



THE SUPREME COURT OF KENYA

KATIBA INSTITUTE V. ATTORNEY GENERAL & 9 OTHERS

SC PETITION NO. 17 OF 2020

DATE OF JUDGMENT: 16th June 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Court partially allows the appeal in this matter.

Background

The appeal concerns the nomination and subsequent appointment of Patrick Gichohi, Olive Mugenda and Felix Koskei (the 5th, 6th and 7th respondents, respectively) as members of the Judicial Service Commission (the JSC), pursuant to Articles 171(2)(g) and (h) of the Constitution. Subsequent to their appointment, the appellant petitioned the High Court challenging their nomination for various reasons. As far as the appellant was concerned, the nomination of Patrick Gichohi was invalid for the reason that it was the President, and not the Public Service Commission (PSC) that nominated him contrary to Article 171(2)(g) of the Constitution and that he was a retired public servant. The nominations of the three respondents were also not subject to the requirement of fair competition and merit and the National Assembly did not vet them in accordance with Section 7 of the Public Appointments (Parliamentary Approval) Act; and that the National Assembly disregarded the integrity questions raised against Olive Mugenda. Moreover, the appellant called into question the constitutionality of Section 15(2) of the Judicial Service Act on two fronts: first, that it 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 secondly, 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.

The High Court found that first, fair competition and merit was not a requirement. Secondly, it was satisfied that there was no fault in the approval process conducted by the National Assembly leading to the appointment of Felix Koskei and Olive Mugenda, though it found Patrick Gichohi's nomination was not subject to approval by Parliament hence the purported approval was inconsequential and a nullity. Thirdly, it found that Section 15(2) of the Judicial Service Act was not inconsistent with the Constitution. Ultimately, the High Court dismissed the petition and held that the three respondents were properly nominated and subsequently appointed.

On appeal, the Court of Appeal agreed with the High Court save for finding that the High Court went off on a tangent by pronouncing itself on the question whether Patrick Gichohi's approval by the National Assembly was necessary when that question had not been pleaded or addressed by the parties.

In the appeal before the Supreme Court, the Court framed the following issues for determination:

- 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.*

Upon consideration, the Supreme Court by a majority of 4:1 has partially allowed the appeal for the reasons that:

1. Issue 1:

Regarding Patrick Gichohi:

- a) Article 171 (2)(g) does not give any criteria for arriving at the nominee of the PSC, the nomination is at the discretion of the PSC. PSC in identifying its nominee internally, 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. In its absolute discretion, the PSC identified a suitable candidate, based on merit through consultation.
- b) Article 171(2)(g) does not envisage or indeed require a nominee of the PSC to the JSC to be approved by Parliament and therefore his approval by the National Assembly was of a bonus without any consequence, hence null and void.

Regarding, Felix Koskei and Olive Mugenda:

- a) 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, the person must not be a lawyer and must be approved by Parliament. In making the nomination the President must also consider merit, national values and principles, integrity and national diversity. The suitability of the nominees is further tested by vetting by the Legislature which ascertains whether in making the appointments, the President took these factors into account.
- b) As far as the nomination of these two members of JSC under Article 171(2)(h) is concerned, fair competition is not a requirement, and 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.

2. **Issue 2:** Section 15 (2) 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 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. However, it 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. The President's role regarding the

JSC and its membership is limited to Article 171(2)(h), to nominate two persons, a man and a woman, who are not lawyers, to represent the public.

3. **Issue 3:** The three respondents were duly nominated and in the case of Felix Koskei and Olive Mugenda, approved by the National Assembly, after satisfying itself as to their suitability for appointment. The approval of Patrick Gichohi by the National Assembly was however not necessary.

The appeal 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.

Dissenting Opinion of Njoki, SCJ

1. **Issue 1:** Agrees with the majority decision.
2. **Issue 2:** 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. However, it is consistent with Article 171(2) of the Constitution which assigns the President the role of appointing elected and nominated members of the JSC. 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. Article 250 of the Constitution makes general provisions on the composition, appointment, and terms of office of Chapter Fifteen Commissions. Article 250 (2) of the Constitution encompasses three stages which are mandatory: identification or recommendation for appointment in a manner prescribed by national legislation; approval by the National Assembly; and appointment by the President. 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. 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.
3. **Issue 3:** Agrees with the majority decision.

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