REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. 74 OF 2011

(Coram: Mwongo PJ, Ngugi,Korir,Odunga and Onguto jj)

J HARRISON KINYANJUI.....……..……PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....……..1ST RESPONDENT

JUDICIAL SERVICE COMMISSION.....…….2ND RESPONDENT

JUDGEMENT

Introduction

1. The Petitioner herein, **J Harrison Kinyanjui**, is an advocate of the High Court of Kenya.
2. The 1st Respondent, **the Attorney General**, is established by Article 156 of the Constitution of Kenya and he is the Chief Legal Adviser of the Government with the mandate of *inter alia* promoting, protecting and upholding the rule of law and defending public interest.
3. The 2nd Respondent, **the Judicial Service Commission** (hereinafter referred to as "the Commission")**,** is a Constitutional Commission established under Article 171 of the Constitution.
4. According to the Petitioner, following interviews conducted by the Commission for the posts of the Chief Justice and the Deputy Chief Justice under section 30 of the Judicial Service Act, 2011 the Commission nominated **Dr Willy Mutunga** and **Ms**. **Nancy Baraza**, as the Chief Justice and Deputy Chief Justice respectively.
5. According to the Petitioner, this was contrary to his legitimate expectation that the Commission would avail to both the President and Parliament names of such eligible interested parties and who would be recommended for the two respective posts, and from which list a choice for the said appointments would ultimately be made. According to him, his position was validated by the amendment of section 30(3) of the Judicial Service Act, 2011 (hereinafter referred to as "the Act") vide the ***Statute Law (Miscellaneous Amendment) Act***, 2015 (also hereinafter referred to as "the Amendment Act") which deleted subsection (3) of the said section and substituted it with a new subsection. To the Petitioner, the Commission cannot lawfully recommend and present only one nominee for the respective positions of the Chief Justice and the Deputy Chief Justice to the President for appointment since to do so would in effect amount to a concluded decision on their appointment and that would curtail the powers of the President and Parliament to constitutionally deliberate on the choice of whom to appoint to such posts.
6. It was contended that the Commission contravened Article 166(1)(a) of the Constitution by constituting itself as the appointing authority, inasmuch as it left no room for either Parliament to

debate the prospective and competing qualified persons and for the President to finally approve. The Petitioner's contention was that the President's role is that of the appointing authority and is not a ceremonial role merely of receiving the names from the Commission and forwarding them to the National Assembly for rubberstamping but is now given a leeway under the aforesaid amendments in the appointment process. The Petitioner therefore urged the Court, pursuant to the transitional clauses of the provisions of section 24(2) of the 6th Schedule to the Constitution rule that the said amendments are valid.

7. It was the Petitioner's case that no consultations can be made in the arising circumstances which amount to an unconstitutional usurpation by the Commission of the exercise of these powers by the Executive and Parliament, and an unconstitutional foisting upon the Kenyan people of a choice by a Constitutional Commission mandated to act in furtherance of the principles of the Constitution. To him, by presenting only one name to the President of Kenya, there would be no democratic choice given to the President or Parliament as envisaged under Article 10(2)(b) of the Constitution. However, pursuant to section 13(2) of the Act, the members of the Commission are bound and obligated to abide by Article 10 of the Constitution in the discharge of their functions.
8. The Petitioner further averred that upon concluding its interviews on May 12th 2011, the Commission immediately proceeded to announce its decision. However, under section 21(d) and 23 of the Act, the Commission is obliged to keep a record of its proceedings and minutes of all its meetings. Further, pursuant to section 16 of the Act, it is obliged to ensure that each of the applicants vying for the respective post is subjected to an interrogation of their suitability to the positions they respectively applied for by secret ballot.
9. To the Petitioner, the spirit and tenor of section 15(1) of the Act is the provision of a set of nominees to Parliament for such appointments as are envisaged under the watch of the Commission, and indeed section 15(1)(b) of the said Act envisages the possibility of the rejection of the names of the nominees by Parliament and the subsequent presentation of a fresh name from a list o nominees by the President.
10. The Petitioner therefore, by his further amended petition, sought the following orders:

1. **A declaration that the Judicial Service Commission is bound under Article 10(b) of the Constitution of Kenya to apply the principle of transparency, democracy, fairness and good governance to present at least 3 nominees to the President of the Republic of Kenya for appointment to the position of the Chief Justice and Deputy Chief Justice.**
2. **A declaration that the Judicial Service Commission is bound to comply with Article 10(2)(c) of the Constitution of Kenya, 2010 in the process of conducting its public interviews of such interested parties for the posts of the Chief Justice and Deputy Chief Justice and it ought to demonstrate, uphold, or conduct itself with integrity, transparency or accountability in arriving at its decision thereon.**
3. **Any other relief that this Honourable Court shall deem expedient in the circumstances.**
4. **The 1st Respondent to bear the arising costs.**

11. In his submissions the Petitioner defended his right to commence these proceedings on the basis of Articles 3(1), 22, 23 and 258 of the Constitution contended that as long as any petitioner can demonstrate that the Constitution has been contravened or is threatened with contravention, such relevant proceedings can be brought before this Court for appropriate relief and the petitioner need not have any personal interest in the matter.
12. It was further submitted that Article 165(3) of the Constitution accords this Court jurisdiction to hear any question directed at the interpretation of the Constitution including the determination of the question whether any law is inconsistent or in contravention of the Constitution, which is the case here.

