PATRICK OUMA ONYANGO AND 12 OTHERS Vs THE HONOURABLE ATTORNEY GENERAL AND 2 OTHERS: A CLASSICAL CASE OF MIS-APPLYING AND DIS-APPLYING *JURISPRUDENCE*?

Ongoya Z.E.[♦]

> Kenya is caught up in the middle of an incredibly noisy exercise towards a new Constitution. …… broadly speaking, most Kenyans would agree, in spite of their political differences, that there is a need for Kenya to have a [*democratic*] constitution. What they do not agree with however is how to go about designing this Constitution[1].

1.0 Introduction

When a historian with a genuine bias in favour of matters relating to the constitution will finally and incisively document, in a sequential manner, the rowdy character of Kenya's attempt at the Constitution making process, the Kenyan judiciary may not be credited with bringing the sanity of law to the process. To the contrary, the judiciary may be accused of having bent backwards to provide a forum for the tramps in the theatre of the absurd to trivialize the entire process.

This case review attempts to lend credit to the above averments. The review makes a critical evaluation of the court's reasoning in High Court Misc. Civil Application No. 677 of 2005 (O.S).

For purposes of this analysis, the term *jurisprudence* is employed in its French sense to refer to case law and its English sense to refer to the general speculations about the meaning, nature and character of law[2]. It is contended that the three judges dis-applied existing *jurisprudence* on constitutional litigation in the former sense and misapplied *jurisprudence* in the latter sense.

2.0 Factual background and Issues in Dispute

The case was brought in the nature of a constitutional reference for the enforcement of fundamental rights and freedoms under Section 84 of the Constitution of the Republic of

---

♦ Research Fellow [Law Governance and Democracy] University of Nairobi 2005/2006, LLB.[Hon.s] University of Nairobi, Dip. Law (Kenya School of Law), Advocate of the High Court of Kenya, Associate (Mohammed Muigai Advocates).

[1] Michelo Hansungule, Kenya's Unsteady March Towards the Lane of Constitutionalism, University of Nairobi Law Journal Vo. 1, 2003, P. 41

[2] *See generally* Harris J.W., Legal Philosophies, 2nd edition, , Reed Elsevier (UK) Ltd, London, (reprint 2003) P. 1.

Kenya. The case was further predicated upon Sections 1, 1a, 3, 8, 46, 47, 49, 56, 70 and 123(8) of the Constitution of the Republic of Kenya, Rules 9 and 11 of the Constitution of Kenya, (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules (the Chunga Rules), Sections 17, 27, 28, 28A and 28B(4) and (5) of the Constitution of Kenya Review Act (the Principal Act) as amended by Sections 4 and 5 of the Constitution of Kenya Review (Amendment) Act 2004 (the Consensus Act), Section 3A of the Civil Procedure Act (Chapter 21, Laws of Kenya) and all other enabling provisions of the law – whatever this last one was intended to mean. This analysis shall seek to demonstrate that this was an incompatible mix of legal provisions on constitutional litigation.

The application sought sixteen orders and declarations which included the following declarations:

a) The National Assembly had no power to debate, alter or amend the Draft Constitution of Kenya 2004 as adopted by the National Constitutional Conference on March 15, 2004 (the Bomas Draft) in light of the decision of the High Court Miscellaneous Civil Application No. 82 of 2004 (O.S) (the Njoya case) or otherwise and of sections 1, 1A, 46, 47 and 49 of the Constitution.

b) The mandate to ***make a constitution*** and/or, identify, debate and resolve any perceived contentious issues in the Bomas Draft lies solely with the sovereign people of Kenya in a referendum or any other forum specifically constituted by Kenyans for that purpose and not the National Assembly and such an exercise by the National Assembly was contrary to the provisions and/ or its spirit, principles and values as enshrined therein.

c) Constitution making is not a legislative process and therefore any law that purported to elevate members of parliament and/or the National Assembly above Kenyans by ascribing a special role in constitutional review process to the former was *ultra vires* the Constitution and, therefore, null and void.

d) The powers and duties conferred the president by Section 28A of the Principal Act as amended by Section 5 of the Consensus Act were in excess of the Constitution and in violation of Sections 3, 8, 46 and 47 of the Constitution and the collective sovereign will of the People of Kenya since such sovereign cannot

be subject to, contingent upon or dependent on the will, act or whims of the president.

