Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another; Law Society of Kenya (Interested Party); Article 19-Eastern Africa Curiae (Amicus Curiae) (Petition 314 of 2016 & Judicial Review 306 of 2016 (Consolidated)) [2016] KEHC 3581 (KLR) (Constitutional and Judicial Review) (29 August 2016) (Judgment)

Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another [2016] eKLR

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND JUDICIAL REVIEW

PETITION 314 OF 2016 & JUDICIAL REVIEW 306 OF 2016 (CONSOLIDATED)

GV ODUNGA, J

AUGUST 29, 2016

BETWEEN

TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE ..... 1ST PETITIONER

ARNOLD MAGINA ..... 2ND PETITIONER

YASH PAL GHAI ..... 3RD PETITIONER

SAMWEL MOHOCHI ..... 4TH PETITIONER

AND

JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

THE LAW SOCIETY OF KENYA ..... INTERESTED PARTY

AND

ARTICLE 19-EASTERN AFRICA CURIAE ..... AMICUS CURIAE

Court outlines the procedure for recruitment of the Chief justice, Deputy Chief Justice and judges of the Supreme Court

The proceedings were provoked by the decision of the Judicial Service Commission to commence the recruitment of suitable persons for the positions of the Chief Justice, the Deputy Chief Justice and a Judge of the Supreme Court

of Kenya. The court outlined the procedure for recruitment of the Chief justice, Deputy Chief Justice and judges of the Supreme Court.

Reported by Emma Kinya Mwobobia & Ian Kiptoo

Constitutional Law *- fundamental rights and freedoms - right to information - limitation - when could the right to public information held by a public office be limited - whether the Judicial Service Commission had absolute discretion in regard to what information it could release to the public - Constitution of Kenya, 2010,article 24 and 35; Judicial Service Act, regulation 5 of the first schedule to the Act.*

Constitutional Law *- national values and principles - public participation - whether public participation was a requirement in the recruitment process of judges especially at the short listing stage of the process - Constitution of Kenya, 2010, article 10.*

Constitutional Law *- fundamental rights and freedoms - fair administrative action and non-discrimination - whether failure to shortlist candidates having the same qualifications was irrational and amounted to discrimination - Constitution of Kenya, 2010, article 47; Fair Administrative Action Act, 2015, section 4.*

Jurisdiction *- jurisdiction of the High Court - jurisdiction of the High Court to inquire into the recruitment process of judges by the judicial Service Commission - whether High Court could question the mandate of the Judicial Service Commission being an independent commission tasked with the recruitment of judges - Constitution of Kenya, 2010, article 165(6).*

Judicial Review *- remedies of judicial review - nature and scope of judicial review remedies - what were the parameters for the grant of judicial review remedies.*

Words and Phrases *- discrimination - definition - the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured - Blacks Law Dictionary, 9th edition.*

Words and Phrases *- public interest - definition - the general welfare of the public that warrants recognition and protection and it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation - Black's Law Dictionary, 9th Edition.*

Brief facts

The Proceedings were provoked by the decision of the Commission to commence the recruitment of suitable persons for the positions of the Chief Justice, the Deputy Chief Justice and a Judge of the Supreme Court of Kenya. It was stated by the petitioners that Kenyans were not made aware of the circumstances under which the requirements outside the Constitution were set, hence the decision by the respondents to include other qualifications not stipulated in the Constitution was unconstitutional and *ultra vires*.

Furthermore, it was stated that Kenyans had a right to information in public offices including the criteria used for short listing candidates for the positions of Chief Justice, Deputy Chief Justice and Supreme Court Justices; which the respondents failed to provide. In addition, the petitioners stated that the failure by the respondents to adhere to articles 27 and 172 of the Constitution of Kenya, 2010 in the exercise of their powers was unconstitutional.

In opposing the petition, the 1st respondent stated that it duly complied with all the relevant provisions of the Constitution and the Act in evaluating and short listing applicants for the advertised position of the Chief Justice, Deputy Chief Justice and the Supreme Court Judge. Additionally, it set and applied the criteria that ensured that the various requirements for the qualifications, both professionally and otherwise of applicants to the High Offices were measurable and verifiable, the Commission in accordance with regulations 3(2) and 4(1) and (3) of the First Schedule to the Judicial Service Act, devised such lawful and reasonable tools, (in the Adverts and Application Form) as would enable it to assess the suitability of applicants to the office of the Chief Justice and other Judges of the Supreme Court and notified all prospective applicants in the advertisement published in the media.

Issues

i. Whether High Court could question the mandate of the Judicial Service Commission being an independent commission tasked with the recruitment of judges.
ii. What were the parameters for the grant of judicial review remedies?
iii. Whether public participation was a requirement in the recruitment process of judges especially at the short listing stage of the process.
iv. Whether failure to shortlist candidates having the same qualifications was irrational and amounted to discrimination.
v. When could the right to public information held by a public office be limited?
vi. Whether the Judicial Service Commission had absolute discretion in regard to what information it could release to the public.
vii. Whether the procedure adopted by the Commission in the recruitment process complied with the constitutional and statutory provisions.
viii. Whether the Judicial Service Commission acted within its mandate by requiring applicants to furnish reports from various bodies.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 31

Right to Privacy

Every person has the right to privacy, which includes the right not to have-

a) Their person, home or property searched;

b) Their possessions seized;

c) Information relating to their family or private affairs unnecessarily required or revealed; or

d) The privacy of their communication infringed.

Article 35

Right to Access to Information

1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.

Article 165(6)

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

Regulation 5 of the 1st Schedule of the Judicial Service Act

(1) The Commission shall maintain the confidentiality of sensitive and highly personal information in applications, including home and e-mail addresses, home and mobile telephone numbers, income, names and occupations of immediate family members, formal disciplinary or ethical complaints, charges or grievances brought against the applicant as a lawyer or otherwise that did not result in public discipline, medical and health history, the financial interests of the applicant, and all unsolicited comments and letters for which the author requests confidentiality or which the Commission in its discretion believes should remain confidential to protect third parties.

(2) Any information not described under subparagraph (1) as non-public material shall be set out in a separate part of the application and may be available to the public.

Held

1. The Commission's submission that article 249(2) of the Constitution, 2010, subjected the Commission only to the Constitution and Laws of Kenya and thus the Commission was independent and not subject to any direction or control by any person or authority, if taken to its extreme conclusion might easily have fallen foul of article 2 of the Constitution of Kenya, 2010. When any of the state organs stepped outside its mandate, the court would not hesitate to intervene.
2. The court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under article 165(3) of the Constitution of Kenya, 2010, had the duty and obligation to intervene in the actions of other State Organs where it was alleged or demonstrated that the Constitution had either been violated or threatened with violation. The principle of independence of the constitutional Commissions did not inhibit the court's jurisdiction or prohibit it from addressing the petitioner's grievances so long as they stemmed out of alleged violations of the Constitution. To the contrary, the invitation to do so was most welcomed as that was one of the core mandates of the court.
3. The finding was fortified under the principle that the Constitution was the supreme law of the country. All state organs had to function and operate within the limits prescribed by the Constitution. In cases where they stepped beyond what the law and the Constitution permitted them to do, they could not seek refuge in independence and hide under that cloak or mask of inscrutability in order to escape judicial scrutiny.
4. Where a statute donated powers to an authority, the authority ought to have ensured that the powers that it exercised were within the four corners of the statute and ought not to have extended its powers outside the statute under which it purported to exercise its authority. Where the law exhaustively provided for the jurisdiction of a body or authority, the body or authority had to operate within those limits and ought not to have expanded its jurisdiction through administrative craft or innovation. Furthermore, courts would not be rubber stamps of the decisions of administrative bodies. However, if Parliament gave great powers to statutory bodies, the courts would allow them to exercise it. The courts would nevertheless be vigilant to see that the said bodies exercised those powers in accordance with the law.
5. The doctrine of independence had to be read in the context of Kenya's constitutional framework. Where the adoption of the doctrine would clearly militate against the constitutional principles, that doctrine or principle would bow to the dictates of the spirit and the letter of the Constitution and the enabling legislation. It was not only the role of the courts to superintend the exercise of such powers but their constitutional obligation to do so. In effect, the Commission's independence given by article 249(2) of the Constitution of Kenya, 2010 only remained valid and insurmountable as long as it operated within its legislative and constitutional sphere. Once it left its stratosphere and entered the airspace outside its jurisdiction of operation, the courts were then justified in scrutinizing its operations.
6. The independence clause did not accord constitutional commissions *carte blanche* to act or conduct themselves on a whim; their independence was, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law. The Constitution instilled a culture of justification, in which every exercise of power was expected to be justified.
7. However, that was not a jurisdiction that the courts would lightly invoke. The court would be extremely reluctant to substitute its own views as to what was wise, prudent and proper in relation to matters pertaining to the recruitment of judicial officers in preference to those formulated by

professional men possessing technical expertise and rich experience of actual day to day working of judicial institutions and the departments controlling them.

8. It would be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the judicial system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It was equally important that the court would also as far as possible, avoid any decision or interpretation of a statutory provision, rule or by-law which would bring about the result of rendering the system unworkable in practice.

9. It was not appropriate that judicial review would be made use of to monitor actions of local authorities under the Act, save in exceptional cases. Where the existence or non-existence of a fact was left to the discretion of a public body and that fact involved a broad spectrum ranging from the obvious to the debatable to the just conceivable, it was the duty of the court to leave the decision of that fact to the public body to whom Parliament had entrusted the decision making power save where it was obvious that the public body consciously or unconsciously were acting perversely. Where the Constitution was shown to have been or was under a threat of being defiled or the law violated, the court would undertake its constitutional mandate and correct the wrong.

10. It would be appreciated that the parameters of the remedies for judicial review in Kenya's constitutional set up were no longer just common law offshoot but were a constitutional resort. The purpose of judicial review was to check that public bodies did not exceed their jurisdiction and carried out their duties in a manner that was detrimental to the public at large. It was meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limits defined by the law.

11. As a result, judicial review had significantly improved the quality of decision making. It had done that by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It had also restrained or curbed arbitrariness, checked abuse of power and had generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it was a sufficient tool in causing the body in question to remain accountable.

12. Judicial review was a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It did not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It might have been that the tribunal whose decision was being challenged had done something which it had no lawful authority to do. It might have abused or misused the authority which it had. It might have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed.

13. As regards the decision itself, it might have been found to be perverse, irrational, or grossly disproportionate to what was required. The decision might have been found to be erroneous in respect of a legal deficiency, for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker was required to apply.

14. The Constitution of Kenya, 2010 had elevated the process of judicial review to a pedestal that transcended the technicalities of common law. As a result, all power of judicial review in Kenya was found in the Constitution which required Kenyan courts to go further in exercising its judicial review jurisdiction. It was no longer tenable to create a two track system of judicial review, one based on the Constitution and the other on common law.

15. The argument that the Commission was a delegate under article 1(3) of the Constitution of Kenya, 2010 and exercised delegated powers to, among other things, protect the sovereignty of the people of Kenya under article 249(1) of the Constitution of Kenya, 2010 with due respect failed to appreciate the notion of public participation in representative democracy. Where the right to public participation

was required, it ought not to have been abrogated simply because there was in place some form of delegated representation.

