



Case Number:	Petition 566 of 2012
Date Delivered:	20 Dec 2016
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Onguto Joseph Louis Omondi
Citation:	Marilyn Muthoni Kamuru & 2 others v Attorney General & another [2016] eKLR
Advocates:	-
Case Summary:	<p style="text-align: center;"><b><u>National Government Cabinet is invalidly Constituted Based on the two thirds Gender Rule.</u></b></p> <p style="text-align: center;"><b>Marilyn Muthoni Kamuru &amp; 2 Others v Attorney General &amp; another</b></p> <p style="text-align: center;"><b>High Court at Nairobi</b></p> <p style="text-align: center;"><b>Constitutional &amp; Human Rights Division</b></p> <p style="text-align: center;"><b>Petition No. 566 of 2012</b></p> <p style="text-align: center;"><b>J L Onguto J.</b></p> <p style="text-align: center;"><b>December 20, 2016</b></p> <p style="text-align: center;"><b>Reported by Emma K. Mwobobia</b></p> <p><i>Constitutional Law – fundamental rights and freedoms – equality and freedom from discrimination – two third gender rule – claim that the cabinet had breached the right to equality and</i></p>

*freedom from discrimination by not fully implementing the two thirds gender rule – Constitution of Kenya, 2010, article 27 (8).*

**Constitutional Law** – *two third gender rule – application of the two third gender rule – obligation by the Constitution for the State to implement the two third gender rule – requirement that not more than two thirds of the members of elective or appointive bodies shall be of the same gender – where the nominees to the cabinet were not representative of the two thirds gender rule – whether the nomination by the President and approval by the National Assembly of the President’s nominees of the members of the Cabinet had flouted the two third gender rule – Constitution of Kenya, 2010, article 27(8).*

**Constitutional Law** – *fundamental rights and freedoms – national values and principles – right to dignity – claim that the cabinet as constituted had not incorporated the two third gender rule – whether the Petitioner’s right to dignity had been violated in lieu of breach of the two third gender rule.*

**Jurisdiction** – *High Court jurisdiction - declaratory orders – where the court had issued declaratory orders as to the invalidity of the cabinet as constituted – suspension of the declaration of invalidity – whether the court could suspend the declaration of invalidity in order to deal with the consequences of such validity.*

### **Brief Facts**

The President of the Republic of Kenya reconstituted his first cabinet in December 2015. He nominated 23 Cabinet members comprising of 18 men and 5 women. The composition led to the distress and stress of the Petitioners who were convinced that the Constitution had been violated, not just by the President but also by the National Assembly that approved of the President’s nominees. The Petition sought an answer to the question as to whether the nomination by the President and approval by the National Assembly of persons for the position of the cabinet secretaries was done in contravention of Article 27(8) of the Constitution. The larger question in

that regard was whether the Cabinet as constituted violated the Constitution for its failure to adhere to the two third gender rule as provided for under Article 27(8) of the Constitution.

### Issues

- i. Whether the cabinet as constituted, having more men than women in the cabinet, had violated the provisions of article 27(8) of the Constitution on the two third gender rule.
- ii. Whether article 27(8) of the Constitution was applicable to the composition of the national cabinet.
- iii. Whether the President and the National Assembly had violated the Constitution by nominating and appointing a cabinet that had more male representation than female.
- iv. Whether Parliament in approving the nominees by the President had violated their oversight constitutional obligation provided for in the Constitution.
- v. Whether the petitioners' right to dignity was violated by the nomination and appointments of the Cabinet Secretaries without considering the two-third gender rule.
- vi. Whether the court had jurisdiction to grant an appropriate remedy where it had made a finding of invalidity or violation of the law.
- vii. Whether court could suspend the sitting cabinet where it found that the cabinet secretaries had been invalidly constituted.
- viii. Whether the state was bound by the equality rendering structure that had been prescribed by the Constitution during nominations and appointments.

Constitution of Kenya, 2010

Article 27

*(1) Every person 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.*

*(8) 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.*

**Held:**

1. Article 27 of the Constitution required not only equality and freedom from discrimination but affirmative action to remedy the historical wrongs. The State had a duty to ensure full participation of the groups of persons provided for in the Constitution in the affairs of the State. In that regard, the Constitution was replete with provisions that guaranteed persons historically disadvantaged were represented in State organs exercising

power for and on behalf of the people of Kenya.

