



THE SUPREME COURT OF KENYA

AN OVERVIEW



2022 Edition



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Published by
The Judiciary of Kenya
P.O. Box 30041 - 00100, Nairobi
Tel: +254 20 2221221

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Abbreviations

AJFJ – African Judges and Jurists Forum

BBI – The Constitution of Kenya (Amendment) Bill, 2020
[Building Bridges Initiative Bill]

CBS – Chief of the Order of the Burning Spear

CKRC – Constitution of Kenya Review Commission

CLARION – Centre for Law and Research International

CMJA – Commonwealth Magistrates and Judges Association

CRJ – Chief Registrar of the Judiciary

CSR – Corporate Social Responsibility

EACJ – East African Court of Justice

EAMJA – East African Magistrates and Judges Association

EBS – Elder of the Burning Spear

EGH – Elder of the Golden Heart

FIDA – Federation of Women Lawyers - Kenya

IACA – International Anti-Corruption Academy

IARMJ – International Association of Refugee and Migration Judges

ICJ – International Commission of Jurists

IOM – International Organization for Migration

JAG – Judicial Action Group

JLAC – Judicial Leaders Advisory Council

JSC – Judicial Service Commission

JTI – Judiciary Training Institute

KACC – Kenya Anti- Corruption Commission

KICC – Kenyatta International Convention Centre

KJA – Kenya Judiciary Academy

KJSA – Kenya Judiciary Staff Association

KMJA – Kenya Magistrates and Judges Association

KWJA – Kenya Women Judges Association

LEAD – Legal Education Aid Programme

MGH – Moran of the Golden Heart

NEMA – National Environment and Management Academy

NCLR – National Council for Law Reporting

PCC – Public Complaints Committee

PCK – People’s Commission of Kenya

SCJ – Supreme Court Justice

SCR – Supreme Court Registrar

SJT – Sustaining Judiciary Transformation

STAJ – Social Transformation through Access to Justice

WJC – Wildlife Justice Commission



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Supreme Court through Time



MESSAGE FROM THE CHIEF JUSTICE AND PRESIDENT OF THE SUPREME COURT OF KENYA

Through its institutional mandate and jurisdiction, the Supreme Court is uniquely positioned to enhance reforms, dismantle social inequalities, and expand individual rights and freedoms. Being the final custodian and guarantor of the Constitution, the Supreme Court provides jurisprudential leadership to the country and sets legal parameters to guide in the development of a uniquely Kenyan jurisprudence.

As demonstrated in a highlight of the Court's decisions, the Supreme Court has through various pronouncements steered the country towards a path of development grounded in democracy, social justice, the rule of law, good governance, and respect for human rights. Its establishment was a negotiated necessity by Kenyans to embed an apex Court within Kenya's constitutional structure that would safeguard the exercise of constituent and public power and which would settle complex constitutional

questions and issues of general public importance. The Constitution of Kenya creates a governance system that upholds the welfare of the people and that enhances the utility of public goods for the good of the people. As a core component of this structure, the Supreme Court becomes the people's Court – ensuring that constitutional promises are neither negated nor ignored by the State.

As such, in addition to being at the pinnacle of the hierarchy of judicial institutions in a country pursuing social transformation, the Court serves as the hub of giving effect to the transformational constitutional values and principles which should inform and permeate all actions by State and non-State actors. Thus, the apex Court has played a key role in the transition towards a socially just State and society.

Conversely, the Supreme Court bears not only the Constitutional responsibility to settle the law in Kenya, but also has the prerogative to set scalable standards in service delivery. Our focus in the Kenyan Judiciary









is to be an institution that is people centric. This therefore means that our operations must enable easy access and reinforce the integrity of court proceedings to enhance public trust.

The Judiciary has adopted a Vision anchored on the principle of social justice to guide its operations for the next decade (2021-2031). The 'Social Transformation through Access to Justice' Vision for the Judiciary lays a strong emphasis on all courts serving as "centres of excellence" in service delivery. I have designated the Supreme Court as the "*model court*" in terms of standardisation of service delivery. This means that all our processes will utilise economies of efficiency to enhance access to justice for all. Once a Petition, Application or Advisory Opinion is lodged with the Registry, they are processed efficiently to enable timely hearing and determination. The operating rule is that every file in the registry must be under constant review and management.

To track performance, we have optimised the internal organisation of the Court and court operations by generating and use of high

quality and reliable data. To supplement manual procedures, we have also laid out a strategy to fully digitise the Court to enhance access.

The Supreme Court has concretised its place in Kenya's constitutional architecture as a Court that is dependable and deep in its engagement with the law and complex legal questions. It has been 10 years since the Supreme Court was first operationalised. During this next decade, the Court will continue to inspire stability throughout the country while securing legal certainty and predictability.

**Hon. Justice Martha K. Koome, EGH
Chief Justice and
President of the Supreme Court of Kenya**





NOTE FROM THE DEPUTY CHIEF JUSTICE AND VICE- PRESIDENT OF THE SUPREME COURT

For the period of its over ten years of existence, the Supreme Court of Kenya has striven to assert the supremacy of the Constitution and the sovereignty of the people of Kenya. This the Court has done through authoritatively determining the law in the weighty matters brought before it through the interpretation or application of the Constitution in a manner that breathes life into its progressive and transformatory provisions and principles.

The Court's role in the structure of the Judiciary and in the wider framework of our



constitutional democracy cannot be gainsaid. The Court endeavours to be a beacon of the rule of law, fairness and impartiality and a positive example for all courts, tribunals and indeed, other justice system actors and state organs.

The Supreme Court continues developing and fostering jurisprudence that maximises access to justice. The Judiciary's current vision to facilitate Social Transformation through Access to Justice (STAJ) builds on the two previous frameworks - the Judiciary Transformation Framework (JTF) and the Sustaining Judiciary Transformation (SJT) strategic blueprint.

Of necessity, the Supreme Court must lead the way in the development of a social justice jurisprudence and a system of law that is socially transformative and empowering for communities.

