IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: GATEMBU, NYAMWEYA & LESIIT, JJ.A)

CIVIL APPEAL NO. 154 OF 2019

BETWEEN

ATTORNEY GENERAL……APPELLANT

AND

THE DOCK WORKERS UNION……1ST RESPONDENT
TAIRENI ASSOCIATION OF MIJIKENDA……2ND RESPONDENT
CABINET SECRETARY, MINISTRY OF
TRANSPORT AND INFRASTRUCTURE……3RD RESPONDENT
NATIONAL ASSEMBLY……4TH RESPONDENT
KENYA PORTS AUTHORITY……5TH RESPONDENT
MEDITERRANEAN SHIPPING COMPANY……6TH RESPONDENT
KENYA SEAFARERS WELFARE ASSOCIATION…..7TH RESPONDENT
KENYA NATIONAL SHIPPING LINE LTD……8TH RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Mombasa (Ogolla, Mabeya & Thande, JJ.) dated 4th October 2019

in

High Court Constitutional Petition No. 82 of 2019)

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JUDGMENT OF GATEMBU KAIRU, JA

1. In a judgment delivered on 4th October 2019, the High Court at Mombasa (***E.K. Ogola, A. Mabeya & M. Thande, JJ.***) allowed a Constitutional Petition by the 1st and 2nd Respondents and declared the amendment to Section 16 of

the Merchant Shipping Act (No. 4 of 2009) (the Act) to introduce Section 16(1A) as unconstitutional, null and void and of no consequence for violating Articles 10 and 118 of the Constitution.

2. The Attorney General, the appellant, was aggrieved by that decision and lodged this appeal. The National Assembly, the 4th respondent (the cross appellant) was also aggrieved by the judgment and filed a Cross-Appeal dated 16th December 2019.

3. On 28th February 2022, the appeal was withdrawn at the request of learned counsel, Ms. Langat, for the appellant on the grounds that the substratum of the appeal had been compromised, leaving for determination the cross-appeal by the 4th respondent. This judgment is therefore confined to determination of the cross appeal.

4. The background in brief is that in early 2019, through The Statute Law (Miscellaneous Amendment) Bill, 2019 (the Bill) published in a Special Issue of the Kenya Gazette Supplement No. 33 (National Assembly Bills No. 201), Parliament sought to amend the Act, which is an Act of Parliament making provision for the registration and licensing of Kenyan ships, to regulate proprietary interests

in ships, the training and the terms of engagement of masters and seafarers and matters ancillary thereto; to provide for the prevention of collisions, the safety of navigation, the safety of cargoes, carriage of bulk and dangerous cargoes, the prevention of pollution, maritime security, the liability of ship-owners and others, inquiries and investigations into marine casualties; to make provision for the control, regulation and orderly development of merchant shipping and related services; generally to consolidate the law relating to shipping and for connected purposes.

5. Section 4 of the Act provides that The Minister shall, in addition to any other power conferred on him by any other provisions of this Act, be responsible for the administration and implementation of this Act. In the Bill, it was proposed that the Act be amended by inserting a new section 4A immediately after Section 4 in the following terms:

> "*Exemption. 4A. Notwithstanding any other provision in this Act, the Cabinet Secretary may, on the recommendation of the Authority,* [Kenya Maritime Authority] *by notice in the Gazette and subject to such conditions as may be appropriate, exempt any Government entity or enterprise from any provision of this Act where such exemption is in*

the public interest and in furtherance of Government policy."

6. The National Assembly (hereafter referred to as *"the National Assembly"* or as *"the 4th respondent"* or as "the cross appellant" as the circumstances warrant) passed the Bill on 12th June 2019 and thereafter presented it to the President for assent on 18th June 2019 in accordance with the requirements of the Constitution.

7. The President refused to assent to the Bill on the grounds that the intention in proposing the amendments to the Act was to empower the Cabinet Secretary to exempt any Government entity or enterprise from the provisions of the Act, including the provisions of section 16(1). In his memorandum to the Speaker of the National Assembly dated 18th June 2019, the President stated that there was also a proposed amendment to Section 16 of the Act to exempt the Kenya National Shipping Line (KNSL) from the restrictions imposed under Section 16(1) of the Act. Section 16(1) imposes restriction on shipping lines from providing certain other services, including service as crewing agency, pilotage, clearing, and forwarding agency, port facility operator, shipping agent, terminal operator, container freight station, quayside service provider and

others. The President further noted in his memorandum that the proposed amendments were rejected by the House which instead introduced a new subsection 16(1A) as follows:

> *"(1A) The provisions of subsection (1) shall not apply to a shipping line wholly owned by the Government."*

8. The President expressed that the provision as enacted effectively excludes KNSL from the advantage sought to be conferred since it is not wholly owned by the Government and would therefore not qualify for the exemption and that this therefore hampered the Government's efforts to revitalize the KNSL. The President recommended that the new subsection 16(1A) be deleted and substituted with the following new provision:

> *"(1A) The provisions of subsection (1) shall not apply to a shipping line owned or controlled by the Government."*

9. The National Assembly acceded to the President's recommendation and passed the said Bill introducing Section 16(1A) as proposed by the President.

10. In their constitutional petition before the High Court, the 1st and 2nd respondent asserted that the new proposal by

the President was not subjected to public participation. They pleaded further that Ministry of Transport and Infrastructure, which was named as the 2nd respondent in the petition, illegally and in contravention of the Constitution entered a Memorandum of Understanding (MoU) with Mediterranean Shipping Company to take over the management and control of parts of the Kenya Port of Mombasa; that the MoU was shrouded in secrecy and lack of transparency and was entered into without public participation.

11. The 1st and 2nd respondent further averred that Article 35 of the Constitution was violated for the failure to disseminate and publish information pertaining to privatization of Terminal 2 of the port of Mombasa; that Article 73 of the Constitution was also violated by dint of disregard by State Officers of their responsibilities in observance of national values; that the respondents in the petition acted contrary to Articles 118, 174 and 232 of the Constitution which requires facilitation of public participation in decision making and exercise of state powers and involvement of the people in upholding the objects of devolution and in policy making process; and that Article 201 of Public Finance was also violated. The

1st and 2nd respondent pleaded that there was continuing danger to their members right to livelihood and socio-economic rights under Article 43 of the Constitution.

12. The 1st and 2nd respondents sought judgment for declarations: that amendments to the Act vide Statute Law (Miscellaneous Amendment) Act 2019 is illegal and unconstitutional and contrary to Articles 10, 12, 21, 27, 35, 40, 43, 46, 47, 54, 55, 56, 57, 73, 118, 174, 201, 227 and 232 of the Constitution; and that the MoU is illegal and unconstitutional and contrary to Articles 10, 12, 21, 27, 35, 40, 43, 47,54, 55, 56, 57, 73, 118, 174, 201, 227, 232 of the Constitution.

13. In his response to the Petition, the Clerk of the National Assembly, Michael Sialai, in his replying affidavit sworn on 8th August 2019 deposed that the legislative power of Parliament is provided for under Article 109 of the Constitution; that the prayers sought in the petition threatened the legislative role of the National Assembly to enact, amend and repeal laws under Articles 1(1), 94 95 and 109 of the Constitution and that the 1st and 2nd respondent were seeking, by their petition, to restrict the National Assembly from carrying out its constitutional mandate.

14. Mr. Sialai explained in his affidavit the steps Bill went through following its publication on 29th March 2019, from the first reading, committal to departmental committees in accordance with standing orders, facilitation of public participation through advertisement in media; the memoranda received from institutions, individuals and general public; that the petitioners were granted an opportunity to actively participate in the amendments through submission of memoranda or otherwise but the failed to do so; that the issues raised by the 1st and 2nd respondents would have been dealt with by the National Assembly's departmental committee; and that the 1st and 2nd respondents are therefore estopped from raising those issues in the petition before the court.

15. It was deponed further that on 13th June 2019, the National Assembly passed the Statute Law (Miscellaneous Amendment) Act, 2019 having taken into account the concerns of different sectors and thereafter forwarded it to the President in accordance with Article 115 of the Constitution; that the President then expressed reservations and returned the Bill to the National Assembly with recommendations which were duly considered by the Assembly, the National Assembly

Departmental Committee which tabled its report before the Assembly, which in exercise of its discretion under Article 115(2)(a) of the Constitution amended the Bill fully accommodating the President's reservations before re-submitting the same for assent to the President who assented to it on 5th July 2019.

16. It was deposed that the President and the Assembly properly exercised their constitutional mandate under Article 115 of the Constitution and the petitioners were mistaken that the Bill ought to have been subjected to public participation upon being referred back to Parliament by the President; that the amendments to the Bill moved after the reservations by the President were within the parameters of what had been subjected to public participation; that the petition was an affront to the doctrine of separation of powers and an encroachment to the legislative mandate of parliament; and that in the circumstances the court ought not to exercise its discretion to grant the orders that were sought.