16. The phrase public involvement was commonly used to describe the process of allowing the public to participate in the decision-making process. A decision making process was a process whereby the concerned authority was confronted with two or more causes of action and was required to choose one or some of them. It did not encompass a situation where the choice had already been made either by the Constitution or legislative instrument and the role of the authority was to simply authenticate the state of affairs. Decision making encompassed the exercise of one's judicious mind to a state of affairs rather than the mere scrutiny of documents. In the instant case, no public participation was required. It was however necessary when it came to determining the super-structural process that necessarily involved interviewing the applicants.

17. Bias and discrimination were grounds for quashing decisions of administrative bodies and public authorities which could not be doubted. Where persons who possessed equal attributes were treated differently without any reasonable or legal basis, it could be inferred that the authority concerned acted arbitrarily. It was clear that discrimination which was disallowed under the Constitution could not be justified where there was no rational basis for the same. Such discrimination could not be arbitrarily imposed. It was trite that where no reasons were given for the exercise of discretion in a particular manner, assuming such discretion existed, or the reasons given were irrational or irrelevant, the court was entitled to infer that there were no reasons for the exercise of the discretion in the manner it was exercised.

18. it was upon the person alleging differential treatment to place before the court material which would go to show that that was the case. None of the applicants had sworn an affidavit in the proceedings. Based on the material before the court, it would not be possible for the court to find that there was in fact differential treatment of the Hon. Justice J B Ojwang from the Hon. Justice Smokin Wanjala. However, on the face of the Commission's decision, it might have rightly been a cause of concern and might even have raised eye-brows where the Commission did not, if properly moved, justify its decision. Mere cause of concern, without more however did not suffice for the purposes of drawing conclusions which the court was being invited to make.

19. For the court to find that the Commission ought to have shortlisted the applicants who were serving as Judges of the Supreme Court as a matter of right would amount to the court stepping into the shoes of the Commission and removing its discretion conferred upon it by the Constitution and the law. The court could not make a decision whose effect would be to automatically qualify Supreme Court Judges to be interviewed for the positions of the Chief Justice or the Deputy Chief Justice.

20. There might have well been circumstances which might have disqualified a serving Judge of the Supreme Court from being shortlisted for interview as Chief Justice or Deputy Chief Justice. The court did not intend to engage in such a speculatory and conjectural voyage. Each case would be determined on its own peculiar circumstances without the court granting an automatic right of passage to a certain class of people to be shortlisted, unless it was shown to the satisfaction of the court that the decision not to shortlist them was, based on the material placed before it, clearly irrational.

21. Although the terms irrationality and unreasonableness were used interchangeably, irrationality was only one facet of unreasonableness. A decision was irrational in the strict sense of that term if it was unreasoned; if it was lacking ostensible logic or comprehensible justification. Instances of irrational decisions included those made in an arbitrary fashion perhaps by spinning a coin or consulting an astrologer or where the decision simply failed to add up-in which in other words there was an error of reasoning which robbed the decision of logic. Less extreme examples of irrational decisions included those in which there was an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons displayed no adequate justification for the decisions or where there was absence of evidence in support of the decision. Shortlisting Mr David

Mwaure Waihiga, for only one position when he applied for the other two positions, whose criteria for shortlisting was the same, did not add up. Without any reasonable or justifiable grounds, such a decision constituted unreasonableness on the part of the Commission.

22. Article 35(1)(a) of the Constitution of Kenya, 2010 did not seem to impose any conditions precedent to the disclosure of information by the state. The principle of maximum disclosure established a presumption that all information held by public bodies would be subject to disclosure. That presumption could be overcome only in very limited circumstances as public bodies had an obligation to disclose information and every member of the public had corresponding right to receive information. Furthermore, the exercise of the right would not require individuals to demonstrate a specific interest in the information.

23. Where a public authority sought to deny access to information, it would bear the onus of justifying the refusal at each stage of the proceedings. The court endorsed the definition of public bodies to include all branches and levels of government including local government, elected bodies, bodies which operated under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quasi-non-governmental organisations, judicial bodies, and private bodies which carried out public functions.

24. Article 35(1)(a) employed the phrase was held by the State. The State was defined in article 260 of the Constitution of Kenya, 2010 as the collectivity of offices, organs and other entities comprising the government of the Republic under the Constitution. That the Commission was a state organ was not in dispute. Accordingly, it was under the obligation to furnish a citizen with information held by it under the said provision. The era when Kenyans' requested for information and were turned away on the basis that they had no interest in the information sought or, that the information in question did not concern them was buried with the Constitution of Kenya, 1963 (repealed) and was no longer tenable.

25. Once the information was proved to be in possession of the respondent, the burden shifted to the respondent to show why the said information ought not to have been disclosed to the applicant. A basis ought to have been laid for the State to be directed to furnish the required information, that basis was provided by the Constitution itself. It was for the State party to demonstrate the legal basis for any restrictions imposed on the freedom of expression and if with regard to a particular State party, the Committee had to consider whether a particular restriction was imposed by law, the State party would provide details of the law and of actions that fell within the scope of the law.

26. The Constitution itself did not impose a limitation to the right to access information under article 35 of the Constitution of Kenya, 2010. However, under article 24 a right or fundamental freedom, as long as it was not preserved under article 25 thereof, was capable of being limited as long as the conditions under article 24 were met.

27. Where a person was seeking purely public information, he or she did not have to demonstrate a specific interest in the information. However, article 31 of the Constitution of Kenya, 2010 required that information relating to a person's family or private affairs ought not to be unnecessarily required or revealed. It did not matter whether that information was acquired by the person in possession thereof in his official capacity or not. If that information was not necessary it ought not to be revealed.

28. A reading of article 31 of the Constitution of Kenya, 2010 seemed to suggest that the burden of showing the necessity to reveal such information fell on the person seeking the same. Where a person sought information relating to a person's family or private affairs, he ought to have laid a basis for the same. That was necessarily so since article 45 of the Constitution of Kenya, 2010 recognised the family as the natural and fundamental unit of society and the necessary basis of social order, which was entitled to enjoy the recognition and protection of the State.

29. However, any information not forming part of regulation 5(1) ought to have been availed to the public. It was the duty and obligation on the part of the Commission, as far as possible, to give reasons not only

as to why the information could not be disclosed, but the grounds of its belief that the information fell within regulation 5(1) so as to clearly inform the person seeking the information, the reasons for non-disclosure but without infringing upon the privacy of the applicant.

30. The mere fact that a person applied for appointment to a public post ought not to be construed as a voluntary assumption of unjustifiable injury to his or her reputation. The process of appointment to a public office ought not to be transformed into an opportunity or an occasion to bring a person down by unjustifiable disclosure of information which would otherwise not have been availed to the public. Of course, an applicant was at liberty to waive that privilege but such waiver had to be expressly made.

31. The court appreciated that regulation 5 of the First Schedule to the Judicial Service Act, that the Commission was required to maintain the confidentiality of sensitive and highly personal information in applications and all unsolicited comments and letters which the Commission in its discretion believed would remain confidential to protect third parties. That called for the meaning of the term in its discretion.

32. It was clear that even in the exercise of what might have appeared to be *prima facie* absolute discretion conferred on an administrative body, the court could interfere and that would be in the following instances:

    a. where there was an abuse of discretion;
    b. where the decision-maker exercised discretion for an improper purpose;
    c. where the decision-maker was in breach of the duty to act fairly;
    d. where the decision-maker had failed to exercise statutory discretion reasonably;
    e. where the decision-maker acted in a manner to frustrate the purpose of the Act donating the power;
    f. where the decision-maker fettered the discretion given;
    g. where the decision-maker failed to exercise discretion;
    h. where the decision-maker was irrational and unreasonable.

33. The phrase in its discretion fell in the same category as if it appeared or if satisfied. To hold that the respondents were the sole judge when it came to the exercise of discretion with respect to what information to disclose would be to throw the rule of law out of the window and whittle away the constitutional provisions in article 35 of the Constitution of Kenya, 2010. Accordingly, the courts were empowered to investigate allegations of abuse of power and improper exercise of discretion.

34. Section 4(2) of the Fair Administrative Action Act, 2015 was express that every person had the right to be given written reasons for any administrative action that was taken against him.

35. The Constitutional fulcrum in dealing with the appointment of Judges was to be found in article 166 of the Constitution of Kenya, 2010. Regulations 6, 7, 8 and 9 which fell under Part III of the First Schedule to the Act headed Review of Applications and Background Investigation, was that the applicant's submit their applications for appointment; then the Commission proceeded to conduct the review to confirm whether the applicants conform with the minimum constitutional and statutory provisions.

36. Regulation 6, Part III of the First Schedule of the Judicial Service Act mandated the Commission to conduct an initial review of all applications submitted for completeness and conformity with constitutional and statutory requirements in order to determine whether the applicants met the minimum constitutional and statutory requirements for the position. According to the Commission, that was the legal basis for short-listing and hence was known as shortlisting of the candidates.

37. Section 30 of the Judicial Service Act expressly provided that the process of shortlisting was in accordance with the First Schedule and in so conducting itself, the selection panel was empowered to determine its own procedure, which procedure had to however be subject to the First Schedule. It followed that section 30 of the Judicial Service Act could not and ought not to have been interpreted in such a manner as to render the First Schedule, itself part of the Judicial Service Act futile. Section 30,

gave an overall picture of the recruitment process and the bolts and the nuts of the same were provided in the First Schedule.

38. It would be stressed that the Commission's powers as delegated to the selection panel under regulation 6 was limited to conducting a review in order to determine whether the applicant met the minimum constitutional and statutory requirements for the position and nothing else. It could not expand that power to include other functions. The said minimum constitutional and statutory requirements formed the basis of the determination as to whether an applicant ought to have moved to the next step. To contend that the Commission had no power at that stage to strike out those applicants who did not meet the said minimum constitutional and statutory requirements would with due respect amount to a legislative absurdity.

39. The process of the recruitment of a Chief Justice, Deputy Chief Justice and a Judge of the Supreme Court were necessarily time bound and for good reason. The role of the said judicial officers was not only critical for the judiciary but for the whole nation. Parliament in its wisdom decided to provide for sieving mechanisms by which the Commission was empowered to systematically weed out those who clearly had no business applying for the job.

40. The sieving process was to eliminate at an early stage, those applicants who were evidently busy bodies with misguided notions, whose reason for applying for the posts was for the purposes of their CVs or for a temporary moment of fame. Such frivolous, vexatious or hopeless applications ought to be struck down at the earliest opportunity in order to pave way for the Commission to conduct its serious business. Otherwise the Commission would find itself tied down to interviewing persons just for formality purposes.

41. A constitutional Commission, was a serious State organ whose mandate had to be taken seriously, only those who satisfied the minimum constitutional and statutory requirements ought to be considered applying for the positions advertised. To permit all applicants to go to the wire as it were would render the stipulated timelines a mirage. The first point of call was whether the applicants had met the patent qualifications for the job. It would, for example, be ridiculous to allow an applicant who had never seen the inside of a law school to pass the initial review stage simply because he or she had applied for the job. The initial review was therefore important and crucial in enabling the Commission to meet its legislative and constitutional mandate, being a policy decision, the court could only interfere where its exercise by the Commission was perverse.

42. The sieving process was in two stages. The first stage was the basis while the second stage was the superstructure. At the first stage, the Commission was concerned with those requirements that could be patently determined on the basis of the documentation without necessarily requiring to see and hear the applicant himself or herself. At that stage, the Commission had no discretion in the matter. The paperwork spoke for itself. Those who passed the stage then moved to the super-structural stage and that was the stage of discretion.