e) The people of Kenya, having the inherent power to constitute and reconstitute their state and government and having given their views as to how they wanted this done, it was a violation of the principles of democracy and the collective sovereign will of the people of the Kenya people for the Constitution of Kenya Review Commission to conduct civic education on the proposed new constitution (the parliament constitution) that was not in line with the views given to it by Kenyans, its report and the Bomas Draft made with the views of Kenyans and instead to conduct a referendum on the *Parliament/*National Assembly constitution as envisaged in Section 28(1) of the Principal Act as amended by Section 5 of the Consensus Act.

f) It was unconstitutional, an abuse of and infringements on the rights of the people of Kenya to subject their *collective* sovereign will to the National Assembly and the presidency, the two being non-existent unless and until created, defied and limited by the people's collective sovereign will in a constitution.

g) The current constitution, not having any transitional provisions under which either the presidency and/ or the National assembly can, as institution(s) make, participate in the making of a new constitution or promulgating a proposed new constitution to be the new constitution, any law not being a law within the meaning of the constitution that gives the National Assembly or the presidency such power or power to so make, participate in the making or promulgate a proposed new constitution to be the constitution is *ultra vires* the constitution and, therefore, null and void.

h) Section 28B (4) of the Principal Act as amended by Section 5 of the Consensus Act violates the Constitutional right of the 3rd Applicant who could not raise Ksh. 5 Million in 2 weeks as stated in the said section as it severely limited and restricted his access to justice together with the 56% of the Kenyans who live below the poverty line as it contravened Section 70 of the Constitution.

i) Sections 17, 27, 28, 28A and 28B of the Principal Act as amended respectively by Section 4 and 5 of the Consensus Act violated the constitutional rights of the

applicants and other Kenyans (who gave their views and which views were reduced into the Bomas Draft by the 2nd Respondent and the national Constitutional Conference) as safeguarded under Sections 1, 1A and in the principles, values and spirit enshrined in the Constitution.

In making their findings, the judges resorted extensively to Kelsenian *jurisprudence* as the basis of some of their findings. The judges also made radical departures from some of the previously decided decisions of the same court in respect of the procedural aspects of the matters before them.

This review makes two claims in respect of the reasoning in the case under scrutiny:

a) The judges in this case wrongly understood Kelsenian principles that guided their findings; this averment will demonstrate that *jurisprudence* was mis-applied in the case under review.
b) The judges failed to apply tests established as governing constitutional litigation in Kenya. In this sense, the review shall demonstrate that *jurisprudence* was dis-applied in the case under scrutiny.

There are many other perspectives that one may take in interrogating the reasoning in this case. For our present purposes, those other perspectives are left for another day.

3.0 Hans Kelsen's Thoughts Misapplied

Among the many contributions that Hans Kelsen made to the field of the philosophy of law is the theory of the grund norm. Of greatest significance to this review is Kelsen's teaching on the manner in which the grund norm changes. Kelsen's theory relating to the *grundnorm* postulated, among other things, that we must trace back the existing constitution to a historically first constitution, which cannot be traced back to a positive norm created by legal authority[3]. In Kelsen's own words "we arrive, instead, at a constitution that became valid in a revolutionary way, that is, either by breach of a former constitution, or for a territory that formally was not the sphere of validity of a constitution and of a national legal order based on it."[4] This theory of reaching a constitution that

[3] M.D.A. Freeman, Lloyd's Introduction to Jurisprudence, 7th ed. Sweet & Maxwell, London, 2001, P. 266
[4] H. Kelsen, The Pure Theory of Law P. 222.

became valid in a revolutionary way in the sense of breach of a former constitution can only help the legal scientist pronouncing dispassionately after the event[5]

In one of the occasions when the judges engaged into an application of Kelsenian thoughts in the course of the judgment in the case under review, they said:

> One might pose the question here, why must objections raised concerning S. 47 and other related technical objections fail? The reason is that the constitution is the 'grund norm' in the Kelsenian theory of law – see CONSTITUTIONS OF THE WORLD BY M.V. PYLEE introduction P. X
>
> "the 'grund norm (the Constitution) is not created by legal procedures or by law creating organs. It is not as a positive legal norm valid, because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid because without this presupposition no human act could be interpreted to be legal especially as a norm creating act. In other words the validity of the Constitution generally lies in the social fact of its being accepted by the community and for the reasons that its "norms" have become efficacious, its validity is meta-legal" See Hans Kelsen – General Theory of Law and State,"
>
> The preoccupation with the people as outlined above in many jurisdictions reflects a wide acceptance and recognition of the constituent power of the people to make new constitutions and in certain cases being consulted as regards an attempt at changing the intended provisions or changing the basic structure." (PG 59)
>
> We hold, find and declare that in the hierarchy of authority the people rank first because it is the people who give birth to Constitutions. The people's constituent power cannot be stopped inhibited or muzzled by any of the organs of modern government including any existing Constitution especially where the Constitution making is being done under an existing Constitution which is fixed and does not provide for its death.

