Aura v Cabinet Secretary, Ministry of Health & 11 others; Kenya Medical Practitioners & Dentist Council & another (Interested Parties) (Constitutional Petition E473 of 2023) [2024] KEHC 8255 (KLR) (Constitutional and Human Rights) (12 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8255 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E473 OF 2023

A MABEYA, RK LIMO & FG MUGAMBI, JJ

JULY 12, 2024

IN THE MATTER OF ARTICLES165 (3) (B) & (D), 258(1) (A) & (C) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF VARIOUS ARTICLES OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE SOCIAL HEALTH INSURANCE ACT AND IN THE MATTER OF THE DIGITAL HEALTH ACT

AND

IN THE MATTER OF THE PRIMARY HEALTH CARE ACT

AND

IN THE MATTER OF THE HEALTH ACT

BETWEEN

JOSEPH ENOCK AURA ..... PETITIONER

AND

CABINET SECRETARY, MINISTRY OF HEALTH ..... 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF INFORMATION, COMMUNICATION & DIGITAL ECONOMY IN KENYA ..... 2ND RESPONDENT

SOCIAL HEALTH AUTHORITY ..... 3RD RESPONDENT

COMMISSION ON REVENUE ALLOCATION ..... 4TH RESPONDENT

NATIONAL ASSEMBLY OF KENYA ..... 5TH RESPONDENT

THE SENATE ..... 6TH RESPONDENT

COUNCIL OF GOVERNORS ..... 7TH RESPONDENT

THE ATTORNEY-GENERAL ..... 8TH RESPONDENT

OFFICE OF THE DATA PROTECTION COMMISSIONER ... 9TH RESPONDENT

HEALTH RECORDS & INFORMATION MANAGERS ..... 10TH RESPONDENT

CLINICAL OFFICERS COUNCIL OF KENYA ..... 11TH RESPONDENT

ATTORNEY GENERAL ..... 12TH RESPONDENT

AND

KENYA MEDICAL PRACTITIONERS & DENTIST COUNCIL .... INTERESTED PARTY

KENYA MEDICAL ASSOCIATION ..... INTERESTED PARTY

The Social Health Insurance Fund Act, the Primary Health Care Act, and the Digital Health Act Rendered Unconstitutional for Lack of Proper Public Participation

The main issue that arose was concerned with the constitutionality of the Social Health Insurance Fund Act, the Primary Health Care Act, and the Digital Health Act. The court held that the effort of the Cabinet Secretary in attempting to realize the social economic rights provided under Article 43 was commendable. The objectives and purpose of the impugned legislation were to have a progressive, transformative, and huge impact on the realization of universal healthcare for the country. However, the haste with which they were enacted infringed on the national values and principles of the Constitution. In as much as it was a noble intention, the constitutional tenets that bound Kenya could not be disregarded. Article 20 required Kenyans to promote and protect the values that underlie an open and democratic society and the spirit, purports, and objects of the Bill of Rights. Being cognizant of the importance of the impugned Laws and the input that had already gone into their enactments and recognizing the purport of the enactments as far as realization of the rights under Article 43 of the Constitution, Parliament was allowed to redeem itself and save the Laws. The breaches that tainted the Laws were redeemable within and could be corrected. The court ordered that Parliament ought to undertake sensitization, adequate, reasonable, sufficient, and inclusive public participation under the Constitution before enacting the said Acts and amending the unconstitutional provisions in terms of the judgment.

Reported by Robai Nasike

Constitutional Law *– fundamental rights and freedoms – limitation of fundamental rights and freedoms – violation of fundamental rights and freedoms – whether provisions of the SHIA infringed on Kenyan's right to dignity and integrity; freedom from servitude and slavery, and the freedom of conscience, religion, and thought – whether sections 26 (5) and 27 (4) which set compliance with the SHIA as a precondition for access to services at both the county and national level was a reasonable and justifiable limitation to Article 43 (1) (a) on the right to access to health – whether sections 26 (5) and 27 (4) which set compliance with the SHIA as a precondition for access to services at both the county and national level infringed on the right to access emergency medical services – Constitution of Kenya, 2010, articles 28, 30 (1), 32, 43 (1) (a).*

Constitutional Law *– national values and principles of governance – participation of the people – public participation – threshold of public participation – what was the bare minimum guideline for public participation to be considered sufficient – whether the process of enacting the SHIFB, DHB and PHB involved sufficient public participation – Constitution of Kenya, 2010, article 10, 118 and 132.*

Constitutional Law *– public finance – principles of public finance – principle of openness and accountability, including public participation in public finance matters – whether the introduction of a new section 38 that provided how to deal with the balance of the funds at the end of the year failed the constitutional test of openness, accountability, and public participation in financial matters – Constitution of Kenya, 2010, article 201 (a).*

Civil Practice and Procedure *– institution of suits – sub judice – determination of suit where there existed another similar suit pending before court, with similar parties who were seeking similar relief – whether there existed a similar suit with the same parties, seeking similar relief in another court, that would render the ongoing suit sub judice – Civil Procedure Act, section 6.*

Legislation *– procedures for enacting legislation – bills concerning county government – consultation of the Commissioner of Revenue Allocation when enacting legislation relating to financial matters concerning County Government – whether failure to consult the Commissioner of Revenue Allocation when enacting legislation relating to financial matters concerning County Government rendered the SHIA, DHA, and PHA unconstitutional – Constitution of Kenya, 2010, Article 205 (1).*

Legislation *– procedures for enacting legislation – bills concerning county government – requirement that bills concerning county government required concurrence between the speakers of the National Assembly and Senate – whether the requirement for concurrence of the speakers of the National Assembly and Senate was mandatory – whether the concurrence between the speakers of the National Assembly and the Senate could be presumed as implicit, where the Memorandum and Objects and Reasons of the impugned laws had already stated that they were Bills concerning counties – Constitution of Kenya, 2010, Article 110 (3).*

Legislation *– procedure for enacting legislation – publication of bills - timelines for publication of bills – discretion of parliament to reduce timelines for publication of bills – whether parliament had the discretion to reduce the timelines for publication of bills – whether parliament exercised proportionate judgment when they reduced the period of publications of the three Bills from the requisite 14 days to less than half of that time.*

Statutes *– enactment of statutes – procedure of enactment of statutes – enactment of Acts of Parliament viz-a-viz statutory instruments – what was the distinction between Acts of Parliament and statutory instruments – whether Acts of Parliament ought to be enacted according to the process set out within the Statutory Instruments Act – Statutory Instruments Act, sections 5, 6, 8, 9 and 11.*

Brief facts

Article 43(1)(a) of the Constitution of Kenya 2010 (the Constitution) provides that every person has the right—to the highest attainable standard of health, which includes the right to health care services, including reproductive health care. To realize the aspirations, set out in the Article, in October 2023 the Legislature enacted 3 legislations: - The Primary Health Care Act No. 13 of 2023 ("PHCA") whose purpose was to provide a framework for the delivery of, access to and management of primary health care and for connected purposes; The Digital Health Act No. 15 of 2023 ("DHA") whose purpose was to provide for the establishment of the Digital Health Agency; to provide a framework for the provision of digital health services; to establish a comprehensive integrated digital health information system; and for connected purposes and; The Social Health Insurance Act No. 16 of 2023 ("SHIA"), whose purpose was to establish the framework for the management of social health insurance; to provide for the establishment of the Social Health Authority; to give effect to Article 43(1)(a) of the Constitution; and for connected purposes.

The petitioner challenged the constitutionality of the 3 statutes ("the impugned statutes"). The respondents, in turn, justify the enactment of those statutes by citing the overarching need to breathe life into Article 43(1)(a) and Article 24 of the Constitution, which pertained to limitations of rights and fundamental freedom.

Issues

i. Whether there existed a similar suit with the same parties, seeking similar relief in another court, that would render the ongoing suit sub judice.

ii. Whether the process of enacting the social health insurance fund bill, digital health bill and primary healthcare bill involved sufficient public participation.

iii. Whether the concurrence between the speakers of the national assembly and the senate could be presumed as implicit, where the memorandum and objects and reasons of the impugned laws had already stated that they were bills concerning counties.
iv. Whether parliament had the discretion to reduce the timelines for the publication of bills.
v. Whether parliament exercised proportionate judgment when they reduced the period of publication of the three bills from the requisite 14 days to less than half of that time.
vi. Whether acts of parliament ought to be enacted according to the process set out within the Statutory Instruments Act
vii. Whether provisions of the SHIA infringed on Kenyan's right to dignity and integrity; freedom from servitude and slavery, and the freedom of conscience, religion, and thought.
viii. Whether sections 26 (5) and 27 (4) which set compliance with the SHIA as a precondition for access to services at both the county and national level was a reasonable and justifiable limitation to Article 43 (1) (a) on the right to access to health.
ix. Whether sections 26 (5) and 27 (4) which set compliance with the SHIA as a precondition for access to services at both the county and national level infringed on the right to access emergency medical services.
x. Whether failure to consult the Commissioner of Revenue Allocation when enacting legislation relating to financial matters concerning the County Government rendered the SHIA, DHA, and PHA unconstitutional.
xi. Whether the introduction of a new section 38 that provided how to deal with the balance of the funds at the end of the year failed the constitutional test of openness, accountability, and public participation in financial matters.

Held

1. Under section 6 of the Civil Procedure Act, the doctrine of sub judice required the existence of two similar suits, with one being first in time, pending before different courts, and involving the same parties seeking similar reliefs. A party invoking the doctrine of sub judice must establish that there was more than one suit over the same subject matter; one suit was instituted before the other; both suits were pending before Courts of competent jurisdiction; and the suits involved the same parties or their representatives.
2. Dominic Masinya Oreo was the petitioner in NRB H.C Pet No. E413 of 2023 and ELRC Pet. No. E 199 of 2023, suing 3 respondents; the National Assembly, the Attorney General and the Cabinet Secretary of the Ministry of Health. In contrast, the petitioner in the instant case was Aura Joseck Enock, who had sued not only the 3 respondents but also 8 additional respondents and two interested parties. While some reliefs in the cited petitions overlapped, they were not entirely similar. The instant petition was more comprehensive and expansive in its scope. The parties involved were not identical and neither were all the issues. Although the other petitions touch on employment issues and NHIF, those were not central to the instant case. The instant petition was not sub judice.
3. Public participation was a fundamental national value and governance principle prominently enshrined in the Constitution of Kenya and highlighted in Articles 10, 118 and 232. Article 10 (2) (a) specifically emphasizes on participation of the people as a cornerstone of Kenya's governance ethos. The provision reinforced Article 1 of the Constitution on the sovereignty of the people. Its spirit was that decisions should not be made affecting the people of Kenya without recourse to them.
4. Article 118 of the Constitution requires Parliament to ensure public participation in the process of legislation. Parliament was required to conduct its business transparently and in the open and hold its sittings and those of the Committees in a place open and accessible to the public. The importance of that requirement was that the participation of the people in their affairs gave impetus to good governance, improved service delivery and responsiveness of government and its agencies.

