

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.E447 OF 2022

BETWEEN

DR. STEPHEN NDICHO.....PETITIONER

-VERSUS-

REGISTRAR OF SOCIETIES.....1ST RESPONDENT

DEPUTY REGISTRAR OF SOCIETIES.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

ATHEIST IN KENYA SOCIETY.....4TH RESPONDENT

J U D G M E N T

1. The Petition dated 18th September 2022 is supported by the Petitioner's affidavit in support of even date.
2. The crux of the instant Petition as supported by the averments in the Petitioner's affidavit is that the 1st Respondent's registration of the 4th Respondent as a society is an affront to the preamble of the Constitution which recognizes the existence of Almighty God. As such, the 1st, 2nd and 3rd Respondents have violated the Preamble of the Constitution, Article 2, 8 and 32 of the Constitution, Article 18 of the Universal Declaration of Human Rights and Section 12 of the Societies Act.
3. Consequently the Petitioner seeks the following reliefs:

- i. A declaration that the registration of the 4th Respondent is unconstitutional.*
- ii. A declaration that the certificate of registration recognizing the 4th Respondent is null and void.*
- iii. A declaration that Kenya is a religious state.*
- iv. A declaration that the 1st, 2nd and 3rd Respondents violated the preamble of the Constitution, under Articles 2, 8, and 32, of the Constitution, Article 18 of the Universal Declaration of Human Rights and Section 12 of the Societies Act.*
- v. Cost of the Petition.*
- vi. A declaration that the 1st, 2nd, 3rd and 4th Respondent to bear the costs of this petition.*
- vii. Any other relief that the Court may deem fit and just to grant.*

Petitioner's Case

4. The Petitioner states that on **17th February 2016**, the 2nd Respondent registered the 4th Respondent as a society under the Societies Act contrary to the dictates of the Constitution. Particularly, he states that the Constitution in its preamble and other provisions implies that Kenya is a religious state comprising various beliefs that acknowledge the existence and Supremacy of the Almighty God.
5. According to the Petitioner, the freedom to religion is part of the democracy that allows persons to choose their religious beliefs. As such, the Constitution recognizes various religious beliefs and so protection of religion is one of the hallmarks of the Constitution.

6. Furthermore, he argues that the failure to respect various religious beliefs could result in a climate of intolerance and impunity which in turn fosters hatred and violence within our societies.
7. Against this background, he asserts that the registration of the 4th Respondent contravenes the spirit of the Constitution with reference to religion. Religion he asserts is part of Kenya's culture and a vital aspect. He emphasizes that religious organizations constitute important sectors of national life. Additionally, that they express themselves to the government and the courts on various issues on a continual basis. He contends that the 4th Respondent's registration contravenes this position, as Kenya is not a secular state.
8. In a nutshell, he avers that, atheism denies the reality of God, rejects the value of religion and argues that religion and faith are futile which position is contrary to the one adopted by the Constitution. The 4th Respondent's activities in Kenya are thus stated to be unconstitutional.

1st, 2nd and 3rd Respondents' case

9. These Respondents' in response filed a Replying Affidavit through the 1st Respondent, Goretti Nyariki, sworn on 11th November 2022. At the onset, she reveals that the 1st Respondent is part and parcel of the 3rd Respondent.

10. She depones that the 4th Respondent was duly registered on 17th February 2016 under Certificate Number 47958 and Society Reference Number 73253.
11. She avers that before this registration, all provisions of the law that could bar the 4th Respondent's registration were considered and actioned. Furthermore, the 4th Respondent's application was transmitted to the National Intelligence for vetting. In response, an adverse Report was reverted back by the National Intelligence on 10th December.
12. Considering this report, the 1st Respondent elected not to register the 4th Respondent. In addition, the 1st Respondent also rejected the application as it perceived that it was in contravention of Article 32 and the Preamble of the Constitution.
13. Soon after on 14th January 2016, the 4th Respondent was issued with a *Notification of Refusal to Register a Society* being alerted that there was reasonable cause to believe that the interest of peace and good order in Kenya would be prejudiced. In reaction, the 4th Respondent appealed this decision to the 3rd Respondent. Whilst the appeal was allowed by the 3rd Respondent, the 1st Respondent went on to cancel the 4th Respondent's registration on the same grounds.
14. Aggrieved, the 4th Respondent appealed the matter to the High Court under **Constitutional Petition No. 308 of 2016**. It is averred that the Court found in favour of the 4th Respondent and thus an order

quashing the de-registration of the 4th Respondent was issued. In effect, the 4th Respondent's registration was reinstated.

