



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. 17 OF 2020

-BETWEEN-

KATIBA INSTITUTE APPELLANT

-AND-

ATTORNEY GENERAL 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

NATIONAL ASSEMBLY 3RD RESPONDENT

JUDICIAL SERVICE COMMISSION 4TH RESPONDENT

PATRICK GICHOHI 5TH RESPONDENT

OLIVE MUGENDA 6TH RESPONDENT

FELIX KOSKEI 7TH RESPONDENT

DR. GEORGE LUKOYE 8TH RESPONDENT

KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS 9TH RESPONDENT

AFRICA CENTER FOR OPEN GOVERNANCE 10TH RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal (W. Karanja, Asike - Makhandia & F. Sichale, JJ. A.) delivered on 24th July, 2020 in Civil Appeal No. 99 of 2019)

Representation:

Mr. Ochiel Dudley for the Appellant
(*Katiba Institute*)

Mr. Ogosso & Mwangi for the 1st, 2nd and 5th Respondents
(*Attorney General's Chambers*)

Mr. Mbarak Awadh Ahmed for the 3rd Respondent
(*National Assembly*)

Ms. Munyingi Diana h/b for Mr. Isaac Wamaasa for the 4th Respondent
(*Judicial Service Commission*)

Mr. Njoroge Regeru for the 6th Respondent
(*Nyiha, Mukoma & Company Advocates*)

Mr. Dulo Charles for the 7th Respondent
(*Dulo & Company Advocates*)

Mr. Ochiel Dudley h/b for Mr. Odongo for the 8th Respondent
(*Chiggai, Alakonya, Lusigi & Odongo LLP*)

Ms. Shumila h/b for Dr. Khaminwa for the 9th & 10th Respondents
(*Khaminwa & Khaminwa Advocates*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This appeal concerns the nomination and subsequent appointment of three members of the Judicial Service Commission (the JSC/Commission) under Article 171(2)(g) and (h) of the Constitution; the questions being whether the nomination and appointment of Patrick Gichohi (the 5th respondent), Olive Mugenda (the 6th respondent) and Felix Koskei (the 7th respondent) as members of the JSC was valid. Secondly, whether Section 15 of the Judicial Service Act, 2011 (JS Act) is inconsistent with the provisions of the Constitution for not providing for the

qualifications of persons to be appointed under Article 171(2)(h), for failure to provide for a competitive process of appointment and for purporting to give the President a role in the appointment of members of the JSC under Article 171(2)(b), (c), (d), (f) and (g) of the Constitution.

[2] In considering these questions, it will be relevant to look at the origin and history of the Commission. History is always important in determining questions like these because generally, legal decisions are deeply connected to the past – often to the recent past. Chapter Ten – Section 184 of the Constitution of Kenya, which was Schedule Two to the Kenya Independence Order in Council, 1963, established the Commission for the first time under the Westminster Model Constitution with a slim membership of only five, comprising the Chief Justice as Chairman, two persons appointed by the Governor- General acting in accordance with the advice of the Chief Justice, from among the Justices of the Court of Appeal or the puisne Judges of the Supreme Court (equivalent of the High Court); and two persons appointed by the Governor General on the advice of the Chairman of the Public Service Commission.

[3] Under the former Constitution, JSC again comprised five members, the Chief Justice as Chairman, the Attorney General, a representative from the High Court, a representative from the Court of Appeal and the Chairman of the Public Service Commission. The members of JSC were direct appointees of the President. See Section 68 (1).

[4] As the Judiciary grew in its complement and expanded in its geographical spread, so did the need to expand the composition and functions of the Commission as reflected in various reports such as Report of the Committee to Inquire into Terms and Conditions of Service of the Judiciary, 1991-1992, the Report of the Committee on the Administration of Justice, 1998, and the Final Report of the Task Force on Judicial Reforms, 2009 - 2010. Although the latter Report advised against including a nominee of the PSC as a member of JSC and

explained that following the de-linking of the Judiciary from mainstream civil service in 1993, the role of the PSC in the JSC would be superfluous, the final (present) Constitution retained its membership. In accordance with the aforementioned reports, the JSC's composition was expanded, and its functions enhanced.

B. BACKGROUND

[5] On 9th February 2018 the President nominated the 5th respondent as a representative of the PSC under Article 171(2)(g) and the 6th and 7th respondents as representatives of the public to the JSC under Article 171(2)(h). Thereafter, on 13th February 2018 the President forwarded the names of the three respondent nominees to the National Assembly for vetting and approval.

[6] Pursuant to Section 6 of the Public Appointments (Parliamentary Approval) Act, the National Assembly, after giving public notice of the vetting exercise, conducted an approval hearing on 21st February 2018. In the process, it received three written objections on the suitability of the 6th respondent. Two of the objections, however, failed the criteria of admission and were struck out, leaving only one by Dr. George Lukoye (the 8th respondent). The 8th respondent was the Secretary of the Kenyatta University Chapter of the Universities Academic Staff Union. He brought the complaint and swore an affidavit on behalf of the Union.

[7] According to the affidavit, the 6th respondent was alleged to have occupied the office of the Vice Chancellor of Kenyatta University for 10 years without being lawfully appointed, a matter that was litigated in **ELRC Petition No. 128 of 2016, Okiya Omtatah Okoiti v. Kenyatta University Council & 6 others**. It was further claimed that she had influenced Kenyatta University Council and/or Council Committee to recommend a fraudulent exorbitant exit package payment in her favour. That exit package was the subject of another court case in **ELRC Civil Case No. 2010 of 2016, Olive Mugenda v. Kenyatta**

University & Another. She was also accused of financial misappropriation, corruption, abuse of office, irregular payment of allowances and irregular recruitment of staff.

[8] The 6th respondent denied the allegations and maintained that the issues raised were *sub-judice* **ELRC Petition No. 128 of 2016** and **ELRC Civil Case No. 2010 of 2016** which were, at the time the complaints were lodged, pending conclusion before the Employment and Labour Relations Court. She, nonetheless, denied allegations of financial mismanagement and explained that the Ethics and Anti-Corruption Commission (EACC) which had conducted investigations in respect of these allegations found no evidence and closed the file.

[9] Ultimately, after considering the complaints and substance of the complaints, the National Assembly rejected the complaints and approved the appointments of the three respondents, who were subsequently formally appointed as members of the Commission.

C. LITIGATION HISTORY

i) *Before the High Court*

[10] Following the approval of the 5th, 6th and 7th respondents by the National Assembly, **Katiba Institute** (the appellant), a registered constitutional research, policy and litigation institute, petitioned the High Court in Constitutional Petition No. 84 of 2018 to challenge the same.

[11] As far as the appellant was concerned, the nomination of the 5th respondent was invalid for the reason that it was the President, and not the PSC that nominated him contrary to Article 171(2)(g) of the Constitution. In addition, the 5th respondent's nomination was made outside the strictures of Articles 73(2)(a), 232 and 234(2)(c) of the Constitution as well as Section 46 of the Public Service Commission Act, 2017 which underpin the requirement of fair competition and

merit as a basis of nomination and/or appointment. The appellant was also concerned that the National Assembly had failed to vet the 5th respondent in accordance with Section 7 of the Public Appointments (Parliamentary Approval) Act.

[12] Regarding the 6th and 7th respondents, the appellant claimed that their nomination was contrary to Articles 10 and 232(1)(g) of the Constitution on account of lack of fair competition and merit; that the National Assembly did not vet the candidates in accordance with Section 7 of the Public Appointments (Parliamentary Approval) Act; and that the National Assembly disregarded the integrity questions raised against the 6th respondent by the 8th respondent.

[13] In the appellant's view, the nomination of the 5th, 6th and 7th respondents blurs the separation of powers between the Executive and the Judiciary; and constitutes a direct threat to judicial independence enshrined under Articles 160(1) and 172(1) of the Constitution. In any case, the appellant argued, the nomination was vitiated by the lack of public participation.

[14] Finally, the appellant challenged the constitutionality of Section 15 of the Judicial Service Act on the grounds that it does not give legislative guidance on the qualifications and/or identification of persons to be appointed as representatives of the public in the JSC under Article 171(2)(h) and therefore violates Article 250(2) (a) and (3) of the Constitution; that it does not require merit or fair competition in the appointment of persons envisaged by Article 171(2)(h) and for that reason, is inconsistent with Articles 10 and 231(1)(g) of the Constitution; and that it purports to give the President a role in the appointment of members of the JSC under Article 171(2)(b), (c), (d), (f) and (g) of the Constitution against the intent of the Constitution.

