



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CONSTITUTION PETITION NO. 4 OF 2013

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER
ARTICLES 19(2), 20(1), 21(1)(3), 22(1)(2), 23(1),(3)(a),(b),(c),(d)&(f),48 AND
165(3),(b),(d)(i),(4)OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLE 27(1),(2),(4) &
(5), ARTICLE 81(C)OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF ARTICLE 24, ARTICLE 81(C), ARTICLE 47(1),(2), ARTICLE 179
& ARTICLE 259 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF THE PERSONS WITH DISABILITIES ACT 2003 & LOCAL
GOVERNMENTS ACT CAP 17 OF 2012

BETWEEN

NORTHERN NOMADIC DISABLED PERSON’S ORGANIZATION
(NONDO).....PETITIONER

R

AND

THE GOVERNOR,COUNTY GOVERNMENT OF GARISSA.1ST RESPONDENT
THE HON. ATTORNEY GENERAL.....2ND
RESPONDENT

JUDGEMENT

Background

This Petition is brought pursuant to Article 2, Article 3, Article 10, Article 20, Article 21, Article 22 (1), (2), Article 23(1) & (3), Article 25(b), Article 27 (2)(4) & (6), Article 65 (3), (b), (d), (i), Article 260 of the Constitution of Kenya 2010 and Rule 11 and 12 of the

Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual High Court Practice and Procedure Rules 2006.

The Petitioner is Northern Nomadic Disabled Persons Organization (NONDO). It describes itself as a non-governmental organization made up of persons with disabilities from Northern Kenya and it states that their mandate is to create a society where persons with disabilities are recognized, valued and accorded the opportunity to participate in governance. It states that it is acting in the interest of its members and in the interest of the general public.

The Petition was filed contemporaneously with Chambers Summons brought under a certificate of urgency seeking interim conservatory orders to stay the appointment of the Committee pending determination by this court of the constitutionality of that appointment. In support of that application was an affidavit sworn by Harun M. Hassan who states that he is the Executive Director of the Petitioner. The affidavit is dated 29th May 2013. In it the deponent has given a list of ten members of the Committee as appointed to demonstrate that among the ten appointed members there was no representation of Persons with Disabilities.

The Petitioner was directed by this court to serve the application. The application was never heard. The parties informed the court that they were discussing an out of court settlement and a consent order was in the offing. This was not to be because on 2nd September 2013, the court was informed that the parties had failed to reach consent and were therefore seeking to get a hearing date of the Petition because the Chamber Summons had been overtaken by events.

Petitioner's Case

The Petitioner filed this Petition on 30th May 2013 against the Governor, County of Garissa, and the Honourable Attorney General, being the 1st and 2nd Respondents respectively, for alleged breach of the Constitution. The Petitioner's case is that the 1st Respondent appointed members of the Garissa County Executive Committee (the Committee) in total disregard of the constitutional requirement that at least five percent of the members of the Committee are Persons with Disabilities and that this was not only unfair but was unconstitutional.

The Petition alleges breach of Article 2 of the Constitution that provides that the Constitution binds all persons and all State Organs; Article 3 that obligates every person to respect, uphold and defend the Constitution; Article 10 that provides that the National Values bind all State Organs, State Officers, public officers and all persons whenever any of them, inter alia, applies, interprets this Constitution; Article 54 (2) that mandates the state to ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities; Article 81 which compels the Electoral system to comply with fair representation of persons with disabilities and Article 27 on equality before the law of every person.

The Petitioner also allege that it wrote to the 1st Respondent requesting him to consider the principle set out in the constitution but he failed to do so.

The Petitioner seeks the following orders:

1. That a declaration be issued under Article 54 and 81 of the Constitution as read with the Fifth Schedule to the Constitution, the 1st Respondent is under a duty to ensure fair representation of persons with disabilities in the appointment of members of the County Executive Committee and to ensure progressive implementation of the principle that at least five percent of the members appointed as members of the County Executive Committee are Persons with Disabilities.

2. That a declaration be issued that the 1st Respondent has failed to ensure fair representation of Persons with Disabilities and the progressive implementation of the principle that at least five percent of the members appointed as members of the County Executive Committee are Persons with Disabilities.

3. That a declaration be issued that the 1st Respondent's failure and omission to ensure fair representation of Persons with Disabilities and the progressive implementation of the principle that at least five percent of the members appointed as members of the County Executive Committee are Persons with Disabilities is illegal and unconstitutional.