2. Article 27 of the Constitution ought to be juxtaposed with the constitutional provisions dealing with the cabinet which were found under articles 130 and 152 of the Constitution. Article 130(1) had established the national executive which comprised the President, the Deputy President and the rest of the cabinet. The cabinet was established under article 152(1) and it consisted of the President, Deputy President, Attorney General and Cabinet secretaries who ought not to be fewer than fourteen or more than twenty-two. Article 130(2) further provided that the national executive would reflect the regional and ethnic diversity of the people of Kenya while article 132(2)(a) empowered the President to nominate and with approval of the National Assembly, appoint cabinet secretaries.
3. The Court was enjoined to be guided by the provisions of article 259(1) of the Constitution which had provided that the Constitution ought to be interpreted in a manner that promoted its purpose, values and principles, advanced the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permitted development of the law and contributed to good governance. Article 259(1) of the Constitution had effectively commanded a purposive approach to the interpretation of the Constitution.
4. Apart from complying with the stipulation that the Constitution ought to be given full life, it was the duty of the Court to give effect to the Constitution as a whole. The various provisions that governed the composition of the cabinet and the gender rule ought therefore to be read together in a manner that gave full effect to the purpose of the Constitution. It was a rule that various provisions of the Constitution ought to be read together with each sustaining each other and not each destroying the other.
5. None of the provisions of the Constitution was to be construed in isolation. A context

- which included history and other provisions of the Constitution was critical always.
6. The cabinet was established under article 152 of the Constitution. Its membership was also clear. Seen with the prism of article 130 of the Constitution, the cabinet was the apex State organ that held and exercised the National Government's executive power. It would therefore qualify as a State organ within the meaning and context of article 260 of the Constitution. Indeed, under article 260, its members were holders of the State office.
  7. There was no doubt that article 27(3) had provided that women and men had the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres. By this provision, the Constitution had ensured that men and women were equal and it destroyed the traditional patriarchy contour that the Kenyan society had for long been constructed upon. In order to ensure men and women participated in the affairs of the development of the Kenyan society, article 27(6) had recognized that there could be need to undertake extra measures.
  8. Article 27(6) of the Constitution reposed a positive command and obligation on the State to move by appropriate instruments to lay the necessary equality-rendering structure. However, as stipulated under sub-article (7), the measures were to be at the State's discretion and were to be exercised in good faith.
  9. Article 27(7) of the Constitution had stipulated that any measure taken under clause (6) would adequately provide for any benefits to be on the basis of genuine need. That did not mean that the State could abandon that obligation. It was in that spirit that article 27(8) imposed upon the State the obligation to redress gender disadvantage by enacting laws that could be needed and also undertaking other measures including affirmative action that would ensure women were needed to redress any inequality that could manifest.
  10. Article 27(8) of the Constitution had

enjoined the State to be proactive and that could be achieved not just through legislation but through appointments as article 27 itself dictated. Therefore, it followed that article 27(8) of the Constitution was applicable to the cabinet.

11. The purposive interpretation had ensured that there was need to have the rights enshrined in the Constitution translated into a reality. The cabinet as the organ and body of the State entrusted with exercising executive authority and with the duty of implementing the requirements of the Constitution ought to do so in a manner that was itself faithful to the letter and spirit of the Constitution.
12. Article 27(8) of the Constitution was not to be given a narrow and bone-minded interpretation but ought to be read together with article 130(2). If that was the case, it would imply that the composition of the cabinet ought to reflect the regional and ethnic diversity of the people of Kenya and ought also not to be composed of more than two thirds of the same gender. Therefore, that interpretation would lead to the conclusion that article 27(8) and 130(2) ought to be read together in order to create harmony and enable the two provisions sustain each other besides assist in advancing and promoting the values and principles of the transformative Constitution.
13. In approving the nominees, the National Assembly would be failing in its duty if it were to blindly or unquestioningly to approve every appointment that came its way from the President. Article 152(2) of the Constitution did not define the strictures within which the National Assembly was to operate its endeavor to fulfill its obligations. It had been given a lee way to determine how best to carry out its constitutional mandate. In that regard, the National Assembly was indeed entitled to satisfy itself before approving the nominees that the nominations complied with the constitutional and statutory provisions including satisfying that Article 27(8) of the Constitution had been met in

the appointment

14. The two-third gender rule had not been without contradiction. It had been a subject of previous litigation. It presented a grey area coupled with downright contradiction. However it should not be frowned upon given that it took perhaps a couple of decades and many lives to finally have the Constitution presented to the people of Kenya. It would be expected that it would exhibit every hallmark of a heavily negotiated document that would accommodate every need of every segment of the Kenyan society.
15. Article 27(8) of the Constitution, especially as far as the appointive positions were concerned, ought not to be realized immediately. In any event, ensuring that not more than two-thirds of the same gender was the bare minimum. However, it had been over six years since the promulgation of the Constitution and it was loathsome that over six years later, the State still claimed to realize some of these rights progressively. The moratorium ought to come to an end especially with regard to appointive positions.
16. There was no reason that could impede the realization of not more than two third gender rule in the cabinet. There was no justifiable or compelling reason and therefore, the appointment of persons to the cabinet as currently constituted violated the not more than two-third gender requirement as provided for under Article 27(8) of the Constitution.
17. In nominating, approving and appointing the cabinet as it was, the President and the National Assembly violated the Constitution. The President was enjoined by the Constitution to dismantle the uneven gender attributes of our society when the Constitution demanded that public appointments were to be made with the two third gender rule in the fore. The National Assembly that approved of the President's nominees was likewise enjoined.
18. The National Assembly ought to exercise that perfect overseer role and tap the

President on the shoulder where he was about to slip. The National Assembly ought to apply a strict scrutiny in approving of any action of the executive and where the action involved appointment to public posts a most searching examination in all aspects ought to be invoked by the National Assembly. However, the National Assembly failed to do so.