[15] Dr. George Lukoye, the Kenya National Commission on Human Rights and Africa Center for Open Governance, the 8th, 9th and 10th respondents, respectively supported the petition.

[16] In opposition, the Attorney General and PSC (1st and 2nd respondents) challenged the competence of the petition on the basis that by dint of Article 171(2)(g) and (h) as read together with Section 15 of the Judicial Service Act, the 5th, 6th and 7th respondents were deemed to have been appointed the moment they were approved by the National Assembly; and as such, they could only be removed through the procedure prescribed under Article 251 of the Constitution. They also argued that the High Court lacked the authority to review the merits of the vetting and approval process of the 5th, 6th and 7th respondents by the National Assembly. Besides, they contended, the nomination and subsequent approval of the 5th, 6th and 7th respondents were above board.

[17] The National Assembly's (3rd respondent) position was that it had carried out the vetting and approval process of the 5th, 6th and 7th respondents in strict conformity with the Constitution and all applicable laws; that it considered the integrity of the three respondents including the objection to the suitability of the 6th respondent; that there is no criteria for the appointment of the representatives of the public in the JSC under Article 171(2)(h) except those spelt out in the Article itself; and that Article 232 of the Constitution was not applicable since it sets out the values and principles of public service as opposed to criteria for appointment of persons under Article 171(2)(h).

[18] The JSC did not take any position in these arguments opting to remain neutral and to watch from the sidelines.

[19] The 5th, 6th and 7th respondents opposed the petition and urged that they were validly nominated and successfully vetted leading to their appointment.

[20] Upon considering these arguments, the High Court (*Mwita, J.*) by a judgment dated 6th July, 2018 found, with regard to the 5th respondent, that Article 171(2)(g) grants the mandate and discretion to PSC to designate its representative to JSC without any conditions; that from the evidence, it was the PSC and not the President that nominated the 5th respondent; and that there is no requirement for

fair competition under Article 171(2) (g) of the Constitution. Finally, the learned Judge noted that by virtue of Article 171(2), the 5th respondent's nomination was not subject to approval by the National Assembly, and therefore the approval hearing conducted by the National Assembly was inconsequential, unconstitutional and a nullity.

[21] The court found in respect of the 6th and 7th respondents, that Article 171(2) (h) confers discretion on the President to nominate a woman and a man who are not lawyers to represent the public; that apart from these requirements, the Article does not place any additional conditions on the appointments, save for approval by the National Assembly; and that in discharging that mandate, the National Assembly did subject the appointments to public participation.

[22] As to the allegations of corruption against the 6th respondent, the High Court held that those claims could only be determined in the two suits which were pending before the court. The court was also satisfied with the 6th respondent's explanation that the EACC by a letter dated 1st October 2013 confirmed that, having conducted full investigations, it found no incriminating evidence against the 6th respondent. In any event, the High Court considered that on the basis of the doctrine of separation of powers, it was not open to it to involve itself in further interrogation of the allegations of the 6th respondent's integrity. The issue having been considered and determined by the National Assembly, that issue was spent and could not be raised before the High Court as though on appeal over the merit of the decision of the National Assembly. Rather, the court's mandate was limited to the determination of the question, whether the National Assembly, in approving the three candidates, acted in accordance with the Constitution and the law. The High Court ultimately found no fault in the approval process conducted by the National Assembly leading to the appointment of the 6th and 7th respondents.

[23] On the constitutionality of Section 15(2) of the Judicial Service Act, the High Court found no constitutional inconsistency to warrant the striking out of the provision.

[24] In the end, the High Court partially allowed the petition by issuing a declaration that the approval of the 5th respondent by the National Assembly was of no effect as no such requirement is provided for under Article 171(2)(g) of the Constitution. The rest of the prayers in the petition were, however, dismissed with no order as to costs.

ii) Before the Court of Appeal

[25] With 5 grounds of appeal, the appellant sought to overturn the decision of the High Court before the Court of Appeal. On the other hand, the National Assembly filed a cross-appeal challenging that part of the judgment that declared that there was no requirement for it to approve the appointment of the 5th respondent under Article 171(2)(g) of the Constitution. The National Assembly contended that this issue was neither pleaded nor canvassed before the High Court for determination.

[26] In the main appeal, the appellant as well as the 8th, 9th and 10th respondents, who supported it, maintained the positions they held in the High Court but added that, at the time of the 7th respondent's nomination by the President on 9th February, 2018, there was no vacancy in the JSC because the 7th respondent's predecessor in JSC, Kipng'etich Arap Korir Bett, had not resigned from that position.

[27] Likewise, the 1st, 2nd, 3rd, 5th, 6th and 7th respondents maintained their grounds in opposing the appeal, while JSC maintained a neutral stance.

[28] From the pleadings and arguments, the Court of Appeal framed the following 4 issues for determination:

- i. *whether courts have the jurisdiction to review the merits or demerits of decisions made by the National Assembly;*
- ii. *whether Section 15(2) of the Judicial Service Act is unconstitutional;*
- iii. *whether Articles 10, 232 and 234 of the Constitution applied to the 5th, 6th and 7th respondents' nomination and/or appointment; and*
- iv. *whether the 5th respondent's appointment required vetting and approval by the National Assembly.*

[29] The Court of Appeal dismissed the appellant's appeal and allowed the National Assembly's cross-appeal. In doing so, the court agreed with the High Court that its mandate did not include delving into the merits of the vetting and approval process and/or replacing the National Assembly's decision with its own; that there is no requirement for fair competition or merit-based selection in nomination of persons under Article 171(2)(h); and that Section 15(2) of the Judicial Service Act was not inconsistent with the Constitution. In allowing the cross-appeal, the court also agreed with the National Assembly that the High Court went off on a tangent by pronouncing itself on the question of whether the 5th respondent's approval by the National Assembly was necessary when that question had not been pleaded or addressed by the parties.

iii) Before the Supreme Court

[30] This outcome, once more aggrieved the appellant who lodged this appeal as of right under Article 163(4)(a) of the Constitution on seven grounds, which the Court has further condensed into 3 as follows:

- i. *Whether there is a requirement for merit and fair competition in appointments to the JSC under Articles 171(2)(g) and (h) as read with Articles 10, 73(2) (a) and 250 of the Constitution;*
- ii. *Whether Section 15(2) of the Judicial Service Act was unconstitutional; and*

- iii. *Whether the process of nomination and subsequent appointment of the 5th, 6th and 7th respondents was valid.*

D. PARTIES' SUBMISSIONS

i. *The Appellant's submissions (Katiba Institute)*

[31] In the written submissions, the appellant clustered and argued its appeal under various heads, the effect of which may be summarized as we have done above in paragraph 30;

- i. *Whether there is a requirement for merit and fair competition in appointments to the JSC under Articles 171(2)(g) and (h) as read with Articles 10, 73(2) (a) and 250 of the Constitution;*

[32] According to the appellant, the Court of Appeal erred by purporting to interpret Article 171(2)(g) and (h) of the Constitution in isolation of Articles 10 and 73(2)(a). In the appellant's opinion, Article 10, as appreciated by *Mutunga, CJ (Rtd)* in ***Kalpana H Rawal & 2 others v. Judicial Service Commission & 2 others***, SC Applic. No. 11 & 12 of 2016; [2016] eKLR, applies and binds all persons including members of the JSC being State officers. Consequently, in line with the rules of harmonious and holistic interpretation of the Constitution, Article 171(2)(g) and (h) must be read alongside Articles 10 and 73(2)(a) so as to meet the requirement of merit and fair competition in appointments to all State organs including the JSC. To support this proposition, the appellant cited the Court's opinion in ***Council of Governors & 47 others v. Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)***, SC Reference No. 3 of 2019; [2020] eKLR.

[33] Accordingly, the appellant posited that, apart from the Chief Justice and the Attorney General who are members of the JSC by virtue of the offices they hold, all the other members under Articles 171(2)(b)(c)(d) and (f) are elected in free and fair

elections, save for the members who are appointed or nominated under Article 171(2)(g) and (h). Therefore, the judgment of the Court of Appeal immunizes the nomination and appointment of members under Articles 171(2)(g) and (h) from the requirement of merit and fair competition, which in turn confers an untrammelled discretion that is incompatible with the Constitution and Kenya's international obligations under Principle V of the ***Commonwealth (Latimer House) Principles on the Three Branches of Government***, to uphold merit and proven integrity as the criteria for eligibility for appointment to public office.