13. According to the Petitioner, in shortlisting the persons to be interviewed for the posts of the Chief Justice and Deputy Chief Justice, the Commission is bound by the provisions of Article 172(2) of the Constitution which requires it to be guided by factors of competitiveness and transparency in the general processes of appointment of judicial officers and other staff of the judiciary and the promotion of gender equality.
14. He contended that submitting only one name to the President for appointment to the two respective posts, violates Article 172(2) of the Constitution. To him, if competitiveness is a tenet espoused in Article 172(2) of the Constitution, the Commission cannot purport to uphold or respect it by presenting only one name of a candidate to be appointed by the Head of State whenever a vacancy arises in the judicial posts of Chief Justice, Deputy Chief Justice and Judges.
15. The Petitioner reiterated that in effecting Article 166(1) of the Constitution, the Commission is bound by Article 10(2)(b) of the Constitution. In his view, Article 166(1) does not stipulate the number of nominees to be presented to the President in order to select from any number of persons the final nominee. Further, no limitation is placed on the Presidential powers in terms of a cap on the number of nominees to be availed to the President by the Commission. It was submitted that the Commission has to act within the prescribed legal framework and that the functional operationalisation of Article 166(1)(a) of the Constitution is given effect by section 30 of the Act and the Regulations thereunder. In addition, in recruiting judicial officers, the Commission is mandated to secure a panel of its own Commissioners and whereas it can hire experts in securing the best services in furtherance of its objectives, it cannot look outside itself to a recruiting agency since Parliament must have intended that the Commission be independent in that regards. In support of this submission the Petitioner relied on **Andrew Omtatah Okoiti vs. Attorney General & 2 Others [2011] eKLR** where it was held that:

"It is clear that the short listing panel can only be constituted from among the Commissioners. There is no statutory basis for including a human resource management expert in the panel...Section 14 of the Act permits the JSC to hire experts and consultants and it is my considered view that a human resource expert can assist the Commission to prepare a suitable interview manual for use in future recruitments."

16. It was submitted that the Commission is also governed in its selection process by the Regulations under the Act, in particular Regulation 14 to ensure compliance with the principle of good governance as espoused in Article 10(2) of the Constitution. The said Regulation, it was submitted, directs the Commission, within seven days of the conclusion of the interview, to deliberate and nominate the most qualified applicants taking into account gender, regional, ethnic and other diversities of the people of Kenya.
17. It was the Petitioner's case that the said Regulation is not framed in the singular "applicant" but in plural "applicants", hence there will be no conflict with the amended section 30(3) of the Act, as contended by learned counsel for the 2nd Respondent, the Commission. In his view, each member of the selection panel of the Commission is required to vote according to his or her personal assessment of the individual applicant's qualifications as determined under the criteria and procedures set out in the Schedule to the Act. In support of his submissions the Petitioner cited **Andrew Omtatah Okoiti vs. Attorney General & 2 Others** (supra) where **Musinga, J** (as he then was) expressed himself as follows:

"Regulation 14(5) which is cited hereinabove, in my view, does not require that the names of each and every applicant who receives three or more affirmative votes be recommended for appointment. In its functions, the JSC must be guided by competitiveness. I believe the proper construction of that regulation is that for an applicant's name to be forwarded to the President

for recommendation, the applicant must have received three or more affirmative votes. JSC would then pick the best out of those who have received three or more affirmative votes and recommend them for appointment. The law is silent as to whether only one name should be picked for each available position or whether the top two or three candidates ought to be recommended so that the appointing authority has some choice. Personally, I would prefer the latter."

18. To the Petitioner, section 30(3) of the Act, as amended has now sealed this unpleasant lacunae, and to render functional and effectual the applicable law to give effect to Article 166 in tandem with Article 10(2) of the Constitution. On this aspect, the Petitioner once more relied on **Andrew Omtatah Okoiti vs. Attorney General & 2 Others** (supra) in which the learned Judge opined that:

"One of the national values stated under Article 10 of the Constitution which binds all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution or any law is transparency. One of the ways of promoting transparency in a recruitment exercise of this nature is where the recruiting panel openly lists the names of successful applicants and the grade or marks awarded to the top three or four of the applicants, forward the report to the President then afford him an opportunity to exercise his discretion accordingly. More often than not the President will appoint the best out of several names forwarded to him."