43. The short listing stage was a very critical one in the recruitment process and the highest degree of transparency ought to have been exhibited. However, the parameters of the exercise of shortlisting were not defined by regulation 13. Therefore whereas it might, in cases where the applicants contended that some applicants were not shortlisted despite meeting the minimum constitutional and legislative requirements, be prudent to secure affidavits from the said applicants, where it was contended that the decision was based on a provision of the law which was irrelevant or inapplicable, the decision, was akin to the tribunal asking itself the wrong questions, and taking into account wrong considerations and as a result arriving at an incorrect decision.

44. What was required under regulation 4, apart from sample writings and photographs, was just information. To impose any other requirements would be outside what was contemplated under regulation 4, hence the failure to comply with such extraneous requirements could not be the basis

for not shortlisting an applicant who had otherwise met all the minimum constitutional and statutory requirements. It was at that stage that the gears shifted from the shortlisting stage to one of interviews.

45. The clearances from Kenya Revenue Authority, Higher Education Loans Board, Law Society of Kenya, Directorate of Criminal Investigations, Advocates Complaints Commission, Ethics and Anti-Corruption Commission and a recognised Credit Reference Bureau were meant for the purposes of determining the applicant's integrity which according to regulation 13, encompassed demonstrable consistent history of honesty and high moral character in professional and personal life; respect for professional duties arising under the codes of professional and judicial conduct; and ability to understand the need to maintain propriety and the appearance of propriety.

46. The structure of the First Schedule unequivocally indicated that the use of Part V factors, under which regulation 13 was to be found, logically came at the oral interview stage following the shortlisting. Part III of the First Schedule dealt with Review of Applications and Background Investigation; Part IV dealt with Interview Procedures; and Part V dealt with Criteria for Evaluating Qualifications of Individual Applicants. Therefore under Part V, the Commissioner no longer dealt with review of applications and the initial background investigation but now proceeded to consider the qualifications of the applicants individually. It was no longer a process whereby the bundle of papers submitted were perused but the individual suitability of the applicants were now put to question.

47. To the extent that the Commission admitted that it relied on Part V of the First Schedule while shortlisting, it used a much more onerous criteria than what was authorized by law. To that extent, it conflated the criteria for shortlisting with that of assessing suitability for purpose of eventual nomination of applicants to the respective positions, hence it misapprehended and misapplied the law when undertaking shortlisting which rendered the same inefficient, unlawful and arbitrary.

48. Failure by the applicants to furnish reports from the various bodies enumerated could not be the sole basis for not shortlisting them. The view was reinforced by the appreciation by all the parties to the proceedings that under regulations 7 and 8 the Commission was empowered to undertake reference checks and background investigations on the applications even after the shortlisting. It was therefore immaterial for the court to decide who between the applicants and the Commission ought to have secured the said reports.

49. Whereas the Commission could well have in its discretion taken the failure to avail the said reports at the interview stage, an applicant might have well been in a position at the time of the interview to explain his reasons for the failure to secure the same. Similarly, since the said reports were not necessarily conclusive evidence of their contents, the Commission might have as well scrutinised the same in order to determine their authenticity.

50. Where the law expressly empowered a public body to exercise statutory power, the powers it exercised and the manner of doing so had to be strictly in accordance with the statute since statutory bodies operating as such ordinarily did not exercise inherent jurisdiction. For the Commission to base its decision on the failure to submit documents not expressly required by the law and in effect locked out those candidates who the legal instrument from which the Commission derived its authority did not expressly lock out amounted to abdicating jurisdiction.

51. The court did not doubt that in the exercise of its power, the Commission had to be afforded the latitude to decide the manner in which the constitutional and legislative criteria for recruiting the best candidate was to be achieved, as long as that criteria was transparent, accountable and verifiable. It was therefore properly empowered to devise such tools as would enable it to achieve its constitutional and legislative mandate. The court ought not to have substituted its own views as to the manner of achieving that mandate for that of the Commission. In seeking that the applicants be cleared by the various vetting bodies in the achievement of that mandate, the Commission was properly within its mandate and could not be faulted.

52. Requirements that removed the mandate from the control of the Commission and placed the mandate at the whim of another body not constitutionally mandated to perform the same, the Commission would have abdicated its duty and had no power to do so. It had to therefore be in charge of the whole process right from inception to the nomination, at no stage should it to have delegated its core mandate to another body or organ.
53. The opinions and decisions of the said vetting bodies could only form the material from which the Commission could have arrived at its decision but could not be the sole basis upon which the Commission's decision was based. Unless that caution was exercised, the Commission ran the risk of recruiting persons whose qualifications were pre-determined by the said bodies as opposed to the Commission itself. Such occurrence was likely to bring into disrepute the integrity of the process of recruitment as envisaged by the people of Kenya in the Constitution.
54. By opening a window for bodies not constitutionally mandated to recruit the Chief Justice, the Deputy Chief Justice and a Judge of the Supreme Court to be the sole or to a substantial extent the determinants of who qualified to be interviewed by the Commission, would amount to failure to exercise constitutional and statutory power. Such a scenario would cast doubt in the minds of the public as to whether the process of recruitment of those key figures in the judicial system was transparently undertaken.
55. There was no room for a system of recruitment of judges by which the authority of the Commission was delegated either expressly or by implication. To allow a process by which the powers of the Commission were subordinated to other bodies or organs, especially from the executive, would be to undermine the independence of the Commission and in a way subject it to the direction or control of the Executive arm of the Government.
56. Any report from the Kenya Revenue Authority, Higher Education Loans Board, Law Society of Kenya, Directorate of Criminal Investigations, Advocates Complaints Commission, Ethics and Anti-Corruption Commission and a recognized Credit Reference Bureau had to be part of the superstructure in the recruitment process and could only be considered at the interview stage. They could not be the basis upon which the Commission determined who it ought to have shortlisted for the interview and who to reject at that nascent stage of the process.
57. To allow such reports whose correctness might not have themselves been vouchsafed without affording those adversely affected would necessarily amount to unfairness. It did not suffice to simply contend that since the reports were furnished by the applicants themselves, that made their contents beyond reproach. It would be noted that the period between which the advertisements were made and the time when those reports were required did not lend itself to a meaningful opportunity for one to challenge the contents of the said reports as required by the law.
58. Whereas such reports might have been *prima facie* evidence whether the respective applicants met the minimum qualifications of possessing a high moral character, integrity and impartiality, that *prima facie* evidence amounted to a rebuttable presumption which could only be properly dealt with at the interview stage. The said reports were useful tools but belonged to the stage of the interview rather than the pre-shortlisting stage.
59. In arriving at its decision, the Commission was not only expected to nominate the most qualified persons as Judges, but had to do so through a process that was not only fair, but one that was seen to be fair to all the applicants. The Commission had to adopt a predictable, transparent and accountable process. A process that was not akin to tossing a coin, waving a magic wand or raising a green flag, but an intellectual process based on specific criteria or approaches.
60. It was for the benefit of the applicants that whoever was eventually found by the Commission to have bested the best, or to be the best of the best, not only carried with him or her the confidence of Kenyans but had self-confidence that he or she was deserving of the job and not that he or she only got the job

because others probably more qualified applicants were unfairly locked out of the competition in order to pave way for his or her nomination and eventual appointment.

61. Whereas the necessity of having the Supreme Court fully functional at all times, taking into consideration the role that court played not only in the judicial system but in the entire governmental system could not be underestimated. The Commission in arriving at its decision had to balance all the ingredients of fair administrative action which encompassed expedition, efficiency, lawfulness, reasonableness and procedural fairness and would not sacrifice one principle at the altar of the other.

62. The element of procedural fairness in article 47 of the Constitution of Kenya, 2010 had to be balanced against reasonableness, expediency and efficiency in the decision making process. The intention of expedition in the appointment of judges, in particular the Chief Justice, the Deputy Chief Justice and the Judges Supreme Court was noble and had to be appreciated if the judicial machinery was to efficiently and effectively function and if the wheels of justice were not to ground to a halt. Therefore, the court could not ignore that objective because it was meant for a wider public good as opposed to an individual who might have been dissatisfied with the recruitment process.

63. The court had to put all public interest considerations in the scales, not only the consideration of expedition. The Constitution and the Fair Administrative Action Act, 2015 also had other objectives, namely to promote the integrity and fairness of the recruitment process and to increase transparency and accountability. Fairness, transparency and accountability were core values of a modern society like Kenya. They were equally important and would not be sacrificed at the altar of expedition.

64. What section 4(6) of the Fair Administration Act, 2015 provided was that for a procedure different from the one prescribed under the Fair Administration Act, 2015 to take precedence over the said Act, that procedure had to be inconformity with article 47 of the Constitution of Kenya, 2010. In effect there could be no substitute to the rules and principles guiding the fair administrative action as espoused in article 47 of the Constitution of Kenya, 2010.

65. Public interest was the general welfare of the public that warranted recognition and protection and it was something in which the public as a whole had a stake; especially an interest that justified governmental regulation. Article 1(1) of the Constitution of Kenya, 2010 provided that all sovereign power belonged to the people of Kenya and would be exercised only in accordance with the Constitution. Under article 1(3)(c), sovereign power under the Constitution was delegated *inter alia* to the Judiciary and independent tribunals.

66. Kenya under the Constitution of Kenya, 2010 constitutional dispensation, judicial power whether exercised by the court or Independent Tribunals was derived from the sovereign people of Kenya and was to be administered in their name and on their behalf. It followed that to purport to administer judicial power in a manner that was contrary to the expectation of the people of Kenya would be contrary to the said constitutional provisions. There was the public interest that harm would not be to the nation or public and that there were many cases where the nature of the injury which would or might be done to the nation or the public service was of so grave a character that no other interest public or private, could be allowed to prevail over it.

67. In appropriate circumstances, courts of law and Independent Tribunals were properly entitled pursuant to article 1 of the Constitution of Kenya, 2010, to take into account public or national interest in determining disputes before them where there was a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilted. The court or Tribunals ought to have appreciated that the principle of proportionality was now part of Kenya's jurisprudence and therefore it was not unreasonable or irrational to take the said principle into account in arriving at a judicial determination.

68. What the court ought to have done when confronted with such circumstances was to consider the twin overriding principles of proportionality and equality of arms, which were aimed at placing the parties before the court on equal footing and to see where the scales of justice lay. Considering the fact that

it was the business of the court, so far as possible, to secure that any transitional motions before the court do not render nugatory the ultimate end of justice. The court, in exercising its discretion, would therefore always opt for the lower rather than the higher risk of injustice.

69. It was also trite that contravention of the Constitution or a statute could not be justified on the plea of public interest as public interest was best served by enforcing the Constitution and statute. Parliament had conferred powers on public authorities in Kenya and had clearly laid a framework on how those powers were to be exercised. Where that framework was clear, there was an obligation on the public authority to strictly comply with it to render its decision valid. The purpose of the court was to ensure that the decision making process was done fairly and justly to all parties and blatant breaches of statutory provisions could not be termed as mere technicalities.

70. In determining the matter, there was no specific allegation that any person who was desirous of applying for any of the three positions, the subject of the proceedings was prevented from so doing by the fact of requirements in the advertisement. There was nothing inherently wrong with the advertisement. It was the manner in which the advertisement was understood and implemented that was perverse.

