Martha Karua v. Republic of Kenya: A litmus test for East African Court of Justice's ever shifting Supremacy and Jurisdictional Remit

By:

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The latest landmark case filed at the East Africa Court of Justice (EACJ) pits Martha Karua against the Republic of Kenya. The Honourable Martha Karua needs no introduction to the Kenyan political and legal space. She is an accomplished lawyer of over three decades standing. She is a long time politician who has served as a member of the Kenyan Parliament and as minister in various ministries, but most notably as Minister of Justice and Constitutional Affairs in the immediate former President Mwai Kibaki's Government. She also unsuccessfully sought the Presidency of Kenya in the 2013 general elections. Although her recent elevation, alongside others, to the rank of Senior Counsel is still mired in controversy and is the subject of pending litigation before the Kenyan High court, there is no taking away the fact that

Hon. Karua is indeed the “iron lady” of Kenyan politics. Her record, both in the opposition and government, precedes her. Hon. Karua’s dalliance with the court has not always been consistent. In fact, it is during her tenure as Minister for Justice and Constitutional Affairs of the Republic of Kenya that the court suffered its most vicious and sustained assault from Kenya, exemplified in the *Anyang Nyong’o v. Attorney General of Kenya* (2006) case.[1] These concerted extra-judicial political interferences and attacks on the court posed an existential threat to its very existence as an organ of the East African Community.[2] It is therefore ironical that Hon Karua now seeks refuge in the regional court

Karua’s latest political venture was in her home turf of Kirinyaga County, where she unsuccessfully sought the gubernatorial seat, and lost to Governor Ann Mumbi. As would be expected of a gallant fighter that Karua is, the matter found its way into the election courts. The trial court, the High Court of Kenya at Kerugoya struck out Karua’s petition as being “fatally defective and beyond salvage” for want of compliance with Rule 8 (1) of the Kenyan election petition rules which require that a petitioner must set out the date of declaration of the election results, the manner of declaration and the results. On Appeal the High Court’s decision was overturned and a hearing on merit ordered. The matter was heard *de novo* before a Nyeri High Court. But there was another problem. The fresh proceedings ordered by the Court of appeal were conducted outside the six months’ period for the hearing and determination of election cases as stipulated Section 85A of the Elections Act (2011). A subsequent appeal to the Supreme Court of Kenya underscored the principle that no election cases can be heard outside the six months’ period. The court also reiterated what it has held in a long line of its decisions: that constitutional and statutory timelines cannot be expanded by courts unless such latitude is conferred in the statute or constitution. This is despite the court finding that the striking out of Karua’s petition in the first place was erroneous. Karua’s road to justice before Kenyan Courts came to an end.

The processes of the various court, from the High Court to the Supreme Court and back, consumed the entire statutory six months’ period and thereby robbed Karua of her day in court. The Supreme Court could do no more than helplessly empathise with Karua, whose allegations of malpractices in the

election, and her opponent's responses thereto, neither saw the light of day nor were they tested and evaluated on merit to determine their veracity. The cases largely turned on technicalities of procedure.

When everyone imagined that the Supreme Court's decision finally marked the end of the legal road for Karua, the versatile politician-cum-lawyer moved the East African Court of Justice. In her petition, she alleges that the Kenyan judicial system denied her justice and as a result the Kenyan state has breached its treaty obligations under Articles 6 (d) and 7 of the EAC Treaty.

The petition presents two interesting discussion points to the discerning legal eye. Firstly, the EACJ has in the past taken two seemingly contradictory positions on whether it can reverse decisions of domestic courts of member states. For example, in its decision in the case of *Sitenda v Secretary General of the EAC and Another,* despite not having express appellate jurisdiction over decisions rendered by national supreme courts, the EACJ entertained and determined an application filed as an appeal from the Supreme Court of Uganda. The Court justified this by stating that the matter dealt with questions relating to breach of the EAC Treaty. In three other cases, the EACJ held that it would amount to abdicating its duty of interpreting and applying the EAC Treaty if it failed to recognise an individual's right to raise human rights questions before it. An expanded interpretation of Article 6 and 7 of the EAC Treaty were found to confer implied jurisdiction on the Court to deal with questions of human rights as between individuals and state members. *In Katabazi & 21 others v Secretary General of the EAC* (2007); *Praxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda (2011C)* and *Independent Medico Legal Unit v Attorney General Kenya 2011a);* while acknowledging that Article 27 of the EACJ treaty divests the human rights jurisdiction from it, the EACJ nonetheless underscored its role under Article 7 of the Treaty, to interpret the EAC Treaty, as being expansive enough to enable it deal with breaches of the Treaty, including those of a human rights nature.

