How failure between the Senate and the National Assembly to agree on a Division of Revenue Bill would be resolved.

The petition which challenged an on-going process for the design and installation of a Mobile Management System (DMS) in the mobile communications sector was filed prematurely.

A hospital is vicariously liable for medical negligence by its part time employees.
<table>
<thead>
<tr>
<th>PRODUCT</th>
<th>STATUS</th>
<th>COST</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kenya Law Reports 1986</td>
<td>Out of stock</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 1987</td>
<td>Out of stock</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 1988</td>
<td>Available</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 1989</td>
<td>Available</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 1990</td>
<td>Out of stock</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 1991</td>
<td>Out of stock</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 1992</td>
<td>Available</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 1993</td>
<td>Available</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 1994</td>
<td>Available</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 1997</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports 1999</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports 2000</td>
<td>Available</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 2001</td>
<td>Available</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 2002 Vol.1</td>
<td>Available</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 2002 Vol.2</td>
<td>Available</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 2003</td>
<td>Available</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 2004 Vol.1</td>
<td>Out of stock</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 2004 Vol.2</td>
<td>Out of stock</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 2006 Vol.1</td>
<td>Available</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 2006 Vol.2</td>
<td>Available</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports 2007 Vol.1</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports 2007 Vol.2</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports 2008</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports 2009</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports 2010 Vol.1</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports 2010 Vol.2</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports 2011 Vol.1</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports 2011 Vol.2</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports 2012 Vol.1</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports 2012 Vol.2</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports 2012 Vol.3</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports 2014 Vol.1</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports 2014 Vol.2</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports 2014 Vol.3</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports 2014 Vol.4</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>PRODUCT</td>
<td>STATUS</td>
<td>COST</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>------------</td>
<td>-------</td>
</tr>
<tr>
<td>Kenya Law Reports (Gender Based Violence)</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports (Family and Gender)</td>
<td>Out of stock</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports (Environment &amp; Land)</td>
<td>Out of stock</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Reports (Election Petitions) Vol.1</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports (Election Petitions) Vol.2</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports (Election Petitions) Vol.3</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Kenya Law Reports (Election Petitions) Vol.4</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>“Election Petitions Vol. 1,2,3 CD ROM”</td>
<td>Available</td>
<td>5000</td>
</tr>
<tr>
<td>Kenya Law Reports Consolidated Tables and Digest (1976-1986)</td>
<td>Out of stock</td>
<td>3000</td>
</tr>
<tr>
<td>Kenya Law Review 2007 Vol.1</td>
<td>Available</td>
<td>3000</td>
</tr>
<tr>
<td>Constitutional Law Case Digest Vol.1 (September 2011-May 2013)</td>
<td>Available</td>
<td>3000</td>
</tr>
<tr>
<td>Supreme Court Case Digest Vol.1 2011-2012</td>
<td>Available</td>
<td>2500</td>
</tr>
<tr>
<td>Supreme Court Case Digest Vol.2 2013</td>
<td>Available</td>
<td>3500</td>
</tr>
<tr>
<td>Devolution Case Digest Vol.1 2012-2015</td>
<td>Available</td>
<td>3000</td>
</tr>
<tr>
<td>KLR 2013 Volume 1</td>
<td>Available</td>
<td>5500</td>
</tr>
<tr>
<td>KLR 2013 Volume 2</td>
<td>Available</td>
<td>5500</td>
</tr>
<tr>
<td>KLR 2013 Volume 3</td>
<td>Available</td>
<td>5500</td>
</tr>
<tr>
<td>KLR 2015</td>
<td>Available</td>
<td>5500</td>
</tr>
<tr>
<td>KLR 1995 and 1996</td>
<td>Available</td>
<td>5500</td>
</tr>
<tr>
<td>Election Petitions Vol. 6</td>
<td>Available</td>
<td>5500</td>
</tr>
<tr>
<td>Devolution Law Report</td>
<td>Available</td>
<td>5500</td>
</tr>
</tbody>
</table>

**Laws of Kenya Volumes**

<table>
<thead>
<tr>
<th>PRODUCT</th>
<th>STATUS</th>
<th>COST</th>
</tr>
</thead>
<tbody>
<tr>
<td>Laws of Kenya Grey Book</td>
<td>Available</td>
<td>15000</td>
</tr>
<tr>
<td>Public Finance Volume</td>
<td>Available</td>
<td>10000</td>
</tr>
<tr>
<td>Family Law Volume</td>
<td>Available</td>
<td>4500</td>
</tr>
<tr>
<td>Land Law Volume</td>
<td>Available</td>
<td>10000</td>
</tr>
<tr>
<td>Commercial Law Vol.1</td>
<td>Available</td>
<td>10000</td>
</tr>
<tr>
<td>Commercial Law Vol.2</td>
<td>Out of stock</td>
<td>10000</td>
</tr>
<tr>
<td>Kenya law Weekly e-Newsletter</td>
<td>Free by email subscription</td>
<td>Free</td>
</tr>
<tr>
<td>Kenya Law Bench Bulletin</td>
<td>Available</td>
<td>Free</td>
</tr>
<tr>
<td><a href="http://www.kenyalaw.org">www.kenyalaw.org</a></td>
<td>Available</td>
<td>Free</td>
</tr>
</tbody>
</table>
The Supreme Court of Appeal of Malawi affirms the High Court decision declaring undue election and ordering fresh election for the office of the President. Pg 68

Pension money that has already been paid, as opposed to pension money that is payable, is part of the estate of a deceased person. Pg 27

EDITORIAL TEAM

Editor /CEO
| Long’et Terer |

Senior Assistant Editor/DCEO
| Janet Munywoki |

Editorial Assistant
| Linda Awuor |

Contributors
| Njeri Githan’ga | Andrew Halonyere | Wambui Kamau |
| Nelson Tunoi | Emma Kinya | Teddy Musiga |
| Beryl Ikamari | Christian Ateka | Robai Nasike |
| John Ribia | Eunice Chelimo | Faith Wanjiku |
| Kevin Kakai | Patricia Nasumba | Musa Okumu |
| Lisper Njeru |

Design and Layout
| Catherine Moni | Josephine Mutie | Cicilian Mburunga |
| Robert Basweti |

Proofreaders
| Phoebe Juma | Innocent Ngulu | Thomas Muchoki |
| Humphrey Khamala |

1. Editors Note 1
2. CJ’s Message 2
3. What they Said 7
4. Feature Case 9
5. Cases 14
6. Restating the Law 48
7. Caseback 49
8. Legislative Updates 50
9. Legal Supplements 57
10. Law Reform Compilation 63
11. International Jurisprudence 68

Disclaimer:
While the National Council for Law Reporting has made every effort to ensure both the accuracy and comprehensiveness of the information contained in this publication, the Council makes no warranties or guarantees in that respect and repudiates any liability for any loss or damage that may arise from an inaccuracy or the omission of any information.
Devolution as laid out in the Constitution of Kenya 2010 is just but a skeleton. The way the devolved system of governance works today, the flesh, nerves, parts and senses that fill the skeleton, is a result of numerous judgements from the Courts. If you want to understand how the Devolved Government works, the 2015 Devolution Law Report is the best place to start.
Members of the Council for Kenya Law

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

The Hon Lady Justice Fatuma Sichale
Judge of the Court of Appeal of Kenya

The Hon Justice Anthony Ndung’u
Judge of the High Court of Kenya

The Hon. Justice (Rtd) Kihara Kariuki
Attorney General
Alt - Ms Linda Murila, Chief State Counsel

Prof Kiarie Mwaura
Dean, School of Law, University of Nairobi

Ms Jennifer Gitiri
Advocate & Public Officer,
Office of the Attorney General & DoJ

Mr Mwenda Njoka
Government Printer (Ag), Government Press
(Represented by Ms Eva Kimeiywo, Principal Printer)

Ms Janet Kimeu
Advocate, Law Society of Kenya

Mr Michael Muchemi
Advocate, Law Society of Kenya

Mr Long’et Terer
Editor/CEO

Members co-opted to serve in ad-hoc Advisory Capacity

Ms Anne Amadi
Chief Registrar, The Judiciary

Amb Ukur Yatani Kanacho
Cabinet Secretary (Ag), National Treasury
(Represented by Mr Jona Wala,
Director, Accounting Services)

Mr Michael Sialai, EBS
Clerk of the Kenya National Assembly
Represented by Samuel Njoroge, Dep. Director,
Legislative and Procedural Services
Editor’s Note

Long’et Terer
CEO/Editor

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

From the Supreme Court, we highlight the precedent setting decisions in the cases of Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae). The petition before the Supreme Court dealt with whether the recommendations of the Commission on Revenue Allocation were binding on both Senate and the National Assembly when they deliberated on the Division of Revenue Bill and the Appropriation Bill; what was the effect of a failure between the Senate and the National Assembly to agree on a Division of Revenue Bill; whether there ought to be precise timelines within which the National Government should release equitable shares of revenue to county governments and whether the National Assembly could enact an Appropriation Act before enacting a Division of Revenue Act.

The Supreme Court held that under article 217 of the Constitution the passing of legislation on division of revenue was a shared mandate between the National Assembly and the Senate. Further, the principles of public finance set out in article 201 of the Constitution included the equitable sharing of national revenue and consultation on financial legislation and they related to both Houses of Parliament. Therefore, there was a joint role shared between the National Assembly and the Senate in the annual division and allocation of revenue Bills. The Division of Revenue Bill and the County Allocation of Revenue Bill were not money Bills within the definition of article 114(3) of the Constitution. They were therefore not within the exclusive competence of the National Assembly. A purposive interpretation of articles 95(4)(a) & 95(4)(b), 96(2), 110(1)(c), 114(3), 205 and 218(1)(a) of the Constitution read together with sections 38 to 41 of the Public Finance Management Act, made it quite clear that both the National Assembly and the Senate played a role in the division of revenue between the two levels of Government.

From the Court of Appeal, we highlight the issue on whether the Teachers Service Commission could be held vicariously liable for the sexual misconduct of its employee in the course of employment (whether it was necessary to issue circulars prohibiting sexual conduct between teachers and students to both students and teachers and what did the provision of a safe learning environment for children entail?; what was the role of the Teachers Service Commission where there were claims of sexual misconduct by a teacher?. This was seen in the case of Teachers Service Commission v WJ & 5 others [2020] eKLR where the Court of Appeal in Nairobi held that Teachers Service Commission was vicariously liable for the sexual misconduct of its employees in the course of employment. Teachers Service Commission had a statutory duty to ensure the minors had a safe learning environment which it failed to do. The absence of provisions for remedy for breach of that statutory duty was no bar to stop the minors from filing a claim of damages under the tort of negligence and the Constitution.

These are just a few of the jurisprudential decisions highlighted in this issue 49 of the Bench Bulletin and it is our heartfelt hope that you will find the publication both enlightening and beneficial.

Long’et Terer
CEO/Editor

The Deputy Chief Justice, Lady Justice Philomena M. Mwilu; Commissioners of the Judicial Service Commission; President of the Court of Appeal, Adan Mohammed, CS East Africa Affairs; Joe Mucheru, CS ICT; H.E Frans Makken, Netherlands Amb. to Kenya, Honourable Judges present; Chief Registrar of the Judiciary, The Director of Public Prosecutions, President, Law Society of Kenya, All heads of Agencies and Representatives of the National Council on the Administration of Justice, Distinguished Guests, Ladies and Gentlemen:

Good Morning!
Today is a great day for the Judiciary and the administration of justice. It marks the single most significant step in our long journey to harnessing Information Technology as an integral part of the delivery of services to our people.
It is exactly 10 years ago when the digitisation of court records was identified as a critical aspect of Judicial reforms by the Task Force that was chaired by Justice William Ouko. In their report published in July 2010 they said, and I quote, that “an ICT policy and master plan [should] be operationalised in the Judiciary to ensure strategic development of ICT infrastructure and systems for present and future needs.”
They observed, with what now appears to be prescient accuracy, that “judicial reforms must also focus on information and communications management in the institution” and that “Resources [should] be provided to the Judiciary to facilitate digitization of court records, automation of the recording of court proceedings and the establishment of interactive databases.”
Subsequently, there have been many reports, and many efforts, to mainstream ICT as an integral feature in the Judiciary’s day-to-day work. For example, the Judiciary Information Communication Technology (JICT) Committee chaired by the retired Justice Philip Waki, even as far back as 2011, was spearheading many infrastructural and other initiatives aimed at mainstreaming technology in the Judiciary. Along the way, countless pilot projects have been undertaken, most of them at the Milimani Law Courts, but the roll-out of extensive digitisation has remained elusive, with one challenge being consistent over the years: Lack of funds to move beyond the pilot stage.
Some of these pilot projects have proven to be highly successful. The implementation of the e-filing system at the Milimani Commercial and Tax Division (undertaken in close collaboration with Mr. Adan Mohammed, the then CS for Industrialization) has, for instance, directly contributed to the improvement of Kenya’s Ease of Doing Business. While most of these projects are yet to have a judiciary-wide impact, they have reaffirmed our institutional capacity to adapt to technology and to manage it for
the benefit of our stakeholders. Indeed, it is from the experiences earned and the lessons learnt in the pilots that we have reached where we are today. It has also been through the effort of the entire Judiciary juggernaut, driven by the desire to succeed, that has enabled us to come this far.

Ladies and Gentlemen,

From the onset, increased use of ICT has been identified as a key plank in our efforts to transform the Judiciary into a modern, progressive institution that is succinctly responsive to the needs of the people we serve. The Judiciary Transformation Framework (JTF), launched in 2012 by the former Chief Justice Willy Mutunga, and my own blueprint, Sustaining Judiciary Transformation (SJT), were very clear about this. When I launched the SJT in January 2017, we shifted from the institutional building and capacity development agenda that defined JTF and focused on a service delivery agenda. SJT emphasizes the improvement in the speed and quality of service delivery in the Judiciary by increasing efficiency and effectiveness at individual and system levels. One of our primary initiatives was the design and adoption of a Digital Strategy that sought to boost not only Judicial operations, but also Enterprise Resource Planning (ERP) capabilities in order to assist in our administrative functions.

Central to this was the establishment of an ICT infrastructure that would support these initiatives, including provision of internet access to all our courts as well as enhancement of our security and disaster recovery capabilities. As we speak, all our courts except Mbalambala and Kakuma Law Courts, which are in far-flung areas, are connected to reliable internet.

These efforts are anchored on the Judiciary ICT Masterplan 2018-2022, an ambitious blueprint that, once fully implemented, will see the Judiciary reap the full benefits of technology and dramatically improve our ability to deliver judicial services efficiently, effectively, and equitably.

Equity is an important variable here. No matter how efficient and effective we become, it will do little good to the people of Kenya if, by having excellent ICT assets such as what we are inaugurating today, it results in only a few privileged people being able to make use of it. If what we are launching today locks out sections of the community or is discriminatory and shows partiality to a class of litigants, we will have failed. Conscious of this need, we have taken care to ensure that everyone is well served by all the technological initiatives we adopt. I will talk more about this later.

Ladies and Gentlemen,

The Electronic Filing System we are launching today has been under development over the last three years. It is a robust system that will fundamentally change the way judicial officers and other judicial staff work, as well as the way court users interface with the courts.

Even though case filing is the core function of the system, it represents a transformation that touches on almost all court activities. I have heard some people ask whether, upon filing their documents online, they will be printed and put in physical files for use when they come to court. The answer to that is NO. The digitisation is total, meaning that in the courtroom, all parties will access case materials online. Even when hearings are going on, all parties will have access to the documents online. This means that the operation of court registries, as we know it today, will drastically change. Court documents previously stored and retrieved in physical files will henceforth be stored and retrieved in soft form from the digital registry.

This system which, I am proud to say, has been designed, developed, and implemented by our very own Judiciary’s Directorate of ICT has many advantages and is expected to significantly impact on the speed, accuracy and efficiency of service delivery.
One of the significant advantages of digitisation is the assurance of the integrity of court files. As many of you must be aware, litigants have been frustrated by constant loss or misplacement of court files or documents. With digitisation and the improvement of ICT infrastructure, such challenges will be a thing of the past.

The other challenge stakeholders in the Justice Sector have faced is authentication of court orders. The system we are launching today will seamlessly integrate with all major stakeholders such as the Office of the Director of Public Prosecutions (ODPP), the Prisons Department and the Probation Service when they are ready and be able to file court documents as well as obtain and verify the authenticity of court orders from the comfort of their offices. The system has many other facets to it.

In addition to the cases being registered in the system, it has an automated fees assessment and payment module which utilises various platforms such as Mpesa and Credit Cards to effect the required financial transactions and generate e-receipts. This will minimize pilferage of court revenue.

Integrated into the system is a process service module which enables electronic service of court processes.

Other important features include an indexed retrieval and viewing module for Judges and Magistrates to access documents; the ability to search for cases; and an integrated Court calendar.

Many litigants, including our brothers and sisters in the diaspora, never get to know what transpires in the hearing of their cases. Since court files are public documents, we will in future make it possible for the public, upon payment of the requisite fees, to access court files for perusal online.

Ladies and gentlemen,

As you know, time is among the court’s most valuable resources. Our digitisation efforts, therefore, must not merely pander to the prestige of achieving global standards in the use of technology, exciting though this is, but also ensure that it aids in improving our efficiency, leading to quicker resolution of matters. An integral companion to e-filing is the Case Tracking System (CTS), which we have already introduced in 60 court stations across the country. The remaining 72 stations will be using the system by end of October this year. CTS involves the monitoring and managing of cases in the court docket from the time the case is filed to the moment it is finally disposed of by way of trial, settlement or otherwise. When optimally used, it ensures that all cases progress swiftly without unnecessary delay, and feedback is given to Judiciary leadership when challenges occur in any of our courts.

An integral part of the CTS is a messaging service that allows us to send updates to our clients through SMS. The clients can also prompt updates by sending an SMS with the case tracking number to the short message number 22490.

Besides the CTS, the Judiciary is also implementing a digital court recording and transcription system in 32 courtrooms around the country. Six courtrooms in the Commercial Division of the High Court at Milimani are already operational while installation is currently being done in another 26 courts, including the Anti-Corruption court in Nairobi.

The full implementation of this system will bring an end to manual recording of court proceedings. The audio recorded proceedings will thereafter be passed on to transcribers who, through strict and elaborate procedures, will prepare the official court records in text form. The Judiciary has partnered with the Ministry of ICT through the AJIRA project which will engage the youth in doing transcription, thereby providing employment to thousands of youths.

Ladies and gentlemen,

ICT has enormous potential to improve the administration of justice. Indeed, we have seen it come in handy in enabling justice delivery in the face of the COVID-19 crisis. We have, since the onset of the pandemic, established virtual courts
and engaged litigants through online meeting applications. Hundreds of cases have been heard successfully despite open court activities being significantly reduced in the wake of the pandemic.

The Coronavirus pandemic has, in a way, become a blessing in disguise. Among the many long-term implications of our increased use of technology is that moving forward, we will no longer require expert witnesses such as the Government chemists, pathologists, ballistic experts, and handwriting experts to appear in court in person. We will use technological platforms to take their evidence from the comfort of their offices and thereby making it convenient for everyone involved.

These advancements are carefully guided by a robust Judiciary ICT Policy whose overall objective is to provide a governance framework for the acquisition, use and disposal of ICT in the Judiciary. Key objectives of the policy include ensuring that the security of our data and information is guaranteed.

Indeed, even as we launch this electronic filing initiative, one of the most recurrent questions is whether the integrity of materials filed and stored electronically will be maintained at all times.

The answer, and I do not have any doubts at all about this, is a resounding YES. Besides the routine security protocols like redundant systems, strong access controls and encryption, we have implemented specific security measures that reflect global best-practices in data security. Of course, it would be foolhardy for me to enumerate those measures here for obvious reasons but rest assured that great care has been taken to ensure the integrity of our electronic files.

**Ladies and gentlemen,**

We cannot expect that an undertaking of this magnitude can be fully implemented without some hiccups, either in the performance of technology or the ability of the people to use it properly. Besides, it is consistent with human nature to be apprehensive about change, sometimes even to resist it only to embrace it with enthusiasm later.

What I would like to assure you today, ladies and gentlemen, is that we shall strive to address all challenges that emerge as we implement the system, and to assist all our stakeholders to adapt to the new requirements as soon and as smoothly as possible. Towards this, we have undertaken extensive training not only for Judiciary staff but our external stakeholders as well.

**Ladies and gentlemen,**

As I said earlier, this system will not serve the highest ideals of justice delivery if it is only convenient to a section of court users. We have therefore initiated various programmes aimed at ensuring that ordinary wananchi seeking court services, especially those who may not have access to the necessary infrastructure, or are unrepresented and unfamiliar with court procedures are not disenfranchised in any way. These include the establishment of IT support centres within our stations where court users, especially the severely indigent ones who may not afford the fees charged in cyber cafes, can be assisted to file their matters.

On the other hand, cyber cafes which meet our stringent standards will be accredited and their staff trained so that they may assist court users to access the system.

In further pursuit of inclusivity, we plan to quickly roll out this service to other parts of the country, beginning with Mombasa and Kisumu. This will start as soon as we have sufficient storage capacity for the heavy data generated in the new system. To this end, we are at an advanced stage in procuring the necessary servers and storage capacity to ensure that we achieve this objective as soon as possible, but not later than in any case not later than three months from today.
Ladies and gentlemen,

To ensure that the increased use of ICT is fully anchored in law, we have undertaken various initiatives aimed at aligning the new processes to relevant legislations. We have finalised the development of practice directions, revised rules and proposed amendments to the Civil Procedure Act, the Evidence Act as well as the Criminal Procedure Act to align them with the ICT environment and facilitate the widespread adoption of technology in courts. The proposed changes are already being reviewed by our stakeholders including the Law Society of Kenya and the general public and we expect to receive their feedback soon so that we can complete the e-filing process.

Ladies and gentlemen,

The court digitisation journey has, since the onset, benefitted from generous funding from many of our supporters, and I wish to thank them all. I would like to single out the International Development Law Organisation (IDLO) for their support of the e-filing initiative from the start, as well as the United Nations Office on Drugs and Crime, GIZ, the World Bank through Judicial Performance Improvement Project and the Government of Kenya for your generous support. Many individuals have worked extremely hard to bring us to this point. Justice Gatembu Kairu, the Chair of the Integrated Court Management System (ICMS) Committee and the entire membership of that Committee and his predecessor, Justice Richard Mwongo; Justices Ouko and Waki whom I have already mentioned; the ICT Directorate led by the Ag. Director, Mr. Steven Ikileng; and many other stakeholders who have worked and continue to work hard, we thank you. The LSK, ODPP, Prisons Department, and all other stakeholders have been very supportive and we are grateful to all of them.

I conclude my speech with great hope that this system will generate the necessary impetus to fully integrate ICT into all justice processes. Honourable Judges, Judicial Officers, ladies and gentlemen, with regard to the use of technology, the proverbial hour is here with us. I am happy to note that we are all gradually embracing these changes. Indeed, the full benefit of technology will not be realised if we, the users, do not fully engage with it. On the other hand, failure to make a conscious effort to learn and be part of the change will render us irrelevant in this fast-changing landscape.

Let us all be the catalysts for change. Thank you and may God bless you all.

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

Supreme Court Judges – DK Maraga (CJ & P), MK Ibrahim, SC Wanjala, NS Ndungu and I Lenaola SCJJ in Council of Governors and 47 others v Attorney General and 3 others (Interested Parties); Katiba Institute and 2 others (Amicus Curiae) - Reference No 3 of 2019
Per MK Ibrahim, SC Wanjala & I Lenaola, SCJJ

“… the enactment of an Appropriation Act cannot precede the enactment of a Division of Revenue Act. This view is based on the premise that the cabinet Secretary responsible for finance submits the estimates of revenue and expenditure to the National Assembly, in his capacity as the Chief Budget Officer of the Executive. In that capacity, the Secretary must surely base his/her estimates on the National Government’s share as provided for in the Division of Revenue Bill. The National Assembly on its part has to approve the estimates of National Government expenditure and the estimates of expenditure for the Judiciary and Parliament on the basis of the Division of Revenue Act.”

Per DK Maraga (CJ & P), SCJ [concurring]

“Unless decisive action is taken to address the historical injustices engendered by the skewed development founded on Sessional Paper No. 10 of 1965 and subsequent policies; unless decisive action is taken to address the income and resource allocation inequalities in this country; unless decisive action is taken to address the soaring unemployment; and unless decisive action is taken to address the looting of public resources through corruption; only the naïve will fail to see that we are sitting on a powder keg the detonation of which will render the 2007/08 post-election skirmishes child play.”

Per NS Ndungu, SCJ [Dissenting]

“… there are a number of conflicting timelines that exist within the legal framework that need to be brought to the attention of Parliament for corrective action. There is need to clarify on the exact timelines within which the Division of Revenue Bill and the County Allocation of Revenue Bill can be introduced to Parliament. This may call for amendments to Articles 218 and 221 of the Constitution, and Section 190 and 191(1) of the PFM Act. The Senate and the National Assembly also need to ensure uniformity in their standing orders, as to when the two Bills may be introduced in Parliament.”

Supreme Court Judges – DK Maraga, CJ and P; PM Mwilu, DCJ & V-P; MK Ibrahim, SC Wanjala & I Lenaola, SCJJ in Bellevue Development Company Ltd v Francis Gikonyo & 3 others - Petition No. 42 of 2018

“Suing a Judge or judicial officer for rendering an unfavourable decision rather than appeal or seek a review, was in our opinion, a misconception and a step in the wrong direction on the part of the Petitioner. As a court, we are cognizant of the fact that at times, litigants may feel aggrieved by some of the decisions that Judges and judicial officers make. But this is not in any way an exoneration of the Petitioner in its actions.”
Court of Appeal Judges – R Nambuye, MK Koome and F Sichale, JJA, in Teachers Service Commission v WJ & 5 others - Civil Appeal No. 309 of 2015

“The African Charter on the Rights and Welfare of the Child and of which Kenya is a signatory urges member states to take ‘specific’ measures including exercising ‘due diligence’ and increasing awareness about sexual abuse. The Committee on the Rights of the Child recognized the prevention of violence against children to be ‘of paramount importance’. This is a non-delegable duty and cannot be delegated to any agency including the TSC. An absolute duty, as opposed to duties of reasonable care, give rise to an obligation on the defendant to ensure that reasonable care is taken. By contrast to the doctrine of vicarious liability, it is the direct relationship between the State and the children, as citizens that establishes the duty in this context, and then the conduct of the TSC that is used to establish its breach. The upshot of this is that a finding of failure by the TSC to exercise reasonable care, of itself, leads to a finding of breach of the State’s duty, which is apparent in this matter.”

Court of Appeal Judges – W Ouko, W Karanja and S Kantai, JJA, in Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others - Civil Appeal No. 14 and 32 of 2016

“Under that Act [Land Act], the Registrar carries out his functions without any restrictions and may rely on any other relevant document and existing records in order to resolve any dispute between landowners. Because a title deed is only prima facie evidence of the matters shown therein, the Registrar’s investigations, of necessity must encompass all entries in the register, rely on any other relevant document and existing records, conduct proceedings in accordance with section 14(1) and cause a survey to be carried out and determine the dispute.”

High Court Judge – W Korir, J, in Apollo Mboya v Judicial Service Commission & another; Justice Kalpana Rawal & 4 others (Interested Parties) - Petition 204 of 2016

“The JSC has no constitutional authority to try judges. It can receive or originate a complaint, investigate a complaint and make a determination whether the complaint meets the threshold for removal of a judge on the grounds found in Article 168(1) of the Constitution. Once it makes the determination, its mandate ends there. It cannot proceed to determine that the threshold has been met and proceed to recommend the removal of a judge. That is the province of the tribunal to be formed by the President. If the JSC determines that the allegations against the judge does not meet the criteria set out in Article 168(1), the JSC downs its tools and informs the complainant and the judge accordingly. The JSC has no authority of the Constitution and the law to make a finding of a lesser infraction and proceed to impose a sanction. It is only a trier of facts who can make a finding of guilt and impose a sentence. Such a role has not been given to the JSC by the people of Kenya. The right to a fair hearing does not envisage a situation where the investigator is also the judge in the same matter.”

