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As the year is slowly drawing to a close it is yet another opportune time for us to relook at our goals and to reassess how far we have gone in realizing them. Kenya Law has been involved in various activities, in the past few months, to ensure that this review of our annual goals, and the progress we have made on them is done in a comprehensive and inclusive manner.

As we have been going through this process I was struck by how much information we hold and even more so how we are able to ensure that this information is properly organized and presented to people throughout the world. The internet has been a very useful resource in this regard and the communication that it makes possible is facilitated by all the communication satellites that revolve around the world and which are able to beam information from one corner to another, in the blink of an eye.

It is eye opening to note that there are approximately 3,000 satellites orbiting the earth. These satellites were placed in space from the year 1957 when USSR launched the first artificial satellite, Sputnik 1. Since then many other nations have followed suit and sent numerous other satellites to space. The longest running space mission is Voyager probe II which was launched in 1977 by NASA.

The knowledge that these space exploratory missions have brought within our grasp has enabled humanity to look at the universe from a different, and more informed, perspective. In a similar way, technology has also transformed our Institution and the manner in which we discharge our mandate for the better.

As Kenya Law sets down its plans for the future we are determined to ensure that our plans will stand the test of time; and that 30 years from now, the activities we have undertaken so far will be seen as compliments to the needs that will exist then.

Long’et Terer

Long’et Terer
Ag CEO/Editor
CJ’s Message

Remarks by The Hon. The Chief Justice at the Launch Of The LSK Legal Awareness Week at Milimani Law Courts, Nairobi

On October 27, 2014

The Chairman of the Law Society of Kenya, Council Members of the LSK, Ladies and Gentlemen:

It gives me great pleasure to join you at the start of a week-long series of activities to promote legal literacy, pro bono services and legal aid not just in Nairobi but also in your branches countrywide.

The Legal Awareness Week comes at a critical time in our country, when there are numerous public debates on law that occur in spite of the facts and without the benefit of legal erudition.

The Law Society of Kenya has a statutory mandate to advise and assist members of the legal profession, the government and the larger public in all matters relating to the administration of justice.

Legal aid for those who are unable to afford the services of a lawyer need to increase, even as the public is encouraged to seize the opportunities for self representation now opened by the Constitution of Kenya 2010. Still, while the membership of the LSK must continue to offer legal assistance aid to the indigent and powerless, it must also extend its services to the powerful and unaware.

Legal awareness appears lowest among holders of public office, thus requiring the LSK to urgently expand its legal awareness programmes to the elite as well. Civic education is required both for the masses as it is for the elite. Recent attacks on the Judiciary suggests that the elite does not understand how court processes work, or if they do, they still need to be educated on why they need to respect those same processes.

Those who hold public office must be reminded that momentary ego trips against the Constitution and the law often produce expensive errors. Officious postures of intransigence against the law ultimately only deliver a costly invoice to the ordinary citizen.

A lawyer’s professional responsibility does not die or end at the door of politics or power. Advocates have a lifelong rendezvous with destiny regardless of where they are: in practice, on the bench, in business, in independent commissions, or in church service. The fidelity to professional ethics is a permanent duty.
That said, there is also need to take stock of our situation. Even at 7,000 members, the number of lawyers is inadequate to serve a population of over 40 million Kenyans. A recent study by the Judiciary's Performance Directorate in 2012/2013 found that Kenyans filed about 54,000 cases in the High Court alone. The Judiciary has 90 High Court judges, which means that, on average, each judge has 600 cases from one year alone. Even if all the 90 judges were sitting throughout the year without weekends and holidays, they would take about three years to conclude one year's matters. We can draw similar parallels for the other courts. This situation is not sustainable. It is the reason Kenyan needs more judges, magistrates and lawyers; but it is also the reason the Judiciary is encouraging alternative dispute resolution mechanisms. I commend the Law Society for initiating processes to embrace alternative dispute resolution in consonance with Article 159 of the Constitution.

My hope is that part of the legal awareness the LSK will be carrying out will embrace alternative dispute resolution. We must retire the common misconception that lawyers only make their fees when cases go to court. The Judiciary is concluding its Alternative Justice System pilot programmes, with the intention of rolling out in January 2015. I hope we can, as always, count on the support and partnership of the LSK.

The theme of this year's Legal Awareness Week, Justice through Sustainable Legal Aid, should remind us that the law is only the handmaiden of a higher purpose – the delivery of justice. That is why lawyers forego financial gain to do public good.

One of the most endearing attributes of the legal profession is to be able to deliver services for the public good, especially without charge. The tradition of pro bono service is a distinguishing feature of great the legal fraternity. I am glad that that tradition is truly alive and well. Which lawyer would not exult in it? Which former chairman of the LSK would not celebrate it, and which Chief Justice would not take pride – as I do – in seeing in it action?

Ladies and Gentlemen: It is now my great pleasure to declare the Legal Aid Awareness Week officially launched, with a clarion call to members: Do not cease to give civic education after the Legal Aid Week.

Thank you.

HON. DR. WILLY MUTUNGA, D.Jur, SC, EGH
CHIEF JUSTICE/ PRESIDENT
THE SUPREME COURT OF KENYA
“The question of timeliness in filing and determining election petitions as set by the Constitution and the Elections Act, section 85A(a) are neither negotiable nor could they be extended by any court for whatever reason. Section 85A of the Elections Act is neither a legislative accident nor a routine legal prescription. It is a product of a constitutional scheme that requires electoral disputes to be settled in a timely fashion”.

“The Supreme Court is the very centre piece of the novelty of the governance set-up of the new constitutional dispensation. The political and constitutional stature of the court runs in tandem with a generic conferment of jurisdiction, a scenario that is fundamentally alien to the closed-in outlook of earlier politico-legal structures as depicted in the Motor Vessel “Lillian S” case”.

“In Kenya, there is no express or implied requirement that where 2 children are involved in sexual penetration, both of them are to be charged with the offence of defilement. However, the absence of such a requirement would not prevent the filing of criminal charges against both children”.

“The distribution of functions between the national government and the county government was distinct from the allocation of functions made to local authorities before the devolved system of government came into effect. The structure of government provided for under the Constitution of Kenya 2010 was not comparable to the local authorities system provided for under the repealed Local Government Act (Cap 265) (repealed)”.

Justice Isaac Lenaola in Okiya Omtatah Okoiti & another v Attorney General & 6 others, Petition No 593 of 2013
“The premium upon which the people of Kenya placed on the right to habeas corpus was emphasized by the fact that until the promulgation of the Constitution of Kenya 2010, the right to habeas corpus was guaranteed only by statutory provisions under section 389 of the Criminal Procedure Code on directions in the nature of habeas corpus. Under the new Constitution, the right to habeas corpus was entrenched in the bill of rights under article 51 (2) by declaring the right as one of the only four (4) rights and fundamental freedoms in the bill of rights that could not be limited”.

Industrial Court Judge Rika J in David Wanjau Muhoro v Ol Pejeta Ranching limited Cause number 1813 of 2011

“Equal pay for equal work or work of equal value was recognized as a fundamental human right. That right is now recognized under Article 41 of the Constitution of Kenya. The International Labour Organization (ILO) Declaration of Philadelphia of 1944, which was part of the ILO Constitution, affirmed that all human beings, irrespective of race, had the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, and of economic security and equal opportunity”.

Industrial Court Judge M Mbaru in Severine Luyali v Ministry of Foreign Affairs and International Trade & 3 others, Petition No. 23 of 2014

“In issuing the directive that all vehicles with tinted windows be impounded without making a distinction between public service vehicles and private ones, the Respondent had obviously purported to exercise powers he did not have. The effect of such directive was to amend the Traffic Rules in particular rule 54A and expand the ambit and application of the said rule”.

High Court judge G V Odunga in Republic v Inspector General of the National Police Service, David Kimaiyo Ex parte Akitch Okola, Miscellaneous Application No. 183 of 2014

“There was a fundamental shift in the labour relations environment in Kenya with the enactment of the Employment Act, 2007 and the Constitution, 2010. Employees, whether they were in the public or private sector enjoyed a protective labour environment, that was not always the norm before. Employers both in the public and the private sphere enjoyed rights regulated under the law and the Constitution. Where employers had developed regulations, policies and guidelines before 2007 and 2010 with regard to the new labour laws and the Constitution, there was an urgent call for them to realign the regulations, policies and guidelines”.

High Court Judge E M Muriithi, in Masoud Salim Hemed & another v Director of Public Prosecution & 3 others, Petition No 7 & 8 of 2014 (consolidated)
Kenya Law participated in the inaugural Strathmore Law School Annual Law Conference on 3rd and 4th of July 2014 at the Strathmore University grounds in Nairobi. The Conference themed, Justice and Jurisprudence: Nation Building through Facilitating Access to Justice, was graced by Deans from various Law schools around the world including, the Dean of Law Oxford University, Legal scholars, Practitioners, Judicial Officers, Researchers, Law Students and other interested Stakeholders both local and international.

The conference was officially opened by Hon. Prof. Githu Muigai, Attorney General, who expressed his optimism that the conference would provide opportunity for debate on legal issues and therefore promote the exchange and development of legal ideas.

RT. Hon. Baroness Patricia Scotland, the former Attorney General UK gave a detailed account of her professional career elaborating how hard work, determination and focus can lead one to success. She is the first African Attorney General in the UK; the first woman to hold the position of Attorney General since its foundation in 1315; and the first woman to be appointed Queens Counsel.

The participants presented papers on the following topics: Justice as the end of law; Justice, immunity and impunity; The role of jurisprudence in nation building; Governance and the Common Good; Justice and the legislative function; The role of the judiciary in nation building; Access to justice and the role of international guidelines and standards; Working towards achieving access to justice for all persons and The role of leadership and good governance in attaining a just society.

The conference was also used to launch a book on the Kenyan constitution written by the Dean, Strathmore Law school Dr. Luis Franceschi and the Director, Kenya School of Law Prof P.L.O Lumumba, titled The Constitution of Kenya 2010: An introductory Commentary.

The Chief Justice and Chairman of the National Council for Law Reporting, Dr. Willy Mutunga, while closing the conference, noted that the creation of a sound legal and constitutional regime and the provision of justice is every bit as important in nation building as economic and political activities.
This Grey Book and CDROM contain a Collection of 15 selected Statutes on Kenyan Procedural Law.

This Publication features the Summaries of selected cases on the interpretation of the Constitution of Kenya, 2010 (September 2011 - May 2013)

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This article presents a brief summation of Legislative Supplements published in the Kenya Gazette on matters of general public importance. The outline covers period between 11th April, 2014 and 1st August, 2014.

<table>
<thead>
<tr>
<th>DATE OF PUBLICATION</th>
<th>LEGISLATIVE SUPPLEMENT NUMBER</th>
<th>CITATION</th>
<th>PREFACE</th>
</tr>
</thead>
<tbody>
<tr>
<td>11th April, 2014.</td>
<td>17</td>
<td>The Medical Practitioners &amp; Dentists (Training, Assessment &amp; Registration) Rules, 2014 (L.N. 37/2014)</td>
<td>The legislation provides for the establishment of an assessment committee, whose function among others is to accredit and regulate all the medical schools, dental schools, internship training centres, continuing professional development and continuing education programme providers. It also provides for the admission criteria to medical and surgery school.</td>
</tr>
<tr>
<td>17th April, 2014.</td>
<td>18</td>
<td>The Advocates (Marketing and Advertising) Rules, 2014 (L.N. 42/2014)</td>
<td>The legislation provides guidelines for what Advocates should include in their adverts. They also clearly spell out what is prohibited in an advert for example, the name and identity of an Advocate’s client. It also lists the forms of advertisement that are permitted and prohibited; adverts on television, radio or any illuminated billboard are prohibited.</td>
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<tr>
<td>9th May, 2014.</td>
<td>19</td>
<td>The Nairobi International Financial Centre Authority Order, 2014. (L.N. 44/2014)</td>
<td>The purpose of this Order is to establish the Nairobi International Financial Centre Authority so as to facilitate the development of a stable, efficient and globally competitive financial service sector that generates high levels of national savings and investments.</td>
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<tr>
<td>Date</td>
<td>Issue</td>
<td>Regulation</td>
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<td>The regulations make provision for the charges to be paid by the owner of an aircraft making a flight in the Flight Information Region, and airspace in Kenya outside the Flight Information Region the charges prescribed in respect of air navigation services provided. The charges are to be paid at the rates and in the manner determined and notified by the Cabinet Secretary for Transport and Infrastructure.</td>
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<td>The principal Rules are amended by inserting the new Schedule immediately after the Thirteenth Schedule to provide for the registration series of all motor vehicles belonging to the County Government.</td>
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<td>The regulations provide for the amendment of the various job groups that have arisen in the Public Service Commission differentiating them from those that were there previously.</td>
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<td></td>
<td>The objective and purpose of this Order is to provide a legal and institutional framework for the care, control, protection, welfare and adoption of children through the establishment of the Child Welfare Society of Kenya.</td>
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<td>These are rules on conduct and registration of marriages and issuance of marriage certificates in Kenya.</td>
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<td>The rules seek to provide for the eligibility for accreditation, the procedure for application for accreditation and the grant of an accreditation certificate for an employment agent.</td>
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<td>The rules provide for the filing, presentation, form and content, and withdrawal of election petitions while also providing for the various scenarios that a claim may arise after the elections of trade union officials has occurred.</td>
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<td>The regulations seek to provide for the manner in which the treasurer is to manage the various cash books and bank account on behalf of the trade unions or various employers’ organizations.</td>
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<td>Date</td>
<td>No.</td>
<td>Description</td>
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<tr>
<td>6th June, 2014.</td>
<td>27</td>
<td>The Labour Relations (General) Regulations, 2014. (L.N. 66/2014)</td>
<td>The regulations seek to provide for the application, form and maintenance of the register of registered trade union or employers’ organizations and all their members.</td>
</tr>
<tr>
<td>6th June, 2014.</td>
<td>29</td>
<td>The National Construction Authority Regulations 2014 (L.N. 74/2014)</td>
<td>The legislation clearly provides for the role of the Authority as regards registration of contractors, both foreign and local.</td>
</tr>
<tr>
<td>12th June, 2014.</td>
<td>31</td>
<td>The Universities Regulations, 2014 (L.N. 76/2014)</td>
<td>The Regulations set out the requirements necessary for the establishment of Universities and conduct of academic affairs in the Universities.</td>
</tr>
<tr>
<td>13th June, 2014.</td>
<td>35</td>
<td>The Merchant Shipping (Co-operation with Search and Rescue Services) Regulations, 2014. (L.N. 88/2014)</td>
<td>These Regulations shall apply to all ships registered under the Merchant Shipping Act, 2009, that is those ships that are owned by Kenyans or operating in Kenyan waters, and provides that such ships shall prepare a plan in respect of the ship, setting out the steps to be taken by those on board for cooperating with the appropriate search and rescue services if the ship requires the assistance of those search and rescue services failure to which would attract a penalty.</td>
</tr>
<tr>
<td>4th July, 2014.</td>
<td>37</td>
<td>The Medical Practitioners and Dentists (Training, Assessment and Registration) Rules, 2014. (L.N. 97/2014)</td>
<td>Under these rules the Medical Practitioners and Dentists Board declares the institutions set out in the schedule as recognized institutions at which internship of a medical practitioner may be undertaken.</td>
</tr>
<tr>
<td>1st August, 2014.</td>
<td>42</td>
<td>The Science, Technology and Innovation (Registration and Accreditation of Research Institutions) Regulations, 2014 (L.N. 106/2014)</td>
<td>The regulations provide for the criteria for accreditation of research institutions with the objective of upholding the standard of research in the Country and securing the confidence in the national research systems.</td>
</tr>
<tr>
<td>1st August, 2014.</td>
<td>43</td>
<td>The National Payment System Regulations, 2014 (L.N. 109/2014)</td>
<td>The regulations provide for the authorization and oversight of payment service providers, designation of payment systems, designation of payment institutions and Anti-money laundering measures.</td>
</tr>
</tbody>
</table>
A) NATIONAL ASSEMBLY BILLS

1. **Public Finance Management (Amendment) Bill, 2014.**
Kenya Gazette Supplement No. 35 (National Assembly Bills No. 14)
The principal object of this Bill is to amend the Public Finance Management Act (No. 18 of 2012) to provide for the receipt of proceeds of any loan raised or external government security issued under the Act and to ensure smooth implementation of the Act.

2. **Traditional Health Practitioners Bill, 2014.**
Kenya Gazette Supplement No: 59 (National Assembly Bills No. 20)
The main purpose of this Bill is to make provision for the training, registration and licensing of traditional health practitioners and to regulate their practice. The Bill also provides for the establishment, composition, functions and powers of the Traditional Health Practitioners Council of Kenya. It is proposed that the Council shall be the regulatory body in respect of the training, licensing and control of the practice of traditional health practice in Kenya.

3. **Statutes Law Miscellaneous (Amendments) Bill, 2014.**
Kenya Gazette Supplement No.75 (National Assembly Bills No. 24)
The Bill seeks amendments to various Acts. Some of the Acts which have been amended include: The Interpretation and General Provisions Act (Cap. 2), The Advocates Act (Cap.16), The Criminal Procedure Code (Cap. 75), The Prisons Act (Cap. 90), The Retirement Benefits Act (Cap. 197) among others.

4. **Finance Bill, 2014.**
Kenya Gazette Supplement No. 87 (National Assembly Bills No.25)
The main purpose of this Bill is to amend the laws relating to various taxes and duties and for matters incidental to the sector of finance.

5. **Supplementary Appropriation (No. 2) Bill, 2014.**
Kenya Gazette Supplement No.92 (National Assembly Bills No.26)
The objective of this Bill is to authorize the issue of certain sums of money out of the Consolidated Fund and their application towards the service of the year ending on the 30th June, 2014, and to appropriate those sums for certain public services and purposes.

6. **Appropriation Bill, 2014.**
Kenya Gazette Supplement No.93 (National Assembly Bills No.27)
The principal object of the Bill is to authorize the issue of a sum of money out of the Consolidated Fund and its application towards the service of the year ending on the 30th June, 2015 and to appropriate that sum for certain public services and purposes.

7. **Central Bank (Amendment) Bill, 2014.**
Kenya Gazette Supplement No. 110 (National Assembly Bills No.28)
The principal object of this Bill is to amend the Central Bank Act to facilitate improved access to Government securities by Kenyans, particularly low income earners. The Bill requires the Bank to put in place mechanisms to establish lower minimum denominations and electronic transactions in the issuance of public debt instruments.

8. **Public Service (Values and Principles) Bill, 2014.**
Kenya Gazette Supplement No. 112 (National Assembly Bills No.29)
The principal object of the Bill is to give effect to the
provisions of Article 232 of the Constitution regarding the values and principles of public service. The same is to be achieved through a general code on the values and principles of public service; public participation in the promotion of the values and principles and policy making of the public service; and reporting on the status of the promotion of the values and principles of the public service.

9. **Persons Deprived of Liberty Bill, 2014.**
Kenya Gazette Supplement No. 113 (National Assembly Bills No. 30)
The principal purpose of this Bill is to give effect to Articles 29(f) and 51 of the Constitution; to provide for the rights of persons deprived of liberty to provide for the complaints and disciplinary procedures, the establishment of consultative committee and other related matters.

Kenya Gazette Supplement No. 114 (National Assembly Bills No. 31)
The Bill seeks to amend the Environmental Management and Co-ordination Act, 1999. The main object of this Bill is to make provisions to align the Environmental Management and Coordination Act (Act) with the Constitution of Kenya, 2010. The Bill takes into account the devolved system of government, rationalizing of state resources, sound environmental practices, structures for dispute resolution and principles such as transparency, accountability and participatory environment management.

B) SENATE BILLS

1. **County Governments (Amendment) (No. 4) Bill, 2014**
Kenya Gazette supplement No. 69 (Senate Bills No. 18)
The Bill seeks to amend the County Government Act No. 17 of 2012 to provide: for the election of deputy speaker of a county assembly, the process for the removal of a deputy governor and governor and to offer clarity on the functions of a deputy governor.

2. **Public Appointments (County Assemblies Approval) Bill, 2014.**
Kenya Gazette Supplement No. 78 (Senate Bills No. 20)
The main objective of this Bill is to provide a legislative framework through which nominees for appointment to public offices, for which the approval of a County Assembly is required under the Constitution or any other law, are vetted and approved for appointment by the County Assemblies.

3. **Parliamentary Service (Amendment) Bill, 2014.**
Kenya Gazette Supplement No. 79 (Senate Bills No. 21)
The principal object of this Bill is to amend the Parliamentary Service Act to provide for the establishment of committees by the Commission. The Bill specifically provides for the establishment of the National Assembly Services Committee and the Senate Services Committee with the aim of enhancing the efficiency of the Commission in the performance of its functions under the Constitution and the Parliamentary Service Act.

4. **Produce and Marketing Bill, 2014.**
Kenya Gazette Supplement No. 80 (Senate Bills No. 22)
The principal objective of the Bill is to establish a system through which potato farming will be improved in both quantity and quality by ensuring that set agronomic practices are followed and standardization of packaging and regulation of the whole industry is instituted to the benefit of the stakeholders. The Bill establishes the National Potato Council, to promote the quality and quantity of potato production, to set standards to regulate the industry, and for all other connected purposes.

5. **Food Security Bill, 2014.**
6. **County Retirement Scheme Bill, 2014.**
Kenya Gazette Supplement No. 96 (Senate Bills No. 25)
The principal object of this Bill is to establish the County Retirement Scheme as a mandatory Scheme for all County Government Officers; provide for the establishment of the Scheme’s Board of Trustees and provide for the Scheme’s management and administration. The proposed Scheme will transition the former local authorities’ retirement arrangements into one universal scheme for all the forty seven county governments besides being open to other public officers and any other person approved by the Board.

7. **Public Fundraising Appeals Bill, 2014.**
Kenya Gazette Supplement No. 99 (Senate Bills No. 28)
The main object of this bill is to provide for the establishment of regulatory mechanisms at the national and county levels which oversee the conduct of fundraising appeals, to provide for the licensing and regulation of fundraisers, the promotion of transparency and accountability to the carrying out of fundraising appeals and to foster greater philanthropy.

8. **National Police Service (Amendment) Bill, 2014.**
Kenya Gazette Supplement No. 103 (Senate Bills No.29)
The Bill proposes to amend the National Police Service Act, No.11A of 2011, seeking to give effect to the provisions of Articles 238, 239,243,244 and 247 of the Constitution. The Bill, in recognition of the critical role of reserve police officers in the maintenance of security, proposes to amend sections 110 and 115 of the National Police Service Act in order to strengthen the framework for the engagement, training and remuneration of police reservists.

9. **Universities (Amendment) Bill, 2014.**
Kenya Gazette Supplement No. 107 (Senate Bills No.31)
The principal object of this Bill is to amend the Universities Act, No. 42 of 2A12, so as to provide for liaison and coordination between the Commission for University Education and the county governments on matters of provision of university education at the county level of government.

10. **County Early Childhood Education Bill, 2014.**
Kenya Gazette Supplement No. 108 (Senate Bills No.32)
The principal object of this Bill is to provide a framework for the implementation of early childhood education by the county government in line with its functions as set out under the Fourth Schedule of the Constitution. The county governments are conferred with the responsibility of ensuring the implementation of early childhood education in the counties.

C) **ACTS**

1. **Insurance (Amendment) Act, 2014**
Kenya Gazette Supplement No. 33 (Act No. 1)
This Act amends several sections of the Insurance Act (Cap. 487). The Act, among others, provides for the objectives of insurance supervision and the mandate and responsibilities of supervisor as set out under the Insurance Act. The Act further broadens its applicability from the limitation to only Kenyan Citizens, to citizens of the East African Community Partner States through amendment of section 153 of Insurance Act.

2. **Marriage Act, 2014**
Kenya Gazette Supplement No. 62 (Acts No. 4)
The purpose of the Act is to amend and consolidate the various laws relating to marriage and divorce. To this extent, the Act repeals all other statutes that regulated marriage and divorce and consolidates them within the Act. The Act introduces broad requirements mandatory for the celebration of any marriage and seeks to protect the rights of spouses and even those of children before, during and after the marriage. The Act also seeks to provide for the celebration of the various kinds of marriages and empowers the Cabinet Secretary to make rules for the celebration of any other marriage not provided for in the Act.

2. Public Finance Management (Amendment) Act, 2014
Kenya Gazette Supplement No. 66 (Acts No. 6)
This legislation amends the Public Finance Management Act, to provide for the issuance of external securities by National Government. Section 53A grants the Cabinet Secretary responsible for matters relating to finance the authority to deal with external loans and the issuance of external securities.

3. Division of Revenue Act, 2014
Kenya Gazette Supplement No. 121 (Acts No. 12)
This Act commenced on 4th August 2014 and its object is to provide for the equitable division of revenue raised nationally between the national and county levels of government for the financial year 2014/2015 in accordance with the Constitution.

Kenya Gazette Supplement No. 123 (Acts No.14)
The Act provides for the training, registration, licensing, practice and standards of Counselors and Psychologists. Section 23 provides that a person is eligible for registration as a Counsellor or a Psychologist if the person holds a Bachelor’s degree in the relevant field and satisfies the Counselors and Psychologists Board that he or she is of good moral character and a fit and proper person to be registered under the Act.
Kenya Law hosted a delegation of the Judges from the judiciary of South Sudan on 24th July 2014. The delegation of five judicial officers was led by the Deputy Chief Justice of the Republic of South Sudan, Hon. Justice Ruben Madol Arol, and consisted of:

- Hon. Benjamin Baak Deng
- Hon. Mohammed Ismail Said
- Hon. George Lado Tartisio.
- Hon. Awor Moya Deng.

The objective of the visit was to benchmark with Kenya Law so as to provide a standard against which the Judiciary of South Sudan would emulate as they strengthen their judicial institutions and departments.

Kenya Law, was able to elaborate on the following aspects of the institution:

- The legal framework under which the Kenya Law is established and its relationship with other actors in the judicial system, especially, the judicial officers.
- The Law Reporting function especially with regards to how judgments are collected, prepared, reviewed, selected and disseminated.
- The methods of compilation and maintenance of an up to date database that contains all the laws of Kenya including subsidiary legislation.
- The practical usefulness of the Kenya Law website indicating its versatility in terms of presentation of information; ease of use of
the various functions including the search capabilities. This of legal information that is maintained within the various databases.

- An elaboration of the various publications generated by Kenya Law including the steps that go towards publication of these products.

Kenya Law was able to showcase the various systems and processes that underpin the discharge of its core mandate. The Law Reporting Department and the Laws of Kenya Department were thus able to make presentations that elucidated, in fine detail, the processes that they go through to ensure that these two main products of the institution, the law reports and the Laws of Kenya, are produced and maintained in a fashion that is both useful and accessible.

The Honourable Judges were therefore able to fully understand the legal framework under which Kenya Law was established, its mandate and its role and place in the administration of justice chain.
Kenya Law participated in this year’s annual ‘Justice Cup’ tournament which is a six-a-side football tournament organized by the Law Society of Kenya (LSK). The event brings together teams drawn from the various stakeholders involved in the administration of justice, including judges and magistrates, auctioneers, advocates, law students, the police, parliamentarians, human rights NGOs and media houses from around the country.

This year, the Justice Cup Football Tournament’s event was held on Saturday, 26<sup>th</sup> July, 2014 at the Parklands Sports Club under the theme of ‘Security, Rights & Justice’ and among the guests who graced the occasion were the Chief Registrar of the Judiciary Mrs. Anne Amadi, the Law Society of Kenya’s Chairman Mr. Eric Mutua and Mr. Otiende Amollo, The Chairman of the Ombudsman amongst others.

The day started off on a tensed note for the Kenya
Law’s Team having failed to make a great impact in the previous recent tournaments but as the day progressed and with constant hard work from the team and the unwavering support from the cheering staff members, positive results, could gradually be realized leading to the team winning the plate after beating Dally & Figgis Advocates 5-3 in finals of the plat category through the penalties. The tournament attracted a total of 39 teams from the legal fraternity, NGOs, Media Houses & private firms.
At hand to receive the plate on behalf of Kenya Law was Mr. Evans Monari, a Kenya Law’s Council member. Participating in the tournament was not only a great sporting event, but helped in marketing Kenya Law as an organization and also provided a bonding experience with the various clients and stakeholders of the Organisation especially those within the legal fraternity.

Hopefully, Kenya Law’s team will next year retain the Plate trophy if not win the Overall Cup which was won this year by the Kenya School of Law.
Supreme Court Case Digest
Volume - 1 (2011 & 2012)

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This Publication features the summaries and the full text of all the decisions made by the Supreme Court in the year 2011 & 2012
The Judiciary Performance Improvement Project (JPIP) is a World Bank funded project with the Judiciary of Kenya. One of the objectives of the JPIP project is to strengthen the capacity of the Judiciary in Kenya to provide its services in a more effective, transparent, and accountable manner.

In line with this objective, a total of 8 staff members from the National Council for Law Reporting (Kenya Law) benefitted from a number of soft skills training programmes that were funded by JPIP.

The training programmes were aimed at equipping the officers with essential skills for effective organizational and human resource management.

The staff members benefitted and learnt the following training programmes:

- Leadership and Change Management (2) conducted by ESAMI in Pretoria, South Africa. Three team leaders from the Human Resources, Strategy and Finance departments travelled to South Africa for the two week training program from 30th June to 11th July 2014. The course was targeted at middle and senior level managers, in both the public and private sector, who wished to sharpen their grasp of leadership and change concepts.

The objective of the programme was to impart a high degree of performance competence to participants in their leadership role, placing particular emphasis on planning and implementing positive qualitative change in their organisations.

Participants were taught the nature of leadership as distinguished from rulership or managership. Finally they were taught to appreciate the need for change and the centrality of leadership in change.

- Results Based Management Training organized by the Kenya Institute of Management in Mombasa, Kenya. Two officers attended this one week training course from the 7th of July to 11th July 2014. The objectives of the training were to introduce the participants to the basics of project management, the importance of project risk management and communication planning. The participants learnt how to monitor and evaluate projects as well as sustain them after their life cycle has ended.

- Senior Management Development Programme by ESAMI in Arusha Tanzania. Two senior officers from the human resources department and the research and development department attended the training program that ran from the 14th of July 2014 to the 25th of July 2014. The program aimed at enhancing leadership and direction at senior and top management levels. It assisted participants to increase their knowledge.
of key management issues and develop critical techniques for effective corporate management. Finally participants learnt how to effectively direct organisation activities to enhance the overall efficiency of their organization. The content of the programme was divided into three broad modules, namely, the General Management Module, the Human Resources Module and the Financial Management Module. The training beneficiaries have since cascaded the lessons learnt to other staff members departmentally and organizationally. A comprehensive plan on how lessons learnt will be implemented was also developed and will guide the organization in adopting new technical and service techniques.
In the past, it used to be that I.T departments drove technology, but that has changed dramatically in recent years. The consumerization of I.T revolution has shifted the technological culture so that the users are the ones getting the latest, cutting edge technologies first, and they want to bring those devices to work. The concept of bring-your-own-device (BYOD) is a growing trend for business IT. There are a variety of benefits to allowing users to supply their own PC and mobile devices, but there are also some concerns. In order to embrace BYOD with confidence, it is important to understand both the pro's and the cons.

Benefits

Businesses that embrace BYOD have some advantages over competitors. For starters, BYOD programs generally shift costs to the user. With the worker paying for most, or all of the costs for the hardware, voice and/or data services, and other associated expenses, companies save a lot of money per month, per user.

That brings us to the second significant benefit: worker satisfaction. Users have the laptops and smartphones they have for a reason those are the devices they prefer, and they like them so much they invested their hardearned money in them. Of course they would rather use the devices they love rather than being stuck with laptops and mobile devices that are selected and issued by the I.T department.