5. Public participation required the following bare minimum: -
    1. Proper sensitization on the nature of legislation to be enacted or policy to be effected;
    2. Adequate notice depending on the circumstances which must however be reasonable;
    3. Facilitation of the public that ensured that members of the public could access the information required in a convenient and practical manner, understand the same, and have a meaningful opportunity to attend, contribute and provide their views;
    4. The views of the public should be considered and where they were to be rejected or declined, the reason for such rejection and dismissal should be stated; That would obviate the public participation being a cosmetic or a public relations act;
    5. Public participation should be inclusive and should reflect a fair representation and diversity of the populace to be affected;
    6. There must be integrity and transparency of the process.
6. There was no sensitization of the public, keeping in mind the nature, extent and magnitude of the policy that was to inform the enactment of the Bills. Sensitization ought to have been done before inviting comments from the public. 14 days for submission of memoranda was not adequate in the circumstances given that it concerned 3 Bills that were highly technical with far-reaching consequences. There was no evidence that there was any deliberate attempt to facilitate the public to give any meaningful contribution within that period.
7. Public participation must be both qualitative and quantitative. The CS did not produce any evidence to show that ordinary members of the public submitted any comment. The notice given by the National Assembly was too short, for members of the public to access the 3 Bills online, study them, process them and make any meaningful contribution. Moreover, the alleged public participation in Mombasa only involved the Ministry of Health and the Council of Governors. No evidence was placed before the court to show that members of the public were invited or were present at the meeting.
8. The advertisement of the Senate inviting views on the Primary Healthcare Bill left a timeline of 1 clear working day for the public to gain access to the website, interrogate and give views on the Bill. The advertisement for the Social Health Insurance Fund Bill (SHIFB) and Digital Health left one with only 2 clear working days to access the website, interrogate and provide what was supposed to be meaningful comments on the Bills.
9. The physical public participation sitting in Lodwar, Turkana County was an already pre-determined ordinary sitting of the Senate dabbed Senate Mashinani. From the entire Hansard, there was nothing to show that the sitting was intended for public participation on the impugned Bills. No evidence was presented to show that members of the public were invited to that meeting to make representations on the 3 Bills as alleged in the affidavit. The memoranda produced as JN5 had not attested to the Senate's contention of any public participation at the alleged meeting and was rejected.
10. It would also seem that the Cabinet Secretary, the National Assembly and Senate all focused on very targeted and specific stakeholders. The criteria used to hand-pick the stakeholders was not explained. Moreover, there was no justification provided for the lack of proactive efforts to involve a broader cross-section of the population, thereby ensuring inclusivity in the process. That focused approach ultimately limited the expression of diverse viewpoints.
11. In all the notices sent out to public to give their written memoranda, the print used was rather small and barely legible. The same failed to meet the threshold for clarity and transparency. A good percentage of the Kenyan populace were illiterate or had no access to internet and could not afford newspapers. The Bills were going to equally affect them and as such their input was critical. There ought to have been a deliberate effort to reach out to them.
12. The NHIF mainly targeted employed Kenyans and those willing to join the scheme. A majority of the population never subscribed to NHIF and only did so when critically ill and admitted in hospital. The

SHIF on the other hand targeted every citizen and made it mandatory for everyone to register and be paid up. There were dire sanctions under sections 26(5) and 27(4) for non-compliance.

13. When legislation was poised to have such profound implications, it was crucial for Parliament to ensure that the public received sufficient notice and opportunities to express their views. Ultimately, those Acts were intended for the people, whose sovereignty was eloquently affirmed in the preamble of the Constitution of Kenya with the resolute declaration, "We the People of Kenya."
14. It was no longer business as usual where the leaders of the country were presumed to know what was suitable for the people. They had to consult the people before making decisions that affect them. All the impugned Acts failed to meet the threshold and criteria set out by the Supreme Court and the bare minimum standards set for public participation. They fall short of the constitutional criteria for public participation.
15. The objective of the Statutory Instruments Act was to provide for the making, scrutiny, publication and operation of statutory instruments. The Act applied to those instruments that were made pursuant to an Act of Parliament and not to Acts of Parliament themselves. Although Acts of Parliament and statutory instruments were both forms of legislation, they differed in their nature, creation and application. Acts of Parliament were primary legislations which set out broad legal principles and frameworks. Statutory instruments, on the other hand, took the form of secondary or delegated legislation and were laws made by individuals or bodies under powers given to them by an Act of Parliament. Those instruments allowed for more detailed provisions to be made within the framework set out by the primary legislation.
16. Acts of Parliament were enacted pursuant to Parliament's constitutional mandate under Articles 94 and 95 of the Constitution. Part III of the Act which provided for regulatory impact assessments was of no relevance to the 3 impugned Acts. The provisions of section 11 which required laying of statutory instruments before Parliament within seven (7) sitting days after the publication of a statutory instrument did not also apply to the 3 statutes.
17. All power that was exercised by each of the arms of government must be exercised following the Constitution as stated in Articles 1(1) and 1(3). Article 2 was a further reminder that the Constitution bound all state organs, an interdict that was further emphasized in Article 93(2) specifically to the National Assembly and Senate to perform their functions per the Constitution. It was not in the space of the Judiciary to interfere with the role of Parliament in the exercise of its constitutional mandate. There was a need to avoid judicial overreach. However, it was within the mandate given under the Constitution for the judiciary to ensure compliance with Constitutional tenets.
18. Courts were called to act with restraint in interfering with the processes of other organs in the exercise of their mandate. However, in exercising discretionary powers under the Standing Orders or any other rules for that matter, Parliament must remember that it was bound by the principles of governance as set out in Article 10 of the Constitution. Of particular importance was the need to ensure the participation of the people, transparency and accountability in the legislation-making process.
19. The primary objective of the publication of Bills was to uphold constitutional imperatives by ensuring public awareness of new legislative proposals. That transparency enabled citizens to grasp the legislative agenda and the substance of a proposed Bill, thereby fostering transparency and accountability in the legislative process. Further, publication ensured that citizens had ample opportunity to thoroughly study and scrutinize any Bill well in advance, facilitating meaningful participation and input from them.
20. The National Assembly published 2 out of the 3 Bills relating to the impugned Acts and reduced the period of publication by more than half of the period required under the Standing Orders. Though well-intentioned, the National Assembly seemed to be more concerned with the urgency to enact the Bills without taking into account the ramifications of such a drastic reduction of time and the ripple effect that it had on the overall process.

21. Parliament had the discretion to reduce the period of publication of Bills under the Standing Orders. That discretion, however, must be exercised reasonably, judiciously and within proportionality. Parliament recognized the significance of the 3 impugned legislations, and hence the more reason to provide adequate time for public notification and thorough scrutiny of the Bills. By shortening the publication period to just 6 and 3 days, respectively, Parliament did not exercise reasonable or proportionate judgment given the nature of the Bills.
22. Article 110(3) was couched in mandatory terms. A Bill was considered to concern counties if it affected the functions and powers of the county governments, or if it related to any matters that impacted county governments. That determination was crucial because it affected how the Bill was processed and which House had the primary responsibility. The need for prior consensus also ensured that the correct legislative process and clarity in the legislative proceedings were followed by the Houses of Parliament.
23. The rationale behind the resolution of the Speakers was to help in determining the House that would handle the Bill. The National Assembly, however, appeared to imply that since the Memorandum and Objects and Reasons of the impugned laws had already stated that they were Bills concerning counties, they needed not to wait for the concurrence of the Speakers and that the Bills were in any case considered by both Houses. The concurrence of the Speakers of the 2 Houses with respect to Bills concerning counties was mandatory. An examination of the record clearly showed that there was blatant disregard of Article 110(3) by both Houses of Parliament in the haste to have the impugned legislation passed.
24. Despite the Houses presuming concurrence between the Speakers as implicit, they were obligated to adhere strictly to the constitutional procedure. The enactment of the 3 impugned legislation should not have been rushed, especially at the cost of disregarding explicit provisions of Article 110(3) of the Constitution. In doing so, both the Senate and the National Assembly failed to demonstrate the requisite diligence and responsibility expected in legislative processes. By proceeding in haste, they overlooked procedural safeguards, which were fundamental to ensuring the integrity and legality of legislative actions.
25. Articles 28, 30(1), and 32 of the Constitution provided for the right to dignity and integrity; freedom from servitude and slavery, and the freedom of conscience, religion, and thought. It could not be seen how the provisions of the law cited from the impugned legislation would infringe on the dignity of Kenyans, nor subject them to servitude and slavery. The fund introduced by SHIA was a form of tax. It was misleading to state that the unborn children will be loaned monies which loans would subject them to slavery and servitude. Those to be given loans were those in the informal sector who would apply for such loans. The indigents and children would have their contributions paid for by the government free of charge. Accordingly, it could not be seen how the said provisions of the Constitution have been infringed by the impugned legislation.
26. It was clear from sections 26 (5) and 27 (4) of the SHIA that some rights had been limited and their enjoyment was pegged on compliance with the impugned Acts. In particular, section 26(5) set compliance with the Act as a pre-condition to accessing services both at county and national government. The petitioner did not demonstrate how the provisions infringe or were likely to infringe or violate the right to life, right to property, and political rights.
27. The primary objective of the 3 legislation was to give effect to Article 43(1)(a) of the Constitution. There was evidence that the former legal framework (NHIF) had failed to realize those rights and in any event, it was unsustainable. The evidence on record showed that the principle of solidarity was lacking in the former legal framework under NHIF. That continued voluntary contribution was unsustainable. It was evident that unless some sort of compulsion or sanction was applied, then the realization of the rights under Article 43(1)(a) would be a mirage.
28. The objectives of sections 26(5) and 27 of SHIA were noble. They were aimed at bringing solidarity and equity in terms of subscription and contribution to the fund and at the same time ensuring that

the benefits were spread across the population and were both sustainable and a reality. Therefore, applying the principles for limitation under Article 24 on the reasonableness, the nature of the right, the extent of the limit, and the proportionality, the proposed limitation under Article 6(3) and 12(1) was reasonable, justifiable, and proportionate.

29. However, to the extent that sections 26(5) and 27(4) of SHIA had not made exceptions to the right to emergency medical services, the same could not stand the test of constitutionality. They offended Article 43(2) of the Constitution. That was because the precondition set out in those 2 provisions infringed on the right to access to emergency services on one hand while it was the same right that the state aspired to realize with the impugned Acts.

30. The import of the impugned provisions would mean that if a person was rushed to hospital in whatever state, including an unconscious state, he/she would only access emergency treatment upon proof of compliance. The right to life and emergency services should have and ought to have been shielded and to the extent that the provisions did not shield or exempt the right to emergency treatment set out in Article 43(2) they were unconstitutional.

31. The Commission must be consulted even though it may or may not set out a recommendation on the proposed legislation. Indeed Article 205(1) was couched in mandatory terms. There was no evidence to show that the Commission of Revenue was consulted or invited to make any recommendations on the 3 impugned legislations. The failure by either of the Houses (the National Assembly and Senate) to consult the Commission on enacting legislation that related to financial matters concerning county governments was unconstitutional. The consultations were crucial for informed decision-making and ensuring fiscal responsibility and equity. It was therefore quite imprudent for the 2 houses to reduce the Commission into a bystander in such critical pieces of legislation.

32. The Social Health Insurance Fund, the Primary Health Fund, and the Emergency Care Insurance Fund were all established under sections 25, 20, and 28 of the Act respectively. By dint of section 5 of the Act, it was a function of the Authority to manage the funds and to develop guidelines for the operations and implementation of the Funds established under the Act. However, the operationalization of the specific sections was yet to be effected by way of regulations. There was reason for apprehension because the existing section was introduced ignoring a key principle under Article 201(a) which emphasized on the need for openness, accountability, and public participation in financial matters.

33. The provisions of Article 201 of the Constitution must be understood and interpreted against a histography of Kenyan society. The drafters of the Constitution were certainly intent on representing a departure from a past where public financial matters were a preserve of closed dialogue in opaque rooms only rubberstamped by Parliament. Section 38 failed the test under Article 201(a) of the Constitution and was therefore unconstitutional.