The three judges do not appear to distinguish the two circumstances under which the Kelsenian *Grundnorm* changes, namely outside a revolution and within a revolution.

In light of the issues before them and the circumstances under which Kenyans were making the new constitution, the three judges placed reliance on the authority of *CONSTITUTIONS OF THE WORLD BY M.V. PYLEE* ***introduction P. X*** that

> the '*grundnorm'* (the Constitution) is not created by legal procedures or by law creating organs. It is not as a positive legal norm valid, because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid because without this presupposition no human act could be interpreted to be legal especially as a norm creating act. In other words the validity of the Constitution generally lies in the social fact of its a being accepted by the community and for the reasons that its "norms" have

[5] Dias [1968] CLJ 233 referred to in M.D.A. Freeman, Lloyd's Introduction to Jurisprudence, 7th ed. Sweet & Maxwell, London, 2001, P. 268

> become efficacious, its validity is meta-legal" See Hans Kelsen – General Theory of Law and State,"

The three judges here failed to distinguish between the following facts:

a) There is a distinction between change of the basic norm under revolutionary circumstances[6] and non-revolutionary circumstances and different considerations apply.

b) The issues before them did not require testing the validity of Kenya's historically first Constitution nor had there been a constitution promulgated after a revolution and whose validity was in question.

c) What was before them, in a nut shell was a case where an alleged "revolution" that was being challenged before it culminated into a new and efficacious legal/ constitutional order.

d) That the legality of the "revolution" was being challenged on the strength of the provisions of the existing and efficacious constitutional order and they should have tested the review process against that existing constitutional order.

In fact, further down in their judgment, the three judges opine that

> We hold, find and declare that in the hierarchy of authority the people rank first because it is the people who give birth to Constitutions. The people's constituent power cannot be stopped inhibited or muzzled by any of the organs of modern government including any existing Constitution especially where the Constitution making is being done under an existing Constitution which is fixed and does not provide for its death.

A number of critical questions necessarily emerge from this reasoning of the court:

a) Were the judges going behind the *grund norm* to limit the definition of the socio political factors that result into the making of a *grundnorm*?

b) Between "the people" (whatever the meaning the judges wanted to attach to the word) and the Constitution, what comprises the *grundnorm*?

c) By saying "the people's constituent power cannot be stopped, inhibited or muzzled …… especially where the constitution making is being done under an existing constitution" were the judges sanctioning a revolution before the same was complete and the new legal order rendered efficacious?

[6] And the use of the word "resolution" in the Kelsenian sense does not in any way imply it must necessarily be violent or through a coup de tat. It simply implies that it had to be in breach of the existing *grund norm.*

With respect, the court demonstrated a faint and generalized as opposed to detailed and specific understanding of Kelsenian postulates relating to the *grund norm*. As already demonstrated, the judges, in their endeavor to apply Kelsenian jurisprudence left more questions unanswered than they did in fact help a student of Kelsen understand the practical application of this great philosopher's thoughts.

3.1 Were the final Orders of the three constitutional court judges consistent with Kelsenian jurisprudence?

I will consider each of the relevant final orders in the case against Kelsenian thoughts.

1. *For the reasons given above and especially our finding that new Constitutional proposals, measures, legislation, including the exercise of Constituent power the touchstone of validity is not the existing Constitution all orders and declarations sought are refused*

This aspect of the judgment is not in accordance with Kelsenian theory. According to Kelsen, if a new *grund norm* were to come into existence in the place of an old one, under circumstances other than a revolution, then the touch stone of validity would be the existing *grundnorm*. On the other hand, a *grundnorm* born out of a revolution would only be unchallengeable once the revolution is successful and the new order is efficacious. In reaching the above quoted finding the three judges, it appears, did not have this Kelsenian distinctions in mind.

