IN THE SUPREME COURT OF KENYA

REFERENCE NO 2 OF 2012

IN THE MATTER OF AN APPLICATION FOR ADVISORY OPINION UNDER ARTICLE 163(6) OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLE 81, ARTICLE 27(4), ARTICLE 27(6) ARTICLE 27(8), ARTICLE 38, ARTICLE 96, ARTICLE 97, ARTICLE 98, ARTICLE 177(1)(b), ARTICLE 116, ARTICLE 125, AND ARTICLE 140 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE PRINCIPLE OF GENDER REPRESENTATION IN THE NATIONAL ASSEMBLY AND THE SENATE

AND

IN THE MATTER OF THE ATTORNEY GENERAL (ON BEHALF OF THE GOVERNMENT) AS THE APPLICANT

DISSENTING ADVISORY OPINION

1 Introduction

1.1 The Attorney General filed this request for an advisory opinion on 10th October 2012. He seeks this Court's advisory opinion on the following questions:

(a) Whether **Article 81(b**) as read with **Article 27(4)**, **Article 27(6), Article 27(8), Article 96, Article 97, Article 98, Article**

177(1)(b), Article 116, and **Article 125** of the Constitution of the Republic of Kenya require progressive realization of the enforcement of the one third gender rule or if it requires the same to be implemented during the general elections scheduled for 4th March 2013.

(b) Whether an unsuccessful candidate in the first round of presidential election under **Article 136 of the Constitution** or any other person is entitled to petition the Supreme Court to challenge the outcome of the first round of the said election under Article 140 or any other provision of the Constitution?

1.2 At the mention of this case on 8th November 2012, The Commission on Administrative Justice (CAJ), The Independent Elections and Boundaries Commission (IEBC), the Commission on the Implementation of the Constitution (CIC) and the National Gender and Equality Commission (NGEC) were admitted as interested partiesunder Rule 23 of the Supreme Court Rules 2011 (now repealed). The Centre for Rights Education and Awareness (CREAW), the Katiba Institute, the Centre for Multi-party Democracy (CMD), FIDA-Kenya, the Kenya Human Rights Commission (KHRC), the International Centre for Rights and Governance (ICRG) and Mr. Charles Kanjama were admitted as amici curiae for the Courtunder Article 22 (3) (e) of the Constitution and Rule 54 of the Supreme Court Rules 2011 (now repealed).

1.3 On this date, certain *amiciCuriae* addressed us on issues of jurisdiction.

2 Jurisdiction

2.1 The objections on lack of jurisdiction of this court articulated by CREAW, CMD and Mr. Kanjama are that the issue of gender representation in the National Assembly and Senate is a pure national government issue that does not concern county governments. Neither is the election of a President, nor any challenge that may come from such an election. They argue that the issue of gender representation does not touch county governments as an elaborate procedure for resolving this has already been prescribed by Article 177 of the Constitution. In support of this position, they rely on the authority of **Petition no. 1 of 2011, In Re the Independent Electoral and Boundaries Commission** where this honourable court refused to apply its jurisdiction over a matter dealing with the electoral boundaries.

2.2 CREAW and CMD further object to the Attorney General's reference for an advisory opinion on the ground that the reference is an abuse of the process of court. They argue, that being the case, this court's jurisdiction is thereby vitiated. They claim that it should be a bar from seeking this opinion because the Attorney-General has not stated whether, as principal legal advisor to the government, his opinion over this matter has been sought, and if sought, what opinion he gave, and if given, what action was taken on the basis of the opinion.

2.3 CREAW further objects to this court's jurisdiction on grounds that the jurisdiction in an advisory opinion, being discretionary in nature, can only be sought when the party seeking is in a

genuine dilemma in relation to the subject matter. CREAW opines that the Attorney-General is not in any dilemma as there are two pending bills before the Parliament that have not been removed from the house's agenda. These bills seek the implementation of the two-thirds gender principle.

2.4 Lastly, CREAW is of the opinion that the Attorney-General is guilty of an abuse of process of court by selectively citing the decision in **Federation of Women Lawyers & Others vs Attorney General [2011]eKLR** where the court held that the two-thirds gender principle was subject to progressive realization. The Attorney General, though a party to other decisions of the High Court that held otherwise has neither disclosed these decisions nor sought to distinguish them. The cases in question are: ***Centre for Rights Education and Awareness & Others vs. the Attorney General and Others (Nairobi High Court Constitutional Petition Number 16 of 2011); MilkaAdhiamboOtieno& Another vs. The Attorney General & Another (Kisumu High Court Constitutional Petition Number 33 of 2011) and; Centre for Rights Awareness & Others vs. The Attorney General and Another (Nairobi High Court Constitutional Petition Number 208 of 2012 as consolidated with Nairobi High Court Constitutional Petition Number 207 of 2012.***

2.5 The Attorney General in response states that under Article 163(6) the Supreme Court has a discretionary jurisdiction to give an Advisory Opinion at the request of the National Government, any State Organ or County Government with respect to any matter

concerning county government. The Jurisdiction of this Court has now been stated in **Constitutional Application No. 2 of 2011 in The Matter of Interim Independent Electoral Commission** where the Court set the guidelines and the sphere of jurisdiction of this Court in giving advisory opinion. It is the Attorney General's position that this reference squarely falls within the four corners thereby set by this court in that decision.