34. The effort of the Cabinet Secretary in attempting to realize the social economic rights provided under Article 43 was commendable. The research and industry shown in coming up with the pieces of legislation were also commendable. The objectives and purpose of the impugned legislation were to have a progressive, transformative, and huge impact on the realization of universal healthcare for the country. However, the haste with which they were enacted infringed on the national values and principles of the Constitution. In as much as it was a noble intention, the constitutional tenets that bound Kenya could not be disregarded. Article 20 required Kenyans to promote and protect the values that underlie an open and democratic society and the spirit, purports, and objects of the Bill of Rights.

35. Being cognizant of the importance of the impugned Laws and the input that had already gone into their enactments and recognizing the purport of the enactments as far as realization of the rights under Article 43 of the Constitution, Parliament was allowed to redeem itself and save the Laws. The breaches that tainted the Laws were redeemable within and could be corrected.

Petition allowed.

Orders

i. *Parliament ought to undertake sensitization, adequate, reasonable, sufficient, and inclusive public participation under the Constitution before enacting the said Acts and amending the unconstitutional provisions in terms of the judgment.*

ii. *Compliance with (i) above be undertaken within 120 days of the date of the judgment.*

iii. *Within that period, the Acts shall remain suspended.*

iv. *In default of (i) and (ii) above, on October 11, 2024, the following relief shall take effect forthwith: -*

    1. *A declaration was thereby issued that the entire Social Health Insurance Fund Act, 2023; the entire Digital Health Act, 2023 and the entire Primary Health Act, 2023 were all unconstitutional for the reasons set out in the Judgment and therefore invalid, null and void.*

v. *Each party to bear their own costs.*

Citations

Cases

1. Anarita Karimi Njeru v Republic Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) — (Explained)
2. Association of Gaming Operators Kenya & 41 others v Attorney General & 4 others Petition 56 of 2014 — (Explained)
3. British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party) Petition 5 of 2017; [2019] KESC 15 (KLR) — (Explained)
4. Commission of the Implementation of the Constitution v Parliament of Kenya and 5 others (Petition 454 of 2012; [2013] KEHC 6313 (KLR) — (Applied)
5. Independent Electoral and Boundaries Commission & another v Mule & 3 others Civil Appeal 219 of 2013; [2014] KECA 890 (KLR) — (Explained)
6. Institute of Social Accountability & another v National Assembly & 4 others Petition 1 of 2018; [2020] KESC 74 (KLR) — Explained
7. In the matter of Council of Governors & 47 others Reference 3 of 2019 [2020] KESC 65 (KLR) (Civ) — (Explained)
8. Kaps Parking Limited & Paytech Limited v County Government of Nairobi & Nairobi City County Assembly Petition 104 of 2020; [2021] KEHC 5819 (KLR) — (Explained)
9. Kenya National Commission on Human Rights v Attorney General and others Advisory Opinion Reference 1 of 2017; [2020] KESC 54 (KLR) — (Explained)
10. Law Society of Kenya v Attorney General & 2 others Civil Appeal 96 of 2014; [2019] KECA 344 (KLR) — (Explained)
11. Legal Advice Centre & 2 others v County Government of Mombasa & 2 others Constitutional Petition 39 of 2016; [2022] KEHC 12338 (KLR) — (Applied)
12. Mate Justus Kariuki & another v Martin Nyaga Wambora & another (Civil Appeal 24 of 2014; [2014] KECA 376 (KLR) — Explained
13. Matemu v Trusted Society of Human Rights Alliance & 5 others Civil Application 29 of 2014; [2014] KESC 6 (KLR) — (Explained)
14. Otieno Kenneth v Attorney General & another Petition 127 of 2017; [2017] KEHC 4811 (KLR) — (Explained)
15. Pevans East Africa Limited & another v Chairman, Betting Control and Licensing Board and 7 others Petition 353 & 505 of 2017; [2017] KEHC 9684 (KLR) — (Explained)

South Africa

1. Certification of the Constitution of the Republic of South Africa (1996 (4) SA 744 — Explained

2. Doctors for Life International v Speaker of the National Assembly and others [2006] ZACC 11; 2006 (12) BCLR 1399 ; 2006 (6) SA 416 — Explained

Statutes

1. Civil Procedure Act (cap 21) — section 6 — (Interpreted)
2. Constitution of Kenya, 2010 — articles 1(1); 1(3); 6(3); 7(1); 12(1); 10(2)(b); 24; 26(1); 31; 43(1)(2)(a); 93(2); 109(4); 110(3); 118(1)(b); 174; 205(1)(2); 206(1)(a);232(1)(d); Schedule IV — (Interpreted)
3. Data Protection Act (cap 411C) — section 31 — (Interpreted)
4. Digital Health Act (No 15 of 2023) — sections 26(5); 27 — Unconstitutional
5. Primary Health Care Act (No 13 of 2023) — section 16(c) — Unconstitutional
6. Registration of Persons Act (cap 107) — sections 5(1)(g)(ha) — (Interpreted)
7. Social Health Insurance Act (No 16 of 2023) — sections 5, 26(3)(5)(6)(7); 27(1)(d); 27(2); 27(2)(c); 27(4); 38; 47(3); part I — (Interpreted)
8. Statutory Instruments Act (cap 2A) — section 5, 6, 8, 9, 11; part III — (Interpreted)

Advocates

None mentioned

JUDGMENT

1. Background to the Petition

1. Article 43(1)(a) of the *Constitution* of Kenya 2010 (" the *Constitution*") provides as follows: -

> " Every person has the right—to the highest attainable standard of health, which includes the right to health care services, including reproductive health care..."

2. In order to realize the aspirations, set out in the said article, in October 2023 the Legislature enacted 3 legislations: -

   i. The *Primary Health Care Act* No 13 of 2023 ("PHCA") whose purpose is to provide a framework for the delivery of, access to and management of primary health care and for connected purposes,

   ii. The *Digital Health Act* No 15 of 2023 ("DHA") whose purpose is to provide for the establishment of the Digital Health Agency; to provide a framework for provision of digital health services; to establish a comprehensive integrated digital health information system; and for connected purposes and

   iii. The *Social Health Insurance Act* No 16 of 2023 ("SHIA"), whose purpose is to establish the framework for the management of social health insurance; to provide for the establishment of the Social Health Authority; to give effect to article 43(1)(a) of the *Constitution*; and for connected purposes.

3. The petitioner now challenges the constitutionality of the 3 statutes ("the impugned statutes") on the grounds more specifically summarized hereafter. The respondents, in turn, justify the enactment of these statutes by citing the overarching need to breathe life to article 43(1)(a) and article 24 of the *Constitution*, which pertains to limitations of rights and fundamental freedoms.

The Petitioners Case

4. By a petition dated 24/11/2023, Joseph Enock Aura (the petitioner), challenges the constitutionality of the impugned statutes seeking various reliefs, including a declaration of their unconstitutionality and nullification.

5. The petitioner through the said petition and his written submissions first raises concerns about the process by which the impugned statutes were enacted. Referring to *SHIA*, it is his contention that the same underwent its first reading in the National Assembly without complying with article 110(3) of the *Constitution*, which mandates concurrence from the Speakers of both houses regarding Bills concerning county governments.

6. He further contends that on 14/9/2023, the National Assembly reduced the publication period for the Social Health Insurance Bill ("SHIB") from 14 to 3 days. To him that violated article 118(1)(b) of the *Constitution* on public participation.

7. Additionally, the petitioner criticizes an advertisement placed by the National Assembly ("NA") on 15/9/2023, inviting Kenyans to access the Bill on itsnwebsite and submit comments by 22/9/2023.

8. He argues that the advertisement lacked the context of a proper invitation, being too small and nearly illegible. He compares this advertisement unfavorably with those placed by other public institutions. Moreover, he claims that Kenyans were not afforded sufficient time to engage and deliberate on the Bill, questioning the NA's focus on Machakos County at the expense of the other 46 counties.

9. Regarding the *PHCA*, the petitioner criticizes the Senate for the inadequate time allocated for public participation. He notes that the Bill was introduced in the Senate on 19/9/2023 and advertised on 21/9/2023 for public participation. That the deadline for public submission of memoranda was on 24/9/ 2023, a weekend, which he argues was too brief. Additionally, he highlights that a scheduled public participation event in Turkana did not take place.

10. Concerning the *DHA*, the petitioner similarly critiques the short notice provided for submission of memoranda. He faults both the National Assembly and the Senate for not conducting any public participation engagements in Kiswahili, contrary to article 7(1) of the *Constitution*, noting that the majority of Kenyans understand Kiswahili better than English.

11. The petitioner contends that section 26(5) of *SHIA* violates the right to life protected under article 26(1) of the *Constitution*. That withholding public services at both national and county levels from unregistered and unpaid members would infringe upon article 174 of the *Constitution*. Additionally, he asserts that section 27(4) of *SHIA* breaches article 43(2) by restricting access to health services solely to registered and paid-up members.

12. Regarding section 47(3) of *SHIA*, the petitioner argues that it is unconstitutional because it requires Kenyans to undergo digitization through unique biometrics. He asserts that this provision relies on sections 5(1)(g) and 5(1)(ha) of the *Registration of Persons Act*, which has since been declared unconstitutional by the Court.

13. Furthermore, the petitioner raises concerns about section 26(3) of *SHIA*, alleging it could facilitate the exploitation of children by requiring digital registration for those born after the legislation's enactment. He also objects to additional provisions introduced into the Act without undergoing public participation, specifically highlighting sections 26(6), 26(7), and section 38 thereof.

14. The petitioner insists that public participation on the impugned statutes should have been conducted in both English and Kiswahili. That there was no rebuttal from the respondents regarding the exclusive

use of English during these engagements. He criticizes the *PHCA* for being overly prescriptive towards counties and for assigning healthcare responsibilities to untrained Community Health Promoters.

15. Based on the foregoing, the petitioner seeks reliefs in the following terms:

    i. A declaration do issue that sections 26(5), 27(1)(a), 27(4), 38, and 47(3) of the *Social Health Insurance Fund Act*, 2023, are inconsistent with the *Constitution* of Kenya, and therefore null and void to the said extent,

    ii. A declaration do issue that in purporting to confer upon unlicensed, unqualified and arbitrarily appointed "Community Health Promoters" the critical responsibility of grass root primary health care across Kenya's counties, the *Primary Health Act*, 2023 sabotages the realization by Kenyans of quality health care pursuant to article 43(1)(a) of the *Constitution* of Kenya.

    iii. A Declaration do issue that there having been no Report availed to the National Assembly of Kenya by the 4th Respondent herein Commission on Revenue Allocation to the Public pursuant to article 205(1) of the *Constitution* of Kenya for consideration under article 205(2) of the *Constitution* of Kenya before the voting on the Social Health Insurance Fund Bill, 2023, the *Digital Health Act*, 2023 is null and void.

    iv. A Declaration do issue that the exclusion of the originally framed Clause/Section 38 of the Social Health Insurance Fund Bill, 2023 in the final *Social Health Insurance Fund Act*, 2023 constitutes a violation of article 206(1)(a) of the *Constitution* of Kenya which demands that all money raised and or received by an entity on behalf of the National Government be paid into the Consolidated fund with the necessary proviso which in this instance was breached

    v. A declaration do issue that the enactment of the *Social Health Insurance Fund Act*, 2023, the *Primary Health Care Fund Act*, 2023, and the *Digital Health Act*, 2023 was in contravention of the National Government's role in health matters as prescribed in Schedule 4 of the *Constitution* of Kenya and are therefore null and void to the said extent.

    vi. A declaration do issue that the entire *Social Health Insurance Fund Act*, 2023; the entire *Digital Health Act*, 2023 and the entire *Primary Health Act*, 2023 are all invalid having been enacted without complying with the mandatory requirements of the *Statutory Instruments Act*.

    vii. A declaration do issue that the entire *Social Health Insurance Fund Act*, 2023; the entire *Digital Health Act*, 2023 and the entire *Primary Health Act*, 2023 are all invalid for lack of effective, tangible and mandatory public participation as prescribed and required under articles 10(2)(b) and 118(b) of the *Constitution* of Kenya and are all therefore null and void.

    viii. An order of prohibition do issue, restraining the Respondents either jointly and/or severally by themselves, their officers acting at their behest, agents, assigns, representatives, employees, servants or otherwise howsoever from giving effect to, enforcing, or taking any steps to enforce, or in any way implementing and or continuing the implementation of any aspect of the impugned of the *Social Health Insurance Fund Act*, 2023, *Digital Health Act*,2023 and the *Primary Health Care Act*, 2023.

    ix. An injunction do issue, to restrain the 3rd Defendant, The Social Health Authority by itself, its servants, agents, employees, Board, or otherwise howsoever from executing any of the functions stipulated in Part I of the *Social Health Insurance Fund Act*, 2023.

x. A copy of the Judgment herein made implicating the *Social Health Insurance Fund Act*, 2023, *Digital Health Act*, 2023 and the *Primary Health Care Act*, 2023 be transmitted to the office of Hon Attorney General for information and necessary action.

xi. Any other, further or better relief that this Honourable Court may deem just and expedient to issue in the circumstances of this case.

xii. Costs of this petition to be awarded to the Petitioner.