17. As already stated, the High Court held that the process of enactment of Section 16 (1A) of the Act was unconstitutional and in doing so expressed that given the reservations and recommendation and the nature and

import of the amendment proposed by the President, the Bill should have been subjected to public participation before being enacted into law.

18. The Attorney General and the National Assembly were aggrieved by the judgment of the High Court, hence the appeal and the cross appeal. As already stated, the appeal having been withdrawn, what remains is the cross appeal. The substance of the grounds of the cross-appeal by the National Assembly as urged before us by learned counsel ***Mr. Mbarak*** are that the High Court erred in: concluding that there was insufficient public participation prior to the enactment of the Statute Law (Miscellaneous Amendment) Act, 2019; holding that the amendments to the Act could not be made through an omnibus Bill; and in demonstrating obvious bias in taking an active part in the proceedings in violation of the National Assembly's right to fair hearing.

19. With regard to public participation, counsel urged that it was demonstrated through the affidavit of the Clerk to the National Assembly Mr. Sialai that there were two advertisements in the local dailies as a result of which memoranda were received; that the 1st and 2nd respondents did not avail themselves of the opportunity to submit

memorandum or to request for extension of time; that in concluding that the six days allowed for public participation was insufficient, the court ought to have taken into account that under Standing Order 127 of the National Assembly Standing Orders, the Committee had 21 days to consider the Bill and within the same period carry out the public participation; that although the Coast Parliamentary Caucus had requested for public hearings to be conducted in Mombasa, that request was declined by the Committee on the basis of having already received views from the public.

20. Counsel submitted, on the strength of the decision of this Court in ***Pevans East Africa Limited & Another vs. Chairman, Betting Control & Licensing & 7 others [2018] eKLR***, that the National Assembly was not required to carry out further public participation regarding the reservations and recommendations by the President before passing the Bill. It was submitted that it is not open to the court to dictate the manner state agencies carry out their mandate.

21. It was submitted further that the court erred in impugning the amendments to the Act on the basis that the same were contained in an omnibus Bill. Counsel cited the case

of ***Nubian Rights Forum & 2 others vs. Attorney General & 6 others; Child Welfare Society & 9 others (interested parties) [2020] eKLR*** for the proposition that the use of an omnibus bill to enact legislation is not unconstitutional; that the test is not whether an amendment is major or minor but rather whether public participation was undertaken.

22. It was submitted further that the High Court demonstrated obvious bias by taking active part in the proceedings in violation of the National Assembly's right to fair hearing; that on the strength of the case of ***Homepark Caterers Limited vs. The Attorney General & 3 others [2007] eKLR***, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. In that regard, counsel submitted that the High Court wrongly, on its own motion, conducted a site visit of the port with a view to collecting evidence to the prejudice of the cross appellant. It was urged that it is not the business of the court to descend into the arena of conflict and frame issues not raised by the parties. In that regard reference was made to the decision in ***Independent***

Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR.

23. Regarding the MoU, it was submitted that the same was not produced and the National Assembly was not privy to it and neither was it brought to its attention yet the court extensively referred to it and granted orders on the basis of the same thus condemning the National Assembly unheard.

24. Opposing the cross appeal, ***Mr. Nyandieka*** assisted by ***Mr. Oginga Ochieng***, learned counsel for the 1st and 2nd respondents submitted that the claim that the court was biased and impartial on account of visiting the *locus in quo* is baseless; that there was consensus on the visit, the same having been discussed and agreed upon in the course of the proceedings; that at the site, the court only confirmed that Terminal two of the port comprised of two berths; that beyond identification of those berths, no evidence was taken at the site. As regards the claim that the court raised matters that were not pleaded, counsel pointed that the matter of public participation was pleaded including the constitutional provisions that were violated in that regard.

25. It was submitted that the High court correctly found that the public participation that was conducted was not sufficient. In that regard it was urged that the advertisement that was placed in the newspapers was obscure without any indication what the proposed amendment to the Act was about; that the memoranda exhibited by the National Assembly as having purportedly been received from different members of the public in response to the advertisements is so similar in form, format and the font type to raise suspicion that the same was prepared by the same person; that while the National Assembly concedes that a request was made for public engagement over the matter which was declined, it was not open to the National Assembly to do so.