High Court Judge – M Ngugi, J, in Assets Recovery Agency v Lilian Wanja Muthoni t/a Sahara Consultants & 5 others - Application No 58 of 2018

“POCAMLA and the entire legal regime related to recovery of proceeds of crime and unexplained assets has the underlying premise that crime and corruption are undertaken in a labyrinthine, secretive manner; that funds and assets may not be directly traced to crime; that while investigations may be carried out, some alleged perpetrators charged and subjected to trial, a conviction may not result.”
The applicants were the Council of Governors and all the 47 County Governments of Kenya. They sought an advisory opinion pursuant to article 163(6) of the Constitution from the Supreme Court with respect to four main issues. All the issues revolved around division of revenue.

The issues before the instant court were; whether the recommendations of the Commission on Revenue Allocation were binding on both Senate and the National Assembly when they deliberated on the Division of Revenue Bill and the Appropriation Bill; what was the effect of a failure between the Senate and the National Assembly to agree on a Division of Revenue Bill; whether there ought to be precise timelines within which the National Government should release equitable shares of revenue to county governments and whether the National Assembly could enact an Appropriation Act before enacting a Division of Revenue Act.

The court found that the Commission on Revenue Allocation (CRA) was established under article 215 (1) of the Constitution. Under article 216(1) of the Constitution, its principal function was to make recommendations for the equitable sharing of revenue raised by the National Government between the national and county governments and among the county governments.

The Supreme Court found that the term recommendation as used in article 216 of the Constitution should first and foremost be given its literal and natural meaning. A recommendation was a suggestion or proposal for a certain cause of action. Such a proposal would not ordinarily bind the person or entity that it addressed. However, categories of recommendation differ in their meaning, nature and effect, depending on the context in which they were deployed. It would be inappropriate to categorize the recommendations of the CRA on the sharing of national revenue as mere suggestions or proposals. The recommendations had to be accorded serious consideration by both Houses while debating the Division of Revenue Bill.

The Supreme Court held that a reading of articles 205, 204(4) and 218 of the Constitution left no doubt that the Constitution placed a very high premium on the recommendations of the CRA. Once those recommendations were tabled in Parliament, they had to be accorded due consideration before voting took place in either of the Houses, on the Division of Revenue Bill and the County Allocation of Revenue Bill. Therefore, if either of the two Houses passed a Bill envisaged under article 205 of the Constitution without considering the recommendations of the CRA, the resultant legislation would be unconstitutional.

The court held that article 218(2) of the Constitution provided that both the Division of Revenue Bill and the County Allocation of Revenue Bill, had to be accompanied by a memorandum setting out, *inter alia*, a summary of any significant deviation from the Commission on Revenue Allocation’s recommendations, with an explanation for each such deviation. Therefore, there was no doubt that Parliament could deviate from the recommendations of the CRA while debating any of the two revenue sharing Bills. Not every deviation from those recommendations had to be explained; only the significant deviations had to be explained. The recommendations of the CRA were not binding on the National Assembly or the Senate. However, the two Houses could not ignore or casually deal with the recommendations.

The Constitution ensured that Parliament would benefit from the technical insights of the CRA.
when debating revenue sharing and allocation Bills by requiring Parliament to consider the CRA’s recommendations without being bound. That ensured that the entities involved in the budget making process were able to critically apply their collective mind to the process. Parliament and the CRA could fail to agree on revenue allocation but they had to be guided by the objective criteria set in article 203(1) of the Constitution. The Supreme Court in the Matter of the Speaker of Senate & Another v the Attorney General & Another & 4 Others; Ref. No 2 of 2013, the Supreme Court opined that the Senate had a clear role to play, in the processing of the Division of Revenue Bill. The Speaker of the National Assembly invited the court to depart from that decision in order to clear an impasse between Senate and the National Assembly on a Division of Revenue Bill by excluding Senate from the process of passing the Bill into law. For the Supreme Court to depart from a prior decision, there had to be a clear and well-reasoned justification. The court noted that a party that wanted the Supreme Court to depart from a previous decision ought to ideally make a formal application in which he stated the reasons in justification for such a motion. The application would have to be served on all respondents who would then respond to it. None of the parties were given an opportunity to respond to the invitation by the Speaker of the National Assembly for the court to depart from its previous decision and an application was not made. The court was moved in a perfunctory manner and it was unable to consider the merits of the Speaker’s invitation in circumstances where the other parties were not heard on the same.

The court held that a preposition that in order to resolve the impasse, an application be made to the High Court under article 165 (3) (d), for orders compelling the National Assembly to provide for the equitable share of revenue due to the counties on the basis of the recommendations by the Commission on Revenue Allocation, was untenable for two reasons:-

a) adopting such a course of action would defeat the finding that the recommendations of the CRA were not binding; and,

b) it would fundamentally shift the revenue allocation function from the legislature to the judiciary, thus radically upsetting the doctrine of separation of powers.

The preposition of using the Revenue Allocation Act of the previous Financial Year as a fallback position to solve the impasse appeared practical and logical but it did not have its basis on any principle or provision of the Constitution.

The court held that the Constitution contemplated a scenario where the National Government would be unable to access funding due to the absence of enabling legislation. Article 222 of the Constitution provided that the National Assembly had power to authorise the withdrawal of money from the Consolidated Fund. It would be for purposes of meeting expenditure necessary to carry on the services of the National Government during that year until such time as the Appropriation Act was assented to. The withdrawal would not exceed one-half of the amount included in the estimates as expenditure for that year that had been tabled in the National Assembly and be included under separate votes for the several services in respect of which they were withdrawn, in the Appropriation Act.

The Supreme Court noted that while the withdrawal of money for the purpose of the National Government expenditure under article 222 of the Constitution was based on a percentage of the estimates of expenditure for that year, the same method could not apply to the County Government, since the estimates did not include the equitable revenue share due to counties. Logic would require that the percentage of the money to be withdrawn would be based on the Division of Revenue Bill; yet this would be legally untenable, given the fact that the Bill, was not only the subject matter of controversy, but was also yet to pass into law. In the circumstances, in the event of an impasse, the percentage of the money to be withdrawn would be based on the equitable allocation to counties in the Division of Revenue Act of the preceding financial year. The legislature should pass legislation to give normative form to that arrangement.

The Supreme Court noted that legislation for the implementation of the national budget and allocation of revenue to both the National Government and county governments had specific and rigid timelines within which they should be enacted because they operationalized the financial existence of the country. Failure by Parliament to discharge such a critical legislative function, in the absence of an emergency, or any other disaster that disrupted parliamentary business, would not only violate the Constitution, but also expose the country to existential danger. Such a Parliament had to be considered to have run its course and be dissolved.

The Supreme Court held that under article 261(7) of the Constitution, Parliament could be dissolved for failure to enact certain legislation within a specific period of time. That provision would not only apply to legislation listed in the Fifth Schedule to the Constitution but also to other legislation such as the Division of Revenue Act. Failure to enact such legislation by Parliament, in the absence of an emergency or other disaster, would invite the
enforcement of sanctions envisaged under article 261 of the Constitution. Therefore, if Parliament failed to agree on division of revenue during a second mediation under article 113 of the Constitution, any person could petition the High Court for a declaration to the effect that Parliament had violated the Constitution.

The Supreme Court found that under article 219 of the Constitution, a county’s share of revenue raised by the National Government had to be transferred to the county without undue delay and without deduction, except when the transfer had been stopped under article 225 of the Constitution. Unless there were timelines set by the Constitution or the law, a court had to consider each case on its own merits to determine whether there had been undue delay in the performance of an act by the concerned entity.

The court found that by not prescribing a specific time limit, article 219 of the Constitution allowed for a degree of flexibility on the part of the National Treasury in effecting monetary transfers to counties. The court was not the appropriate forum for a determination on precisely when monies due to counties should actually be transferred to the counties. However, the fact that the Constitution had not prescribed a specific timeline did not give the National Treasury the latitude to capriciously decide when to disburse funds to the counties.

The Supreme Court found that counties operated within rigid budgetary cycles and any delay in releasing funds to counties had to be justifiable and explained in good time. Releasing funds at a time when they could not be realistically utilized in the implementation of county projects in accordance with their budgets constituted a violation of the Constitution. A reading of article 218(1) and 221 of the Constitution did not provide for which of the two bills, namely the Division of Revenue Bill and the Appropriation Bill, should be enacted before the other. It was clear that once enacted, the Division of Revenue Act divided the revenue raised nationally between the two levels of Government while the Appropriation Act authorized the withdrawal and application of monies from the Consolidated Fund by the National Government.

The Supreme Court noted that both the Division of Revenue Bill and the County Allocation of Revenue Bill were to be introduced in Parliament at least two months before the end of each financial year. The estimates of revenue and expenditure of the National Government were also to be submitted to the National Assembly, at least two months before the end of each financial year. That sequence of events would lead to the following conclusions:

a) The Appropriation Bill was incapable of being introduced unless the estimates of revenue and expenditure had been approved and passed by the House.

b) The Appropriation Bill came into life after the Division of Revenue Bill since the latter would already have been introduced into Parliament at least two months before the end of the financial year.

c) The estimates of revenue and expenditure had to logically be based on or at the very least be in tandem with, the equitable share of revenue due to the National Government as provided for in the Division of Revenue Bill.

d) The Appropriation Act had to be based on the equitable share of revenue due to the National Government as provided in the Division of Revenue Act.

The Supreme Court noted that in an ideal situation, the enactment of an Appropriation Act could not precede the enactment of a Division of Revenue Act. The Cabinet Secretary responsible for finance would submit the estimates of revenue and expenditure to the National Assembly, in his capacity as the Chief Budget Officer of the Executive. In that capacity, the Cabinet Secretary had to base his/her estimates on the National Government’s share as provided for in the Division of Revenue Bill. Additionally, section 39 of the Public Finance Management Act left no doubt that the National Assembly, could not enact an Appropriations Act before enacting the Division of Revenue Act.

Per DK Maraga CJ [concurring]

The Chief Justice held that under article 259(1) of the Constitution, the Constitution was to be interpreted in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights, permitted the development of the law and contributed to good governance. Under article 259(3) of the Constitution, the Constitution would also be interpreted in accordance to the doctrine that the law was always speaking.

The Chief Justice noted that a holistic interpretation of the Constitution meant that the entire Constitution had to be read as an integrated whole with no one particular provision destroying the other but each sustaining the other.

The Chief Justice held that under article 93(1) of the Constitution Parliament consisted of the National Assembly and the Senate. The discharge of legislative functions was shared by the two Houses. Under article 95(1) and 95(2) the members of the National Assembly represented the people of the constituencies and special interests and deliberated in the National Assembly and resolved issues of concern to the people. Under article 96(1) of the
Constitution, the Senate represented the counties and served to protect the interests of the counties and their government. Article 96(2) of the Constitution clearly stated that Senate would participate in the law-making function of Parliament by considering, debating and approving Bills concerning counties as provided in articles 109 to 113 of the Constitution.

The Chief Justice found that under article 217 of the Constitution the passing of legislation on division of revenue was a shared mandate between the National Assembly and the Senate. Further, the principles of public finance set out in article 201 of the Constitution included the equitable sharing of national revenue and consultation on financial legislation and they related to both Houses of Parliament. Therefore, there was a joint role shared between the National Assembly and the Senate in the annual division and allocation of revenue Bills.

The Chief Justice noted that Division of Revenue Bill and the County Allocation of Revenue Bill were not money Bills within the definition of article 114(3) of the Constitution. They were therefore not within the exclusive competence of the National Assembly. A purposive interpretation of articles 95(4)(a) & 95(4)(b), 96(2), 110(1)(c), 114(3), 205 and 218(1)(a) of the Constitution read together with sections 38 to 41 of the Public Finance Management Act, made it quite clear that both the National Assembly and the Senate played a role in the division of revenue between the two levels of Government.

**Per NS Ndungu [dissenting]**

The judge held that a formal application for the court to depart from a previous decision was not a requirement where the matter at hand was an advisory opinion. In advisory opinions there were no interests at stake as would normally be the case in adversarial proceedings. Advisory opinions did not arise from any contests of rights or claims disposed of by regular process. In exercising advisory opinion jurisdiction, the court should not be constrained by procedures required in ordinary proceedings. The Constitution under article 167(3) anticipated that there would be occasional need for the Supreme Court to depart from its previous decisions. The Supreme Court was not bound by its decision in the Senate Matter 2013.

The judge noted that while rendering an advisory opinion, under article 163(6) of the Constitution, the Supreme Court could undertake any necessary interpretation of the Constitution. The court’s revision of its prior decision relating to a similar matter to the one under consideration, would not occasion prejudice to any party. It would clarify and outline a harmonious and comprehensive picture of the requirements for the legislative process and roles for the two Houses as provided under the Constitution. The request to depart from the decision in Senate Matter 2013 was not casually made. A lot of thought, real interest and effort went into making that proposition.

The judge found that a decision of the Majority in the Senate Matter 2013 ought to be reviewed especially because it did not take into account the architectural design of the Constitution and the legislative processes that arose from that design, with regard to the roles of the two Houses of Parliament as set out in articles 95 and 96 and part 4 of Chapter 12 of the Constitution. That design was intended to avoid situations where disputes between the two Houses of Parliament defeated or delayed important aspects of public finance and potentially threw the country into chaos by rendering operations by either level of government impossible or impractical.

The judge held that a design as drawn by the drafters of the Constitution, established which House would originate the Division of Revenue (DOR) Bill, as a money bill and what was to happen when there was an impasse over a money bill. In most jurisdictions, where there was a deadlock between two Houses, the resolution was to allow the final determination to be made by the house with veto powers, which was the house that originated the Division of Revenue Bill. Further, in other democratic and bicameral jurisdictions, the Division of Revenue Bill was considered to be a money bill and therefore legislative processes that applied to money bills applied to it. The Division of Revenue Bill was a money bill that could only be introduced by the National Assembly in accord to article 109 (5) of the Constitution. Article 95(4)(a) of the Constitution reinforced that position. It stated that the National Assembly determined the allocation of national revenue between levels of Government as provided in part 4 Chapter 12.

The judge noted that the National Assembly as the people’s representative budgeted, collected, shared between the levels of government and audited revenue and it was knowledgeable on the finances of the country. The National Assembly was best placed to originate the Division of Revenue Bill as it financed the revenue share and proposed revenue collection forecasts in the requisite division. In the event of a deadlock between the Senate and National Assembly, then the National Assembly as the originating house should have final say or even veto powers.

The judge found that Article 203(2) of the Constitution guaranteed county governments an equitable allocation of a minimum of fifteen percent of all national revenue collected by the National Government. That amount ought to be readily available to county governments as it was already
Cabinet Secretary had to submit to Parliament a Division of Revenue Bill and County Allocation of Revenue Bill prepared by the National Treasury. The Budget Policy Statement, under section 25 of the Public Finance Management Act would be introduced to Parliament by February 15. Under article 218 of the Constitution, a Division of Revenue Bill and a County Allocation of Revenue Bill, had to be introduced in Parliament at least two months before the end of each financial year. Effectively, there was a conflict between the Public Finance Management Act and the Constitution in that the statute altered constitutional timelines set for the introduction of Division of Revenue Bill and a County Revenue Allocation Bill in Parliament.

The judge noted that in an ideal situation where the two Houses agreed on a Division of Revenue Bill and a County Allocation of Revenue Bill, the process ought to end by June 30. Where the two Houses of Parliament failed to agree on an ordinary Bill, the Bill would be referred to a Mediation Committee under article 113 of the Constitution. The Committee would be comprised of an equal number of members from each House and it would create a version of the Bill that was acceptable to both Houses. If the Committee failed to agree on the Bill then that Bill would be defeated. That also meant that even after a single mediation process, Parliament would not meet the constitutional timelines of passing the two Bills.

The judge finally found that there were a number of conflicting timelines that existed within the legal framework that needed to be brought to the attention of Parliament for corrective action. There was need to clarify on the exact timelines within which the Division of Revenue Bill and the County Allocation of Revenue Bill could be introduced to Parliament. That would call for amendments to articles 218 and 221 of the Constitution, and section 190 and 191(1) of the Public Finance Management Act.
Supreme Court

Procedure to be followed by a litigant claiming fraud, dishonesty and perversity against a judge

Bellevue Development Company Ltd v Francis Gikonyo & 3 others [2020] eKLR
Petition No. 42 of 2018
Supreme Court of Kenya
DK Maraga, CJ & P; PM Mwilu, DCJ & V-P; MK Ibrahim, SC Wanjala & I Lenaola, SCJJ
May 15, 2020
Reported by Kakai Toili

Judicial Officers – judicial immunity – rationale and purpose – judicial immunity vis-à-vis impunity – where it was claimed that judicial officers acted fraudulently and dishonestly - what was the distinction between judicial immunity and impunity - what was the nature of judicial immunity - Constitution of Kenya, 2010, article 160(5).

Judicial Officers – judicial immunity – factors to consider in determining the existence of judicial immunity – acting in good faith, acting in excess of jurisdiction and seizure of absent jurisdiction - acting in good faith vis-à-vis bad faith - acting in excess of jurisdiction vis-à-vis seizure of absent jurisdiction - when would a person be considered to have acted in bad faith – what was the distinction between acting in excess of jurisdiction and seizure of absent jurisdiction - Constitution of Kenya, 2010, article 160(5).

Judicial Officer – judges – judges’ conduct – where a litigant made claims of fraud, dishonesty and perversity against a judge - what was the procedure to be followed - Constitution of Kenya, 2010, article 168.

Words and Phrases - good faith – definition of good faith - a state of mind consisting in honesty in belief or purpose, faithfulness to one’s duty or obligations, observance of reasonable commercial standards of fair dealing in a given trade or business, or absence of intent to defraud or to seek unconscionable advantage - Black’s Law Dictionary, Ninth Edition at page 713.

Brief facts
There was a dispute between the petitioner and the 4th respondent, and an arbitrator was appointed to determine the dispute. The arbitrator issued directions as to when the statement of claim was to be filed. The 4th respondent failed to comply with the directions and instead, filed an application seeking extension of time to file its statement of claim. The arbitrator did not issue any direction or orders on that application. The 4th respondent later on served the arbitrator and the petitioner with its statement of claim. The arbitrator issued a ruling stating that he had the jurisdiction to determine the dispute. Aggrieved by that decision, the petitioner filed a suit at the High Court which held that there was no valid claim before the arbitrator. No appeal was preferred against that judgment. Later on, the 3rd respondent was appointed as the sole arbitrator to handle the dispute. The petitioner subsequently filed an application at the High Court seeking to stop the arbitration proceedings.

The 1st respondent issued a ruling determining that the arbitration proceedings before the previous arbitrator were distinct from those pending before the sole arbitrator and that they could proceed. In June 2014, the petitioner filed an application for review of the decision of the 1st respondent. The 2nd respondent, presiding over the review application dismissed the application. Aggrieved by the decisions of the 1st and 2nd respondents, the petitioner filed a petition at the High Court which held that it lacked the jurisdiction to hear and determine the matter as it sought to enquire into decisions of courts of equal status. The petitioner filed an appeal at the Court of Appeal, however, it did not pursue the appeal despite being issued with a hearing notice. The petitioner also filed an appeal from the judgment of the High Court contending that the 1st and 2nd respondents had acted in bad faith and breached its rights to fair trial. The Court of Appeal dismissed the petitioner’s appeal thus leading to the filing of the instant appeal.

Issues
i. What was the procedure to be followed by a litigant who made claims of fraud, dishonesty and perversity against a judge?
ii. What was the nature, rationale and purpose of judicial immunity?
iii. What was the distinction between judicial immunity and impunity?
iv. When would a person be considered to have acted in bad faith?
v. What were the factors to consider in determining the existence of judicial immunity?

vi. What was the distinction between acting in excess of jurisdiction and seizure of absent jurisdiction?

Relevant provisions of the law

Constitution of Kenya, 2010

Article 160(5)

A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.

Held

1. Article 160(5) of the Constitution entrenched the immunity of judicial officers who acted in good faith. The immunity granted by article 160(5) encapsulated protection from legal proceedings founded on acts committed or omissions made by judges in the lawful performance of their judicial functions.

2. The concept of judicial immunity was not without foundation. Judicial immunity was an important tenet in the delivery of justice and the maintenance of the rule of law. For the proper administration of justice, judges should freely express themselves in matters brought before them. A judge, as well as other judicial officers, were required to have confidence in carrying out their judicial functions without the fear that they would be prosecuted or harassed for their acts or omissions.

3. The rationale for judicial immunity was the preservation of independent decision-making capabilities of judicial officers; immunity for judicial acts was thus necessary so that judicial officers could make the sometimes controversial decisions that were their judicial obligation and mandate to make, independent of personal considerations, including fear of personal liability. The concept of judicial immunity was also an important aspect of judicial independence under the doctrine of the separation of powers. The protection offered to judicial officers in article 160(5) of the Constitution was inherent in the independence of the Judiciary as a state organ within the doctrine of separation of powers.

4. It would be repugnant to the cause of justice if judges would act in fear of legal actions being brought against them for decisions they made in the course of discharging their mandate. The immunity granted by article 160(5) of the Constitution was not necessarily for the benefit of the judicial officer concerned. It was for the public and in particular for litigants appearing before the courts.

5. Besides freedom of thought, expression and action, the other cardinal factor encapsulated in judicial immunity was finality. It would be a travesty of justice if disgruntled litigants were permitted to sue judges who ruled against them thus prolonging litigation unnecessarily and personalizing matters that judges ought not to have had personal interest in.

6. There was a clear distinction between judicial immunity and impunity, and it was important that judicial officers understand that they needed not find themselves on the side of latter. Article 160(5) of the Constitution drew the line between immunity and impunity; the line crossed where acting lawfully and in good faith met willful and negligent abandonment of the oath of office to uphold the integrity and independence of the Judiciary and to dispense justice without fear or favour. Article 160(5) was not blind to that inherent distorted character between judicial immunity and impunity, and thus provided a resonating standard for judicial officers to act according to the tenets enunciated under the Constitution; to ensure that there was rule of law, protection of fundamental rights and freedoms in the Bill of Rights and to do justice to all. The latter point spoke to the lawful action qualification as it did to the good faith expectation.

7. Judicial immunity was meant to provide protection to judicial officers from third parties’ interference, influence or obstruction. Judicial immunity was also necessary to protect the reputation and perception of the Judiciary, to maintain the trust of the public and ensure transparency and accountability. A judge acting in his official judicial capacity thus enjoyed immunity from liability for judicial acts performed within the scope of his or her jurisdiction.

8. Article 160(5) of the Constitution granted judicial officers immunity if they acted in good faith. The antithesis to acting in good faith would be to act in bad faith, with a willful intent to act dishonestly or unfaithfully in the performance of judicial acts. The Constitution did not define bad faith. Bad faith included malicious or fraudulent, dishonest or perverse conduct as well as gross illegality. Bad faith existed only when the office-bearer acted with the specific intent to deceive, harm or prejudice
another person or by proof of serious or gross recklessness that revealed a breakdown of the orderly exercise of authority so fundamental that absence of good faith could be reasonably inferred and bad faith presumed.

9. Besides acting in good faith there was a two-tiered approach to determining whether judicial immunity applied:
   a. whether the acts were judicial acts; and
   b. whether the acts were acts performed by the judge in his judicial capacity.

Regardless of any alleged violation of due process, procedural errors did not deprive a judge of immunity because due process necessarily attached to any act performed in a judicial capacity.

10. There was a distinction between excess jurisdiction and clear and deliberate seizure of absent jurisdiction; the former connoted that the judicial officer did not apprehend his jurisdictional limits, and the latter elaborated the deliberate corrupt or malicious seizure of jurisdiction by judicial officers, with obvious consequences on the latter.

11. Save in a clear case of deliberate and unlawful usurpation or seizure of jurisdiction where none existed or some other glaring impropriety, if a judge acted in the honest belief that his act was within his jurisdiction, he was protected. While acting in that belief, the protection continued notwithstanding any error in his reason for doing the act or his method of doing it. As such, if a judge acting in his capacity as a judge, acted in good faith in the lawful performance of his duties, he had absolute immunity even when he acted in excess of his jurisdiction. The protection or immunity of a judge also went into administrative acts. The immunity accorded to a judge was absolute in the meaning attributed to the expression by article 160(5) of the Constitution.

12. Fraud was a serious quasi-criminal imputation, a judge whose conduct was fraudulent, dishonest or perverse, was a disgrace to the cause of justice. A judge's act of bad faith undermined his or her integrity and fidelity to the judicial oath of office. Under the law, the remedy for a litigant making allegations of fraud, dishonesty and/or perversity lay, not in a suit against such a judge but in a petition to the Judicial Service Commission for removal from office under article 168 of the Constitution. Article 168 had an elaborate procedure which entitled both a complaining party and the subject judge the opportunity, both at the Commission and in a tribunal set up under article 168(5) thereof, to a fair hearing. A suit directly against a judge for alleged misconduct or misbehavior was never an expectation of the drafters of the Constitution.

13. A judge remained unquestionably immune as long as he did not take actions that intentionally and plainly prevented litigants from enjoying their constitutional and statutory rights. The duty imposed on a judge was only to recognize that his own decisions could sometimes be in error and to ensure that orders affecting important constitutional rights could be reviewed or appealed in another court. However, the conduct of a judge who acted *mala fides* or unlawfully could thus trigger proceedings before the Judicial Service Commission and could ultimately lead to his removal thus the need for extreme care in the enjoyment of immunity.

14. It could not be said that the petitioner was denied an opportunity to seek appellate or alternative relief from what it considered an affront to its constitutional right to fair hearing under article 50 of the Constitution. Other than legal proceedings against the 1st and 2nd respondents, various avenues were available to it, and it was up to it to decide which avenue best suited its interests. The petitioner proffered an appeal to the Court of Appeal. For reasons unknown or unexplained, it chose not to pursue that appeal but instead filed another cause. The petitioner thus knew and initially chose the appeal mechanism as a means of seeking relief but later abandoned it. It could not therefore be heard to claim that it was denied an opportunity to be heard and that there was a violation of its constitutional rights under article 50.

15. No evidence was provided on the claim that in dismissing the petitioner's applications, the 1st and 2nd respondents acted in bad faith and without jurisdiction thus violating the petitioner's rights to a fair trial in its dispute with the 4th respondent. That was not the act of a serious litigant or complainant even if the 1st and 2nd respondents had no judicial immunity.

16. Suing a judicial officer for rendering an unfavourable decision rather than appealing or seeking a review was a misconception and a step in the wrong direction on the part of the petitioner. At times, litigants could feel aggrieved by some of the decisions that judicial officers made. However, that was not in any way
an exoneration of the petitioner in its actions. To seek relief by apportioning an unwarranted attack on the 1st and 2nd respondents, who were lawfully exercising their judicial function, was not only tantamount to harassment and intimidation of the judicial officers, but also a red herring that the petitioner conceived to deny or delay the 4th respondent’s right to a remedy under their contract.

17. To amount to impunity, a judge’s act had to be a clear and deliberate seizure of absent jurisdiction. If proved, such acts would not only be an attack on the integrity and conduct of the 1st and 2nd respondents, but also a reprehensible affront to the cause of justice and the independence of the Judiciary. Such acts were tantamount to tarnishing the image of the Judiciary, violating its integrity and putting all judicial officers into disrepute. A mere statement that the 1st and 2nd respondents acted with impunity did not suffice. The petitioner had not brought forth any iota let alone credible evidence that the 1st and 2nd respondents acted in bad faith or against the law.

18. The 1st and 2nd respondents as judges of the High Court acted in accordance to and within their jurisdictional limits under article 165 of the Constitution. They could have rendered decisions which were unpalatable to the petitioner, that too was within their judicial function. The petitioner chose to challenge those decisions through an unorthodox approach could not be lauded but ought instead to be condemned.

Petition dismissed; petitioner to bear the costs of all the respondents, both in the court and the superior courts below.
Court of Appeal

The petition which challenged an on-going process for the design and installation of a Mobile Management System (DMS) in the mobile communications sector was filed prematurely.

Communications Authority of Kenya v Okiya Omtata Okoiti & 8 others
Civil Appeal No 166 of 2018
Court of Appeal at Nairobi
W Ouko (P), MK Koome, DK Musinga, JJA
April 24, 2020
Reported by Beryl Ikamari

**Civil Practice and Procedure** - institution of a suit - ripeness - where a petition was brought to challenge an on-going process for the design and installation of a DMS in the mobile communications sector, on grounds that it threatened privacy rights - whether the suit was premature and hypothetical given that the design and functioning of the DMS was still under discussion.