[34] The appellant further contended that the 5th respondent was not validly nominated by the PSC as required under the Constitution, but was instead nominated by the President who has no role whatsoever in the nomination of a representative of the PSC; that the Court of Appeal ignored this evidence in its determination; and that the President forwarding the name of the 5th respondent to the National Assembly for approval, purportedly in exercise of his powers under Article 171(2) as read with Article 250(2)(b) of the Constitution. As a result, the 5th respondent's nomination was *ultra vires* Article 171(2)(g), Section 36 of the Public Service Commission Act and Regulation 3 of the Public Service Commission Regulations 2005 (repealed).

[35] For the 6th and 7th respondents, the appellant has invited us to find that the National Assembly failed to consider relevant factors that had been brought to its knowledge, namely, the serious unresolved questions of the 6th respondent's integrity and the irrationality of the 7th respondent's nomination which occurred before a vacancy arose in the JSC and that consequently in those circumstances, the Court of Appeal ought to have nullified the appointments of the 5th, 6th and 7th respondents to the JSC for having failed to meet the standards of fairness, competition and merit.

ii. Whether Section 15(2) of the Judicial Service Act was unconstitutional.

[36] The appellant maintained that Section 15(2) of the JS Act is contrary to the provisions of Articles 171(2)(g) and (h) of the Constitution for failing to provide for the requirement of merit and fair competition in appointment of members of the JSC; and that the section renders the vetting and approval by the National Assembly a hollow exercise devoid of constitutional meaning.

[37] The appellant also claimed that the Court of Appeal failed to determine whether Section 15(2) is also unconstitutional for requiring the names of the nominees under Article 171(2)(b), (c), (d), (f) and (g) to be submitted to the President for appointment. Yet it is obvious that under Article 171(2)(h) the President's role is limited to appointment of only two persons to represent the public. On account of the provisions of Section 15(2), the appellant argued that the President may delay or refuse to appoint elected members of JSC, thereby impacting on the independence of the JSC and Judiciary.

iii. Whether the process of nomination and subsequent appointment of the 5th, 6th and 7th respondents was valid.

[38] For all the reasons given, the appellant prays that the Court finds that the process nomination and subsequent appointment of the 5th, 6th and 7th respondents was invalid.

[39] The appeal is supported by the 9th and 10th respondents who have fully associated themselves with the appellant's submissions and equally prayed that this appeal be allowed, the judgment of the Court of Appeal set aside, and costs awarded to them.

ii. The 1st, 2nd and 5th Respondents' submissions (AG, PSC & Patrick Gichohi)

[40] The appeal was opposed by the 1st 2nd and 5th respondents in their joint submissions. On the first question, they submitted that the nominees under Article 171(2)(h) of the Constitution are only subject to the requirements that they are of

the opposite gender, non-lawyers and approval by Parliament; that whereas fair competition is not a mandatory requirement, the 5th respondent's nomination was in strict conformity with Articles 10, 27 and 73(2)(a) of the Constitution, Sections 14(1), 36, 37 and 46 of the Public Service Act (PSC Act) as read with Regulation 3 of the Public Service Regulations 2005; that there was public participation in respect of the 5th respondent among the Commissioners of the PSC as a result of which the commission identified him; that the 5th respondent was appointed as a member of PSC pursuant to Articles 233(2) of the Constitution as read with Sections 7(3), 8 and the first schedule to the PSC Act; that he was competitively nominated by PSC and approved by the National Assembly; and that he is a highly qualified and a decorated public servant having previously served in parliament for 33 years and 5 years at the PSC, thereby meeting both merit and relevant qualifications.

[41] On the second question, the 1st, 2nd and 5th respondents submitted that the exercise of presidential powers of appointment under Article 171(2)(h) is in the nature of executive authority and is discretionary; that the power can only be checked by a political organ such as Parliament. They gave the example of the exercise of that power by the President in nominating for appointment Cabinet Secretaries, which nominations do not require competitive selection, but is subject to approval by Parliament.

[42] On the constitutionality of Section 15(2) of the JS Act, they posited that the Act cannot fetter or qualify the Constitution; and it cannot restrict the power of nomination given to PSC under Article 171(2)(g) and donated to the President under Articles 172(2) as read with Article 250(2)(c) of the Constitution. They urged this Court to be persuaded by the decision of the Court of Appeal in **Mumo Matemu v. Trusted Society of Human Rights Alliance**, Civil Appeal No. 290 of 2012; [2013] eKLR on the doctrine of separation of powers in a similar situation. They maintained that whereas courts have the power to nullify and

revoke an appointment that violates the spirit and letter of the Constitution, the courts will hesitate to enter into the arena of merit review of a decision of another constitutional organ of the State that has been reached procedurally.

[43] Regarding public participation, the 1st, 2nd and 5th respondents submitted that the requirements for public participation prior to and during the process leading to the nomination, vetting and approval of the nominees were satisfied strictly in accordance with Article 171(2)(g) and (h) as read with Article 250(2) of the Constitution, the Public Appointments (Parliamentary Approval) Act, PSC Act and PSC Regulations and Standing Order No. 42(1) of the National Assembly Standing Orders.

iii. The 3rd Respondent's submissions (National Assembly)

[44] Though the 3rd respondent (the National Assembly) did not file submissions, Counsel representing it indicated from the Bar that they opposed the appeal, relying on its grounds of objection dated 12th October 2020 and the replying affidavits sworn by Mr. Jeremiah Ndombi before the High Court. We would wish to emphasize that pleadings filed before this Court are independent of those filed before the courts below. It is absurd to suggest, as counsel in effect did, that we look for his objection and affidavit filed in the High Court. We shall consider only submissions made before us.

[45] In the oral submissions made on its behalf, the National Assembly maintained that the appellant has not contested that there was an approval process in the National Assembly conducted in accordance with Article 171 of the Constitution and Sections 7, 5 and 6 of the Public Appointments (Parliamentary Approval) Act. That process, it added, was preceded by public participation where members of the public were invited to provide their views on the suitability of the nominees and upon receipt of three memoranda, which were all against the 6th respondent, the latter was invited to respond to only one as the other two were

rejected by the House. In the end, the House was persuaded that the single remaining complaint was *sub-judice* and similarly dismissed it.

iv. The 4th Respondent's submissions (JSC)

[46] Just like it did before both the superior courts below, the 4th respondent took a neutral position before us, maintaining that it was not a party to the circumstances leading to the appointment of the Commissioners.

v. The 6th Respondent's submissions (Prof. Mugenda)

[47] Equally, opposing the appeal, the 6th respondent took the view that Section 15 of the JS Act, merely mirrors Article 171(2) of the Constitution and cannot provide for any more qualifications than are provided for in the Article; that requirements like merit and fair competition are not part of the constitutional framework. She cited the cases of *Tukero ole Kina v. Attorney General & Another*, [2019] eKLR; *Olum & Another v. Attorney General* [2002] EA 508 and *Queen v. Big M Drug Mart Ltd* [1985] 1 SCR 295 to the effect that both purpose and effect are relevant in determining the constitutionality of legislation. She submitted that Article 73(2) on the guiding principles of leadership and integrity, is distinct from Article 171(2) and that the former does not constitute additional criteria to be imported into Article 171(2).

[48] The 6th respondent expressed satisfaction with the evaluation of evidence by the Court of Appeal and its conclusion on questions of her integrity; that the courts below were not at liberty to examine the merits of allegations that were pending before another court and in respect of which the National Assembly had made a determination.

vi. The 7th Respondent's submissions (Felix Koskei)

[49] On the unconstitutionality of Section 15(2) of the JS Act, the 7th respondent submitted that there is a presumption of constitutionality of the provision which is

grounded on realistic appreciation of the limits of judicial power. He urged the Court to follow the persuasive pronouncements in *Attorney General v. Law Society of Kenya & Another*, Civil Appeal 133 of 2011; [2017] eKLR, *Kizito Mark Ngaywa v. Minister of State for Internal Security and Provincial Administration & another*; HC Petition No. 4 of 2011; [2011] eKLR, and the Indian case of *Hamdarddawa Khana v. Union of India & others*, 1960 AIR 554, to hold that the legislative intent of the statute tilts towards constitutionality.