The Respondents' Case

The 1st respondent ("the CS Health")

16. The CS opposes this petition through a replying affidavit sworn by the Cabinet Secretary for Health, Nakhumicha S. Wafula, on 7/12/2023 and the written submissions to buttress the averments.

17. She asserts that the Ministry of Health conducted public participation by publishing notices on its website inviting the public to review the Bills and submit comments. She states that the Bills were accessible on the Ministry's website and that targeted stakeholders were invited to physical meetings to present their views, which occurred between 4/9/2023 and 19/9/2023.

18. She argues that the stakeholders' comments were consolidated into a memorandum and presented to both houses of Parliament. That public participation was thoroughly conducted in the enactment of the 3 impugned Acts, involving the Ministry of Health, the NA, and the Senate, with a focused engagement on targeted stakeholders, thereby ensuring robustness in the engagements.

19. The CS Health relies on the Court of Appeal decision in *Legal Advice Center and 2 Others v County Government of Mombasa & 4 Others* [2018] eKLR to justify that this approach to public participation encompassed all individuals intended to be affected by the 3 laws. The CS argues that the burden was on the petitioner to demonstrate that the public participation process did not meet constitutional standards, which she asserts was not proven.

20. She defends the concept of mandatory health insurance for all citizens as rooted in the principles of solidarity and universality. These, she states, are aimed at spreading risks across the entire population to enable access to essential healthcare services and prevent "free riding." The CS emphasizes that a mandatory health insurance scheme would ensure stable funding, promote preventive care, reduce public financial burdens, and provide equitable access to medical care.

21. In further response, the CS notes that despite concerns over section 26(5) of *SHIA*, no constitutional rights would be violated, supporting the unique identifier's role in enhancing privacy, confidentiality, and fraud prevention.

22. Regarding the *PHA*, the CS asserts that community health promoters are vital in supporting healthcare workers to implement preventive and promotive health strategies.

The 4th respondents' case ("the Commission on Revenue Allocation" or "the Commission")

23. The Commission on Revenue Allocation opposed the petition through a replying affidavit and further affidavit both sworn by the Commission Secretary, James Katuleand also filed their written submissions.

24. The Commission acknowledges that the impugned Acts, specifically under section 27(1)(d) and 27(2) of *SHIA*, as well as section 16(c) of the *PHEA*, contain provisions concerning financial matters affecting

counties. The Commission Secretary in his replying affidavit argues that the Commission should have been consulted to provide recommendations for consideration by both houses of Parliament. He confirms that the impugned Acts were enacted without the Commission's involvement.

25. In what appears to be a change of tune, the Commission, through a subsequent further affidavit asserts that the lack of consultation does not render the impugned Acts unconstitutional.

The 5th respondent's case ("National Assembly (NA)"

26. The National Assembly filed a replying affidavit in opposition to the petition sworn by the Clerk of the National Assembly, Samuel Njoroge, on 2/2/2024. It raises a preliminary point, that the petition is *sub judice* Nairobi High Court Constitutional Petition No E 413 of 2023 Dominic Masiya Oreo v National Assembly & Others and ELRC Petition No E199 of 2023 Dominic Masinya Oreo v National Assembly & Others. That it should be stayed in light of Constitutional Petition No E 413 of 2023.

27. By way of substantive arguments, the NA confirms that the Digital Health Bill (hereinafter the DHB) was introduced before the House on 8/9/2023, while the Social Health Insurance Fund Bill (SHIFB) was introduced on 11/9/2023. Both Bills underwent their first reading on 14/9/2023.

28. Advertisements soliciting public comments were published in newspapers on 15/9/2023 and 16/9/2023. In accordance with article 118 of the *Constitution*, the NA also sought memoranda from various key stakeholders. The Bills underwent their second reading on 26/9/2023 and the third reading on 12/10/2023.

29. Regarding the Primary Health Bill (PHB), the Clerk confirms that it was first considered by the Senate on 19/9/2023, and public comments were invited via print media. The second and third readings of the Bill occurred in the Senate on 12/10/2023 and 17/10/2023, respectively. That the President subsequently assented to all three impugned Acts.

30. Responding to the petitioner's argument regarding the short publication period, the NA asserts that the House has discretion to shorten publication times as the *Constitution* does not prescribe specific timelines for Bill publication. It maintains that there is no mandatory requirement for the Commission to provide recommendations on County Bills before their enactment into law.

31. The NA defends the public participation exercise and challenges the petitioner to provide evidence of exclusion of any person or entity from the process. It maintains however, that state that views expressed during public participation are not binding on the House. The Assembly denies any exclusion of original clauses from the Bills in the final Acts asserting that it has the authority to amend Bills before passing them into law.

32. The NA contends that the challenged laws do not contravene constitutional provisions. It argues that section 26(5) of *SHIA*, when read alongside section 27, does not intend to limit emergency services as outlined in article 43(1)(a) of the *Constitution*.

The 6th respondents' case ("the Senate")

33. The Senate opposed the petition through a replying affidavit sworn by the Clerk of the Senate, Jeremiah Nyegenye, on 19/2/2024 and written submissions in support of the same. He states that the PHB underwent its first reading on 19/9/2023. The Bill was advertised in the Daily Nation and Standard Newspapers on 21/9/2023, inviting public submissions. Additionally, the invitation for public participation was posted on the Parliament website and social media platforms.

34. He asserts that the Senate Committee on Health received submissions from various stakeholders, and a public hearing was conducted on 26/9/2023 in Turkana County. He justifies the Senate's session in Turkana, arguing it was constitutional as the people of Turkana had an equal right to voice their opinions on the Bills.

35. He insists that the Senate conducted extensive public participation during the legislative process of the impugned Acts, affirming that amendments did not necessarily align with public views expressed but were within Parliament's discretion as governed by its Standing Orders and procedures.

36. The deponent confirms that the PHB was passed by the Senate with amendments on 28/9/2023 and forwarded to the National Assembly. Similar procedures applied to the DHB and SHIFB.

37. The Senate asserts the presumption of constitutionality for each legislation and argues that this presumption can only be overturned by demonstrating a constitutional breach. It relied on the case of *Commission of the Implementation of the Constitution v Parliament of Kenya and 5 Others* [2013] eKLR in support of that proposition.

38. According to the Senate, the petitioner had failed to demonstrate any such breach.

The 7th respondent's case (Council of Governors "COG")

39. The Council of Governors (COG) affirms its commitment to health sector reforms aimed at enhancing access to healthcare, transparency, and accountability. It denies direct involvement in the legislative process of the impugned statutes but acknowledges raising concerns during the public participation exercise.

40. It raises concern regarding the *SHIA*, specifically highlighting issues with section 5 concerning the separation of the roles of the Authority, section 26(5) concerning compliance prerequisites for accessing government services and sections 27(1)(d) and 27(2)(c) concerning county government fund appropriations.

41. It contends that the impugned statutes hinder access to government services by citizens, citing section 26(5) of *SHIA* as unconstitutional due to its requirement for proof of compliance.

42. Regarding the *PHA*, the COG argues that it undermines the constitutional role of county governments as outlined in Schedule 4.

The 9th respondent's case (the Data Protection Commissioner "the Commissioner")

43. The Data Protection Commissioner opposes the petition through a replying affidavit sworn byRose Maseroon 5/3/2024. The totality of the Commissioner's case is further buttressed by way of written submissions.

44. The Commissioner argues that SHIA is not in contravention of the *Data Protection Act* 2019, ("DPA"), which governs privacy rights. She emphasizes that any concerns regarding children's privacy are addressed under the *DPA* framework. Additionally, she states that section 31 of the DPA mandates a Data Protection Impact Assessment to evaluate potential risks to individuals' rights and freedoms.

45. She confirms that the Commission is fully equipped to oversee the processing of personal data arising within the frameworks established by the contested Acts.

The 1st interested party's case ("the Kenya Medical Practitioners and Dentists Council (KMPDC)")

46. Through a replying affidavit sworn by Dr. David Kariukion 19/2/2024 the KMPDC confirms that under *SHIA*, it is responsible for the registration, inspection and categorization of medical practitioners and facilities. The Council confirms that active public participation was conducted where it presented its views, which were considered.

The 2nd interested party's case ("the Kenya Medical Association (KMA)").

47. The KMA, through a replying affidavit sworn by Dr. Brendan Obondoon 22/2/2024 2024 supports the position taken by the KMPDC. It confirms having been invited together with other stakeholders to a public participation forum held on 5/9/2023 and that it submitted its memoranda to the NA and the Senate.

48. By way of written submissions KMA further confirms that the public participation conducted met the threshold under article 10(2) of the *Constitution*.

49. We have set out the respective positions by each of the parties in this petition albeit in summary. Having considered the totality of the pleadings, written and oral submissions, the authorities cited and evidence presented before us, the following are the issues that fall for determination.

    I. Whether the petition is subjudice.

    II. Whether there was breach of articles 10 and 118 of the *Constitution* of Kenya on public participation in the enactment of the impugned legislations;

    III. Whether the process of enactment of the impugned legislations by the National Assembly and Senate was irregular;

    IV. Whether the impugned legislations offend the various provisions of the *Constitution* as alleged or at all;

    V. Whether Sections 26 (5) and 27 of the *Digital Health Act* are inconsistent with the *Constitution*;

    VI. Whether section 38 of the *Social Health Insurance Fund Act* 2023 constitutes a violation of articles 201, 205 and 206 (1) of the *Constitution*

II: Analysis And Determination

Issue No. 1: Whether the petition is sub-judice

50. The NA raises a preliminary point, arguing that this petition is *sub judice* in light of NRB H.C Pet No. E413 of 2023 *Dominic Masinya Oreo vs National Assembly* and ELRC Pet. No. E 199 of 2023 Dominic Masinya Oreo vs National Assembly. According to the National Assembly, since these cited petitions are currently pending before competent courts on the same subject matter, this petition should be stayed.

51. Under section 6 of the *Civil Procedure Act*, the doctrine of sub judice requires the existence of two similar suits, with one being first in time, pending before different courts, and involving the same parties seeking similar reliefs. The Supreme Court of Kenya clarified the requirements for invoking the

doctrine of *sub judice* in *Kenya National Commission on Human Rights v Attorney General and others* [2020] eKLR, wherein it stated that:-

> " A party invoking the doctrine of sub judice must establish that there is more than one suit over the same subject matter; one suit was instituted before the other; both suits are pending before Courts of competent jurisdiction; and the suits involve the same parties or their representatives."

