Kenya Law Marks 14 Years of Excellence

Court orders the Judicial Service Commission to reconsider the names of the applicants who were rejected for the Chief Justice and Deputy Chief Justice Jobs, Pg 5
The Kenya Law Review Journal provides a forum for the scholarly analysis of Kenyan law and interdisciplinary academic research on the law. The focus of the Journal is on studies of the legal system and analyses of contemporary legal issues with particular emphasis on the article’s substantive contribution to understanding some aspect of the Kenya’s legal system and seeks to include articles showing the interplay between the law and other disciplines.
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**Pg 66** Kenya Law marks 14 Years of Excellence

**Pg 79** Better Care for our Senior Citizens; Visit to thogoto home for the elderly
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The present and the future have never looked brighter for Kenya Law. This last quarter saw us marking 14 years of excellence during our Staff Annual Conference on 26th August 2016 at the Safari Park Hotel. Kenya Law has radically altered the landscape of the legal profession by making legal information, which was previously very difficult if not impossible to source, accessible at the click of a button.

During this event, we bid farewell to former Chief Justice and chair of the Council for Law Reporting Dr. Willy Mutunga. In his farewell speech he recognized and lay emphasis on the instrumental role of Kenya Law in the justice and legal sector as a channel through which the jurisprudence developed by the Judiciary is sifted and disseminated.

Kenya Law is committed to build on its past successes and learn from its challenges so that it may excel even further in its mandate in the years to come.

We pride ourselves in being at the forefront as the leading and most authoritative source of a broad range of public legal information. We would therefore like to assure our stakeholders, that moving forward; we will continue playing a vital role as a leading legal resource frontier and strive to guarantee accessibility to legal information.

As we recognize the increasing importance of our role as a nurturing and societal conscious organization, we visited Thogoto home for the aged and spent the day with them while donating several items to the Home. This activity is one of the many that we have planned to undertake in order to positively impact society through making a contribution to the welfare of humanity.

Long’et Terer

(CEO/Editor)
Dr Mutunga’s Farewell Message

Remarks Made by Hon. Justice Dr. Willy Mutunga, immediate former Chief Justice & President of the Supreme Court of Kenya at the Kenya Law staff annual conference on the 26th August 2016 at Safari Park hotel – Nairobi

Ladies and Gentlemen,

I would like to thank you for this opportunity and the honor you have bestowed upon me by inviting me here to share this day with you. Kenya Law is an institution that is dear to me, and in whose prosperity I greatly rejoice and gladly share. You are a singular institution in many aspects, but the one that stands out the most for me is your youth and vibrancy.

I have had the pleasure of engaging with most of you at various forums and it always amazes me how focused you are about what you do. Your passion in carrying out your job, your innovative ways of resolving problems, your open-armed embracing of ICT, and your enthusiasm for life in general. This has made it a joy to be the Chairman of the Kenya Law Council.

Kenya Law plays a very instrumental role in the justice and legal sector. It is the channel through which the jurisprudence developed by the Judiciary is sifted and disseminated. This is especially significant in view of the Constitutional requirements on the right to information. Indeed your mission as an institution is to provide universal access to Kenya’s public legal information, by monitoring and reporting on the development of jurisprudence for the promotion of the rule of law.

The essence of your obligation as an organization is captured in your slogan “Where Legal Information Is Public Knowledge”. This statement connotes an enlightened understanding that your mandate is not merely to be a provider of public legal information, but to be the peoples fountain of knowledge and understanding of the law. Being the custodians of all legal information, you are by default the champions of legal awareness and consciousness.

Your indirect mandate is therefore, the empowerment of all Kenyan citizenry regarding issues involving the law, thus promoting realization of legal culture, participation in the formation of laws and the rule of law.

Ladies and Gentlemen,

It is important to note that knowledge constitutes a valuable intangible asset for creating and sustaining a competitive advantage. In keeping with your position as the regional, if not international, centre of excellence in the provision of accessible public legal information, do not cease in your role as an educator of all those seeking your knowledge. You have set yourselves as the gold standard by which law reporting and access to public legal information is measured.

It is therefore your duty to society to share and disseminate this knowledge to all those

The Hon. Dr. Willy Mutunga, D. Jut., SC, EGH Former Chief Justice, President Supreme Court of Kenya
wishing to partake from your wealth of experience.

This is where re-engineering and reinventing yourselves comes in. The journey towards a transformed Judiciary was one we undertook after looking inwards and realizing we were not where we wanted to be. The **Judiciary Transformation Framework** (JTF) provided the basis and compass for the realization of the transformation process.

I am aware that you also undertook an internal audit of your systems and processes and that the result of this was an Editorial Transformation Framework (ETF). This framework articulated the shift that we now see in the reporting of jurisprudence, in improved processes and in better engagement with stakeholders.

I was pleased to be a part of the process through which Kenya Law re-engineered its systems and processes to exceed the expectations of the stakeholders and of Kenyans at large.

**Ladies and Gentlemen,**

Even though I am no longer the Chairman of your Council, I am confident in the current Council and the Management team that you have in place. I have no doubt that I am leaving you in good hands, after all, this is a pro-employee Council and your Management team is from within yourselves. I can say so confidently because during my tenure as your Chairman this team worked tirelessly to come up with, and implement several key staff welfare advancement initiatives.

Among these were; establishing a pension scheme for all staff members, enhancing the staff medical scheme, establishing a group life cover for all staff, ratifying an organization structure that ensured structured career progression, and the staff upgrading of 2011 to name but a few. I have the utmost confidence in the leadership and management of the Council because I know that very few institutions have such a blend of experience, diversity, knowledge and goodwill.

I would urge the Council, the Management and the Kenya Law team at large to give the in-coming Chief Justice and Chair the same support that you provided me during my tenure. To the management team, your task is to actualize the vision of the organization-to ensure there is "**Accessible public legal information towards an enlightened society**".

You have shown great team spirit and you must continue on the same path as it is the only way you can ensure the success of the organization and of yourselves.

**In conclusion,**

I want you to know that I will always be your ambassador and shall carry the Kenya Law flag wherever I go. It has been an honor serving as your Chairman.

I wish you all a good afternoon.

Dr. Willy Mutunga
The Kenya Law Android app contains:

- Selected Statutes of high public interest.
- The Kenya Gazette.
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National Council for Law Reporting (Kenya Law) - A service state corporation in the judiciary
The Trusted Society of Human Rights Alliance, (the Alliance) in this case brought a case against the Judicial Service Commission (the Commission) concerning the advertised vacancies in the positions of the Chief Justice (CJ) and Deputy Chief Justice (DCJ) and a Judge of the Supreme Court of Kenya for the Judiciary of the Republic of Kenya. The interested applicants had up to the 6th of July, 2016 to submit their applications.

It was contended for the Alliance that in the said advertisements, the Commission enumerated a raft of qualifications both in the Constitution and outside the Constitution of Kenya including clearance from the Higher Education Loans Board for beneficiaries and non-beneficiaries, the Kenya Revenue Authority, Directorate of Criminal Investigations, Advocates Complaints Commission, the Ethics and Anti-Corruption Commission and a recognized Credit Reference Bureau.

According to the Alliance, whereas the Constitution in Articles 10, 73 and 166(3) set the qualifications for the positions in question, malice, impunity and greed drove the Commission to oust the provisions of the Constitution and instead set criteria unknown to the law. As a result, according to the society the Commission shortlisted candidates for the 3 positions and in so doing, left out several names, among them Prof Jackton Boma Ojwang and Justice Aaron Ringera.

The Alliance submitted that the Commission was required to adhere to the provisions of Article 172(2) of the Constitution which required it to be guided by competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary and the promotion of gender equality.

On the issue of the right to information, it was submitted that it was beyond dispute that the right to information was at the core of the exercise and enjoyment of all other rights by citizens and the right was expressly recognized in the Constitution of Kenya, 2010 and in international conventions to which Kenya is a party and which form part of Kenyan law by virtue of Article 2(6) of the Constitution.

The Alliance therefore urged the Court to find that the short-listing of the applicants was flawed and also to find that: the actions of the JSC in setting the qualifications in the advertisements for recruitment of the Chief Justice, the Deputy Chief Justice and the Supreme Court justice were unconstitutional hence null and void; that these actions outrageously violated Articles 10,35,73 and 172(2) of the Constitution; and that the process of short-listing, interviewing, recruiting and appointment of persons to the positions of the Chief Justice, the Deputy Chief Justice and the Supreme Court justice is/was opaque, clandestine, shrouded in secrecy and riddled with suspicion and contrary to article 10,73 and 172(2) of the Constitution of Kenya hence unconstitutional and consequently null and void or in the alternative the process of short-listing commences afresh.

In opposing the case the Commission averred that the Petitions and Application were misguided, bad in law, pre-mature and hasty as they did not raise any Constitutional or justifiable issues for determination by the Court. The Commission noted that section 30 of the Act enjoins the Commission to...
constitute a selection panel comprising of not less than five (5) members, which panel was to shortlist the persons for nomination by the Commission to the positions of the Chief Justice/President of the Supreme Court, the Deputy Chief Justice and Judges of the Superior Courts in accordance with the First Schedule to the Act. The First Schedule on the other hand only provided the procedure and the criteria for determining the qualifications and did not set out any qualification not embodied in or derived from the Constitution itself. It was therefore the Commissions’ position that Parliament did not leave it to it to set any additional qualifications not provided for in the Constitution that would allow the Commission to act in an arbitrary manner as had been alleged by the Petitioners.

The Commission was mandated to review all applications submitted for completeness and conformity with constitutional and statutory requirements which were to relate to a determination of whether the Applicant met the minimum constitutional and statutory requirements for the position. It was the Commission’s case that contrary to the assertions by the Petitioners, it duly complied with all the relevant provisions of the Constitution and the Act in evaluating and short-listing Applicants for the advertised position of the Chief Justice, the Deputy Chief Justice and the Supreme Court Judge and that in accordance with the provisions of the Constitution and the Act, set and applied the criteria that ensures that the various requirements for the qualifications, both professionally and otherwise of the applicants to the High Office of the Chief Justice and other Judges of the Supreme Court Judges are measurable and verifiable.

On the issue of the public participation, the Commission was of the view that the members of the public actually participated in the process of appointment of Judges and disclosed that in fact, it had already invited the members of the public to avail any relevant information in respect of the short-listed candidates and had received relevant information from some members of the public which information the Commission would give due consideration.

It was the Commission’s case that the process had complied with the principles and/or international best practices. Further, that it had the obligation to filter out those Applicants who did not meet the minimum constitutional and statutory requirements. It was contended that the position advanced that the only short-listing provided under the law was under section 30(3) of the Act was untrue as the short-listing under that section was ‘for persons for nomination’ to the said persons, but for that to happen the process had to take place.

On the issue of the right to information, the Commission submitted that this was not an absolute right under the Constitution of Kenya but is a right that is limited either in the Constitution or by statute. The limitations are: that the Constitution conferred some rights in citizens qua natural persons as opposed to juridical persons in respect of the information held by the state or state organs; that where the disclosure requested for was not in the public interest or was likely to lead to a disclosure of private and confidential information relating to other persons, then such information could not be disclosed; and, that an applicant had to first request for the information sought from the State organ prior to approaching the Courts for an order. The applicant could only come to the Courts after that request had been declined whereupon the Court had jurisdiction to scrutinize the reasons given for the refusal to disclose information requested. The Commission therefore urged the Court not to permit the Petitioners to hold the entire country at ransom when there were no legitimate grounds upon which the process was challenged.

The broad issues for determination before the Court therefore were:

a. Whether the Commission correctly adhered to the constitution and the provisions of the Judicial Service Act and the regulations made there under when it “short-listed” the applicants to fill the vacant positions of the Chief Justice, the Deputy Chief Justice and Judge of the Supreme Court; and

b. Whether the Commission was under an obligation to furnish the Petitioners with the information requested;

c. Whether the Commission did satisfy its obligation to furnish the said information;

The Court in making its determinations considered the independence of the Commission holding that where a state organ or officer stepped out of its mandate the Court had the jurisdiction to intervene. It was the considered opinion of the Court that it was vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, had the duty and obligation to intervene in actions of other State Organs where it was alleged or demonstrated that the Constitution had either been violated or threatened with violation. In effect the Commission’s independence given by Article 249(2) only remained valid and insurmountable as long as it operated within its legislative and constitutional sphere. Once it left its stratosphere and entered the airspace outside its
jurisdiction of operation, the Courts were justified in scrutinizing its operations. However, that was not a jurisdiction that the Courts would hasten to invoke, the Court held.

On the issue of public participation the court found that where the right to public participation was required, it could not be abrogated simply because there was in place some form of delegated representation. As to whether public participation was necessary in the nature of the short-listing, no public participation was necessary. It was however necessary when it came to determining the "super-structural" process that necessarily involved interviewing the applicants.

On the issue of discrimination, the Court took the view that it was upon the person alleging differential treatment to place before the Court material which would go to show that that was the case. The JSC could not be accused of having abused its discretion unless the petitioner demonstrated that he/she had met all the stipulated requirements, applied and was not shortlisted. For the Court to find that the Commission ought to have shortlisted the applicants who were serving as Judges of the Supreme Court as a matter of right would amount to the Court stepping into the shoes of the Commission and removing its discretion conferred upon it by the Constitution and the law. The Court would not make a decision whose effect would be to automatically qualify Supreme Court Judges to be interviewed for the positions of the Chief Justice or the Deputy Chief Justice. Each case had to be determined on its own peculiar circumstances without the Court granting an automatic "right of passage" to a certain class of people to be shortlisted unless it was shown to the satisfaction of the Court that the decision not to shortlist them was, based on the material placed before it, clearly irrational.

On the issue of the right to access information, Article 35 of the Constitution of Kenya did not seem to impose any conditions precedent to the disclosure of information by the state. It was the Courts opinion that the principle of maximum disclosure established a presumption that all information held by public bodies was subject to disclosure and that that presumption could be overcome only in very limited circumstances. Further, that public bodies had an obligation to disclose information and every member of the public had a corresponding right to receive information. In addition, the exercise of that right was supposed to require individuals to demonstrate a specific interest in the information. Where therefore a public authority sought to deny access to information, it bore the onus of justifying the refusal at each stage of the proceedings.

Moreover the Court noted that, the freedom of information is an inseparable part of freedom of expression and the Commission being a state organ, it was under the obligation to furnish citizens with information held by it under the said provision. Once the information was proved to be in possession of the Commission, the Court held that the burden shifted to the Commission to show why the said information ought not to be disclosed to the citizens.

In appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article I of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilted. Therefore the Court or Tribunals ought to appreciate that in the Courts jurisdiction, the principle of proportionality is now part of Kenya's jurisprudence and therefore it was not unreasonable or irrational to take the said principle into account in arriving at a judicial determination.

The Court pointed out that it is trite law that contravention of the Constitution or a Statute would not be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute. In determining the matter, the Court also pointed out that in the proceedings, there had been no specific allegation that any person who was desirous of applying for any of the three positions the subject of the proceedings was prevented from doing so by the fact of the requirements in the advertisement. There was nothing inherently wrong with the advertisement. It was the manner in which the advertisement was understood and implemented that was perverse.

On that premise the Court quashed the decision of the Commission rejecting some of the names of the applicants in the Commission's short listing. It also compelled the Commission to reconsider the names of the applicants which were rejected afresh and communicate its decision, particularly where adverse, to the parties affected and thereafter proceed in accordance with the law. The Court further prohibited the Commission from making recommendations to the President on the persons to be appointed as the Chief Justice, the Deputy Chief Justice and a Judge of the Supreme Court of the Republic of Kenya pending enforcement of its reconsiderations.
“The relevant principles applicable to award of damages for constitutional violations under the Constitution are that a monetary award for constitutional violations is not confined to an award of compensatory damages in the traditional sense. An additional award, not necessarily of substantial size, can be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. Accordingly, the expressions punitive damages or exemplary damages are better avoided as descriptions of that type of additional award. In some cases, a suitable declaration can suffice to vindicate the right which has been breached”.

“Consider the nature of the claim and the period of delay, approximately 30 years and the circumstances surrounding the Petition and the persons alleged to have been behind the process and the fact that there was no clear provision of the period of time for commencing such petitions, the petition is not defeated by laches. Moreover, the general elections of 2002 brought to the country change of regime that led to a new wave of litigation in respect of violation of human rights. Those who feared victimization woke up to a new era where they can petition for their rights without fear.”

“The Courts of Kenya have the jurisdiction to give effect to the rights of the child, irrespective of the origin of such child. It does not matter that that child comes from the howling sands and winds of the Sahara Desert, the depths of the Congo forests, the Miombo woodlands of Tanzania, the windswept Drakensberg mountains of the South of the continent, the steppes of outer Mongolia or the fringes of the world’s oceans and seas, the Courts of Kenya will give shelter and succour to that child. Under the Constitution of Kenya, 2010, the rights of the child are paramount. It will be unworthy of the Constitution if jurisdiction is denied to the Kenyan Courts”.

“The Council of Legal Education in conjunction with the Kenya School of Law are the institutions specifically tasked with providing professional training to and examining those who intend to be advocates. To excessively curtail their powers in carrying out that onerous mandate would amount to usurping their mandates and substituting the Court’s discretion for that of the School. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness”.

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Justice A M Emukule, in Republic v Resident Magistrate (Hon. B. Koech) ex-parte H L & another, Miscellaneous Civil Application 3 of 2016 at the High Court at Mombasa

Justice G V Odunga in Nabulime Mariam & others v Council of Legal Education & 5 others, Judicial Review Application No. 377 of 2015 in the High Court of Kenya at Nairobi

Justice Anthony Ombwayo In re Estate of William Kimngeny Arap Leting (Deceased), E & L C Petition No. 1 of 2013 in the Environment & Land Court of Kenya at Eldoret
“Protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. The importance of freedom of expression can not be over-emphasised. Freedom of expression enables the public to receive information and ideas, which are essential for them to participate in their governance and protect the values of democratic government, on the basis of informed decisions. It promotes a market place of ideas. It also enables those in authority to be brought to public scrutiny and thereby hold them accountable. Once it is recognized that section 29 of the Kenya Information and Communications Act limits a right that is as important as the right to freedom of expression undoubtedly is, then the state should bring the law imposing such limitation within the rubric of article 24 of the Constitution.”

“Section 12 of the Registration of Births and Deaths Act which requires that the name of the father of a child born outside marriage should be entered in the register of births only with the consent of the father is unconstitutional and in violation of articles 27, 28 and 53 of the Constitution. In addition its effect of imposing an unfair burden on women, the mothers of children born outside marriage, is to that extent discriminatory on the basis of sex.”

“In applications for certification and grant of leave to appeal to the Supreme Court, the decisive factor is not whether the Appellate Court decision is perceived as right or wrong by any of the parties, but rather, whether the intended appeal raises “a matter of general public importance”.

“While the provisions of section 6(2)(c) of the Media Council Act are so vague and broad as to unjustifiably limit media freedom and freedom of expression and therefore the Cabinet Secretary can not properly issue guidelines in furtherance thereof, no speculation can be done with respect to the constitutionality or otherwise of any guidelines that can be issued to put into effect the provisions of the rest of the section which accorded with the Constitution and the exercise of freedom of expression or with respect to the operations of the Authority established under the Kenya Information and Communications (Amendment) Act. Section 6 (2)(c ) is unconstitutional for being couched in a manner that is vague and broad and that is likely to limit the freedom of expression”.

Justices I Lenaola, M Ngugi & W Korir in Nation media group limited and 6 others v Attorney General and 4 others, Petition 30 of 2014 Consolidated with Petition 31 of 2014 & Judicial Review Miscellaneous Application 30 of 2014 in the High Court of Kenya at Nairobi

Lady Justice Mumbi Ngungi in Geoffrey Andare v Attorney General & 2 others, Petition 149 of 2015 in the High Court of Kenya at Nairobi

Lady Justice Mumbi Ngungi in L.N.W v Attorney General & 3 others, Petition 484 of 2014 in the High Court of Kenya at Nairobi - Constitution and Human Right Division

Supreme Court justices W Mutunga; CJ, KH Rawal DCJ, MK Ibrahim, JB Ojwang & NS Ndungu, SCJJ in Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another, Motion 42 & 43 of 2014
Thanks for the information. This is the first time am receiving case back from my appeals. Keep it up.

Thanks for the feedback. Was happy to learn the high court confirmed my judgement

Thank you very much for this feed back.

Thank you so much case back, keep me updated always
Brief facts

On 12th April, 1989 Kenya Commercial Bank (KCB) granted certain financial facilities to a company called Benjoh Amalgamated Limited, with Muiri Coffee Estate Limited acting as a guarantor. Benjoh Amalgamated and Muiri Coffee thereafter defaulted in repayment. On default, KCB instructed auctioneers to realize the securities held under the transaction. The auction to realize the securities was scheduled, however Benjoh Amalgamated and Muiri Coffee launched proceedings against the 1st applicant in the High Court. Consent was entered for payment. There was a default, and KCB instructed auctioneers to move and re-advertise the properties for sale. Meanwhile, Muiri Coffee and Amalgamated Co. filed some other cases before the High Court, seeking an injunction restraining the sale. Those suits were dismissed.