19. To the Petitioner, the democratic choice on the part of the President in appointing the Chief Justice or the Deputy Chef Justice as now expressed in the amendment to section 30(3) of the Act, buttresses the spirit of Article 155 of the Constitution. The Petitioner cited the decision of **Lenaola, J** in **Consumer Federation of Kenya (COFEK) vs. Public Service Commission & Another [2013] eKLR** as supporting this position. In that case the learned Judge held that:

"The above Article merely seeks that the 1st Respondent should "recommend" the appointment of persons to the office of Public Secretary. It does not "appoint" nor does it "approve" the appointments made as would seem to be the Petitioner's argument. The role of the 1st Respondent is important but only one in a chain of events."

20. In the Petitioner's view, Article 166(1) of the Constitution vests the appointing power of the Chief Justice and the Deputy Chief Justice on the President of the Republic of Kenya, while the "recommendation" is left to the 2nd Respondent Commission. In turn, it was submitted that the nomination process is left to the Commission's selection panel, within the prescription of the Regulations set out in the Act and hence neither of these aspects can be overridden or assumed by one party without violating the spirit of Article 166(1) of the Constitution. By way of analogy, the Petitioner urged the Court to consider the provisions of section 6 of the ***Ethics and Anti Corruption Commission Act*** in particular the role of the Public Service Commission vis-à-vis the Judicial Service Commission.
21. According to the Petitioner, section 3(5)(e), (f) and (g) of the ***Ethics and Anti Corruption Commission Act*** which were lawfully enacted and are thus constitutional and consistent with similar provisions affecting equally important Constitutional Commissions, are not any different from the amendments contained in section 30(3). The Petitioner relied on the said decision of **Consumer Federation of Kenya (COFEK) vs. Public Service Commission & Another** (supra).
22. Responding to the objection by the 2nd Respondent that the petition had been overtaken by events, it was contended that the amendments made to the petition render it alive for

determination. To the Petitioner, under Article 23(3) of the Constitution, this Court is entitled to grant appropriate reliefs including declaration of rights, injunctions, conservatory orders, declaration of invalidity of any law, compensation and judicial review. In this case, since the petition seeks declarations, it was argued that the orders sought herein ought to be granted and, at a bare minimum, an award of costs to be borne by the Respondents.

1st Respondent's Case

23. Although the 1st Respondent had initially filed grounds of opposition dated 30th November, 2012, it seems that in due course it had a change of heart and before us, **Mr Miller**, his learned counsel, informed us that he was supporting the petition. Apart from urging the Court to order the 2nd Respondent to bear the costs of the petition, the 1st Respondent adopted his submissions in petition no. 3 of 2016 where the issues were substantially similar to the issues raised in this petition.
24. Since the 2nd Respondent's submissions in petition no. 3 of 2016 have been reproduced therein, we do not intend to duplicate the same in this petition.

2nd Respondent's Case

25. In opposition to the petition, the 2nd Respondent, the **Judicial Service Commission**, filed the following grounds of opposition:

1. **THAT the amended Petition filed on 14th January 2016 has been overtaken by events and should be dismissed with costs.**
2. **THAT the amendments to section 30(3) of the *Judicial Service Act* by the *Statute Law (Miscellaneous Amendment) Act, 2015* which provides that the Secretary of the Judicial Service Commission (JSC) shall forward the names of three (3) qualified persons for each vacant position to the President are inconsistent with the provisions of Article 166(1)(a) of the Constitution and therefore null and void.**
3. **THAT the legality and validity of the amendment to section 30(3) of the *Judicial Service Act* has been challenged in Petition No. 3 of 2016; Law Society of Kenya vs. AG & Others, which is pending determination by this honourable court.**
4. **THAT the role of the President in the appointment of the Chief Justice and the Deputy Chief Justice under Article 166(1) of the Constitution is facilitative as Head of State and must be in accordance with the recommendation of the Judicial Service Commission.**
5. **THAT the drafters of the Constitution did not contemplate that the process of nomination and recommendation for appointment of the judges of the Superior Courts would be subject to any veto by the President. The amendments to the *Judicial Service Act* have an unconstitutional effect and therefore are null and void.**
6. **THAT the constitutional structure and design was intended to insulate the process of appointment of judges from interference by any organ of the state and the President's role is purely facilitative.**
7. **THAT the amended section 30(3) of the *Judicial Service Act* is contrary to the doctrine of separation of powers and violates the constitutional independence of the judiciary.**
8. **THAT the *Statute Law (Miscellaneous Amendment) Act* cannot be used to make substantive amendments to statutes and amendment to section 30(3) of the *Judicial Service Act* violates Article 118 of the Constitution for want of public participation.**