**Hon. Lady Justice Philomena Mbete Mwilu, MGH
Deputy Chief Justice & Vice-President of the
Supreme Court of Kenya**



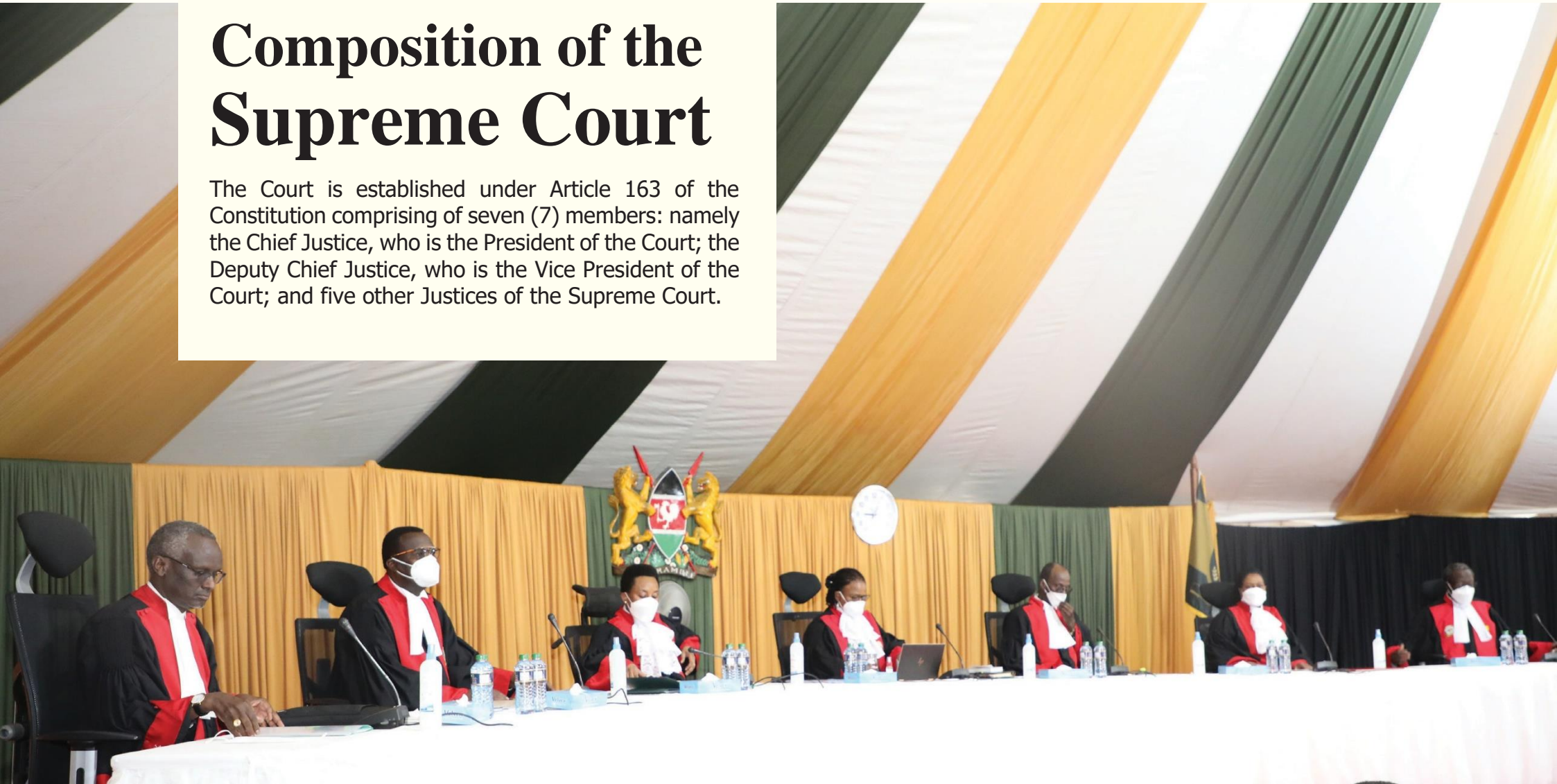
Chapter 1

The Supreme Court at a Glance



Composition of the Supreme Court

The Court is established under Article 163 of the Constitution comprising of seven (7) members: namely the Chief Justice, who is the President of the Court; the Deputy Chief Justice, who is the Vice President of the Court; and five other Justices of the Supreme Court.



The History of the Court

The birth of the Supreme Court of Kenya, which is today the highest court in the land, can be traced to the controversial Presidential election in 2007. The Kreigler Commission which was established thereafter to look into the unprecedented electoral violence that occurred, as well as allegations of electoral irregularities, concluded that there were legitimate concerns relating to the Electoral Commission and the Judiciary which needed to be addressed. In particular was lack of faith and confidence in processes that arbitrated election outcomes: Kenyans made serious allegations against the Judiciary, including inefficiency, incompetence and corruption. It was fairly evident that the people had lost faith in the Judiciary's ability to dispense justice fairly, impartially and without fear.

Kenyans also raised the concern about the generally restrictive approach to constitutional interpretation which the High Court had adopted, especially in the area of human rights litigation. Complaints were also raised about the lack of a right of appeal from a High Court

decision on constitutional matters; this was seen as a denial of the right of appeal of the aggrieved party. Some High Court decisions were further criticized for being made against the public interest and being influenced by factors outside the law. The people were of the view that a Supreme Court should be created and that such a court should have power to issue Advisory Opinions.

As a result, the Constitution of Kenya 2010 , which was popularly supported through a referendum, established the Supreme Court as the highest court in the land, a final arbiter on interpreting the Constitution; and with exclusive original jurisdiction in respect of presidential election petitions.



The Jurisdiction of the Supreme Court

The Supreme Court's jurisdiction is set out under Articles 58(5), 163(3), (4), (5) & (6), 168(8) of the Constitution and Sections 12, 13, 15, 29, and 40 of the Supreme Court Act No. 7 of 2011 Laws of Kenya, as follows, to: -

1. Exclusively hear and determine disputes relating to the Presidential elections.
2. Hear and determine appeals from the Court of Appeal:
 - a) as of right where the case involves interpretation or application of the Constitution.
 - b) where the Supreme Court or the Court of Appeal certifies that a matter of general public importance is involved. A certification by the Court of Appeal may be reviewed by the Supreme Court and either affirmed, varied, or overturned.
3. Hear and determine Appeals from any other court or tribunal, as prescribed by national legislation.
4. Render an Advisory Opinion at the request of the National Government, any State organ, or any County Government, with respect to any matter concerning County Government.
5. Determine the validity of:
 - a) a declaration of a state of emergency;
 - b) an extension of such declaration and
 - c) any legislation enacted or action taken in consequence of a declaration of a state of emergency.
6. Hear and determine appeals against a tribunal's recommendation to remove a Judge.

The language of the Court is English. If a party intends to address the Court in any language other than English, they are to give the Registrar a seven (7) day notice before the hearing date.