26. Counsel submitted that the recommendations and amendments to the Bill proposed by the President fundamentally altered what had previously been submitted to the public, that it was necessary to subject the same to public participation. In what was referred to as legislative deception, counsel urged that what had been submitted to the public as the proposed amendment to the Act and what was ultimately enacted was radically different.

27. Turning to the claim that the High Court erred in referring to the MoU in its decision, it was submitted that the existence of the MoU was not contested; that all the parties to the petition addressed themselves to it and the court was entitled to take judicial notice of the same on the authority of the decision in ***Independent Electoral and Boundaries Commission vs. National Super Alliance, C.A. No. 224 of 2017***; that the burden shifted to the 3rd respondent, Cabinet Secretary, Ministry of Transport and Infrastructure, to produce it; that the National Assembly never objected to the reference to it before the High Court and cannot do so now.

28. Regarding the complaint that the court addressed issues that had not been raised, counsel submitted that this complaint is an afterthought; that the High Court could not turn a blind eye to the pleadings and material placed before it and properly pronounced itself on the same.

29. I have considered the cross appeal and the rival submissions. There are three main issues for determination. The first is whether the court erred in concluding that there was insufficient public participation prior to the enactment of the Statute Law (Miscellaneous

Amendment) Act, 2019. Second is whether the court erred in holding that the amendments to the Act could not be made through an omnibus Bill. Third is whether there is merit in the claim that the High Court was biased against the National Assembly and whether its right to fair hearing was violated on account of the court's site visit.

30. In addressing those issues, I am mindful of the duty of the Court on a first appeal. The Court is called upon to **"reconsider the evidence, evaluate it…and draw** [our] **own conclusions…".** See ***Selle & Another vs Associated Motor Boat Co. Ltd.& others [1968] EA 123***. I am also cognizant that in granting the orders that it did, the High Court did so in exercise of judicial discretion. As cautioned by ***Madan, JA*** in ***United India Insurance Co. Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs. East African Underwriters (Kenya) Ltd [1985] eKLR***:

> *"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.*

The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

31. Within those parameters, I first consider the question of public participation. In concluding that the National Assembly did not undertake sufficient public participation, the High Court expressed in paragraph 102 of the impugned judgment:

"We are of the opinion that although there was some attempt to hold some modicum of public participation, the same was not reasonable in the circumstances. The notice and period given was too short. There was no information given regarding the proposed amendments to allow any meaningful or any public participation at all. By publishing the notice in the Dailies and giving a short period of 6 days, the 3rd Respondent cannot purport to have satisfied the constitutional requirement of facilitating public participation."

32. In the same vein, the High Court found that the reservations and recommendations made by the President altered the nature of proposed amendments to the Act to

an extent that the same ought to have been subjected to public participation. The court stated:

> "*…to the extent that the reservations and recommendation of His Excellency the President were not part of what was published and subjected to the purported public participation, the same could not have been dealt with under Part 4 of Chapter 8 without the application of Article 118 of the Constitution.*
>
> *117. Accordingly, it is our opinion and we so hold, that due to the nature and import of the proposed amendment by His Excellency the President, his reservations and recommendation should have been subjected to public participation before being enacted into law.*"

33. Did the High Court err in reaching those conclusions? Under Article 10 of the Constitution, all state organs and all persons are bound by the national values and principles of governance, among them, participation of the people, when applying, interpreting the Constitution; enacting, applying or interpreting any law.

34. Under Article 118(1)(b) of the Constitution, Parliament is commanded to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. As the Supreme Court of Kenya stated in ***British American Tobacco Kenya, PLC vs.***

Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (interested parties); Mastermind Kenya Limited (the affected party), S.C. Petition No. 5 of 2017 [2019] eKLR, public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. In the same case the Supreme Court pronounced principles of public participation, amongst them, that public participation is not a cosmetic or public relations act but must be real and not illusory; it must be purposive and meaningful and *"must be accompanied by reasonable notice and reasonable opportunity"* and that reasonableness is to be determined on a case-to-case basis. The Supreme Court emphasized that a component of meaningful public participation includes *"clarity of the subject matter for the public to understand."* See also, the judgment of the Supreme Court in ***Attorney-General & 2 others vs. Ndii & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent)***.