19. Even if the Constitution had not given a static number of cabinet secretaries, there would be no difficulty in implementing the two-third gender rule. It would mean that whenever the cabinet was being constituted, whatever its number, its membership ought not to be more than two-thirds of the same gender. As it was not suggested that there was a dearth of qualifications on the part of either gender, there ought to exist no fear that a situation where cabinet seats remained vacant could ever exist.
20. Human dignity was one of the national values and principles established under article 10 of the Constitution. It was central to the notion of human rights and freedoms in general. The right to human dignity was the foundation of all other rights and together with the right to life, it formed the basis for the enjoyment of all other rights. Put differently, if a person enjoyed the other rights in the Bill of Rights, the right to human dignity would automatically be promoted and protected while it would be violated if the other rights were violated. In the circumstances and as a consequence of the violation of article 27(8) of the Constitution, the Petitioners' right to dignity had been violated.
21. The Constitution had prohibited the State from maintaining a gender imbalance in appointive and elective positions. It was unthinkable that the same Constitution imposed a lesser duty on the President and the National Assembly.
22. Article 23 of the Constitution in respect to the enforcement of fundamental rights and freedoms had empowered the court to frame or grant appropriate relief. In order to ensure that the Constitution was not

threatened with a violation, the court could grant any remedy. In making its remedy the Court ought to bear in mind its duty under article 258 of the Constitution to interpret and apply the Constitution in a manner that, *inter alia*, promoted good governance.

23. Article 258 of the Constitution did not limit the court's jurisdiction to fashion an appropriate remedy to deal with a finding of invalidity or violation of the law. It was accepted that the court could suspend the declaration of invalidity in order to deal with the consequences of such invalidity.
24. The Court ought to be creative in fashioning an appropriate relief that was tailored to the facts of the case and was consistent with the values of the Constitution. Ordinarily, a finding by the court that the Constitution had been violated would lead to a declaration to that effect. A declaration would mean that the impugned act had no legal effect and was thus null and void.
25. The Court in framing an appropriate relief ought to be mindful of the circumstances of the case and in particular the need to avoid undue hardship. Such a consideration ought to be judicious and dependent on the case.
26. A suspension of the invalidity of the violation of article 27(8) of the Constitution would be most appropriate in the obtaining circumstances. The suspension should be for a period of eight months or until such a time a new cabinet would be constituted either by the present Government or by the new Government to be elected into office in August 2017. The President and the National Assembly in appointing such cabinet ought to ensure that the provision of article 27(8) of the Constitution had been fulfilled.
27. For avoidance of doubt, the cabinet ought to be reconstituted earlier if the President so desires or await the expiry of the suspension, whichever came first. Perhaps it could be noted that it was such basics like appointments made in compliance with the two third gender rule which had the

	<p>potential of bringing a paradigm shift in the treatment of any disadvantaged gender at any basic domestic level including the education field.</p> <p>Petition allowed. Each party to bear its own costs.</p> <p><i>a. A declaration issued that the nomination by the President and approval by the 2<sup>nd</sup> Respondent of persons for the cabinet secretaries positions was done in contravention of the principle of rule of law and good governance because it contravenes Article 27(8) requirement that an appointive body should not have more than two-thirds of persons of the same gender.</i></p> <p><i>b. A declaration issued that the President has acted in contravention of the Constitution in nominating, appointing and maintaining a cabinet that does not meet the two third gender requirement under Articles 10, 27(8) and 28 of the Constitution.</i></p> <p><i>c. A declaration issued that the National Assembly acted in violation of the Constitution by approving nominees for cabinet secretaries position when it was clear that it would effectively result in violation of the rule of law and specifically Article 27(8) of the Constitution.</i></p> <p><i>d. The declarations of violation above are suspended for a period of eight (8) months from the date of this judgment.</i></p>
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-

Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 566 OF 2012**

**BETWEEN**

MARILYN MUTHONI KAMURU.....1<sup>ST</sup> PETITIONER

DAISY DOREEN JEROP AMDANY.....2<sup>ST</sup> PETITIONER

CENTER FOR RIGHTS EDUCATION AND AWARENESS.....3<sup>RD</sup> PETITIONER

**AND**

THE ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT

THE NATIONAL ASSEMBLY.....2<sup>ND</sup> RESPONDENT

**JUDGMENT**

**Introduction**

1. This Petition seeks an answer to the question as to whether the nomination by the President and approval by the National Assembly of persons for the position of the cabinet secretaries was done in contravention of Article 27(8) of the Constitution. The larger question in that regard is whether the Cabinet of the national government as currently constituted violates the Constitution for its failure to adhere to the two third gender rule as provided for under Article 27(8) of the Constitution.