52. Upon reviewing the aforementioned petitions alongside this petition, we observe that Dominic Masinya Oreo is the petitioner in those cases, suing 3 respondents; the National Assembly, the Attorney General and the Cabinet Secretary of the Ministry of Health. In contrast, the petitioner in the present case is Aura Joseck Enock , who has sued not only these 3 respondents but also 8 additional respondents and two interested parties.

53. Furthermore, we have examined the reliefs sought in the cited petitions. While some reliefs overlap, they are not entirely similar. The current petition is more comprehensive and expansive in its scope. Based on the foregoing, we conclude that the parties involved are not identical and neither are all the issues. Although the other petitions touch on employment issues and NHIF, these are not central to the present case.

54. Accordingly, we find that the present petition is not *sub judice*, and accordingly, we proceed to address the substantive issues before us.

Issue No. 2: Whether there was breach of articles 10 and 118 of the *Constitution* of Kenya on public participation in the enactment of the impugned legislations

55. Public participation stands as a fundamental national value and governance principle prominently enshrined in the *Constitution* of Kenya and highlighted in articles 10, 118 and 232. Article 10(2)(a) specifically emphasizes "Participation of the people" as a cornerstone of Kenya's governance ethos. It reinforces article 1 of the *Constitution* on the sovereignty of the people. It's spirit is that decisions should not be made affecting the people of Kenya without recourse to them.

56. Article 118 of the *Constitution* requires Parliament to ensure public participation in the process of legislation. Parliament is required to conduct its business transparently and in the open and hold its sittings and those of the Committees in a place open and accessible to the public. The importance of this requirement is that participation of the people in their own affairs gives impetus to good governance, improves service delivery and responsiveness of government and its agencies.

57. Article 118(1) provides thus;

> " Parliament shall;
>
> a. ...
>
> b. facilitate public participation and involvement in the legislative and other business of Parliament and its committees"

58. The principle of public participation extends beyond Parliament. Articles 10 and 232 binds all state organs, state officers, public officers and all persons when applying, interpreting, enacting the *Constitution* or implementing public policy directions. Article 232(1)(d) provides;

> " 1. The values and principles of public service include;

(d) involvement of the people in the process of policy making"

59. A perusal of Standing Order No. 127 (6th edition) of the National Assembly Standing Orders shows that, aware of the importance of the aspect of public participation, Parliament captured the principle well when it required that Bills should first be sent to the relevant Departmental Committees which shall conduct public participation. Standing Orders 127(2) and (3A) provide;

> "(2) The Departmental Committee to which a Bill is committed shall facilitate public participation on the Bill through an appropriate mechanism, including inviting submission of memoranda;
>
> holding public hearings;
>
> consulting relevant stakeholders in a sector; and
>
> consulting experts on technical subjects
>
> (3A) The Departmental Committee shall take into account the views and recommendations of the public under paragraph (3) in its report to the House."

60. In the same manner, the Senate Standing Order No. 145 provides for Committal of Bills to Committees and public participation as follows: -

> "(1) A Bill having been read a First Time shall stand committed to the relevant Standing Committee without question put....
>
> (5) A committee to which a Bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the committee makes its report to the Senate."

61. The Supreme Court in *British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party)* (Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) (Judgment) set out the following guidelines on public participation.

> "As a Constitutional principle under article 10(2) of the *Constitution*, public participation applies to all aspects of governance.
>
> i. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
>
> ii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this Constitutional principle using reasonable means.
>
> iii. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a Constitutional requirement. There is need for both quantitative and qualitative components in public participation.
>
> iv. Public participation is not an abstract notion; it must be purposive and meaningful.

v. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

vi. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

vii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

viii. Components of meaningful public participation include the following:

a. clarity of the subject matter for the public to understand;

b. structures and processes (medium of engagement) of participation that are clear and simple;

c. opportunity for balanced influence from the public in general;

d. commitment to the process;

e. inclusive and effective representation;

f. integrity and transparency of the process;

g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter".

62. Beyond our borders, Ngcobo J in *Doctors for Life International vs. Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 CC, held:-

> " The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.... Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as "a continuum that ranges from providing information and building awareness, to partnering in decision-making." This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realized."

63. The Learned Judge further observed: -

> "Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement. What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process."

64. In view of the foregoing, we opine that public participation requires the following bare minimum: -

i. Proper sensitization on the nature of legislation to be enacted or policy to be effected;

ii. Adequate notice depending on the circumstances which must however be reasonable;

iii. Facilitation of the public to ensure that members of the public are able to access the information required in a convenient and practical manner, understand the same, have a meaningful opportunity to attend, contribute and provide their views;

iv. The views of the public should be considered and where they are to be rejected or declined, reason for such rejection and dismissal should be stated; This will obviate the public participation being a cosmetic or a public relations act;

v. Public participation should be inclusive and should reflect a fair representation and diversity of the populace to be affected;

vi. There must be integrity and transparency of the process

65. In the petition before us, there are 3 pieces of legislation that are being challenged. The petitioner contends that there was no adequate public participation. That the period of publication was reduced to 3 days and the time given for public participation was too short. The affected respondents contend otherwise.

66. The CS's position is that the Ministry placed public notices in the Daily Nation of 5/9/2023 calling for comments and inviting for public participation. That members of the public could also access the Bill on the Ministry of Health website to read and send comments and memoranda. That the notice informed members of the public that they could issue their feedback via email. Following that, the Ministry received memoranda physically and digitally from different stakeholders.

67. The CS contends that she invited various stakeholders for physical meetings for them to submit comments between 4/9/2023 and 19/9/2023. A list of 29 stakeholders comprising of medical associations, NGOS and religious bodies has been presented by the CS as proof of this contention. In her view, this represented sufficient public participation in developing the policy that informed the enactment of the impugned legislations.

68. The NA and the Senate have equally defended their processes of public participation. According to the NA the DHB and the SHIFB were published on 8/9/2023 and 11/9/2023, respectively. They were

read in the NA for the first time on 14/9/2023 and committed to the Departmental Committee on Health on the same day.

69. The Committee placed advertisements on 15/9/2023 and 16/9/2023 calling for comments on both Bills to be submitted on or before 22/9/2023. That it sought memoranda from several stakeholders and engaged the Ministry of Health and COG between 17/9/2023 and 20/9/2023 in Mombasa. It also engaged the Kenya Association of Private Hospitals and the National Health Insurance Fund between 22/9/2023 and 25/9/2023 in Machakos County.

70. As for the Senate, an advertisement was placed on the Daily Nation on 4/10/2023 calling for memoranda on the DHB and SHIFB, to be received on or before 7/10/2023. The Senate also sought comments from 10 stakeholders comprising of 4 government agencies, 5 stakeholders in the private sector and the Central Organization of Trade Unions (COTU). In respect to the PHB, the Senate placed advertisements on print media on 21/9/2023 calling for memoranda by 24/9/2023.

71. We have considered the evidence on record. As regards the CS, at page 379 of the exhibits to her replying affidavit sworn on 1/12/2023, are 4 copies of adverts carried in the Daily Nation of 5/9/2023. The adverts called for comments on the 3 draft Bills. They were categorical on the organizations that were invited for public participation on specific days viz; 5th ,6th ,7th, and 8/9/2023. As for the public, the comments were to be submitted within 15 days, on or before 19/9/2023.

72. In light of our earlier determination on the minimum threshold for meaningful public participation, and in the absence of any evidence to the contrary, it is our finding that there was no sensitization of the public having in mind the nature, extend and magnitude of the policy that was to inform the enactment of the Bills. Sensitization ought to have been done before inviting comments from the public.

73. As to the notice, we find that 14 days for submission of memoranda was not adequate in the circumstances given that it concerned 3 Bills that were highly technical with far reaching consequences. There is no evidence that there was any deliberate attempt to facilitate the public to give any meaningful contribution within this period.

74. While we are alive to the Supreme Court's decision in the *British American Tobacco case* (*supra*), on the fact that someone not being heard does not vitiate the process, we hasten to add that public participation must be both qualitative and quantitative.

75. The CS did not produce any evidence to show that ordinary members of the public submitted any comment. We are not surprised at this given the short notice and the technical nature of the Bills. All that the CS produced was a list of stakeholders comprising of medical associations, NGOs and religious bodies who had specifically been invited to give their views as already stated above.

76. As relates to NA, the notice given was between 15/9/2023 and 22/9/2023 to submit memoranda. 15/9/2023 fell on a Friday. The earliest working day in the notice period was Monday 18/9/2023. The period between Monday 18/9/2023 and Friday 22/9/2023 was too short in our view, for members of the public to access the 3 Bills online, study them, process them and make any meaningful contribution.

77. Moreover, the alleged public participation in Mombasa between 17/9/2023 and 20/9/2023 only involved the Ministry of Health and the COG. No evidence has been placed before us to show that members of the public were invited or were present at the meeting.

78. As regards the Senate, the advertisement inviting views on the PHB was carried in the dailies on 21/9/2023, giving up to 24/9/2023 for receipt of memoranda. 21/9/2023 was a Thursday leaving only 1 clear working day for the public to gain access to the website, interrogate and give views on the Bill.

79. Regarding the other 2 Bills, that is SHIFB and DHB, the advertisement was placed in the dailies on 4/10/2023 for submission of memoranda by 7/10/2023. The 4/10/2023 was a Wednesday, leaving only 2 clear working days to access the website, interrogate and provide what was supposed to be meaningful comments on the Bills.

80. The Senate contends that it carried out a physical public participation sitting in Lodwar, Turkana County. We have perused the documents relating to the alleged public hearing of 26/9/2023 at the Lodwar Vocational and Training Centre. Our finding is rather surprising. It emerges that the particular sitting was an already pre-determined ordinary sitting of the Senate dabbed Senate Mashinani.

81. At page 199 of exhibit JN9 of Jeremiah Nyengenye's replying affidavit sworn on 19/2/2024, the Hansard Reads as follows:'

> " The sittings were held pursuant to the resolutions of the Senate made on 8/3/23 and on 30/5/2023 to hold its plenary and committee meetings in the counties for 1 week within the month of September in every session of the 4th Senate. The sittings in Turkana county were held in the backdrop of immense successes realized from the sittings of the Senate outside Nairobi held in Uasin Gishu and Kitui county in September 2018 and 2019 respectively."

82. We have considered the entire Hansard and there is nothing to show that the sitting was intended for public participation on the impugned Bills. No evidence was presented to show that members of the public were invited to that meeting to make representations on the 3 Bills as alleged in the said affidavit. The memoranda produced as JN5 do not attest to the Senate's contention of any public participation at the alleged meeting and we reject the same.

83. We strongly condemn the practice of public officers making misleading statements (and at times, outright falsehoods) under oath, particularly concerning matters of significant public interest and especially in solemn litigation matters.

84. It would also seem that the CS, the NA and Senate all focused on very targeted and specific stakeholders. The criteria used to hand-pick the stakeholders is not explained. Moreover, there is no justification provided for the lack of proactive efforts to involve a broader cross-section of the population, thereby ensuring inclusivity in the process. This focused approach ultimately limited the expression of diverse viewpoints.

85. The other issue of concern is the nature and mode of notice that was sent out to the public to give their written memoranda. We have perused through all the notices by the Ministry of Health, the NA and the Senate. We note that in all of them, the print used is rather small and barely legible. The same fail to meet the threshold for clarity and transparency.

