Constitution but it did not contemplate the suspension of the remuneration of a commissioner.

5. Under article 251 of the Constitution, a commissioner’s removal from office involved a petition to Parliament, Parliament petitioning the President to appoint a tribunal to investigate the commissioner and make recommendations on removal. A petition was presented to Parliament for the petitioner removal and it was forwarded to the President for the setting up of a tribunal but the tribunal was not set up. Instead the Head of Public Service wrote a letter to the petitioner imploring him to resign voluntarily but the said letter was never served on him. Therefore, the petitioner served his entire 6 years and the appointing authority waived the right to remove him from office on grounds of physical or mental incapacity to perform the functions of his office. Consequently, the stoppage of the petitioner’s salary and allowances had no legal basis.

6. The petitioner did not plead with precision, the particulars of the alleged violations of his rights to fair labour practices and non-discrimination. Although paragraph 29 of the petition set out the provisions of the Constitution that were material and germaine, the petitioner did not set out the manner in which those provisions were breached. The court would therefore not entertain the petition with relation to the alleged violations because of inadequate pleading.

7. Section 30 of the Employment Act could not justify the stoppage of petitioner’s salary and benefits. The petitioner’s contract of service was firmly grounded on express provisions of the Constitution.

Petition allowed.

Orders:-

i. An order of certiorari was issued to quash the 1st respondent’s decision to withhold and/or stop the petitioner’s salary and benefits.

ii. An order of mandamus was granted to compel the respondents pay the petitioner Ksh. 35,145,000 being the amount of his salary withheld from March 1, 2014 to October 2, 2018 when his term of office lapsed.

iii. The sum awarded was subject to statutory deductions.

iv. The petitioner was awarded costs plus interest at court rates from the date of filing the suit.
Feedback For Caseback Service

By Emma Mwobobia, Ruth Ndiko & Patricia Nasumba, Law Reporting Department

Hon. Stephen Kalai Ngii
Senior Resident
Magistrate
Mariakani Law Courts

Thanks a lot. Caseback is indeed an Integral component of jurisprudential diet. It continues to catalyse my intellectual growth. Keep it up.

Hon. Charles obulutsa
Chief magistrate
Nyahururu Law Courts

Thanks for the feedback. It is always a learning experience and rich contribution to my legal library. keep up the good work. i wonder sometimes what i would do without Kenya law.

Hon. Christine Wekesa
Senior Resident
Magistrate
Lodwar Law Courts

Thank you very much for your service. The void has since been filled by this service, this has come in handy for me as it has helped me to develop jurisprudence with regard to similar cases. Please keep up the good work.

Hon. Nelly
Chepchirchir-Adalo
Senior Resident
Magistrate
Mariakani Law Courts

It feels really good when the high court agrees with your decision. Keep them coming.

Hon. Justice Stephen
M. Kibunja
Environment and Land Court, Kisumu

It’s always a pleasure to receive feedback on my decisions.
Legislative Updates

By Nelson Nkari, Laws of Kenya Department

This article provides a summary of Legislative Supplements published in the Kenya Gazette on matters of general public importance in the period July to November, 2020.

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**Legal Supplements**

*By Nelson Nkari, Laws of Kenya Department*

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International Jurisprudence

The admission of evidence at the conclusion of a trial is tantamount to denying the accused
the opportunity to challenge the evidence.

Danie Van Der Walt v The State [2020] ZACC 19
Constitutional Court of South Africa

Mogoeng CJ, Froneman, Jaftha, Khampepe, Majiedt, Madlanga, Mathopo, Mlantla, Theron, Tshiqi JJ and Victor AJ
July 21, 2020

Constitutional Law — right to fair trial — right to challenge evidence — whether the admission of evidence at the close of trial was sufficiently serious as to undermine basic notions of fair trial and justice — Constitution of the Republic of South Africa, 1996, section 35 (3) (i).

Brief facts
The applicant, an obstetrician and gynaecologist, was convicted by the trial court where he was found to have acted negligently in the care of his patient and whose negligence caused her death. He was consequently convicted and sentenced to five years’ imprisonment. He unsuccessfully appealed to the High Court and the Supreme Court of Appeal.

The applicant challenged the reliance of exhibits and medical textbooks by the trial court at the close of trial. The exhibits and the textbooks were not referred to in his testimony as evidence to be relied upon. He thus sought leave to appeal against conviction and sentence on the basis that the trial was handled in a manner that infringed his right as an accused to challenge evidence as protected under section 35 (3) (i) of the Constitution of the Republic of South Africa.

The applicant averred that a different approach ought to be used when assessing the standard of care on medical professionals. As such, the degree of negligence should be determined in accordance with the views of the medical profession. The applicant therefore contended that five years imprisonment was shockingly inappropriate and thus constituted an infringement of section 12(1) (a) of the Constitution of the Republic of South Africa.