15. She asserts that the 1st Respondent is bound by the High Court's decision and further that the matter herein is res judicata as a consequence.
16. It is further contended that the 1st Respondent followed due process and the law in this matter and hence cannot be adjudged to have violated the Constitution or the law.

4th Respondents' Case

17. In rejoinder, the 4th Respondent through Harrison Mumia, filed a Replying Affidavit sworn on 30th October 2022.
18. In addition to the reiterated chronology of events as outlined by the 1st Respondent, he stressed that the High Court decision in **Constitutional Petition No.308 of 2016** was never been appealed against neither set aside thus legally binding.
19. He avers that the Petition is premature and speculative. As well, that it is breach of the doctrine of exhaustion in view of Sections 38 and 39 of the Societies Act.
20. He likewise asserts that the Petitioner has misapprehended the meaning of Article 8 of the Constitution as against the 1st and 2nd Respondent's mandate of registering societies. Moreover, it is noted that the 1st Respondent's officers have discretion while executing

Sections 11 and 12 of the Societies Act as long as are in line with Sections 38 and 39 of the Act.

21. That the Petition is vague in claiming that due legal process was not followed in registering the 4th Respondent, the alleged activities of the 4th Respondent and how these have violated the Petitioner's rights. Accordingly, it is reasoned that the Petitioner's failure to be specific in setting out these particulars renders the prayers sought to be incapable of being granted. In sum, he urges the Court to dismiss the Petition.

Parties Submissions

Petitioner's Submissions

22. The Petitioner's submissions are not in the Court file or the Court Online Platform (CTS). The Petitioner failed to put in any submissions prompting this Court to order that the Petition shall be determined with or without the said submissions.

1st, 2nd and 3rd Respondents' Submissions

23. State Counsel, Zahra Ahmed filed submissions dated 28th March 2024 and set out the issues for determination as: *whether the registration of the 4th Respondent is unconstitutional; whether Kenya is a religious state and whether Article 2, 8 and 32 of the Constitution, Article 18 of Universal Declaration of Human Rights and Section 12 of the Societies Act were violated.*
24. Counsel commenced by submitting that the registration of the 4th Respondent was lawful as per the Societies Act. This was affirmed

by this Court in **Constitutional Petition No. 308 of 2016** that issued the Court Orders that quashed the 1st Respondent's decision to deregister the 4th Respondent. It was stressed that these orders were not appealed against or set aside hence must be complied with. Reliance was placed in **Hadkinson v. Hadkinson [1952] ALL E.R. 567** where it was held that:

"It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made against by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. LORD COTIENHAM, LC., said in CHUCK v. CREMER (1846) 1 Coop. temp. Cott. 342: - 'A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...'"

25. On the second issue, counsel referring to Article 32 of the Constitution argued that Kenya is not a religious state although it reverences religion highly. Counsel stressed that this is made apparent under Article 8 of the Constitution that stipulates '*There shall be no State religion*'. To support this point Counsel cited the case of **Jesse Kamau & 25 Others V Attorney General [2010] KEHC 3166 (KLR)** where it was observed as follows:

"...the current Constitution and Article 9 of the Zero (Bomas) Draft (which declared that Kenya is a sovereign democratic state, and the Republic of Kenya shall be a multi-party democratic state) and state and religion shall be separate, that there shall be no state religion, and the state shall treat all religions equally). The term 'secular' denotes the three fold relationships among man, state and religion. The word secular is not defined either in the Independence Constitution or the current constitution and Hon. Abida's reference to the abortive

Bomas Constitution on secularism is a moot point. A secular state means one that protects all religions equally and does not uphold any religion as a state religion. Unlike England where the Queen is Titular Head of the Church of England, in Kenya there is no provision to make any religion "the established church." The state is to observe an attitude of neutrality and impartiality towards all religions. In a secular state it is assumed that the state will minimally have to contend with and respond to each of the demands of equality, liberty and neutrality.