1 FILING & REGISTRATION

ASSESSMENT

SERVICE DELIVERY CHARTER
SUPREME COURT OF KENYA

JUDICIARY EFFORTS

The Supreme Court Registry

The Supreme Court Registry is where all pleadings, supporting documents and all orders and decisions of the Court are recorded and maintained. The main Registry is located in the Supreme Court Building in Nairobi while two Sub-Registries were established in Mombasa and Kisumu on 24th February, 2022.

The Supreme Court registry's official working hours are 8.30 a.m to 5.00 p.m and 9.00a.m. to 12 noon during vacation. The registry is open from Monday to Friday, except on public holidays or as otherwise directed from time to time by the Chief Justice.

**SUPREME COURT
REGISTRY**

Chapter 2

Justices of the Supreme Court of Kenya





Hon. Justice Martha Koome, EGH

**Chief Justice and
President of the Supreme Court of Kenya**

**Date of Assumption of Office as Chief Justice of
the Republic of Kenya: 21st May 2021**

Constitutional and Statutory Responsibilities:

- *Head of the Judiciary*
- *President of the Supreme Court of Kenya*
- *Chairperson of the Judicial Service Commission*
- *Chairperson of the National Council on the Administration of Justice (NCAJ)*
- *Chairperson of the National Council for Law Reporting (NCLR)*





Hon. Lady Justice Philomena Mbete Mwilu, MGH,

**Deputy Chief Justice and
Vice-President of the Supreme Court of Kenya**

**Date of Assumption of Office as Deputy Chief Justice
of the Republic of Kenya: 28th October, 2016**

Constitutional and Statutory Responsibilities:

Deputy Head of the Judiciary

*Assigned Portfolio: Co-ordination of the overall
performance of the Court and Supreme Court
representative to the Judicial Service Commission*



Hon. Mr. Justice Mohammed Ibrahim, CBS, SCJ

Justice of the Supreme Court of Kenya

Date of Appointment to the Supreme Court of Kenya:
16th June 2011

Assigned Portfolio: *Chairperson of the Judiciary Committee on Elections, Supreme Court Library management, liaison with internal stakeholders, and coordination of Supreme Court engagement with non-state actors.*





Hon. Justice (Dr.) Smokin Wanjala, CBS, SCJ

Justice of the Supreme Court of Kenya

**Date of Appointment to the Supreme Court of Kenya: 16th
June, 2011**

Assigned Portfolio: *Director of the Kenya Judiciary Academy, coordinating Supreme Court research, Law Clerks and Judges' lecture circuit series; Liaison with National Council for Law Reporting on Courts decisions;*



Hon. Lady Justice Njoki Ndungu, CBS, SCJ

Justice of the Supreme Court of Kenya

Date of Appointment to the Supreme Court of Kenya:
16th June 2011

Assigned Portfolios: *Supreme Court Rules and Regulations, coordination of Supreme Court engagement with other Government institutions, observance of the Court's traditions and ceremonies and representation to the Judiciary Leadership Team; Code of Conduct and Ethics, Alternative Mechanisms Dispute.*





Hon. Mr. Justice Isaac Lenaola, MBS, SCJ

Justice of the Supreme Court of Kenya

Date of Appointment to the Supreme Court of Kenya:
28th October, 2016

Assigned Portfolios: *Court Registry management (Judicial function), Bench/Bar relations, linkages with regional and international courts, use of Information and Communication Technology (ICT) in the Court, media relations, Protocol and follow up of the Court's decisions containing structural interdicts, case summaries.*



Hon. Mr. Justice William Ouko, CBS, SCJ

Justice of the Supreme Court of Kenya

Date of Appointment to the Supreme Court of Kenya:
21st May 2021

Assigned Portfolios: Registry management (administrative function), Judges and staff welfare, security and building infrastructure and facilities, corporate social responsibility preparation of Court budget and resource mobilization, liaison on terms and conditions for Judges of the Court.



**Registrar of the
Supreme Court of Kenya**



Hon. Letizia Wachira

Supreme Court Law Clerks



**Front row L-R Priscilla Njoroge, Evelyne Kinyua, Joy Keyonzo, Nancy Macharia, Caroline Nderitu,
Back row L-R Maureen Okoth, Janet Ogata, Joan Gakuya, Hilda Kunyanga**



Chapter 3

Selected Jurisprudence Emerging from the Court



The Mandate of the Court

The Court derives its mandate from the Constitution of Kenya, 2010. The Constitution confers upon the Court powers to exercise diverse jurisdictions as follows:

Exclusive Original Jurisdiction

Under Article 163(3)(a), the Court has exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of the President. In exercise of this jurisdiction, pursuant to Article 140(2), the Court must hear and determine such petitions within 14 days after the filing of the petition.

Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 others, Petition 5 of 2013; [2013] eKLR (Raila 2013)

The Court determined three main issues that is, whether the President-elect and Deputy President-elect were validly elected; whether the Presidential election held on March 4th, 2013 was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the Constitution; whether the rejected votes ought to have been included in determining the final tally of votes in favour of each of the Presidential-election candidates; and the consequence of any declarations, orders and reliefs issued by the Court. In dismissing the petition, the Court found that the elections of 4th March 2013, were not envisaged to be conducted on a purely electronic basis, and that, the voting system envisioned in Kenya was to be manual. The Court also noted that Regulation 82, and Section 39 of the Elections Act, which dealt with electronic transmission, operated on the basis that electronically transmitted results were only provisional.



The Court also settled the applicable standard of proof in a Presidential Election to be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in Article 138(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt. The Court interpreted the threshold in Article 138 (4) (a) of the Constitution relating to the meaning of ‘all votes cast’ to include both valid and rejected votes. The Court also found that the annulment of a Presidential election would not necessarily vitiate the entire General Election.

Due to the strict Constitutional timelines for determining a Presidential Election Petition, the Court declined to admit “further affidavit” as the same would have led to consequences not only subverting the Constitution itself, but most significantly, precipitating a crisis in the operations of the Executive Branch.

Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 Others, Presidential Petition No. 1 of 2017; [2017] eKLR (Ojwang, Njoki, SCJJ - Dissenting)

Following the pronouncement of the President- Elect from the general election held on 8 August, 2017, this petition was filed to annul the election for failure to comply with laid out constitutional principles and provisions of the Election Act on grounds that it was tainted by illegalities and irregularities affecting the integrity of the election. By a majority, the petition was allowed making the Supreme Court of Kenya the first apex Court in Africa to annul a presidential election.