4. That a declaration be issued to the 1st Respondent to ensure the progressive implementation of the principle that at least five percent of the members appointed as members of the County Executive Committee are Persons with Disabilities. The list of the persons appointed compliance with the Article 179 is therefore null and void *ab initio* and ought to be struck down so as to pave way for the genuine and constitutional list of members of County Executive Committee.

5. That an order be issued directing the 1st Respondent and the 2nd Respondent to take steps to ensure the progressive implementation of the principle that five percent of the members appointed as members of the County Executive Committee are Persons with Disabilities.

6. That the costs of, and incidental to, this Petition be awarded to the Petitioner against the Respondents.

7. That this honourable court be pleased to grant such further order or orders as may be just and appropriate.

The Respondents' Case

In his replying affidavit dated 3rd September 2013 and filed on 12th September 2013, the 1st Respondent deposes that the Petitioner did not request for consideration of its members in appointments to the Committee but rather demanded that the Committee be nullified; that the members of the Committee were nominated, approved and gazetted in accordance with the Constitution; that pursuant to Article 179 (2) (b) and Section 30 of the County Government Act, 10 members of the Committee were appointed taking into account the peculiar requirements of Garissa County and other factors and was not specific or limited to a person's condition; that Article 54 (2) does not confer a fundamental right or freedom but is an operative clause for bringing into effect the rights and freedoms of Article 54 (1); that Article 81 is inapplicable in the circumstances of this case; that five percent of ten is impracticable; that Persons with Disabilities were not discriminated against; that one Mukhtar Farah, who holds the Youth Affairs in the Governor's Office is a person with disability; that the prayers being sought by the Petitioner cannot issue and that this Petition ought to be dismissed for being an abuse of the process of the court.

The 2nd Respondent filed on 8th October 2013 Grounds of Opposition that:

- i. The insistence on restrictive and narrow interpretation of Article 54(2) of the Constitution is gross misapprehension and misreading of the import of the Constitution.
- ii. That the alleged breach of the Constitution in respect of the alleged discrimination against persons with disabilities is a matter of evidential facts requiring strict proof to which the burden is with the Petitioner.
- iii. That the Petition is an abuse of the court process and the same be dismissed with costs.

Agreed Issues

The parties agreed to file a list of agreed issues as follows:

- i. Whether the Petitioner has locus standi.
- ii. Whether the Respondents are the proper parties in this Petition.
- iii. Whether the Petition is competent and whether it discloses a cause of action.
- iv. Whether the Respondents have violated any of the Petitioner's rights as framed.
- v. Whether the realization of the right under Article 54 (2) is progressive or immediate.

- vi. Whether the process of nomination was carried out in any way intended to ensure that the constitutional objectives were met.
- vii. Whether the Petitioners are entitled to the orders sought taking into account the evidence produced.
- viii. Who is entitled to costs?

Petitioner's Submissions

The Petitioner in its submissions has reiterated its case that the 1st Respondent breached the Constitution in appointing members of the Committee. The Petitioner cited **In the Matter of the Principle of Gender Representation in the National Assembly and Senate [2012] eKLR; Olum v. Attorney General of Uganda [2002] E.A 508 and USIU v. Attorney General & Another [2012] eKLR** to stretch the point that the Constitution has to be read as an integral whole and no particular provision destroying the other but each sustaining the other.

The Petitioner submitted that this court has jurisdiction to hear and determine this; that this court has powers to intervene even in cases where the process of appointment is complete (See **FIDA Kenya & Others v. Attorney General & Another in Petition Number 102 of 2011**); that the competence and suitability of persons with disabilities has not been challenged by the Respondents and therefore the exclusion of members of the Petitioner from appointment to the Committee is illegal and unconstitutional.

On the issue of immediate versus progressive realization of a right, the Petitioner relied on the Supreme Court Decision (**Gender Representation Case Above**) where it was stated that:

“59. This leads us to the inference that whether a right is to be realized ‘progressively’ or ‘immediately’ is not a self-evident question: it depends on factors such as the language used in the normative safeguard, or in the expression of principle; it depends on the mechanisms provided for attainment of gender-equity; it depends on the nature of the right in question; it depends on the mode of constitution of the public body in question (e.g appointive or elective; if elective, the mode and control of the process for the election); it depends on the identity and character of the players who introduce the candidates for appointments or election; it depends on the manner of presenting candidature for the election nominations.”

The Petitioner submitted that the right under Article 54 (2) of the Constitution is an expression of a principle; that nature of the right required the 1st Respondent to include at least one person with disability in the Committee and that the principle under Article 54 (2) should be realized immediately. It was further submitted that Persons with Disabilities have been effectively denied their fundamental rights in the past and they are presently being denied and that it is likely that the said right will continue being contravened in the foreseeable future unless the circumstances are changed.