3. *The orders and declarations sought against the Electoral Commission of Kenya ECK have been disallowed on the ground that the existing constitution and the law sufficiently empowers the ECK to undertake the intended mandate or function*

This finding is in accordance with Kelsenian thought. It recognizes that the power of the Electoral Commission of Kenya to "mid-wife" a new constitution must be derived from the existing Constitution.

4. *……. Prayers concerning the alleged unconstitutionality of the process from 1997 to-date have been wholly disallowed on the principle of the doctrine of the political question and non-justiciability, i.e, courts have no powers in respect of the process this being substantially political and that courts have and must recognize the limits of their powers and the effectiveness of the orders they make.*

The court in reaching the above quoted finding, appears to be guided by Kelsen's theory to the effect that the validity of a *grundnorm* cannot be a subject of inquiry because the *grundnorm* is a product of socio-political factors. The finding, however, falls short of accuracy in appreciating Kelsen to the extent that Kelsen envisaged immunity from challenge only for an effective/ efficacious constitution already in place. In the case of a constitution still in the process of being made, Kelsen might have deemed it necessary that all stages of the process must accord to the dictates of the existing *grundnorm.* The judges' fettering of jurisdiction in respect of the question whether the process had been constitutional since 1997, under the pretext of non-justiciability, therefore, runs counter to the teachings of Hans Kelsen.

5. ……*Under the relevant provisions it is the proposed new Constitution which shall automatically repeal the existing Constitution on the effective date.*

In reaching this finding, the court reasoned as follows:

> Article 289 of the proposed new constitution provides that the new proposed Constitution shall come into force upon its promulgation by the president
>
> The effective date has been defined in the proposed new Constitution as the date the new Constitution comes into force
>
> The repeal of the existing Constitution shall be as per Article 290 of the proposed new Constitution …..

The question that begs for an answer is, were the learned judges predicting the efficacy of the proposed new constitution before the same came into force? If this be the case, then the judges once again found themselves on the wrong side of Kelsenian postulates relating to succession of *grundnorms.*

7. …… *we find and declare that the basic steps in Constitution making are:*
    a. *Popular consultations*
    b. *Framing of the proposals*
    c. *Referendum or a Constituent Assembly specially elected and mandated.*

These prescriptive character of the judges fails to take into account a number of factors that would have been of interest to Hans Kelsen, namely;

a) The judges were not specific that these steps are applicable to a situation where the constitution is being made in peace time as opposed to a revolution. A revolution can take many different forms and it would not be realistic to prescribe a specific form that it should take.

b) That judges did not specify where, from the existing *grundnorm* (Constitution), they were deriving this formulae. In fact, they had already declared that the existing Constitution could not be the touch stone of validity. Kelsen, on the other hand, would have expected that, unless it be by way of a revolution, the new grund norm should be made in a manner that was in consonance with the existing constitution.

8. ……... *Upon enactment in the referendum they shall have put their final seal of approval. This must be correct because upon approval at the referendum the people at the Referendum shall have put in place a new structure of government under the new dispensation which shall in turn on behalf of the people exercise Executive, Legislative and Judicial powers*

Once again, the judges here were endorsing an anticipated *grundnorm* before its efficacy could be put to test. This was not in accordance with Kelsenian teachings.

4.0 The dis-application of existing jurisprudence relating to constitutional litigation

4.1 The threshold requirement in constitutional litigation and the applicability of Section 84 of the Constitution

In Constitutional litigation, there is need to meet the threshold requirement of establishing that there exists a constitutional question.

This is intended to avoid raising purely statutory questions before the forum of the constitutional court.

In the case of Julius Meme & Another Vs Republic & Anor[7], the court made the following pertinent holding:

[7] [2004] KLR 637

> The threshold issue is whether or not this constitutional reference was rightly made. Learned counsel ….. has unequivocally submitted that the constitutional reference, at one remove raises non-constitutional questions one notch too high; and at another remove engages this very court in a purely academic exercise. He cited in support of his contention the very relevant case *Anarita Karimi Njeru Vs Republic (No. 1) 1979 KLR 154*. The High Court in that case did set out considerations which should guide parties as they seek to file a constitutional reference in the High Court. In the words of Trevelyan and Hancox, JJ (at P. 156)
>
> > We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed, and the manner in which they are alleged to be infringed.
>
> We are in agreement and adopt this principle as the basis upon which all constitutional references must be founded.

It is self evident from the foregoing that to meet the threshold requirement for a constitutional reference, the "holy trinity" comprises of:

(i) The precise complaint;

(ii) The provision of the constitution infringed;

(iii) The manner in which the section is infringed.

