



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 574 of 2012

KITUO CHA SHERIA.....PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

LEGAL RESOURCES FOUNDATION.....INTERESTED PARTY

JUDGMENT

Introduction

1. This is a public interest petition filed to determine the issue whether prisoners have the right to vote under the Constitution and whether this right has been violated by the respondents.

Petitioners Case

2. This case is brought by Kituo Cha Sheria, a locally registered non-governmental organisation committed to the promotion, protection and enhancement of human rights. It brings this petition in public interest under the provisions of **Article 22(2)** and **258(2)(c)** of the Constitution. It seeks relief for violation of fundamental rights of prisoners to be registered as voters and their right to vote in the 4th March 2013 general election and other future elections and referenda.

3. In the petition dated 14th December 2012 supported by the affidavit of Gertrude Angote, the acting Executive Director, sworn on 14th December 2012, the petitioner seeks the following orders;

(a) For a declaration that prisoners in Kenya possess the fundamental and an inalienable right to be registered as voters and to vote pursuant to Article 38 (3)(a) and (b) of the Constitution of the Republic of Kenya.

(b) That the Honourable Court makes a finding that the 1st respondent's exclusion of prisoners from

voter registration exercise is illegal and a violation of their fundamental rights to be registered as voters and to vote in the forthcoming elections and subsequent elections and referenda.

(c) That pursuant to prayers (a) and (b) above, this Honourable court be pleased to grant an order compelling the 1st respondent for the immediate registration of prisoners as voters and to facilitate their voting in the 4th March 2013 elections and subsequent elections and referenda.

(d) That this Honourable court orders the 1st respondent to extend the period of registration of voters for purposes of registration of prisoners.

(e) That this Honourable Court declare each of the prisons as registration centres and also polling centres and deploy Independent Electoral and Boundaries Commission Officials as Returning Officers in the prisons for the 4th March 2013 elections and subsequent elections and referenda.

(f) That the Honourable Court instruct the 1st respondent to liaise with Prison authorities for prisoners to be allowed to access their identification Cards for purposes of registration as voters and for the safe keeping of the voters cards upon the registration of prisoners as voters.

(g) Costs in this suit.

(h) For all such orders, writs and or directions as the Honourable Court may deem fit, just and appropriate to safeguard the fundamental rights of prisoners under the Constitution of Kenya.

4. The petitioner's cause is also supported by the Legal Resources Foundation, which was joined as interested party. Legal Resources Foundation is a registered non-governmental organisation which through its Administration of Justice Program, it focuses attention to human rights of prison inmates. The interested party has filed a supporting affidavit of Ann Kamau, an Assistant Program Officer, sworn on 17th December 2012.

5. The respondents did not contest the petitioner's contention that prisoners had a right to vote. Mr Muhoro, counsel for the IEBC, noted since the determination of the case of ***Priscilla Nyokabi Kanyua v Attorney General and Another IICDRC Petition No. 1 of 2010 (Unreported)***, the Independent Electoral and Boundaries Commission ("IEBC") complied with the orders of the Court to facilitate the registration of voters and ensure that they vote during the 2010 referendum. He stated that the IEBC has maintained the same registration and polling centres that were established in compliance with the Court order and has, since then, continued to register voters in prison. The IEBC, however, opposed the petition on the ground that it had taken measures to ensure that prisoners are registered and that it had taken adequate steps to ensure their right to vote.

Constitutional provisions

6. The petitioner's case is founded on the provisions of **Article 38** of the Constitution which provides as follows;

38. (1) Every citizen is free to make political choices, which includes the right—

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

(3) Every adult citizen has the right, without unreasonable restrictions—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

7. Ms Burugu, counsel for the petitioner, submitted that the right to be registered as a voter and to vote applies to every person and it includes prison inmates. The right to vote is actualised or operationalized in **Article 83** which is part of **Chapter Seven** titled – “**Representation of the people**”. **Article 83** provides for the qualification for registration as a voter which states as follows;

(1) A person qualifies for registration as a voter at elections or referenda if the person—

(a) is an adult citizen;

(b) is not declared to be of unsound mind; and

(c) has not been convicted of an election offence during the preceding five years.

(2) A citizen who qualifies for registration as a voter shall be registered at only one registration centre.

(3) Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election.