There are two major advantages that come with BYOD as well. BYOD devices tend to be more cutting edge, so the organization gets the benefit of the latest features and capabilities. Users also upgrade to the latest hardware more frequently than the painfully slow refresh cycles at most organizations.

Concerns

BYOD isn’t all wine and roses, though. There are some issues to consider as well. By embracing BYOD, organizations lose much of the control over the I.T hardware and how it is used.

Company-issued I.T equipment typically comes with an acceptable use policy, and it is protected by company-issued security that is managed and updated by the I.T department. It is a little bit trickier telling an employee what is, or is not, an acceptable use of their own laptop or smartphone.

It is therefore necessary to have a clearly defined policy for BYOD that outlines the rules of engagement and states up-front what the expectations are. You should also lay out minimum security requirements, or even mandate company-sanctioned security.
tools as a condition for allowing personal devices to connect to company data and network resources.

There is also an issue of compliance and ownership when it comes to data. Businesses that fall under compliance mandates or those that deal with sensitive and/or confidential data have certain requirements related to information security and safe-guarding specific data. Those rules still must be followed even if the data is on a laptop owned by an employee.

In the event that a worker is let go, or leaves the company of their own accord, segregating and retrieving company data can be a problem. Obviously, the company will want its data, and there should be a policy in place that governs how that data will be retrieved from the personal laptop and/or smartphone.

If you're not already taking advantage of the BYOD trend, you should definitely consider it. Just make sure you're aware of both the pros, and the cons, and address any potential issues up front.

Organizations that have adopted a bring-your-own-device (BYOD) strategy are granting employees choice and flexibility; as a result, they are gaining productivity. However, providing those benefits requires responsibility, as IT must find a way to ensure the safety of both the employees’ and the organization’s data on personal devices.
The Constitution of Kenya 2010: Decolonizing Kenya’s Jurisprudence

By: Dr. Willy M. Mutunga*  Edited by: Kipkemoi Sang**

INTRODUCTION

In 2010 Kenya created a new modern constitution that replaced both the 1963 Constitution and the past Colonial Constitution in 1963. This was the culmination of almost five decades of struggles that sought to fundamentally transform the backward economic, social, political, and cultural developments in the country.

The Vision of the Constitution of Kenya.
The making of the Kenyan 2010 Constitution is a story of ordinary citizens striving and succeeding to overthrow the existing social order and to define a new social, economic, and political order for themselves. Some have spoken of the new Constitution as representing a second independence.

There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism and 50 years of independence. In their wisdom the Kenyan people decreed that past to reflect a status quo that was unacceptable and unsustainable through: provisions on the democratization and decentralization of the Executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya that they delegate to institutions that must serve them and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human rights state in Kenya; mitigating the status quo in land that has been the country’s Achilles heel in its economic and democratic development; among others reflect the will and deep commitment of Kenyans for fundamental and radical changes through the implementation of the Constitution. The Kenyan people chose the route of transformation and not the one of revolution. If revolution is envisaged then it will be organized around the implementation of the Constitution.

The Vision of the New Judiciary under the Constitution
The Old Judiciary

Let me reflect briefly on the nature of the judiciary of which all Kenyans are a part. We are the heirs, albeit by what you might think of as a bastard route, to a tradition that gives a very powerful place to the judiciary: under the common law system. It is a flawed inheritance because it came to us via the colonial route. The common law as applied in Kenya, at least to the indigenous inhabitants, as in the colonies generally, was shorn of many of its positive elements.

During the Colonial era we were not allowed freedom of speech, assembly or association. Our judiciary was not independent, but was essentially a civil service, beholden to the colonial administration and very rarely minded to stand up to it. Indeed, administrative officers took many judicial decisions. There was no separation of powers. And institutions of the people that they trusted were undermined or even destroyed.

Indeed the common law was a tool of imperialism. Patrick McAuslan, upon whose book with Yash Ghai, most lawyers of Kenya cut their constitutional teeth, wrote satirically (plagiarising the late nineteenth century poet, Hilaire Belloc) “Whatever happens, we have got the common law, and they have not”. We can recall the trial of Jomo Kenyatta: a masterful display of juristic theatre in which the apparent adherence to the rule of law substantively entrenched the illegitimate political system in power at the time.

1 Dr. Willy Mutunga is the Chief Justice of the Republic of Kenya and the President of the Supreme Court of Kenya. He gave this speech to judges and guests of the Kenyan Judiciary on the occasion of launching the Judiciary Transformation Framework on May 31, 2012.

2 LLB (Bachelors of Laws-4 th Year ), Mount Kenya University School of Law, MKUSL, Intern, Law Reporting Department National Council for Law Reporting(Kenya Law), (edited this article), the article was also published by ‘Socialist Lawyers’ Magazine of the Hablame Society of Socialist Lawyers (Stots) October 2013 pg 20-3


4 “Whatever happens, we have got the Maxim gun, and they have not.” See, Beloc, H., The Modern Traveler.- 1898, Cornell University Library, (2009).

5 My trusted colleague, Professor Obora Okofo of Osgoode Hall Law School (Canada) was
Colonial mind-sets persisted, in the executive, the legislature and, unfortunately, even in the judiciary, even after independence. We continued to yearn for the rule of law.

By the rule of law, I do not mean the sort of mechanical jurisprudence we saw in cases like the Kapenguria trials. It was mechanical jurisprudence that led the High Court in independent Kenya to reach an apparently technically sound decision that the election of a sitting President could not be challenged because the losing opponent had not achieved the pragmatically impossible task of serving the relevant legal documents directly upon the sitting President. Again it was this purely mechanical jurisprudence that fuelled the decision of a High Court that the former section 84 of the independence Constitution (that mandated the enforcement of Bill of Rights) rendered the entire Bill of Rights inoperative because the Chief Justice had not made rules on enforcement as he was obligated by the self-same Constitution to do.7

The New Judiciary, the New Rule of Law, the Decolonizing Jurisprudence

It is time for the judiciary of Kenya to rise to the occasion, and shake off the last traces of the colonial legacy. As I see it, this involves a number of strands or approaches.

There must be no doubt in the minds of Kenyans, or of us, about our impartiality and integrity. No suspicion that we defer to the executive, bend the law to suit our long term associates or their clients, or would dream of accepting any sort of bribe.

Secondly, to be a judge has always been the pinnacle of ambition of any lawyer who actually takes pride of mastery of legal principles and techniques, hard working, and committed to applying these qualities in the task of judging.

Thirdly, in Kenya we have been the inheritors of not only the common law but of English Court procedures. While English Court procedures have over time been made simpler, some archaic terminology has been done away with, case management has been firmer, and ADR has been much more used, in Kenya we still have cases that are heard in driblets. We need radical changes in judicial policies, judicial culture, end of judicial impunity and laziness.

Fourthly, I see in the Constitution, especially Article 159 (2), a mandate for us to carry out reforms tailored to Kenya’s needs, and aimed at doing away with these colonial and neo-colonial inefficiencies and injustices. It is perhaps remarkable, and indeed, a paradox that, although disappointment with the judiciary was at least as great among the common Kenyan as frustration with politicians, it is also true that they chose to place their faith in the institution of the new judiciary in implementing the new Constitution.

Fifthly, what I want to emphasise here is the need to develop new, not only highly competent but also indigenous jurisprudence. I link this last adjective to the Constitution’s value of patriotism. I conceive that it requires the judge to develop the law in a way that responds to the needs of the people, and to the national interest. I call this robust (rich), patriotic, indigenous, and patriotic jurisprudence as decreed by the Constitution and also by the Supreme Court Act of Kenya.8 Above all, it requires a commitment to the Constitution and to the achievement of its values and vision.9

Sixthly, few people now maintain the myth that judges in the common law system do not make law. Our Constitution tears away the last shreds of that perhaps comforting illusion, especially in the context of human rights, when it provides under Article 20 (2) (a) that “a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom”. As I read it, it means that if an existing rule of common law does not adequately comply with the Bill of Rights, the court has the obligation to develop that rule so that it does comply. And it is matched (in Article 20(3)(b), which follows) by an obligation to interpret statute in a way that also complies with the Bill of Rights. This is an obligation, not to rewrite a statute, but to read it in a way that is Bill of Rights compliant if at all possible. I would urge that it is not just the Bill of Rights that should be used as the touchstone of legal appropriateness but also the Constitution more generally. The Constitution says no less.

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8 Section 3.

9 See the Constitution of Kenya 2010: the Preamble, Articles 2(4), 10, 20(3), 20(4), 22,23,24, 25,159, 191(5) and 259. These articles decree how the Constitution is to be interpreted and, indeed, under Article 10(1)(b) any law. And, “any law” would include, in my view, rules of common law, as well as statute.
Elements of Robust (rich), Indigenous, Patriotic, and Progressive Jurisprudence

The elements of this decolonizing jurisprudence would include the six strands and approaches discussed above, would shun mechanical jurisprudence, but would also reflect the following ingredients:

The decolonizing jurisprudence of social justice does not mean insular and inward looking. The values of the Kenyan Constitution are anything that we can and should learn from other countries. My concern, when I emphasize “indigenous” is simply that we should grow our jurisprudence out of our own needs, without unthinking deference to that of other jurisdictions and courts, however, distinguished. And, indeed, the quality of our progressive jurisprudence should be a product for export to these distinguished jurisdictions. After all our constitution is the most progressive in the world.

While developing and growing our jurisprudence commonwealth and international jurisprudence will continue to be pivotal, the Judiciary will have to avoid mechanistic approaches to precedent. It will not be appropriate to reach out and pick a precedent from India one day, Australia another, South Africa another, the US another, just because they seem to suit the immediate purpose. Each of those precedents will have its place in the jurisprudence of its own country. A negative side of a mechanistic approach to precedent is that it tends to produce a mind-set: “If we have not done it before, why should we do it now?” The Constitution does not countenance that approach.

Our jurisprudence must seek to reinforce those strengths in foreign jurisprudence that fit our needs while at the same time rescuing the weaknesses of such jurisprudence so that ours is ultimately enriched as decreed by the Supreme Court Act.

The task of growing such jurisprudence involves a partnership: between other judiciaries, the profession and scholars. I hope that the bar, too, will respond to the challenge. Standards of advocacy need to improve, the overall quality of written and oral submissions needs to improve. We have so far found the jurisdictions of India, South Africa and Columbia to be great partners as our respective constitutions are similar in many respects. Besides, decolonizing jurisprudence requires South-South collaboration and collective reflection.

We are trying to move away from excessively detailed written submissions. This makes sense only if the judges read the written submissions in advance. And do so with a critical eye, prepared to interrogate the arguments of counsel. And prepared also to put forward alternative ideas. It is a questionable practice to come up with ideas and authorities in the privacy of Judges’ chambers when writing a judgment, if counsel had no chance to put forward argument on those ideas and authorities. The very purpose of written submissions is to try to prevent that happening by enabling the judge to be well prepared in advance. If the judge is well prepared, he or she is in a much stronger position to criticise counsel for not being prepared. In this way the bench can help encourage higher standards of advocacy.

We are trying to make this task easier for you by enhancing the quality and quantity of legal materials available to the bench by and appointing legal researchers. It will be a learning experience for judges as well as legal researchers to work out how the cause of justice can best be served by this innovation. We are confident that this offers an opportunity to make major strides in the quality of the jurisprudence in the courts of Kenya.

I want also to add that these major strides in the quality of jurisprudence in our courts can be amplified if we improved our collegiality and ability to co-educate each other so that the decisions coming out of our courts will reflect the collective intellect of the Judiciary distilled through the common law method as well as through regular discourses and learning by judicial officers. To be a good judge must involve continuous training and learning and regular informal discourses among judges.

The Judiciary Training Institute (JTI) must become our institution of higher learning, the nerve centre of our progressive jurisprudence. JTI will co-ordinate our academic networks, our networks with progressive jurisdictions, our training by scholars and judges, starting with our own great scholars and judges. In our training to breathe life into our constitution our jurisprudence cannot be legal-centric; it must place a critical emphasis on multi-disciplinary approaches and expertise.

Now that law reporting is regular under the able leadership of National Council for Law Reporting, the Supreme Court has also established a program of researching the “lost jurisprudence” during the years when reporting did not exist. I am confident
there will emerge gems and nuggets of progressive jurisprudence from that search.

Let us hope that the community of scholars responds to the challenge equally. The quality and quantity of Kenyan legal literature is disappointing. We need high quality commentary on the Constitution, and on our laws. And we need high quality commentary on our judgments. We must not be over-sensitive to criticism. No one learns anything if they are not criticised. There are some small shoots of revival in legal writing. Let us hope they thrive and multiply.

Article 159(2)(e) says that the courts must protect and promote the purposes and principles of the Constitution. I have sought to establish such framework for purposive interpretation in two Supreme Court matters.10

The Constitution took a bold step and provides that “The general rules of international law shall form part of the law of Kenya” and “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”.11 Thus Kenya seems to have become a monist state rather than a dualist one! The implications of this will have to be worked out over time, as cases come before the courts. Even in the past, Kenyan judges have not ignored international law. They have often quoted the Bangalore Principles on Domestic Application of International Human Rights Norms.12

Now, however, the courts have greater freedom. Many issues will have to be resolved. Indeed, we now have great opportunity to be not only the users of international law, but also its producers, developers and shapers.

In some ways our task is rather easier than that faced by some other court systems struggling to establish the validity of their place in the constitutional scheme.

The principle of Marbury v Madison, that established the possibility of judicial review of legislation, and at the same time the key place of the courts in the upholding of the US Constitution, is enshrined in our Constitution (Articles 23(3)(d) and 165(3)(d)). So are the basic characteristics of the Indian public interest litigation (Articles 22(2) and 258(2)). Our path has been smoothed: we do not have to strive to establish our role as guarantor of the supremacy of the Constitution, or of the rights of the downtrodden. We are indeed clearly mandated to fulfil these roles.

Let me again remind you that our Constitution specifically mandates public interest litigation. Our appointment process is precisely designed to give us independence of the executive and the legislature so that we can if necessary “force other institutions of governance to do what they are supposed to do”. We can only pray that we have the moral stature, the legal skills and the courage to do what we are directed to do.

Finally, Article 159(2) of the Constitution has restored “traditional dispute resolution mechanisms” with constitutional limitations.13 We live in our country where courts are not the only forums for administration of justice. Traditional dispute resolution mechanisms keep these institutions as free as possible from lawyers, ‘their law,’ and the ‘law system of the capitalist.’14 The development of the “Without the Law” jurisprudence will be a critical nugget in our progressive jurisprudence.

Conclusion
Professor Upendra Baxi wrote, of Public Interest Litigation in India:

“The Supreme Court of India is at long last becoming…the Supreme Court for Indians. For too long the apex court had become “an arena of legal quibbling for men with long purses”. Now increasingly, the court is being identified by the Justices as well as people as “the last resort of the oppressed and bewildered.”15

I hope that the courts of Kenya will truly be viewed as the courts for all Kenyans, and the salvation of the Kenyan oppressed and bewildered. And, to return to where I really began: I believe we shall only do this through the rigorous but creative use of the basic values of our Constitution, indeed through the judiciary’s becoming the embodiment of those values, especially of patriotism, social justice and integrity.

10 In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion of the Supreme Court (Reference No 2 of 2012, In the Matter of Jodh Singh Rai and 3 Others v Tarlochan Singh Rai and 4 others (Petition No 4 of 2012).
11 Art. 2 (5) and (6).
12 Principles 7,8
13 Under Article 159(1) of the Constitution traditional dispute resolution mechanisms shall not be used in a way that (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results to outcomes that are repugnant to justice and morality; or (c) is inconsistent with this Constitution or any written law.
15 In “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India” in Dhawan et al., Judges and the Judicial Power (London and Bombay: Soreet and Maxwell and Tripathi, 1985) 289 (citations removed).
The Association of Reporters of Judicial Decisions (ARJD) is a professional membership organization open to individuals working with governments or non-governmental agencies involved in reporting of the Judicial decisions.

The Association was founded in 1982 by Henry C. Lind, the Reporter of Decisions for the United States Supreme Court. It has since expanded to include Reporters of Decisions and comparable officials serving courts that officially publish opinions relied on for their precedential value from all over the world.

Membership is also available to Reporters’ assistants and staff and to those retired from the profession. Current membership spans across the world, with Kenya being a key player in the organization. It joined the association in 2006 and it has been an active participant in ARJD activities, including the Association’s Annual Meetings.

This year Kenya Law joined other Reporters in the Association’s Annual Meeting held in Denver Collorado, USA from 6th to 10th August 2014.
Kenya Law was represented by Mr Longet Terer, (Ag. CEO), Cornelius Lupao (Team Leader - Law Reporting Department) and Andrew Halonyere a Senior Law Reporter.

The conference commenced with welcoming remarks from the Colorado Court of Appeals Chief Judge Alan Loeb. He urged the Reporters to have a productive meeting and to explore and enjoy historic Denver Colorado and highlighted this year’s theme of the conference which centered around emerging jurisprudence from courts in various thematic areas across the world. The congregation of reporters was also welcomed by Bill Hooks, the outgoing AJRD President (2013 – 2014). This was later followed by a narration of the History and Current State of Tribal Court Opinion Reporting, by Laurie Oliver, Team Coordinator, Judicial, Legal Editorial Operations, Professor Jane Thompson, an Associate Director of Faculty Services and Research, William A. Wise of University of Colorado and Justice Jill Tompkins the President National American Indian Court Judges Association. According to the presenters the basic premise for tribal court jurisdiction in the United States was from federal recognition of inherent tribal sovereignty. Inherent tribal sovereignty basically meant that the tribes that were in the United States land first, were self-governing at that time, and the U.S. federal government recognized the original sovereign powers that tribes already had.

Peter W. Martin and Jane M. G. Foster a Professor of Law in Cornell University then, made a presentation on Post Release Revisions of Judicial Opinions, a key issue that frequently every reporter including those within or jurisdiction are faced with on day to day basis. An issue arose as to whether a reporter could amend a judgment if it had errors. The presenters expounded on the range of current practices with suggestions such as, where there is an error in quoting a section of statute in a judgment, the best practice in many jurisdictions, would be to consult the concerned judicial officer before working on the judicial opinion.

During the round table discussions, the main topic discussed was on succession planning. There was an open interaction between New and Retired Reporters where it emerged that there were gaps in law reporting in certain jurisdictions that was occasioned by lack of permanent law reporters. It was therefore emphasized by members that every reporter should at least endeavor to train and be deputized with at least two reporters to evade gaps in Law Reporting. The other issues that were discussed...
was membership participation, especially current membership, expanding and increasing membership participation and communication, and the role of social networks such as twitter, blogs and facebook in law reporting, an aspect that Kenya Law has taken initiative in utilizing the same.

Among other presenters at the conference included Ronald Nemirow who made a presentation on Marijuana Legalization in Colorado and Matt Butterick on Typography for Lawyers; Style, Language and Publication Guidance.

During the conference members also had an opportunity to visit the Colorado Supreme Court and Court of Appeals where the congregation was warmly welcomed by Justice William W. Hood, III. This was further followed by a tour in the judicial building, the law reporters were guided with one of their own the Colorado Law Reporter Leah Walker. The day was later capped with a dinner tour on a vintage locomotive train to the rocky mountains of the old west Colorado. Apart from the conference, social events were scheduled on a daily basis at the Hyatt Hotel pavilion, providing an informal setting for attendees to interact and discuss issues of common interest.

The concluding session revolved around plans for the preparation of the 2015 and 2016 venues for the ARJD meeting and the elections of the AJRD President. The meeting ended on a high note with a majority of the members voting in favour of Susan Williams (Law Reporter of the Supreme Court and Court of Appeals of Arkansas) and also in favour of holding the 2016 meeting in Columbus Ohio. The 2015 AJRD meeting will be held in Nashville.

On the last day of the session, Bill Hooks the outgoing President was appreciated by the members and presented with a gift on behalf of the ARJD members by his successor President Susan Williams. Mr Longet the Ag CEO of Kenya Law thereafter presented to both the outgoing and the incumbent president with animal wood carving gifts from Kenya on behalf of Kenya Law.
At Kenya Law we acknowledge that our conduct and professional practices today must be designed to create and shape a sustainable tomorrow. And one of the ways of achieving this is by nurturing good working relations. Therefore every year towards the last quarter of the year Kenya Law holds its annual staff team building retreat. But before this major retreat, every department holds a departmental retreat. This year the Law Reporting Department held its departmental retreat at the Sarova Shaba, Samburu.

The Law Reporting Department is the largest department in the organization which drives the core mandate of the institution of monitoring and reporting on the development of Kenyan jurisprudence through the publication of the Kenya Law Reports.

The department comprises of Law Reporters unit, Technical Proof Reading unit, Inventory Unit and the Publishing Unit and it also supervises Interns from the Kenya School of Law. It has a membership of about 42 officers.

This year, the department took some time off from the daily busy office life and retreated to reflect on it’s activities for the year thus far as well as chart the way forward with regard to and further improvements in meeting it’s mandate.

The department focused on discussing its achievements in line with its core mandate and how it satisfies the values of the organization as a whole. The discussions were very interactive and every member of the department participated in the session.

The department had the chance to evaluate the Head of Department’s interaction with the other members of staff. Members were allowed to give their views on the HOD’S leadership, work ethics etc.
Whereas it is highly unlikely in other state organizations for members of the department to evaluate their Heads of Department, The Law Reporting Department fosters and improves better working relations amongst members of the department and its leadership.

Apart from the deliberations, various activities meant to built synergies amongst the members were carried out. This included various sporting activities.
Teach Yourself to Be Rich

By Jacinta Moraa

Teach Yourself to Be Rich

Being rich is what so many of us want. Why? Being rich has many definitions. For some, it defines success. For others, it means winning. It means freedom, responsibility or freedom from responsibility. For some, it means all of these things. What’s it mean for you?

Just the thought of being rich lets us daydream. We often say, "If only I was rich enough to (insert dream, goal or fantasy)."

Why aren't you rich? What's holding you back? Why aren't you, at least, on the way to achieving riches? Kids become millionaires. We hear stories of millionaires today who went from rags to riches in their 20s, 30s and 40s. Then, there are those who attract riches late in life.

Why aren't you rich?

Use Your Head

We recently watched a YouTube video about neural pathways. The more neural pathways are used the stronger they become, similar to muscles. It is neural pathways that allow the mastery of skills, such as playing the violin, playing basketball or doing math. We think of some of the greats, such as Michael Jordan, who didn't qualify for his high school basketball team, and Bill Gates, who dropped out of Harvard.

The world's greats built their neural pathways. They live, sleep and breathe their craft; think Tiger Woods or Serena and Venus Williams. In each case, these stars credit their parents for driving them to achieve. Each mastered their craft through repetition, practice and study.

The question then becomes, can this be done with money? The answer is yes! How? We must teach ourselves to be rich.

Rich Thinking

How do we teach ourselves to be rich? We, too, teach ourselves to be rich through repetition, practice and study. Every day wake up and tell yourself you are a winner. Get on your playing field and practice. Study the masters, living and dead, in your field.

Below are three key ways to teach yourself to be rich:

1. Think Rich

- Rich people think about financial growth. They learn the nuances of their business and industry. They've charted a clear path to success and use their time and energy efficiently. Is this you?
- Rich people don't spend more than they make. They understand that in order to become and stay rich, they must earn more than they spend. Are you doing this?
- Rich people make their money work for them. Whether through investing in their business or the stock market, they know they must invest. Investing makes their money multiply by putting their money to work where they cannot physically be. Is your money working harder than you?

2. Be a Master

- Often the poor stay poor because they are either not skilled nor retain enough intellectual property to demand a higher salary. Mastery of a skill or thought is a commodity. When you master a skill or have proprietary knowledge, you can demand more money for your time and efforts. Of what are you the master?
- Many of today's rich are so because they were or are on the forefront of a technology or industry. Of what are you on the forefront?

3. Stay focused

- We often only see the rich playing. What we don't see is their time spent mastering, building and discovering. Behind closed doors they put in the hours, not on the couch watching television, but rather in the office, in the lab or on the court. The rich don’t waste their time because it's their most valuable asset. How do you spend your time?
The rich constantly learn. They are curious and engaged. With the plethora of information available on the internet you can do the same. YouTube, Coursera, iTunes University and the internet in general offer numerous ways to learn and grow more in almost any area. What more can you learn?

Many of us dream of being rich. We want the comfortable and rewarding life. Getting there is the hard part, but it’s easier if we rewire our neurons to mimic the rich. Thinking like a champion and following these three steps will do just that.

Mighty Oak

Stand tall oh mighty oak, for all the world to see, your strength and undying beauty forever amazes me.

Though storm clouds hover above you, your branches span the sky, in search of the radiant sunlight you count on to survive.

When the winds are high and restless and you lose a limb or two, it only makes you stronger, we could learn so much from you.

Though generations have come and gone and brought about such change, quietly you’ve watched them all yet still remained the same.

I only pray God give to me the strength he’s given you, to face each day with hope, whether skies are black or blue.

Life on earth is truly a gift every moment we must treasure, it’s the simple things we take for granted that become our ultimate pleasures.

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Workplace Stereotypes

By Eva Murage, Laws of Kenya Department

Matthew 7:1 “Do not judge, or you too will be judged.”

What is a Stereotype?

The definition of a stereotype is any commonly known public belief about a certain social group or a type of individual. Stereotypes are often confused with prejudices, because, like prejudices, a stereotype is based on a prior assumption. Stereotypes are often created about people of specific cultures or races and might be an exaggerated image of a person or groups, allowing for little or no social variation or individual differences, usually passed along by peers, family members or the media.

Workplace Stereotyping: A Silent Productivity Destroyer

When you think of diversity in the workplace you typically think of race and gender, but in reality workplace diversity is much broader. Consider your co-workers; they differ in a variety of ways such as age, tribe, marital status, official titles, religion, disability and nationality. All of these differences can lead to stereotyping which may result in workplace tension.

Can Stereotyping Have a Negative Effect in a Workplace?

Quite simply, the answer is “Yes.” Stereotyping, or in other words placing labels and identifying people based on their membership in a certain social category results in making general assumptions about an individual with little or no personal knowledge about them. In other words, many people base their judgment of a person based on tribe, gender, age, etc. and the most common stereotypes are derogatory and refers to negative characteristics.

Unfortunately, in the workplace it’s no laughing matter. What happens when you make these assumptions of a colleague based on the stereotypes affiliated with that person’s gender, tribe, religion etc., is you subconsciously start to look for things to confirm your beliefs and over time you might pick up on one or two isolated incidents that cause you to justify or confirm your assumptions. The use of these stereotypes prevents people from getting to know one another and interacting effectively based on individuating information and may start off with a hostile and unfriendly relationship, so when you close your mind about the individual it damages your ability to really work well with that person.

However, if you were to get to know your new co-worker as an individual, you would be able either to put aside any differences for the sake of productivity or to learn some new perspectives and build a strong relationship based on mutual understanding. This holds true for any individual and any potential stereotypes.

How Do Stereotypes Hurt Us?

In the corporate world, there is a high price to be paid for stereotyping:

- Litigation
- Lost employees
- Poor employee morale
- Lost sales and customers
- Difficulty hiring top-level employees
- Difficulty retraining employees
- Diminished productivity/profits

However, we also suffer personal consequences when we judge people based on biases, labels, and stereotypes. We miss out on valuable experiences, insights, and amazing relationships. We also miss out on connecting with others on a genuine level.

The Problem of Positive Stereotypes

While it is obvious how a negative stereotype can be a problem, many people are under the mistaken impression that a positive stereotype, such as the statement that members of a particular ethnic group are smart, is a good thing. Yet, that very stereotype can cause people to place unreasonable expectations on members of that particular ethnicity, which in turn can lead to undue pressure and/or erroneous assessments of competence. Imagine failing when everyone expects you to succeed because of your
ethnicity, consider how much pressure you would feel to make things get done the right way, how much harder you would believe that you have to work since people have a positive notion about you based on your ethnicity. Thus, even though it may appear that a positive stereotype embeds a compliment, refrain from using it and get to know the person instead.

Just as stereotypes are harmful and unfair in everyday life, they can quickly wreak havoc on morale and productivity in the workplace. Varying degrees of stereotyping occur in workplaces despite a greater awareness and acceptance of diversity.

Why is it important not to stereotype people?
Because it can get to some people and hurt them. Also just because they listen to something different, look different, or do something different doesn’t mean they don’t have feelings.

Why do people have stereotypes and judge others?
Some people are insecure and many people find that judging others distracts from their own weaknesses and it is easy to be judgemental about those who are different from us. As humans we tend to label others because it makes us feel safe and superior and it is often easier than to look at people too deeply.

Why is it Bad to Stereotype?
Stereotyping is not only hurtful, it is also wrong. Even if the stereotype is correct in some cases, constantly putting someone down based on your preconceived perceptions will not encourage them to succeed.

Stereotyping can also lead people to live lives driven by hate, and can cause the victims of those stereotypes to be driven by fear. It is a lose-lose situation, both for those who are doing the stereotype and those who are victims.

Below are some of the common stereotypes which can impact the workplace.
* Single vs. Married: Single people feel as though they are seen in one of two ways. First, they are often thought to be frivolous and more interested in their social life than they are their work, many say they feel stigmatized by their single status as being damaged goods because they aren't married. Secondly, some say their married co-workers think they should be able to work longer hours because they don't have any outside responsibilities. On the flip side, singles often say they can focus more on their work because of their status and can use it to their advantage to move up the corporate ladder. Others view their married counterparts as having an advantage because they have a partner to help with outside responsibilities.

* Children vs. No Children. While this typically impacts women more than men, it isn't just a female issue. But a lot of women say they are made to feel guilty at work because of how they have to juggle their work and childcare responsibilities while at the same time they are made to feel guilty because they are working and not at home with their children. Employees who don't have children sometimes feel resentful when they have to cover for co-workers who frequently are absent because of child-related emergencies. Today, more working women have young children at home and employers are finding ways to manage this fairly.

* Generation X (those born between 1961 and 1981) vs. Generation Y (those born between 1982 to 2002): As the population ages, more and more people are choosing to work much longer in their careers. The Generation X workers did not grow up with technology as the Generation Y workers. So there is a tension between the tried and true ways of doing business versus the technological solutions of today. This generational gap can create serious friction in the work place. But instead of immediately stereotyping the individual, you should get to know the other person and appreciate each other's strengths. Learn from each other.

* Old Geezers vs. Young Turks: Aged-based stereotyping affects all groups. Young workers may be viewed as having a sense of entitlement in that recent graduates expect a high grade of employment even though they may be considered incompetent due to lack of experience. This unfair thought process works against individuals who have true drive and a strong work ethic. Conversely, older workers may be seen as “lifers” or simply counting the days towards retirement without putting in much effort. This stereotype ignores years of hard work performed by these employees, along with the experience and leadership these dedicated professionals can provide to younger generations.

The bottom line is everyone should keep an open
mind and get to know your co-workers as individuals. Avoid making assumptions and stereotyping. None of us is the same and no one fits into a specific category. Respect diversity of all types in your work environment.

Age-based stereotyping affects all groups. Young workers may be viewed as having a sense of entitlement in that recent graduates expect a high grade of employment; young employees may be considered incompetent due to lack of experience. This unfair thought process works against individuals who have true drive and a strong work ethic. Conversely, older workers may be seen as "lifers" or simply counting the days toward retirement without putting in much effort. This stereotype ignores years of hard work performed by these employees, along with the experience and leadership these dedicated professionals can provide to younger generations.

Age-related stereotypes are prevalent in workplaces that employ people of a wide range of ages. Younger employees might believe that older employees are incapable of keeping up with modern-day trends, while older workers can mistakenly believe that their young co-workers are lazy. A study done in 2011 reported that traits of a workplace that has problems associated with age include employees judging each other based on their age alone and employers only hiring people from a certain age group.