[50] On the application of Articles 171 (2)(g) and (h) and 250 as read with Articles 10 and 73(2)(a) on the requirement for merit and fair competition, the 7th respondent has submitted that the Constitution envisages appointments under Article 171(2)(h) to be *sui generis* and distinct from ordinary appointments in the public service. Properly interpreted, Article 171(2)(h) does not require fair competition; and that the words of Articles 171(2)(h) and 250(2) of the Constitution are plain on the presidential powers to appoint persons to serve in the JSC and no more is required.

[51] Further, the 7th respondent contended that Article 171 is self-executing as it provides for the mode of identification, qualifications and the manner of appointment. Where the Constitution itself makes it clear how membership should be identified and how appointments should be made, including conferring discretion in certain instances, the court may not question that discretion as long as it is exercised in accordance with the Constitution and the law.

[52] On whether there was irrationality in his vetting, the 7th respondent submitted that his nomination was not prejudicial to anybody; was subject to thorough vetting by Parliament and was in accordance with constitutional mandate and competence of the appointing authority.

vii. The 8th Respondent's submissions (Dr. Lukoye)

[53] Though Mr. Ochiel Dudley, holding brief for Mr. Odongo, who is on record for the 8th respondent, indicated during the hearing that the 8th respondent would rely entirely on his written submissions, it has turned out that neither the hard nor online copies were filed by the 8th respondent.

E. ISSUES FOR DETERMINATION

[54] We reiterate what we have stated in paragraph 30 above, that all these arguments, in our judgment, require answers to only three questions:

- i. Whether there is a requirement for merit and fair competition in appointments to the JSC under Articles 171(2)(g) and (h) as read with Articles 10, 73(2) (a) and 250 of the Constitution;*
- ii. Whether Section 15(2) of the Judicial Service Act was unconstitutional; and*
- iii. Whether the nomination and subsequent appointment of the 5th, 6th and 7th respondents were valid.*

F. ANALYSIS AND DETERMINATION

Jurisdiction of this Court

[55] It is our responsibility, as a matter of practice, to independently satisfy ourselves that this appeal is properly before the Court, even if the issue of jurisdiction has not been raised. In this appeal, however, the 6th respondent's objection to jurisdiction was limited to the argument by the appellant that the Court of Appeal drew inferences not supported by the evidence. According to the 6th respondent, this issue does not involve the interpretation or application of the Constitution.

[56] The appeal is brought as of right pursuant to Article 163(4)(a) of the Constitution. From the petition in the High Court, the arguments before both

superior courts below as well as the judgments of the two courts, we have no doubt whatsoever that the subject matter involves the interpretation and application of Articles 171 and 250 of the Constitution. The appeal, for these reasons, meets the principles enunciated in *Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & another*, SC. Pet. No. 3 of 2012; [2012] eKLR.

Turning to the first question,

i) Whether there is a requirement for merit and fair competition in appointments to the JSC under Articles 171(2)(g) and (h) as read with Articles 10, 73(2) (a) and 250 of the Constitution;

[57] The arguments around this question relate to the nomination of the 5th respondent which the appellant together with the 8th, 9th and 10th respondents had challenged in the High Court as being invalid for the reasons that it was done by the President as opposed to the PSC contrary to Article 171(2)(g) of the Constitution; that it was made outside the strictures of Articles 73(2)(a), 232 and 234(2)(c); and that the 5th respondent was irregularly vetted by the National Assembly contrary to Article 172(2)(g).

[58] As for the 6th and 7th respondents, it was claimed that their nomination was also not based on fair competition or merit contrary to Articles 10 and 232(1)(g) of the Constitution and that they failed to meet the integrity test under Chapter Six of the Constitution; and that the National Assembly disregarded the fact that the 7th respondent's nomination was made before his predecessor resigned from office.

[59] The resolution of the opposing arguments lies in the interpretation and application of Articles 171(2)(g) and (h) as read with Article 250(2) of the Constitution and Section 15(2) of the JS Act.

[60] The Constitution by force of Article 2 is declared the supreme law; the law which binds all persons and all State organs; whose validity or legality is not subject to any kind of challenge. It further declares that any law that is inconsistent with

it, is void to the extent of that inconsistency. Further, any act or omission in contravention of the Constitution is invalid, while every person is under obligation to respect, uphold and defend it.

[61] The exercise of sovereign power of the people, delegated to State organs, the Legislature, the Executive, the Judiciary and independent tribunals are constrained by the principle that these organs may exercise no powers and perform no functions beyond those conferred upon them by law. In this sense, the Constitution entrenches the principle of legality and provides the foundation for the control of public power.

[62] While bearing these principles in mind, we turn to consider whether the Constitution requires merit and fair competition in the appointments to the JSC under Articles 171(2)(g) and (h) as read with Articles 10, 73(2)(a), 232(1)(g) and 250 of the Constitution. This issue turns on the construction of these Articles.

[63] The Constitution itself at Article 259 provides for the manner of its construction. It must be interpreted in a manner that, among other things:

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

[64] This Article has been affirmed by the Court; *In the Matter of Interim Independent Electoral Commission*, SC Application No. 2 of 2011; [2011] eKLR and *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, SC Advisory Opinion No. 2 of 2012; [2012] eKLR, in a long line of many other cases. In the latter, the Court observed that:

“8.8 In interpreting the Constitution and developing jurisprudence, the Court will always take a purposive interpretation of the Constitution as guided by the Constitution itself.”

[65] Earlier, *In the Matter of Kenya National Commission on Human Rights*, SC Reference No. 1 of 2012; [2014] eKLR, the Court defined what it means to holistically interpret the Constitution as follows:

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

[66] To understand the import and tenor of a provision of the Constitution, the entire Constitution has to be read as an integrated whole, because the Constitution embodies certain fundamental values and principles which require that its provisions be construed broadly, liberally and purposely to give effect to those values and principles. Where words used in any provision of the Constitution are precise and unambiguous, then they must be given their natural and ordinary meaning. The words themselves alone in many situations declare the intention of the framers because, to borrow the words of Burton, J. in *Warburton V. Loveland*, (1832) 2 D. & Cl. 480, the language used **“speak the intention of the legislature.”**

[67] Those values and principles reflect our historical and political realities and the people’s aspirations for a democratic State, built on the rule of law and respect for human rights.

[68] We reproduce below Article 171(2)(g) and (h) to answer the question whether, when read together with Articles 10 and 73(2)(a), it requires merit and fair competition in appointments to the JSC. These two Articles deal with the application of national values and principles of governance, integrity, fairness, transparency and accountability in selection, election or implementation of public policy decisions.

[69] Our focus turns to Article 171 which reads as follows, with specific emphasis on (g) and (h):

“The Commission shall consist of

a. the Chief Justice, who shall be the chairperson of the Commission;

b. one Supreme Court judge elected by the judges of the Supreme Court;

c. one Court of Appeal judge elected by the judges of the Court of Appeal;

d. one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates;

e. the Attorney-General;

f. two advocates, one a woman and one a man, each of whom has at least fifteen years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates;

g. one person nominated by the Public Service Commission;
and

h. one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.” [our emphasis]

[70] It is apparent from this provision that membership to the JSC is four-pronged; by virtue of office, for example the Chief Justice and the Attorney General; through elections by peers, namely, representatives of the Supreme Court, Court of Appeal, High Court, the Magistracy and the advocates; by nomination by the PSC, and the fourth category is through appointment by the President.

[71] This ground concerns the third and fourth categories. It questions the validity of appointment of the 5th respondent, a nominee of the PSC to the JSC and the appointment of the 6th and 7th respondents to represent the public. Paragraphs 6 and 7 of the Petition filed in the High Court, reproduced below summarise the appellant’s case:

“First, the President’s purported nomination of Patrick Gichohi as a member of the Judicial Service Commission is assailed as *ultra vires* Article 171 (2)(g) of the Constitution. Second, the nominations of Olive Mugenda and Felix Koskei as members of the Judicial Service Commission under Article 172(2)(h) of the Constitution is impugned as having been bereft of competition or merit as the basis of appointment contrary to Article 232(1)(g) of the Constitution. Third, the petitioner queries the constitutionality of Section 15 of the Judicial Service Act, 2011 in so far as it does not proffer any legislative guidance the manner for identification or specific qualifications for

appointment to represent the public, as a member of the Judicial Service Commission under Article 172 (2) (h).”