71. Article 23(3) of the Constitution of Kenya, 2010 provided that in any proceedings brought under article 22, a court could grant appropriate relief, including declaration of rights, injunction, conservatory order, a declaration of invalidity of any law that denied, violated, infringed, or threatened a right or fundamental freedom in the Bill of Rights and was not justified under article 24, an order for compensation; and an order of judicial review. In cases of awarding appropriate relief in article 23 of the Constitution of Kenya, 2010. Orders to be granted by the court ought to have been like so much straw into a burning fire and consumed only the offending decisions, like guided missiles hit only the targeted decisions.

Application Allowed. No order as to costs

Orders

i. *The decision of the Judicial Service Commission made vide press releases July, 12th, 13th and 15th 2016 rejecting some of the names of the applicants in the Commission's shortlisting removed into the court and quashed.*

ii. *The Judicial Service Commission compelled to reconsider the names of the applicants which were rejected afresh in accordance with the terms of the Judgement and communicate its decision, particularly where adverse, to the parties affected and thereafter proceed in accordance with the law.*

iii. *Pending the Judicial Service Commission's reconsideration ,the Judicial Service Commission was prohibited from making recommendations to the President on the persons to be appointed as the Chief Justice, the Deputy Chief Justice and a Judge of the Supreme Court of the Republic of Kenya.*

Citations

Statutes

None referred to

Advocates

Mr Thuita for Mr Karanja for the 1st Petitioner
Mr Ongoya for the 2nd Petitioner
Mr Wanyoike & Miss Nkonge for the 3rd and 4th Petitioners
Mr Njoroge Regeru & Mr Ochieng Oduol for the 1st Respondent
Mr Onyiso for the 2nd Respondent
Mr Morintat for the Interested Party

JUDGMENT

Introduction

1. The 1st Petitioner herein, the Trusted Society of Human Rights Alliance, is described as a duly registered Human Rights Society within the Republic of Kenya with the mandate of protection of constitutionalism, the rule of law, democracy and human rights.

2. The 2nd Petitioner, Arnold Magina, is an advocate of the High Court of Kenya pursuing a Master of Laws Degree at the University of Nairobi.

3. The 3rd Petitioner, Yash Pal Ghai, is a Kenyan citizen and a retired professor of law and former Chairperson of the Constitution of Kenya Review Commission.

4. The 4th Petitioner, Samwel Mohochi,isa Kenyan citizen and advocate of the High Court of Kenya.

5. The 1st Respondent, the Judicial Service Commission, (also hereinafter referred to as "the Commission" or "the JSC") is a Constitutional Commission established under Articles 171 and 248(2) (e) of the Constitution. It is also a corporate body under Article 253 of the Constitution capable of suing and being sued and is, pursuant to Article 172 of the Constitution, constitutionally charged with promoting and facilitating the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice including recommending to the President persons for appointment as Chief Justice, Deputy Chief Justice and Judges of the superior courts.

6. The 2nd Respondent, the Attorney General(hereinafter referred to as "the AG"), is the chief government legal adviser, sued pursuant to Article 156 of the Constitution of Kenya on behalf of the Government of Kenya.

7. The interested party, the Law Society of Kenya, is a professional body established under the Law Society of Kenya Act Chapter 18 of the Laws of Kenya, charged with the responsibility of overseeing the practice of law in Kenya and mandated to advice the public and the Government in respect of legal and constitutional matters.

8. The amicus curiae, Article 19-East Africa, describes itself as an international human rights organization which defends and promotes freedom of expression and access on information around the world involved in monitoring, researching, publishing, lobbying, campaigning, setting standards; and conducting strategic litigation for the promotion of the right to freedom of expression.

9. What provoked these proceedings which were on 22nd July, 2016 consolidated for the purposes of expeditious hearing, was the decision of the Commission to commence the recruitment of suitable persons for the positions of the Chief Justice, the Deputy Chief Justice and a Judge of the Supreme Court of Kenya.

1st Petitioner's Case

10. According to the 1st Petitioner, on the 16th June 2016 the Commission advertised vacancies in the positions of the Chief Justice (CJ) and Deputy Chief Justice (DCJ) and a Judge of the Supreme Court of Kenya for the Judiciary of the Republic of Kenya pursuant to which interested applicants had up to the 6th of July, 2016 to submit their applications. This deadline was however extended up to the 8th July, 2016 for the reason, the media disclosed, that there was a public holiday falling in between.

11. It was pleaded by the 1st Petitioner that in the said advertisements, the Commission enumerated a raft of qualifications both in the Constitution and outside the Constitution of Kenya including clearance from Higher Education Loans Board for beneficiaries and non-beneficiaries, Kenya Revenue Authority, Directorate of Criminal Investigations, Advocates Complaints Commission, Ethics and Anti-Corruption Commission and a recognized Credit Reference Bureau.

12. According to the 1st Petitioner, whereas the Constitution in Articles 10,73 and 166(3) has set the qualifications for the positions in question, malice, impunity and greed drove the respondents to oust the provisions of the Constitution and instead set criteria unknown to the law. As a result, the respondents shortlisted candidates for the 3 positions and in so doing, left one the name of Prof Jackton Boma Ojwang, one of the serving Judges of the Supreme Court, unlike some Judges in the Court of Appeal and the High Court. This, according to the 1st Petitioner, was without any reason being advanced for the said omission. Apart from the said Judge, a former court of appeal judge who serves also in a regional Court Justice Aaron Ringera, a respected jurist and scholar, was similarly not shortlisted. It was therefore contended that candidates with solid credentials were knocked out at the short listing stage rendering the remaining predetermined process a mockery of the intelligence of Kenyans hence setting a dangerous precedent by allowing a few individuals in the Commission to impose their friends in the Judiciary of the Republic of Kenya. By so doing, it was contended that the rule of law and constitutionalism ad been overthrown by the respondents. It was averred that majority of the commissioners of the Commission owe allegiance to some political leaning and have earmarked candidates for the three slots and that the process is a white wash for a predetermined outcome.

13. It was pleaded that Kenyans were not made aware of the circumstances under which the requirements outside the Constitution were set, hence the decision by the respondents to include other qualifications not stipulated in the Constitution is unconstitutional and ultra vires. To the 1st Petitioner, this action served to favour preferred candidates hence robbing Kenyans of judicial independence as anticipated by the Constitution of Kenya. In addition, the process of recruitment for the 3 positions was rushed to shield it from public scrutiny, yet the current constitutional setup has no room for such discrimination and blatant disregard of the rule of law as provided for under Article 10 of the Constitution.

14. It was averred that the Commission's decision to provide for additional qualifications for the positions violated the Constitution in that it failed to appreciate the provisions of Article 27 of the Constitution of Kenya by discriminating against applicants who did not get Higher Education Loans Board; it prescribed additional qualifications which are not provided for in the law; it blatantly disregarded well laid down provisions of the law; it amounted to arbitrary action; it abrogated the Constitution; and it set the stage for the manipulation of the judiciary.

15. It was averred that the Constitution guarantees the right to equal protection and benefit from the law, freedom from discrimination, and right to administrative action which ought to be respected and protected and provides in Article 10 for national values of the rule of law, transparency and accountability.

16. To the 1st Petitioner, Kenyans have a right to information in public offices including the criteria used for short listing candidates for the positions of Chief Justice, Deputy Chief Justice and Supreme Court Justices; Minutes of the persons/meeting that came up with the rules for short listing and comprehensive minutes for the short listing of the three positions while Article 73 provides for respect for public offices as well as inspiration of public confidence in public offices. Further, Article 172(2) of the Constitution of Kenya decrees that the 1st respondent shall be guided by competitiveness and transparent processes of appointment of judicial officers and staff.

17. The 2nd Respondent was accused of having allowed the Constitution of the Republic of Kenya to be denigrated.

18. In the 1st Petitioner's view, the judiciary is the bastion for the rule of law, constitutionalism and human rights and must observe the same. Further, Articles 47 and 48 of the same Constitution guarantees fair administrative action and the right to access to justice to all the citizens of the Republic of Kenya. In support of its submissions, the 1st Petitioner relied on Article 166(3) of the Constitution of Kenya, Part V of the First Schedule to the Judicial Services Act, 2011(hereinafter referred to as "the Act") which sets out the criteria for evaluating qualifications of individual applicants.

19. It was submitted that the Commission is required to adhere to the provisions of Article 172(2) of the Constitution which requires it to be guided by competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary and the promotion of gender equality. To the 1st Petitioner, the short listing stage is a very critical one in the recruitment process and the highest degree of transparency ought to be exhibited. Whereas in that process, the Commission exercises discretion in short listing the Applicants, the parameters of exercise of that discretion has been defined by regulation 13.

20. To the 1st Petitioner, the determination of the independence of the judiciary, is not based on one event but the whole process starting from the manner in which the judicial officers are appointed, how they are to carry out their mandate and the manner of their removal from the office, all of which must be cumulatively considered in order to determine whether the judiciary is independent and the extent of such independence. Independence, it was contended, is therefore a culmination of several factors that presumes that there is an appropriate appointment process; subject to strict procedures for removal of judges, a fixed term in the position; and a guarantee against external pressures. According to the Petitioner, where any stage of the process of appointment is shrouded in mystery without a clear formula that is both transparent and accountable on how such appointment is to be made, doubts may be cast as to what factors dictated such appointments. In this respect the 1st petitioner relied on the Compendium and Analysis of Best Practice in the Appointment, Tenure and Removal of Judges under Commonwealth Principles.

21. The 1st Petitioner's position was premised on the press releases of 12th, 13th and 15th July, 2016 shortlisting individuals for the position of Chief Justice, Deputy Chief Justice and Judge of the Supreme Court which according to it did not provide the criteria used to shortlist the Applicants nor did it provide any reasons to the public why those who had been shortlisted for the various positions had been shortlisted or those not shortlisted had not been shortlisted. In this respect the 1st Petitioner adopted the position of Langa, CJ in Hugh Glenister vs. President of the Republic of South Africa & Others Case CCT 41/08; [2008] ZACC 19 at para 33.

22. It was further submitted that this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(2)(a) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation which is what is being alleged in this petition. Accordingly, the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. To the contrary, the invitation to do so is most welcome as that is one of the core mandates of this Court. Reliance for this position was sought from the views expressed in "Judicial Independence: An overview of Judicial and Executive Relation in Africa", an article by Muna Ndulo, Joy Brenda Masinde vs. Law Society of Kenya & Another [2015] eKLR and Githu Muigai & Another vs. Law Society of Kenya & Another [2015] eKLR.

23. In exercise of its powers, the 1st Petitioner submitted that the Commission has a constitutional duty and administrative discretion, in the exercise of which it has no discretion other than to comply with the provisions of Articles 27 and 172 of the Constitution and cannot exercise its mandate outside the statute and or Constitution.

24. To the 1st Petitioner, the minimum qualifications are clearly set out under Article 166(3) whereas the criteria is set out under Regulation 13 of the Act hence in selecting the ideal candidate out of the pool of interested applicants all of whom possess the minimum statutory qualifications, the Respondents are at liberty to take into consideration any additional qualification that may give one candidate an edge over the other candidates and proceed to appoint suitable candidate on the basis of that additional qualification. This would maintain the spirit of the Constitution which provides for equality as well as appointment on a transparent and competitive basis.