Breaking Down Stereotypes

Breaking down, recognizing, and eliminating stereotypes begins with dialogue. Conversation reduces bias because we learn more about each other and reach an understanding. Conversation also reduces preconceptions by educating us on misinformation and it limits the spread of bias.

Steps to Take to Assess and Eliminate Stereotypes

- Respect and appreciate others’ differences. Imagine if people looked and acted the same. It would be boring!
- Consider what you have in common with other people — lots more than you think.
- Avoid making assumptions or creating labels.
- Develop empathy for the others. Try to walk in their shoes.
- Educate yourself about different cultures and groups.

These days it is unacceptable to have stereotypical views of others in the workplace because it can be very costly, not to mention the lack of productivity and profits. It is important to recognize and remember that we all have stereotypes; it is part of the human experience. However, the first step is to be honest and recognize our preconceived notions about others and why we have formed them, and then take an active approach to educate ourselves.

Three Ways to Decrease Stereotype in a Workplace:

1. **Encourage Team work**
   - Team work builds relationships among employees
   - Employees are more open to learn about different cultures
   - Make people feel comfortable about sharing

2. **Expand employee knowledge about diversity**
   - Teach employees about cultural difference
   - Apply effort to you endeavor to learn from things you don't understand

3. **Have an open mind**
   - Look at situations from other person’s point of view
   - Be open to new experiences
   - Practice humility

Conclusion

Stereotype is a deadly weapon existing around us. As long as there are different races and cultures, stereotypes will never go away. This is because humans fear what they do not understand and thus, must categorise behaviour in order to better understand the world around them. It often targets people with diverse appearance, beliefs, and behavior, which in turn influence people's decisions. It could be harmful without people realizing it. Stereotyping still takes place today yet people remain tolerant to these behaviors. It must be stopped.
Greetings
I am Ag. SRM Kandara. I would like to get feedback on my appeal files from this service. I have learnt of it from my colleague.

Kindly advice.

Ag. SRM Kandara
Cecilia K.
Kithinji

I love caseback it keeps us informed. Well done caseback. Thank you.

Hon. Munyekenye

Many thanks for this service. It is a good learning tool. Thank you.
The Supreme Court Cases

Rules on Timelines of filing & determining electoral disputes are non-negotiable
Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others
Petition No.18 of 2014 (consolidated with Petition No. 20 of 2014)
Supreme Court of Kenya at Nairobi
W M Mutunga, CJ & P, K H Rawal, DCJ & V-P; P K Tunoi, M K Ibrahim, J B Ojwang, S C Wanjala & S N Njoki,
SCJJ
August 29, 2014
Reported by Teddy Musiga & Charles Mutua

Brief facts
The matter had its origins in the High court, where the first respondent (Ferdinand Waititu) challenged the election of the first appellant (Evans Kidero). The petitioner at the High court (Ferdinand Waititu) based his petition on the main claim that the election of the 1st appellant herein (respondent then) had not been conducted in accordance with the principles embodied in article 86 of the Constitution. The High court (by majority (with Warsame, J dissenting) upheld the election of the first appellant thereby dismissing the petition as having been conducted in accordance with the electoral principles. The petitioner having been aggrieved by that decision moved to the Court of Appeal. However, the appeal was filed 72 days after the delivery of the trial court judgment notwithstanding provisions of section 85A of the Elections Act that provided that electoral appeals from the High Court to the Court of Appeal had to be filed within 30 days of the delivery of the High Court judgment.

In admitting & entertaining the appeal, the Court of Appeal opined on two major grounds, that; firstly, section 85A (a) of the Elections Act being a statutory timeline, was not as mandatory as the timelines named in the Constitution itself; and so a court of law could extend the period within which an intending petitioner could lodge an appeal beyond the 30 day limit prescribed in the Elections Act that provided that electoral appeals from the High Court to the Court of Appeal had to be filed within 30 days of the delivery of the High Court judgment.

Rules were applicable in their totality to election petition appeals before the court; and so Rule 82 (1) of the Court of Appeal Rules (which provided for the certificate of delay) could apply to extend the time for filing an election petition appeal beyond the 30 day limit prescribed by section 85A of the Elections Act.

The appellants herein (then respondents) were aggrieved by that decision and moved to the Supreme Court for a final determination.

Issues
I. Whether the Court of Appeal acted without jurisdiction by entertaining an appeal filed 72 days after the delivery of the trial court's decision yet section 85A(a) of the Elections Act provided that appeals to the Court of Appeal had to be filed within 30 days from the date of judgment of the High Court.

II. Whether the Court of Appeal could entertain and determine appeals filed out of time where the delay in filing those appeals emanated from judicial processes/ bureaucracies at the registries.

III. Whether the Court of Appeal disregarded the doctrine of stare decisis, on the question of timeliness, on the issue of scrutiny, and on the burden & standard of proof by failing to apply binding decisions of the Supreme Court in contravention of article 163(7) of the Constitution.

IV. Whether an election could be nullified on the basis that a party did not get a fair trial before the trial court.

Election Law – Election petition – timeliness in filing election petitions – mandatory nature of timelines in election petitions – claim where an election appeal was filed 72 days after the date of the judgment of the trial
court whereas electoral laws provide for filing of election appeals to the Court of Appeal within 30 days of that judgment – whether a certificate of delay under the Court of Appeal rules could be entertained in electoral disputes –Constitution of Kenya, 2010, article 87. Elections Act, section 85A (a). Court of Appeal Rules, Rule 82.

Constitutional Law - Fundamental Rights & Freedoms - right to fair trial – remedies to breach of right to fair trial – whether an election could be annulled on the grounds of alleged breach of right to fair trial – Constitution of Kenya, 2010, article 50.

Held:

1. The guiding principles to be taken into account by parties who sought to predicate their appeals upon article 163(4)(a) of the Constitution included the fact that;
   i. A Court’s jurisdiction was regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent;
   ii. The chain of courts in the constitutional set-up have the professional competence to adjudicate upon disputes coming up before them; and only cardinal issues of law or of jurisprudential moment deserved the further input of the Supreme Court;
   iii. Not all categories of appeals lay from the Court of Appeal to the Supreme Court under article 163(4)(a); under that head, only those appeals from cases involving the interpretation or application of the Constitution could be entertained by the Supreme Court and;
   iv. Under that same head, the lower Court’s determination of an issue which was the subject of further appeal, had to have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;
   v. An appeal within the ambit of article 163(4) (a) was one founded on cogent issues of constitutional controversy;
   vi. With regard to election matters, not every petition-decision by the Court of Appeal was appealable to the Supreme Court; only those appeals arising from the decision of the Court of Appeal, in which questions of constitutional interpretation or application were at play, lay to the Supreme Court.

2. Article 163(4) (a) provided that appeals could lie from the Court of Appeal to the Supreme court as of right in any case involving the interpretation or application of the Constitution. The operative words (interpretation or application) carried different meanings. Interpretation of the Constitution involved revealing or clarifying the legal content, or meaning of constitutional provisions for purposes of resolving the dispute at hand. The basic reference point in constitutional interpretation was the text. On the other hand, application of the Constitution was a more dynamic notion. It entailed creatively interpreting the Constitution to eliminate ambiguities, vagueness and contradictions in furtherance of good governance. Quite often, it involved interpreting the constitution in such a manner as to adapt it to changing circumstances in the community, with care not to usurp the role of the legislature.

3. The Constitution at chapter 7 provided for the general principles of the electoral system – principles that stood alongside prescriptive norms. Where disputes arose with regard to the interpretation and application of such principles and norms in election petitions, the Supreme Court as the apex court could not gaze helplessly when moved by litigants.

4. The question of timeliness in filing election petitions, and whether the Court of Appeal erred in the interpretation of section 85A of the Elections Act vis a vis article 87(1) of the Constitution and the allegation that the appellate court elevated and applied a civil litigation rule (subsidiary legislation) to an election dispute, beyond and in breach of section 85A(a) and by extension, the Constitution itself were all pertinent constitutional controversies that invited the Supreme Court’s jurisdiction under article 163(4)(a) of the Constitution for a final interpretation or application of the Constitution.

5. Under section 85A (a), the respondent ought to have filed an appeal within 30 days from the date of the judgment (September 12, 2013) that would have been October 10, 2013. However, the appeal was filed on 22/11/2013) 72 days from the date of the judgment (September 12, 2013) that would have been October 10, 2013. However, the appeal was filed on 22/11/2013) 72 days from the date of the judgment of the High Court.

6. The question of timeliness in filing and determining election petitions as set by the Constitution and the Elections Act, section 85A(a) were neither negotiable nor could they be extended by any court for whatever reason. Section 85A of the Elections Act was neither a legislative accident nor a routine legal prescription. It was a product of a constitutional scheme that required electoral disputes to be settled in a timely fashion.

7. The court of appeal erred in law by choosing to
depart from the legal principles established by the Appellate court itself and affirmed by the Supreme Court on the timeliness in resolving electoral disputes and without specifically distinguishing the earlier cases in accordance with the normal judicial practice.

8. The Court of Appeal’s majority position even if founded upon notions of “justice and fairness” had overlooked clear imperatives of the law that were overriding. They overlooked the law of precedent, expressly declared in article 163(7) of the Constitution. They failed to recognize that section 85A of the Elections Act was directly born of article 87 of the Constitution. They had not taken into account that the ideals of justice were by no means the preserve of the intending appellant and that they had to enure to the electorate as a whole. They failed to recognize that the overall integrity of the democratic system of governance was sealed on a platform of orderly process, of which the judiciary was the chief steward and in which the course of justice already charted by the superior courts was to be methodically nurtured.

9. The majority on the appellate bench held that rule 82(1) of the Court of Appeal rules was applicable to the matter before them, with the effect of setting in motion the computation of time such as would have excluded the time taken by the High court in the preparation of the proceedings. If that rule were to be applied to election petition appeals, as the majority appellate judges held then it meant that an election petition appeal could be filed within as much as 60 days of the filing of the notice of appeal.

10. That rule provided in addition that the time taken to prepare the proceedings be excluded from the computation of the sixty days. That rule therefore, ousted the provisions of section 85A(a) of the Elections Act, regarding the time within which an appeal had to be filed. Such a rule if applicable defeated the object of efficient electoral dispute settlement under the Constitution. Further, an instrument of subsidiary legislation (Rule 82 of the Court of Appeal rules) could not override the provisions of an Act of Parliament (section 85A of Elections Act).

11. Accordingly, the instant petition was filed outside the mandatory time prescribed by section 85A of the Elections Act. The proceedings at the High Court were ready for collection on the October 9, 2013 notwithstanding the fact that the certificate of delay was issued on October 30, 2013. The petition of appeal ought to have been filed on or before the close of day on October 10, 2013. Therefore the appellate judges erred in law by admitting and determining an incompetent appeal, the same having been filed out of the time prescribed by the peremptory provisions of section 85A(a) of the Elections Act as read with article 87(1) of the Constitution.

The majority judgment of the Court of Appeal annulling the election of the first appellant was declared a nullity for all purposes.

Since no further issues of significant constitutional character had come up, there was no need to render an opinion in respect of other questions, upon their merits.

Concurring Opinion of S N Ndung’u, SCJ

1. The aspect of time, when filing an election petition was couched in mandatory language under articles 87 and 105 of the Constitution of Kenya, 2010. After declaration of the election results, the intended petitioner had the duty to file a petition within 28 days as required by the Constitution. Failure to do so rendered the petition nugatory. The petitioner in such a case required neither judgment nor proceedings from the Independent Electoral and Boundaries Commission. All the petitioner required was the actual declaration of election results by the returning officer (which he received on the polling day). As such the responsibility of actualizing the right to challenge the election results rested on the petitioner.

2. Article 50(1) of the Constitution guaranteed the right to a fair trial. The events that unfolded at the registry & the delay in the release of proceedings should not have compromised the 1st respondent’s inalienable right to a fair trial. Thus the Supreme Court had to respond to the constitutional command that every person was entitled to enjoy the rights and fundamental freedoms in the Bill of rights to the greatest extent consistent with the nature of the right or fundamental freedom.

3. Section 59 of the Interpretation & General Provisions Act, Cap 2 provided for the construction of power to extend time to the effect that where a statute prescribed a time for doing an act or taking a proceeding and power was given to a court or other authority to extend that time, then unless a contrary intention appeared, that power could be exercised by the court although the application for extension could not be made until after the expiration of the time prescribed.
4. Rule 82 of the Court of Appeal Rules that provided for extension of time was not necessarily in conflict with, or inferior to the Elections Act (section 85A) because section 59 of the Interpretation & General Provisions Act, Cap 2 provided a bridge between the Elections Act and the Court of Appeal Rules. The Election Act prescribed time for doing an act but did not expressly state that the time could not be extended within the confines of section 59 & the Court of Appeal Rules. If Parliament had intended for the Court of Appeal Rules not to apply, it would have stated so. Therefore the Court of Appeal was right in admitting and hearing the 1st respondent's appeal in the circumstances.

5. The prerequisites of article 259 of the Constitution required the constitution to be interpreted in a manner that permitted the development of the law. As such, regard to precedents of the Supreme Court could not bar lower courts from adhering to those progressive requirements. As an interwoven system of justice, the responsibility of every judge was to ensure that the mandated exercise of judicial authority was followed and that ultimately, justice was delivered within the confines of the Constitution.

6. Judgments of a court of final appeal stood on a different basis from those of subordinate courts. A departure therefore had to be a rare phenomenon justifiable only on the basis of consideration of the deepest sentiments of justice occasioned by a complete disassociation of the factual situation between the previous case and that being considered. It had to be apparent that the test of experience and passage of time had rendered the rule untenable of application in the circumstances then prevailing. The settlement of electoral law by the Supreme Court eliminated any difficulty in identifying the ratio set forth as binding precedent.

7. The Court of Appeal considered in great depth and in actual circumstance, the bounds of section 85A of the Elections Act *vis a vis* the Rules governing the court. That examination was well within the bounds of their power and the same could not be faulted for failure to abide by article 163(7) of the Constitution.

8. Under section 83 of the Elections Act, an election could only be declared void if that election did not substantially comply with the written law—Constitution, Elections Act and Regulations made thereunder. Where there was substantial compliance with the written law in an election, the irregularities had to indeed have affected the result of the election for that election to be invalidated. The emphasis then was not what happened subsequent to the declaration of the results, but what happened before and in the process of the election up and until the declaration of the result.

9. The principles to be considered before an election could be annulled were:
   i. If it was demonstrated that an election was conducted substantially in accordance with the principles of the Constitution and the Elections Act, then such an election was not to be invalidated only on the ground of irregularities.
   ii. Where, however, it was shown that the irregularities were of such a magnitude that they affected the election result, then such an election stood to be invalidated.
   iii. Where, however, it was shown that the irregularities were of such a magnitude that they affected the election result, then such an election stood to be invalidated.
   iv. Mere allegations of procedural or administrative irregularities and other errors occasioned by human imperfection were not enough, by and of themselves, to vitiate an election.

10. Under article 25(c) of the Constitution, the right to a fair trial could not be limited. However, it was an individual's right — a right in personam and the remedy for the violation of such a right could not be nullification of an election since an election reflected the views of the people expressed through the vote, not just rights of individuals and therefore courts had to be careful not to exercise their power in such a manner as to interfere with the people's expression in instances where the proven election irregularities did not affect the election results. Therefore, the Court of Appeal erred in nullifying the 1st and 2nd appellant's election as a remedy for the violation of a fair trial.

11. Article 23(3) of the Constitution, 2010 lay out the remedies available for the enforcement of the Bill of Rights as declaratory orders, injunction, conservatory orders, declaration of invalidity of any law, order of compensation & judicial review. On the other hand, section 21 of the Supreme Court Act gave the Supreme Court general powers to make any orders or grant appropriate reliefs.

12. Whereas an order of retrial is the usual remedy granted for breach of fair trial, in the instant case,
an order of retrial would not have been possible since the jurisdiction of an election court to hear and determine an election petition expired after six months of filing the petition.

13. The six month period of the High court and the Court of Appeal’s power as an election court had expired. Under section 21 of the Supreme Court Act, the Supreme Court could remedy the denial of a fair trial by creating a window for the cross examination of the Returning officer by the 1st respondent. In so doing, the court would have fully remedied the first respondent’s denial of the right to fair hearing since he would have been able to challenge the evidence of the returning officer in the same way as he would have done had he been granted an opportunity by the High court as the most appropriate remedy in the circumstances.

14. Costs followed the event and the awarding of costs to one successful party should not be seen as a punitive measure.

The decision of the Court of Appeal delivered on May 13, 2014 annulled

The judgment of the High Court dated September 10, 2013 reinstated.

The Supreme Court reaffirmed the status of the 1st appellant as the duly elected Governor of Nairobi County

Parties to bear their own costs at the High Court, Court of Appeal and Supreme Court

Supreme Court Upholds the Election of the Member of Parliament for Narok East Constituency

Lemanken Aramat v Harun Lempaka & 2 others
Petition No 5 of 2014
Supreme Court of Kenya at Nairobi

W M Mutunga, K H Rawal, P K Tunoi, M K Ibrahim, J B Ojwang’, S C Wanjala, SCJJ
August 6, 2014
Reported by Andrew Halonyere & Valarie Adhiambo

Issues

I. Whether proceedings in the election petition in question were a nullity ab initio, having been premised on a petition filed in the High Court outside the 28 day period following the declaration of the election outcome, as had been provided for in the Constitution

II. Whether the filing of an election petition outside of the prescribed time was an issue bearing on the competence of a court or on the jurisdiction of that court

III. In an electoral dispute relating to the question of the validity of election of a member of Parliament, did an order by the Court of Appeal for a recount of votes by the High Court after the lapse of the constitutional time-frame of six months purport to extend the jurisdiction of the High Court?

IV. Whether a court could entertain the issue of jurisdiction where the same had not been pleaded

V. What was the extent of the jurisdiction of the Supreme Court?

VI. Whether the Supreme Court could address any issues of merit in a matter in which the lower courts lacked jurisdiction

VII. Whether the Supreme Court had to down its tools after determining that it had no jurisdiction to entertain a matter

VIII. Whether the Supreme Court had jurisdiction to entertain the matter in question

Electoral Law - election petitions-expeditious disposal of election petitions - where the Constitution made a provision requiring that election petitions, for elections other than presidential elections, be filed within 28 days after the declaration of the election results by the Commission- whether proceedings were a nullity ab initio, having been premised on a petition filed out of time at the High Court - Constitution of Kenya, 2010, article 87 (2)

Electoral Law - election petitions- time-frame for filing electoral disputes- where a party argued that the filing of an election petition out of the prescribed time was an issue of competence of the petition rather than a jurisdictional issue- whether the filing of an election
petition outside of the prescribed time was an issue of competence or of jurisdiction

**Electoral Law** - election petitions – questions relating to membership in Parliament- where an election petition challenged the validity of the election of a member of Parliament- time- essence of time- where the Constitution provided a six-month time-frame for the hearing and determination of such questions by the High Court- where the Court of Appeal ordered a recount of votes by the High Court after the lapse of the constitutional time-frame for determination of such questions-whether an order by the Court of Appeal for a recount of votes by the High Court in such an election petition outside the constitutional time-frame of six months purported to extend the jurisdiction of the High Court- Constitution of Kenya, 2010, article 105 (1)& (2)

**Civil Practice and Procedure** - pleadings- questions of lack of jurisdiction by the court and nullity of proceedings- appeal- where on appeal, a party failed to plead the issues of the lower court’s lack of jurisdiction and nullity of the proceedings but canvassed them in its submissions- whether the Court could entertain the issue of jurisdiction and nullity where the same had not been pleaded

**Jurisdiction** - jurisdiction of the High Court- jurisdiction of the Court of Appeal- where the High Court and Court of Appeal lacked jurisdiction in proceedings that they had entertained- appeal to the Supreme Court on the basis that the proceedings in the lower courts were a nullity-whether the Supreme Court had jurisdiction to entertain the matter in question-what was the extent of the jurisdiction of the Supreme Court-whether the Supreme Court could address any issues of merit in a matter in which the lower courts lacked jurisdiction- whether the Supreme Court had to down its tools after determining that it had no jurisdiction to entertain a matter- Constitution of Kenya, 2010, article 163(8); Supreme Court Act, 2011, section 3

**Constitution of Kenya, 2010**

Article 87 (2)

Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

Article 105

(1) The High Court shall hear and determine any question whether—
(a) a person has been validly elected as a member of Parliament; or
(b) the seat of a member has become vacant.

(2) A question under clause (1) shall be heard and determined within six months of the date of lodging the petition.

**Held**

1. A condition that had been set in respect of electoral disputes was the strict adherence to the timelines prescribed by the Constitution and the electoral law. The jurisdiction of the Court to hear and determine electoral disputes was inherently tied to the issue of time, and a breach of the strict scheme of time removed the dispute from the jurisdiction of the Court.

2. There were instances in general litigation when jurisdiction was not affected by a party’s failure to meet the filing requirements. For example, a Court would in certain instances exercise its discretion to admit a matter for hearing when an argument regarding proper form was pending before it. The Court’s authority under article 159 of the Constitution remained unfettered, especially where procedural technicalities posed an impediment to the administration of justice.

3. The Constitution, in some instances, linked certain vital conditions to the power of the Court to adjudicate a matter. That was particularly true in the context of Kenya’s special electoral dispute-resolution mechanism. By linking the settlement of electoral disputes to time, the Constitution emphasized the principles of efficiency and diligence, in the construction of vital governance agencies.

4. Timeliness are a precondition in the prosecution of electoral causes. It is a constitutional requirement that went to the root of democratic governance. Efficient and dependable plays and interplays of governance entities are fundamental principles underlying Kenya’s democratic Constitution of 2010. The vital primary agencies of discharge of the public mandate had to each function within a disciplined time-frame, if they were not to hold up the functioning of a different public agency, with the effect of occasioning immobility in one or more of the governance-units. Only through efficient and responsive functioning, could those agencies have operated in synergy, so as to bear out the people’s sovereign expression as declared in article 1(1) and (2) of the Constitution.

5. The legitimacy of a challenge to electoral outcomes spoke for itself. It was an avenue for ascertaining the mode of conveying the people’s expression of their right of franchise.

6. The Court, as a device of sanctification of the people’s electoral determination, was not an
unregulated forum, where so critical a dispute could linger for indeterminate periods of time. Thus, the Supreme Court, in asserting the authority of the Constitution, underlay the element of the imminent time-constraint in the resolution of electoral disputes throughout the judicial system. The ultimate principle was: while citizens were at liberty to contest electoral outcomes, they would proceed within prescribed timelines, and in that way, helped to sustain the due functioning of other constitutional processes.

7. The phenomenon of nullity, in any transaction that bore legal incident, was a pure jurisdictional issue. The issue, particularly in that instance, formed a direct link with the timelines bearing upon the Courts determining electoral disputes, and was a vital element in the relevant constitutional prescriptions. It was, therefore, a question falling under the Supreme Court's jurisdiction, as conferred by article 163(4) (a) of the Constitution. The issue of nullity was plainly linked to constitutional timelines, and to the jurisdiction of the Court.

8. There was no conflict at all in the case, between the electoral requirements of timelines, on the one hand, and the values of the Constitution, on the other hand. Compliance with timelines was itself a constitutional principle that reinforced the constitutional values attendant upon the electoral process. That was consistent with the inherent character of the Constitution which allowed the fulfilment of individual rights, by laying out accessible procedures to sustain the citizen’s stakeholder and nationality-claims; but concurrently reprobated complacency in the assertion of legitimate claims. The Constitution bore an inner entreaty for predictability, transparency, and service-orientation to the people; but the realization of such values had a time-element.

9. Section 76(1) (a) of the Elections Act which stood in contradiction to the governing law on timelines, in the electoral process had been annulled extending back to the date of enactment of the statute. Those who filed election petitions outside the 28-day requirement of the Constitution could not avoid the consequence of their dilatoriness for it was the prescribed time-frame that opened the jurisdiction of the Courts. Having been such an elemental constitutional requirement, it stood out by itself, irrespective of the averments made by parties in their pleadings. To that question, the general discretion provided for in article 159 would not apply, as that was not an ordinary issue of procedural compliance.

10. The original jurisdiction of the High Court in criminal and civil matters, by article 165(3) (a) of the Constitution, was unlimited. In addition, the High Court had a special jurisdiction in electoral matters, conferred by the Constitution, and given effect under the Elections Act. It had the jurisdiction to determine any question as to whether a person has been validly elected as a Member of Parliament under article 105(1) (a) of the Constitution. By article 87(2) of the Constitution, that jurisdiction was activated upon a declaration by the authorized electoral body (IEBC) that a particular person had been returned as Member of Parliament, when there was a challenge to that electoral declaration. The High Court's special jurisdiction was clearly time-bound and had practical meaning only in the context of the prescribed timelines.

11. The Supreme Court could begin to inquire into the High Court's jurisdiction despite the fact that the question of “competence” had not arisen through formal pleadings. By article 163 of the Constitution of Kenya, a Supreme Court, with ultimate constitutional responsibility, and bearing binding authority in questions of law over all other Courts, had been established. The exclusive dedicated role of the Supreme Court took several forms. For example, it had original jurisdiction to hear and determine disputes relating to the elections to the office of the President; it was required to hear and determine as of right, on appeal, any case involving the interpretation or application of the Constitution and; it could give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.

12. The Supreme Court was expressly empowered by article 163(8) to make rules for the exercise of its jurisdiction and, by article 163(9), a Parliamentary enactment could make further provision for the operation of the Supreme Court. The Supreme Court Act, 2011, had been enacted which upheld the Court's standing as the formal custodian of the interpretive process for the Constitution, the national grundnorm. It was not possible to detract from the Supreme Court's authority to hear and determine all the relevant questions.

13. It was a responsibility vested in the Supreme Court to interpret the Constitution with finality...
and that entailed that the Court determining appropriately those situations in which it ought to have resolved questions coming up before it, in particular, where those had a direct bearing on the interpretation and application of the Constitution. Besides, as the Supreme Court carried the overall responsibility for providing guidance on matters of law for the State's judicial branch, it followed that its jurisdiction was an enlarged one, enabling it in all situations in which it had been duly moved, to settle the law for the guidance of other Courts.

14. The Supreme Court's jurisdiction in relation to electoral disputes was broader than that of the other superior Courts. While the Court of Appeal's jurisdiction was based on section 85A of the Elections Act, with its prescribed timelines, that of the Supreme Court was broader and was founded on the generic empowerment of article 163 of the Constitution, which conferred an unlimited competence for the interpretation and application of the Constitution. That, read alongside the Supreme Court Act, 2011, illuminated the greater charge that was reposed in the Supreme Court, for determining questions of constitutional character.

15. When a lower court lacked jurisdiction, the Supreme Court had jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit. That could only be additional to the jurisdictional competence of the Supreme Court. Article 163(7) of the Constitution had specially empowered the Supreme Court to give stewardship to the terms of the Constitution; in particular, that charter's safeguards for individual rights and for the scheme of just redress to all matters in dispute. The Constitution's prescription was carried further in the Supreme Court Act, 2011, which required the Court to "assert the supremacy of the Constitution and the sovereignty of the people of Kenya"; to "provide authoritative and impartial interpretation of the Constitution"; and to "develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth".

16. The Constitution, by article 259(1)(c), required such interpretation of it as permitted the development of the law. The Supreme Court's unconstrained mandate in the instant case would provide the requisite condition for such interpretation. As the guardian of the Constitution, and the final arbiter on constitutional dispute-situations, the Supreme Court had been entrusted with the mandate to ensure the effectiveness of the binding constitutional norm. Thus, the decisions emanating from that Court had a binding effect on all subsequent determinations of related matters by other courts in the judicial set-up.

17. The Supreme Court's special jurisdiction merited express recognition. The Constitution's paradigm of democratic governance entrusted to that Court the charge of assuring sanctity to its declared principles. The Court's mandate in respect of such principles could not, by its inherent character, be defined in restrictive terms. Thus, such questions as came up in the course of dispute settlement (which, itself, was a constitutional phenomenon), especially those related to governance, were intrinsically issues importing the obligation to interpret or apply the Constitution – and consequently, issues falling squarely within the Supreme Court's mandate under article 163(4) (1)(a), as well as within the juridical mandate of that Court as had been prescribed in article 259(1) (c) of the Constitution, and in section 3(c) of the Supreme Court Act, 2011.

18. The language, purpose and principles of the Constitution, and the broad terms in which the Supreme Court's jurisdiction had been conferred by both the Constitution and the organic law made under it, gave the clear message that such issues of merit were not beyond that Court's jurisdiction. The electoral questions canvassed before that Court were in a fundamental sense, constitutional ones, in respect of which jurisdiction lay, by virtue of article 163(4) (a) of the Constitution.

19. The Supreme Court, by virtue of its broad competence in determining questions that entailed the interpretation and application of the Constitution, had the unrestricted latitude to determine issues whether of form or merit, brought up by the instant cause. Whether or not the Court determined a particular issue, was a matter of discretion, exercised by reference to considerations of practical purpose.

20. As an ultimate court, whenever the Supreme Court made any determination at all, be it one of merits, or even a residual one, it had an inherent obligation annexed to the disposal of matters in contention, of concluding the contest by determining the deserts of the parties in the form
of costs, or related elements. The Court should not have abnegated its obligation to provide overall direction in the interpretation and application of the law.

21. The Supreme Court was required to proceed independently and to evaluate the circumstances of each case, to determine whether a term of the Bill of Rights had been compromised by a lower court in its adjudication. Even outside the domain of the Bill of Rights, that Court, by virtue of its status as the ultimate court in the settlement of the course of jurisprudence, held a crucial place in the determination of questions of 'pure law' bearing on matters of public interest.

22. The Supreme Court's priority in the case at hand was to ascertain the extent of the jurisdiction of the other Courts at the time they had made their determinations. If they lacked jurisdiction, then their decisions would have been null. Consequently, it would not have been necessary for the Court to have examined such other questions as might have been the subject of the orders of those Courts.

23. A Court dealing with a question of procedure, where jurisdiction was not expressly limited in scope, as in the case of articles 87(2) and 105(1) (a) of the Constitution, could exercise discretion to ensure that any procedural failing that lent itself to cure under article 159, was cured. Certain procedural shortfalls might not have had a bearing on the judicial power (jurisdiction) to consider a particular matter. In most cases, procedural shortcomings would only affect the competence of the cause before a Court, without in any way affecting that Court's jurisdiction to entertain it. A Court so placed, taking into account the relevant facts and circumstances, could cure such a defect; and the Constitution required such an exercise of discretion in matters of a technical character.

24. In the instant case, the jurisdictional issue involved was one that turned on the interpretation and application of the Constitution. The special design and character of the Constitution would not have favoured the rule historically associated with the common law tradition, that the contest to jurisdiction should have had its origin at the trial court. That was not, however, to water down the distinct merits of the orderly approach at common law, which sustained the principle that a cause before the Court was established through pleadings.

25. Jurisdiction was, ordinarily, a prior question linked to the constitutional competence of a court to resolve a particular contested matter, save that the Supreme Court's jurisdiction was broader than that of the other courts. For the other courts, the span of applicable jurisdiction was more narrowly defined and, at all times, the competence of those courts sprang from the clear terms of their jurisdictional empowerment.

26. The jurisdiction of a court was not a fluid phenomenon, as it was regulated by the Constitution. It could not, therefore, be extended through judicial craft or innovation. The critical question at hand rested on the relationship between timelines as had been laid down in the electoral law, and the issue of jurisdiction.

27. The Appellate Jurisdiction Act (Cap. 9) did not confer jurisdiction upon the Court of Appeal to remit an electoral-dispute matter back to the High Court after the six-month limit set out in article 105(1) and (2) of the Constitution had lapsed. The Constitution and the Elections Act, which were the foundation of a special electoral-dispute regime, conferred upon the High Court the power to determine electoral disputes within six months, and the Appellate Court could not confer upon itself powers to resurrect the jurisdiction of Election Courts, after such jurisdiction had been exhausted under the law.