Claims against the 5th Respondent.

[72] According to the particulars contained in paragraphs 47 to 65 of the High Court petition, the nomination of the 5th respondent was challenged for being *ultra vires* Article 171 as it was made by the President, as opposed to the PSC; and secondly, that at the time of his nomination, he had retired from the public service.

[73] The nominating entity is the PSC. From the history we have given in paragraphs 2,3 and 4 above, it is apparent to us that a nominee of the PSC to the JSC has traditionally been a serving member. Section 184 (1)(c) of the 1963 Constitution, for instance, stipulated, among other things, that Judicial Service Commission shall consist of:

“(c) two persons who are for the time being designated in that behalf by the Governor-General, acting in accordance with the advice of the Chairman of the Public Service Commission, from among the members of that Commission”

[our emphasis].

This was later amended. Section 68(1) (d) of the former Constitution replaced the two members with the chairman of the Public Service Commission.

[74] Today the Constitution simply states a nominee of the PSC to the JSC shall be that **“one person nominated by the Public Service Commission”**. It does not state the person must be a member or chairperson of the PSC. One person is just one person, who must be nominated by the PSC.

[75] It is not a disqualifying factor under Article 233(3) for a member of the PSC to be a retired public servant. Indeed, by Section 8(2) of the Public Service Act, a member of the PSC is only required to be a citizen of Kenya; a holder of a degree

from a university recognized in Kenya; with at least ten years' experience in their respective profession; and meets the requirements of leadership and integrity in Chapter Six of the Constitution.

[76] We note that although the appellant pleaded before the High Court that the 5th respondent had retired, no such evidence was presented, and more importantly the question was neither addressed nor determined by the learned Judge. Similarly, the issue was neither canvassed by the parties nor resolved by the Court of Appeal. For us, in the first place, whether or not the 5th respondent had retired is a question of fact, the consideration of which we are precluded by the terms of Article 163(4) of the Constitution from entertaining, and particularly so now, because the superior courts below did not express any opinion on the matter. We say no more on this question.

[77] On the claims that the 5th respondent was nominated by the President and not the PSC, our perusal of the record and the sequence of events leading to the submission of the 5th respondent's name to the National Assembly prove this assertion to be inaccurate. What is on record is a letter from the Office of the President dated 9th February, 2018 to the Speaker of the National Assembly enclosing the instrument for the nomination of the 5th, 6th and 7th respondents. This alone does not, in our opinion, amount to an appointment or nomination by the President.

[78] In her replying affidavit, Alice Otwala, who is described as the Secretary/CEO of PSC, deposed that on 30th January 2018, the PSC received from the Secretary of the JSC a notification of the vacancy of its representative to JSC and requested it to present a nominee for appointment; that pursuant to Regulation 3 of the Public Service Commission Regulations 2005 which allows the Commission to make decisions through consultations, such consultations were held among the commissioners, and the 5th respondent nominated; that subsequently, the PSC held a special board meeting on Monday 12th February, 2018 where the 5th

respondent's nomination was ratified and the name forwarded to the office of the President for appointment. On 2nd March 2018, by Gazette Notice No. 2091, the President, citing Articles 171(2) and 250 as the basis of his action, appointed the three respondents as members of the JSC. We confirm, however, that although the notice makes reference to Article 250, it is Article 171(2)(g) and (h) that was expressly and specifically relied on in the notice.

[79] Article 171(2)(g) is crisp and laconic; that the JSC shall consist of, among other members, **“one person nominated by the Public Service Commission.”** Nothing has been shown to us to suggest that the appointment of the 5th respondent was made by President. Instead, the evidence on record demonstrates fairly clearly the steps taken upon declaration by the JSC of the vacancy for the representative of the PSC. The plain language of Article 171(2) (g) simply requires the PSC to present a nominee. The Article, however, does not make provision of the mechanism and procedure of such nomination. We are satisfied that since the procedure for identifying its nominee is an internal affair, determined at the discretion of the PSC itself, and in view of the uncontroverted evidence of Alice Otwala, the method adopted was consultative and inclusive.

[80] The third reason for challenging the appointment of the 5th respondent was that he was nominated outside the strictures of Article 232 and 234(2)(c), Section 46 of the Public Service Commission Act, 2017, all of which, underpin *inter alia*, the constitutional requirement of fair competition and merit as a basis of appointment.

[81] One of the values and principles of public service in terms of Article 232 of the Constitution is fair competition and merit as the basis of appointments and promotions in the service. We have in the previous paragraphs noted that Article 171 (2)(g) does not give any criteria for arriving at the nominee of the PSC but concluded that the nomination is at the discretion of the PSC. The sovereign people of Kenya deliberately entrusted the PSC to nominate “one person” to represent it

in the JSC. We also note that the PSC Act under Section 46(1) prescribes that where the PSC is required by the Constitution or any legislation to nominate or recommend a person for appointment, the Commission shall abide by the Constitutional requirement of fair competition and merit as a basis of appointment and ensure that the appointment facilitates achievement of a representative public service. PSC in identifying its nominee internally, we have noted, was guided by the values and principles espoused in the Constitution and the law. The fair competition and merit requirement must be seen in this context and circumstances. The commissioners themselves, as opposed to the members of the public or any other entity, including the court, are more qualified to determine the question of merit in the nomination. No member of the PSC complained of unfair treatment or discrimination.

[82] The appointment of the 5th respondent has also been opposed on the ground that the National Assembly, in vetting the 5th respondent, failed to interrogate whether the PSC complied with the mandatory considerations and the procedure to arrive at the nominee under Section 7 of the Public Appointments (Parliamentary Approval) Act. For this alleged failure, the appellant prayed for a finding that the approval of the 5th respondent by the National Assembly was *ultra vires* Section 7 of the Public Appointments (Parliamentary Approval) Act, 2011 and therefore did not meet the standard of strict scrutiny, hence invalid.

[83] The High Court found that the National Assembly had no constitutional or legal mandate to approve a nominee under Article 171(2)(g). This conclusion was the subject of cross-appeal by the National Assembly. On this, the Court of Appeal faulted the High Court, holding that the issue was not pleaded or canvassed before the learned Judge, for which reason the cross-appeal was allowed.

[84] It is common factor that after being nominated by the PSC, the 5th respondent's name was forwarded by the President to the National Assembly for

vetting before appointment to the JSC. The 5th respondent did not resist this process but indeed successfully went through it.

[85] Though the Court of Appeal, in allowing the cross-appeal, held that the vetting of the 5th respondent was neither pleaded nor canvassed before the learned Judge of the High Court, from our own examination of the record, we note that in the appellant's submissions dated 27th April 2018 before the High Court, it addressed the irrationality of the vetting of the 5th respondent. Before the High Court, Mr. Ochiel highlighting the 5th ground submitted on the need of a rationality test arguing that the National Assembly ought to have applied strict scrutiny in approving any action of the Executive and where the action involves appointment to public posts, all relevant factors must be considered by the National Assembly. Clearly, the issue was squarely before the High Court and the learned Judge was justified to determine it.

[86] Although we too agree, with respect, that the vetting of the 5th respondent by Parliament was not prejudicial to him or any party, it is important to always bear in mind the Constitutional edict that State organs can only exercise the powers and perform the functions conferred upon them by the Constitution and the law. It is our considered view that it was contrary to and inconsistent with the Constitution for Parliament to purport to vet the 5th respondent. Again, we resort to the plain language of Article 171(2)(g), that membership of the JSC includes “**one person nominated by the Public Service Commission.**”

[87] Article 250(2) that provides for approval of Commissioners by the National Assembly is a provision of general application to all Chapter Fifteen Commissions and independent offices, “**except to the extent that this Constitution provides otherwise**”. See Article 248(1). Apart from Chapter Fifteen, the Constitution makes specific and distinct provisions for each of the ten Chapter Fifteen Commissions. They are constituted differently. Some have no set number of members, yet some have no procedures for appointment of the members. For

example, under Article 88, the Constitution interestingly only provides for those who do not qualify for appointment to the Independent Electoral and Boundaries Commission, without stating the numbers or the procedure for their appointment. It is Section 6 of the Independent Electoral and Boundaries Commission Act (IEBC Act) that sets out the qualification for the chairperson or members. The IEBC Act defines the chairperson and members as those appointed “**in accordance with Article 250(2)**”. It specifically provides, in the First Schedule that the President shall, within seven days of receipt of the names approved by the National Assembly, by notice in the Gazette, appoint the Chairperson and the members of the Commission.

