

CASE DIGEST

THE LAW, PRACTICE AND
JURISPRUDENCE AROUND CHAPTER SIX
AND THE QUALIFICATIONS OF
CANDIDATES IN THE 2022 GENERAL
ELECTIONS PERIOD



TRANSPARENCY
INTERNATIONAL
KENYA

**CASE DIGEST ON THE LAW, PRACTICE AND JURISPRUDENCE AROUND CHAPTER SIX AND THE
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TI-Kenya works towards a transparent and corruption-free society. Founded in 1999, the organization has 24 years' experience in governance work at the national and county levels. TI-Kenya pursues advocacy, partnerships development, strategic litigation, research, capacity building, and civic engagement as its core approaches. TI-Kenya contributes to development of effective legal, policy, and legislative frameworks as well as the promotion of national values that support transparency and accountability.

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EXECUTIVE SUMMARY

SUMMARY OF METHODOLOGY

This case digest is a product of an initial inception meeting on 30th May 2023 with the Transparency International Kenya Team which set out the historical background of corruption and compliance with Chapter 6 of the Constitution of Kenya 2010. Parties identified the recurrent pattern of non-compliance by aspirants with the qualification requirements set out under the Constitution and attendant statutes. The timeline to be covered by this case digest was agreed to be from 2010-2022, with great emphasis put on cases post-2017 elections, with specific emphasis on the recently concluded 2022 general elections. On the jurisdiction of the cases to be covered, the scope of the digest was set to cover decisions from tribunals such as the IEBC Dispute Resolution Tribunal, the Chief Magistrates Court, High Court, Court of Appeal and finally the Supreme Court.

This case digest also features a report done by Transparency International Kenya titled “The Verdict: An analysis of the Interpretation of Chapter 6 by Kenyan Courts” 12th December 2019 which went to a great length to analyse the jurisprudence of Chapter 6 from Kenyan Courts featuring known cases such as Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR Court of Appeal. The Case study utilized for the KIIs, using a semi-structured interview guide for all categories of actors, broadly grouped as duty bearers and right holders. The case digest canvassed various themes in the case analysis including jurisdiction, the principle on exhaustion of internal remedies, admissibility of evidence, as well as the constitutionality of the constitutional and statutory requirements of the qualifications of candidates in general elections.

ACRONYMS

CAJ- Commission on Administrative Justice (CAJ).

CRB- Credit Reference Bureau

CSO- Civil Society Organizations

DCI- Directorate of Criminal Investigations

EACC- Ethics and Anticorruption Commission

HELB- Higher Education Loans Board

KIIs--- Key Informant Interviews

KNEC- Kenya National Examination Council

KNEQ- Kenya National Qualifications Authority

IEBC --- Independent Electoral Boundaries Commission

TI-Kenya---Transparency International Kenya

MCA-Member of County Assembly

NCAJ- National Council on the Administration of Justice

NCIC- National Cohesion and Integration Commission

KRA- Kenya Revenue Authority

ORPP- Office of the Registrar of Political Parties

ODPP- Office of the Director of Public Prosecution

BACKGROUND

Kenya has had an endemic problem of corruption. Its ranking in the main governance and corruption indices has been poor consistently for over two decades. This is despite efforts that have been put in place in enacting laws and establishing institutions with specific and general mandates in the fight against corruption. While these efforts have received inspiration from countries such as Hong Kong where a similar architecture has worked, it is clear that more needs to be done to address Kenya's corruption problem. In promulgating the Constitution of Kenya 2010, Kenyans went the furthest in enshrining a whole chapter to govern matters of ethics and integrity. In so doing, Kenyans were acknowledging that the prosecution-based approach to fighting corruption needed to be supplemented by other approaches that go to the fundamental levels of values and ethics as a bedrock upon which to build an ethical society, as an antidote to corruption.

More inspiration on an ethical approach to fighting corruption came from Papua New Guinea. The Constitution of Papua New Guinea adopted in 1975 had a leadership code, leadership tribunal 'responsibilities of office' spoke about integrity, and respect for the office during tenure – with the idea that this was to be expanded into organic law.

Chapter 6 of the Constitution of Kenya 2010 also drew inspiration from the Seven Principles of Public Life in the United Kingdom, also known as the Nolan Principles. The Seven 7 principles of public life apply to anyone who works as a public officeholder¹. This includes people who are elected or appointed to public office, nationally and locally, and all people appointed to work in the civil service, local governments, the police, the courts and probation services, non-Departmental bodies, health, education, social services and care services.

The principles also apply to all those in other sectors that deliver public services. Lord Nolan who chaired the Committee on Standards in Public Life in 1958 first set them out and they are included in the Ministerial Code. The seven Principles include:

- a) Selflessness: holders of public office should act solely in terms of the public interest.
- b) Integrity: holders of public office must avoid placing themselves under any obligation to people or organizations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must declare and resolve any interests and relationships.
- c) Objectivity: holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.
- d) Accountability: holders of public office are answerable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.
- e) Openness: holders of public office should act and take decisions in a transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.
- f) Honesty: holders of public office should be truthful.
- g) Leadership: holders of public office should exhibit these principles in their own behavior. They should actively promote and robustly support the principles and be willing to challenge poor behavior wherever it occurs.

In Kenya, corruption has remained endemic since independence, some have argued that corruption was a colonial creature through the powerful chiefs created.

When Kenya gained independence from the British in 1963, the post-independent government inherited the colonial indirect system of government — the whole kit and caboodle. With their "illegitimacy" and corruption networks carried over and sanctioned by the new African government, chiefs entrenched themselves even further by extending their corrupt patronage networks within the government bureaucratic structures².

1 Committee on Standards in Public Life - The 7 principles of public life Available at <https://www.gov.uk/government/publications/the-7-principles-of-public-life>

2 <https://www.theelephant.info/features/2021/07/31/the-evolving-language-of-corruption-in-kenya/>

Fast forward, Kenya passed and adopted the Kenyan Constitution with a dedicated Chapter on Leadership and Integrity. Chapter 6 of the Constitution of Kenya provides for leadership and integrity requirements especially for State officers and public officers. The chapter sets out principles of decision-making and conduct of State Officers while discharging the public duties bestowed on them. Chapter 6 of the constitution also sets out parameters that guide how State Officers exercise the authority given to them as holders of high public offices. In addition, the leadership and integrity requirements under Chapter 6 are in tandem with the provisions of Art. 10 of the constitution on national values and principles of governance especially patriotism (citizenship and leadership), democracy, good governance, integrity, transparency and accountability.

Under the chapter, the authority of a State officer is a public trust, which implies that it's a public office that derives power from and is accountable to the people. Under Art.1, State Officers as the leaders of the State organs exercise their power and authority as agents with delegated powers from the people. Consequently, such powers and authority must be exercised in service to the people of Kenya, who are the principal holders of the sovereign power.

While Kenya has had several legislation touching on corruption, the question of morality and ethics has been thrown around sometimes in an effort to confuse the two and even question the same within the Kenyan social and cultural setting. 'Moral' and 'ethical' are terms used to denote standards of behavior and suggest that there are acceptable and unacceptable ways of behaving; principles of right and wrong. Moral and ethical leadership therefore is the demonstration, practice, and promotion of such standards of behavior by people with influence over a defined group of people within society through formal and informal societal relations. Courts have been at the center of the confusion and failed to provide clear thresholds for ethics and criminality.

However, within the last few years, there have been some progressive rulings that have given life to this Chapter. Some of these cases include the Lenolkulal case³, where the Governor of Samburu after being charged with corruption was barred from accessing his office and seen to be in a state of moral ill health. This was an important precedent because it set the stage for violations of Chapter 6 being used to bar entry to office. This is a stark difference with the situation back then where officials had been protected by Article 181 of the Constitution which sets out the established Grounds for Removal of a County Governor.

Unfortunately, a closer review of the cases leading to the elections in 2022, indicate that the courts failed to inspire confidence on implementing the letter and spirit of the Constitution, besides the Sonko Petition's judgment issued by the SCORK⁴. This Digest gives an analysis of the cases filed on grounds of violation of Chapter 6 and how courts have interpreted the Chapter under various themes around the Leadership and Integrity Chapter of the Kenyan Constitution during and after the general elections held in 2022.

3 Moses Kasaine Lenol Kulal v Director of Public Prosecutions (2019) eKLR

4 *Sonko v County Assembly of Nairobi City & 11 others (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR) (5 December 2022)*



**POLICY, LEGAL AND
ADMINISTRATIVE
FRAMEWORKS ON LEADERSHIP
AND INTEGRITY**

CHAPTER ONE

POLICY, LEGAL AND ADMINISTRATIVE FRAMEWORKS ON LEADERSHIP AND INTEGRITY

The legal provisions on moral and ethical requirements and their significance are as follows:

1.1 Policy & Legal Frameworks

i. Constitution of Kenya 2010

Article 99 of the Constitution provides for the qualifications and disqualifications for election as a Member of Parliament. The Article requires in subsection (1) (b) that a person seeking election as a Member of Parliament shall satisfy any educational, moral and ethical requirements prescribed by the Constitution or by an Act of Parliament. Article 137(2) provides that a person qualifies for nomination as a presidential candidate if the person is qualified to stand for election as a member of parliament.

Article 193 extends the same satisfaction of any educational, moral and ethical requirements prescribed by the Constitution or by an Act of Parliament for a person seeking election as a member of a county assembly. Article 180(2) provides that to be eligible for election as a county governor, a person must be eligible for election as a member of a county assembly. Therefore, a person seeking election as a governor or deputy governor is subject to the said provisions.

Under Article 99(2) (h), which is replicated in Article 193(2) (g), a person is not eligible for election to a state office if the person has been found, in accordance with any law, to have misused or abused a state office or public office or to have contravened any of the requirements under Chapter Six of the Constitution. However, for a person to be disqualified in accordance with this provision, all possibility of appeal or review of the relevant sentence or decision must first be exhausted.

In addition to the above specific provisions concerning qualifications for persons seeking elective positions, the Constitution of Kenya 2010 has dedicated an entire chapter to leadership and integrity. Article 73(1) of the Constitution posits that the authority assigned to a state officer is a public trust and Article 73(2) enlists the guiding principles on leadership and integrity.

Further, Article 75(2) provides that a person who contravenes any of the requirements in Articles 75, 76, 77 or 78(2) shall be subjected to the applicable disciplinary procedures for the relevant office and may, in accordance thereto, be dismissed or otherwise removed from office. Article 75(3) provides that a person dismissed or removed is disqualified from holding any other state office. In the circumstances, a person seeking an elective state office must not have been a subject of such dismissal or removal from office for violation of the requirements under the aforementioned articles.

ii. Leadership and Integrity Act, 2012

Section 12 A of the Leadership and Integrity Act prescribes that any person intending to be appointed to a State office shall submit to the Commission a self-declaration form in the form set out in the First Schedule

Section 13 of the Leadership and Integrity Act prescribes the moral and ethical requirements for purposes of Articles 99(1) (b) and 193(1) (b) of the Constitution. It provides as follows-

For the purposes of Articles 99(1)(b) and 193(1)(b) of the Constitution, a person shall observe and maintain the following ethical and moral requirements—

- i. demonstrate honesty in the conduct of public affairs subject to the Public Officer Ethics Act (No. 4 of 2003);
- ii. not to engage in activities that amount to abuse of office;
- iii. accurately and honestly represent information to the public;
- iv. not engage in wrongful conduct in furtherance of personal benefit;

- v. not misuse public resources;
- vi. not discriminate against any person, except as expressly provided for under the law;
- vii. not falsify any records;
- viii. not engage in actions which would lead to the State officer's removal from the membership of a professional body in accordance with the law; and
- ix. not commit offences and in particular, any of the offences under Parts XV and XVI of the Penal Code (Cap. 63), the Sexual Offences Act (No. 3 of the Counter-Trafficking in Persons Act (No. 8 of 2010), and the Children Act (Cap. 141).

Section 13(2) obligates any person seeking election to a state office to submit to the Independent Electoral and Boundaries Commission a self-declaration in the form set out in the First Schedule to the Act. Part 9 of the Schedule contains a list of moral and ethical questions to which the declarant is required to respond and provide details where necessary. There is, however, no express provision on what IEBC should do upon receipt of the self-declaration forms.

iii. Anti-Corruption and Economic Crimes Act, No. 3 of 2003

Section 64(1) of the Act provides that a person who is convicted of corruption or economic crime shall be disqualified from being elected or appointed as a public officer for ten years after the conviction. However, this section does not apply to an elected office if the constitution sets out the qualifications for that office, neither does it apply for a conviction that occurred before the Act came into operation.

iv. Bribery Act, No.47 of 2016

Section 18 (11) of the Bribery Act, 2016 provides that a person who is convicted of an offence involving bribery shall be disqualified from being elected or appointed to hold a state office or a public office for a period of not more than ten years after conviction.

v. Elections Act, No.24 of 2011

Sections 22 to 26 of the Elections Act provide the qualifications and disqualifications for nomination of candidates in an election. These include educational, moral and ethical requirements as set out in the Constitution and applicable statutes. To this extent, the Elections Act reiterates the requirements for eligibility set out in the Constitution as read together with other qualifying statutes such as Section 13 of the Leadership and Integrity Act.