26. It was submitted on behalf of the Commission that this petition raises three issues for determination and these are:

i. **The role on the President and Judicial Service Commission in the appointment of Chief Justice and Deputy Chief Justice under the new Constitution vis-à-vis the doctrine of separation of powers.**
ii. **Whether the Judicial Service Commission complies with provisions of Article 10(2)(b)(c) in the process of conducting public interviews.**
iii. **Whether section 30(3) of the Judicial Service Act as amended is in accord with the Constitution.**

27. The Commission relied on the provisions of Article 166(1)(a), 171 and 171(1)(b) of the Constitution as well as section 30 of the ***Judicial Service Act*** and the First Schedule to the Constitution and submitted that there is no provision for any role to be played by the President in the appointment process of judges. To the Commission, this was deliberate as it was intended to insulate the process of appointment of judges and undergird the independence of the judiciary. However, the Commission acknowledged that the Constitution reserves for the President, as head of state, the power to appoint in accordance with Article 172 of the Constitution once the Commission has interviewed and recommended persons fit to be appointed.
28. It was submitted that whereas Article 132(2) of the Constitution provides the general appointing powers of the President, the same confirms that the appointment of judges is not one of the reserved functions of the President under the Constitution, hence the constitutional scheme and design that vests the President with the power to appoint, nominate and dismiss the cabinet secretaries and other state and public officers does not extend to judges.
29. It was the Commission's position that the process of the enactment of the ***Statute Law (Miscellaneous Amendments) Act, 2015*** violated Article 118 of the Constitution and secondly, its effect would be to violate Articles 166(1)(a) and (b) and 172 of the Constitution. The Commission relied on ***Compendium and Analysis of Best Practice in the Appointment, Tenure and Removal of Judges under Commonwealth Principles*** in support of its submissions and added that the Constitution sought to entrench the independence of the judiciary by limiting the role of the President in the appointment of judges and members of the Commission. In support of this submission the Commission also cited ***Kenya Democracy and Political Participation: a Review by AfriMap, Open Society Initiative for Eastern Africa and the Institute for Development Studies*** (IDS).
30. To the Commission, the amendment to section 30 of the Act undermines and violates the Constitution by clawing back on the independence of the judiciary and its effect is to confer on the President a role and mandate not provided for under the Constitution hence is patently unconstitutional. This Court was therefore urged to boldly interpret and give effect to the Constitution and define the limits of the role of the President in the appointment of judges in the new constitutional dispensation. The Commission relied on the Uganda case of **Karahunga vs. Attorney General [2014] UGCC** and based on **Speaker of the Senate & Another vs. Hon. Attorney General & Others Advisory Opinion Reference No. 2 of 2013** and **Hugh Glenister vs. President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC)**, this Court was urged not to shy away from granting the orders sought in the petition.
31. Based on **Democratic Alliance vs. President of the Republic of South Africa & 3 Others [2012] CCT 122/11**, it was submitted that the determination of the appropriate qualifications for appointment as judges is on the Commission as the Constitution contemplates no role for the President in determining the qualification for appointment and that this is intended to safeguard judicial independence.
32. To the Commission, the impugned amendment effectively vests on the President discretion in the appointment of the Chief Justice and the Deputy Chief Justice contrary to Article 166 of the Constitution as read with the supremacy clause in Article 2(4) of the Constitution. It was further

submitted that the process of effecting the same amendment was in violation of the Constitution since the object of the ***Statute Law (Miscellaneous Amendments) Act*** was to correct anomalies, inconsistencies, outdated terminology or errors which are minor, non-controversial amendments to a number of statutes at once. To the Commission, Parliament violated Article 118 of the Constitution in making a substantial amendment to the Act through the said Amendment Act in a process which did not involve public participation.

33. It was submitted that though the petition seeks a declaration that the Commission is bound to apply the principles of transparency, democracy and accountability as provided under Article 10(2)(b) and (c) of the Constitution whilst conducting the appointing process, the Commission had adhered to the same principles since they are integral aspects of securing the independence of the Commission and the judiciary as enunciated in the Commonwealth Latimer House Principles where it is stated that judicial appointment should be made on the basis of clearly defined criteria and by a publicly declared process., as provided in section 30 of the Act as read with the First Schedule to the Act.
34. It was further submitted that the Commission is bound by Article 172(2)(a) of the Constitution which requires it to adhere to the principles of competitiveness and transparent process as well as Article 249(1) of the Constitution. In this respect the Commission again relied on ***Compendium and Analysis of Best Practice in the Appointment, Tenure and Removal of Judges under Commonwealth Principles***.
35. To the Commission however, the provisions of the Constitution and the Act are observed and complied with by the Commission in the appointment process.
36. The Commission therefore invited the Court to make orders which would give effect to the Constitution and uphold the independence of the judiciary and the Commission. It was submitted that the alleged violations of the Constitution by the Commission were without basis. However, the Commission submitted that the amendment to section 30(3) of the Act is patently unconstitutional and the Court was urged to declare it to be so and to dismiss the petition with costs.