**Constitutional Law** - national values and principles of governance - public participation - adequacy of public participation and consultations, on the design and installation of a DMS in the mobile communications sector, were still on-going - whether it was possible at that stage to determine whether public participation for the DMS was adequate.

**Constitutional Law** - fundamental rights and freedoms - consumer protection rights and rights to privacy - allegations that the proposed design and installation of the DMS by the Communications Authority of Kenya would give access to mobile communication device user’s private information to third parties - whether under the circumstances consumer protection rights and rights to privacy were violated.

**Constitutional Law** - constitutional petition - precision in drafting a constitutional petition - whether a petition disclosed any violations of consumer’s rights to privacy.

**Brief facts**

At the High Court, the petitioner challenged the proposed installation of a device known as the Mobile Management System (DMS) by the Communications Authority of Kenya (CAK). He said that it would occasion the infringement of various rights including rights to privacy, fair administrative action, property and consumer protection. The appellant explained that it was concerned about theft of mobile devices and the proliferation of counterfeit or illegal devices. It had therefore found it necessary to create a centralized Equipment Identification Register (EIR) which was the DMS. The creation of such a register was within its mandate. It was necessary to facilitate the implementation of the DMS and creation of a system that could define and identify counterfeit devices and substandard goods, reported lost or stolen devices and instances of SIM boxing operations that had infiltrated the industry and were evading payment of licences and taxes.

In responding to the question of infringement of privacy rights, the appellant said that the system would not create automatic access to the call data records (CDR) or content of such calls concerning any mobile number and the access that was requested from the mobile operators EIR’s and home location register was for purposes of identifying the IMEI, IMSI and MSISDN for each device. The respondent added that the DMS was at design stage and therefore the petition was premature and based on unfounded allegations.

The petition was successful. The High Court issued various orders including orders to the effect that the setting up of the DMS was unconstitutional as it was done without adequate public participation and was a threat to the privacy rights of mobile communication device users. The appellant was prohibited from setting up the DMS in that manner.

The appellant challenged the High Court’s decision. It stated inter alia that the High Court failed to hold that the petition was premature or hypothetical and that it considered extraneous and unpleaded matters in concluding that the DMS threatened rights to privacy.

**Issues**

i. Whether a suit intended to challenge the proposed design and installation of the
Mobile Management System (DMS) by the Communications Authority of Kenya was hypothetical and premature.

ii. Whether there was adequate public participation in the proposed design and installation of the DMS.

iii. Whether the installation of the DMS threatened the consumer's rights to privacy.

iv. Whether the pleadings as drawn disclosed any violations of consumer rights to privacy.

Held

1. As the first appellate court, the court had a duty to re-evaluate and re-analyse all the material that formed part of the pleadings and affidavit evidence which informed the decision of the High Court.

2. The case as pleaded in the petition filed by the 1st respondent was slovenly drawn; it was made up of generalized allegations that were wholly predicated on unsubstantiated statements taken from newspaper reports and statements made by unnamed technical experts. The probative weight to be given to statements of facts contained in newspaper cuttings, required the maker of the statement to appear in court and be subjected to court room processes for that statement to be admissible in evidence.

3. The pleadings were not elegantly drawn. In an adversarial system, a party was bound by their pleadings and that protected the other party from being ambushed with new claims in the course of a hearing.

4. A petition should set out with a reasonable degree of precision particulars about how alleged acts amounted to infringement of the person's constitutional rights. The petition and the supporting affidavits were based on allegations of what was feared could happen, conjectures or at best unconfirmed sources of information.

5. The High Court did not rely on the 1st respondent's pleadings alone. There was a supporting affidavit made on behalf of the 7th respondent which was responded to extensively. Considering that the overarching principle in the administration of justice was to do substantive justice, it was prudent to consider and determine all issues raised in the appeal.

6. The supporting affidavit of the 7th respondent was in support of the petition and it had letters annexed to it. It was those letters that formed the foundation of the petition and not the unsupported allegations in the petition.

7. The High Court overlooked the statutory mandate of the appellant which was as stated in the Kenya Information and Communication Act, No 2 of 2018 (KICA) that was *inter alia* to licence and regulate postal information and communication services. The High Court also did not identify the actual probable evidence that led to the conclusion that DMS would intrude on privacy and even if there were issues of concern which were still being addressed. Another key concern that the High Court overlooked was the undisputed fact that there were acknowledged challenges in the sector which needed to be fixed.

8. In fixing challenges in the mobile communications industry, there was a strategy which was implemented in the 1st phase where about 1.8 million stolen and counterfeit devices were netted and switched off. However, the challenges escalated to another level where the purveyors of counterfeit devices became more high-tech and started cloning genuine IMEI numbers to the counterfeit devices whose detection was not possible. In addition, the appellant was also faced with proliferation of SIM boxing operators who were operating illegally without a licence or remittance of taxes in contravention of the law. Had the High Court considered the nature of those challenges, it would have arrived at a different conclusion. The High Court, in considering those challenges, would have balanced the right to privacy and allow the appellant execute its mandate while following the law and in consultation with the other players in the industry.

9. The High Court over concentrated on the interpretation of an aspect of the term 'access' in a narrow sense in regard to retrieving data which it took to mean intrusion of privacy of communication. The High Court did not consider other aspects of 'access' such as making use of the resources to address the challenges at hand. In accessing the data there was fear that the right to privacy was likely to be infringed and that fear seemed to have preoccupied the High Court. The right to privacy was important but the issues of abuse by unscrupulous mobile operators also needed to be tackled so as to strike a balance between securing the right to privacy and dealing with the problem without infringing the right to privacy.

10. In setting out the DMS, in pursuit of the appellant’s mandate to regulate the mobile communication sector, the appellant had a duty to abide by the law. There was no concrete
evidence that the DMS was going to spy or intrude on private communication other than the unsupported newspaper cuttings.

11. Courts could not undertake the appellant’s mandate; they could only adjudicate concrete disputes. There was apprehension that rights could be infringed but it had not crystalized, as meetings with technical teams to discuss the design, architecture and configuration of the DMS were ongoing.

12. There was no credible evidence to demonstrate that the DMS was meant to spy on consumers’ private information other than to net out the illegal operators.

13. There was ongoing public participation. There were ongoing consultations on how the DMS would operate. Since that process was not completed, it would be premature to decide whether public participation was adequate or not, noting that there was no known science of determining that and such a determination would be based on a consideration of several factors.

Appeal allowed.

Orders:-

i. The orders of the High Court of April 19, 2018 were set aside.

ii. In exercise of its mandate of developing a DMS system, the appellant had to continue with the consultations that were ongoing with the stakeholders and MNOs prior to the filing of the petition so as to complete the technical and consumer guidelines on the DMS.

iii. The guidelines/regulations should be subjected to public participation.

iv. Each party to bear its costs of the appeal.

Teachers Service Commission is vicariously liable for the sexual misconduct of its employees in the course of employment.

Teachers Service Commission v WJ & 5 others [2020] eKLR

Civil Appeal No. 309 of 2015
Court of Appeal at Nairobi

R Nambuye, MK Koome & F Sichale, JJA
April 24, 2020
Reported by Kakai Toili

Labour Law – employment – employer-employee relationship – vicarious liability of an employer for the acts of an employee - where a teacher committed sexual misconduct in the course of employment - whether the Teachers Service Commission could be vicariously liable for the sexual misconduct of its employee - Teachers Service Commission Act (repealed), section 7(2)(c).

Constitutional Law – constitutional commissions – Teachers Service Commission (TSC) – role – where there were claims of sexual misconduct by its employee – where TSC issued circulars prohibiting sexual conduct between teachers and students – where the circulars were only issued to the teachers - whether it was necessary to issue the circulars to both students and teachers - Teachers Service Commission Act (repealed) section 4(2).


Jurisdiction – jurisdiction of the Court of Appeal – jurisdiction to interfere with the High Court's exercise of discretion to award damages - what were the circumstances in which the Court of Appeal could interfere with the High Court's exercise of discretion.

Brief facts

The 1st and 2nd respondents (minors) filed a claim at the High Court against the appellant (TSC) and alleged that the 3rd respondent, who was the deputy head teacher and the minors’ Kiswahili teacher, had violated the minors. It was claimed that TSC had failed to discharge its constitutional and statutory mandate which included the exercise of disciplinary power over teachers who breached the provisions of the Code of Regulations for teachers. TSC claimed that it received information that the 3rd respondent had breached the provisions of the Code of Regulations for Teachers by sexually abusing the minors on various occasions and that it carried out disciplinary proceedings against the 3rd respondent, and as a result of the proceedings, it dismissed the 3rd respondent.

The High Court held that the allegations of sexual abuse had been proved on a balance of probabilities and that the minors had suffered a violation of their rights to dignity, health and education. The
High Court also held that there was insufficient enforcement of the TSC circular prohibiting sexual contact between teachers and students, and the Code of Ethics and the policies were not properly disseminated in schools. The High Court further held that there was failure by the State to provide legal remedies and support for children who were victims of sexual abuse by teachers and that the TSC, the State and 4th respondents were vicariously liable for the wrongful acts of the 3rd respondent. Aggrieved by that decision, the appellant filed the instant appeal.

Issues

i. Whether the Teachers Service Commission could be held vicariously liable for the sexual misconduct of its employee in the course of employment.
   a. Whether it was necessary to issue circulars prohibiting sexual conduct between teachers and students to both students and teachers.
   b. What did the provision of a safe learning environment for children entail?

ii. What was the role of the Teachers Service Commission where there were claims of sexual misconduct by a teacher?

iii. What were the circumstances in which the Court of Appeal could interfere with the High Court’s exercise of discretion to award damages?

Relevant provisions of the law

Teachers Service Commission Act (repealed)

Section 4(2)

It shall also be the duty of the Commission to keep under review the standards of education, training and fitness to teach appropriate to persons entering the teachers service, and the supply of teachers, and to tender advice to the Minister from time to time on the aforesaid matters and on such other matters as may be referred to it by the Minister.

Section 7(2)(c)

A person shall be entitled to be registered as a teacher if—in the case of a person whom the Commission wishes to employ, his education, fitness to teach and experience are such as, in the opinion of the Commission, to warrant his registration.

Held

1. As the first appellate court, it was the court’s duty to re-evaluate the evidence before the High Court, and ascertain if the trial court came to the correct conclusion in respect to both facts and the law. Even though the 3rd respondent had been acquitted of the criminal charges by the Magistrate’s Court, the minors’ statements and those of their guardians, with respect to the events that took place on July 4, 2010 in the 3rd respondents’ house, and in the classroom on July 30, 2010 were consistent enough to draw a conclusion of culpability based on the test of balance of probabilities. Furthermore, the TSC’s disciplinary action involving interdiction, investigation, dismissal and de-registration sufficiently showed that the 3rd respondent, a deputy head teacher in charge of the minors at the time, committed acts amounting to sexual assault against the minors, or conducted himself inappropriately as a teacher, so much so that his employer found it justifiable to not only dismiss him from employment but also to deregister him as a teacher. The 3rd respondent did not challenge either his dismissal or his deregistration.

2. Many teachers were serial offenders who abused students in one school and were often transferred to other schools, where the abuse continued. That meant that;
   a. there was insufficient enforcement of the circular and the code of ethics and the steps taken by the State and TSC were in many respects limited and ineffectual; and,
   b. there was a failure in providing support and remedies for children who could be subjected to sexual violence by their teachers.

3. The minors were vulnerable victims who were under the authority and power of the 3rd respondent. TSC as the employer of the 3rd respondent did not adduce evidence to show how the regulations were cascaded and taught to the students who needed the information even much more than the teachers. It was not enough to issue circulars to teachers or schools while leaving out students. Students were the potential victims who needed the information more than even the teachers.

4. Bearing in mind the prevalence of the problem of sexual abuse by teachers, the State and TSC had a higher duty to exercise reasonable care so as not to expose children to dangerous elements within the school. Providing a safe learning environment did not only refer to infrastructure, but also ensuring the dignity of the child was not violated more so by their caregivers. By parity of reasoning, if the minors for example had sustained physical injuries, say by an accident and while in the school premises,
which accident was caused by failure of the school, the school and the State would also be vicariously liable.

5. There were circulars and policies that prohibited sexual interaction between a teacher and a child, but that did not mean the mere existence of policy in itself empowered the child victims to question the legitimacy of the teacher's sexual requests, nor did it show how a child could make a report of the incidences of sexual abuse. For example, TSC had a duty to ensure that the policy was put in the notice board of every classroom and for the head teacher to sign a form confirming that both teachers and students had been explained the content of the policy.

6. There had to be present, a reporting procedure such that if a student was sexually abused, the matter could be reported to an impartial office where the privacy of the child was observed and the matter was followed through the justice system. The 3rd respondent was in charge of the school's discipline and counseling and one wondered where the minors were to report. The measures employed by the TSC and the State to provide a safe learning environment for children were insufficient and ineffective and the High Court's judgment should have been used to strengthen and operationalize the policies.

7. The primary function of the ‘course of employment’ requirement was to ensure that the employee’s tort was sufficiently linked to the employer's enterprise, so as to justify the imposition of liability on the employer. It thus limited the responsibility of the employer to acts committed by the employee, acting in their employment capacity, and excluded those related to personal or private life. Although the incidences that took place on July 4, 2010 took place in the 3rd respondent's house, the opportunity to lure the minors to his house occurred in school where he exercised power and authority over them. The minors were students who were supposed to obey their teacher. The abusive acts continued from the house as they were followed by other instances of the sexual abuse, such as the one that occurred on July 30, 2010, which happened in a classroom.

8. A teacher’s work was to offer protection to his students and not to take advantage of their tender age and abuse them. An act would be deemed to have been committed during the course of employment if there was a close connection between the unauthorized conduct and the employment. There was a close connection between the conduct of the 3rd respondent as a teacher when he abused his position as a teacher and abused his students.

9. The level of risk faced by the minors in the instant appeal was elevated due to the prevalence of sexual abuse in Kenyan schools which was a matter of public notoriety as conceded by TSC itself worthy of judicial notice. The minors' case was not an isolated incident and TSC was well aware that a real danger existed where innocent school children were routinely subjected to abuse by their teachers who stood in a position of loca parentis with the children. The appellant's submission that there were claims that the 3rd respondent had a history of sexual misconduct which led to his transfer to the school where the alleged acts occurred did not help matters. As a matter of public policy, TSC had a duty to investigate such allegations before transferring the 3rd respondent so as not to endanger the minors as it came to pass. Once the employee had been hired, TSC had a legal duty to supervise the employee and his conduct while at work in order to shelter 3rd parties more so children from risk. That was a statutory duty under section 4(2) of the repealed Teachers Service Commission Act.

10. Under the theory of negligent retention (also known as negligent supervision), an employer was held liable for retaining an employee who it knew or should have known was not fit for the employment position. The theory placed an affirmative investigative duty on the employer to remedy improper activity when they knew or ought to have known of its existence within the workplace. When applying negligent retention theory, courts focused on whether the employer had notice concerning past sexual improprieties and/or what measures, if any, the employer took to reprimand or dismiss the abusing employee. Notice could be in the form of actual notice or constructive notice of facts which should have suggested that the employee posed a special threat. Actual notice was that which was given directly and personally while constructive notice was information or knowledge of a fact imputed to a person who had a duty to inquire into it.

11. Through a report by a child therapist who documented how when the school community learnt of the sexual abuse of the minors, some teachers repeatedly mocked the minors while defending the 3rd respondent, suggested that there was an existing culture of tolerance to sexual abuse of students which thrived in that school. The report also went further to show that TSC's Code of Regulations was not in use
in that school; there was failure to ensure the teachers were properly instructed not to sexually abuse children and likewise children were not empowered on how to report their teachers when subjected to abuse.

12. Liability in tort depended on reasonable foreseeability of loss and not merely on the directness or otherwise of the consequences. TSC took on the risk that its employee would commit a legal wrong especially when he was transferred to the school, and failure to warn the school and students of the 3rd respondent’s weakness. TSC was accordingly liable for the creation of such risk as there were no credible mechanisms that were put in place to mitigate the wrong. The main function of vicarious liability was to provide compensation to those vulnerable persons who, through no fault of their own, were exposed to the inherent risks of the employer’s business.

13. As innocent victims, the minors were entitled to compensation for having been subjected to such humiliation, shame and pain that could have a lifelong effect on them. It was inconceivable how the minors in their tender years were made to carry that kind of burden of shame due to selfishness of a caregiver. Compensation and award of damages was an exercise of discretion by the High Court and could be interfered with if the Court of Appeal was convinced that the High Court acted upon some wrong principles of law, or that the amount awarded was extremely high or low. The appellant did not demonstrate that the award was too high. The minors were traumatized and stigmatized perhaps for the rest of their lives. The award of damages could not be interfered with.

14. The argument that it was TSC’s duty to implement its own policies and guidelines to curb sexual misconduct by its employees and that in the circumstances, the unlawful acts were in no way linked to the State could not pass the test of the 5th respondent’s mandate under article 156(6) of the Constitution which included to promote, protect and uphold the rule of law and defend the public interest. The instant case raised very serious matters of public interest and protection and promotion of the rule of law. Moreover, international law obligated states to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical, mental abuse including sexual abuse.

15. The African Charter on the Rights and Welfare of the Child and of which Kenya was a signatory urged member states to take specific measures including exercising due diligence and increasing awareness about sexual abuse. The Committee on the Rights of the Child recognized the prevention of violence against children to be of paramount importance. That was a non-delegable duty and could not be delegated to any agency including the TSC. An absolute duty, as opposed to duties of reasonable care, gave rise to an obligation on the defendant to ensure that reasonable care was taken. By contrast to the doctrine of vicarious liability, it was the direct relationship between the State and the children, as citizens that established the duty in that context, and then the conduct of the TSC that was used to establish its breach. A finding of failure by the TSC to exercise reasonable care, of itself, lead to a finding of breach of the State’s duty.

16. The appellant had a statutory duty to ensure the minors had a safe learning environment which it failed to do. The absence of provisions for remedy for breach of that statutory duty was no bar to stop the minors from filing a claim of damages under the tort of negligence and the Constitution.

Appeal and cross-appeal dismissed with costs to the 1st and 2nd respondents.
A Kenyan entity trading with a non-resident person not having a permanent establishment in Kenya, is obliged to deduct and remit withholding tax

Kenya Revenue Authority & another v Republic (Ex parte) Kenya Nut Company Limited [2020] eKLR
Civil Appeal No. 58 of 2015
Court of Appeal at Nairobi
W Ouko, DK Musinga and S Kantai, JJA
April 24, 2020
Reported by Chelimo Eunice

**Tax Law** – withholding tax – legal framework governing withholding tax – criteria for charging withholding tax – obligation & duty to deduct and remit withholding tax from a foreign entity trading with a Kenyan entity – whether Kenya Revenue Authority and the Commissioner of Domestic Taxes had jurisdiction to assess withholding tax - whether Kenya Revenue Authority and the Commissioner of Domestic Taxes exceeded their jurisdiction or acted against the law in assessing and demanding for withholding tax in a situation where payment was made at source and when it was not possible to deduct the tax from the overseas agents’ commission - Income Tax Act, sections 10, 35 and 96.

**Tax Law** – withholding tax – penalties and interest charged on failure to deduct or remit withholding tax – which law was applicable to withholding tax between the year 2000 and 2004 - Income Tax Act, sections 35, 72D and 93; Income Tax (Withholding Tax Rules) 2001, rule 14A.

**Civil Practice and Procedure** - judicial review – nature & scope of judicial review – judicial review orders - orders of certiorari and prohibition – when were orders of certiorari and prohibition issued - whether aspects of merit review of administrative action could be included in judicial review - Constitution of Kenya, article 27.

**Brief facts**

The appellant carried out a tax audit on the respondent’s business between 2002 and 2005. After being given an opportunity to provide an explanation on some of the issues arising from the audit, the respondent was ultimately informed through a letter dated on October 1, 2007 that it owed Ksh. 33,534,855 in withholding tax based on the commissions paid to their overseas selling and marketing agents. The appellant assessed and demanded the said amount via a letter dated August 19, 2008 (assessment notice). The respondent objected to the assessment and insisted that no withholding tax was owed. To forestall the intended action by the appellant, the respondent filed in the High Court (the trial court) a judicial review application.

The trial court found merit in the motion and issued an order of certiorari and quashed, among others, the decision of the appellant contained in the letter dated August 19, 2008. Aggrieved by the decision, the appellant filed the instant appeal on grounds, among others, that the trial court erred; in failing to find that it was the duty of the respondent to ensure that withholding tax was deducted and remitted to the appellants irrespective of whether the proceeds of sale were remitted to it or its agents and in stating that there was no provision in the Income Tax Act that justified the levying of penalties and interests.

**Issues:**

i. Who was obliged to deduct and remit withholding tax from a foreign entity trading with a Kenyan entity?

ii. Whether Kenya Revenue Authority and the Commissioner of Domestic Taxes had jurisdiction to assess withholding tax where payment was made at the source to a foreign entity.

iii. What amount of penalties and interest would be charged on failure to deduct or remit withholding tax?

**Relevant provisions of the Law**

**Income Tax Act:**

Section 35(1):

“A person shall, upon payment of an amount to a non-resident person not having a permanent establishment in Kenya in respect of:

(a) a management or professional fee;

(b) a royalty;

(c) interest, including interest arising from a discount upon final redemption of a bond, loan, claim, obligation or other evidence of indebtedness measured as the original issue discount;

Provided that:

e) interest which is chargeable to tax, deduct therefrom tax at the appropriate non-resident rate.

**Held:**

1. The Income Tax Act (the Act) was enacted to, among other purposes, make provision for the
charge, assessment and collection of income tax, for the ascertainment of the income to be charged, for the administrative and general provisions relating thereto.

2. Withholding tax was governed by sections 10 and 35 of the Act and the Income Tax (Withholding Tax Rules) 2001 (the Rules). It was a tax that was chargeable on, among others, interest, dividends, royalties, management or professional fees, commissions, pension or retirement annuity, creating an obligation on the tax payer, whether resident or non-resident, to deduct and remit the tax on eligible income which accrued in or was derived from Kenya.

3. During the period of tax audit conducted by the appellant in respect of the respondent’s exports between 2002 and 2005, it was confirmed that the foreign selling and marketing agents were paid commission. On such commission, being to a non-resident without a permanent establishment in Kenya, withholding tax was levied.

4. The remedy of judicial review was concerned with reviewing not the merits of the decision of which the application for judicial review was made, but the decision making process itself. 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. It was not part of that purpose to substitute the opinion of the court for that of the authority constituted by law to decide the matter in question. Merit consideration could be entertained in exceptional cases, especially where it was shown that there was no evidence upon which such a finding could be made so as to render the finding unreasonable.

5. On account of consideration of proportionality and unreasonableness of a decision in issue, analysis of article 47 of the Constitution as read with the provisions of the Fair Administrative Action Act, there was a shift of judicial review to include aspects of merit review of administrative action. However, even if the merits of the decision was undertaken, the court had no mandate to substitute its own decision for that of the administrative body.

6. The orders of certiorari and prohibition were issued as a matter of discretion and judicial discretion was exercisable in the interests of justice, rationally but not capriciously or whimsically. The appellate court could only interfere with the exercise of that discretion if it was satisfied that the trial court misdirected itself in some matter as a result of which it arrived at a wrong decision, or if it was manifest from the case as a whole that the trial court was clearly wrong in the exercise of discretion and accordingly occasioned injustice.

7. Certiorari would issue to quash a decision already made and an order of certiorari would issue if the decision was made without or in excess of jurisdiction, or where the rules of natural justice were not complied with or for such like reasons.

8. Prohibition, on the other hand, was an order from the High Court directed to an inferior tribunal or body which forbade that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lay, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice.

9. Under the Income Tax Act and the Kenya Revenue Authority Act, the Commissioner of Domestic Taxes (the Commissioner) wielded immense power and was generally responsible for the control and the collection of, and accounting for, tax. With that, the Commissioner was empowered to assess and recover tax from payers. By the same token he had discretion to, inter alia, refrain from assessing or recovering taxes, penalties or interest. From the contents of the letters in question, there was nothing to suggest that the appellants had no jurisdiction to assess withholding tax, or that they exceeded their powers, or that their actions were in contravention of any law. In addition, the tax assessment was shared with the respondent by the appellants. The latter made comments in their letter to the appellants dated June 29, 2006 and even engaged tax experts, M/s Ernst & Young, to analyze the assessment. Further, there was a meeting between the parties to discuss the issues relating to that audit. At the meeting the respondent was availed an opportunity to state its position by providing certain details and particulars. It, therefore, could not be correct to assert that in arriving at the impugned decision, the appellant did not observe the rules of natural justice.

10. Given its exposure and involvement in international trade, the respondent had the capacity to device practical technique, methods and systems that would ensure collection and remission of tax from source. For instance, provision ought to have been made in the contract between them and the foreign agents to ensure that at the point the commission was paid, withholding tax should have been factored in and thereafter remitted to the respondent.
11. The trial court appreciated the importance and prudence of placing the responsibility of devising workable procedures to ensure compliance with tax law upon the tax payer and decried the effect the converse would have on tax administration and enforcement. The trial court, however, erred in proceeding to hold that though the commission in question was paid by the respondent, the respondent was unable to deduct the tax at the time its agents were receiving payments due to the fact that the commissions were deducted at source; and that had the proceeds of sale been remitted, first, to the respondent before the payment of the said commission there would have been no question of the applicant's liability to deduct the same in form of withholding tax.

12. With regard to withholding tax due from a non-resident person not having a permanent establishment in Kenya, but trading with a Kenyan entity, it became the business of the latter to ensure that the tax was deducted from such payment and remitted. That obligation was mandatory. The Kenyan entity was deemed to have full knowledge of the provisions of sections 10, 35 and 96 of the Act. To enter into a contract with foreign agents which allowed foreigners to deduct and retain at source their commissions without putting in place mechanisms of taking into account withholding tax was not only reckless on the part of the respondent but was also intended to deny the country revenue. The argument that the amount retained by the agents comprised commissions and expenses was immaterial. The respondent was under an obligation to identify and satisfy the appellants what portions were expenses and which ones were commissions.

13. Legitimate expectation could only operate within the law and it could only be relied on when the law had been complied with. It could not, however, be relied on to shield a person from paying tax. Even though a public body could create legitimate expectation, for legitimate expectation to arise, there had to be an express, clear and unambiguous promise given by a public authority, the expectation itself had to be reasonable, the representation had to be one that the decision-maker was competent to make and there could not be a legitimate expectation against clear provisions of the law or the Constitution.

14. Amendments to section 35 (6) of the Act gave the Commissioner power to impose such penalty as could, from time to time, be prescribed under the Rules. Rule 14A of the Rules had prescribed that the penalty for failure to deduct or remit withholding tax for the purposes of section 35(6) of the Act, the Commissioner could impose a penalty equal to 10% of the amount of the tax involved, subject to a maximum penalty of one million shillings.

15. Rule 14A of the Rules was headed and specific to penalty for failure to deduct or remit withholding tax under section 35 of the Act. It was the relevant provision on the point under consideration. It was, however relevant only to that small extent. Rule 14 A of the Rules came into effect by virtue of Legal Notice No. 54 which took effect from July 1, 2004. The withholding tax demanded from the respondent was for the years 2000-2005. Rule 14A of the Rules could not apply to the years between 2000 and June, 2004. That period was covered by section 72D of the Act which had been introduced by Act No. 8 of 1997 and which increased the penalty to 20% from the original 15%. Section 94 of the Act provided that, in addition to the penalty under section 72D of the Act, a late payment interest of 2% per month would also be charged on any amount due until it was fully recovered, provided the interest did not exceed 100% of the principal tax owing. That was the extent to which the percentage payable on the penalty was adjusted.

16. On the issue of whether there was exemption of fruits and vegetables from taxation, the same was not argued before the trial court, and the court found that it had been abandoned by the appellants. Thus, the same would not be considered by the instant court.