Section 43(5) of the Elections Act, requires that a Public officer who intends to contest an election should resign from public office at least six (6) months before the date of election. Section 43 (5A) requires a public/state officer to resign seven (7) days after declaration of a vacancy. However, a serving President, Deputy President, Member of Parliament, County Governor, Deputy County Governor and Member of County Assembly are exempted from the application of Section 43(5) of the Elections Act.

vi. Regulation 46 of the Elections (General) (Amendment) Regulations, 2017 prescribes that a candidate shall obtain and submit a self-declaration form as prescribed under the Leadership and Integrity Act, 2012.

vii. Political Parties Act, 2011

The political parties Act also provides for vetting of candidates by political parties. Section 38H (a) of Political Parties provides that; a political party conducting party nominations shall ensure that each candidate who is nominated; makes and deposits a self-declaration form in the prescribed form under the Leadership and Integrity Act, 2012.

viii. Public Appointments (Parliamentary Approval) Act, 2011

An Act of the parliament to provide for procedures for parliamentary approval of constitutional and statutory appointments and for connected purposes. Section 6 provides for approval hearings which requires county Assemblies to look at among other thing whether the candidates complies with Chapter Six of the Constitution.

ix. Public Appointments (County Assemblies Approval) Act, 2017

An Act of Parliament to provide for the procedure for the approval of public appointments by County Assemblies and for connected purposes. Section 7 provides for approval hearings which requires county Assemblies to look at among other things whether the candidates comply with Chapter Six of the Constitution.

x. National Ethics and Anti-Corruption Policy- Sessional Paper No.2 Of 2018

The overall objective of this National Ethics and Anti-Corruption Policy is to reduce levels and prevalence of corruption and unethical practices in Kenya by providing a comprehensive, coordinated and integrated framework for the fight against corruption and promotion of ethics. The policy identifies integrity and vetting as a way of promoting integrity in the country.

xi. Administrative Frameworks

In an effort to promote the spirit of the constitution and implement Chapter Six on Leadership and Integrity, government institutions require job applicants to obtain certain certifications in compliance with the requirements of the Constitution. Some of the requirements include issuance of the following documents;

- a) Valid Certificate of Good Conduct from the Directorate of Criminal Investigations Clearance
- b) Certificate from the Higher Education Loans Board
- c) Tax Compliance Certificate from KRA
- d) Clearance from Ethics and Anti-Corruption Commission
- e) A Clearance Certificate from an approved Credit Reference Bureau CRB

Those seeking employment are required to get clearance from the Kenya Revenue Authority, the Credit Reference Bureau (CRB), Ethics and Anticorruption Commission (EACC), Higher Education Loans Board (HELB), and the Directorate of Criminal Investigations (DCI)

1.2 Key Stakeholders In The Implementation Of Chapter 6

The role of ensuring compliance with the moral, ethical and integrity requirements by persons seeking to contest for elective positions cuts across various institutions. These include:

i. Ethics and Anti-Corruption Commission

EACC is established under the Ethics and Anti-Corruption Commission Act, 2011 enacted pursuant to Article 79 of the Constitution. It is constitutionally mandated to ensure compliance with and enforcement of the provisions of Chapter Six of the Constitution on leadership and integrity. Its powers and functions are provided for in various statutes including the Ethics and Anti-Corruption Commission Act, 2011; Anti-Corruption and Economic Crimes Act, 2003; the Leadership and Integrity Act, 2012; the Public Officer Ethics Act, 2003; and the Bribery Act, 2016.

Specifically, the EACC by virtue of its mandate and functions would have information and records pertaining to convictions for violation of relevant laws that impact on clearance of candidates for elections, reports or findings upon investigation, of fake or forged academic certificates that may be presented by candidates seeking clearance, citizenship status of candidates, among others.

ii. Independent Electoral and Boundaries Commission

IEBC is an independent Commission established under Articles 88 and 248 of the Constitution of Kenya, 2010 and the Independent Electoral and Boundaries Commission Act, 2011. It is mandated to, among other functions, conduct and supervise referenda and elections to any elective body or office established by the Constitution or an Act of Parliament.

The mandate of IEBC is amplified in various statutes including the Independent Electoral and Boundaries Commission Act, 2011; the Leadership and Integrity Act, 2012; the Elections Act, 2011, the Election Offences Act, 2016 and the

Political Parties Act, No. 11 of 2011.

iii. Political Parties

The political Parties Act, 2011 mandates each political party to vet their candidates during the nomination process. This obligation therefore requires political parties to ensure that aspirants presented for elections are people of integrity.

iv. Judiciary

The Judiciary adjudicates over matters touching on the integrity of aspirants under various statutes. Judicial determinations are, therefore, critical in considering whether or not a person seeking election to public office meets the prescribed integrity requirements under Chapter Six of the Constitution, Leadership and Integrity Act, 2012, among others. Further, the Judiciary has custody of the data on convictions which is relevant in determining the eligibility of an aspirant based on the period of a sentence.

v. Office Of The Director Of Public Prosecutions

Under Article 157 of the Constitution, the Director of Public Prosecutions (DPP) is exclusively vested with the exercise of prosecutorial powers in Kenya. Pursuant to exercise of this mandate, the DPP has information and records which constitute relevant consideration for clearance of candidates, such as convictions for the category of offences provided in section 13(1)(i) of the Leadership and Integrity Act. These include offences under Parts XV and XVI of the Penal Code, the Sexual Offences Act, the Counter-Trafficking in Persons Act, and the Children Act.

vi. Professional Bodies

Professional bodies in Kenya cut across the public and private sectors. They have established rules, regulations, procedures and guidelines as well as codes of professional ethics for compliance by their membership. Generally, professional bodies have their inbuilt mechanisms for enforcement of the applicable codes by their members. They thus have information and records that would be relevant for consideration in the clearance of a candidate to contest an elective position, for purposes of section 13(1)(h) of the Leadership and Integrity Act which provides that a person shall not engage in actions which would lead to removal from the membership of a professional body in accordance with the law.

vii. Quasi-Judicial Tribunals and Commissions Of Inquiry

Any agency that is clothed with jurisdiction to inquire into or investigate a matter and make a decision or finding in respect to the matter, such as quasi-judicial tribunals or commissions of inquiry becomes relevant if the matter dealt with impacts clearance of an aspirant. Apart from the ad hoc Commissions of inquiry, other examples of agencies that are empowered to inquire into matters and make a finding include the National Cohesion and Integration Commission (NCIC) and the Commission on Administrative Justice (CAJ).

viii. Legislative Bodies

In the exercise of their oversight functions, the National Assembly, Senate and County Assemblies may conduct impeachment proceedings in respect of state or public officers under their jurisdiction. An impeachment becomes a relevant finding if it concerns a matter among those listed in section 13 of the Leadership and Integrity Act, 2012 such as abuse of office, misuse of public resources, and falsification of records, among others.

ix. Commission for University Education

The Commission for University Education (CUE) is established under the Universities Act, No. 42 of 2012 to regulate university education in Kenya, including accrediting universities and universities academic programs, among other functions. Given that the prescribed educational qualifications for elective offices, CUE is a relevant agency for the purpose of recognition and equation of qualifications conferred by foreign universities.

x. Office of The Official Receiver In Insolvency

The Office of the Official Receiver in Insolvency is established under the Insolvency Act, 2015 as the Official Receiver in Insolvency. The office is a Department under the Business Registration Service, a Semi-Autonomous Government Agency under the Office of the Attorney General and Department of Justice. In the registration of candidates to contest elections, the Office is relevant for the purposes of providing information on the bankruptcy status of aspirants.

xi. Kenya National Qualifications Authority

The functions of the Kenya National Qualifications Authority (KNQA) include the creation of an accurate, reliable and robust database of all qualifications in the country to enable comparability, equation, recognition and information sharing of qualifications globally. The Authority has a critical role in authenticating the qualifications of persons offering themselves for election to offices with minimum educational requirements.

xii. Directorate of Immigration Services

For the purposes of elections, the Directorate of Immigration Services is the custodian of information on all Kenyan citizens holding dual citizenship. IEBC requires this information in the registration of candidates for election given the legal restrictions related to dual citizenship.

xiii. Kenya National Examination Council

Section 3 of the Kenya National Examinations Council Act No. 29 of 2012 establishes the Kenya National Examinations Council (KNEC) as the national body responsible for overseeing national examinations in Kenya. According to Section 10, the Council is mandated with the critical role to confirm authenticity of certificates or diplomas issued by the Council upon request by the government, public institutions, learning institutions, employers and other interested parties.

xiv. National Police Service

Pursuant to Article 247 of the Constitution, the National Police Service Act of 2011 was enacted establishing police services under the supervision of the National Police Service and the command of the Inspector-General of the Service. The Directorate of Criminal Investigations being part of the larger National Police Service is mandated under Part V, Section 28 and 35 of the Act to issue certificates of good conduct to aspirants among others.

xv. County Public Service Board

County Public Service Boards are established under Article 235 of the Constitution and Section 57 of the County Government Act No. 17 of 2012. Section 59 of the County Government Act mandates the Boards to appoint persons to hold or act in offices of the county public service and to advise the county government on human resource management and development among others. The Service Board is the relevant body tasked with hiring and firing public officers in the County Government. In this regard information relating to resignation of public officers is provided by the Boards.

xvi. County Assembly Service Board

County Assembly Service Boards (CASB) are established under Section 12 (1) of the County Government Act No. 17 of 2012. Section 12 (7) of the County Government Act mandates the Board to inter alia constitute offices in the county assembly service, and to appoint and supervise office holders. The Service Board is the relevant body in this regard where information relating to resignation of public officers in the county assembly is resident.

xvii. Citizens

The citizenry can be enablers where they give information during vetting of candidates. They can also be obstacles in instances where they fail to give crucial information about individuals during a vetting exercise.

xviii. Civil Society

They play a critical role in promoting integrity as they create awareness to the citizens and public. Helps to engage citizens in engaging citizens in social vetting, transparency and accountability.

1.3 Minimum Requirements And Qualifications For Elective Positions In Kenya

- a) Must be a Kenyan citizen by birth;(Citizenship by birth is not a requirement for other elective positions. However, the candidate must have been a citizen of Kenya for at least 10 years before the election)
- b) Is qualified to stand for election as a member of Parliament;
- c) Must not owe allegiance to a foreign state
- d) Must be a registered voter;
- e) Is a holder of a degree from a university recognized in Kenya;
- f) Is nominated by a Political Party or is an independent candidate;
- g) Must not be a public officer or acting in any State of public office other than, President, Deputy President or Member of Parliament;
- h) Must meet the moral and ethical requirements under the Leadership and Integrity Act;
- i) Must not hold dual citizenship unless citizenship of the other country has been obtained by operation of law without capacity to opt out;
- j) Must not be an undischarged bankrupt;
- k) Must not be a person of unsound mind;
- l) Must not be subject to a sentence of imprisonment of at least six months from the date of registration of candidates or date of elections. However, this disqualification is applied only if all possibility of appeal or review have been exhausted;
- m) Must not have been found after due process, to have abused or misused state or public office or contravened Chapter Six of the Constitution; and
- n) Must not have been dismissed or removed from public office (including by impeachment) for contravening the provisions of Articles 75, 76, 77 and 78 of the Constitution;

Requirements; The Candidate must submit the following documents to the Commission;

- a) Certified copies of educational qualification certificates, including a Degree Certificate in accordance with Section 22 of the Elections Act, 2011 and Regulation 47 of Elections (General) Regulations, 2012.
- b) A copy of a National Identity Card/valid Passport (the document used by the candidate to register as a voter).
- c) A Passport size photograph with white background submitted in hard and soft copy.
- d) If a Party Candidate, a Nomination Certificate from a fully registered Political Party nominating the candidate, duly dated and signed by an authorized official of the party.
- e) A duly signed and dated Code of Conduct (Second Schedule of the Elections Act, 2011)
- f) A duly filled Commission Nomination Form, including: An original Statutory Declaration Form for purposes of nomination pursuant to (Regulation 18(3) Elections (General) Regulations, 2012 and an original Self-Declaration Form (Regulation 46 of Elections (General) Regulations, 2012).
- g) For both Political Party Candidates and Independent Candidates, an electronic and printed copy of not fewer than 2000 voters from each of the majority of the counties in the prescribed form.



**JUDICIAL INTERPRETATION
ON INTEGRITY QUESTIONS**

CHAPTER TWO

JUDICIAL INTERPRETATION ON INTEGRITY QUESTIONS

2.1 IMPEACHMENT

2.1.1 Mike Sonko V County Assembly Of Nairobi City & 11 Others (Petition 11 (E008) Of 2022) [2022] Kesc 76 (Klr) (5 December 2022)

Significance

Due process was followed in the impeachment of the County Governor of Nairobi.

Facts

The Appellant, the former County Governor of Nairobi had filed a petition challenging his impeachment. His petition at the High Court was dismissed and so was his subsequent appeal. Aggrieved the appellant filed an appeal before the Supreme Court where he challenged the impeachment on grounds that it was unconstitutional as it violated the sovereignty of his constituents and undermine the vote at the ballot box, on grounds that the impeachment was done without due process and that he was not accorded a fair trial.

On the other hand, the Appellants objected to the jurisdiction of the Supreme Court, averring that the Court did not have jurisdiction to the appeal owing to the Appellant's failure to cite the provisions the appeal was based on.

Issues

1. Whether the court's jurisdiction was properly invoked;
2. Whether due process was followed by the county assembly in the removal of the appellant from the office of governor;
3. Whether the appellant was accorded adequate time and facility to respond to the charges against him both at the county assembly and in the senate;
4. Whether public participation was undertaken;
5. Whether the charges were substantiated to the prescribed standard warranting removal of the appellant from the office;
6. Whether the sovereignty of the people envisaged under article 1 of the constitution was respected and protected in the removal process.

Holding

On the issue of jurisdiction, the Court remarked that pleadings must always carry reference to the relevant provisions of the Constitution, the law and rules relied upon and specify at the end the relief sought. The instant petition had not identified the provisions as required. Further, the Court cited the case of Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney- General & 2 others, SC Petition No 45 of 2018; [2020] eKLR and reiterated its decision in that case that "...even if the original suit in the High Court or lower court invoked specific constitutional provisions, that fact alone is not enough for one to invoke and sustain an appeal before this court. A party has to steer his appeal in the direction of constitutional interpretation and application. He/she should directly point to the specific instances where the Court of Appeal erred in its interpretation and application of the Consti-

tution". The court remarked that the Appellant had failed to demonstrate how the appeal involved application or interpretation of the Constitution. For this reason, it held that it did not have jurisdiction. However, it remarked that not all matters in the appeal concerned matters of constitutional interpretation and proceeded to determine the other issues.