John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission (IEBC) & 3 others Petitions Nos. 2 and 4 of 2017 [2017] eKLR (Njoki SCJ, Dissenting)

This case emanated from the fresh elections that were conducted upon the nullification of the 2017 Presidential elections. The election results were challenged on several grounds, including that there lacked fresh nominations, the percentages of voters changed, that the Returning Officers and Presiding Officers did not have authority, the Biometric Voter Register was not secure and prone to fraud, and finally the applicable election law, there having been an amendment.

The Court dismissed the consolidated petitions that challenged the fresh election results holding that they were conducted in accordance with the Constitution and electoral laws. The Court found that though section 14 of the Elections Act required nominations to be conducted for an election under article 138(5), the Constitution itself restricted the candidates who may participate in such an election, to only the candidate,

or candidates with the greatest number of votes, and the candidate, or candidates, with the second greatest number of votes. Consequently, nominations would be pointless, as the Constitution itself established with specificity who the participating candidates should be. An election held under article 138(5) of the Constitution was not a stand-alone election, but rather, one anchored on an 'initial' election that had been conducted and where no candidate met the constitutional threshold, for being declared elected. On the issue of changing percentages in terms of voter turnout, the Court held that it did not in any way call into question the final tally announced by IEBC. The Court further found no validity in the petitioners' claim that the said Returning Officers and their deputies, lacked authority. On the allegation of secureness and accuracy of the BVR kits, the Court found it was unable to detect such serious anomalies as to demand that the election should be invalidated. On the applicable law, the Court found that in respect of the conduct of the 26th October, 2017 election was the Elections Act, 2011, the Elections Laws (Amendments) Act, 2017 (Act No. 34 of 2017) not having come into effect as at the time of that election, and the same not having had retrospective application.



Appellate Jurisdiction

Pursuant to Article 163(3)(b), the Court has appellate jurisdiction to hear and determine appeals from the Court of Appeal and any other court or tribunal as prescribed by national legislation. Appeals from the Court of Appeal lie to the Court in two ways: first, as of right in any case involving the interpretation or application of the Constitution in accordance with Article 163(4)(a); and second, by virtue of Article 163(4)(b), upon certification by either the Court of Appeal or the Court, that a matter of general public importance is involved in the intended appeal.

Appeals as of Right pursuant to Article 163(4)(a)

Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others **Petition No. 14 of 2014 as consolidated with Petition no. 14 A of 2014; Petition no. 14B of 2014; and Petition no. 14C of 2014 [2014] eKLR (Rawal DCJ &VP, Concurring)**

The Country was at the time transiting from analogue to the digital era of television transmission. The core of the dispute was whether the Communications Commission of Kenya (CCK) lawfully and constitutionally allocated a Broadcast Signal Distribution to Pan African Network Group Kenya Limited, wholly owned by foreigners. Conversely, the Court was also to determine whether CCK infringed on the fundamental rights of local media houses being Royal Media Services Limited, Nation Media Group Limited and Standard Media Group Limited.

The Court found that although CCK deployed the procurement procedure in the Public Procurement & Disposal Act, in granting a BSD license to Pan African Network Group Kenya Limited and denying the same to the local media houses, that decision was not informed by the imperatives of the national values and principles pursuant to Article 10 of Constitution. Given the fact that the subject matter of the license was a critical public



resource and whose capitalization the Kenyan public had an interest in, the Court found that CCK was bound to conduct its affairs more responsibly and transparently. The Court had found that CCK had instead opted to be hamstrung by the technicalities of procedure as if it were an ordinary procurement of goods and services, holding that it was operating as if the Constitution did not exist.

In the Court's conclusion, it recommended *inter alia* that Communications Authority of Kenya re-align its operations and licensing procedures so as to be in tune with Articles 10, 34 and 227 of the Constitution. In its final orders, it restored the BSD licence issued to Pan African Network Group Kenya Limited but directed the regulator to consider the merits of applications for a BSD licence by the local media houses, and of any other local private sector actors in the broadcast industry, whether singularly or jointly. The Court directed the regulator, in exercise of its statutory authority, in consultation with all the parties to this suit, to set the timelines for the digital migration, pending the international Analogue Switch-off Date of 17th June, 2015.

Independent Electoral and Boundaries Commission (IEBC) v New Vision Kenya (NVK Mageuzi) & 4 others, Petition No. 25 of 2014; [2015] eKLR

In this case, the Supreme Court was asked to determine whether orders directing the Independent Electoral and Boundaries Commission (IEBC) to provide progressive voter registration for Kenyan voters in the diaspora who sought to exercise their right to vote and seek elective posts were inconsistent with the Constitution and legislative provisions.

The Court held that the right to vote was not an inalienable right but was a right which was subject to limitations in a manner and form permitted in Article 24 of the Constitution of Kenya and that therefore, the right to vote was not an absolute right. The Court then went on to find that the directions to IEBC to ensure that the registration of Kenyans living in the diaspora as voters in all elective posts was realized progressively and expressed the principle of incremental progress toward a full-scale attainment of the right to vote. The Court noted that such orders were not a departure from the terms of the Constitution but were orders which were aspirational and expressed the possibility of Kenyans in the diaspora gaining the capacity to vote in all elective posts apart from the Presidency and referenda.



The Court then proceeded to direct IEBC to put in place mechanisms to ensure that voting at every election was simplified, transparent and considered the needs of persons or groups with special needs, such as Kenyans living in the diaspora for the comprehensive registration of Kenyan citizens.



***Francis Karioko Muruatetu & Another v. Republic
Petition No. 15 of 2015; [2017] eKLR***

The appeal raised fundamental legal issues that had engaged other comparative jurisdictions in a seemingly unending controversy: *whether the mandatory death sentence and commutation thereof to life imprisonment are unconstitutional; whether the mandatory death sentence under Section 204 of the penal code limits the discretion of the trial court in sentencing the accused; whether the sentencing process was part of fair hearing as enshrined in Article 50(2) of the Constitution, and whether Section 251 of the Criminal Procedure Code limited second appeal to conviction only.*

The Court held that: The trial process did not stop at convicting the accused person. Sentencing was also a crucial component of a trial as it was during sentencing that the Court heard submissions that impacted on sentencing. The mandatory nature of the sentence therefore denied an accused person the right to a fair trial. It found that a person facing the death sentence



most deserved to be heard in mitigation because of the finality of the sentence. Mitigation was an important element of fair trial and the fact that it was not expressly mentioned, as a right in the Constitution did not deprive it of its necessity and essence in the process of a fair trial. The right to fair trial was not just a fundamental right but also one of the inalienable rights enshrined in the Universal Declaration of Human Rights. Any Court dealing with the offence of murder was allowed to exercise judicial discretion by considering any mitigating factors in sentencing an accused person found guilty of that offence.

Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another Petition 32 of 2014 [2017] eKLR

This was a matter of an appeal from a finding of contempt of court by the County Assembly of Embu which had been restrained by the High Court from holding impeachment proceedings against the sitting Governor without first serving the applicant with a notice containing specific grounds/charges upon which the impeachment was being proposed, and without giving him an opportunity to be heard.

The County Assembly despite being served with the Orders of the Court in the local dailies approved the impeachment motion leading the Governor to file contempt proceedings seeking to commit the speaker and the clerk of the County Assembly to civil jail for a period of 6 months. In response to the application the Respondents denied having been served with any Court Order and that they had wrongly been held in contempt as they were never parties to the proceedings before the Court. The High Court did not find merit in their response and proceeded to hold the speaker and clerk of the County Assembly in contempt. The Court also proceeded to find that any consequent resolutions made in disobedience of the Court Order were, in effect, void ab initio, and a nullity in law.



The Speaker and the Clerk of the County Assembly dissatisfied with the holding of the High Court appealed to the Court of Appeal, but the Appellate Court affirmed the decision of the High Court Judge.

The Appellants then appealed to the Supreme Court, but the Respondent raised a preliminary objection stating that the matter arose out of contempt proceedings in the High and did not raise a matter of constitutional application or interpretation and neither had the appeal been certified as one of general public importance. It was the Appellants contention that various provisions of the constitution had been violated and therefore the Court needed to intervene. The Appellant also urged the Court to find that the High Court had no place to interfere in parliamentary processes that had already commenced. Parliamentary privilege was also cited as the reason for failing to provide specific charges that were being levelled against the Governor.

The Respondent on the other hand submitted that separation of powers between the Legislature, the Executive and the Judiciary is a subject falling to the supervisory jurisdiction of the Court, and that the High Court acted within its jurisdiction in issuing the

conservatory orders. It was also the Respondent's position that the violation of the constitution alluded to by the Appellants was never urged before the High Court or the Court of Appeal.

On the issue of jurisdiction, it was held that such an expansive scope to the concept of "interpretation and application of the Constitution", readily grasps different issues of law – such as contempt Orders and that the law of contempt of Court can hardly be screened from the grasp of "interpretation and application of the Constitution."

It was the Court's finding that no arm of Government is above the law and that the Court's mandate, where it applies, is for the purpose of averting any real danger of constitutional violation however the Court did not agree with the finding of the High Court citing the Appellants in contempt and stated that the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of the Constitution allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate-allocation under the Constitution, is



essential, as a scheme for circumventing conflict and crisis, in the discharge of governmental responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The Court set aside the orders of the High Court and Court of Appeal with regards to stopping parliamentary procedures.

British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party), Petition 5 of 2017, [2019] eKLR

The Court recognized that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people of Kenya. However, being alive to the absence of a legislative framework on public participation, the Court under its mandate under Section 3 of the Supreme Court Act set out the following guiding principles for public participation:

- i. *As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.*
- ii. *The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.*
- iii. *The lack of a prescribed legal framework for public participation is no excuse for not conducting public*



participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

- iv. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfil' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.*
- v. Public participation is not an abstract notion; it must be purposive and meaningful.*
- vi. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case-to-case basis.*
- vii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.*
- viii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case-to-case basis.*
- ix. Components of meaningful public participation*

include the following:

- a. clarity of the subject matter for the public to understand.*
- b. structures and processes (medium of engagement) of participation that are clear and simple.*
- c. opportunity for balanced influence from the public in general.*
- d. commitment to the process.*
- e. inclusive and effective representation.*
- f. integrity and transparency of the process.*
- g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.*



Joseph Lendrix Waswa v Republic, Petition No. 23 of 2019; [2020] eKLR

In this case, the appellant was charged with the offense of murder. Counsel for the father of the deceased (the victim) sought to actively participate in the proceedings. The trial court limited the role of the Counsel for the victim to submissions on points of law at the close of the prosecution case and if the accused is placed on his defence. In the appeal before the Supreme Court, the Court sought to interrogate the following issues: the extent of a victim's participation in a criminal matter and what ought to happen when a constitutional issue arose in a criminal trial of which trial ought to be disposed of expeditiously.

The Court observed that a victim cannot and does not wear the hat of a secondary prosecutor. When victims present their views and concerns in accord with section 9(2) (a) of the VPA, victims are assisting the trial Judge to obtain a clear picture of what happened (to them) and how they suffered, which the Judge may decide to consider. The Court proceeded to set the guidelines to assist courts in considering an application by a victim or his legal representative to participate in a criminal trial.

Simon Gitau Gichuru v. Package Insurance Brokers Ltd, Petition No. 36 of 2019; [2021] eKLR

In this case, the Supreme Court sought to determine whether there was a difference between direct discrimination, indirect discrimination and the elements that constitute the two types of discrimination while deciding on whether an employer is justified in dismissing an employee on grounds of incapacity.

The Court held that no person should directly or indirectly discriminate against another person on account of health status or disability by setting out the definition of discrimination, what amounts to direct discrimination, the salient features of indirect discrimination and what the courts should consider when faced with claims of indirect discrimination. The Court further went on to hold that failure to accommodate an employee with disability amounted to indirect discrimination and outright victimization.



William Musembi and 13 others v Moi Educational Centre Co. Ltd & 3 others, Petition No. 2 of 2018; [2021] eKLR

The crux of the dispute revolved around alleged forceful and illegal eviction of persons, who were inhabitants of informal settlements which were on private land. The Court was called upon to interrogate and contrast the obligations of the State and that of private citizens to observe, respect, protect, promote or fulfil constitutional rights. In particular, the right to dignity under Article 28 of the Constitution, the right to adequate housing in Article 43 of the Constitution, rights of children pursuant to Article 53 of the Constitution and of older persons under Article 57 of the Constitution.

The Court held that an evicting party must carry out evictions in a manner that respects the dignity, right to life and security of those affected including protecting the rights of women, the elderly, children and persons with disabilities including according such persons, the first priority to salvage their property.

The Court also clarified that the progressive realization of Article 43 rights (economic and social rights including accessible and adequate housing) lies with the State and does not extend horizontally to private entities.

However, the Court held that private entities have the obligation, under Article 20(1) of the Constitution, not to violate Article 43 rights since the Bill of Rights applies and binds both the State and all persons (horizontal and vertical application).