Appeal allowed with costs. Percentage of penalty adjusted to 10% of the amount of the tax involved, subject to a maximum penalty of Kshs. 1,000,000 for the period July, 2004 to 2005.
Pension money that has already been paid, as opposed to pension money that is payable, is part of the estate of a deceased person.

Kenya Commercial Bank v Isaac Ingati Abong’ & Another
Civil Appeal No 56 of 2016
Court of Appeal at Kisumu
Asike-Makhandia, PO Kiage & J Otieno-Odek, JJA
April 3, 2020
Reported by Beryl Ikamari

Law of Succession – estate of a deceased person - property that could form part of the estate – pension money - whether pension money that had been deposited into the bank account of a deceased person was part of a deceased person’s estate, even though some of it had erroneously been deposited into the account after the death of that deceased person - Law of Succession Act, (cap 160), section 3; Retirement Benefits Act, No 3 of 1997, section 36A.

Statutes - interpretation of statutory provisions - scope of applicability of section 36A of the Retirement Benefits Act - whether it was applicable to pension money that had already been paid out to a deceased member of a pension scheme - Retirement Benefits Act, No 3 of 1997, section 36A.

Brief facts

The respondents, as beneficiaries and administrators of the estate of Alice Oriido Akeng’o, moved the court seeking orders in relation to over Kshs. 2,000,000 belonging to the deceased. The money was held in an account at the Kenya Commercial Bank Ltd, Kakamega Branch and they wanted the bank manager to disclose the whereabouts of the money and to pay them the money. After receiving the confirmation of grant, respondents learnt that the money was no longer available.

The sums of money in the bank account in question were monthly pension paid into the account. That money had been paid for seven years after the deceased’s death. The payment of the money was contrary to the Trust Deed and Rules which required that pension would be paid during the lifetime of a pensioner. The bank manager argued that the deceased did not disclose the names of any beneficiaries with respect to the pension money and therefore the respondents were not entitled to the pension as provided for under rules 12 and 14 of the Trust Deed. The bank manager also explained that on learning about the deceased’s death, money in the account in question was transferred to the Pension Scheme’s account and that since it did not belong to the deceased pensioner, it could not form part of her estate.

The High Court made a finding that the trustees and administrators of Kenya Commercial Bank Staff Pension Fund should assess the amount that the deceased was entitled to at the time of her death and make arrangements to pay that money to her dependants. The appellants’ appeal was premised on various grounds including assertions that the deceased was only entitled to pension during her lifetime, that pension under the Retirement Benefits Act was not part of the deceased’s estate and that the High Court lacked jurisdiction to entertain the matter.

Issues

i. Whether pension money could form part of the estate of a deceased person.

ii. Whether it was an error for a court to issue orders to an administrator of a pension scheme where a dispute arose when money from a deceased person’s bank account had been credited into the pension scheme’s account.

iii. Whether section 36A of the Retirement Benefits Act, which provided that benefits payable under a pension scheme would not be part of the estate of a member for purposes of administration, was applicable to pension money that had already been paid to a deceased member of a pension scheme.

Relevant provisions of the law

Retirement Benefits Act, No 3 of 1997

Section 36A Treatment of death benefits

Upon the death of a member of a scheme, the benefit payable from the scheme shall not form part of the estate of the member for the purpose of administration and shall be paid out by the trustees in accordance with the scheme rules.

Held

1. The respondents were not demanding benefits from a pension scheme but they were claiming money that had already been deposited into the deceased’s bank account. Section 36A of the Retirement Benefits Act related to money that was payable or was accruing to beneficiaries and not what had already been disbursed.

2. The pension scheme had deposited Kshs.
2,111,447.35 into the deceased’s bank account allegedly in an erroneous manner. The said sums of money, after being deposited, were no longer bound by the rules and regulations of the pension scheme or the Retirement Benefits Act. The funds formed part of the estate of a deceased person as provided for in section 3 of the Law of Succession Act.

3. Under section 3 of the Law of Succession Act the term estate was defined to mean the free property of a deceased person. An estate referred to the property which a person was legally competent to freely dispose during his lifetime and in respect of which his interest had not been terminated by his death.

4. Under the circumstances, there was a legal lacuna as the Retirement Benefits Act and the Trust Deed and Rules did not clearly provide that the death of a pensioner would automatically lapse the contract. That meant that the appellant had no legal right to debit the deceased’s account in favour of the pension scheme. The funds in that account formed part of the deceased’s estate.

5. Money that had already been distributed into the deceased’s account was part of the deceased’s estate and the beneficiaries of the deceased were entitled to it. That money should not be distributed in accordance with the Trust Deed and Rules but had to be deposited back into the account and the respondent had to administer it in accordance with the Law of Succession Act.

6. It was not an error for the High Court to issue orders to the administrator of the pension scheme as the orders were addressed to his office and not his personal capacity.

Appeal dismissed with costs.

Order:-

The money that was the subject of the appeal should not be distributed as per the Trust Deed and Rules but under the Law of Succession Act as it formed part of the estate of the deceased. The money should therefore be credited into the account of the deceased to enable the respondents to access it.
Constitutional Law - Judiciary - removal of a judge from office - role of the Judicial Service Commission in the removal of a judge from office under article 168 of the Constitution - whether in a situation where allegations made against a judge did not meet the threshold for grounds relating to removal of a judge from office, the Judicial Service Commission, could opt to engage in disciplinary measures, such as admonishing a judge - Constitution of Kenya 2010, article 168.

Constitutional Law - fundamental rights and freedoms - rights to fair administrative action and a fair hearing - whether a party that was given an opportunity to give written representations but was not heard orally, before an administrative decision against that party was made, had rights to fair administrative action and fair hearing violated.

Constitutional Law - timelines - unreasonable delay - where reasons for delay included a heavy workload - whether a delay of six months by the Judicial Service Commission in rendering a decision on a petition for the removal of judges from office was unreasonable.

Constitutional Law - interpretation of constitutional provisions - role of the Judicial Service Commission in the removal of a judge from office under article 168 of the Constitution - the decision of the Judicial Service Commission on whether to forward a petition for removal of a judge from office to the President for the setting up of a tribunal to consider the same - whether such a decision could be partial in the sense that some issues raised in the petition, could be reserved for determination at a future date - Constitution of Kenya 2010, article 168.

Constitutional Law - interpretation of constitutional provisions - role of the Judicial Service Commission in the removal of a judge from office under article 168 of the Constitution - whether the Judicial Service Commission, in handling complaints of misconduct made against a judge could undertake a merit review of a judgment, ruling or order in order to determine whether a judge had engaged in misconduct - Constitution of Kenya 2010, article 168.

Brief facts
The petitioner filed a petition with the Judicial Service Commission for the removal of the five interested parties from office as judges of the Supreme Court. The petitioner alleged that in response to a written statement from the JSC on a retirement age of 70 years for all judges, 3rd, 4th and 5th interested parties had intimated, via a letter dated September 24, 2015, that they had withdrawn their services. The main allegation therefore related to some form of a strike at the Supreme Court. The JSC considered the petition and sought and obtained written responses from the interested parties. In the course of the proceedings, the 1st and 2nd interested parties left the Judiciary, for different reasons, after having served as judges.

After considering whether a ground for removal of a judge from office under article 168(1) of the Constitution existed, the JSC decided to embark on a disciplinary measure of admonishing the judges. It found that there had been misconduct but not that there had been gross misconduct. The JSC did not forward the petition to the President for the setting up of a tribunal. It chose to discipline the judges by admonishing them.

The petitioner complained that it took six months for the JSC to render a decision and the decision only related to part of his complaint. He said that the delay was unreasonable. He added that the JSC should have forwarded his petition to the President under article 168(4) of the Constitution as that was what the Constitution required. According to the petitioner, the decision to admonish the judges was unconstitutional.

The 5th interested party also filed a petition (Petition No 218 of 2016) that was consolidated with that of Apollo Mboya v Judicial Service Commission & another; Justice Kalpana Rawal & 4 others (Interested Parties)
Petition No 204 of 2016
High Court at Nairobi
W Korir, J
May 14, 2020
Reported by Beryl Ikamari
the petitioner. She alleged that her rights to fair administrative action and a fair hearing had been violated. She explained that she was not afforded an opportunity to be heard orally before the JSC made its decision. She said that there was an unreasonable delay of six months in rendering a partial decision on the complaint made against her. The JSC was yet to give its full decision on the complaints made against her. She further contended that the JSC could not admonish her as it had no mandate to do so. According to the 5th interested party, it was the tribunal that would be appointed by the President that had the mandate to undertake disciplinary action.

The 5th interested party also alleged that the lack of procedural rules relating to the exercise of the JSC's mandate, meant that the process of considering allegations before the JSC was open to arbitrariness and unfairness. She asked the court to grant orders for the promulgation of regulations as required under section 47 of the Judicial Service Act.

Issues

i. What was the role of the JSC in the process provided for the removal of a judge from office under article 168 of the Constitution?

ii. Whether a party that was given an opportunity to give written representations but was not heard orally, before an administrative decision against that party was made, had rights to fair administrative action and fair hearing violated.

iii. Whether a delay of six months made by the Judicial Service Commission in rendering a decision about a complaint relating to the possible removal of a judge from office, was an unreasonable delay.

iv. Whether it was lawful for the Judicial Service Commission to render a partial decision, while leaving some issues for determination at a future date, in a petition for the removal of certain judges from office.

v. Whether the Judicial Service Commission, in handling complaints of misconduct made against judges could undertake a merit review of a judgment, ruling or order in order to determine whether a judge had engaged in misconduct.

vi. Whether under article 168 of the Constitution, after considering a petition for the removal of a judge and finding that the required threshold for removal had not been met, the Judicial Service Commission could discipline a judge for misconduct not amounting to gross misconduct.

Held

1. Article 168 of the Constitution provided for the process of the removal of a judge from office. The role of the JSC was to initiate or receive a complaint against a judge, consider whether it disclosed a ground for removal as set out in article 168(1) of the Constitution and if it did, to forward the petition to the President for purposes of forming a tribunal to hear and determine the petition on merit.

2. In order for the rules of natural justice and in particular the right to a fair hearing to be deemed to have been complied with, three conditions ought to have been met; the right to be heard by an unbiased tribunal, the right to have notice of the charges, and the right to be heard in answer to those charges.

3. The allegations made against the 5th interested party were very clear. Even though she asked for further and better particulars, she understood the complaint. She responded to the complaints via a replying affidavit. It was therefore apparent that she was confronted with charges that she understood and was given an opportunity to respond to them and she responded.

4. The JSC wrote to the 5th interested party informing her of a special committee appointed to consider the petition against her and that she would be notified of a hearing date. However, she was not informed of the hearing date but instead she received a letter through which she was admonished for the alleged misconduct.

5. Although the JSC was a master of its own procedure, the nature of allegations raised against the interested parties required an oral hearing. Even though an oral hearing would have been the better option under the circumstances, the JSC had the discretion of considering the petition and the written responses in reaching a determination as it did. It could not therefore be accused of failing to comply with the principles of natural justice.

6. The 4th and 5th interested parties alleged that the committee that handled her matter was biased but did not elaborate on the issue in their submissions. There was scanty evidence on the issue of bias and it was difficult for the court to make an adverse finding against the JSC on grounds of alleged bias.

7. The JSC complied with the minimum
requirements of the fair administrative action. The threshold of article 47 of the Constitution and the Fair Administrative Action Act, 2015 was met by the JSC in respect of the administrative proceedings against the interested parties.

8. Where no particular time for performing an act was prescribed by the Constitution, the act should be done without unreasonable delay. The question of what was reasonable varied from case to case. Each case had its own circumstances including the seriousness of the issues, the number of witnesses, and the conduct of the parties and their advocates. Considering the reasons given by the JSC as to why it took the period of time it took to determine the petition, there was no unreasonable delay in the determining of the matter.

9. The JSC explained that the reason for failure to give a decision on all the issues raised in the complaint was that those issues were *sub judice*. Splitting the petition and leaving some issues undetermined could only mean that the issues not addressed had no merit. The JSC had no authority to leave some issues for a later determination. The affected judges were entitled to know their fate once and for all.

10. Whenever a party was aggrieved by the decision of a judge or a judicial officer, the way to go was to file an appeal or seek review. The JSC had no power to conduct a merit review of a judgment or ruling in order to determine whether there was misconduct on the part of a judge or judicial officer. However, it could not be said that judgments were entirely no-go-zones for the JSC. Nevertheless, the JSC should avoid complaints which invite it to analyze a judgment or ruling in order to determine alleged incompetence of the judge or judicial officer who authored the decision. It was therefore wrong for the JSC to take charge of the *Salat* case in an attempt to determine if the opinion of the majority or the minority was right.

11. Allowing the JSC to meddle with the judicial discretion of judges and judicial officers would severely impact on the independence of the Judiciary. Nonetheless, the JSC could use judgments to find that grounds of removal under article 168(1) had been established. If a judge or judicial officer heard the case of his spouse, child, mother, brother, sister, relative or friend against another party, the JSC could legitimately use the judgment or ruling to show that the judge or judicial officer sat in a case in which he or she had a personal interest.

12. The role of the JSC under article 168 of the Constitution was clear. The JSC had no power to “try” and “convict” a judge. Such power was reserved for the tribunal formed by the President where the JSC found that the threshold for recommending the removal of a judge from office had been met. Where the JSC found no evidence that met the threshold in article 168(1) of the Constitution it had to down its tools.

13. The JSC had no powers to discipline judges under the provisions of article 168 of the Constitution. It was not feasible that the Constitution could have granted the JSC disciplinary powers without providing an avenue for appeal to judges aggrieved by its decisions. The makers of the Constitution of Kenya, 2010 never contemplated any other procedure for dealing with the failings of a judge apart from the one provided by article 168 of the Constitution.

14. By admonishing the 5th interested party, the JSC crossed its constitutional and statutory boundaries which limited its powers to determining the merits of the complaint against a judge for the sole purpose of determining whether the petition should be sent to the President. The JSC had no disciplinary powers over judges in the current constitutional set-up.

15. The purported disciplinary action taken against the judges of the Supreme Court by the JSC was unlawful and unconstitutional. The finding by the court that the JSC took the judges through a fair administrative process did not sanitize the unconstitutionality or illegality in light of the finding that the JSC had no constitutional or statutory authority to discipline judges. Administrative action taken without legal backing was unconstitutional.

16. The JSC as empowered by section 47(2) (c) of the Judicial Service Act, was required to make regulations specifically to provide for all preliminary procedures for making any recommendations required to be made under the Constitution. Such regulations would ensure that judges facing allegations that could lead to removal from office were
able to clearly predict the procedure to be followed. The JSC had made the regulations but they were pending at the National Assembly. The court could therefore not compel the JSC to do something that was in the hands of another state organ.

Consolidated petition partly allowed. Each party was to bear its costs.

**Orders :-**

(a) Petition No. 204 of 2016

i. A declaration that the Judicial Service Commission was not mandated and/or required to administer any form of discipline against judges of the superior courts of Kenya and any such purported discipline such as admonishment was unconstitutional and was therefore null and void ab initio;

ii. A declaration that the Judicial Service Commission violated the Constitution by purporting to admonish Justices Mohammed Ibrahim, Jackton Ojwang and Njoki Ndung’u; and

iii. A declaration that the action of the Judicial Service Commission of issuing part determination on Mr. Apollo Mboya’s petition seeking the removal of Justices Mohammed Ibrahim, Jackton Ojwang and Njoki Ndung’u from office and reserving other limbs of the petition to a futuristic date was unreasonable, irregular and unlawful and was therefore unconstitutional and therefore null and void.

(b) Petition No. 218 of 2016

i. An order of certiorari was issued calling into the court and quashing the decision of the Judicial Service Commission dated May 9, 2016 insofar as it found the conduct of Justice Njoki Ndung’u “unbecoming of a judge of the Supreme Court and amounting to misconduct”, and to the extent that she be “admonished for this misconduct”. The decision was also quashed insofar as it purported to reserve the determination of the additional grounds filed by Mr. Apollo Mboya on October 21, 2015 for consideration at a later date. For avoidance of doubt, the finding by the Judicial Service Commission that Mr. Apollo Mboya’s petition “did not meet the requisite threshold to warrant a recommendation for the appointment of a tribunal for.....removal of Justice Njoki Ndung’u “in terms of article 168(1) and (4) of the Constitution” was valid and remained undisturbed;

ii. A declaration that in the circumstances of the case the constitutional jurisdiction of the Judicial Service Commission did not extend to merits review of the decision in the Supreme Court Petition No. 23 of 2014 Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & others as the Judicial Service Commission was attempting to inquire into matters lawfully conducted, transacted or decided by the judges of the Supreme Court in the course of the exercise of their judicial authority, functions and discretion; and

iii. A declaration that the decision by the Judicial Service Commission to purport to investigate Justice Njoki Ndung’u on the matters raised in Mr. Apollo Mboya’s petition as “further grounds” dated October 21, 2015 was unreasonable, unfair, unprocedural and unlawful on the grounds that it was ultra vires the power and authority vested in the Judicial Service Commission as it called for a merits review of lawful discretionary decisions of Justice Njoki Ndung’u in her capacity as a judge of the Supreme Court; and that it was a breach of the principles of natural justice and the rights of Justice Njoki Ndung’u to a fair and impartial process as enshrined in article 47 of the Constitution.

A criminal conviction is not a precondition for an application for forfeiture of property to the State under the Proceeds of Crime and Anti-Money Laundering Act.

**Aberila v Lilian Wanja Muthoni t/a Sahara Consultants & 5 others**

Application No 58 of 2018

High Court at Nairobi

M Ngugi, J

April 15, 2020

Reported by Beryl Icamari

**Statutes** - interpretation of statutory provisions - proceeds of crime - where the holder of property was unable to show that there was a legitimate source for it - circumstances under which property would be deemed to be the proceeds of crime - Proceeds of Crime and Anti-Money Laundering Act (cap. 59B), sections 2 and 92.

**Constitutional Law** - fundamental rights and freedoms - right to property and right to a fair hearing - where an application for civil forfeiture of property, on grounds that the property was allegedly the proceeds...
of a crime, was made before a conviction for the offence relating to the property had been meted out - whether under the circumstances, the civil forfeiture application was a violation of the right to a fair hearing and the right to property - Constitution of Kenya 2010, articles 40 and 50; Proceeds of Crime and Anti-Money Laundering Act (cap. 59B), section 92.

Statutes - interpretation of statutory provisions - preconditions relating to the grant of an application for civil forfeiture of property to the state - whether a criminal conviction was a precondition for an application for forfeiture to be made - Proceeds of Crime and Anti-Money Laundering Act (cap. 59B), section 92(4).

Brief facts

The applicant made an application with respect to certain property, which was money held in bank accounts, that it believed to be the proceeds of crime. The applicant wanted the court to grant orders of forfeiture of those funds to the State. The 1st respondent had been the Principal Secretary in the Ministry of Public Service, Youth and Gender Affairs. The National Youth Service (NYS) fell under that ministry. She had been arrested and charged with various offences including abuse of office and conspiracy to commit a felony. The charges were about millions of public funds lost from the NYS.

After the 1st respondent’s arrest, the applicant, Assets Recovery Agency, began investigations to recover assets that were allegedly the proceeds of crime. The investigations by the DCI revealed massive schemes of embezzlements of public funds, fraud and money laundering rendering such funds proceeds of crime liable to forfeiture under the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA). Investigations also revealed that the 1st respondent opened and operated bank accounts in her name, her companies and business entities in her name and on behalf of her children. Those accounts had received suspiciously large cash deposits in US dollars and Kenya shillings, and there were reasonable grounds to believe that the funds in question were part of the funds stolen from the NYS.

Issues

i. When would property held by a person be said to constitute the proceeds of a crime?

ii. Whether an application for civil forfeiture of property suspected to be the proceeds of crime was a violation of rights to property and the right to a fair hearing.

iii. Whether a criminal conviction was a precondition for an application for forfeiture to be made under Part VIII of POCAMLA.

Held

1. The making of an order of forfeiture under section 92 of POCAMLA was not dependent on the outcome of criminal proceedings or of an investigation done with a view to instituting such proceedings. What was required was proof that a party had fund or assets which, on a balance of probabilities, were proceeds of crime. Once the applicant established that, the onus was on the respondents to show that the funds or assets had a legitimate source.

2. As the Principal Secretary, State Department of Public Service and Youth, in the Ministry of Public Service, Youth and Gender Affairs, the 1st respondent fitted the definition of a politically exposed person under regulation 22 of the Proceeds of Crime and Anti-Money Laundering Regulations, 2013. Under that provision, a politically exposed person was a person who had been entrusted with a prominent public function in a country or jurisdiction including, inter alia, a senior state officer and a senior public officer. The definition of ‘politically exposed persons’ included children and close relatives of persons in the position of the 1st respondent. The Central Bank of Kenya Guidance Note: Conducting Money Laundering/ Terrorism Financing Risk Assessment (December 2017) echoed that definition of a politically exposed person. The rationale behind the provision was to ensure that banks were on the lookout for persons holding public or state offices who could misuse their positions to acquire public funds corruptly or to engage in conduct that POCAMLA and similar legislation such as the Anti-corruption and Economic Crimes Act (ACECA) sought to curtail.

3. The National Youth Service (NYS) was within the Ministry in which the 1st respondent was the Principal Secretary. Allegedly, the NYS lost millions of funds and the 1st respondent was among the persons charged with various offences relating to the loss of the funds. Further, pursuant to section 60 of the Evidence Act, the court took judicial notice of the Press Release of the Central bank of Kenya dated September 12, 2018 which entailed investigations into bank transactions that concerned the NYS that showed that the banks failed to comply with reporting obligations under POCAMLA. The Central Bank of Kenya penalized those banks.

4. Section 92(4) of POCAMLA made it clear
that the validity of a forfeiture order was not affected by the outcome of criminal proceedings or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned was in some way associated. Therefore, the applicant was not required to show on prima facie basis that an offence had been committed.

5. The applicant had shown that investigations were undertaken with respect to loss of public funds from the NYS and criminal proceedings were on-going against the 1st respondent and others. The applicant also demonstrated that the respondents’ bank accounts received funds during the period to which the investigations and criminal proceedings related and that the respondents were unable to show that the funds had a legitimate source. On a balance of probabilities, they had established that the respondents had funds which were suspected to be proceeds of crime.

6. The respondents were accorded an opportunity to explain the source of their funds. They explained that they ran a farm in Uyoma Siaya and that the 1st respondent’s husband also offered consultancy services for which he had been paid. However, no documents were produced to show ownership of the Uyoma farm or that the funds in question were from produce from the farm. They did not explain the fact that bank account deposits were made in Nairobi and the farm’s produce was sold in Siaya. Nothing in the documents tendered explained the large deposits made into the respondents’ accounts.

7. It was difficult to accept that the large sums of money deposited into the bank accounts were payments for farm produce. It was not too much to expect a person operating a legitimate business in agricultural or horticultural produce to have records of sales and payments as well as income tax returns that showed the amount of produce, to whom the sales were made, the profits, if any, and tax paid thereon.

8. With respect to the consultancy business ran by the 1st respondent’s husband, an affidavit by Micah Kigen showed that he had paid Kshs. 40,000,000 for the services. The evidential value of the affidavit as evidence of the consultancy business was doubtful. Further evidence showed that the bank account for the consultancy business received Kshs. 22,000,000 which was later withdrawn from the account. Additionally, that account did not receive any deposit during the period under investigation; 2015 to 2019.

9. The allegations that the 1st respondent also had business ventures, properties and loans from which she obtained the funds deposited in the subject accounts, were not supported by documentation. The handwritten statement of the 1st respondent on the ventures was of no evidential value.

10. There was no evidence tendered to show that part of the sums of money in the account were from the 1st respondent’s former employers-NEPAD and the relevant Ministry.

11. The respondents were unable to show a legitimate source for the funds deposited in the ten accounts that were the subject of the forfeiture application. The respondents’ accounts received substantial deposits within a very short time, between 2016 and 2018, in some cases a matter of days or weeks. There were some withdrawals but they did not detract from the fact that the respondents had not shown a legitimate source of the sizeable deposits into their accounts.

12. Once the applicant established on a balance of probabilities that the respondents had funds in their accounts for which they not been able to show a legitimate source, the onus was on the respondents to satisfy the court that the assets and funds held in their accounts were not the proceeds of crime.

13. The respondents had large sums of money in their bank accounts for which they were unable to show a legitimate source. The only conclusion that could be made under the circumstances was that the funds were proceeds of crime as defined in POCAMLA.

14. POCAMLA and the entire legal regime related to recovery of proceeds of crime and unexplained assets had the underlying premise that crime and corruption were undertaken in a labyrinthine, secretive manner, that it was possible that the funds would not be directly traced to the crime, that while investigations could be carried out and some alleged perpetrators charged and subjected to trial, a conviction was not always result. Yet, the respondents could have in their possession substantial funds and assets for which they were not able to show a legitimate source.

15. Money and assets were capable of being traced to specific sources including salaries and businesses. There had to be books of account in relation to the businesses. For hundreds of thousand of shillings to be deposited into bank accounts, there had to be a clear source for the funds. Under the circumstances, the 1st respondent was a senior state official facing charges relating to loss of millions of public funds.
and she needed to have a clear explanation for the large sums of money in her bank accounts.

16. The applicant had established that the funds in contention were the proceeds of crime and they should be forfeited to the state.

17. Article 40 of the Constitution guaranteed the right to property. The making of a forfeiture order where the respondents had money for which they were unable to show a legitimate source and was therefore the proceeds of crime, did not violate the respondents’ right to property.

18. The respondents’ argument that only a criminal court could determine whether they committed a crime and that they could not be punished as the crime relating to the funds in question had not been proven, would not defeat the application for forfeiture. The forfeiture application was a process provided for in part VIII of POCAMLA and it was not dependent on the outcome of a criminal prosecution or investigation. There was therefore no violation of the right to a fair hearing or the right of access to justice.

19. A conviction was not a precondition for civil proceedings under Part VIII of POCAMLA, or for the making of a forfeiture order. Section 92(4) of POCAMLA clearly stated that the validity of such an order was not affected by the outcome of criminal proceedings or investigations about the offence relating to the property in question.

Application allowed. Costs to be borne by the respondents.

How a foreign judgment from a country that does not have an agreement for the reciprocal recognition and enforcement of its judgments with Kenya can be enforced.

Raw Bank PLC v Yusuf Shaa Mohamed Omar & another
Civil Suit No 10 of 2014
High Court at Mombasa
DO Chepkwony, J
May 28, 2020
Reported by Beryl Ikamari

Civil Practice and Procedure - judgments - foreign judgments - recognition and enforcement of foreign judgments - where there was no agreement between Kenya and the country in which the judgment was issued, for the recognition and enforcement of foreign judgments - applicability of common law principles and the Civil Procedure Act to the enforcement of the judgment - Foreign Judgments (Reciprocal Enforcement) Act (cap 43), section 18; Civil Procedure Act (cap 21), section 9.

Civil Practice and Procedure - summary judgment - triable issues raised in the defence - where the enforcement of a foreign judgment was sought - whether the defence raised triable issues which warranted a full trial and could not be determined via summary judgment.

Civil Practice and Procedure - costs - security for costs - circumstances under which the court would make an order for security for costs - effect of failure by the applicant to demonstrate the defendant’s inability to pay costs due to poverty - Civil Procedure Rules 2010, order 26 rule 1.

Brief facts
The 1st defendant carried on business as ETS YSMO at Lubumbashi in the Democratic Republic of Congo. The plaintiff loaned the 1st defendant a sum of USD150,000 and the 2nd defendant was the guarantor via promissory notes for that loan. The 1st defendant then closed its place of business and disappeared and the plaintiff found it difficult to recover the loan. The plaintiff filed a suit at the Commercial Court of Lubumbashi and obtained judgment against the defendants for the sum of Kshs.118,619.74 being the principal sum and USD10,000 as damages together with interest at 8% p.a.

Thereafter, the plaintiff filed a suit at the High Court at Mombasa in order to obtain a judgment that could be enforced on the defendants’ properties in Kenya in order to satisfy the debt. The plaintiff explained that its investigations indicated that there were attachable assets belonging to the defendants within the court’s territorial jurisdiction. The plaintiff also filed an application for the defendants’ statement of defence to be struck out and judgment to be entered in its favour. The plaintiff explained that the suit sought recognition and or enforcement of a foreign Judgment of the Commercial Court of Lubumbashi which was still binding on the parties and had not been set aside. The plaintiff also said that the issues in the suit had been determined by a foreign court and they could not be determined further by the High Court.