2.6 For the IEBC, Mr. Norwojee responded stating that the matters of national and local government were closely intertwined. As an illustration, he pointed to Articles 110 and 111 of the Constitution, which give procedures for the passing of bills "concerning county governments." These bills would be discussed and passed by the National Assembly and the Senate. Therefore, one could see a nexus as to how the composition and validity of the various houses of Parliament affected county governments.

3 Two-thirds Gender principle: Immediate or Progressive realization?

3.1 Various provisions of the Constitution are implicated in the resolution of this question. I will reproduce the various Articles of the Constitution as they relate to arguments of Counsel for and against the immediate realization of the two-thirds gender rule.

3.2 Article 97 decrees as follows:

97. (1) The National Assembly consists of—

(a) Two hundred and ninety members, each elected by the registered voters of single member constituencies;

(b) Forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency;

(c) Twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and

(d) The Speaker, who is an *ex officio* member.

Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (a).

3.3 Article 98 decrees as follows:

98. (1) The Senate consists of—

(a) Forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency;

(b) Sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90;

(c) Two members, being one man and one woman, representing the youth;

(d) Two members, being one man and one woman, representing persons with disabilities; and

(e) The Speaker, who shall be an *ex officio* member.

(2) The members referred to in clause (1) (c) and (d) shall be elected in accordance with Article 90.

(3) Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (a).

3.4 The composition of the two houses must be read against Article 81, which states:

Article 81.
The electoral system shall comply with the following principles––

(a) ...

(b) Not more than two-thirds of the members of elective public bodies shall be of the same gender;

(c) ...

(d) Universal suffrage based on the aspiration for fair representation and equality of vote; and

(e) ...

3.5 The Attorney General argues that there has been no consensus on the interpretation of these Articles (81 (b) as read with articles 27 (6), 27 (8), 96, 96, 98, 177 (1), 116 and 125 of the Constitution). He is concerned that the time when these articles strictly apply is not clear.He states that there are prevailing diverse interpretations, leading to likelihood that the gender quota may not be realized in the elections of March 2013, which

may lead to a constitutional crisis in that the National Assembly may be declared unconstitutional.

3.6 The Attorney General further explains that the legitimate expectation of Kenyans would have been that the two-third gender principle would be implemented in the Political Parties Act, Act No. 11 of 2011, and the Elections Act, Act No. 24 of 2011.This legislation, however, is devoid of any mechanisms to implement the principle. He highlights that his office has been involved in the drafting of certain bills that sought to provide a formula for the realization of the electoral gender quotas. The bills, namely, the Constitution of Kenya (Amendment) Bill, 2011 and the Constitution of Kenya (Amendment) Bill, 2012, have however not been passed by Parliament. .

3.7 The Attorney General then turns his focus on the use of the word "shall" in Article 81. He posits that the Supreme Court's interpretation of the word will result in either the provision decreeing its immediate or progressive implementation. Citing various authorities, including **R v THE MINISTER FOR HEALTH AND THE MEDICALPRACTITIONERS AND DENTISTS BOARD, EX PARTE AVENUE HEALTH CARE LTD, NBI HC JR MISC APPL. 280 OF 2007 and the Black's Law Dictionary, 2nd Edition,**he states that the interpretation of the word "shall" has not always been as an imperative, leading to mandatory application, and the Court can therefore interpret the word to achieve a progressive realization of these provisions.

3.8 The Attorney General proceeds to delve into a comparative study of how quota systems have worked in Africa, giving examples of

South Africa, Mozambique, Senegal, Rwanda, Uganda and Tanzania. In all these countries, he illustrates that the provision of quotas has resulted in a rise in representation of women in their respective legislative assemblies, but has also spurred some problems that are unique to each country.

3.9 The Attorney-General concludes by stating that the mandatory number of women in the National Assembly in accordance with Article 97 (1) (b) amounts to a mere 13.4%. Should the electorate not elect sufficient numbers to comply with the two-thirds gender principle, he posits that the only way to achieve compliance would be by nominations. This would result in Parliament having higher numbers that those expressly stipulated with considerable financial implications for the tax-payer. He therefore states that when all these factors are considered, the tenable interpretation in respect of this issue would be one that supports progressive realization of the principle.

3.10 The Interested parties (except CAJ that is not wholly categorical on the issue, and IEBC that is ready to implement whatever opinion this court gives) and amici curiae are united that the Attorney General's position is wrong. All assert that the implementation of this provision should be immediate. The IEBC takes a very neutral standpoint on this issue, stating that it will abide by the decision of the Court and will conduct the March 4, 2013 elections in accordance with as this Court's Advisory Opinion.

3.11 CAJ is categorical that the present dilemma is to be blamed on the legislature. Mr. OtiendeAmollo argues that Parliament was

responsible for the removal of the provisions implementing the requirements under Article 81 (b). As proof of this, he states that the mechanism- proportional representation, using the counties as electoral colleges- always existed in all drafts of the Constitution, from the Bomas Draft, the Wako Draft, the Harmonised Draft and the Proposed Draft. The provisions only disappeared once the Parliamentary Select Committee on Constitutional Review met with the CoE in Naivasha. Furthermore, Parliament has shot down constitutional amendments that would seek to implement the 2/3 gender principle.

3.12 He is categorical that the implementation should be immediate. However, due to the inaction of Parliament, he seeks to introduce a compromise: under Article 100, Parliament has an obligation to pass legislation that would promote the representation of women. This legislation has been given a time line of 5 years as per the Fifth Schedule. He calls for the Court to pronounce that this is to be strictly followed, achieving the 2/3 gender principle by the next election cycle, that is, in 2017/18.