1st Respondent's Submissions

The 1st Respondent submits that the Petitioner does not have locus standi because there is no proof that Harun M. Hassan is the executive director of the Petitioner; that Harun M. Hassan has no authority to sign the affidavits on behalf of the Petitioner and therefore the affidavits have no evidential value.

The 1st Respondent has submitted that Article 179 of the Constitution and Section 35 of the County Government Act provide the criteria for nominating, vetting and approving County Executive Committee and that this criteria was met; that the Petitioner has not proved that the County Assembly has failed to meet this criteria; that the County Assembly has not been enjoined in this Petition; that there are other considerations in appointing the members of the Executive Committee and that the County Government Act imposes a duty on persons interested for nomination which duty such persons must discharge before they can claim a right under Article 54 (2); that the members of the Petitioner have not demonstrated in court such qualifications as they may have had; that there is no proof that Persons with Disabilities applied for the positions and were not considered.

It is further submitted that the Petitioner has not demonstrated how the right to fair administrative action has been infringed and that it is trite law that constitutional violations must be pleaded with a reasonable degree of precision (see **Anna Rita Karimi Njeru case above**); that the Petitioner has not proved in what way has the 1st Respondent denied it the right to access to justice; that Article 54 (2) does not create a right, it is a principle by which the State is to ensure the progressive implementation of this principle.

The Petitioner further submits that Article 54(2) must be read together with Articles 24, 25, 52, 179(3) and 259 of the Constitution and Section 35 of the County Government Act in order to give it full effect to the provisions; that the nature of the right, if right at all, is limited in the number of the members to be appointed and by qualification required of those appointed; that the principle under Article 54(2) is to be implemented progressively and not immediately; that Persons with Disabilities will be taken care of under the docket dealing with Children Affairs, Social Welfare and Women and that Mukhtar M. Farah who handles the docket of Youth Affairs is a Person with Disability.

2nd Respondent's Submissions

The 2nd Respondent has narrowed the main issues for determination as follows:

- i. The meanings of progressive implementation under Article 54 (2) and fair representation of persons with disabilities under Article 81 (c) of the Constitution.
- ii. The criteria of appointing County Executive Committee Members.
- iii. Whether the Petitioner has met the threshold test of constitutional proof as per the Principle in **Anarita Karimi Njeru v. The Republic (1976-1980) KLR 1272.**

The 2nd Respondent submits that “progressive realization” as defined by the Supreme Court of Kenya in the matter of **Re Matter of the Interim Independent Electoral Commission,**

Constitutional Application No. 2 of 2011 (unreported) connotes a phased-out attainment of an identified goal; that the Petitioner has misapprehended Article 54 (2) of the Constitution in that the meaning of this Article is that at least five percent means persons with disabilities be five percent of state employees generally and not five per cent of County Executive Committee Members.

It is further submitted that Article 81 (c) does not demand what percentage or specific positions that the persons with disabilities should be given but that they be fairly represented in state employment generally; that fair representation of special interests groups such as persons with disabilities cannot be achieved immediately but gradually.

On the criteria of appointing County Executive Committee Members, the 2nd Respondent refers to Article 179 (2) and Section 35 of the County Governments Act on the manner of appointing the County Executive Committee and I will analyze it in the course of this judgement.

The 2nd Respondent has submitted that the Petitioner has cited numerous Articles of the Constitution as having been infringed or violated without providing any particulars of the alleged violations; that the alleged discrimination against persons with disabilities is a matter of evidential facts requiring strict proof and that there is no evidence provided.

The 2nd Respondent submitted further that the checks and balances under the doctrine of separation of powers should not be construed to mean that one arm of the government can substitute its opinion with other's or supplant its decision on another arm (**see Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**).

The 2nd Respondent has urged this court not to grant the prayers sought in the petition for failure to disclose constitutional violations or any rights of its members infringed by the Respondents; that the petitioner did not disclose whether persons with disabilities applied for posts of County Executive Committee and specifically eliminated from the process and discriminated.

Determination

My careful reading of all the issues raised in this petition leads me to the understanding that the issues can be addressed under the following headings:

- i. Does the Petition have the locus standi?
- ii. What are the criteria of appointing the County Executive Committee?
- iii. Did the Petitioner meet the threshold test of constitutional proof?
- iv. Is the realization of the right under Article 54 (2) progressive or immediate?