[88] Similarly, apart from establishing the Teachers Service Commission, Article 237 does not specify the membership or the procedure for appointment. Section 8(9) of the Teachers Service Commission Act confers on the President, after approval of the National Assembly, the power to appoint members of the TSC. In the same vein, Article 67 establishes the National Land Commission and only prescribes its functions, just as Article 59 does with respect to the Kenya National Human Rights and Equality Commission. In both situations, the President, through the enabling legislation, appoints the chairpersons and members. All the statutes relating to these commissions attribute the process and the power of appointment to Article 250. Article 250, as a general provision is called to aid to fill up the lacuna where there are no express constitutional provisions. Article 171 is a self- executing provision, complete with the mode of identification, the nature of qualifications and the manner of appointment of members of the JSC.

[89] Had the framers intended that the nominee of the PSC be vetted by Parliament, just like the two members representing the public under Article 171(2)(h) they would have expressly made a similar provision. Where the framers required approval by Parliament of any appointment, they expressly said so in the Constitution. For example, under Article 215, the chairperson of the Commission

on Revenue Allocation is nominated by the President and approved by the National Assembly. The chairperson, vice chairperson and seven members of the Public Service Commission are appointed by the President with the approval of the National Assembly under Article 233. Outside the Chapter Fifteen commissions, the appointment of the Chief Justice and the Deputy Chief Justice under Article 166, (and not of any other Judge) after the recommendation of the JSC, is subject to the approval by the National Assembly. Clerks of the Houses of Parliament are appointed by the Parliamentary Service Commission under Article 128 but with the approval of the relevant House. Under Article 152, the President nominates and, with the approval of the National Assembly, appoints Cabinet Secretaries.

[90] These examples are enough to show that Article 171(2)(g) does not envisage or indeed require a nominee of the PSC to the JSC to be approved by Parliament and that the approval of the 5th respondent by the National Assembly was a bonus had no consequence, therefore null and void.

The decision of the Court of Appeal on this aspect of the appeal is set aside.

Claims against the 6th and 7th Respondents.

[91] The challenges against the appointment of the 6th and 7th respondents are to the effect that, contrary to the provisions of Article 232 and the relevant implementing statutes as specifically required by Article 232 (1) (g), the nomination of the 6th and 7th respondents were not based on fair competition or merit, and therefore unconstitutional and invalid. In addition, it was pointed out that the 7th respondent's nomination was made before his predecessor resigned from office, a fact the National Assembly ought to have inquired into, it was submitted.

[92] To the extent that the National Assembly failed to interrogate the two, their appointment was contrary to the mandatory requirements of Section 7 of the Public Appointments (Parliamentary Approval) Act, 2011; and that the National

Assembly failed to satisfy itself that the procedure used to arrive at the nominees was in consonance with Section 7 of the Public Appointments (Parliamentary Approval) Act, 2011.

[93] The National Assembly was accused of disregarding all the integrity questions that were raised against the 6th respondent; that it did not consider at all the investigation and prosecution of the 6th respondent on allegations of criminal impropriety.

[94] The two questions posed by these claims are, whether the 6th and 7th respondents were required, before their nomination, to satisfy the fair competition and merit criteria; and whether the 6th respondent was disqualified from nomination for failing to meet the integrity test.

[95] Starting with the latter question, it is common ground that two suits were instituted against the 6th respondent in the Employment and Labour Relations Court, **ELRC Petition No. 128 of 2016** and **ELRC Civil Case No. 2010 of 2016** in which allegations of fraud, financial misappropriation, corruption, abuse of office, irregular payment of allowances and irregular recruitment of staff were made.

[96] The 6th respondent denied the allegations in her defence before the Employment and Labour Relations Court, the National Assembly and the two superior courts below. She maintained that these issues were *sub-judice*; and that at any rate, the allegations were investigated by the Ethics and Anti-Corruption Commission (EACC) which upon finding no evidence closed the file. EACC by a letter dated 1st October 2013 confirmed this, and both superior courts below were satisfied that the matter, having been investigated, a decision made by EACC and Parliament having given the 6th respondent a clean bill of health, it was not open to the courts to conduct a merit review of those decisions. The superior courts below noted, though, that the civil actions before the Employment and Labour Relations Court were still pending hearing and determination.

[97] For our part, while agreeing with the concurrent conclusions of both the High Court and the Court of Appeal, we find no merit in the argument that the National Assembly disregarded the memorandum which had raised integrity issues against the 6th respondent. It is clear to us from the record that the National Assembly considered the complaints, invited the 6th respondent to respond and, in the end, expressed satisfaction with the explanation proffered.

[98] It is now settled on the authority of Article 165(3) (d) (ii) and numerous judicial pronouncements, that it is the duty of the court to ensure that State organs comply with the Constitution, its values and principles and the law, when discharging their functions to obviate any danger of constitutional violation; and to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution. The only caveat to this constitutional proclamation is that, in reviewing the administrative actions of these organs, the court must not substitute itself into the organs whose actions or decisions are the subject of review or substitute the impugned decision with its own decision. That is what the doctrine of separation of powers demands. See the persuasive decision in *Kenya Youth Parliament & 2 Others v AG & Another*, Constitutional Petition No. 101 of 2011; [2012] eKLR, our own, in the case of *Judicial Service Commission v. Speaker of the National Assembly & 8 Others* [2014] eKLR, where we restated that:

“The Constitution disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the Constitution, then the Courts are empowered by Article 165 (3)(d)(ii) to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution.”

See also our decisions in *Justus Kariuki Mate & another v. Martin Nyaga Wambora & another*, SC Petition No. 32 of 2014; [2017] eKLR and *Speaker of the Senate & Another v. Attorney General & 4 Others*, Reference No. 2 of 2013; [2013] eKLR.

[99] In the instant matter, the court’s concern was limited to confirming and being satisfied that the National Assembly acted in accordance with the Constitution and the law. The record vindicates the conclusion by both courts. The National Assembly, relying on its own procedures and the Public Appointments (Parliamentary Approval) Act conducted an inquiry before satisfying itself that there were no impediments at that stage to disqualify the 6th respondent. It was not for the court, in the absence of any violations by the National Assembly to review its decision.

[100] With nothing to show that the National Assembly failed to comply with the Constitution and the law in approving the appointment of the 6th respondent, or that the High Court erred in its determination of this issue, the Court of Appeal properly applied its mind to the law, the evidence and reached the correct decision.

[101] The next and final front of this set of grounds of appeal is the interpretation of Article 171(2)(g) and (h) as read with Articles 10, 73(2) (a) 232(2)(a) and 250 of the Constitution and also with Section 7 of the Public Appointments (Parliamentary Approval) Act. The question being whether there is a requirement for merit and fair competition in appointments to the JSC under Article 171(2)(g) and (h)?

[102] For the umpteenth time, we remind ourselves that under Article 171(2)(h) the membership of the JSC consists of:

“(2)(h). one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly”. [our emphasis].

[103] We have emphasized that the two members are of opposite gender; they represent the public; they must not be lawyers; appointed by the President and approved by the National Assembly.

[104] How does the President identify the candidates to fill the two positions? What criteria does he use to ascertain their suitability, qualification, disposition and experience? Was it the intention of the people of Kenya to entrust the President with full and unfettered discretionary powers to make the appointments of persons to represent them in the JSC on their behalf?

[105] It has been suggested that the procedure used to arrive at the nominees was *ultra vires* Section 7 of the Public Appointments (Parliamentary Approval) Act, 2011, hence invalid; that the guiding principles of leadership and integrity which include selection on the basis of personal integrity, competence and suitability, under Article 73(2)(a) was not met; and further, that the values and principles of public service which include fair competition and merit as the basis of appointments were ignored.

[106] In short, the only broad issue here is whether the appointment of the 6th and 7th respondents met the test of fair competition and merit. While we entertain no doubt that fair competition and merit are values and principles of public service, we do not think all cases of appointment to a public office must be based on fair competition. It will all depend on the language of the provision of the Constitution under which the appointment is to be made. We have said in paragraph 103 above that Article 171(2) (h) only requires that for a person to be appointed to represent the public in the JSC, that person has to be either a woman or man, and the person must not be a lawyer. In nominating the person, these are the attributes that the President, acting in good faith and in the best interest of the public, must take into account. He must also consider merit, national values and principles, integrity and national diversity. Nomination by the President is not the end of the process.