The defendants filed an application praying for the plaintiff’s suit to be struck out for being scandalous,
frivolous or vexatious and otherwise an abuse of the process of the court. In the alternative they applied for the plaintiff to be ordered to deposit security for costs in the sum of Kshs 1,000,000. The defendants explained that the court did not have jurisdiction to entertain the matter as there was no reciprocal agreement between Kenya and Congo for the enforcement of foreign judgments. They added that the judgment of the Commercial Court of Lubumbashi should not be enforced because the defendants were not heard before it was issued and that was contrary to the rules of natural justice.

Issues
i. Whether a foreign judgment, from a country with no agreement with Kenya on reciprocal recognition and enforcement of foreign judgments, could be enforced in Kenya.
ii. When would the court grant an application for summary judgment?
iii. When would the court make an order for security for costs?

Held
1. The appellant sought to enforce and execute in Kenya a judgment from the Democratic Republic of Congo. However, that country was not a designated country under the provisions of the Foreign Judgments (Reciprocal Enforcement) Act. Therefore, the Foreign Judgments (Reciprocal Enforcement) Act did not apply to the circumstances.

2. In the absence of a reciprocal enforcement arrangement, a foreign judgment was enforceable in Kenya as a claim in common law. While considering the applicable common law principles and taking into account the provisions of section 9 of the Civil Procedure Act, to enforce a foreign judgment in Kenya from a non-designated country, the following requirements had to be fulfilled:
   a) A party had to file a plaint at the High Court of Kenya providing a concise statement of the nature of the claim, claiming the amount of the judgment debt, supported by a verifying affidavit, list of witnesses and bundle of documents intended to be relied upon. A certified copy of the foreign judgment should be exhibited to the plaint.
   b) It was open to a defendant to challenge the validity of the foreign judgment under the grounds set out in section 9 of the Civil Procedure Act.
   c) A judgment creditor was entitled to summary judgment under order 36 unless the defendant judgment debtor could satisfy the court that there was a real prospect of establishing at trial one of the grounds set out in section 9 of the Civil Procedure Act.
   d) If the foreign judgment creditor was successful after trial, the judgment creditor would have the benefit of a High Court judgment and the judgment creditor would be entitled to use the procedures of the Kenyan courts to enforce the foreign judgment which would then be executed as a Kenyan judgment.
   e) The money judgment in the foreign judgment had to be final and conclusive. It could be final and conclusive even though it was subject to an appeal. Under section 9 of the Civil Procedure Act, a foreign judgment was conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title except:
      i. where it had not been pronounced by a court of competent jurisdiction;
      ii. where it had not been given on the merits of the case;
      iii. where it appeared on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law was applicable;
      iv. where the proceedings in which the judgment was obtained were opposed to natural justice;
      v. where it had been obtained by fraud; or
      vi. where it sustained a claim founded on a breach of any law in force in Kenya.
   f) Under Section 4 (4) of the Limitation of Actions Act an action for enforcement of a foreign judgment had to be brought in Kenya within 12 years of the date of that judgment.
   g) The foreign court had to have had jurisdiction, (according to the Kenyan rules on conflict of laws) to determine the subject matter of the dispute and the parties to the foreign court’s judgment and the enforcement proceedings had to be the same or derive their title from the original parties.
   h) The Kenya High Court would generally consider the foreign court to have had jurisdiction where the person against whom the judgment was given:
      i. was, at the time the proceedings were commenced, habitually resident or
incorporated in or having a principal place of business in the foreign jurisdiction, or
ii. was the claimant or counterclaimant in the foreign proceedings, or
iii. submitted to the jurisdiction of the foreign court, or
iv. agreed, before commencement, in respect of the subject matter of the proceedings to submit to the jurisdiction of the foreign court.

i) Where the above requirements were established to the satisfaction of the Kenya High Court, the High Court would not re-examine the merits of the foreign court judgment. The foreign judgment would be enforced on the basis that the defendant had a legal obligation as a matter of common law, recognized by the High Court, to satisfy the money decree of the foreign judgment.

3. The power to strike out pleadings was a drastic step that should be used sparingly and only in the clearest of cases. Nonetheless, a balance had to be struck between that principle and the policy consideration that a plaintiff should not be kept away from his judgment by unscrupulous defendant who filed a defence which was a sham simply for the purpose of delaying the finalization of the case.

4. The statement of defence contained various averments including a challenge to the jurisdiction of the court, a challenge as to whether the 2nd defendant executed any guarantee for the loan as alleged. It raised triable issues and where a defendant raised *prima facie* triable issues, he was entitled in law to defend a matter.

5. The determination of the issues raised in the defence could not be by way of summary judgment where the foreign judgment was from a non-designated country. For that reason, the case should proceed for full trial.

6. Under order 26 rule 1 of the Civil Procedure Rules, an order for security for costs was discretionary. That discretion was to be exercised reasonably while considering the circumstances of the case and the considerations included the following matters:
   - absence of known assets within the jurisdiction of court;
   - absence of an office within the jurisdiction of court;
   - insolvency or inability to pay costs;
   - the general financial standing or wellness of the plaintiff;
   - the good faith of the plaintiff’s claim; or
   - any other relevant circumstance or conduct of the plaintiff or the defendant.

7. In order for an order for security of costs to be made, the applicant ought to establish, that if unsuccessful in the proceedings, the respondent would be unable to pay costs due to poverty.

8. The plaintiff’s claim was genuine as it entailed the enforcement of a foreign judgment and the defendants did not show that the plaintiff had financial limitations. There was no reason for the court to exercise discretion and order for security for costs.

**Application dismissed. Costs to be in the cause.**

The nature and effect of a probation report in sentence re-hearing proceedings.

Republic v Peter Mutuku Mulwa & another [2020] eKLR

Criminal Case No. 46 of 2003

High Court of Kenya at Machakos

GV Odunga, J

March 30, 2020

Reported by Chelimo Eunice

**Constitutional Law** – rights and fundamental freedoms – right to fair hearing – right of an accused person to have the trial begin and conclude without unreasonable delay – whether delay in determining criminal proceedings infringed upon the rights of an accused person to a fair hearing – what were the emergent principles on the right to a trial within a reasonable time – Constitution of Kenya, 2010, article 50 (2) (e).

**Criminal procedure** – re-sentencing – principles guiding courts in re-sentencing hearing – whether a probation report was binding on the court on re-sentencing hearing - whether it was mandatory for a court to reduce the initial sentence during re-sentencing.

**Constitutional Law** – rights and fundamental freedoms – rights of persons detained, held in custody or imprisoned - whether a convict lost his rights and fundamental freedoms by virtue of being imprisoned - what were the objectives of sentencing - Constitution of Kenya, 2010, article 51 (1).
Brief facts

The accused sought an order for resentencing. They were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. They had sawed some timber and then left for a meal. On their return, they found the deceased stealing the timber and they beat him up, tied his hands and left to get some help. When they returned, they found him dead. After hearing the evidence, the trial court found them guilty, convicted them accordingly and sentenced them to death.

Issues:

i. Whether delay in determining criminal proceedings infringed upon the rights of an accused person to a fair hearing.

ii. What were the emergent principles on the right to a trial within a reasonable time?

iii. What principles guided courts in re-sentencing?

iv. Whether a probation report was binding on the court on re-sentencing hearing.

v. Whether it was mandatory for a court to reduce the initial sentence during re-sentencing.

vi. Whether a convict lost his rights and fundamental freedoms by virtue of being imprisoned.

vii. What were the objectives of sentencing?

Held:

1. Delay in determining criminal proceedings infringed upon the rights of an accused person to have the trial begin and conclude without unreasonable delay pursuant to article 50 (2) (e) of the Constitution.

2. The following broad principles emerged from the consideration of the Commonwealth and international jurisprudence on the right to a trial within a reasonable time:

a) the trial within a reasonable time guarantee was part of international human rights law and although the right would not be textually in identical terms in some countries the right was qualitatively identical.

b) the right was not an absolute right as the right of the accused had to be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions.

c) the general approach to the determination whether, the right had been violated was not by a mathematical or administrative formula but rather by judicial determination whereby the court was obliged to consider all the relevant factors within the context of the whole proceedings.

d) there was no international norm of reasonableness. The concept of reasonableness was a value judgment to be considered in particular circumstances of each case and in the context of domestic legal system and the economic, social and cultural conditions prevailing.

e) although an applicant had the ultimate legal burden throughout to prove a violation, the evidentiary burden would shift depending on the circumstances of the case. However, the court could make a determination on the basis of the facts emerging from the evidence before it without undue emphasis on whom the burden of proof lay.

f) the standard of proof of an unconstitutional delay was a high one and a relatively high threshold had to be crossed before the delay could be categorized as unreasonable.

g) although the procedure for raising a violation of the right varied from one jurisdiction to the other, the violation of the right had to be raised at the earliest possible stage in the proceedings to enable the court to give an effective remedy otherwise the right could be defeated by the doctrine of waiver where applicable.

h) the purpose of the right was to expedite trial and was designed principally to ensure that a person charged did not remain too long in a state of uncertainty about his fate.

i) the right was to trial without undue delay. It was not a right not to be tried after undue delay except in Scotland and it was not designed to avoid trials on the merits.

j) i) the remedy for the violation of the right varied from jurisdiction to jurisdiction. In some jurisdictions such as Canada and New Zealand it seemed that permanent stay of proceedings was the normal remedy for violation of the right.

ii) under the Common Law and under the jurisprudence of European Court of Human Rights, a permanent stay of proceedings was considered a draconian remedy only granted where it was demonstrated that the breach was so severe that a fair trial could not be held.

iii) in most of the Commonwealth countries with bill of rights and a constitution based on West Minister model, and, in South Africa the remedies were flexible – courts could grant any relief it considered appropriate in the circumstances of the case.

iv) in some jurisdictions, where the applicant was already convicted, the quashing of a
conviction was not considered a normal remedy and the court could take into account the fact that the applicant had been proved guilty of a crime, the seriousness and prevalence of the crime and design an appropriate remedy without unleashing a dangerous criminal to the society.

3. A resentencing hearing or any other sentencing hearing for that matter was neither a hearing de novo nor an appeal. Such proceedings were undertaken on the understanding that conviction was not in issue. It, therefore, followed that in those proceedings, the accused was not entitled to take up the issue of the propriety of his conviction. He had to proceed on the understanding that the conviction was lawful and restrict himself to the sentence and address the court only on the principles guiding the imposition of sentence and on the appropriate sentence in the circumstances.

4. The court could only refer to the evidence adduced in so far as it was relevant to the issue of sentencing but not with a view to making a determination as to whether the conviction was proper. While the court was entitled to refer to the evidence in order to determine whether there existed aggravating circumstances or otherwise for the purpose of meting the sentence, it was not proper for the court to set out to analyse the evidence as if it was meant to arrive at a decision on the guilt of the accused.

5. That the possibility of reform and social re-adaptation of the offender was to be considered in sentence re-hearing implied that where the accused had been in custody for a considerable period of time, the court ought to consider calling for a pre-sentencing report and possibly the victim impact report in order to inform itself as to whether the accused was fit for release back to the society.

6. Fairness to the accused where a sentence re-hearing was considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the accused during the three stages would, therefore, be a factor to be considered in determining the appropriate sentence. The need to protect the society required the court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report.

7. The probation report being a report which was not subjected to cross-examination in order to determine its veracity, was just one of the tools the court could rely on in determining the appropriate sentence. It was, therefore, not necessarily binding on the court and where there was discrepancy regarding the contents of the report and information from other sources such as from the parties themselves and the prison, the court was at liberty to decide which information to rely on in meting out its sentence. To rely on the probation report as the gospel truth amounted to abdication of the court’s duty of adjudication to probation officers. While the report of the probation officer ought to be treated with great respect, it was another thing to accept it hook, line and sinker. It, however, ought not to be simply ignored unless there were good reasons for doing so.

8. Where the accused had spent a considerable period of time in custody, it could be prudent for the court while conducting a sentence re-hearing, to direct that an inquiry be conducted by the probation officer and where necessary a pre-sentencing and victim impact statements be filed in order to enable it determine whether the accused had sufficiently reformed or had been adequately rehabilitated. That was so because the circumstances of the accused in custody could have changed either in his favour or otherwise in order to enable the court to determine which sentence ought to be meted. It may be that the accused had sufficiently reformed to be released back to the society. It could well be that the conduct of the accused while in custody could have deteriorated to the extent that it would not be in the interest of the society to have him released since one of the objectives of sentencing was to protect the community by incapacitating the offender.

9. A prisoner could not be detained unless there were legitimate penological grounds for that detention. Those grounds included punishment, deterrence, public protection and rehabilitation. Many of those grounds were available at the time when a life sentence was imposed. However, the balance between those justifications for detention was not necessarily static and could shift in the course of the sentence. What could be the primary justification for detention at the start of the sentence could not be so after a lengthy period into the service of the sentence. It was only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that those factors or shifts could be properly evaluated.

10. If a prisoner was incarcerated without any
prospect of release and without the possibility of having his life sentence reviewed, there was the risk that he could never atone for his offence. Whatever the prisoner did in prison, however, exceptional his progress towards rehabilitation, his punishment remained fixed and unreviewable. If anything, the punishment became greater with time. The longer the prisoner lived, the longer his sentence. Thus, even when a whole life sentence was condign punishment at the time of its imposition, with the passage of time it became a poor guarantee of just and proportionate punishment.

11. The circumstances under which the initial sentence was imposed could change as one served out the sentence. Accordingly, in undertaking a resentencing the court had to consider whether the circumstances of the accused during his/her incarceration had changed for the better or for worse. It was, therefore, important that not only should a report be availed to the court concerning the position of the victim’s family and the offender’s family but also the report from the prison authorities regarding the conduct of the offender during the period of incarceration. Therefore, where a resentencing was directed, the trial court ought to consider the filing of a probation report in order to assist it arrive at an appropriate report. However, the failure to do so was not necessarily fatal to the sentence.

12. In re-sentencing, the court was not obliged to reduce the initial sentence. What was required of the court undertaking the re-sentencing was to look at all the circumstances of the case and to make a determination whether the appellant’s incarceration had achieved the objective for which he was sentenced such as punishment, deterrence, public protection and rehabilitation. The court was not to be bound only by the appellant’s conduct that led to his incarceration but also his conduct and circumstances since the incarceration.

13. The petitioner’s liberty and rights to resentencing was being hindered by circumstances beyond their ability and there was no indication as to when, if at all, the previous records would be availed. Thus, their petition could no longer be delayed. A convict did not lose his rights and fundamental freedoms simply because he was in prison. That was so because article 51(1) of the Constitution provided that a person who was detained, held in custody or imprisoned under the law, retained all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom was incompatible with the fact that the person was detained, held in custody or imprisoned.

14. The best practice was that, where an appeal was pending before the Court of Appeal or a higher court or where the previous proceedings had not been availed, re-sentencing proceedings ought not to be proceeded with and the latter ought to be kept in abeyance pending the determination or termination of the pending appeal or the availability of the previous records. However, where the applicant had waited for a very long time to get his previous records transmitted back to the court in order to facilitate the court in carrying out its constitutional mandate to no avail, the justice of the case dictated that the rights of the petitioner be upheld.

15. Since what the accused were seeking was a reconsideration of their sentence, there was no undue hindrance to the court which was the trial court undertaking the resentencing proceedings by calling for the probation officer’s report, victim impact report and report from the prison and proceedings to consider the petitioner’s mitigation and arriving at an appropriate sentence.

16. According to the probation officer’s report, the 1st accused, while in incarceration used to operate a number plate printing machine and also learnt carpentry through apprenticeship. According to the community, he was social and related well with his community members, was industrious, supportive and resourceful and had a positive attitude and was respectful to the authorities both at home and in prison. It was confirmed that reconciliation had taken place between the families of the 1st accused and those of the victim’s both of whom belonged to the same clan and therefore the deceased’s family had no objection to the court being lenient to the 1st accused as customary compensation had been done.

17. As for the 2nd accused, he was described as well behaved and industrious person who took good care of his family. The family of the deceased held no grudge against him after the reconciliation between them and the 1st accused since the 2nd accused was not from the same clan and he had only been contracted by the family of the 1st accused to saw timber for them. Similarly, the prison gave a positive report towards him and had no problem with the local administration.

18. There were four sets of factors a court
looked at in determining the appropriate custodial sentence after determining the correct entry point, being:

a. circumstances surrounding the commission of the offence; the factors included:
   i. was the offender armed? The more dangerous the weapon, the higher the culpability and hence the higher the sentence.
   ii. was the offender armed with a gun?
   iii. was the gun an assault weapon such as AK47?
   iv. did the offender use excessive, flagrant or gratuitous force?
   v. was the offender part of an organized gang?
   vi. were there multiple victims?
   vii. did the offender repeatedly assault or attack the same victim?

b. circumstances surrounding the offender; the factors included:
   i. the criminal history of the offender; being a first offender was a mitigating factor;
   ii. the remorse of the applicant as expressed at the time of conviction;
   iii. the remorse of the applicant presently;
   iv. demonstrable evidence that the applicant had reformed while in prison;
   v. demonstrable capacity for rehabilitation;
   vi. potential for re-integration with the community;
   vii. the personal situation of the offender including the applicant’s family situation; health; disability; or mental illness or impaired function of the mind.

c. circumstances surrounding the victim; the factors to be considered included:
   i. the impact of the offence on the victims, if known or knowable;
   ii. whether the victim got injured, and if so the extent of the injury;
   iii. whether there were serious psychological effects on the victim;
   iv. the views of the victim(s) regarding the appropriate sentence;
   v. whether the victim was a member of a vulnerable group such as children; women; persons with disabilities; or the elderly;
   vi. whether the victim was targeted because of the special public service they offer or their position in the public service; and
   vii. whether there had been commitment on the part of the offender or applicant to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime.

19. According to the prison report, the accused had been in custody for a period of 17 years. Loss of life was, no doubt, a very serious matter. In those circumstances, however, it was highly unlikely, that the accused would commit a similar offence. It was clear that the accused had during the period of their incarceration reformed and had engaged themselves in activities meant to assist them in reintegrating with the community. Not only were they well behaved but they had reconciled with the family of the deceased who no longer harboured any ill-will towards them. Their communities had no issue with them re-joining the society and their families were ready to welcome them back into the fold. Due to reconciliatory steps initiated by both families, the victim’s family had forgiven the accused and had no issue with them being released since it was their opinion that the accused had been sufficiently disciplined and had learned their lessons during the period they had been in custody. The period of incarceration of the accused was sufficient punishment and consequently their incarceration had achieved three objectives of retribution, deterrence and rehabilitation.

20. The accused’s incarceration had served the purposes for which imposition of sentences was meant. Once the sentence imposed on an accused had met the objectives of retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation, it was no longer necessary or desirable to continue holding the accused in incarceration. The victim’s family, the community and the accused’s family as well as the prison authorities were in agreement that it was no longer in their interest to keep the accused incarcerated.

Application allowed.

Order:

The accused sentenced to the period that could ensure
their immediate release from prison unless they were otherwise lawfully held.

(Ruling delivered pursuant to section 168 of the Criminal Procedure Code as read with article 50 of the Constitution in the absence of the accused due to the prevailing restrictions occasioned by Covid-19 pandemic and particularly as the decision was in favour of the accused.)

A hospital is vicariously liable for medical negligence by its part time employees.

BO (a minor suing through his next friend DOO v Nathan Khamala & another [2020] eKLR

Civil Case No. 351 of 2010

High Court at Nairobi

L. Njuguna, J

February 27, 2020.

Reported by Kakai Toili

**Tort Law** - negligence – medical negligence – where a doctor working on a part-time basis committed medical negligence - whether the hospital was vicariously liable for the negligence of a doctor who was working there on part-time basis.

**Tort Law** – negligence - medical negligence - standard and duty of care of health care professionals – where a patient alleged medical negligence on the part of a doctor treating him – when did the duty of care arise and what was the nature of the duty of care - when did medical negligence arise.

**Evidence Law** – evidence – medical evidence – where a doctor prepared a medical report – where the doctor did not testify in court on the findings in his report - what was the effect of failure of the doctor to give evidence in court.

**Brief facts**

The plaintiff filed the instant suit against the defendants for among other orders; a declaration that the defendants jointly and severally acted negligently and in breach of duty of care owed to him and were liable to compensate him for his pain, suffering and loss; a declaration that the 2nd defendant was vicariously liable for the negligence of, and breach of duty of care owed to the plaintiff by the 1st defendant in providing medical advice, treatment and management of the plaintiff among others. The plaintiff averred that in January, 2009, he attended the 2nd defendant for medical advice and treatment after sustaining injuries to his left forearm resulting in a fractured forearm. He claimed that he was advised, treated and managed by the 1st defendant and other professionals employed by the 2nd defendant.

The plaintiff averred that on the advice of the 1st defendant, he underwent a corrective surgery on his left forearm but subsequent to the aforesaid surgery, his injuries did not improve but on the contrary, he developed more complications. The plaintiff stated that after being dissatisfied with the advice/treatment and management accorded to him at the 2nd defendant, he sought a second opinion from a hand trauma specialist surgeon (deceased doctor) and that as a result of the aggravated injuries, he had to undergo two surgical operations to correct the damages caused to his left forearm. The plaintiff further claimed that as a consequence of the further injuries, he suffered a deformity to his left hand.

**Issues**

i. Whether a hospital was vicariously liable for medical negligence by its part-time basis employees.

ii. When did a duty of care arise between a health care professional and a patient and what was the nature of the duty of care?

iii. When did medical negligence arise in the treatment of patients by health care professionals?

iv. What was the effect of failure of a doctor to give evidence on his/her medical report in court?

**Held**

1. The defendants did not deny that they admitted the plaintiff at the hospital on/or about the January 31, 2009, following injuries to his left arm after a fall while playing. A perusal of plaintiff’s evidence revealed that the plaintiff was admitted at the 2nd defendant’s hospital on January 31, 2009 and was discharged on February 3, the same year. It also showed that the attending doctor was the 1st defendant. Similarly the exhibits produced by the defendant attested to the same fact and further showed that even after the discharge, the plaintiff continued with the clinics in the 2nd defendant’s orthopedic clinic under the 1st defendant, among other doctors. A duty of care arose once the 1st defendant agreed to treat the plaintiff upon his admission at the 2nd defendant’s facility.
2. A duty of care arose once a doctor or any other health care professional agreed to diagnose or treat a patient. That professional assumed a duty of care towards that patient. A person who held himself as ready to give medical advice or treatment impliedly undertook that he was possessed of skill and knowledge for that purpose. Such a person, whether he was a registered medical practitioner or not, who was consulted by a patient, owed him certain duties namely, a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment and a duty of care in his administration of that treatment. There existed a duty of care between the patient and the doctor, hospital or health provider. Once that relationship had been established, the doctor was taken to:
   a. possess the medical knowledge required of a reasonably competent medical practitioner engaged in the same specialty.
   b. possess the skills required of a reasonably competent health care practitioner engaged in the same specialty.
   c. exercise the care in the application of the knowledge and skill to be expected of a reasonably competent health care practitioner in the same specialty.
   d. use the medical judgment in the exercise of that care required of a reasonably competent practitioner in the same medical or health care specialty.

3. A physician had a duty of care and skill which was expected reasonably of a competent practitioner in the same class to which a physician belonged acting in the same or similar circumstances. When a physician or other medical staff member did not treat a patient with proper amount of quality care, resulting in serious injury or death, they committed medical negligence.

4. A hospital was vicariously liable for the negligence of the members of staff including the nurses and doctors. A medical person who was employed part-time at a hospital was a member of staff, for whose negligence the hospital was liable.

5. On the degree of permanent incapacity, both PW1 and the deceased doctor gave a common percentage at 50%. PW1 was a consultant orthopedic (hand and upper extremity) surgeon while the deceased doctor was a plastic hand surgeon. On the other hand, the doctor who prepared the defendant’s medical report (defendant’s doctor) was a consultant surgeon. Both PW1 and the deceased doctor were consultants in the area with regard to which the plaintiff was treated and therefore, their reports were likely to carry more weight. In any event, PW1 in his evidence explained the factors he took into consideration in arriving at the 50% incapacitation. However, the defendant’s doctor did not come as a witness to testify on his opinion on the degree of incapacitation. The degree of 50% opined by the two specialists was more credible. Submissions could not take the place of evidence.

6. Damages had to be within limits set out by decided cases and also within the limits the Kenyan economy could afford. Large awards were inevitably passed on the members of the public, the vast majority of whom could not afford the burdens in the form of increased costs of insurance or increased fees. Damages should not be so inordinately low or so inordinately high as to be a wholly erroneous estimation of damage. The court took into account the degree of injuries sustained by the plaintiff and the doctor’s opinion and diagnosis. Suit partly allowed; plaintiff awarded a sum of kshs. 1,500,000 as compensation for the injuries; general damages awarded to attract interest from the date of the judgment till payment in full; plaintiff awarded costs of the suit.

A casual contract of employment cannot be converted to a temporary contract of employment where an employee has worked for over three months

Esther Njeri Maina v Kenyatta University [2020] eKLR
Petition No. 133 of 2018
Employment and Labour Relations Court at Nairobi

H Wasilwa, J
April 15, 2020

Reported by Kakai Toili

Labour Law – employment – employment contract
- casual contract of employment – where an employee worked under a casual contract of employment for over three months and did the same job on a continuous basis and was not entitled to maternity leave – where the employer sought to convert the casual contract of
leave.

Relevant provisions of the law

Employment Act, 2007

Section 37 Conversion of causal employment to term contract:

1) Notwithstanding any provisions of this Act, where a casual employee:
   a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
   b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.

Held

1. The position in law concerning casual employment was provided for under section 37 of the Employment Act 2007. In light of section 37, one could not be held as a casual worker for over 3 months and especially so if one was doing the same job on a continuous basis as was the case with the petitioner.

Brief facts

The petitioner averred that she was employed in August 2009 as a secretary and had worked for the respondent continuously without any off days, paid maternity leave, sick off or annual leave. She averred that she had performed her duties for a long time and on a permanent basis with the respondent who had never issued her with written terms and conditions of service. The petitioner claimed that in July 2018, they were required to sign individual contracts or else they would not be included in the respondent’s payroll for that month. The petitioner together with some of her colleagues enquired whether they were entitled to maternity leave under the contract and why the contract indicated that the same had been explained to them yet that was untrue. She further claimed that the Administration Registrar undertook to follow up on the matter but never did.

The petitioner averred that the seasonal contracts reduced the salaries and was based on 22 working days in a month and did not make provisions for maternity leave. The petitioner claimed that in September 2018, her head of department issued her with another contract and instructed her to sign it in his presence and not photocopy or take photographs of the same. She claimed that she did as was instructed, for fear of being dismissed from employment. The petitioner thus claimed that the respondent had violated her rights under the Constitution as she had been discriminated against because the employment terms of other categories of employees were in line with the provisions of the Employment Act and that she had been denied the opportunity to serve on permanent terms.

Issues

i. Whether a casual contract of employment could be converted to a temporary contract of employment where an employee had worked as a casual employee for a period of over 3 months.

ii. Whether employees who did the same job on a continuous basis for over three months ought to be considered as casual employees.

iii. Whether employees on casual contracts of employment were entitled to maternity leave.

Brief facts

The petitioner averred that she was employed in August 2009 as a secretary and had worked for the respondent continuously without any off days, paid maternity leave, sick off or annual leave. She averred that she had performed her duties for a long time and on a permanent basis with the respondent who had never issued her with written terms and conditions of service. The petitioner claimed that in July 2018, they were required to sign individual contracts or else they would not be included in the respondent’s payroll for that month. The petitioner together with some of her colleagues enquired whether they were entitled to maternity leave under the contract and why the contract indicated that the same had been explained to them yet that was untrue. She further claimed that the Administration Registrar undertook to follow up on the matter but never did.

The petitioner averred that the seasonal contracts reduced the salaries and was based on 22 working days in a month and did not make provisions for maternity leave. The petitioner claimed that in September 2018, her head of department issued her with another contract and instructed her to sign it in his presence and not photocopy or take photographs of the same. She claimed that she did as was instructed, for fear of being dismissed from employment. The petitioner thus claimed that the respondent had violated her rights under the Constitution as she had been discriminated against because the employment terms of other categories of employees were in line with the provisions of the Employment Act and that she had been denied the opportunity to serve on permanent terms.

