

**POLICY DIRECTION AND ADMINISTRATION OF THE
JUDICIARY BY THE JUDICIAL SERVICE COMMISSION: A
NEW DAWN, A FRESH PARADIGM.**

By

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Introduction:

In August 2010 Kenyans voted in a new Constitution through a national referendum. In the process, Kenyans welcomed and embraced the new Constitution as a reforming document that recasts their country in a certain way, quite different from its past and proudly launched on a progressive trajectory. The new constitution has a progressive and expansive bill of rights. The imperial presidency has been forced to abdicate; the Legislature has been completely divorced from the Executive. It is however the Judiciary, and rightly in my view, that has faced the most radical and sweeping changes under the new constitution.

The Judiciary is the only arm of the three traditional arms of Government that faced the immediate implementation of the new Constitution. Both the Executive and the Legislature will wait their fate with some palpable trepidation in 2012 when Kenyans go for general elections. In my view, that wasn't accidental. It was the drafters' views that the need to arrest and address the pressing issues that face the Judiciary would not await for the general elections in 2012. The problem was immediate. So was the remedy provided in the Constitution.

As for the Judiciary, the new Constitution introduced the following measures: -

- (a) All judges and magistrates who were in the employment of the judiciary before the promulgation of the constitution will go through a vetting process. This vetting programme entails an audit that determines the suitability of all judges and magistrates to continue serving.
- (b) The post of a Deputy Chief Justice to deputise the Chief Justice in the discharge of his mandate.
- (c) A Supreme Court as the highest Court in the land was created at the very apex of the Courts' structure.
- (d) Decentralization of the Courts' administrative powers – the Chief Justice is the President of the Supreme Court and is not to sit in the Court of

Appeal, the Court of Appeal is headed by its President and the High Court by the Principal Judge.

- (e) The Judicial Service Commission has been revamped. The new Judicial Service Commission now has powers to employ all judges and employees of the Judiciary. Equally important the membership was expanded whereby the public has now representatives. Also the law Society of Kenya has two representatives.
- (f) In order to free the Judiciary from the financial manipulation and control by the Executive arm of Government, the Constitution created the Judiciary Fund.
- (g) A new office of Chief Registrar and Deputy Chief Registrar of the Judiciary was created. This is a new constitutional office and is the accounting officer of the Judiciary who is in charge of the Judiciary Fund.

The above measures and institutional changes introduced by the new constitution heralded a radical paradigm shift in both the management of the Judiciary and even its hierarchical order. Equally important is the new and very welcomed measure whereby the new Constitution now recognises the Judiciary as an arm of Government that has been put in constitutional parity with the Executive and the Legislature.

In totality, the new Constitution frees the Judiciary from the yoke of the Executive, creates a Judicial Service Commission that has control of all facets of the Judiciary, gives it financial autonomy. It sets free and expects that the Judiciary will deliver justice to the Kenyan people. Equally important, the Constitution now sets benchmarks for the Judiciary in term of both the qualitative and quantitative delivery of justice to the Kenyan public.

The Judicial Service Commission: A New Broom to Clean the Rot.

Article 171 of the constitution created the Judicial Service Commission of Kenya. Apologists of the old order say that this is a revamped version of the Judicial Service Commission created under section 69 of the old Constitution. Nothing could be far from the truth.

The Judicial Service Commission under Article 171 gives the composition of the Commission. The Chief Justice chairs it. The Supreme Court, the Court of Appeal and the High Court each have one representative. The magistracy has one member. The Law Society of Kenya has two members. There are also two members who must be none lawyers and who represent the Kenyan public. The Public Service Commission also has one representative.

A major weakness of the Judicial Service Commission in terms of its composition is that members of the Judiciary are over represented. For a commission with 11 members, 5 judicial officers is quite an over kill. When you add the Attorney General who is an appointee of the President and further appreciate that the two members who represent the public are appointed by the President may in future create situations whereby the executive and its employees will have a big say in both the composition of the Judicial Service Commission and the broader administration of the justice system. That has been a major oversight of the drafters of the Constitution.

Policy Direction of the Judiciary and how the Judicial Service Commission is going about.

Under Article 172 of the Constitution, the Judicial Service Commission now has a full and holistic mandate over the Judiciary. It has the constitutional mandate “to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice”.