8. The petitioner’s case is that **Article 83** sets out the qualifications of a voter and being convicted does not disqualify a citizen from voting nor does the fact of imprisonment. The only prisoners who may be precluded from voting are those who have been convicted of committing an election offence during the preceding five years. Counsel submitted that on the whole, the only internal limitation to the right to vote relates to the rights of persons in the Diaspora to vote in **Article 82(1)(e)** which right is to be realised progressively (see the cases of **New Vision Kenya (NVK Mageuzi and Others v IEBC and Others** Nairobi Petition No. 331 of 2012 (Unreported) and **Jeffer Issak Kaur v Ministry of Justice, National Cohesion and Constitutional Affairs and Others** Nairobi Petition No. 556 of 2012 (Unreported)).

9. The IEBC is the body charged with the responsibility to register voters under **Article 88(4)(a)** as mirrored under **section 4** of the ***Independent Electoral and Boundaries Commission Act (No. 9 of 2011)***, (“IEBC Act”) and is required under **Article 83(3)** to facilitate registration of voters. In addition to this responsibility, as a State organ, the IEBC is bound by **Article 10**, which encapsulates the national values and principles of governance which include engendering human rights, equality, dignity, public participation among others. **Article 21(1)** imposes on the IEBC, as a State organ, to observe, respect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. These provisions read together do not permit the State to be a passive actor but require an activist sense in ensuring fundamental rights are promoted and fulfilled. In ***Jeffer Issak Kaur v Ministry of Justice, National Cohesion and Constitutional Affairs and Others (Supra)*** at para. 18, Justice Lenaola noted that, ***“The enshrinement of the right in a Constitution to vote not only puts a bulwark against any government action that infringes on that right but also necessarily places a positive obligation on the State to ensure that its citizens vote voluntarily.”*** In ***Richter v Minister for Home Affairs and Others [2009] ZACC 3***, the Constitutional Court of South Africa noted that, ***“Unlike many other civil and political guarantees, as this Court has remarked on previous occasions, the right to vote imposes an obligation upon the state not merely to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised.”***

10. The issue of the right of prisoners to vote within our jurisdiction first arose in the case of ***Priscilla Nyokabi Kanyua v Attorney General and Another (Supra)***. The Interim Independent Dispute Resolution Constitutional Court (IIDRCC) addressed the right of prisoners to vote at the 2010 referendum. The Court concluded that the right of prisoners to vote in the referendum is fundamental as the referendum constituted the exercise of the people’s constituent power. The Court held that the former Constitution did not disqualify inmates from voting in a referendum and that there was no legitimate governmental objective or purpose that would be served by denying inmates the right to vote in a referendum. The Court directed the Attorney General and necessary authorities to facilitate accessibility of prisons and the prisons identification documents to enable the Interim Independent Electoral Commission to register inmates who wished to vote to do so. The Court, being one of limited jurisdiction to determine matters relating to the Constitution review process under the former Constitution, limited its findings to the referendum.

11. Though the ***Priscilla Kanyua Case*** marked a first step in Kenya towards recognition of the right of prison inmates, this right is recognised worldwide. In ***Suave v Attorney General of Canada [2002] 3 SCR 519***, the Supreme Court of Canada affirmed the right of prisoners to vote and held that the Federal Government did not have sufficient reasons to deny prisoners the right to vote. The Court stated that, ***“[t]he right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features underpins the legitimacy of Canadian democracy and Parliament’s claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizen, jeopardizes its claim to representative democracy, and erodes the basis of its right to convict and punish lawbreakers.”***

12. In ***Arnold Keith August and Another v Electoral Commission and Others CCT 8/99 [1999] ZACC 3***, the Constitutional Court of South Africa declared that all persons who were prisoners on the date of the general elections were entitled to vote in that election if they have registered to vote and that the respondents were to make all reasonable arrangements necessary to enable prisoners to register to vote. The Court rejected the argument that allowing prisoners to vote posed special hardships on the electoral commission. Justice Sachs underlined the importance of the right to vote in the following terms, ***“[u]niversal adult suffrage on a common voter roll is one of the foundational values of our entire constitutional order...The universality of the franchise is important not only for nationhood and***

democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.”

13. The Constitution as the supreme law is founded on the sovereignty of the people of Kenya (see ***Njoya and Others v Attorney General and Others (2008) 2 KLR (EP) 658***). This sovereignty is exercised through voting for representatives in the National and County governments who exercise delegated authority of the people in accordance with **Article 2**. It is beyond argument then that the right to vote is fundamental to our system of government. The Constitution, with its emphasis on the peoples’ sovereignty, the values on rule of law, equity, inclusiveness, equality, human rights as well as the right to vote guaranteed under **Article 38** and the qualification of voters provided under **Article 83** does not exclude prisoners from being registered to vote and consequently voting in an election. Apart from merely guaranteeing the right, the Constitution places upon the State and its agencies the positive responsibility to ensure that all the people of Kenya and particularly those who are marginalised or vulnerable are able to exercise this fundamental right.