28. The Constitution is the supreme law of the land in the terms of its article 2(1), which binds all persons and State organs. It follows that the Constitution is sovereign and holds a place of superiority over any orders and decrees of a court. Accordingly, the Court of Appeal could not confer jurisdiction upon the High Court to conduct a recount, as the jurisdiction of the High Court under article 105(1) and (2) of the Constitution, was, in the first place, contestable on the ground of expired timelines and would in any case have been already exhausted.

29. Article 105(2) of the Constitution was concerned with mandatory timelines that embodied jurisdictional requirement. There was no standard
1. The Constitution had set the tone for the principle of timely disposal of electoral disputes when it provided the time within which to lodge an election dispute in both a presidential and a non-presidential election, by articles 140 and 87(2) respectively. That principle of timely disposal of election disputes had informed Parliament in the enactment of section 76(1) (a) of the Elections Act. However, that section had been declared unconstitutional by the Supreme Court, for having anchored the 28 days within which one was to file a petition challenging election results in an election other than a presidential election on the publication of the results, rather than on the declaration of results, as had been provided for in the Constitution.

2. The Supreme Court’s decisions were binding, as had been provided by article 163(7) of the Constitution. Consequently, that Court could not make decisions just to fit a particular case. Its decisions were arrived at after detailed consideration and were meant to finally settle legal controversies and shape the Country’s jurisprudence, and could only be departed from after a sufficient ground had been established.

3. The Court’s noble but sacred mandate under section 3 of the Supreme Court Act, 2011, was to establish a pragmatic and indigenous jurisprudence founded on good governance and the rule of law. Such jurisprudence could not have been founded on divergent decisions in cases where the facts were similar.

4. The correct legal position was that a party who came to court to seek redress was bound by his pleadings. That principle, however, referred to issues as had been framed by parties and reliefs that bordered on the rights and obligations as between parties. A question of nullity of proceedings that bordered on jurisdiction did not qualify as settling or calling for a determination as regards rights and obligations as between parties. A question of nullity of proceedings that bordered on jurisdiction did not qualify as settling or calling for a determination as regards rights and obligations as between parties in litigation. It was a legal question. It was for that reason that it could be raised at any time, by any party, even by the court itself.

5. Where a jurisdictional question had been raised, a challenge of parties being bound by their proceedings could not rightly lie. The law was the preserve of the courts, which courts took judicial notice of. A party did not have a ‘monopoly’ of the law. The Court did have that monopoly as it applied the law to a set of facts in reaching its decision. Hence, a court of law could rightly raise a legal question of jurisdiction even where no party had raised such a question.

6. A question of competence of proceedings which bordered on jurisdiction of the Court to admit such proceedings did not fall to be left to the discretion of parties’ pleadings as the same was a matter that could have been taken up by the Court suo motu. A court was bound to always satisfy itself of whether or not it had jurisdiction to hear and determine a matter before it; and to also warn itself that the matter before it was one which it should have admitted under its jurisdiction for

In the dissenting opinion of Mohammed Ibrahim, SCJ

The Supreme Court Cases
consideration.

7. The proceedings in the High Court were a nullity *ab initio*, having been premised on a petition that was filed out of time. All the proceedings that had sprung from a petition that was a nullity were also null and void. Consequently, the Supreme Court did not have jurisdiction to entertain the appeal. On the basis of lack of jurisdiction, the Supreme Court ought to have downed its tools and not delved into any other question on their merits.

8. The decision of the majority with regard to not downing their pens upon making a determination that the High Court proceedings were a nullity, and delving into other questions of merit, was a departure from previously decided cases. While the Supreme Court had the jurisdiction and discretion to depart from its past decision, there had been no justification to do so in the case at hand. The Court should have stopped upon making the finding that it had made on the issue of jurisdiction alone.

9. In similar cases that had been previously determined, there had been other questions which the Supreme Court identified as having fallen for determination. All those questions had had a ‘great constitutional’ bearing as the Supreme Court had been bestowed with jurisdiction and the mandate under section 3 of the Supreme Court Act to settle constitutional questions with finality. Having found that the proceedings in those cases had been a nullity *ab initio*, the Court had to downed its tools and could not proceeded to determine the other framed issues.

10. The context of the case at hand had not given rise to a constitutional moment for the Court to seize and go into any other issues after making a finding that the petition was a nullity *ab initio* and that the Court of Appeal and the High court lacked jurisdiction to hear it. Such a constitutional moment could only have arisen where the Court was satisfied that it had jurisdiction. Jurisdiction was everything and such a moment would only have arisen where the matter was rightly before the Court; where it had been substantively, rather than tangentially, brought before the Court.

Judgment of the Court of Appeal annulled. Gazette Notice declaring the Appellant as the duly elected Member of Parliament for Narok-East reinstated and sustained. Parties to bear own costs.

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Supreme Court grants extension of time to file an appeal where the delay was caused by the court

Hassan Nyanje Charo V Khatib Mwashetani & 3 Others [2014]

In The Supreme Court of Kenya at Nairobi

Application No. 15 of 2014

M K Ibrahim, J B Ojwang, SCJJ

July 4, 2014

Reported by Teddy Musiga and Getrude Serem

Brief facts

The applicant filed an application before the Supreme Court seeking extension of time to file an appeal to the Supreme Court pursuant to rule 33 of the Supreme Court Rules, 2012. The applicant alleged that he had been unable to lodge his appeal in time because of the Court of Appeal’s delay in delivering the ruling on certification of the matter as that of general public importance and also that the Court of Appeal had failed to furnish him certified proceedings to enable him to prepare the record of appeal *inter alia*. He therefore argued that the Supreme Court had jurisdiction to extend time to achieve the ends of justice, in the discharge of its mandate under section 3 of the Supreme Court Act.

Issue

I. Whether the Supreme Court had the jurisdiction to entertain an application for extension of time before leave had been granted for the Court to hear such matters.

Jurisdiction – appellate jurisdiction of the Supreme Court – extension of time for filing appeals to the Supreme Court – claim where the delay in filing the appeal was alleged to have been caused by the Court of Appeal by failing to furnish the applicant with certified
copies of proceedings to lodge an appeal to the Supreme Court – Constitution of Kenya, 2010 article 163(4).

Held:

1. Appeals to the Supreme Court need not lie on the entirety of the issues arising in the lower Courts. What went to the Supreme Court on appeal, were disputes over constitutional interpretation or application, or over matters of general public importance. Thus, if such issues could be isolated from the general case heard by the lower Courts, then it was implausible to argue that one could not further distinguish the issues of constitutional relevance that clothed the Supreme Court with direct jurisdiction, from those requiring certification as matters of general public importance.

2. The matter presented two varying public-interest considerations that required balancing by the Court. The first was the principle of timeliness in the resolution of election disputes, embodied in article 87(1) of the Constitution and access to justice, embodied in article 48 of the Constitution. The delay in the prosecution of the case prejudiced the certainty of the political representation of the people of Lunga Lunga Constituency and the applicants’ right to access justice. It was clear that the blame lay squarely on the Court processes of generating proceedings.

3. It would not have been in the interests of justice to turn away an applicant who had, prima facie, exercised all due diligence in pursuit of his cause, but was impeded by the slow-turning wheels of the Court’s administrative machinery. Though prejudice to the representation of the people of Lunga Lunga Constituency was to persist, it was due to no fault on the part of the applicant.

4. It had become quite clear from recent decisions of the Supreme Court, that the domain of elections be it in respect of the Presidency, Senate, National Assembly or gubernatorial office entailed special considerations of priority in constitutional governance. It by no means came unexpectedly, that a dedicated regime of electoral law, built upon the broad principles, and the specific terms of the Constitution, together with the elaborative body of statutory and regulatory law, was well and truly evolved.

5. The concept of timelines and timeliness had been upheld as a vital ingredient in the quest for efficient and effective governance under the constitution. However the court had to take cognizance of the eternal mandate of responding appropriately to individual claims, as dictated by compelling considerations of justice where the applicant had exercised all due diligence so as to move a court on electoral issue, but the mechanisms had shut the doors on him. When he lodged his complaint to the court for extension of time the court had to avail to him the requisite appeal papers. The sluggish motion of the judicial machinery enjoyed no constitutional privilege, as against the specific guarantees of the Bill of Rights.

Application for extension of time allowed.
Supreme Court sets aside Court of Appeal’s decision nullifying the election of Member of the National Assembly for Nyando Constituency
Frederick Otieno Outa v Jared Odoyo Okello & 4 others
In the Supreme Court of Kenya at Nairobi
Petition No. 10 of 2014
July 3, 2014
Reported by Teddy Musiga and Getrude Serem

Issues
I. Whether section 85A of the Elections Act was unconstitutional as it limited the jurisdiction of the Court of Appeal to determine only matters of law?

II. Whether the jurisdiction of the Court of Appeal could be limited or fettered in scope, manner or procedure confined to only particular questions?

III. Whether the constitution envisaged the limitation of the right of appeal in the Court of Appeal?

IV. Whether the Court of Appeal erred by finding the appellant to have committed the election offence of bribery by using the Constituency Development Funds (CDF)?

V. Whether the Court of Appeal contravened its jurisdictional limit on evidentiary question by reversing the trial court’s finding or conclusions of facts in terms of section 85A of the Elections Act, 2011?

VI. Whether the Constituency Development Fund (CDF) committee members were public officers under the constitution?

Jurisdiction – Appellate jurisdiction of the Court of Appeal – whether the appellate jurisdiction of the Court of Appeal is limited to only questions of law or whether there were circumstances in which the appellate jurisdiction could entertain both matters of fact and law – whether the Court of Appeal can overturn the decision of the trial court on matters of facts – Constitution of Kenya, 2010 article 164(3).


Section 85 of the Elections Act, provides that:
“An appeal from the High Court in an election petition concerning membership of the National Assembly, Senator or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be:
 a) filed within thirty days of the decision of the High Court; and
 b) Heard and determined within six months of the filing of the appeal to the Court of Appeal.”

Article 260 of the Constitution defines a public officer as:
(a) any State officer; or
(b) any person, other than a State Officer, who holds a public office.

It continues to define public office as;
“An office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.”
article 260, defines the public service, as:

“The collectivity of all individuals, other than State officers, performing a function within a state organ.”

Held:

1. Section 85A found its way into the Elections Act by way of a Miscellaneous Amendment Act, No. 47 of 2012. The Act, in its original design, was silent on the issue of appeals to the Court of Appeal. Section 85 had only provided that an election petition was to be heard and determined within a period specified in the Constitution. That period was specified in article 105(2) of the Constitution. A question relating to the validity of the election of a Member of Parliament was to be heard and determined within a period of six months by the High Court. The Act, as initially enacted, gave no room for appeals to the Court of Appeal, with respect to election petitions.

2. Article 105(1) of the Constitution vested in the High Court powers to consider whether a Member of Parliament had been validly elected, or the seat had become vacant. The clear intent of that provision, was that a first-instance claim challenging the validity of an election, or questioned whether a parliamentary seat had been rendered vacant, had to be lodged in the High Court. Such a dispute, by article 105(2) of the Constitution, was to be resolved within a period of not more than six months.

3. The Court of Appeal, under article 164 (3) of the Constitution, exercised the jurisdiction of the first appellate Court; and in its broad design in the judicial scheme, the Court of Appeal had general jurisdiction to review matters in dispute, be they matters of law or matters of fact.

4. Electoral contestations often involved constitutional interpretation and application. When such disputes were adjudicated upon by the High Court, new contests could emerge, that required resolution within the judicial system. Such further disputes were also directly appealable to the Court of Appeal. The Court of Appeal was therefore vested with jurisdiction to hear and determine appeals from the High Court, in respect of decisions made pursuant to article 105(1) of the Constitution of Kenya, 2010.

5. Electoral dispute resolutions under article 105 could not be a one-stop adjudicatory process. The legitimate expectation of the Kenyan people was that they were not to be deprived of the right to have electoral disputes resolved through the hierarchy of judicial mechanisms, and the system of justice known to the Constitution. The right to question the validity of an election entailed an examination by the High Court whether the electoral provisions, the principles of the Constitution, and the requirements of law had been satisfied. First-instance determinations of such questions, were amenable to appeal before the Court of Appeal, in accordance with the provisions of section 85A of the Elections Act and this was by no means, subversive of the hierarchical setting of the Court system in Kenya.

6. The Constitution intended that a comprehensive appellate system be in place, to crystallize a uniform and settled authority of the law, to be applied fairly, in the administration of justice. For the resolution of electoral disputes, an appeal served a more invaluable objective. It ensured that through the judicial process, it was ascertained that a particular candidate was seen to be validly and popularly conferred with the electoral mandate, to lead and represent the people. The appeal process also served to impart credence, by affirming the place of certainty and predictability in the law, as the appellate Court laid down precedent-setting norms, to be applied by lower Courts.

7. The Constitution of Kenya, 2010, founded a regime of electoral law, which, even though sharing common principles of justice and fairness with the normal civil and criminal jurisdictions, bore a new ingredient that was underlined by objects of democracy, good governance, and efficiency of public institutions. That was the context in which article 105 set afoot the process of enacting new electoral legislation, and the making of attendant rules and regulations. That was also the context in which the specific terms of the Elections Act – in a broad sense, a context of compatibility, rather than that of discord.

8. Section 85A of the Elections Act was therefore the legislative mechanism intended to effectuate the constitutional principle of timely resolution of electoral disputes as enshrined in article 87(1) of the Constitution.

9. By limiting the scope of appeals to the Court of Appeal to matters of law only, section 85A restricted the number, length and cost of petitions and, by so doing, met the constitutional command in article 87, for timely resolution of electoral disputes. Section 85A of the Elections Act
Act was, therefore, neither a legislative accident nor a routine legal prescription. It was a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. The section was directed at litigants who could be dissatisfied with the judgment of the High Court in an election petition. To those litigants, it said “limit your appeals to the Court of Appeal to matters of law only.” (Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No. 2B of 2014)

10. Similar to article 87(1) is article 105 (3), which conferred upon Parliament a mandate to enact separate and special legislation giving it full effect. Article 105 (1) made the High Court the first-instance forum for resolving electoral disputes, where any challenge to the election of a Member of Parliament was to be directed. Article 105(2) prescribed the timeline within which such a dispute was to be resolved. By article 105(3) of the Constitution, Parliament was mandated to design and enact a special legislative mechanism, to enable the realization of two objects. The judicial duty of the High Court to hear and determine causes of action in electoral contests, in the first instance, and, where required, provided an avenue of appeal to the Court of Appeal and secondly, the specification of jurisdiction and timelines.

11. A statutory provision could be said to be unconstitutional only if it contravened an express provision of the Constitution. A reading of section 85A of the Elections Act showed that there was nothing in it that ran into conflict with the constitutional provision conferring appellate jurisdiction upon the Court of Appeal, or with any other constitutional provision. To allow section 85A to be impugned, without a cogent forensic ground, would open up improper avenues for contests to yet other statutory provisions: such as section 75 of the Elections Act, which limited the appellate jurisdiction of the High Court (on appeals from a Resident Magistrate Court, on the validity of the election of a County Assembly Member) to matters of law only and section 71A of the Civil Procedure Act, which also limited the appellate jurisdiction of the High Court to matters of law only.

12. The Constitution often left open space for legislation, for the purpose of specifying the details of how the constitutional aspirations and requirements were to be effectuated. It was on this account, that article 94 of the Constitution conferred upon Parliament the legislative authority, exercisable on behalf of the people, to enact laws that governed the conduct and affairs of governance, the State organs, as well as the citizens, throughout the Republic.

13. Parliament had exercised that mandate, and came up with the Elections Act, 2011. A legislative framework for giving effect to persons’ rights to the adjudication of electoral disputes, safeguarded in article 105(1). What section 85A did was to give effect to the tenor of article 105, to have an electoral dispute determined by the High Court, with room for further appeal on matters of law, to the Court of Appeal.

14. A question of law existed when the doubt or controversy concerned the correct application of law or jurisprudence to a certain set of facts or when the issue did not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact existed when the doubt or difference arose as to the truth or falsehood of facts or when the query invited calibration of the whole evidence considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation. The Court could not adjudicate which party told the truth by reviewing and revising the evidence adduced at the trial court. Neither verbal sophistry, nor artful misinterpretations of supposed facts could compel the Court to re-examine findings of fact which were made by the trial court. (Republic v. Malabanan G.R. No. 169067, October 632 SCRA 338, 345 and New Rural Bank of Guimba v. Fermina S Abad and Rafael Susan G.R No. 161818 (2008)

15. “Matters of law” could therefore be characterized to have three elements:

a) The technical element: This involved the interpretation of a constitutional or statutory provision.

b) The practical element: This involved the application of the constitution and the law to a set of facts or evidence on record.

c) The evidentiary element: This involved the
evaluation of the conclusions of a trial court on the basis of the evidence on record.

16. The trial Court alone was the custodian of true knowledge of witnesses and their quirks, and could pronounce on issues of credibility. Short of an appraisal of witness account appearing as absurd, or decidedly irrational, it behove the Court sitting on appeal to respect the trial Judge's appraisal of primary facts.

17. Section 67(2) of the Elections Act provided that the offence of bribery was cognizable. A person alleged to have committed it was liable to arrest, without warrant. It showed the gravity of the offence, and signaled that a high standard of proof was required. An allegation that an election offence had been committed had to be specific, cogent, and certain. That requirement guaranteed the right of fair trial, for the person(s) against whom such allegations were made.

18. The principle thus conveyed, was that the pleadings had to be clear, the allegations elaborate, and the evidence adduced, focused and clear-cut. The foundation was clear: election offences bore the mark of a criminal conduct within the framework of an election petition, yet outside the normal criminal jurisdiction. Election offences were, therefore, quasi-criminal in nature; and the Court could not enter a finding of guilt, if the evidence adduced was not definitive and could not sustain such a finding, or if there was any doubt as to whether such an offence was, indeed, committed, or by whom? The commission of an election offence if proved, not only led to the election being set aside, but also to the disqualification of the perceived culprit, from standing as a Parliamentary-election candidate, given the terms of article 99(2) (h) of the Constitution. The offender was also liable to criminal penalty, under the Elections Act. Hence, the person alleging the commission of the offence was required to prove the ingredients of the offence. And such proof of an offence took a higher level than the mere preponderance of probabilities.

19. There was no basis to support the conclusion that the evidence adduced at the trial Court was of such a degree as to sustain such a finding of guilt. The 1st respondent was under obligation to adduce convincing evidence on how, when, where, and in what circumstances, the CDF cheques were issued for the various centers, showing how that act influenced voters to vote for the appellant. With such details missing, the conclusion reached by the appellate Court lacked a basis in law.

20. With a new constitutional dispensation that extoled principles of dedicated public service, based upon progressive values and recognized good practices, statutory provisions such as those of the CDF Act disclosed the clear intent that the duties and responsibilities of those bearing the relevant mandate, were to be effected in conditions of public trust and confidence. Hence the entire code of public conduct was informed by certain values: integrity, professionalism, accountability, neutrality, impartiality, and good governance. The Constitution affirmed those values in various Articles: 10, 81, 129, 175, 201, 232 and 238. Those values were to condition the conduct of every individual, office-bearer, agency or institution entrusted with day-to-day execution of public duty. There were thus, common values that pervade a large set of public-service-oriented laws founded upon the declared constitutional principles.

21. The proper meaning of public officer, for purposes of the electoral law, was that embodied in article 260 of the Constitution as read together with section 2 of the Elections Act. The different definitions in other statutory provisions, could not take precedence over the said constitutional provision. And thus, the proper meaning of “public officer” was:

a) the person concerned had to be a State officer; or

b) any other person who held “public office” – an office within the national government, county government, or public service;

c) A person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.

22. The CDF officials, at the time, did not qualify under the term public officers as it appeared in the Constitution, and in the relevant body of law. However, it was essential for the realization of free and fair elections, at such a time, that candidates
desist from such conduct as the misuse of public office or public resources, to the detriment of their opponents.

23. The electoral code of conduct, and the provisions of the law regarding public office and public officers, made it clear that while public officers were individuals entrusted with the mandate of service to the people, public resources were tangible assets, possessions or items of material worth, that were in the control of the public, or owned by the public collectively. It was, therefore, incorrect for the Court of Appeal to include public officers within the category of public resources.

The concurring opinion of Ndungu Njoki, SCJ

She concurred with the final decision and orders of the majority. However she took a different opinion with regard to the question whether Constituency Development Fund members were public officers under the Constitution of Kenya, 2010.

24. The meaning given to the words ‘public officer’ by the majority judges was narrow and limiting; particularly when it involved the interpretation of a constitutional provision. A more comprehensive definition was appropriate and desirable if one was to meet the laid down guidelines for the construction and interpretation of the Constitution as laid out in article 259 of the Constitution.

25. The meaning given to the words public officer went beyond the ordinary meaning of the word itself more towards a definition that was orientated in a value system to be expected in democratic society. Those guidelines were further reinforced by the introductory rider in the definitions section, of article 260 of the Constitution.

26. The definition of ‘public officer’ could not be strictly confined to the singular definition clause in article 260 of the Constitution as there were other constitutional stipulations, and statutory and common law provisions that spoke to the definitions, values, principles, and the institutional framework of public service that had to apply. That therefore called for the Constitution to be read in a holistic manner when it came to the interpretation of any one clause.

27. In arriving at a true meaning of “public officer” under the Constitution, then and in line with article 259 thereto, four key questions would be asked to determine whether one was a public officer. If one or more of the questions below was answered in the affirmative then the person would be rightly considered within the meaning of the term “public officer”

a) Whether the person concerned was in an office in the national government, the County government or the public service.

b) Whether such a person receives remuneration or benefits payable by the consolidated fund or directly money provided by the parliament.

c) Whether that person performed a function within a state organ or a state corporation.

d) Whether the person was holding public office under the terms of the former constitution.

28. All CDF officials appointed before the promulgation of the Constitution of Kenya, were public officers under the former Constitution and therefore the transitional Clause in section 31 of the Sixth Schedule applied to them.

29. The Constituency Development Fund Committee was established pursuant to section 24 of the Constituencies Development Act, No. 30 of 2013 (the CDF Act, 2013). Previously, the administration of the Constituencies Development Fund was governed by the Constituencies Development Act, Cap 425A of the Laws of Kenya (repealed Act), which was repealed by Act No 30 Of 2013. In the instant matter, the repealed Act was in force at the time the 2013 Nyando Constituency Parliamentary Elections were held, but stood repealed immediately thereafter. Therefore reference had to be made to both statutes in order to arrive at the public status of CDF officers

30. The CDF Board, a body corporate established under an Act of Parliament was a State corporation within the meaning of that Act, and therefore also in the Constitution. All State Corporations, had national outreach by nature and design, and fell squarely under the auspices of the National Government. This also meant that the CDF Board was also a public service institution that was in existence under the former constitution and its officials and employees were to be considered public officers under it. The effect of the
transitional clause in section 31 of Schedule 6 of the current constitution would also apply.

31. The government regulations attendant to public finance as provided under the Constitution and the relevant public code of conduct were applicable where Constituency Development Funds were concerned. The allowances paid to the CDF Officers constituted, as elaborated above, part of the Fund. As such, those allowances were paid directly out of money provided by Parliament.

32. Since the allowances paid to the CDF Officers were drawn from the Fund, those allowances were essentially drawn from the Consolidated Fund pursuant to article 206(2)(c) of the Constitution. That therefore qualified any office held in the administration of the Constituency Development Fund as a public office within the meaning given by article 260 of the Constitution. As such, a CDF officer was a public officer. Therefore, the Court of Appeal was correct in finding that CDF officials were public officers.

33. It was clear that the reasonable and justifiable duty would be, in deference to the Constitution and the public code of conduct, to ensure that a strict separation of public duty and partisan politics was maintained. The limitation therefore on public officers vis-a-vis political participation, as cited in the Elections Act, the Public Officer Ethics Act, the Leadership and Integrity Act and any other related legal provisions, was well within the allowance for limitation within the constitutional framework. It was important to note that the limitation only extended to appointed and not elected public officials leaving an avenue for those public officials who wished to exercise their political rights, to do so by running for public office. However, those who chose to remain in the public service in politically neutral positions were to remain impartial.

34. There was no evidence to show, that the behavior of DW 9 (the Treasurer of Nyando CDF Committee) who was at the relevant time a public officer, had any effect on the outcome of the election in the instant matter. The allegations that he used CDF funds to campaign for the Appellant were unproven. The standard of proof to be met in such an instance included a number of steps, a chain of events, so to speak which were to be shown by the evidence a) that the person involved was a public officer; that the said public officer used public resources for the purposes of political campaigns;

b) that there was intention of the part of the public officer to influence the outcome of the election to favour an individual running for office or a party participating in an election; or
c) That the said resources were used to commit an election offence.

35. The law provided for sanctions and penalties that would apply where an appointed public officer had behaved impartially and participated in political activity. It was clear, from the facts of the instant case and applicable law on the conduct of public officers, that the Treasurer of Nyando CDF committee (DW 9), as a public officer had contravened the law on a number of ethical transgressions, and for which he was individually liable.

The appeal was allowed, and the determination by the Court of Appeal nullifying the election of Frederick Otieno Outa, was set aside.

The finding by the Court of Appeal that the appellant, Frederick Otieno Outa committed the election offence of bribery was overturned.

The Certificate and Report issued by the Court of Appeal, on the basis of its finding pursuant to sections 86(1) and 87(1) of the Elections Act, was annulled.

The appellant’s costs at the High Court, the Court of Appeal and the Supreme Court were to be borne by the 1st respondent.

The 2nd and 3rd respondents were to bear their own costs at the High Court, the Court of Appeal and the Supreme Court.

These Orders were to be served upon the parties and upon the Speakers of the two Houses of Parliament, for appropriate legislative initiatives as recommended herein.
Issues:

i. Whether the period of 28 days provided in article 87 of the Constitution of Kenya, 2010 started counting when the returning officer issued the winning candidate with a certificate in Form 38 or from the day the results were published in the Kenya Gazette.

ii. Whether a petition, having been filed outside the 28 days prescribed in article 87 of the Constitution, was a nullity.

iii. Whether jurisdiction of the Supreme Court under article 163(4)(a) of the Constitution was intertwined with that of the High court and Court of Appeal under article 87 and 105 of the Constitution and section 85A of the Elections Act.

Electoral Law - election petitions-expeditious disposal of election petitions-time within which to file an election petition-where the petition was filed outside the 28 days as stipulated by law - whether the period of 28 days provided in article 87 of the Constitution of Kenya started to run on the day the Returning Officer issued the winning candidate with a certificate in Form 38 or from the day the results were published in the Kenya Gazette-Constitution of Kenya, 2010, article 87.

Jurisdiction - jurisdiction of the Supreme Court under article 163(4)- whether jurisdiction of the Supreme Court under article 163(4)(a) of the Constitution was intertwined with that of the High Court and Court of Appeal under the provisions of the Constitution and the Elections Act- Constitution of Kenya,2010 articles 87 and 105; Elections Act section 85A.

Held:

1. The constitutional principle of timely disposal of election petitions was found in article 87(2) of the Constitution, which provided that petitions concerning an election, other than a presidential election, were to be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission (IEBC).

2. Declaration of the results occurred in three stages: at the polling station when the Presiding Officer had completed Form 35; at the Constituency Tallying Centre, where the Returning Officer for the constituency had completed Form 36, and at the County tallying Centre where the County Returning Officer had completed the certificate in Form 38.

3. The issuance of the certificate in Form 38 to the persons elected indicated the termination of the Returning Officer’s mandate, thus shifting any issue as to validity, to the election court. Based on the principle of efficiency and expediency therefore, the time within which a party could challenge the outcome of the election started to run upon the final discharge of duty by the Returning Officer.

4. The declaration of election results was the aggregate of the requirements set out in the various forms, involving a plurality of officers. The finality of the set of stages of declaration was depicted in the issuance of the certificate in Form 38 to the winner of the election. That marked the end of the electoral process by affirming and declaring the election results which could not be altered or disturbed by any authority.

5. Therefore the period of 28 days, within which a person challenging the validity of declared results was required to file a petition before the Court, started to run from the day the Returning Officer issued the winning candidate with the certificate in Form 38, but not from the day the results were published in the Kenya Gazette.

6. The Supreme Court in Mary Wambui Munene v. Independent Electoral and Boundaries Commission & 2 others had set a steady jurisprudential foundation on the question of applicability of the determination of unconstitutionality of section 76(1)(a) of the Elections Act and the Court was not about to depart from the pragmatic perception, which endeavored to sustain a right recognized under the operative state of the law. Such a pragmatic perception, once reflected in judicial interpretation was to be regarded as a
building-block of Kenya’s jurisprudence under the new constitutional dispensation.

7. A decision in principle applied retrospectively to all persons who prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided they were entitled to bring proceedings that sought the remedy in accordance with the ordinary rules of law such as a statute of limitations.

8. It could also apply to cases pending before the courts. That was to say that a judicial decision would be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision was excluded from cases already finally determined. The instant matter was pending in the Court of Appeal, and thus, the finality clause did not apply.

9. The court had affirmed the need for certainty in the interpretation and application of the constitutional provisions. That principle ought to have been upheld in the application of judicial precedents. Ultimately, the Court as the custodian of the norm of the Constitution had to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of the various interpretative frameworks duly authorized. The overall objective of the interpretive theory, in the terms of the Supreme Court Act, was to facilitate the social, economic and political growth of Kenya.

10. The petition in the High Court, which was filed 35 days after the date of the final declaration of results by the Returning Officer, fell outside the 28 days prescribed by the Constitution; and thus, all the proceedings ensuing from such declaration of results, at the High Court and the Court of Appeal, were a nullity. Neither of the two courts had the jurisdiction to hear and determine questions founded upon such election results.

11. The proceedings having been a nullity, the court no jurisdiction. The court could not entertain a matter that was null and void ab initio as a court of law could not legitimately consider an issue in which it had already declared that it had no jurisdiction.

As Per K H Rawal, DCJ & Vice President

12. The jurisdiction of the Supreme Court to hear and determine election appeals was set out by the court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (Munya case) where the court evaluated the essential attributes of the electoral question, which conveyed such question to the court under the concept of constitutional interpretation and application.

13. In the case of election appeals, the Supreme Court isolated articles 81(e) and 86 of the Constitution as the operative ones, in locating the electoral dispute within the Supreme Court’s broader constitutional mandate.

14. The jurisdiction of the High Court to resolve electoral disputes was to be found in article 105, read together with article 87(2) of the Constitution. Those two articles gave certain time prerequisites, linked to the High Court status as an election court.

15. In addition, section 85A of the Elections Act granted the Court of Appeal jurisdiction to hear and determine election appeals, but on the basis of issues of law only. That provision also gave certain time-signals to the Court of Appeal, as a court sitting in election appeals.

16. The jurisdiction of the Supreme Court, however, as elaborated in article 163(4)(a) and (b) of the Constitution was distinct from that of the High Court and the Court of Appeal. While the High Court and the Court of Appeal were both guided by time and scope, the role of the Supreme Court was broader, resting upon the interpretation and application of the Constitution, as well as the settling of issues of general public importance.

17. Article 163(4)(a) of the Constitution granted the Supreme Court the broad jurisdiction to hear and determine appeals as of right in any case that involved the interpretation or application of the Constitution. Article 163(4)(b), on the other hand, allowed the court to hear and determine appeals upon the certification that a matter of general public importance was involved.

18. In the Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others Civil Application No 5 of 2014, the court also underscored its mandate, in the terms of the Supreme Court Act, 2011 to assert the supremacy of the Constitution and to provide authoritative and impartial interpretation of the Constitution. Thus, the Supreme Court’s jurisdiction was distinct from that of both the High Court and the Court of Appeal.