2. Upon answering the above question in the affirmative, the Petitioners in their Amended Petition dated 8 January 2016 seek the following orders;

***a. A declaration that the nomination by the President and approval by the 2<sup>nd</sup> Respondent of persons for the cabinet secretaries positions was done in contravention of the principle of rule of law and good governance because it contravenes Article 27(8) requirement that an appointive body should not have more than two-thirds of persons of the same gender.***

***b. A declaration that the President has acted in contravention of the Constitution in nominating, appointing and maintaining a cabinet that does not meet the two third gender requirement under Articles 10 and 27(8) of the Constitution.***

***c. A declaration that the President, by violating the requirement of Article 27(8) in regard to the composition of the cabinet, has established a government otherwise than in compliance with the Constitution directly violating the requirement of Article 3(2) of the Constitution.***

***d. A declaration that the cabinet, as currently constituted is unconstitutional.***

***e. A declaration that the National Assembly acted in violation of the Constitution by approving nominees for cabinet secretaries position when it was clear that it would effectively result in violation of the rule of law and specifically Article 27(8) of the Constitution.***

***f. An order that the cabinet as currently constituted is unconstitutional and therefore void.***

***g. Any such other orders as this Honourable Court shall deem just.***

3. The facts are essentially not in dispute and may be easily gathered from the affidavit sworn in support of the Petition. I reprise the same as follows: The President of the Republic of Kenya reconstituted his first cabinet in December 2015. The number totaled 23 Cabinet members; 18 men and 5 women. The composition led to the distress and stress of the Petitioners who were convinced that the Constitution had been violated, not just by the President but also by the National Assembly that approved of the President's nominees.

4. Learned counsel Mr. Waikwa Wanyoike presented the Petitioners' case. He submitted that by enacting Article 27(8) of the Constitution, the people of Kenya committed themselves to the realization of the gender equity and expressed their desire to be free from discriminatory laws or conduct. On that submissions he relied on the cases of **Centre for Rights Education and Awareness vs. Attorney General & Another [2015]eKLR** and **Federation of Women Lawyers (FIDA-K) & 5 Others vs. Attorney General and Another [2011]eKLR**. In both cases the Court recognized that the purpose of Article 27(8) of the Constitution is to place an obligation upon the State to address historical and traditional injustices that may have been encountered or visited on a particular segment of the people.

5. He urged the court to adopt a substantive interpretative approach to Article 27. In his view, the wording of Article 27 conceptualizes a substantive approach to equality to the extent that it stipulates the right to equal opportunities and recognizes the need to undertake various legislative and other measures that ensure the realization of the rights guaranteed under Article 27 are achieved. He claimed that this provision is critical as a substantive equality tool because it requires in mandatory terms that the State be proactive in creating the necessary legislative and policy infrastructure to ensure the realization of the principle of limiting the maximum of either gender to two-thirds. In that regard Mr Waikwa contended that the proper import of Article 27(8) would be that the President and Parliament ought to ensure that whatever appointments are made to a State organ or body do meet the requirements of Article 27(8).

6. In addition, Mr. Waikwa submitted that Article 27(8) is an elaboration of sub-article six (6) which stipulates that the state must take measures including affirmative action to redress past discrimination. He added that the effect of this provision has been to demonstrate that the Constitution permits and allows affirmative action to redress past discrimination.

7. Mr. Waikwa further submitted that the Cabinet is a state organ created under Article 152 of the Constitution. In his view therefore, it is a body for purposes of Article 27(8) of the Constitution and its composition ought to comply with the aforesaid provision. He asserted that the actions of the Respondents in appointing the cabinet as currently constituted violates Article 27 because whether direct or tacit it results into perpetuation of discrimination against women.

8. It was Mr. Waikwa's further submission that the perpetuation of substantive inequality is also a violation of the Petitioners' right to dignity guaranteed under Article 28 of the Constitution. He claimed that human dignity is one of the national values and principles established under Article 10. Counsel relied on the case of **William Musembi vs. Moi Education Centre [2014]eKLR** where it was held that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the

dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Relying on the case of **Republic vs. Kenya National Examination Council and Another Ex-parte Audrey Mbugua Ithibu [2014]eKLR**, he submitted that human dignity is the cornerstone of the other human rights enshrined in the Constitution.

9. He further submitted that the infringement of the right to equality and dignity by the Respondents cannot be justified in a free and democratic society. That the Respondent have failed to justify the limitation. In the absence of such justification he urged the Court to find that the limitation is unreasonable. For that proposition, he relied on the case of **Coalition for Reform and Democracy (CORD) & 2 others vs. Republic & 10 others [2015]eKLR**.