The two parties then reverted to the High Court and filed an application seeking to set aside the consent. The application was allowed. KCB was aggrieved by that decision and appealed to the Court of Appeal. The Appellate Court allowed the appeal thereby reinstating the consent. The dispute between the two sets of parties continued, resulting in yet other suits before the High Court, seeking an injunction restraining the sale. Those suits were dismissed.

It emerged that even the Appellate Court’s Ruling on the consent, had been challenged and in a decision rendered, the High Court recognized that the question was now res judicata, having been resolved by the highest Court of the land, which at that time was the Court of Appeal. The said High Court determination was appealed before the Court of Appeal. The Court of Appeal held that all the issues that had been raised before the High Court were res judicata and that led to the appeal before the Supreme Court.

Issues

i. Whether the matter as certified by the Court of Appeal, had met all the principles for certifying a matter as one of general public importance

ii. Was the application before the Court of Appeal, seeking certification for further appeal, barred by the doctrine of res judicata?

iii. Whether the test for granting certification to appeal to the Supreme Court as a Court of last resort was different from the test of granting leave to appeal to an intermediate Court.

iv. Whether the Respondent’s intended appeal involved matters that had been resolved before the promulgation of the Constitution of Kenya 2010, so as to be barred by the doctrine of finality of litigation, and whether in the circumstances the Supreme Court lacked jurisdiction.

v. Whether the Court of Appeal had acted per incuriam, in certifying the cause as one involving a matter of general public importance, and granting leave to appeal to the Supreme Court, where a different Bench of that same Court had denied leave.
of res judicata. Constitution of Kenya, 2010, Articles 163 (3) and (4)

Civil Practice and Procedure - appeals- appeals to the Supreme Court-circumstances under which the appeals would be granted to the supreme court- whether the matter brought before the court was one that raised an issue of general public importance to raise the warrant of issuance of appeal to the Supreme Court- whether the Court of Appeal acted per incurium in certifying a cause as one involving a matter of general public importance, and granting leave to appeal to the Supreme Court, where a different Bench of the Court of Appeal had denied leave - Civil Procedure Rules

Relevant provisions of the law
The constitution of Kenya, 2010
Article 47
Article 163(3) (b) (i)
Article 163(4) (a) or (b)

Held

1. It is trite law that in an application for certification and grant of leave to appeal to the Supreme Court, the decisive factor is not whether the Appellate Court decision was perceived as right or wrong by any of the parties, but rather, whether the intended appeal raised “a matter of general public importance”.

2. The test for granting certification to appeal to the Supreme Court as a Court of last resort was different from the test of granting leave to appeal to an intermediate Court for example from the High Court to the Court of Appeal. The primary purpose of the appeal was correcting injustices and errors of fact or law and the general test was whether the appeal had realistic chances of succeeding. If that test was met, leave to appeal would be given as a matter of course. In contrast, the requirement for certification by both the Court of Appeal and the Supreme Court was a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court.

3. The importance of the record of a Court, particularly for a Court of record, such as the High Court, could not be gainsaid. The record of a Court of record is a fundamental reference point in the administration of justice. There was no fault with the Court of Appeal Ruling granting certification and its observations and findings, as regards the vital question of the availability of a record of a Court of record. The Court of Appeal in granting leave reinforced the public-interest element in the issue that spoke to its nature as a matter of general public importance, when it held so.

4. The issue of the character of superior courts as courts of record and the consequences of absence or incompleteness of the record, where rights were determined with finality on the basis of what ought to be on that very record was neither shallow nor idle. Rather, formulated in the precise manner in which it was before the Supreme Court, the issue appeared to have far-reaching consequences and implications on the integrity of the adjudicative processes of the Courts.

5. Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stood as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights.

6. The doctrine of res judicata in effect, allows a litigant only one bite at the cherry. It prevents a litigant or persons claiming under the same title from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts apart from occasioning unnecessary costs to the parties and it ensures that litigation come to an end and the verdict duly translated into fruit for one party and liability for another party conclusively.

7. Contrary to the respondent’s argument that the principle of res judicata was not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of article 159 of the Constitution, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.

8. Whenever the question of res judicata is raised,
A court would look at the decision claimed to have settled the issues in question, the entire pleadings and record of that previous case and the instant case, to ascertain the issues determined in the previous case and whether those were the same in the subsequent case. The Court should ascertain whether the parties were the same, or were litigating under the same title and whether the previous case was determined by a Court of competent jurisdiction.

9. The position advanced by the respondent, and sustained by the Court of Appeal was inconsistent with the principle that an application for certification first came before the Court of Appeal as the court seized of the facts of the matter, and only thereafter does an aggrieved party come to the Supreme Court seeking a review.

10. The crucial doctrine of res judicata, excludes the possibility that a differing Bench of the Appellate Court from the one that entertained the main cause, would consider the certification question emanating from the same parties, and in the same cause of action. It was clear that the Court of Appeal was not considering different application-issues. The applications rested on one foundation; and they were seeking the same relief, and were founded upon the very same cause of action. Hence the proper Bench to entertain that matter was one and the same.

11. The Supreme Court of Kenya was created upon the promulgation of the Constitution of Kenya, 2010. Before then, the Court of Appeal was the final Court of the land. The Supreme Court, in exercise of its appellate jurisdiction as provided in the Constitution was forward looking. The Court could only hear appeals from the Court of Appeal in matters that were not concluded before 27th August, 2010. Any matters that had been determined by the Appellate Court before that time, had attained their finality, and were not appealable to the Supreme Court.

12. The issue of the consent as between the parties in the matter before the Court was determined by two separate Benches of the final Court (Court of Appeal) on 10th March, 1998 and on 31st March, 2006. The two decisions were rendered before the promulgation of the Constitution 2010, that was, before the establishment of the Supreme Court. Consequently, they were final and binding and they could not be re-opened by the Supreme Court.

13. In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle was that the chain of Courts in the constitutional set-up, running up to the Court of Appeal had the professional competence and proper safety designs to resolve all matters turning on the technical complexity of the law and only cardinal issues of law or of jurisprudential moment, would deserve the further input of the Supreme Court.

14. The Court of Appeal had acted per incuriam, in certifying the cause as one involving a matter of general public importance and granting leave to appeal to the Supreme Court where a different Bench of that same Court had denied leave. The Supreme Court by the terms of the Constitution was not to serve as just another layer in the appellate court structure, it had specific functions that were well defined.

Application partly allowed


The certification of the Court of Appeal granted in Application Sup. No. 20 of 2013 on 7th November, 2014 set aside.

The Petition of Appeal already filed by the respondent in the Supreme Court, being Appeal No. 35 of 2014, was struck out, as its sub-strum, namely the certification granted by the Court of Appeal, spent.

Each party to bear own costs.
Principles applicable to award and assessment of damages for violation of Constitutional rights of an individual by the State

Gitobu Imanyara & 2 others v Attorney General
Civil Appeal No. 98 Of 2014
Court of Appeal
At Nairobi

Alnashir Visram, F. Sichale, Mohammed, JJA
May 19, 2016
Reported by Njeri Githang’a

Constitutional Law - fundamental rights and freedoms-
violation of-award of damages for violation of rights-
principles applicable to award and assessment of damages-
what appropriate remedies are available for damages arising out of the violation of Constitutional and fundamental rights of an individual by the State.

Constitutional Law - constitutional tort actions-
public law remedies- whether damages arising out of
Constitutional violations also known as constitutional tort actions are within public law remedies and different from the common law damages for tort under private law

Company Law - locus standi- legal entity of a company-
a company being a separate legal entity from its owners and having a right to sue and be sued as a separate and distinct personality-whether shareholders of a company can bring an action for losses and damages suffered by the company- whether a constitutional court could award damages for losses suffered by Petitioners’ companies or associated business interests

Brief facts
The claim before the High Court was for damages for Constitutional violations by the state. Liability was expressly admitted by the Respondent, (save for any lawful conviction which was to be adjudicated by the Court) the Judge proceeded to deal with the damages for the admitted violations of the appellants fundamental rights and freedoms under article 23(3) of the Constitution of Kenya, 2010 and in his final judgment issued a declaration in respect of each of the appellant that: (1) the Petitioner’s fundamental rights and freedoms under articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1) of the Constitution 2010 and under sections 72(1), 72(2), 72(3), 72(5),74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1) of the Constitution of Kenya (Repealed) at material times had been and were repeatedly contravened and grossly violated by the Police, Criminal Investigation Department Officers, National Security Intelligence Service (formerly Special Branch), and other Kenyan Government servants, agents, employees and institutions, on numerous dates at various police stations in Nairobi City and surrounding towns; secondly, he further gave orders awarding Kshs. 15 Million, Kshs. 10 Million and Kshs. 7 Million to the 1st appellant, 2nd appellant and 3rd appellant respectively for general damages suffered as a result of the constitutional right violations by the State agents.

It was that judgment that provoked the joint appeal. They claimed that it was inadequate compensation of damages for the injuries and losses suffered by the appellants and the failure by the Judge to set aside the criminal conviction of the 1st appellant especially when liability was admitted by the Respondent was wrong. It was argued that there was nothing more serious than a criminal conviction of an advocate and that because the respondent opted to admit liability and did not challenge the issue before the trial court, it was proper for the Court to set aside the criminal conviction of the 1st appellant so that the 1st appellant’s honor and dignity could be restored. Counsel submitted that the criminal conviction was procured through unconstitutional means and hence should be set aside.

On the second broad ground of appeal relating to award of damages, it was submitted that an award of KShs. 15,000,000/=,Kshs. 10,000,000/= and Kshs. 7,000,000/= to the appellants respectively as general damages was manifestly low for the kind of violations the appellants had suffered, so as to warrant the interference of the Court.

The respondent in opposing the appeal submitted that the trial judge had arrived at the correct conclusion, both in terms of the law and the quantum of damages. It was submitted that the
judge rightfully considered the evidence placed before him, the limited public resources and the burden to the innocent tax payers if such atrocious sums were awarded to the appellants as prayed in their petitions.

Counsel submitted that the reliefs sought by the appellants for constitutional violations were against the State which were within the public law remedies and therefore should be distinguished from the private or personal remedies in tort. He argued that in such cases, it was the state which bore the responsibility for such violations and not the individual who committed the atrocities. In furtherance of that position, counsel argued that damages awarded under public law for the violations of constitutional rights of individuals by state should not be punitive but should suffice to only vindicate the Petitioners.

**Issues**

1. What appropriate remedies are available for damages arising out of the violation of Constitutional and fundamental rights of an individual, by a State.
2. What are the principles applicable to award and assessment of damages for the violation of the Constitutional rights of an individual by the State?
3. Whether damages arising out of Constitutional violations also known as Constitutional Tort Actions are within public law remedies and different from the common law damages for tort under private law.
4. Whether a constitutional court could award damages for losses suffered by Petitioners' companies or associated business interests.
5. Whether shareholders of a company can bring an action for losses and damages suffered by the company.

**Held**

1. The Court is not necessarily bound to accept the findings of fact by the Court below and an appeal to the Court of Appeal from a trial by the High Court is by way of retrial and the principles upon which the Court acts in such an appeal are well settled. The Court has to reconsider the evidence, evaluate it itself and draw its own conclusions bearing in mind that it has neither seen nor heard the witnesses and should make due allowances in that respect.

2. The Court would be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because an appellate Judge thought that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Court on the question of the amount of damages it would generally be necessary that the Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the plaintiff was entitled.

3. In arriving at the quantum for award of general damages, the trial court considers various similar cases where different amounts for damages have been awarded by the domestic courts for violations of constitutional rights. On the question of the award of exemplary damages, the trial court appreciated that exemplary damages were not properly awardable noting the burden to the innocent tax-payer.

4. Under common law principles, an injured party is entitled to damages for the loss and injury suffered under private law causes of action, such as tort, where compensation of personal loss was at issue. However, in the instant case, there is need to consider what appropriate remedies were available for damages arising out of the violation of Constitutional and fundamental rights of an individual by a State under public law.

5. The relevant principles applicable to award of damages for constitutional violations under the Constitution are that a monetary award for constitutional violations is not confined to an award of compensatory damages in the traditional sense. An additional award, not necessarily of substantial size, could be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. Accordingly, the expressions punitive damages or exemplary damages were better avoided as descriptions of that type of additional award. In some cases, a
suitable declaration could suffice to vindicate the right which had been breached.

6. A consideration on when a remedy in a Constitutional violation case was just and appropriate included, a remedy that would;
   a) meaningfully vindicate the rights and freedoms of the claimants;
   b) employ means that were legitimate within the framework of constitutional democracy;
   c) be a judicial remedy which vindicated the right while invoking the function and powers of a court; and
   d) be fair to the party against whom the order was made.

7. The award of damages for constitutional violations of an individual’s right by the state or the government are reliefs under public law remedies within the discretion of a trial court. However, the court's discretion for award of damages in Constitutional violation cases is limited by what is appropriate and just according to the facts and circumstances of a particular case.

8. The primary purpose of a constitutional remedy was not compensatory or punitive but was to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination was an exercise in rationality and proportionality. In some cases, a declaration only would be appropriate to meet the justice of the case, being itself a powerful statement which could go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages could be called for in addition to the declaration. Public policy considerations is also important because it is not only the Petitioner’s interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.

9. A company is a separate legal entity from its owners and has a right to sue and be sued as a separate and distinct personality. The law does not allow the shareholder of a company to bring an action for losses and damages suffered by the company. The proper plaintiff in an action arising out of losses and damages suffered by the company is the company itself. The Nairobi Law Monthly Magazine associated with the 1st appellant, the Finance Magazine associated with the 2nd appellant and both the Beyond Magazine and People Magazine associated with the 3rd appellant were separate legal entities capable of bringing a law suit for the losses alleged to have been suffered. For the same reasons, the 1st appellant had no legal capacity to claim for losses or damages allegedly suffered by the National Bank of Kenya, Deposit Protection Fund and National Council of Churches who were his creditors.

10. In the proceedings, the 2nd appellant claimed for losses amounting to Ksh. 95,000,000/= due to the seizures of almost 950,000 copies of the Finance Magazine. However the only evidence produced in support of quantum of damages was a copy of the Daily Nation newspaper coverage. The primary documents that the appellants relied on were newspaper articles. The media articles, taken alone, were of no probative value and did not demonstrate any effort on the part of the 2nd appellant to demonstrate losses he suffered. The appellants had failed to discharge their burden of proof on claims for damages. In any event, even if the Magazines were confiscated thereby occasioning any losses; the 2nd appellant had no locus standi to bring a cause of action for the said losses.

11. The fact that the respondent admitted liability ab initio did not in any way shift the burden of proof from the appellants. Even where a defendant had not denied the claim by filing the defence or an affidavit or even where the defendant did not appear, formal proof proceedings were conducted. The claimant lay on the table evidence of facts contended against the defendant and the trial court had a duty to examine that evidence to satisfy itself that indeed the claim had been proved. If the evidence fell short of the required standard of proof, the claim had to be dismissed. The standard of proof in a civil case, on a balance of probabilities, did not change even in the absence of a rebuttal by the other side.

12. The appellant could not say that he was not obliged to place evidence of damage suffered before the constitutional court before liability was determined. It must first be shown that there had been damage suffered as a result of the breach of the constitutional right before the court could exercise its
discretion to award damages in the nature of compensatory damages to be assessed. If there was damage shown, the second stage of the award was not available as a matter of course. It was only if some damage had been shown that the Court could exercise its discretion whether or not to award compensatory damages. The practice had developed in constitutional matters in the jurisdiction of having a separate hearing for the assessment of the damages, but it could not be overemphasized that, this was after there was evidence of the damage.

13. Financial losses incurred by the appellants associated businesses and properties, were special damages which should not only be specifically pleaded but also strictly proved for they were not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and probability of proof required depended on the circumstances and the nature of the acts themselves.

14. The appellants did not specifically plead and prove the damages from the losses they allegedly suffered. That could have been done by proof of receipts, bank statements or any invoices to show the liquidated losses incurred as a result of their Constitutional violations, however, the particulars were lacking in the case.

15. The assessment of damages is a discretionary relief, the trial court could not be faulted for failure to award exemplary and aggravated damages on the grounds of heavy burden to the innocent tax payer and secondly due to the improved political environment and the positive steps taken by the government in dealing with human rights violations. The test was not what would alleviate the hurt which the plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.

16. There was no justification to interfere with the trial Judge’s exercise of discretion in assessing the damages awarded to the appellants based on the evidence placed before him. Even though the trial Judge did not distinguish between public law remedies and private law remedies, he however proceeded correctly and applied the general principles for award of monetary damages in arriving at his decision.

17. The inhuman treatment, physical and mental torture, and losses suffered by the appellants in the hands of State agents could not be denied. However a court of law had to apply the law based on the evidence presented before the Court. Therefore the trial judge’s discretion in the award of damages to the appellants could not be interfered with.

18. The respondent did not address the Court on the issue whether the Judge misapplied the law by failure to set aside the criminal conviction of the 1st appellant issue either in his written submissions or during the hearing of the appeal and neither did the appellants raise the issue in their submission. The judge had declined to set aside the conviction of the 1st appellant as the same was an order of the court in a criminal conviction.

19. The then Attorney General was accused of personally supervising the 1st appellant’s prosecution and trial in that he “… intimidated and/or compromised the trial magistrate into convicting and sentencing him to five years imprisonment without an option of fine.” The particulars and extent of the interference in the trial court and in the appeal court was not explained and the record was completely silent on that. As pointed above, the ground of appeal was directed at the Attorney-General and not at the trial court nor the 1st appellate court.

Appeals dismissed with each party to bear their own costs
High Court Cases

High Court has Exclusive jurisdiction to determine constitutional issues from disputes arising out of decisions of Tribunals
Capital Markets Authority v Jeremiah Gitau Kiereini & another
Civil Appeal No 9 of 2014
Court of Appeal at Nairobi
P N Waki, W Karanja & J W Mwera, JJA
November 7, 2014
Reported By Nelson Tunoi & Silas Kandie

Brief Facts
The Capital Markets Authority (CMA) suspended the trading in CMC Holdings (CMCH) Limited shares on the Nairobi Stock Exchange (NSE) after boardroom wrangles between rival directors of CMC Holdings Limited spilled into the public domain, pending investigations. Prior to intervention by the CMA, CMCH had instructed Price Waterhouse Coopers (PWC) to carry out a forensic investigation covering some specific areas of its business and table a report to it. The CMA separately commissioned Webber Wentzel, a South African firm, to conduct a forensic investigation into defined aspects of the financial operations of CMCH and its trading subsidiaries. Webber Wentzel was also asked to review the PWC Report and comment on the methodology applied and the conclusions drawn by PWC.

The CMA sent the 1st Respondent a copy of the Webber Report via a letter and notified him through the same that the Board of the Authority had resolved to appoint an ad hoc Committee under section 14 of the Capital Markets Act. The Committee would consist of five persons with a majority of independent members. The 1st Respondent was requested to appear before the Committee. However through his advocate the 1st Respondent wrote a letter to the Committee stating that he would not appear before it as participating in its proceedings would occasion grave prejudice to him and to Court proceedings on the same subject matter, which were either pending or were likely to be instituted.

The Committee conducted its investigations upon conclusion of which it submitted its recommendations to the CMA Board. The CMA subsequently issued a press release announcing that it had taken an enforcement action against executive and non-executive directors allegedly found to have flouted the capital markets’ legal and regulatory requirements in relation to the affairs of CMCH. Further that the 1st Respondent had been disqualified from any appointment as director of any listed company or licensed or approved person, including a securities exchange in the capital markets in Kenya. Consequently, the 1st Respondent filed a Constitutional Petition and the High Court held, inter alia, that the CMA was in breach of the 1st Respondent's right to fair administrative action under article 47 of the Constitution. The High Court set aside the decision of the CMA taking enforcement action against the 1st Respondent, hence the instant appeal.

Issues:

i. Whether the High Court had jurisdiction to determine constitutional issues from disputes arising out of decisions by the Capital Markets Authority (CMA) in light of section 35A that established the Capital Markets Tribunal.