35. In ***Kiambu County Government & 3 others vs. Robert N. Gakuru & others, C.A No. 200 of 2014 [2017] eKLR***, this

Court adopted the words of **Ngcobo, J** in the South African case of ***Doctors for Life International vs. Speaker of the National Assembly & others (CCT 12/05)[2006] ZACC 11, 2006(12) BCLR 1399(CC), 2006(6) SA416*** in the context of measures that need to be taken to facilitate public participation, that *"Parliament and the provincial legislatures must provide notice of and information about legislation under consideration"* and that *"public involvement in the legislative process requires access to information."*

36. The legislative process that culminated in the enactment of the Statute Law (Miscellaneous Amendment) Act, 2019 is well set out in the replying affidavit of the Clerk to the National Assembly Michael Sialai. The Bill was published on 29th March 2019. It was read the first time before the National Assembly on 3rd April 2019 and thereafter committed to various Departmental Committees, amongst them, the Transport, Public Works and Housing Committee to which the mandate of reviewing legislation relating to, *inter alia*, transport, roads, and public works fell, scrutinized the proposed amendments to the Act as contained in the Bill and invited memoranda from the public.

37. In advertisements published in the ***Daily Nation*** and ***The Standard*** Newspapers on Wednesday 10th April 2019, titled *"In the matter of consideration by the National Assembly of the Statute Law (Miscellaneous Amendment) Bill (National Assembly Bill No. 21 of 2019) Submission of Memorandum, the National Assembly"* notified the public that the Bill seeks to make various amendments to the statutes set out in a table in the notice, that the Bill relates to *"making various amendments that do not merit the publication of separate Bills".* The notice ended with an invitation thus:

> "*Pursuant to the provisions of Article 118 [1][b] of the Constitution and Standing Order 127(3), the Committee invites members of the public to submit representations they may have on the said Bill. The representations may be forwarded to the Clerk of the National Assembly, P. O. Box 41842 Nairobi; hand delivered to the office of the Clerk, Main Parliament Buildings Nairobi; or emailed to clerk@parliament.go.ke; to be received not later than Tuesday, 16th April 2019 at 5:00 PM.*"

38. Beyond notifying the public that the Act was amongst other statutes that were subject of the proposed amendments in the Bill, no information, at all, was provided in the advertisements as to the nature or objectives of the proposed amendments to the Act. As the

High Court correctly observed in the impugned judgment, unlike other notices published in the same newspapers by the National Assembly inviting memoranda with respect other Bills, *"which contained adequate and elaborate explanation and information"* the notice relating to the proposed amendment to the Act *"was lacking in detail."*

39. The Clerk to the National Assembly Mr. Sialai deposed in his affidavit that following the advertisements, memoranda and petitions were received from many entities and individuals, among them Seafarers Union of Kenya, Task Catering Training Institute Limited. Petitions supporting the amendments to the Act were received from, among others, Nyainda Paul Henry a seafarer,; Gen Samson Mwathethe, Chairman of the Blue Economy Implementation Committee; Kenya Utalii College; Technical University of Mombasa Marine Engineering Students Association; Bandari Maritime Academy Nautical Science Association; Mtongwe Ferry Rescue Team; Kenya Coast National Polytechnic Maritime Students Cadet group; Beach Cleaners Association; National Industrial Training Authority; Coast Beach Hotels Association; Mbita Point Boat Operators; Kenya Seafarers Welfare Association; Kenya Sludge Disposal

Association; Transporters Association; Pwani Lifesavers Organisation; Zablon Mwangangi of Kenya Ship Contractors Association; Joshua Kiminza of Blue Economy Stakeholders Forum; Hawkers Association; Mombasa Port Tuk-Tuk Unitary Operators Association; Kilindini Port Unitary Taxi Operators Group; Retired Marine Engineers Association; and others. The Clerk stated further that stakeholders who had submitted memoranda were invited to a meeting of the Departmental Committee on Transport, Public Works, and Housing on Thursday 16th May 2019 to receive views and recommendations on the Bill.

40. I observe, as the High Court did, that practically all those petitions supporting the amendments were similar in format and style and appear to have followed a template and the High Court was right to conclude that the petitions looked *"similar in print and content and form"* and *"seem to have been produced by the same person."*

41. It was asserted that based on the foregoing, the public was vigorously involved in the process of the enactment and that the 1st and 2nd respondents were granted the opportunity to actively participate in the amendments but they did not raise any issues regarding the same. Whereas,

as cautioned by the Supreme Court of Kenya in ***The Speaker of the Senate & Another vs. Attorney General & 4 Others [2013] eKLR*** *"the Court cannot supervise the workings of Parliament"* in deference to institutional comity between the three arms of government, I am unable to fault the conclusion by the High Court that although there was some modicum of public participation, the same was not reasonable in the circumstances given the dearth of information in the notices inviting memoranda and the rather short notice given for the same.