Random House Dictionary defines the term secularism as "a system of social political philosophy that rejects all forms of religious faiths." Secularism means liberation of politics from hegemony of religion.

Oxford Learners Dictionary defines secularism, as "belief, morality and education etc should not be based on religion."

Professor Donald E. Smith Professor of Political Science in Pennsylvania USA in his Book – India as Secular State says: -

"The secular state is a state that guarantees individual and corporate freedom of religion, deals with individual as a citizen irrespective of religion, is not constitutionally bound to a particular religion nor does it seek to promote or interfere with religion."

The definition given by Smith reflects three aspects of secularism in the form of interrelated relatives as: - religion and individual, individual and state and state and religion.

Separation of state and religion is the third principle of a secular state that preserves integration, of the other two relationships, freedom of religion and citizenship."

26. Consequently, in the last issue, Counsel submitted that these Articles had not been violated as alleged. This is because Kenya as asserted by the Petitioner is not a religious state. It was stated that this was equally affirmed in **Republic v Head Teacher, Kenya High School and another ex-parte SMY, Miscellaneous Civil Application 318 of 2010**, where it was stated that Kenya is a

secular state. It was argued furthermore that the Petitioner had not shown any specific violation to the cited provisions.

4th Respondents' Submissions

27. 10th August 2023, Richard Ngari and Company Advocates filed submissions and identified the issues for discussion as: *is a prayer for declaration that the registration of the 4th Respondent is unconstitutional capable of being granted; whether the provisions of the Preamble contemplate a violation capable of redress and whether the exercise of the 1st to 3rd Respondents discretion as contemplated by the Societies Act under Sections 9 and 10 can amount to a violation of the Constitution.*
28. On the first issue, Counsel submitted that it was impossible to grant this prayer. This is due to the final orders issued in **Constitution Petition No.308 of 2016.**
29. Furthermore, it was submitted that cancellation of any registration is governed under Section 12 of the Societies Act as read with Section 24 of the Office of the Attorney General Act and Article 9 of the Code of Conduct in the Act. Considering this, this Court cannot usurp the 1st Respondent's exclusive mandate.
30. Correspondingly, it was argued that the Petitioner had not demonstrated how any breach of the legal process had been conducted in registering the 4th Respondent neither abuse of the discretion vested on the 1st Respondent.

31. In like manner, Counsel maintained that the Petitioner was not clear whether what is deemed unconstitutional is the act of registration or the specific Sections of the Societies Act. For that reason, the Petitioner's lack of specificity is faulted for making it incapable to grant the sought remedy. This is because Article 20(4) of the Constitution favours a constitutional interpretation that leans towards enforcement of a right and a fundamental freedom.

32. Reliance was placed in **Kenya National Examination Council v Republic ex-parte Geoffrey Gathenji Njoroge[1996] eKLR** where it was held that:

"Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way. What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

33. Counsel in the second issue argued that the Constitution in its preamble does not provided any specific rights capable of being violated and thus does not form part of substantive law. Reliance was placed in **Jacobson v. Massachusetts 197. U.S. 11 (1905)** where it was observed that:

"...We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question is in derogation of rights secured by the Preamble of the Constitution of the United States. Although that Preamble indicates the general purposes for which the people ordained

and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments."

34. In conclusion, Counsel submitted that the Petitioner has not set out the purported violations and unlawful acts caused by the 1st to 3rd Respondent's in registering the 4th Respondent. In addition, no fault on the part of the 1st to 3rd Respondents had been demonstrated. It was asserted that performance of their legal duty could not amount to violation of rights as averred by the Petitioner. Reliance was placed in **Constitutional Petition No.308 of 2016** where this Court held that:

"The test in administrative actions is that of the legality and lawfulness of such administrative actions."

Analysis and Determination

35. It is my considered opinion that the issues that arise for determination are as follows:

- i. Whether the matter is res-judicata in view of Petition 308 of 2016 which reversed the suspension of registration of the 4th Respondent by the 1st Respondent.***
- ii. Whether Kenya is a religious State.***
- iii. Whether the 1st, 2nd and 3rd Respondents violated the preamble of the Constitution; Articles 2, 8 and 32 of Constitution; Article 18 of the Universal Declaration of Human Rights and Section 12 of the Societies Act.***

- iv. *Whether the Petitioner is entitled to the reliefs sought.*

Whether this matter is res judicata in view of Petition 308 of 2016 which reversed the suspension of registration of the 4th Respondent by the 1st Respondent.