Issues
i. Whether the applicant’s right to fair trial was violated when the trial court denied him the opportunity to challenge the medical textbooks and exhibits that were used to arrive at the determination of his case.

ii. Whether the admission of evidence at the close of trial was sufficiently serious as to undermine basic notions of fair trial and justice.

iii. What was the impact of the ‘no difference’ approach to a trial?

iv. Whether the standard of care placed on medical professionals when assessing professional negligence ought to be different from other skilled persons.

Relevant provisions of the law
Constitution of the Republic of South Africa section 35
Arrested, detained and accused persons

3. Every accused person has a right to a fair trial, which includes the right—

(i) to adduce and challenge evidence;

Freedom and security of the person — Section 12

(1) Everyone has the right to freedom and security of the person, which includes the right—

(a) not to be deprived of freedom arbitrarily or without just cause;

Held
1. The determinations of the aforementioned issues are of public importance as they could serve as guidance to other courts, to the benefit of many accused persons who appear before them. It was thus in the interest of justice to grant leave to the instant appeal.

2. A timeous ruling on the admissibility of evidence was crucial. It shed light on what evidence a court could take into consideration and could even give an indication as to how much weight should be accorded to it. That could enable an accused to make an informed decision on whether to close their case without adducing evidence or to adduce further evidence to controvert specific aspects of evidentiary material. Without a timeous ruling on all evidence that bore relevance to the verdict, an accused would be caught unawares at a stage when they could no longer do anything.

3. An accused ought not to be ambushed by the late or unheralded admission of evidence. The trial court should be asked clearly and timeously to consider and rule on its admissibility. That could not be done for the first time at the end of the trial. The
prosecution should before it closed its case clearly signal its intention to rely on specific evidence, and the trial judge should before the state closed its case rule on its admissibility, so that the accused could appreciate the full evidentiary ambit he faced.

4. Though not all procedural irregularities were sufficiently serious as to constitute an infringement of the constitutional right to a fair trial, the prosecution could not argue that whatever cross-examination that could have been made by the applicant would have made no difference to the outcome. Such argument failed to address a crucial issue that was the admission and rejection of evidence at the right time could influence the decision whether to close their case without tendering any or further evidence. Nobody could ever guess with any degree of accuracy the impact that such evidence if tendered would have had on the outcome. The “no difference” argument was thus misconceived. Indeed the textbooks that were not presented as evidence but were relied upon when the trial court concluded the case meant that the applicant was denied an opportunity to challenge it and adduce controverting evidence.

5. Whether the applicant would have been able to challenge the medical textbooks evidence successfully was not the question. The relevant question was whether the applicant had the opportunity to challenge the medical textbooks evidence. The applicant was plainly denied that opportunity. Likewise, not knowing that such evidence would be relied upon, he was denied the opportunity, if so minded, to adduce controverting evidence. The right to challenge evidence required that the accused should know what evidence was properly before the court. In the applicant’s case, the medical literature relied upon was never adduced at all. That went to the heart of a fair trial.

6. The ‘no difference’ approach was generally an asthema. Courts should not accept that the right to a fair hearing disappeared when it was unlikely to affect the outcome. Procedural objections were often raised by unmeritorious parties and judges could be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle, it was vital that the procedure and the merits should be kept strictly apart, since otherwise the merits could be prejudged unfairly.

7. The right to a fair trial embraced a concept that was more than the substantive fairness as provided under section 35 subsection 3 of the Constitution of the Republic of South Africa, where the specific rights to a fair trial were listed out in paragraphs (a) to (o). It was broader and more context-based. It contained the notions of trial fairness, which were not just based on formalities.

8. The applicant’s right to fair trial was violated by the pronouncement on the admissibility of exhibits at the stage of deciding his guilt. Put differently, the late admission of exhibits constitutes an irregularity of a nature that vitiated the trial in a constitutionally impermissible manner.

9. The reliance on unproved medical textbooks thus infringed the applicant’s right to fair trial as enshrined under section 35(3) (i) of the Constitution of South Africa. Like the late admission of exhibits, these two acts constituted an irregularity of a nature that vitiated the fair trial in a constitutionally impermissible manner.

10. It was faulty to argue that because doctors played an important societal role in providing access healthcare, such a role should play a weighty factor in sentencing them for negligently killing their patients. The jarring analogy of drivers killing people out of negligence were deserving of harsher sentences than doctors who killed whilst providing medical care could not stand.

11. In the case of an expert, such as a surgeon, the standard was higher than that of the ordinary lay person, and the court ought to consider the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belonged. The gut-wrenching truth was that those that died in the hands of doctors who acted negligently were terminally denied that all important right, the right to life. It was a no-brainer which way the scale should have tilted.

12. The applicant’s conviction ought not to be set aside on the merits. It was not set aside on the basis that the applicant’s guilt was not proved beyond a reasonable doubt. Rather, it was set aside on the basis that the trial court committed irregularities whose nature was such that the applicant’s right to fair trial was infringed. A conviction under those circumstances should not stand.