10. Learned counsel further submitted that the President has a clear obligation to uphold, defend and respect the Constitution. That the President is required to defend the Constitution and defend it against violations. In this regard, counsel relied on the cases of **Economic Freedom Fighters vs. Speaker of the National Assembly and others vs. Speaker of the National Assembly and others [2016] ZACC 11** and **President of the Republic of South Africa and another vs. Hugo [1997] ZACC 4** where the constitutional Court of South Africa held that the President is obliged to obey each and every provision of the Constitution.

11. He further claims that the National Assembly has the role of reviewing the conduct of the President and exercise oversight role over the state organs which includes exercising oversight role over the conduct of the President. He submits that the National Assembly failed to fulfill its constitutional mandate as it was bound to ensure constitutional compliance by the President while approving the nomination of persons for appointment as cabinet secretaries.

12. Mr. Waikwa wound up his submissions by urging the Court to find that the President in nominating and appointing the cabinet as is currently constituted acted against the requirements of Article 131(2)(a) and (e) of the Constitution in that he failed to uphold, respect and safeguard the Constitution and ensure protection of human rights and fundamental rights and freedoms. Further that the Respondents violated the provisions of Article 27(8) of the Constitution by constituting a Cabinet that is in violation of the mandatory requirement of Article 27(8) of the Constitution on the composition of the cabinet.

13. As a consequence of the alleged violation, counsel urged the court to find that there was also a violation of the Petitioners' right to dignity guaranteed under Article 28 of the Constitution. He urged the Court to declare that the cabinet as currently constituted is unconstitutional and invalid.

### **Respondents' case**

14. In response to the Petition the 1<sup>st</sup> Respondent, the Attorney General, filed grounds of opposition on 26 February 2016. The grounds were later detailed in the oral submissions by Mr. Mwangi Njoroge, State Counsel representing the Attorney General. Mr. Njoroge stated firstly, that the cabinet as currently constituted represents both gender.

15. Secondly, the 1<sup>st</sup> Respondent submitted, Article 27(8) does not prescribe criteria for cabinet appointments. In Mr Njoroge's view the criteria applicable in the appointment of cabinet secretaries is as availed under Article 130(2) of the Constitution which provides that that cabinet must reflect regional and ethnic balance. To that end, Mr. Njoroge claimed that the legislative and other measures envisaged in Article 27(8) are distinguishable from the criteria established under Article 130(2) of the Constitution. In that regard, he contended that the only consistent and wholistic construction of Article 27(8) as read together with Article 81(b) indicated that an appointment of cabinet members is not subject to the two-

thirds gender rule.

16. Thirdly, Mr. Njoroge maintained that in the context of the preamble to the Constitution and the substantive provisions of Article 10 of the Constitution, appointive positions at the national level are based on regional and ethnic representation as well as personal competence of appointees.

17. In any event, Mr. Njoroge submitted that the obligation established under Article 27(6) and (8) can only be achieved through progressive realization.

18. For those reasons, Mr. Njoroge insisted that the Constitution had not been violated in any manner. And, that the Petition before the court is misconceived and an abuse of the court process.

19. The second Respondent, the National Assembly neither filed any response to the Petition nor made any submissions on the same.

### **Discussion and Determination**

20. The Petitioners filed this Petition seeking inter alia a declaration that the cabinet as presently constituted violates the provisions of Article 27(8) of the Constitution. The Petition was filed following the nomination by the President and the subsequent approval by the National Assembly and appointment by the President of cabinet secretaries sometime in December 2015. Currently, the Cabinet constitutes 18 men and 5 women; giving a percentile composition of 21.7 women and 78.3 men.

21. There is no controversy and the parties are in agreement that the Constitution holds dear those who have been historically marginalized; women, youth, persons with disabilities, marginalized communities and other vulnerable persons. Article 27 of the Constitution requires not only equality and freedom from discrimination but affirmative action to remedy these historical wrongs. The State has a duty therefore to ensure full participation of these groups of persons in the affairs of the State. In that regard, the Constitution is replete with provisions that guarantee persons historically disadvantaged are represented in State organs exercising power for and on behalf of the people of Kenya. The Supreme Court in **Advisory Opinion No 2 (supra)** noted;

***The Court is fully cognizant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution, that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices or gender – indifferent laws, policies and regulations. These sentiments equally reflect the position of persons with disabilities, the youth, minorities and marginalized communities.***

22. Broadly speaking this exposition of the law by the Supreme Court sets the scene for determination of the issue in this Petition.

#### *Key Constitutional and legal provisions*

23. Before I embark on considering the issue before me, I think it is essential to set out the provisions of Article 27 which deal with the two-third gender rule. Article 27 of the Constitution safeguards equality and freedom from discrimination. It states thus;

***27 (1) Every person 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.**

**(8) 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.**

24. This provision must be juxtaposed with the constitutional provision dealing with the cabinet which are found under Articles 130 and 152 of the Constitution. Article 130(1) establishes the national executive which comprises the President, the Deputy President and the rest of the cabinet. The cabinet is established under Article 152(1) of the Constitution and it consists of the President, Deputy President, Attorney General and Cabinet secretaries who must not be fewer than fourteen nor more than twenty-two. Article 130(2) then provides that the national executive shall reflect the regional and ethnic diversity of the people of Kenya. Article 132(2)(a) empowers the President to nominate, and with approval of the national assembly, appoint cabinet secretaries.