Constitutional Law - fundamental rights and freedoms - right to fair administrative action - right to fair hearing - right to be given proper notice of allegations and opportunity to be heard before an administrative action is taken - whether the investigative and enforcement action taken by the Capital Markets Authority against the 1st Respondent without giving him the right to be heard and no proper notice of allegations against him was an infringement of his right to fair administrative action and right to fair hearing as provided under articles 47 and 50 of the Constitution - Constitution of Kenya, 2010 articles 47 and 50

Jurisdiction – jurisdiction of the High Court - whether the High Court had jurisdiction to determine disputes arising out of decisions of the Capital Markets Authority Tribunal – whether the issue laid before the High Court under article 47 was constitutional in form and substance and consequently the right forum for its adjudication – Constitution of Kenya, 2010, articles 47, 165(3)(b) and (d) (ii); Capital Markets Act section 35A
Held:

1. The High Court had considered the objection on jurisdiction and found that it had been called upon to intervene in a matter where a party alleged breach of his fundamental rights and freedoms and that the issue squarely fell within the jurisdiction of the High Court by dint of article 165(3) (b) and (d)(ii) of the Constitution. No other adjudicative body, including the Tribunal, had that mandate. Therefore, there was express jurisdiction flowing from the supreme law itself.

2. The Court of Appeal could not fault the trial court for resorting to the Constitution itself in resolving, inter alia, the allegation on violation of fair administrative action under article 47 of the Constitution placed before it. The existence of an alternative remedy, in the instant case the Tribunal, would not be efficacious because the High Court did not share with the Tribunal the powers under article 165 of the Constitution. The issue laid before the High Court under article 47 was constitutional in form and substance and consequently the right forum for its adjudication was the High Court. The issue arose from the pleadings and the evidence before the trial court and was not raised by the court suo motu. Thus the appeal relating to jurisdiction failed.

3. From the examination and evaluation of the specified functions of the committee, its main function was to verify, by calling further evidence, the investigation report and findings of the Webber report. It was to carry out further investigation. Beyond that, it would give recommendations to the Board on actions to be taken, if any.

4. The Court did not have the benefit of the report submitted to the Board by the committee or the recommendations made as those were confidential, and there was statutory provision for that confidentiality.

5. What deserved a constitutional challenge was the summary imposition of sanctions and other penalties before giving the 1st Respondent an opportunity to be heard in mitigation. Some of the findings made by the committee bordered on criminal offences and yet penalties were imposed before hearing the affected person. After the hearing, the Board could have arrived at the same conclusion, but it would have passed muster in complying with the law.

6. There was no express provision in the CMA Act for a hearing before imposition of sanctions and other penalties, but the right to fair administrative action, which included fair hearing was so jealously guarded by the Constitution that the Court would apply article 10 on transparency and accountability, and article 20(3) of the Constitution to develop the law to the extent that it did not give effect to a right or fundamental freedom and adopt the interpretation that most favored the enforcement of the right or fundamental freedom.

7. Regarding considerations of public interest to override constitutional requirements of fair administrative action and fair hearing, those rights of the individual were so fundamental that they could not be limited even by public interest.

Orders;

i. Appealed allowed in as far as it questioned the process ending with the findings made by the committee on the specific allegations placed before it for investigation, and reiterated that the findings were made procedurally, and were valid until they were set aside by a lawful order on appeal. The order of the trial court setting aside the findings of the committee, which were accepted by the Board as listed in the letter dated August 3, 2012 set aside.

ii. Appeal dismissed in so far as it questioned the finding of the trial court that article 47 of the Constitution was breached since the 1st Respondent was not given the opportunity to be heard before sanctions and other penalties were imposed on him.

iii. The sanctions, penalties and offences imposed by the Capital Markets Authority Act under sections 11(3)(cc), 25A and 34A set aside. CMA should be at liberty to re-impose them if they were merited only after giving the opportunity to the 1st Respondent to be heard.

iv. The disposition related only to the 1st Respondent.

v. As there had been partial success, and the matter was of public importance, each party was to bear its own costs of the appeal and in the High Court.

Each party was to bear its own costs.
Constitutional Law – Rights of a Child – best interests of the child - right to shelter, parental protection and education – whether the best interests of the child are considered by the Children’s Court when in granting orders that would bar the child from returning to his father – where the child was not residing within the jurisdiction of the Children’s Court – whether the Children’s Court had jurisdiction to give effect to the rights of the child regardless of the origin of the child - Constitution of Kenya, 2010 article 53(2); Children Act, 2001, section 4(2)

Judicial Review – application for judicial review orders of certiorari and prohibition – application challenging the jurisdiction and the orders of the Children’s Court – where the applicant sought leave to be exempted from the requirement to exhaust alternative remedies as required by provisions of the Fair Administrative Action Act - whether the orders of certiorari and prohibition could issue against the respondent – whether the Children’s Court had jurisdiction to give effect to the rights of the child regardless of the origin of the child – whether the application had merit - Constitution of Kenya, 2010, article 165(6); Fair Administrative Action Act, 2015, section 7(2), 9 & 12; Children Act, 2001, section 80

Brief facts
The Applicant and the Interested Party were married in Dar-es-Salaam, Tanzania and were blessed with one issue, LL. They separated few years later and the Interested Party, a Kenyan citizen, moved to and resided in Mombasa, Kenya. By a Settlement Agreement dated December 20, 2010 between the Applicant and the Interested Party, the Interested Party was granted sole primary custody of LL but that the Interested Party would consult the Applicant if the child’s school would be changed or if the Interested Party and LL were relocating from Mombasa. The Settlement Agreement granted the Applicant access and visitation rights and the right to take LL during school holidays subject to prior agreement with the Interested party, and that the Interested Party would be entitled to keep the child for at least two (2) weeks per annum, again subject to agreement on the appropriate dates when the child would be with the Interested Party.

The child went to stay with the Applicant for the July, 2015 holidays, when the Applicant made a decision that the child would remain with him, and proceeded to enroll the child at a school in Dar-es-Salaam. Few months later the child travelled alone to Mombasa from Dar-es-Salaam to be with the Interested Party, expressing her desire not to return to Dar-es-Salaam since the Applicant had subjected her to verbal abuse. The Interested Party filed proceedings at the Children’s Court at Tononoka, Mombasa and the orders made by the Children’s Court, the child was prevented from returning to her father or to her school in Dar-es-Salaam.

Consequently, the Applicant filed a judicial review application before the High Court and sought for: leave to be exempted from the requirement to exhaust alternative remedies as required under section 9 of the Fair Administrative Action Act, 2015; an order of certiorari to quash the proceedings and orders issued on December 22, 2015; an order of prohibition prohibiting the Children’s Court from further entertaining the proceedings in Children Case No. 496 of 2015; an order restoring status quo; and a declaration that the rights of the ex-parte Applicant and the intended interested party in so far as they related to the proceedings in Children Case No. 496 of 2015 be determined by the Tanzania Courts.

Issue:

i. Meaning of administrative action

ii. Whether the Children’s Court had jurisdiction to issue orders to parties who did not reside in Kenya.

Held:

1. A statute which restricted access to the courts must be construed strictly. What the Fair Administrative Action Act defined as administrative action, were decisions by authorities or quasi-judicial tribunals, which actions or decisions or omissions adversely affected the rights or interests of any person to whom the actions, decisions or omissions
related. Such actions, decisions or omissions related to actions, decisions and omissions by such authorities as the rating authorities, rent tribunals, tax tribunals, and such like. With respect, they did not relate to judicial decisions by subordinate courts. Such actions or decisions were liable to appeal as of right or judicial review under article 165(6) of the Constitution in exercise of the court’s supervisory jurisdiction and on the well-trodden common law grounds of illegality, irrationality or procedural impropriety (now also given statutory underpinning by section 12 of the Fair Administrative Action Act - this Act was in addition to and not in derogation from the general principles of common law and the rules of natural justice), and the more extensive new statutory grounds set out in section 7(2) of the Fair Administrative Action Act.

2. Section 80 of the Children Act, 2001, merely gave a general right of appeal from a decision of the Children Court to the High Court, and from a decision of the High Court to the Court of Appeal. An appeal to the High Court was not a condition precedent to filing a Judicial Review application. Consequently, under both article 165(6) of the Constitution of Kenya, 2010 and sections 7(2) and 12 of the Fair Administrative Action Act 2015, the Applicant had an unqualified right to commence Judicial Review proceedings. There was no need to seek exemption under section 9(4) of the said Act, to commence Judicial Review proceedings.

3. The Children Court Magistrate had the necessary jurisdiction to make the orders she made. The orders were in accord with the relevant law, the Children Act. The preamble to the Act provided that an Act of Parliament to make provision for parental responsibility fostering, adoption, custody, maintenance, guardianship, care and protection, to make provision for administration of children’s institutions, to give effect to the principles of the convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes. Further, section 5 of the Children Act provided that no child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, social, political, economic, or other status, race, disability, tribe, residence or local connection.

4. Section 73 of the Children Act established the Children Court and section 76(1) of the Act conferred upon that Court a wide discretion. Section 76(1) provided that subject to section 4 where a court was considering whether to make one or more orders under the Act with reference to a child, it shall not make the order or any other orders unless it considered that doing so would be more beneficial to the welfare of the child than making no order at all.

5. The Courts of Kenya have the jurisdiction to give effect to the rights of the child, irrespective of the origin of such child. It did not matter that that child came from the howling sands and winds of the Sahara Desert, the depths of the Congo forests, the Miombo woodlands of Tanzania, the windswept Drakensberg mountains of the South of the continent, the steppes of outer Mongolia or the fringes of the world’s oceans and seas, the Courts of Kenya would give shelter and succour to that child. Under the Constitution of Kenya, 2010, the rights of the child are paramount. It would be unworthy of the Constitution if jurisdiction was denied to the Kenyan Courts.

6. The judicial review orders of certiorari and prohibition did not lie against the respondents. Thus the question of restorative orders to the status quo ante immediately prior to the grant of the order issued on December 22, 2015 did not arise. It was a matter that should be heard and determined in terms of section 4(4) of the Children Act, which provides that in matters of procedure affecting a child, the child should be accorded an opportunity to express his opinion, and that opinion should be taken into account as may be appropriate, taking into account the child’s age and the degree of maturity.

7. The Court of Judicial Review was not the proper Court to hear and determine the evidence of the child. That was a question of merit, not process of decision-making. For instance the Notice of Motion dated and filed on May 12, 2016 seeking the production of the child before the Court was incompetent because the Judicial Review Court had no jurisdiction to hear evidence on merit and
was a matter to be placed before the Children Court, and not the Judicial Review Court.

8. The Applicant had sought a declaration that the rights of the Applicant and Interested party, so far as they related to the matters in issue in the proceedings filed in the Children’s Court Case at Tononoka, Mombasa, be determined by the Tanzania Courts. Having come to the conclusion that the Children Court at Tononoka had jurisdiction to determine matters of children, and the child in particular, and denied the orders of certiorari and prohibition, a declaration to the contrary would be a negation of those orders. In any event the matters before the Tanzania courts were divorce proceedings between the Applicant and the Interested Party and had their own course to run. Therefore, no orders as to application for determination of the dispute in Tanzanian Courts.

Notice of motion dismissed with costs against the ex parte Applicant; custody and welfare of the child ‘LL’ was to be determined by the Children’s Court at Tononoka, Mombasa.

Whether a County Government could dismiss seconded staff from the national government

Kenya National Union of Nurses v Nairobi County Government & 5 others

Cause Number 593 Of 2015

Employment and Labour Relations Court

At Nairobi

Hellen S. Wasilwa, J

July 19, 2016

Reported by Njeri Githang’a & Winnie Matiri

Labour Law - employment- termination and dismissal- summary dismissal- valid reasons to warrant dismissal- circumstances where a termination of employment by an employer could be termed as unfair- Employment Act, section 44, 43 (2) & 45(2)

Labour Law - employment-summary dismissal- remedies- reinstatement- what were the guidelines on what could be considered in case of reinstatement - Employment Act, section 44, 43 (2), 45(2)& 49(4); Employment and Labour Relations Court Act, section 12(3)

Constitutional Law - devolution- functions and powers of County Public Service Board- disciplining of staff- claim where the Chief Officer of the Public Service Management dismissed staff- whether the County Government could dismiss seconded staff- whether the Chief Officer, Public Service Management had the mandate to perform disciplinary action against nurses- County Government Act, section 58 & 59

Brief facts

Nurses at Pumwani Maternity Hospital stopped offering their services for fear of their security after fracas ensued at the hospital on or about the April 6, 2015. On April 10, 2015, the Chief Health Officer (CHO) of Nairobi County ordered them back to work but they declined because of the incidents. The CHO finally suspended 64 Nurses.

The Claimants were challenging the suspension on the ground that it was done without giving the Nurses an opportunity to be heard, and defend themselves before a disciplinary committee. The Nurses stated that the 1st and 4th Respondents had failed to put in proper measures to guarantee their safety and that their salaries and allowances had been unprocedurally withheld and they had been deliberately frustrated.

The Claimants averred that disciplinary control in the County Government for staff employed by the Public Service Board was the mandate of the Public Service Board directly through the secretary who was the CEO or through a member of the board on delegation in writing and not the head of Public Service Management. The Claimants further submitted that the 1st Respondent could not dismiss seconded staff as they were not the primary employer.

Issues

i. Whether the County Government could dismiss seconded staff from a Ministry.

ii. Whether the Chief Officer, Public Service Management had the mandate to perform disciplinary action against nurses.

iii. Circumstances where a termination of employment by an employer could be termed as unfair.

iv. What were the guidelines in cases of reinstatement?
Held

1. Under section 44 of the Employment Act, absence from duty was a reason that warranted summary dismissal as it was one of the actions termed as being gross misconduct. However, under section 43 (2) of Employment Act it was imperative that the employer proved reasons for dismissal. Abscondment of duty was a valid reason to warrant dismissal from duty of the Claimant’s Members as envisaged under section 43 of Employment Act.

2. Section 58 of the County Government Act, the County Public Service Board was established. Under section 59 of the County Government Act, the functions and powers of a County Public Service Board were exhibited. The County Public Service Board (CPSB) had power to deal with the Human Resource functions of the County Public Service including appointments, discipline and removal from office of any person serving within the County Public Service. The entity that disciplined and dismissed the Claimants herein was the Public Service Management which was a new entity not in the Act and it was not clear where the Head of that Public Service Management got powers to discipline or dismiss the Claimants.

3. The process of discipline was also set out in the County Public Service Human Resource Manual which stated that the powers of disciplinary control and removal of County Public Officers from the service were vested in the CPSBs or Authorized Officers as specified in the County Government Act. It also set out the principles guiding exercise of disciplinary control as adherence to the principles of natural justice, an opportunity to be heard by the affected person and the person making the decision must not be biased.

4. Section 45(2) of the Employment Act stipulated that a termination of employment by an employer was unfair if the employer failed to prove that the reason for the termination was valid, that the reason for the termination was a fair reason related to the employee’s conduct, capacity or compatibility or based on the operational requirements of the employer and that the employment was terminated in accordance with fair procedure. The dismissal of the Claimants was therefore unfair and unjustified.

5. The prayer on quashing of the suspension and dismissal letters was an order for reinstatement. The suspension letters and the dismissal letters were done by a person or entity not authorized in law to do the suspension/dismissal and it followed that the said letters were null and void and of no effect. Section 12(3) of Employment and Labour Relations Court Act provided that the Court had the power to make interim preservation orders including injunctions in cases of urgency, a prohibitory order, an order for specific performance, a declaratory order, an award of compensation in any circumstances contemplated under that Act or any written law, an award of damages in any circumstances contemplated under that Act or any written law, an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thought fit to impose under circumstances contemplated under that Act or any written law, and an award of damages in any circumstances contemplated under that Act or any written law, an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court might deem fit to grant.

6. Section 49(4) of Employment Act 2007 gave a guideline on what could be considered in case of reinstatement;

   (a) the wishes of the employee;
   (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination;
   (c) the practicability of recommending reinstatement or re-engagement;
   (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
   (e) the employee’s length of service with the employer;
   (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
   (g) the opportunities available to the
employee for securing comparable or suitable employment with another employer;
(h) the value of any severance payable by law;
(i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
(j) any expenses reasonably incurred by the employee as a consequence of the termination;
(k) any conduct of the employee which to any extent caused or contributed to the termination;
(l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
(m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.

7. The Respondents had not expressed any reservations about reinstatement of the Claimants. Practically, reinstatement of the Claimants would not inconvenience the Respondents as the services of the Claimants were still needed by the Country and the Respondents County as a whole given that Pumwani Maternity Hospital was the largest Maternity Hospital in the region. The Claimants had also served the Respondents in various capacities over a long period of time and some of them were not capable of securing suitable or comparable jobs in that period. Reinstatement would be the only viable remedy in the circumstances.

Petition allowed, Claimants to be reinstated to work unconditionally with no loss of salary and allowances within 30 days, claimants to bear the costs.

The Council for Legal Education’s discretion in regulation of the Law Students’ Training Programmes
Nabulime Mariam & others v Council of Legal Education & 5 others
Judicial review application 377 of 2015
High Court of Kenya at Nairobi
G V Odunga J
May 9, 2016
Reported by Halonyere Andrew & Nowamani Sandrah

Judicial Review - orders of certiorari and mandamus - rules of natural justice - whether the Council for Legal Education had the discretion to admit or deregister or ban ATP students from sitting the bar exams - whether it was fair for the Petitioners to be denied a fair opportunity to present their cases to enable them correct or contradict any relevant statements and allegations prejudicial in their view - Constitution of Kenya, 2010 articles 47-50; Kenya School of Law Act, sections 16 and 17; Legal Education Act Section 8

Constitutional Law - fundamental rights and freedoms - right to fair administration - whether the School of Law having admitted students had the mandate to later reject their application to be examined - whether the rights of a duly admitted student could be abrogated, restricted or altogether taken away arbitrarily - whether it was in breach of the rules of natural justice.

Constitutional Law - fundamental rights and freedoms - right to Education - equality and freedom from discrimination - whether the Respondent’s action infringed on the Petitioner’s right to education - whether it was proper for the Council to direct the Petitioners to a particular institution, Riara University, to study for a Remedial Programme in order to qualify to sit for the Bar Examination - Constitution of Kenya, 2010, articles 47 & 50; Kenya School of Law Act, sections 16 and 17; Legal Education Act Section 8

Brief facts
This was a petition challenging the Council for Legal Education’s decision to reject the petitioners’ application for registration to sit for the Advocates Training Programme (ATP) for the academic year 2015/2016.

According to the petitioners, the Council for Legal Education had placed an advert in the local dailies requiring inter alia all candidates who were then at the Kenya School of Law and those who had re-sits to apply for registration for the November, 2015 Bar Examination. The petitioners submitted that like all other eligible candidates, they submitted their application in the prescribed manner and within the prescribed time frame.

The Petitioners, contended that the Council’s
decision of rejecting or failing to consider the said applications, was arrived at without observing the principles of natural justice, it was *ultra-vires* and unreasonable. They therefore sought for orders of *certiorari*, *mandamus*, and a declaration that their rights under article 47 of the Constitution were infringed, and a declaration that the 1st Respondents’ decision to send the petitioners to Riara University for a Remedial Programme to qualify to sit for the Bar Examination in exclusion of the other accredited institutions was illegal.

**Issues**

1. Whether the Council for Legal Education had the discretion to admit or deregister students undergoing Advocates Training Programme (ATP) or ban them from sitting the bar exams.
2. Whether the Petitioner’s legitimate expectations of registration to sit for the bar examinations leading to admission to the Roll of Advocates had been breached by the Council for Legal Education.
3. Whether it was proper for the Council for Legal Education to direct the Petitioners to a specific institution, to study for a Remedial Programme to qualify to sit for the Bar Examination.
4. To what extent would the court interfere with policy issues or decisions taken in fulfillment of a policy.

**Relevant provisions of the law.**

The Constitution of Kenya, 2010

Articles 47-50

**Held**

1. Under section 17 of the Kenya School of Law Act, the institution that was empowered to admit students to the School was the School itself. The School was further empowered pursuant to section 4 of the same Act in its capacity as a public legal education provider responsible for the provision of professional legal training as an agent of the Government to develop curricular, training manuals, conduct examinations and confer academic awards.

2. All the Petitioners were students from foreign universities. The power to recognize such foreign universities was bestowed upon the Council for Legal Education. In making a decision to recognise any foreign university, the Council was under a statutory duty to thoroughly vet such institutions in order to satisfy itself that the quality of legal education offered by the said institutions was at par with the quality being offered by the local universities in order to ensure that all those who were being admitted to the School met the same standards. It was the Council that recognised and approved qualifications obtained outside Kenya for purposes of admission to the Roll. The Council was also mandated to *inter alia* supervise legal education providers and administer such professional examinations as might be prescribed under section 13 of the Advocates Act.

3. For purposes of admission to the Advocates Training Programme, there ought not have been different or double standards for local and foreign degree holders. Both ought to have been subjected to the same standards. By requiring the applicant, like all other applicants, to meet the threshold for admission to the Advocates Training Programme, the respondents did not in any way violate their constitutional rights to fair administrative action, education and training.

4. The Council ought to properly and thoroughly undertake its homework before giving recognition under the law. Once satisfied that a particular University or institution ought to be recognised, the criteria for admission to the School in sections 16 and 17 of the Kenya School of Law Act and the Second Schedule thereto came into play.