Appeal allowed.

Orders

i. Leave to appeal granted.

ii. The order of the trial court set aside and replaced with the following:

(a) The appeal against conviction upheld and, as a consequence, the conviction and sentence set aside.

(b) The matter to be referred to the Director of Public Prosecutions, to decide whether the accused should be re-arraigned.

(c) In the event that the accused was re-arraigned, the trial ought to be before a different trial court.
Relevance to the Kenyan situation
Right of the accused to challenge evidence

According to the decision in Danie Van Der Walt v The State [2020] ZACC 19, South African courts did not pronounce an automatic infringement of an accused's right to fair trial when a particular trial procedure was not observed. They assessed whether that particular breach amounted to a serious violation of basic notions of fair trial and justice. The South African courts have nonetheless expanded the parameters of fair trial beyond the itemized rights in the Constitution of the Republic of South Africa. They insisted that a fair trial gave the impression and perception that it was fair and just depending on the circumstances.

In Kenya, the right for the accused to be informed in advance of the evidence the court intended to rely on, and to have reasonable access to that evidence is expressly provided for in Article 50 (2) (j) (k) Kenya’s Constitution 2010. Article 50 (2) (k) of the Constitution states as hereunder:

(2) Every accused person has the right to a fair trial, which includes the right—

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

Kenyan courts acknowledged the importance of the accused having the opportunity to challenge evidence, but the absence of such an opportunity did not necessarily amount to an automatic violation of the accused’s right to fair trial. Different circumstances surrounding a particular breach of fair trial had to be evaluated in order to determine if the proponent argument for the breach would stand. In the case of Domenic Kariuki v Republic [2018] eKLR, the court stated that:

The right to a fair trial was not one of those rights that could be limited under Article 24 of the Kenyan Constitution, 2010. Fair trial was the main object of criminal procedure, and it was the duty of the court to ensure that such fairness was not hampered or threatened in any manner. That meant the duty was cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Thus, under no circumstances could a person’s right to fair trial be jeopardized. It should however be noted that rights go hand in hand with responsibilities. Nowhere in the court record was it revealed that the appellant asked for provisions of the documents and was denied. It was unclear why the appellant did not raise the issue at the earliest instance. As such, the appeal is dismissed.

Professional medical negligence

The Kenyan courts establish medical negligence through the lenses of fellow medical practitioners when faced with similar circumstances. Put differently, if a medical practitioner of similar experience would have acted in the same manner as the accused, then no conviction would be proffered.

It was stated in the case of J W (a minor) suing through her mother L W as her next Friend) v Medical Superintendent Malindi District Hospital & 2 others [2018] eKLR, the court stated that:

The standard of care in medical negligence differed from that of ordinary cases of negligence. If a professional man professed an art, he ought to be reasonably skilled in it. He should also be careful, but the standard of care, which the law required, was not insurance against accidental slips. It was such a degree of care as normally skilful member of the profession may reasonably be expected to exercise in the actual circumstances of the case, and, in applying the duty of care to the case of a surgeon, it was - necessary to have regard to the different kinds of circumstances that could present themselves for urgent attention. A charge of professional negligence against a medical practitioner was serious. It stood on a different footing to a charge of negligence against the driver of a motor car. The consequences were far more serious. It affected his professional status and reputation. In medical cases the fact that something had gone wrong was not in itself any evidence of negligence.

In the case of John Mutora Njuguna t/a Topkins Maternity & Clinic v ZWG [2017] eKLR it was stated that:

The test was the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not have possessed the highest expert skill; it was a well - established law that it was sufficient if he exercised the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical practitioner, negligence meant failure to act in accordance with the different kinds of circumstances that could present themselves for urgent attention. A charge of professional negligence against a medical practitioner at that time. There could be one or more perfectly proper standards and if he conformed to one of the proper standards, then he was not negligent.

According to the case of Danie Van Der Walt v The State [2020] ZACC 19, the South African courts unlike the Kenyan courts, had a different approach in the determination of standard of care placed on medical professionals when assessing professional medical negligence. They determined professional medical negligence by placing a higher standard of care on medical practitioners. As such, actions and omissions by medical professionals that led to the jeopardized health or loss of lives of their patients would lead to assumption
Factors examined in a transnational guardianship case while considering a child’s best interests

SMK v PK
Supreme Court of India
Civil Appellate Jurisdiction
Civil Appeal No. 3559 of 2020
UU Lalit, I Malhotra & H Gupta, SCJJ
October 28, 2020
Reported by Faith Wanjiku

Constitutional Law – rights of a child: best interest principle – where a child was involved in a transnational guardianship case - what were the essentials of the welfare and best interest principle of a child.