#### *General principles*

25. The parties in this case addressed me on the principles of interpretation of the Constitution applicable in this case.

26. In dealing with the task at hand, this Court is enjoined to be guided by the provisions of Article 259(1) which provides that the Constitution shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the "Bill of Rights and permits development of the law and contributes to good governance. Article 259(1) effectively commands a purposive approach to interpretation of the Constitution.

27. Purposive interpretation was explained by the Supreme Court of Canada in the case of **R vs. Big M Drug Mart Limited [1985] 1 SCR 295** where the Court stated;

***The proper approach to the definition of 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. .... [T]his analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ..... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore .....be placed in its proper linguistic, philosphic and historical contexts.*

28. Apart from complying with the stipulation that the Constitution must be given full life, it is the duty of this Court in considering this matter to give effect to the Constitution as a whole. The various provisions that govern the composition of the cabinet and the gender rule must therefore be read together in a manner that gives full effect to the purpose of the Constitution. I shall fully adopt the principle of harmonization set out in the case of **Centre for Rights Education and Awareness and Others vs. The Attorney General (supra)**. It is a rule that various provisions of the Constitution must be read together with each sustaining each other and not each destroying the other: see **Tinyefuza vs. The Attorney General Constitutional Appeal No. 1 of 1997**.

29. A compendium of the various decisions would lead to the irresistible conclusion that none of the provisions of the Constitution is to be construed in isolation. Context which includes history and other provisions of the Constitution is critical always.

30. With those principles in mind, I now turn to consider the issue before me.

#### **Is Article 27(8) applicable to the appointment of the cabinet "**

31. The Petitioners contend that the cabinet as is currently constituted violates the provision of Article 27(8) of the Constitution. The Attorney General on his part submits that Article 27(8) does not apply to the composition of the cabinet.

32. The cabinet as stated earlier is established under Article 152 of the Constitution. Its membership is also clear. Seen with the prism of Article 130 of the Constitution, the cabinet is the apex State organ that holds and exercises the national government's executive power. It would therefore qualify as a State organ within the meaning and context of Article 260 of the Constitution. Indeed, under Article 260, its members are holders of State office. The question therefore would be whether Article 27(8) is applicable to the composition of the national cabinet.

33. There is no doubt that, Article 27(3) provides that "**women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**" In my view, by this provision, the Constitution ensures that men and women are equal and it destroys the traditional patriarchy contour the Kenyan society has for long been constructed upon. In order to ensure men and women participate in the affairs of the development of the Kenyan society, Article 27(6) recognises that there may be need to undertake extra measures. It thus provides:

**"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.***”

34. In my understanding, this provision reposes a positive command and obligation on the State to move by appropriate instruments to lay the necessary equality-rendering structure. However, as stipulated under sub-Article (7), these measures are to be at the State’s discretion and are to be exercised in good faith. Sub-Article (7) stipulates;

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

In my view, that does not mean that the State may abandon that obligation. It is in that spirit that Article 27(8) imposes upon the State the obligation to redress gender disadvantage by enacting laws that may be needed and also undertaking other measures including affirmative action that would ensure women are needed to redress any inequality that may manifest.

Article 27(8) enjoins the State to be proactive and that may be achieved not just through legislation but through appointments as the Article itself dictates.

35. With that understanding in mind, and having stated that the cabinet is a State organ within the context and meaning of Article 260 of the Constitution, it follows that Article 27(8) of the Constitution is applicable to the cabinet.

36. This purposive interpretation ensures that there is need to have the rights enshrined in the Constitution translated into a reality. The cabinet as the organ and body of the State entrusted with exercising executive authority and with the duty of implementing the requirements of the Constitution must do so in a manner that is itself faithful to the letter and spirit of the Constitution.

37. I make this finding notwithstanding the submissions made by the Mr. Njoroge that Article 27(8) is not applicable to the composition of the Cabinet. According to him, it is Article 130(2) which is applicable. This article provides thus; ***“the composition of the national executive shall reflect the regional and ethnic diversity of the people of Kenya.”*** I hold the view that this provision of the Constitution should not be given a narrow and bone-minded interpretation. As I have stated elsewhere above, it must be read together with Article 27(8) of the Constitution. If that is the case, it would imply that the composition of the cabinet must reflect the regional and ethnic diversity of the people of Kenya and must also not be composed of more than two thirds of the same gender. In my view, that interpretation would lead to the conclusion that Article 27(8) and 130(2) must be read together in order to create harmony and enable the two provisions sustain each other besides assist in advancing and promoting the values and principles of the transformative Constitution.

