

INDIGENOUS JURISPRUDENCE

A Synopsis of Selected Cases of the Supreme Court of Kenya

This booklet sets out selected jurisprudence emanating from the Supreme Court based on its jurisdiction.

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1) *Exclusive Original Jurisdiction*

Under Article 163(3)(a) of the Constitution, 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.

Burden and Standard of Proof in a Presidential Election Petition

Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 Others, Presidential Petition No. 5 of 2013; [2013] eKLR

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 4th March, 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 of the Elections (General) Regulations, 2012 and Section 39 of the Elections Act, which dealt with electronic transmission, operated on the basis that electronically transmitted results are 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 will not necessarily vitiate the entire General Election.

Nullification of a Presidential Election

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 8th August, 2017, this petition was filed seeking to annul the election for failure to comply with laid out constitutional principles and provisions of the Elections 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.

Eligible Presidential candidates in a fresh Presidential Election following nullification of the initial Presidential Election

John Harun Mwau & 2 Others v. Independent Electoral and Boundaries Commission (IEBC) & 3 Others, Presidential Petition Nos. 2 and 4 of 2017; [2017] eKLR

This case emanated from the fresh elections that were conducted upon the nullification of the 2017 Presidential Election. The election results were challenged on several grounds, including that they were no 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.

Nature of Evidence required to nullify a Presidential Election and Orders that can be granted in a Presidential Election Petition

Raila Odinga & 16 Others v. William Ruto & 10 Others; Law Society of Kenya & 4 Others (Amicus Curiae), Presidential Petition Nos. E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated); [2022] KESC 54 (KLR)

The consolidated petition was determined on the basis of nine (9) issues framed by the Court.

First, whether the technology deployed by the Independent Electoral Boundaries Commission (IEBC) for the conduct of the 2022 General Election met the standards of integrity, verifiability, security, and transparency to guarantee accurate and verifiable results. The Court upon considering the pleadings, submissions, and the ICT Scrutiny and Inspection, Tallying and Recount Report by the Registrar of the Court, which fully examined the IEBC's Result Transmission System (RTS), was not persuaded that the technology deployed by IEBC failed the standard of Article 86(a) of the Constitution on integrity, verifiability, security and transparency.

Second, whether there was interference with the uploading and transmission of Forms 34A from the polling station to IEBC's Public Portal. The Court found that no credible evidence was presented to the Court to establish there was any interference with the uploading and transmission of Forms 34A from the polling station to IEBC's public portal.

Third, whether there was a difference between Forms 34A uploaded on IEBC's Public Portal and the Forms 34A received at the National Tallying Centre, and Forms 34A issued to the Agents at the Polling Stations. The Court found that there was no difference between the Forms 34A uploaded on IEBC's public portal with those received at the National Tallying Centre, and those issued to the candidates' agents at the Polling Stations.

Fourth, whether the postponement of Gubernatorial Elections in Counties and Constituencies resulted in voter suppression. The Court found that by virtue of Section 55B of the Elections Act, 2011 IEBC had the requisite power to postpone election in the Constituencies, Counties and wards in question. In addition, the Court found that there was no proof that the postponement resulted in voter suppression to the detriment of the runners up Presidential and Deputy Presidential Candidates.

Fifth, whether there were unexplainable discrepancies between the votes cast for Presidential candidates and other elective positions. The Court found that there was a plausible explanation for the vote differential on account of the categories of voters who only vote for the President, such as prisoners and Kenyans in the diaspora, as well as stray votes.

Sixth, whether IEBC carried out the verification, tallying, and declaration of results in accordance with Article 138 (3) (C) And 138 (10) of the Constitution. The Court found that pursuant to Article 138 (3) (c) of the Constitution, the power to verify and tally Presidential Election results as received at the National Tallying Centre, vests not in the Chairperson of IEBC, but in the Commission itself. IEBC carries out this exercise through its secretariat staff, technical personnel, and any other persons hired for that purpose under the oversight and supervision of the Chairperson, and other members of the Commission. Although, the power to declare the result of a Presidential Election after verification and tallying, is vested in the Chairperson, he does so only as a delegate of the Commission. Ultimately, notwithstanding the divisions apparent between the Chairperson and four Commissioners, the Court was satisfied that IEBC carried out the verification, tallying, and declaration of the Presidential Election results in accordance with Article 138 (3) (c) and (10) of the Constitution.