Family Law – guardianship – appointment of a guardian by a court – where a guardianship case was of transnational nature – factors to consider - what factors were to be examined in a transnational guardianship case while considering the child’s best interests - Guardian and Wards Act, 1890, section 17

International Family Law – mirror orders – scope and nature of – where the welfare of a child living in another country needed to be protected - supervisory jurisdiction of courts of the country of the original order - what was the scope and nature of mirror orders and whether they could ensure the continued supervisory jurisdiction of courts of the country of the original order which was essential for a child’s welfare.

Brief facts
The marriage between the parties was solemnized at New Delhi and a male child, AVK (minor) was born at New Delhi. The parties had been living separately since April 26, 2012. The appellant was an Indian citizen whereas the respondent and the child had dual citizenship of Kenya and United Kingdom. The child also had been granted OCI (Oversees Citizen of India).

The legal proceedings began after the mother filed a lawsuit for a permanent injunction restricting the father and his parents from removing the minor child from her custody. During the ongoing litigation, various orders were passed regarding visitation rights to the father. Then in November 2012, the father moved a petition under section 7 of the Guardians and Wards Act, 1890 before the Family Court at Saket.

In 2018, a family court upheld the judgment granting custody of the child to the father. The order was affirmed by Delhi High Court in February, 2020. Thereafter, the mother decided to approach Supreme Court to appeal the High Court judgment.

Issues

i. What were the essentials of the welfare and best interest principle of a child?

ii. What factors were to be examined in a transnational guardianship case while considering the child’s best interests?

iii. What was the scope and nature of mirror orders and whether they could ensure the continued supervisory jurisdiction of courts of the country of the original order which was essential for a child’s welfare?

Relevant provisions of the law
Guardian and Wards Act, 1890
Section 17 - Matters to be considered by the Court in appointing guardian

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by the sole and paramount consideration of what would best sub serve the interest and welfare of the child, to which all other considerations had to yield. The welfare and benefit of the minor child would remain the dominant consideration throughout. The courts had to not allow the determination to be clouded by the inter se disputes between the parties, and the allegations and counter allegations made against each other with respect to their matrimonial life.

Held by majority

1. Courts while exercising parens patriae jurisdiction would be guided by the sole and paramount consideration of what would best sub serve the interest and welfare of the child, to which all other considerations had to yield. The welfare and benefit of the minor child would remain the dominant consideration throughout. The courts had to not allow the determination to be clouded by the inter se disputes between the parties, and the allegations and counter allegations made against each other with respect to their matrimonial life.

2. To decide the issue of the best interest of the child, the court would take into consideration various factors, such as the age of the child; nationality of the child; whether the child was of an intelligible age and capable of making an intelligent preference;
the environment and living conditions available for the holistic growth and development of the child; financial resources of either of the parents which would also be a relevant criterion, although not the sole determinative factor; and future prospects of the child. A court while dealing with custody cases, was neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and wellbeing of the child.

3. In selecting a guardian, the court was exercising parens patriae jurisdiction and was expected, nay bound, to give due weight to a child’s ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values could not be ignored. They were equally, or even more important, essential and indispensable considerations. If the minor was old enough to form an intelligent preference or judgment, the court had to consider such preference as well, though the final decision should rest with the court as to what was conducive to the welfare of the minor.

4. In the instant case, the issue of custody of the minor had to be based on an overall consideration of the holistic growth of the child, which had to be determined on the basis of his intelligent preferences as mandated by section 17(3) of the Guardians and Wards Act, 1980, the best educational opportunities which would be available to him, adaptation to the culture of the country of which he was a national, and where he was likely to spend his adult life, learning the local language of that country, exposure to other cultures which would be beneficial for him in his future life.

5. In the instant case, the minor was by now almost 11 years of age. It had been observed by the Family Court, the child counsellor, and the High Court in their personal interactions with the child at different stages of the proceedings, that he was a bright and articulate child, who was capable of unequivocally expressing his preferences and aspirations.

6. What emerged from all those interactions of the minor with the courts since 2016 when he was 6 years old, till the present when he was almost 11 years old, was a very positive attitude towards his father and paternal grandparents, even though he had not lived with them since the age of two and a half years when he was a toddler, and had come to India on a visit in March 2012, after which he did not go back.

7. In view of the various personal interactions which the courts had had with the minor at different stages of the proceedings, from the age of 6 years, till the present when he was now almost 11 years old, it would be in his best interest to transfer the custody to his father. If his preferences were not given due regard to, it could have an adverse psychological impact on the child.