On the issue of due process, the court remarked that the procedure for removal of a governor from office was provided for in the Constitution. It then went on to cite the case of Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR and remarked that under the principle of separation of powers limited the court to deciding on matters of individual rights and fundamental freedoms and not to enquire into how the County Assembly and Senate perform duties in which they alone have discretion or to review the merit of the decision by the County Assembly and Senate to impeach a Governor and that it could not interfere with parliamentary procedures that did not breach the Constitution. The court further remarked that an unfair decision in the context of the removal of a governor (under Article 181 of the Constitution and Section 33 of the County Governments Act) is one where no adequate notice was given, where there was bias and where the hearing was unfair. On these considerations, the court found that the appellant had been given adequate notice via a letter dated 26th November 2020. Further, the court found that the appellant was not denied a fair hearing as his advocate did not adduce written instructions authorizing him to appear for the Appellant at the County Assembly. For these reasons, the court found that due process was followed.

On the third issue, the court remarked that both Article 47 and 50 guarantee an individual the right to be heard. The court found that the Appellant was accorded a fair hearing both before the County Assembly and the Senate and was accorded an adequate opportunity to respond to the charges.

On the fourth issue of public participation, the court affirmed that there was adequate public participation in the Appellant's impeachment as a notice was issued to the residents of Nairobi County of the impending impeachment. Further, a comprehensive report on the same was prepared. Additionally, the impending impeachment was advertised in the Daily Nation Newspaper on 27th November 2020 and the attention of the general public was drawn to the impending impeachment. The advertisement called upon county residents to make their representations and deliver the same to the Nairobi County Assembly. Consequently, the evidence showed that over 40,000 submissions were received and considered in the impeachment process.

On the issue of whether the charges were substantiated to the prescribed standard, the court held in the affirmative, remarking that all the organs involved, from the County Assembly to the Court of Appeal, found proof of all the charges and that nothing had been placed before it to warrant its interference with those conclusions by the two superior courts.

On the issue of whether the sovereignty of the people was respected in the removal process, the Court cited Article 1 of the Constitution of Kenya on the Sovereignty of the people. The Court held that locking out the electorate from being heard in a matter as important as impeachment of the Governor would indeed result in the violation of their sovereignty. However, as it had already been demonstrated that there was adequate public participation, the sovereignty of the people had been respected.

Based on the reasons above, the appeal was dismissed, in dismissing the Petition, the court stated obiter,

"It bears mentioning in conclusion that Chapter Six of the Constitution was not enacted in vain or for cosmetic reasons. The authority assigned to a State officer is a public trust to be exercised in a manner that demonstrates respect for 10 Petition 11 (E008) of 2022 the people; brings honor to the nation and dignity to the office; and promotes public confidence in the integrity of the office. It vests in the State officer the responsibility to serve the people, rather than the power to rule them".

2.1.2 Republic V Independent Electoral & Boundaries Commission Dispute Resolution Committee & Another; Thang’wa (Exparte); Party (Interested Party) (Judicial Review Application 2 Of 2022) [2022] Kech 10043 (KlR) (7 July 2022)

Significance

This case concerns the refusal of IEBC to clear and register the complainant as a candidate in the 2022 elections on the grounds that the Complainant stood disqualified from contesting due to an alleged impeachment/removal from office as a County Executive Committee Member of Kiambu County.

Facts

In this case, the ex parte Applicant filed a complaint with the 1st Respondent challenging the Independent Electoral and Boundaries Commission’s (IEBC) refusal to clear and register him as a candidate for the Senatorial position in Kiambu in the August 2022 elections under the UDA ticket. The 1st Respondent upheld the IEBC’s decision, citing the ex parte Applicant’s ineligibility to hold public office during a purported removal from the office and the fact that the Applicant was late in presenting his nomination papers. Aggrieved by this decision, the ex parte Applicant initiated judicial review proceedings at the Milimani High Court, but the same were transferred to the Kiambu High Court for determination in view of territorial jurisdiction. The Applicant, on being granted leave sought orders of Mandamus and Prohibition against the 1st Respondent, claiming that it exceeded its mandate by framing its own issues for determination and making findings on issues not argued by the parties.

Issues for Determination

1. Whether the ex parte Applicant’s rights to natural justice were violated;
2. Whether the decision by the 1st Respondent was irrational, illegal unreasonable, and procedurally defective;
3. Whether the ex parte applicant was entitled to the reliefs sought.

Holding

The ex parte Applicant averred that the IEBC was a judge in its own case because the 1st Respondent was a committee within the IEBC and that two of the members sitting in the committee were IEBC commissioners. The Court rejected this contention and concurred with the holding in *Diana Kethi Kilonzo & another v IEBC & 10 others* [2013] eKLR, holding that the resolution of disputes was a mandated function of the IEBC under Article 88 of the Constitution of Kenya. The court added that the functions of the 1st Respondent were constitutionally and statutorily underpinned and that the composition of the committee could not be faulted. The ex parte Applicant also argued that he was disqualified without being afforded an opportunity to be heard on the matter. In this respect, the court found that there was indeed a violation of his right to a fair hearing.

On the issue of the 1st Respondent’s decision, the ex parte applicant argued that the 1st Respondent took extraneous matters into consideration while deciding on whether to uphold the IEBC’s decision. The 1st Respondent based its decision to uphold the IEBC’s decision on the fact that the ex-parte applicant was late in submitting his nomination papers. However, the 1st Respondent failed to take into account the fact that there was an order of Prohibition issued by the High Court preventing the ex parte Applicant from complying with the timelines. Additionally, even if the 1st Respondent was unaware of the prohibitory order, it did not afford the ex parte Applicant an opportunity to be heard where he would have explained his lateness. Based on these reasons, the court held that the 1st Respondent’s decision was unreasonable and unfair.

On the issue of the reliefs sought the Court found that the Applicant was entitled to the sought reliefs as he had demonstrated that the 1st Respondent’s decision was unreasonable and unfair. Consequently, the court quashed the 1st Respondent’s decision and issued an order of Mandamus compelling the 2nd Respondent to register the ex parte Applicant as a Senatorial candidate.

2.2 EDUCATION QUALIFICATIONS

2.2.1 *Republic v Wavinya Ndeti & 4 Others; Gideon Ngewa & Another (Ex parte); Wiper Democratic Movement Kenya (Interested Party) (Judicial Review 3 Of 2022) [2022] KeHC 12434 (KLR) (18 July 2022) (Judgment)*

Significance

Neither the Independent Electoral and Boundaries Commission (IEBC) nor the IEBC Dispute Resolution Committee have jurisdiction to investigate or authenticate potential candidates' education qualifications. This mandate falls on the Commission for University Education.

Facts

The Applicants in this case sought orders of certiorari quashing the decision of the 2nd Respondent's Dispute Resolution Committee upholding the 2nd Respondent's clearance of the 1st Respondent to vie for the position of Governor of Machakos County on the grounds that the 1st Respondent was not a holder of a university degree recognized in Kenya as required under Section 22 of the Elections Act. The Applicants averred that a keen examination of the 1st Respondent's academic qualifications revealed that the 1st Respondent's degrees were obtained under three different names, these being Wavinya Ndeti, Wavinya Oduwole and Petti Wavinya Oduwole. However, the 1st Respondent had failed to confirm that the two names belonged to her in the affidavit submitted to the 2nd Respondent for clearance. The Applicants also submitted that the 1st Respondent obtained a master's degree and a bachelor's degree without a first degree, which was an unusual occurrence in the UK education system where the 1st Respondent was educated. In light of this, the Applicants also sought an order of mandamus compelling the 2nd Respondent to verify the 1st Respondent's qualifications.

The 2nd Respondent argued that neither it, nor its dispute resolution committee had jurisdiction to launch investigations into the authenticity of degrees in dispensing with its role to adjudicate election disputes. It further argued that investigation into academic qualifications was the preserve of the 3rd respondent as a specialized commission. For these reasons, the 2nd Respondent prayed that the application be dismissed.

Issues for Determination

1. Whether the 2nd Respondent's dispute resolution commission was mandated to investigate the authenticity of potential candidates' education qualifications;
2. Whether the 1st Respondent's academic certificates met the requirements for recognition.

Holding

On the first issue, the 2nd Respondent's Dispute Resolution Committee, in upholding the decision to clear the 1st Respondent to vie for the gubernatorial position, stated that it had no jurisdiction to determine the authenticity of the 1st Respondent's academic qualifications. Further, the 2nd Respondent averred that the jurisdiction to determine these matters was vested in the 3rd Respondent under Section 5 of the Universities Act. On the other hand, the Applicants relied on Regulation 47 of the Election (General) Regulations 2012, averring that the 2nd Respondent was mandated to authenticate the candidates' degree certificates as part of its mandate of ascertaining the candidates' education qualifications. The Court considered these contentions and concurred with the 2nd Respondent's arguments that the authentication of education qualifications was the preserve of the 3rd respondent. Further, it stated that nothing in Regulation 47 conferred any power on the 2nd Respondent to recognize or equate university degrees.

On the 2nd Issue, the Applicants alleged that the 1st Respondent's certificates had not met the required standards under the Universities Act. The court stated that on this issue, the burden to prove these allegations fell on the Applicants under the provisions of Section 107 (1) of the Evidence Act and precedent set in the case of Anne Wambui Nderity v Joseph Kiprono Ropkoi & another [2005]. However, the court found that the Applicants' allegations were purely speculative and that the Applicants had not dispensed with the burden of proof. The court

further stated that the mere fact that another country's education system was unusual and differed from that in Kenya did not necessarily mean that such foreign degrees should not be recognized.

In light of these reasons, the application was dismissed.

2.2.3 Musyoka V Returning Officer, Independent Electoral And Boundaries Commission, Machakos County & 3 Others (Constitutional Petition E004 Of 2021) [2022] KeHC 160 (KlR) (11 February 2022) (Judgment)

Significance

The requirement that a candidate wishing to vie for a Parliamentary seat must have a degree only began applying from the 2022 general elections.

Facts

The petition revolved around the 2nd Respondent's nomination of the 3rd Respondent to contest for the Senatorial position in Machakos County in the senatorial by-election following the demise of the previous holder of the position. The Petitioner averred that, according to information presented to him by the 3rd Respondent's campaign manager, he had determined that the 3rd Respondent attended Kyaume Primary School but did not possess a clearance certificate. To further anchor his claim, he referred to the 3rd Respondent's own declaration forms which were left blank in spaces where she was required to indicate her education qualifications. Additionally, the Petitioner averred that the 3rd Respondent did not attend secondary school. For this reason, the certificate issued by World Outreach International Bible College to the 3rd respondent could not qualify as a post-secondary school qualification.

Based on these averments, the Petitioner contended that the 3rd Respondent Violated Section 13 of the Leadership and Integrity Act by availing a false degree certificate. Additionally, he averred that the 2nd Respondent violated Articles 84 and 91 of the Constitution of Kenya, the IEBC Act, the Electoral Code of Conduct, and Section 22 of the Elections Act (Amended) by issuing a nomination certificate to an unqualified person.

On the other hand, the Respondents urged the court to find that the requirement for a post-secondary qualification had been postponed to the August 2022 General elections for contestants other than governors and the president under Section 22 (1A) of the Elections Act. Additionally, the 3rd Respondent argues that there was no evidence presented from the relevant institutions charged with recognizing degrees that the 3rd Respondent's degree was forged.

Issues for Determination

1. Whether the 3rd Respondent was required to possess a degree certificate to vie for the senatorial by-election in Machakos County;
2. Whether the 3rd Respondent was possessed of post-secondary qualifications;
3. Whether the law required the 3rd Respondent to have post-secondary school academic qualification.

Holding

On the first issue, the court examined the wording of Section 22 (1A) of the Elections Act which suspended the requirement for candidates contesting for parliamentary seats to have a university degree till the 2022 general election. However, the court noted that the election which formed the subject of the petition was a by-election, not a general election. It proceeded to express the view that had the section stipulated that the requirement for a degree applied to all elections held after 2017, it would have applied to the 3rd Respondent. However, since the provision had been suspended till the 2022 general election, the requirement that those vying for Parliamentary seats must hold a degree from a university recognized in Kenya did not apply to the 3rd respondent when she vied for the position of Senator for Machakos County in the 2021 by-election.

On the second issue, the court, relying on the case of Raila Odinga & another v IEBC & 2 others [2017] eKLR,

remarked that though the legal and evidential burden in an election petition lies with the petitioner initially, if the petitioner lays prima facie evidence against the respondent to a point where the respondent would fail if no further evidence were adduced, the evidential burden shifts to the respondent. On the back of this, the court remarked that the evidential burden shifted to the 3rd Respondent after the Petitioner in this case adduced the affidavit sworn by the 3rd Respondent's campaign manager detailing that the Petitioner did not complete her primary school education. In light of this, the Court held that, by failing to adduce evidence, the 3rd Respondent failed to prove that she had a post-secondary academic qualification, a burden that had shifted to her.

On the 3rd issue, it was held that the law did not, at the time of the 3rd Respondent's nomination for the by-election, require her to possess a university degree. Based on these reasons, the petition was dismissed for lack of merit.

2.2.4 Anguche V Wakhungu & 3 Others; Commission for University Education & 2 Others (Interested Party) (Constitutional Petition E002 Of 2022) [2022] Kehc 10338 (KlR) (15 July 2022) (Ruling).

Significance

The burden of proving that a candidate for a gubernatorial position does not have a valid degree certificate.

Facts

In the Petition dated 2nd June 2022 and supported by the Petitioner's affidavit, the Petitioner averred that the 1st Respondent, who was vying for the gubernatorial position in Kakamega County, was not a holder of a valid degree certificate as he had attained a mean grade of C- in his KCSE. Further, he contended that the 1st Respondent had several re-sits which he re-sat in 2017, and could therefore not have graduated in 2011 as he purported. Based on these averments, the Petitioner invited the Court to interrogate the validity of the 1st Respondent's degree certificate and declare that he does not qualify for election as a governor for lack of the required academic qualifications under the Constitution of Kenya. However, the Petitioner did not file any submissions.