In my view issues number two and six in the agreed issues will be addressed under issue (ii) above while issues number three and four in the agreed issues will be addressed under issue (iii) above.

Locus standi

Article 22 of the Constitution provides that:

1. *Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or threatened.*

2. *In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-*

- a. *a person acting on behalf of another person who cannot act in their own name;*
- b. *a person acting as a member of, or in the interest of, a group or class of persons;*
- c. *a person acting in the public interest; or*
- d. *an association acting in the interest of one or more of its members*

Further, in the **Mumo Matemu case supra**, the Court of Appeal endorsed the view held by the High Court in **Trusted Society case supra** that the standard guide for locus standi must remain the command in Article 258 of the Constitution. It provides that:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by -

- (a) a person acting on behalf of another person who cannot act in their own name;*
- (b) a person acting as a member of, or in the interest of, a group or class of persons;*
- (c) a person acting in the public interest; or*
- (d) an association acting in the interest of one or more of its members.*

I need not belabor the point. Even if the Petitioner was not a registered association, by dint of Articles 22 and 258 of the Constitution they would still have the legal legs to stand on. The Court of Appeal however hastened to caution in the **Mumo Matemu case** that the person who moves the court for judicial redress in the cases of this kind must not act for personal gain or private profit, political motivation or other unspecified consideration. My view is that the Petitioner is not being driven by personal gain or some political millage and therefore the Petitioner has *locus standi* to move this court in this Petition.

Criteria for appointment

Starting with the constitutional provisions on this issue, Article 179 (2) of the Constitution provides the membership of the county executive committee as consisting of the county governor and deputy county governor; and members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.

Article 179 (3) provides that the number of members appointed under clause (2) (b) shall not exceed one-third of the number of members of the county assembly, if the assembly has less than thirty members; or ten, if the assembly has thirty or more members.

This court has been told that the members of the county assembly of Garissa are thirty so the relevant number of members of the county executive committee is ten. The qualification of appointing the members of this committee is provided under section 35 (3) of the County Government Act and include:

- i. Being a Kenyan citizen.
- ii. Being a holder of at least a first degree from a university recognized in Kenya.
- iii. Satisfaction of the integrity test under Chapter Six of the Constitution.
- iv. Possess knowledge, experience and a distinguished career of not less than five years in the field relevant to the portfolio of the department to which the person is being appointed.

Before appointment the Governor is obligated to ensure to the fullest extent possible, the composition of the executive committee reflects the community and cultural diversity of the county and take into account the principle of affirmative action as provided for in the Constitution (see section 35 (1) County Government Act). The county assembly is also obligated under section 35 (2) of the same Act to take into account when approving those appointments that not more than two-thirds are of either gender are appointed; that the minorities, marginalized groups and communities and community and cultural diversity within the county are represented.

The constitution obligates the appointing authority to take into account the principles of affirmative action. “Affirmative action” is defined under Article 260 of the Constitution to ***include any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom.***

In my view this definition is wide enough to allow any appointing authority with the principle enunciated under Article 54 (2) of the Constitution in mind to get out of the normal way of doing things and even include in the advertisement for applications for the appointment to the County Executive Committee information that special interest groups like women, the marginalized, the persons with disabilities and the minorities in society are encouraged to apply. I think too that where such people apply and during the appointing process it comes out that these people have qualifications in relevant fields and have not qualified but are placed in second or third positions, efforts ought to be made to apply affirmative action principle and appoint them.

All this boils down to this: the Petitioner bears the burden of proving all this has not been done. Even where criterion for appointment has not been put in place, the appointing authority can only appoint people who have presented themselves and shown interest in the appointments.

Constitutional threshold

The respondents are saying that the Petitioner has not reached the threshold in **Anarita Karimi Njeru case supra**. It was submitted that the Petitioner has referred to various articles of the constitution as having been violated without giving particulars of the alleged violations. The principle in **Anarita Karimi case** is captured in the words of the Justices Trevelyan and Hancox when they stated as follows:

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

The Petitioner has cited various articles of the constitution without any particulars of that the alleged violations of those provisions. For instance in paragraph 8 of the Petition the Petition states as follows:

Based on these facts the petitioner is seeking redress before this Honourable court for enforcement of the constitutional rights, freedoms and entitlements of persons with disabilities under Articles 47, 48, 54, 81. The Petitioner goes on to cite Articles 2, 3, 10, 54 and 81. In paragraph 18 the Petitioner gives particulars of derogation but no particulars are given. Instead the Petition goes on to state that the 1st Respondent failed to comply with Articles 54 and 81.