8. Having considered his preferences and aspirations, the court would then consider other aspects with respect to the welfare of the child.

a) The minor was a citizen of Kenya and U.K., even though he was born in India. Evidently, his parents took a conscious decision to obtain dual citizenship of Kenya and U.K. for him soon after his birth, when he ceased to be an Indian citizen, by virtue of the Explanation to Clause 2 of Rule 7 of the Registration of Foreigners’ Rules, 1982 and Section 9 of the Citizenship Act, 1955. The minor travelled to India in 2012 on a Kenyan passport, with an OCI card attached to his passport. The Kenyan passport was cancelled in 2016 when a non-cognizable report was filed by the appellant regarding the loss of his passport. Subsequently, no steps were taken to obtain a fresh Kenyan passport to date. The factum of his nationality was a relevant aspect which had to be given due consideration while deciding the issue of custody of the child.

b) The educational opportunities which would be available to the child was an aspect of great significance while determining the best interest of the child. It was submitted on behalf of the respondent that he had secured admission for the minor in the Nairobi International School, which followed the IB curriculum. That would be more beneficial to him, given the fact that he was a dual citizen of Kenya and United Kingdom, and intended to pursue further education overseas. Being a citizen of United Kingdom, the child would get various opportunities as a citizen for admission to some of the best universities for further education, which would be in his best interest.

c) It was necessary that the minor got greater exposure by overseas travel. It was important for him to be exposed to different cultures, which would broaden his horizons, and facilitate his all-round development, and would help him in his future life.

d) The minor child was the heir apparent of a vast family business established by the family of the respondent in Kenya and U.K. Since the businesses of the paternal family were primarily established in Kenya and the U.K., it would be necessary for the minor to imbibe and assimilate the culture and traditions of the country where he would live as an adult. It would also be necessary for him to learn the local language of Kiswahili, and adapt himself to the living conditions and surroundings of the country. Since the child was still in his formative years of growth, it would be much easier for him to imbibe...
and get acclimatized to the new environment.

e) The minor child had been in the exclusive custody of his mother from birth till adolescence, which was the most crucial formative period in a person’s life. Having completed almost 11 years in her exclusive custody, the minor was then entitled to enjoy the protection and care of his father, for his holistic growth and development. However, the appellant's continued participation in the growth and development of the child would be crucial. It had to be recognized that the appellant had given her best to the minor, and had him admitted in one of the best public schools in Delhi. The credit had to also go to her for ensuring that the child was emotionally balanced, and had not tutored him against his father and paternal family.

9. The objection raised by the appellant regarding the respondent being racist had not been established from the material on record. The respondent and his family had been living in Kenya for over 85 years, and had established an extensive business in that country. There was no evidence brought on record to substantiate the allegation, except an oral submission made on behalf of the appellant. No importance could be given to that objection as a ground for refusing custody of the child to the appellant.

10. With respect to the allegation of alcoholism and excessive drinking made by the appellant, both the Family Court and the High Court had considered that objection at length and considered the evidence led by her in that regard. She had produced R.W.2, a practicing advocate from the chambers of her counsel, who had deposed with respect to two incidents which allegedly took place at social events in Delhi. The courts below were of the view that R.W.2 was an interested witness, and his evidence could not be relied upon, and had to be disregarded. The Supreme Court therefore rejected that objection as being unsubstantiated.

11. The allegation of marital infidelity made by the appellant as a ground to refuse custody to the respondent, had been seriously disputed by him. The allegation was based on certain messages which the appellant submitted that she stumbled upon, when the respondent was visiting India in April 2012. The certificate u/S. 65B produced by the appellant merely stated that the content of the emails placed on record were the same as the content of the emails on her inbox. That certificate did not certify the source of the messages allegedly received on the Blackberry of the respondent, which were transferred to her cellphone. In the absence of a certificate in accordance with section 65B of the Indian Evidence Act on admissibility of electronic records, with respect to the source of the messages, the Supreme Court could not accept the same as being genuine or authentic. Oral evidence in the place of such certificate could not possibly suffice as section 65B (4) was a mandatory requirement of the law.

12. The Family Court rejected the allegations of marital infidelity based on the aforesaid emails. The High Court also held that the emails were dated May 5, 2012 and May 6, 2012; on which dates, the appellant could not have had access to the Blackberry of the respondent, since the respondent had left India on April 26, 2012, which had been admitted by the appellant in her examination in chief. The Supreme Court was thus unable to place reliance on the emails with respect to the allegations of marital infidelity and affirmed the findings of the Family Court and High Court in that regard.

13. It would be in the best interest of the minor, if his custody was handed over to his father, the respondent. Once the minor shifted to Kenya, he would be required to adjust to a new environment and study in a new educational system with a different curriculum. It would be in the best interest of the minor if he was able to go to Kenya at the earliest, so that he could have some time to adjust to the new environment, before the new term started in January 2021 in the Nairobi International School. That would, however, not imply that the appellant would be kept out of the further growth, progress and company of her son. The appellant would be provided with temporary custody of the child for 50% of his annual vacations once a year, either in New Delhi or Kenya, wherever she liked. The appellant would also be provided access to the minor through emails, cellphone and Skype during the weekends.