Issues

i. Whether a casual contract of employment could be converted to a temporary contract of employment where an employee had worked as a casual employee for a period of over 3 months.

ii. Whether employees who did the same job on a continuous basis for over three months ought to be considered as casual employees.

iii. Whether employees on casual contracts of employment were entitled to maternity leave.

Relevant provisions of the law

Employment Act, 2007

Section 37 Conversion of causal employment to term contract:

1) Notwithstanding any provisions of this Act, where a casual employee:
   a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
   b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.

Held

1. The position in law concerning casual employment was provided for under section 37 of the Employment Act 2007. In light of section 37, one could not be held as a casual worker for over 3 months and especially so if one was doing the same job on a continuous basis as was the case with the petitioner.
2. The law envisaged that an employer was duty bound to issue an employee with an appointment letter detailing the nature of the relationship as envisaged under section 9 of the Employment Act. The respondent failed to issue the petitioner with a contract of employment and held her as a casual for over 3 months as she performed the same tasks, which flouted the law. The law recognized existence of causal employment but the same could not be indefinite.

3. The respondent was in breach of the law when it purported to unilaterally change the casual employment to a temporary one in 2018 instead of confirming the permanent and pensionable employee status the petitioner had earned after serving the respondent from 2009. The nature of the employment relationship between the petitioner and respondent was not casual or temporary but permanent and pensionable.

4. Under article 41 of the Constitution, every person had a right to fair labour practices. Indeed, fair labour practices included adherence to the law through the issuance of an employment contract, confirmation of employment after serving under probationary period or being a casual employee for a period exceeding 3 months. The respondent failed to adhere to the law and therefore subjected the petitioner to unfair labour practices. In addition, the respondent breached other rights pertinent to a labour contract such as maternity leave and reasonable and fair remuneration. The petitioner’s rights under the Constitution were breached and in particular, her right to fair labour practices.

Petition partly allowed; respondent to pay the petitioner costs of the petition.

Orders

i. A declaration was issued that the petitioner’s right to fair labour practices was infringed upon.

ii. A declaration was issued that the petitioner’s nature of employment relationship with respondent was not casual or temporary but permanent and pensionable with effect from the date of the judgment.

iii. The respondent to issue the petitioner with a contract detailing the nature of that contract as per the law and in tandem with other permanent and pensionable employees who were permanent and pensionable on her grade.
Feedback For Caseback Service

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

Hon. Justice Fred A. Ochieng
Presiding Judge
High Court Kisumu

Thank You for the feedback.
It is always important to be informed of the results of an appeal arising from one’s decision, as it enables one to know whether or not to continue with the line of thought already held.

Hon. Omido J.M.
Principal Magistrate
Kwale Law Courts

Well received, with thanks.
CaseBack has been a useful avenue through which I continue learning from my decisions which are appealed from.
Keep up the good work.

Hon. Mary I. G. Moranga
Senior Principal Magistrate
Kitale Law Courts

I take this opportunity to express my gratitude for the continued updates on the outcome of matters handled by myself on Appeal.

Hon. Nelly Chepchirchir
Senior Resident Magistrate
Mariakani Law Courts

Dear cashback,
Thank you so much for the case back. I am a better person, informed and duly guided. Am so glad to have received the case back. Long live KLR!!

Hon. Gladys Ollimo
Resident Magistrate
Butere Law Courts

Thank you team case back! It’s motivating to learn that my decision was not overturned on appeal.
Legislative Updates

By Nelson Nkari, Laws of Kenya Department

This is a synopsis of National Assembly and Senate Bills published in the period April to June, 2020.

A. NATIONAL ASSEMBLY BILLS

<table>
<thead>
<tr>
<th>BILL</th>
<th>ASSEMBLY BILL</th>
<th>FINANCE BILL, 2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dated</td>
<td>5th May, 2020</td>
<td></td>
</tr>
</tbody>
</table>

Objective

This Bill was submitted by the Cabinet Secretary for the National Treasury and Planning and formulates the proposals announced in the Budget for 2020/2021 relating to liability to, and collection of taxes, and for matters incidental thereto. The Bill also seeks to amend the following laws:

1. **Roads Tolls Act (Cap. 407)**
   - The Bill proposes to amend the Act to enable the persons, who enter into agreement with the Cabinet Secretary responsible for roads, collect road tolls on roads constructed and managed under such agreements. The amendment also proposes creation of a Fund by the Cabinet Secretary for the National Treasury in which the funds collected shall be deposited into.

2. **Capital Markets Act (Cap. 485A)**
   - The Bill seeks to amend section 11 (3) of the Act to bring private equity and venture capital firms that access public funds (pensions scheme funds) under the regulatory oversight of the Capital Markets Authority in line with the Cabinet Secretary's policy pronouncement and intention in the financial year 2015/16 budget speech. The Bill further seeks to amend section 18 of the Act to remove the function of payment of beneficiaries from collected unclaimed dividends when they resurface since this is a function currently domiciled under the Unclaimed Financial Assets Authority.

3. **Insurance Act (Cap. 487)**
   - The Bill seeks to amend section 204A (3) of the Insurance Act to specify the period within which an appeal against the decision of the Commissioner of Insurance by an aggrieved party can be filed in the Tribunal.

4. **Standards Act (Cap. 496)**
   - The Bill proposes to amend the definition of “consolidator” in section 2 of the Act to facilitate visibility of individual consignees for the purpose of customs declaration.

5. **Kenya Revenue Authority Act (No. 2 of 1995)**
   - The Bill seeks to amend the Act to provide for a legal framework for the establishment of an institution to offer capacity building and training on tax, customs and revenue administration. The Bill further proposes to amend the Act to include commissions earned by the Kenya Revenue Authority on collections made on behalf of government agencies or county governments as a source of funding for the Authority capped at 2% of the revenue collected. The Bill also seeks to amend the Act by providing for specific timelines within which the Authority can be sued to enable the Authority to effectively manage its disputes.

   - The Bill seeks to amend the Retirement Benefits Act, 1997 to enhance supervisory role of the Authority on pension schemes by providing powers to charge a penalty for failure to submit actuarial valuation reports within the period specified in the Regulations.

7. **Insolvency Act (No. 18 of 2015)**
   - The Bill proposes to amend the Second Schedule to the Act to reduce the risk exposure on the tax revenues held by commercial banks before transfer to Central Bank by declaring them preferential claims in the order of priority in the event of insolvency.

Sponsor

Joseph K. Limo, Chairperson of the Departmental Committee on Finance and National Planning

<table>
<thead>
<tr>
<th>BILL</th>
<th>ASSEMBLY BILL</th>
<th>REFERENDUM BILL, 2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dated</td>
<td>8th May, 2020</td>
<td></td>
</tr>
</tbody>
</table>

Objective

The principal object of the Bill is to provide for the procedure of the approval of an amendment to the Constitution by a referendum, the conduct of a referendum, referendum petitions and consequential amendments to the Elections Act (No. 24 of 2011) which currently provide for the conduct of a referendum.

Sponsor

Jeremiah Kioni, Chairperson, Constitutional Implementation Oversight Committee
<table>
<thead>
<tr>
<th>NATIONAL ASSEMBLY BILL</th>
<th>INCOME TAX BILL, 2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dated</td>
<td>15th May, 2020</td>
</tr>
<tr>
<td>Objective</td>
<td>The Income Tax Bill, 2020, is intended to simplify the law on income tax, expand the tax base, adopt new developments in tax practices that are suited to the Kenyan economy, simplify tax administration, reduce the cost of compliance, and provide for matters incidental to and connected therewith.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Aden Duale, Leader of the Majority Party, National Assembly</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>NATIONAL ASSEMBLY BILL</th>
<th>POVERTY ERADICATION AUTHORITY BILL, 2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dated</td>
<td>22nd May, 2020</td>
</tr>
<tr>
<td>Objective</td>
<td>The principal object of this Bill is to provide for an institutional framework that will promote and manage policies that combat poverty. The Authority shall ensure the participation of all Kenyans in economic growth, coordinating national economic empowerment and poverty reduction agenda.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>John Waluke Koyi, Member of Parliament</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>NATIONAL ASSEMBLY BILL</th>
<th>REFERENDUM (No. 2) BILL, 2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dated</td>
<td>29th May, 2020</td>
</tr>
<tr>
<td>Objective</td>
<td>The principal object of this Bill is to consolidate the law relating to conduct of referenda, to provide for a transparent and fair process in order to obtain a clear expression of the will of people, by establishing the procedures for the conduct of referenda, providing for the referendum committees and establishing a level playing field for the opposers and supporters of a referendum question, by providing for equal public funding and by limiting expenditure in a reasonable manner for the public good, to afford the people an opportunity to make decisions based on information from both points of view.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>William Kipkiror Cheptumo, Chairperson, Department Committee on Justice and Legal Affairs, National Assembly</td>
</tr>
</tbody>
</table>

**KLR 2013 Vol 1, 2 and 3**

Apart from offering great insights about Constitutional Law in Kenya after the transition to the new Constitution of Kenya 2010, the KLR 2013 series also provides insights on criminal law, labour law, tax law and tort law. The KLR 2013 series is a must have in your Library!

Each Retailing at Ksh.5,500.00

Please Contact: The Sales, Marketing and Customer Care Department
ACK Garden Annex, 5th Floor, 1st Ngong Avenue, Ngong Road P.O. Box 10443-00100 Nairobi

+254 (0)20 271 2767, 2719231  info@kenyalaw.org  www.kenyalaw.org  mykenyalaw  mykenyalaw
<table>
<thead>
<tr>
<th>NATIONAL BILL</th>
<th>ASSEMBLY</th>
<th>STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2020</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Dated</strong></td>
<td>5th June, 2020</td>
<td>This Bill contains proposed amendments to the following statutes:</td>
</tr>
<tr>
<td><strong>Objective</strong></td>
<td></td>
<td>1. <strong>Interpretation and General Provisions Act (Cap. 2)</strong> The Bill proposes to amend the Interpretation and General Provisions Act (Cap. 2) to harmonise the definition of “Kenya Defence Forces” with the one contained in the Kenya Defence Forces Act, 2012. It also proposes to recognise the Attorney-General as the office to administer the matters relating to the legal sector.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. <strong>Records Disposal Act (Cap. 14)</strong> The Bill proposes to amend the Records Disposal Act to make provisions empowering the Chief Justice to make rules on the disposal records of the Employment and Labour Relations Court.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3. <strong>Penal Code (Cap. 63)</strong> The Bill proposes to amend the Penal Code to replace the reference to the Commissioner-General of Police with the Inspector-General in line with the National Police Service Act, 2011.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4. <strong>Criminal Procedure Code (Cap. 75)</strong> The Bill proposes to amend the Criminal Procedure Code to harmonise the terms therein with the National Police Service Act, 2011 and to provide for police supervision for persons previously imprisoned for offences under the Counter-trafficking in Persons Act, 2012 and the Prevention of Organised Crimes Act, 2010. It additionally proposes to amend the Act to allow the Court to order the recovery of any penalty for the failure to observe a condition that has been ordered or agreed to by an accused person before Court for the grant of bail from the sale of both movable and immovable property of the person; to delete offences already provided for in the Sexual Offences Act, 2006; and to allow an appeal from the High Court in the exercise of its original jurisdiction.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>5. <strong>Evidence Act (Cap. 80)</strong> The Bill proposes to amend the Act to expand the definition of “Photograph” and allow for the presentation and admissibility of digital photographs.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>6. <strong>Public Holidays Act (Cap. 109)</strong> The Bill proposes to amend the Public Holidays Act to harmonise the terms applied therein with the Constitution and to rename Moi Day as Utamaduni Day.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>7. <strong>Firearms Act (Cap. 114)</strong> The Bill proposes to amend the Firearms Act to replace the reference to the Commissioner General of Police with the Inspector General in line with the National Police Service Act, 2011.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>8. <strong>Housing Act (Cap. 117)</strong> The Bill proposes to amend the Housing Act to remove the mandatory nature of contributions to the National Housing Fund.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>9. <strong>Official Secrets Act (Cap. 187)</strong> The Bill proposes to amend the Official Secrets Act to harmonise its provisions with the structure of courts and other State offices established by the Constitution. It also proposes to amend the Act to harmonise it with advances in technology.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>10. <strong>Films and Stage Plays Act (Cap. 222)</strong> The Bill proposes to amend the Films and Stage Plays Act to empower the Kenya Film Classification Board to regulate and manage matters touching on classification of films, commercials and other advertisements, and online film content.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>11. <strong>Kenya Roads Board Act, 1999 (No. 7 of 1999)</strong> The Bill seeks to amend the Act to provide for the minimum number of meetings the Board can hold in any given year, and depart from the current situation where the Board must hold a meeting every month.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>12. <strong>Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003)</strong> The Bill proposes to amend the Act to allow a public officer whose case is not concluded within twenty-four (24) months to apply to the Court for his or her suspension to be lifted and to allow the Commission to apply to Court for an order for a State Officer under investigation or charged with corruption or economic crimes to be temporarily restricted from specific access to their office for a period not exceeding ninety (90) days. It additionally proposes to delete Part IIIB of the Act which relates to the defunct Kenya Anti-Corruption Commission Advisory Board.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>13. <strong>Statistics Act, 2006 (No. 4 of 2006)</strong> The Bill proposes to amend the Statistics Act to give the Board the power to cancel or revise data if data is found to be inaccurate.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>14. <strong>Employment Act, 2007 (No. 11 of 2007)</strong> The Bill proposes to amend the Employment Act, 2007 to remove references to contributions to the National Housing Fund and also to harmonise the reference to the armed forces with the terms applied in the Kenya Defence Forces Act, 2007 and also to exclude the Coast Guard Service from its provisions.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>15. <strong>Accountants Act, 2008 (No. 15 of 2008)</strong> The Bill seeks to amend the Accountants Act to introduce trainee accountants as a category of persons to be subject to the Act and make some additional provisions in that respect.</td>
</tr>
</tbody>
</table>
   The Bill seeks to amend the Act to include investigators from the Ethics and Anti-Corruption Commission as authorised officers under the Act and to include the Secretary of the Ethics and Anti-Corruption Commission and the Director of Public Prosecutions as members of the Anti-Money Laundering Advisory Board.

18. **Counter-Trafficking in Persons Act, 2010 (No. 8 of 2010)**
   The Bill proposes to amend the Act to include the Director of Public Prosecutions in the Counter-Trafficking in Persons Advisory Committee.

   The Bill proposes to amend the Judicial Service Act to reduce the post-qualification years of experience required for recruitment as a legal researcher from two years to one year.

20. **Political Parties Act 2011 (No. 11 of 2011)**
   The Bill proposes to amend the Political Parties Act to clarify the amount of money payable by Government into the Political Parties Fund.

   The Bill proposes to amend the KCNHR Act, 2011 to elaborate on the functions of the Commission and to update the provisions relating to appointment of members of the Commission.

22. **Employment and Labour Relations Court Act, 2011 (No. 20 of 2011)**
   The Bill proposes to amend the Employment and Labour Relations Court Act, 2011 to empower the Chief Justice to make rules for the delegation of specified powers to the Registrar for purposes of the Civil Procedure Act (Cap. 21).

   The Bill proposes to amend the Act to allow the Ethics and Anti-Corruption Commission to institute proceedings for the recovery of corruptly acquired assets located outside Kenya. It further proposes to amend the Act to allow the Ethics and Anti-Corruption Commission to institute proceedings for the recovery of corruptly acquired assets located outside Kenya.

   The Bill proposes to amend the Public Appointments (Parliamentary Approval) Act, 2011 to increase the period during which a House of Parliament shall consider a nomination and table its report, from fourteen to twenty-eight days.

25. **Leadership and Integrity Act, 2012 (No. 19 of 2012)**
   The Bill proposes to amend the Act to allow the Ethics and Anti-Corruption Commission to verify the contents of any self-declaration form filed by a person intending to be appointed to a State office and to advise Parliament or a selection panel on the suitability of the person for appointment. It additionally proposes to introduce the offences of operating an account outside Kenya without approval by the Commission and failing to submit annual statements of such accounts to the Commission. Both Offences attract a penalty of five years imprisonment or a fine of five million shillings, or both. It further proposes to allow the High Court to invalidate the assumption of office of a State Officer where they fail to sign the Leadership and Integrity Code.

26. **Universities Act, 2012 (No. 42 of 2012)**
   The Bill proposes to amend the Act to provide for the establishment by Charter of degree-awarding institutions specialising in national security issues, and to apply the provisions of the Act relating to administration and management of universities to those institutions.

27. **Basic Education Act, 2013 (No. 14 of 2013)**
   The Bill proposes to amend Basic Education Act, 2013 to harmonise the provisions relating to membership of the County Education Boards, Boards of Management and the Education Appeals Tribunal.

   The Bill proposes to amend the Kenya Law Reform Commission Act, 2013 to provide for the powers of the Attorney-General with respect to the Commission and to streamline membership by ex officio members in the Commission.

29. **Scrap Metal Act, 2015 (No. 1 of 2015)**
   The Bill proposes to amend the Scrap Metal Act, 2015 to provide for the powers of a police officer during investigations under the Act.

30. **Retirement Benefits (Deputy President and Designated State Officers) Act, 2015**
   The Bill proposes to amend the Act to provide for, firstly, the administration of benefits due to retired Deputy-President, Vice-President, Prime Minister, Speakers of Parliament, Chief Justice and Deputy Chief Justice, and, secondly, for such benefits to be factored in the respective estimates of the national government, the parliament, the service and the Judiciary, submitted for approval by the National Assembly. However, the administration of pension, lump sum payment upon retirement, and gratuity provided for in the Act shall not be affected by this amendment, and will continue being administered by the relevant office in the National Treasury.

   The Bill proposes to amend the Investment and Financial Analysts Act to streamline the day to day operations of the Institute with the Act.

32. **Court of Appeal (Organisation and Administration) Act, 2015 (No. 28 of 2015)**
   The Bill proposes to amend the of Appeal (Organisation and Administration) Act, 2015 to provide for the vacation dates of the Court to harmonise them with those applying in other courts.

33. **Procurement and Asset Disposal Act, 2015 (No. 33 of 2015)**
   The Bill proposes to amend the Act to address the challenges faced by procuring entities in implementing multiple awards of contracts in the wake of sections 82 and 86 of the Act.

34. **Bribery Act, 2016 (No. 47 of 2016)**
   The Bill proposes to amend the Act to require all persons, and not just those holding a position of responsibility, to report any knowledge or suspicion of bribery.

35. **Kenya Coast Guard Act, 2018 (No. 11 of 2018)**
   The Bill proposed to amend the Kenya Coast Guard Act, 2018 to include the Kenya Wildlife Service and the Kenya Forest Service as bodies from which the Service can recruit officers. It also proposes to expand the Technical Committee of the Service and to standardise the ranks in the Service with the Defence Forces.

36. **Energy Act, 2019 (No. 1 of 2019)**
   The Bill proposes to amend the Energy Act to cure ambiguity and typographical errors, and to streamline membership to various bodies created in the statute.
### NATIONAL ASSEMBLY BILL
**MEDIATION BILL, 2020**

<table>
<thead>
<tr>
<th>Date</th>
<th>15th June, 2020</th>
</tr>
</thead>
</table>
| **Objective**| The principal object of this Bill is to:  
   a) provide for the settlement of all civil disputes by mediation;  
   b) set out the principles applicable to mediation;  
   c) provide for the establishment of the Mediation Committee; and  
   d) provide for the accreditation or registration of mediators and recognition and enforcement of settlement agreements among other things. |
| **Sponsor**   | Aden Duale, Leader of the Majority Party, National Assembly |

### NATIONAL ASSEMBLY BILL
**NATIONAL AVIATION MANAGEMENT BILL, 2020**

<table>
<thead>
<tr>
<th>Date</th>
<th>15th June, 2020</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Objective</strong></td>
<td>The Bill aims at giving effect to the recommendations of the Parliamentary report (dated the 17th June, 2019) on the inquiry into the Kenya Airways’ Privately Initiated Investment Proposal (PIIP) to Kenya Airports Authority prepared by the Departmental Committee on Transport, Public Works and Housing proposing, among other recommendations, the nationalisation of Kenya Airways. The Bill proposes for the establishment of the Kenya Aviation Corporation as a holding corporation and its Operating Entities including Operating Entity Subsidiaries.</td>
</tr>
<tr>
<td><strong>Sponsor</strong></td>
<td>Aden Duale, Leader of the Majority Party, National Assembly</td>
</tr>
</tbody>
</table>

### B. SENATE BILLS

#### SENATE BILL
**COMMUNITY HEALTH SERVICES BILL, 2020**

<table>
<thead>
<tr>
<th>Date</th>
<th>3rd April, 2020</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Objective</strong></td>
<td>The principal object of this Bill is to provide a framework for the regulation of community health services and the recognition of community health workers.</td>
</tr>
<tr>
<td><strong>Sponsor</strong></td>
<td>Agnes P. Zani, Senator</td>
</tr>
</tbody>
</table>

#### SENATE BILL
**PANDEMIC RESPONSE AND MANAGEMENT BILL, 2020**

<table>
<thead>
<tr>
<th>Dated</th>
<th>17th April, 2020</th>
</tr>
</thead>
</table>
| **Objective**| The principal object of this Bill is to provide a framework for the effective response to and management of a pandemic in order to prevent the occurrence or spread of a pandemic whenever it arises. It also seeks to provide measures to mitigate against the effects of the pandemic and provide a mechanism to cushion those that may be adversely affected by the pandemic.  
   This Bill seeks to provide a mechanism for the coordinated response by the National and County Governments and a framework setting out specific measures required to be undertaken to address the socio-economic issues that may arise following a pandemic.  
   The Bill further provides for the establishment of a National Pandemic Response Committee as an ad-hoc committee whenever a pandemic is declared. The Committee is required to spearhead the implementation of activities geared towards preventing the spread and mitigating against the negative impact of a pandemic. The Bill also outlines the functions required to be undertaken by the Committee in order to prevent the spread and address the adverse consequences of the pandemic. |
| **Sponsor**   | Johnson Sakaja, Chairperson, Ad-Hoc Committee on Covid-19 Situation in Kenya |

#### SENATE BILL
**COUNTY ALLOCATION OF REVENUE BILL, 2020**

<table>
<thead>
<tr>
<th>Dated</th>
<th>17th April, 2020</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Objective</strong></td>
<td>The principal object of this Bill is to make provision for the allocation of revenue raised nationally among the county governments for the financial year 2020/21.</td>
</tr>
<tr>
<td><strong>Sponsor</strong></td>
<td>Mohamed M. Mahamud, Chairperson, Committee on Finance and Budget</td>
</tr>
</tbody>
</table>
SENATE BILL

INVESTMENT PROMOTION (AMENDMENT) BILL, 2020

Dated

27th May, 2020

Objective

This Bill seeks to amend the Investment Promotion Act to ensure the participation of County Governments in the promotion of trade in the country. The Bill seeks to also include the participation of county governments in the formulation and implementation of policies and strategies formulated by the Kenya Investment Authority to attract investors, both foreign and local in the counties.

Further, the Bill seeks to streamline the management of the Authority by outlining the specific qualifications for appointment of Board members and their tenure of office. The constitution of the office of the Managing Director has also been enhanced.

Sponsor

Alice Milgo, Senator
This article provides a summary of Legislative Supplements published in the Kenya Gazette on matters of general public importance in the period 1st April, 2020 and 30th June, 2020.