5. In determining whether or not to admit the students, the School had to adhere to the guidelines made by the Council. The passing of prescribed examinations entailed a consideration not only of the course content but might necessarily entail the substances of the courses as well and the right body to determine whether the substance of a particular course purported to have been offered and undertaken was the Council. The law reposed upon the Council the power to make a determination thereon which determination had to be lawful, fair and reasonable. In that respect, no objection could be successfully taken with respect to a decision for some remedial courses to be
taken to align the qualifications with the local standards where the substance of the courses undertaken were found wanting.

6. It did not mean that the Council was the sole and ultimate judge when it came to the determination of proper exercise of such discretion, since that Court was under a constitutional obligation to ensure that the safeguards provided under article 47 of the Constitution were not destroyed by being whittled away in purported exercise of discretion. Accordingly the Courts were empowered to and were under a duty to investigate allegations of abuse of power and improper exercise of discretion.

7. The Council in conjunction with the Kenya School of Law were the institutions specifically tasked with providing professional training to and examining those who intended to be advocates. To excessively curtail their powers in carrying out that onerous mandate would amount to usurping their mandates and substituting the Court’s discretion for that of the School. The courts would only interfere with the decision of a public authority if it was outside the band of reasonableness.

8. It was not for the courts to determine whether a particular policy or particular decisions taken in fulfillment of that policy were fair. The Court would only be concerned with the manner in which those decisions had been taken and the extent of the duty to act fairly would vary greatly from case to case. Many features would come into play including the nature of the decision and the relationship of those involved on either side before the decisions were taken.

9. There was nothing inherently wrong or unreasonable in the School and the Council setting reasonable guidelines for the attainment of their statutory mandate as long as such guidelines were lawful and were geared towards ensuring that those whom they admit for ATP were duly qualified to undertake the training and the eventual task for which they intend to train as long as the said guidelines cut across board and they did not amount to a discrimination that could not be lawfully justified.

10. The mere requirement that remedial programmes be taken ought not to be termed as unlawful. To decide to the contrary would amount to treating the petitioners differently from their fellow students and it was that action that would amount to discrimination.

11. Once a student was admitted to the school they acquired all the rights which related to their status and those rights could only be taken away through the due process of the law. In other words the rights of a duly admitted student could not be abrogated, restricted or altogether taken away arbitrarily or creatively. Such rights could no longer be enjoyed at the discretion of the Council hence the Council was no longer empowered to unilaterally make a decision whose effect would be to numb the enjoyment of the same. For the Council to unilaterally decide at that stage the Petitioners not only had been admitted to the school but had undertaken courses set by the Council whose results had been released, that the Petitioners ought to undertake remedial courses would fly in the face of the provisions of article 47 of the Constitution and would have violated the petitioners right to natural justice.

12. The Petitioners had acquired certain rights as students. The effect of unilaterally exposing them to remedial programme implied some measure of exposure to a possibility of being unable to get admitted to the Bar. Having enjoyed the status of being students at the School, they had enjoyed some benefits or advantages that went together with the said status. Such benefits or advantages could only be withdrawn or restricted on some rational grounds which they had been given an opportunity to comment on.

13. The rationale for remedial programmes was to attain some standards in the legal profession. Under section 8 of the Legal Education Act, the Council had been bestowed with a lot of powers with respect to regulation of legal education in Kenya. For the Council to justify preferences for Riara University when it came to remedial programmes to other accredited Universities, whether provisionally or fully accredited amounted to unjustifiable discrimination. To justify that action amounted to a neglect of the obligation placed on the Council to ensure standardisation in the legal education
Legitimate Expectation is not confined to past advantage or benefit but extends to a future promise or benefit

Republic v Kenya Revenue Authority ex-parte Universal Corporation Limited
Miscellaneous Application 460 of 2013
High Court at Nairobi
G V Odunga, J
June 10, 2016
Reported by Nelson Tunoi & Silas Kandie

Constitutional Law - rule of law - predictability and certainty in government dealings with the public - whether the Respondent by its action in demanding for payment of VAT created a legitimate expectation in the Applicant that tax was not payable in the circumstances - what constitutes legitimate expectation in taxation and is it absolute? - Constitution of Kenya, 2010 article 10

Constitutional Law - fundamental rights and freedoms - right to fair administrative action - whether the Applicant’s right to fair administrative action was violated by the Respondent’s failure to issue tax refunds - Constitution of Kenya, 2010, article 47

Judicial Review - nature and scope of judicial review - judicial review orders of mandamus and prohibition - whether a Judicial Review Court has jurisdiction to substitute a decision of an authority constituted to decide the matter in question with its own decision - Constitution of Kenya, 2010 article 47; Civil Procedure Act (cap 21) section 3A; Civil Procedure Orders (cap 21 Sub Leg), Order 53 Rule 4

Judicial Review - jurisdiction of the High Court within judicial review vis-à-vis an appellate court - whether a Judicial Review Court is the proper forum to deal with the issue of the payable taxes in a taxation matter.

Statutes - interpretation of statutes - interpretation of tax legislation - whether a Court can interpret the intendment of a tax legislation - Constitution of Kenya, 2010 article 260, VAT Act Cap 476 Section 20; Customs and Excise Act (the CEA) Cap 476, item 26 of Part B of the 8th Schedule.

Brief Facts
The Applicant was a limited liability company incorporated under the Companies Act (cap 486) and carried on the business of production, manufacturing and packaging of pharmaceutical products. Thus, packaging and raw materials imported for use in the manufacture of medicament were tax exempted under item 26 of Part B of the Eighth Schedule to the VAT Act and Customs and Excise Act (CEA).

However in 2004, the East African Community Customs and Management Act (EACCMA) was passed, which operated to repeal the provisions of the Customs and Excise Act and under the Fifth Schedule, Part B thereof, packaging materials and raw materials for manufacture of medicament was exempted upon recommendation of the authority responsible for the manufacture of medicaments.

Following the passage of the East African Community Customs and Management Act, the Minister of Health periodically made recommendations to the Treasury and the Respondent to have raw materials and packaging for manufacture of medicament exempted from payments of VAT and Customs Duty in accordance with section 23 of the repealed VAT Act, which permitted the Minister of Health to do so and the Fifth Schedule, Part B, item 16 of East African Community Customs and Management Act.

The ex-parte Applicant sought to stop demand of alleged Value Added Tax (VAT) by the Kenya Revenue Authority (KRA), stating it to be unfair, unreasonable, and unilateral for the reason that under the East African Community Customs and Management Act duty included any cess, levy, imposition, tax or surtax imposed hence duty in the context included VAT and that it was breach of the Applicant’s legitimate expectation. The Applicant contended that it had been tax compliant from its inception and had been issued with Tax compliance certificates by Kenya Revenue Authority over the years.

Issues:

i. What is the legal definition of duty in regard to taxation law?
ii. Whether a government policy could
supersede the express provisions of the law and whether the High Court is at liberty to determine intendment of tax legislation.

iii. Whether a Judicial Review application was the proper way to deal with the issue of the payable taxes in a taxation matter.

iv. Whether the issuance of a tax compliance certificate by a taxing authority was absolute proof of compliance of tax due.

v. Whether the Respondent by its action in demanding for payment of VAT created a legitimate expectation in the applicant that tax was not payable in the circumstances.

vi. What constituted legitimate expectation in taxation.

vii. Whether a Judicial Review Court had jurisdiction to substitute a decision of an authority constituted to decide the matter in question with its own decision.

viii. Whether the Applicant’s right to fair administrative action under article 47 of the Constitution was violated by the Respondent’s failure to issue tax refunds.

Held:

1. The Applicant relied on the amendments to the Customs and Excise Act in 2002 (CEA) which according to it (the Applicant) broadened the definition of “duty” to include VAT. The question was therefore whether in broadening the definition of duty in the Customs and Excise Act in 2002, necessarily amended the VAT Act as well. That would amount to derogation of the known principle in tax matters that one had to look merely at what was clearly stated as there was no room for any intendment and nothing was to be read in or implied. That rule applied to both the taxpayers and the taxing authority. Accordingly, the Court could not import the definition of duty under the CEA to apply to the VAT Act by implication. Therefore, it was clear that for the period in question, apart from other issues raised in the application, the applicant had no specific legal regime exempting it from payment of the subject taxes.

2. The passage of the EACCMA did not automatically exempt the Applicant from the payment of the subject taxes since the Minister’s powers were to periodically recommend to the Treasury and the Respondent to have raw materials and packaging for manufacture of medicament exempted from payments of VAT and Customs Duty in accordance with section 23 of the now repealed VAT Act which permitted him to do so and the 5th Schedule, Part B, item 16 of EACCMA. The exemption was not absolute but was subject to recommendations. The position seemed to have prevailed till May 29, 2014 when by the VAT Amendment Act; the First Schedule to the VAT Act was amended to allow for exemption of VAT on raw materials imported for use in manufacture of medicaments. Even with the amendment, it was clear that the exemption of VAT depended on the periodical approvals by the Minister.

3. The Court did not have the liberty to read into the tax legislation the effect of what was not expressed therein. Similarly, the Court was not permitted to draw on the past episodes to determine whether or not the tax was payable. As long as the 2001 amendments to the Finance Act which removed the exemptions regime from the VAT Act and the Customs and Excise Act remained intact, the law was that prima facie, the Applicant was liable to pay the said taxes. That position was reinforced by the Constitution under article 210(1) providing that no tax or licensing fee may be imposed, waived or varied except as provided by legislation.

4. Public or government policy could not override the express provisions of the law. Kenya is governed by the rule of law and any action should be rooted in the rule of law rather than on some perceived public policies or dogmas. The former had been branded an unruly horse, and when you rode it, you never knew where it would carry you.

5. The parties ought to appreciate the parameters of judicial review as opposed to an appeal. Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question was not whether the judge disagreed with what the public body had done, but whether there was some recognisable public law wrong that has been committed. Whereas private law
proceedings involved the Claimant asserting rights, judicial review represented the Claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic.

6. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It did not allow the Court of review to have examined the evidence with a view of forming its own view about the substantial merits of the case. The decision might have been found to be erroneous in respect of a legal deficiency, for example, through the absence of evidence, or through a failure for any reason to have taken into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker was required to apply. While the evidence might have been explored in order to see if the decision was vitiated by such legal deficiencies, it was perfectly clear that in a case of review, as distinct from an ordinary appeal, the Court might not set about forming its own preferred view of the evidence.

7. The common law view was that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process and that its purpose is to ensure that the individual was given fair treatment by the authority to which he had been subjected. It was important to remember in every case that the purpose of the remedy of judicial review was to ensure that the individual was given fair treatment by the authority to which he had been subjected and that it was no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court was observed, the court would, under the guise of preventing abuse of power, be itself, guilty of usurpation of power.

8. The proper forum to deal with the issue whether or not tax was due and payable ought to be left to an appellate Tribunal as opposed to a judicial review Court since such issues went to the merit of the decision rather than the process.

9. A Tax Compliance Certificate was not a final proof of payment of taxes, but rebuttable evidence that a person was tax compliant. However, where there was evidence that the taxpayer did not actually pay the taxes, the tax authority ought to furnish the taxpayer with the grounds on the basis of which the tax authority believed that the information giving rise to the Certificate was incorrect before seeking to recover what in its view was the correct amount of tax due.

10. The principle of legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It was a principle which should not be restricted because it had its roots in what was gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty.

11. The Customs Officer was supposed to verify the accuracy of the entries made by the clearing agent within the shortest time possible in order to facilitate the release of the goods and mitigate the accrual of demurrage and customs warehouse rent hence the reason for conferment of the powers under section 235 and 236 of the EACCMA to conduct Post Clearance Audits to verify the accuracy of the entries after the goods had been released from Customs control. However the exercise of statutory power should be so exercised in a manner that was fair and just to the people against whom the same was being exercised.

12. Public authorities must exercise their powers diligently, fairly and prudently. A public exercise of power whether permitted or otherwise in a manner that frustrated the purpose for which the power was granted amounted to abuse of the same. That abuse of power was one of the grounds upon which a taxing authority's powers could be challenged.

13. The Respondents sought to recover the taxes for the period between January 2008 and October, 2013. Whereas the period for which the taxes were being demanded was within
the statutory grace period of 6 years, when it came to the consideration of legitimate expectation, it was the effect of the delay as opposed to its length coupled with the conduct of the parties that came into focus. Where the inability by the taxing authority to discover the actual taxes payable was as a result of concealment by the tax payer, the tax payer could not hide behind legitimate expectation to escape the payment of taxes. However, where the taxing authority was asleep and as a result lulled the taxpayer into a false sense of security that the taxes in question would not be demanded, as a result of which the tax payer lost recourse which would have been legally available to it had the tax been demanded promptly, it was unfair and unjust for the demand to be sustained.

14. It was not in doubt that the Applicant was in control of the instruments through which the actual taxes were payable. By not regularly monitoring its said instruments with a view to determining the actual taxes payable, the Respondent placed the Applicant in the unenviable position where the applicant was being exposed to shouldering the burden which legally ought not to have been shouldered by it. The circumstances of the case cried loud against the imposition of the burden on the Applicant. The Respondent, by its failure to act prudently, cultivated in the Applicant legitimate expectation that the position prevailing before 2001 would continue to prevail notwithstanding the 2001 amendments to the Finance Act.

15. Where the delay in exercising statutory power had led to injustice which would otherwise have been avoided and no explanation was forthcoming for such inaction the law must step in to ameliorate the injury, hence that was the genesis of the principle of legitimate expectation. The Respondent’s actions and inactions legitimately created an expectation on the Applicant that the taxes were not payable. Legitimate expectation arose either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant could reasonably expect to continue.

16. If a public authority delayed in the exercise of its statutory power without justifiable grounds and as a result, the person against whom the power was exercised was exposed to unwarranted injury, the authority may be deemed to have intended to exercise its powers in order to achieve collateral purposes. To set out to impose a liability upon the Applicant, which liability the Applicant would have been entitled to reimbursement after the period for seeking the same, was irrational.

17. The dynamic nature of the law always spoke and developed as new legal problems emerged in society or the old ones metamorphosed into complicated and coloured problems. Judicial review is developing fast and extended itself beyond the traditional targeted areas and grounds, due to the recognition that the grounds upon which the Court exercised its judicial review jurisdiction was incapable of exhaustive listing.

18. Since the Constitution was incremental in its language, what the current constitutional dispensation required was that both the grounds and remedies in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of the society so as to achieve fairness and secure human dignity. But care should be taken not to think that the traditional grounds of judicial review in a purely judicial review application under the Law Reform Act and Order 53 of the Civil Procedure Rules had been discarded or its scope had left the airspace of process review to merit review except in those cases provided in the Constitution. In other words the categories of judicial review grounds are not heretically closed as opposed to their being completely overtaken or that the Court’s jurisdiction under Order 53 of the Civil Procedure Rules should include merit review. Once that distinction was made, there should be little difficulty for the Court to maintain that it should be concerned with process review rather than merit review of the decision of the Respondent.

19. The Applicant had filed a review with the Commissioner in accordance with section 229 of the EACCMA, which review had never been responded to and thus taken as having been allowed. The issue could not
be the basis upon which the Court could be entitled to grant the orders sought as the same were not one of the grounds expressed in the statement. Where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it was only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should have been made and judicial review granted, it was necessary to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.

20. The final decision did not rest upon the issue whether the Respondent was legally entitled to collect the taxes due or whether taxes were actually due. The decision rested on the process that was being adopted by the Respondent in the exercise of its statutory obligation. That was not an issue for an appeal but one that fell squarely within the judicial review jurisdiction. Accordingly, the provisions of section 229 and 230 of EMCCA did not bar the Court from dealing with the issues raised.

21. Whereas the role of the Respondent in the collection of taxes which was the mainstay of development in the Country, and that all those who were liable to pay taxes ought to do so no matter the amount as long as the same is lawful, the Respondent in the exercise of its mandate is expected to be guided by the national values and principles of governance in article 10 of the Constitution, one of which was integrity. Efficiency in public finance was a component of integrity. A body entrusted with the collection of revenue ought not to be seen to be lethargic in the conduct of its affairs and whereas the law allowed the Respondent a period within which to confirm its record, that period ought not to be taken as a derogation of article 47 of the Constitution that required that administrative action be carried out expeditiously.

22. Since in making its decision the Respondent was purportedly applying the law, it was constitutionally obliged pursuant to article 10(1)(c) of the Constitution to comply with the national values and principles of governance and that included fair administrative action as enshrined in article 47 of the Constitution. The Respondent was under a constitutional obligation to be efficient and when it failed to adhere to the constitutional decree, rendered its decision unfair, and was liable to be struck out as it amounting to abuse of power.

23. On the ground of legitimate expectation, abuse of or wrongful exercise of power and irrationality of the Respondent’s decision could not stand since a decision tainted with abuse of power is not severable and is always tainted in the eyes of the law. It would be contrary to justice to compel the Applicant to pay the sum demanded by the Respondent because to do so would be contrary to substantive fairness which dictated that a body should not act conspicuously unfairly as to abuse its power, or in unjustified breach of legitimate expectations.

Application allowed; judicial review orders of certiorari and prohibition granted; no order as to costs.
The consent of a father of a child born out of wedlock is not required before including his name on the child’s birth certificate
L.N.W v Attorney General & 3 others
Petition 484 of 2014
High Court of Kenya at Nairobi
Constitution and Human Right Division
Mumbi Ngugi J
May 26, 2016
Reported by Long et Terer

Brief Facts:
The petition concerned the rights of children born outside marriage with the main issue revolving around the registration of their births and the circumstances under which the name of the biological father should be inserted in the birth certificate of the child.

The Petitioner, a single mother of a child born out of marriage, filed a petition on her own behalf and for her child and other children born out of wedlock, challenging the constitutionality of section 12 of the Registration of Births and Deaths Act, which provided that the only time that the name of the father of a child born outside marriage can be entered in the register of births was upon the joint request of the father and mother, or upon proof of marriage.

The Petition was brought against the Attorney General (AG), the chief legal advisor and legal representative of the national government and the Registrar of Births and Deaths whose mandate was outlined under the Registration of Births and Deaths Act, and included, inter alia, the registration of all births and deaths in Kenya and the keeping of appropriate records in respect thereof.

Issues
i. Whether a child born out of wedlock was entitled to have the name of his or her father entered into the certificate of birth without the father’s consent
ii. Whether there was any possible risk of entering false information in the Register by unscrupulous women if consent was not sought from the father
iii. Whether section 12 of the Registration of Births and Deaths Act contravened equality clause under articles 27, and aspects of the best interest interests of children under article 53 of the Constitution by requiring that the consent of the father should be sought before his name was included in the Child’s birth certificate

Constitutional Law - Bill of Rights - rights of a child born out of wedlock - requirements of consent from fathers before child registration of birth - whether a child born out of wedlock was entitled to have the name of his or her Father into the certificate of birth without the father’s consent - Constitution of Kenya, 2010, article 53(1) (e)

Statutes - interpretation of statutes - constitutionality of statutory provisions - requirements of consent of the father before entering his name in the child’s certificate of birth - whether Section 12 of the Registration of Births and Deaths Act contravened the bill of rights of the child and those of the mother under the Constitution by requiring that the consent of the father should be sought before his name was included in the child’s birth certificate - Constitution of Kenya, 2010, articles 27 and 53; Registration of Births and Deaths Act (cap 149) section 12

Relevant Provisions of the Law
Registration of Births and Deaths Act (cap 149)
Section 12
No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom.

Held
1. The effect of section 12 was that if a father of a child born outside marriage was not willing to have his name entered in the register as the biological father, then his name would never be entered in the register since, if the mother and father were not married to each other, there would never be any proof of marriage between them as would satisfy the Registrar.
2. The equality provisions in article 27 required that there should be no legislation
that afforded different treatment to children on account of their birth. Thus, the rights guaranteed to children under article 53, as well as all the other rights contained in the Constitution, ought to be accorded to all children, whether born within or outside marriage.

3. Every child is entitled to a name and a nationality. In a patriarchal society such as Kenya, that implied the father's name.

4. In addition to being a limitation on the right to non-discrimination and dignity, the provisions of section 12 had a deleterious effect on other rights of the child as well. Article 53(1)(e) provided inter alia that a child was entitled to parental care and protection, which included equal responsibility of the mother and father to provide for the child, whether they were married to each other or not. In order to access the said right, a child ought to have in its documentation, the name and identity of its father. That, however, was unlikely to happen if the inclusion of the name of a person as the father of a child was dependent on the willingness of that person to be included in the birth register.

5. Article 53(1)(e) of the Constitution therefore meant that the question of inheritance did turn on identity and recognition of children by both their mothers and fathers. Consequently, a provision in legislation that denied a child such recognition ought to derogate from the entitlement of the child to inherit.

6. Article 24 of the Constitution required that the importance of the purpose of the limitation be considered, as well as the relationship between the limitation and its purpose, and whether there were less restrictive means of achieving the purpose.