36. Res judicata as a legal principle is codified under Section 7 of the Civil Procedure Act as follows:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

37. The Supreme Court in *Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & another Motion [2016] eKLR* held as follows:

"[52] Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights..."

38. The Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR* observed as follows:

"...for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following

elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (a) The suit or issue was directly and substantially in issue in the former suit.*
- (b) That former suit was between the same parties or parties under whom they or any of them claim.*
- (c) Those parties were litigating under the same title.*
- (d) The issue was heard and finally determined in the former suit.*
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."*

39. The Court proceeded to note that:

"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

40. In effect the Court concluded that:

"The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not

even by consent of the parties –because it is the court itself that is debarred by a jurisdictional Injunct, from entertaining such suit. That much was stated by this Court in Ngugi v. Kinyanjui & 3 Others [1989] KLR 146 when it held (at p147) that;

"3. Section 7 was a mandatory bar from (sic) any fresh trial of a concluded issue and a Judge cannot competently get round that bar by obtaining the consent of the parties to an arbitration of a concluded issue."

41. I will go straight to the point and consider the implication of Petition 308 of 2016 on this matter. The full citation is **Atheist in Kenya & Harrison Mumia vs Registrar of Societies & Mukulu Kariuki & Attorney General [2018] KEHC (KLR).**
42. Brief facts of the above case were that the 1st Petitioner had been registered under the Societies Act, Cap 108 Laws of Kenya on 17/2/2016 through certificate number 42958. It commenced its activities but on 29/8/2016; the 2nd Petitioner wrote to the 1st Petitioner suspending it on the grounds that its activities had ***"had generated great public concerns which is prejudicial and incompatible with peace, stability and good order of the republic."***
43. The Petitioners challenged the suspension terming it summary and in breach of the Constitution. Despite part of the prayers sought by the Petitioner being *"a declaration that atheism is constitutionally protected freedom and fundamental right, and that, atheism is not in any way unconstitutional;* the Court avoided dealing with these issues and instead focused only on the procedural propriety of the suspension letter in question. This is discernible in paragraph 19 of

the judgment and is further reinforced by the ratio as can be confirmed in paragraphs 45, 46 and 47 of that judgment.

44. At paragraph 19; the Court observed thus:

*"I have considered this Petition the response thereto, submissions by both sides and authorities relied on. In my view, the **Petition raises only one issue, that is, whether the 1st Petitioner suspension was procedural and lawful.**"*

45. Indeed, paragraphs 45, 46 and 47 of the Judgment confirm the above position. The Court **stated:**

" 45. It is therefore clear to me beyond doubt that the respondents violated the petitioners' rights and failed to act in accordance with the Constitution and the law by according them a hearing before suspending registration of the 1st petitioner as a society. Article 2(1) of the Constitution proclaims the Constitution as the Supreme law of the Republic and binds all persons and all state organs at all levels of government. Further, national values and principles governance in Article 10 of the Constitution also bind all state organs, state officers, public officers and all persons whenever they apply or interpret the Constitution or enact apply or interpret any law. The national values and principles of governance include (2) (b) human dignity, equality, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. To that extent, the petitioners' rights must be valued, respected and protected.

46. **In the circumstance, I find and hold that the respondents' action is untenable for violating the Constitution and the law. If the respondents have reason to believe that the 1st petitioner's registration or its activities are questionable, they**

must act in accordance with the Constitution, the Fair Administrative Act and section 12 of the Societies Act and give the petitioners an opportunity to respond to any misgivings about its activities before taking any drastic action against them. 47. For those reasons, I find that the petition has merit and must succeed. As to damages, I do not think the petitioners laid a basis for such an order. The request is therefore declined. Ultimately, the orders that commends themselves for granting are as follows;

- i. A declaration is hereby issued that the respondents violated the petitioners' constitutional and statutory rights as set out under Articles 47 of the Constitution, the Fair Administrative Act and Section 12 of the Societies Act.*
- ii. An order is hereby issued quashing the letter by the 2nd respondent dated 29th April 2016 purportedly suspending registration of the ATHEISTS SOCIETY IN KENYA the 1st petitioner herein. iii. Each party do bear their own costs..."*

47. Clearly whether the registration of the 4th Respondent violates the tenets of the Constitution was not decided by the Court and this is the substance of instant Petition hence it cannot be argued that the issues in this Petition are res judicata. Res judicata would only apply if the issues were raised and conclusively determined by the Court which was not the position in Petition 308 of 2016.