14. To safeguard the rights and interest of the appellant, the respondent would obtain a mirror order from the concerned court in Nairobi, which would reflect the directions contained in the judgment. Given the large number of cases arising from transnational parental abduction in intercountry marriages, the English courts had issued protective measures which took the form of undertakings, mirror orders, and safe harbour orders, since there was no accepted international mechanism to achieve protective measures. Such orders were passed to safeguard the interest of the child who was in transit from one jurisdiction to another. The courts had found mirror orders to be the most effective way of achieving protective measures.

15. In international family law, it was necessary that jurisdiction was exercised by only one court at a time. It would avoid a situation where conflicting orders could be passed by courts in two different jurisdictions on the same issue of custody of the minor child. Those orders were passed keeping in
mind the principle of comity of courts and public policy. The object of a mirror order was to safeguard the interest of the minor child in transit from one jurisdiction to another, and to ensure that both parents were equally bound in each state. The mirror order was passed to ensure that the courts of the country where the child was being shifted were aware of the arrangements which were made in the country where he had ordinarily been residing. Such an order would also safeguard the interest of the parent who was losing custody, so that the rights of visitation and temporary custody were not impaired.

16. The judgment of the court which had exercised primary jurisdiction of the custody of the minor child was however not a matter of binding obligation to be followed by the court where the child was being transferred, which had passed the mirror order. The judgment of the court exercising primary jurisdiction would however have great persuasive value.

Appeal dismissed with no order as to costs.

Orders

i. The respondent was to obtain a mirror order from the concerned court in Nairobi to reflect the directions contained in the judgment, within a period of 2 weeks from the date of the judgment. A copy of the Order passed by the court in Nairobi had to be filed before the Supreme Court;

ii. After the mirror order was filed before the Supreme Court, the respondent would deposit a sum of INR 1 Crore in the Registry of the Supreme Court, which would be kept in an interest bearing fixed deposit account (on auto-renewal basis), for a period of two years to ensure compliance with the directions contained in the judgment. If the Supreme Court was satisfied that the respondent had discharged all his obligations in terms of the aforesaid directions of the Supreme Court, the aforesaid amount would be returned with interest accrued thereon to the respondent;

iii. The respondent would apply and obtain a fresh Kenyan passport for the minor, the appellant would provide full cooperation, and not cause any obstruction in that behalf;

iv. Within a week of the mirror order being filed before the Supreme Court, the appellant would provide the Birth Certificate and the Transfer Certificate from Delhi Public School, to enable the respondent to secure admission of the minor to a School in Kenya;

v. The appellant would be at liberty to engage with the minor on a suitable videoconferencing platform for one hour over the weekends; further, the minor was at liberty to speak to his mother as and when he desired to do so;

vi. The appellant would be provided with access and visitation rights for 50% once in a year during the annual vacations of the minor, either in New Delhi or Kenya, wherever she liked, after due intimation to the respondent;

vii. The respondent would bear the cost of one trip in a year for a period of one week to the appellant and her mother to visit the minor in Kenya during his vacations. The cost would cover the air fare and expenses for stay in Kenya;

viii. The appellant would not be entitled to take the minor out of Nairobi, Kenya without the consent of the respondent;

ix. The parties would file undertakings before the Supreme Court, stating that they would abide and comply with the directions passed by the Supreme Court without demur, within a period of one week from the date of the judgment.

x. As an interim measure, till such time that the respondent was granted full custody of the child, he would be entitled to unsupervised visitation with overnight access during weekends when he visited India, so that the studies of the minor were not disturbed. The respondent and his parents would be required to deposit their passports before the Registrar of the Supreme Court without demur, within a period of one week from the date of the judgment. After the visitation was over, the passports would be returned to them forthwith.

xi. The appeal would be listed before the Supreme Court after a period of four weeks to ensure compliance with the aforesaid directions, and on being satisfied that all the aforesaid directions were duly complied with, the custody of the minor would be handed over by the appellant to the respondent.

Per H Gupta, SCJ (Dissenting opinion)

1. The appellant had no disability so as to take custody from her. She was well educated, was a practicing advocate who left her law practice to nurture her child. Therefore, she has the maturity and sense of judgment. She had mental stability as even though the parties were at loggerheads, the child had a cordial relation with the respondent. There was no valid plausible reason to take custody of child from the appellant to hand over to the respondent as a chattel.

2. Delhi Public School was one of the prestigious schools in National Capital Region. The child was studying in the said school since 2013. There was no doubt that there were good schools in Kenya as well however the education of the child in Delhi Public School could not be said to be in any way inferior to the education in Kenya. At times, people tended to believe that other countries were better in every sphere as compared to India, though it was true. Therefore, shifting of child at that stage of life would be counter-productive to the growth of child.