86. In any event, given the demographic nature of Kenyans, 3 days' notice for interrogation of the highly technical Bills was insufficient. We recognize and appreciate that there is a good percentage of the Kenyan populace who are illiterate or have no access to internet and cannot afford newspapers. The Bills were going to equally affect them and as such their input was critical. There ought to have been a deliberate effort to reach out to them.

87. Unlike NHIF which mainly targeted employed Kenyans and those willing to join the scheme, majority of the population never subscribed to NHIF and only did so when critically ill and admitted in hospital. The *SHIA* on the other hand targets every citizen and makes it mandatory for everyone to register and be paid up. There are dire sanctions under sections 26(5) and 27(4) for non-compliance.

88. When legislation is poised to have such profound implications, it is crucial for Parliament to ensure that the public receives sufficient notice and opportunities to express their views. Ultimately, these Acts are intended for the people, whose sovereignty is eloquently affirmed in the preamble of the *Constitution* of Kenya with the resolute declaration, "We the People of Kenya."

89. It is no longer business as usual where the leaders of our country are presumed to know what is suitable for the people. They must consult the people before making decisions that affect them.

90. Accordingly, we find and hold that all the impugned Acts fail to meet the threshold and criteria set out by the Supreme Court and the bare minimum standards we have set out above. They fall short of the constitutional criteria for public participation.

Issue 3: Whether the process of enactment of the impugned legislations by the National Assembly and Senate was irregular:

The *Statutory Instruments Act* (the Act)

91. The petitioner decries the process of enactment of the impugned Acts for being in contravention with sections 5,6,8,9 and 11 of the *Statutory Instruments Act*. Section 5 of the Act provides for consultation before making statutory instruments in certain cases; section 6 for regulatory impact statements; section 8 for notification of regulatory impact statements; section 9 where regulatory impact statements may be unnecessary and section 11 requires laying of statutory instruments before Parliament.

92. The Attorney General and the NA fault the petitioner for his misapprehension of the law. It is their case that the impugned legislations are parliamentary enactments and not statutory instruments and as such not subject to the *Statutory Instruments Act*.

93. The objective of the *Statutory Instruments Act* is discernable from the preamble to the Act. It is to provide for the making, scrutiny, publication and operation of statutory instruments. A statutory instrument is defined under section 2 of the Act as:-

> " Any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued."

94. It is clear from the above definition that the Act applies to those instruments that are made pursuant to an Act of Parliament and not to Acts of Parliament themselves. Although Acts of Parliament and statutory instruments are both forms of legislation, they differ in their nature, creation and application.

95. Simply put, Acts of Parliament are primary legislations which set out broad legal principles and frameworks. Statutory instruments, on the other hand, take the form of secondary or delegated legislation and are laws made by individuals or bodies under powers given to them by an Act of Parliament. These instruments allow for more detailed provisions to be made within the framework set out by the primary legislation.

96. In view of the foregoing, we align ourselves with the submission that Acts of Parliament are enacted pursuant to Parliament's constitutional mandate under article 94 and 95 of the *Constitution*.

97. Given this context, we do further agree with the submission by the respondents that Part III of the Act which provides for regulatory impact assessments is of no relevance to the 3 impugned Acts. It is also our finding that the provisions of section 11 which require laying of statutory instruments before Parliament within seven (7) sitting days after the publication of a statutory instrument does not also apply to the 3 statutes. On these accounts this ground in the petition fails.

The NA Standing Order No. 120

98. The petitioner is aggrieved by the decision of the NA that was taken during the enactment process to reduce the period of publication of the DHB and SHIFB from 14 to 6 days and the PHB, from 14 days to 3 days. He relies on Standing Order No. 120 which provides as follows: 120(1)A

> " A Bill shall not be introduced in the House unless—
>
> ...
>
> (c) the Bill, together with the memorandum referred to in Standing Order 117 (Memorandum of Objects and Reasons), has been published in the Gazette (as a Bill to be originated in the Assembly), and unless, in the case of a Division of Revenue Bill, County Allocation of Revenue Bill, an Appropriation Bill or a Supplementary Appropriation Bill, a Finance Bill, a County Governments Additional Allocations Bill, an Equalization Fund Appropriation Bill a period of seven days, and in the case of any other Bill a period of fourteen days, beginning in each case from the day of such publication, or such shorter period as the House may resolve with respect to the Bill, has ended". (emphasis ours).

99. An extract of the NA Hansard Report of 14/9/2023, found at page 223 of the petitioner's Bundle of Documents confirms the reasons given for the motion to reduce the time of publication. These were that 'these are very critical Bills for the realization of our Universal Health Coverage (UHC)' and further that 'these are a [sic] very important Bills. For our effectiveness, it is good for us to approve them as soon as possible and implement'.

100. In their responses and submissions, the NA and Senate defend this move citing the urgency of the Bills and the discretion that the Standing Orders vests on the Houses to be able to reduce the publication period for Bills where necessary. The NA submits that there is nothing unconstitutional about reducing the period of publication as the *Constitution* has left it to Parliament to determine such timelines.

101. The NA further relied on the case of *KAPS Parking Limited & Another v County Government of Nairobi & Another* [2021]eKLR in support of that position. In that case, the court held that a County Assembly has the power to reduce the period within which a Bill may be introduced into the Assembly upon publication in the Gazette.

102. The question that we must however determine is, whether the discretionary power under Standing Order No. 120 ought to be exercised within any parameters. Secondly, we are required to determine whether on this occasion, Parliament lived up to the parameters required of it in exercising that discretion.

103. Before doing so, we cannot tire to remind ourselves that all power that is exercised by each of the arms of government must be exercised in accordance with the *Constitution* as stated in article 1(1) and 1(3). Article 2 is a further reminder that the *Constitution* binds all state organs, an interdict that is further

emphasized in article 93(2) specifically with respect to the NA and Senate to perform their functions in accordance with the *Constitution*.

104. Article 109(4) of the *Constitution* provides that: -

> " A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with articles 110 to 113, articles 122 and 123 and the Standing Orders of the Houses". (Emphasis).

105. The courts have emphasized time and again that it is not in the space of the Judiciary to interfere with the role of Parliament in the exercise of its constitutional mandate. We proceed from a well guided front on the need to avoid judicial overreach. We nonetheless note that it is well within the mandate given under the *Constitution* for the judiciary to ensure compliance with Constitutional tenets.

106. In *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR, the Supreme Court pronounced itself on the balance between restraint and exercise of constitutional duty. In that case it held that: -

> " From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:
>
> a. Each arm of Government has an obligation to recognize the independence of other arms of Government;
>
> b. Each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;
>
> c. The Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;
>
> d. For the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interest attending each case;
>
> e. In the performance of the respective functions, every arm of Government is subject to the law."

109. Further, in *Pevans East Africa Limited & another v. Chairman, Betting Control and Licensing Board and 7 Others* (2013) eKLR, the Court of Appeal held that: -

> " Where the *Constitution* has reposed specific functions in an institution or organs of state, the court must give those organs sufficient leeway to discharge their mandate and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the *Constitution*, the law or that their decisions are so perverse, so manifestly irrational that they cannot be allowed to stand under the principles and values of our Constitution. Courts must decline to intervene at will in the Constitutional spheres of other organs, particularly when they are invited to substitute their judgment over that of other organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the court do not normally have."

110. Drawing from the foregoing, Courts are called to act with restraint in interfering with the processes of other organs in the exercise of their mandate. However, in exercising discretionary powers under the Standing Orders or any other rules for that matter, Parliament must remember that it is bound by the principles of governance as set out in article 10 of the *Constitution*. Of particular importance is the need to ensure participation of the people, transparency and accountability in the legislation making process.

111. The issue raised by the petitioner pertains to the publication of Bills. We believe that the primary objective of such publication is to uphold constitutional imperatives by ensuring public awareness of new legislative proposals. This transparency enables citizens to grasp the legislative agenda and the substance of a proposed Bill, thereby fostering transparency and accountability in the legislative process. Further, publication ensures that citizens have ample opportunity to thoroughly study and scrutinize any Bill well in advance, facilitating meaningful participation and input from them.

112. From the evidence on record, the NA published 2 out of the 3 Bills relating to the impugned Acts and reduced the period of publication by more than half of the period required under the Standing Orders. The movers of the motion correctly pointed out that the Bills were critical and urgent. As we have already observed, the Bills had potential ramifications to all citizens of this county.

113. Though well intentioned, the NA seems to have been more concerned with the urgency to enact the Bills without taking into account the ramification of such drastic reduction of time and the ripple effect that this had on the overall process.

114. We are alive to the fact that Parliament has the discretion to reduce the period of publication of Bills under the Standing Orders. That discretion however, must be exercised reasonably, judiciously and within proportionality. In the circumstances of this case we are not convinced that the discretion was exercised along those lines.

115. In our assessment, Parliament recognized the significance of the 3 impugned legislations, and hence the more reason to provide adequate time for public notification and thorough scrutiny of the Bills. By shortening the publication period to just 6 and 3 days, respectively, Parliament did not exercise reasonable or proportionate judgment given the nature of these Bills.

116. We also note that there seems to have been lack of proper coordination between the Ministry of Health, the NA and the Senate in the enactment of the impugned Bills. Our observation is informed by the fact that while the Ministry of Health was still in the process of gathering feedback on the impugned Bills with scheduled sessions from 5/9/2023 to 19/9/2023, the NA and the Senate were already in the process of enacting the impugned Bills. This raises the question as to whether the views collected by the Ministry of Health during this period were genuinely considered or if it was merely a superficial exercise to create an appearance of public involvement.

Concurrence of the Speakers under article 110(3)

117. The petitioner takes issue with the alleged breach of article 110(3) of the *Constitution*. He alleges that the necessary concurrence of the Speakers of both Houses on the nature of the Bills was lacking, a contention opposed by both the Senate and the NA.

118. Article 110(3) of the *Constitution* provides that: -

> " Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and whether it is a special or an ordinary Bill".

119. Article 110(3) is couched in mandatory terms. A Bill is considered to concern counties if it affects the functions and powers of the county governments, or it relates to any matters that impact county governments. This determination is crucial because it affects how the Bill is processed and which House has the primary responsibility. The need for prior consensus also ensures that the correct legislative process and clarity in the legislative proceedings is followed by the Houses of Parliament.

120. In contextualizing this issue, and because of what we shall state later on regarding this issue, we recognize that the first reading of a Bill is a formal step in the legislative process where the Bill is introduced to either of the Houses and its title and main objectives are read out. It is a crucial procedural step in the legislative process, serving to formally introduce a Bill, promote transparency, and prepare the legislative body for detailed examination and debate.

121. While the first reading does not involve substantive debate, it sets the stage for the Bill's progression through subsequent legislative stages, ensuring that it receives thorough scrutiny and consideration. It is our view that for this step to be meaningful and procedurally sound, the correct classification and jurisdiction must already be established as mandatorily required in article 110(3) of the *Constitution*.

122. We note that the NA correctly submits that the rationale behind the resolution of the Speakers is to help in determining the House that will handle the Bill. The NA however appears to imply that since the Memorandum and Objects and Reasons of the impugned laws had already stated that they were Bills concerning counties, they needed not wait for the concurrence of the Speakers and that the Bills were in any case considered by both Houses.

123. In our view, the concurrence of the Speakers of the 2 Houses with respect to Bills concerning counties is mandatory. An examination of the record clearly shows that there was blatant disregard of article 110(3) by both Houses of Parliament in the haste to have the impugned legislations passed.

124. An analysis will serve to demonstrate this point. The Senate confirms by way of affidavit and submission that the Speaker of the Senate wrote to his counterpart at the NA seeking concurrence on the nature of the PHCB on 18/9/2023.