In *Samuel Mukira Mohochi V Attorney General of the Republic of Uganda* (2013) **,** the Petitioner, a Kenyan lawyer, had been denied entry into Uganda, on orders of the state's immigration officers. In finding for the petitioner, the court held that the Republic of Uganda's exercise of her sovereignty with regard to the

movement of the citizens of partner states was fettered when it entered into the Protocol on Free Movement of Persons in the EAC. Significantly, the court underscored that the provisions of the EAC Treaty and Protocols take precedence over national laws, in case of conflict. In essence, that sovereignty cannot act as a defence or justification for non-compliance, and neither can it be a restraint or impediment to compliance, with treaty obligations.

Yet, in a relatively more recent pronouncement, in *East African Civil Society Organisation Forum v The Attorney General of the Republic of Burundi and 2 Others* (2017), the court declined to take up implied jurisdiction choosing to state that its power was limited in interrogating matters related to the EAC Treaty and that it did not to sit on appeal from member national courts or reopen matters determined by member national courts.

The state of case law from the EACJ is, therefore, demonstrative of an institution that is still prevaricating on crucial questions of its jurisdictional remit in the matters foregoing. Karua's petition therefore presents an opportunity for the court to finally settle its jurisdictional remit with respect to Appellate or review jurisdiction over national member states' supreme court decisions, particularly those touching on treaty obligations under Articles 6 and 7 of the EAC Treaty.

Secondly, though originally conceived as a sub-regional court for purposes of determining economic integration disputes between member states, the EACJ has largely metamorphosed into a human rights court, albeit without express treaty mandate to that effect. There are two schools of thought on the propriety of this expansionist approach by the court to its jurisdiction. There are commentators who view the creeping jurisdiction of the court into the human rights arena as progressive and a positive sign to the effect that member states take principles human rights, democracy and the rule of law seriously enough to consider them necessary even for economic integration. Proponents of the expansionist approach underscore that a purely inter-state trade disputes court would render it moribund since African states rarely sue each other.[3] On the opposite side are those who think that the expansion through judicial craft into the human rights territory, and in the absence of express treaty provisions makes the court's decisions in that regard prone to resistance or non-

observance[4], as has been witnessed in the past in decisions such as *Anyang Nyong'o v. Attorney General of Kenya* (2006). Although the Council of EAC ministers has since 2004 been "considering" proposals for expanding the EAC's jurisdiction, the Court, through judicial creativity, enabled by the elasticity of the wordings of Articles 6 and 7 of the EAC Treaty, have been able to wade into disputes regarding questions on human rights, democracy and the rule of law. The former approach is the "implied powers" approach, while the latter is the strict "express powers" approach to jurisdiction of courts.

Despite these philosophical differences, the empirical fact is that over 90 percent of the disputes before the court relate to complaints over human rights violations (usually against the member states and its apparatus, and breach of the principles of democracy enshrined in the EAC Treaty). These cases are usually brought by public-spirited individuals, human rights lawyers, NGO's and civil society groups; all of whom have been variously accused of inviting the court to put its jurisdictional treaty limits. Karua's case, therefore, also invites the court to resolve and settle the debate on its express versus implied jurisdiction and powers in matters regarding human rights, democracy and rule of law.

It is a momentous occasion for the court, I urge that the court seizes it.

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[1] See the commentary by Mwalimu Mati, at https://www.theeastafrican.co.ke/oped/434748-253402-13nglmp/index.html.

[2] Alter K, Gathii J and Helfer L (2016) "Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences" 27 *European Journal of International Law*, pp. 293-328 at p. 328.

[3] For example, Alter et al, note 2 above.

[4] For example, Nkatha M J (2012) "The Role of Regional Economic Communities in Protecting and Promoting Human Rights in Africa: Reflections on the Human Rights Mandate of the Southern Africa Development Community" *(20) African Journal of International and Comparative Law* at p. 97.

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