

**THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 628 OF 2014 CONSOLIDATED WITH PETITION NOS 630 OF  
2014 AND 12 OF 2015**

**COALITION FOR REFORM AND DEMOCRACY-CORD & 2 OTHERS vs THE  
ATTORNEY GENERAL & ANOTHER**

**JUDGMENT DELIVERED ON 23<sup>RD</sup> FEBRUARY 2015 BY JUSTICES ISAAC  
LENAOLA, MUMBI NGUGI, HEDWIG ONG'UDI, HILLARY CHEMITEI AND  
LOUIS ONGUTO**

**PRESS AND PUBLIC SUMMARY**

*The following summary is provided to assist the public and the media in reporting this case and is not binding on the court.*

1. The three consolidated petitions challenge the constitutionality of The Security Laws (Amendment) Act No. 19 of 2014 (SLAA). SLAA was enacted by the National Assembly on 18<sup>th</sup> December 2014 and received presidential assent on 9<sup>th</sup> December 2014. It came into force on 22<sup>nd</sup> December 2014. SLAA amends the provisions of twenty two other Acts of Parliament concerned with matters of national security and it is these amendments that have precipitated the petitions now before us.
2. After considering the parties arguments, the Court identified the following four (4) issues for determination:
  - i. Whether the Court has jurisdiction to determine the present petition. In this regard, the Court will be required to consider:
    - a. Whether the issues in dispute are ripe for determination;
    - b. Whether the Court should be guided by the doctrine of avoidance;

- c. Whether determination of the issues raised in this matter is a violation of the doctrine of separation of powers.
    - d. Whether the KNCHR as a constitutional commission can lodge a claim against the State.
  - ii. Whether the process of enactment of SLAA was in violation of the Constitution. Under this issue, the Court will be called to determine whether:
    - a. The enactment was unconstitutional for failure to involve the Senate in legislation that involved Counties;
    - b. The process was unconstitutional in light of the chaotic manner of enactment of SLAA that was in breach of Parliamentary Standing Orders with regard to Parliamentary debate and voting;
    - c. The process was flawed and unconstitutional for lack of public participation;
    - d. In light of the shortcomings above, the presidential assent to the Bill was unconstitutional.
  - iii. Should the answers to the 1<sup>st</sup> and 2<sup>nd</sup> issues above be in the affirmative, then the court will proceed to consider the constitutionality of the provisions of SLAA vis -a -vis the Bill of Rights. In this regard, the Court shall consider the question whether SLAA is unconstitutional for violation of:
    - a. The right to freedom of expression and the right to freedom of the media guaranteed under Articles 33 and 34;
    - b. The right to privacy under Article 31;
    - c. The rights of an arrested person under Article 49 and the right to fair trial under Article 50;

- d. Entitlement to citizenship and registration of persons under Article 12;
- e. The right to freedom of movement under Article 39 and the rights of refugees under Articles 2(5) and 2(6) of the Constitution and International Conventions.

iv. Whether the provisions of the Act are unconstitutional for violating the provisions of Articles 238, 242 and 245 of the Constitution with regard to national security, appointment and tenure of office of the Inspector General of Police, creation of National Police Service Board and the appointment and tenure of National Intelligence Service Director General and the Deputy Inspector General of Police.

3. In light of the above issues the court made the following findings: as follows;

**(a) On the question whether the Court has jurisdiction to determine the present petitions, the Court found that:**

- (i) The Petition raised issues that are justiciable and ripe for determination by this Court.
- (ii) The Court is bound by the doctrine of avoidance but it does not apply in the present circumstances. It has jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution.
- (iii) The doctrine of separation of powers does not prevent the Court from examining whether the acts of the Legislature and the Executive are inconsistent with the Constitution as the Constitution is the supreme law.

- (iv) Kenya National Commission on Human Rights (KNCHR) as an independent commission can lodge a petition alleging a violation of the Constitution by the State or other State organs.

**(b) On the question whether the process of enactment of SLAA was in violation of the Constitution, the court found as follows:**

- (i) The Speaker of the Senate was consulted in determining whether SLAA was a Bill concerning counties. There was concurrence between the Speakers of the National Assembly and the Senate that SLAA did not concern counties.
- (ii) That there was reasonable public participation in the process leading to the enactment of SLAA.
- (iii) Based on evidence before the Court, there was no violation of Standing Orders of the National Assembly.
- (iv) In light of (i), (ii) and (iii) above, presidential assent to the Bill was constitutional.

**(c) On the question whether the impugned provisions of SLAA were unconstitutional for violating the Bill of Rights; the court found:**

- (i) Section 12 of SLAA and Section 66A of the Penal Code are unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution.
- (ii) Section 34 of SLAA is unconstitutional in so far as it includes “telescopes” in Section 2 of the Firearms Act.