Determinations

37. We have considered the issues raised in this petition.
38. We are aware that a substantial part of this petition has been determined in Petition No. 3 of 2016 between the Law Society of Kenya and the Attorney General & Another though not in an exactly similar fashion. Whereas in this petition the effect of the orders sought amount to the validation of the amendments to section 30(3) of the ***Judicial Service Act, 2011*** vide the ***Statute Law (Miscellaneous Amendments) Act, 2015***, Petition No. 3 of 2016 – Law Society of Kenya vs. The Attorney General & Others - sought that the same amendments be annulled. We have already found in the said Petition that the said amendments were unconstitutional. We therefore adopt our findings in the said petition with respect to the issue whether the Commission ought to be obliged to forward three names to the President for the purposes of appointment of the Chief Justice and the Deputy Chief Justice and hold that the Judicial Service Commission is not obliged to forward three names to the President for the purposes of appointment of the Chief Justice and the Deputy Chief Justice. We also adopt the same in so far as the constitutionality of the amendment to section 30(3) of the ***Judicial Service Act, 2011*** vide the ***Statute Law (Miscellaneous Amendments) Act, 2015*** is concerned.
39. In this petition, the Petitioner, an advocate of the High Court of Kenya, defended his right to commence these proceedings and based on Articles 3(1), 22, 23 and 258 of the Constitution contended that as long as any Petitioner can demonstrate that the Constitution has been contravened or is threatened with contravention, such relevant proceedings can be brought before this Court for appropriate relief and the Petitioner need not have any personal interest in

the matter.

40. On this issue, we wish to quote the holding in **Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010**, in which the Court expressed itself as follows:

"Over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by an outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The strict rule of locus standi applicable to private litigation is relaxed and a broad rule is evolved which gives locus standi to any member of public acting bona fide and having sufficient interest in instituting an action for redressal of public wrong or public injury by a person who is not a mere busybody or a meddlesome interloper; since the dominant object of Public Interest Litigation is to ensure observation of the provision of the constitution or the law which can be best achieved to advance the cause of the Community or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, bona fide and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like action popularis of Roman Law whereby any citizen could bring such an action in respect of public delict. Standing will be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy… In Kenya the Court has emphatically stated that what gives locus standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The court equally has recognised that organisations have rights similar to that of individual private member of the public. A new dawn was the ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of locus standi were broken and the law was liberalised and a purposeful approach took the driving seat in the area of Public Law. In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental rights, and broad public interest protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of locus standi. Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons

represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not assist such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception…"

41. The Court continued:

"In the interest of the realisation of effective and meaningful human rights, the common law position in regard to locus standi has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organisation being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to locus standi is required to fulfil the Constitutional court's mandate to uphold the Constitution as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled."

42. In **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others** Civil Appeal No. 290 of 2012 the Court of Appeal stated at page 16 as follows:

"Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution."

43. Article 258 of the Constitution provides as follows:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

44. Long before the promulgation of the current Constitution, it was held on 11th March, 1970, in Shah Vershi Devji & Co. Ltd vs. The Transport Licencing Board **Nairobi HCMC No. 89 of 1969 [1970 EA 631; [1971] EA 289** that:

"Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word "person" is defined in section 123 as including "any body of persons corporate or unincorporated. Thus, a company is a "person" within the meaning of Chapter V of the constitution which is headed "Protection of Fundamental Rights and Freedoms of the Individual" and would be entitled to all the rights and freedoms given to a "person" which it is capable of enjoying. The word "individual" can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a "person" and is, from its nature, capable of being enjoyed by a "corporation" then a "corporation" can claim it although it is included in the list of rights and freedoms of the individual". The word "individual" like the word "person", does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word "individual". "Individual" seems to be any legal person who is not the general public."

45. The issue of standing was also dealt with by **Nyamu, J** (as he then was) in **Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** as follows:

"The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others…Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law…The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue….Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase "person aggrieved" was treated as a question of fact – "grievances are not to be measured in pounds and pence"…Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to

restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest…"

46. In other words the Judge was of the view that the strict interpretation of the locus standi rule in public law litigation ought to be relaxed so as not to lock out persons with genuine grievances from being heard by the Courts. The Judge therefore continued to state that:

"In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them……..The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are "persons directly affected". I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan."

47. It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case the Constitution has opened the doors of the Courts very wide to welcome any person who has bona fide grounds that the Constitution has been or is threatened with contravention to approach the Court for an appropriate relief. In fact, since Article 3(1) of the Constitution places an obligation on every person to respect, uphold and defend the Constitution, the invitation to approach the Court for redress as long as the person holds bona fide grounds for believing that the Constitution is under threat ought to be welcome.
48. In this case we cannot fault the Petitioner for instituting these proceedings and we hold that he was within his right to commence these proceedings.
49. It was contended that in short listing the persons to be interviewed for the posts of the Chief Justice and Deputy Chief Justice, the Commission is bound by the provisions of Article 172(2) of the Constitution which requires it to be guided by factors of competitiveness and transparency and the promotion of gender equality, in the general processes of appointment of judicial officers and other staff of the judiciary. It was further submitted that the Commission is also governed in its selection process by Regulations under the Act, in particular Regulation 14, to ensure compliance with the principle of good governance as espoused in Article 10(2) of the

Constitution.