7. Article 10 on national values and principles read together with article 27, which guaranteed the right to non-discrimination and article 28 which guaranteed to all, inherent dignity, and article 53(2) which emphasised on the paramount importance of the best interest; all sought to transform society, to recognize the inherent dignity and worth of all persons; to protect those who have hitherto been marginalized and to ensure that they enjoyed the human rights guaranteed to all on the same basis as others. The best interests of the child, whatever its status of birth, ought to be the primary consideration in every matter concerning the child.

8. Constitutional aspirations, in so far as they applied to children born outside marriage, far outstrip in importance the need to keep official records, or the desire to "protect" men from "unscrupulous" women, assuming that, that was the purpose that section 12 was intended to serve. That was more so given the fact that there were less restrictive means of achieving those purposes.

9. Section 12 of the Registration of Births and Deaths Act which required that the name of the father of a child born outside marriage should be entered in the register of births only with the consent of the father was unconstitutional and in violation of articles 27, 28 and 53 of the Constitution. In addition, its effect of imposing an unfair burden on women, the mothers of children born outside marriage, was to that extent discriminatory on the basis of sex.

10. Parental responsibility for children, whether born within or outside marriage, is the responsibility of both the father and the mother. Where the identity of the father is not known, or his particulars were not included in the birth register or the child's birth certificate, then a single mother has the burden of pursuing the father for support, and having first to establish the question of his paternity. However, with legislation that provided for inclusion of the particulars of fathers in the birth certificates of all children, whether born within or outside marriage, the burden imposed on women is lessened, and it is possible for men to take up their responsibilities with respect to children sired outside marriage.

11. Section 22 of the Act, provided clear safeguards to prevent the entry of false information in the Register. Indeed, the correctness of information submitted to the Registrar could be protected by making use of other provisions or methods for establishing the correctness of the data.

12. The law ought to demand that fathers of children born outside marriage step up to
the plate and take parental responsibility for their children. That should begin with the provisions in respect of registration of the birth of such children. A situation in which such children and their mothers are discriminated against on the basis of the law could not be allowed to continue under a transformative constitution.

13. Section 12 of the Registration of Births and Deaths Act, which contained the requirement of the consent of a father of a child born out of wedlock to have his name entered in the births register and the child’s birth certificate, was unconstitutional and in violation of articles 27, 28 and 53 of the Constitution. The section could not be justified under article 24 of the Constitution.

Petition allowed. Section 12 of the Registration of Births and Deaths Act was inconsistent with articles 27, 53 (1)(a) and (e) and 53 (2) of the Constitution and therefore null and void.

What constitutes a substantial question of law to warrant the constitution of an uneven number of Judges?
National Gender and Equality Commission v Cabinet Secretary, Ministry of Interior and Coordination of National Government & 2 others
Petition No 12 of 2016
High Court at Nairobi
I Lenaola, J
May 27, 2016
Reported by Nelson Tunoi & Silas Kandie

Constitutional Law – conservatory orders – application seeking, inter alia, conservatory orders staying the application and/or the operation of the amendment contained in section 2 of the Statute Law (Miscellaneous Amendment) Act, 2015 – whether the petitioner had established a prima facie case with a likelihood of success to warrant issuing of conservatory orders - whether the High Court should grant conservatory orders staying the application and operation of an amendment of a law pending the determination of the Petition – whether the application had merit – Constitution of Kenya, 2010, articles 22, 23(3) and 27(6) and (8); Statute Law (Miscellaneous Amendment) Act, 2015, section 2; National Police Service Act, sections 13 and 14(b)

Constitutional Law – petition - petition seeking a declaration of invalidity of the amendments contained in the Statute Law (Miscellaneous Amendment) Act, 2015 relating to the National Police Service Act, for being inconsistent with the Constitution – what were the relevant factors in determining what constituted a substantial question of law - whether the High Court should certify the application as one raising a substantial question of law and thus warranting the constitution of an uneven bench assigned by the Chief Justice in terms of article 165(4) of the Constitution - Constitution of Kenya, 2010, articles 22, 23(3) and 27(6) and (8); Statute Law (Miscellaneous Amendment) Act, 2015, section 2; National Police Service Act, sections 13 and 14(b)

Brief Facts:
The Applicant filed an application seeking, inter alia, conservatory orders staying the application and/or the operation of the amendment contained in section 2 of the Statute Law (Miscellaneous Amendment) Act, 2015 deleting paragraph (b) of section 14 of the National Police Service Act, which provided for the framework for gender equality mainstreaming in the national Police Service especially at top leadership as required by article 27(6) and (8) of the Constitution pending the hearing and determination of the application. The application was based on the ground that the amendments were in violation of article 27(6) and (8) of the Constitution.

Sequentially, the Applicant filed a petition seeking a declaration of invalidity of the amendments contained in section 2 of the Statute Law (Miscellaneous Amendment) Act, 2015 relating to section 13 and 14(b) of the National Police Service Act, No 11A of 2011, for being inconsistent with the Constitution.

Issues:

i. Whether the High Court should grant conservatory orders staying the application and operation of an amendment of a law pending the determination of the Petition.

ii. Whether a miscellaneous amendment could be invoked to amend a major and substantive statutory or constitutional provision.

iii. Whether the High Court should certify
the application as one raising a substantial question of law and thus warranting the constitution of an uneven bench assigned by the Chief Justice in terms of article 165(4) of the Constitution.

Held:

1. Article 23(3) of the Constitution empowered a court to grant appropriate relief in any proceedings brought under article 22 of the Constitution where there had been violation of or threat of a violation of a fundamental right or freedom. Such relief would include a conservatory order.

2. Conservatory orders are not ordinary civil law remedies but are remedies provided for under the Constitution. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam, meaning they are remedies in respect of a particular state of affairs as opposed to injunctive orders which can only attach to a particular person.

3. Without making a final determination on the constitutionality of the impugned amendments to section 14(b) of the National Police Service Act, the Applicant had raised a prima facie arguable case with reasonable prospects of success. However, the Applicant had not advanced compelling facts to illustrate how it would suffer prejudice if the conservatory orders were not granted because the impugned amendments that were the subject of the Petition had already come into effect and unless overturned, remained law.

4. In Kenya, like in many other jurisdictions, there was a presumption of constitutional validity of legislation until the contrary was proven. The burden rested on anyone who challenged the constitutionality of that legislation to rebut that presumption. The Applicant was asking the Court to suspend the operation of the impugned amendments pending its Petition to have the same declared constitutionally invalid. Conservatory orders in such circumstances could not be granted, primarily because the presumption of constitutional validity of section 2 of the Statute Law (Miscellaneous Amendment) Act, 2015 relating to section 13 and 14(b) of the National Police Service Act stood. It would be premature to grant such orders as the Petition was pending and a final determination on the constitutionality of the said amendment had not been made.

5. The Court took judicial notice of the fact that the interviews to replace the Deputy Inspector-General (Ms. Grace Syombua Kaindi) were to be conducted in May 20, 2016, which was made public by a notice issued by the National Chairperson of the National Police Service Commission in May 16, 2016. There was no evidence before Court that the new Deputy Inspector-General would not be appointed in terms of the current law which should be in line with the Constitution including article 27(8).

6. There was nothing to suggest that the relief sought in the Petition would be rendered nugatory if the conservatory order was not granted. The Petition still presented a live controversy which the Court could determine and if it was in line with whatever decision the National Police Service Commission would make, the said decision would be invalidated by the Court. As it was, the process of recruitment that was being undertaken by the above mentioned Commission could actually end up complying with the expectation of the Applicant subject to what would be decided at the conclusion of the Petition. The Police Service required complete leadership at the top in the current insecure period hence the need not to derail its processes based on interim orders. It was also not in the public interest to grant the conservatory orders sought.

7. Although the phrase “substantial question of law” had not been defined in the Constitution, it was left to the individual judge to satisfy himself or herself that the matter was substantial to the extent that it warranted reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine the matter. That discretion should however be exercised by taking into account a multiplicity of factors that had been set out through many judicial decisions.

8. The relevant factors in deciding what constituted a substantial question of law
were:

i. Whether, directly or indirectly, it affected the substantial rights of the parties; or

ii. Whether the question was of general public importance; or

iii. Whether it was an open question in the sense that the issue had not been settled by pronouncements of the Supreme Court; or

iv. The issue was not free from difficulty; or

v. Whether the matter was moot in the sense that the matter raised a novel point; or

vi. Whether the matter was complex; or

vii. Whether the matter was free from difficulty; or

viii. Whether the matter by its nature required a substantial amount of time to be disposed of; or

ix. The effects of the prayers sought in the Petition; and

x. The level public interest generated by the Petition.

Whereas the decision of an enlarged bench could be of the same value as a decision arrived at by a single High Court judge, the Constitution itself did recognize that in certain circumstances, it would be prudent to have a matter which satisfied the constitutional criteria determined by a bench composed by a bench of numerically superior judges.

10. The issues raised in the Petition were by no means trivial. To the contrary, they were important constitutional issues implicating the rights under article 27 of the Constitution. The Petition related to the application of the constitutionally entrenched two thirds gender rule to appointive positions. The question had not been dealt with by any superior Court and its pronouncements would not only affect the National Police Service Commission in its future appointments but would be a guide to other state organs as well. In addition, it was a matter of great public importance because the gender balance debate currently occupied a big part of national discourse.

11. As the rights of women would be greatly impacted by whatever decision to be made and the process of the enactment of miscellaneous amendments would be settled, the matter had huge statutory and other implications to the public generally. The issues raised in the application qualified as substantial questions of law as contemplated in article 165(4) of the Constitution read in conjunction with article 165(3)(b) or (d).

Application dismissed; matter referred to the Chief Justice for constitution of an uneven number of judges under article 165(4) of the Constitution.

Constitutionality of amendments to insurance law limiting the payment of compensation to third parties
Law Society of Kenya v Attorney General & 3 others
Petition 148 of 2014
High Court of Kenya at Nairobi
J L Onguto, J
April 5, 2016
Reported by Teddy Musiga and Mercy Cherotich

Brief Facts
The Petitioner was a body corporate society established under the Law Society of Kenya Act, No 21 of 2014. Its objects and functions included assisting the Government and the courts in matters relating to legislation, administration of justice and the practice of law in Kenya as well as upholding the Constitution and advancing the rule of law and the administration of justice in Kenya. The Petitioner was aggrieved by the enactment of the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013 and in particular the provisions under section 3 (a), (b), (e), (f) and section 6. It also claimed that Section 5(b)(iv) of the Insurance (Motor Vehicles Third Party Risks) Act (Cap 405) Laws of Kenya which provided that the policy of insurance under the Act needed not be a policy of which liability was in excess of the sum of Kenya shillings Three Million, arising out of a claim by one person. Accordingly, the Petitioner contended that those provisions were unconstitutional, null and void as they allegedly
violated the Constitution.

**Issues**

I. Whether parliament by enacting Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013 limiting compensation payable in specific injuries fulfilled judicial functions

II. Whether the provisions under section 3 (a), (b), (e), (f) and section 6 of the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013 were unconstitutional for purporting to limit the payment of compensation in specific injuries

III. Whether the impugned provisions (section 3 (a), (b), (e), (f) and section 6 of the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013) violated the right to bodily integrity or security of person.

**Constitutional Law** – separation of powers – powers of parliament – powers of the judiciary – whether parliament in exercising its legislative powers can interfere with judiciary’s judicial powers – the Constitution of Kenya 2010, article 1, 93, 94 and 159.

**Constitutional Law** – Fundamental rights and freedoms – right to human dignity – right to freedom and security – right to property - whether the rights to dignity, security and property is infringed by limiting the payment of compensation in specific injuries - the Constitution of Kenya 2010, article 28 and 29.

**Held**

1. The Judiciary and Parliament derived their mandate from article 1 of the Constitution of Kenya, 2010. They were required to perform their functions in accordance with the Constitution.

2. Under article 159 of the Constitution, judicial authority was derived from the people and vested in, and had to be exercised by, the courts and tribunals established by or under the Constitution. The Judiciary was further urged to exercise its authority in accordance with the principles set out under Article 159 (2) of the Constitution.

3. Article 93 of the Constitution established Parliament which consisted of the National Assembly and the Senate. The role of Parliament was set out under article 94 of the Constitution. The legislative authority which it exercised was derived from the people and at the national level, was vested in Parliament. The National Assembly deliberated on and resolved issues of concern to the people. It also enacted legislation through Bills passed by Parliament and assented to by the President. Parliament was also required to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees.

4. The role of those two State organs was well demarcated. One exercised judicial authority, while the other, legislative authority. In principle, a legislature could not fulfil judicial functions and the judiciary could not make laws or decide for the legislature what was appropriate for enactment.

5. However much as the roles of those two State organs were well demarcated, they interlinked. Where a dispute arose which alleged violation of the Constitution, then judicial intervention would not be a violation of the doctrine of separation of powers as the Court would merely be performing its solemn duty under the Constitution.

6. During the colonial period, laws in Kenya were enacted on the pattern of several English statutes. Thus, in order to trace the enactment of the Insurance (Motor Vehicles Third Party Risks) Act, it was relevant to trace the historical development of the law for compulsory third-party insurance in England.

7. Between 1919 and 1930, a great number of motor vehicles were added to the traffic on the roads, and the accidents became numerous. It became evident that in a number of cases, serious hardship was caused where the person inflicting the injury was devoid of means and, being uninsured, was unable to pay the damages which he was liable. It was against this backdrop that the Road Traffic Act, 1930 was enacted in England. It sought to provide a system of compulsory insurance against certain risks. Prior to the enactment of that law, there was no law of compulsory insurance in respect of third party rights in England. An injured person would bring an action against the motorist for the recovery of damages as and when an accident took place.
8. The system of compulsory insurance required by Part II of the Road Traffic Act, 1930 was limited in scope. Its object was to reduce in number the cases where the judgment for personal injuries obtained against a motorist was not met. Owing to the lack of means of the defendant in the running-down action and his failure to insure against such liability. Although the admitted object of the Act was to identify and compensate, the injured "third parties", they were given no right to sue insurers directly for payment of the damages awarded against their assured by virtue of the promise of indemnity contained in the policy. By 1947, a stage had been reached in motor insurance law whereat, all injured third parties would receive compensation irrespective of the financial condition of him who caused the damage.

9. In Kenya, Insurance (Motor Vehicles Third Party Risks) Act in its preamble stated that it was 'An Act of Parliament to make provision against third party risks arising out of the use of motor vehicles.' That Act commenced on October 1, 1946. The design and architecture of the statute was similar to the English one and it would not be unreasonable to conclude that the aim and objectives were also similar, even though there were still much fewer automobiles on the Kenyan roads in comparison to England.

10. The essence of the Motor Insurance (Third Party Risks) Bill, 1945 was to enable persons injured in motor vehicle accidents to recover damages awarded against impecunious drivers. Hence section 4 (1) of the Act, that had remained largely un-amended since its enactment in 1945.

11. Motor vehicle third-party insurance has had a checkered history in Kenya especially regarding insurance cover for Public Service Vehicles (PSVs). There were various insurance companies that had faced enormous challenges especially in the underwriting of PSVs. This situation that had been said to threaten the stability of the insurance industry.

12. The pool of insurance regarded third-party risks, especially with regard to PSVs had to be of major concern to the State in view of the serial insolvency of the principal underwriters.

13. In determining the constitutionality of a statute, the court had to consider the purpose and effect of the impugned statute by the Constitution. If the purpose was not to infringe a right guaranteed by the Constitution, the court had to go further to examine the effect of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the Constitution, the statute or section in question would be declared unconstitutional.

14. In order to determine whether a statute met the constitutional requirement, the Court had regard not only to its purpose but also its effect. Both purpose and effect were relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect could invalidate legislation. All legislation is animated by an object the legislature intended to achieve. That object was realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, were clearly linked, if not indivisible. Intended and achieved effects had been looked to for guidance in assessing the legislation's object and thus the validity.

15. In constitutional interpretation, there is a rebuttable presumption that legislation was constitutional, the onus of rebutting the presumption rested on those who challenged that legislation's status. In examining the constitutionality of a statute it should be assumed the legislature understood and appreciated the needs of the people and the law it enacted were directed to problems which were made manifest by experience and the elected representatives assembled in a Legislature to enact laws which they considered to be reasonable for the purpose for which they were enacted. Presumption is therefore, in favour of the constitutionality of an enactment.

16. The court's duty was to delicately ascertain whether the legislation was in accordance with or in contravention of the Constitution and made an appropriate declaration and then, do no more.

17. Courts are enjoined to administer justice in accordance with the principles laid down
under Article 159 of the Constitution. When Parliament enacts legislation, it is supposed to be that such legislation serves the interests of the public and for general order. There was evidence on record that there was elaborate communication between the Insurance regulators and government officials seeking to facilitate efficient regulation of the insurance industry through amendments to the Insurance Act.

18. On the issue of access to justice and fair hearing, the State through the courts had ensured that all persons were able to ventilate their dispute. Fair hearing entailed such disputes being determined by an impartial arbiter.

19. Where a dispute had been lodged in court, and the facts of the case had been presented before the court, nothing stopped the court from coming up with an adequate remedy. In any event, the courts were in the business of dispute resolution. Where the court, awarded damages to a party, it was with regards to the facts of a case and what the justice of the case demanded. Therefore, the judgments being rendered by the court were not in any way being legislated by Section 5(b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act.

20. What Insurance (Motor Vehicles Third Party Risks) Act had done was to cap the amount of money that the insurer paid to the injured person. Nothing in the Insurance (Motor Vehicles Third Party Risks) Act stopped a litigant or the injured person from pursuing a claim against the insured individual where an award in excess of the amount recoverable from the insurer was made.

21. The provision as to the mandatory insurance cover of the amount of Kshs. 3,000,000/= did not in any way prohibit any insured who could be minded to source and seek a higher cover from agreeing with the insurer on such cover, subject of course to a higher premium and other agreement on the terms of the policy. There was nothing unconstitutional with the provisions of Section 5(b) of the Insurance (Motor Vehicles Third Party Risks) Act (Cap 405).

22. With regard to the constitutionality of the Schedule to the Amendment Act, the argument should certainly be different. The Schedule did not appear to be for general guidance even for the insurer and courts. It was not about strict liability. It was a case of the court being left to determine liability and then the insurer determining what amount to pay for each injury suffered and payable under the Kshs. 3,000,000/= limit through the Schedule. The amount payable was actually capped and that could have led to a defeat of the intention of the statute altogether.

23. The purpose of Insurance (Motor Vehicles Third Party Risks) Act in general should not be ignored. The purpose as could be gleaned from history was to ensure that the security of a person as to his physical and bodily integrity was not compromised. The State sought to ameliorate the quandary of victims rendered helpless by motor vehicle accidents and who ordinarily ended up not being compensated by careless or negligent drivers who were impecunious.

24. Under the Constitution, the State ensured that the dignity and security of a person as guaranteed under Articles 28 and 29 are protected both through criminal sanctions as well as through other measures. Such measures could be taken to include the compulsory third party insurance schemes and covers. Where again the State through statute sought to limit the level of compensation, then it would be right to conclude that the right to bodily integrity was under threat of being taken away. The Schedule actually sought to limit the amount payable under the insurance cover by the insurer.

25. It had been argued that the Schedule was only effective post any judgment. However, a closer reading of the Schedule would reveal that the court process was not completely over. Judgment issued in favour of a victim could have been enforced by the victim against the insurer. The court process would certainly be compromised if the insurer was then to be allowed to apportion that which the victim had been awarded.

26. The Schedule only applied post judgment. The Amendment Act did not state that the judgment referred to was one that had already been rendered. Literally read, judgment...
could well mean one yet to be delivered. In such an eventuality, judicial authority could certainly be said to be compromised.

27. There appeared no clear justification for that limitation on the amount the victim was to recover from the insurer as far as the percentages were being invited. The court ought to have been able to award an amount even in the excess of Kshs. 3,000,000/= for a lost limb or sight and that should be recoverable from the capped amount of Kshs. 3,000,000/= without any additional apportionment. There existed a common law remedy to an award of damages as assessed by the court and in trying to apportion the same without imposing strict liability, the legislature was not only violating the right to bodily integrity but also the right to security of person as well as the courts authority to decide what a person was to be awarded in compensation. There was indeed no reasonable justification advanced by the Respondent as to why the Insurer should be allowed to apportion any judgment amount awarded to a claimant and only pay a portion thereof where the amount was not in excess of Kshs. 3,000,000/= without taking the recourse of appeal.

28. The Constitution under article 40, made provision for the protection of right to property. Article 260 of the Constitution defined property to include any vested or contingent right to, or interest in or arising from inter alia money or choses in action. It was not in dispute that choses in action amount to property. However, curtailing the amount payable by the insurers to Kshs. 3,000,000/= under the Insurance (Motor Vehicles Third Party Risks) Act was an infringement of the right to property for reasons that, any award in excess of the amount of Kshs. 3,000,000/= issued by the court in its judgment could be claimed by the injured person directly from the insured. Thus, the argument that the right to property had been infringed failed.