The 1st Respondent filed an affidavit in which he averred that he began his university studies in 2011 but took a break due to his busy schedule. However, he averred that he resumed his studies in 2018 and graduated in 2019. Further, he averred that he attained a mean grade of B plain in his KCSE examination which he sat for at Friends School Kamusinga in 2003. The 2nd Respondent also swore an affidavit to the effect that the 1st Respondent was a student at the institution and was conferred with a Bachelor of Science in Information Systems and Technology Degree on 11/08/2019. Regarding the appearance of the 2nd Respondent's name in the 2nd Respondent's graduation book for their graduation held in 2011, the 2nd Respondent averred that before 2017, the university permitted students who had one semester remaining to complete their course requirements to appear in the graduation booklet to walk with their course mates. This did not mean that they would be conferred with a degree certificate.

Issue for Determination

1. Whether the 1st Respondent had met the statutory and constitutional qualification to contest and, if elected, to hold the office of a Governor.

Holding

The court held that as the Petitioner had asserted a negative, evidential burden had shifted onto the Respondents. The court stated that the Respondent had filed affidavits to the effect that the KCSE and Degree certificates issued to the 1st Respondent were all genuine. As the petitioner failed to meaningfully and materially challenge the affidavits, the court came to the inevitable conclusion that the Petition had failed as the Petitioner had failed to establish the claims against the Respondents. The Petition was dismissed.

2.2.5 Wambui & 10 Others V Speaker of The National Assembly & 6 Others (Constitutional Petition 28 Of 2021 & Petition E549, E037 & E065 Of 2021 & E077 Of 2022 (Consolidated)) [2022] Kehc 10275 (Klr) (Constitutional And Human Rights) (13 April 2022) (Judgment)

Significance

Section 22 (1) (b) (i) of the Elections Act is not operational, of no legal effect and void ab initio and the requirement that a person must possess a degree from a university recognized in Kenya to qualify to be a Member of Parliament in Kenya is void.

Facts

The various consolidated petitions challenged the constitutionality of Section 22 (1) (b) (i) of the Elections Act as introduced by an amendment through the Election Laws (Amendment) Act, No 1 of 2017, which required a university degree as a precondition to nomination for election and/or political party lists for Members of Parliament. The Petitioners sought that the Section be declared unconstitutional on various grounds, including that there was no public participation in the enactment of the Section, that the section was contrary to Chapters 1 & 4 and with Articles 10 (2) (a), 24, 27, 38 (3), 54 and 56 of the Constitution of Kenya.

On the other hand, the respondents argued that the consolidated petitions were res judicata, that the impugned provision enjoyed the presumption of constitutionality, and that there was no evidence to show that the impugned provision was unconstitutional.

Issues for Determination

1. Whether the petitions are res judicata;
2. Whether the petitions are caught up by the ripeness doctrine;
3. Whether Section 22 (1) (b) (i) of the Elections Act offends Articles 24, 27, 38, 55 and 56 of the Constitution;
4. Whether there was adequate public participation in the enactment of Section 22 (1) (b) (i) of the Elections Act.

Holding

On the first issue, the Court cited Section 7 of the Civil Procedure Act on the definition of the doctrine of res judicata. Further, the Court cited the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR where the Court held that the doctrine of res judicata aims to prevent causes of action from being re-litigated once they have been adjudicated upon and determined. The Court also cited the case of Karia & another v Attorney General & others [2005] where it was held that the matters in dispute in the former suit must be the same as the ones in the instant suit and the parties to the two suits must be the same. Finally, the Court cited the case of Kenya Commercial Bank Limited v Benjoh Amalgamated Limited, Civil Appeal No. 107 of 2010 where the Court held that the elements of res judicata must be satisfied conjunctively. In light of these authorities, the Court held that the instant petitions were not res judicata as the elements of res judicata had not been satisfied conjunctively as required.

On the issue of the ripeness doctrine, the Respondents contended that parliament had received the public petitions challenging the constitutionality of Section 22(1)(b)(i) of the Elections Act and that it was in the process of considering them. The court was informed that the Senate had already passed an amendment repealing the impugned provision and that the matter was pending consideration before the National Assembly. As such, it was not ripe for the court to exercise its jurisdiction during the pendency of the process before Parliament. The Court cited the case of Kiriro wa Ngugi & 19others v Attorney General & 2 others [2020] eKLR where the High Court held that the doctrine focuses on the time when a dispute is presented for adjudication and that courts should frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable

controversies. Further, the Court Cited the case of Council of Governors & 3 others v Senate and 53 others [2015] eKLR where the High Court considered whether the right to petition parliament under Article 119 took away the right to approach the High Court. In that case, the High Court answered the question in the negative, remarking that, “It would therefore be, in our view, for the court to abdicate its responsibility under the Constitution to hold that a party who considers that legislation enacted by Parliament in any way violates the Constitution is bound to first petition Parliament with respect to the said legislation. The constitutional mandate to consider the constitutionality of legislation is vested in the High Court, and articles 2(4) and 165(3(d)(i) mandate this Court to invalidate any law, act or omission that is inconsistent with the Constitution.” The Court agreed with the High Court’s sentiments and held that the petitions were not caught up by the ripeness doctrine.

On the issue of the constitutionality of Section 22 (1) (b) (i) of the Elections Act, the Court remarked that an examination of the provision revealed that it was intended as a limitation to the political rights under Article 38 (3) of the Constitution. For that reason, the Court remarked that the limitation must be in line with the provisions under Article 24 of the Constitution, which provides that a permissible limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The Petitioners had averred that the limitation imposed by this Section was unreasonable and unjustifiable for various reasons. In support of their averment, the Petitioners adduced the 2019 Kenya Population and Housing Census Report which indicated that only 1.2 million Kenyans held university degrees. Further, the report detailed that 25% of all degree holders were situated in Nairobi, with some constituencies not having a single degree holder. Further, they averred that the Section failed to take into account other relevant qualifications and experiences which can be equated to conventional degrees under the Kenya National Qualifications Framework Act No. 22 of 2014. Finally, the Petitioners argued that the Section effectively secured the positions of Members of Parliament to a small clique of wealthy individuals as the cost of obtaining a university degree was way beyond the ability of many Kenyans. In light of these reasons, the court held that the Section was not well thought out that there was need for it to be looked at again.

On the issue of public participation, the court remarked that under Article 10 of the Constitution, public participation is an irreducible minimum in the process of enacting any legislation and that there was need for comprehensive public participation and stakeholder agreement in the enactment of the Section in question. However, in the present case, the court remarked that Parliament ignored all that and the Senate only received presentations from some few entities which in any case the manner of invitation was not disclosed. For this reason, it was held that there was no meaningful public participation in the enactment of the Section.

In light of the reasons above, the Court declared Section 22 (1) (b) (i) in-operational, of no legal effect and void ab initio and stated that the requirement that a person must possess a degree from a university recognized in Kenya to qualify to be a Member of Parliament in Kenya was nullified.

2.2.6 county Assembly Forum & 6 Others V Attorney General & 2 Others; Senate of The Republic Of Kenya (Interested Party) (Constitutional Petition E229, E225, E226, E249 & 14 Of 2021 (Consolidated)) [2021] Kehc 304 (KlR) (Constitutional And Human Rights) (15 October 2021) (Judgment)

Significance

Subjecting all the candidates for the positions of Member of County Assembly (MCA) to a minimum academic qualification of a university degree prejudiced the rights and fundamental freedoms of those who were not able to directly acquire/afford university degrees.

Facts

The petitions challenged the constitutionality of the requirement of a degree qualification for a person to be nominated as a candidate for election to the office of a Member of a County Assembly in Kenya as set out in Section 22(1)(b)(ii) of the Elections Act (the impugned provision). The petitioners variously argued that the limitation imposed by the impugned provision failed the tests in Article 24 of the Constitution of Kenya, 2010 (the Constitution) on the limitation of fundamental rights and freedoms since it was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The petitioners also contended that the impugned provision was discriminatory. The Petitioners thus sought orders declaring the impugned provision unconstitutional.

Issues for Determination

1. Whether the consolidated Petitions are res-judicata;
2. Whether the consolidated Petitions are caught up by the ripeness doctrine;
3. Whether section 22(1)(b)(ii) of the Elections Act offends articles 24, 27, 38(2), 55 and 56 of the Constitution;
4. Whether there was adequate public participation in the enactment of section 22(1)(b)(ii) of the Elections Act.

Holding

On the first issue, the Respondents averred that the petitions were res judicata the decisions in Johnson Muthama -vs- Minister for Justice and Constitutional Affairs & Another (2012) eKLR, John Harun Mwau -vs- Independent Electoral and Boundaries Commission & Another (2013) eKLR and Okiya Omtatah Okoiti & Another -vs- Attorney General & Another (2020) eKLR. The Court, taking account of the provisions of Section 7 of the Civil Procedure Act and the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others, held that the Petitions were not res judicata for the reasons that the Johnson Muthama case and the Harun Mwau case were determined long before the impugned petition, meaning that the non-existent provision could not have been adjudicated upon. Regarding the Okiyah Omtatah case, the court found that though the constitutionality of the impugned provision was in issue, the Court declined jurisdiction and the matter was not fully and finally determined.

On the issue of the ripeness doctrine, the Interested Party averred that Parliament had received the Public Petitions challenging the constitutionality of Section 22(1)(b)(ii) of the Elections Act and that it was in the process of considering them. As such, it was not ripe for this Court to exercise its jurisdiction during the pendency of the process before Parliament. The Court considered the case of Kiriro wa Ngugi & 19 others v Attorney General & 2 others [2020] eKLR where the High Court held that the doctrine focuses on the time when a dispute is presented for adjudication and that courts should frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies. However, the Court rejected the Interested party's contention and agreed with the holding of the High Court in Council of Governors & 3 others v Senate & 53 others that the right to petition Parliament under Article 119 of the Constitution did not oust the jurisdiction of the High Court to consider the constitutionality of a provision of the law. For this reason, the Interested Party's contention failed.

On the constitutionality of the impugned provision, the Petitioners averred that the provision was a limitation on political rights under Article 38 but that the limitation was not reasonable or justifiable as required under Article 24 of the Constitution of Kenya. The Petitioners had averred that the limitation imposed by this Section was unreasonable and unjustifiable for various reasons. In support of their averment, the Petitioners adduced the 2019 Kenya Population and Housing Census Report which indicated that only 1.2 million Kenyans held university degrees. Further, the report detailed that 25% of all degree holders were situated in Nairobi, with some constituencies not having a single degree holder. Further, the report detailed that 25% of all degree holders were situated in Nairobi, with some constituencies not having a single degree holder. Further, they averred that the Section failed to take into account other relevant qualifications and experiences which can be equated to conventional degrees under the Kenya National Qualifications Framework Act No. 22 of 2014. Finally, the Petitioners argued that the Section effectively secured the positions of Members of Parliament to a small clique of wealthy individuals as the cost of obtaining a university degree was way beyond the ability of many Kenyans. In light of these reasons, the court held that the Section contravened Articles 24, 27, 38 (3) and 56 of the Constitution.

On the issue of public participation, the court found that neither the Respondents nor the Interested Party contested the claim that there was no public participation in the enactment of the impugned provision. For this reason, the court found that there was no public participation. The court further remarked that public participation is an irreducible minimum in the process of enacting any legislation. Parliament must always strictly adhere to the requirement of and carry out adequate public participation for any of its legislations to gain legitimacy.

Based on the reasons above, the Court ordered that Section 22(1)(b)(ii) of the Elections Act is unconstitutional and in violation of Article 10(2)(a) of the Constitution for failure to undertake public participation and on account of violation of Articles 24, 27, 38(3) and 56 of the Constitution.

2.3 Compliance and Interpretation Of Chapter 6.

2.3.1 **Okoti & 15 Others V Attorney General & 7 Others; Commission On Administrative Justice & 15 Others (Interested Parties) (Constitutional Petition E090,E168,E221,E230,E234,E249, E017,E109 & E010 Of 2022 (Consolidated)) [2022] Kehc 3209 (Klr) (Constitutional and Human Rights) (24 June 2022) (Judgment)**

Significance

The High Court has no jurisdiction to determine petitions that raised abstract or hypothetical questions. Further, pre-election disputes such as those regarding suitability and eligibility for nomination of candidates, must be resolved by the IEBC in the first instance. The High Court's jurisdiction is only triggered once the IEBC makes a decision on the issue.

Facts

The 1st petitioner was concerned that persons with integrity issues were vying for public office in the General Elections. Although the petition was general and did not target a specific person, the petitioner noted, for instance, that a person was elected as a Member of Parliament despite having being arrested, charged and dismissed from his high-profile public-sector position for receiving a bribe. The petitions also argued that the 1st respondent and other leaders who had been impeached from public office due to gross misconduct and violation of the Constitution would be a threat to the Constitution if elected or re-elected back to public office.

Issues for Determination

1. Whether the High Court had the jurisdiction to determine petitions that raised abstract or hypothetical questions;
2. Whether the petitions are premature in view of the Constitutional and statutory mandate of the IEBC.

Holding

The court remarked that in determining the issues, it was necessary for it to interpret various provisions of the Constitution. For this reason, the court cited Article 259 (1) of the Constitution, stating that the Article required that the Constitution be interpreted in a manner that promotes its purpose, promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance. The Court further considered the case of *Government of Republic of Namibia v Cultura* 2000, 1994(1) SA 407 where it was held that a constitution must be "...broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation". Further, it cited the case of *Centre for Rights Education and Awareness (CREAW) and Others v The Attorney General Nairobi Petition No 16 of 2011 [2011] eKLR* where the court held that "In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read together to get a proper interpretation."

Regarding the issue of jurisdiction, the court cited Article 165 (3) of the Constitution of Kenya on the Jurisdiction of the High Court. It stated that though the court was allocated wide jurisdiction, the court is not in the business of engaging in academic or abstract discourse that is not anchored in disputed facts. That is why the Constitution does not confer upon this court the jurisdiction to issue advisory opinions. In this, the Court cited the case of *John Harun Mwau and 3 others v Attorney General [2012] eKLR* where the court held that it could not deal with hypothetical issues and that the jurisdiction to interpret the Constitution under Article 165(3)(d) does not exist in a vacuum and is not exercised independently in the absence of a real dispute. The Court remarked that the petitions Nos. E090 of 2022, E168 of 2022 and E221 of 2022 only required the court to pronounce itself on purely academic issues. For that reason, they were rejected.