3. Both lower courts had misread the printouts on the alleged messages inferring marital infidelity to hold that they were not proved as the respondent was not
in India in the month of May, 2012. Both lower courts overlooked the fact that the messages were forwarded by the appellant to her mobile on April 22, 2012 when admittedly the respondent was staying with the appellant at her house in Defence Colony. He left India only on April 26, 2012. The messages were sent from the Indian mobile number used by the respondent. The respondent had not given any explanation how the messages came to be delivered to his phone. The denial of knowing Ms. Sonia was of no consequence as it was for him to explain how the messages were in his mobile. The conduct of the respondent in April, 2012 in reference to the exchange of messages with a woman were enough to create bitterness in the relationship of the parties.

4. The appellant had left her active law practice to nurture her child. She had relatives in Delhi and also in many other cities. She was continuously involved in providing healthy and holistic upbringing of the child. Though the respondent had been regularly visiting India every month to visit the child, that did not entitle him to the guardianship of the child as he was not a truthful person. He had the audacity to deny the marriage proposed initially through a matrimonial advertisement. He had not led evidence in respect of sexually explicit messages received by him from another woman. He had been found to pamper child which had the potential of derailing the education and further upbringing in the crucial years of teens.

5. The welfare of the child would be to stay in India with his mother who had brought up the child for last 11 years. The child was intelligent but not mature enough to take decisions by himself. Even, the law recognized that the child of less than 18 years was incapable of representing himself. Therefore, any opinion of the child was not determinative of the final custody of the child but the Supreme Court as parens patriae was duty bound to assess the entire situation to return a finding whether the welfare of the child would be with the mother with visitation rights to the father or custody with the father with visitation rights to the mother. If the child was moved to Kenya, there was no way that the Supreme Court could enforce the orders to get the child back to India, even if it so desired.

6. In the present case, the child had grown up in India in the last 11 years. At that age, the child would be exposed to physical and psychological harm, if he was shifted to Kenya amongst fellow students and teachers but without any friends. He would be taken care of by nannies, maids with liberal pampering by the grandparents and the father.

7. The order of the High Court granting visitation rights for one week was a farce. The respondent had been coming to India quite frequently and had unsupervised visitation rights over the child as well. Therefore, instead, it would be in the interest of justice, if the respondent was given unsupervised visitation rights in India or abroad for a month during summer or winter holidays either in parts or consecutively. The travel documents of the child would be retained by the appellant so that child was not removed from the jurisdiction of the Supreme Court, if the child was with the respondent in India. The appeal would be allowed with the orders passed by the Family Court and the High Court set aside and grant of visitation rights to the respondent. However, liberty would be given to the parties to seek further orders, as could be required from time to time, from the Family Court, New Delhi.

Relevance to the Kenyan Situation

Child custody cases in Kenya are not a new thing and happen almost on a daily basis in the Kenyan courts. Be that as it may, the rights of a child mirrored through the best interest principle are always upheld in the legal system.

The Constitution of Kenya, 2010, being the supreme law of the land, protects the rights of a child in its Article 53. Particularly, sub-article (2) provides that a child’s best interests are of paramount importance in every matter concerning the child. The Children Act No. 8 of 2001 was enacted to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children’s institutions. Section 83 goes ahead to provide for considerations the court looks at in determining whether or not a custody order should be made in favour of an applicant, which include the conduct and wishes of the parent or guardian of the child, the ascertainable wishes of the child and the best interests of the child.

There are also international laws such as the Convention on the Rights of the Child, 1989 and the African Charter on the Rights and Welfare of the Child, 1990, protecting the rights of a child.

There are also cases on child custody determined while echoing protection of the rights of the child in Kenya as seen below;

In JKN v HWN [2019] eKLR, the court held that when determining child custody, the general principle was that custody of young children should be awarded to the mother unless special circumstances and peculiar circumstances existed to disqualify her from being awarded custody. What amounted to the exceptional circumstances depended on each case and would include; if the mother was unsettled, had taken a new husband, her quarters were in a deplorable condition, disgraceful conduct, immoral behaviour, drunken habit, or bad company. This was also echoed in JO v SAO (2016) eKLR.
In *BK v EJH* [2012] eKLR, the court held that the test for the best interest of a child was not subjectively dictated by the selfish whims of a child. There had to be an element of objectivity. A child’s wish to stay with a particular parent might not be in his best interest. In such a situation, his own preference could not be automatically allowed. The wishes and feelings of a child had to therefore be treated with a lot of caution.

In *MAA v ABS* (Civil Appeal No. 32 of 2017, the court held that the interest of the children was first and paramount and everything had to be done to safeguard, conserve and promote the rights and welfare of the children.