48. The next issue which I need to consider is ***Whether the 1st, 2nd and 3^d Respondents violated the preamble of the Constitution; Articles 2, 8 and 32 of Constitution; Article 18***

of the Universal Declaration of Human Rights in registering the 4th Petitioner.

49. This question cannot be considered without application of the principles of constitutional interpretation. The principles of constitutional interpretation have been discussed severally by the Courts. The Court of Appeal in **Ferdinand Ndung'u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & others [2014] eKLR** noted as follows:

"I accept the proposition that the appellant has put forward, that the Constitution must be interpreted in a liberal, purposive and progressive manner, in order to give effect to the principles and values contained therein. This is found at Article 259 (1) of the Constitution which is framed as follows:

Article 259. (1) This Constitution shall be interpreted in a manner that—

- (a) promotes its purposes, values and principles;*
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;*
- (c) permits the development of the law; and*
- (d) contributes to good governance.*

These principles have been reiterated time and again by our courts. In Njoya & 6 others - vs- Attorney General & 3 others No 2 [2008] 2 KLR (EP), this Court held that:

The Constitution is not an Act of Parliament but the supreme law of the land. It is not to be interpreted in the same manner as an Act of Parliament. It is to be construed liberally to give effect to the values it embodies and the purpose for which its makers framed it."

50. Correspondingly, the Supreme Court in the Matter of the Interim Independent Electoral (supra) guided as follows:

"(86)The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.

[87] In Article 259(1) the Constitution lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that

- (a) promotes its purposes, values and principles;*
- (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights;*
- (c) permits the development of the law; and*
- (d) contributes to good governance." Article 20 requires the Courts, in interpreting the Bill*

of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

[88] These constitutional imperatives must be implemented in interpreting the provisions of Article 163(6) and (7), on Advisory Opinions. Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

[89] It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation."

51. Equally, in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR the Supreme Court stated as follows:

"[137] This, in our perception, is an interpretive conundrum, that is best resolved by the application of principle. This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within

its context, and in its spirit. In the Matter of the Kenya National Human Rights Commission, Sup. Ct. Advisory Opinion Reference No. 1 of 2012; [2014] eKLR, this Court [paragraph 26] had thus remarked:

"...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result" [emphasis supplied].

[138] In Speaker of the Senate & Another v. Attorney-General & 4 Others, Sup. Ct. Advisory Opinion No. 2 of 2013; [2013] eKLR, [paragraph 156], this Court further explicated the relevant principle:

"The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower Courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It

is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitutions borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly [capture] express the minds of the framers, and the minds and hands of the framers may also fail to properly mind the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras."

52. The issue that this Petition raises is that the registration of the 4th Respondent "**Atheists in Kenya**" is unconstitutional for violating the preamble of the Constitution, Article 2, 8 and 32 of the Constitution as well as Article 18 of the Universal Declaration of Human Rights and Section 12 of the Societies Act."

53. It is necessary to set out the impugned constitutional provisions for contextual analysis.

54. Starting with the preamble, it begins thus:

We, the people of Kenya- "**ACKNOWLEDGING** the *Supremacy of the Almighty God of all creation*"

55. **Article 2** is on the Supremacy of the Constitution and has five sub-articles arranged as follows:

2 (1) This Constitution is the Supreme Law of the Republic and binds all persons and all State organs at both levels of Government.

- 2) *No person may claim or exercise State authority except as authorized under this Constitution.*
- 3) *The validity or legality of this Constitution is not subject to challenge by or before any Court or other State Organ*
- 4) *Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid*
- 5) *The general rules of international law shall form part of Kenya*
- 6) *Any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this Constitution.*

56. **Article 8** provides:

"There shall be no State religion."

57. **Article 32** states:

Freedom of conscience, religion, belief and opinion.