Seventh, whether the declared President-elect attained 50%+1 of all the votes cast in accordance with Article 138(4) of the Constitution. The Court found that the declared President-elect attained 50%+1 of all the votes cast in accordance with Article 138(4) of the Constitution.

Eighth, whether there were irregularities and illegalities of such magnitude as to affect the final result of the Presidential Election. The Court found that the illegalities and irregularities pointed out by the petitioners were not of such magnitude as to affect the final result of the Presidential Election.

Ninth, the reliefs and orders the Court can grant or issue. The Court found that in a Presidential Election Petition it can only issue orders stipulated under Article 140 of the Constitution. In that, it can either, where it finds that the election of the President-elect is invalid, nullify the election and direct IEBC to hold a fresh election; or, declare the election of the President-elect as valid.

Ultimately, the Court unanimously dismissed the consolidated petition and as a consequence, declared that the election of William Ruto, as the President elect valid under Article 140 (3) of the Constitution

2) *Appellate Jurisdiction*

Pursuant to Article 163(4) (a) & (b) of the Constitution, the Supreme Court has appellate jurisdiction to hear and determine appeals from the Court of Appeal as of right in any case involving the interpretation or application of the Constitution; and upon certification by either the Court of Appeal or the Court, that a matter of general public importance is involved in the intended appeal.

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

Broadcasting Signal Distribution Licensing

Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others, Petition No. 14 of 2014 as consolidated with Petition Nos. 14 A, 14B & 14C of 2014

The Country, at the time. was 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 & transparently. The Court 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 and 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.

Registration of voters in the diaspora

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 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 subject to limitations in a manner 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 to be 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.

Constitutionality of the mandatory death penalty for the offence of murder

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. The Court interrogated the following issues: 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.

Judicial intervention to stop ongoing legislative process

Justus Kariuki Mate & Another v. Martin Nyaga Wambora & Another, Petition No. 32 of 2014; [2017] eKLR

This was a matter of an appeal from a finding of contempt of court against the County Assembly of Embu which had been restrained by the High Court from holding impeachment proceedings against the sitting Governor without first serving him with a notice containing specific grounds or 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 Speaker and the Clerk 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 them 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.

They 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 Speaker and Clerk's contention that various provisions of the constitution had been violated and therefore the Court needed to intervene. They 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 Speaker and the Clerk 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 and Court of Appeal citing the Speaker and the Clerk 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.

Threshold of Public Participation

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 No. 5 of 2017; [2019] eKLR

In issue was the Tobacco Control Regulations 2014 which were made pursuant to Section 53 of the Tobacco Control Act; and sought to regulate various aspects of the Tobacco sector in Kenya. One of the main issues was whether the process that led to the making of the Tobacco Regulations 2014 was unconstitutional for lack of public participation.

In considering the issue, 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 guiding principles for public participation. In particular, the Court emphasised *inter alia* that public participation applies to all aspects of governance; the onus is on the concerned public entity or officer to give effect to public participation using reasonable means; and public participation must be real and not illusory. The Court went on to state that components of meaningful public participation include clarity of the subject matter for the public to understand; structures and processes (medium of engagement) of participation that are clear and simple; opportunity for balanced influence from the public in general; commitment to the process; inclusive and effective representation; integrity and transparency of the process; and capacity to engage on the part of the public.

Participation of victims in a criminal trial

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 victims 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, 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 Victim Protection Act, 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.

Indirect Discrimination

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.

Eviction of squatters on private land

William Musembi 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 as well as 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).

Amendment of the Constitution

The Attorney General & 2 Others v. David Ndii & 79 Others, SC Petition Nos. 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 called upon to determine the constitutionality of the Bill which it did through the seven issues it framed.

On the applicability of the basic structure doctrine, the majority found that no gaps had been identified with regard to Chapter Sixteen of the Constitution, which deals with amendments to the Constitution that would justify the applicability of the basic structure doctrine in Kenya. The Court also noted 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.

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. Furthermore, the majority found that the President initiated the Constitution of Kenya (Amendment) Bill, 2020 as a popular initiative. Consequently, the majority were of the view that the Amendment Bill was unconstitutional.

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 unanimously found 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 unanimously 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.

The majority found 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.

The majority also held that the question raised regarding the interpretation of Article 257(10) of the Constitution on whether or not it entails or requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions was not ripe for determination.