On the second issue, the court cited the case of *Hon. Mohamed Abdi Mohamud v Ahmed Abdullahi and Others SCK Pet. No 7 of 2018 [2019] eKLR* and concurred with the Supreme Court's decision that pre-election disputes

such as those regarding suitability and eligibility for nomination of candidates, must be resolved by the IEBC in the first instance. The High Court's jurisdiction is only triggered once the IEBC makes a decision on the issue. In the instant petition, Mike Mbuvi Sonko, Samuel Arama and Karungo wa Thangwa had submitted themselves to the jurisdiction of the IEBC Dispute Resolution Committee under Article 88(4)(e) of the Constitution of Kenya as read with section 74 of the Elections Act and the Committee was yet to make a decision on the disputes. For that reason, the Court found that the cases against the three respondents had been filed prematurely.

Based on these reasons, all the petitions were struck out.

2.3.2 Mberia V Republic (Anti-Corruption And Economic Crimes Appeal E005 Of 2021) [2022] KeHC 10025 (Klr) (Anti-Corruption And Economic Crimes) (14 July 2022)

Significance

A conviction for an offence of bribery under the Bribery Act bars a person from running for office as a Member of the County Assembly.

Facts

The appellant, a member of County Assembly for Langata Ward, had been charged with conspiracy to commit an offence of corruption contrary to Section 47 (a) (3) as read with Section 48 (1) of the Act and three counts of receiving a bribe contrary to Section 6 (1) (a) as read with Section 18 of the Bribery Act.

The Appellant, had allegedly been tasked by the County Assembly to investigate the alleged illegal acquisition of public land by the proprietor of Kiragu Waichachi Schools in Kiambu and Eastleigh Section 3. While carrying out his duties, the Appellant requested a Kshs. 1,000,000 bribe from the School's manager to withdraw a letter sent to the school requesting its title deed and approval plans. The Appellant further requested that he and the school's manager meet in person. The school's manager proceeded to lodge a complaint at the Ethics and Anti-Corruption Commission where he was fitted with a recording device before proceeding to the meeting. At the meeting, the Appellant reiterated the request for the Kshs. 1,000,000 bribe and demanded that a Kshs. 500,000 installments, which was negotiated to Kshs. 300,000 be paid to him on the next day. The recording of the conversation was adduced in court.

The Appellant, on the other hand, had denied visiting the school and also relied on the defense of entrapment.

Based on this evidence, the trial Magistrate acquitted the Appellant on the charge of conspiracy but found him guilty of the three counts of receiving a bribe and fined the Appellant Kes. 700,000 and in default, to serve 12 months' imprisonment on each count. The Magistrate further ordered that the Appellant be barred from holding public office as a Member of the County Assembly under the Provisions of Section 18 (8) of the Bribery Act.

The appellant appealed the trial Magistrate's decision, arguing that it was erroneous on account of the trial court's misapprehension of the facts and failure to uphold the law when convicting him. The Respondent, on the other hand, argued that the State had discharged the burden of proof against the Appellant on the three counts of bribery.

Issues for Determination

Whether the Prosecution had discharged its burden of proof.

Holding

The court remarked that as this was the first appeal, it was bound to examine the evidence afresh. The court provided that the offence of bribery occurred when one either requested (solicits), agreed to receive or received a financial advantage intending that a relevant function or activity should be performed improperly whether by the person receiving the bribe or by another person. Based on the evidence presented at the trial court, the court found that the Appellant was performing a public function as per Section 7 of the Bribery Act at the time the

events took place. It further stated that based on the prosecution witness' evidence at the trial court, there was overwhelming evidence that the Appellant had committed the crimes he had been accused of.

Additionally, the court found that the defense of entrapment did not apply in this case as the Appellant had already hatched a plan to solicit the bribe and was not tricked into asking for the bribe. In this, the court relied on the case of Mohammed Korio Nur v Republic. However, the Court found that the trial court misdirected itself by ordering that the Appellant be barred public office as this order was inconsistent with Article 194 (1) of the Constitution which provided for the manner in which the office of a member of the County Assembly can be vacated. However, the Court clarified that the conviction was a bar to running for such office under Article 193 (2) (g) and a ground for removal under Article 194 (1) (c).

In light of this, the Appellant's conviction was upheld, save for the order barring him from office which was set aside.

2.3.3 public Service Commission & 4 Others V Cheruiyot & 20 Others (Civil Appeal 119 & 139 Of 2017 (Consolidated)) [2022] Keca 15 (Klr) (8 February 2022) (Judgment)

Significance

The jurisdiction of the Employment and Labor Relations Court is limited to determination of employment disputes and an employer-employee relationship must exist between the parties to a dispute in the ELRC. Further the elements of *res judicata* need to be satisfied conjunctively. Additionally, Acts of Parliament enacted before the holding of the first general election under the 2010 constitution are exempt from the requirement of public participation.

Facts

The respondents in this Appeal had resigned from their posts at the County Government of Meru pursuant to the provisions of Section 43 (5) and (6) of the Elections Act, 2011, which required persons interested in vying for elective posts to resign from at least six months before the general election. 31 days after tendering their resignation notices, they sought to have these notices quashed and resume work. The County Government of Meru declined their request as 30 days had elapsed and their resignations had already been accepted by the Governor. Consequently, the Respondents filled a petition at the Employment and Labor Relations Court seeking orders declaring Section 43 (5) and (6) of the Elections Act, 2011 unconstitutional on the grounds that it was discriminatory by requiring certain public officers to resign while it allowed others to maintain office.

The trial court held that the Sections were unconstitutional, prompting the present appeal. The Appellants grounds of appeal were that the trial court acted without jurisdiction by exercising jurisdiction reserved for the High Court under Article 163 (b) and (d) of the Constitution of Kenya, that the Learned judge erred by failing to recognize that the issue of the constitutionality of the Sections in question was *res judicata*, that the learned judge erred by finding that there was no public participation in the enactment of Section 43 (5) and (6) of the Elections Act, that the learned judge erred by applying wrong principles and that the learned judge erred in law by finding that an employee can retract a resignation notice tendered voluntarily and acted upon.

Issues for Determination

1. Whether the Employment and Labor Relations Court had jurisdiction to entertain and determine the matters raised in the consolidated petitions;
2. Whether the proceedings before the trial court were *res judicata*;
3. Whether Section 43 (5) of the Elections Act is unconstitutional;
4. Whether the Trial Judge made the correct findings on the issue of public participation during the enactment of the Elections Act.

Holding

On the issue of the Trial Court's jurisdiction, the court cited the case of Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited and remarked that a decision made by a court without jurisdiction is void ab initio. The court further cited the Supreme Court Case of In the Matter of the Interim Independent Electoral Commission [2011] eKLR and reiterated the Supreme Court's holding that courts in Kenya derive their jurisdiction from the Constitution, Statute and Principles laid out in judicial precedent. On the back of these precedents, the Court examined Section 12 of the Employment and Labor Relations Court (ELRC) Act, 2011 which provided for the jurisdiction of the ELRC and found that the ELRC had jurisdiction to determine disputes arising out of employment and labor relations. However, the court found that the ELRC's jurisdiction was not limited to matters of contract only, but could also determine constitutional violations provided they were ancillary to the disputes contemplated under Section 12. In this case, however, owing to the voluntary resignation notices tendered by the Respondents to their respective employers, the Court stated that the ELRC should have found that there was no longer an employer-employee relationship between the Respondents and the Applicants and downed its tools. In light of this, the Court held that the ELRC arrogated itself jurisdiction exceeding that conferred on it by law.

On whether the issue of the Constitutionality of Section 43 (5) of the Elections Act was res judicata, the Appellants submitted that the same issue had been litigated upon and determined in the case of Charles Omanga & another v Independent Electoral and Boundaries Commission (IEBC) and another. The Court cited Section 7 of the Civil Procedure Act and the case of IEBC v Maina Kiai & 5 others, which laid out several elements that must be satisfied conjunctively for res judicata to be effectively pleaded. One condition laid out in this case is that the parties in the subsequent suit must be the same as those in the initial suit. In light of these authorities, the court found that the parties in the consolidated petitions were not the same as the parties in the Charles Omanga case. Therefore, the matters before the trial court were not res judicata.

On the Constitutionality of Section 43 (5) of the Elections Act, the court referred to Articles 137, 99, 180 and 193 of the Constitution which provided for the eligibility of persons seeking elective positions in the posts of President, Member of Parliament, County Governor and member of the County Assembly. Under these Articles, the persons seeking to be elected into public office must not be a public officer or a state officer. The Court therefore found that the provisions in Section 43 (5) and (6) gave effect to the provisions of the Constitution and were therefore reasonable, justifiable and not unconstitutional.

On the issue of Public Participation, the court found that the provisions of Section 2 (1) (b) of the Sixth Schedule to the Constitution of Kenya suspended the application of Chapter Eight of the Constitution till the first elections of Parliament under the 2010 Constitution. (The requirement for public participation is housed in Chapter Eight under Article 118 (1) (b)). Therefore, as the Elections Act was enacted a more than a year before the first General Elections under the 2010 Constitution, it was exempt from the requirement of public participation.

In light of the above findings, the consolidated appeals were allowed.

2.3.4 kioko V Yusuf (Sued as Returning Officer Mombasa) & 3 Others (2022) Kehc 10148 (Klr).

Significance

Whether there is need for additional requirements as a moral prerequisite for the clearance of a candidate by IEBC to seek implementation of Chapter Six of the Constitution of Kenya 2010.

Facts

The plaintiff instituted a petition alleging that the 1st respondent had rejected a copy of his degree certificate as certified by an advocate. The respondent averred that a media release was made by the chairman of the 3rd respondent requiring that the copy of the degree certificate be certified by the issuing body. This fact had been brought to the petitioner's attention at 3:30 p.m. on the day of submitting nomination documents between 2:00 and 4:00 p.m. The respondent further averred that the petitioner had been disqualified for not adhering to the requirements set and not satisfying the moral requirement. The petitioner had previously been impeached from office of the senate for abuse of office, gross violation of the Constitution, gross misconduct, and crimes under National Law.

Issues for Determination

1. Whether the petitioner presented all the documents required by the 3rd respondent within the stipulated time; and whether time could be extended in the circumstances;
2. Whether the petitioner is entitled to reprieve from disqualification under Article 193 (3) of the Constitution;
3. Whether costs are payable and by whom.

Holding

On the issue of whether all the documents required were presented, the court held that the petitioner had complied with the constitutional, statutory, and regulatory requirements as posted in the respondent's Candidate Registration Management System. Disqualification of the petitioner on the grounds, inter alia, that he did not provide an original degree certificate and a copy certified by the issuing body the court cited Section 27 of the Independent Electoral and Boundaries Commission Act. The IEBC therefore has no authority to demand additional requirements other than those set out in applicable statutes and regulations. Furthermore, the petitioner had already submitted a copy of his degree certificate duly certified by the commissioner of oaths, and the degree certificate had been issued by a local university and hence did not require authentication from the Commission for University. This coupled with the fact that the extension of time would not have given the petitioner an unfair advantage or even prejudiced the respondent's preparedness, makes the latter's approach unreasonable.

The court held that the Constitution should be interpreted holistically to speak as one harmonious document. Thus Article 75, being part of Chapter 6 of the Constitution could not be read in isolation from Article 193; granted that 193 (2) provided for disqualification based on contravention of any Chapter 6 provisions. Articles 193 (3) hence afforded protection to the petitioner by having a pending appeal at the Supreme Court. The IEBC could therefore also not feign ignorance of an appeal to which they are parties.

The court declared that the parties should bear their costs. This was discernible from the orders of the court of appeal in an appeal the petitioner and 3rd respondent was part where the former raised substantive issues of law involving interpretation of the constitution and state law.

2.3.5 ethics and Anti-Corruption Commission V Nelson Kivali Musyoka & 2 Others (2019) Eklr

Significance

The supervisory jurisdiction of the High Court in determining disputes relating to nominated candidates.

Facts

The petitioner sought declarations relating to the eligibility of the 1st respondent to contest in the general elections for the position of Member of the County Assembly for Voo Kyamatu ward Kitui County. The 1st respondent had forged a degree certificate and signature Alice Wahome Advocate hence misrepresenting information. The 2nd respondent failed to observe its obligation to undertake further investigation of the allegations clearly re-

vealed in the integrity verification report submitted by the petitioner. The petitioner further sought a permanent injunction barring the 1st respondent from holding any public office for breaching the ethical requirements of Chapter Six of the Constitution of Kenya.

Issues for Determination

1. Whether the honorable court has jurisdiction to hear and determine this matter;
2. Whether the petitioner's claim is time-barred.

Holding

On the issue of jurisdiction, the court established its authority to review and exercise supervisory jurisdiction under articles 165 (3) and (6) in election petition matters. However, this was subject to the pre-election disputes being for resolution by the IEBC in the first instance. Article 88 (4) of the Constitution provides, that the settlement of disputes relating to or arising from nominations are matters handled by the IEBC. The court held that the dispute should have been handled by the 2nd respondent through its dispute resolution committee. It had the mandate to handle the dispute under Articles 87 (2) and 88 (4) of the Constitution of Kenya. The petition had hence been brought wrongly before the court which did not have the jurisdiction to handle issues relating to nominated candidates.

The court also held that the petitioner had acted in good faith with the intention of ensuring compliance by the 2nd respondent to enforce Chapter Six of the Constitution. It however failed to pursue the matter vigilantly by having it referred to and dealt with by the Disputes Resolution Committee of the 2nd respondent. It would be unjust for the court to entertain this petition and the application since the issue of nomination in this matter had been overtaken by events. The court ordered that the application and petition be dismissed as it had no jurisdiction to entertain them and that they were time-barred. The parties were also to bear their costs.