42. In the same vein, there is the question whether the Bill should have been subjected to public participation after the President's reservations and recommendations. As already stated, the Bill was passed on 13th June 2019 and forwarded to the President for assent, who, as already indicated made recommendations upon which the Bill was returned to the National Assembly. I have already set out above how the initial proposed amendment mutated and as indicated the National Assembly acceded to the President's recommendation and passed the said Bill introducing Section 16(1A) as proposed by the President.

43. Section 16 of the Act, to which the President proposed the addition or introduction of Section 16(1A) provides:

"(1) No owner of a ship or person providing the service of a shipping line shall, either directly or indirectly, provide in the maritime industry the service of crewing agencies, pilotage, clearing and forwarding agent, port facility operator, shipping agent, terminal operator, container freight station, quay side service provider, general ship contractor, haulage, empty container depots, ship chandler or such other service as the Minister may appoint under Section 2.

(2) Any person who contravenes the provisions of subsection (1) commits an offence and shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or both such fine and imprisonment."

44. The amendment that was initially proposed in the Bill, and which proposed amendment was presented for public participation was the addition of Section 4A as follows:

"4A Notwithstanding any other provision of this Act, the Cabinet Secretary may, on the recommendation of the Authority, by notice in the Gazette and subject to such conditions as may be appropriate, exempt any Government entity or enterprise from any provision of this Act where such exemption is in the public interest and in furtherance of Government policy."

45. What was published in the Bill, after presidential reservation was this:

> *"(1A) The provisions of subsection (1) shall not apply to a shipping line wholly owned by the Government."*

46. This is what was assented to by the President:

> *"(1A) The provisions of subsection (1) shall not apply to a shipping line owned or controlled by the Government."*

47. It is therefore evident, as the High Court found, that the Bill as published and subjected to public participation and what was ultimately enacted is substantially different. In ***Pevans East Africa Limited & another vs. Chairman, Betting Control & Licensing Board & 7 others*** (above) issue had been taken as to whether when the President returns a Bill back to the National Assembly pursuant to Article 115 of the Constitution, whether such Bill requires to be subjected to the entire law-making process afresh. In answering that question, this Court adopted with approval the pronouncement by the High Court in ***Institute for Social Accountability & 6 Another vs. National Assembly & 4 Others [2015] eKLR***, where the High Court considered the power of the National Assembly to amend Bills vis-à-vis the duty to ensure public participation and stated:

> *"We are aware that during the legislative process, amendments to the Bill may be moved during the Committee Stage and to hold that every amendment*

moved must undergo the process of public participation would negate and undermine the legislative process. In this case, we are satisfied that the amendment moved was in substance, within the parameters of what had been subjected to public participation during the review process. We find that the public was involved in the process of enactment of the CDF Act through the Task Force and review panel earlier set up by CDF Board. The amendment was within the parameters of what was in the public domain and in the circumstances we find and hold that the amendment bill did not violate the principle of public participation." [Emphasis]

48. Moreover, two things distinguish that case from the present. First, in that case, the court found that the Bill was submitted to adequate public participation. Secondly the amendment assented to involved the rate of proposed tax which was within the parameters of what had been subjected to public participation. In the present case, it was a matter of complete substitution. What was ultimately enacted was not within the parameters of what had been subjected to public participation.

49. The next issue is the High Court erred in holding that the amendments to the Act ought not have been made through an omnibus Bill. In that regard, the Court expressed:

"It is clear therefore that from available jurisprudence, statute law (miscellaneous

amendments) bills are for minor non-contentious amendments such as grammar, correction of errors and such simple matters. Such bills should not contain substantive and important legislation which should be contained in independent bills.

130. Looking at the amendment effected by Section 16 (1A), it is evident that the same cannot be said to have been minor or non-controversial. It was substantive in nature and had far reaching effects on Maritime operations in this country."

50. The High court explained that the amendment entailed change in policy through legislation and that the same would have required robust debate in the National Assembly accompanied by effective and satisfactory public participation through a substantive separate independent bill.