Exhaustion of dispute resolution mechanisms prescribed by Statute prior to approaching courts

Albert Chaurembo Mumba 7 Others (sued on their behalf and behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v. Maurice Munyao and 148 others (suing on their behalf and behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme), SC Petition No. 3 of 2016; 2019 [eKLR]

By a Trust Deed dated 1st April, 1998 an irrevocable trust in the form of a Retirement Benefits Scheme called the Kenya Ports Authority Pension Scheme was established between Kenya Ports Authority (the Sponsor) and the Registered Trustees of the Kenya Ports Authority Pension Scheme (the Scheme). The main objective of the Scheme was to provide pensions and other periodical payments to members upon their retirement. The respondents who were all former employees of the Sponsor filed a suit in the High Court seeking a declaration that the Scheme had made an unconstitutional, illegal, unlawful, wrongful and fraudulent amendment to the 1998 Trust Deed and Rules.

The question as to which was the proper forum with original jurisdiction to hear and determine the dispute between the parties arose; that is, whether it was the High Court, the Employment and Labour Relations Court or the Chief Executive Officer of the Retirement Benefits Authority.

The Supreme Court stated that the in-built review and appellate mechanisms established under the Sections 46 and 48 of the Retirement Benefits Act should have been exhausted first by the respondents. In that regard, it held that the proper forum for the respondents to launch their case was first to write to the CEO then if dissatisfied with the decision appeal to the Retirement Benefits Appeals Tribunal. As a result, the Supreme Court remitted the matter for adjudication by the CEO of the Retirement Benefits Authority under the mechanism laid down under the Retirement Benefits Act.

An interested party's locus standi to lodge a Cross Petition raising a different cause of action

Methodist Church in Kenya v. Mohamed Fugicha & 3 Others, SC Petition No.16 of 2016; [2019] eKLR

The germane question was whether a person who had been admitted into court proceedings as an interested party could lodge a Cross Petition raising a distinct cause of action from the main parties therein.

In that regard, the Court found that the most crucial or overriding interest in any case before a court is that of the primary or principal parties. Moreover, the Court took cognizance of the fact that one of the principles for admission of an interested party is that such a party must demonstrate that he or she has a stake in a matter before a court. It follows therefore, in the Court's view, that an interested party's stake or legal interest cannot take the form of an altogether new issue or cause of action from the main parties. Consequently, the Court held that an interested party may not introduce new issues or causes of action for determination by a court. The issues to be determined by a court will always remain the issues presented by the principal parties, or as framed by a court from the pleadings and submissions of the principal parties.

Constitutionality of the Constituencies Development Fund Act, 2013

Institute for Social Accountability & Another v. National Assembly & Others, SC Petition No.1 of 2018; [2022] KESC 39 (KLR)

In 2013, the National Assembly enacted the Constituencies Development Fund Act, 2013 (CDF Act, 2013) and subsequently, the Constituencies Development Fund (Amendment) Act No. 36 of 2013 (CDF Amendment Act, 2013). Thereafter, there was a challenge to the constitutionality of these Acts on grounds that they were passed without the involvement of the Senate, they offended the constitutional principles of division of revenue, and violated the division of functions between the National and County Governments. Moreover, in 2015, during the pendency of the case, the National Assembly repealed the CDF Act, 2013 and enacted the National Government Constituencies Development Fund, 2015 (NGCDF Act, 2015). It was therefore contended that the 2015 enactment rendered the dispute moot, leaving no live controversy requiring adjudication.

The Court considered the import of the doctrine of mootness and established the contours of its application. Substantively, the Court found that the CDF (Amendment) Act, 2013 concerned County Governments, and failure to involve the Senate in the enactment process

offended Article 96 of the Constitution rendering the CDF Act 2013 and its Amendment unconstitutional. Similarly, it was determined that the CDF Act 2013 violated the division of functions between the National and County levels of Government for reasons that under the Constitution, the decentralization of service must be undertaken within the confines of the structures of the National Government or County Governments, not parallel to the two levels of Government. In conclusion, the Court also found that the CDF Act 2013 offended the constitutional revenue-sharing formula by directly allocating 2.5% of all the national revenue against the Constitution which calls for equitably sharing among the two levels of government.