2.3.6 ethics and Anti-Corruption Commission V Granton Graham Samboja & Another; Kenyatta University & Another (Interested Parties) (2021) Eklr

Significance

The requirement of exhaustion of internal remedies prior to invoking Jurisdiction of the High court as a hindrance to the implementation of Chapter Six of the Constitution of Kenya 2010.

Facts

The first petitioner was vying for the second time, being the incumbent governor of Taita Taveta County. However, the petitioner challenged the eligibility of the respondent and consequently sought that the court thoroughly assess the eligibility and registration of the first respondent as a gubernatorial candidate. Further, the petitioner argued that the court scrutinizes the jurisdiction and responsibilities of the second respondent in finding the first respondent eligible for the gubernatorial seat. The respondents in reply to this challenged the validity of the petition.

Issues for Determination

1. Whether the honorable court has jurisdiction to entertain the petition;
2. Whether the 2nd respondent failed to discharge its duties under article 88 (4) (f) and 192 (1) of the Constitution in disregarding the petitioner's integrity verification report dated 20th May 2017.

Holding

The court contended that pre-election disputes of first instance including those relating to or arising from nominations should be brought before the IEBC. The High Court's jurisdiction must operate within the constitutional limits and hence cannot usurp the power of the aforementioned relevant authorities. In view of the subject matter, the court does not have jurisdiction to entertain this instant petition.

The court also held that the petitioner was found to be acting in good faith and intended to have the IEBC comply with and enforce provisions of Chapter Six of the COK. They also failed to have the matter referred to and dealt with by the Disputes Resolution Committee in the IEBC. Further, the petitioner having pursued the issue of nomination which had been overtaken by events rendered that it would be unjust for the court to entertain the petition and application. The court determined that it lacked jurisdiction to hear the petition and hence is struck out with costs.

2.3.6 Suleiman Murunga Kasuti V Independent Electoral And Boundaries Commission & 2 Others (2018) Eklr

Significance

The legal policy/principles, thresholds, standards, and norms that enable or hinder the vetting in Chapter Six of the Constitution of Kenya 2010.

Facts

The petitioner contended that the general election for the national assembly seat for Kimilili seat in Bungoma County was marred by massive irregularities. The petitioner further argued that the bale containing the election materials was opened and this was taken note of by the respondents and agents of the petitioner. The respondents averred they had gone over the issue with the petitioner and other candidates who all agreed to proceed with the elections.

Issues for Determination

1. What is the legal framework that governs election and election disputes in Kenya;
2. Whether the burden and standard of proof in election petitions was different, and if so, the consequent effect in interlocutory applications;
3. Whether the grounds in support of the petition were proved as required in law.
4. Costs

Holding

On the issue of the legal framework, the court observed that sovereign power enshrined in Article 1 of the COK is exercised through the principles and processes centering on political rights as laid down by Article 38 of the COK as well as Articles 81 and 92 of the COK on the inclusive representation of people. Secondly, it considers Article 88 of the COK establishing the IEBC as the body responsible for conducting and supervising referenda and elections. It also takes into account the ensuing mandate and requirements under Articles 89, 83, 86, and 90 of the COK and Articles 84 and 85 of the Elections Code of Conduct.

The court held that the burden of proof is static and rests on the petitioner throughout the trial and that only the evidential burden of proof shifts to the respondent. The latter depends on the nature and effect of evidence adduced by the petitioner. Further, the standard of proof in election petitions is higher than the balance of probabilities but lower than beyond reasonable doubt. This has been the case since the petitions were not ordinary civil proceedings. Where the petition allegations are of a criminal or quasi-criminal nature, the standard would be beyond reasonable doubt. This was the stance that was adopted in this petition.

The court also held that the applications filed were only supposed to aid in proving or disproving the grounds already stated in the petition. They should not attempt to change the nature or character of the petition or adduce fresh evidence in support of it. Therefore, any new or further evidence or grounds attained by the aid of interlocutory applications should not be used to determine a petition.

The petition was based on four main grounds; unlawful transmission of results, massive irregularities, bribery and violence, and voter intimidation. On the grounds of unlawful transmission of results, the court opined that the petitioner failed to demonstrate how the transmission process was in breach of the COK and the law. The results

being transmitted both electronically and through form 37A did not invalidate the results under Section 39 of the Elections Act 2011 and Regulation 82 of the Elections (General) Regulations 2012.

The irregularities considered by the court were tampering with the bale containing the election materials at the tallying center, the assistance of illiterate voters, disenfranchisement of voters, shortage of ballot papers, signing of declaration form 35B by petitioner and his agents, and doubling and multi-voting at Kamukuywa D.O's polling station. The issues fell short of the evidentiary burden of proof. The court contended that on the issue of voter bribery and intimidation, the petitioner's testimony was narrowed down to hearsay. Further, neither the charge sheets were availed nor the complainants testified in court.

On the matter of other emerging issues for consideration, issues on forms 33, 35A, 35 and the polling station diaries, mini scrutiny, and whether the performance of the IEBC and the returning officer was questionable, the petitioner failed to discharge the evidential burden of proof in the foregone issues. The court ordered that a total award of kshs 6,000,000 on instruction fees be paid.

2.3.7 In The Supreme Court of Kenya; Petition 2 Of 2020; Ferdinand Ndungu Baba Yao Waititu V Republic. (2021) Kesc 11(KI)

Significance

Jurisdiction of the Supreme Court involving interpretation and application of Chapter 6 of the Constitution.

Facts

The appellant was arrested and charged with three counts of dealing with suspect property and conflict of interest. Upon denial of charges the trial court and application for bail or bond, the latter was granted by the trial court. The appellant could either pay a cash bail of kshs. 15,000,000 or a bond of kshs. 30,000,000 with a surety of a similar amount. Further, the trial court attached conditions that the appellant could not access his public office until the hearing and determination of the case and; that the appellant and all his co-accused were to deposit their travel documents with the court and have no contact with any witness directly or indirectly. Aggrieved by the orders the appellant filed for revision of the trial court's order which was upheld and reiterated by the High Court and Court of Appeal.

Issues for Determination

1. Whether the court had jurisdiction to entertain the appeal.
2. Whether the bail conditions imposed by the trial court were reasonable.
3. Whether they resulted in the removal of the appellant from office.
4. What reliefs were available to parties?

Holding

The court held that it had jurisdiction to entertain the appeal over the judicial exercise of discretion in issuing bail terms during the pendency of the trial. This was attributed to the decision being of sufficient importance to the trial hence if not well exercised it would warrant its determination in an interlocutory appeal.

The court averred that the removal of office had to be undertaken as per Section 33 of the County Governments Act. The procedure under this was only invoked by notice to the speaker of the Kiambu County Assembly and not through the trial Court's ruling. The condition of denial of access to the office served to prevent interference with witnesses who worked under him or suppress the evidence against him which was at the office. The court thus found that bail terms did not amount to removal of office. The appellant had not advanced other reasons to show that the bail conditions were unconstitutional, unreasonable, or unattainable.

The appellant had further not demonstrated how the exercise of discretion was not judicious and how the learned judges of the high court and court of appeal erred in failing to interfere with the exercise of the trial court's dis-

cretion. It was held that interfering with a court's discretion could only be done if it's satisfied that the judge had misdirected himself in some matter hence making a wrong decision resulting into injustice.

The court ordered for the appeal to be dismissed and for the appellant to bear the costs of the appeal.

2.3.8 franklin Mithika Linturi V Ethic and Anti-Corruption Commission & 3 Others (2018) Eklr

Significance

The Principle of natural justice; The right to be heard.

Facts

During the general elections held on 8th August 2017, the 1st respondent prevailed upon the University of Nairobi to remove the name of the petitioner from the list of graduates to be graduating. This was on the basis that the pre-secondary school certificate, from Dr. Babasaheb Ambedkar Marathwada University, was not recognized and hence could not be a sufficient qualification for his first degree at the University for Bachelor of Commerce. Further, criminal investigations on offenses of forgery, knowingly providing misleading and false information to a public entity, and the execution of false declaration reports on the latter were instigated. The 1st respondent on 31st May 2017 also advised IEBC that the petitioner had not satisfied the educational, moral, and ethical requirements to qualify as a candidate in the elective process.

Issues for Determination

1. Whether the court has jurisdiction to entertain this matter.
2. Whether the decisions made by the 1st, 2nd, and 3rd respondents violate, infringe, or threaten to do the same to the petitioner's rights under Article 47 of the Constitution.
3. Whether the actions taken by the University are constitutional and procedurally fair.
4. An order should be issued to restrain all the respondents from acting based on the Integrity Verification Report.
5. Whether the 2nd respondent's petition was an abuse of power and discretion exceeding jurisdiction.

Holding

In regard to the jurisdiction of the court, it held that most of the issues did not properly fall for determination in a constitutional petition and ought to be dealt with by either ordinary civil courts or alternative dispute resolution forums. The court would only consider a constitutional question where a remedy is not available under some legislative provision or other basis. Issues that fall under this were; whether the petitioner qualified for admission to the University of Nairobi, whether the IEBC was justified in deciding not to entertain the complaint against the Petitioner the qualifications of the Petitioner, whether the EACC had not read and interpreted correctly the qualifications required for admission at the School of Law of the University of Nairobi and whether the University erred in its handling of the information received from Dr Babasaheb Ambedkar Marathwada University are with due respect not matters which properly fall within the realm of the jurisdiction of this Court sitting as a Constitutional Court.

The court held that the University nullified the petitioner's degree whilst denying them an opportunity to make their case relying only on the Ethics and Anti-Corruption Commission. This was against the principle of natural justice that required persons who might be affected by administrative decisions or proceedings to be given adequate notice of what is proposed.

The Ethics and Anti-Corruption Commission in taking action against the petitioner before the conclusion of investigations amounts to a violation of fair administrative action enshrined in Article 47 of the Constitution.

The court also held that the Ethics and Anti-Corruption Commission in preparing its report and submitting it to

relevant authorities before conclusively completing its investigations was ‘putting the cart before the horse’. Its action clearly amounted to harassment and intimidation and it thereby exercised its powers for an improper purpose. It also led to the violation of a person’s constitutional rights hence must be prohibited.

The court declared that the decisions made against the petitioner by the 2nd and 3rd respondents are unconstitutional and procedurally unfair and have resulted in the violation of fundamental rights under Article 47 of the constitution, That the actions of the university to discontinue the petitioner and stopping him from graduating was unconstitutional and procedurally unfair. An order of certiorari and mandamus was issued to reinstate the petitioner as a student and to add his name to the graduation list respectively. The costs of these proceedings are awarded to the Petitioner to be borne by the 2nd Respondent, the Ethics and Anti-Corruption Commission.

2.3.9 Njiru & 10 Others V Ruto & 5 Others; Azimio La Umoja One-Kenya Coalition & 3 Others (Interested Parties) (2022) Kesc 55 (KlR) (Civ).

Significance

Nature of the exclusive original jurisdiction of the Supreme Court to determine disputes relating to the election of the President.

Facts

The applicants averred that the 2nd respondent was unfit and unsuitable to hold the office of Deputy President. They also sought to restrain the 1st and 2nd respondents from being sworn into offices of President and Deputy President respectively, in the event they got elected

Issues for Determination

1. What was the nature of the exclusive original jurisdiction to determine disputes relating to presidential elections?

Holding

The Constitution conferred upon the Supreme Court, exclusive original jurisdiction to determine disputes relating to the election of the President, limited only to the circumstances contemplated under article 140(1) of the Constitution. It was not a blanket jurisdiction that empowered the Supreme Court, to extend its judicial authority over any and all interpretational questions, touching upon the election of the President. The court could also not determine the validity or otherwise of a presidential election before the same was held and the results thereof declared.

2.3.10 Bryan Mandila Khaemba V Didmus Wekesa Baraza Mutua, Independent Electoral And Boundaries Commission & Omondi George Election Petition No. E001 Of 2022

Significance; The jurisdiction of the Independent Electoral Boundaries Commission to handle leadership and integrity issues forming pre-election disputes.

Facts

The Petitioner sought a declaration that the election for the 1st Respondent, Didmus Wekesa Baraza for the Member of National Assembly for Kimilili Constituency-Bungoma County was conducted illegally and unconstitutionally; a declaration that the 1st Respondent acted illegally by using public resources to campaign for the elective seat and a declaration that the 1st Respondent committed an election malpractice of a criminal nature by shooting and killing Brian Olunga a direction that the order declaring the election malpractice be transmitted to the Office of the Director of Public Prosecutions (ODPP) for the purpose of investigations and an order directed at the 2nd Respondent, the Independent Electoral Boundaries Commission (IEBC) to conduct fresh elections for the Member of National Assembly for Kimilili Constituency-Bungoma County.

In his defense, the 1st Respondent cited Article 50 (1) of the Constitution which provides that every person has the right to have any dispute decided through a fair and public hearing before a court or an independent tribunal. He further cited Article 50 (2) of the Constitution which provides for the right of an accused person such as the presumption of innocence, the right to remain silent and the right to refuse to give self-incriminating evidence. The 1st Respondent also argued that pursuant to the amendment on Section 80(4)(b) of the Elections Act, an election court can no longer make a finding of guilt on an election offence but the section requires the Court to make a finding on whether the election offence “may have occurred”. The 2nd and 3rd Respondents argued that the alleged act of violence that resulted in the death of the deceased falls within the ambit of Section 11 of the Election Offences Act, and accordingly, the instant Court lacks the jurisdiction to entertain that limb of the Petition. The further argued that the fact that the election for the Member of National Assembly representative for Kimilili Constituency was not questioned in the instant Petition, the Court should strike out the instant Petition.

Issues for Determination:

Whether the Petition filed is merited

In discussing whether the instant Petition was merited, the Court considered an array of issues including whether the issues raised within the petition formed pre-election disputes.

The argument by the Petitioner that the 1st Respondent used public resources during his campaign contrary to Section 14 of the Election Offences Act formed a pre-election dispute that ought to have been raised with the IEBC.