51. In ***Law Society of Kenya vs Attorney General & 2 others [2019] eKLR***, this Court in concluding in that case that the Legislature had overreached in passing substantive amendments in an un-procedural non-participatory manner, through the Statute Law Miscellaneous Amendments) Act, 2012, stated:

> **"…it is prudent to look at the ordinary usage of the Statute Law Miscellaneous Amendments) Bill. As was stated by the appellant and is clear from its long title, it professes and is meant to be**

> "An Act of Parliament to make minor amendments to Statute Law". From ordinary use of the word "minor" in this context, it means something that is of less importance, insignificant even. Indeed, the lexical meaning as obtained from the Concise Oxford English Dictionary, Twelfth Edition at page 911 is *"having little importance, seriousness or significance"*. The urging of the appellant is that the Statute Law (Miscellaneous Amendments) Bill is for correcting anomalies, inconsistencies, outdated terminologies or errors which are minor and non-controversial.
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> A quick look at Black's Law Dictionary, Eighth Edition at page 1470, describes substantive law as;
>
> > *"The part of the law that creates, defines, and regulates the rights and duties, and powers of parties."*
>
> The Court must, therefore, satisfy itself that the amendments did not create, define, regulate or confer any powers to any parties, for if they did, they would not be said to be minor or inconsequential."

52. In the present case, the amendment was seeking to exclude any shipping line owned or controlled by the Government from application of Section 16 of the Act, which, as already noted, bars an owner of a ship or person providing the service of a shipping line from providing in the maritime industry the service of crewing agencies,

pilotage, clearing and forwarding agent, port facility operator, shipping agent, terminal operator, container freight station, quay side service provider, general ship contractor, haulage, empty container depots, ship chandler or such other service, thereby giving preferential treatment to such entity.

53. Indeed, the Departmental Committee on Transport, Public Works and Housing of Parliament in its report of June 2019 in one of its *"key observations"* expressed:

> "*The proposed amendment is substantive in nature since it seeks to allow the Cabinet Secretary to exempt an organization from the application of the Act hence ought not to be contained in a Statute Law (Miscellaneous) Amendment Bill, whose purpose is to make minor amendments to existing statutes. The merits of the proposed amendment should be considered in a substantive amendment Bill to the Merchant Shipping Act, No.4 of 2009*."

54. Based on the foregoing, I am unable to fault the decision or reasoning by the High Court in this regard and neither am I persuaded that the decision in that regard is perverse. I do not have any basis for interfering with the decision of the High Court in that regard.

55. The last issue for consideration is whether there is merit in the claim that the High Court was biased against the

National Assembly and whether its right to fair hearing was violated on account of the court's site visit. The cross appellant has complained that the court demonstrated obvious bias and took active part in the proceedings against its constitutional right to fair hearing and failed to remain neutral and impartial by directing parties to visit the Kenya Airports Authority Container Terminal without any application and explanation and thus assisting in collection of evidence on behalf of the 1st and 2nd respondents.

56. In ***Standard Chartered Financial Services Limited & 2 others vs. Manchester Outfitters (Suiting Division) Limited (Now known as King Wollen Mill Limited & 2 others [2016] eKLR***, this Court stressed that the rule against bias is an important element of the right to a fair trial and that the rule is to be applied so that even the appearance of bias is done away with and that the rule aids in public confidence in the fairness and impartiality of the judicial system. The Court went on to say that:

> ***"In determining whether or not there has been bias, the test to be applied is whether a reasonable person, fully appraised of the circumstances of the case would hold that there has been an appearance of bias."***

57. In the present case, the record of proceedings shows that on 1st August 2019, the High Court gave directions regarding filing and exchange of submissions and for the hearing of the petition. Item 4 of those directions was that *"on 26/8/2019 there will be a site visit by the Court after the commencement of the proceedings."* The record of 26th August 2019 at 3.00 p.m. records,

> ***"The court visited Terminal No. 2 of Kenya Ports Authority between 11.30 a.m. to 13.00 p.m. in the presence of all the parties to the petition. The court was taken round the facility comprising Terminal No. 2 being Berths 21 and 22 which comprise phase one of Terminal 2. The team was informed by Ms. Ikegu counsel for Kenya Ports Authority that Terminal No. 2 is in 3 phases and that phases 2 and 3 are yet to be developed. The court appreciated the guided tour of the Terminal No. 2 and the knowledge gained will assist in making an informed decision. Any party who intended (sic) the tour is at liberty to make any observations."***

58. Counsel for the National Assembly then on record Mr. Nyamodi is then recorded as having sought assurance from the court "*that apart from what the court has read to us as its observation, there is no other observations from the court*" to which the court is recorded as having responded "*our observation about the tour of Terminal No. 2 is as recorded above*."

