

THE SUPREME COURT OF KENYA

THE ATTORNEY GENERAL & 2 OTHERS v. DAVID NDII & 79 OTHERS

SC PETITION NO. 12 OF 2021

(CONSOLIDATED WITH PETITIONS NOs. 11 & 13 OF 2021)

DATE OF JUDGMENT: 31ST MARCH 2022

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court

Orders: The Court partly allowed the consolidated appeals

Background:

Following the Constitution of Kenya (Amendment) Bill, 2020 (*the Amendment Bill*), which was a proposal to amend the Constitution, 2010, 8 petitions were filed in the High Court challenging the process that resulted in the Amendment Bill and its contents on the ground that they were not in accordance with the Constitution. The High Court in a Judgment dated 13th May, 2021 allowed the petitions in part and issued a number of Orders. Thereafter, appeals were filed in the Court of Appeal and by a judgment dated 20th August, 2021 the Court of Appeal set aside some of the orders of the High Court.

Aggrieved with the Court of Appeal's decision, the Attorney General, Independent Electoral Boundaries Commission and Mr. Morara Omoke filed appeals in the Supreme Court which were eventually consolidated. The consolidated appeals were basically asking the Supreme Court to interpret the provisions of Chapter Sixteen (Articles 255-257) of the Constitution which provides for how the Constitution can be amended and determine whether the Court of Appeal's judgment was sound in law.

Having appreciated the consolidated appeals, the Supreme Court framed seven issues as arising for its consideration and has partly allowed the appeals in the following terms:

1.

- (a) **The basic structure doctrine is not applicable in Kenya.**
- (b) **In order to amend the Constitution of Kenya 2010, the four sequential steps are not necessary as pronounced by the two Superior courts below. (*Ibrahim, SCJ dissenting*).**

Reasons for the 1st finding:

The Majority held that no gaps had been identified with regard to Chapter Sixteen of the Constitution, which deals with amendments to justify the application of the basic structure doctrine. Further, the Constitution is self-executing in dealing with any threat of any possibility of abusive amendments as witnessed in the pre-2010 era. In addition, the Court held that the basic structure doctrine does not form part of the general rules of international law which are applicable in Kenya under Article 2(5) of the Constitution.

Dissenting, *Ibrahim, SCJ* agreed with the High Court and Majority of the Court of Appeal that the basic structure doctrine is applicable in Kenya. He agreed with the High Court that fundamental features of the Constitution, which are to be identified on a case by case basis by the courts, could only be amended by the People in exercise of their primary constituent power. He further found that genuine exercise of primary constituent power can be identified through the four-sequential steps prescribed by the High Court.

2.

- (a) **The President cannot initiate Constitutional amendments/ changes through the popular initiative under Article 257 of the Constitution. (*Njoki Ndungu, SCJ dissenting*).**
- (b) **The President initiated the amendment process in issue (*Njoki Ndungu & Lenaola SCJJ dissenting*).**
- (c) **Consequently, under Article 257 of the Constitution, the Constitution Amendment Bill of 2020 is unconstitutional (*Njoki Ndungu & Lenaola SCJJ dissenting*).**

Reasons for the 2nd finding:

The Majority held that Article 257 in providing for the popular initiative amendment route was conceived and designed to serve as a citizen-driven process of amending the Constitution to the exclusion of the President. Secondly, the process of amending the Constitution through the Constitution of Kenya (Amendment) Bill, 2020 was initiated by the President rendering the subject amendment process unconstitutional as it was contrary to the provisions of Article 257 of the Constitution.

Dissenting, *Njoki Ndungu, SCJ* found that the President can initiate/move constitutional changes while exercising his constitutional functions under Articles 132 and 141 of the Constitution as well as under the power delegated to him as a democratically elected representative of the people under Article 1 of the Constitution. She equally found that State Organs may also move constitutional changes in exercise of the delegated authority given to them under Article 1 of the Constitution. In addition, she held that a popular initiative is based on several steps laid out in Article 257, the success of which depends on the promoters ability to attain numerical thresholds at each stage.

Lenaola, SCJ whilst agreeing with the Majority that a popular initiative is a preserve of citizens to the exclusion of the President, held that the President did not initiate or promote the Constitution of Kenya (Amendment) Bill, 2020. In his view, the initiation of the subject Amendment Bill was done by the BBI National Secretariat.

3. The Second Schedule of the Constitution of Kenya (Amendment) Bill, 2020 is unconstitutional for being in breach of Article 10 (2) of the Constitution of Kenya 2010 there having been no public participation on the Schedule. (Unanimous)

Reason for the 3rd finding:

The Court found that the Second Schedule of the Constitution of Kenya (Amendment) Bill, 2020, which apportioned and allocated the proposed

additional seventy (70) constituencies, was a late addition to the subject amendment process and was not subjected to public participation as required by the Constitution. In concurring, *Njoki Ndungu, SCJ* held that the Second Schedule of the Constitution (Amendment) Bill had not been enacted into law and as such, a constitutional challenge on it is not ripe. However, in her view there are circumstances in which there is an exception to the doctrine of ripeness, and in this case it did apply hence she found that if the Amendment Bill was passed into law, the Second Schedule would be unconstitutional, as it introduced amendments to substantive Articles of the Constitution without an attendant proposal to amend those specific Articles.