<table>
<thead>
<tr>
<th>DATE OF PUBLICATION</th>
<th>LEGISLATIVE SUPPLEMENT NUMBER</th>
<th>CITATION</th>
<th>PREFACE</th>
</tr>
</thead>
<tbody>
<tr>
<td>3rd April, 2020</td>
<td>18</td>
<td>Value Added Tax (Amendment of the Rate of Tax) Order, 2020. (L.N. 35/2020)</td>
<td>The Cabinet Secretary for the National Treasury and Planning makes these Rules in exercise of powers conferred by section 6 (1) of the Value Added Tax Act, 2013, for amendment of the rate of Value Added Tax from 16% to 14%.</td>
</tr>
</tbody>
</table>
| 3rd April, 2020      | 18                            | Public Order (State Curfew) Order, 2020 (L.N. 36/2020) | The Cabinet Secretary for Interior and Co-ordination of National Government makes this Order in exercise of powers conferred by section 8(1) of the Public Order Act, and in view of the serious threat posed to national security and public order by the spread of the COVID-19 pandemic. This Order provides for:  
  • The designated curfew hours as being between seven o’clock in the evening and five o’clock in the morning with effect from 27th March 2020, for a period of 30 days.  
  • Restrictions on public gatherings and movement except as permitted by a Police officer in charge of police in a County or a Police Division.  
  • Categories of personnel exempted from the curfew and movement restrictions. |
| 3rd April, 2020      | 19                            | Public Health (Declaration of Formidable Epidemic Disease) Order, 2020 (L.N. 37/2020) | The Cabinet Secretary for Health makes these Regulations in exercise of the powers conferred by section 35 of the Public Health Act. These Regulations provide for the declaration of coronavirus disease 2019 to be a formidable epidemic disease. |
| 3rd April, 2020      | 20                            | Copyright Act—Joint Collection Tariffs (L.N. 39/2020) | The Cabinet Secretary for ICT, Innovation and Youth Affairs makes these Regulations in exercise of powers conferred by section 46A (a) of the Copyright Act, 2001. These Regulations provide for:  
  • approval of new joint collection tariffs;  
  • revocation of the Joint Collection Tariffs issued under Legal Notice No. 107 of 2019; and  
  • General Rules to govern licensing. |
<table>
<thead>
<tr>
<th>Date</th>
<th>Regulation</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>3rd April, 2020</td>
<td>Capital Markets (Coffee Exchange) Regulations, 2020 (L.N. 40/2020)</td>
<td>The Cabinet Secretary for National Treasury and Planning makes these Regulations in exercise of powers conferred by section 12(1)(ka) of the Capital Markets Act. These Regulations provide for: • giving effect to section 12(1) of the Capital Markets Act; • the establishment and regulation of coffee exchanges; • licensing of coffee brokers; • establishment and operationalization of direct settlement system for expedited and transparent payment of coffee sales proceeds; • promotion and maintenance of an efficient coffee exchange; • directives, principles and conditions for trading of clean coffee at an exchange; • secure, stable and transparent trading in an environment of fair competition; and • protection of the interests of the grower, the buyer and other stakeholders at an exchange.</td>
</tr>
<tr>
<td>3rd April, 2020</td>
<td>Capital Markets (Commodity Markets) Regulations, 2020 (L.N. 41/2020)</td>
<td>The Cabinet Secretary for National Treasury and Planning makes these Regulations in exercise of powers conferred by section 12(1)(ka) of the Capital Markets Act. These Regulations provide for inter alia: • Licensing of commodity exchanges; • Rules of the commodity exchanges; • Obligations of a commodity exchange; • Rules regarding membership to the board of the commodities exchange; • Rules regarding various committees; • Requirements for self-regulation; • Licensing of commodity brokers; and • Establishment of the settlement guarantee fund.</td>
</tr>
<tr>
<td>3rd April, 2020</td>
<td>Public Order (State Curfew) Variation Order, 2020 (L.N. 43/2020)</td>
<td>The Cabinet Secretary for Interior and Co-ordination of National Government makes this order in exercise of the powers conferred by section 8(5) of the Public Order Act. A variation is made to the Public Order (State Curfew) Order, requiring all employers to ensure that staff not designated as critical or essential services providers leave the workplace no later than 4 O’clock in the afternoon.</td>
</tr>
<tr>
<td>3rd April, 2020</td>
<td>Retirement Benefits Act (Exemption from Compliance) Order, 2020 (L.N. 43/2020)</td>
<td>The Cabinet Secretary for the National Treasury and Planning in consultation with the Retirement Benefits Authority makes these Regulations in exercise of powers conferred by section 59 of the Retirement Benefits Act. The objective of these regulations is to provide exemption from compliance with section 34(4C) of the Retirement Benefits Act for the Trustees of Retirement Benefits Schemes whose financial year ends on the 31st of December 2019.</td>
</tr>
<tr>
<td>Date</td>
<td>Page</td>
<td>Title</td>
</tr>
<tr>
<td>-----------</td>
<td>------</td>
<td>----------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
| 17th April, 2020 | 26   | Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020 (L.N. 49/2020) | The Cabinet Secretary for Health makes these Rules in exercise of powers conferred by section 36 (m) of the Public Health Act. The objectives of these Rules are to:  
• Assign responsibility for notification of a suspected COVID-19 case to every owner, person in charge of, or occupier of premises, and every employer and head of a household;  
• Assign responsibility to every medical officer of health, public health officer or medical practitioner to transfer a suspected COVID-19 patient to the nearest health facility;  
• Grant power of search to medical officers and health practitioners, allowing them to enter any premises to search for or inquire about cases of COVID-19;  
• Grant power to medical or health officers to disinfect premises;  
• Grant power to medical or health officers to provide directions as to how a building can be used;  
• Provide rules as to the removal of bodies of all persons who die from COVID-19;  
• Define who can be categorized as carriers of COVID-19;  
• Provide rules for how the Cabinet Secretary may designate a place as an infected area; and  
• Define the general powers of the Cabinet Secretary to place measures necessary to curb the spread of COVID-19. |
| 17th April, 2020 | 27   | Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 (L.N. 50/2020) | The Cabinet Secretary for Health makes this Order in exercise of powers conferred by section 36 of the Public Health Act and in view of the serious threat posed to the health and lives of Kenyans by the spread of the COVID-19 pandemic. This Order:  
• Restricts movement of persons into and out of an infected area unless movement is for the purposes set out by the order;  
• Provides rules for operation of public transport within an infected area;  
• Provides rules for hygiene conditions to be met, including wearing of face masks and maintaining a physical distance of no less than one meter;  
• Prohibits public gatherings and sets a limit on the number of people allowed to attend a funeral; and  
• Sets the penalty for anyone who violates these rules as a fine not exceeding twenty thousand shillings or imprisonment for a period not exceeding six months or both. |
| 17th April, 2020 | 27   | Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) (Nairobi Metropolitan Area) Order, 2020 (L.N. 51/2020) | The Cabinet Secretary for Health makes this Order in exercise of powers conferred by section 36 of the Public Health Act and Rule 3 of the Public Health (Restriction of Movement of Persons and Related Measures) Rules 2020. This Order:  
• Defines the areas constituting Nairobi Metropolitan Area; and  
• Imposes the restriction of movement rules within Nairobi Metropolitan Area for 21 days beginning 1900HRS on Monday 6th April 2020 until 2359HRS on Monday 27th April 2020. |
<table>
<thead>
<tr>
<th>Date</th>
<th>No.</th>
<th>Title</th>
<th>Reference</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>17th April, 2020</td>
<td>27</td>
<td>Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) (Mombasa County) Order, 2020</td>
<td>(L.N. 52/2020)</td>
<td>The Cabinet Secretary for Health makes this Order in exercise of powers conferred by section 36 of the Public Health Act and Rule 3 of the Public Health (Restriction of Movement of Persons and Related Measures) Rules 2020. This Order: • Defines the areas constituting Mombasa County; and • Imposes the restriction of movement rules within Mombasa County for 21 days beginning 1900HRS on Wednesday 8th April 2020 until 2359HRS on Wednesday 29th April 2020.</td>
</tr>
<tr>
<td>17th April, 2020</td>
<td>27</td>
<td>Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) (Kilifi County) Order, 2020</td>
<td>(L.N. 53/2020)</td>
<td>The Cabinet Secretary for Health makes this Order in exercise of powers conferred by section 36 of the Public Health Act and Rule 3 of the Public Health (Restriction of Movement of Persons and Related Measures) Rules 2020. This Order: • Defines the areas constituting Kilifi County; and • Imposes the restriction of movement rules within Kilifi County for 21 days beginning 1900HRS on Wednesday 8th April 2020 until 2359HRS on Wednesday 29th April 2020.</td>
</tr>
<tr>
<td>17th April, 2020</td>
<td>27</td>
<td>Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) (Kwale County) Order, 2020</td>
<td>(L.N. 54/2020)</td>
<td>The Cabinet Secretary for Health makes this Order in exercise of powers conferred by section 36 of the Public Health Act and Rule 3 of the Public Health (Restriction of Movement of Persons and Related Measures) Rules 2020. This Order: • Defines the areas constituting Kwale County; and • Imposes the restriction of movement rules within Kwale County for 21 days beginning 1900HRS on Wednesday 8th April 2020 until 2359HRS on Wednesday 29th April 2020.</td>
</tr>
<tr>
<td>17th April, 2020</td>
<td>28</td>
<td>Banking Act (Credit Reference Bureau) Regulations, 2020</td>
<td>(L.N. 55/2020)</td>
<td>The Cabinet Secretary for the National Treasury and Planning makes these Regulations in exercise of the powers conferred by section 31 (3) of the Banking Act. These Regulations provide for inter alia: • Procedures and guidelines for establishment and licensing of bureaus; • Rules for operation of bureaus; • Rules for cross-border credit information sharing; • How bureaus are to be governed and managed; • Procedures and guidelines for dissolution and liquidation of bureaus; • The powers of the Central Bank to oversee the activities of bureaus; and • Other general rules and guidelines for the operation of bureaus.</td>
</tr>
<tr>
<td>24th April, 2020</td>
<td>29</td>
<td>Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Variation Rules, 2020</td>
<td>(L.N. 56/2020)</td>
<td>The Cabinet Secretary for Health makes these Rules in exercise of powers conferred by section 36 of the Public Health Act and further to the Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules. These Rules: • Delete the previous definition of “gathering” and substitute it with a new definition; and • Insert a new rule listing places and premises that are to remain closed during the restriction period.</td>
</tr>
<tr>
<td>Date</td>
<td>Page</td>
<td>Section</td>
<td>Description</td>
<td></td>
</tr>
<tr>
<td>--------------</td>
<td>------</td>
<td>----------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>24th April, 2020</td>
<td>30</td>
<td>Public Order (State Curfew) Variation Order, 2020 (L.N. 57/2020)</td>
<td>The Cabinet Secretary for Interior and Co-ordination of National Government makes this Order in exercise of powers conferred by section 8(5) of the Public Order Act. This Order varies The Public Order (State Curfew) Order, 2020 by designating Kenya Ferry Services, its employees and officers engaged in transportation of food supplies and other cargo, as essential service providers.</td>
<td></td>
</tr>
<tr>
<td>24th April, 2020</td>
<td>31</td>
<td>Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Variation Rules, No. 2 of 2020 (L.N. 58/2020)</td>
<td>The Cabinet Secretary for Health makes these Rules in exercise of powers conferred by section 36 of the Public Health Act and further to the Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules. These Rules insert a new sub-rule that: • Sets the time for transportation of passengers by ferry as between 5:30 O’clock in the morning and 6:30 O’clock in the evening; • Prohibits ferry operators from engaging in cargo transportation between 5:30 O’clock in the morning and 6:30 O’clock in the evening; and • Set the hygiene conditions to be observed by ferry operators and users. These Rules also delete sub-rule 5(5) and substitute it with a new sub-rule 5(5) that makes it an offence to violate sub-rules (1), (2), (3), (4) or (4A).</td>
<td></td>
</tr>
<tr>
<td>24th April, 2020</td>
<td>32</td>
<td>Public Finance Management (Strategic Food Reserve Trust Fund) (Revocation) Regulations, 2020 (L.N. 61/2020)</td>
<td>The Cabinet Secretary for Treasury and Planning makes these Regulations in exercise of the powers conferred by section 24 (4) of the Public Finance Management Act, 2012. These Regulations revoke The Public Finance Management (Strategic Food Reserve Trust Fund) Regulations, 2015 (L.N. 15/2015).</td>
<td></td>
</tr>
<tr>
<td>24th April, 2020</td>
<td>35</td>
<td>National Construction Authority (Defects Liability) Regulations, 2020 (L.N. 64/2020)</td>
<td>The Cabinet Secretary for Transport, Infrastructure, Housing, Urban Development and Public Works, makes these regulations in exercise of powers conferred under section 42 of the National Construction Authority Act, 2011. These Regulations: • Set the rules for determining patent defects liability period; • Define the obligations of parties during the patent defects liability period; • Set the rules for determining latent defects liability period; • Make requirements for obtaining insurance for latent defects, and insurance by the owner.</td>
<td></td>
</tr>
<tr>
<td>Date</td>
<td>Page</td>
<td>Regulation Name</td>
<td>Cabinet Secretary/Ordering Authority</td>
<td>Description</td>
</tr>
<tr>
<td>-----------</td>
<td>------</td>
<td>---------------------------------------------------------------------------------</td>
<td>--------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
| 30th April, 2020 | 37   | Public Procurement and Asset Disposal Regulations, 2020 (L.N. 69/2020)            | The Cabinet Secretary for Lands and Physical Planning makes these Regulations in exercise of the powers conferred by section 180 of the Public Procurement and Asset Disposal Act, 2015. | The object and purpose of these Regulations is to operationalize the Public Procurement and Asset Disposal Act, 2015, on the coordination of procurement and disposal procedures by procuring entities. The Regulations are meant to:  
• provide means of administering the powers vested in the Cabinet Secretary for the National Treasury and Planning under the Constitution, the Act and any other related legislation;  
• harmonize and standardize application of government service in controlling and managing the procurement function in government;  
• set out a standardized public procurement and asset disposal management system for use in Government service; and  
• ensure accountability, efficiency, transparency and effective application and utilization of public resources. |
| 8th May, 2020 | 67   | Sacco Societies (Non-Deposit-Taking Business) Regulations, 2020 (L.N. 82/2020)     | The Cabinet Secretary for Agriculture, Livestock, Fisheries and Cooperatives makes these Regulations in exercise of the powers conferred by section 68 (1) of the Sacco Societies Act, 2008. | The purpose of these Regulations is to:  
• specify the non-deposit-taking business to which these Regulations shall apply; and  
• prescribe measures for the conduct of specified non-deposit taking business pursuant to section 3(2) of the Act. |
| 22nd May 2020 | 75   | State Corporations Act - Railway City Development Authority Order, 2020 (L.N. 88/2020) | Uhuru Kenyatta, President and Commander-in-chief of the Kenya Defence Forces, makes this Order in exercise of the powers conferred by section 3 (1) of the State Corporations Act. | This Order establishes an authority to be known as Railway City Development Authority, whose purpose and object shall be to:  
• co-ordinate the development and re-development of the Area in accordance with an approved master plan and any other statutory planning documents; and  
• co-ordinate investment in the development and redevelopment of the Area. |
| 22nd May 2020 | 78   | Universities Act - University of Embu Statutes, 2020 (L.N. 90/2020)               | The Embu University Council makes these Statutes in exercise of the powers conferred by section 23 of the Universities Act and sections 11(k) (vi) of the Embu University Charter, 2019. | These Regulations set out provisions on:  
• registration of umbrella miller associations;  
• agreements for dealing in sugarcane and sugarcane products; and  
• other provisions relevant to the sugar industry. |
| 5th June, 2020 | 84   | Crops (Sugar) (General) Regulations, 2020 (L.N. 99/2020)                          | The Cabinet Secretary for Agriculture, Livestock, Fisheries and Co-operatives in consultation with the Agriculture and Food Authority and the County Governments, makes these Regulations in exercise of the powers conferred by section 40 of the Crops Act, 2013. | These Regulations set out provisions on:  
• registration of umbrella miller associations;  
• agreements for dealing in sugarcane and sugarcane products; and  
• other provisions relevant to the sugar industry. |
12th June, 2020 88 Supreme Court Rules, 2020 (L.N. 101/2020)
The Supreme Court makes these Rules in exercise of the powers conferred by Article 163(8) of the Constitution and section 31 of the Supreme Court Act, 2011.

The Supreme Court makes these Rules in exercise of the powers conferred by Article 163(8) of the Constitution and section 31 of the Supreme Court Act, 2011.

The scope and objectives of these Rules are listed as:

- These Rules apply to proceedings under the Court’s jurisdiction and includes petitions, references and applications.
- The overriding objective of these Rules is to ensure that the Court is accessible, fair and efficient.
- The Court may use appropriate technology in its proceedings and operations.
- The Court shall interpret and apply these Rules without undue regard to technicalities and procedure.
- Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders or give directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

12th June, 2020 88 Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (L.N. 102/2020)
The Judicial Service Commission makes these Regulations in exercise of the powers conferred by section 47(2)(a) of the Judicial Service Act read with section 37 of the Leadership and Integrity Act, 2012 and section 5(1) of the Public Officer Ethics Act, 2003.

The objectives of these regulations are:

- give effect to Articles 168 (1) (b) and 172 (1) (c) of the Constitution;
- give effect to Article 10 of the Constitution on national values and principles of governance;
- give effect to the provisions of the Leadership and Integrity Act, 2012, the Public Service (Values and Principles) Act, 2015 and the Public Officer Ethics Act, 2003;
- provide for the Judicial Code of Conduct and Ethics, as a guide on ethical conduct for judges, judicial officers and judicial staff;
- state basic standards governing the conduct of judges, judicial officers and judicial staff;
- provide guidance to assist judges, judicial officers, and judicial staff in establishing and maintaining high standards of judicial and personal conduct; and
- provide a framework for the judiciary to regulate judicial conduct of judges, judicial officers and judicial staff.
**Law Reform Issues April-June, 2020 Tabulated**

Compiled by Faith Wanjiku

<table>
<thead>
<tr>
<th>LAW REFORM ISSUE</th>
<th>BRIEF FACTS &amp; METADATA OF JUDGMENT</th>
<th>HOLDINGS PERTINENT TO LAW REFORM</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>The legal status of the Council of Governors as it is not a State organ and does not have the capacity to seek an advisory opinion from the Supreme Court on matters concerning county governments.</td>
<td>1. For a reference to qualify for the Supreme Court’s advisory-opinion discretion, it had to fall within the four corners of article 163(6) of the Constitution: it had to be a matter concerning county government. The question as to whether a matter was one concerning county government would be determined by the court on a case by case basis: a. The only parties that could make a request for an advisory opinion were the national government, a State organ or a county government. Any other person or institution could only be enjoined in the proceedings with leave of the court, either as an intervenor (interested party) or as amicus curiae. b. The court would be hesitant to exercise its discretion to render an advisory opinion where the matter in respect of which the reference had been made was a subject of proceedings in a lower court. c. Where a reference had been made to the court the subject-matter of which was also pending in a lower court, the court could nonetheless render an advisory opinion if the applicant could demonstrate that the issue was of great public importance and requiring urgent resolution through an advisory opinion. In addition, the applicant could be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial court process. 2. The applicant was neither the national government nor was it among the 47 county governments as known to the Constitution. Article 260 of the Constitution defined a State organ as a commission, office, agency or other body established under the Constitution. The applicant was not a commission or an office under the Constitution. 3. Under article 2(1) of the Constitution, the Constitution was the supreme law of the land. Article 259 of the Constitution gave the approach to be adopted in interpreting the Constitution, basically in a manner that promoted its purposes, values and principles. In interpreting the Constitution, the starting point was to look at article 259 and then article 260 of the Constitution where specific words and phrases were interpreted. While article 259 dealt with construing the Constitution and outlined the principles that underpinned that act; article 260 dealt with interpretation, that was, it was explicit in assigning meaning to the words and phrases it addressed. 4. In search of the meaning assigned to some words and phrases as used in the Constitution, one needed to consult article 260 of the Constitution to find out if that particular term or phrase had been defined. It was only where the same had not been defined that the court would embark on seeking a meaning by employing the various principles of constitutional interpretation. In looking for the meaning of a particular word or phrase in the Constitution one would go to article 260 for interpretation. In giving meaning to words and phrases under the Constitution, article 260 was direct in using the term ‘means’ and also deductive in using the term ‘includes’. 5. Article 259 of the Constitution introduced a new approach to the interpretation of the Constitution. It obliged courts to promote; the spirit, purport, values and principles of the Constitution, advance the rule of law, human rights and fundamental freedoms in the Bill of Rights and contribute to good governance, an approach which had been described as; a mandatory constitutional canon of statutory and constitutional interpretation. The article imposed a mandatory duty upon everyone to adopt an interpretation that conformed to article 259. 6. Constitutional provisions had to be construed purposively and in a contextual manner. Courts were constrained by the language used and could not impose a meaning that the text was not reasonably capable of bearing. In other words, interpretation should not be unduly strained; it should avoid excessive peering at the language to be interpreted.</td>
</tr>
</tbody>
</table>

For a reference to qualify for the Supreme Court’s advisory-opinion discretion, it had to fall within the four corners of article 163(6) of the Constitution: it had to be a matter concerning county government. The question as to whether a matter was one concerning county government would be determined by the court on a case by case basis: a. The only parties that could make a request for an advisory opinion were the national government, a State organ or a county government. Any other person or institution could only be enjoined in the proceedings with leave of the court, either as an intervenor (interested party) or as amicus curiae. b. The court would be hesitant to exercise its discretion to render an advisory opinion where the matter in respect of which the reference had been made was a subject of proceedings in a lower court. c. Where a reference had been made to the court the subject-matter of which was also pending in a lower court, the court could nonetheless render an advisory opinion if the applicant could demonstrate that the issue was of great public importance and requiring urgent resolution through an advisory opinion. In addition, the applicant could be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial court process. 2. The applicant was neither the national government nor was it among the 47 county governments as known to the Constitution. Article 260 of the Constitution defined a State organ as a commission, office, agency or other body established under the Constitution. The applicant was not a commission or an office under the Constitution. 3. Under article 2(1) of the Constitution, the Constitution was the supreme law of the land. Article 259 of the Constitution gave the approach to be adopted in interpreting the Constitution, basically in a manner that promoted its purposes, values and principles. In interpreting the Constitution, the starting point was to look at article 259 and then article 260 of the Constitution where specific words and phrases were interpreted. While article 259 dealt with construing the Constitution and outlined the principles that underpinned that act; article 260 dealt with interpretation, that was, it was explicit in assigning meaning to the words and phrases it addressed. 4. In search of the meaning assigned to some words and phrases as used in the Constitution, one needed to consult article 260 of the Constitution to find out if that particular term or phrase had been defined. It was only where the same had not been defined that the court would embark on seeking a meaning by employing the various principles of constitutional interpretation. In looking for the meaning of a particular word or phrase in the Constitution one would go to article 260 for interpretation. In giving meaning to words and phrases under the Constitution, article 260 was direct in using the term ‘means’ and also deductive in using the term ‘includes’. 5. Article 259 of the Constitution introduced a new approach to the interpretation of the Constitution. It obliged courts to promote; the spirit, purport, values and principles of the Constitution, advance the rule of law, human rights and fundamental freedoms in the Bill of Rights and contribute to good governance, an approach which had been described as; a mandatory constitutional canon of statutory and constitutional interpretation. The article imposed a mandatory duty upon everyone to adopt an interpretation that conformed to article 259. 6. Constitutional provisions had to be construed purposively and in a contextual manner. Courts were constrained by the language used and could not impose a meaning that the text was not reasonably capable of bearing. In other words, interpretation should not be unduly strained; it should avoid excessive peering at the language to be interpreted.
7. Under article 259(2) of the Constitution, if there was a conflict between different language versions of the Constitution, the English language version prevailed. Where a word was used in the Constitution and it appeared that a different meaning was created to the known English meaning, then one had to fall back to the known English version meaning of that word. It was on that basis that the court fell back to the dictionary English meaning of the word ‘under’ as used in article 260 of the Constitution. The word ‘under’ was an English word whose meaning was discernible from English dictionaries. An invocation of the literal meaning to interpretation of legal words and phrases led to the conclusion that English words should be given their natural meaning. Other rules of interpretation (the Golden and the Mischief) were only resorted to where there was an ambiguity.

8. The word ‘under’ could not be said to be ambiguous so as to call for invocation of the general doctrine of interpretation. It was a common word used daily by English speakers and its meaning was plain and known. A word, such as ‘include’ was also a noun whose interpretation did not need any construction and construing, unless used in a sentence or a phrase. The deductive interpretation of clear English words could not be resorted to with the aim of founding or donating jurisdiction where none existed.

9. In interpreting article 260 of the Constitution, the court was not to re-write the Constitution but to declare what the drafters stated and intended. It was clear what the drafters intended and achieved in stating with precision what constituted a State organ. The court would not expand that meaning by defining what ‘under’ was used in article 260, for its meaning was plain in English. State organs were those commissions, offices agencies or bodies established under the Constitution. That was, those institutions that were established in the Constitution.

10. The establishment of any State organ had to be traceable to the Constitution. The Ethics and Anti-Corruption Commission (EACC) was a constitutional commission expressly decreed by the Constitution, the founding basis for the EACC was in article 79 of the Constitution. There was no equivalent constitutional provision for the establishment of the applicant, which was purely a statutory creature. Article 189 of the Constitution did not provide for creation of the applicant as an entity. It advocated for procedures for settling intergovernmental disputes. Even where national legislation, under article 189(4), created a body in which it vested the procedures for settling intergovernmental disputes, such a body did not acquire the status of a State organ.

11. The definition of a State organ under article 260 of the Constitution to include agency or other body established under the Constitution, did not cover the applicant. The applicant was not a commission, office, agency or body established under the Constitution. The constituting statute was the Intergovernmental Relations Act (IRA) which by any definition could not grant the applicant constitutional credentials. A perusal of the IRA revealed that the applicant’s legal status was ambiguous. The legal status of the applicant was not legislated upon, that position left many questions unanswered such as whether for example, it had the capacity to sustain the proceedings. The applicant had no capacity to seek an advisory opinion under article 163(6) of the Constitution.

12. The agency referred to in article 260 of the Constitution in defining a State organ was not the classical agent in the principal-agent relationship in the law of agency, more profound in commercial law. Agency as used in the Constitution, in article 260 or in statute referred to government institutions charged with the performance of a particular mandate such as investigation and/or prosecution. It referred to an entity rather than a relationship. The applicant could not acquire locus before the court as an agent of the county governments.

13. As the Supreme Court charged with protecting the supremacy of the Constitution as stated in section 3 of the Supreme Court Act, the court was the ultimate court charged with settling the law. Where an act was omitted or committed by the lower courts, it was the court that corrected it. In any event, decisions of other courts did not bind the court as was
<table>
<thead>
<tr>
<th>LAW REFORM ISSUE</th>
<th>BRIEF FACTS &amp; METADATA OF JUDGMENT</th>
<th>HOLDINGS PERTINENT TO LAW REFORM</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>the law under article 163(7) of the Constitution. A perusal of the two cited decisions, the applicant was in most cases not the main party and the question of its status in law was never in issue.</td>
<td>14. The deem principle had no place in law, something was either legal or not, either legitimate or not. It could not be deemed to be what it was not. The court had no basis and/or justification to go into the merits of the other issues raised.</td>
</tr>
<tr>
<td></td>
<td>Article 159(2)(c) of the Constitution was an important pillar of the Constitution. The Constitution was a living document in which life should constantly be breathed into. The provisions of the Constitution were not mute but should be nourished and sustained by courts among other entities. Consequently, the need to encourage alternative dispute resolutions (ADR) in dispute resolution could not be gainsaid. That burden rested on all persons and government entities by virtue of article 2(1) of the Constitution which provided that the Constitution bound all.</td>
<td>15. Article 159(2)(c) of the Constitution was an important pillar of the Constitution. The Constitution was a living document in which life should constantly be breathed into. The provisions of the Constitution were not mute but should be nourished and sustained by courts among other entities. Consequently, the need to encourage alternative dispute resolutions (ADR) in dispute resolution could not be gainsaid. That burden rested on all persons and government entities by virtue of article 2(1) of the Constitution which provided that the Constitution bound all.</td>
</tr>
<tr>
<td></td>
<td>Given the provisions of the IRA and the ADR constitutional principle in article 159(2)(c) of the Constitution, even if the reference would have survived the preliminary objections, the court would have recommended that the matter be remitted back for the parties concerned to undertake ADR. In so doing, the court would be informed by a number of factors:</td>
<td>16. Given the provisions of the IRA and the ADR constitutional principle in article 159(2)(c) of the Constitution, even if the reference would have survived the preliminary objections, the court would have recommended that the matter be remitted back for the parties concerned to undertake ADR. In so doing, the court would be informed by a number of factors:</td>
</tr>
<tr>
<td></td>
<td>a. In giving life to section 31 of the IRA which recommended ADR to be exhausted before pursuing the matter in court, the court would be giving credence to the doctrine of subsidiarity as regards legislations that were more particular on how constitutionally recommended norms had to be actualized. Hence, to actualize ADR in article 159(2)(c) of the Constitution, it would be proper that the court allowed section 31 to be pursued first.</td>
<td>a. In giving life to section 31 of the IRA which recommended ADR to be exhausted before pursuing the matter in court, the court would be giving credence to the doctrine of subsidiarity as regards legislations that were more particular on how constitutionally recommended norms had to be actualized. Hence, to actualize ADR in article 159(2)(c) of the Constitution, it would be proper that the court allowed section 31 to be pursued first.</td>
</tr>
<tr>
<td></td>
<td>b. Co-operation among various State functionaries was key. Article 189 of the Constitution provided for cooperation between the two levels of governments: national and county governments. That in case of a dispute between the two levels of government, every effort to settle the dispute under the national law should be pursued. Hence the court would not allow such a requirement of the Constitution to be abdicated.</td>
<td>b. Co-operation among various State functionaries was key. Article 189 of the Constitution provided for cooperation between the two levels of governments: national and county governments. That in case of a dispute between the two levels of government, every effort to settle the dispute under the national law should be pursued. Hence the court would not allow such a requirement of the Constitution to be abdicated.</td>
</tr>
<tr>
<td></td>
<td>c. Recommending that the matter be referred back to pursue ADR would be in line with the precedent of the court. First under rule 3 of the Supreme Court Rules, the court had jurisdiction to make any order it deemed fit in the interest of justice. Hence, the court would have held that despite having jurisdiction to render an advisory opinion in the matter, the appropriate remedy would be that the parties pursue ADR which would have led to a win-win outcome to all parties involved, given that the two levels of government were constitutionally in a continuing relationship.</td>
<td>c. Recommending that the matter be referred back to pursue ADR would be in line with the precedent of the court. First under rule 3 of the Supreme Court Rules, the court had jurisdiction to make any order it deemed fit in the interest of justice. Hence, the court would have held that despite having jurisdiction to render an advisory opinion in the matter, the appropriate remedy would be that the parties pursue ADR which would have led to a win-win outcome to all parties involved, given that the two levels of government were constitutionally in a continuing relationship.</td>
</tr>
</tbody>
</table>

**Brief Facts**

| Gazette Notice No. 9816 (vol. Cxxi- no. 137) dated 14th October, 2019, appointing the position of the Chairperson of the National Employment Authority Board without following the laid out substantive and procedural, constitutional and statutory requirements applicable in public service appointments, is unconstitutional, unlawful and irregular for being in contravention of Articles 10,27,73 (2) and 232 of the Constitution of Kenya, 2010. |
| Kenya Young Parliamentarians Association & 2 others v Cabinet Secretary Labour & Social Protection & 3 others; Institute of Human Resource Management & another (Interested parties) Employment and Labour Relations Court at Nairobi Petition No 190 of 2019 ON Makau, J January 17, 2020 |

**HOLDINGS PERTINENT TO LAW REFORM**

1. Human Resource Management involved the management of persons in order to achieve an organisation’s objectives. It included planning, procurement, compensation, integration among others. The Human Resource Management Professionals Act established the Human Resource Institute and provided for the regulation of the standards and practice of human resource management professionals. The 1st interested party was definitely not a human resource professional under the Human Resource Management Professionals Act according to the Institute. However, Section 10(2) of the NEA Act only required 7 years’ experience in human resource management or equivalent. Experience was knowledge or skill gained over time.

2. The court considered the CV of the 1st interested party but found no iota of evidence that she had any experience in human resource management. The roles she had undertaken as shown in the CV could not be interpreted as being the equivalent of human resource management because there was nothing to show that she had ever held managerial and operative functions of human resource management anywhere, for 7 years. The concepts and techniques of human resource management which would lead to the experience sought under section 10(2) of the NEA Act could not be assumed to be obliquely attained. Such experience would only accrue from a background
in the subject or interaction with such functions, which I find the appointee has not exhibited. Furthermore, chapter 6 of the constitution provided that the guided principles of leadership and integrity included selection on the basis of personal integrity, competence and suitability.