This is a very liberal and expansive constitutional mandate that is given to the Judicial Service Commission. It is an all-encompassing mandate and total control

over the Judiciary. In addition the Constitution gives the Judicial Service Commission the powers to recommend for appointment of the Chief Justice and the Deputy Chief Justice and all judges and magistrates.

This is a radical shift from the past. Previously the law was that the President appointed judges “on the advice of the Judicial Service Commission”. In reality no serious consultation occurred and judges were appointed by the President on the advice and lobbying of politicians and politically well-connected individuals. The new mode of appointment as clearly captured in Article 172(2) for the first time introduces meritocracy, transparency and openness to the recruitment process of judicial officers. It lit up a process that was characterised by darkness, corruption, opaqueness and politically manipulative wheeler-dealer manoeuvring and horse-trading.

It is generally agreed that the bedrock of judicial independence really lies in the mode of judicial appointment. If the process is free from Executive interference, then a solid foundation can be laid. On the other hand a process that is captive to political or other interest will only lay a weak and wobbling foundation.

In this regard, Kenya has set a precedent. We are the only country in the world that has competitively and through advertisement and live television interviews hired a Chief Justice, Deputy Chief Justice and judges of the Supreme Court. It is a major policy decision on the part of the Judicial Service Commission that positions of judgeship or any other position will be handled on the basis of a completely open and transparent process.

The other major development brought about by the Constitution is that probably after the Chief Justice, the Judicial Service Commission is the second most important and powerful institution. Of course, the Judicial Service Commission recommends the Chief Justice for appointment, but in the administration of the Judiciary, the Judicial Service Commission ranks only after the Chief Justice. The Chief Justice is also the chairman of the Judicial Service Commission. This is the organ that gives policy directions on the management of the Judiciary. The Chief Justice as the chairman of the Judicial Service Commission is then tasked with the

implementation of the Judicial Service Commission's policy decisions and directions.

The Judicial Service Commission is alive to both the history of the Kenyan Judiciary and the task or the expectations of ordinary Kenyans. Kenyans want a justice system that is just, fair and efficient. Barrack Muluka captures this succinctly when he said:

“The common man understands justice that demonstrates common sense. We want justice we can smell. When we get into the corridors of justice, we want to smell justice. We want to smell it in the washrooms and in the courtrooms alike. We want justice that we can touch, feel, see and indeed test...when the administration of justice appears to the man in the street to be deficient of attributes that can be appreciated via common sense, then that justice is flatly flawed”¹.

So, with the above in mind and having in mind our constitutional mandate these are some of the policy directions and vision that the Judicial Service Commission is thinking about as it seeks to fulfil its mandate to reform the Kenyan judiciary: -

First, there is need to have a policy that faithfully adheres to the Constitution and the statutory law in the recruitment of all judicial officers and all other employees of the Judiciary. The days of smoke room deals, opaque appointment, Godfather, political connections are over. As you very well know, we recruited the Chief Justice, Deputy Chief Justice, and judges of the Supreme Court. Transparency, full glare of public and media scrutiny and audit is what we hold ourselves against. We welcome public scrutiny and participation in the recruitment of senior judges.

Second, we are adopting a policy of no tolerance towards corruption. The Judicial Service Commission is aware of how endemic and rampant corruption is at all levels of the Judiciary. This is one problem that the Judiciary as an institution has struggled to address. A number of internal commissions have been formed. Then we had the famous radical surgery that led to the Judiciary losing many judges in the Court of Appeal, the High Court and the magistracy.

¹ Barrack Muluka, *What Common Man Expects of Mutunga*, Nairobi Law Monthly, page 66, Vol 2, Number 8, August 2011

Our zero tolerance policy towards corruption has a number of components –

- (a) The Judicial Service Commission has formed a sub-committee that will be our liaison committee to the vetting Board. This committee will seek to have a permanent standing before the Board and will submit one candidate per candidate basis.
- (b) The Chief Justice has created an office of the Judiciary Ombudsperson. This is a powerful office that has been mandated to investigate both internal and external complaints. This office will process complaint for the Judicial Service Commission.
- (c) The Judicial Service Commission has also decided to adopt a policy that ensures quality of decision-making process and justice is attained in the process. We are putting emphasis on the rationale of judgments especially where there are complaints.
- (d) In all appointments to the Judiciary the integrity of the candidate and the issues of corruption both real and perceived are issues for the consideration of the Judicial Service Commission.