The right to fair trial and the discretion of the Director of Public Prosecutions (DPP) in its prosecutorial mandate

Jirongo v. Soy Developers Ltd & 9 Others, SC Petition No. 38 of 2019; [2021] KESC 32 (KLR)

This appeal was prompted by the setting aside of a High Court decision in which the Director of Public Prosecutions had been restrained from proceeding with criminal proceedings instituted against the appellant. The appellant had been charged with various offences in contravention of the Penal Code, related to a conveyancing transaction between himself and the respondents that took place 24 years prior to the institution of the charges. He challenged his arrest on the grounds that the charges were selective, unreasonable, an abuse of process and an illegal exercise of discretion. Moreover, that the 24year delay infringed his fundamental rights and legitimate expectations.

The Supreme Court observed that evidence demonstrated that the documentation necessary to prove or disprove the alleged fraud was most likely, no longer available. The Court also noted that such a delay and use of the criminal process to force the hand of the appellant while civil suits were pending, fatally tainted the fairness of the resultant prosecution.

The Supreme Court held that the prosecution of the appellant amounted to a breach of his right to a fair trial guaranteed by Articles 25(c) and 50 of the Constitution. Therefore, the High Court was well within its constitutional mandate to curtail the appellant's prosecution. The Court underscored that in the exercise of its functions, the DPP ought to act judiciously and not in perpetuation of unfair and malicious criminal proceedings, and must be guided by the principle that the right to a fair trial cannot be limited.

Guiding Principles on the recommendations from Commissions to public bodies

Kenya Vision 2030 Deliveries Board v. The Commission on Administrative Justice & 2 Others, SC Petition No. 42 of 2019; [2021] eKLR

Some of the functions of the Commission on Administrative Justice (CAJ), which is established by the Commission on Administrative Justice Act, 2011, include investigating complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector. Therefore, the Supreme Court observed that it equally has the mandate to make recommendations to a public officer or body. Nonetheless, the Court held that such recommendations are not binding since neither the Constitution or the Act makes such a provision.

The Court went on to set out guiding principles on recommendations from Commissions to pubic bodies as follows; Firstly, any power to make a recommendation ought to be specifically provided for in the Constitution or in law; secondly, a recommendation from a Commission is only binding upon a public entity where it has been specifically provided for in the Constitution or in law; thirdly, the manner in which a recommendation is to be implemented by a public entity is discretionary; fourthly, exercise of discretion in implementing a recommendation may only be interfered where there is gross abuse of discretion, manifest injustice or palpable excess of authority; and fifthly, any recommendation by a Commission which is not implemented may be reported to Parliament for any further action, if necessary.

Nature of Administrative Action contemplated under Article 47 of the Constitution

Ethics and Anti-Corruption Commission (EACC) & Director of Public Prosecutions v. Tom Ojienda, SC, t/a Prof. Tom Ojienda & Associates & 2 others; Law Society of Kenya (Amicus Curiae), SC Petition Nos. 30 & 31 of 2019; [2022] KESC 59 (KLR)

The Supreme Court pronounced that the nature of administrative action contemplated under Article 47 of the Constitution is not just any action or omission, or any exercise of power or authority, but one that relates to the management of affairs of an institution, organization, or agency.

Therefore, the Court observed that the Ethics and Anti-Corruption Commission's (EACC) investigative powers include powers, privileges and immunities of a police officer under Section 23(3) of the Anti-Corruption and Economic Crimes Act (ACECA), to search premises under Section 29 of ACECA, to apply for surrender of travel documents under Section 31 of ACECA, to arrest persons under Section 32 of ACECA amongst others. Accordingly, to the Court those powers strictly speaking when exercised cannot be described as "administrative action" within the meaning of Article 47

Nonetheless, the Court emphasized that where the EACC is acting under its police powers, it is bound by the Constitution and the laws pursuant to which the police conduct their investigations and connected purposes.

Impeachment of a Governor from Office

Hon. Mike Mbuvi Gideon Kioko v. The Clerk, County Assembly of Nairobi City & 11 Others, SC Petition No. 11 (E008) of 2022

The appeal concerned the impeachment of the appellant from the office of the Governor of Nairobi City County. The appellant called upon the Court to set aside and/or declare unconstitutional the resolution passed by Senate for his removal from office through impeachment. The appellant contested his impeachment on the grounds that it was not in compliance with due process and the procedure for such impeachment as delineated under Article 181 of the Constitution, Section 33 of the County Governments Act, 2012 and the Nairobi City County Assembly Standing Orders. The challenge of his impeachment before the High Court and Court of Appeal was unsuccessful.