29. The argument that the right to property had been infringed applied to the impugned Section 3(e) and 3(f) of the Amendment Act. The judgment correctly deemed as property by the Petitioner and stated to be transgressed by the amendments through a request for a medical check-up as well as use by the claimant of false or inaccurate information, would not transgress the Constitution. There were adequate safeguards provided in the intended amendments. Indeed in the latter case, the judgment was only not enforceable once the claimant had been convicted.

30. Any party who felt aggrieved or held the view that the constitution was being violated or was under threat of violation ought to be able to move to court with some expedition. In the instant case, the Petitioner was not guilty of any laches. The impugned provisions of the Amendment Act came into force in 2014 and that was the same year that the Petitioner moved to court. Where the challenge of a statute’s constitutionality was the question raised by the Petition, then such action could, depending on the circumstances, be raised at any time. The doctrine of interpretation that the law was always speaking and we should always endeavour to bring our laws in line with the changing times as well as the Constitution.

31. The Insurance (Motor Vehicles Third Party Risks) Act did not exclude compensation to affect proprietary rights. It only limited who paid how much by apportioning a maximum of Kshs. 3,000,000/= to be paid by the insurer and the additional if any by the insured. On the other hand, in so far as the amendments to the Insurance (Motor Vehicles Third Party Risks) Act sought to cap and tie the payment of compensation in specific injuries that violated the right to bodily integrity or security of person.

Petition partially allowed.

a. It was declared that Sections 3(a,) 3(b) and 6 of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013 was unconstitutional, null and void.

b. It was declared that 10 (1) and the schedule introduced of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013 was unconstitutional, null and void.

c. Parties to bear its own costs.
KLR ELECTION PETITIONS DECISIONS

This volume contains decisions emanating from the 2007 General Elections from the Court of Appeal of Kenya and the High Court of Kenya.

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By Yvonne Kirina (Laws of Kenya Department)

BILLS

Insurance (Amendment) Bill, 2016 (Kenya Gazette Supplement No.100 (National Assembly Bills No. 25)

The object of this Bill is to amend the Insurance Act to enhance insurance business in Kenya. The Bill proposes to provide for the licensing and regulation of takaful insurance business in Kenya in order to encourage international investment in this sector, which is a target area for the Nairobi International Financial Centre.

The Bill further proposes to amend the Act to enable the operationalization of risk-based solvency requirements for insurers that were introduced in the Finance Act, 2013. Among those proposals is acquirement that an insurer should maintain a 100% capital adequacy ratio at all time.

Contempt of Court Bill, 2016 (Kenya Gazette Supplement No.120 (National Assembly Bills No. 30)

The principle object of the Bill is to define contempt of court and to limit the power of court to punish for contempt to of court.

Sexual Offences (Amendment) Bill, 2016 (Kenya Gazette Supplement No.121 (National Assembly Bills No. 31)

The primary objective of this Bill is to amend the Sexual Offences Act to expressly prohibit plea bargaining and collusion in sexual offences which help the perpetrators of sexual offences evade justice. The Bill further proposes to create special units in all at least one police station per county police stations to handle sexual offences. The units shall be equipped with modern equipment and facilities for timely investigations and all police stations shall have officers specifically trained in handling and investigating sexual offences.

National Authority for the Campaign against Alcohol and Drug Abuse (Amendment) Bill, 2016 (Kenya Gazette Supplement No.133 (National Assembly Bills No. 32)

The principal purpose this Bill is to amend section 6 of the National Authority for the Campaign Against Alcohol and Drug Abuse Act, Cap. 121B in order to reconstitute the National Authority for the Campaign Against Alcohol and Drug Abuse Board in line with the Constitution and the Report on the Presidential Taskforce on Parastatal Reforms. As it is presently, the Board is composed of fifteen persons contrary to the Constitution and the Report on the Presidential Taskforce which recommends a minimum of three members and a maximum of nine members to a Board. The amendments that are proposed seek to reduce the size of the Board to nine members in accordance with the law.

County Governments (Amendment) (No. 2) Bill, 2016 Kenya Gazette Supplement No. 85(Senate Bills No. 7)

The principal object of this Bill is to amend the County Governments Act, No. 17 of 2012 so as to provide for the procedure for the disposal of a report of a Commission of Inquiry established under section 123(4) of the County Governments Act, 2012, and in particular, to govern scenarios where a Commission of Inquiry does not recommend the suspension of a county government or situations where the President is not satisfied that justifiable reasons exist for the suspension of a county government.

ACTS OF PARLIAMENT

Health Records and Information Managers Act, 2016 No. 15 of 2016

This is an Act of Parliament to make provision for the training, registration and Licensing of the health records and information managers; to regulate their practice; to provide for the establishment, powers and functions of the Health Records and Information Managers Board.

Judiciary Fund Act, 2016 No. 16 of 2016

This Act of Parliament provides for the regulation of the Judiciary Fund. The objectives of the Fund are to safeguard the financial and operational independence of the Judiciary; ensure accountability for funds allocated to the Judiciary; and ensure that the Judiciary has adequate resources for its functions.
County Allocation of Revenue Act, 2016 No. 22 of 2016

This Act provides, pursuant to Article 218(1)(b) of the Constitution, for the allocation of an equitable share of revenue raised nationally among the county governments, in accordance with the resolution approved by Parliament under Article 217 of the Constitution for the financial year 2016/2017.

Engineering Technology Act, 2016 No. 23 of 2016

The objective of this Act is to make provision for the regulation, practice and standards of engineering technologists and technicians.

Value Added Tax (Amendment) Act, 2016 No. 24 of 2016

The principal object of this Act is to amend the Value Added Tax Act, 2013 (No. 35 of 2013) to exempt sugarcane farmers from paying value added tax (VAT) on transportation of sugarcane from the farms to the milling factories.

Banking (Amendment) Act, 2016 No. 25 of 2016

This Act seeks to amend the Banking Act (Cap 488) by inserting a new section 33B which gives Power to the Central Bank of Kenya to enforce interest rate ceilings by setting the maximum interest rate chargeable for a credit facility in Kenya at no more than four percent, the base rate set and published by the Central Bank of Kenya.

It is important to note that under this new section of the Act, a bank or financial institution which contravenes the new provisions commits an offence and shall, on conviction, be liable to a fine of not less than one million shillings, or in default, the Chief Executive Officer of the bank or financial institution shall be liable to imprisonment for a term not less than one year.

SUBSIDIARY LEGISLATION.

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<th>LEGISLATIVE SUPPLEMENT NUMBER</th>
<th>CITATION</th>
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<td>49</td>
<td>Coffee (General) Regulations, 2016. L.N. 120/2016.</td>
<td>The Purpose of these rules is to provide for the regulation, promotion and development of the coffee industry in Kenya.</td>
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<tr>
<td>51</td>
<td>Public Finance Management(Senate Monitoring and Evaluation) Regulations, 2016 L.N. 122/2016.</td>
<td>The purpose of the Regulations is to guide the Senate Sessional Committee on Monitoring and Evaluation in the administration, disbursement and management of the Fund to ensure efficiency and effectiveness. The regulations specify the sources of monies to the Fund; provide guidance on the administration and management of the Fund and provide financial procedures for the Fund.</td>
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The Constitution of Kenya, 2010, under article 159 (2) provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles: justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of this Constitution shall be protected and promoted.

Limitation of time to institute proceedings where parties are involved in a labour dispute is provided for under the Employment Act, section 90 which provides that notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

Various courts have ventilated on the issue of when time within which to institute court proceedings in employment disputes starts running and they have arrived at different conclusions. In *Hawkins Wagunza Musonye v Rift Valley Railways Kenya Limited*, Misc Civil Application No. 11 OF 2014 the Court held that where parties to a labour dispute were engaged in conciliation, negotiation and other non-adjudicatory dispute settlement mechanisms before going to Court, the ‘limitation of time’ clock stops running. The Court further held that those non-adjudicatory mechanisms were common place in labour disputes and were anchored on article 159 of the Constitution. The Court further held that the clock restarted when such mechanisms broke down.

In *Kenya Union of Commercial, Food and Allied Workers v Water Resource Management Authority & another*, Cause No 1 of 2015, the Court agreed with the decision in *Hawkins Wagunza Musonye v Rift Valley Railways Kenya Limited* and held that there could arise intervening circumstances which would affect limitation of action in employment situations and that conciliation as provided for under the Labour Relations Act, 2007 was one such case. The Court further held that this was the essence of the doctrine of *stare decisis*.

In *Benjamin Wachira Ndiithi V Public Service Commission & another*, Cause No 953 of 2010 the Claimant took the view that the cause of action in his case did not accrue until August 8, 2006 when he was notified that his employment file had been closed, thus dashing any hopes of his reinstatement to the public service. However the Court held that the Claimant’s termination from the 1st Respondent’s employment took effect on October 1, 2000 as communicated by a letter dated September 29, 2000. The Court further held that it followed therefore that the cause of action upon which the Claimant’s claim was based accrued on October 1, 2000 and that was the date when time began to run as against the Claimant’s claim.

In *Hilarion Mwabolo v Kenya Commercial Bank Cause 1375 of 2012* the Court held that the accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination as stated in the letter communicating the termination. The Court further held that the fact that an employee whose employment had been terminated sought a review or an appeal did not mean that accrual of the cause of action was held in abeyance until a final verdict on the review or appeal.

From the above decisions it is clear that the court’s position on the time within which to institute a suit in a labour dispute begins to run is not yet clear. This brings out the need for Parliament to amend the Employment Act, 2007 to make the position clearer.
Brief Facts

The Prosecution made an Application for purposes of obtaining the accused person's blood sample to establish if the samples found at the scene of crime matched his blood. The Prosecution explained that the blood samples, which were initially retrieved by the Government Chemist, were contaminated and that the new samples were necessary in ascertaining allegations that there was a struggle between the accused and the deceased in which the accused sustained injuries.

The accused objected to the application on grounds that providing the blood samples would amount to a violation to the right against self-incrimination. The accused explained that if the blood samples were to match to the blood found at the scene of crime, that situation would amount to compelling an accused to give self-incriminating evidence.

Issue

i. Whether the taking of a blood sample from an accused for purposes of obtaining evidence was a violation of the accused’s right to refuse to give self-incriminatory evidence.

Holdings Pertinent to Law Reform

1. It was necessary for an accused person to cooperate with the police and medical officers for purposes of taking the blood sample. Any physical struggle against that could lead to an altercation which would potentially amount to degrading treatment suffered by the accused. That degrading treatment would not amount to a violation of the accused’s rights to freedom from torture and cruel, inhuman and degrading treatment. Generally, Courts have ruled that the taking of samples including saliva without an accused’s consent is not a violation of that right.

2. Bearing in mind that Article 159(2) (d) of the Constitution of Kenya mandates courts to administer justice without undue regard to technicalities, time is now ripe for Parliament to enact laws to regulate the extraction of blood or other samples from persons accused of other offences other than sexual offences.
ii. Whether the decision to bar the *ex parte* Applicant from contesting the LSK’s Council membership position was done in good faith.

iii. What were the effects of the absence of regulations that determined *inter alia*, the Society’s manner of election?

**Holdings pertinent to Law Reform**

1. There were no regulations in place governing the society’s elections and the Society could not be allowed to claim that the election process commenced with the nomination exercise. The verification and shortlisting of eligible candidates could only have occurred between November 24, 2015 and February 1, 2016. At the time of the expiry of the said period, the Applicant was already eligible to contest for Council membership. The Applicant was therefore eligible to contest for the post of Council member of the Society.

2. The application by the *ex parte* Applicant clearly pointed to the need for the Council to urgently make regulations under section 43(h) of the LSK Act. The Code governed behavior during elections and was necessary in ensuring the integrity of the elections but could not take the place of regulations, which were meant to establish the procedures governing the elections.

3. The court recommended the need for LSK to make regulations that governed inter alia elections to ensure the integrity of the election. (Paragraph 49 of the main judgment)

4. The application pointed to the need for the Council to urgently make regulations under Section 43(h) of the Act. The Code governs behavior during elections and is necessary in ensuring the integrity of the elections but cannot take the place of regulations, which are meant to establish the procedures governing the elections.
Penetration is a Mandatory Requirement for the Offence of Bestiality to be Established.

Her Majesty the Queen v D.L.W. & another
Superior Court of Canada
2016 SCC 22


June 9, 2016

Reported by Linda Awuor & Kakai Toili

Statutes – interpretation of statutes - Criminal Code, 1985(Canada) – section 160 (3) – meaning of the word “bestiality” – the legal meaning of bestiality - whether the Canadian Parliament intended to depart from the legal meaning of bestiality when it used the word without further definition - whether the Canadian Parliament intended bestiality to occur once penetration was established between an animal and a human - Interpretation Act, 1985 (Canada), sections 45 (2) and (3)

Criminal law – offences against morality – unnatural offences –bestiality – elements of bestiality – penetration – whether penetration is an essential element of bestiality

Issues
(i) Whether penetration was an essential element of the offence of bestiality.
(ii) Whether the term bestiality had a well-understood legal meaning in the common law
(iii) Whether parliament intended to depart from the legal meaning of bestiality when it used the word without further definition in the English version of the Code.

Relevant provisions of law
Criminal Code, 1953-54(Canada)
Section 147 - Buggery or bestiality

Everyone who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Criminal Code, 1985(Canada) as amended on July 23rd, 2015

Section 160 – Bestiality

Section 160 (3) - Bestiality in presence of or by child

Despite subsection (1), every person who commits bestiality in the presence of a person under the age of 16 years, or who incites a person under the age of 16 years to commit bestiality,

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Interpretation Act, 1985 (Canada)

Section 45 (2) - Amendment does not imply change

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Interpretation Act, 1985 (Canada)

Section 45 (2) - Amendment does not imply change
in law

The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.

Section 45 (3) - Repeal does not declare previous law

The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.

Held by majority of the Court (with Abella J dissenting):

1. Criminal offences in Canada since 1955 had been entirely statutory with the exception of criminal contempt. However, the common law continued to play an important role in defining criminal conduct. Defining the elements of statutory offences often required reference to common law concepts.

2. A number of principles guided statutory interpretation, the three most important were the following: first, when the Canadian Parliament used a legal term with a well-understood legal meaning, it was presumed that parliament intended to incorporate that legal meaning into the statute. Second, any departure from that legal meaning must have been clear, either by express language or necessary implication from the statute. Finally, apart from criminal contempt, there could be no liability for common law crimes. Creating and defining crimes was for parliament, the courts must have not expanded the scope of criminal liability beyond that established by parliament.

3. The term bestiality had a well-established legal meaning and referred to sexual intercourse between a human and an animal. Penetration had always been understood to be an essential element of bestiality. The Canadian Parliament adopted that term without adding a definition of it and the legislative history and evolution of the relevant provisions showed no intent to depart from the well-understood legal meaning of the term.

4. Courts should not have by development of the common law broadened the scope of liability for the offence as the Trial judge did. Any expansion of criminal liability for the offence was within the Canadian Parliament’s exclusive domain.

5. When the Canadian Parliament used a term with a legal meaning, it intended the term to be given that meaning. Words that had a well-understood legal meaning when used in a statute should have been given that meaning unless parliament clearly indicated otherwise.

6. There was the related principle of stability in the law. Absent clear legislative intention to the contrary, a statute should not have been interpreted as substantially changing the law, including the common law. That principle, if it had been applied too strictly, could have led to refusal to give effect to intended legislative change. But it nonetheless reflected the common sense idea that parliament was deemed to know the existing law and was unlikely to have intended any significant changes to it unless that intention was made clear.

7. The principle of stability in the law was reflected in section 45(2) and 45(3) of the Canadian Interpretation Act R.S.C. 1985, which provided that the amendment of an enactment did not imply any change in the law and that the repeal of an enactment did not make any statement about the previous state of the law.

8. There could be no serious dispute that the offence of buggery with an animal/la bestialité in the Canadian Criminal Code, 1892 which continued to be in force until the 1955 revisions, had a widely and generally understood meaning: the offence required sexual penetration between a human and an animal. It was also clear that the term bestiality was understood to mean sodomy or buggery with an animal.

9. There was no express statutory provision that expanded the scope of the bestiality offence and there was nothing in the legislative evolution and history that supported any parliamentary intent to bring about such a change by implication. The required clarity and certainty were entirely lacking.

10. Courts would only conclude that a new crime had been created if the words used
to do so were certain and definitive. That approach not only reflected the appropriate respective roles of parliament and the courts, but the fundamental requirement of the criminal law that people must have known what constituted punishable conduct and what did not, especially when their liberty was at stake.

11. In the absence of clear parliamentary intent to depart from the clear legal definition of the elements of the offence, it was manifestly not the role of the courts to expand that definition. If parliament had intended the significant change in the law, it would surely have been noticed either in parliamentary debates or by commentators.

12. There was no evidence that any substantive change had been intended. The fact that no substantive change had occurred in the French version of the offence led to the conclusion almost inevitably that the change in terminology in the English version was simply intended to give the offence a clearer, more modern wording which would have been more consistent with the French equivalent. The 1955 revisions to the Code did not expand the elements of the bestiality offence and penetration between a human and an animal was the essence of the offence.

13. The fact that Parliament made no change to the definition of bestiality in the midst of the comprehensive revision of the sexual offences supported the conclusion that it intended to retain its well-understood legal meaning.

14. It defied logic to think that parliament would have renamed, redefined and created new sexual offences in a virtually complete overhaul of the provisions in 1983 and 1988 and yet would have continued to use an ancient legal term with a well-understood meaning, bestiality, without further definition in order to have brought about a substantive difference in the law. The bestiality offences added in the 1988 revisions, while not having changed the definition of the underlying offence; added protections for children in relation to that offence. There was nothing inconsistent with the purpose of the provisions in the conclusion that the elements of bestiality remained unchanged. There was no hint in any of the parliamentary record that any substantive change to the elements of the offence of bestiality was intended.

Abella J dissenting:

1. By 1988, parliament had intended or at the very least had assumed, that penetration was irrelevant. That was a deduction easily justified by the language, history, and evolving social landscape of the bestiality provision. It was hard to attribute to parliament the inconsistent purpose that animal cruelty protection in the Code would have covered all birds and animals but the sexual conduct with animals provision, bestiality, would have been limited to those animals whose anatomy permitted penetration. Continued imposition of the penetrative component of buggery on bestiality technically left as perfectly legal all sexually exploitative acts with animals that did not involve penetration. That in turn completely undermined the concurrent legislative protections from cruelty and abuse for animals.

2. If the elements of bestiality and buggery had been the same, the addition of bestiality to the language of section 147 of the Canadian Criminal Code 1953-54, on buggery or bestiality, would have been redundant and there would be no need to change the provision from one prohibiting buggery, as it had for hundreds of years, to one having prohibited buggery and bestiality. No legislative provision should have been interpreted to render it mere surplusage. The addition of the offence of bestiality, therefore, must have been intended to mean something different from buggery.

3. Section 160(3) of the Canadian Criminal Code 1985, on bestiality in the presence of a child was inarguably a reflection of parliament’s purpose to have protected children from having witnessed, or having been compelled to commit bestiality. If all parliament had intended was that children be protected from seeing or being made to engage in acts of penetration with animals, one could have reasonably wondered what the point was of such an unduly restricted preoccupation. Since it is a well-established principle of statutory interpretation that the legislature did not intend to produce absurd consequences, what parliament must
have intended was protection for children from having to witness or being forced to participate in any sexual activity with animals.

4. Parliament’s goal of having to protect children from sexual conduct with animals in the new bestiality provision could have also been inferred from the other changes to the Code in the 1988 Amendments. Parliament introduced the offences of sexual interference, sexual exploitation, and invitation to sexual touching, all of which protected minors and none which required penetration. It would have been anomalous if no penetration was required for these offences, which focused on protecting children from sexual exploitation generally, but remained an essential element of section 160(3) of the Canadian Criminal Code 1985, on bestiality in the presence of a child, which protected children from sexual exploitation with animals.

5. Absence of a requirement of penetration was not a broadening of the scope of bestiality. It was more as a reflection of parliament’s common sense assumption that since penetration was physically impossible with most animals and for half the population, requiring it as an element of the offence eliminated from censure most sexually exploitative conduct with animals. Acts with animals that had a sexual purpose were inherently exploitative whether or not penetration occurred, and the prevention of sexual exploitation was what the 1988 Amendments to the Canadian Criminal Code were all about.

Appeal dismissed

Relevance to the Kenyan Situation: Bestiality under the Kenyan law is provided for in the Penal Code under sections 162 (b) and 163. Section 162 (b) of the aforementioned statute provides that any person who has carnal knowledge of an animal, is guilty of a felony and is liable to imprisonment for fourteen years. Section 163 provides that any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years. However the Penal Code does not define the term bestiality.

