**Njoya and others v Attorney-General and others**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 25 March 2004

**Case Number:** 82/04

**Before:** Ringera, Kubo JJ and Kasango AJ

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Constitution – Amendment and review – Whether the power of amendment allows Parliament to*

*repeal and replace entire Constitution – Section 47 – Constitution of Kenya – Sections 26, 27 and 28 –*

*Constitution of Kenya Review Act (Chapter 3A).*

*[2] Constitution – Fundamental rights – Discrimination – Composition of constituent assembly skewed*

*against certain regions – Whether skewed representation amounted to discrimination against Applicants*

*– Whether Applicants entitled to redress – Section 82 – Constitution of Kenya.*

*[3] Constitution – Interpretation – Narrow and broad construction – Whether Constitution should be*

*given literal interpretation – Nature of teleological interpretation incorporating fundamental values and*

*principles.*

*[4] Constitution – Review – Constituent power – Whether constituent power enjoys juristic content –*

*Exercise of constituent power by the people – Direct and indirect exercise – Whether direct referendum a*

*mandatory organ of review – Proper mode of representation in constituent assembly – Whether skewed*

*representation in assembly discriminated against Applicants personally – Sections 1, 3, 3A and 82 –*

*Constitution of Kenya.*

**Editor’s Summary**

After continuous political pressure, Parliament enacted the Constitution of Kenya Review Act (Chapter 3A) to facilitate the comprehensive review of the Constitution. It provided for the establishment of a commission to prepare a draft Constitution and oversee the process of review, culminating in a national Constitution Conference. The Act provided for the possibility of a referendum on items for which two thirds majority of the Constitution Conference (“the Bomas Conference”) could not be attained. During the course of the Bomas Conference, the delegates became deeply divided over a number of core issues, including the question of whether to adopt a Presidential, Parliamentary or hybrid system of government, and the structure of devolved government. Complaints increased that the composition of Bomas and the design of the review process were skewed undemocratically in favour of some parties. Against this background, seven Kenyans applied to the High Court for orders that the review Act was unconstitutional. It was claimed that (1) the non-inclusion of a compulsory referendum on the entire document vitiated the constituent power of the Applicants, (2) the two-thirds voting majority at the conference was unconstitutional, (3) the manner of composition of the conference was skewed and discriminatory against the Applicants, and (4) the manner in which the Commission and the Conference had functioned did not faithfully and fairly capture the views of the Applicants. The Court dealt with these matters, as well as the question of constitutional interpretation, and whether Parliament was empowered to enact a new Constitution within the power of amendment granted in section 47 of the Constitution.

**Held** (*per* Ringera J and Kasango AJ; Kubo J dissenting) – Quite unlike an Act of Parliament which is subordinate, the Constitution should be given a broad liberal and purposive interpretation to give effect to its fundamental values and principles (*Crispus Njogu v AG* criminal application number 39 of 2000, followed; *Ndyanabo v AG* [2001] 2 EA 485 approved; *Republic v Elman* [1969] EA 357 disapproved). The sovereignty of the people betokens that they have a constituent power, by which all citizens can make or change the Constitution. This power, while not expressly recognised, has a juridical status within the Constitution. This constituent power must be exercised indirectly through a constituent assembly within the phase of Constitution-making. It must thereafter be exercised directly through referendum whereby every Kenyan votes to adopt the Constitution. Since only one third of the delegates to the National Conference were directly elected by the people, the Conference lacked the peoples’ mandate, and hence was not a proper constituent assembly. Further, no amount of antecedent history of skewed representation could justify the turning of minorities into majorities, as had happened in the composition of the Conference (*Reynolds v Simms* [377 US 533 12 L ed] at 506 adopted). (*Per* Ringera J and Kasango AJ; Kubo J dissenting) Since none of the Applicants’ personal rights had been infringed, the declarations sought should not be issued (*Adar v Attorney-General* miscellaneous civil application number 14 of 1994 applied). Parliament did not have the power, in the exercise of its amendment power under section 47 of the Constitution, to repeal the current Constitution and enact a new one. It only had power to change some provisions of the Constitution. There is no power to alter the basic structure of the Constitution since this is part of the constituent power that rests with the people (*Kessevananda v State of Kerala* [1973] AIR SC 1461 adopted; *Teo so Lung v Minister for Home Affairs* [1990] RC 490 distinguished). Hence section 28 of the Review Act, which required Parliament to enact the Constitution Review Bill within seven days of publication, was inconsistent with section 47 of the Constitution. No injunction would be granted as the Constitutional Conference had completed its work and the prayer had been overtaken by events. *Per curiam* (*per* Ringera J): The fundamental values and principles according to which the Constitution must be interpreted are constitutionalism (limited government under rule of law), equality of all citizens, the doctrine of separation of powers and the enjoyment of fundamental rights and freedoms. (*Per* Ringera J and Kasango AJ) While a constituent assembly does not have to comprise only directly elected members, such directly elected members must form the majority of the assembly. Some additional representation of minority and special interests may also be advisable. Kenya is a multicultural society and representation should not be on the basis of population alone. (*Per* Ringera J and Kasango AJ) Democratic representation must reflect a balance between the majoritarian principle of one person one vote and the equally democratic dictate of minority accommodation, in other words equality and equity. However, to accommodate minorities does not entail reversing the democratic equation by having minority dominance in representative forums. (*Per* Ringera J) Kenya has had 38 constitutional amendments in her history. Some of these amendments effected significant changes in the basic structure of government. These changes were however not challenged in the courts and are now part of the Constitution. However, there is no precedent in Kenya for the proposition that Parliament can make a new Constitution Declarations issued to the effect that (1) a compulsory referendum and representative constituent assembly are mandatory in the process of Constitution review, (2) the determination of contentious issues in the constituent assembly by two thirds majority infringed the applicant’s right to a referendum, and (3) Parliament only had the power to alter but not to enact a new Constitution.

Each party to bear its own costs.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Adar and others v Attorney-General and others* miscellaneous civil application number 14 of 1994 (UR)

*Githunguri v Republic* [1986] KLR 1

*Matiba v Attorney-General* High Court civil miscellaneous appeal number 666 of 1990 (UR)

*Michuki and another v Attorney-General and others* [2003] 1 EA 158

*Mutunga v Republic* [1986] KLR 167

*Ndyanabo v Attorney-General* [2001] 2 EA 485

*Nganga v Republic* [1985] KLR 121

*Njogu v Attorney-General* [2000] LLR 2275 (HCK)

*Republic v El Mann* [1969] EA 357

*Uganda v Commissioner of Prisons* ex parte *Matovu* [1966] EA 514

***India***

*Keshava Menon v State of Bombay* [1951] SCR 228

*Kessevananda v State of Kerala* [1973] AIR (SC) 1461

*Minerva Mills Limited v Union of India* [1981] 1 SCR 206

***Singapore***

*Teo So Lung v Minister for Home Affairs* [1990] LRC 490

***United Kingdom***

*Barnes v Jarvis* [1953] I WLR 649

***United States of America***

*BA Reynolds v MO Sims USSC* Report [1963] Volume 12

Reynolds v Simms [377 US 533, 12 L Ed] 506