19. The guiding principles attendant on the exercise of a court’s jurisdiction were laid out in article 159(2) of the Constitution. Article 159(2)(b) and (e) bore the principles directly incorporated into the constitutional or statutory provisions, granting the court the power to resolve electoral disputes. Justice ought not to have been delayed and the purpose and principles of the Constitution ought to have been protected and promoted.

20. The Supreme Court, being at the exalted position
of an apex court, had the right and obligation to develop the jurisprudence touching on issues of general public interest, as well as those that touched on the interpretation of the Constitution. That right could not be curtailed by anyone. The court was not to hesitate, in the interest of developing an indigenous jurisprudence, to pave further paths that were to advance the rule of law. That could easily be accomplished by taking certain minimal actions that fell within the court’s constitutional and legislative mandate.

21. The election court was a court anchored upon the dictates of time, with its mandate, by the provisions of article 105 of the Constitution, limited to six months after the filing of the election petition. Therefore, even where the court declared that the election court lacked the jurisdiction to hear and determine a matter, the special nature of the Supreme Court under article 163(4)(a) of the Constitution ordained that its mandate to settle legal issues of constitutional controversy, remained alive.

22. The modalities of the charge which was exercised in final form by the Supreme Court were guided by article 259(1) of the Constitution, which directed that the Constitution was to be interpreted in a manner that promoted its purposes, values and principles; advanced the rule of law, and the human rights and fundamental freedoms in the bill of rights; and permitted the development of the law. Therefore, to curtail the authority of the Supreme Court to address itself to legal issues of constitutional relevance would negate the very essence of its establishment as a final court. The Supreme Court’s special mandate however was to be discharged judiciously.

23. The Supreme Court, as the guardian of the Constitution, and the final arbiter on constitutional interpretation, had the task of safeguarding the juridical integrity of this charter, and its continued effectiveness. In ascertaining that a lower court had the jurisdiction to address itself to a matter coming up before itself, different questions arose, including those of the legal and historical context.

24. Any appeal admissible within the terms of article 163(4)(a) of the Constitution ought to have been founded upon cogent issues of constitutional controversy. The determination that a particular matter bore an issue or issues of constitutional controversy properly fell to the discretion of the court, in furtherance of the objects laid out under section 3 of the Supreme Court Act, 2011.

25. The peculiar nature of the Constitution of Kenya, 2010 informed the peculiarity of the Judiciary in the new dispensation, and more so, that of the Supreme Court. The Constitution progressively broadened the arena of litigation in the country and the Supreme Court had to remain steadfast in its duty to address itself on issues that could properly come before it.

26. In ensuring that the standards of procedural fairness and the values elaborated under article 10 of the Constitution were safeguarded, the special nature of the Supreme Court, and the exceptional burdens of constitutional adjudication reposed in it required the Court to delve into issues of constitutional controversy even where the issue at hand was one of determining its own jurisdiction.

As Per J B Ojwang, SCJ

27. It was evident, in the judgment that the outcome had adhered to the path set by the decision of the Court of Appeal in Owners of Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd. The conventional wisdom of that case that jurisdiction was everything and that a court lacking jurisdiction had to down its tools, could retain validity for most categories of Kenya’s courts. That could not be the case for the apex court which was the Supreme Court established under article 163 of the Constitution.

28. The Supreme Court is the very centre piece of the novelty of the governance set-up of the new constitutional dispensation. The political and constitutional stature of the court ran in tandem with a generic conferment of jurisdiction, a scenario that was fundamentally alien to the closed-in outlook of earlier politico-legal structures as depicted in the Motor Vessel “Lillian S” case.

29. From article 163(3) and (4) of the Constitution, the inherently enlarged competence of the Supreme Court was at once apparent an element not shared with any of the lower courts. Interpretation and application of the Constitution, subject only to objective and rational judgment in proper context, was an inherently open-ended phenomenon; much like the determination that a particular question fell within the category of matters of general public importance, and therefore falling to the jurisdiction of the Supreme Court.

30. The Supreme Court was the bearer of a wider jurisdiction than would have been contemplated at the time of Lillian S, was manifested from the terms of article 163(6) of the Constitution that the Supreme Court could give an advisory opinion at the request of the national government, any State organ, or any county government with respect
to any matter concerning county government. The Constitution, thus, reposed special trust in the Supreme Court, to apply its internal procedures, and its modalities of reasoning, to evaluate essentially political questions of public governance, and to render a legitimate opinion that guided the operations of the State and its plurality of agencies.

31. Article 163(8) of the Constitution empowered the Supreme Court to make rules for the exercise of its jurisdiction and by article 163(9), Parliament was empowered to make further provision for the operation of the Supreme Court. By the latter provision, the Supreme Court Act, 2011 was enacted, and it consecrated the Supreme Court as the formal custodian of the interpretive process of the Constitution itself.

32. By the unlimited scope of such a remit, it was clear that the Supreme Court's latitude, in the course of hearing any case or determining any question, or examining matters arising whether these were constitutional or bearing upon the public interest was of a profound nature.

33. The Supreme Court was not to sidestep meritorious occasions for a decision, by invoking obsolescent concepts for it was the fundamental plank of the constitutional order, bearing the mandate to develop the law to the extent that it did not give effect to a right or fundamental freedom, and to adopt the interpretation that most favoured the enforcement of a right or fundamental freedom.

34. Thus, in a typical case of dispute resolution, it would not be right in principle for the court to proceed on the footing that a court of law downed its tools in respect of the matter before it the moment it held the opinion that it was without jurisdiction. The Supreme Court had a special role in the constitutional function of dispute settlement and it stood not on the same platform as the other courts of the land.

Appeal allowed. Determinations made by both the High Court and the Court of Appeal set aside. Parties to bear their own costs. Orders to be served upon the Speaker of the National Assembly.
The Respondents had instituted judicial review proceedings seeking the orders of certiorari and prohibition against the Appellants (the County Councils of Wajir and Mandera) to stop them from levying taxes that were arbitrary, illegal and unfair in the form of cess on “miraa” obtained from Meru County Council whenever the said “miraa” was transported through those administrative jurisdictions. They argued that there had been no approval by the Minister for Local Government of any by-laws or resolutions by the appellants to levy this tax. The High Court ruled that the imposition of cess by the appellants was without legal authority, which culminated into this appeal.

It was the appellants’ case that the Court erred in law in finding that it was mandatory, under section 192A of the Agriculture Act, for them to obtain the consent of the Minister for Agriculture prior to passing by-laws on imposition of cess on “miraa” transported through their administrative areas of jurisdiction. They further argued that in holding that the by-laws were made in derogation of the Local Government Act, the Court cited and relied on section 202 (7); which was nonexistent.

The Wajir County Council contended that the Court erred in law in finding that it was mandatory, under section 192A of the Agriculture Act, for them to obtain the consent of the Minister for Agriculture prior to passing by-laws on imposition of cess on “miraa” transported through their administrative areas of jurisdiction. They further argued that in holding that the by-laws were made in derogation of the Local Government Act, the Court cited and relied on section 202 (7); which was nonexistent.

Brief Facts

The Wajir County Council contended that the Court erred in law in finding that it was mandatory, under section 192A of the Agriculture Act, for them to obtain the consent of the Minister for Agriculture prior to passing by-laws on imposition of cess on “miraa” transported through their administrative areas of jurisdiction. They further argued that in holding that the by-laws were made in derogation of the Local Government Act, the Court cited and relied on section 202 (7); which was nonexistent.

Issues

I. Whether a typographical error by a Court in citing a provision of law was fatal

II. What was the procedure for the making of by-laws relating to the imposition of cess on an agricultural produce?

III. Whether it was mandatory for a local authority to seek the consent of the Minister for Agriculture before imposing cess on an agricultural produce

Civil Practice and Procedure - judgments- typographical errors in a judgment- where a Court erroneously cited and relied on a non-existent provision of law-whether a typographical error by a Court in citing a provision of law was fatal

Statutes - subsidiary legislation- by-laws- the power of local authorities to make by-laws- imposition of fees and charges by local authorities- by-laws relating to imposition of cess on agricultural produce- where a local authority purported to levy cess on miraa transported through its jurisdiction- procedure for the making of by-laws relating to the imposition of cess on an agricultural produce- whether it was mandatory for a local authority to seek the consent of the Minister for Agriculture before imposing cess on an agricultural produce- Agriculture Act, section 192A (1) & (3)

Agriculture Act (cap 318) Section 192 A:

(1) Subject to subsection (1A), local authority may, with the consent of the Minister given after consultation with the Minister for the time being responsible for Local Government, by by-laws, impose a cess on any kind of agricultural produce, and may in the by-laws make such incidental provision as is necessary or expedient; and the cess shall form part of the local authority’s revenues.

(1A) Notwithstanding the provisions of subsection (1), eighty per cent of all monies collected as cess under that subsection shall be used in maintaining roads...
and other services, in the local authority, related to the sectors in respect of which such monies are levied, and the remaining twenty per cent shall be credited to the general account of the local authority.

Provided that the eighty per cent of the cess collected in respect of tea and coffee shall be transmitted to the Kenya Roads Board Fund.

(3) The procedure for the making, approval and publication of by-laws made under subsection (1) shall be that prescribed by the Law under which the local authority is established, and, for the purposes of the enforcement thereof, such by-laws shall be deemed to be by-laws made under that Law.

Held:

1. Section 202(7) of the Local Government Act did not exist. Reference was made in the record of appeal to section 202(3) of the Act. It was a typographical error for the Judge to have cited section 202(7) instead of section 202(3) of the Act. The typographical error did not go to the root or form the ratio decidendi for the final decision and determination by the Court.

2. Under section 192A (1) of the Agriculture Act the discretion of whether or not to impose a cess on any kind of agricultural produce lay with a local authority. Once the local authority exercised the discretion and chose to impose cess on an agricultural produce, the Minister for Agriculture had to consent and then consult with the Minister for Local Government, and if approval was granted, the cess could be imposed.

3. A local authority could not impose cess on an agricultural produce without consent of the Minister for Agriculture who had to consult and obtain approval from the Minister for Local Government. Such consent, consultation and approval were mandatory before cess could be levied on an agricultural produce. The High Court did not err in law by finding that approval of the Minister for Local Government obtained upon consultation with the Minister for Agriculture was a mandatory requirement before cess could be imposed on an agricultural produce.

4. Section 202 (3) of the Local Government Act provided that nothing in the Act could be deemed to empower a local authority to make by-laws overriding or derogating from the provisions of any other written law for the time being in force in Kenya. The import of the provision was that section 202 (1) of the said Act, which empowered a local authority to impose cess, could not override or derogate from the provisions of section 192A (1) of the Agriculture Act. Section 202 (1) of the Local Government Act was subject to Section 202 (3) of the same Act and Section 192A (1) of the Agriculture Act.

5. Section 204 (1) of the Local Government Act made it mandatory that after any by-law had been made by a local authority it had to be submitted to the Minister for his approval. Section 202 (4) of that Act provided that no by-law made thereunder had the force of law until it had been approved by the Minister, whether with or without alteration, and published, or notice thereof published, in the manner prescribed therein. There was no evidence on record that approval of the Minister for Local Government was obtained by Mandera County Council for the by-law imposing cess on “miraa”.

6. The Respondents had laid a factual basis by stating that the by-law for Mandera County Council had not been approved by the Minister. The evidential burden to prove the existence of such approval shifted to the County Council of Mandera. Section 206 of the Local Government Act provided for the mode of admissibility of evidence in proof that approval of the Minister had been obtained. A copy of every by-law which had been approved by the Minister had to be kept by the Clerk and would be admissible in evidence without further proof and would be evidence of the due making of such by-law and of the contents thereof.

7. The evidential burden to demonstrate that approval of the Minister was obtained was a fact which was within the knowledge of Mandera County Council. No evidence was placed before the High Court in accordance with Section 206 (1) of the Local Government Act. Further, a Certificate in terms of Section 206 (2) of that Act was never tendered in evidence. The High Court did not therefore err in its finding that there was no proof that Mandera County Council had obtained approval of the Minister to levy cess on “miraa”.

8. Section 192A (3) of the Agriculture Act stipulated that the procedure for the making, approval and publication of by-laws made under section 192A (1) would be that prescribed by the law under which the local authority was established, and, for the purposes of the enforcement thereof, such by-laws would be deemed to be by-laws made under that law. With respect to the County Council of Wajir, a Certificate in terms of Section 206 (1) of the Local Government Act that had been tendered in evidence indicated that the Minister for Local Government had approved the imposition of cess.
on “miraa” within that jurisdiction. In the approved by-law, the specified rates to be paid were stipulated. The Gazette Notice dated September 5, 2008, as read with County Council of Wajir (Miraa Import Cess) By-law, 2008, and with section 192A (3) of the Agriculture Act was sufficient proof that relevant approval of the Minister for Local Government had been obtained.

9. The High Court erred in law by interpreting Section 192A (1) of the Agriculture Act without considering the provisions of Section 192A (3) of the same Act in holding that consent of the Minister for Agriculture had not been obtained in relation to imposition of cess on “miraa” by the Wajir County Council. Cess imposed by the said County Council was legal because the procedure for the making, approval and publication of by-laws made under Section 192A (1) of the Agriculture Act was the procedure prescribed by the Local Government Act.

i. Cess imposed on “miraa” by the County Council of Wajir and the County Council of Wajir (Miraa Import Cess) By-law, 2008 upheld.

ii. Cess imposed on “miraa” by the County Council of Mandera declared illegal.

iii. Each party to bear own costs.

Appropriateness of reinstatement as a remedy in redundancy situations

Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others

Civil Appeal No 46 of 2013

Court of Appeal at Nairobi

E M Githinji, D K Maraga & A K Murgor, JJ A

July 11, 2014

Reported by Beryl A Ikamari & Karen Mwende

Brief facts

On August 1, 2012 the Appellant issued a notice to staff and their trade union, indicating that due to a staff rationalization exercise there would be redundancies affecting a maximum of 650 employees. The explanation offered for the restructuring was that the Appellant had experienced a decline in revenue due to the harsh economic climate and had high operating costs.

There were meetings between the Appellant and the employees’ trade union (the 1st Respondent) but there were wrangles in the trade union’s leadership and the trade union stopped engaging in the negotiations and consultations. It sought court orders for an injunction to halt the process.

The injunction was discharged and on September 4, 2012, the Appellant issued termination letters, on account of redundancy, to 447 unionizable employees. A suit was lodged at the Industrial Court to challenge the Appellant’s decision and the Industrial Court found that there was no justification for the declaration of redundancy and that the employees had been terminated from employment unfairly. The Industrial Court issued orders for the reinstatement of the employees.

Against the Industrial Court’s decision, hence an appeal was lodged at the Court of Appeal.

Issues

i. Whether there was substantive justification for the declaration of redundancy.

ii. Whether a valid redundancy notice had been issued.

iii. Whether there was a mandatory legal requirement for consultations before final decisions on redundancy were made.

iv. Whether a valid selection process had been undertaken for purposes of redundancy.

v. Whether reinstatement was an appropriate remedy for the employees who had been terminated on account of redundancy.

Employment Law - termination of employment contracts-redundancy-circumstances in which a declaration of redundancy would be justified-Employment Act, 2007, sections 40, 43, 45 & 47.

Employment Law - termination of employment contracts-redundancy-procedure to be followed-whether consultations were mandatory and the nature of the appropriate selection criteria- Constitution of Kenya 2010,

Held

1. Redundancy as defined in section 2 of the Labour Relations Act, No 14 of 2007 and section 2 of the Employment Act, 2007 had two broad aspects, namely:
   a) The loss of employment in redundancy cases was involuntary and at the initiative of the employer.
   b) The loss of employment in situations of redundancy would arise without the employee being at fault and where the employee's services had become superfluous.

2. Article 10 of the Constitution of Kenya 2010, which dealt with the national values and principles of governance, was inapplicable to the dispute between the parties. The dispute was a dispute on the question of redundancy between a private company and its employees and there were specific and elaborate laws governing redundancy in such employment contracts.

3. Section 40 of the Employment Act, 2007, entitled the employer to terminate an employee's services on account of redundancy. The decision to declare redundancy was the employer's statutory right and the employer was entitled to terminate an employee's contract of service, as long as the employer genuinely believed that there was a redundancy situation.

4. The Appellant had tendered evidence of its financial status and on the need to employ mitigating initiatives. The circumstances of the Appellant were shown to have led to the decision to declare redundancies and the declaration of redundancy under the circumstances was justified. It was not within the court's jurisdiction to make decisions on how the Appellant could secure its financial future in those circumstances and to substitute the Appellant's decision with its decision.

5. The legal requirements for a redundancy notice under section 40(1)(a) of the Employment Act, 2007, were such that the notice would have to be one months' notice, issued to the labour union to which the employees were members and the labour officer in charge of the area that the employees were employed, stating the reasons for and extent of the intended redundancy.

6. Where the employee was a member of a trade union, it was not necessary for that notice to be issued to the employee under section 40(1)(a) of the Employment Act, 2007; it would be adequate if it was issued to the trade union and labour officer. However, an employee who was not in a trade union would have to receive the notice.

7. The Appellant had issued a notice on the subject of an intended redundancy to both the employees and their trade union. There was no evidence that the relevant labour officer had received the notice. That issue on the notification of the labour officer was not pleaded, canvassed or determined by the Industrial Court.

8. The notice issued had satisfied the one month notification period as required in law. The period between the issuance of the notice and the issuance of redundancy letters to individual employees was 34 days.

9. Section 40 of the Employment Act did not make express provisions for consultations to be done in situations of redundancy. However, the requirement for consultations was implicit as the International Labour Organization Termination of Employment Convention 1982 required employers to notify trade unions and competent authorities of impending terminations and to provide trade unions with an opportunity for consultations.

10. The Convention would be applicable to the dispute by virtue of article 2(6) of the Constitution of Kenya 2010 which provided that treaties ratified by Kenya were part of the laws of Kenya.

11. However, the requirement for consultation was not a requirement to the effect that the employer would consult with the employee; it was a requirement to the effect that the employer would consult with the trade union, which would engage in consultations on behalf of the employees.

12. There had been attempts at consultations and negotiations between the employer and the trade union. However, those attempts failed as the trade union, which had leadership wrangles, refused to continue with the consultations despite the willingness of the employer to consult. The employer was not responsible for the failure in the consultations.

13. In accordance with section 40(1)(c) of the Employment Act, 2007, the criteria to be applied in selecting employees for termination on grounds
of redundancy included seniority in time, skill, ability and reliability of the employee.

14. The consideration of seniority in time related to the employee's length of service and imported the last in first out (LIFO) principle into redundancy processes. It was however not mandatory for the LIFO principle to be applied in all cases as the realities of business could require other approaches. For instance, modern technological know-how which an organization required could be knowledge possessed by new employees.

15. Given that the 447 employees selected for redundancy purposes, out of a pool of 4,834 employees, were assessed in less than a week (4-5 days) and that some had scored highly in the annual performance appraisal, the selection criteria had not met the statutory threshold. The Appellant did not apply a fair selection criterion.

16. Reinstatement was provided for in section 49 of the Employment Act, 2007, as a remedy for unfair termination. However, reinstatement was not an automatic right to an employee who was terminated unfairly. It would be a discretionary remedy offered on the basis of the merits of each case.

17. Part of the considerations in making determinations on whether or not to order reinstatement included practicability. Practicability included reasonableness, which invoked a broad inquiry into the equities of the parties' cases. Such considerations would include the prospective effects of the order of reinstatement, not only upon the individual employer and employee, but also other affected employees and third parties.

18. Although reinstatement was prayed for, it was not pleaded and no evidence was tendered on the practicability or otherwise of the order of reinstatement.

19. The order of reinstatement was inappropriate and impracticable in light of the Appellant's precarious financial position. The remedy was not efficacious as it defeated the objective of justified redundancy.

20. Section 49(1) of the Employment Act, 2007, provided for an award of damages equivalent to a number of months' wages or salary not exceeding 12 months based on the gross monthly wage or salary of the employee at the time of dismissal. Consequently, given that the selection procedure for termination was unfair, an award of damages equivalent to 6 months gross monthly wages or salary of the employee at the time of dismissal was appropriate.

Dissenting Per E M Githinji, JA, Dissenting

1. The statutory provisions applicable to claims on unfair termination, in redundancy situations included sections 40, 43, 45 & 47(5) of the Employment Act, 2007. As a valid defence to a claim of unfair termination on account of redundancy, an employer would have to prove: -
   a) The reason or reasons for termination;
   b) That the reason for termination was valid;
   c) That the reason for termination was fair based on the operational requirements of the employer
   d) That the employee was terminated in accordance with fair procedure.

2. The phrase “based on the operational requirements of the employer” had to be construed in the context of the statutory definition of redundancy. It meant that while there may have been underlying causes for redundancy, such as reorganization, the employer had to show that the termination was attributable to redundancy. Redundancy meant that the services of an employee had been rendered superfluous or the abolition of office, job or loss of employment.

3. The circumstances leading to a situation of redundancy included evidence tendered to show a decline in passenger volumes, unstable fuel prices, reduced revenue and an increasingly competitive environment. There was also evidence that the redundancy was implemented by various means including abolition of roles and reconfiguration of roles and that 447 unionizable employees had their contracts of employment terminated.

4. As long as an employer genuinely believed that there was a redundancy situation, terminations were justified and it was not within the Industrial Court's jurisdiction to substitute its business decision with what was reasonable.

5. The International Labour Organization's recommendation No 166 providing for consultations in situations of redundancy had not been ratified by Kenya. The applicable Collective Bargaining Agreement (CBA) did not provide for consultations and article 10 of the Constitution of Kenya, 2010, which provided for national values and principles of governance, did not apply to private contracts between employers and employees.

6. There was no express or implied legal provision or obligation which required that consultations would have to be done before making redundancy decisions.

7. The period between the issuance of the
redundancy notice and the issuance of termination letters was 34 days and the intervening injunction which was discharged 4-5 days before the issuance of the termination letters, did not stop the notice period from running. The legally required notice period of 30 days as per section 40 of the Employment Act, 2007, was complied with.

8. The criteria for selecting employees for purposes of redundancy terminations, as provided for in section 40(1)(c) of the Employment Act, 2007, included seniority in time, skill, ability and reliability. The redundancy notice had an attached document which explained why the LIFO principle (last in first out) principle would not be applied. While LIFO was an objective criterion, it was not always suitable and its application was not mandatory.

9. It was not shown that the criteria used for selecting employees for purposes of redundancy was unfair. The claim that the employees had been terminated on grounds of previous trade union activities was unsubstantiated.

10. The remedy of reinstatement was discretionary. In determining its suitability the Industrial Court was required to be guided by considerations on the practicability of the remedy and the common law principle that specific performance in a contract of employment could only be ordered in very exceptional circumstances.

11. There was a genuine redundancy resulting in loss of employment and procedural fairness was applied.

Appeal partly allowed by majority holding. (The selection procedure for purposes of redundancy was found to be unfair but the order of reinstatement to duty was substituted with an order that 6 months’ gross salary would be paid as compensation.)

Circumstances where a Court not being a final court could exercise residual jurisdiction to review its decisions to which there are no appeals
Benjoh Amalgamated Limited & another v Kenya Commercial Bank [2014] eKLR
Civil Application No. Sup. 16 of 2012
Court of Appeal at Nairobi
G B M Kariuki, D K Musinga & W Ouko, JJ.A
June 20, 2014
Reported by Nelson Tunoi & Riziki Emukule

Brief Facts:
The two applicants (Benjoh Amalgamated Limited and Muiri Coffee Estate Limited) were limited liability companies. They brought the present application seeking orders to be granted leave to appeal to the Supreme Court against the decision of the court and/or in the alternative the court to recall review or set aside the judgement against them. Their argument was that the Court lacked jurisdiction to have made the judgement in reference to a consent order without confirming the existence of such a consent order.

Issues:
I. Whether the matter brought to the Court was one that raised an issue of general importance to warrant the issuance of leave to appeal to the Supreme Court?
II. Whether the Court of Appeal had residual jurisdiction to review its own decisions

Civil Practice and Procedure - review-application for review on decisions already determined by a court-where a Court not being a final court could exercise residual jurisdiction to review its decisions to which there were no appeals-whether the Court of Appeal had residual jurisdiction to review its own decisions-Constitution of Kenya, 2010, article 164(3); Appellate Jurisdiction Act (cap 9); Court of Appeal Rules (cap 9 Sub Leg), Rules 1(2), 35

Held:
1. The foundation for the intended appeal was the validity of a consent order and whether there was evidence on that basis that it could not bind the appellants thus justifying its being set aside. This was neither an issue that transcended the
interest of the parties in the litigation nor had an impact on society in any way thus could not amount to a matter of general public importance and a certificate to appeal to the Supreme Court could not be issued under article 163(4)(b) of the Constitution of Kenya, 2010.

2. The Court of Appeal had appellate jurisdiction that arose once an appeal was filed or a notice of appeal lodged showing intention to appeal. It had inherent power provided under rule 1(2) of the Court of Appeal Rules to make any orders as were necessary for justice to be achieved. The concept of review recognized inherent human fallibility and the need to overcome abuse of process of court or miscarriage of justice.

3. The High Court had the power to review its own decisions conferred upon it by both the Civil Procedure Act and its subsidiary Rules for reasons such as discovery of new and important evidence or mistake on the face of the record, but there was no similar statute with regard to the Court of Appeal. There was no apparent jurisdiction for the Court of Appeal to review its orders or judgments save for the slip rule embedded in rule 35 of the Court of Appeal Rules which enabled the court to effect its manifest intention in a judgement or order.

4. Prior to the 2010 Constitution, the Court of Appeal took the position that it did not have jurisdiction to review its own decisions and that the only power it had with regard to review was in relation to the slip rule under rule 35 and further that its inherent power under rule 2(1) was exercisable in hearing appeals when it was still a court of last resort.

5. Case law on the issue of review showed that there were two conflicting principles that emerged namely the “finality principle”, which did not support review, and the “justice principle”, which advocated for limited review on the basis that the purpose of litigation was to do justice to the litigating parties. The “finality principle” was urged on the basis of public interest as a public policy issue and was anchored on the need for stability and consistency in law while the “justice principle” was urged on the basis of justice to the parties and to boost the confidence of the public in the judicial system.

6. Where the Court was one of final resort, and notwithstanding that it had not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it had residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same. This was jurisdiction that was to be invoked with caution and only in cases whose decisions were not appealable to the Supreme Court.

7. In a review application, the length of the delay and what had transpired in the interim period was critical as it bore on the balance of justice. The Court of Appeal would be reluctant to invoke its residual jurisdiction of review where there were laches, since the parties came to court for review after fourteen (14) years, or where legal rights of innocent third parties had vested during the intervening period which could be interfered with without causing further injustice. The Court would not therefore entertain review of decisions made before the Constitution of Kenya, 2010 came into being.

Application dismissed with costs to the respondent.

Children born out of surrogacy agreement have a right to know biological parents.

J L N & 2 others v Director of Children Services & 4 others

High Court at Nairobi
Petition No 78 of 2014

D S Majanja, J
June 30, 2014

Reported by Beryl A Ikamari & Karen Mwende

Brief Facts

WKN and CWW entered into a surrogacy agreement with JLN who agreed to be a surrogate mother by undergoing In Vitro Fertilization. Following the delivery of the children, the issue arose as to whether CWW should be registered as the mother of the children in the Acknowledgement of Birth Notification, as required under the Births and Deaths Registration Act (Cap 149) rather than JLN, the birth mother.

The Hospital (the 3rd respondent) informed the 1st respondent, the Director of Children Services of the circumstances concerning the birth of the twins. The Director took the view that the children were in need
of care and protection and as a result, his officers took them and placed them under the care of a Children's Home.

Issues

I. Whether a woman who gave birth under a surrogacy agreement would be recognized as a birth mother and a parent under the law.

II. Whether children born through a surrogacy agreement were children in need of care and protection.

III. Whether the Hospital violated the petitioners’ rights to privacy by disclosing confidential medical information to a third party.

IV. Whether withdrawal of children from persons claiming to be their parents would, in certain circumstances, be a violation of the right to human dignity.

Constitutional Law - fundamental rights and freedoms-enforcement of fundamental rights and freedoms-right to privacy-disclosure of confidential medical information to a third party-whether disclosure of information touching on a surrogacy agreement would be a violation of the right to privacy- Constitution of Kenya 2010, article 31.

Constitutional Law - fundamental rights and freedoms-enforcement of fundamental rights and freedoms-right to human dignity-whether the withdrawal of children from their parent’s custody would be a violation of the right to dignity- Constitution of Kenya 2010, article 28.

Family Law - children’s rights-children in need of care and protection-circumstances in which a child would be deemed to be in need of care and protection-whether children born through a surrogacy agreement would automatically be deemed to be children in need of care and protection-Children Act, Cap 141, section 119.

Family Law - definition of a parent-whether a woman who gave birth under a surrogacy agreement would be recognized as a birth mother and a parent under the law-Births and Deaths Registration Act (Cap 149), section 10 & Children Act (Cap 141), section 2.

Article 31 of the Constitution of Kenya 2010

31. Every person has the right to privacy which includes the right not to have-

(a) their person, home or property searched;

(b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed.

Held

1. The right to privacy was not absolute. Implicit in the protection accorded, under the right to privacy, was the requirement that information relating to family and private matters was not to be unnecessarily revealed. However, there would be instances where the right to privacy in respect of the patient/client relationship could be abridged. In the case of W v Edgell [1990] 1 ALL ER 835 Lord Bingham set out the principles under which a doctor could disclose the information held in confidence. The principles were as follows;

I. A real and serious risk of danger to the public had to be shown for the exception to apply.

II. Disclosure had to be to a person who had legitimate interest to receive the information.

III. Disclosure had to be confined to that which was strictly necessary (not necessarily all the details).

2. The Hospital had a statutory duty to record to the best of its knowledge the particulars of the children in the Notification under section 10 of the Births and Deaths Registration Act (Cap 149). Section 10 of the Act implied that the mother referred to in the Act was the birth mother. Section 2 of the Children Act (Cap 141) defined a parent as, “the mother or father of a child and included any person who was liable by law to maintain a child or was entitled to his custody.” As the birth mother, JLN had the immediate responsibility of maintaining the children and was entitled to their custody. The Hospital was therefore within the law to insist that JLN had to be registered as the parent of the children.

3. Kenya did not have a law that governed surrogacy and related issues. In the absence of a law on surrogacy, the Hospital was entitled to seek guidance on the issue from the Director. Under section 38(1) of the Children Act the Director was required to safeguard the welfare of children and in particular, to assist in the establishment, promotion, co-ordination and supervision of services and facilities designated to advance
the wellbeing of children and their families. In the alternative, the Hospital was entitled to seek guidance from the Principal Registrar of Births and Deaths. The Hospital therefore did not violate the petitioner’s rights to privacy when it informed the Director of the surrogacy arrangements between the petitioners.

4. A cursory look at the provisions of section 119 of the Children Act confirmed that the children were not in need of care and protection and if indeed they were, there was no reason to take them to the Children’s Home. At the time the Director took his action, the 1st petitioner had been discharged from the Hospital and left the new born children still receiving care at the Hospital as they had been born prematurely. The children had not been abandoned. The only issue that the Director was called upon to decide was on the registration of the children’s birth.

5. The director did not act in the best interest of the children as there was no dispute even between the surrogate mother and the genetic mother. The best solution was to have the children retained in the hospital pending the determination of the parental issue in court or by giving appropriate directions. In that way, the children would continue getting the medical attention which they needed as they were born pre-term. The law provided that at birth the mother was the person entitled to immediate custody of the children and in this case there was no issue of the birth mother rejecting the children.