Courts in Kenya have handled various cases dealing with bestiality and have taken the approach that there must be penetration for the offence of bestiality to be established. In Stephen Muthee Wakuthiye v Republic, Criminal Appeal No. 21 of 2013, the High Court upheld the Trial Magistrate’s decision of finding the Appellant guilty of the offense of bestiality. The Appellant’s clothing and identity card had been found next to a cow and he had cow dung on his genitals; the cow also had a red swollen vulva with bruises, the High Court held this to be sufficient circumstantial evidence for the offence of bestiality.

This case is relevant in the Kenyan context since it brings out the need for the Kenyan parliament to define key legal terms used in the statutes they enact. As the law stands now, Kenyan courts would not find one guilty of bestiality should they be found to perform such similar sexual acts with animals as long as there's no penetration.

Transfer of cases from one court to another furthers access to justice

Anita Kushwaha v Pushap Sudan
Transfer Petition (C) No. 1343 Of 2008
With 12 others
Supreme Court of India
Civil/Criminal Original Jurisdiction
July 19, 2016
Reported by Linda Awuor & Kakai Toili

Constitutional Law – bill of rights – fundamental rights and freedoms – access to justice – whether access to justice is a fundamental right – Constitution of India, articles 14, 21 & 32; International Covenant on Civil and Political Rights, 1966, article 2(3)

Civil Practice and Procedure – transfer – transfer of civil cases – transfer of civil cases to or from courts in the states of Jaumu and Kashmir – whether the Supreme Court of India had the power to transfer civil cases from or to the states of Jaumu and Kashmir – Constitution of India, articles 21, 32 & 142; Indian Code of Civil Procedure 1908, sections 1 & 25.

Criminal Law - criminal procedure – transfer – transfer of criminal cases – transfer of criminal cases to or from
Brief Facts:
By an order dated April 21, 2015, a three-judge bench of the Court had referred the Transfer of Petitions to a Constitution Bench to examine whether the Court had the power to transfer a civil or criminal case pending in any Court in the State of Jammu and Kashmir to a Court outside that State and vice versa. Out of thirteen Transfer Petitions placed before the Court, pursuant to the reference order, eleven sought transfer of civil cases from or to the State of Jammu and Kashmir while the remaining two sought transfer of criminal cases from the State to Courts outside that State.

Issues:

i) Whether the transfer of cases furthered access to justice as a fundamental right.

ii) Whether the Supreme Court of India had the power to transfer cases from or to the states of Jammu and Kashmir.

Relevant Provisions of the Law:

Constitution of India

Article 14 - Right to equality
The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 21 - Protection of life and personal liberty.
No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 32 - Right to Constitutional Remedies.

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Article 39 A - Equal Justice And Free Legal Aid
The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Article 136 - Special leave to appeal by the Supreme Court

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

Article 142 - Enforcement of decrees and orders of Supreme Court and orders as to discovery

(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or Transfer of certain cases order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

Civil Procedure Code 1908 (CPC)

Section 1 - Short title, commencement and extent

(1) This Act may be cited as the Code of Civil Procedure, 1908.
(2) It shall come into force on the first day of January, 1909.

(3) It extends to the whole of India except-

(a) the State of Jammu and Kashmir;
(b) the State of Nagaland and the tribal areas.

Provided that the State Government concerned may, by notification in the Official Gazette, extend the provisions of this Code or any of them to the whole or part of the State of Nagaland or such tribal areas, as the case may be, with such supplemental, incidental or consequential modifications as may be specified in the notification.

SECTION 25 - POWER OF SUPREME COURT TO TRANSFER SUITS

(1) On the application of a party, and after notice to the parties, and after hearing such of them as desire to be heard, the Supreme Court may, at any stage, if satisfied that an order under this section is expedient for the ends of justice, direct that any suit, appeal or other proceeding be transferred from a High Court or other Civil Court in one State to a High Court or other Civil Court in any other State.

(2) Every application under this section shall be made by a motion which shall be supported by an affidavit.

(3) The Court to which such suit, appeal or other proceeding is transferred shall, subject to any special directions in the order of transfer, either retry it or proceed from the stage at which it was transferred to it.

(4) In dismissing any application under this section, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding two thousand rupees as it considers appropriate in the circumstances of the case.

(5) The law applicable to any suit, appeal or other proceeding transferred under this section shall be the law which the Court in which the suit, appeal or other proceeding was originally instituted ought to have applied to such suit, appeal or proceeding.

Criminal Procedure Code, 1973

Section 406 - Power of Supreme Court to transfer cases and appeals.

1) Whenever it is made to appear to the Supreme Court that an order under this section is expedient for the ends of justice, it may direct that any particular case or appeal be transferred from one High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court.

2) The Supreme Court may act under this section only on the application of the Attorney-General of India or of a party interested, and every such application shall be made by motion, which shall, except when the applicant is the Attorney-General of India or the Advocate-General of the State, be supported by affidavit or affirmation.

3) Where any application for the exercise of the powers conferred by this section is dismissed, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider appropriate in the circumstances of the case.

International Covenant on Civil and Political Rights, 1966

Article 2 (3)

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.

Held:

1. The Indian Code of Civil Procedure, 1908 and the Indian Code of Criminal Procedure, 1973 (hereinafter referred to as Central Codes) were applicable to the rest of the country specifically but excluded the application thereof to the State of Jammu and Kashmir. That was evident from section 1 of the Code of Civil Procedure, 1908 and section 1 of the
2. Section 25 of the Indian Code of Civil Procedure, 1908 on the power of Supreme Court to transfer suits and Section 406 of the Indian Criminal Procedure, 1973 on the power of Supreme Court to transfer cases and appeals as was applicable to the rest of India, could not have been invoked by any litigant who sought transfer of any case to or from the State of Jammu and Kashmir.

3. It was equally true that Jammu and Kashmir Code of Civil Procedure, SVT.1977 and Jammu and Kashmir Code of Criminal Procedure SVT.1989 did not have any provision directing the transfer of any case, civil or criminal from any court in the state to a court outside that state or vice versa. Resort to the central or state codes of civil and criminal procedures for having directed transfer of cases to or from the state was, therefore, ruled out.

4. The question, however, was whether independent of the provisions contained in the Indian Codes of Civil and Criminal Procedure there was a source of power which could be invoked for directing the transfer of a case from the State of Jammu and Kashmir or vice versa.

5. Two distinct questions fell for consideration, the first involved examination of whether access to justice was indeed a fundamental right and if so, what was the sweep and content of that right, while the second was whether articles 32 on the right to constitutional remedies and 142 on enforcement of decrees and orders of the Supreme Court and orders as to discovery, of the Constitution of India empowered the issuance of suitable directions for transfer of cases to and from the State of Jammu & Kashmir in appropriate situations. Both aspects were well-traversed by judicial pronouncements.

6. Availability of article 142 of the Constitution of India on enforcement of decrees and orders of the Supreme Court and orders as to discovery, for directing transfer of cases in situations where such power was not available under an ordinary statute or the Constitution had been judicially explored on several earlier occasions.

7. The concept of access to justice as an invaluable human right, was recognized in most constitutional democracies as a fundamental right, had its origin in common law as much as was in the Magna Carta. The Magna Carta laid the foundation for the basic right of access to courts.

8. The Universal Declaration of Rights drafted in the year 1948 gave recognition to rights pertaining to access to justice and to the same effect was clause 3 of article 2 of International Covenant on Civil and Political Rights, 1966.

9. Courts in England had over the centuries post Magna Carta developed fundamental principles of common law which were enshrined as the basic rights of all humans. Those principles were over a period of time recognised in the form of bill of rights and constitutions of various countries which acknowledged the Roman maxim *ubi jus ibi remedium*.

10. Judicial pronouncements in England had delved and elaborated on the concept of access to justice to have included among other aspects, the state’s obligation to make available to all its citizens the means for a just and peaceful settlement of disputes between them as to their respective legal rights.

11. Access to justice had been recognised as a valuable right by courts of India long before the commencement of the Constitution. Decisions of the Supreme Court of India had unequivocally recognised the right of a citizen to move the court as a valuable constitutional right recognised by article 32 of the Constitution as a fundamental right by itself.

12. Juristic content and basis of access to justice as a fundamental right was not provided only by judicial pronouncements, the Commission for Review of the Constitution had recommended that access to justice be incorporated as an express fundamental right. The recommendation had not yet led to the incorporation of the proposed article 30 A, but that did not in the least matter, for what the proposed article may have added to the constitutional guarantees already stood acknowledged as a part of the right to life under article 21 of the Indian Constitution on protection of life and personal liberty,
by judicial pronouncements. The proposed incorporation of article 30 A, would have simply formalised what already stood recognised by judges and jurists alike.

13. Access to justice is and has been recognised as part and parcel of the right to life in India and in all civilized societies around the globe. The right is so basic and inalienable that no system of governance could possibly have ignored its significance, leave alone afford to have denied the same to its citizens. The Magna Carta, the Universal Declaration of Rights, the International Covenant on Civil and Political Rights, 1966, the ancient Roman jurisprudential maxim of *ubi jus ibi remedium*, the development of fundamental principles of common law by judicial pronouncements of the courts over centuries past had all contributed to the acceptance of access to justice as a basic and inalienable human right which all civilized societies and systems recognised and enforced.

14. By a long line of decisions an expansive meaning and interpretation had been given to the word “life” appearing in article 21 of the Indian Constitution on protection of life and personal liberty. Given the fact that pronouncements had interpreted and understood the word life appearing in article 21 of the Constitution on a broad spectrum of rights considered incidental and integral to the right to life, there was no real reason why access to justice should have been considered to be falling outside the class and category of the said rights, which already stood recognised as being a part and parcel of the article 21 of the Constitution. If life implied not only life in the physical sense but a bundle of rights that made life worth living, there was no juristic or other basis for holding that denial of access to justice would not have affected the quality of human life so as to take access to justice out of the purview of the right to life guaranteed under article 21.

15. Access to justice is indeed a facet of the right to life guaranteed under article 21 of the Indian Constitution. Access to justice may have as well been a facet of the right guaranteed under article 14 of the Constitution on the right to equality, which guaranteed equality before law and equal protection of laws to not only citizens but also to non-citizens.

16. Equality before the law and equal protection of laws is not limited in its application to the realm of executive action that enforced the law. It is as much available in relation to proceedings before courts and tribunals and adjudicatory fora where law is applied and justice administered.

17. The citizen’s inability to access courts or any other adjudicatory mechanism provided for determination of rights and obligations is bound to result in denial of the guarantee contained in article 14 of the Indian Constitution on right to equality both in relation to equality before law as well as equal protection of laws. Absence of any adjudicatory mechanism or the inadequacy of such mechanism is bound to have prevented those looking for enforcement of their right to equality before laws and equal protection of the laws from having sought redress and thereby negating the guarantee of equality before laws or equal protection of laws and reduced it to a mere teasing illusion. Access to justice could be said to be part of the guarantee contained in article 14 as well.

18. The four main facets that constitute the essence of access to justice are that:
   a) The state must provide an effective adjudicatory mechanism.
   b) The mechanism so provided must be reasonably accessible in terms of distance.
   c) The process of adjudication must be speedy.
   d) The litigant’s access to the adjudicatory process must be affordable.

19. One of the most fundamental requirements for having provided to the citizens access to justice was to set-up an adjudicatory mechanism whether described as a court, tribunal, commission or authority or called by any other name whatsoever, where a citizen could have agitated his grievance and have sought adjudication of what he may have perceived as a breach of his right by another citizen or by the state or any one of its instrumentalities. In order that the right of a citizen to access justice is protected, the mechanism so provided must have not only been effective but must have also been just, fair and objective in its approach. The
procedure which the court, tribunal or authority may have adopted for adjudication must have in itself been just and fair and in keeping with the well-recognized principles of natural justice.

20. The mechanism must have been conveniently accessible in terms of distance. The forum or mechanism so provided must have, having regard to the hierarchy of courts or tribunals, been reasonably accessible in terms of distance for access to justice since so much depended upon the ability of the litigant to have placed his or her grievance effectively before the court or tribunal or a competent authority to have granted such a relief.

21. The process of adjudication must have been speedy. Access to justice as a constitutional value would have been a mere illusion if justice had not been speedy. Justice delayed, it was famously said, is justice denied. If the process of administration of justice was so time consuming, laborious, indolent and frustrating for those who sought justice that it dissuaded or deterred them from even considering resort to that process as an option, it would have been tantamount to denial of not only access to justice but justice itself.

22. There was jurisprudentially no qualitative difference between denial of speedy trial in a criminal case, on the one hand, and civil suit, appeal or other proceedings, on the other. Civil disputes could at times have had an equally, if not, more severe impact on a citizen’s life or the quality of it. Access to Justice would therefore have been a constitutional value of any significance and utility only if the delivery of justice to the citizen was speedy, for otherwise, the right to access to justice was no more than a hollow slogan of no use or inspiration for the citizen.

23. The increase in literacy, awareness, prosperity and proliferation of laws had made the process of adjudication slow and time consuming primarily on account of the over worked and under staffed judicial system, which was crying for creation of additional courts with requisite human resources and infrastructure to have effectively dealt with the ever increasing number of cases that were being filed in the courts and mounted backlog of over thirty million cases in the subordinate courts. While the States had done their bit in terms of providing the basic adjudicatory mechanisms for disposal of resolution of civil or criminal conflicts, access to justice remained a big question mark on account of delays in the completion of the process of adjudication on account of poor judge population and judge case ratio in comparison to other countries.

24. The process of adjudication must have been affordable to the disputants. Access to justice would have been no more than an illusion if the adjudicatory mechanism provided was so expensive as to have deterred a disputant from taking resort to the same. Article 39-A of the Indian Constitution on equal justice and free legal aid, promoted a laudable objective of having provided legal aid to needy litigants and obliged the state to make access to justice affordable for the less fortunate sections of the society.

25. Affordability of access to justice had been, to an extent, taken care of by the state sponsored legal aid programmes under the Legal Service Authorities Act, 1987. Legal aid programmes had been providing the much needed support to the poorer sections of the society in the accessing justice in Courts.

26. The need for transfer of cases from one court to the other often arose in several situations which were suitably addressed by the courts competent to direct transfers in exercise of powers that were available to them under the Code of Civil Procedure (CPC) or the Code of Criminal Procedure (Cr.P.C.). Convenience of parties and witnesses often figured as the main reason for the courts to have directed such transfers. What was significant was that while in the rest of India, the courts dealt with applications for transfer of civil or criminal cases under the provisions of the CPC and the Cr.P.C, the fact that there was no such enabling provision for transfer from or to the State of Jammu and Kashmir did not detract from the power of a superior court to have directed such transfer if it was of the opinion that such a direction was essential to have sub served the interest of justice.

27. If the provision that empowered courts to direct transfer from one court to another were to stand deleted from the Code of
Civil Procedure or the Code of Criminal Procedure, the superior courts would still have been competent to have directed such transfer in appropriate cases so long as such courts were satisfied that denial of such a transfer would have resulted in violation of the right to access to justice to a litigant in a given fact situation.

28. If access to justice was a facet of the right to life guaranteed under article 21 of the Indian Constitution on protection of life and personal liberty, a violation actual or threatened of that right would have justified the invocation of the powers under article 32 of the Constitution on right to constitutional remedies.

29. The exercise of the power under article 21 of the Indian Constitution on protection of life and personal liberty could have taken the form of a direction for transfer of a case from one court to the other to meet situations where the statutory provisions did not provide for such transfers. Any such exercise would have been legitimate, as it would have prevented the violation of the fundamental right of the citizens guaranteed under article 21 of the Constitution.

30. Article 142 of the Indian Constitution on the enforcement of decrees and orders of the Supreme Court and orders as to discovery, could have been invoked to direct transfer of a case from one court to the other. Article 139-A on equal justice and free legal aid, was not intended to nor did it operate to affect the wide powers available to the Court under articles 136 on special leave to appeal by the Supreme Court and 142 of the Constitution.

31. There was no prohibition against use of power under article 142 of the Indian Constitution on the enforcement of decrees and orders of the Supreme Court and orders as to discovery, to direct transfer of cases from a court in the State of Jammu and Kashmir to a court outside the state or vice versa.

32. Though there was no enabling provision, the absence thereof could not be construed as a prohibition against transfer of cases to or from the State of Jammu and Kashmir. At any rate, a prohibition simplicitor was not enough. What was equally important was to see whether there was any fundamental principle of public policy underlying any such prohibition. No such prohibition nor any public policy could have been seen in the cases, much less a public policy based on any fundamental principle.

33. The extraordinary power that was available under article 142 of the Indian Constitution on the enforcement of decrees and orders of the Supreme Court and orders as to discovery, could have been usefully invoked in a situation where the denial of an order of transfer from or to the Court in the State of Jammu and Kashmir would have denied the citizen his or her right of access to justice.

34. The provisions of articles 32 on the Right to Constitutional Remedies, 136 on special leave to appeal by the Supreme Court and 142 on the Enforcement of decrees and orders of the Supreme Court and orders as to discovery, were therefore, wide enough to direct such transfer in appropriate situations, no matter that the Central Code of Civil and Criminal Procedures did not extend to the State nor did the State Codes of Civil and Criminal Procedure contain any provision that empowered the court to transfer cases.

Petition allowed, transfer of petitions was to be listed before the regular bench for hearing and disposal on merits.

Relevance to Kenyan Position:

The Constitution of Kenya, 2010 under article 48 provides that the state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

Kenyan Courts have handled various cases touching on access to justice in considering whether to transfer cases, for instance in Mutia Muindu t/a Mutibra Auctioneers v CFC Stanbic Bank Ltd Garnishee & another, Misc App Cause No. 2 Of 2015 the Employment and Labour Relations Court found that no good cause had been shown by the Applicant as to why the suit would be transferred to Nairobi. The Court went on to hold that transferring this file to Nairobi would not only have delayed the determination of the dispute but it was also very expensive for the respondents. The Court further held that
decentralization of the Court was meant to encourage faster disposal of cases and access to justice by bringing service close to people and in order to mitigate on costs of litigation and that transferring the case to Nairobi would militate against the said constitutional obligation to faster disposal of cases and access to justice.

In *George Mwongera Mwendameru v Loise Gakii, Miscellaneous Application No 70 of 2015*, the High Court held that as a superior court, it had the power to transfer causes from one subordinate court to another for hearing and disposal. The Court went on to hold that the power served an important purpose in law: to attain the ends of and facilitate access to justice. That was why the Court could invoke and exercise the power *suo moto*.

In *Abraham Mwangi Wamigwi v Simon Mbiriri* [2012] eKLR the Court held that where a suit was instituted before a court having no jurisdiction, such a suit could not have been transferred to a court where it ought to have been properly instituted. The Court stated that the reason was that a suit filed in a court without jurisdiction was a nullity in law and whatever was a nullity in law was in the eyes of the law nothing and that the Court could not have purported to transfer nothing and mould it into something through a procedure known as transfer. The Court further stated that courts could only transfer a cause whose existence was recognized by law.

This case is important to the Kenyan situation as it will go a long way in assisting the Kenyan Courts in handling cases dealing with transfer of cases and access to justice.

A reference filed under the treaty for the establishment of the East African Community is not an action in tort but one that challenges the legality of an activity of a partner state or of institutions of the Community.

**James Alfred Koroso v The Attorney General of the Republic of Kenya & The Principal Secretary, Ministry of State for Provincial Administration and Internal Security of the Republic of Kenya**

I. Lenaola, DPJ; F. Ntezilyayo & F.A. Jundu

March 24, 2016

*Reported by Linda Awuor & Faith Wanjiku*

**Brief Facts**

The Applicant alleged that having been lured into Kenya by the Kenyan police in 1993, he was tortured, beaten physically and sexually assaulted in various Kenyan police stations. He had allegedly been arrested from the Kenya-Tanzania border and thereafter charged with the offence of robbery with violence in *Criminal Case No.73 of 1993*. The Court, however, found that the Applicant had no case to answer and acquitted him. Upon his acquittal and release from incarceration, the Applicant filed *Civil Case No.2966 of 1996* at the High Court of Kenya against the 1st Respondent for false imprisonment and malicious prosecution, violation of constitutional rights, general and exemplary damages.

During the entire hearing of the said suit, the 1st Respondent failed to bring his witnesses to defend him despite repeated adjournments to allow him to do so and judgment was eventually entered in favour of the Applicant on February 22, 2008.

Despite the Applicant’s repeated demands for payment, the Respondents refused and failed to pay him. Further, various Notices to Show Cause were issued by the said Court against the Respondents. The Applicant filed the Reference claiming to be paid all the decretal sums he had been awarded by the Courts. He also contended that the acts and conduct of the Respondents were an infringement and violation of articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community (EAC) in particular the principles of good governance, rule of law, accountability, transparency and social justice.