50. In our view, as a matter of principle, this submission cannot be faulted. We associate ourselves with the ***Commonwealth Latimer House Principles*** which state that judicial appointment should be made on the basis of clearly defined criteria and by a publicly declared process. We also defer to ***Compendium and Analysis of Best Practice in the Appointment, Tenure and Removal of Judges under Commonwealth Principles*** that:

"Transparency requires that such specific criteria or approaches to evaluation should also be published, alongside the basic constitutional and statutory criteria so that both those interested in judicial office and the wider public may be aware of the qualities that are sought in a judge. The second aspect of transparency, which is much more the responsibility of the commission, is to ensure that judicial selection occurs by way of a 'publicly declared process'. There is a close link with the criteria for judicial office, as the very purpose of having criteria would be undermined if they were not applied throughout the process of selection."

51. Article 10(1) of the Constitution provides that:

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.

52. That the Judicial Service Commission falls within the persons and bodies enumerated hereinabove is not in doubt. It is also not in doubt that in carrying out its selection process the Commission applies and interprets both the Constitution and the ***Judicial Service Act***. Accordingly, the Commission is bound by the national values and principles of governance.
53. Article 10(2) proceeds to set out the examples of the said national values and principles of governance as:

(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 marginalised;

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

(d) sustainable development.

54. Therefore in carrying out its constitutional and legislative mandate, the Commission is bound, by *inter alia* the principles of democracy, the rule of law, good governance, integrity, transparency and accountability. The rule of law requires that the Commission complies with the provisions of the Act and the Regulations made thereunder including the timelines stipulated therein and the need to inform the candidates of their fates within the aforesaid timelines. To this end, the ***Concluding Oberservations of the Human Rights Committee on the Congo***, UN document CCPR/C/79/ADD. 118 para. 14 stated that:

"The process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encourages. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary."

53. To this end, Paragraph 14(1) of the First Schedule to the Act provides that:

The Commission shall, within seven days of the conclusion of interviews, deliberate and nominate the most qualified applicants taking into account gender, regional, ethnic and other diversities of the people of Kenya.

54. Paragraph 15 on the other hand provides that:

(1) The Secretary shall, within seven days of the Commission's vote, cause the applicants to be notified by telephone or electronic means, about the Commission's decision.

(2) Despite subparagraph (1), the Secretary shall cause to be transmitted to each applicant, a written notice of the Commission's decision.

(3) The names of the persons nominated for recommendation for judicial appointment may be posted on the Commission's website and placed in its press release.

55. It is our view and we so hold that the Commission is obliged to strictly comply with the said Regulations. We are however alive to the provisions of Regulation 17(1) which provide that:

Any irregularity resulting from failure to comply with any provision of this Schedule shall not of itself render the proceedings void or invalid where the irregularity does not occasion a miscarriage of justice.

56. It is however our view that Regulation 17 provides for an exception rather than the rule. The rule, in our view, is that the provisions of the Schedule ought to be strictly adhered to.
57. Apart from the foregoing, we agree that the Commission is bound by Article 172(2)(a) of the Constitution which requires that in the performance of its functions, the Commission is to be guided by *inter alia* competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary as well as Article 249(1) of the Constitution.
58. We however are unable to read into the said principles the requirement that the Commission ought to forward to the President more than one name. In our view the principle of competitiveness ought to be achieved during the selection process undertaken by the Commission and not by the President in deciding which name to submit to the National Assembly. In Petition No. 3 of 2016 aforesaid, we held that the role of the President is restricted to receiving the nominee and submitting the name for approval by the National Assembly since even the Commission itself cannot revisit the said names once forwarded save in the circumstances contemplates in **paragraph 16 of the First Schedule to** the ***Judicial Service Act, 2011*** relating to death, incapacity, or withdrawal of a nominee. We agree with the Commission that save for the limited circumstances provided in **paragraph 16 of the First Schedule to** the Act, the role of the President in the process of appointment of the Chief Justice and the Deputy Chief Justice is purely facilitative as the Head of State and subject to the approval of the National Assembly, and must be in accordance with the recommendation of the Judicial Service Commission.
59. It was contended by the Petitioner that Article 166(1) does not stipulate the number of nominees to be presented to the President in order to select from any number of persons the final nominee.

Further, no limitation is placed on the Presidential powers in terms of a cap on the number of nominees to be availed to the President by the Commission. It was submitted that the Commission has to act within the prescribed legal framework and that the functional operationalisation of Article 166(1)(a) of the Constitution is given effect by section 30 of the Act and the Regulations thereunder.