[107] In approving the nominee, the National Assembly is required to ascertain whether in making the appointments, the President took these factors into account. The suitability of the nominee is further tested by vetting by the Legislature. Members of the public have the opportunity to raise any issues on the candidates' suitability to hold a public office. We may add, by way of observation, that of all the 11 members of the JSC, this is the only category in the entire Article 171 where approval by the National Assembly is required before appointment.

[108] By way of contrast, the appointment of Principal Secretaries under Article 155 or of judges pursuant to Article 166 are, respectively, based on the recommendation of the PSC and JSC. Through a competitive process, the two Commissions identify suitably qualified candidates to recommend to the President for appointment. In the case of the former, the nominees of the President must be approved by the National Assembly, and this is explicitly provided for by the Constitution, just as the requirement for fair competition. To import into Article 171(2)(h) fair competition is to add an additional layer of requirements over and above those provided by the Constitution.

[109] A purposive and harmonious construction of Articles 171, 248 and 250 of the Constitution leaves no doubt in our minds that the framers intended Article 171(2) of the Constitution to apply exclusively to the process of appointment of members of JSC, separate and distinct from that of other Commissions and independent offices; that Article 250 is a general provision dealing with Commissions and independent offices generally. This is gathered from the tenor of Article 248 (1) of the Constitution which relates to the application of Chapter Fifteen and states that;

“248. (1) This Chapter applies to the commissions specified in clause (2) and the independent offices specified in clause (3), except to the extent that this Constitution provides otherwise”. [our emphasis].

From our plain reading of this Article, we conclude that Article 171 is an exception to Article 250, in many instances.

[110] Just as the Constitution confers discretion on the President to nominate the Attorney-General and Cabinet Secretaries, subject only to approval by the National Assembly, so does it permit him to nominate a man and a woman, not lawyers, to represent the public in the JSC after approval by the National Assembly.

[111] For these reasons, we respectfully agree that, as far as the nomination of two members of JSC under Article 171(2)(h) is concerned, fair competition is not a mandatory requirement; and that where the Constitution itself makes provision on the manner and process of identification and appointment of members, the court may not question the exercise of discretion in the appointment as long as it is exercised in accordance with the Constitution and the law.

That should be sufficient to dispose of this ground. It has no merit.

To the main second ground of appeal,

ii. Whether Section 15(2) of the Judicial Service Act is unconstitutional

[112] A separate petition before this Court, SC Petition No. 45 of 2019, ***Law Society of Kenya v. Attorney General & 4 others***, which was heard earlier, on 7th July, 2022 and our decision rendered on 31st March 2023, which had also sought a declaration that Section 15(2) of the JS Act is inconsistent with the Constitution, but for different reasons from those proffered in this appeal.

[113] Section 15(2) of the JS Act was enacted to give effect to the provisions of Article 171(2) of the Constitution. It provides:

“(2) Where the nominations are to be made by bodies specified under Article 171(2)(b), (c), (d), (f) and (g) of the Constitution—

- (a) the respective nominating body shall submit the name of its nominee to the President; and**
- (b) the President shall, within three days of receipt of the names, appoint the nominees as members of the Commission.”**

[114] The two main answers this ground seeks to establish are, whether Section 15 violates Article 250(2) (a) and (3) in so far as it fails to prescribe merit, diversity and fair competition as prerequisites for appointment of one person to represent the PSC and one woman and one man to represent the public in the JSC under Articles 171(2)(g) and (h), respectively; and whether the President’s role in the appointment, and the National Assembly’s approval of the members of the JSC under Section 15(2) of the JS Act are inconsistent with Article 171(2)(b), (c), (d), (f) and (g) of the Constitution.

[115] There is a general presumption that every Act of Parliament is constitutional, and the burden of proof lies on the person who alleges otherwise. This principle enunciated in the Tanzanian case of *Ndyanabo v. A.G of Tanzania* [2001] E.A. 495, which has been repeatedly applied with approval by the superior courts below. This Court, for its part, in the case of *Law Society of Kenya v. Attorney General & another*, SC Petition No. 4 of 2019; [2019] eKLR, after reviewing many decisions from this and outside jurisdictions, restated that principle, which requires that, in determining whether a statute or a provision is constitutional or not, the court must ascertain the object, purpose and effect of that statute; to discern the intention expressed in the statute itself.

[116] The simple answer to the first limb of this ground, is found in the preceding paragraphs where we have considered the question and concluded that the duty to nominate one person under Article 171(2) (g) to the JSC is in the exclusive province of the PSC; and finally, that, in its absolute discretion, the PSC identifies a suitable candidate, based on merit and through consultation. It is emphasized that, under

Article 233(3) of the Constitution and Section 8 of the Public Service Commission Act it is imperative that members of the PSC possess the specified qualification for appointment, as explained in paragraph 75 above.

[117] Section 15 cannot prescribe prerequisites for the nomination of a representative of the PSC and the two representatives of the public that exceed the constitutionally prescribed requirements. Fair competition in the identification and nomination of a representative of the PSC is not a constitutional imperative specified in this regard. Similarly, as explained in paragraphs 108 and 111 above, as far as the two representatives of the public are concerned, fair competition is not a mandatory requirement, we conclude on this aspect.

[118] Regarding the second limb of this ground, the question is, whether by requiring that the names of the nominees under Article 171(2)(b), (c), (d), (f) and (g) be submitted to the President for appointment, Section 15(2) is inconsistent with the Constitution.

[119] Section 15(2) requires that where the nominations are made by way of election by the Justices of the Supreme Court, Court of Appeal; by members of the association of judges and magistrates; by members of the statutory body responsible for the professional regulation of advocates; and after the PSC nominates its representative, these nominating bodies must submit the name of their nominee to the President. The President, upon receipt of the names, is required, within three days, to appoint the nominees as members of the Commission.

To what extent is this provision inconsistent with the Constitution?

[120] We emphasize, that only under Article 171(2)(h) does the President have the mandate to nominate two persons, a man and a woman, who are not lawyers, to represent the public. That is the scope of the President's role regarding the JSC and its membership. To the extent, therefore that Section 15(2)(a) and (b) requires that

the names of all the other nominees who are not representatives of the public but are elected by their peers through their professional bodies, or nominated by the PSC, to be submitted to the President for “appointment”, we find the section is *ultra vires* the express provisions of the Constitution. The section donates to the President functions that go beyond his powers under Article 171(2)(h) of the Constitution. The appointment envisaged in Article 250(2) can only apply and is limited to the two members representing the public. As a matter of fact, the only time the word “appointed” is used in the entire Article 171, is in relation to those two members. For the elected members, the appointment is concluded upon the declaration of the results of the election. The next phase of gazetteing of names and the taking of the oath are only final formalities before assumption of the office.

[121] By Article 88(4) of the Constitution as read with Section 4 of the Independent and Electoral Boundaries Commission Act, the IEBC has the mandate to “**conduct or supervise**” referenda and “**elections to any elective body or office established by this Constitution**”, and any other elections as prescribed by an Act of Parliament. This mandate, going by previous elections by the nominating entities identified, includes conducting elections of members of the JSC under Article 171(2) (b), (c), (d) and (f). Rules made by some of the nominating entities have recognized the role of the IEBC as the body to conduct their elections. For example, the Law Society of Kenya (General Regulations), 2020, is clear on this. It must of necessity follow, as is the norm with all elections conducted by the IEBC, that upon declaration of results, apart from issuing to the successful candidate a certificate, the IEBC gazettes the candidate as the duly elected representative, to mark the end of the election process.

[122] In the case of a member nominated by PSC under sub- Article (2) (g), the name ought to be forwarded, not to the President but to the JSC and a notice issued in the official gazette, to notify the public of the nomination and membership. As an alternative to IEBC gazetteing the candidate duly elected, once the outcome of

the election is communicated to the JSC, then like the Parliamentary Service Commission, the Secretary to the JSC may gazette the member or members declared as duly elected. In both instances, elected and nominated members take the oath prescribed under the Third Schedule to the Constitution, before the Chief Justice before assumption of office.