25. It was therefore the 1st Petitioner's case that by the inclusion of additional requirements in the advertisement to the minimum requirements as set out under Article 166(3) of the Constitution, the Commission acted outside of its statutory mandate as the additional requirements which fell outside Article 166(3) of the Constitution as read with regulation 13 of the Act, were made ultra vires their powers and must be quashed. In this respect, the 1st Petitioner relied on Andrew Omtatah Okoiti vs. Attorney General & 2 Others [2011] eKLR where it was stated that apart from those minimum constitutional qualifications, Part V of the First Schedule to the Judicial Service Act, 2011sets out the criteria for evaluating qualifications of individual applicants and that whereas the Commission exercises discretion in shortlisting the applicants, the parameters of exercise of that discretion by the Commission has been defined by regulation 13. In this case, it was submitted that the Commission applied an unknown criteria as individual applicants were left out of the shortlisting whereas they had met the minimum constitutional and statutory qualifications. In the 1st Petitioner's view, whereas the impression created by the Commission was that Hon.Prof. Justice J.B. Ojwang, an accomplished scholar of law and a sitting judge of the Supreme Court had questionable integrity, the Commission had not made any step towards removal of the judge from his position as a result thereof. With respect to Rtd Hon. Justice Aaron Ringera, who had served in the position of High Court Judge, Solicitor General and an Appeal Judge and was serving as a Judge of the East African Court of Justice, the impression was that whereas his qualifications would accord him a position for the three positions, the failure to shortlist him imputed lack of integrity, impartiality and high moral character and hence cast doubt as to his competence in the current position of a judge of the East African Court of Justice. Similarly with respect to Prof. Makau Mutua, a renowned law scholar who had applied for the position of the Chief Justice, the failure to shortlist him sent a message to the public is that he is wanting on matters of integrity.

26. The 1st Petitioner relied on regulations 6 and 8 in the First Schedule to the Act (hereinafter referred to as "the Regulations") and based thereon, contended that during the shortlisting, the Commission is only required to determine whether the Applicant meets the minimum constitutional and statutory requirements upon which the qualifications under Article 166(3) of the Constitution are to be assessed. Further regulation 8 provides that:

27. In the 1st Petitioner's view, the requirement that the applicants do furnish clearance from institutions such as the Kenya Revenue Authority, Higher Education Loans Board, Law Society of Kenya, Directorate of Criminal Investigations, Advocates Complaints Commission, Ethics and Anti-Corruption Commission and a recognized Credit Reference Bureau are not specifically provided for under the Constitution and or the Act or the Regulations thereunder as a requirement for qualification, hence comprise extraneous requirements not forming part of the constitutional and

statutory requirements and criteria set out under Article 166(3) of the Constitution as read with Part V of the First Schedule to the Act, respectively for evaluating qualifications of individual applicants.

28. It was further submitted that the criteria for shortlisting of candidates is also dependent on the provisions of Article 166(2)(c) of the Constitution of Kenya which provides that the person have a high moral character, integrity and impartiality. To the 1st Petitioner, a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution. Accordingly, as the issue of integrity, high moral character and impartiality relate to the person as opposed to his qualifications, any decision made in respect thereof should be made after according the said individual an opportunity to address the issues of lack thereof of the qualities as enumerated and any decision made in his/her absence amount to a breach of the rules of natural justice and the provisions of section 4(3) of the Fair Administrative Actions Act as read with Article 47 of Constitution of Kenya, 2010. Accordingly, the 1st Petitioner submitted that the shortlisting process herein was carried out in breach of fair administrative action as the issue of integrity, high moral character and impartiality was determined in the absence of the Applicants not shortlisted whereas the issues raised therein and the decision made denied them the opportunity to address the allegations lodged against them. In the 1st Petitioner's view, the right to be heard is therefore not just a common law requirement but is under our current Constitution, a constitutional requirement as well and reference was made to Onyango Oloo vs. Attorney General [1986-1989] EA 456.

29. It was the 1st Petitioner's position that the Applicants herein being persons working in the public arena had a legitimate expectation that any decision in respect of their applications would be made with due communication being made to them and or afforded an opportunity to address the issues raised as against them noting that no process was initiated at which the applicants could be heard on the allegations of lack of integrity as required under Article 50. In this respect, the 1st Petitioner relied on Selvarajan vs. Race Relations Board [1976] 1 ALL ER 12 in which Lord Denning held that:

> "...it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it. The investigating body is however the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only."

30. Arising from the foregoing, the decision not to shortlist the Applicants on the issue of integrity casts doubt on the competence of the Applicants which is a public issue and the criteria used should also be made public as the positions sought to be filed are public offices.

31. On the right to information, it was submitted that it is beyond dispute that the right to information is at the core of the exercise and enjoyment of all other rights by citizens and the right is expressly recognized expressly in the Constitution of Kenya 2010, and in international conventions to which Kenya is a party and which form part of Kenyan law by virtue of Article 2(6) of the Constitution. It was submitted that Article 232 of the Constitution provides the principles and values of public service, one of which is transparency and provision to the public of timely, accurate information. However in the absence of legislation setting out the parameters for access to information, we would have to fall back on

international standards with regard to the provision of information which standards require, among other things, maximum disclosure and limited exceptions, hence it is incumbent on the Commission to show reasons, based on the harm or public interest considerations, why it should not provide such information as is requested for by a citizen.

32. In this case it was submitted that there was no reason adduced to justify the refusal to provide the information sought as there was no objective criteria used to shortlist the applicants that was made to the public. It was therefore submitted that the right to information gives effect to the national values and principles of governance contained in Article 10 of the Constitution, and in particular, good governance, integrity, transparency and accountability.

33. In the 1st Petitioner's view, the protection of privacy has been considered of sufficient importance to warrant constitutional protection under our Constitution. The 1st Petitioner however appreciated that it is important to protect the privacy of an individual either from unlawful searches or seizures, or from unlawful disclosure of private information, since this s not one of the rights that cannot, under Article 25, be limited based on the factors enumerated under Article 24 of the Constitution.

34. It was therefore the 1st Petitioner's case that the Commission acted outside its mandate by exercising discretion not provided by statute, Regulations thereunder and/or under the Constitution in the criteria used to shortlist the Applicants; that there was no opportunity accorded to the Applicants to address the issues raised against them whereas they possessed the minimum statutory and constitutional qualifications for the position advertised and applied for, whose action was in breach of the right to fair administrative action as provided under Article 47 of the Constitution and section 4 of the Fair Administrative Actions Act; that the criteria used for shortlisting the applicants is not provided under statute hence the right to information as to the criteria applied in the shortlisting process; that the transparency and accountability required of the process starts in the initial process, in this case, being the shortlisting and where there is no transparency, the entire process becomes flawed leading to lack of confidence that the end result will be the best suited candidates for the position of Chief Justice, Deputy Chief Justice and a judge of the Supreme Court; that the positions sought to be filled require that the public be well apprised which can be effected through providing information as sought and where the process is carried out and the information requested for is not provided, the entire exercise is cast in doubt whereas the same relates to the highest position in the judiciary.

35. These submissions were highlighted on behalf of the 1st Petitioner by its learned counsel Mr Karanja.

36. The 1st Petitioner therefore urged the Court to find that the shortlisting of applicants was flawed and to grant the following reliefs:

    a. A declaration that the actions of the 1st respondent in setting the qualifications in the advertisements for recruitment of Chief Justice, Deputy Chief Justice and Supreme Court justice are unconstitutional hence null and void.

    b. A declaration that the actions of the respondents above have out rightly violated the Articles 10,35,73 and 172(2) of the Constitution.

    c. A declaration that the decision by the respondents to provide additional qualifications for recruitment of Chief Justice, Deputy Chief Justice and Supreme Court justice are unconstitutional hence hence ultra-vires.

    d. An order of certiorari to remove into this honourable court for the purpose of it being quashed the decision by the respondents in setting the qualifications in the advertisements for recruitment of Chief Justice, Deputy Chief Justice and Supreme Court justice.

e. A declaration that the respondents are escapists and have abdicated their duty to respect and uphold the constitution of Kenya in the recruitment of Chief Justice, Deputy Chief Justice and Supreme Court justice

f. A declaration that the process of short listing, interviewing, recruiting and appointment of persons to the positions of Chief Justice, Deputy Chief Justice and Supreme Court justice is/was opaque, clandestine, shrouded in secrecy and riddled suspicion and contrary to article 10,73 and 172(2) of the Constitution of Kenya hence unconstitutional and consequently null and void or in the alternative the process of short listing commences afresh.

g. The petitioner be paid costs of this Petition

2nd Petitioner's Case

37. The 2nd petitioner, on his part while explaining that he commenced his proceedings in the public interest in pursuit of his civic obligations to respect, uphold and defend the constitution, to strike a blow for constitutionalism and the rule of law and to smother arbitrariness also averred that Article 166(2) and (3) of the Constitution exclusively set out the minimum qualifications for one to be appointed a Chief Justice or other judge of the Supreme Court.

38. To the 2nd Petitioner, it is expected that in the interest of the principles of equal opportunity for all and effective public participation in the process as dictated by articles 10 and 27 of the Constitution, all applicants who meet the minimum qualifications are shortlisted for interview whereat any other higher threshold/advantage criteria may be tested and applied. To his mind, it was incredible that the Commission failed to shortlist a whopping eight (8) candidates for the position of Chief Justice including eminent scholars, jurists of many years' experience as well as a serving judge of the Supreme Court of Kenya. It was his position that it was incredible that a serving Judge of the Supreme Court (which office has the same eligibility qualifications as those of the Chief Justice) and who is prima facie is eligible for consideration for the office of Chief Justice did not pass the threshold for shortlisting. To him, his was a prima facie demonstration that the decision was unconstitutional and was plainly irrational and to the extent that the same logic applied to fail to shortlist the other candidates, the same should be quashed.

39. In the 2nd Petitioner's view, the consideration for short listing and consequential short listing of candidates for the position of Chief Justice of the Republic of Kenya was an administrative action that affected the rights of the interested candidates to equal opportunity and the general public to public participation in the eventual determination of who will be the next Chief Justice of the Republic of Kenya yet general public has an over-arching interest in the whole process being conducted in strict compliance with constitutional requirements and passing the test of the kindred good governance concepts of constitutionalism and the rule of law.

40. According to him, since the Constitution at Article 166(2) & (3) sets out the minimum requirement for one to be eligible for consideration for the position of Chief Justice of the Republic of Kenya, a failure or refusal to shortlist a candidate otherwise than for failure to meet this minimum criteria is plainly unconstitutional.

41. In the 2nd Petitioner's view, to the extent that the decision not to short list eight of the applicants for the position of Chief Justice was influenced by considerations outside the framework considerations in article 166(2) & (3) of the Constitution, the same was arbitrary and the exact anti-thesis of a decision that respects the twin concepts of constitutionalism and the rule of law.

42. In his view, the Commission has no authority under the Constitution to impose conditions for consideration for the office of Chief Justice other than the considerations set out in the constitution.

43. The 2nd Petitioner therefore opined that it is just and equitable that the impugned decision of the Commission be subjected to the judicial review jurisdiction of this Honourable Court because the same sets a dangerous precedent of arbitrariness in recruitment processes to public office. In his view, there is real and present danger that the Commission is bent on a process to pre-determine the next Chief Justice of the Republic of Kenya by use of the board room short listing process, a tactic that is plainly unconstitutional and would be a justification to disband the Respondent. He asserted that there is need for judicial scrutiny/review of the short listing process of candidates for the position of Chief Justice as a matter of extreme urgency before the rest of the process is allowed to carry on in the interest of transparency, accountability as well as the hackneyed principles of the constitutionalism and the rule of law since the process of appointment of the Chief Justice of Kenya is so important a governance process that it should not be allowed to carry on with lingering questions and doubts as to its transparency and accountability. Unless reviewed, any doubts in the process of appointment of the Chief Justice of the Republic of Kenya risks bringing not only the legitimacy of the apex court of the country, the Supreme Court, into question but indeed the entire judicial branch of government risks suffering an irreparable legitimacy crisis. He disclosed that Kenya as a country has had its fair share of experience with the governance challenges arising from legitimacy questions of the judicial institution that as a well-meaning citizen, the applicant herein does not wish to see being repeated.

