



**REPUBLIC OF KENYA**  
**THE SUPREME COURT OF KENYA**  
**LAW SOCIETY OF KENYA v. THE ATTORNEY GENERAL & 4 OTHERS**

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

**SC PETITION NO. 45 OF 2019**

**DATE OF JUDGMENT: 31<sup>ST</sup> MARCH 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 allows the appeal in this matter***

### **Background**

On 9<sup>th</sup> March, 2018, Justice M. Warsame, the 3<sup>rd</sup> respondent, was re-elected by the Justices of the Court of Appeal to serve a second term as their representative to the JSC in accordance with Article 171(2)(c) as read with Article 171(4) of the Constitution and Section 16 of the Judicial Service Act (JS Act). Thereafter, his name was forwarded to the President pursuant to Section 15(2) of the JS Act for appointment as a member of the JSC. Instead, the President dispatched the name to the 2<sup>nd</sup> respondent for approval before appointment pursuant to Article 250(2)(b) of the Constitution. As a result, the National Assembly, the 2<sup>nd</sup> respondent, sought to conduct approval hearings to vet the 3<sup>rd</sup> respondent precipitating the action before the High Court.

Aggrieved by the President's reluctance to appoint the 3<sup>rd</sup> respondent, and the insistence of the 2<sup>nd</sup> respondent to vet him, the appellant challenged the decision in the High Court. Subsequently, the 4<sup>th</sup> respondent also filed an opposing Petition, challenging the constitutionality of Section 15(2) of the JS Act on the ground that, contrary to Article 250 of the Constitution, it does not make parliamentary approval of all JSC commissioners mandatory. The two petitions were consolidated and heard together. The High Court found that the requirement relating to approval of nominees by the National Assembly in Article 250 does not apply to JSC commissioners, except those appointed by the President under Article 171(2)(h) of the Constitution- one woman and one man to represent the public. On Section 15(2) of the JS Act, the court ruled that the provision does not confer any discretion on the President once he receives the names but he is under a legal obligation, in exercise of his executive function, to formally appoint the nominee(s) within three days of receipt of the name(s). In the end, the court found that Section 15(2) was constitutional.

Aggrieved, the 1<sup>st</sup> respondent sought to overturn in the Court of Appeal, the entire judgment of the High Court. The appellant, on its part, filed a cross appeal to challenge that part of the judgment of the High Court that found Section 15(2) of the JS Act constitutional. The Court of Appeal dismissed the 1<sup>st</sup> respondent's appeal as well as the appellant's cross-appeal. In doing so, it held that, Parliament in enacting Section 15(2) of the JS Act was guided by Article 171(2) which creates four categories of members and catered for appointment procedure for each. More specifically, Parliament was clear that the only persons to be subjected to approval hearing in the National Assembly were the two candidates representing the public, and no other. As such, the 3<sup>rd</sup> respondent, having been elected by his peers as a member of the JSC, was not subject to approval by the National Assembly. In rejecting the ground of unconstitutionality of Section 15(2) of the JS Act, the court endorsed the construction placed on Section 15(2) by the High Court that the President's duty is simply to appoint an elected commissioner within three days of submission of the nominee's name.

In the appeal, the Supreme Court delineated the following 2 issues for determination:

- i) *Whether a member of the JSC elected under Article 171(2)(b), (c), (d), (f) and (g) ought to be vetted and approved by the National Assembly before appointment;*
- ii) *Whether Section 15(2) of the Judicial Service Act is inconsistent with the Constitution to the extent that it gives the President a role in the appointment of JSC Commissioners elected and/or nominated under Article 171(2)(b), (c), (d), (f) and (g) or for failure to require that all persons elected and or nominated as JSC Commissioners be subject to approval by the National Assembly*

Upon considering the appeal, the Supreme Court by a majority of 4:1 allowed the appeal holding that:

**Issue 1:** There is no basis, constitutional or legal for a member of the JSC elected or nominated under Article 171(2)(b), (c), (d), (f) and (g) to be vetted and approved by the National Assembly before appointment. Only those commissioners of the JSC upon whom there is a constitutional obligation for vetting before appointment have to be approved by the National Assembly

**Issue 2:** To the extent that Section 15(2)(b) of the JS Act donates to the President the power to appoint elected and nominated members of the JSC, it is void for being inconsistent with Article 171 of the Constitution which does not recognize such power. Section 15(2) goes against the letter and spirit of Articles 1(3) and 2(2) which stipulate 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 authorised under the Constitution.

Parties were directed to bear their own costs.

### ***Dissenting Opinion of Njoki Ndungu, SCJ***

The learned Judge delivered her dissenting opinion on the issues as follows:

*Issue 1: Whether a member of the JSC elected under Article 171(2)(b), (c),(d),(f) and (g) of the Constitution ought to be vetted and approved by the National Assembly before appointment?*

The reasons for which parliamentary approval for state officers (including all JSC Commissioners) is necessary is firstly, to check the President's powers of appointment; secondly, to ensure that the members nominated to serve as state officers meet the integrity test under Chapter Six of the

Constitution, and thirdly, to ensure strict compliance of the national values and principles of governance as stipulated in Article 10 and in compliance with Article 250(4) of the Constitution, and in particular, participation of the people, integrity, transparency and accountability. Further, the appointive process is a sequence of three *mandatory* steps: (1) Nomination by the various bodies (whose selection process of their nominee is an elective process by their select and exclusive membership – not the public); (2) Public vetting of those nominees through the approval process by elected representatives of the people; and finally (3) Appointment of those nominees by the Head of the State, following which they can perform duties as State officers.

*Issue 2: Whether Section 15 (2) of the Judicial Service Act is inconsistent with the Constitution to the extent that it gives the President a role in appointment of JSC Commissioners?*

After approval by Parliament, the President, in exercise of the mandate given to him under Articles 132 (4), 248 and 250(2) of the Constitution, has the power to appoint members of the Judicial Service Commission. Further, the appointment of JSC Commissioners as State officers by the President is an executive function specifically and properly conferred on the President by Article 132(4) of the Constitution and Section 15(2) of the Judicial Service Act.