[123] We do not, respectfully, agree with the conclusion of the Court of Appeal that Section 15(2) merely replicates the requirements of the Constitution. On the contrary, as we have demonstrated, Section 15(2) contradicts Article 171 of the Constitution. It directs the nominating bodies of members under Article 171(2)(b), (c), (d), (f) and (g) to submit the names of their nominees to the President; and the President to appoint the nominees as members of the Commission within three days of receipt of the names, while nowhere in Article 171 is there a requirement to submit the names to the President or for the President to appoint the concerned members. Once elected by different entities under (b), (c), (d) and (f) or nominated by the PSC under (g), those persons become members of JSC. It is a contradiction of terms to suggest that elected members are also at the same time appointed. *Black's Law Dictionary*, 9th Ed. pg. 116, aptly draws this distinction in the legal definition of the word “**appointment**” to mean:

“the designation of a person, such as a non-elected public official, for a job or duty; especially naming of someone to a non-elected public office” [our emphasis].

[124] In the circumstances and for all these reasons, we find that Section 15(2) is inconsistent with the provisions of Article 171(2) of the Constitution in so far as it purports to assign the President the role of appointing elected and nominated members of the JSC. It infracts the spirit and letter of Articles 1(3) and 2(2); that sovereign power delegated to State organs, must be exercised strictly in accordance

with the Constitution; and that no person may claim or exercise State authority except as authorized under the Constitution.

[125] On whether Section 15(2) is contrary to Article 171(2)(b), (c), (d), (f) and (g) for providing for the approval by the National Assembly of nominated and elected members of the JSC, we confirm that, quite in consonance with Article 171(2)(h), the only instance where approval of the National Assembly is required in Section 15(1) of the Act, is in relation to the two members under Article 171(2)(h) of the Constitution, to represent the public. We note, however, that the only member of the JSC who was irregularly vetted by the National Assembly was the 5th respondent. That vetting was superfluous, void and of no legal effect since it was not done in accordance with the Constitution.

[126] We have held earlier that Section 15 does not violate Article 250(2) (a) and (3) in so far as it does not prescribe merit, diversity and fair competition as prerequisites for the appointment of a representative of the PSC and the two members to represent the public in the JSC under Articles 171(2)(g) and (h), respectively.

iii. Whether the nomination and subsequent appointment of the 5th, 6th and 7th respondents were valid.

[127] The final ground is itself our conclusion drawn from the examination of the arguments in the first two grounds regarding the validity of the nomination of the 5th, 6th and 7th respondents. We are satisfied that the three were duly nominated and in the case of the 6th and 7th respondents, approved by the National Assembly, after satisfying itself as to their suitability for appointment. The approval of the 5th respondent by the National Assembly, was however not necessary, as we have explained above.

[128] Overall, the appeal fails but partially succeeds to the extent that Section 15 of the Judicial Service Act contravenes Article 171(2) by vesting in the President

the power to appoint members elected or nominated under Article 171(2)(b), (c), (d), (f) and (g) of the Constitution.

G. COSTS

[129] Costs follow the event but are at the discretion of the Court. We take note that the appeal is of public interest nature, and the order that commends itself to us is to direct parties to bear their own costs.

DISSENTING OPINION OF NJOKI NDUNGU, SCJ

[130] I have read the majority decision in this appeal, and whilst I agree with them on their finding on the issues of jurisdiction, the requirement for merit and fair competition in appointments to the JSC, and the validity of appointments of the 5th, 6th and 7th respondents; I am, however, of a different opinion in response to the following issue: ***whether Section 15 (2) of the Judicial Service Act is unconstitutional.***

[131] This Court in SC Petition No. 45 of 2019, ***Law Society of Kenya v. Attorney General & 4 others (LSK)*** was seized with the issue of the constitutionality of section 15 the JS Act albeit for different reasons from those invoked in this appeal. In my dissenting opinion in that matter, which opinion, I still stand by, I was of the view that to determine whether Section 15(2) of the JS Act is inconsistent with the Constitution, three questions that must be answered. Namely, does the President have a constitutional obligation to appoint JSC Commissioners? If this answer is in the affirmative, can the President do so without approval of the National Assembly? And, in appointing elected JSC members, will the President interfere with the independence of the JSC? I delivered myself thus on these questions at paragraphs 106-109 of my dissent:

(i) *Can the President appoint elected JSC Commissioners?*

“[106] The President as the Head of State and Government derives his powers from Article 131 of the Constitution. In that regard, Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. The people may exercise their sovereign power either directly or through their democratically elected representatives. Sovereign power under the Constitution is therefore, delegated to among other State organs, the National Executive (headed by the President) and Parliament.

[107] Article 132(2)(f) of the Constitution provides that ‘the President shall nominate and, with the approval of the National Assembly, appoint and may dismiss in accordance with the Constitution, any other State or public officer whom the Constitution requires or empowers the President to appoint or dismiss’.

[108] Pursuant to Article 260 of the Constitution, a State officer is interpreted to mean ‘a person holding a State office.’ This same provision also interprets a State Office to mean, among other offices, a member of a commission to which Chapter Fifteen applies. Article 248(2)(e) of the Constitution, clearly stipulates that the JSC is one of the Commissions to which Chapter Fifteen of the Constitution applies, except to the extent that the Constitution applies otherwise. Therefore, all Commissioners of the JSC are State officers.

[109] Article 250 of the Constitution makes general provisions on the composition, appointment, and terms of

office of Chapter Fifteen Commissions. The appointment process of members of Chapter Fifteen Commissions is in three stages, unless provided for otherwise elsewhere in the Constitution. These stages pursuant to Article 250(2) of the Constitution are: identification or recommendation for appointment in a manner prescribed by national legislation; approval by the National Assembly; and appointment by the President.”

[132] I am still of the considered view that the three stages pursuant to Article 250 (2) of the Constitution, as illustrated above, are mandatory. An appointment cannot be concluded at the first stage of identification and recommendation, without going through the second step of parliamentary approval and the third step of appointment by the President. I reiterate that to do so would be to disregard the carefully woven constitutional architectural design of separation of powers, and constitutional checks and balances between the arms of Government and the different State organs.

[133] Additionally, as I held in *LSK*, an interrogation of Articles 171 and 172 of the Constitution do not reveal any provisions disallowing the President from appointing elected JSC Commissioners, being State officers as Commissioners. For clarity, at paragraph 112, I stated:

“.....the President has a constitutional duty to appoint as Commissioner, individuals identified by the various bodies under Article 171 of the Constitution. The President has a duty to appoint JSC Commissioners both under the powers conferred to him under Article 132(4) of the Constitution and by virtue of Section 15(2) of the JS Act. There is no express exception to Article 132 of the Constitution that would exclude members of the JSC.”

[134] I therefore find that the approval of the 5th Respondent by Parliament and his subsequent appointment by the President is proper and well founded in the law.

[135] I am still of the view that Section 15(2) of the JS Act is inconsistent with the Constitution only in as far as it purports to direct a specific timeline in which the President appoints individuals selected under Article 171; that is, “to appoint within three (3) days”. This timeline, other than being extremely short and limiting, does not take into account any other necessary constitutional processes that must be carried out by the Executive and Parliament before such appointment. However, the Majority have a different view and as my views are in the minority, the decision of the Court is that of the majority.

H. DISPOSITION

[136] Consequent, upon our conclusion above, the Petition of Appeal dated 7th September 2020 is disposed of by making the following orders in answer to the three issues framed for determination:

- i) There is no requirement for fair competition in appointments to the JSC under Article 171(2)(g) and (h).***
- ii) Section 15(2) of the Judicial Service Act is, to the extent, that it confers on the President the authority to appoint members elected and nominated to the JSC under Article 171(2), (b), (c), (d), (f) and (g), unconstitutional.***
- iii) The approval by the National Assembly of the 5th respondent was irregular and unnecessary.***
- iv) To the extent that Section 15(2) confers on the President power to appoint the 5th respondent, it is inconsistent with Article 171 and therefore invalid. But it is in harmony with Article 171 in so far as it does not prescribe merit, diversity***

and fair competition as prerequisites for appointment of a representative of the PSC and the two members to represent the public in the JSC under Articles 171(2)(g) and (h), respectively.

v) Parties to bear their own costs.

vi) We hereby direct that the sum of Kshs. 6,000/- deposited as security for costs upon lodging of this appeal be refunded to the appellant.

It is so ordered.

DATED and DELIVERED at NAIROBI this 16th Day of June, 2023.

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

**I certify that this is a true copy
of the original**

REGISTRAR
SUPREME COURT OF KENYA