- 4. Civil proceedings cannot be instituted in any court against the President or the person performing the functions of the office of the President during their tenure of office in respect of anything done or not done under the Constitution of Kenya 2010. (Unanimous)**

Reasons for the 4th finding:

The Court found that the intention of Article 143(2), which provides immunity to the President, is to immunize/protect the President from civil proceedings during his tenure in office for acts or omissions connected with the office and functions of the office of the President. The two Superior courts below erred by attempting to amend the provisions of the Constitution through a Judgement.

5.

- (a) There was no obligation under Article 10 and 257 (4) of the Constitution, on IEBC to ensure that the promoters of the Constitution of Kenya (Amendment) Bill, 2020 complied with the requirements for public participation. (Unanimous)**
- (b) There was public participation with respect to the Constitution of Kenya (Amendment) Bill, 2020 (*Mwilu; DCJ & VP, Ibrahim and Wanjala, SCJJ dissenting*).**

Reasons for the 5th finding:

The Court found that there is no legal provision placing such an obligation on IEBC. While on the second part, the majority of the Court has held that there was uncontroverted evidence of public participation with respect to the Constitution of Kenya (Amendment) Bill, 2020 save for the Second Schedule. While *Ibrahim, SCJ* agreed that there was public participation in regard Amendment Bill, he found that the same was not reasonable or meaningful.

Dissenting, *Mwilu, DCJ & VP, and Wanjala, SCJJ* found that there was no evidence of public participation with respect to the subject Amendment Bill.

6. The IEBC had the requisite composition and quorum to undertake the verification process under Article 257(4). (*Ibrahim, SCJ dissenting*)

Reasons for the 6th finding:

The Majority held that IEBC Act ought to be read in conformity with Article 250(1) of the Constitution which envisages that it is properly constituted with a minimum of three Commissioners. Although the paragraph 5 of the Second Schedule of the IEBC Act fixed the quorum at five Commissioners, this cannot override the Constitution. Moreover, there was a Judgement of the High court in the *Isaiah Biwott Kangowny v. Independent Electoral Boundaries Commission & Attorney General*, HC Constitutional Petition No. 212 of 2018; [2018] (*Isaiah Biwott Case*) which was *in rem*. It was held that the IEBC was quorate and therefore the Commission cannot be faulted for following the said Decision.

Dissenting, *Ibrahim, SCJ* held the view that the IEBC Act was enacted to give effect to the Constitution hence courts ought to give effect to statutory provisions unless the same is declared unconstitutional. He therefore, found IEBC was not properly composed or quorate at the time of verification of signatures. He however held that since IEBC was relying on the *Isaiah Biwott Case*, which remained unchallenged, meant that the actions it took in the intervening period were lawful.

7. The question raised regarding the interpretation of Article 257(10) of the Constitution on whether or not it entails/ requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions was not ripe for determination (Njoki Ndungu, SCJ concurring).

Reasons for the 7th finding:

The Majority were of the view that IEBC had not had an opportunity to address its mind and make a determination on whether Article 257(10) of the Constitution requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions. In her concurring opinion, *Njoki Ndungu, SCJ* held that although the question was premature and not ripe, the exception to the doctrine of ripeness applied, and therefore IEBC may only present one question at Referendum: Yes or No to the draft Bill; further Section 49 of the Elections Act is inconsistent with the provisions of the Constitution.

Consequently, the consolidated appeal is determined as follows;

- (1) **The appeal is allowed on the issue No. 1.** The basic structure doctrine is not applicable in Kenya;
- (2) **The appeal is allowed on issue No 4.** Civil proceedings cannot be instituted in any court against the President or the person performing the functions of the office of the President, during their tenure of office in respect of anything done or not done under the Constitution of Kenya 2010;
- (3) **The appeal is allowed on issue No. 5.** There was no obligation under Article 10 and 257 (4) of the Constitution, on IEBC to ensure that the promoters of the Constitution of Kenya (Amendment) Bill, 2020 complied with the requirements for public participation. Further there was public participation with respect to the Constitution of Kenya (Amendment) Bill, 2020;

- (4) **The appeal is allowed on issue No. 6.** IEBC had the requisite composition and quorum to undertake the verification process under Article 257(4);
- (5) **The appeal is allowed on issue No. 7.** The question raised regarding the interpretation of Article 257 (10) of the Constitution, on whether or not it entails/ requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions was not ripe for determination;
- (6) **The appeal is disallowed on issue No. 2.** The President cannot initiate Constitutional amendments/changes through the popular initiative under Article 257 of the Constitution. The President initiated the amendment process in issue and consequently, under Article 257 of the Constitution, the Constitution Amendment Bill of 2020 is unconstitutional;
- (7) **The appeal is disallowed on issue No 3.** The Second Schedule of the Constitution of Kenya (Amendment) Bill, 2020 is unconstitutional for being in breach of Articles 10 (2) and 89 of the Constitution of Kenya 2010;
- (8) **Each Party shall bear their own costs.**

Dated at Nairobi this 31st Day of March, 2022.