Whether the right to vote has been violated

14. The next and I think the important issue for consideration is whether the prisoners’ rights have been violated and whether such violation can be justified.

15. According to the deposition of Mrs. Getrude Angote, the IEBC excluded all prisoners across the country when it carried out the voter registration exercise for the election scheduled for 4th March 2012. When Kituo requested the IEBC to confirm whether it had commenced registration of voters through the letters dated 18th April 2012, 8th May 2012 and 4th December 2012 addressed to the Chairman of the IEBC, the letters went unanswered. Apart from writing directly to the IEBC, the petitioner’s concerns were augmented and highlighted through a rigorous press campaign to draw the IEBC’s attention to this issue. The petitioner noted with concern that the IEBC positions regarding the rights of inmates to vote was expressed by one of the IEBC Commissioners who was reported, in the Daily Nation of 4th December 2012, stating that, *“We do not have such plans. We have not received any letter from any organisation demanding that inmates participate in the general election.”*

16. Ms Ann Kamau of Legal Resources Foundation also depones that the IEBC deliberately excluded prisoners from the voter registration exercise thereby jeopardising their participation in the forthcoming general elections. According to Ms Kamau, the IEBC set up registration and voting centres within the Machakos Prison for purposes of registering Prison Officers and their relatives as voters but this was insufficient to ensure that prisoners register and vote in the forthcoming election. Ms Kamau also alludes to discussions with IEBC officials on the issue of registration of prisoners and exchange of emails. These inquiries, it appears, did not yield any response from the IEBC.

17. In response to the petitioner and interested party’s case, the Director Legal and Public Affairs of the IEBC, Ms Praxedes Tororey, deponed to an affidavit sworn on 21st December 2012. The replying affidavit raises three broad issues. First, that the IEBC made the necessary arrangements to ensure all citizens including prisoners are given an opportunity to register to vote. The IEBC appointed registration and assistant registration officers through **Gazette Notice Number 16726**. Thereafter, acting pursuant to and in accordance with the provisions of the Constitution and all relevant laws relating to the registration of voters, IEBC invited all persons who so wished to register to apply for registration from 19th November

2012 to 18th December 2012. That the IEBC established Registration Centres throughout the country in Prisons premises, adjacent to Prisons, next to Prisons and in very close proximity to the same in places such as Kamiti, Kitui, Machakos and Makueni.

18. Second, the IEBC has not received any report from any of the registration officers that any prisoner who has applied for registration as a voter in accordance with the law has been refused, turned away or denied the right to register. Furthermore the IEBC contends that neither the petitioner's nor the interested party have shown that such an instance has occurred at any of the Voter Registration Centres countrywide or that the IEBC ignored, prevented or refused to register prisoners as alleged.

19. Third, the IEBC contends that the period for voter registration has elapsed and the IEBC is now preparing and compiling the Voters Register after which the same will be opened for inspection by members of public from 4th January 2013 upto 19th January 2013 after which the final Register will be compiled and ready for purposes of nominations and general election. In the circumstances, the IEBC contends that permitting the registration of prisoners as voters would throw the entire remaining electoral process into a spin leading to the cancellation of the 4th March 2013 general election. Ms Tororey believes that, *"this honourable Court has a duty in determining this matter to ensure that the greater and overwhelming public interest and good is not jeopardized by this application which lacks any merit and or legal basis whatsoever."*

20. After hearing and considering the matter, I was of the view that the deposition filed on behalf of the IEBC was inadequate to deal with the issues raised by the petitioner and in a ruling dated 15th January 2013, I stated as follows, ***"[2] Under Article 83(3), the IEBC is the body required to make and implement administrative arrangements for the registration of voters and the conduct of elections, which shall be designed to facilitate and shall not deny an eligible citizen the right to vote or stand for elections. This obligation is, in my view, an affirmative obligation imposed on the IEBC as an agent of the State specifically empowered to realise the right to vote under Article 38. Under Article 21(1) it is the fundamental duty of the State and every State organ to observe respect, promote and fulfil the rights and fundamental freedoms in the bill of rights. [3] Article 21(3) all imposes a further responsibility on the state, its organs and public offices to address the need of vulnerable groups including women, children and others and for this purpose, prisoners are a vulnerable group that require special attention. Indeed the State and IEBC have particular responsibility to address themselves to this group. [4] In order to finalise this case, I direct the IEBC to file an affidavit within the next two days to demonstrate the steps, measures and activities it has taken realise the fundamental rights of prisoners to register and vote during the first general elections."***