3.13 The CIC and CMD are both assertive that there has never been any controversy regarding the interpretation of Article 81 (b) of the Constitution. Both CMD and CIC document details of series of consultative meetings have taken place from May 2011 to September 2012 between civil society, Parliamentary representatives and members of the Executive on the issue of the implementation of the provisions of this Article. The cardinal objective of such meetings has always been, in CIC's considered opinion, that this provision needs to be implemented by the

March 2013 elections. Mr. Nyamodi for CIC argues that to interpret the relevant provisions as requiring progressive realization would be contrary to a reading of the Constitution as a whole. He cites the authority of **USIU v AG & ANOR [2012] eKLR,** where Majanja J., reiterated with approval the holding in **OLUM v THE ATTORNEY-GENERAL OF UGANDA [2002] 2 EA 508:**

"*the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other.*"

3.14 CMD further argues that it does not make sense for the Court to grant, as CAJ suggests, a period of 2 election cycles for Parliament to come into conformity with the rule. Mr. Mwenesi argues that though the period within which Parliament is supposed to have passed legislation under Article 100, that period expires on 27th August, 2015. As such, Parliament will find itself being unconstitutional mid-term. He asserts this is not a desirable situation.

3.15 Katiba Institute is assertive that the principle is to be immediately achieved. Mr. Sing'olei argues that as such, the principal of non-discrimination calls for a 50% representation of women in Parliament, who are slightly higher than 50% of the population. He argues that the affirmative action principle of 1/3 is a minimum, and any progressive realization must proceed from that minimum. He also argues that Parliament by its inaction cannot deny women their entitlement to equality in

political representation. The Courts must step in to ensure that the Constitution is complied with.

3.16 All interested parties and *amici curiae* further state that the words signaling progressive realization have been expressly used in the Constitution with regard to other rights, in particular, socio-economic rights under Article 43. However, except in the case of Article 54 (2) regarding the representation of persons with disabilities, the words progressive realization have never been used in reference to the conduct of elections or to the removal of gender discrimination under Article 27 (6) and (8) of the Constitution. They, therefore, posit that the constitutional requirement that not more than two thirds in elective bodies shall be occupied by the same gender, applies to the March 2013 elections. Their collective argument is that if the intention of the framers of the constitution was as the Attorney General argues and urges, they would have so stated.

4 Separation of powers

4.1 NGEC warns that in delivering this Advisory Opinion, the Court should not overstep its purview and violate the principle of separation of powers. It states that the duty to determine whether a principle has been, is being, or will be realized is an executive function that requires clear standards to be developed. It argues that the role of the Court is to determine whether a legal principle or obligation has been enacted, complied with or implemented. However, in conclusion to its written submissions, it states that this Court's concern, as the highest judicial authority in Kenya, should be to give effect to the fundamental

rights and freedoms and the values and principles of governance espoused by the Constitution. No other party addresses the Court on this question.

5 Discrimination

5.1 The CAJ argues that our history records the struggle for women's representation. This history of exclusion owes itself to the patriarchal nature of the Kenyan society. CAJ argues that this is demonstrated by how previous attempts to introduce affirmative action for women representation have been scuttled by a male-dominated parliament. Such prejudice, it argues, still exists in today's Parliament, as it rejected the two constitutional amendment bills brought by the Attorney General to try and provide mechanisms for the implementation of this constitutional imperative.

5.2 The Katiba Institute agrees with this proposition, stating that the Constitution is well aware of this and states in Article 10 that one of the Constitution's principles is the protection of the marginalized. Thus, the two-thirds gender principle recognizes that certain sectors of the society- historically women- have been marginalized by the political system. The Katiba Institute then introduces the concept of "substantive equality." This, it states is a recognition that formal equality (equality before the law) does notto ensure that women enjoy the same kind of political representation as men. It therefore posits, with reference to ColmO'Cinneide's article *"The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?"*(2008)UCL Human Rights Journalthat the right to equality is interpreted as requiring the

elimination of historically rooted patterns of prejudice, discrimination and disadvantage that contribute to the subordination of women.

5.3 CMD perhaps most widely canvasses this issue of discrimination in its submissions. Counsel for CMD argues strongly that it would be discrimination, contrary to Article 27, particularly sub-articles (6) and (8) for the government to fail to introduce legislation to secure the principles enacted in the Article and in Article 81 (b). Article 27 states as follows:

27 (1) Everyperson is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

5.4 CMD further argues that any denial of this right must fulfill the requirements under Article 24. Article 24 states:

24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including––

(*a*) the nature of the right or fundamental freedom;

(*b*) the importance of the purpose of the limitation;

(*c*) the nature and extent of the limitation;

(*d*) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(*e*) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(*a*) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom**,** and the nature and extent of the limitation;

(*b*) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(*c*) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) …

…

5.5 CMD argues that as the Attorney General is seeking to limit a right guaranteed under Article 27, he must fulfill the requirementsof Article 24, in that the limitation should be by legislation that specifically states its intention to limit such rights. It is CMD's contention that the Attorney General has not fulfilled this requirement.

5.6 CMD also refers to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). In particular, they refer to Article 4 which states:

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

5.7 Here, CMD seeks to proffer a remedy to the State so as to remedy the discrimination that has been dealt upon women in Kenya in this area of political representation. CMD therefore asks the Court to require that Parliament and the Attorney General fulfill the constitutional mandate and install some stop-gap measures

to eliminate this discrimination. CMD also argues that Article 4 of CEDAW has constitutional force under Article 2 of the Constitution.