44. It was the 2nd Petitioner's case that the process adopted by the Commission to "shortlist" candidates by way of summarily striking Applicants off the process in the manner that it did in the process under review is alien to the Constitution and the Judicial Service Act which both govern the process of appointment of Chief Justice, Deputy Chief Justice and Judge of the Supreme Court. Whichever way one looks at it, he averred there is apparent arbitrariness and want of any clear criteria that was applied by the Commission in the manner in which it undertook the process of striking Applicants off the process of said appointments as evidenced by the following:

    (a) The basic qualifications in law for one to be appointed Chief Justice, Deputy Chief Justice and Judge of the Supreme Court are the same word for word.

    (b) The Hon. Lady Justice Roselyn Naliaka Nambuye applied to be considered for the position of Chief Justice, Deputy Chief Justice as well as Judge of the Supreme Court and was shortlisted for each of the three positions, namely, Chief Justice, Deputy Chief Justice and Judge of the Supreme Court an indication that she had met the basic criteria/qualifications for appointment for each of the three offices which are the same.

    (c) The other applicant who applied for each of the three positions of Chief Justice, Deputy Chief Justice and Judge of the Supreme Court, David Mwaure Waihiga, was shortlisted for the position of Judge of the Supreme Court, but failed to be shortlisted for the positions of Chief Justice, and Deputy Chief Justice despite both positions carrying the same basic qualifications as that of the Judge of the Supreme Court for which he was shortlisted.

    (d) The fact that the Hon Justice Jacton Boma Ojwang was not shortlisted despite being serving Judge of the Supreme Court.

45. From the foregoing, it was contended that the Commission acted quite arbitrarily in purporting to shortlist candidates for interviews for the positions of Chief Justice, Deputy Chief Justice and Judge of the Supreme Court in a manner that evinces blatant arbitrariness; misapprehension of the law

on appointment of the Chief Justice, Deputy Chief Justice and Judge of the Supreme Court; or incompetence of the persons who discharge the functions of the commissioners of the Commission.

46. While conceding that section 30 of the Judicial Service Act enjoins the Commission to constitute a selection panel comprising of not less than five (5) members, it was contended that the panel shortlists persons for nomination by the Commission to the position of the Chief Justice, Deputy Chief Justice and Judges of the Supreme Court in accordance with the First Schedule and section 1 thereof outlines the entire procedure for selection of applicants for recommendation for appointment as Judges and the criteria for determining their qualifications. In that regard, there is no provision for pre-interview short-listing of Applicants in the nature of striking off certain applicants from the process either in the Act or in the Schedule. Instead, the only "shortlisting" known to the Act is shortlisting by a selection panel under section 30(3) in accordance with the First Schedule, for the purpose of recommendation for appointment. It was therefore asserted that no other provision grants the Commission the power to shortlist or summarily strike Applicants off the process as it did.

47. It was therefore averred that JSC unilaterally varied the recruitment and interview procedures outlined in section 9 of the First Schedule to the Judicial Service Act.

48. The 2nd Petitioner relied on section 2 of the First Schedule to the Judicial Service Act, which defines the term "Applicant" as meaning any person making an application to the Commission for consideration for appointment as a Judge and reiterated that it is apparent from the functional powers of the Commission in the appointment process that it does not have power to summarily strike off certain applicants from the process in the exercise of the power to shortlist as set out in the Constitution.

49. On behalf of the 2nd Petitioner, it was submitted that Constitution of Kenya has granted the High Court wide jurisdiction to rule on the constitutionality of any legislative or administrative actions through the power of Judicial Review and that the High Court has jurisdiction, under Article 23(1), to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and grant appropriate relief, including an order of judicial review. Similarly, Article 47 recognizes the right to fair administrative action and assures every person of the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Moreover, under Article 47, if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the concerned persons has the right to be given written reasons for the action. The 2nd Petitioner relied on Martin Nyaga Wambora vs. Speaker of the Senate [2014] eKLR.

50. According to the 2nd Petitioner, the jurisdiction under Article 23 is to be exercised in accordance with Article 165(6) which is a comprehensive catalogue on the jurisdictional ambit of the High Court.

51. In this respect the 2nd Petitioner relied on the Supreme Court's pronouncement in Communications Commission of Kenya vs. Royal Media Services Limited [2014] eKLR when it held that the Constitution of 2010 had elevated the process of judicial review to a pedestal that transcends the technicalities of common law (at 355) and as a result all power of judicial review in Kenya is found in the Constitution (at 358) which requires Kenyan courts to go further than Marbury v Madison in exercising its judicial review jurisdiction. The court also cautioned against the creation of a two track system of judicial review one based on the constitution and the other on common law cases previously decided.

52. Similarly reliance was placed on the decision in Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC)at 33on the same issue.

53. Based on Republic vs. Director of Public Prosecution ex parte Chamanlal Vrajlal Kamani [2015] eKLR, Sylvana Mpabwanayo Ntaryamira vs. Allen Waiyaki Gichuhi [2016] eKLR, Gabriel Keya vs. Nick Emson & Another [2016] eKLR, Peter Muchai Muhura vs. Teachers Service Commission [2015] eKLR; Kenya Human Rights Commission vs. Non-Governmental Organisations Co-Ordination Board [2016] eKLR; Khadhka Tarpa Urmila vs. Cabinet Secretary Ministry of Interior and Coordination of National Government [2016] eKLR at 43 and Masai Mara (SOPA) Limited vs. Narok County Government [2016] eKLR, it was submitted that the High Court has increasingly recognized that the judicial review jurisdiction of the High Court is a constitutional exercise in supervision of power which extends to private administrators and covers both procedural and substantive or merit issues. To the 2nd Petitioner, the provisions of the Fair Administrative Act, 2015 support this expansion of the power of judicial review court since section 2 thereof defines administrator to include a private administrator while section 11 enhances the reliefs the High Court can grant from three to eleven plus, including a declaration. Further, section 11(1)(a) thereof empowers the court in proceedings for judicial review to grant any order that is just and equitable, including an order declaring the rights of the parties in respect of any matter to which the administrative action relates. Additionally, where proceedings for judicial review relate to failure to take an administrative action, the court may grant any order that is just and equitable, including an order declaring the rights of the parties in relation to the taking of the decision between the parties as well as orders as to costs and other monetary compensation.

54. According to the 2nd Petitioner, the Commission's administrative decision was ultra vires the powers of the Respondent as the Commission has no authority under the constitution to impose minimum conditions for consideration for the office of Chief Justice other than the considerations set out in the constitution by Acting outside the constitutional and statutory framework. Any additional criteria must only apply at the interview stage. It was contended that the Commission acted ultra vires by striking out the Applicants at the preliminary stage while they met the minimum qualifications under the Constitution and should have been interviewed under the First Schedule to the Act.

55. The 2nd Petitioner while reiterating the foregoing submitted that Parliament has enacted the Judicial Service Act, 2011 with the object of among others ensuring that the Commission and the Judiciary upholds, sustains and facilitates a Judiciary that is accountable to the people of Kenya; promotes and sustains fair procedures in its functioning and is guided in all cases in which it has the responsibility of taking a decision affecting a judicial officer of any rank or its own employee, by the rules of natural justice.

56. It was therefore submitted that the Commission unilaterally varied the recruitment and interview procedures outlined in sections 9 and 10 of the Act. However, by adopting a unknown procedure for pre-interview shortlisting, the Commission was accused of acting acted ultra vires the Act hence its action is liable to be quashed on that ground and for violating section 7(2)(a) of the Fair Administrative Action Act, 2015, the implication being that the Commission could not act contrary to the Judicial Service Act which is its empowering provision; act in excess of jurisdiction or power conferred under the Judicial Service Act which has no provision for pre-interview shortlisting of Applicants; strike the Applicants off the process in a manner that denies them a reasonable opportunity to state their case by being afforded the chance to explain any perceived gaps in their application.

57. While appreciating that the Commission is independent and has discretionary powers in the process of appointment of judges, it was contended that its independence and discretion must be exercised within the four corners of the Constitution and the law. In this respect the 2ndPetitioner relied on In Re The Matter of the Interim Independent Electoral Commission [2011] eKLR that the "independence clause" does not "accord" constitutional commissions and Etienne Mureinik notes in A Bridge to

Where? Introducing the Interim Bill of Rights (1994) 10 SAJHR 32,and submitted that every decision by the Commission must be justified, among others on the basis of Article 10 which binds it whenever it applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. In the 2nd Petitioner's contention, to entrench the culture of justification, this court is given inter alia the jurisdiction under Article 165(d)(ii) to determine the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in accordance with the Constitution. The constitutionalisation (sic) of the right to fair administrative action, also means that failure to justify an administrative action implies that that administrative action is "unreasonable". This is in opposition to the standard of "outrageous in defiance of logic or acceptable moral standard" test set in Wednesbury. Based on Bato Star Fishing Ltd vs. Minister of Environmental Affairs and Tourism [2004] ZACC 15at 44,which was dealing with section 6(2)(h) of the South African Promotion of Administrative Justice Act, a legislation the 2nd Petitioner contended squares with section 4(2)(k) of our Fair Administrative Action Act, 2015to the extent that it forbids unreasonable administrative actions or decisions, it was submitted that because of the constitutionalisation of fair administrative action, an unreasonable decision is simply a decision that a reasonable decision-maker could not reach and not necessarily an egregious one per Wednesbury.

58. The 2nd Petitioner therefore contended that what will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. He posed the questions whether a reasonable decision maker guided by the Constitution and the Fair Administrative Action Act, 2015, would reach the decision that a serving judge of the Supreme Court (which office has the same eligibility qualifications as those of the Chief Justice) could fail to meet the minimum threshold required for short listing for interview to as Chief Justice and President of the Supreme Court and whether a reasonable decision maker reach the decision that an eminent scholars and jurists of many years' experience including serving judges fail to meet the minimum threshold for interviews for purposes of determining their qualification under the First Schedule to the Judicial Service Act.

59. The court was further urged to adopt this interpretation of "unreasonable" as it is the one which in terms of Article 20(3)(a) most favours the enforcement of the right to fair administrative action and read common law precedents such as Wednesbury decided before the promulgation of the Constitution in conformity with the Constitution under Article 20(3) and section 7(1) of the Sixth Schedule to the Constitution. In this respect reference was made to Kenya Human Rights Commission vs. Non-Governmental Organisations Co-Ordination Board [2016] eKLR where it was held that the Court, effectively has a duty to look both into the merits and legality of the decision made due to the requirement of "reasonable" action under Article 47, and also the process and procedure adopted due to the requirement of following all precepts of natural justice under both Articles 47 and 50(1) of the Constitution. The court proceeding under Article 47 of the Constitution is expected not only to pore over the process but also ensure that in substance there is justice to the petitioner hence the traditional common law principles of judicial review are not the only decisive factor.