21. It is upon the direction that the supplementary affidavit sworn on 17th January 2013 by Mahamud Mohamed Jabane, the Manager, Legal Services, was filed. At the material part, he states as follows;

*[7] That in facilitating eligible prisoners the right to vote, the Commission as far back as the year 2010 prior to the referendum vote for the Constitution of Kenya, later promulgated on 27th August 2010, established registration centre and polling stations in prisons across Kenya pursuant to the Judgment in the case of **Priscilla Nyokabi Kanyua, Petition No. 1 of 2010** delivered by the Interim Independent Constitutional Dispute Court at Nairobi on 23rd June 2010.*

[8] That the said prisons registration centres set up in 2010 were retained during the gazettelement of Registration Centres on 16th November 2012 for the upcoming March 4 2013 General Elections and as such, the Commission has continued in its facilitation and operation of the said registrations.

[9] That it is instructive to note that the prisons registration centres country wide for purposes of logistics were clustered with other registration Centres because the number of registration centres was higher than the number of BVR kits (15,000 BVR kits vis a vis 24,617 Registration Centres).

[10] That the Commission employed registration officers, assistant registration officers and registration clerks to man all the registration centres country wide including those in prisons.

[11] That I verily believe that the Commission fulfilled its obligation and Constitutional duty to every adult citizen prisoners included and without restrictions by ensuring that registration centres were within reach of every and all citizens and in this regard the Commission set up 24,617 such centres including mobile centres and did not exclude prisons, which were duly gazetted as registration centres.

[12] That I verily believe the Commission complied with its fundamental and Constitutional duty as required of every state organ by observing, respecting and fulfilling the rights and freedoms as enshrined in the Bill of Rights.

[13] That I verily believe that the Commission as a state organ was receptive to and carried out its responsibility to a vulnerable group which in this case was those in prison by taking into account their incarceration and limited freedom of movement and as such created registration centres within the said prisons to enable them register as voters and subsequently vote in exercise of their constitutional right to the same.

[14] That the Commission carried out massive voter registration education throughout the country through a variety of modes such as radio broadcasts in 96 radio stations, television broadcast in 9 stations, news paper adverts in all major local dailies through which I verily believe the Commission was able to reach most if not all of the eligible adult citizens, including the prisoners who now a days have access to radio, televisions and newspapers introduced in Prisons via the now famous Moody Awori Prison reforms.

[14] That the Commission further posted information on its voter registration exercise and education thereof on its website www.iebc.or.ke and a link therein vote.iebc.or.ke and in which link any person surfing thereof could find a registration centre near them or convenient for them to register as a voter via Google Maps. I verily believe that the prisoners had access to this search engine as the "Moody Awori" reforms referred to herein above have given them access to internet facilities and were thus not in the dark about the availability and or proximity of registration Centers to them nor of their rights to register as voters.

[15] That I verily believe that the Commission has in no way whatsoever breached the provisions of the Constitution in respect of the right of prisoners to be registered and subsequently vote.

22. In addition to the deposition, Mr Muhoro, counsel for the IEBC submitted that the IEBC carried out its constitutional mandate by creating polling and registration centres within and in close proximity to prisons to enable prisoners register to vote. Further, given the nature of prison custody, the IEBC could not do much more as the prisoners were in lawful custody. IEBC relied on the provisions of **Article 51**.

23. The 2nd respondent supported the position taken by the IEBC, Mr Wamotsa, counsel appearing on behalf of the Attorney General, submitted that that the IEBC duly gazetted prisons as registration centres and prisoners were given the opportunity to register as voters and no evidence has been proffered by the petitioners that any prisoner was denied registration.

Determination

24. The petitioner's case is that the IEBC excluded prisoners from voter registration exercise. Apart from press reports attributed to an IEBC Commissioner that the IEBC did not intend to register prisoners as voters, I do not think that the IEBC deliberately set out to exclude voters. The depositions filed on behalf of the IEBC demonstrate that it understood its obligations to prisoners in light of its experience in the ***Priscilla Kanyua Case*** and these obligations consisted of providing registration and polling stations within prisons and conducting voter education.