32. 1. *Every person has the right to freedom of conscience, religion, thought, belief and opinion.*

2. *Every person has the right, either individually or in community with others, in public or in private, to manifest any religion, or belief through worship, practice, teaching or observance of a day of worship.*

3. *A person may not be denied access to an institution, employment or facility, or the enjoyment of any right, because of the persons belief or religion.*

4. ***A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.***

58. Expounding on the meaning of Article 32 of the Constitution, the Court in **Pradipkumar Bhagwanji Shah & another v Dinesh Meghji Dhanani & 8 others [2020] eKLR**, held as follows:

"34. The freedom of religion is provided for under Article 32 of the Constitution of Kenya 2010 which provides:

"32. Freedom of conscience, religion, belief and opinion-

(1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.

(3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.

(4) A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion."

35. The Constitutional provisions herein above highlight, the importance placed on one's right to express and manifest his/her religious beliefs as was fittingly expressed in the case of *Nyakamba Gekara v. Attorney General & 2 Others (2013) eKLR*, where the Court stated:

"In the same view, the case of *R (Williamson) v Secretary of State for education and Skills [2005] 2 AC 246* is highlighted. Lord Nicholls had this to say:

"Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilized society individuals' respect each other's beliefs. This enables them to live in harmony."

36. It is evidently clear that Article 32 of the Constitution on freedom of conscience, religion, belief and opinion is fundamentally important to the peaceful functioning of any democratic society. The freedom of religion clearly involves in one being able to express his/her beliefs through overacts."

59. Furthermore, this concept was reasoned in **Seventh Day Adventist Church (East Africa) Limited v Minister for Education & another; Board of Governors Alliance High School (Interested Party); National Gender and Equality Commission (Amicus Curiae) [2013] KEHC 6006 (KLR)** as follows:

"48. Over and above the above provision, the Constitution at article 8 states that, 'there shall be no stat religion'. To my mind and as this court stated recently, the import of this provision is that no religion shall have prevalence over any other and no particular one should be seen as the one each citizen is obligated to follow including on the observance of a day of worship - See Nyakamba Gekara v Attorney General and 2 Others, Petition No 82 of 2012. That being so, have the respondents infringed the rights of Adventist's Students under article 32, as is claimed by the petitioner? Our Constitution nor any International instrument define religion. However, while interpreting article 9 of the European Convention on Human Rights which protects the right of individuals to hold religious

and other beliefs; and to practise them alone or with other people and also the right to manifest one's religion or beliefs; the European Court on Human Rights has repeated on many occasions that the State is not entitled to assess the legitimacy of the religious views or the way in which they are manifested - See Hasan and Chaush v Bulgaria, (2002) 34 EHRR 55, Metropolitan Church of Bessarabai v Moldova (2002) 35 EHRR 305 and Sahin v Turkey (2007) 44 EHRR 5.

60. These authorities have clearly set out the tempo as one of provisions the Petitioner relied on was **Article 18 of ICCPR**; *this particular Article has been interpreted by the UN Human Rights Committee to protect:*

"Theistic, non-theistic and atheistic beliefs as well as the right not to profess any religion or belief.

61. Article 20 (2) of the Constitution provides that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest possible extent consistent with the nature of the right or fundamental freedom and in Article 20 (3) the Court is commanded in applying the Bill of Rights to:

- a) *develop the law to the extent that it does not give effect to a right or fundamental freedom; and*
- b) *adopt the interpretation that most favours the enforcement of a right or fundamental freedom.*

62. In my view, it is a matter of conscience for any person to decide whether to believe in anything or be religious for if this was not the case, it will translate into people being compelled to believe in or practice what is actually against their conscience. The right of

atheist should thus be protected under Article 32 unless by practicing it is shown to be violating the rights of others or if it amounts to an act forbidden by law.

63. In my view, it would be unconstitutional to impose a belief in any person if that person does not endorse as this amounts to theocratic tyranny which our Constitution does support as is made clear in Article 8 which provides that "***there shall be no state religion***" and Article 32 (4) which states that "***A person shall not be compelled to act, or engage in any act, that is contrary to the person's believe or religion.***"
64. In view of the foregoing, I find that this Petition lacks merit and is hereby dismissed. Each Party to bear its own costs.

Dated, signed and delivered virtually at Nairobi this 5th day of December, 2024.


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L N MUGAMBI
JUDGE