125. The Senate confirms that the first reading of the PHCB was on 19/9/2023, that the process of public participation began on 21/9/2023 and that the Senate Health Committee held a public hearing on 26/9/2023. Within record time, on the same day the Committee tabled its report and passed the PHCB with amendments on 28/9/2023.

126. While all this was happening with such haste, the Speaker of the National Assembly had not yet communicated his concurrence as required under article 110(3) of the *Constitution*. It was not until 2/10/2023 after the Bill had been passed by Senate that the Speaker of the NA wrote confirming his consensus that the Bill was an ordinary Bill that concerned counties.

127. Regarding the DHB, the evidence confirms that the Speaker of the NA wrote to his counterpart on 13/9/2023 seeking concurrence of the nature of the DHB. As we have already pointed out, the *DHA* went through the first reading at the NA on 14/9/2023 and an advert was ran on 15/9/2023 inviting public views. All this went on despite that it was not until 19/9/2023 that the Speaker of the Senate signaled his concurrence writing that the ordinary Bill concerned counties.

128. Finally, as regards the SHIFB, the communication exchange for purposes of article 110(3) of the *Constitution* took place vide the letters dated 13/9/2023 and 19/9/2023 when the Speaker of the Senate responded to his counterpart in concurrence over the Bill being an ordinary county Bill. Again, in blatant disregard to constitutional imperatives, the Senate avers and confirms that the Bill had already been introduced to the NA on 14/9/2023.

129. In conclusion to this issue, it is imperative to underscore that despite the Houses presuming concurrence between the Speakers as implicit, they were obligated to adhere strictly to the constitutional procedure. The enactment of the 3 impugned legislations should not have been rushed, especially at the cost of disregarding explicit provisions of article 110(3) of the *Constitution*.

130. In doing so, both the Senate and the National Assembly failed to demonstrate the requisite diligence and responsibility expected in legislative processes. By proceeding in haste, they overlooked procedural safeguards, which are fundamental to ensuring the integrity and legality of legislative actions.

The voting processes

131. The petitioner made extensive oral submissions challenging the irregularity of the omnibus voting process adopted by both Houses in passing the impugned legislations. This issue was however never pleaded in the petition.

132. It is a well-established principle that a party is bound by his pleadings and cannot take an adversary by surprise at the trial. The Court too is bound by the pleadings of parties in its determination.

133. In *Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others* [2014] eKLR it was held that:

> "It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

134. For this reason, we decline the invitation to adjudicate over this question and make no finding on the same.

Issue 4: Whether the impugned legislations offend the various provisions of the *Constitution* as alleged or at all

135. To begin with, we observe that the 159-paragraph petition was drafted in a very imprecise manner. As early as 1979, it was held that Constitutional petitions that allege violation of rights and freedoms should be pleaded with precision. (See *Anarita Karimi vs Republic* [1979] eKLR).

136. In both *Anarita Karimi Case* and *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR, it was established that in a constitutional petition, a party should plead the specific article of the *Constitution* and the right or freedom decreed and plead the actions of the respondent that constitute the alleged violation.

137. The practice of pleading and/or setting out a litany of articles of the *Constitution* and the rights or freedom decreed thereby without juxtaposing them with the corresponding acts that constitute a violation and throwing them on to the court for it to decipher must be discouraged. It amounts to nothing but mere verbiage and inconsequential surplusage. It leads to waste of courts time to go through such a petition and try it.

138. In the present case, save for articles 10, 110, 205, 206 and 118 of the *Constitution*, which we have already dealt with and will refer to later on in this Judgment, the petitioner cited so many articles of the *Constitution* without pleading with specificity how they had been violated. The petition as drafted makes wild allegations on the effect of the legislations without tying them to the specific articles of the *Constitution* and stating how the rights and freedoms therein have been infringed or violated.

139. Be that as it may, we will endeavor to cite the provisions of the *Constitution* that were thrown at the Court and see whether what was pleaded by the petitioner amounts to an infringement or violation of the *Constitution*.

140. Articles 6(3) and 12(1) (a) of the *Constitution* are cited. These provide for the right to access government services throughout Kenya. Article 27 (1) is also cited. It provides for the right not to be discriminated under any grounds. The petitioner contends that sections 26(5) and 27(4) of SHIA violates the aforesaid articles of the *Constitution*. That their net effect is to curtail the people's rights to access public services. We shall consider these in the next issue.

141. Articles 28, 30(1) and 32 of the *Constitution* are also cited. These provide for the right to dignity and integrity; freedom from servitude and slavery and the freedom of conscience, religion and thought. We do not see how the various provisions of the law cited from the impugned legislations would infringe on the dignity of Kenyans, nor subject them to servitude and slavery. The fund introduced by *SHIA* is a form of tax. In our view, it is misleading to state that the unborn children will be loaned monies which loans will subject them to slavery and servitude.

142. Our understanding is that those to be given loans are those in the informal sector who will apply for such loans. The indigents and children will have their contributions paid for by the government free of charge. Accordingly, we do not see how the said provisions of the *Constitution* have been infringed by the impugned legislations.

Issue No. 5: Whether Sections 26 (5) and 27 of the Digital Health Act are inconsistent with the *Constitution*

143. The petitioner has challenged the constitutionality of sections 26(5) and 27(4) of *SHIA* on grounds that the impugned provisions lock out people from accessing emergency medical treatment contrary to article 43(2) of the *Constitution*. He also complains that section 26(5) will limit the right of citizens to access public services as provided for under articles 6(3) and 12(1) of the *Constitution*. The position taken is that because section 26 (5) makes registration of people a prerequisite to accessing public services, it infringes on the economic and social rights to those unregistered under article 43 of the *Constitution*.

144. The COG is in support of the petition and submits that sections 26(5), 27 (1) (a) and 47 (3) of *SHIA* are unconstitutional and unlawful. That section 26 (5) requires proof of compliance with the Act as a precondition to access public services from the government which jeopardizes fundamental rights.

145. It is also submitted that the provision is an affront to the Fourth Schedule of the *Constitution* which assigns functions to the National and County Governments. That county governments are bestowed with the function of service delivery to Kenyans such as licensing, issuing business permits, levying of land rates, county transport and pre-primary education among others.

146. With regards to section 47(3) of *SHIA*, it is submitted that requiring active and up to date contribution as a precondition to access health care services poses a threat to the constitutional right of citizens to access emergency health care.

147. Further, that section 47(3) also violates the right to health by requiring every Kenyan to be uniquely identified using biometrics for provision of health services. The case of *Law Society of Kenya vs Attorney General & 2 Others* (2013) eKLR has been cited. The Court is urged to find that in determining the constitutionality or otherwise of legislative provisions, it must have regard to the purpose and effect of the legislation in question.

148. On the other hand, the position taken by the CS is that the limitation of rights is justified. She cites the provisions of article 24 of the *Constitution* on the limitation of rights and fundamental freedoms.

149. The Courts have laid out the test that ought to be applied in determining the constitutionality or otherwise of statues. In *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR the Court held that: -

> "In determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see *Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others* Nairobi Petition No. 3 of 2011 [2011]eKLR, *Samuel G. Momanyi v Attorney General and Another* (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect".

150. The Canadian Supreme Court in the R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 enunciated this principle as follows;

> "Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity".

151. Likewise, in *Kenneth Otieno v Attorney General & another* [2017] eKLRthe Court held as follows: -

> "First, this Court is enjoined under article 259 of the *Constitution* to interpret the *Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under article 159(2)(e) of the *Constitution* to protect and promote the purpose and principles of the *Constitution*.
>
> Second, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise (see *Ndyanabo v Attorney General of Tanzania* [2001] EA 495). We therefore reiterate that this Court will start by assuming that the CDF Act 2013 is constitutional and valid unless the contrary is established by the petitioners.
>
> Third, in determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see *Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others* Nairobi Petition No. 3 of 2011

[2011]eKLR, *Samuel G. Momanyi v Attorney General and Another (supra))*. Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect".

152. In our view, these decisions point out to a 3-pronged enquiry. First, the object and purpose sought to be archived by the enactment, second, the approach and effect of the approach taken in achieving that objective and purpose and finally the question of proportionality.

153. Before we delve on the impugned provisions and the limitation of rights, we find it important to look at the objects of *SHIA* in a holistic manner. The CS through Mr. Ngatia, SC made good effort to bring out the genesis and historical background of what brought about the need to enact *SHIA* and the other impugned legislations.

154. The significant point emerging is that, the NHIF which has been in place since 15/2/1989 created two categories of contributors. One category being those in formal employment who are forced to contribute by virtue of employment and the second category is those in the informal sector who voluntarily contributed to the fund and stood to benefit from the fund when they fell sick.

155. From the record, statistics show that the contributors from the formal sector constituting 13 % of contributors contributed 83% to the fund. On the other hand, the majority in the informal sector only contributed 17 % of the fund but they constituted the majority of the claimants. This had rendered the fund unsustainable and the CS contended that the scheme would eventually collapse.

156. The CS provided evidence indicating that county governments owe the NHIF Kshs 422,630,364/- out of which Kshs 18,000,000/- is a historical debt. It is therefore submitted that section 27 (2) (c) is intended to enable county governments to appropriate funds for the social protection of indigents or households in need within their respective counties. Section 27 (4) and section 43 (7) are meant to ensure compliance in terms of contribution and prevent fraud and fictious claims by health care providers or the insured.

157. The CS submits that the state is obligated to take progressive measures to realize the rights under article 43. She adds that *SHIA* was enacted to establish the framework for managing social health insurance, providing for the establishment of the Social Health Authority, and giving effect to article 43(1)(a) of the *Constitution* of Kenya.It is her contention that UHC cannot be realized through voluntary contribution and that with that realization, legislative measures to sanction or compel compliance is necessary.

158. We have considered the rival arguments. It is apt here to cite the impugned provisions. Section 26(5) states as follows:

> "Any person who is registerable as a member under this Act shall produce proof of compliance with the provisions of this Act on registration and contribution as a precondition of dealing with or accessing public services from the national government, county government or a national or county government entities."

159. Section 27(4) in turn provides: -

> "A person shall only access healthcare services under this Act where their contributions to the Social Health Insurance Fund are up to date and active".

160. From the foregoing, it is clear that some rights have been limited and their enjoyment is pegged on compliance with the impugned Acts. In particular section 26(5) sets compliance with the Act as a pre-condition to accessing services both at county and national government.

161. The petitioner contends that the right to life under article 26 and the right to property under article 40 are inalienable and cannot be taken away by statute without justification. That the said provisions limit political rights of citizens under article 38. He also contends that section 47(3) of *SHIA* infringes on the right to privacy under article 31.

162. With greatest respect, the petitioner did not demonstrate how the said provisions infringe or are likely to infringe or violate the right to life, right to property and political rights. As regards the right to privacy, the Data Protection Commissioner submitted, and it was not challenged, that the biometric identification would be strictly in terms of the *DPA* which is not challenged.

163. The petitioner also contends that the impugned provisions limit the right to access emergency medical treatment under article 43(2), other citizens' rights under articles 6(3) and 12(1) of the *Constitution*. The CS contends that the rights under articles 6(3) and 12(1) are not absolute and can be limited under article 24 of the *Constitution*. She gave justification of the limitations as the need to bring everyone on board and make social insurance a reality in Kenya. She submits that forcing the few in employment to shoulder the burden of the millions in the informal sector and unemployed is not sustainable.

164. We have considered the foregoing submissions. The issue before us is the state's obligation for progressive realization of the rights under article 43 vis a vis the rights of citizens set out in article 6(3) and 12(3). These are the rights sought to be limited by the compulsion set out in section 26(5) of *SHIA*. The section provides that a person not compliant could be denied access to public services.