On appeal to the Supreme Court the jurisdiction of the Court was challenged. The Court found that it lacked jurisdiction to determine the appeal. However, in view of the public interest nature of the dispute, the need for due guidance to the judicial process and to the courts below and for the sake of posterity and development of jurisprudence it was important to settle all the pertinent questions the appeal raises.

Upon determination of the seven framed issues, the Court came to the conclusion that the impeachment proceedings before the County Assembly and the Senate were properly conducted in accordance with the Constitution, the County Governments Act and Standing Orders of the Assembly and the Senate; the appellant was accorded adequate time and facility to respond to the charges against him both at the county assembly and in the Senate; that there was sufficient public participation during the entire process; that there were four counts of impeachable charges against the appellant, the County Assembly, the Senate and the two superior courts below were convinced that the charges were proved to the standard required in such circumstances; and that in the instant situation, the people exercised their power through their democratically elected representatives to uphold and defend Chapter Six of the Constitution. Finally, of pertinence is that the Court seized the opportunity to set out the principles governing the process of impeachment or removal of a county Governor.

Nature and Scope of Judicial Review Proceedings

Praxidis Namoni Saisi & 7 Others v. DPP & 2 Others, Petition Nos 39 & 40 of 2019; [2020] eKLR

The consolidated appeal concerned judicial review proceedings that had barred the Director of Public Prosecutions from prosecuting criminal proceedings against the activities of members of a tender evaluation committee in the Geothermal Development Company. The Appellants challenged the Court of Appeal's finding that the High Court sitting in judicial review proceedings should not consider the merits of the decision by a public body but rather to undertake a consideration of how the decision was made.

The Supreme Court found that, though the legal system has moved away from common law to codification in the Constitution and the Fair Administrative Actions Act, the main focus of judicial review remained to examine the way in which a decision was made, rather than the decision itself. The Court held that this was reinforced by the fact that while a court may consider some aspects of the decision's merit during a judicial review, it cannot make a decision on its own merit but must send it back to the original decision-making body or office for further review.

A Public Office does not vest in the office holder the right to property in the office

County Assemblies Forum v. Attorney General & 3 Others; Parliamentary Service Commission (Interested Party), Petition No. 22 of 2017; [2022] KESC 66 (KLR)

The County Assemblies Forum filed an appeal before the Supreme Court challenging the Court of Appeal's decision which set aside the High Court's decision that found the date of the second General Elections under the 2010 Constitution, 8th August 2017, unconstitutionally reduced the Members of the County Assemblies (MCAs) term in office by eight (8) months. It also challenged the Court of Appeal's finding that there was no conflict between Article 177 (1) (a) and 177 (4) of the Constitution; that there was no legitimate expectation to hold public or elective office to the end of its term; and that the award of damages for the unexpired term of office of MCA's was based on a misapplication of the law.

The Supreme Court agreed that the MCAs term in office was cut short by eight months since the first General Election under the 2010 Constitution was held on 4th March, 2013. However, the Court held that a Public Office exercised for the benefit of the public, does not vest in the holder of the office the right to property of the office. The holders of elective office vie and hold

office, not for their private benefit but for the benefit of their constituents on whose behalf they act. The MCAs term in office ended by operation of the Constitution, thereby their claim for legitimate expectation lacked merit.

The Court further held that there is no conflict between Articles 177(4) and 177(1) of the Constitution, apparent or otherwise. If the two were to be put side by side, they can both be given effect at the same time as demonstrated by the continued election cycle.

Authority to institute Extradition Proceedings

Director Of Public Prosecution v. Okemo & 4 Others, Petition No. 14 of 2020; [2022] KESC 33 (KLR)

The Appeal before the Court concerned whether extradition proceedings were *sui generis* or criminal in nature and who between the Attorney General and the Director of Public Prosecution had the authority to institute extradition proceedings.

The Court held that a reading of Article 157 of the Constitution, the relevant extradition treaties, and other applicable laws, left no doubt that extradition proceedings were criminal in nature. The fact that extradition proceedings were criminal in nature, divested the Attorney General of any authority to involve him/herself in their initiation (that was issuance of Authority to Proceed) and conduct before a court of law. More so, since the power to initiate and prosecute criminal proceedings is the exclusive preserve of the Director of Public Prosecutions. The Attorney General however retained the executive authority to receive requests for extradition and to transmit the same to the Director of Public Prosecutions for necessary action.