- (iii) Section 56 of SLAA and the new Section 42 of the National Intelligence Service Act as well as Section 69 of SLAA and Section 36A of the Prevention of Terrorism Act are constitutional and do not violate the right to privacy guaranteed under Article 31 of the Constitution.
- (iv) Section 15 of SLAA which introduced Section 36A to the Criminal Procedure Code (CPC) is constitutional and does not breach the right of arrested persons as provided for under Article 49 of the Constitution and the right to fair trial as provided for under Article 50(2) of the Constitution.
- (v) Section 16 of SLAA and Section 42A of CPC are unconstitutional as they violate the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on as provided under Article 50(2) (j) of the Constitution
- (vi) Section 20 of SLAA which introduced Section 364A to the CPC is unconstitutional for being in conflict with the right to be released on bond or bail on reasonable conditions as provided for under Article 49(1) (h) of the Constitution.
- (vii) Section 21 of SLAA which introduced Section 379A to the CPC is constitutional and does not violate the right to be released on bond or bail on reasonable conditions as provided for under Article 49(1)(h) of the Constitution.
- (viii) Section 26 of SLAA which introduced Section 26A to the Evidence Act is unconstitutional for violating the right to remain silent during proceedings as guaranteed under Article 50(2)(i) of the Constitution.

- (ix) Section 29 of SLAA which introduced Section 59A to the Evidence Act is constitutional and is not in violation of the right to remain silent during proceedings as provided for under Article 50(2) (i) of the Constitution.
  - (x) Section 31 of SLAA which introduced Section 78A into Evidence Act is Constitutional and does not violate the right to fair trial as enshrined in Article 50 of the Constitution.
  - (xi) Section 25 of SLAA which introduced Section 18A to the Registration of Persons Act is constitutional and does not violate the right to citizenship under Article 12 of the Constitution.
  - (xii) Section 47 of SLAA which amended the Refugee Act of 2006 by introducing paragraph (c) to Section 14 is constitutional and does not violate the right to movement as provided for under Article 39 of the Constitution.
  - (xiii) Section 48 of SLAA which introduced Section 18A to the Refugee Act, 2006 is unconstitutional for violating principle of *non-refoulment* as recognized under the 1951 United Nations Convention on the Status of the Refugees which is part of the laws of Kenya by dint of Article 2(5) and (6) of the Constitution.
- (d) **On whether the provisions of the Act are unconstitutional for violating the provisions of Articles 238, 242 and 245 of the Constitution with regard to the national security, appointment and tenure of office of the Inspector General of Police, creation of National Police Service Board and the appointment and**

**tenure of the National Intelligence Service Director General and the Deputy Inspector General of Police, the Court found as follows:**

- (i) Section 4 and 5 of SLAA and Section 8 and 9 of Public Order Act are constitutional and do not violate Articles 238 and 239 of the Constitution.
- (ii) Section 86 of SLAA which amended Section 12 of the National Police Service Act is constitutional and is consistent with Article 245 and does not violate Article 246(3) of the Constitution.
- (iii) Section 95 of SLAA which introduced Section 95A to the National Police Service Act and creates the National Police Service Board is unconstitutional and violates Article 246(3) of the Constitution.

4 Following the above findings, the Court made the following orders:

- (a) Section 12 of the Security Laws (Amendment) Act and Section 66A of the Penal Code is hereby declared unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution.***
- (b) Section 34 of the Security Laws (Amendment) Act is hereby declared unconstitutional in so far as it includes “telescopes” in Section 2 of the Firearms Act.***
- (c) Section 16 of the Security Laws (Amendment) Act and Section 42A of Criminal Procedure Code are hereby declared unconstitutional as they violate the right of an accused***

*person to be informed in advance of the evidence the prosecution intends to rely on as provided under Article 50(2) (j) of the Constitution*

- (d) Section 20 of the Security Laws (Amendment) Act which amended Section 364A of the Criminal Procedure Code is hereby declared unconstitutional for being in conflict with the right to be released on bond or bail on reasonable conditions as provided for under Article 49(1) (h) of the Constitution.*
- (e) Section 26 of the Security Laws (Amendment) Act which introduced Section 26A into the Evidence Act is hereby declared unconstitutional for violating the right of an accused person to remain silent during proceedings as guaranteed under Article 50(2) (i) of the Constitution.*
- (f) Section 48 of the Security Laws (Amendment) Act which introduced Section 18A to the Refugee Act, 2006 is hereby declared unconstitutional for violating the principle of non-refoulment as recognized under the 1951 United Nations Convention on the Status of Refugees which is part of the laws of Kenya by dint of Article 2(5) and (6) of the Constitution.*
- (g) Section 95 of the Security Laws (Amendment) Act which introduced Section 95A to the National Police Service Act and created the National Police Service Board is hereby declared unconstitutional for violating Article 246(3) of the Constitution.*