60. It was contended that the Commission's action was unconstitutional for want of public participation. It was averred that the Commission denied the public a chance to participate in the process rendering it a nullity and the 2nd Petitioner sought support from Robert N. Gakuru vs. Governor Kiambu County [2014] eKLR. It was further submitted that the Commission denied the Applicants and the public the benefit of section 5 of the Fair Administrative Action Act, 2015, which violation renders the action of the Commission a nullity. To the 2nd Petitioner, that section applies where any proposed

administrative action, such as disqualification of the Applicants summarily, is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public. In this respect, the 2nd Petitioner relied on Moi University vs. Council of Legal Education [2016] eKLR and contended that the Commission was aware of the ramifications of its decision on the general public hence it ought to have made the public aware of its decision to summarily strike the Applicants off the process in line with the spirit of Article 10 of the Constitution which obliges all public officers and all persons to be bound by inter alia the principle of public participation when applying or interpreting any law or making or implementing public policy decisions.

61. It was submitted that there was no evidence that the Commission having decided to strike off the Applicants at the pre-interview stage issued a public notice of the proposed administrative action inviting public views in that regard; consider all views submitted in relation to the matter before taking the administrative action; consider all relevant and materials facts; and where it proceeded to take the administrative action proposed in the notice it had to give reasons for the decision or administrative action as taken and issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by the action to appeal as well as the manner and period within the which such appeal would be lodged. Nevertheless, the Commission's decision not only affected the eight Applicants as a group, but also had ramifications on the interest of the general public interest in an independently, competitively and fairly recruited Chief Justice. he 2nd Petitioner cited in support David Kariuki Muigua vs. Attorney General [2012] eKLR at 12and reiterated that there is no evidence that there was a competitive process that would enable public participation in the process or show the transparency and accountability required under the Constitution, thereby giving legitimacy to the appointment of the shortlisted Applicants.

62. The 2nd Petitioner submitted that Article 259 requires the Constitution to be interpreted in a manner that promotes its purposes values and principles, advances the rule of law and human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance. In this regard, the theory of a holistic interpretation of the Constitution mainstreamed by the Supreme Court requires this Court to adopt an interpretive approach that takes into account, alongside a consideration of the text and other provisions in question, non-legal phenomenon such as Kenya's historical, economic, social, cultural, and political context as was held In the Matter of the Kenya National Human Rights Commission [2014] eKLR at 26. Accordingly, this court is beholden to take judicial notice of the eroded confidence of the Kenyan public in the judiciary during the Constitution making process leading to unanimous submission to the Committee of Experts that the judiciary had to be reformed (See Final Report of the Committee of Experts, pp 75).It was asserted that what Kenyans want(ed) and envisage(d) is a new Judiciary, that they would have confidence in – with the new Judges being selected through a competitive process by the Judicial Service Commission as was held in Judges & Magistrates Vetting Board vs. Centre for Human Rights & Democracy [2014] eKLR at 212 and 213.

63. In the view of the 2nd Petitioner, the constitutional provisions dealing with the judiciary, were appreciated in Law Society of Kenya vs. Attorney General (Petition 313 of 2014) [2016] eKLR.

64. The 2nd Petitioner's position was that there is also real and present danger of a number of deserving candidates who were desirous of applying for the positions of Chief Justice, Deputy Chief Justice and/or Judge of the Supreme Court but whose attempts to apply could have been thwarted by a failure to access these administrative documents that are not, in any event, the minimum constitutional requirements to apply for the job.

65. In his view, the failure to interview a serving judge of the Supreme Court to serve as Chief Justice and President of the Supreme Court also shows that either the Commission was biased or may reasonably

be suspected of bias contrary to section 7(2)(a)(iv) of the Fair Administrative Action Act, 2015. (See Civicon Limited vs. Kenya Revenue Authority the Commissioner of Customs [2014] eKLR at 28).

66. It was therefore urged that it is just and equitable that the impugned decision of the Respondent be subjected to the judicial review jurisdiction of this Honourable Court because the same sets a dangerous precedent of arbitrariness in recruitment processes to public office.

67. These submissions were highlighted before me by the 2nd Petitioner's learned counsel, Mr Ongoya.

68. The 2nd Petitioner therefore sought the following reliefs:

a) An order of Certiorari to bring into this honourable court an quash the extraneous requirements in the advertisement for the positions of Chief Justice Deputy Chief Justice and Judge of the Supreme Court of the Republic of Kenya, namely, Copies of clearance certificates from the following bodies: Kenya Revenue Authority, Higher Education Loans Board, Law Society of Kenya, Directorate of Criminal Investigations, Advocates Complaints Commission, Ethics and Anti – Corruption Commission, A Recognized Credit Reference Bureau

b) A declaration pursuant to Section 11(1)(a) of the Fair Administrative Action Act, 2015 that for purposes of short listing of candidates for interview for the position of Chief Justice, Deputy Chief Justice and Judge of the Supreme Court of the Republic of Kenya, any person who met the minimum criteria set out in Article 166(2) & (3) is entitled to be shortlisted and to be interviewed.

c) An order pursuant to section 11(1)(c) of the Fair Administrative Action Act, 2015 directing Respondent to give reasons for the administrative action or decision taken by the Respondent declining, failing or refusing to short-list eight of the candidates for interviews for the position of Chief Justice as well as the other candidates for the offices of Deputy Chief Justice and Judge of the Supreme Court of the Republic of Kenya

d) An order of Certiorari to bring into this honourable court and quash the decision of the Respondent communicated vide the Press release dated Tuesday 12.07.2016 declining, failing or refusing to short-list eight of the candidates for interviews for the position of Chief Justice of the Republic of Kenya and the subsequent decisions declining to shortlist other candidates for the positions of Deputy Chief Justice and Judge of the Supreme Court.

e) An order of prohibition prohibiting the Respondent from carrying on with the process of scheduling interviews, interviewing, receiving public views, considering and making recommendations to the President for the appointment of any person as Chief Justice Deputy Chief Justice and Judge of the Supreme Court of the Republic of Kenya on the basis of the short list of candidate made public vide the Press release dated Tuesday 12.07.2016

f) An order of mandamus directed to the Respondent to re-advertise the vacant position of the Chief Justice, Deputy Chief Justice and Judge of the Supreme Court of the Republic of Kenya and to process all the applications that will be received from eligible candidates in strict conformity with the Constitution and devoid of any prejudices, ill will, caprice or pre-set views.

g) An Order in terms of Section 11(1) of the Fair Administrative Action Act 2015 declaring that the Respondent through its current office bearers has failed in its constitutional obligation and has acted unconstitutionally in the ongoing process of recruitment of the Chief Justice, Deputy Chief Justice and Judge of the Supreme Court.

h) Costs of and incidental to this application be provided for.

3rd and 4th Petitioners' Case

69. The case for the 3rd and 4th Petitioners was that on July 8th 2016, the Respondent issued a Press Release in which it listed the number of persons who had applied for the positions of CJ, DCJ and a Judge of the Supreme Court as fourteen (14), fifteen (15) and twenty one (21) respectively. The said Press Release also set out the procedure that the Respondent was to employ up to the point of interview which was that the Commission would convene on Monday the 11th July 2016 to open the applications and review the same for completeness and conformity with the necessary requirements within 14 days. Thereafter the Commission would within 21 days of the initial review conduct reference checks in an effort to review, verify and supplement information provided by applicants and also communicate to all of the applicants' referees and former employers who would be asked to comment on the applicant's candidature under the criteria set out in the law.

70. To the 3rd and 4th Petitioners, although the Commission had 30 days to conduct the reference checks, the background investigations and verifications may continue until the time as the Commission votes on its nominees for the respective positions and this would be done in accordance with the Constitutional and statutory requirements. The Commission would also consider the extent to which the information provided was relevant to the applicant's candidature. In addition, the Commission would issue a further press release announcing the names of the applicants, the shortlisted candidates and the dates for conducting the interviews and to allow for public participation in the recruitment process, the Commission would invite any member of the public to avail, in writing, any information of interest to the Commission in relation to any of the applicants. It was reiterated by the Commission that in recruiting the Chief Justice, Deputy Chief Justice and Supreme Court Judge, the Commission would be strictly guided by constitutional principles and best practices, and would conduct the exercise in a fair, just and transparent manner.

71. According to the 3rd and 4th Petitioners, on July 12th 2016 the Commission issued a Press Release providing names of six (6) individuals it had shortlisted for interview for the position of the Chief Justice and on July 13th 2016, issued a Press Release providing the names of persons it had shortlisted for interview for the positions of the DCJ and Judge of the Supreme Court. Then on July 15th 2016 it issued a Press Release containing the names of all applicants, names of the shortlisted applicants for the various positions and a schedule of interviews, according to which, the interviews were to start on August 29th 2016 and conclude on October 7th, 2016. To these Petitioners, nowhere in its Press Release or through any other communication to the public (at that time or any other time) did the Commission provide the criteria it had used to shortlist the Applicants for the aforesaid three positions of CJ, DCJ or Judge of the Supreme Court. Nor did it (at that time or any other time) provide any reasons to the public why those who had been shortlisted for the various positions had been shortlisted or those not shortlisted why they had not been shortlisted.

72. Accordingly, on July 14th 2016, the said Petitioners wrote to the Commission seeking information under Article 35(1)(a) and 35(3) of the Constitution relating to the criteria used to shortlist applicants for the positions of CJ, DCJ and Judge of the Supreme Court and the reasons why those shortlisted were shortlisted as well as why those applicants not shortlisted were not shortlisted. By a letter dated July 15th 2016 but only served on the 4th Petitioner on July 20th 2016 and to the 3rd Petitioner on July 22nd 2016, the Secretary to the Commission indicated that the said Petitioners' request for information would be placed before the Respondent for a decision. On July 21st 2016 given the urgency of the matter, the said Petitioners wrote to the Commission requesting to be provided with the information sought in their letter of July 14th 2016 by July 22nd 2016.

73. Thereafter, on July 27th 2016 the Petitioners filed their Petition before this Court to compel the Commission to release the said information and on July 28, 2016, the law firm of Njoroge Regeru and Co. Advocates sent a letter of the same date purporting to respond to the request for access to information made by the Petitioners on July 14, 2016. The said Petitioners disclosed that in a nutshell the letter, included the following effect:

    1) A list of individuals who had applied for the various positions as well as those who had been shortlisted;

    2) A statement that the criteria used for assessing the various applications received and for short-listing the applicants was provided for under Article 166(2) and (3) of the Constitution 2010, as read together with Part V of the First Schedule of the Judicial Service Act, 2011.

    3) A statement that the reasons why particular applicants were not short-listed were duly communicated to each one of them in writing and that the Commission was not at liberty to disclose the said reasons to third parties as such disclosure may infringe on the respective applicant's constitutional rights, including the right to privacy.

    4) Additionally, a statement that those short-listed were so short-listed because they met the requirements prescribed in Article 166(2) and (3) of the Constitution and the criteria specified in Part V of the First Schedule of the Judicial Service Act, 2011.

    5) An assertion that blanket disclosure of all information received by the Commission or held by the Judiciary and which was reviewed or considered was neither practical nor desirable at this stage. It insisted that some of the said information was private and confidential and as such ought to be dealt with as stipulated in Regulations 11 and 12 of Part IV of the First Schedule of the Judicial Service Act 2011.

    6) Finally, a statement that the need to fill the positions as expeditiously as possible was among the considerations that informed the time-frame set for the interviews.