60. In our view, the ***Judicial Service Act*** operationalises the Constitution. It is not permitted to expand the scope of the constitutional provisions outside what the Constitution itself provides. The Petitioner himself recognises that Article 166(1) does not stipulate the number of nominees to be presented to the President in order to select from any number of persons the final nominee. To enact a provision that compels the Commission to forward a certain number of names, in our view, amounts to an abridgement of the wide discretionary powers conferred upon the Commission by the Constitution. In our view, Parliament cannot purport to limit or restrict discretionary powers conferred by the Constitution unless the Constitution itself empowers Parliament to do so. Our position is buttressed by the provisions of Article 249(2) of the Constitution which provides that:

The commissions and the holders of independent offices—

(a) are subject only to this Constitution and the law; and

(b) are independent and not subject to direction or control by any person or authority.

61. With respect to the law, Article 2(4) of the Constitution provides that unless the law is consistent with the Constitution, the same is null and void. In determining the constitutionality of legislation, this Court is, pursuant to Article 159(2)(e), to be guided by the principle that the purpose and principles of this Constitution shall be protected and promoted. Similarly, Article 259(1) of the Constitution provides that the Constitution is to be interpreted in a manner that promotes its purposes, values and principles.
62. Taking into account the aforesaid principles, it is our view that it is not permissible for Parliament to interpret and apply the Constitution in a manner not contemplated by or under the Constitution. Unless the powers of Parliament are exercised within the four corners of the Constitution, there may well be nothing stopping Parliament from enacting a provision that requires the Commission to forward say ten names in future, thus effectively removing the powers of selection from the Commission and conferring them on the President.
63. Whereas we appreciate the view expressed in **Andrew Omtatah Okoiti vs. Attorney General & 2 Others** (supra) that "*more often than not the President will appoint the best out of several names forwarded to him***"** that view, with due respect, was based on the good will of the sitting President. In our view, the experience of the people of Kenya is what drove them to ensure that their aspirations was put in black and white and that nothing was left to the good will of the President which good will had progressively been eroded. To us, the immediate pragmatic purpose of an orientation of the judicial process is to ensure *predictability, certainty, uniformity, stability* and *jurisprudential standards* that sustain the principles of the Constitution, and the rights and duties flowing from the legal set-up, and which provide sanctity for the legitimate actions of the people. This aspiration, we hold, cannot be achieved if application of the law is left to the good will of those in power at any given point in time.
64. As a Court we have to guard against attempts to water down the powers of the constitutional commissions by adhering to the purposive approach in the interpretation of the Constitution and keeping both the spirit and the letter of the Constitution alive.
65. It was the Petitioner's case that Regulation 14 of the First Schedule to the Act is not framed in the singular "applicant" but in plural "applicants", hence there will be no conflict with the

amended section 30(3) of the Act, as contended by learned counsel for the 2nd Respondent, the Commission. In other words, the Petitioner contends that the word “applicants” presupposes that the Commission ought to forward to the President more than one name. It is, however, important to note that the said Schedule applies to appointment of judges. If the proposition of the Petitioner was to be validated, it would mean that even in cases of appointment of judges, the Commission would be compelled to forward more than one name even in cases where there exist only one vacancy. A further interpretation would be that the Commission would have to forward three names for each vacancy. In our view such an interpretation would lead to an absurdity.

66. We take the view, in interpreting the said Regulation that resort ought to be had to section 3(4) of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya which provides that:

In every written law, except where a contrary intention appears, words and expressions in the singular include the plural and words and expressions in the plural include the singular.

67. It is therefore our view that whether the use of words and expressions in the plural applies to singular depends on the particular legal provisions and the context in which the same expression is being used. In our view the use of the expression *applicants* is not to be necessarily construed to be plural even where only one vacancy is to be filled unless there is an express provision to that effect in the legal instrument concerned. In this case, we decline to adopt the interpretation that the expression *applicants* must necessarily imply that more than one name must be submitted by the Commission to the President.
68. The Petitioner relied on the decision of **Consumer Federation of Kenya (COFEK) vs. Public Service Commission & Another** (supra) where the Court held that:

“In any event, the “people” are represented in the National Assembly and that is why Chapter Seven of the Constitution is titled, ‘Representation of the People’ and so too, Article 1(2) of the Constitution has deep meaning. It provides that “the people may exercise their sovereignty directly or through their democratically elected representatives”. In the present case there is opportunity for a second time for the people to participate indirectly in raising issues, good or bad, about the persons recommended for appointment because Parliament, before approving any applicant will scrutinise their suitability for the office of the Principal Secretary.”