The Constitutional/ legal basis of the application that was before court has been set out in the preambular paragraphs to this review. It is evident that the applicants brought the application before court as a matter of enforcement of fundamental rights and freedoms- this was therefore a Section 84 application.

Section 84 of the Constitution of the Republic of Kenya is clear on the prescriptive sections of the Constitution of Kenya that it seeks to provide an enforcement mechanism.

In its material parts, it provides:

> Subject to subsection (6), if a person alleges that <u>any of the provisions of Sections 70 to 83 (inclusive)</u> had been, is being or is likely to be contravened …….

It is apparent that the only alleged breach that is to be ventilated by instrumentality of Section 84 of the Constitution is Sections 70 to 83 (inclusive). The applicants in the case under review alleged violations of Sections 1, 1A, 3, 8, 46, 47 and 49 of the Constitution. The judges could have done better for purposes of shaping jurisprudence on constitutional litigation by stating why they entertained alleged breaches of the said provisions of the Constitution in a Section 84 application.

4.2 Litigation in the Nature of *Actio Popularis*

There is nothing entirely wrong by court's encouraging litigation in the nature of public interest action where constitutional matters are pleaded. However, for purposes of good order in the application of the doctrine of precedent that is hallowed in the jurisprudence of our courts, departure from an established principle ought to be explained. Looking at the orders sought by the applicants in this matter, they filed in action on their own behalf and on behalf of the "people of Kenya."

A look at Section 84 of the Constitution of the Republic of Kenya pursuant to which the application was brought provides that:

> ……. If a person alleges that any of the provisions of Sections 70 to 83 (inclusive) had been, is being or is likely to be contravened in relation to him (or in case of a person who is detained, if another person alleges a contravention in relation to the detained person) then, … that person may apply to the High Court for redress.

To add emphasis to the specificity of the above provisions, the High Court had earlier in the case of **Njoya & 6 Others Vs Attorney General & 3 Others (No. 2)**[8] observed that:

> Except for a detained person for whom someone else may take up the cudgels, every other complainant of an alleged contravention of fundamental rights must relate the contravention to himself, as a person. Indeed the entire Chapter V of the Constitution is headed "Protection of Fundamental Rights and Freedoms of the Individual". There is no room for representative actions or public litigation in matter subsumed by Section 70 to 83 of the Constitution.

When confronted by a similar question, the court remarked:

> This Originating summons dealt with matters that are larger than the constitution itself. This was a matter that was not anticipated and so no procedure is provided for anywhere in the Kenyan laws. The court dealt with this application under its inherent jurisdiction. The applicants have derived their standing in the matter from the very nature of the subject matter. All Kenyans are interested in this case and are keenly awaiting its outcome. It is matter of great public interest and it would have been impossible to get consent of all Kenyans in order to file or regularize the Originating summons, given the nature of the orders sought and the time within which this application was be heard and a determination made. It would have been impossible for the court to ask the applicants to comply with procedure if there was any. The court preferred to go for the substance of the application rather than deal with technicalities.
>
> So that even though the objections raised and arguments by the applicants were valid and substantive, the court was reluctant to consider them and instead delved directly into the Originating summons.

[8] [2004] KLR 261

The court did not endeavor to give its specific grounds for departing from this jurisprudence. This is not to say that the court was not entitled to depart therefrom. The emphasis here is that before departing from this position, the court was duty bound to set out "good" reasons for so doing[9].

The court's statement that it can be moved for substantive orders pursuant to its inherent jurisdiction outside any established framework of constitutional, statutory and delegated rules is strenuous to reason, logic and deserves clarification. The court did not clarify under what circumstances that was permissible.

5.0 Conclusion

This review sought to take a critical look at the decision of the High Court of Kenya in the case of Patrick Ouma Onyango And 12 Others Vs The Honourable Attorney General And 2 Others. The review sought to demonstrate that the application of *jurisprudence* in the determination of "hard cases" in the Dworkinian sense can be a fairly elusive task. Hopefully, the court of appeal will be confronted with a similar dispute as the one in the case under review to set right the law in respect of the questions that the High Court grappled with in the case of Patrick Ouma Onyango And 12 Others Vs The Honourable Attorney General And 2 Others.

[9] See generally House of Lords decision in the case of Cassell and Co Ltd Vs Broome and Another [1972] 1 ALLER 801 where the court noted that "even this house since it has taken the freedom to review its own decisions, will do so cautiously."