The Court also looked at the issue of the argument by the Petitioner that despite the criminal charge faced by the 1st Respondent, the election Court can direct the ODP to carry out further investigations. This argument failed for the reason that the Petitioner did not tie the criminal charge to a specific electoral offence.

Holding:

The Court held that the Petition was unmerited, struck it out with costs of Kshs. 800,000/= to the 2nd and 3rd Respondents. In dismissing the Petition, the Court argued that the Petitioner knew that facts forming the basis of a pre-election dispute but failed to have it resolved as provided by the Constitution and written law by way of complaining to the IEBC. The Court relied on the principles set out by the Supreme Court case of Sammy Ndungu Waity v IEBC & 3 Others (2019) eKLR which held that pre-election disputes are to be resolved as provided under the Constitution by IEBC or where applicable by the PPDT.

2.3.11 Kenneth Njagi Njriu & 10 Others V Hon. William Samoei Ruto, Hon. Rigathi Gachagua & 9 Others – Supreme Court Petition No 22 (E025) Of 2022

Significance

Does the Supreme Court have jurisdiction to hear and determine issues of non-compliance with Chapter 6 by the President or Deputy President before the holding of General elections?

Facts:

The Petitioners filed a Petition dated 5th August 2023 seeking ten (1) declarations condensed into four(4) prayers to wit; a declaration that the 2nd Respondent is unfit and unsuitable to hold office of Deputy President by dint of his non-compliance with Chapter Six of the Constitution and Articles 99 (1) as read with Article 148 (1) of the Constitution; a declaration that the nomination of the 2nd respondent as a running mate by the 1st respondent was invalid, null and void ab initio; a declaration that the 1st respondent violated Articles 99 (1), as read with Articles 137 (1), 148 (1) of the Constitution by nominating the 2nd respondent as a candidate for Deputy President in the General Elections conducted on 9th August 2022, hence unfit and unsuitable to hold office of President; and an order quashing the 4th respondent’s Gazette Notice No. 7995 published on 1st July 2022 declaring the 1st and 2nd respondents as the President and Deputy President candidates for the 3rd Respondent.

The 1st to 3rd Respondents filed a Notice of Preliminary Objection dated 11th August 2023 challenging the jurisdiction of the Court to entertain the present appeal and motion; that for those reasons, the Court is only clothed with exclusive original jurisdiction pursuant to Article 140 of the Constitution; that the petition and motion offends the principle of exhaustion as regards avenues of recourse available pursuant to Article 88 (4) (d) and (e) of the Constitution; that it fails the test of justifiability and ripeness and offends the principle of sub-judice as Constitutional Petition No. E395 of 2022 is pending before the High Court;

Issues for Determination

Whether the Supreme Court has Jurisdiction to entertain the instant Petition

Holding:

On this issue, the Court cited Article 140 (1) of the Constitution which provides that;

“A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election”

The Court stated that the applicants are inviting the Court to assume jurisdiction outside the confines of Article 163 (3) as read with Article 140 (1) of the Constitution. That they were inviting the Court to unconstitutionally expand its jurisdiction. To wait until a day to the General Elections, before seeking the Orders of such magnitude, is an abuse of the Court process.

The Court held that, applying the settled principles, it lacks jurisdiction to hear and determine the petition and also the present application. It stated that the Court’s jurisdiction under Article 163 (3) (a) of the Constitution only kicks in after the declaration of the presidential election results and subsequent to a competent petition challenging the election.

The Court issued the following final orders:

- (i) The Objections raised by the 1st to 5th respondents in respect of the Notice of Motion dated 5th August 2022 and Petition dated 5th August 2022 are allowed;
- (ii) The Notice of Motion dated 5th August 2022 and Petition dated 5th August 2022, are for the reasons given, incompetent and are hereby struck out;
- (iii) The Applicants shall bear costs.

The Court stated that The Constitution therefore confers upon the Supreme Court, exclusive original jurisdiction to determine disputes relating to the election of the President, limited only to the circumstances contemplated under Article 140 (1). In the case of Okiya Omtatah Okoiti v. Independent Electoral and Boundaries Commission & Others; SC Petition No. 18 of 2017, [2020] eKLR, the Court has, with finality settled the question of its jurisdiction under Article 163 (3) (a) by stating thus:

“We hasten to restate the position that, the Constitution confers upon the Supreme Court, exclusive original jurisdiction, to determine disputes relating to the election of the President arising under Article 140 only. Though exclusive and original, this jurisdiction is limited to the circumstances contemplated in Article 140 (1). It is not a blanket jurisdiction that empowers the Supreme Court, to extend its judicial authority over any and all interpretational questions, touching upon the election of the President. It must be further emphasized that, Article 163 (3) of the Constitution does not oust the High Court’s original jurisdiction to interpret the Constitution under Article 165 (3)

(d). The Supreme Court’s exclusive and original jurisdiction to determine the validity of a presidential election, only kicks in after the declaration of results, following a petition challenging the election.

...

[52] The Supreme Court cannot determine the validity or otherwise of a presidential election, before the same is held and the results thereof declared. It is one thing for the Court to pronounce itself on a constitutional or legal question, but it is another thing to determine the validity of an election. In other words, the Supreme Court cannot anticipate the validity of a presidential election, within the meaning of Article 140 (1) of the Constitution”

2.3.12 Independent Electoral And Boundaries Commission V Hon. Sabina Wanjiru Chege Supreme Court Petition No 23 (E026) Of 2022

Significance: Whether the IEBC had jurisdiction to summon, hear complaints and make findings, where there is breach of the Electoral Code pursuant to Article 88 (4) (e) of the Constitution, even where the offenders are members of political parties but not aspirants.

Facts

This appeal was brought pursuant to Article 163(4) (a) of the Constitution, Section 15 (2) of the Supreme Court Act, 2011 and Rules 38 and 39 of the Supreme Court Rules, 2020. It challenges the decision of the Court of Appeal (Karanja, J. Mohammed & Laibuta, JJ.A.) in Civil Appeal No. E255 of 2022. The impugned decision upheld the decision of the High Court (Mrima, J.) in Constitutional Petition No. E073 of 2022.

The Independent Electoral Boundaries Commission through its Electoral Code of Conduct Enforcement Committee (hereinafter the ‘Committee’) instituted proceedings against the Respondent by its summons issued on 11th February 2022 following comments that she had allegedly made at a public rally at Isibuye area within Vihiga County on 10th February 2022 in contravention of Clause 6(a) and (i) of the Electoral Code of Conduct (hereinafter ‘the Code’). She was also served with a statement of breach detailing the alleged offensive utterances. According to the Appellant, the Respondent’s comments cast aspersions on the integrity of the General Elections 2017, and raised credibility questions on the Appellant’s capacity to deliver a free and fair election administered in an impartial, accurate and accountable manner as envisaged under Article 81(e) of the Constitution.

Subsequently, the Respondent was summoned to appear before the Committee on 15th February 2022, for hearing of the complaint against her. She appeared before the Committee in obedience to the summons but raised a preliminary objection challenging inter alia, the jurisdiction of the Committee to hear the matter. By its ruling delivered on the same date, the Committee dismissed the Respondent’s preliminary objection. Dissatisfied with the Committee’s ruling, the Respondent filed High Court Constitutional Petition No. E073 of 2022, Sabina Wanjiru Chege v. Independent Electoral and Boundaries Commission (the High Court Petition) challenging the proceedings, She argued that the Committee violated her fundamental rights protected under Articles 1(1), 2(1) & (4), 3(1), 20(1), 22, 23, 24(1)(a) - (e), 27, 33, 35 (1) & (3), 47(1) & (2) and 50 of the Constitution.

In a Judgment delivered on 4th April 2022, the trial court (Mrima, J.) allowed the Respondent’s Petition, effectively quashing the summons and statement of breach levelled against her, as well as the proceedings conducted before the Committee. The trial court determined that the Committee was unconstitutional, null and void ab initio for being in contravention of Articles 2(4), 3(1), 249 and 252 of the Constitution. It also issued orders quashing parts of Sections 7, 8, 10 and 15 of the Code under the Second Schedule of the Elections Act; and portions of Rules 15(4) and 17(1) and (2) of the Rules of Procedure on Settlement of Disputes establishing and granting powers to the Committee to summon witnesses, and conduct hearings of complaints based on allegations of breach of the Code.

Issues for Determination

- i. Whether the Electoral Code of Conduct Enforcement Committee had jurisdiction to entertain violations of the Electoral Code of Conduct.
- ii. Whether the Electoral Code of Conduct was binding upon the Respondent
- iii. Whether the Respondent’s Cross Petition is incompetent

Holding

The Supreme Court held that the Appeal partially succeeded to the extent that the IEBC had jurisdiction to summon, hear complaints and make findings thereon, where there is breach of the Electoral Code pursuant to Article 88 (4) (e) of the Constitution.

On the Second issue, the Respondent argued that at the time she was making the said utterances, she was not an aspirant vying for any elective seat and as such, the IEBC electoral code of conduct did not apply to her. The Court however noted that the Respondent was a member of the Jubilee Party and the said party was taking part in the 2022 general elections hence bound by the IEBC Electoral Code of Conduct. In addition, the Supreme Court also held that the Appeal also partially succeeded to the extent that the Electoral Code of Conduct is constitutionally sound.

On the third issue, the Court held that the pleadings by the Respondent, ought to have been filed in adherence to Rule 47 of the Supreme Court Rules. The failure to so comply renders the Cross-Petition, incurably defective.

2.3.13 Kennedy Irungu Ngodi & Another V Mary Waithera Njoroge & 11 Others [2021] Eklr

Significance

The President, Members of Parliament, Governors and Members of the County Assembly relinquished their political positions on the day of the next general elections. Therefore, Members of County Assemblies did not have to explicitly resign from their offices either before nominations or at all as they do not hold their offices on the day of the general election.

Facts

The Petitioners approached the court seeking redress against the 1st to 11th Respondents who they alleged were ineligible to vie as elected Members of Parliament in the 2017 General election under the provisions of the Elections Act and the Constitution of Kenya. The Petitioners' argument was that the Respondents were barred from vying under the provisions of Article 260 as read with Article 99 (2) as they were state officers and that they had not resigned from their positions as Members of various County Assemblies at least six months before the election as required by Section 43 (5) of the Elections Act. The Petitioner further argued that the 1st – 11th respondents should have been barred under Article 77 of the Constitution as they held offices in various political party. They contended that their positions in those political parties violated the requirement under Article 77 which prevented State Officers from participating in any other gainful employment while serving.

Regarding the 12th Respondent, the Petitioners averred that it acted wrongfully by allowing the 1st – 11th respondents to vie as Members of Parliament while aware that they were state officers at the time of their nomination. Further, they averred that the 12th Respondent's actions were discriminatory towards other State officers who did not vie for elective positions by dint of the requirements under Article 260 as read with Article 99 (2) of the Constitution of Kenya. Finally, they averred that the 11th Respondent violated the provisions of Article 38 by illegally eliminating the possibility of other qualified candidates contesting for the seats in question through their preferred tickets awarded to the 1st – 11th Respondents.

The Respondents argued that the issues disclosed by the Petitioners were res judicata as they had already been dealt with in the Karanja Petition. They also argued that Article 99 (2) of the Constitution and Section 43 (5) of the Elections Act only prevented concurrent holding of the two offices but did not serve as a bar against Members of County Assemblies vying for elective positions.

Issues for Determination

1. Whether the Petition is res judicata the decision in the Karanja Petition and whether the Petition should await the decision in the Waibara Petition;
2. The Constitutionality of Sections 43 (5) and 43 (6) of the Elections Act;

3. Whether there is a distinction between Election and Nomination to contest an election for purposes of Article 99 (2) of the Constitution of Kenya;
4. Whether the 1st – 11th Respondents were eligible to be elected as Members of Parliament under Articles 260 and 99 (2) of the Constitution of Kenya.

Holding

On the first issue, with respect to whether the petition was *res judicata*, the court cited Section 7 of the Civil Procedure Act and the Supreme Court case of *IEBC v Maina Kiai & 5 Others* [2017] eKLR and found that while the issues in the Karanja Petition and the present Petition were similar in that the two cases were dealing with the constitutionality of Sections 43 (5) and (6) of the Elections Act, the two parties to the two Petitions were different. For that reason, the Court found that the Petition was not *res judicata*. With respect to whether the Petitioners should await the decision in the Waibara Petition, which had raised similar issues, been allowed by the trial court but was appealed against, the court found that as the present Petition was brought under Article 105 (1) (b) of the Constitution of Kenya, the Constitution dictated that it be disposed of within 6th months of filing under Article 105 (2). The court further stated that since the timeline was fixed by the Constitution, it could not be enlarged. This was in line with the decision of the Supreme Court in *George Mike Wanjohi v Stephen Kariuki & 2 others* [2014] eKLR. For this reason, the court held that the contention that the instant appeal should await the determination of the Waibara appeal failed.

On the issue of the Constitutionality of Sections 43 (5) and (6) of the Elections Act, the court declined to determine the issue of the constitutionality of the cited Sections as that issue neither arose in any of the pleadings nor was it espoused in any of the Petitioners' prayers. In coming to this determination, the Court cited the case of *Raila Amolo Odinga & another v IEBS & 2 others* where the Supreme Court held that "...no party should be permitted to travel beyond its pleadings". However, the court noted that the issue of the constitutionality of the cited Sections was already settled by the courts in the two cases of *Union of Civil Servants & 2 others v Independent Electoral and Boundaries Commission (IEBC) & another* [2015] eKLR and *Eric Cheruiyot & 7 others v Independent Electoral and Boundaries Commission & 7 others* [2017] eKLR where the two Sections were held to be unconstitutional.

On the third issue, the 1st, 5th, 8th, 10th, 11th and 12th Respondents had contended that nomination to contest for elections were not an election for the purpose of Article 99 (2) of the Constitution of Kenya. The Court disagreed with this contention, holding that the nomination process was the first domino that once tipped, launched a succession chain of events eventually culminating in the announcement of a validly elected candidate. In coming to this conclusion, the Court cited the Supreme Court in the case of *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* where it was held that "...a Presidential election, much like other elected-assembly elections, is not lodged in a single event; it is, in effect, a process set in a plurality of stages."