The Attorney General & 2 others v. David Ndi & 79 others, SC Petitions No. 11, 12 & 13 of 2021; [2022] eKLR (BBI Case)

Following an attempt to amend the Constitution of Kenya through a popular initiative presented as the Constitution of Kenya (Amendment) Bill, 2020, the Supreme Court was asked to determine the constitutionality of the Bill, which it did through seven issues for determination.

- On the applicability of the basic structure doctrine, the majority found that no gaps had been identified regarding Chapter Sixteen of the Constitution, which deals with amendments to the Constitution that would justify the applicability of the basic structure doctrine in Kenya, further noting that the Constitution is self-executing in dealing with any threat of any possibility of abusive amendments as witnessed in the era before the Constitution of Kenya, 2010. In addition, the majority held that the basic structure doctrine does not form part of the general rules of international law which are applicable under Article 2(5) of the Constitution. *Ibrahim, SCJ* dissenting, was of the view that the basic structure doctrine is applicable in Kenya by finding that the fundamental features of the Constitution, identified on a case-by-

case basis, could only be amended by the people in exercise of their primary constituent power.

- On whether the President can initiate constitutional amendments through a popular initiative under Article 257 of the Constitution, the majority found that amendments to the Constitution through popular initiatives are a citizen-driven process to the exclusion of the President, with *Njoki Ndungu, SCJ* dissenting by finding that the President can initiate constitutional amendments through a popular initiative while exercising his constitutional functions under the Constitution. Furthermore, the majority found that the President initiated the Constitution of Kenya (Amendment) Bill, 2020 as a popular initiative with *Lenaola, SCJ* dissenting by finding that the President did not initiate the amendment. Consequently, the majority were of the view that the Amendment Bill was unconstitutional with *Njoki Ndungu & Lenaola, SCJJ* dissenting on the constitutionality of the Bill.
- The Court unanimously found that the Second Schedule of the Constitution of Kenya (Amendment) Bill, 2020 is unconstitutional for being in breach of Article 10 (2) of the Constitution of Kenya 2010 with the Court noting that the proposed additional



seventy (70) constituencies to the Schedule was a late addition to the amendment process and was not subjected to public participation as required by the Constitution

- The Court was also unanimous that civil proceedings cannot be instituted in any court against the President or the person performing the functions of the office of the President during their tenure of office in respect of anything done or not done under the Constitution of Kenya 2010. The Court held that Article 143(2) of the Constitution grants immunity to the President by protecting the President from civil proceedings during his tenure in office for acts or omissions connected with the office and functions of the office of the President.
- The Court found there was no obligation under Article 10 and 257(4) of the Constitution on the Independent and Electoral Boundaries Commission (IEBC) to ensure that the promoters of the Constitution of Kenya (Amendment) Bill, 2020 complied with the requirements for public participation. The majority were also of the view that there however was public participation with respect to the Bill with *Ibrahim, SCJ* though agreeing that there was public participation, being of the view that the same was not reasonable

or meaningful. *Mwilu DCJ & VP, Ibrahim and Wanjala, SCJJ* while dissenting, however found that there was no evidence of public participation.

- The majority held that IEBC had the requisite composition and quorum to undertake the verification of signatures under Article 257(4) of the Constitution by finding that the IEBC Act ought to be read in conformity with Article 250(1) of the Constitution which envisages that it is properly constituted with a minimum of three Commissioners. The majority noted that although Paragraph 5 of the Second Schedule of the IEBC Act fixed the quorum at five Commissioners, the provision cannot override the provisions of the Constitution. *Ibrahim, SCJ* dissenting was of the view that the IEBC Act was enacted to give effect to the Constitution hence courts ought to give effect to statutory provisions unless the same is declared unconstitutional therefore finding that IEBC was not properly composed or quorate at the time of verification of signatures.
- The Court also held that the question raised regarding the interpretation of Article 257(10) of the Constitution on whether or not it entails/ requires that all specific proposed amendments to



the Constitution should be submitted as separate and distinct referendum questions was not ripe for determination with *Njoki Ndungu, SCJ* concurring by finding that although the question was premature and not ripe, the exception to the doctrine of ripeness applied, and therefore IEBC may only present one question at Referendum: 'Yes' or 'No' to the draft Bill.

Appeals raising issues of General Public Importance pursuant to Article 163(4)(b)

Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscione
SC Application No. 4 of 2012 [2013] eKLR (*Ibrahim, Ojwang SCJJ Dissenting*)

The Court of Appeal declined to certify this case as one involving a matter of general public importance stating that the matter was one that arose as a matter of a private contract between two people and had no bearing to public interest. In essence therefore, the Applicant was asking the Court to overturn the Appellate Court's decision. The Court in dismissing the application proceeded to set out the governing principles on certification of matters as of general public importance as follows:

- i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case and has a significant bearing on the public interest.
- ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is



- a substantial one, the determination of which will have a significant bearing on the public interest.
- iii. such question or questions of law must have arisen in the Court or Courts below and must have been the subject of judicial determination.
 - iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination.
 - v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution.
 - vi. the intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance” which he or she attributes to the matter for which certification is sought.
 - vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.

National Bank of Kenya Limited v Anaj Warehousing Limited, Petition No.36 of 2014; [2015] eKLR

Among the main issues for determination was *whether a document or instrument of conveyance was null and void for all purposes, on ground that it was prepared, attested and executed by an advocate who did not have a current practicing certificate, within the meaning of Section 34 (1) (a) of the Advocates Act.*

The emerging principle from this decision is that a litigant’s access to justice ought not to be defeated merely on the technical consideration that the Advocate who drew up the requisite legal documents lacked a current practising certificate. The Court held that no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.



Isaack M'inanga Kiebia v Isaaya Theuri M'lintari & Another, SC Petition No. 10 of 2015; [2018] eKLR

The Court while exercising its appellate jurisdiction under Article 163(4)(b) of the Constitution was called upon to give clarity on the issue of whether a claimant of a trust in customary law needs to prove actual physical possession, or occupation. This was because of conflicting decisions from the Superior courts below.

The Court appreciated that land in a traditional African setting, is always the subject of many interests and derivative rights; and that such rights could be vested in individuals or group units. Therefore, the Court held that of essence is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether they are in possession or actual occupation of the land.

Town Council of Awendo v Nelson O Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties), Petition No. 37 of 2014; [2019] eKLR

In this case the Court determined whether a proprietor, whose land has been compulsorily acquired by the state, for a public purpose, in accordance with the Constitution and the Law, retains a reversionary interest in, or a pre-emptive right over any un-utilized portion of such land, should the public purpose for which it was acquired become spent.