5.8 KHRC and FIDA-KENYAadopt a similar line of argument, referring to the preamble of CEDAW to the effect that discrimination against women violates the principle of equality of rights and respect for human dignity, and is an obstacle to the participation of women on equal terms with men in the political life of their country.Mr. Nderitu, counsel for both of these *amici*therefore points to the obligation on the State under Article 7 of the Convention as follows:

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

5.9 ICRG argues that Article 27 rights are merely *principles* against discrimination and not fully rights. He further argued that their

existence in the Constitution is as a result by lobbying from women's groups, which he referred to as *sectarian* interests. He further argues that the wording of Article 81 is clear- the provisions therein are principles, not rights or obligations of the State. As such, they do not result in express government obligations.

5.10 Mr. Charles Kanjama argues that the obligations of the State that call for immediate action under Article 27 lie under clauses (1) – (4). The obligations under clauses (5) – (6) under the Article are more aspirational, and therefore call for progressive realization. Similarly, he argues that the principles under Article 81 are very aspirational, and may never be fully realized when considered realistically. He therefore argues that they should be implemented over a period of time, and thus, progressively.

5.11 The Attorney General has unfortunately not responded to the arguments on discrimination put forward by CAJ, Katiba Institute, KHRC and CMD, even in his reply to the *amici's* and interested parties' submissions.

6 Issues for Determination

6.1 Having read counsels' written submissions and heard them in their oral arguments, the issues for determination are anchored on the questions advanced by the Attorney General in his reference for an Advisory Opinion. It is wise to reproduce the questions here:

(a) Whether **Article 81(b**) as read with **Article 27(4)**, **Article 27(6), Article 27(8), Article 96, Article 97,**

Article 98, Article 177(1)(b), Article 116, and **Article 125** of the Constitution of the Republic of Kenya require progressive realization of the enforcement of the one third gender rule or if it requires the same to be implemented during the general elections scheduled for 4th March 2013.

(b) Whether an unsuccessful candidate in the first round of presidential election under **Article 136 of the Constitution** or any other person is entitled to petition the Supreme Court to challenge the outcome of the first round of the said election under Article 140 or any other provision of the Constitution?

6.2 Before I make my determination on the questions posed by the Attorney General there is the matter of jurisdiction of this Court to hear the reference which matter was argued upfront as a preliminary objection to the reference. I held I had jurisdiction to hear the reference and I will now give my reasons for so holding.

7 **Jurisdiction.**

7.1 I have already stated that this Court has jurisdiction in this matter and it is imperative that I dispose with this before going into a consideration of the submissions by counsel on the substantive issues.

7.2 Counsel for CREAW and CMD argue that there is a failure by the Attorney-General to disclose all facts, site all relevant cases that have been decided by other courts and this,therefore, results in

an abuse of the process of the Court. It is important to note that one of the duties of an officer of the Court in the administration of justice is to avail before the Court all relevant facts, including those that may be against the officer's case. An intentional non-disclosure may make render the proceedings an abuse of court process, especially where such intent is established. Whether this action denies the officer access to court and the court downs its tools on him/her has to be determined.

7.3 Do the AttorneyGeneral's actions constitute an abuse of the court process? This Court has had occasion to pronounce itself on when it may hold there has been an abuse of court in Criminal Appeal No. of 2012, **ICJ V THE ATTORNEY-GENERAL & 2 OTHERS**. In that case Counsel's attention had been brought on decided cases on the issues he was raising in his application. Counsel was advised to consider those decisions before arguing his application. Counsel seemed not to consider the advice and the Attorney General argued that failure to do so was an abuse of court, punishable at least by ordering Counsel pay costs. In that application the learned judges considered decided cases on the issue. They clearly identified a clear case of an abuse of court in **NishithYogendra Patel v Pascale MirailleBaksh&Anor [2009] eKLR**where pursuing similar remedies in parallel (competent) courts was seen as an abuse of court process leading to the striking out of the application. The learned judges did not find the conduct of the Counsel amounted to an abuse of court and argued:

"Upon a careful reflection, we would not hold this to be a glaring abuse of Court process. The Supreme Court is only now

in the process of clarifying its appellate jurisdiction, through interpretation of statute law in the context of varying case-scenarios. The appellant by lodging the appeal, has laid before the Court an opportunity to further consolidate the jurisprudential gains in the earlier decisions."

7.4 While it is a principle never in dispute that Counsel should bring to the attention of the Court decisions that support their case and those that do not, the failure to do so only attracts reprimand and never amounts to deny them the opportunity to be heard. In this Reference the Attorney General simply swore an affidavit where he concisely laid down his arguments for seeking an Advisory Opinion well aware that the time for comprehensive arguments would take place when the Reference came up for hearing. Indeed, this is what happened and in his address in support of his Reference he canvassed all relevant cases and disclosed all facts. I do not think it was necessary to commit all arguments in a skeleton affidavit whose purpose was to give the Court the basis for the Reference for an Advisory Opinion.

7.3 CREAW and CMD still on the issue that the Reference was an abuse of court argued that the Attorney-General has not revealed whether his opinion was sought on this question, what advice he has given or whether that advice was followed by the Government. Given the criteria given on this question these concerns do not amount to an abuse of process of court and cannot be a basis for lack of jurisdiction to entertain the Reference. There is no legal bar in the court's Advisory Opinion jurisdiction that buttresses this position. The objection by

CREAW that the Attorney General has not proved that he is in a genuine dilemma fails for the same reason.