59. The site visit was therefore part of the directions given by the court on 1st August 2019 in the presence of counsel for all the parties, regarding the hearing of the petition. No objection was taken at that point regarding the site visit. On 1st August 2019, the High Court indicated that the site visit would be on 26th August 2019. There was opportunity, in the intervening period for any party uncomfortable with the direction on site visit, to take issue. The record also shows that all the parties were present during the site visit on 26th August 2019. Counsel for the National Assembly sought and was given assurance that the observation by the court at the site visit was confined to what was recorded. Moreover, the court made it clear that any party was at liberty to make any observations regarding the site visit. In the impugned judgment, the court made no reference to the site visit and the claim that the object of the visit was for purpose of *"assisting in collection of evidence on behalf of the petitioners"* is not borne out.

60. I am not persuaded that the circumstances in this case are such as would give rise to a reasonable apprehension in the mind of the reasonable fair minded and informed member of the public, that the High Court did not apply its

mind to the case impartially. (See decision of the East African Court of Justice in ***Attorney General of the Republic of Kenya vs. Prof. Anyang' Nyong'o and others (5/2007) [2007] EACJ 1 (6th February 2007)***).

61. In conclusion therefore, I find no merit in the cross-appeal and would dismiss it with no orders as to costs in view of public interest in the matter.

62. As ***Nyamweya*** and ***Lesiit, JJA*** agree, the final order of the Court is that the cross-appeal is dismissed with no orders as to costs.

Dated and delivered at Mombasa this 12th day of May 2023.

S. GATEMBU KAIRU, FCIArb

.....
JUDGE OF APPEAL

I certify that this is a
true copy of the original.
Signed
DEPUTY REGISTRAR

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GATEMBU, NYAMWEYA & LESIIT, JJ.A)

CIVIL APPEAL NO. 154 OF 2019

BETWEEN

ATTORNEY GENERAL……..…….APPELLANT

VERSUS

THE DOCK WORKERS UNION…….....……1ST RESPONDENT

TAIRENI ASSOCIATION OF MIJIKENDA…..…....2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF

TRANSPORT AND INFRASTRUCTURE…....……....3RD RESPONDENT

NATIONAL ASSEMBLY……..….4TH RESPONDENT

KENYA PORTS AUTHORITY…….……....5TH RESPONDENT

MEDITERRANEAN SHIPPING COMPANY……..6TH RESPONDENT

KENYA SEAFARERS WELFARE ASSOCIATION…….7TH RESPONDENT

KENYA NATIONAL SHIPPING LINE LTD…….……....8TH RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Mombasa (Ogolla, Mabeya & Thande, JJ.) dated 4th October 2019 in High Court Constitutional Petition No. 82 of 2019)

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CONCURRING JUDGMENT OF NYAMWEYA, JA

1. I have had the advantage of reading in draft the judgment of my brother Gatembu J.A., and I fully agree with the procedural history of the Appeal and Cross-Appeal herein that the learned Judge has ably articulated; the issues arising from the Cross-Appeal dated 16th December 2019 filed by the National Assembly, which is the subject of the judgement as the main

Appeal was withdrawn by the Attorney General; and the reasoning and conclusions on the issues raised by the Cross-Appeal.

2. I accordingly concur that the Cross-Appeal by the National Assembly is not merited, and should be disposed of along the orders proposed by Gatembu, JA.

Dated and delivered a Mombasa this 12th day of May 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: GATEMBU, NYAMWEYA & LESIIT, JJ.A)

CIVIL APPEAL NO. 154 OF 2019

BETWEEN

ATTORNEY GENERAL……APPELLANT

AND

THE DOCK WORKERS UNION……1ST RESPONDENT
TAIRENI ASSOCIATION OF MIJIKENDA……2ND RESPONDENT
CABINET SECRETARY, MINISTRY OF
TRANSPORT AND INFRASTRUCTURE……3RD RESPONDENT
NATIONAL ASSEMBLY……4TH RESPONDENT
KENYA PORTS AUTHORITY……5TH RESPONDENT
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(Being an appeal against the judgment of the High Court of Kenya at Mombasa (Ogolla, Mabeya & Thande, JJ.) dated 4th October 2019

in

High Court Constitutional Petition No. 82 of 2019)

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CONCURRING JUDGMENT OF LESIIT, JA

I have had the advantage of reading in draft the judgment of ***GATEMBU KAIRU, JA.*** I am in full agreement with the reasoning and conclusions and have nothing useful to add.

Dated and delivered at Mombasa this 12th of May 2023.

J. LESIIT

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JUDGE OF APPEAL