25. As I stated, the obligation of the IEBC and other state organs and agencies to realise the right of prisoners to register to vote and to vote in the forthcoming general election is not a passive duty but an active one imposed by the Constitution and particularly the Bill of Rights on the State and all its instrumentalities. In my view the breach of prisoners' right to vote entailed failing to take positive steps to facilitate, promote and fulfil this right. It is clear therefore that the facts placed before the Court in this respect are wholly inadequate to satisfy the obligation placed on the State and IEBC by the Constitution and the law.

26. Mr Muhoro, submitted that the IEBC was limited to facilitating the registration of voters in prison and given the nature of imprisonment, the facilitation of any further activities was limited by the fact of imprisonment. Counsel submitted that the nature of prison custody is such that certain rights are by their nature limited and it is the prisons authorities to take such steps as are necessary to ensure prisoners register to vote and subsequently vote. Counsel referred to **Article 51** which provides as follows;

51. (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.

27. I do not read the provisions of **Article 51** as limiting the rights and fundamental freedoms of prisoners which include the right to register as a voter and to vote. I also do not read the provisions of **Article 51** to diminish in any way the responsibilities of the IEBC to prisoners. **Article 83(3)** imposes on the IEBC a duty to take positive or affirmative steps to ensure that the right to vote is for all Kenyans is realised. The mere fact of providing registration centres for prisoners cannot be adequate to "***facilitate the right to vote.***" This argument does not take into account the fact that prisoners are vulnerable persons in society. They do not have access to information, documentation and means to voluntarily register as votes like other free citizens let alone access to websites and other electronic media. The duty to facilitate voting means that the IEBC must co-ordinate with other institutions to ensure that the right to vote is realised at least within the context of what can be realised within the realm of prison. Nothing has been placed before the Court to demonstrate that, in fact, the IEBC liaised with the Prison authorities to facilitate actualisation of the right of prisoners to vote. This is why providing registration centres in prisons, of itself, does not promote and fulfil the right of prisoners to vote.

28. The reference by Mr Jabane to the voter education carried out by the IEBC as a measure taken to ensure prisoner register to vote and actually vote betrays a serious misunderstanding of the position of prisoners. They do not ordinarily access television and radio advertising, reading material and electronic media like websites. The means of voter education enumerated by IEBC are of little utility to prison inmates. Furthermore, the argument that no prisoner has raised any complaint demonstrates that the IEBC may not be aware of its responsibilities to those in vulnerable circumstances. The Constitution demands that these persons be given special attention and it cannot be an answer to the petitioner's plea that no prisoners have raised complaints. The issue of rights of prisoners to vote was indeed raised

by the petitioner and interested party and the IEBC was obliged to consider it given the status of the prisoners.

29. Unlike the right of citizens outside Kenya, whose right to vote is to be realised progressively as elucidated in the ***New Vision Kenya (NVK) Mageuzi and Others v IEBC and Others (Supra)*** and ***Jeffer Issak Kaur v Ministry of Justice, National Cohesion and Constitutional Affairs and Others (Supra)***, the right for prisoners to vote is one that is immediate and the State and its agencies must comply with the obligations that require that this right be realised. The obligation to realise this right includes the duty promote, protect and fulfil this right. In this respect, I find and hold that the respondents violated the rights of person in prisons by failing to facilitate and promote their rights.

30. Having established a violation to the extent that the State failed in its obligation to prisoners, the Court is called upon to consider the relief. **Article 23** empowers this Court to frame an appropriate remedy to vindicate the rights of persons aggrieved. The nature of relief to be granted is not merely theoretical matter but a practical one that must depend on the circumstance of each case. In the ***Priscilla Kanyua Case***, the Court ordered the predecessor of the IEBC to facilitate registration of prisoners and IEBC contends that it duly complied with the orders. It must be recalled though, the case dealt with registration of prisoners for a referendum.

31. In ***Jeffer Issak Kaur v Ministry of Justice, National Cohesion and Constitutional Affairs and Others (Supra)***, Justice Lenaola, while dealing with reliefs to be granted regarding the right of persons in the diaspora to vote stated, *“Firstly, Court orders must be issued in a manner that would sustain democracy rather than stifle it or impede the realisation of its gains. In the present case, the applicant came to Court in the eleventh hour and even now as I write, the registration of voters exercise has come to an end and other legal processes towards having an organised and peaceful General Election have commenced. The Applicant may not be to blame; IEBC promised him and others in the diaspora that they will indeed register and vote and he sat back in anticipation. He is disappointed and rightly so and he is asking this Court to stop the General Elections until he and others are immediately registered as voters. I disagree and for obvious reasons. The right exists and has not been taken away save by the Constitution itself and it can be realised in my view as soon as the next General Election after the March 2013 one and I hope the IEBC has taken a cue from my sentiments above and work out a comprehensive programme towards a total realisation of the right by the diaspora to vote in that Election. Only then can we say that our democracy has come of age. Secondly, to reopen the registration exercise will only lead to confusion that is unnecessary in the context of our shared history. Only five years ago, a discredited electoral body was unable to deliver credible election results and the country burnt. It is less than 60 days to the next election and any further delay in the preparation thereof would only lead to a frustration that may implode the Nation. The IEBC needs time to set the stage for a credible election and any set-backs will not assist it in that regard.”*