7.5 At this point I should revisit my pronouncement on this issue of jurisdiction for References seeking Advisory Opinion in this court. In the Reference **Re IEBC** the relevant paragraphs on this issue are as follows:

> ***"[37] The said Article 163(6) requires too that any request for an Advisory Opinion is to be "with respect to any matter concerning county government." In this respect, the relevant question is whether the issue as to "the date of the next general election" relates to county government.***
> ***[38] Learned counsel, Mr. Nowrojeewas clear, that this is a question of county government: for the elections the due date of which calls for confirmation, are the very device for establishing county assemblies, and county executives – and that is "county government". On this point, other counsel, Ms. Kimani, Professor Ghaiand Mr. Njiru, were in agreement.***
>
> ***[39] On the question whether election date is a matter of "county government", I have taken a broader view of the institutional arrangements under the Constitution as a whole; and it is clear to me that an interdependence of national and county governments is provided for – through a devolution-model that rests upon a unitary, rather***

than a federal system of government. Article 6(2) of the Constitution provides that:

"The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and co-operation."

Many offices established by the Constitution are shared by the two levels of government, as is clear from the terms of the Fourth Schedule which makes a "distribution of functions between the national government and county governments". Article 186(2), for instance, typifies the concurrence of operations, providing thus:

"A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government."

I have taken note too that the Senate (which brings together County interests at the national level) and the National Assembly (a typical organ of national government) deal expressly with matters affecting county government; and that certain crucial governance functions at both the national and county level – such as finance, budget and planning, public service, land ownership and

management, elections, administration of justice – dovetail into each other and operate in unity.

[40] There is, therefore, in reality, a close connectivity between the functioning of national government and county government: even though the amicus curiae Professor Ghaiurged that the term "county government" is not defined in the Constitution; and that the expression "county government" should not be too broadly interpreted. I consider that the expression "any matters touching on county government" should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government. However, interpretation in this category is to be made cautiously, and on a case-by-case basis, so as to exclude matters such as fall outside this Court's Advisory-Opinion jurisdiction.

[41] Now on the facts of the instant case, I would hold that election date is a question so central to county government, as to lie within the jurisdiction of this Court, in relation to the request for an Advisory Opinion. I am not, on this point, in agreement with counsel for 2nd Interested Party, that the request for an Advisory Opinion is beyond jurisdiction because no county government has as

yet been set up, and so no party has locus to seek such an opinion…

[83] With the benefit of the submissions of learned counsel, and of the comparative assessments recorded herein, I am in a position to set out certain broad guidelines for the exercise of the Supreme Court's Advisory-Opinion jurisdiction.

(I) For a reference to qualify for the Supreme Court's Advisory-Opinion discretion, it must fall within the four corners of Article 163(6): it must be "a matter concerning county government. "The question as to whether a matter is one "concerning county government", will be determined by the Court on a case-by-case basis.

(ii) The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as amicus curiae.

(iii) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the Court proceedings in question have been instituted after a request has been made

to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.

(iv) ***Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the applicant may be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial Court process."***

7.6 For the Court to have jurisdiction, the Reference must fall within the four corners elucidated. This request is unaffected by the last two prescriptions, as it is untouched by proceedings from lower Courts. It was, however, argued on behalf of CREAW that since appeals of this issue of two-third gender principle are now before the Court of Appeal a decision on this Reference could render them nugatory. It is true that this courts' decision binds the Court of Appeal, but it is for the Court of Appeal to make such a decision. I have no evidence that the pending appeals are on all issues raised in this Reference. In any event this court has held that it will decide matters that come to us on a case-by-case basis. We have also held we should not subvert the jurisdiction of the courts below. The Court of Appeal will take itsgolden chance to enrich the jurisprudence in this area. That objection therefore

fails.The Attorney General is a Constitutional Office that is capable of seeking an Advisory Opinion. **The only contention that remains is: is this a matter concerning county government?**

7.7 Matters of who are people's representatives in Parliament and the Senate are central to county governments. As pointed out by learned counsel for the IEBC, Mr. Norwojee, national governments even discuss the allocations of resources to county governments through procedures in Articles 110 and 111 of the Constitution. The constitution and validity of these two houses of Parliament therefore will affect their ability to deliver on these key obligations to county governments. The gender question is one that is quintessential to determining their validity.

7.8 The election of the President under Article 138 has been granted further grassroots significance by requiring county representation:

Article 138.

(1)…

(2) …

(3)…

(4) A candidate shall be declared elected as President if the candidate receives—

(*a*) More than half of all the votes cast in the election; and

(*b*) At least twenty-five per cent of the votes cast in each of more than half of the counties.

7.9 Indeed, the role of the Senate in county governments is its existential purpose. Article 96 makes this clear:

> **96.** (1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.
> (2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.
> (3) The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.
> (4) The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.

7.10 There cannot be any doubt that the issue of two-third gender principle in the elections to Parliament and the Senate is a matter "concerning county government." So is the election of the President. Thus this honourable Court has jurisdiction to hear the Reference by the Attorney General and deliver an Advisory Opinion.

8 **Interpretation of the Constitution**

8.1 Interpreting the various Articles that are in issue here is the fundamental issue in this Reference. Learned Counsels before

ushave suggested various methods of interpreting the Constitution that should be adopted by this Court. These methods have been used by various jurisdictions, including some prescriptions arising from Kenyan Courts, both under the repealed and current Constitutions. Fortunately, to interpret the Constitution we need not go further than its specific Articles that give usthe necessary guidance into its interpretation.