Judicial officers and staff are expected to exhibit high moral standards, integrity, impartiality, fair and high ethical behaviour befitting persons mandated to safeguard the law and administer justice. Unfortunately, the public perception of the Kenyan judiciary is one associated with corruption; bribery, fraud and other serious malpractices in the court corridors remain the order of the day.

To address these ills of corruption, the Judicial Service Commission will put in place comprehensive policies to curb corruption and eradicate it from the corridors of justice. The code of conduct will be revised soon in this regard.

Third, there is an urgent need to focus very strong on judicial impunity. Judicial impunity for us as Judicial Service Commission means a set of conducts on the part of a judge; a bench of judges or a magistrate to make decisions that are on face value are contrary to the law. Or one that is so outrageous that it runs affront to common decency, commonsense and the national values enumerated under the Constitution.

The days when a judge or a magistrate would make an outrageous decision and tell the lawyers or litigants to “go and appeal” are over. We as Judicial Service Commission expect the judicial officer or the bench of judges to get it right in the first instance so that the chance of appeal is minimised. Where a given judge doesn’t get it right on the law too frequently, we are of the view that it raises a competency or integrity issues that must be quickly addressed by the Judicial Service Commission. We are aware that many jurisdictions monitor how the appellate Courts handle matters that are referred to them from lower Courts. Judges whose judgments are frequently appealed against and overturned should be subject to certain redress and measures.

Four, we will introduce performance management. Performance management is the process of planning, executing, reviewing, monitoring, evaluating and measuring the results of both the institution and individuals in order to meet the expectations of the Kenyan public and also to attain certain goals and targets. Policies regarding management needs to be in place for the Kenyan Judiciary.

Five, the Judicial Service Commission is undertaking a massive programme to increase the number of judges and magistrates. We all know the problem of case backlog and delayed judgments. The Kenyan Judiciary is terribly understaffed. We will greatly increase the number of judges in the High Court, Court of Appeal and the magistracy. This will entail a programme in which justice is dispensed, quickly, fairly and justly.

A component of this task is to open High Courts in a number of Counties. Soon the Judicial Service Commission will open High Courts in Garissa, Isiolo, Kitui, Kijido and Lodwar among other counties.

Six, the welfare and terms of service of all Judiciary employees are very high on our agenda. The Judicial Service Commission is conscious of the conditions of service for staff in the Judiciary. We are working very hard to improve the terms of staff so that they have competitive and attractive terms for all staff.

The Judiciary needs to robustly engage the Vetting Board to ensure that the process is fair to all those being vetted but also have to be effective in achieving the mandate of the Board. Just as the Judicial Service Commission is engaging the

Board, I think it is imperative and indeed incumbent on all members of the Judiciary to come forward as part of their civic and nationalistic duty and volunteer information to the Vetting Board where they have evidence and information.

The Judiciary will implement an ICT and a computerization programme. The resources are now available; it is just a matter of implementation. In this regard, it will greatly help if judges and magistrates learn the basics on how to use computers and the laptops the Judiciary has supplied them at great cost. It is disheartening to hear that majority of the judges and magistrates are computer illiterate at this day and age.

Seven, the Judiciary needs interagency coordination whereby it will bring all actors on board for improved administration of justice. This includes Community Service Orders programmes, the State Law Office, the Bar, Bar-bench committees and the National Council on Administration of Justice. There should be judicial outreach to communities and schools.

Conclusion.

The Judicial Service Commission is determined to fulfil its Constitutional mandate with regard to the Judiciary. It is alive to the pregnant and even increasing expectations of the Kenyan public. It is a promise it must and will fulfil. We are also aware of the challenges facing the Judiciary, in terms of personnel and resources.

It is however in the fight against corruption, integrity issues and ethical malpractices that we will give great importance. A corrupt Judiciary is a waste of taxpayers' time and the resources. The Judicial Service Commission intends to slay this multi-headed hydra once and for all.

Thank you.