6. The Director violated the rights and fundamental freedoms of the petitioners by taking away the children in a manner that could not be justified under the Children Act, caused them distress and embarrassment by taking away the children. Their right to human dignity under article 28 of the Constitution was violated.

Petition allowed in part. (The case against the 3rd respondent was dismissed with no order as to costs. The 1st respondent was to pay each of the petitioners the sum of Kshs. 500,000.00/=)

Court rules on payment of withholding tax by non-residents

Motaku Shipping Agencies Ltd v Commissioner of Income Tax
Civil Suit No 60 of 2013
High Court at Mombasa
M Kasango, J
June 19, 2014
Reported by Andrew Halonyere and Valarie Adhiambo

Brief facts
The appellant (Motaku Shipping Agencies Ltd) entered into ship management agreements with owners of different vessels from other countries under which it was appointed as a manager of the vessels. It was to procure provisions of various professional and managerial services to the vessels whenever they visited Kenyan ports and the ship owners remitted money for procurement of the services. The respondent carried out a tax audit of the appellant’s business and issued assessment notices for payment of taxes including withholding tax on the payments made by the appellant to the service providers. The appellant objected to the withholding tax assessment on grounds that the payments were effected by them acting as agents of the ship owners who were non-resident persons and according to section 10 of the Income Tax Act, only payments made by a resident person or a person having a permanent establishment in Kenya were subject to income tax.

According to the respondents the subject payments were made by the appellant who was a resident for purposes of the Income Tax Act and therefore were deemed to be income which accrued in or was derived in Kenya and the appellant was under obligation, pursuant to Section 35 of the Income Tax Act, to withhold and remit to the respondent a percentage of such payments. Further, that withholding tax was not tax of the payer but a tax of the person to whom it was paid and the payer merely acted as an agent of the Commissioner for purposes of collection and accounting. An appeal before the Tax Local Committee Mombasa failed hence this appeal whose competency was also challenged by respondents arguing that it raised new issues.

Issues

1. Whether an agent who was a resident for the purpose of Income Tax Act could be exempted from deducting taxes on payments made on
behalf of principals who were non-residents and had no permanent establishment in Kenya.

II. Whether rule 14 of the Income Tax (Appeals to the High Court) Rules prohibited raising an issue that was not raised before the Local Committee in an appeal before the High Court?

III. Whether withholding tax was a tax of the payee and the payer only acted as an agent for the purposes of collection and accounting for the tax collected?

**Tax Law** - charge of tax - withholding tax - withholding tax on payments for managerial or professional fees - where the payment was made by an agent on behalf of a principal who was a non-resident and had no permanent establishment in Kenya - claim by the respondent that withholding tax is a tax of the payee and the payer only acted as an agent for the purpose of collection and accounting for the tax collected - Income Tax Act, section 3(1), 10 and 35(1)(a) and (3)(f)

**Income Tax Act**

**Section 3(1)**

Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.

**Section 10**

For the purposes of this Act, where a resident person or a person having a permanent establishment in Kenya makes a payment to any other person in respect of -

(a) a management or professional fee or training fee;
(b) a royalty;
(c) interest and deemed interest;
(d) the use of property;
(e) an appearance at, or performance in, a public or private place for the purpose of entertaining, instructing, taking part in any sporting event or otherwise diverting an audience; or
(f) an activity by way of supporting, assisting or arranging an appearance or performance referred to in paragraph (e) of this section;
(g) winnings from betting and gaming, the amount thereof shall be deemed to be income which accrued in or was derived from Kenya:

**Provided that** –

1. this section shall not apply unless the payment is incurred in the production of income accrued in or derived from Kenya or in connection with a business carried on or to be carried on, in whole or in part, in Kenya;

2. this section shall not apply to any such payment made, or purported to be made, by the permanent establishment in Kenya of a non-resident person to that non-resident person.

**Held**

1. Rule 14 of the Income Tax (Appeals to the High Court) Rules provided that the appellant was not, except by leave of the Court and upon such terms as the Court would determine, to rely on a ground other than a ground stated in the memorandum of appeal. Rule 2 of the same rules defined a "memorandum" to mean a memorandum of appeal presented under rule 3 and rule 3 provided for form and time of filing an appeal under section 86 (2) of the Income Tax Act which was clearly an appeal to the High Court.

2. The memorandum of appeal filed by the appellant before the Local Committee clearly contained as grounds the issue of payments made on behalf of principals who were nonresidents and had no permanent establishment in Kenya - whether withholding tax was a tax of the payee and the payer only acted as an agent for the purposes of collection and accounting for the tax collected - Income Tax Act, section 3(1), 10 and 35(1)(a) and (3)(f)

3. From section 3 (1) of the Income Tax Act, it was clear that subject to the provisions of the Act, income of a person whether resident or non-resident was chargeable to income tax provided the income accrued in or was derived from Kenya. Therefore, income of a person could not be subject to income tax unless it was income which accrued in or was derived from Kenya.

4. In section 10 of the Income Tax Act, for a payment
for management or professional fee to have been deemed to be income which accrued in or was derived from Kenya, that payment had to be made by a resident person or a person having a permanent establishment in Kenya and the payment had to be incurred in the production of income accrued in or derived from Kenya or in connection with a business carried on or to be carried on in whole or in part, in Kenya and only then was such payment chargeable to income tax.

5. A cursory reading of Section 35 (1) (a) and (3) (f) of the Income Tax Act showed that all payments in respect of management or professional fee was subject to withholding tax. However, the key phrase in the said provisions was “which was chargeable to tax”. That section stipulated that the deduction was to be made only in instances where the payment was chargeable to tax and to establish whether payment for management or professional fee was chargeable to tax, one had to fall back to the provisions of sections 3 (1) and 10 of the Income Tax Act.

6. The relationship between the Appellant and the vessel owners was one of an agent and principal and the fact that the appellant made the subject payments on behalf of its principals was clearly documented and could not therefore be disputed. Since the appellant made the payments only as an agent, legally it was the principals who made the payments.

7. There was no provision in the Income Tax Act for taxation of payment in respect of management or professional fee made by a non-resident and person not having a permanent establishment in Kenya, even if such payment was made to a person resident or having permanent establishment in Kenya. Therefore, since the payments in issue were made by the vessel owners who were non-resident persons not having a permanent establishment in Kenya, the same were not chargeable to income tax even if the payments were made to persons based in Kenya.

8. The Income Tax (Withholding Tax) Rules, 2001 mandated a person who made payment of, or on account of, any income which was subject to withholding tax to deduct tax from the payment at the provided rate. The said rules did not create a distinction between instances where the payer was an agent and where the payer was the principal himself. Even an agent was under obligation to retain a portion of any payment made to any person on behalf of the principal and to remit the same to Kenya Revenue Authority on account of withholding tax, if the payment was chargeable to income tax.

9. The Income Tax Act did not just impose income tax by reference to the person receiving the payment but also by reference to the person making such payment and the place where the income was deemed to have accrued in or was derived from. All the three reference points- the payer, the payee and the place of accrual or derivation- had to be borne in mind in determining whether payment was subject to withholding tax. Thus, in the instant case, although the persons receiving the payments were resident persons for purposes of income tax, the persons making the payments were non-resident persons not having permanent establishment in Kenya who the Income Tax Act did not mandate to retain portions of the payments for purposes of withholding tax.

10. The appellant was under no obligation to retain portion(s) of the subject payments and to remit the same to the respondent on account of withholding tax, since the appellant was not the payee for purposes of withholding tax and the payments in question were not subject to income tax under the Income Tax Act.

The decision of the Income Tax Local Committee Mombasa was set aside and was substituted with an order that the respondent's additional assessment of withholding tax that was due from the Appellant as particularized in the form 11H.O was annulled.

Costs were awarded to the Appellant.
Brief Facts
The Plaintiff in the instant matter had sustained injuries as a result of an accident caused by the negligence of the 1st Defendant who was the driver of the motor vehicle owned by the 2nd Defendant. She sought general damages for pain and suffering, special damages, loss of income, loss of consortium, future medical expenses, interest on the same and costs of the suit.

Injuries Suffered
1. Fracture of spine, thoracic vertebrae T12
2. Complete paraplegia
3. Large ward on right shoulder
4. Urine retention (incontinence)
5. Dislocation of right knee
6. Severe spinal injury
7. Partial paralytic ileus

Issues
i. Whether the Plaintiff's claim was time barred having been instituted two months after the statutory limit of three years had elapsed from the date when the cause of action arose and whether the order extending time was properly granted.

ii. Whether the suit motor vehicle was owned by the 2nd Defendant.

iii. Whether the said vehicle was being driven by the 1st Defendant as agent of the 2nd Defendant.

iv. Whether the accident was caused by the negligence of the Defendants.

v. Whether the Plaintiff was entitled to damages and if so, what was the quantum?

vi. Who should bear the costs?

Tort law - institution of negligence suit- whether a suit based on negligence could be instituted four years after the cause of action arose- whether the present suit was time barred with the accident having occurred in 2007 while the suit was instituted in 2010.

Civil Practice and Procedure - leave to file out of time- whether a negligence suit could be filed out of time- whether the leave to file out of time had been properly obtained.

Civil Practice and Procedure - leave to file out of time- under what circumstances could the court allow an Applicant to institute proceedings after time had elapsed? – where the Petitioner sustained injuries and filed the suit four years after the cause of action had arisen- Limitation of Action Act Cap 22, section 27.

Limitation of Actions Act, Cap 22 Section 27
“1. Section 4 (2) does not afford a defense to an action founded on tort where -

(a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

2. The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which -

(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.

3. This section does not exclude or otherwise affect -
(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4 (2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or
(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.”

Held
1. The effect of the Limitation of Actions Act Cap 22 was that certain causes of action ought not to be brought after the expiry of a particular period of time. In other words the Act barred the bringing of particular actions after the specified periods of limitation but did not necessarily extinguish such causes of action. A cause of action that was barred could in certain cases be revived if the conditions set out in section 27 of the Limitation of Actions Act Cap 22 were fulfilled.
2. The extension of time applied only to claims made in tort and even then the claims had to be in respect of personal injuries arising from negligence, nuisance or breach of duty (whether the duty existed by virtue of a contract or of a written law or independently of a contract or written law).
3. However, even if the conditions were satisfied time would not be extended unless the Applicant proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the Plaintiff. In order to prove this, the Applicant was expected to show that he did not know that fact; that in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and that in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it had been reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.
4. ‘Appropriate advice’ was defined as meaning in relation to any facts or circumstances ‘advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case ought to be’.
5. In the result, where the Defendant or his representative such as the insurance company led the Plaintiff to believe that the claim is capable of being settled and in reliance thereof the Plaintiff or his advocate refrained from filing the suit until after the limitation had run its course, that ought to have constituted a good ground for extending time notwithstanding the provisions of section 27 aforesaid. It was therefore upon the Defendant at the hearing to challenge the grounds upon which the order extending law was granted. Whereas the defence concentrated on the provisions of section 27 of the Limitation of Actions Act Cap 22, no serious challenge was directed to the issue of negotiations. It could not therefore be that the order extending time to file the suit was not properly granted.
6. The Court appreciated that the Traffic Act was an Act of Parliament meant to consolidate the law relating to traffic on the roads; it was not an Act which decided de facto or de jure ownership of vehicles hence ownership of vehicles passed by sale and delivery and registration books were only evidence of title and property passed in accordance with the Sale of Goods Act, when the contract of sale was made.
7. Without the defence calling witnesses who could be cross-examined on the documents produced by them rendered the same of very little, if any, weight at all. In light of the contents of the certificate of official search produced before the Court, the only reasonable conclusion was that the suit motor vehicle was owned by the 2nd Defendant.
8. Where it was proved that a car had caused damage by negligence, then in the absence of evidence to the contrary, a presumption arose that it was driven by a person for whose negligence the owner was responsible. That presumption was made stronger by the surrounding circumstances and it was not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending did not of itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver. Thus, the 1st Defendant was vicariously liable.
9. The only evidence on record on how the accident occurred was the Plaintiff’s evidence. Without any evidence to the contrary, it had to be concluded that the accident took place when the driver of the suit motor vehicle was reversing. He ought to
have had a proper lookout before reversing and the fact that the accident took place without him noticing the Plaintiff could only be explained on the ground of negligence.

10. In awarding damages, the general picture, the whole circumstances, and the effect of injuries on the particular person concerned had to be looked at, some degree of uniformity had to be sought, and the best guide in that respect was to have regard to recent awards in comparable cases in the local courts. It was eminently desirable that so far as possible comparable injuries were compensated by comparable awards. The court had to strike a balance between endeavouring to award the Plaintiff a just amount, so far as money could ever compensate, and entering the realms of very high awards, which could only in the end have a deleterious effect.

11. On the issue of the multiplier, the law was that due regard was to be paid to the expectation of working life and dependency by the named dependants as well as the contingencies of life including the fact that the deceased could have died prematurely of a cause other than the accident that took him as well as the fact that the money would be paid in lump sum.

12. In determining the multiplicand, the important figure was the net earnings of the deceased. The Court was then to multiply the multiplicand by a reasonable figure representing so many years. In choosing the said figure, usually called the multiplier, the court had to bear in mind the expectation of earning life of the deceased. Taking into account the contingencies of life as well as the fact that the money would be paid in a lump sum, a multiplier of 15 years was reasonable in the instant case.

(i) **General Damages** = Kshs 3,000,000.00

(ii) **Special Damages** = Kshs 972,157.32

(iii) **Wheelchair** at Kshs 50,000.00 x every 5 years (3) = Kshs 150,000.00

(iv) **Diapers** at Kshs 50,000.00 x 15 years = Kshs 750,000.00

(v) **Special Mattress** for 15 years = Kshs 150,000.00

(vi) **Nurse aide** at Kshs 10,000 x 12 months x 15 years = Kshs 1,800,000.00

(vii) **Transport costs** at Kshs 6,000 x 52 weeks x 15 years = Kshs 4,680,000.00

(viii) **Physiotherapy** at Kshs 4,500 x 15 x 52 = Kshs 3,510,000.00

(ix) **Daily skin care** at Kshs 1,000 x 15 x 12 = Kshs 180,000.00

Total quantum assessed at Kshs. 15,042,157.32

Costs awarded to the Plaintiff.
Brief Facts
Following the judgment in, Martin Nyaga Wambora & others v. Speaker of the Senate and others Petition No. 3 of 2014(Wambora’s case) declaring the removal proceedings before Embu County Assembly (the County Assembly) and impeachment of the petitioner null and void, a new motion was filed in the County Assembly for the removal of the petitioner (Martin Nyaga Wambora) from office. The application by the petitioner sought conservatory orders restraining the Speaker of the Senate (3rd respondent) or any member of the Senate from introducing, discussing or deliberating his impeachment, and a stay of the resolution passed by the County Assembly regarding the motion to remove him from office.

The respondents on the other hand raised preliminary objections on jurisdiction of the Court on grounds that the proceedings before the County Assembly were in contravention of powers, privileges and immunities of the County Assembly as per article 196 of the Constitution read with section 4 and 12 of the National Assembly (Powers and Privileges) Act and section 17 of the County Government Act and further that the applications and proceedings were res judicata considering the judgment in the Wambora case.

Issues:
I. Whether county assemblies and the Senate enjoyed the powers and privileges provided in the National Assembly (Powers and Privileges) Act (Cap 6 Laws of Kenya)
II. Whether the High Court had jurisdiction in issues and procedures that were before a County Assembly where these were, by law, within the mandate of the County Assembly and Senate
III. Whether the matter was res judicata in light of the decision by the Court in a former suit by the Petitioner
IV. What principles guided the granting of conservatory orders?
V. Whether the Petition was arguable and whether a prima facie case had been established that would warrant the granting of conservatory orders
VI. Whether the matter was sub judice effectively prohibiting the Senate from acting on the resolution by the County Assembly
VII. Whether a resolution passed by a county assembly to impeach a Governor violated his rights to hold elective office, to human dignity and to fair administrative action
VIII. Whether the reintroduction of the resolution in the County Assembly before the lapse of three months breached section 33(8)of the County Governments Act which required that a re-introduction of a removal vote be brought to the Senate three months after a previous similar vote

Constitutional Law - the legislature- establishment of Parliament- the Senate- powers and privileges of the National Assembly- whether the Senate enjoyed the powers and privileges of the National Assembly- the National Assembly (Powers and Privileges) Act (Cap 6 Laws of Kenya)

Constitutional Law - devolved government- county governments- County Assemblies- powers, privileges and immunities of county assemblies-legislation providing for the powers and privileges of county assemblies-whether county assemblies enjoyed the powers and privileges of the National Assembly- law regulating powers and privileges of Parliament to apply mutatis mutandis to County Assemblies - transitional provisions of the Constitution-existing laws to continue in force with necessary adaptations for conformity with Constitution-County Government Act, 2012 section 17; Constitution of Kenya, 2010 sixth schedule section 7

Constitutional Law - fundamental rights and freedoms-right to hold elective office- where a County Assembly passed a motion to impeach a Governor- whether that resolution violated the Governor’s right to hold elective
Constitutional Law - fundamental rights and freedoms-right to human dignity- where a County Assembly passed a motion to impeach a Governor- whether that resolution violated the Governor's right to human dignity-Constitution of Kenya, 2010 article 38 (3)(c)

Constitutional Law - fundamental rights and freedoms-right to fair administrative action- where a County Assembly passed a motion to impeach a Governor- whether that resolution violated the Governor's right to fair administrative action- Constitution of Kenya, 2010 article 47

Jurisdiction - jurisdiction of the High Court-jurisdiction of the High Court in issues and procedures that are by law within the mandate of the County Assembly and Senate - whether the High Court had jurisdiction in issues and procedures that were before a County Assembly where these were by law within the mandate of the County Assembly and Senate -Constitution of Kenya, 2010 article 165 (3)

Civil Practice & Procedure - conservatory orders – principles guiding grant of conservatory orders-- whether the Petition was arguable and whether a prima facie case had been established that would warrant the granting of conservatory orders- what principles guided the granting of conservatory orders

Constitutional Law - devolved government-county governments-removal of a county governor-resolution by the County Assembly to remove the Governor-where a previous resolution by the County Assembly to remove the Governor was declared null and void - whether the reintroduction of the resolution in the County Assembly before the lapse of three months breached section 33(8) of the County Governments Act which required that a reintroduction of a removal vote be brought to the Senate three months after a previous similar vote-Constitution of Kenya,2010 article 181;County Government Act section 33(8)

Held

1. Article 196(3) of the Constitution gave Parliament powers to enact legislation providing for powers, privileges and immunities of county assemblies, their committees and members. Section 17 of the County Government Act, 2012, on the other hand, provided that the national law that regulated the powers and privileges of Parliament would, with the necessary modifications, apply to the County Assembly.

2. Section 7 of the sixth schedule to the Constitution provided that all laws in force immediately before the effective date of the Constitution were to be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution. In light of that provision, and noting that National Assembly (Powers and Privileges) Act was in existence before the effective date, it was applicable in relation to the Senate and the County Assembly pursuant to article 196(3) and section 17 of the County Government Act.

3. No other law regulated the powers and privileges of Parliament, which included the Senate, under article 93 of the Constitution. Accordingly, the National Assembly (Powers and Privileges) Act was applicable to the Senate with the necessary modifications, as it was to the County Assembly, and both the County Assembly and the Senate enjoyed the powers and privileges provided in the National Assembly (Powers and Privileges) Act, which was the national law that regulated the powers and privileges of Parliament.

4. Article 165 (3) of the Constitution vested the High Court with unlimited original jurisdiction in civil matters. Further, the High Court had jurisdiction, under article 166(3) (b) and (d) (ii), to determine the question whether a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or threatened; and to hear any question respecting the interpretation of the Constitution, including the determination of the question whether anything said to be done under the authority of the Constitution or of any law was inconsistent with or in contravention of the Constitution. The Court, clothed with the constitutional provisions under article 165 (3), was seized of jurisdiction to entertain the suit and the application therein.

5. The principle behind res judicata held that litigation had to come to an end on a matter the substance of which had previously been heard and determined by the Court. Such matter could therefore not be re-opened to be restarted all over again, unless the decision reached had been set aside. It was not the reasons for the decision that were res judicata but the decision itself.

6. The first process of removal of the County Governor was concluded with the rendering of the Court's decision, declaring the processes null and void; both at the County Assembly and
at the Senate, *inter alia*, on grounds of failure to obey the Court’s orders. In the contrary, the suit at hand, commenced with a fresh notice of motion in the County Assembly, which resulted in a resolution which was then under consideration in the Senate. The facts and circumstances at hand were not the same as those in the earlier litigation, and the two processes were, completely different. The Petitioner had moved to Court to litigate on the second process, which was a new matter, the substance of which had not been litigated before.

7. In terms of section 7 of the Civil Procedure Act, the matter was not one that qualified as being “in the former suit” or as a matter which had “been heard and finally decided”. It therefore could not be said to be the same matter as that in the prior suit by the Petitioner and was therefore not *res judicata*.

8. In determining whether or not to grant conservatory orders, several principles had been established by the courts. The Court would only issue conservatory orders in exceptional circumstances and would be minded of the mandate of other constitutional organs in exercise of their constitutional mandate.

9. An applicant had to demonstrate that he had a *prima facie* case with a likelihood of success and that unless the court granted the conservatory order, there was real danger that he would suffer prejudice as a result of the violation or threatened violation of the Constitution. The danger had to be imminent and evident, true and actual and not fictitious; so much so that it deserved immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that was remote and unlikely would not attract the court’s attention.

10. The second principle was whether if a conservatory order was not granted, the matter would be rendered nugatory. The third principle was that the public interest had to be considered before grant of a conservatory order. Where a conservatory order was sought against a public agency like a legislative assembly that was mandated to carry out certain functions in the normal course of its business, it was only to be granted with due caution. The interruption of the lawful functions of the legislative body had to take into account the need to allow for their ordered functioning in the public interest.

11. The allegations of breach of fair administrative action on the basis of threshold of seriousness and nexus prescribed by the High Court in the Petitioner’s prior suit could not stand. When the County Assembly exercised its statutory mandate under section 33 of the County Governments Act and pursuant to the constitutional power under article 181, it was for that Assembly, and not for the Court, to ascertain that the legal threshold was satisfied whilst conducting its quasi-judicial inquiry. The Court’s role could not precede the County Assembly’s inquiry role. The role of the Court was not essentially to conduct a merit review of the Assembly’s actions.

12. There was no indication that the County Assembly did not, in terms of the requirements of natural justice, deliberate on the charges to ascertain their legality or otherwise. Accordingly, the Petitioner had not demonstrated a *prima facie* case that called for the issuance of a conservatory order to preserve his right to hold office. The right under article 38(3) (c) was constitutionally circumscribed by article 181 and a statutory process was prescribed under section 33 County Governments Act for effecting the removal of the office holder.

13. In the prior suit by the Petitioner, the Court had found that the impugned vote had been done in breach of court orders and was therefore a nullity. That characterization of the word “nullity” was the trite and common legal appreciation of it, which was described as “Nothing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect.” *(Black’s Law Dictionary)*

14. If the previous resolution as presented to the Senate and the subsequent Senate proceedings had already been described as non-existent or a nullity, it followed on a *prima facie* basis, that no vote could have taken place there. The Petitioner’s allegation of breach based on section 33 (8) of the County Governments Act did not therefore assist the Petitioner’s plea of a *prima facie* case merit a conservatory order.

15. A matter that was *sub judice* was a matter pending before the court or judge for determination. The Court at that point did not have enough information to determine whether the matter before it was actually *sub judice*.

16. No interlocutory order could be issued in the case unless the Court had the benefit of all the arguments by all the Parties on the merits. The Court had to further be minded that the matter began through a process enshrined under the Constitution, by virtue of article 181 and section...
33 of the County Government Act, 2012 and was at that time before the Senate. The application did not merit the conservatory orders sought at that stage.

The constitutionality of criminalizing sexual acts between two consenting children (adolescents)

C K W v Attorney General & another
Petition No 6 of 2013
High Court of Kenya at Eldoret
F A Ochieng, J
July 25, 2014
Reported by Beryl A Ikamari

Brief facts
The Petitioner, C K W, was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act, No 3 of 2006. The particulars of the offence were that on a given date, the Petitioner had intentionally and unlawfully caused his genital organ to penetrate the genital organ of J, a girl aged 16 years. At the material time, the Petitioner was a 16 year old male child.

The Petitioner explained that the Complainant, J, was his girlfriend and the sexual act complained of was consensual. He stated that the Complainant willingly went to the Petitioner’s house and they had consensual sex. The petition was brought on grounds that the sexual act complained of was consensual. It was contended that it was discriminatory and unconstitutional to have the Petitioner prosecuted for the act on the basis that sexual conduct complained of was between children. Additionally, it was argued that it was discriminatory to only prosecute the male child involved in the act.

Issues
i. Whether section 8 of the Sexual Offences Act, which proscribed the offence of defilement, was unconstitutional as it discriminated against children by criminalizing consensual sexual acts engaged in by children with other children but allowing consensual sexual acts engaged in by adults with other adults.


Section 8 of the Sexual Offences Act, No 3 of 2006;
1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not
Held

1. The law was not discriminating against adolescents. In criminalizing sexual conduct between children, while allowing such conduct amongst consenting adults, the law aimed to protect children against harmful sexual conduct.

2. The legal provision on defilement served an important societal goal of protecting children from engaging in premature sexual conduct. There was an accepted need for guidance and protection for adolescents, who left to their own devices, tended to engage in risky behaviour.

3. Under section 8 of the Sexual Offence Act, No 3 of 2006, it was possible for both male and female children to be charged with the offence of defilement. Therefore, the legal provision did not discriminate against male children.

4. In Kenya, there was no express or implied requirement that where 2 children were involved in sexual penetration, both of them were to be charged with the offence of defilement. However, the absence of such a requirement would not prevent the filing of criminal charges against both children.

5. The Petitioner was an adolescent male when he engaged in the sexual act complained of and the complaint was made against him. There was no complaint made against the female adolescent who willingly participated in the sexual act, and on those grounds only, the boy was charged.

Petition dismissed.

Court Orders KEMRI to Acknowledge and Compensate their Scientific Researchers in Protecting the Researchers’ Intellectual Property Rights.

Dr Samson Gwer & 5 others v Kenya Medical Research Institute (KEMRI) & 3 others [2014] eKLR

Petition No 21 of 2013
Industrial Court
MN Nduma, J
July 18, 2014
Reported by Emma Kinya Mwobobia & Opiyo Lorraine

Brief Facts

The Petitioners herein had been employed by the 1st Respondent, Kenya Medical Research Institute (KEMRI) on diverse dates under the Wellcome Trust Programme. The said programme was subsumed under KEMRI in a new agreement between KEMRI and the Wellcome Trust Research Laboratory. They were research scientists while enjoying study scholarships under the said programme.

The Petitioners’ contracts were extended on short term basis. However the Petitioners alleged that they were unclear and oppressive effectively subjecting them to unfair administrative arrangement by the Respondents. They also alleged that they were discriminated against by the Respondents and that their right to fair labour practice had been infringed upon. The Petitioners claimed that their right to intellectual property had also been violated and the Respondents took credit for their work and scientific innovation.

The funding under KEMRI emanated from external donors who attached specific terms and conditions to the grant and administration of the Welcome Trust Research Programs. The terms and conditions became the subject of the Petitioners’ grievances. The Above background forms the basis of the suit herein.

Issues

i. Whether the Respondents promoted racial discrimination and inequality contrary to article 27 (4) of the Constitution, in stipulating that the scientific researchers had to have the relevant connection to European Economic Area.

ii. Whether the present case fell for determination on the basis of discriminative policy under international sponsorship programme or the government policy.

iii. Whether the suspension of the Petitioners by the 1st Respondent amounted to unfair administrative action contrary to article 47 of the Constitution.

iv. Whether an employer was entitled to the intellectual property rights of an employee by virtue of being their employer.

v. Whether the 1st Respondent committed scientific misconduct in promoting
Where Legal Information is Public Knowledge

Constitutional law - fundamental rights and freedoms: equality and freedom from discrimination - whether the conduct of the Respondents amounted to discrimination, in stipulating and implementing policies that resulted in deliberate career blockade against those who did not meet the requirements – in a situation where the Kenya Medical Research Institute required the scientific researchers to have the relevant connection to European Economic Area- Constitution of Kenya 2010 article 27 (4), Employment Act Cap 226 section 5 (2).

Constitutional law - fundamental rights and freedoms: right to fair administrative action – whether the Petitioners were entitled to fair administrative action enshrined in the Constitution - whether the Respondents failed to accord the Petitioners their right to fair administrative action – where the Petitioners were arbitrarily suspended as a result of raising concerns of their discontentment with the working contract enforced by their employer, the 1st Respondent- Constitution of Kenya 2010, article 41 and 47.

Intellectual Property - right to have one’s intellectual property protected from infringement and plagiarism - scientific misconduct – whether an employer could seek to have legal ownership of its employees’ intellectual property rights – whether it was lawful for the employer to promote plagiarism by allowing other known researchers to take credit for the work of the Petitioners - where the Respondent in the instant matter forced the Petitioners to give up their intellectual rights and cede their passwords to research and innovation.

Constitution of Kenya, 2010

Article 27

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

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

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

Employment Act No. 11 of 2007

Section 5

“(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.”

Convention No. 111 Convention concerning discrimination in respect of Employment and Occupation, (1958)

Article I

“For the purpose of this convention the terms discrimination includes;

a. any distinction exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”

Held

1. The Constitution ought not to have been interpreted as any ordinary statute especially where words used were unambiguous. Whereas article 27 (4) dealt with discrimination by the state, sub article (5) specifically prohibited discrimination by any person directly or indirectly against another person. That distinction was important for purposes of the instant suit because the pleadings and submissions pointed to discriminative policy prescribed under an international sponsorship programme rather than government policy.

2. Deliberate attempts by the institutional leaders to inhibit calls for a re-examination of institutional policies and practices that promoted racial discrimination and responding with repression indicated individual culpability by the Respondents and its senior officials inactively promoting racial discrimination and inequality.

3. Given the history of the country, racial discrimination at the work place be it perpetuated by individuals or by an institution was completely unacceptable and should not have been tolerated for purposes of accessing funds, exchange programmes and other benefits provided by international benefactors.

4. A requirement that a scientific researcher under the employment of KEMRI had to have relevant connection to the European Economic area (EEA)
was discriminatory as against colleagues under the same employment who did not have such relevant connection.

5. The Petitioners proved on a balance of probability that the 1st Respondent had not done enough to eliminate institutional discrimination in violation of Article 27 and Section 5(2) of the Employment Act to the loss and detriment of the Petitioners.

6. The 1st Respondent as a state employer was bound by the Constitution to protect the right of the Petitioners and not allow a policy that appropriated their intellectual property. The Petitioners proved that the 1st Respondent perpetrated unfair labour practices in violation of Article 41 of the Constitution by arbitrarily suspending them from employment and study for raising genuine grievances and recalling them on changed, ambiguous and inferior terms and conditions of service.

7. That also amounted to unfair administrative action contrary to Article 47 of the Constitution. The same was exacerbated by the 1st Respondent’s failure to attend conciliation under the auspices of the Minister for Labour and subsequently renouncing the recommendations by the Minister to reinstate the Petitioners to their employment and study on clear terms of service. The failure to provide the Petitioners with the report of the investigation essential to prosecute their case was in violation of Article 35(1) (b) of the Constitution.

8. The dispute led to the loss of employment and opportunity to complete their respective study programmes mid-stream. That loss was enormous in terms of career development, contribution to scientific outcomes to the country and in terms of ability to get alternative employment and academic scholarships.

9. The systemic discrimination and violation of the fundamental rights of the Petitioners had significant detrimental effect on the Petitioners. The Petitioners not only lost a chance to renew their employment contracts and connected scholarships to complete their studies but also lost significant scientific research outcomes as a result of unequal and discriminative practices by the Respondent described and proven by the Petitioners.