69. Whereas we appreciate that the people are represented in Parliament, it is our view that the present Constitution is partly crafted based on the *Lockean* social contract theory. This is so when it is appreciated that Article 1(1) of the Constitution, the very first Article, provides that “all sovereign power belongs to the people of Kenya”. It is further important to appreciate that according to the same document at Article 1(2), that sovereign power may be exercised directly or through the people’s democratically elected representatives. When it comes to the exercise of such power through the said representatives, it is important to note that under Article 1(3) the people’s representatives only exercise a “delegated” function. In other words, in the exercise of their power, the said representatives are enjoined to exercise such power in accordance with the will of the people as expressed in the Constitution. Consequently, in performing their delegated function the said representatives must abide by the letter and spirit of the Constitution and must bow to the will of the people. The importance of public participation notwithstanding representative democracy was underscored by **Sachs, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra) when he opined that:

“Representative democracy undoubtedly lies at the heart of our system of government, and needs resolutely to be defended. Accountability of Parliament to the public is directly achieved

through regular general elections. Furthermore, we live in an open and democratic society in which everyone is free to criticise acts and failures of government at all stages of the legislative process. Yet the Constitution envisages something more. True to the manner in which it itself was sired, the Constitution predicates and incorporates within its vision the existence of a permanently engaged citizenry alerted to and involved with all legislative programmes. The people have more than the right to vote in periodical elections, fundamental though that is. And more is guaranteed to them than the opportunity to object to legislation before and after it is passed, and to criticise it from the sidelines while it is being adopted. They are accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making. Elections are of necessity periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government. Thus it would be a travesty of our Constitution to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years. Although in other countries nods in the direction of participatory democracy may serve as hallmarks of good government in a political sense, in our country active and ongoing public involvement is a requirement of constitutional government in a legal sense. It is not just a matter of legislative etiquette or good governmental manners. It is one of constitutional obligation.

70. According to the learned Judge:

"A vibrant democracy has a qualitative and not just a quantitative dimension. Dialogue and deliberation go hand in hand. This is part of the tolerance and civility that characterise the respect for diversity the Constitution demands. Indeed, public involvement may be of special importance for those whose strongly-held views have to cede to majority opinion in the legislature. Minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy. Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections. Public involvement accordingly strengthens rather than undermines formal democracy, by responding to and negating some of its functional deficits. A long-standing, deeply entrenched and constantly evolving principle of our society has accordingly been subsumed into our constitutional order. It envisages an active, participatory democracy. All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws. An appropriate degree of principled yet flexible give-and-take will therefore enrich the quality of our democracy, help sustain its robust deliberative character and, by promoting a sense of inclusion in the national polity, promote the achievement of the goals of transformation."

71. In our view the mere fact that the "people" are represented in the National Assembly by their Members of Parliament does not preclude Parliament from adhering to the principle of public participation in the enactment of legislation.

Summary of Findings

72. In light of our findings in Petition No. 3 of 2016 aforesaid as well as our determinations in this petition, we have arrived at the following findings:

1. **The JSC did not violate the Constitution by presenting one name each for the positions of the Chief Justice and the Deputy Chief Justice.**
2. **We reaffirm that to the extent that the amendments to section 30(3) of the Judicial Service Act compelled the Judicial Service Commission to submit three names to the President for appointment of the Chief Justice and the Deputy Chief Justice respectively, the said amendments violated the letter and the spirit of Article 166(1) of the Constitution.**
3. **That there is no requirement either now or prior to the amendments to section 30(3) of the Judicial Service Act vide the Statute Law (Miscellaneous Amendments) Act for the Judicial Service Commission to forward three names each for the positions of the Chief Justice and the Deputy Chief Justice to the President for the purposes of appointment.**

Disposition and Remedies

73. The Petitioners have sought various orders and declarations from the Court with regard to the acts of the respondents. Based on our findings hereinabove, we make the following orders:

1. **We declare that the Judicial Service Commission is bound, under Article 10(b) of the Constitution of Kenya, to apply the principles of accountability, transparency, democracy, fairness and good governance in the process of selection of the Chief Justice and Deputy Chief Justice.**
2. **We declare that the Judicial Service Commission is bound to comply with Article 10(2)(c) of the Constitution of Kenya, 2010 in the process of conducting its public interviews of candidates for the posts of the Chief Justice and Deputy Chief Justice and it ought to demonstrate, uphold, or conduct itself with integrity, transparency or accountability in arriving at its decision thereon.**
3. **Save for the above declarations, this petition otherwise fails and is dismissed.**
4. **We make no order as to the costs of the petition.**

Dated and Signed at Nairobi this 26th Day of May 2016

R. MWONGO

PRINCIPAL JUDGE

W. KORIR

JUDGE

MUMBI NGUGI

JUDGE

GV ODUNGA

JUDGE

J L ONGUTO

JUDGE

Delivered on 26th day of May, 2016

R MWONGO

PRINCIPAL JUDGE

J L ONGUTO

JUDGE