### **Does the composition of the Cabinet violate the Constitution "**

38. The Petitioners contended that the Cabinet as currently constituted does not meet the two third gender rule. That there are 18 men and 5 women which does not connect with the two third gender rule. In that regard, the Petitioners stated that the President in nominating and appointing the cabinet secretaries violated Article 27(8) of the Constitution. And also that Parliament in approving the nominees, violated their oversight constitutional obligation.

39. Sadly, the National Assembly did not respond to the Petition. However from the material before me, and to my mind and in approving the nominees, the National Assembly would be failing in its duty if it were to blindly or unquestioningly approve every appointment that comes its way from the President.

Article 152(2) does not define the strictures within which the National Assembly is to operate its endeavor to fulfill its obligations. It has been given a lee way to determine how best to carry out its constitutional mandate. In that regard, the National Assembly was indeed entitled to satisfy itself before approving the nominees that the nominations comply with the constitutional and statutory provisions including satisfying that Article 27(8) of the Constitution had been met in the appointment.

40. However, I heard the 1<sup>st</sup> Respondent's counsel assert that the President and the National Assembly did not violate the Constitution. He claimed that the realization of the two-third gender rule is one to be effected progressively.

41. The two-third gender rule has not been without contradiction. It has been subject of previous litigation. It appears that it presents a grey area coupled with downright contradiction. But this should not be frowned upon given that it took perhaps a couple of decades and many lives to finally have the Constitution 2010 presented to the people of Kenya. It would be expected that it would exhibit every hallmark of a heavily negotiated document that would accommodate every need of every segment of the Kenyan society.

42. In that context I am in agreement with the sentiments of the retired Chief Justice Dr. W Mutunga in **Advisory Opinion No. 2 of 2012** where he stated that;

***One 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.***

43. I would therefore agree that Article 27(8), especially as far as the appointive positions are concerned, should be realized immediately in contrary to the submissions of Mr. Njoroge. In any event ensuring that not more than two-thirds of the same gender is the bare minimum. It has been over six years since the promulgation of the Constitution. It is loathsome that over six years later, the State still claims to realize some of these rights progressively. The moratorium ought to come to an end especially with regard to appointive positions.

44. I do not see any reason that may impede the realization of not more than two third gender rule in the cabinet. I am unable to find any justifiable reason. Mr. Njoroge did not offer any reason for the same and neither did he try to justify the limitation under Article 24 of the Constitution. No compelling reason was advanced. For that reason, I therefor find that the appointment of persons to the cabinet as currently constituted violates the not more than two-third gender requirement as provided for under Article 27(8).

45. The same finding would also apply to the actions of the President and the National Assembly, that in nominating, approving and appointing the cabinet as it is today, they violated the Constitution. The President is enjoined by the Constitution to dismantle the uneven gender attributes of our society when the Constitution demands that public appointments to be made with the two third gender rule in the fore.

The National Assembly that approves of the President's nominees is likewise enjoined. The National Assembly must exercise that perfect overseer role and tap the President on the shoulder where he is about to slip. The National Assembly ought to apply a strict scrutiny in approving of any action of the executive and where the action involves appointment to public posts a most searching examination in all aspects must be invoked by the National Assembly. In the instant case, the National Assembly failed to do so.

46. I also heard Mr. Njoroge contend that the Constitution does not fix a static number for the cabinet secretaries but gives a minimum and maximum number and thus, it would be impossible to meet the two-third gender rule. In my view, even if the Constitution does not give a static number of cabinet secretaries, I do not see where the difficulty would lie in implementing the two-third gender rule. It would mean that whenever the cabinet is being constituted, whatever its number, its membership should not be more than two-thirds of the same gender. As it was not suggested that there is a dearth of qualifications on the part of either gender, there ought to exist no fear that a situation where cabinet seats remain vacant may ever exist.

### **Violation of the right to dignity**

47. The Petitioners claimed that their right to dignity as established under Article 28 of the Constitution was violated. Human dignity is one of the national values and principles established under Article 10. It is central to the notion of human rights and freedoms in general. Article 19(2) states that fundamental rights and freedoms exists to '**preserve the dignity of the individuals and communities and to promote social justice and the realization of the potential of all human beings**'. Indeed, the court in the case of **William Musembi vs. Moi Education Centre (supra)** stated that;

***the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.***

48. The right to human dignity is the foundation of all other rights and together with the right to life, it forms the basis for the enjoyment of all other rights. Put differently, if a person enjoys the other rights in the Bill of Rights, the right to human dignity will automatically be promoted and protected while it will be violated if the other rights are violated. In the circumstances, and as a consequence of the violation of Article 27(8) of the Constitution, the Petitioners' right to dignity has been violated.

### **Conclusion**

49. I have answered the questions I set to answer in this Petition.

50. The Constitution prohibits the State from maintaining a gender imbalance in appointive and elective positions. I think it is unthinkable that the same Constitution imposes a lesser duty on the President and the National Assembly.