8.2 It is, therefore, necessary for the Court at this early opportunity to state that no prescriptions are necessary other than those that are within the Constitution itself. The Constitution is complete with its mode of its interpretation, and its various Articles achieve this collective purpose. It is in interpreting the constitution that our robust, patriotic, progressive and indigenous jurisprudence will be nurtured, grown to maturity, exported, and becomes a beacon to other progressive national, African, regional, and global jurisprudence. After all, Kenya correctly prides itself as having the most progressive constitution in the world with the most modern Bill of Rights. In my view this is the development of "rich jurisprudence" decreed by Section 3 of the Supreme Court Act "that respects Kenya's history and traditions and facilitates its social, economic and political growth."

8.3 Let me now look at the relevant Articles of the Constitution that lay critical guidelines to its collective interpretation. I start with Article 10:

Article 10.

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them––

(*a*) applies or interprets this Constitution;

(*b*) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include––

(*a*) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(*b*) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(*c*) good governance, integrity, transparency and accountability; and

(d) sustainable development.

8.4 Article 259 further expounds how these values are to be applied in the interpretation of the Constitution:

259. (1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

(2) …

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking …

8.5 The Constitution then narrows further to the particularly sensitive matter of the Bill of Rights, prescribing how these rights shall be applied in conformity to the general interpretation of the Constitution:

20. (1) The Bill of Rights applies to all law and binds all State organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(3) In applying a provision of the Bill of Rights, a court shall—

(*a*) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(*b*) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote––

(*a*) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(*b*) the spirit, purport and objects of the Bill of Rights.

8.6 The Supreme Court must and shall remain the exemplary custodian of the Constitution. It is from these articles that the Supreme Court finds its approach to the interpretation of the Constitution. The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such amanner as to stray from the letter of the Constitution. The obligation upon this Court to uphold this interpretation is provided for in Section 3 of the Supreme Court Act (Act No ...of 2011):

3. The object of this Act is to make further provision with respect to the operation of the Supreme Court as a court of final judicial authority to, among other things —

(a) assert the supremacy of the Constitution and thesovereignty of the people of Kenya;
(b) provide authoritative and impartial interpretation of the Constitution;
(c) develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth;
(d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya;
(e) improve access to justice; and
(f) provide for the administration of the Supreme Court and related matters.

8.7 The obligation of the Supreme Court is, therefore, to cultivate progressive indigenous jurisprudence in the momentous occasions that present themselves to the Court. By indigenous jurisprudence, I do not mean insular and inward looking. The values of the Kenyan Constitution are anything but. We need to learn from other countries and from scholars like the distinguished Counsel who submitted before us in this Court. My concern, when I emphasize “indigenous” is simply that we should grow our jurisprudence out of our own needs, without unthinking deference to that of our other jurisdictions and courts, however distinguished. This Court, and the Judiciary at large has, therefore, a great opportunity to develop a robust,

indigenous, patriotic and progressive jurisprudence that will give our country direction in its democratic development.

8.8 In interpreting the Constitution and developing jurisprudence, the Court will always take a purposive interpretation of the Constitution as guided by the Constitution itself. An example of such purposive interpretation of the Constitution has been articulated by the Supreme Court of Canada in **R v Big Drug Mart**(1985). In paragraph 116 of the ruling, the Court states:

> *The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect…to recall the Charter was not enacted in a vacuum, and must therefore… be placed in its proper linguistic, philosophic and historical contexts.*

8.9 Furthermore, in **Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC)**, Lord Wilberforce summarized the justification of this approach by stating that it was "*a generous interpretation… suitable to give individuals the full measure of the fundamental rights and freedoms referred to.*"

8.10 I further agree with the cited case on **S v Zuma(CCT5/94) (1995),** where the Constitutional Court of South Africa agreed with these decisions and emphasized that in taking this

approach, regard must be paid to the legal history, traditions and usages of the country concerned.

8.11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting the Constitution, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.

9 **Immediate and Progressive Realization**

9.1 The Attorney General advances an argument that the word "shall" used in Article 81 (b) is not instructive on whether implementation of this obligation is immediate or progressive. He rightly states that the use of this word has been interpreted on a case-by-case basis in Kenyan courts and other jurisdictions. Article 260 of the Constitution does not see it as a word requiring interpretation. The broad approach I have given on how the provisions of the constitution are to be interpreted makes it abundantly clear that it is unwise to tie in the interpretation of this Article to a single word. It is this broad approach that is holistic that will help me determine whether either immediate or progressive realization of the right to the gender quota is envisioned.

9.2 Reading Articles 81 (b), 27 (4), 27 (8) leaves me with no ambiguities as to the purpose and direction of these provisions. The ambiguity arises as it has been argued by the Attorney General, when the provisions of these Articles are read against

the content of the provisions of Articles 96, 97, 98 and 177 (1) (b). The Attorney General described this situation as a "conundrum," "lacunae," "inconsistency," and "downright contradiction." This is definitely true if the interpretation of these provisions is a narrow one as opposed to the broad approach that is decreed by the constitution. It is true the constitution will present the courts with inconsistencies, grey areas, contradictions, vagueness, bad grammar and syntax, legal jargon, all hallmarks of a negotiated document that took decades to complete. It reflects contested terrains, vested interested that are sought to be harmonized, and a status quo to be mitigated. These features in our constitution should not surprise anybody, not the bench, or the bar or the academia. What cannot be denied, however, is we have a working formula, approach and guidelines to unravel these problems as we interpret the constitution. We owe that interpretative framework of its interpretation to the Constitution itself.In the case of the Supreme Court theSupreme Court Act reinforces this framework.