10. It was difficult to quantify loss of study opportunity and research conducted over a period of several years that had been appropriated by the Respondent for the benefit of others without due acknowledgment and credit being given. It was also difficult to recompense for sustained invasion of personal dignity caused by policies skewed for a selected group in an institution the Petitioners called their employer.

11. It was difficult to assess the extent of suffering and loss the Petitioners had undergone as they fought before various institutions and the Court to have their rights and human dignity vindicated.

Each of the Petitioners entitled to compensation for the said violations under Article 23 of the Constitution in the sum of Kshs. 5 million; access to all the outcomes of their scientific research and to the credit and benefit attached to the outcomes under Article 35 and 40 of the Constitution and a certificate of service acknowledging the service and scientific outcomes attributed to their research and work within 30 days from the date of the judgment. Respondent to pay interest at Court rates and costs of Petition from the date of the judgment to payment in full.

The jurisdiction of an arbitration board to grant divorce

T S J v S H S R
High Court of Kenya at Nairobi
Misc. application no.8 of 2013
L Kimaru J
June 5, 2014
Reported by Njeri Githang’a and Getrude serem

Brief facts
The application in the matter was seeking the court to adopt an award made by the His Highness Prince Agha Khan Shia Ismailia Conciliation and Arbitration Board for Nairobi. The parties in the suit had celebrated their marriage under the Ismaili Religious Rites. The board had dissolved the marriage and made determination on custody of children and division of matrimonial property.

Issue
i. Whether the His Highness Prince Agha Khan
Shia Ismailia Conciliation and Arbitration Board for Nairobi had jurisdiction to grant a divorce and give orders on custody of children and division of matrimonial property.

**Jurisdiction** – jurisdiction to grant divorce - jurisdiction of the His Highness Prince Agha Khan Shia Ismailia Conciliation and Arbitration Board for Nairobi – whether the board had jurisdiction to grant divorce by way of an arbitration award – whether the board had jurisdiction to issue orders in relation to custody of children and division of matrimonial property – whether an Ismaili Muslim was bound to an arbitration agreement by virtue of their faith – Constitution of Kenya, 2010 article 170 (5);

**Family law** - divorce – jurisdiction to grant divorce – where the His Highness Prince Agha Khan Shia Ismailia Conciliation and Arbitration Board for Nairobi had granted divorce orders - jurisdiction of the ordinary courts to grant divorce – whether the His Highness Prince Agha Khan Shia Ismailia Conciliation and Arbitration Board for Nairobi could grant divorce orders - Constitution of Kenya, 2010 article 170 (5);

**Held**

1. The Board did not have jurisdiction to grant an order of divorce in proceedings commenced under Alternative Dispute Resolution Mechanism. Though the Ismailis were Muslims, they conducted their religious affairs differently to other adherents of the Islamic faith. They established a Board which was intended to address any dispute between members of the Ismaili faith.

2. The Board could only deal with matters which were not within the exclusive jurisdiction of either the ordinary courts or the Kadhis’ Courts. Under article 170(5) of the Constitution, the Kadhis’ Courts were granted jurisdiction to determine questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submitted to the jurisdiction of the Kadhis’ Court.

3. The disputes envisaged to be resolved by arbitration under the said Act were essentially disputes of a commercial nature and not of a personal nature. It was only the ordinary courts or the Kadhis’ Courts which had jurisdiction to hear and determine matrimonial disputes which could result in the granting of an order of divorce. The Board had no jurisdiction or power to grant an order of divorce purportedly pursuant to an arbitration agreement.

4. The Board did not have jurisdiction to make orders of custody and maintenance of children. That jurisdiction was specifically reserved to the Children’s Court under section 73 of the Children Act. However, that did not preclude a body such as the Board from arbitrating over disputes relating to custody and maintenance of the children where both parties submit to the authority of such a body by agreement.

The arbitral award granting divorce declared null and void.

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**The distribution of functions in the provision of healthcare services by the national government and county governments**

Okiya Omtatah Okoiti & another v Attorney General & 6 others

Petition 593 of 2013

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Isaac Lenaola, J

August 6, 2014

Reported by Beryl A Ikamari & Karen Mwende

**Brief facts**

The Petitioners sought an interpretation of the terms ‘national referral health facilities’ and ‘county health facilities.’ They claimed that the Respondents had wrongly interpreted the two terms. They explained that the proper interpretation would be that national health referral facilities would not only include Kenyatta National Hospital and Moi Teaching and Referral Hospital but would also include all public hospitals from Level 2 to Level 6 as designated by the Ministry of Health. They further elaborated that county health facilities and pharmacies would refer to health facilities previously managed by local authorities or which counties would reasonably be expected to establish.

In opposition to the Petition issues concerning
the court’s jurisdiction to hear the Petition and the court’s capacity to adjudicate on the complex issue of healthcare provision were raised. On jurisdiction, it was contended that the matter was res judicata as it concerned issues that had been raised and decided on in a concluded suit (JR No 317 of 2013) and it also concerned an intergovernmental dispute which was to be determined via dispute resolution mechanisms provided for in the Intergovernmental Relations Act, No 2 of 2012.

Held
1. In order for the plea of res judicata to be raised successfully, the following factors would have to be in existence;
   a) The issue in the current suit must have been decided on by a competent court,
   b) The matter which was in dispute in the concluded suit must be the same matter, directly or substantially, in dispute between the parties in the suit where the plea of res judicata was being raised.
   c) The parties in the concluded suit would have to be the same parties, litigating in the same capacity, in the suit in which the plea of res judicata was being raised.

2. On the following grounds, the plea of res judicata could not be raised successfully;
   a) The concluded suit referred to in making the plea of res judicata, JR No 317 of 2013, did not have the same parties as the parties to the Petition.
   b) The issue in the concluded suit, JR No 317 of 2013, related to violations of section 7 and 24 of the Transition to Devolved Government Act, No 1 of 2012, failure to adhere to the requirements of article 43 of the Constitution of Kenya 2010, irrationality and abuse of statutory powers. On the other hand, the issues raised in the Petition related to the proper interpretation to be given to the terms ‘national referral health facilities’ and ‘county health facilities.’ The issues in the two suits were distinct despite the fact that they all related to the provision of health services.

Issues
i. Whether national referral health facilities would include other health facilities apart from Kenyatta National Hospital and Moi Teaching and Referral Hospital and whether county health facilities only included the facilities previously established and managed by local authorities or those health facilities that counties would reasonably be expected to establish.

ii. Whether the court lacked the jurisdiction to determine the Petition as the matters raised were res judicata.

iii. Whether the court lacked the jurisdiction to determine the Petition as the matters raised in it were matters which were to be resolved through mechanisms for the resolution of intergovernmental issues provided for in the Intergovernmental Relations Act, No 2 of 2012.


Civil Practice and Procedure - res judicata - circumstances in which the plea of res judicata could be raised - requirements for similar parties and similar issues in raising the plea of res judicata.

Jurisdiction - jurisdiction to determine intergovernmental disputes - meaning of intergovernmental disputes - whether a matter raised by private citizens could constitute an intergovernmental dispute - Constitution of Kenya 2010, articles 6, 165(3)(d) & 189, & Intergovernmental Relations Act, No 2 of 2012, section 30.

3. The Intergovernmental Relations Act, No 2 of 2012 intended to establish mechanisms for the resolution of intergovernmental disputes pursuant to the provisions of articles 6 and 189 of the Constitution of Kenya, 2010. It specifically established dispute resolution mechanisms under sections 30 to 35.

4. Within the meaning of section 30 of the Intergovernmental Relations Act, No 2 of 2012, there was no dispute either between the national government and the county government or amongst the county governments. The Petition was brought by private citizens.

5. There was no legislative intent revealed in the Intergovernmental Relations Act for any issue, real or perceived as a dispute, to be brought by any person, other than the county government or the national government, for determination within the purview of the dispute resolution mechanism set up in the Act.
6. Under article 165(3)(d) of the Constitution of Kenya 2010, the court had the jurisdiction to determine questions concerning the interpretation of the Constitution. The court could therefore consider the meaning of the words ‘national referral health facilities’ in Part 1 of the Fourth Schedule to the Constitution and the words ‘county health facilities and pharmacies’ in Part 2, Section 2(a) of the Fourth Schedule to the Constitution.

7. The distribution of functions between the national government and the county government was distinct from the allocation of functions made to local authorities before the devolved system of government came into effect. The structure of government provided for under the Constitution of Kenya 2010 was not comparable to the local authorities system provided for under the repealed Local Government Act (Cap 265) (repealed).

8. The Constitution had not defined the words ‘national referral health facilities’ and ‘county health facilities.’ It also did not categorize hospitals into different levels.

9. The classification of hospitals into levels and into national referral health facilities or the national health system and the county health facilities and system was a policy issue, to be determined in accordance with the provisions of section 15 of the Sixth Schedule to the Constitution of Kenya 2010.

10. The court’s jurisdiction was limited to interpreting the law and it could not make policy or enact the law as that was the mandate of the Executive and Parliament. The court had no ability or mechanism to determine the criteria to be used to categorize hospitals or capacity to examine equipment, facilities and manpower for purposes of such categorization.

Petition dismissed.

An order of habeas corpus cannot be issued where custody of the subject is not established

Masoud Salim Hemed & another v Director of Public Prosecution & 3 others
Petition No 7 & 8 of 2014 (consolidated)
High Court at Mombasa
E M Muriithi, J
August 8, 2014
Reported by Andrew Halonyere & Valarie Adhiambo

Brief facts
The consolidated petitions before the court were applications for an order of habeas corpus with respect to one Hemed Salim Hemed (subject). The subject of these habeas corpus proceedings, was arrested by the police from the Masjid Musa mosque and had not been produced before the Court within 24 hours as required by the Constitution, or at all, in contravention of the subject’s rights and fundamental freedoms.

The respondents’ answer to the petition was that the subject was arrested at the Mosque but he escaped from police custody while being transported to the holding station at Makupa Police station, Mombasa, and having lost the physical custody of the subject they could not comply with the order of habeas corpus.

Issues
i. Who had the burden of proof in habeas corpus proceedings?

ii. What was the nature of the right to habeas corpus?

iii. Whether an order of habeas corpus could be issued where custody of the subject was not established

iv. Whether one could seek other reliefs in a habeas corpus application where the facts upon which the right to habeas corpus was sought had not been established

Constitutional Law - fundamental rights and freedoms - right to habeas corpus - nature of the right to habeas corpus - proceedings for habeas corpus - where it is established that a person was arrested but is not in custody of the police - whether an order of habeas corpus could be issued
corpus could be issued where custody of the subject was not established -Criminal Procedure Code, section 386

Constitutional Law - fundamental rights and freedoms
-right to habeas corpus -where applicants sought other fundamental rights in habeas corpus proceedings
-whether one could seek other reliefs in a habeas corpus application where the facts upon which the right to habeas corpus was sought had not been established

Held
1. The general burden in a habeas corpus application had to pursuant to section 107 of the Evidence Act remain with the petitioner, who had to establish any competent and convincing evidence that the missing person, on whose behalf the petition was filed, was under the custody of the respondents. The petitioners were able to establish that, and the respondents admitted the arrest of the subject by the police and the question was on whether the police had custody of the subject at the time of the habeas proceedings.

2. Where detention of an applicant was established, the burden of proving the legality of detention rested with the state, and to place the burden on an applicant to prove illegality of the detention was to require the applicant to prove a negative. The matter did not call for the respondents to prove legality of detention as the continued detention of the subject was denied and explained by the subject’s alleged escape. However, in these circumstances, the respondents had a special burden of proof on the point of alleged escape, in accordance with the provisions of section 109 of the Evidence Act.

3. The evidence presented by the petitioners placed the subject in the hands of the police at arrest but further investigation were necessary to disclose whether in fact the subject escaped from custody or what became of him upon arrest.

4. The Court had to return a verdict that the subject of the habeas corpus proceedings, Mr. Hemed Salim Hemed was missing and believed to be dead within the meaning of section 386 of the Criminal Procedure Code. The court therefore, had to find that the respondents’ custody of the subject at the time of the ruling was not proved and it was also not proved that the respondents lost custody of the subject after the arrest, and the case had to further be investigated to determine the correct factual position. Accordingly, the order of habeas corpus had to be held in abeyance until it was established that the respondents had custody or had regained custody of the subject, as the case would be.

5. Even where the court found a prima facie case that the subject of habeas corpus had been murdered, the court nonetheless ordered police investigation to determine the perpetrators. In the instant case, it was not possible to find without further investigations that there was a prima facie case that the subject of the habeas corpus application was not alive and had met an unnatural death.

6. The premium upon which the people of Kenya placed on the right to habeas corpus was emphasized by the fact that until the promulgation of the Constitution of Kenya 2010, the right to habeas corpus was guaranteed only by statutory provisions under section 389 of the Criminal Procedure Code on directions in the nature of habeas corpus. Under the new Constitution, the right to habeas corpus was entrenched in the bill of rights under article 51 (2) by declaring the right as one of the only four (4) rights and fundamental freedoms in the bill of rights that could not be limited.

7. If the respondents were neither detaining nor restraining the applicant or the person on whose behalf the petition for habeas corpus had been filed, then it ought to have been dismissed. That remedy had one objective which was to inquire into the cause of detention of a person. Custody was crucial in habeas corpus case, and even where physical custody was lost by voluntary act of the respondents the right to habeas corpus was to be affected.

8. Where, the facts upon which relief could be sought had not been fully established, the correct procedure was to file fresh proceedings in that behalf. Due to the inchoate nature of the cause of action, and the fact that there was no limitation with respect to constitutional claims, separate proceedings for particularized reliefs under the bill of rights other than the habeas corpus proceedings ought to have been filed. To pursue the reliefs under the bill of rights for any violations thereof with respect to the subject of those habeas corpus proceedings, the family of the subject was at liberty to file suitable proceedings as and when appropriate.

9. Forcible taking and disappearances was the proper subject of criminal investigations and not habeas corpus. When forcible taking and disappearance and not arrest and detention had
been alleged, the proper remedy was not habeas corpus proceedings, but criminal investigations and proceedings. Much as the court could have wanted to resolve those disappearances speedily when it was interested in determining who was responsible for the disappearance and detention, it would not have wanted to step beyond its reach and encroach on the duties of other duly established agencies. The proceeding for habeas corpus could not be used as a substitute for a thorough criminal investigation.

MA. Estrelita D. Martinez v. Director General and Ors.

10. Bearing in mind the separation of powers of the court and the investigative and prosecutorial agencies, in the unresolved circumstances of the disappearance of the subject, there was still scope for the carrying out of further investigations to determine the circumstances of the disappearance from police custody or death, in police custody or otherwise, or, if the subject was living, his whereabouts to facilitate his being retaken into custody of the police to enable the compliance with the habeas corpus order.

Orders of the Court

i. The Chief Magistrate’s Court Mombasa as a court empowered to conduct inquests was to carry out in accordance with section 387 of the Criminal Procedure Code an inquiry into the circumstances of the death of the subject, the proceedings on the basis that he was now designated ‘a missing person presumed dead’ within the meaning of the section.

ii. The Criminal Investigations Directorate of the Police was to further investigate the circumstances surrounding the disappearance and or death of the subject of those habeas corpus proceedings.

iii. The court was of its own motion pursuant to rule 6 (c) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, (the Mutunga Rules), invite as amicus curiae (friend of the Court) the Kenya National Human Rights Commission (KNHRC), which was constitutionally mandated to investigate all cases of human rights violations, to conduct investigations in the matter and jointly with the Criminal Investigations Directorate to prepare a report for the inquest and the Court

iv. The KNHRC / Police investigations report was to be filed with the Chief Magistrate’s Court conducting the inquest into the death and with the Court to enable final orders and closure of the proceedings. If the investigations revealed that the subject was alive at a known place, the subject could be retaken into the custody of the police upon which the order for habeas corpus was to be implemented. If the subject was believed to have died, the circumstance of the death was to be certified to the Inquiry by the Magistrate and the Court so that the Inquest and the proceedings for habeas corpus were to be terminated with such orders as to prosecution of any persons who could have committed an offence(s), as could be necessary in the circumstances.

v. The petitioners could also file complaints with the Independent Police Oversight Authority.

vi. Further consideration of the petitions for habeas corpus was stood over generally.

vii. For compensation in damages for violations of rights and fundamental freedoms of the subject and or loss of dependency, as appropriate, the family of the subject could file proceedings in that behalf as the habeas corpus proceedings were confined to redressing wrongful or illegal confinement.

viii. Costs were to abide by the final outcome of the matter.

Court Rules Against Varying of Interest rates on a Borrower by a Credit Facility Institution


High Court at Nairobi, Commercial & Admiralty Division

Civil Suit No 414 of 2004

GV Odunga J

August 4th 2014

Brief Facts

The Plaintiff herein had applied for a mortgage facility in the sum of 1.3 million Shillings from the Defendant at a monthly payment of Kshs 26,273/= at the rate of 18% per annum for 15 years. The said interest rate could only be varied with the concurrence and prior
written approval of both parties and in any event not without at least 4 months’ notice in advance. The Plaintiff then subsequently took a charge and a further charge which were dully executed and registered.

The Defendant varied the said interest to 26% per annum thereby making it impossible for the Plaintiff to service the facility. In addition, the defendant also employed the use of a faulty banking computer software system which led to errors in calculation of interest. As a result of the above, the Defendant exercised its statutory power of sale by selling the house that the Plaintiff had constructed with the money borrowed in order to recover the money. The Plaintiff on the other hand, as a result of the Defendant’s faulty computer system ended up being charged exorbitant amounts in penalties and interest. The above background formed the basis of the matter before the court.

Issues
i. Whether the penalty interest and default charges levied by the Defendant was contrary to the terms of the Charge document and unlawful and whether it constituted a fetter or clog on the Plaintiff’s equity of redemption.

ii. Whether the failure to give notice constituted a breach of contract and whether the Plaintiff could be awarded damages for breach of contract.

iii. Whether the Defendant’s calculations were free from error.

iv. Whether the Defendant’s only option was to realise the security.

v. Whether the defendant breached any of the provisions of the Banking Act.

vi. Whether the plaintiff was entitled to the prayers sought.

Constitutional Law - fundamental rights and freedoms - consumer rights - right of a borrower as a consumer of a credit facility – whether the Plaintiff’s rights herein had been infringed by the Defendant company where the latter had failed to inform him of the increase in interest rates without notice contrary to the contractual agreement in the Charge document, where the interest and penalties had accumulated subsequent to the increase in the interest rates making the Plaintiff unable to repay his loan - whether the Plaintiff suffered considerable loss as a result of the actions of the Defendant company – Constitution of Kenya 2010 article 46 (1)

Civil Procedure Rules, 2010

Order 21 rule 17

“The court may, either by the decree directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched, and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as prima facie evidence of the truth of the matter therein contained with liberty to the parties interested to take such objection thereto as they may be advised.”

Held

1. The Defendant ought to have expressly provided for charges in the Charge documents in order to entitle it to levy the same. Without any express provision, any levies could only be made with the consent of the Plaintiff. In the instant case there was no blanket and unfettered discretion reserved to the Defendant. The Bank ought to have stipulated all the conditions for the grant of facilities and ought not to have hidden some from the customer only for it to resort to them thereon under the guise of customary practice.

2. The Court appreciated that in certain cases trade usage could be implied in a contract. For the penalty to have been certain there ought to have been certainty as to the levy of the interest but since the rate was not contained in any contractual document, the rate also must have been certain and must have been known in the market otherwise such levying of interest would
have violated the provisions of Article 46(1) (b) of the Constitution. To argue otherwise would open an avenue in which the right of redemption could easily be clogged or fettered.

3. A party ought not to have mutated the terms of a contract unilaterally to the detriment of the other party to the contract. That was what the people of the Republic realised when they enacted unto themselves Article 46 (1) (b) and (c) of the Constitution which provided for the rights to the information necessary for consumers of goods and services to gain full benefit from goods and services and to the protection of their health, safety, and economic interests. Thus, in the circumstances of the instant case, the Defendant was not entitled to ‘penalty interest’, ‘interest on arrears’ or ‘default charges’.

4. The necessity for giving the notice was meant to give the borrower a chance to decide whether to keep the facility alive based on the new terms or to bring the contract to an end by either paying the amount due or instructing the Bank to realize the security if in his view he would not be in a position to service the facility based on the intended variations.

5. In the instant case, it was clear that the requirement for 4 months notice was never complied with by the Defendant. Therefore in the absence of any evidence that the Plaintiff was given the contractual notice, the variations of the rates of interest to the Plaintiff’s detriment were unlawful. Any application of interest rate with respect to the first Charge in excess of 18% per annum was also unlawful. Similarly variation of interest rate with respect to the second charge in excess of 19% was unlawful.

6. Since the calculations were peculiarly within the knowledge of the Defendant the onus shifted to it to explain the basis upon which those figures were arrived at. However taking into account the fact that the plaintiff’s position was that the errors pointed out by him were but just a sample one could not state with certainty how many “minor errors” were committed by the Defendant and their cumulative effect on the loan repayment. Thus, the Defendant’s calculations could not be free from error.

7. The Defendant was not bound to only realize the charged property. As long as the loan remained unpaid the Defendant was properly entitled to any lawfully due charges based on the contractual documents.

8. The issue whether the Defendant breached any of the provisions of the Banking Act was not proved to the required standards.

9. Taking into account the Court’s finding with respect to the uncontractual charges, variation of interest rates and the errors in calculation, the instant matter was one in which the proper order would have been that accounts be taken between the parties, taking into account the finding of the Court in the Judgment.

Orders

(a) The parties were to agree on and appoint an independent accountant to take accounts between them and file his report within 45 days from the date of his appointment. In default of such agreement each party to appoint an accountant and the two appointed accountants to appoint an umpire and the three to go through the documents in possession of the parties and prepare a report for filing in this matter within 45 days of the appointment of the umpire.

(b) Where the parties agree on one accountant his costs would be shared equally by the parties. However where three accountants were appointed each party would bear the costs of his accountant while the costs of the umpire would be shared equally by the parties.

(c) In taking the said accounts, the books of account in which the accounts in question had been kept would, subject to the judgment, be taken as prima facie evidence of the truth of the matter therein contained with liberty to the parties interested to take such objection as they would be advised.

(d) Further orders of the Court were to await the filing of the said report.

(e) Liberty to apply was granted.
Brief facts

The respondent terminated the claimant’s contract of employment on grounds that the claimant neglected his duties leading to fraudulent activities in the Finance department where he was the Finance manager. However, the claimant disputed the validity of the termination reason, fairness of the termination procedure and also claimed that he was denied equal pay for equal work, or work of equal value while he was in employment. Specifically, he claimed that he was subjected to unlawful discrimination because he was a black person. He alleged that white managerial staffs, holding similar responsibilities to his and other black managers, were paid disproportionately higher salaries. White managers earned about Ksh. 500,000/= per month while black managers earned approximately Ksh. 200,000/=.

Issues

I. Whether the process of termination of the employment of the claimant was irregular, unfair and contrary to the contract of employment and labour laws.

II. Whether there existed circumstances in which an employee’s negligence amounted to gross misconduct thus warranting summary dismissal.

III. Whether employers could withhold employees’ salary as a form of disciplinary sanction.

IV. What is the scope of the right to equal pay for equal work or work of equal value?

V. Whether the time limitation of three years for instituting claims under the Employment Act could be applied in instances the dispute arose out of accrued benefits over a long time.

Held

1. Courts would be reluctant to find that an employee’s act of negligence amounted to gross misconduct that merited summary dismissal, in the absence of deliberate and intentional wrongdoing. *(Dietman v Brent LBC [1987] IRLR 259; London Borough of Hackney v Benn [1996] CA)*

2. In dealing with employment disputes, courts had to exercise caution in adopting judicial precedents as not all the circumstances in each case were similar to the other. Employment relationships were unique and each case was to be analysed on its own unique facts. Facts, in each case of negligence, with all the extenuating circumstances, were to be considered to ascertain if the conduct or omission by the Employee was sufficiently serious to merit dismissal.

3. Section 44(4)(c) provided the elements of the negligence for which an employer could summarily dismiss an employee on account of gross misconduct as:

   a. Willful neglect by the Employee to perform any work which was his duty to perform.

   b. Careless and improper performance by the Employee of any work, which from its nature it was his duty, under his contract, to have performed carefully and properly.

4. The Claimant could not have been willfully negligent, or performed his duty carelessly and improperly, he had advised the Respondent...
from as early as 2005, on the weaknesses of its Accounting System. The Auditors’ Reports, the Cumming Report, the evidence of the CEO and that of the Claimant before the Auditors, all pointed at an institutional failure rather than an individual failure. There was no way the claimant could have exercised greater supervisory control to avoid fraud in the absence of the implementation of reforms to the accounting system which the claimant had been advocating for since 2005.

5. The termination of the employee’s employment was not based on valid and fair reason since the respondents failed to prove the reasons for termination of the claimant’s employment contract under section 43 of the Employment Act; It did not establish on the part of the claimant willful negligence, or careless and improper performance of duty under section 44(4) (c) of the Act and did not demonstrate valid or fair reason for termination under section 45 of the Act.

6. The principle of fair hearing required that the employee had sufficient opportunity to prepare. This entailed:
   a. The Right to sufficient time to prepare. Time however, was not the totality of sufficiency of opportunity.
   b. The right to fully understand the charges. General charges such as dishonesty, fraud and fraudulent activities were vague and offered the employee no opportunity to respond intelligibly, or at all.
   c. The right to documentation. The Employee had a right to be given the documents the Employer intended to rely on at the hearing, as well as other documents the Employee requested for.

7. Employers could not withhold Employee’s salaries as a form of a disciplinary sanction. It added on to the gravity of the procedural irregularity, when the Employee’s salary was used as a weapon against him.

8. The law did not contemplate the conversion of an Employee’s annual leave entitlement into anything else, other than cash. Compulsory leave was essentially a suspension of the Employee from Employment, pending investigation of the employment offence, and the outcome of the disciplinary process. Annual leave could not be converted into suspension by whatever name that suspension could be characterized. Annual leave was voluntarily taken by the Employee, at such time as was agreed with the Employer. It was not meant to be involuntary.

9. The concept of “Equal pay for equal work or work of equal value” could be simplified as the fundamental right of every worker, to receive equal pay, for the same or similar work. That could entail equal pay for doing completely different work, but which was, based on objective criteria, of equal value.

10. Equal pay for equal work or work of equal value was recognized as a fundamental human right. That right was now recognized under Article 41 of the Constitution of Kenya. The International Labour Organization (ILO) Declaration of Philadelphia of 1944, which was part of the ILO Constitution, affirmed that all human beings, irrespective of race, had the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, and of economic security and equal opportunity.

11. The Equal Remuneration Convention, 1951 and the Discrimination (Employment and Occupation) Convention, 1958 prohibited distinctions, exclusions or preferences made on various grounds including race. However, disparity in pay was permitted when there were objective differences in the value of work to be performed. The concept required a means of measuring and comparing different jobs, on the basis of objective criteria such as skills, working conditions, responsibilities and effort.

12. Qualified employees had to be paid equally when they performed the same or virtually the same work, in equivalent conditions. Work of equal value was work which was different in content, involving different responsibilities, requiring different skills or qualifications.

13. In determining the value or worth of a job, employers had to undertake objective job evaluation that was free from bias. Two types of job evaluation methods [JEM] existed. The first was the Global or Ranking Methods, the second was the Analytical job evaluation;
   i. Under the Global or Ranking Methods, the jobs were ranked on the basis of the importance of the job requirements. The whole job rather than the individual component was evaluated. This identified the characteristics of the job-holder with the characteristics of the job

High Court Cases
b. The Employer had to rebut the presumption, by introducing evidence of legitimate nondiscriminatory reason for its actions.

c. The Court at the end had to examine if the reasons offered by the Employer was pretextual, and if they were pretextual, then discrimination could be the correct diagnosis in the circumstances.

17. In the instant matter, the claimant did more than merely show a prima facie case that he was subjected to unequal pay, based on his race. On the other hand, the respondent failed to discharge its obligations in showing nondiscriminatory reasons for the disparity between the claimant’s salary and other employees.

18. In remedying employment wrongs, claims for unpaid wages and salaries could not be treated as claims for special damages in civil claims. Focus of the court had to be on what was reasonable in each case particularly as employment records which were necessary in specific proof were legally in the custody of the employer.

19. Whereas section 90 of the Employment Act provided for limitation of time at three years for disputes arising out of the Employment Act, the period in employment was a continuous period, with employment benefits vesting in the employee, and obligations on the part of the employer attaching over time. There were accrued benefits which could not be isolated and subjected to a different date of accrual. At the date of termination, the employee had to be accorded all benefits arising under a contract of employment. Therefore the assertion by the respondent that the claimant should have sued when the pay decision was made instead of waiting beyond the 3 years period to raise the issue of pay disparity could not stand.

The termination was unfair and unlawful.

The Claimant was discriminated against by the Respondent, on account of his race, and paid an unequal pay for equal work, or work of equal value.

The Respondent was to within 30 days of the delivery of this Award, pay to the Claimant 12 months’ gross salary in compensation for unfair termination at Ksh. 3,489,084; Ksh. 18,256,947 in cumulative pay disparity, and damages for discrimination; Ksh. 559,148 being the balance of annual leave pay- total Ksh. 22,305,179.

The amount was to be paid less PAYE tax.

No order on the costs and Interest.
Brief facts

The 1st, 2nd, 3rd and 4th Respondents were involved in a people's initiative to amend the Constitution, which was to culminate in a referendum. The initiative was based on article 257 of the Constitution of Kenya 2010. In the initiative, 1 million signatures had already been collected from registered voters on the basis of a general suggestion.

The 1st, 2nd, 3rd and 4th Respondents had undertaken to formulate a draft Bill and to provide a record of the signatures from registered voters to the Independent Electoral and Boundaries Commission (IEBC) for verification. The IEBC was to determine whether the draft Bill reflected the initiative's objects and purposes and whether at least 1 million signatures had been collected from registered voters in support of the initiative.

The Petitioner, a member of a political party which was opposed to the initiative, was aggrieved by the manner in which the initiative was being conducted. He applied to the High Court for conservatory orders to stop the collection of signatures and to stop the IEBC from receiving and verifying a draft Bill and records of the signatures. The Petitioner had various complaints about the initiative including the fact that the signatures were being collected on the basis of a general suggestion, not a draft Bill, and that Parliament had not been involved in the process.

Issues

i. Whether the dispute was justiciable and whether it concerned a political question.

ii. Whether the High Court had the jurisdiction to hear and determine the Petition.

iii. Whether the Applicant's membership in a political party, which did not support the initiative in question, meant that the Petition had been lodged in Court in bad faith.

iv. Whether the Applicant had met the legal requirements for the grant of conservatory orders.

Constitutional Law - interpretation of constitutional provisions-justiciability-political question-considerations that govern determinations on whether certain acts of the organs of state were political questions.

Jurisdiction - jurisdiction of the High Court-the High Court's jurisdiction to interpret the Constitution-the High Court's jurisdiction over disputes concerning people's initiative to amend the Constitution-Constitution of Kenya 2010, article 165(3)(d)(ii).

Constitution Law - fundamental rights and freedoms-enforcement of fundamental rights and freedoms-remedies-conservatory orders-whether it was necessary to demonstrate the existence or a breach or threatened breach of a fundamental right and freedom recognized in the Bill of rights in order to obtain conservatory orders-Constitution of Kenya 2010, articles 22 & 23(3)(c).

Held

1. The justiciability of a matter would depend on the nature of the dispute and on whether it was amenable to the judicial process or it was purely a political question. Justiciability would also depend on the legal principles, surrounding the particular act in question, as discernible from the applicable legal instruments.