165. We have considered the objectives of the 3 legislations. The primary objective is to give effect to article 43(1)(a) of the *Constitution*. There is evidence that the former legal framework (NHIF) has failed to realize those rights and in any event, it is unsustainable.

166. The evidence on record shows that the principle of solidarity is lacking in the former legal framework under NHIF. That continued voluntary contribution is unsustainable. It is evident that unless some sort of compulsion or sanction is applied, then the realization of the rights under article 43(1)(a) will be a mirage.

167. The objectives of section 26(5) and 27 of *SHIA* are therefore noble. They are aimed at bringing solidarity and equity in terms of subscription and contribution to the fund and at the same time ensure that the benefits are spread across the population and is both sustainable and a reality.

168. In our view therefore, applying the principles for limitation under article 24 on the reasonableness, the nature of the right, the extent of the limit and the proportionality, we find that the proposed limitation under article 6(3) and 12(1) is reasonable, justifiable and proportionate.

169. However, to the extent that section 26(5) and 27(4) of *SHIA* have not made exception to the right to emergency medical services, the same cannot stand the test of constitutionality. They offend article 43(2) of the *Constitution*. We say so because the precondition set out in those 2 provisions infringes on the right to access to emergency services on one hand while it is the same right that the state aspires to realize with the impugned Acts.

170. The import of the impugned provisions would mean that if a person is rushed to hospital in whatever state, including an unconscious state, he/she will only access emergency treatment upon proof of compliance. The right to life and emergency services should have and ought to have been shielded and

to the extent that the provisions did not shield or exempt the right to emergency treatment set out in article 43(2) they are unconstitutional.

Issue 6: Whether section 38 of the Social Health Insurance Fund Act 2023 constitutes a violation of articles 201, 205 and 206 (1) of the *Constitution*

171. The petitioner contends that section 38 of the Act, as currently enacted and significantly amended from the original Bill, violates the principles of public finance as enunciated in article 201 of the *Constitution*. These guiding principles of public finance encompass openness, accountability, public participation in financial matters, the promotion of an equitable society, the prudent and responsible use of public funds and clear, responsible financial management and fiscal reporting.

172. The petitioner accuses the NA and Senate of breaching these tenets first by failing to consult the Commission on Revenue Allocation (the Commission) before enacting the legislations as required under article 205 of the *Constitution*.

173. In response to this assertion, the Attorney General cited the case of *Association of Gaming Operators Kenya & 41 Others v Attorney General & 4 Others* [2014] eKLR, arguing that a statute cannot be deemed unconstitutional merely because no recommendations were made by the Commission even if the Bill pertains to county governments. This position is reiterated by the CS.

174. On its part, the NA argues that the Commission had no role to play since the Funds established under the impugned Acts were not established for purposes of revenue sharing between the national and county governments or for financing of county governments. The monies in the funds were to be appropriated by the NA and as such the report by the Commission was not required.

175. Article 205(1) of the *Constitution* is categorical on the circumstances where the consultation with the Commission is mandatory. This is when "a Bill that includes provisions dealing with the sharing of revenue, or any financial matter concerning county governments is published".

176. Without belaboring the point, there is written confirmation by the Speaker of the NA that the Bills and therefore the impugned Acts concerns county governments. This is admitted also by the Senate. The question for determination therefore is whether the Commission's recommendations should have been invited.

177. In what appears to be blowing hot and cold, the Commission in its replying affidavit starts by confirming that indeed the impugned Acts contain provisions relating to financial matters of county governments. It proceeds to note that as mandated in articles 215 and 205 of the *Constitution*,

> "it ought to have been consulted for it to make its recommendations, which should have been tabled and considered by the 5th and 6th Respondents before the enactment of the said Acts. The 4th Respondent was neither consulted nor its recommendations sought and/or obtained prior to the 5th and 6th Respondents passing the impugned Acts into law despite the said Acts containing provisions dealing with financial matters concerning county governments."

178. However, in a sudden volte face, the Commission through its further affidavit appears to contend that providing recommendations, as envisaged in article 205 of the *Constitution*, is discretionary and not mandatory.

179. Both the Attorney General and the Commission cite the decision in *Association of Gaming Operators-Kenya & 41 others v Attorney General & 4 others* [2014] eKLR in which this Court (Majanja J) held as follows: -

> "In this instance, there is no indication that the CRA considered the Finance Bill, 2013 and made recommendations. In the absence of such recommendation by the CRA, article 205(2) cannot come into play. In the absence of recommendation by CRA, I do not think that the resultant legislation can be declared unconstitutional by reason of the CRA failing to discharge its duty to make recommendations on the Finance Bill, 2013. I therefore find and hold that the Finance Act, 2013 cannot be impugned on the basis of want of compliance with article 205".

180. The Constitutional Court of South Africa in *Certification of the Constitution} of the Republic of South Africa*, 1996 (4) SA 744 (CC) dealt with the role of the Financial and Fiscal Commission (FFC), which is similarly established. It emphasized the importance of the FFC's role in providing expert recommendations to government. It also highlighted that while the recommendations of the FFC were advisory, they carry significant weight and must be seriously considered by the legislative bodies.

181. More importantly, the Supreme Court of Kenya has had the opportunity to consider the role of the Commission and the implications of article 205 of the *Constitution*. This was when it was approached for an advisory opinion on whether the Commission's recommendations are binding *in the matter of Council of Governors & 47 others* (Reference 3 of 2019) [2020] KESC 65 (KLR) (Civ) (15 May 2020) (Advisory Opinion). The Supreme Court pronounced itself follows: -

> "It is our considered opinion that, where either of the two Houses passes a Bill envisaged under article 205 of Constitution, without considering the recommendations of the Commission on Revenue Allocation, the resultant legislation would be unconstitutional...
>
> It is our considered opinion that the recommendations by the Commission on Revenue Allocation are not binding upon either the National Assembly, or the Senate. What the two Houses cannot do however is to ignore or casually deal with such recommendations. (emphasis ours)

182. In simple terms, the Supreme Court clarified that although the Commission's recommendations are not binding on either House, the input from the Commission is nonetheless an unequivocal prescription in article 205 of the *Constitution*. This means that the Commission must be consulted even though it may or may not give a recommendation on the proposed legislation. Indeed article 205(1) is couched in mandatory terms that: -

> When ... the Commission on Revenue Allocation shall consider those provisions and may make recommendations to the National Assembly and the Senate.

183. There is no evidence to show that the Commission was consulted or invited to make any recommendations on the 3 impugned legislations. Our reading of the Advisory Opinion by the Supreme Court is that contrary to the holding of this Court in *Association of Gaming Operators-Kenya & 41 others v Attorney General* (*supra*), the failure by either of the Houses to consult the Commission on 'enacting legislation that relates to financial matters concerning county governments' is unconstitutional.

184. The consultations are crucial for informed decision-making and ensuring fiscal responsibility and equity. It was therefore quite imprudent for the 2 houses to reduce the Commission into a bystander in such critical pieces of legislation.

185. The petitioner's other point of contention is the alleged breach of article 206(1) of the *Constitution*. This concerns the provision in section 38 of *SHIA* that eliminates the requirement to return any unused funds from the Social Health Insurance Fund to the Consolidated Fund at the end of each financial year.

186. The petitioner expresses dissatisfaction with the unilateral decision to substantially alter this provision after public participation had taken place, thereby preventing the public from discussing the section as it currently stands. He raises concerns about the potential for pilferage, misuse, embezzlement, open theft, and wanton pillaging, all occurring without accountability.

187. The initial section 38 under *SHIA* provided for investment of monies of the Authority which are not immediately required, in a reputable bank with the advice of the Central Bank of Kenya or in government securities with the advice of the National Treasury. The current section 38 Act is completely different. It reads as follows: -

> " All receipts, earnings and accruals to the Authority and balance of the funds at the close of each financial year shall be retained by the Authority for the purposes of the Funds".

188. In their responses, the Attorney General, the CS, the NA and the Senate defended the omission of the initial section 38 on the basis of article 206(1), maintaining that the Social Health Insurance Fund was established under the Act for that purpose and that there is nothing unconstitutional with section 38 since the *Constitution* under article 206(1) allows for the same.

189. Article 206(1) of the *Constitution* provides as follows: -

> " There is established the Consolidated Fund into which shall be paid all money raised or received by or on behalf of the national government, except money that—
>
> a. is reasonably excluded from the Fund by an Act of Parliament and payable into another public fund established for a specific purpose;"

190. We do not agree with the petitioner on the submission that the three funds established are ambiguous. We note that the Social Health Insurance Fund, the Primary Health Fund and Emergency Care Insurance Fund are all established under sections 25, 20 and 28 of the Act respectively.

191. Contrary to the view expressed by the petitioner, by dint of section 5 of the Act, it is a function of the Authority to manage the funds and to develop guidelines for the operations and implementation of the Funds established under the Act. We however note that the operationalization of the specific sections is yet to be effected by way of regulations.

192. We agree that there is reason for apprehension as expressed by the petitioner. This is so because the current section was introduced ignoring a key principle under article 201(a) which emphasizes on the need for openness, accountability and public participation in financial matters. Further, the question that lingers in our minds is, why was the new section 38 introduced without the benefit of public participation?

193. The provisions of article 201 of the *Constitution* must be understood and interpreted against a histography of the Kenyan society. The drafters of the *Constitution* were certainly intent in

representing a departure from a past where public financial matters were a preserve of closed dialogue in opaque rooms only rubberstamped by Parliament. Section 38 in our view therefore fails the test under article 201(a) of the *Constitution* and is therefore unconstitutional.

194. We should point out here that we appreciate the effort of the CS in attempting to realize the social economic rights provided under article 43. The effort is commendable. The research and industry shown in coming up with the pieces of legislation is also commendable. The objectives and purpose of the impugned legislations were to have progressive, transformative and a huge impact in the realization of universal healthcare for this county.

195. However, the haste with which they were enacted infringed on the national values and principles of the *Constitution*. In as much as we appreciate the noble intention, we cannot disregard the clear constitutional tenets which binds us. Article 20 requires us to promote and protect the values that underlie an open and democratic society and the spirit, purports and objects of the bill of rights.

196. Being cognizant of the importance of the impugned Laws and the input that has already gone into their enactments and recognizing the purport of the enactments as far as realization of the rights under article 43 of the *Constitution* we are prepared to give Parliament an opportunity to redeem itself and save the Laws. The breaches that tainted the Laws are redeemable within our findings and can be corrected.

197. Before we pen off we wish to acknowledge the industry and input of Learned Counsel who appeared in this matter.

III: Disposition

198. Accordingly, we find that the petition is meritorious and we allow it in the following terms; -

a. Let Parliament undertake sensitization, adequate, reasonable, sufficient and inclusive public participation in accordance with the *Constitution* before enacting the said Acts and amend the unconstitutional provisions in terms of this judgment.

b. Compliance with (a) above be undertaken within 120 days of the date of this judgment.

c. Within that period, the Acts shall remain suspended.

d. In default of a and b above, on 10/11/2024, the following relief shall take effect forthwith:-

i. A declaration is hereby issued that the entire *Social Health Insurance Fund Act*, 2023; the entire *Digital Health Act*, 2023 and the entire *Primary Health Act*, 2023 are all unconstitutional for the reasons set out in this Judgment and therefore invalid, null and void.

e) Since this was a public interest litigation we order each party to bear their own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 12TH DAY OF JULY ,

.....

ALFRED MABEYA

JUDGE

.....

ROBERT LIMO

JUDGE

.....

DR. FREDA MUGAMBI

JUDGE