9.3 The favouriteand popular legal argument articulated by Counsel is that if the framers of the constitution intended the implementation of the two-thirds gender principle to be progressive, it would have been easy for them to so provide. This argument always needs serious scrutiny and interrogation because it is always advanced as if it is obvious that would invariably be the case. In this Reference it is reinforced by the quotation of other Articles in the constitution that clearly provide for progressive realization. In my view this argument cannot, in itself, be conclusive. Nor are the High Court authorities binding on this Court besides them also calling for further interrogation,

harmonization and problematization. We need to look elsewhere to resolve this "conundrum." In my view we need to look at the arguments around non-discrimination and national values as decreed by the constitution; that political and civil rights demand immediate realization; and a thorough treatment of the historical, social, economic, and political basis of the two-thirds gender principle as decreed by Section 3 of the Supreme Court Act. Before I do that I can quickly depose of the issue raised over the separation of powers.

10 **Separation of Powers**

10.1 Contrary to the position taken by NGEC, I find that there is no violation of the principle of separation of powers in the Supreme Court's rendering of this Advisory Opinion under Article 163 (6). This Court's role is clearly defined in the Constitution. There is no evidence that this apex Court in exercising its constitutional mandate in this Reference has in any way entered the constitutionally preserved mandates of the Executive and Parliament.

10.2 Furthermore, I am equally persuaded of this Court's power to declare Parliament unconstitutionally constituted. It is this Court's duty to defend the Constitution, and ensure that all bodies within it are constituted constitutionally and employ all powers donated by the People to it constitutionally. I am similarly guided was the Egyptian Constitutional Court in **Anwar SubhDarwish Mustafa v The Chairman of the Supreme Council of the Armed Forces, Supreme**

Constitutional Court Case No. 20/24. In this case, the Supreme Constitutional Court of Egypt declared Parliament unconstitutional in regard to its constitution of 1/3 of its seats, which were to be reserved for independent candidates. The Egyptian Parliament had introduced amendments purporting to introduce competition between political party candidates and independents for the reserved seats. This resulted in independents getting less than the constitutionally required 1/3 membership in Parliament. The Supreme Constitutional Court of Egypt declared that the election of this 1/3 of Parliament was unconstitutional, and directed that elections should be redone to comply with the Constitution. The Supreme Court of Egypt not only looked at the provisions of the Constitution Declaration, but also delved in the history and purpose of the provisions. The Court was persuaded that the framers of the constitution wanted a Parliament that had party members and independents to give Egypt collective intellect and diverse visions that the country needed in its democratic development.

10.3 I am persuaded to take a similar approach to this reference and find,as exemplary custodian of the Constitution that the Supreme Court of Kenya hasthe power donated it by the People of Kenya to do so. Parliament and Senate that do not reflect the two-thirds gender principle shall be unconstitutional.

11 <u>Discrimination, National Values and the Kenyan Context</u>

11.1 From article 27, and from CEDAW, it is clear that disenfranchisement of the Kenyan women in the political arena is a form of discrimination. CEDAW applies through the operation of Article 2 (6) of the Constitution of Kenya, having been acceded to by Kenya on 9th March 1984. These provisions collectively call for the immediate removal of this discrimination through the empowerment of women representation in political office, with CEDAW calling for stop-gap measures to be put in place to reverse the negative effects on our society through the operation of this systemic discrimination.

11.2 The history of this disenfranchisement ashamedly started with the birth of this country. There was not a single female MP in the first legislature in 1963. These numbers have only been marginally improving: 4.1% female representation in Parliament in 1997, 8.1% in 2002 and 9.8% in 2007. This is despite the female population being the majority, albeit slightly, at 50.44%. This history must have in the minds of Kenyans, particularly women, when they voted for a new constitution through a referendum and celebrated its promulgation on August 27, 2010. The Supreme Court Act decrees we take this history into account. In doing so I see very clear progressive realization of gender equity and equality, that was slow, but which was progressively consolidated. The two-thirds gender principle reflects this historical progression.

11.3 The Attorney General properly comparedwomen representation in Parliament to other East African countries that have adopted affirmative action programs for women representation in the

legislature. According to the Attorney General's submission, Uganda adopted affirmative action procedures in its 1995 Constitution and women's representation now ranks at 35% in 2011, up from 18.1% in 1996. The United Republic of Tanzania adopted a distribution of seats through proportional representation of political parties through a Constitutional Amendment in 1995- women's representation has risen in the Tanzanian Assembly from 17.5% in their 1995 elections to 36% in their 2010 elections. Rwanda has the world's most documented affirmative action program in its Constitution, has seen representation of women in its lower house (Chamber of Deputies) rise from 17.1% in 1994 to 56.3% in 2008, and representation in its upper house (Senate) now stands at 38.5% as at 2011. Rwanda is the only country in the world with a female majority in parliament. This comparison has no force of law in the instant Reference, but Imust observe that Kenya, as an anchor state in the Eastern and Horn of Africa would demean its status, and that of its Parliament, if the patriotic duty of guaranteeing gender equity and equality was not seen in the region as one of its priorities.