3. The 1st interested party's personal integrity was not in question. However, her competence and suitability to the appointed was questionable. In particular, that the lack of experience in human resource management or its equivalent made her incompetent and unsuitable for the position. Competence could be said to be ability, knowledge or skill that enabled a person to understand and act effectively in a job situation. It was not necessary for one to have academic qualifications in order to be competent to do a certain job or assignment. It was possible for one to have competence in a certain field out of practice and experience, for instance, having undertaken similar duties in a similar or related field for some time. Such experience would make the person competent without necessarily having attained higher academic qualification in that field.

4. The Constitution provides for competency as a principle of leadership and governance. Such competence would mean the ability by the 1st interested party to undertake the role having had experience in human resource management. In the absence of experience in the specific field, the 1st interested party was not competent for appointment to the position of Chairperson of NEA.

5. The Cabinet Secretary (1st respondent) did not appoint the 1st interested party as a ceremonial steward to the NEA. The relevant professional qualification and skills were necessary in that role of the NEA Chairperson. As a Chairperson, the 1st interested party was not expected to be a flower-girl in NEA but the person to provide leadership to the board and the specialised Authority in order to ensure that it achieved its functions under the NEA Act. The constitutional dispensation required that value for tax payers' money was guaranteed through meeting of thresholds before appointing persons to public positions. No one should be appointed to any public office if he or she could not meet the legitimate purpose of government in the constitutional or statutory positions.

6. The petitioners had proved that the 1st interested party did not meet the qualifications for appointment to the position of Chairperson of NEA prescribed under section 10(2) of the National Employment Authority Act.

7. The NEA Act did not provide for the process of recruitment of persons to the board including that the chairperson. However, any appointment of a public officer had to adhere to the values set out under article 10 and article 232 and had to take into account the provisions of chapter six of the Constitution, in particular article 73(2). In addition, adherence had to be made to section 10 of the Public Service (Values and Principles) Act required that public appointments and promotions be on the basis of fair competition and merit.

8. The petitioners requested for the list of shortlisted candidates, the scores of each applicant and the reviews and evaluation of each of the applicants but the respondents declined to supply the same. The respondents argued that the information was not submitted due to the short duration between the date of the letter of request and the date of filing the suit. That explanation did not hold because up to the time when the hearing was concluded, the respondents did not avail the requested information documents related to the recruitment process except the 1st interested party.

9. It was such information that the court ought to interrogate in order to verify whether the recruitment process was in compliance with the Constitution because it was in the public interest that merit and fair competition was considered in appointing the 1st interested party as a chairperson of the Authority that was expected to provide for a comprehensive institutional framework for employment management, to enhance employment promotion interventions and to enhance access to
<table>
<thead>
<tr>
<th>LAW REFORM ISSUE</th>
<th>BRIEF FACTS &amp; METADATA OF JUDGMENT</th>
<th>HOLDINGS PERTINENT TO LAW REFORM</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>C</strong></td>
<td><strong>Kenya Commercial Bank v Isaac Ingtiti Abong’ &amp; Another</strong></td>
<td><strong>employment for youth, minorities and marginalized groups.</strong></td>
</tr>
<tr>
<td><strong>Brief facts</strong></td>
<td><strong>Civil Appeal No 56 of 2016</strong></td>
<td><strong>10. The 1st respondent had not proved that he competitively appointed the 1st interested party as the chairperson of the National Employment Authority. The 1st respondent also did not prove that there was a mechanism by which the public was to interrogate the integrity and competence of the appointee. The process of the 1st interested party’s appointment was flawed and in breach of the constitution and statutes.</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Asike-Makhandia, PO Kiage &amp; JO Odek, JJA</strong></td>
<td><strong>11. The right of access to information under article 35 of the Constitution was only available to citizens who were natural persons and not juridical persons like corporations or companies or organisations like the petitioners herein. The failure by the respondents to provide the petitioners with the information concerning the recruitment process of the 1st interested party as the chairperson of NEA did not violate the petitioners’ rights to information under article 35(1). The petitioners were not entitled to damages for violation of their alleged right to information under article 35 of the Constitution.</strong></td>
</tr>
<tr>
<td><strong>April 3, 2020</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>BRIEF FACTS &amp; METADATA OF JUDGMENT</strong></td>
<td><strong>Money that had already been distributed into the deceased’s account was part of the deceased’s estate and the beneficiaries of the deceased were entitled to it. That money should not be distributed in accordance with the Trust Deed and Rules but had to be deposited back into the account and the respondent had to administer it in accordance with the Law of Succession Act.</strong></td>
<td></td>
</tr>
<tr>
<td><strong>HOLDINGS PERTINENT TO LAW REFORM</strong></td>
<td><strong>6. It was not an error for the High Court to issue orders to the administrator of the pension scheme as the orders were addressed to his office and not his personal capacity.</strong></td>
<td></td>
</tr>
</tbody>
</table>

There is a legal lacuna as the Retirement Benefits Act and the Trust Deed and Rules do not clearly provide that the death of a pensioner automatically lapses the contract. The High Court made a finding that the trustees and administrators of the estate of Alice Oriowo Akengo, moved the court seeking orders in relation to over Kshs. 2,000,000 belonging to the deceased. The money was held in an account at the Kenya Commercial Bank Ltd, Kakamega Branch and they wanted the bank manager to disclose the whereabouts of the money and to pay them the money. After receiving the confirmation of grant, respondents learnt that the money was no longer available. The sums of money in the bank account in question were monthly pension paid into the account. That money had been paid for seven years after the deceased’s death. The payment of the money was contrary to the Trust Deed and Rules which required that pension would be paid during the lifetime of a pensioner. The bank manager argued that the deceased did not disclose the names of any beneficiaries with respect to the pension money and therefore the respondents were not entitled to the pension as provided for under rules 12 and 14 of the Trust Deed. The bank manager also explained that on learning about the deceased’s death, money in the account in question was transferred to the Pension Scheme’s account and that since it did not belong to the deceased pensioner, it could not form part of her estate. The High Court made a finding that the trustees and administrators of Kenya Commercial Bank Staff Pension Fund should assess the amount that the deceased was entitled to at the time of her death and make arrangements to pay that money to her dependants. The appellants’ appeal was premised on various grounds including assertions that the deceased was only entitled to pension during her lifetime, that pension under the Retirement Benefits Act was not part of the deceased’s estate and that the High Court lacked jurisdiction to entertain the matter.
Parental administration of reasonable and moderate chastisement to children is unconstitutional for infringing the doctrine of best interests of the child

Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others [2019] ZACC 34
CCT 320/2017
Mogoeng, CJ; Cameron, Froneman, Khampepe, Mhlantla, & Theron, JJ; Basson, Dlodlo, Goliath & Petse, AJJ
September 18, 2019
Reported Faith Wanjiku and Moses Rotich

Constitutional Law - fundamental rights and freedoms - enforcement of - right to human dignity - freedom and security of the person - whether the common law entitlement of parents to administer reasonable and moderate chastisement to their children infringed on children's right to protection of dignity and freedom and security of the person - Constitution of South Africa, 1996, sections 10 & 12

Constitutional Law - fundamental rights and freedoms - limitation of fundamental rights and freedom - right to freedom and security of the person - claim that a parent's right to reasonably and moderately chastise their children was a reasonable justification to right to protection of human dignity and freedom and security of the person - Constitution of South Africa, 1996, sections 10, 12 and 36.


Civil Practice and Procedure – appeals - locus standi – parties with the locus standi to institute an appeal - where a friend of the court institutes an appeal where the main parties were unwilling or unable to appeal - whether a friend of the court (amicus curiae) had standing to bring an application for leave to appeal


Words and Phrases – assault – definition - unlawful and intentional application of force to the person of another or inspiring belief in that person that force is immediately to be applied as threatened - Burchell and Milton Principles of Criminal Law (1991), page 423

Brief facts

The matter was an appeal against the judgment of the High Court at Gauteng Local Division, Johannesburg, which declared the entitlement of parents to administer reasonable and moderate chastisement on their children unconstitutional. That declaration was based on the infringement of several constitutional rights that a child enjoyed including protection of human dignity and freedom and security of the person provided in sections 10 and 12(1)(c) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

The matter began as a criminal trial where a father was charged in the Johannesburg Magistrate Court with assault with intent to do grievous bodily harm. The father had allegedly kicked and punched his thirteen-year old son for watching pornographic material. The father could not raise the defence of a parent's right to administer reasonable and moderate chastisement to his/her child, as it was a valid defence against a charge of common assault throughout South Africa, except for Gauteng. He was subsequently found guilty and convicted. His appeal to the High Court was dismissed with a declaration that the common law right of parents to chastise their children moderately and reasonably was constitutionally invalid and unavailable to parents charged with the offence of assault (common or with the intent to do grievous bodily harm) upon their children.

None of those who were parties before the High Court wanted, or was able to challenge that decision. Freedom of Religion South Africa, which was amicus curiae (friend of the court) in the
High Court, sought to assume that responsibility and lodged the instant matter on grounds of public interest.

Issues

i. Whether a friend of the court (amicus curiae) had standing to bring an application for leave to appeal in circumstances where the main parties in the lower court were unwilling or unable to appeal.

ii. Whether the common law right and biblical belief of a parent to administer reasonable and moderate chastisement on their children was unconstitutional for infringing:
   a. the right to be free from all forms of violence from either public or private sources protected under section 12(1)(c) of the Constitution;
   b. protection of human dignity as provided under section 10 of the Constitution; and,
   c. the principle of best interests of the child protected under section 28 of the Constitution.

iii. Whether the biblical belief of a parent to administer reasonable and moderate chastisement on their children was an integral part of the exercise of the right to freedom of religion.

iv. What was the meaning of the word “violence” within the context of section 12(1)(c) of the Constitution?

v. Whether the phrase “all forms of violence” as used in section 12(1)(c) of the Constitution could be construed as including reasonable and moderate chastisement of a child by a parent.

Relevant provisions of the Law
Section 10

Everyone has inherent dignity and the right to have their dignity respected and protected.

Section 12(1)

1. Everyone has the right to freedom and security of the person, which includes the right—
   (a) not to be deprived of freedom arbitrarily or without just cause;
   (b) not to be detained without trial;
   (c) to be free from all forms of violence from either public or private sources;
   (d) not to be tortured in any way; and
   (e) not to be treated or punished in a cruel, inhuman or degrading way.

Held

1. A jump or translation from being a friend of the court in a lower court to becoming a party at an appeal stage was at times permissible on considerations of justice. In the instant matter Freedom of Religion South Africa (applicant/intervenor) not only sought to become a party in the public interest, but the issues raised also brought out the need for intervention as a party, on behalf of the general body of parents and children in the country. The applicant was not seeking to be involved in the instant matter for the first time. It took part in the proceedings in the High Court, albeit in a different capacity. It was familiar with the issues that it sought to raise on behalf of the broader public for the attainment of a final and authoritative pronouncement by the Court.

2. Technicalities and senseless constraints that came with rigidity should never be allowed to stand in the way of a legitimate and demonstrably desirable pursuit and attainment of justice. Only parties to litigation should ordinarily be allowed, because of their direct and active participation borne of their material interest in the case, to challenge the decision of the court which decided against them. After all, courts should protect scarce judicial resources and not easily allow litigious busybodies to clog the roll in circumstances where those directly and materially affected by the outcome saw no need to challenge an adverse outcome. However, there were exceptions to that guiding principle and those exceptions were grounded on the interests of the public.

3. Legal principles existed to facilitate rather than to frustrate the attainment of a just, equitable, and definitive outcome. The issue of discipline, its positive and negative aspects, and the need for certainty on the disciplinary options available to parents cried out for the attention of the Court. A pronouncement by the apex court on whether the common law defence of reasonable and moderate chastisement was constitutionally invalid would clearly serve the interests of the public. That was the extent of its general and prospective application. Accordingly, the applicant was clothed with standing to intervene and bring an application for leave to appeal.

4. Ordinarily, litigants should not be allowed to bypass the Supreme Court of Appeal in matters involving the application or interpretation of the common law. The administration of reasonable and moderate punishment by parents on their children had been declared unconstitutional by the High Court. That declaration, though not relating to legislation, was just too close and similar in character to declarations of unconstitutionality relating to
legislation, to render the bypassing of the Supreme Court of Appeal excusable. Although not all declarations of unconstitutionality of all common law principles would justify a departure from normal practice, the nature or importance of the constitutional issues raised, the seriousness and far-reaching implications of the unconstitutionality in the instant matter justified a departure from the normal appeal route, via the Supreme Court of Appeal. Certainty and finality was needed urgently. A delay that would be caused by that appeal process trajectory would not be in the public interest or in the interests of justice. That was so because parents disciplined their children daily. The sooner they knew what was legally permissible, the better.

5. The application of force to the body of another could, subject to the de minimis non curat lex (the law does not concern itself with trifles) principle, take the form of the slightest touch, holding a person’s arm or bumping against them. However, the assault could be justified or rendered lawful on the basis of authority or the right of chastisement. Had it not been for that defence, that application of force could have led to a parent being convicted of assault.

6. Section 12(1)(c) of the Constitution prohibited all forms of violence and gave everyone the right to freedom and security of the person. A proper determination of the constitutionality of chastisement required that it be located within a criminal law setting, which was its natural habitat. Moderate and reasonable chastisement hitherto constituted an effective defence for parents who had administered it to their children and could be or were charged with assault. Assault was an unlawful and intentional application of force to the person of another or inspiring a belief in that person that force was immediately to be applied as threatened. That accorded with the definition the courts had given to assault; the intentional application of unlawful force to the person of another or threatening to apply it. Therefore, assault was the ordinary grammatical meaning that ought to be ascribed to the word violence within the context of section 12(1)(c) of the Constitution. More importantly, even when contextually and purposively interpreted, as it should, the definition of assault converged on the same meaning. Violence was not so much about the manner and extent of the application of the force as it was about the mere exertion of some force or the threat thereof.

7. Violence was behaviour involving physical force intended to hurt, damage or kill someone or something. That was the ordinary grammatical meaning that ought to be ascribed to the word violence within the context of section 12(1)(c) of the Constitution. More importantly, even when contextually and purposively interpreted, it should, the definition of assault converged on the same meaning. Violence was not so much about the manner and extent of the application of the force as it was about the mere exertion of some force or the threat thereof.

8. From the language of section 12(1)(c) of the Constitution, the operative words were “free from all forms of violence”. Therefore, the question was whether to ascribe a highly technical meaning to the word “violence” or give it its ordinary grammatical meaning which connoted any application of force, however minimal. Chastisement, by its very nature, entailed the use of force or a measure of violence. It would appear that the actual or potential pain or hurt that flowed from chastisement was that it was believed to be more likely to have a greater effect than any other reasonably available method of discipline.

9. It was the bite of the force applied or threatened that was hoped to be remembered to restrain a child from misbehaviour whenever the urge or temptation to do wrong came. How then could reasonable and moderate chastisement not fall within the meaning or category of violence envisaged in section 12(1)(c) of the Constitution? After all, reasonable and moderate chastisement included corporal punishment with the instrumentality of a rod or a whip. That accorded with the biblical injunction contained in Proverbs 13:24 that he who spared his rod hated his son, but he who loved him disciplined him promptly. The reference to violence, therefore, extended to all forms of chastisement, moderate or extreme – a smack or a rod. The objective was always to cause displeasure, discomfort, fear or hurt. The actionable difference all along laid in the extent to which that outcome was intended to be or was actually achieved.

10. Since punishment by the application of force to the body of a child by a parent was always intended to hurt to some degree, moderate and reasonable chastisement indubitably amounted to legally excusable assault. And there could not be assault, as defined, without meeting the requirements of all forms of violence envisaged in section 12(1)(c) of the Constitution.

11. The mischief sought to be addressed through section 12(1)(c) was not only certain or some forms of violence, but all forms. The Republic of South Africa had a painful and shameful history of widespread and institutionalised violence. Section 12 of the Constitution existed to help reduce and ultimately eradicate that widespread challenge. “All forms” in that provision was all-encompassing that its reach or purpose seemed to leave no form of violence or application of force to the body of another person out of the equation. To drive the point home quite conclusively, the Constitution extended the prohibition of violence to either public or private sources.

12. The application of force, including a touch depending on its location and deductible meaning,
or a threat thereof constituted assault. Parental authority or entitlement to chastise children moderately and reasonably had been an escape route from prosecution or conviction. That meant that the violence proscribed by section 12(1)(c) of the Constitution could still be committed with justification if that parental right was retained. However, if it was accepted that what would ordinarily be criminally punishable, but for the common law defence of moderate and reasonable chastisement, was indeed what section 12(1)(c) sought to prevent, then children would be protected by that section like everyone else. All forms of violence meant moderate, reasonable and extreme forms of violence. Moreover, a culture of authority, which legitimated the use of violence, was inconsistent with the values for which the Constitution stood.

13. Parental chastisement of a child, however moderate or reasonable met the threshold requirement of violence proscribed by the constitutional provision and, therefore, limited the right in section 12(1)(c) of the Constitution. The conclusion that it could not escape the reach of section 12(1)(c) was thus inevitable.

14. Section 10 of the Constitution provided that everyone had inherent dignity and the right to have that dignity respected and protected. That right occupied a special place in the architectural design of the Constitution, and for good reason, given the history of the Country. The role and stressed importance of dignity in the Constitution aimed to repair indignity, to renounce humiliation and degradation, and to vest full moral citizenship to those who were denied it in the past.

15. Children were constitutionally recognized as independent human beings, inherently entitled to the enjoyment of human rights, regardless of whether they were orphans or had parents. The word “everyone” in section 12(1)(c) also applied to them. Every child had his or her own dignity. If a child was to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she could not be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. Foundational to the enjoyment of the right to childhood was the promotion of the rights, as far as possible, to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.

16. There was a sense of shame, a sense that something had been subtracted from one’s human whole, and a feeling of being less dignified than before, that came with the administration of chastisement to whatever degree. That said, being held accountable for actual wrongdoing generally also had the same effect. Being found guilty of misconduct or crime and the consequential sanction like imprisonment, however well deserved, had a direct impact on one’s dignity. It was all a matter of degree. Moderate and reasonable chastisement impaired the dignity of a child and thus limited the provisions of section 10 of the Constitution.

17. Section 36 of the Constitution provided for possible limitation of the certain rights in the bill of rights including the right to protection of human dignity and freedom and security of the person in sections 10 and 12. Therefore, the common law defence of reasonable and moderate chastisement, being a law of general application, could potentially limit the rights in the bill of rights. That defence was available to all parents, regardless of their religious, cultural or other persuasions, when charged with assault of their children. It limited a child’s constitutional rights to dignity and to be protected from all forms of violence. As such, it had to be determined whether that limitation was reasonable and justifiable, regard being had to some of the factors listed in section 36 of the Constitution.

18. Parental chastisement was significantly different from the institutionalised administration of corporal punishment that had since been abolished. It was an intimate and administered by a loving parent whereas corporal punishment was somewhat cold, detached and implemented by a stranger of sorts. Parents had the inherent obligation to raise their children to become responsible members of society whose delinquency they stood to be blamed for, whereas strangers like teachers only had an official and possibly less-caring duty to punish. The primary responsibility to mould or discipline a child into a future responsible citizen was that of parents. For example, Christian parents had a general right and capacity to bring up their children according to Christian beliefs. The abolition of the defence of moderate and reasonable chastisement thus meant that the chastisement aspect of parents’ religiously or culturally ordained way of raising, guiding and disciplining their children was no longer available to them.

19. To discipline their children in terms of the prescripts of their faith or culture would expose parents to criminal prosecution, possible conviction and possible imprisonment. The only safety valve available to parents was the de minimis rule. Although that rule had acute shortcomings in terms of its inability to prevent the abolition of the defence from possibly imposing a strain on the family structure by allowing parents to be prosecuted for even the minutest of well-intentioned infractions,
it was at least of some benefit in that it could save parents from being needlessly imprisoned. It did, barring diversion, not necessarily exclude the unlawfulness of the chastisement and a criminal conviction of assault, but only allowed the assault to go unpunished because of its triviality.

20. Properly managed, reasonable and moderate chastisement could arguably yield positive results and accommodate the love-inspired consequence management contended for by the appellant. That was why so many other civilisations and comparable democracies had kept that defence alive and relatively few had abolished it. In Africa, it was only Benin, Kenya, the Republic of Congo, Togo and Tunisia that had abolished corporal punishment in all settings, including in the home. Globally, only 54 states in seven territories had fully prohibited corporal punishment in the home, while 145 states in 32 territories had not fully prohibited it.

21. Section 28 of the Constitution provided that a child’s best interests were of paramount importance in every matter concerning the child. Children were most vulnerable. Some of them were so young that they were incapable of lodging a complaint about abusive or potentially injurious treatment or punishment, however well-intentioned it might have been. Even those who were of school-going age might often be ignorant of what they could do to alert the law enforcement authorities to actual or potentially harmful parental conduct that they were made to endure. The State was obliged to respect, protect, promote and fulfil a child’s constitutional rights and the provisions of section 28 of the Constitution thus bound the Judiciary. That meant that in examining a parent’s entitlement to chastise a child reasonably and moderately, of paramount importance should be the best interests of the child in respect of protection from potential abuse and the need to limit the right because of the good a child and society stood to derive from its retention as a disciplinary tool.

22. Section 28(2) of the Constitution anticipated possibilities of conduct that were actually or potentially prejudicial to the best interests of a child. Unsurprisingly, it was crafted in terms so broad as to leave no doubt about the choice it made between the best interests of the child and the parent’s perceived entitlement to resort to unreasonable and immoderate chastisement meant to procure a child’s obedience to a parent’s legitimate directive and orders.

23. Parents had over the years enjoyed the right to discipline their children in a variety of ways including the administration of moderate and reasonable chastisement. Its foundation being both religious and cultural in character, the administration of moderate and reasonable chastisement was regarded as an incidence of the enjoyment of one’s constitutional right of freedom of religion or culture.

24. Unlike the constitutional protections available to the child, the right to freedom of religion did not expressly provide for parental entitlement to administer moderate and reasonable chastisement to the child nor did any provision of the Constitution acknowledge the existence of a cultural right to the same effect. The appellant’s reliance on the right to parenting grounded on South Africa’s international obligations under several conventions that dealt with the right to family in particular ought to suffer the same fate. Not only did international law not recognise the right to discipline, but also the Constitution did not make express provision for it, unlike the rights sought to be vindicated.

25. There was paucity of clear or satisfactory empirical evidence that supported chastisement as a beneficial means of instilling discipline. Though not conclusive, there were, however, some pointers to the potentially harmful effect of chastisement. Positive parenting reduced the need to enforce discipline by resorting to potentially violent methods. It could replace occasionally harsh and inconsistent parenting with non-violent and consistent strategies for discipline like positive commands, tangible rewards and problem-solving, depending on age.

26. What militated more against the retention of the defence of moderate and reasonable chastisement was the best interests of the child, which were of paramount importance in all matters involving a child. To retain that kind of chastisement, it would have to be demonstrated that apart from the fact that it ordinarily fell within the category of assault, there was something about it that advanced the best interests of the child. In other words, there should be something about that excusable crime of assault that evidently redounded to the good of the child. It bore repetition that not much was said to help the Court appreciate that the benefits of that chastisement indeed outweigh its disadvantages, and thus justify the limitation.

27. Chastisement was meant to discipline and help a child appreciate consequence management. In other words, the purpose of moderate and reasonable chastisement was to mould a child into a responsible member of society. A child’s best interests, in that context, was to achieve the same laudable objective without causing harm or unduly undermining the fundamental rights of the child. The application of force or a resort to violence, which could be harmful or abused, could not, in circumstances where there
was an effective and non-violent option available, be said to be consonant with the best interests of a child. For indeed the best interests of children were about what was best for them in the circumstances – what benefited them most with no or minimum harm.

28. What undermined the justification for retaining chastisement, more revealingly, was the availability of less restrictive means to achieve discipline. Chastisement was, after all, traditionally supposed to be the option of last resort, employed only when all else failed. Besides, the experience-borne traditional approach generally adopted by South African parents over the years had been to teach, guide and admonish their children, resorting to chastisement only as a measure of last resort. No research was required to verify that reality. The unreasonable and immoderate chastisement, which constituted assault proper, maltreatment or child abuse, had always been a criminal offence. It was an aberration that had inexplicably been left to permeate society with consequences that somehow militated against or undermined the retention of moderate and reasonable chastisement.

29. The right to be free from all forms of violence or to be treated with dignity, coupled with what chastisement in reality entailed, as well as the availability of less restrictive means, spoke quite forcefully against the preservation of the common law defence of reasonable and moderate parental chastisement. There was no material before the Court that could justify its continued existence, for it did not only limit the rights in sections 10 and 12 of the Constitution, but it also violated them unjustifiably.

Appeal dismissed with no order as to costs.

Orders:-

i. Application for direct access granted.

ii. Freedom of Religion South Africa granted leave to intervene.

iii. The common law defence of reasonable and moderate parental chastisement declared inconsistent with the provisions of sections 10 and 12(1)(c) of the Constitution.

Relevance to Kenya

Article 29(c) of the Constitution of Kenya, 2010, gives every person the right not to be subjected to any form of violence from either public or private sources. In a similar version to the Constitution of South Africa, Kenya’s Constitution uses the phrase “any form of violence”. Further, article 28 of the Constitution of Kenya provides that every person has inherent dignity and the right to have that dignity respected and protected. Article 53 of the Constitution enunciates the principle of paramount interests of children. It provides that a child’s best interests are of paramount importance in every matter concerning the child.

Prior to the enactment of the Constitution in the year 2010, section 13 of the Children Act, 2001, provided for the protection of children from abuse. It provides that a child shall be entitled to protection from physical and humiliating abuse by any person. It gives every child the right not to be subjected to torture, cruel treatment or punishment. Notably, section 127 of the Children Act creates the offence of cruelty to and neglect of children. It specifically provides that person who, having parental responsibility, custody, charge or care of any child, willfully assaults, ill-treats, abandons, or exposes a child in any manner likely to cause him or her unnecessary suffering or injury to health commits an offence. The offence attracts a maximum fine of two hundred thousand shillings or, subject to direction of the court, a charge under the Penal Code if the offence is of a serious or aggravated nature.

Similarly, the Basic Education Act, 2013, provides for the elimination of corporal punishment or any form of cruel and inhuman treatment or torture as a principle guiding provision of basic education in Kenya.

In M W K v another v Attorney General & 3 others [2017] eKLR, it was held that the 2010 Constitution had ushered in a new era where the society was committed to raise, develop and nurture children in an environment that is conducive to their well-being. The society had a duty to ensure that children receive the support and assistance that is necessary for their growth and development. The Court further recognised that children merit special protection through legislation that guards and enforces their rights and liberties. In attempting to guide and protect children, the interventions should not expose them to harsh circumstances which might adversely affect their development.

Section 251 of the Penal Code creates the offence of assault causing actual bodily harm. It provides that any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable upon conviction to imprisonment for five years. The court in Alex Kinyua Murakaru v Republic [2015] eKLR stated that actual bodily injury is any physical injury to a person, or psychiatric injury that is not merely emotions, fear or panic to make out the offence, the prosecution must show that there has been an assault, and that the assault has resulted in actual bodily harm. There must be an intention to assault (mens rea) and the assault must have taken place
(actus resus). The court further held that bodily harm includes any hurt or injury calculated to interfere with the health or comfort of the victim; such hurt or injury need not be permanent, but must be more than merely transient or trifling.

Courts in Kenya have yet to pronounce themselves on whether or not parental chastisement would amount to actual bodily harm within the context of section 251 of the Penal Code. According to the instant South African decision, reasonable and moderate chastisement offends the constitutionally entrenched freedom and security of the person and right not to be subjected to any form of violence. In the two legal systems, the best interests of the child are of paramount importance; and in nurturing children, the best way would be that which benefit them the most with no or minimum harm.
How failure between the Senate and the National Assembly to agree on a Division of Revenue Bill would be resolved.

The petition which challenged an on-going process for the design and installation of a Mobile Management System (DMS) in the mobile communications sector was filed prematurely.

A hospital is vicariously liable for medical negligence by its part-time employees.