Limitation of time in filing human rights violation claims

Monica Wangu Wamwere & 5 Others v. The Attorney General, Petition No. 26 of 2019 Consolidated with Petition Nos. 34 & 35 of 2019

The appeal concerned mothers of political prisoners who participated in a demonstration by going on a hunger strike to urge for their release in 1992. The political prisoners had been incarcerated by the then oppressive regime for politically instigated offences ranging from treason, sedition, to being members of unlawful organizations. In response to the demonstrations, police officers forcefully dispersed the demonstrators. Due to the status of the judiciary before the promulgation of the Constitution of Kenya, 2010, the appellants, sought damages for violation of their fundamental rights and freedoms by the police officers under the current constitutional dispensation.

Therefore, the Court sought to determine four main issues, that is, whether there was a limitation of time in filing claims for human rights violation; whether there was unexplained inordinate delay by the appellants in filing their petitions in the High Court; whether the appellants proved on a balance of probabilities that their fundamental rights and freedoms were violated; and the appropriate remedy in the circumstances of the appeal.

In allowing the appeal, the Court held that there was no limitation of time in matters relating to violation of rights under the Constitution which are evaluated and decided on a case by case basis. The Court also found that the appellants' explanation for the delay in filing their petitions in the High Court was plausible to the extent that it was attributed to lack of faith in the pre-2010 judiciary. The Court noted that although the appellants did not exhibit any physical injuries or medical reports, it was persuaded that the whole incident, which was of public notoriety, had a psychological/traumatic effect on them. This was because the respondent did not give any justifiable reason(s) whatsoever why it was necessary to violently disrupt and disband the protests by the appellants who were harmless. The psychological/ traumatic effect could be equated to inhumane treatment which was a violation Section 74(1) of the repealed Constitution. The appellants were each awarded Kshs. 2,500,000/- damages.

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

Guiding principles in determining whether an appeal involves issues of general public importance

Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone, Application No. 4 of 2012; [2013] eKLR

The Court formulated the governing principles on certification of an appeal as involving issues of general public importance as follows:

i. … the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one 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;

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.

The juridical status of customary trust in land

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

The dispute that gave rise to the particular issue in question revolved around rights and interests over a parcel of land alleged to be ancestral land and owned by a clan. According to the claimant despite the parcel being registered in favour of some of the members of the clan they held the same in trust for the other unregistered members. The High Court and the Court of Appeal agreed with the claimant. Of significance is that the Court of Appeal in arriving in its decision found that in order to prove a trust in land (read customary trust), one need not be in actual physical possession and occupation of the land. However, there were other decisions both in the High Court and the Court of Appeal to the contrary.

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 or not they are in possession or actual occupation of the land.

Distinction between pre-emptive right and reversionary interest over compulsorily acquired 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

The appeal turned on 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. 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, the Court differentiated between land over which a pre-emptive right of re-acquisition arises and un-utilized land or portion of compulsorily 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, 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 has not been utilized in full, leaving a portion thereof. In this instance the Court found that neither the original owners, nor their successors in title have pre-emptive rights to re-acquire the un-utilized portions. In conclusion, the Court 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*

e. *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.*

Right to appeal against a decision of the High Court with regard to setting aside arbitral awards

Nyutu Agrovet Limited v. Airtel Networks Kenya Limited; Chartered Institute of Arbitrators – Kenya Branch (Interested Party), Petition No. 12 of 2016; [2019] eKLR

In this matter, the issue before the Court was whether there was a right of appeal against a High Court's 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 is where the High Court, in setting aside an arbitral award, has stepped

outside the grounds set out under Section 35 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 the 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.

This determination ascertained that the only instance a second appeal lies to the Court of Appeal with regard to setting aside an arbitral award is limited to exceptional circumstances.

Right to housing and eviction of squatters from public land

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

The Court addressed 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; the place of Structural Interdicts (if any) as forms of relief in human rights litigation under the Constitution; and 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.

While partially allowing the appeal, the Court found that 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. The U.N Guidelines, General Comment No. 7 are not "binding" upon the state 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. Further, 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.