It was the Court's determination that a pre-emptive right is different from a reversionary interest, as the former arises, upon the cessation of the purpose of compulsory acquisition, while the latter reposes in the holder of a superior title and becomes exercisable upon the expiry of an estate. By the same token, it differentiated between land over which the pre-emptive right of re-acquisition arises and un-utilized land or portion of acquired land. It clarified that in the former case, there is total failure of the public purpose, and consequently pursuant to Section 110 (2) of the Land Act, the acquiring authority, is not necessarily barred from applying the land to another public purpose. However, that should it decide to abandon the land to private purchase, then



the original owners have the pre-emptive rights to re-acquire the land upon restitution of the full sum. In the latter case, it expounded, the public purpose has been realized, but the acquired land is not been utilized in full, leaving a portion thereof. In this instance, it found neither the original owners, nor their successors in title have pre-emptive rights to re-acquire the un-utilized portions. In conclusion, it issued four guiding principles.

- a. *where the Government, pursuant to the relevant constitutional and legal provisions, compulsorily acquires land, such land, would only be used for the purpose for which it was compulsorily acquired.*
- b. *the allocation of compulsorily acquired land, to private individuals or entities, for their private benefit, in total disregard of the public purpose or interest for which it was compulsorily acquired, would be incapable of conferring title to that land in favour of the allottees;*
- c. *a person whose land had been compulsorily acquired in accordance with the relevant constitutional and legal provisions did not retain any reversionary interest in the said land; and*
- d. *unutilized portions of compulsorily acquired land could be used for a different public purpose, or in furtherance of a different public interest, including the allocation of such portions to private individuals or entities, at the market price, in furtherance of such public interest.*

Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators - Kenya Branch (Interested Party) Petition No. 12 of 2016 [2019] eKLR (Maraga CJ & P, dissenting)

In this matter, the issue before the Court was whether there was a right of second appeal against a High Court decision relating to the setting aside of an arbitral award, under Section 35 of the Arbitration Act, to the Court of Appeal. The Court established that the only instance an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties.

The Court emphasized that this circumscribed and narrow jurisdiction should be so sparingly exercised only in the clearest cases and that such appeals should address process failures as opposed to the merits of the arbitral award itself.



Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) SC Petition No. 3 of 2018; [2019] eKLR

In this Case, the Court addressed the place of ***Structural Interdicts*** (if any) as forms of relief in human rights litigation under the Constitution; the effect of Article 2 (5) and 2 (6) of the Constitution regarding the applicability of international law in general and international human rights in particular; the relevance and applicability of Guidelines by UN bodies in the interpretation and application of Socio-Economic Rights by Kenyan Courts under the Constitution; and the circumstances under which a Right to Housing may accrue (if at all) in accordance with the provisions of Article 43 (1) (b) of the Constitution.

While partially allowing the appeal, the Supreme Court found that a Court may issue orders to redress the violation of a fundamental right; Article 2 (5) and (6) of the Constitution embraces both international custom and treaty law, and the same can be said to be both outward, and inward looking; U.N Guidelines, General Comment No. 7 are not “binding” upon the state’s parties, nor are they *part of the law of Kenya* in the language and

meaning of Article 2 (6) of the Constitution, unless they have ripened into a norm of customary international law, as evidenced by widespread usage; and that the right to housing over public land crystallizes by virtue of a long period of occupation by people who have established homes and raised families on the land. Where landless citizens occupy public land and establish homes thereon, they acquire protectable rights to housing but not title to the land.



Jurisdiction to offer Advisory Opinion.

Article 163(6) of the Constitution vests the Court with the power to give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.

Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others, Application No. 2 of 2011; [2012] eKLR

In this matter, the Supreme Court sought to interrogate *inter alia*: whether the special jurisdiction under Section 14 is appellate in nature and therefore one of the categories of appeal contemplated by Article 163 (4) of the Constitution?; *whether the Supreme Court has jurisdiction to entertain appeals from cases that were determined and finalized by the Court of Appeal before the promulgation of the Constitution of Kenya 2010?; and are sections 15 and 16 of the Supreme Court Act intended to operate retrospectively?*

On the special jurisdiction of this Court under Section

14, it was noted that Section 14 of the Supreme Court Act confers powers of review upon the Supreme Court through a special jurisdictional regime and that the words 'review' and appeal cannot be used interchangeably as neither section 23 of the "Transitional Provisions" to the Constitution, nor Article 163 (3) and (4) of the Constitution gives the impression that an appeal bears the same meaning as a review. On the retrospective operation of the Jurisdiction of the Supreme Court, the Court noted that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. Ultimately the Court held that Article 163 (4) (b) is forward-looking and does not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalized by the Court of Appeal before the commencement of the Constitution.



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 (Mutunga CJ&P dissenting)

In this Reference, the Court was asked to address the question of whether gender representation of not more than two – thirds of the members of elective public bodies shall be of the same gender applies in respect of the very next general elections to be held on 4th March, 2013 or apply progressively over an extended period of time.

It was the Court's view that inference whether a right is to be realized "*progressively*" or "*immediately*" is not a self-evident question: it *depends* on factors such as the *language* used in the normative safeguard, or in the expression of principle; it depends on the *mechanisms* provided for attainment of gender-equity; it depends on the *nature of the right* in question; it depends on the *mode of constitution* of the public body in question (e.g. appointive or elective; if elective, the mode and control process for the election); it depends on the identity and character of the *players who introduce the candidates* for appointment or election; it depends on the *manner of presenting candidature* for election or nomination.

The majority, bearing in mind terms of Article 100 of the Constitution [*on promotion of representation of marginalised groups*] and of the Fifth Schedule [*prescribing timeframes for the enactment of required legislation*] established that the implementation of the two-third gender representation requirement was to be progressively realized within five (5) years from the date of promulgation of the Constitution, that is 27th August 2015.



In the Matter of the Speaker of the Senate & another, Advisory Opinion Reference No. 2 of 2013; [2013] eKLR (Mutunga CJ & P, Rawal DCJ & VP - Concurring and Njoki SCJ - Dissenting)

In this case, the dispute was occasioned by the act of the Speaker of one parliamentary Chamber, the National Assembly, reversing his action of referring a legislative matter to the other Chamber, the Senate, and having the National Assembly alone conclude deliberations on a Bill, which was then transmitted to the President for assent, and which thereafter became enacted law.