As can be seen above, Kenyan courts have held the same as the Supreme Court of India on the best interests of the child in custody/guardianship cases. However, each custody case is different and its unique circumstances are always looked into in addition to the legal provisions. The Supreme Court of India sets out the law and also analyses the unique facts of the case to determine who among the two parties should be granted custody of the minor in an intercountry marriage situation and therefore brings out factors to be considered in such a situation. In addition, it makes an order for a mirror order from a Nairobi court meant to safeguard the interest of the child in transit from one jurisdiction to another, and to ensure that both parents are equally bound in each state. The interest of the parent who is losing custody is also protected, so that the rights of visitation and temporary custody are not impaired. The Supreme Court of India case is therefore very jurisprudential in matters guardianship/custody of children being of a transnational nature.
LAW REFORM ISSUES
Compiled by Faith Wanjiku

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| A. Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties) [2020] eKLR Petition No. 284 and 353 of 2019 (consolidated) High Court at Nairobi J Ngaah, AK Ndung’u & TM Matheka, JJ October 29, 2020 | On diverse dates between the years 2017 and 2019, the National Assembly passed a total of 23 Acts of Parliament without the participation of the Senate and unilaterally forwarded 15 others to the Senate without complying with article 110(3) of the Constitution of Kenya, 2010, (Constitution). Aggrieved, the Senate in July 2019 filed the instant petition seeking, amongst others, the nullification of the Acts passed or amended by the National Assembly without reference to the Senate. The Council of County Governors also filed its own petition contending that the amendments by the National Assembly to section 4 of the Kenya Medical Supplies Authority Act, No. 20 of 2013 without regard to the Senate was unconstitutional and asked for the nullification of those amendments. Owing to similarity of constitutional issues between the two petitions, the petition by the Council of County Governors was consolidated with the instant petition. The Speaker of the Senate sought the Supreme Court's opinion on the import of article 110(3) of the Constitution in Supreme Court Advisory Opinion No. 2 of 2013, In the matter of the Speaker of the Senate and another v Attorney General and 4 others [2013] eKLR (Reference No. 2 of 2013). In that Advisory Opinion, the Supreme Court held that the consideration of Bills to be passed by Parliament was not a unilateral exercise exclusive to either of the two Houses; rather, the Speakers of both houses had to engage and consult and to the extent that the Speaker of the National Assembly had proceeded in passing the Division of Revenue Bill without such consultation or engagement, he had acted against the Constitution and in particular, article 110(3). | 1. The business of considering and passing of any Bill was not to be embarked upon and concluded before the two Chambers, acting through their Speakers, addressed and found an answer for a certain particular question: What the nature of the Bill in question was. The two Speakers, in answering that question, had to settle three sub-questions before a Bill that had been published, went through the motions of debate, passage, and final assent by the President. The sub-questions were:
   a. Whether the Bill concerned county governments and if it was, whether it was a special or an ordinary Bill.
   b. Whether the Bill did not concern county governments.
   c. Whether it was a money Bill.
2. In answering the questions to determine the nature of a Bill, the Speakers had to consider the content of the Bill. They had to reflect upon the objectives of the Bill. That, by the Constitution, was not a unilateral exercise and on that principle, it was obvious that the Speaker of the National Assembly by abandoning all engagement or consultation with the Speaker of the Senate, and proceeding as he did, had acted contrary to the Constitution and its fundamental principles regarding the harmonious motion of State institutions.
3. Neither Speaker could, to the exclusion of the other, determine the nature of a Bill: for that would inevitably result in usurpations of jurisdiction, to the prejudice of the constitutional principle of the harmonious interplay of State institutions. The Senate, though entrusted with a less expansive legislative role than the National Assembly, stood as the Constitution’s safeguard for the principle of devolved government. That purpose would be negated if the Senate were not to participate in the enactment of legislation pertaining to the devolved units, the counties [article 96(1), (2) and (3)].
4. Any law passed without compliance with article 110(3) of the Constitution was unconstitutional. Article 2 of the Constitution not only asserted the supremacy of the Constitution but it also, in the same vein, removed any doubt on constitutionality of a law enacted contrary to the Constitution. Of particular relevance was article 2(4) that any law or any act or omission in contravention of the Constitution was invalid. The actions of the National Assembly to pass the impugned laws without reference to the Senate contrary to article 110(3) fell into that category of laws that article 2(4) frowned upon, they were simply unconstitutional.
5. Bills originating from the Senate were, like any other Bill, subject to the same legislative process outlined in article 110 (3) of the Constitution and it was not up to the Speaker of the National Assembly to arrogate to himself the task of determining whether such Bills were money Bills or not and to the extent that standing order no. 143(2) to (6) purported to give him such powers, it was also unconstitutional.
6. Article 93(2) of the Constitution provided that the National Assembly and the Senate would perform their respective functions in accordance with the Constitution. While the legislative authority lay with Parliament, the same was to be exercised subject to the dictates of the Constitution. While Parliament was within its general legislative mandate to establish procedures of how it conducted its business, it had to abide by the prescriptions of the Constitution. It could not operate besides or outside the four corners of the Constitution. |
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L Terer
Editor/CEO
May, 2019
Kenya Revenue Authority could not impose a penalty and also undertake criminal prosecution with respect to the same tax liability.

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An advocate acting for the victim can actively participate in criminal proceedings to safeguard their constitutional and statutory rights.