32. In conclusion, the Learned Judge directed, *“[T]he government and IEBC must be told that they need to put in place efficient, concrete and realistic mechanisms including fiscal and logistical measures to ensure that all citizens living abroad take part in the General Election following the March 2013 elections.”* Unlike, the situation in the ***Priscilla Kanyua Case*** (Supra) where the order was directed to ensure that prisoners vote in the referendum, the General Election involves elections at several levels of government and it is in this respect that the sentiments of Justice Lenaola I have alluded to are apposite particularly given the specific challenges of the first general elections.

33. The obligation of the Court is to give effect to the rights contained in the Bill of Rights and the fact that giving effect to these rights may be inconvenient cannot override constitutional imperatives. In the ***Arnold Keith August Case (Supra)***, Justice Sachs noted that the Court did not have information or

expertise to enable it decide the nature of arrangements which should be made or how they should be effected once the court had made a finding that prison inmates were entitled to vote. It nevertheless made the necessary directions to enable inmates vote.

34. I am alive to the fact that the IEBC is the body charged with the responsibility of administering elections and in light of the difficulties alluded to by Justice Lenaola in *Jeffer Issak Kaur v Ministry of Justice, National Cohesion and Constitutional Affairs and Others (Supra)*, I direct that it shall facilitate, in conjunction with the prison and other government institutions, the exercise of the right of prisoner who have already registered to vote to do so in the first general election.

35. The IEBC must also take necessary measures including necessary administrative arrangements even after the March 2013 General Elections to ensure registration of prisoners like other citizens as mandated of it under **Article 88(4)(a)** and the facilitation of the realisation of the right to vote of all eligible inmates.

Costs

36. The general principle that costs are in the discretion of the court has been upheld in cases of fundamental rights and freedoms (see *John Harun Mwau and Other v Attorney General Nairobi Petition No. 65 of 2010 (Unreported) [2012] eKLR*).

37. The uncontested evidence demonstrates that this petition would have been unnecessary had the IEBC answered the correspondence from the petitioner and interested party. In an era where the Constitution obliges public institutions to be accountable and transparent, it is important that public institutions respond to queries raised by civic minded citizens. I would hasten to add that the right of access to information guaranteed under **Article 35** underpins the values in **Article 10(c)** of “*good governance, integrity, transparency and accountability.*” In the circumstances, I think an order for costs against the IEBC is warranted. The IEBC shall pay the petitioner’s costs and one-half of the interested party’s costs.

Disposition

38. In conclusion I hereby make the following orders;

(a) I declare that prisoners are, subject to **Article 83 (1)** of the Constitution entitled to be registered as voters and have the right to vote under **Article 38(3)(a)** and **(b)** of the Constitution.

(b) I declare that the Independent Electoral and Boundaries Commission has the obligation to observe, respect, protect, promote and fulfil the rights and fundamental freedoms of prisoners and more particularly to facilitate their right to register to vote and to vote.

(c) I direct that the Independent Electoral and Boundaries Commission shall put in place measures to ensure that prisoners who are registered to vote are able to vote in first General Election.

(d) I direct that the Independent Electoral and Boundaries Commission shall put in place and implement measures to ensure facilitate the right of prisoners to register to vote and vote in future elections and referenda.

(e) The 1st respondent shall bear the petitioner’s costs and one-half of the interested party’s costs.

DATED and **DELIVERED** at **NAIROBI** this 21st day of January 2013.

D.S. MAJANJA

JUDGE

Ms Mburugu, instructed by Carol Mburugu Advocates for the petitioner.

Mr Muhoro instructed by Kimani Muhoro and Company Advocates for the 1st respondent.

Mr Wamotsa, Litigation Counsel, instructed by State Law Office for the 2nd respondent

Mr Chigiti, instructed by Chigiti and Chigiti Advocates for the interested party.



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