By a majority decision, the Court advised that the Senate had a clear role to play, in the processing of the Division of Revenue Bill and that the Speaker of the National Assembly should have complied with the terms of Article 112 of the Constitution. The Court further advised that the National Assembly should have considered the deliberations of the Senate on record and, failing concurrence on legislative choices, the matter should have been brought before a mediation committee, in accordance with the terms of Article 113 of the Constitution.

In Re Speaker, County Assembly of Embu Reference 1 of 2015 [2018] eKLR

The County assembly of Embu sought an advisory opinion on inter alia the following question on the procedure for administration of oath of office, in accordance with Article 74, for a Deputy Governor who assumes office under Article 182(2) of the Constitution, in the event of impeachment of a County Governor; the criteria for filling the vacancy that occurs in the Office of the Deputy County Governor, where the originally-elected Deputy Governor assumes office as Governor, after impeachment of the elected County Governor; and the timeline within which the Deputy Governor assuming office of Governor under Article 182(2) of the Constitution, should assume office.

There was consensus by the parties that there was a lacuna in the law as regards the filling of the position of County Deputy Governor in the event of a vacancy.

The Court found with regard to criteria of filling a vacancy in the office of the Governor the foregoing principle calls for a reading of Article 182 of the Constitution alongside Article 149, which makes provision for the procedure and timelines for filling a vacancy in the Office of the Deputy President. From the signal embodied in Article 149 of



the Constitution, and in the absence of any applicable legislative provision, the Court held that, where a vacancy occurs in the Office of the Deputy County Governor, the Governor shall within fourteen days, nominate a person to fill such vacancy. The County Assembly shall vote on the nomination within sixty days after receiving it. Where a vacancy occurs in both the offices of County Governor and Deputy County Governor at the same time, the office of the Deputy County Governor shall remain vacant until the election of a new Governor. The new Governor shall nominate a person to fill the vacancy within fourteen days after assuming office. The County Assembly shall vote on the nomination within sixty days after receiving it. The Court stated that this holding shall obtain in all circumstances pursuant to which the Office of the Deputy Governor may become vacant as contemplated by the Constitution, i.e death, resignation or impeachment.

Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae) Advisory Opinion Reference No. 3 of 2019 [2020] eKLR

In this case the Commission for Revenue Allocation pursuant to Article 216 of the Constitution made recommendations concerning the sharing of revenue regarding the Division of Revenue Bill for the Financial Year 2019/2020. The Senate went by the said recommendation while the National Assembly elected not to. There was a failed attempt at mediation under Article 113 of the Constitution occasioning the need for an advisory opinion from the Court.

The Court found that the recommendations by the Commission for Revenue Allocation are not binding on either the National Assembly or the Senate. It however held that the recommendations had to be given due consideration during deliberation in both houses. It further held that not every deviation had to be explained, only the significant deviations had to be accompanied with a memorandum explaining the deviation. In the event of an impasse occasioned by the lack of concurrence between the two Houses over the Division of Revenue Bill, unresolvable by mediation, the Court held that the



National Assembly shall, for the purpose of meeting the expenditure necessary to carry on the services of the County Government during that year until such time as the Division of Revenue Act is assented to, authorize the withdrawal of money from the Consolidated Fund. The monies so withdrawn shall be included, under separate vote(s) for the several services in respect of which they were withdrawn. The Court further held that the percentage of the money to be withdrawn be based on the equitable allocation to Counties in the Division of Revenue Act of the preceding financial year. Further, that in keeping with the spirit of Article 222 (2) (b) of the Constitution, the money to be withdrawn should be 50% of the total equitable share allocated to the Counties in the Division of Revenue Act. The Court added that in event that 50% of the total equitable share allocated to Counties in the preceding year exceeds the total equitable share proposed in the Division of Revenue Bill, then the percentage to be withdrawn from the Consolidated Fund should not be less than 15% of all revenue collected by the National Government. The 15% recommended in case of such an eventuality is derived from Article 203 (2) of the Constitution



Appeals from Tribunals formed under Article 168(8) of the Constitution.

The Supreme Court may hear and determine an appeal by a judge aggrieved by a decision of a tribunal formed under Article 168 of the Constitution to consider his/her removal.

Joseph Mbalu Mutava v. Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya, Petition 15B of 2016; [2019] eKLR

This was the first time the Court exercised its jurisdiction under Article 168(8) of the Constitution to determine an appeal arising out of the decision of the Tribunal appointed to investigate the conduct, of a Judge pursuant to Article 168(5) of the Constitution, which recommended his removal from office. The Court used this opportunity to set foundational principles applicable in the exercise of this jurisdiction. In this regard, the Court recognized that in exercising this jurisdiction it acts as the first and only appellate Court from the findings of the Tribunal. Accordingly, it had the duty to re-evaluate and re-assess the evidence on record with a view of establishing whether the Tribunal in arriving at its conclusion, misdirected itself and whether its conclusion should stand.

Applications Emanating from Declaration of State of Emergency.

The Court, pursuant to Article 58(5), has jurisdiction to consider applications emanating from a declaration of a State of Emergency. The jurisdiction of the Court in this regard has not yet been exercised.



The Doctrine of Necessity

The Court's Duty to Sit

***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition (Application) No. 4 of 2012 [2013] eKLR (Ibrahim, SCJ - Concurring)**

The Supreme Court in determining an application for recusal of a Judge recognized that by Article 163(2) of the Constitution, its membership comprises seven Judges; and is properly composed for normal hearings when it has a quorum of five Judges. The Court took judicial notice that at the time, the Court had had a vacancy of one member and further that half of the then membership were previously in service in other superior Courts. Therefore, there was the possibility of having heard matters which could potentially come before the Supreme Court. The Court noted that recusal, in those circumstances, would create a quorum-deficit which would have rendered it impossible for the Supreme Court to perform its prescribed constitutional duties. The Court held that such a possibility would be contrary to public policy and be highly detrimental to the public interest, especially given the fact that the novel democratic undertaking of the new Constitution was squarely anchored firstly, on the superior Courts, and secondly, on the Supreme Court as the ultimate device of safeguard.



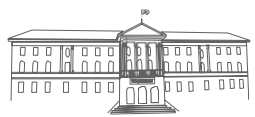


Hon. Martha Koome, Chief Justice and President of the Supreme Court of Kenya during a virtual court hearing.





Justices of the Supreme Court arrive for delivery of judgment in the Building Bridges Initiative case.





Hon. Martha Koome, Chief Justice of Kenya during conferencing with fellow Judges of the Supreme Court.





Hon. Martha Koome, Chief Justice of the and President of the Supreme Court of Kenya during the East African Chief Justices Forum in Mombasa.









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