11.4 What is undeniable is Kenyan women have continuously and consistently struggled for their equity and equality in all spheres of life. There is a consistent historical thread of this agitation as documented by the publication**Ed; Ruto, Kameri-Mbote&Muteshi-Strachan, Promises and Realities: Taking Stock of the 3rd UN International Women's Conference (Nairobi: ACTS Press, 2009)** that is consummated by the majority vote in the 2010 referendum and the subsequent promulgation of the constitution on August 27,

2010. Arguing that the two-thirds gender rule requires progressive realization flies into the face of this history of struggle by Kenyan women. Katiba Institute is definitely right when it argues that the one-third is simply a minimum and that progressive realization must be confined to developments that move the country towards a 50/50% threshold in gender equity and equality.

11.5 One point on the issue of discrimination that has not been taken up by any Counsel in this Reference is obvious from the provisions of Article 177 (1) (b). In deference to Mr. Mwenesi for CMD, he did argue that the Article in question is a clear proof of the submission for immediate realization of the two-thirds gender principle. In my opinion this puts to rest the argument of progressive realization of the principle. I see no reason a constitution that decrees non-discrimination would discriminate against women running for Parliament and the Senate. I see no constitutional basis for discrimination **among** women themselves as the consequence of the progressive realization of the two-thirds gender principle would entail. A constitution does not subvert itself. Deciding that women vying for county representation have rights under constitution while their counterparts vying for Parliament and the Senate are discriminated against would result in that unconstitutional position. This article read with the provisions of Articles 27(4), 27 (8) and 81 (b) make it abundantly clear that the two-thirds gender principle has to be immediately realized.

11.6 I believe the immediate implementation of the two-thirds gender principle is reinforced by **values** of patriotism, equity,

social justice, human rights, inclusiveness, equality and protection of the marginalized. Such values would be subverted by an interpretation of the provisions that accepts progressive realization of this principle.

11.7 I am in agreement with Counsel for the Katiba Institute that the Constitution's view to equality, as one of the values provided under the constitution, in this case is not the traditional view of providing equality before the law. Equality here is **substantive**, and involves undertaking certain measures, including affirmative action, to reverse negative positions that have been taken by society. Where such negative exclusions pertain to political and civil rights, the measures undertaken are immediate and not progressive. For example, when after struggles for universal suffrage Kenyans succeeded in getting that right enshrined in the Bill of Rights of the 1963 constitution, nobody could be heard to argue that we revert back to the colonial pragmatic progressive realization of the right to vote!

11.8 The requirement that the electoral system shall comply with the principle under Article 81 (b) that not more than 2/3 of members of elective bodies are of the same gender also falls on key players in the electoral system. The key players in the electoral system in Kenya are the State, the IEBC and political parties. The role of political parties in the electoral system and the need for their regulation can be seen in different Articles in the Constitution, in particular Article 90 on Party Lists. Article 90 provides for regulations on how nominations for reserved seats in Parliament, and requires that these lists reflect gender equality and the

ethnic diversity of Kenya. The IEBC is tasked with ensuring that the party lists comply with these rules.

11.9 Are political parties in their party lists affected by Article 81 (b)? In my considered view, they are. Parties are an integral part of the electoral system and their party lists must ensure that they comply with the 2/3 rule. Parties are the only vehicles through which candidates for parliamentary seats are established. If party lists do not contain any/insufficient female candidates, no/insufficient female candidates will be elected.As such, it is important for political parties to establish internal mechanisms through which to ensure that not more than 2/3 of the entire list comprises of one gender. The IEBC is mandated by dint of the same provision to ensure that these party lists comply with this provision.

11.10 There were powerful arguments raised by Counsel Thong'orifor CREAW on what is happening here and now in the implementation of the two-thirds gender principle. She argued that the state was, indeed, implementing the principle as a matter of clear policy. Both CIC and CMD argued persuasively that stakeholder convening and discussions on the two-thirds gender principle was always about implementation and not interpretation. There is evidence that this position is correct. At no time did the Attorney General controvert the positions argued by Counsel. There was no argument by Counsel that these activities have given the principle constitutional validity. If the argument had indeed, been made by Counsel I would have held that it was invalid.

11.11 I hold, therefore, in the words of the South African Constitutional Court in **August v The Electoral Commission CCT 8/99** that Parliament by its silence cannot deprive the women of this country the right to equal representation. I take judicial notice of Parliament having a short period before it is dissolved, but I do not see Parliament refusing to legislate in a matter like this that affects the majority of the voters in this country. I have no reason to doubt the patriotism of the current Parliament that is fully aware of the constitutional consequences of refusing to legislate. In the event that Parliament fails to do so, any of the elected houses that violate this principle will be unconstitutional and the election of that house shall be null and void. Article 3 of the Constitution makes this clear:

> **3.** (1) Every person has an obligation to respect, uphold and defend this Constitution.
> (2) ***Any attempt to establish a government otherwise than in compliance with this Constitution is unlawful.***

11.12 It is worthy of note that arguments by Counsel on progressive realization of the two-thirds principle implied that Parliament would be called upon to legislate. Mr. Mwenesi raised the issue of the implications of the timeline of 5 years for Parliament to legislate under the Fifth Schedule of the constitution. He argued that 5 years would expire in the mid-term of the new Parliament. It is implied that Parliament would

legislate. These scenarios suggest that the best option in my view, an option that avoids the unconstitutionality of the next Parliament, is to legislate here and now and secure the rights of women under the two-thirds gender principle.

It is my opinion, therefore, that the answer to the Attorney General's first question is that the two-thirds gender principle be implemented during the General Election scheduled for March 04, 2013.

DATED and **DELIVERED** at **NAIROBI** this 11th Day of December, 2012

.....

W. MUTUNGA
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

I certify that this is a true copy of the original

Ag. REGISTRAR
SUPREME COURT OF KENYA