Presumption of Marriage and Division of Property

MNK v. POM; Initiative for Strategic Litigation In Africa (ISLA) (Amicus Curiae), Petition No. 9 of 2021; [2023] KESC 2 (KLR)

Invoking the provisions of Section 17 of the Married Women's Property Act 1882, the respondent filed a suit in the High Court for the division of property which was registered in the appellant's name. The respondent's claim was premised on the contention that they had cohabited for a long period of time with the appellant as husband and wife; and the property in question had been jointly acquired and developed during the pendency of their marriage.

In the appeal before the Supreme Court, the Court held that the respondent had failed to disprove the allegation that the appellant was married and as such, declined to find there was a presumption of marriage. The Supreme Court further recognized that there exist relationships where couples choose to have interdependent relationships without the intention of contracting a marriage. It was therefore the Court's finding that in such situations a presumption of marriage must never be made where this intention does not exist. The Supreme Court also noted that marriage is a voluntary union and that courts should shy away from imposing 'marriage' on unwilling persons.

Nevertheless, the Court was convinced that the respondent and the appellant contributed to the acquisition and development of the suit property; that there was a common intention of the parties at the time of purchase of the property that gave rise to a constructive trust between the appellant and respondent; and they both have a beneficial interest in the property.

Division of Matrimonial Property

JOO v. Martha Bosibori Ogentoto; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae), Petition No. 11 of 2020; [2023] KESC 4 (KLR)

The Supreme Court held that Article 45(3) of the Constitution provides for equality of rights between spouses during dissolution of marriage, but does not automatically grant a 50:50 division of property without proof of contribution. The court stated that a fair and equitable distribution of matrimonial property should be determined on a case-by-case basis, taking into consideration the circumstances of each individual case. The determination of the extent of contribution made by each spouse is also on a case-by-case basis and is necessary in determining the percentage of the property available to each party.

3) *Advisory Opinion*

Progressive realisation of the two-third gender representation requirement in elective public bodies

In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Advisory Opinion No. 2 of 2012; [2012] eKLR

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 then next general elections to be held on March 4th, 2013 or applies 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.

Legislative role of the bicameral Parliament in processing Division of Revenue Bill

***In the Matter of the Speaker of the Senate & Another*,** Advisory Opinion Reference No. 2 of 2013; [2013] eKLR

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.

Filing a vacancy in the Office of the Deputy County Governor where there was a lacuna in the law

In re Speaker, County Assembly of Embu Reference No. 1 of 2015; [2018] eKLR

The County Assembly of Embu sought an advisory opinion on *inter alia* the procedure for administration of oath of office, in accordance with Article 74 of the Constitution, 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 Deputy County Governor 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, that is, due to death, resignation or impeachment.

Division of Revenue between the National and County Government.

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 recommendations 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 should 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

4) Appeals from Tribunals formed under Article 168(8) of the Constitution (removal of a Judge from Office)

Role of the Supreme Court in an appeal against a Tribunal's decision recommending the removal of Judge from office.

Joseph Mbalu Mutava v. Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya, Petition No. 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.

Threshold of Gross Misconduct that would warrant removal of a Judge from Office

Hon. Mr. Justice Martin Mati Muya v. The Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Petition No. 4 of 2020; [2022] KESC 16 (KLR)

The appeal concerned the removal of a Judge based on how he had handled a matter before him wherein he issued *ex tempore* orders maintaining *status quo* and reserved reasons for his Ruling to be delivered at a later date. Those reasons were rendered five months after the period allowed by the Rules. During that period, the delivery of those reasons was adjourned eight times.

The Supreme Court reversed the Tribunal's finding that the delay in giving reasons was

inordinate and amounted to gross misconduct because Judge proffered plausible explanation for the delay. The Court clarified that gross misconduct or misbehaviour as grounds of removal of a Judge from office is used in contradistinction to simple misconduct or misbehaviour. Gross was held to be an expression of something very serious. It is a test of whether the Judge, whose conduct is being investigated, could continue to be trusted to carry out his or her role in the administration of justice. In this regard, the Court observed that there was no evidence led to the effect that the Judge had formed a pattern delaying rulings, reasons thereof, or judgments. Even though the Judge's action amounted to misconduct it did not warrant removal from office.

5) 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.

6) 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

The Supreme Court in determining an application for recusal of a Judge recognized that by dint of Article 163(2) of the Constitution, its membership comprises seven Judges; and is properly constituted 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 had previously served in other superior Courts. Therefore, there was the possibility of the said Judges 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 render it impossible for the 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.