On whether the 1st – 11th Respondents were qualified to vie and be elected as Members of Parliament, the Court examined Articles 136, 102, 180, 177 and 93 of the Constitution of Kenya and found that the President, Members of Parliament, Governors and Members of the County Assembly relinquished their political positions on the day of the next general elections. Therefore, Members of County Assemblies did not have to explicitly resign from their offices either before nominations or at all as they do not hold their offices on the day of the general election. However, the court noted that if a vacancy occurs in Parliament in the course of an election cycle, for example, through a by-election, a Member of a County Assembly wishing to vie as a candidate would then have to resign from their office as provided for under Section 43 (5A) of the Elections Act. For these reasons, the court found that the 1st – 11th Respondents were eligible to vie as Members of Parliament.

2.3.14 Mwawaza V Mwaizda & Another (Petition E001 of 2022) [2022] Kehc 10031 (Klr) (15 July 2022) (Judgment)

Significance

Public officers wishing to contest for electoral positions must resign from their roles as public officers at least six

months before the election as per the provisions of Section 43 (5) of the Elections Act, 2011.

Facts

The Petitioner moved to the Court to appeal the decision of the Independent Elections and Boundaries Commission Dispute Resolution Committee upholding the 1st Respondent's decision to invalidate his nomination based on the fact that he had been serving as a public officer at the Coast Institute of Technology and had not resigned six months before the election day as required under Section 43 (5) of the Elections Act. The Respondent, on the other hand, argued that she was wrongly sued or cited in the current appeal as her decision was challenged before the IEBC Dispute Resolution Committee and a decision made hence her office had become functus official.

Issues for Determination

1. Whether the IEBC Dispute Resolution Committee erred in finding that the appellant is a public officer who should have resigned six months to the election date prior to presentation of his nomination papers in compliance with Section 43(5) of the Elections Act.

Holding

On the issue of whether the Petitioner was a public officer, the Court cited Article 260 of the Constitution of Kenya which defined a public officer as any State officer or person, other than a State Officer, who holds a public office. Further, the Court cited the definition of a public office in the same Article, which word was defined to mean an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament. The Court also took into consideration the meaning of the word "public officer" as provided for under the Public Officer Ethics Act. The Petitioner contended that though he was an employee of the Coast Institute of Technology, he was paid by the institution's Board of Governors (BOG) and did not derive his benefits from the consolidated fund or directly from money provided by Parliament. The Court rejected this contention, remarking that the BOG was an agent of the ministry of education and that fees collected from students is public fund authorized for collection by the mother ministry which is a government department and by extension a state organ.

The Court also deliberated on the contents of Section 43 (5) of the Elections Act and the mischief it was intended to remedy. It remarked that the reasoning behind the enactment of the Section could be found under the provisions of Section 23 (2) of the Leadership and Integrity Act. Under this Section, the reasoning for the enactment of Section 43 (5) of the Elections Act was to preserve neutrality and impartiality in discharging public duty without aligning or being perceived to align to any particular political affiliation or group.

In light of this, the Court held that the Petitioner was a public officer and upheld the finding of the IEBC Dispute Resolution Committee to the extent that the appellant did not comply with Section 43(5) of the Elections Act 2011 for failure to tender his resignation six months prior to election date before presentation of his nomination papers to Voi Returning officer for the position of member of parliament.



3

**CONCLUSIONS
AND
RECOMMENDATIONS**

CHAPTER THREE

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

Impeachment

It is now settled that Courts make the following considerations when dealing with impeachment cases:

- i. Whether the Court's jurisdiction was properly invoked
- ii. Whether due process was followed by the County Assembly in the removal of a Governor from office;
- iii. Whether a Governor was accorded adequate time and facility to respond to the charges against him both at the county assembly and in the senate;
- iv. Whether public participation was undertaken;
- v. Whether the charges were substantiated to the prescribed standard warranting removal of the appellant from the office;
- vi. Whether the sovereignty of the people envisaged under article 1 of the Constitution was respected and protected in the removal process; and
- vii. The principle of separation of powers

A review of the impeachment cases reveal that Courts will generally consider whether their jurisdiction has been properly invoked before moving to consider the pleadings and evidence filed in any matter.

As regards evidence, Courts have held that a Petitioner must specifically plead and prove the Constitutional violations alleged and how their Petition invoke the interpretation of the constitution. In addition, the principle of separation of powers plays a huge role in the Court's intervention in the impeachment process. For instance, in Sonko v County Assembly of Nairobi City & 11 others (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR) the Court reiterated the principle of separation of powers arguing that the principle of separation of powers limits Courts the court to matters of Constitutional violations and not to enquire into how the County Assembly and Senate perform duties in which they alone have discretion or to review the merit of the decision by the County Assembly and Senate to impeach a Governor and that it could not interfere with parliamentary procedures that did not breach the Constitution. Courts have also held that an unfair decision in the context of the removal of a governor (under Article 181 of the Constitution and Section 33 of the County Governments Act) is one where no adequate notice was given, where there was bias and where the hearing was unfair.

Education Qualifications

The issue of academic qualifications faced its death knell in this election. Courts in the cited decisions and other unreported petitions declared Sec. 22 of the Elections Act unconstitutional on the premise of the section offending other rights contained in the Bill of Rights, this essentially means that elective positions all the way from Governors⁵, Senators, Members of Parliament and even Members of the County Assembly will not be required to have a degree. Hon. Kipchumba Murkomen moved the Bill to amend Sec. 22 of the Elections Act to scrap the degree requirement for Members of Parliament which sadly is now the legal position after being adopted⁶.

The Courts have also failed to authoritatively make determination on those who present fake certificates and a number of cases have been ongoing for far too long on the issue even beyond elections hence aiding the offenders to proceed and contest for various seats.

IEBC on the other hand has argued in court that it doesn't have the requisite powers to authenticate educational papers submitted to it bringing to fore the need to have a Chapter 6 Working Group to support in the process of verifi-

5 <https://www.standardmedia.co.ke/opinion/article/2001448312/governor-candidates-dont-need-a-degree-to-contest-just-as-mcas>

6 <https://www.citizen.digital/news/senate-passes-amendment-removing-education-qualification-for-mps-n293134>

cation and authentication of papers submitted before IEBC for clearance and the need for the relevant state agencies to develop a common position/strategy in approaching the relevant suits.

Compliance and Interpretation Of Chapter 6

On the issue of jurisdiction, courts have given conflicting decisions. In Trusted Society's Case- Trusted Society of Human Rights Alliance v Attorney General and Anor [2012] e KLR Petition, the court held that the High Court has jurisdiction to consider issues touching on suitability, competence, and integrity of candidates for public or political positions and stated that Institutions charged with the responsibility of vetting candidates failed to consider issues of ethics and integrity then the High Court could intervene. On the other hand, in the International Centre for Policy and Conflict & 5 others v Attorney General & 5 others the court held that it had no jurisdiction until the Petitioners have exhausted all the existing avenues generally avoiding to make a finding on the core issues before it and introducing the doctrine of avoidance. It again rejected an opportunity deliberate and exhaust the issues in the Petition of Okiya Omtatah Okoiti & Other v The Attorney General & 7 others eKLR (2022).

Regarding the integrity standards, the courts have stuck with the criminality standards in enforcing chapter 6 and insisting that one has to be convicted and exhausted all his avenues of appeal and even proceeded to say that the same has to be a domestic court as inferred from the Uhuru Kenyatta case. Some progressive decisions like in the Waititu Petition, the courts have stated that due to the nature of criminal cases one is facing, they render the person unfit to hold public office.

RECOMMENDATIONS

The Courts

- a) Kenyan courts should be more purposive and proactive in interpreting Chapter 6 of the Constitution of Kenya. They should do so in a manner that gives meaning to the transformative nature of the Constitution of Kenya 2010. A purposive approach to the interpretation of Chapter 6 by the Courts is required because this part of the Constitution was crafted to save the country from impunity and corruption it cannot therefore be that the Courts would seek to advance other rights at the expense of Chapter 6.
- b) Opportunities should be explored at the Judicial Training Institute to highlight the challenges of the inconsistent jurisprudence and what best practice scenarios would look like on interpretation of Chapter 6. In addition, there is need for Kenyan Courts to provide jurisprudence on the blatant disobedience of Court orders by aspirants and elected leaders since it constitutes a serious breach of chapter 6.
- c) Kenyan courts should interpret chapter 6 of the Constitution in a manner that gives meaning to the National Values and Principles of Governance set out in Article 10 [including good governance, integrity, transparency and accountability –Article 10] – the Harmonization Principle in Constitutional Interpretation.

Standard of Proof for Chapter 6 Cases

- a) The first challenge since 2010 was that the codification of leadership, integrity and political accountability was left to the political class to legislate. Many legislative and executive officeholders in Kenya are being investigated for serious crimes. Some have been charged with serious criminal offences ranging from corruption, murder, forgery, hate speech, et cetera. One of the greatest hurdles to the implementation of Chapter 6 is the interpretation of the presumption of innocence enshrined under Article 50 of the Constitution 2010. The courts have considered the doctrine to be absolute and failed to appreciate that the doctrine foundation was in criminal law and specifically to afford an accused a fair trial and not to be applied as a shield in ethics or integrity questions.
- b) The threshold for cases on Chapter 6 which often involve crimes such as murder, forgery etc. is beyond all reasonable doubt which is often too high. Similarly, in corruption and cases involving economic crimes, the standard of proof is usually beyond all reasonable doubts, and any doubts are usually resolved by the Court in favor of the accused persons. There is need to lower the standard of proof of cases involving the implementation of Chapter 6 to match that of civil cases, which is on a balance of probabilities. This will pave way for the achievement of the huge promise that the Chapter 6 of the Constitution and Leadership and Integrity Act offers with regard to integrity requirements of electoral candidates and other leaders in general.

Timeframe for Prosecuting Cases On Chapter 6

Owing to the presumption of innocence as under Article 50 of the Constitution, Courts should ensure the speedy resolution of cases involving the implementation of chapter 6 especially for electoral candidates. It is noteworthy that the minimum qualification requirements for the positions of Member of County Assembly, all the way to the President provide for the disqualification of a candidate on account of imprisonment only if all possibilities of appeal or review have been exhausted. The Appellate process in Kenyan Courts can be quite lengthy and candidates/aspirants may use this to take part in elections and circumvent the accountability standards of leadership and integrity.

Parliament

The cases on chapter 6 have highlighted various gaps exploited to evade compliance to Chapter 6, Parliament should;

- a) Consider constitutional and legislative changes strengthen enforcement mechanisms for Chapter 6. Enacting such legislation would mean that this jurisprudence set by the Samburu and Kiambu cases would stand and not be overturned by subsequent rulings – further having these in law would make enforcement more effective.
- b) Develop clear criteria for vetting those seeking elective positions before the next general elections and include strict enforcement mechanisms for these beginning at the Party Primaries level.

c) Ensure stricter and objective inquiry into the credentials, professional training and personal integrity while vetting candidates for office in line with the Public Appointments (Parliamentary Approval) Act of 2011.

IEBC, State Agencies and Other Fact-Finding Bodies

There is need to develop a Chapter 6 Vetting Group composed of the Attorney General, EACC, ODPP, IEBC, KNEC, NCAJ, DCI, KRA among other state agencies during the electioneering period to support the verification and vetting of candidates. The process seems to stall due to tight timelines as dictated by the Election Act, the Political Parties Act and other regulations on elections. These strict timelines complicate the vetting process, which in most instances its left to EACC. A well-coordinated approach would make the vetting process faster.

Office of The Registrar Of Political Parties

One of the biggest impediments to the gains by the codification of Chapter 6 in the Constitution of Kenya 2010 is poor practices by political parties. In terms of legislation, the Political Parties Act, 2011 and The Political Parties (Membership) Regulations guide political party affairs in the run up to elections. The Office of the Registrar of Political Parties, is established under the Political Parties Act, 2011 has a huge role to play in ensuring the adherence of leadership and integrity standards by aspirants before any election. An analysis of the cases reveals an urgent need for the Office of The Registrar of Political Parties to restore order in the affairs of political parties and ensure every political parties has rules entrenched with the leadership and integrity requirements even at the nomination level for aspirants/candidates.

Civil Society Organizations

While CSOs have done a number of commendable initiatives, there is need to continue the efforts relentlessly, specifically.

- a) Public Interest Litigation (PIL) can be carried out on select cases to test the courts emerging jurisprudence around Chapter 6 with suggested actions around Governors and members of parliament that have been charged in court with cases touching on Chapter 6, while a number of candidates were cleared and eventually won there is need to seek the interpretation of court on the integrity of the offices they occupy especially those actively pursuing criminal cases in court and even seeking appeal on some convictions that have issued by courts.
- b) There is need to aggressively conduct civic education for citizens to understand the purpose of Chapter 6 and its general implications on development and good governance. This will combat rhetoric from politicians, and public perceptions that these prosecutions are influenced by tribal and political considerations, and help develop an understanding of how these provisions serve to uphold the integrity of public office. A connection between service delivery and the cost of corruption would enable raise awareness among citizens on the need to choose leaders who meet the integrity standards under Chapter 6 of the Constitution.
- c) Civil Society Organizations (CSOs) should also pick some amendment Bills that had been fronted in the 12th House which lapsed but have been approved for reintroduction, specifically the Leadership and Integrity Amendment Bill, 2021 and the Anti-Corruption and Economic Crimes Amendment Bill, 2020 to fix the gaps that have been exploited by politicians to escape the glare of Chapter 6.
- d) Civil Society Organizations (CSOs) need to conduct civic education to the general public around electoral offences and the required code of conduct of aspirants before elections. Citizens need to understand the laws around campaign financing and the prohibition of the use of public resources for campaigns by aspirants.
- e) CSOs should work with the judiciary and its institutions to organize colloquia on Chapter 6 to specifically discuss the decisions, challenges and related matters on leadership and integrity from an adjudicatory perspective.

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