**Issues**

i. Whether the Court had jurisdiction to entertain the Reference on violation of fundamental principles of the Treaty.

ii. Whether the Reference was filed under the two month limit in the Treaty and therefore time-barred.

iii. Whether the actions of the Respondents were in violation of articles fundamental and operational principles of the Treaty for the Establishment of the East African Community.

iv. Whether the issues in the Reference were
similar to the issues in Nairobi HCCC No.2966 of 1996.

**International Law - Law of Treaties - Interpretation of the Treaty for the Establishment of the East African Community-jurisdiction of the Court - whether the Court had jurisdiction to entertain the Reference - Treaty for the Establishment of the East African Community (As amended on 14th December)-article 27**

**International Law - Law of Treaties - Interpretation of the Treaty for the Establishment of the East African Community-Reference by Legal and Natural Persons - Whether the Reference was time-barred- Treaty for the Establishment of the East African Community (As amended on 14th December)-article 30(2)**

**International Law - Law of Treaties - Interpretation of the Treaty for the Establishment of the East African Community-Fundamental Principles of the Community-whether the actions of the Respondents were in violation of article 6(d) of the Treaty- Treaty for the Establishment of the East African Community (As amended on 14th December)-article 6(d)**

**Relevant Provisions of the Law**

**Article 6(d) - Fundamental Principles of the Community**

good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people’s rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights;

**Article 7(2) – Operational Principles of the Community**

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

**Article 27(1) - Jurisdiction of the Court**

The Court shall initially have jurisdiction over the interpretation and application of this Treaty:

Provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

**Article 30 (1),(2) - Reference by Legal and Natural Persons**

Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or act ion is unlawful or is an infringement of the provisions of this Treaty.

The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.

**Held**

1. The Court had jurisdiction under articles 23, 27 and 30 of the Treaty to entertain and determine the Reference in particular the interpretation and application of articles 6(d) and 7(2). The Applicant’s accessibility to the Court was mandated under article 30(1) of the Treaty. The Applicant had alleged that articles 6(d) and 7(2) had been violated or infringed by the Respondents. In numerous decisions of the Court, the Court held that once there was an allegation of infringement of the provisions of the Treaty, the Court had jurisdiction to interpret and apply the provisions alleged to be infringed under the powers conferred on it by articles 23(1) and 27(1) of the Treaty.

2. Close reading of the Reference showed that the complaints of the Applicants were based on non-compliance by the Respondent of a judgment, decree and certificate of order by the High Court of Kenya issued on February 22, 2008, April 11, 2008 and December 8, 2011 respectively by which time or dates the Treaty had long been brought into force i.e. since July 7, 2000. They were further based on the judgment issued on March 19, 2013, decree and certificate of order issued on March 25, 2013 in Judicial Review Application No.44 of 2012 issued on March 19, 2013 and decree and certificate of order on March 25, 2013 as well as the various court orders by way of Notices to Show Cause and Warrants...
of Arrest to the 2nd Respondent from 2013 to 2014. The Court therefore, disagreed with the arguments of the Respondents as regards application of the principle of non-retroactivity.

3. The issue of exhaustion of local remedies could not detain the Court because it had in its previous decisions stated that exhaustion of local remedies was not a pre-condition for accessing the Court. That the matter was before the Court of Appeal of Kenya did not bar the Applicant from accessing the Court under article 30(1) of the Treaty. The Court as per the provisions of articles 23(1), 27(1) read together with article 30(1) of the Treaty and as per numerous of its previous decisions, had jurisdiction to entertain and determine the Reference given the Applicant’s allegation that there was violation or infringement of articles 6(d) and 7(2) of the Treaty.

4. Article 30(2) limited the time within which a party could approach the Court to two months from the date of the action complained of (or from the date the Applicant came to know of an alleged violation). The filing of the Reference by the Applicant on July 21, 2014, in that context, was well within the time limit of two months stipulated under article 30(2) of the Treaty counted from the date the Respondents defied the Warrant of Arrest. While therefore the initial claim by the Applicant before the High Court of Kenya may have related to events between 1993 and 1996, the issues in context were the aforesaid orders issued between 2008 and 2014. It was the Court’s view that whereas any orders issued prior to 21st May, 2014 were out of time, some orders were issued as late as July 9, 2014 and certainly defiance of such orders fell within the time limit in challenging them before the Court. The Reference was filed by the Applicant partly within the time limit as required under article 30(2) of the Treaty.

5. The Court could inquire into non-compliance with the Warrant of Arrest dated July 9, 2014. The latter arose from the defiance of the 2nd Respondent to a Notice to Show Cause dated July 3, 2014. Such actions and conduct of the Respondents, undoubtedly, were not in pursuance of the principles of good governance and rule of law stated in articles 6(d) and 7(2) of the Treaty.

6. Comparison of the issues in the two cases clearly showed that issues in those two cases were different. The cause of action in Civil Case No.2966 of 1996 was on false imprisonment, malicious prosecution, battery and assault, loss of business and damages inter alia, while in the Reference, the Applicant’s cause of action was centered on violation of articles 6(d) and 7(2) of the Treaty. It was obvious from the foregoing that the issues for determination in the two cases were completely different although based on the same set of facts.

7. As far as prayer (a) was concerned, that is, a declaration that the Respondents had violated articles 6(d) and 7(2) of the Treaty, the non-compliance with the Warrant of Arrest issued by the High Court of Kenya on July 9, 2014, amounted to a violation of the principles of good governance and rule of law. The conduct of the Respondents since the Applicant obtained his Judgment on February 22, 2008 was most unfortunate. The Judgment was rendered by a competent Court in Kenya and there was an expectation that in a country governed under the rule of law, all court orders, however painful and whatever the views of the Respondents, ought to be respected and complied with unless overturned by an appeal or otherwise reviewed. The Respondents in that regard filed a Notice of Appeal on March 4, 2008 and finally an appeal was filed on July 1, 2014, six years later. No justifiable reason had been given for that delay and yet the Applicant had constantly and persistently pursued the fruits of his Judgment. Had the Court’s hands not been tied by the limitation provision in article 30(2) of the Treaty, it would have certainly held the Respondents to account for their actions within their obligations under the Treaty.

8. As regards prayers (b), (c), (d) and (e), the Court agreed fully with the Respondents that the Court, under articles 23, 27 and 30 was not conferred with powers to grant such orders. It only dealt with interpretation and application of the provisions of the Treaty and ensuring its compliance thereon. A reference under article 30 of the Treaty could not be construed as an action in tort brought by a person injured by or through the misfeasance of another. It was an action
brought to challenge the legality, under the Treaty, of an activity of a Partner State or of institutions of the Community. The alleged collusion and connivance of the Treaty, if any, was not actionable under article 30 as held in Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit.

9. The Applicant referred to article 44 of the Treaty and alleged that the Court was empowered to impose pecuniary obligation in execution of a judgment of the Court and argued that the said article was an authority that the Court could grant a money award to an applicant hence, the Court had jurisdiction to grant prayers (b), (c), (d) and (e). Judgment of the Court mentioned in article 44 took the import of the provisions of articles 23, 27 and 30 of the Treaty, that is, that it was limited to interpretation and application of the provisions of the Treaty and their compliance thereof. The imposition of pecuniary obligation in article 44 referred to matters in pursuance of an interpretation and application of the provisions of the Treaty and nothing else. Pecuniary obligations included costs and had nothing to do with the awards and orders mentioned by the Applicant in prayers (b), (c), (d) and (e).

10. In prayer (d), the Applicant prayed to the Court to order the Respondent to pay the decretal amount granted in Civil Case No.2966 of 1996 by the High Court of Kenya. Likewise, in prayer (e), the Applicant prayed to the Court to order the Respondents to pay interest at commercial rate on the decretal sum from the date of Judgment to the date of satisfaction. The two sought reliefs fell under the jurisdiction of the National Courts in Kenya. Indeed, the record showed that the Respondents had obtained an order of stay of execution at the Court of Appeal of Kenya, and that they were pursuing an Appeal before the said Court against the decision of the High Court in Civil Case No. 2966 of 1996. The Court could not grant prayers (d) and (e) sought by the Applicant. 2,4,9,2, 3, 4

11. In prayer (f), the Applicant prayed for costs. He referred to Rule 111(1) of the East African Court of Justice Rules of Procedure 2013 which provided that costs should follow the event and that there was an occasion the Court had ordered certain Respondents to pay costs. It was also well known that the grant of costs was a discretionary exercise by a court. After due consideration of the matter, the Applicant was only entitled to 1/4 of the costs.

Reference partly allowed:

i. Prayer (a) of the Reference granted in the following terms only:
   A declaration be and is hereby issued that by failing to effect the Warrant of Arrest issued by the High Court of Kenya on July 9, 2014, and before orders of stay of execution were issued by the Kenyan Court of Appeal on July 22, 2014, the Respondents violated articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community.

ii. Prayers (b), (c), (d) and (e) of the Reference are denied and are therefore dismissed.

iii. The Applicant shall have 1/4 of the costs of the Reference.
Better Care for our Senior Citizens

CSR - A visit to thogoto home for the elderly

By Joseph Asige (Sales, Marketing & Customer Care Department)

In traditional African societies, elders are revered and are usually cared for by their grown children into old age. The country currently has 1.2 million people above the age of 60. The number is expected to reach 2.2 million in the next 10 years, according to the latest government population figures. Modern Kenyans are beginning to place ageing parents in the care of a growing number of retirement homes, something that was unheard of a generation ago, with eight per cent of all adults in Kenya infected with Aids, and the number of deaths from the epidemic this has left some elderly without offspring to care for them.

Old age brings along with it a whole set of issues for the elderly. Loneliness creeps in early resulting in the elderly spending time alone, all by themselves. The loneliness and isolation in their own homes make them feel insecure and vulnerable, which often leads to serious health and well-being issues. The common lament is that they have no one to support them at this stage in life. Further, their needs are compounded by conditions associated with aging, including chronic illness, diseases, functional limitations, physical / mental frailty and limited financial means. As people get older, they need support to continue to lead an active, healthy, independent and secure life. The poor basic infrastructure only adds to the woes of the elderly.

The challenge for Kenyan society today is to cater for the healthcare, well-being and housing needs of this fast aging population. This requires a multi-dimensional approach backed with specific programs providing – age appropriate housing and health care services for the elderly in the community.

It is for this reason and in the spirit of Corporate Social Responsibility (CSR) that the National council for law reporting (Kenya Law) family under the leadership of the CEO Mr. Longet Terer and the Kenya law welfare committee saw it fit for us to visit the Thogoto home for the aged and spend the day with them. The committee made a request for fellow staff members, their family and friends for participation and contribution – whether in cash or in kind towards the home. Donations were in the form of food stuffs: cooking oil, rice, sugar, wheat/maize flour, tea leaves, salt; crockery such as mugs (plastic or metallic); cleaning detergents; beddings; Clothes’ and shoes for both men and women.

Thogoto Home for the aged is sponsored by the

Kenya law family interacting with the senior citizens. Ms. Emma Kinya interacting with a senior citizen.

Kenya Law Family with the senior citizens of Thogoto home.
Presbyterian Church of the Torch-Thogoto. The home caters for people aged between 70-100 years; most of whom are homeless or abandoned. The home is situated along Kikuyu Hospital-Thogoto road.

Kenya law staff was received by Ms. Jane Gaturu (Administrator) together with other social workers at the home. Ms. Gaturu gave a brief history of the home and introduced the few senior citizens who were available as we interacted with them, an experience that brought joy, happiness and excitement in the faces of the senior citizens, and in the spirit of good will, giving and spreading the love and care, we celebrated with the elders at Thogoto Home for the Aged, taking part in various duties and chores around the home, listening to their stories and life experiences, singing and sharing a meal together.

Ms. Gaturu together with the other social worker were very grateful to Kenya law team for the generous donations and a worthy visit to the home, “On behalf of the management, staff and the elders of Thogoto home for the aged, I want to express my appreciation for your generosity, support and donation to this home for the senior citizens and for taking your time to come and spend time with the elders, your generosity and time you have spent with us means so much to me but even more to the senior citizens. Thank you and may God bless you” said Ms. Gaturu.

Our visit at the home was concluded by a speech from our CEO Mr. Longet who pointed out the need for Kenya law family and the society at large to show care, love and support for our parents and elders. "Our focus and priority in life should not always be about personal success and growth. The support, love and care for our parents, siblings, relatives and that in need in the society should also be part of our priority in life, for when our families and those around us are
comfortable, as an individual you will also be comfortable and productive at everything you do” Said Mr. Longet.

The definition of Corporate Social Responsibility (CSR) varies across the globe and has evolved over time. The concept might seem abstract. To simplify and summarize the core idea, CSR is all about “responsibilities to society beyond that of making profits and brand awareness”.

As Kenya Law we understand that we have a responsibility to our society and we have made Corporate Social Responsibility (CSR) an integral part of our organizational culture to underline our deep commitment to making a difference in people’s lives. Our focus for this visit was not only to contribute to the citizenship of our brand, whether it is doing the right things socially, economically and environmentally but to ensure that we continually do work that contributes to society for a sustainable future. At the same time, we understand our role in supporting positive growth of the society and we are committed to sustainable, consistent performance over the long term. This includes making a difference in the communities where we operate by investing in their social and economic development. We view the support we provide through the CSR initiatives as an ‘investment’ that contributes to the sustainability of the community rather than a ‘donation.’ That’s because the contributions we make provide significant growth to the society. By this we understand that “our organization cannot succeed in a society that fails. Likewise, where and when the organization is stifled, societies fail to thrive.”
Kenya Law has radically altered the landscape of the legal profession by making legal information, which was hitherto very difficult if not impossible to source, accessible at the click of a button.

Speaking at the sixth Kenya Law annual staff conference, held at the Safari Park hotel on 26th August 2016; Kenya Law CEO/Editor Mr. Long’et Terer outlined the milestones achieved by the institution in only fourteen years.

“In a span of 14 years we have transformed, from a small unit of 15 employees to a semi-autonomous state corporation, blazing the trail and setting standards for legal information institutes not just in Africa but in the world.” He said.

Former Chief Justice and chair of the Council For Law Reporting Dr. Willy Mutunga, who was the chief guest, underscored the instrumental role of Kenya Law in the justice and legal sector as a channel through which the jurisprudence developed by the Judiciary is sifted and disseminated.

The event also served to bid farewell to Dr. Mutunga for his distinguished service as the Chair of the National Council For Law Reporting for the last five
1. Winnie Mbori of the H.R & Admin department receives the Employee of the year -2016 award from Ms. Christine Agimba.


3. Former Kenya Law CEO/Editor Mr. Michael Murungi presents the 2016 -Team player of the Year, Law Reporting Department to Musa Okumu.

4. Kenya Law CEO/Editor Mr. Long’et Terer presents the 2016 -Team player of the Year award, Finance department to Mr. Josepaht Ratemo. Mr. Ratemo was also the 2nd runners up; employee of the year category.

5. Kenya Law CEO/Editor Mr. Long’et Terer presents the 2016 -Team player of the Year, SMCC department to Mr. Joseph Asige. Joseph was also the 2nd runners up; employee of the year category.

6. Kenya Law CEO/Editor Mr. Long’et Terer presents a gift to the former Chief Justice Dr. Willy Mutunga during the 6th Kenya Law Annual Staff Conference on 26th August 2016.
years. He expressed confidence in the institution's leadership and noted that very few institutions have such a blend of experience, diversity, knowledge and goodwill.

"I want you to know that I will always be your ambassador and shall carry the Kenya Law flag wherever I go. It has been an honor serving as your Chairman," he said.

Other dignitaries present were Council members: Ms. Christine Agimba, Deputy Solicitor General, State Law Office; Mr. Joash Dache – Chief Executive Officer, Kenya Law Reform Commission and the former CEO, Mr. Michael Murungi. Also present was a motivational speaker Dr. Stanley Mukolwe who gave advice on how to achieve a work life balance.

Organized by the HR and Admin Department, the conference brought together all the Kenya Law employees who eagerly gathered to evaluate and celebrate the organizational performance of the previous year and to crown the best performing employees, through the Kenya Law Reward and Recognition Scheme.

The Kenya Law choir lit up the conference with their mix of traditional and contemporary music. The different heads of departments presented their reports highlighting the achievements of the previous year.

The following staff members were recognized for their exemplary performance and discipline:

1. Team Leader of the Year
   - Martin Andago, ICT department
2. Employee of the Year
   - Winnie Mbori, HR and Admin Department
3. 1st Runners up
   - Musa Okumu, Law Reporting Department
4. 2nd Runners up
   - Josephat Ratemo, Finance Department
5. 2nd Runners up
   - Joseph Asige, Sales Marketing and Customer Care Department
6. Innovator of the Year
   - Julie Mbijiwe, Laws of Kenya Department

Departmental Nominees

1. Team player of the Year, Law Reporting Department
   - Musa Okumu
2. Team player of the Year, HR and Admin Department
   - Winnie Mbori
3. Team player of the Year, ICT department
   - Kenneth Momanyi
4. Team player of the Year, Research and Development Department
   - Siphira Gatimu
5. Team player of the Year, Laws of Kenya Department
   - Julie Mbijiwe
6. Team Player of the Year, Sales Marketing and Customer Care Department
   - Joseph Asige
7. Team Player of the Year, Finance Department
   - Josephat Ratemo.
Moral breakdown and the decline of the Rule of Law

By Stanley Mutuma, Advocate of the High Court of Kenya

There exists a nexus between a society’s morals and the upholding of the rule of law. In contextualizing this matter, one would need to elaborate and distinguish between morality, spirituality and societal expectations.

For any society to exist in a harmonious and cohesive manner, the rule of law needs to be present and adhered to by a majority of the society. A.V. Dicey, 1 clearly stipulates the tenets of the rule of law. In the absence of the adherence to the rule of law, then it is inevitable what would happen. One can imagine a society in which the strongest survive, in common parlance it would be a jungle society.

It matters little, whether one looks at this objective from any of the legal schools of thought. The naturalist would opine that since law emanates from a supreme being, then religion would be the panacea of society’s evils. In a fast changing society where religious beliefs are being constantly challenged from different quarters, this kind of premise would be like trading on thin ice. Secondly, modern societies are not premised on theocracies, it would be far too optimistic to hold such a position. Legal scholars who would wish to be anchored in the positivistic school of law, have also some several shortcomings to ponder; their principles being based on the legislative making process.

Assuming that the elected and nominated members of the legislature, are the custodians of enacting such laws that would be beneficial to the general society. I opine that such assumptions, are premature. Reason being that it well known that several pieces of legislation are driven by special interest groups and may not necessarily be for the greater good of society. A look at a history of any nation, and keen historians will verify that in past years; laws were made to suppress the majority and maintain the status quo 2 of the ruling minority. It took popular and sometimes violent revolutions to change this state of affairs.

The idea of law as a tool of social engineering, as discussed by Roscoe Pound has also its flaws. Societal expectations and norms can and do change over time. It would be expecting too much from judges and legal practitioners to be yoked with the burden of shaping society into a certain direction. For instance, one judge’s view and perception of the world could be entirely different from his colleague sharing the same panel. In turn leading to an inconsistency of rulings and pronouncements.

To this end therefore we need to examine and interrogate carefully and thoughtfully, the challenges of maintaining the rule of law in contemporary societies with all the divergent views and freedoms guaranteed by the constitution.

I opine, that there has to be a basic set of principles or rules that hold society together. The set of rules could be silent, manifested in taboos, or norms and practices of different societies. Such fundamentals are to be protected dearly and that digression from such standards is to be considered as an infringement of the society’s values. This means that the values are cultivated in the upbringing of the children of the society. Once such morals are part of the DNA of the person, then it becomes possible for them to distinguish between right and wrong.3 In the instance that one would then choose to digress, from such understood positions, then one would be doing so willfully or negligently.

As experts in the matter of human development stipulate, the formative years of development form a path that the individual is likely to pursue in future. With the advent of low and fast falling moral standards in society, everything seems to be acceptable. Some proponents of absolute freedom seem to argue and propagate that one is free to do as he or she pleases without any regard to his fellow mankind. Such kind of views and sentiments have found their way to the family home. With children, being quick learners of adult behavior, then it is no wonder that such ideas like the principles of the rule of law are quickly wearing thin. The corruption of the mind is translated into corruption in the daily life activities. This gives rise to such false notions that one can get away with almost anything including the most horrendous acts of breaking of...
the law. This moral decline is manifest in all aspects of our country today. It is the falsehood that states that school going students can destroy school property and with the support of their parents/guardian financial ability and complacency of the school authorities get away with it. A false principle that a poor victim can be substituted to serve a jail term that rightly should be held by a rich convict who bribes his way out. With such ideas being so strongly entranced in our system, no one would really seem to give it much thought. The society has become deeply engrossed in its own pursuit of materialism that few would seem to care for the seemingly injustices taking place.

It is only when such an injustice comes home or lurking in one’s shadow that we seem to wake up to the fact.

In the interest of living in a civil and harmonious society let us wake up to the truth and reality that our country faces. Let the citizens be enlightened that having unjust and unequal society is much a moral issue as it is a matter of the law.