2. Where the law imposed on the executive legally prescribed duties and responsibilities, the performance of which depended upon enhancing or handling public interest, the political officers of the executive would be required to act consistently and in accordance with the law. If the public officers failed to observe the requirements of the law, their failure would harm the interest of the public and the rights of individual citizens.

3. Pursuant to article 165(3)(d)(ii) of the Constitution of Kenya 2010, the High Court would be possessed of the jurisdiction to hear any questions on the interpretation of the Constitution, including determinations on whether anything said or done, was done under the authority of the Constitution and whether it was inconsistent with or in contravention of the Constitution.

4. Considering the constitutional provisions under
which the Petition was founded and the material placed before the Court, the holding that the Court lacked the jurisdiction to determine the matter could not be made.

5. The Petitioner’s membership in a political party, whose position was adverse to the initiative in question, did not mean that the Petition was brought in bad faith. The Petitioner’s membership in that party did not affect his rights to bring the Petition as an individual.

6. In order to establish a case for the grant of conservatory orders, the applicant had to demonstrate that there was a *prima facie* case and that unless the conservatory order was granted there was real danger which was prejudicial to the Applicant’s case.

7. In considering an application for conservatory orders, the Court would not make definite or conclusive findings of either fact or law, it would only seek to determine whether the requirements for the grant of conservatory orders had been met.

8. A *prima facie* case is not a case that would certainly succeed at the hearing of the main case. It is a case which is not frivolous and the Applicant had to show the existence of a case which disclosed arguable issues; and for the dispute in question, those arguable issues would have to be arguable constitutional issues.

9. Where it was apparent that there were competing interests and rights, the principle of proportionality would be applied in order to secure the rights and freedoms in question. The determination on the conservatory orders would take into account the need to balance the interests of the parties and the need to preserve the subject matter of the claim.

10. The Applicant had raised the following arguable issues for determination, namely;
   a) Whether article 257 of the Constitution of Kenya 2010, provided that the Constitution could be amended through Parliament, by the people and Parliament, and the issue of a referendum would only arise if Parliament failed to give effect to the draft presented to it via the people’s initiative.
   b) Whether article 257(1), 257(2) & 257(3) of the Constitution of Kenya 2010, required that where an amendment to the Constitution was proposed by popular initiative signed by at least 1 million registered voters, the initiative would have to be in the form of a draft Bill and the signatures of voters could only be collected on the basis of a draft Bill and not a general suggestion.

11. The Applicant also raised issues that were not arguable issues, namely;
   a) Whether the current Parliament, was a transitional Parliament, which was required to implement and not to amend the Constitution. Given that the Constitution had been amended by Parliament and no legal provision prevented its amendment, the issue was not arguable.
   b) Whether given the requirements of article 251(d) of the Constitution of Kenya 2010, which provided for the prudent use of public funds, it was in public interest that a referendum for the amendment of the Constitution be held at the same time as the general elections. The argument on the management of public funds was attractive but it was not at the level of a *prima facie* case.
   c) Whether Part V of the Elections Act, No 24 of 2011, was unconstitutional. That argument on unconstitutionality was not properly developed.

12. The issues raised in the Petition included arguable issues and the Applicant had established the existence of a *prima facie* case.

13. The Applicant sought conservatory orders pursuant to the provisions of article 23(3)(c) of the Constitution of Kenya 2010. For such relief to be granted under that provision, the Applicant would be required to demonstrate that the relief was sought on grounds that a right or fundamental freedom recognized in the Bill of Rights had been denied, violated or infringed or was being threatened. However, the Applicant had failed to show the nexus between the remedy sought and a breach of a fundamental right or freedom recognized in the Bill of Rights.

14. The Applicant was also required to demonstrate that the conservatory orders were necessary and that the failure to grant conservatory orders would prejudice him. The Applicant had failed to demonstrate that the orders sought would preserve his interests and rights in the popular initiative and that the failure to grant the orders would mean that the subject matter of his Petition would be adversely impacted on.

15. An application for conservatory orders would need to be made at the earliest time possible. Where a party waited until the last minute to bring such an application, the court could decline to grant the orders sought.

*Application dismissed.*
Court Grants a Probationary Sentence in a Manslaughter Case

Republic v Bernard Kiptoo & 2 others [2014] e KLR
Criminal Case No 35 of 2012
High Court at Kericho
JK Sergon J
July 4th, 2014
Reported by Emma Kinya Mwobobia & Opiyo Lorraine

Issues
i. Whether the court could order a probationary sentence in a manslaughter case.

Held
1. In mitigation, the accused persons stated that they were first offenders and were brothers aged between 21 and 25 years who had lost their father a while back so they were under the care and guidance of their elderly and sickly mother. The accused persons had also been in custody since the month of September 2012.

2. The families of the victim and that of the accused persons had been reconciled in the month of December 2013 after which the Kipsigis Traditional Cleansing rituals were undertaken. A non-custodial sentence would therefore enable the accused persons to undergo those rituals to make the reconciliation process complete and to fully reintegrate them to the society.

3. The court was convinced that the appropriate sentence in the circumstances was to be non-custodial.

Penal Code, Cap 63
Section 204
“Punishment of murder
Any person convicted of murder shall be sentenced to death.”

Section 205
“Punishment of manslaughter
Any person who commits the felony of manslaughter is liable to imprisonment for life.”

The three accused persons namely: Bernard Kiptoo Langat, Robert Kipkorir Langat and Harun Cheruiyiot Langat to be set free from custody to proceed and serve two (2) years probation under the supervision of the Probation Officer, Bomet County.

Acquittal of an employee of a criminal offence does not exonerate him/her from all culpability for the employment offence

Banking, Insurance and Finance Union (Kenya) v Consolidated Bank of Kenya Limited
Cause No. 1944 of 2012
Industrial Court at Nairobi
Rika J,
July 18, 2014
Reported by Phoebe Ida Ayaya and Maryconpecter Nzakuva

Brief Facts
The Claimant filed the Statement of Claim on behalf of its aggrieved member who was a former employee of the Respondent Bank. The aggrieved had been charged with the offence of preparing to commit a felony and was subsequently summarily dismissed by the Respondent on the same day.

The aggrieved faulted the decision to summarily dismiss him due to the fact that he was acquitted in the above criminal case, he was not issued with a letter to show cause why disciplinary action could not issue, and that he was not heard before his dismissal.
The Claimant sought for reinstatement of the Grievant, all salaries and allowances which the aggrieved lost as a result of the uncalled for dismissal, compensation for loss of employment, unfair confinement, unfair prosecution, humiliation and embarrassment in front of the public and his family members.

Issues:

i. Whether acquittal in a criminal case against an employee deprived the employer of the right to rely on the same facts relating to the charged offence in justifying summary dismissal of an employee.

ii. Whether the aggrieved was entitled to reinstatement upon acquittal of a criminal offence.

iii. Whether the procedure for summary dismissal was fair and what was the appropriate remedy for the aggrieved.

Employment Law - termination of employment - summary dismissal - termination of employment without notice on grounds of gross misconduct - termination of employment on commission or suspicion of an employee having committed a criminal offence against the employer - whether acquittal in a criminal case against an employee deprived the employer of the right to rely on the same facts relating to the charged offence in justifying summary dismissal of an employee - whether the aggrieved was entitled to reinstatement upon acquittal of a criminal offence - whether the procedure for summary dismissal was fair and what was the appropriate remedy - Employment Act, 2007, sections 41, 43, 44 and 45.

Held:

1. It was the duty of the employer under sections 43 and 45 of the Employment Act, 2007, to establish the validity and correctness of the reason for termination of employment.

2. Employers were not limited in initiating workplace disciplinary proceedings against employees by police investigations and criminal trials against their employees which could be initiated by public authorities, based on the same facts.

3. The individual contract of employment, the collective agreement, policy and procedure document, the letter of suspension, or the law to which the employment relationship was subject, could join the public criminal process to the private disciplinary process, so that a finding of not guilty in the public process, was imposed on the disciplinary process.

4. In the absence of such workplace instruments, the employer had no reason to wait for the outcome of the criminal process before taking disciplinary action against a delinquent employee, or adopt the outcome of the criminal process as the logical result of the private disciplinary process.

5. Conversely, an employee under such disciplinary process would have no expectation that the related criminal process, where it culminated in an acquittal, exonerated the employee from all culpability for the employment offence.

6. Police investigations and criminal proceedings were public processes, undertaken by public authorities to safeguard public order while the disciplinary process was essentially a private process, by a private enterprise, aimed at protecting the private interest of the enterprise. The standards of proof in the two processes were different. The criminal trial against the aggrieved required the prosecution to establish its case beyond reasonable doubt while at the workplace all the employer was required to have were reasonable and sufficient grounds to act, more or less on the balance of probabilities.

7. The criminal case against the aggrieved came to a cropper as did most criminal cases in Kenya, due to poor preservation and presentation of evidence by the prosecuting authorities. The police did not take the cell phone records of the accomplices, photographs which were allowed at the Industrial Court could not be produced at the criminal trial based on evidential restrictions, and evidence of CCTV camera was not led. The aggrieved in the end was found not guilty, because of failure by the prosecution to meet the high standards of proof required in the criminal trial.

8. The above pieces of evidence on the other hand, would not be necessary to establish the fairness and validity of termination, under section 43, 44, and 45 of the Employment Act, 2007.

9. The finding of a *prima facie* case against an employee at the criminal trial would be strong evidence of the employee’s culpability for the employment offence at the workplace, considering the lower standards of proof required in the workplace to justify termination. The court was satisfied that the Respondent had valid reasons in summarily dismissing the aggrieved from employment, as required under the Employment Act, 2007.

10. Section 41 of the Employment Act, 2007 required the employer to explain to the employee the
challenges against the employee, in a language understood by the employee. The employee had the right to be accompanied to the disciplinary session by a workmate or shop floor level trade union representative. Any representations made by the employee or the person accompanying him to the session, ought to be considered by the employer before a decision could be taken.

11. The aggrieved was not accorded the minimum procedural protections. There was no hearing in any form. Although the Respondent alleged to have issued the aggrieved with a letter to show cause why disciplinary action could not be taken against him, the said letter was issued on the same date the aggrieved was arrested. There was no opportunity to respond to the letter to show cause because the aggrieved was in police custody on the date the letter to show cause, and the letter of summary dismissal was issued.

12. The law no longer contemplated on-the-spot termination of employment on disciplinary grounds, devoid of a hearing. Summary dismissal was defined under section 44(1) of the Employment Act, 2007 as termination of employment without notice, or with less notice than that to which the employee was entitled, under any statutory provision, or contractual term. The above definition did not suggest that summary dismissal was not preceded by a fair hearing. Fair hearing ought to always be given, regardless of the length or absence of notice of termination.

13. The terms and conditions of employment prescribed in individual and collective employment agreements ought to be consistent with the Employment Act, 2007. Employees had the right to be heard before termination, regardless of the nature of the termination notice. The Respondent misapprehended Clause A5 of the CBA to justify on-the-spot termination, without regard to procedural protections granted to the aggrieved under Section 41 of the Employment Act, 2007. Hence, the Respondent failed the fairness test, on account of the procedure adopted.

14. The Respondent was able to demonstrate fair and valid reason for termination of the Grievant’s contract of employment. The Grievant conceded that the activities over which he was investigated and charged eroded the qualities of trust and confidence, which were the cornerstones of an employment relationship.

15. Therefore, it would be irresponsible and unreasonable of the court to grant an order returning the aggrieved to the Respondent because his presence there would not foster trust and confidence between him and the Respondent and would by extension, shake the confidence and trust of the Customers in the Respondent Bank.

Claim allowed in part and the Grievant awarded Kshs.399,440 as compensation for lack of hearing before summary dismissal.

High Court Quashes the Directive on Impounding of Private Vehicles with Tinted Windows

Republic v Inspector General of the National Police Service, David Kimaiyo Ex parte Akitch Okola

Miscellaneous Application No. 183 of 2014
High Court of Kenya at Nairobi

G V Odunga, J
July 11, 2014

Reported by Andrew Halonyere & Anne Mbuthia

Brief Facts

In light of the rise of insecurity in the country, the Inspector General of the National Police Service (the Respondent) issued a directive to the effect that all vehicles with tinted windows be impounded with immediate effect.

The Applicant brought judicial review proceedings seeking an order of certiorari to remove in the court for the purposes of being quashed the Respondent’s directive ordering private vehicles with tinted windows to be impounded and an order prohibiting the said Respondent or persons acting under him from impounding such vehicles.

The basis of the application was that the law exclusively prohibited the use of tinted windows with regard to public service vehicles, rather than all vehicles, and the Respondent had no power to amend that law.

Issues:

i. What were the grounds upon which
administrative actions could be subjected to judicial review?

ii. Whether any law prohibited the driving of private vehicles fitted with tinted windows or windscreens.

iii. Whether by directing that privately owned vehicles with tinted windows be impounded the Inspector General of the National Police Service purported to amend rule 54A (1) of the Traffic Rules that prohibited the use of tinted windows with regard to public service vehicles and whether he had the power to do so.

Judicial review - certiorari and prohibition - grounds for judicial review orders on administrative actions- where the Inspector General of the National Police Service issued a directive for the impounding of all vehicles fitted with tinted windows- whether any law prohibited the driving of private vehicles fitted with tinted windows or windscreens- whether by directing that privately owned vehicles with tinted windows be impounded the Inspector General of the National Police Service purported to amend rule 54A (1) of the Traffic Rules- whether the Inspector General of the National Police Service had the power to amend the said Rules-Traffic Rules, rule 54A(1)

Held:

1. The grounds upon which administrative action was subject to control by judicial review could conveniently be classified under three heads. These were illegality, irrationality and procedural impropriety. Illegality meant that the decision-maker had to correctly understand the law that regulated his decision-making power and had to give effect to it. Irrationality 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 meant 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. (Per Lord Diplock in Council for Civil Service Unions v Minister for Civil Service (1985) A.C. 374, at 401D)

2. It was clear from rule 54A(1) of the Traffic Rules that only public service vehicles were prohibited from being driven or operated when fitted with tinted windows or tinted windscreens. The court had not been referred to any provision of the law which extended the prohibition under that rule to private vehicles. Without any such legal authority, the Respondent gave the directives without any legal basis.

3. Whereas there was an obligation placed on the executive to protect the lives and properties of the citizens and residents of Kenya, that obligation had to be undertaken in accordance with the law and any attempt to exercise extra-legal powers under the guise of performance of Constitutional obligation would have come to naught as the court would not have hesitated to thwart such attempts. Therefore, where the law exhaustively provided for the jurisdiction of a body or authority, the body or authority had to operate within those limits and ought not to have expanded its jurisdiction through executive craft or innovation.

4. The courts would be no rubber stamp of the executive and if Parliament gave great powers to the executive, the courts had to allow them to it but, at the same time, they had to be vigilant to see that the executive exercised them in accordance with the law. The executive had to act within its lawful authority and an act, whether it was of a judicial, quasi-judicial or administrative nature, was subject to the review of the courts on certain grounds. The executive had to act in good faith. Extraneous considerations ought not to have influenced its actions and it ought not to have misdirected itself in fact or law.

5. By directing that the vehicles with tinted windows be impounded, the Inspector General of the National Police Service was in effect imposing penal sanctions on those who would violate the directive. Where the provisions of an enactment were penal, they had to be construed strictly. In such circumstances one ought not to have done violence to its language in order to bring people within it, but ought rather to have taken care that no one was brought within it who was not brought within it in express language. (Tanganyika Mine Workers Union v The Registrar of Trade Unions (1961) EA 629).

6. A strict reading of rule 54A of the Traffic Rules clearly showed that private vehicles had not been brought within the ambit of the rule. To have purported to bring the said vehicles within the ambit of the rule without amending the same was obviously the wrong route to follow in an attempt to secure the country.

7. In issuing the directive that all vehicles with tinted windows be impounded without making a distinction between public service vehicles and private ones, the Respondent had obviously purported to exercise powers he did not have. The
effect of such directive was to amend the Traffic Rules in particular rule 54A and expand the ambit and application of the said rule.

8. Article 245(2) (b) of the Constitution empowered the Respondent to exercise command over the National Police Service and to perform any other functions prescribed by national legislation. The national legislation in question was the National Police Service Act, 2011. Section 10(1) of the said Act prescribed the functions of the Respondent and none of them expressly empowered him to amend or vary the Traffic Rules.

9. The Respondent had no power under the law to amend the Traffic Rules. By-laws made under statutory powers ought not to have been unreasonable, or in excess of statutory power or repugnant to that statute nor to the general principles of law.

Orders of certiorari and prohibition issued. Costs to the Applicant.

Reference No 9 of 2010

Before: Jean-Bosco Butasi, PJ, Isaac Lenaola, DPJ, John Mkwawa, J.

June 20, 2014

Brief Facts

The Applicant, African Network for Animal Welfare (ANAW), a Charitable Pan-African animal welfare and community-centered organization registered as a Non-Governmental Organisation in Kenya sought to challenge the proposed action by the Government of the United Republic of Tanzania to construct and maintain a road known as the “Natta-Mugumu – Tabora B-Kleins Gate – Loliondo Road, across the northern wilderness of the Serengeti National Park.

This road was intended for the use of the general public with all the attendant consequences to the environment, generally.

Before the Reference was filed, 53 km earth road existed between Tabora B Gate and Kleins Gate within Serengeti National Park and only 5 km of that road was paved with gravel or murram. It was mostly used by tourists and Tanzania National Parks Authority (TANAPA) officials and any other person who wanted to do so had to obtain special authorization from Serengeti National Park’s Management to use it.

The move by the Government to construct the road according to the Applicants would have deleterious environmental and ecological effects and was likely to cause irreparable and irreversible damage to the delicate ecosystem of the Serengeti and adjoining national parks such as the Masai Mara in Kenya.

They also claimed that United Republic of Tanzania’s actions were a violation the EAC Treaty and its obligations in respect of Serengeti which had been declared a “World Heritage Property” of “outstanding Universal value” according to the United Nations Educational, Scientific and Cultural Organization (UNESCO) and therefore its protection and conservation was a matter of international concern.

The respondents on the other hand claimed that the road was already in existence and in use and that it was merely being upgraded. Its use according to them had no negative impact on the Serengeti ecosystem and in upgrading all negative environmental impacts were mitigated.

The applicant sought declaratory, injunctive and restraining orders against the Respondent.

Issues:

i. Whether the Reference was bad in law as it sought to enforce a part of the Treaty which was yet to be ratified by all Partner States thus unenforceable in law.

ii. Whether the Applicant had locus standi to institute a reference premised on alleged violations of International Conventions and Declarations on the environment and natural resources.

iii. Whether the Respondent intended to upgrade, tarmac, pave, realign, create or commission the trunk road-Serengeti Super Highway.

iv. Whether the disputed road existed and was in use.

v. Whether the proposed construction infringed Articles 5, 8 and 111 of the EAC Treaty and International Instruments.

vi. Whether the Applicant was entitled to the prayers sought

International Law - treaties-ratification of treaties-operationalization of certain parts of a treaty through a protocol-protocol to operationalize chapter 19 of the treaty-whether the Reference was bad in law as it sought to enforce a part of the Treaty which was yet to be ratified by all Partner States thus unenforceable in law-Articles 111-114, Article 151 (1),152,153 (1)of the Treaty for the Establishment of the East African Community.

Environmental Law - environmental impact assessment-impact of construction of a superhighway across a national park-whether the proposed construction infringed Articles 5, 8 and 111 of the EAC Treaty and International Instruments.
Treaty for the Establishment of the East African Community.

Article 5(3) (c)
For purposes set out in paragraph 1 of this Article, and as subsequently provided in particular provisions of this Treaty, the Community shall ensure:
the promotion of sustainable utilization of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment of the Partner States.

Article 8 (1) (c);
The Partner States shall:
co-ordinate through the institution of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community.

Article 111(2)
Action by the Community relating to the environment shall have the following objectives:
To preserve, protect and enhance the quality of the environment;

Article 151 (1)
The Partner States shall conclude such protocols as may be necessary in each area of co-operation which shall spell out the objectives and scope of the institutional mechanism for co-operation and integration.

Article 152
This Treaty shall enter into force upon ratification and deposit of instruments of ratification with the Secretary-General by all Partner States.

Article 153 (1)
This Treaty and all instruments of ratification and deposit of instruments shall be deposited with the Secretary General who shall transmit certified true copies thereof to all the Partner States.

Article 11 of the Vienna Convention
The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession or by other means if so agreed.

Held:

1. The Treaty was signed on 30th November 1996 and there was no evidence that Tanzania or any other Partner State never ratified it or ratified it with exceptions. Signature and ratification were two different and distinct steps in the treaty-making process and that ratification was the final consent by a Partner State to be bound by the provisions of a treaty. Therefore, Tanzania having signed and ratified the Treaty, it was clearly bound by each provision therein.

2. Article 151 (4) of the Treaty provided that the Annexes and Protocols to the Treaty formed an integral part of the Treaty and by its very nature, a protocol under Article 151 (1) of the Treaty spelled out the objectives and scope of, and institutional mechanisms for co-operation and integration but failure to enact a protocol ought not have ousted the obligations placed on a Partner State by clear and unambiguous provisions in the body of the Treaty. Chapter Nineteen was as binding on Tanzania as to other Partner States with or without a protocol in that regard.

3. Where a Partner State failed to honour commitments made to other international organizations, with appropriate facts placed before the Court, a decision to ensure compliance would be made in favour of a party that fit the description in Article 130 (4) and which had a genuine complaint in that regard. In fact, the Organisation of African Unity (now the African Union), the United Nations and its agencies and other international organizations, bilateral and multi-lateral development partners interested in the objectives of the Community were specifically named in that regard and Partner States were implored to accord special importance to co-operation with those agencies. In appropriate circumstances, a case would be made if a Partner State acted to the contrary. The Court could not purport to operate outside the framework of the Treaty and usurp the powers of other organs created for the enforcement of obligations created by other instruments including the African Charter and Protocol.

4. The Applicant’s case was not alleged violations of the International Declarations and Conventions per se, but infringement of Chapter Nineteen of the Treaty, a matter well within the mandate of the Court and the Applicant had locus standi under Article 30(1) of the Treaty to bring proceedings in that regard.

5. The Respondent intended to upgrade the Natta-Mugumu-Tabora B – Kleins Gate-Loliondo Road from its current earth status. There was however no evidence that it intended to re-align it but certainly upgrading involved construction and commissioning thereof.

6. There was no doubt that the United Republic of Tanzania had initially intended to construct a bitumen road from Natta through Mugumu to Tabora B Gate at Serengeti and 53 kms of it would have had to go through the Park to Kleins Gate and onwards to Loliondo. The intention, according
to the report by Inter-Consult Ltd, was to provide an all-weather road linking the district town of Mugumu and Loliondo to the regional capitals of Musoma and Arusha and thereby stimulating socio-economic growth of 2.3 million people living in the districts of Serengeti and Ngorongoro whose respective capitals of Mugumu and Loliondo would be served by the bituminized road.

7. The Government took into account the concerns raised on the negative impacts on the environment and did not commence the construction of the proposed road. However, if the initial proposal was implemented, then the adverse effects would not be mitigated by all the good that the road was intended to bring to the 2.3 million people residing in the affected areas of Mugumu- Loliondo. On the obligations imposed on Tanzania by Articles 5(3), 8(1)(c), 111(2) as well as 114(1) of the Treaty, there was no doubt that if implemented, the road project as initially conceptualized, would be in violation of the Treaty to that extent only.

8. The Government of the Republic of Tanzania was lawfully entitled to construct roads within its territory, where it failed in its obligations to the conservation and protection of the environment within the meaning of Articles 5(3) (c), 8(1) (c) and Article 111(1) as well as Article 114(1), then a declaration would be made in that regard. In the instant Reference, it was obvious that while its actions had the potential to cause irreversible damage to the Serengeti environment and ecosystem, once UNESCO and other bodies, including the Applicant intervened, it did not proceed with the road project and instead retreated to the drawing board and was conducting further studies on it. However, if allowed to proceed with the road project as previously conceptualized, it would be in breach of the Articles of the Treaty.

9. Regarding the prayer by the Applicant seeking to restrain the Respondent from maintaining any road or highway across the Serengeti National Park, it was clear that if the road project was implemented as originally planned, the effects would be devastating both for the Serengeti and neighbouring Parks like the Masai Mara in Kenya. There was therefore need to stop future degradation without taking away the Respondent’s mandate towards economic development of its people.

10. The Applicant sought a permanent injunction restraining the Respondent from maintaining any road or highway across any part of the Serengeti National Park. This was practical and proper to ensure that the United Republic of Tanzania as a Partner State stayed within its obligations under the Treaty. However the final orders would be tailored so as not to tie its hands in programmes that it had designed for its people. This was within the courts mandate under Rule 68(5) of the Court’s Rules of Procedure.

11. With regards to costs, the litigation was in the wider public interest and for the sake of sustainable future for the environment. Therefore, the Applicant had no direct benefit in the final orders and so each party was to bear its own costs.

A declaration was issued that the initial proposal or the proposed action by the Respondent to construct a road of bitumen standard across the Serengeti National Park was unlawful and infringed Articles 5(3)(c), 8(1)(c), 111(2) and 114(1) of the Treaty.

A permanent injunction was issued restraining the Respondent from operationalizing its initial proposal or proposed action of constructing or maintaining a road of bitumen standard across the Serengeti National Park subject to its right to undertake such other programmes or initiate policies in the future which would not have a negative impact on the environment and ecosystem in the Serengeti National Park.

Each party to bear its own costs.

Relevance to Kenya

Kenya is a Partner State to the East African Community. It is also bound by various treaties and conventions it ratifies by virtue of Article 2(5) and (6) of the Constitution of Kenya including those that seek to protect and preserve the environment.

The case is also valuable in the Kenyan context as it is acknowledged and the court recognized that the construction of the superhighway was likely to affect Kenya’s Masai Mara.

Keeping in mind that both preservation and protection of the environment and development programs such as construction of roads are considered to be of paramount importance, there arises a need for Partner States to assess and balance the need for development on the one hand and effect of development and its potential to inflict irreparable harm to the environment and the need to protect the ecosystem on the other.

Environment has been considered in this case as a matter of public and international interest. Governments cannot be seen to unduly favour development interests at the expense of the overriding interest to preserve and protect the ecosystem for the good of the public and for the sake of future generations.
Brief Facts.
While campaigning for a second term, President George W. Bush was scheduled to spend the night at a Jacksonville, Oregon, cottage. Local law enforcement officials permitted a group of Bush supporters and a group of protesters to assemble on opposite sides of a street along the President’s motorcade route. When the President made a last-minute decision to have dinner at the outdoor patio area of the Jacksonville Inn’s restaurant before resuming the drive to the cottage, the protesters moved to an area in front of the Inn, which placed them within weapons range of the President. The supporters remained in their original location, where a two-story building blocked sight of, and weapons access to the patio.

The petitioners, two Secret Service agents responsible for the President’s security (the agents), directed local police to clear the area where the protesters had gathered, eventually moving them two blocks away to a street beyond weapons reach of the President. The agents however did not require the guests already inside the Inn to leave, stay clear of the patio, or go through a security screening. After the President dined, his motorcade passed the supporters, but the protesters, now two blocks from the motorcade’s route, were beyond his sight and hearing.

The protesters sued the agents for damages, alleging that the agents engaged in viewpoint discrimination in violation of the First Amendment when they moved the protesters away from the Inn but allowed the supporters to remain in their original location.

They alleged that, in directing their displacement, the agents acted, not to ensure the President’s safety, but to insulate the President from their message. They also argued that, had the agents’ professed interest in the President’s safety been sincere, the agents would have screened or removed from the premises persons already at the Inn when the President arrived. They further asserted that the agents violated clearly established federal law by denying them “equal access to the President.”

The protesters supplemented the complaint with allegations that the agents acted pursuant to an unwritten Secret Service policy of working with the ‘Bush’ White House to inhibit the expression of disfavored views at presidential appearances. The Court of Appeals held that the agents were not entitled to qualified immunity because the Court’s precedent made clear that the Government could not regulate speech based on its content.

Issues:

i. Whether there was a violation of a clearly established First Amendment right: freedom of expression and assembly based on the agents’ decision to order displacement of the protesters.
ii. Whether the doctrine of qualified immunity would apply to the security agents.

Constitutional Law—bill of rights—freedom of assembly—whether there was a violation of a clearly established First Amendment right based on the security agents’ decision to order displacement of the protesters—First Amendment the Constitution of United States.

Constitution of United States
Amendment I
The First Amendment guarantees freedoms concerning religion, expression, assembly, and the right to petition. The right to freedom of speech allows individuals to express themselves without interference or constraint by the government. Freedom of assembly involves the right to peaceably come together, express, pursue or defend common interests and to petition the Government for redress of grievances.

Held:
1. The doctrine of qualified immunity protected government officials from liability for civil damages unless a plaintiff pleaded facts showing: that the official violated a statutory or constitutional right;

   i. that the right was ‘clearly established’ at the time of the challenged conduct[Ashcroft v.
2. The constitutional challenge to Secret Service actions had previously been addressed by the court in (Hunter v Bryant, 502 U.S. 224) where it held that qualified immunity shielded the agents from claims that the arrested violated the plaintiff’s right under the Fourth, Fifth, Sixth and Fourteenth Amendment. Accommodation for reasonable error was nowhere more important than when the specter of Presidential assassination was raised. Thus, the overwhelming importance of safeguarding the President was recognized in other contexts as well.

1. There was no previous decision which would alert Secret Service agents engaged in crowd control that they bore a First Amendment obligation to make sure that groups with conflicting views were at all times in equivalent positions. Nor would the maintenance of equal access make sense in the situation the agents confronted, where only the protesters, not the supporters, had a direct line of sight to the patio where the President was dining. The protesters suggested that the agents could have moved the supporters out of the motorcade’s range as well, but there would have been no security rationale for such a move.

2. A map of the area showed that because of the protesters’ location, they posed a potential security risk to the President, while the supporters, because of their location, did not. Staff, other diners, and Inn guests were on the premises before the agents knew of the President’s plans, and thus could not have anticipated seeing the President, no less causing harm to him. The agents also could keep a close watch on the relatively small number of people already inside the Inn, surveillance that would have been impossible for the hundreds of people outside the Inn.

3. A White House Manual directed the President’s advance team to work with the Secret Service to designate a protest area preferably not in the view of the event site or motorcade route. This manual guided on the conduct of the political advance team, not the Secret Service, whose own written guides explicitly prohibited agents from discriminating between anti-government and pro-government demonstrators. Even accepting as true the submission that Secret Service agents, had at times assisted in shielding the President from political speech, this case was scarcely one in which the agents acted without a valid security reason.

4. The protesters were at least as close to the President as were the supporters when the motorcade arrived at the Jacksonville Inn. When the President reached the patio to dine, the protesters, but not the supporters, were within weapons range of his location. Given that situation, the protesters could not plausibly urge that the agents had no valid security reason to request or order their eviction.

5. Individual government officials could not be held liable in a Bivens suit (Bivens v. Six Unknown Federal Narcotic Agents, 403 U.S. 388(1971)) which recognized the implied right of action against federal officers for violations of the Fourth Amendment, unless they themselves acted unconstitutionally. The court therefore declined to infer from alleged instances of misconduct on the part of particular agents an unwritten policy of the Secret Service to suppress disfavored expression, and then to attribute that supposed policy to all field level operatives.

The agents were entitled to qualified immunity
The Court of Appeal’s judgment was reversed.

Relevance to Kenya.
Qualified immunity is fairly a new doctrine in Kenya. This case can help establish the doctrine as a defence for public officers especially the police and security agents for acts done reasonably.

The case also introduces the right to equal access to the President.
## Product Catalogue and Price List

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