51. I have consequently found that Article 27(8) applies to the composition of the Cabinet which is a State organ exercising executive authority. I have also found that a limn of the Cabinet as currently constituted would reveal that it is gender-blind in relation to the Constitution. It offends the equality provisions of the Constitution. I have further found that failure to comply with Article 27(8) also violates the Petitioners' right to dignity under Article 28.

52. I have also found that the President and the National Assembly in nominating and appointing the

cabinet as currently constituted has an obligation to ensure that Article 27(8) of the Constitution is adhered to.

### **What is the appropriate remedy"**

53. Having reached the above findings, the next crucial question is; what is the appropriate relief to grant" Article 23 of the Constitution in respect to the enforcement of fundamental rights and freedoms empowers the court to frame or grant, "*appropriate relief.*" In order to ensure that the Constitution is not threatened with a violation, this court may grant any remedy. In making its remedy this Court must bear in mind its duty under Article 258 of the Constitution to interpret and apply the Constitution in a manner that, *inter alia*, promotes good governance.

54. Article 258 of the Constitution does not limit the court's jurisdiction to fashion an appropriate remedy to deal with a finding of invalidity or violation of the law. It is accepted that the court may suspend the declaration of invalidity in order to deal with the consequences of such invalidity. In **Suleiman Shahbal vs. Independent Electoral and Boundaries Commission and 3 Others Petition No. 3 of 2014 [2014]eKLR**, the Supreme Court expressed the following position;

***The lesson of comparative jurisprudence is that, while a declaration of nullity for inconsistency with the Constitution annuls statute law, it does not necessarily entail that all acts previously done are invalidated. In general, laws have a prospective outlook; and prior to annulling-declarations, situations otherwise entirely legitimate may have come to pass, and differing rights may have accrued that have acquired entrenched foundations. This gives justification for a case-by-case approach to time-span effect, in relation to nullification of statute law. In this regard, the Court has a scope for discretion, including: the suspension of invalidity; and the application of "prospective annulment". Such recourses, however, are for sparing, and most judicious application – in view of the overriding principle of the supremacy of the Constitution, as it stands.***

55. I am guided. It is clear that the Court must be creative in fashioning an appropriate relief that is tailored to the facts of the case and is consistent with the values of the Constitution. The obvious question now would therefore be, what would be the consequences of a finding that the Constitution has been violated" Ordinarily, such a finding would lead to a declaration to that effect. A declaration would mean that the impugned act has no legal effect and is thus null and void.

56. It is for that reason that the Court in framing an appropriate relief must be mindful of the circumstances of the case and in particular the need to avoid undue hardship. Such a consideration must be judicious and dependent on the case.

57. In making my findings, I am conscious of the fact that the cabinet is a crucial organ of the State which the executive cannot function without. I am also aware that the country is headed to the national polls in another eight months or so. In that context, I must accord public interest and good order some leverage.

58. I am therefore of the view that a suspension of the invalidity of the violation of Article 27(8) would be most appropriate in the obtaining circumstances. The suspension should be for a period of eight months or until such a time a new cabinet will be constituted either by the present government or by the new government to be elected into office in August 2017. The President and the National Assembly in appointing such cabinet must ensure that the provision of Article 27(8) of the Constitution has been fulfilled.

59. For avoidance of doubt, the cabinet may be reconstituted earlier if the President so desires or await the expiry of the suspension, whichever comes first. Perhaps however, it may be noted that it is such basics like appointments made in compliance with the two third gender rule which have the potential of bringing a paradigm shift in the treatment of any disadvantaged gender at any basic domestic level including the education field.

### **Costs**

60. As this Petition involves matters of public interest, I shall order that each party bear its own costs.

### **Disposition**

61. I find that the cabinet as currently constituted has not met the criteria established under Article 27(8) of the Constitution. In the result, I make the following orders:

***a. A declaration is hereby issued that the nomination by the President and approval by the 2<sup>nd</sup> Respondent of persons for the cabinet secretaries positions was done in contravention of the principle of rule of law and good governance because it contravenes Article 27(8) requirement that an appointive body should not have more than two-thirds of persons of the same gender.***

***b. A declaration is hereby issued that the President has acted in contravention of the Constitution in nominating, appointing and maintaining a cabinet that does not meet the two third gender requirement under Articles 10, 27(8) and 28 of the Constitution.***

***c. A declaration is hereby issued that the National Assembly acted in violation of the Constitution by approving nominees for cabinet secretaries position when it was clear that it would effectively result in violation of the rule of law and specifically Article 27(8) of the Constitution.***

***d. The declarations of violation above are suspended for a period of eight (8) months from the date of this judgment.***

***e. Each party shall bear its own costs.***

62. Orders accordingly.

Dated, signed and delivered at Nairobi this 20<sup>th</sup> day of Dec ,2016.

**J.L.ONGUTO**

**JUDGE**



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