In paragraph 20 of the Petition, the Petitioner has indicated particulars of discrimination but there are no particulars given. In paragraph 28 it is indicated Justification and entitlement and again articles 20 and 21 are given without evidence.

The Court of Appeal in **Mumo Matemu** case found that the petition did not meet the threshold in **Anarita Karimi Njeru case** for similar reasons like in this case where there is no evidence to support the allegations of violations of constitutional provisions. As submitted by the respondents, there is no evidence that any of the members of the Petitioner presented themselves for appointment and they were rejected. There is no evidence of the number of their members and the distribution of membership in all the counties in Northern Kenya given that their membership covers a region they refer to as Northern Kenya. There is no evidence to show the number of their members who belong to Garissa County. There is evidence to show how many of those members meet the criteria for appointment under Section 35 of the County Government Act.

Progressive versus immediate realization

This court has been told that the members of the Petitioner were left out in the appointments. As submitted by the respondents, the Petitioner bears the burden of proving that its members

applied and were not considered. I have perused the Petitioner's pleadings and I did not see any evidence that any of their members applied or presented themselves and were not considered.

The Supreme Court of Kenya in the **Advisory Opinion No 2 of 2012 - In the Matter of the Principle of Gender Representation in the National Assembly and the Senate** defined "Progressive realization" as a gradual movement or development towards a destination" (Concise Oxford English Dictionary). The Justices went on to say that:

"[53] We believe that the expression "progressive realization" is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal – a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action."

The language of Article 54 (2) to my mind is clear that realization of five percent of the members of the public in elective and appointive bodies of persons with disabilities is progressive going by the **Supreme Court Advisory Opinion** (supra).

I have considered the provisions of Article 54(2) and I agree with the respondents that it is not a right but a principle on how to implement the five percent of persons with disabilities requirement. The rights of persons with disabilities are to be found in Article 54 (1) of the Constitution. The Petition did not claim that any of those rights under Article 54 (1) have been violated.

My understanding of Article 81 of the Constitution is that electoral system are obligated to comply with the principle of fair representation of persons with disabilities and as argued by the respondents, the matter before me is about appointive positions not elective.

Failure to enjoin the County Assembly as argued by the respondents is in my view fatal to the Petitioner. The appointment of the Executive Committee is not complete without involvement of the assembly. In fact the Governor nominates and sends the names of the nominees to the assembly. As stated above failure by the assembly to comply with the law can only be taken up against that body (see Section 35 (2) of the County Government Act).

This court was asked to respect the doctrine of separation of powers and not to intervene in this matter. I choose to go by the Court of Appeal on this issue in the **Mumo Matemu case** where it explained this doctrine by stating that:

".....However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function."

The Court of Appeal in the **Matemu case** also agreed with the High Court's dicta in the Trusted Society Case in the following:

“Separation of powers must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretative role-including the last word in determining the constitutionality of all government actions....”

The Court of Appeal also agreed with the High Court in the Trusted Society case that the High Court may conduct review of appointments to State or Public Offices but this must meet the rationality test instead of both rationality and reasonableness test which was found to be ambiguous.

Conclusion

Having analyzed the petitioner's case and the respondents' response, it is my finding that the petitioner has not proved its case. In the first place there is no evidence to show what rights were violated or to show discrimination of its members. The letter (see letter dated 6th May 2013) allegedly written to the 1st respondent asking him to consider members of the petitioner to positions in the County Executive Committee is actually a demand letter to nullify the nominations. It seems to have been written after the nominations had been done. The petitioner ought to have raised issue with the County Assembly during approval process.

There lacks evidence that any of the members of the Petitioner applied for the posts at the Executive Committee and also none were attached to this petition showing qualified members who were not considered.

While I do not agree with the 2nd Respondent that the five percent means all State jobs, I wish also to state that for the five percent principle to be realized, appointing authorities ought to do more when advertising for certain statutory appointments to ensure the minorities, marginalized and special groups apply instead of sitting to wait to be picked because they are so marginalized. This becomes crucial where the law sets out particulars of qualifications to be met before appointments are done.

I sympathize with the persons with disabilities but again sympathy will not help. Care needs to be taken to ensure the appointing authorities do not take the short cuts in making appointments but that' advertisements where these apply, or sensitization where applicable, is aimed at the marginalized and special groups to ensure they are aware of their rights to apply for such positions.

The Petitioner has not proved this case. I must therefore dismiss it. Due to the nature of the case, I will order each party to bear its own costs of this petition. It is so ordered.

Dated, signed and delivered this 16th day of December 2013.

S.N.MUTUKU

JUDGE



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