74. According to the said Petitioners, no further information was received by the Petitioners from the Commission.

75. On behalf of the 3rd and 4th Petitioners, it was submitted that the Commission violated the law in failing/refusing to provide them with the information they sought through an access to information request based on their undertaking the shortlisting of Applicants for the positions of Chief Justice, Deputy Chief Justice and Judge of the Supreme Court. To them, the single and or cumulative effect of the violation is to vitiate the process of shortlisting candidates for the aforementioned positions and to render it constitutionally void.

76. In support of their case, the said Petitioners relied on Articles 33(1)(a), 35(1)(a) and 35(3) of the Constitution and the decision of Mumbi Ngugi, J in Nairobi Law Monthly Company Limited vs. The Kenya Electricity Generating Company and 2 Others [2013] Petition no. 278 of 2011, as well as the decision of the South African Constitutional Court decisions of The President of RSA vs. M & G Media(CCT 03/11) [2011] ZACC 32para 10 and Brummer vs. Minister for Social Development and Others(CCT 25/09) [2009] ZACC 21para 62 as well as the decision of the Inter-American Court of Human Rights in the case of Claude-Reyes et al. v. Chile judgment of September 19, 2006[1].

77. That the freedom of information is also an inseparable part of freedom of expression, the said Petitioners submitted was emphasised by the Supreme Court of Appeal in South Africa in Hoho vs. The State. Case No. 493/05 (2008) in para 29. Therefore the 3rd and 4thPetitioners submitted that

the historical motivations for inclusion of access to information right as well as the emerging case law from the Kenyan Courts and from other relevant jurisdictions have established a number of key foundational principles regarding the right to access to information applicable in this case which are:

a) That access to information is a foundational principle of democracy and is integral to the realization of the principles of transparency and accountability by the state;

b) That the right to access to information is intertwined with other rights and is critical to facilitate the exercise of rights, including freedom of expression and the right to political participation;

c) That the right is included in Article 2(5) and 2(6) of the Constitution on the basis of the international covenants that Kenya state is a party to but also on the basis of its universality of application in open and democratic states;[2]

d) That those seeking information from the state need not justify the reasons for so doing yet the state still has a positive obligation to disclose information requested;

e) That the state has the additional obligation to disclose information that is of interest to the public on its own initiative – See United Nations Human Rights Committee General Comment No 34 to Article 19 – Freedom of Expression and Opinion.

f) That the level of public interest is a critical factor in minimizing the expectation of privacy where the Court has to assess the balance between disclosure/right to expression and privacy – See Axel Springer AG v. Germany [GC] - 39954/08,judgment 7.2.2012 [GC] (European Court of Human Rights)

g) That there should be minimum exceptions to disclosure which should be stipulated in law. That the general rule is "full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances."

h) That "'Information' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information" including that the approach taken on non-disclosure is based on the least restrictive means on violation of the rights to access information and expression.

78. In this case, the said Petitioners submitted that Commission's refusal to provide them with the requested information was a limitation on their rights under Article 35(1)(a) and 33(1)(a) and which cannot be justified in an open and democratic society.

79. Dealing with its first issue, the Petitioners submitted that they had requested specific information from the Commission in their letter of July 14, 2016 yet the Commission's response can only be deemed to amount to the denial of information on the criteria used to shortlist applicants for the three positions because the listing of the constitutional and statutory provisions does not amount to a clear and unequivocal answer on the criteria used. To them, it is clear that some of what is provided for in Part V of the First Schedule of the Judicial Service Act, 2011 can only be realistically and reasonably only be tested at the interview and not at the shortlisting stage. For example, "effectiveness in communicating orally in a way that will readily be understood and respected by people from all walks of life." Further the Commission refused/failed to provide the information relating to the reasons why Applicants not shortlisted were not shortlisted particularized as against each unsuccessful applicant as well as reasons why those shortlisted were shortlisted particularized as against each shortlisted applicant. The Commission refused to provide information on this request beyond stating that those shortlisted were shortlisted because they met the shortlisting criteria. The request was that the reasons be particularized against each shortlisted candidate which JSC refused to do. Also falling in this

category was the information reviewed and/or considered by the Commission from third parties or from the Commission itself in making the decision whether to shortlist the respective applicant since the Commission refused/failed to disclose this information save to state, without any justification, that disclosure was "neither practical nor desirable at this stage."

80. Additionally, the Petitioners submitted that the Commission misapprehended its request under this section as the Petitioners were seeking reasons that influenced the Commission's decision-making as opposed to the actual information received from third parties. As rule 5 of the Third Schedule on 'Provisions relating to the Appointment, Discipline and Removal of Judicial Officers and Staff' requires that a record shall be kept of the business transacted at every meeting of the commission, the information requested should thus be readily available.

81. It was the said Petitioners' position that Courts have held that when disclosure of information (or part thereof) sought is denied, this results in a violation of the right to access information. In this regard, a violation of the right to access to information as well as other rights implicated will eventually be found unless the non-disclosing party is able to show a legal and reasonable justification for non-disclosure. In this respect the Petitioners relied on The President of RSA vs. M & G Media (570/10) [2010] [2010] ZASCA 177where the Supreme Court of Appeal stated at paras 10 and 11 that:

(10) Etienne Mureinik captured the essence of the Bill of Rights when he described it as a 'bridge from a culture of authority ... to a culture of justification' – what he called 'a culture in which every exercise of power is expected to be justified.' The Bill of Rights, he continued:

> 'is a compendium of values empowering citizens affected by laws or decisions to demand justification. If it is ineffective in requiring governors to account to people governed by their decisions, the remainder of the Constitution is unlikely to be very successful. The point of the Bill of Rights is consequently to spearhead the effort to bring about a culture of justification. That idea offers both a standard against which to evaluate [the Bill of Rights] and a resource with which to resolve the interpretive questions that it raises'.

(11) The 'culture of justification' referred to by Mureinik permeates the Act. No more than a request for information that is held by a public body obliges the information officer to produce it unless he or she can justify withholding it. And if he or she refuses a request then 'adequate reasons for the refusal' must be stated (with a reference to the provisions of the Act that are relied upon to refuse the request).). And in court proceedings under s 78(2) proof that a record has been requested and declined is enough to oblige the public body to justify its refusal."

82. In the 3rd and 4th Petitioners' view, the European Court of Justice has also taken the view that disclosure should be the norm and exceptions should be strictly construed and this position was restated in Youth Initiative for Human Rights vs. Serbia (Application no. 48135/06) decided on September 25, 2013, in which the Court adopted the Comments in a Report of the Joint Declaration of the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression of(December 2004).

83. In the Kenyan context, it was submitted that the justification has to be evaluated based on the requirements stipulated in Article 24 of the Constitution as was stated by the High Court in Nelson O. Kadison vs. Advocates Complaints Commission &Another[2013] eKLR at para 7 that:

> "I find that the Advocates Complaints Commission, being a statutory body established under the Advocates Act (Chapter 16 of the Laws of Kenya) falls within the meaning of

"State" and is therefore obliged to provide information held by it under Article 35(1)(a) unless there are supervening reasons consistent with Article 24 of the Constitution."

84. In the Petitioners' view they had established that the Commission declined to provide them with some of the critical information they had sought and this amounts to a violation on their right to access information and in effect, their right to expressions under Article 33(1)(a) and 35(1) (a) of the Constitution. As a result, the constitution requires the Commission to justify the limitation of the right an onus which according to them, the Commission failed to discharge.

85. With respect to the issue whether the said failure or refusal a limitation by law and is it reasonable and justifiable in an open and democratic society based on human dignity, equity and freedom based on factors enumerated in Article 24 of the Constitution, it was submitted that the Constitution has established a method a Court should follow in assessing whether this criteria is met. This methodical approach, according to them has been adopted by the Court of Appeal in Mtana Lewa vs. Kahindi Ngala Mwagandi[2015] eKLR (Per MÍnoti J.A.) and by this Court in numerous decisions including the Muslims for Human Rights (MUHURI) &Another vs. Inspector-General of Police & 5 Others [2015] eKLR. The first question is whether there is a violation of the right which involves an inquiry on the scope of the right and whether the right has been denied. The second question is the legality of the limitation whose analysis, according to the Petitioners, should proceed as follows:

a. Whether the substantive provision recognizing the right provides for an internal limitation (internal qualifier) on the right by denying certain actions or behaviour protection by the right. If it does, is the impugned action one that is not protected by the right? If so, then there is no infringement of the right. A clear example is the exclusion from the protection of freedom of expression of propaganda for war and expression of certain other certain other views/sentiments.

b. If the action complained about is found to have created a limitation the analysis moves to inquire whether the implicated right is among those enumerated in Article 25 and hence cannot be limited. If so, there is an infringement and the analysis ends.

c. If the right is not enumerated in Article 25 as one of the rights and freedoms that may not be limited, then an analysis on the basis of Article 24 follows by assessing:

    i. Is the limitation provided for by law (if the limitation is not by law, then there is an infringement);

    ii. If provided by law, is the limitation justifiable in an open and democratic society based on human dignity, equality and freedom on the basis of:

        (1) The nature of the right or freedom;

        (2) The importance of the purpose of the limitation;

        (3) Balancing the enjoyment of the right to ensure it does not prejudice the enjoyment by other individuals of their rights;

        (4) The relation between the limitation and the purpose (The analysis here tends to inquire whether the limitation is rationally connected to the objective);

        (5) Whether the limitation adopted provides for the least restrictive means to achieve the purpose.

86. It was however emphasised that the onus to satisfy the Court that a limitation is justifiable rests on the person seeking to justify the limitation (Article 24(3)) and in the present case that onus is on the Commission. Moreover, the onus has to be demonstrated through reference to credible evidence and law. Where, the party bearing the onus fails to provide evidence or legal justification for the limitation then the Court must conclude that the limitation is unjustified.

87. According to the Petitioners, Article 35(1)(a) under which the information was sought as opposed to Article 33 on freedom of expression, does not have an internal limitation/qualifier. In the Petitioners' view, none of these internal limitations are applicable in regard to Article 33(1)(a) right relevant to this case for at least two reasons. First, the Petitioners reliance on Article 33(1)(a) was limited to "freedom to seek and receive" information. Secondly, while it is conceivable that the Petitioners may have used that information for purposes of exercising their freedom of expression the qualification would have only be applicable to evaluate the actual expression but not anticipatory expression, especially where there was no reasonable basis for the Commission to expect that the expression would be the type that would be prohibited under Article 33(2) or 33(3). In view of the foregoing, the Petitioners submitted that the internal limitations in Article 33 are irrelevant to their asserted right under Article 33(1) (a).

88. On the issue whether the limitation is provided for by law, it was submitted that under Article 24(1) and 24(2) there is a requirement that the limitation be by law and in this respect the Petitioners reproduced Article 24(2) of the Constitution and contended that the question for the Court, is whether there is any provision, within the Judicial Service Act 2011 or generally, that seeks to limit access to information and specifically the type of information sought by the Petitioners from the Commission. In their view as there is no such law, there is no legal basis to support the limitation on access to information that the Petitioners sought. While the Commission invoked Article 31 on the right to privacy as well as Regulation 5 of the First Schedule to the Act as the legal basis for its refusal/denial to disclose the information sought, it was submitted that the Commission made a blanket invocation of these laws without demonstrating how disclosure in regard to specific and varying requests is prohibited by these laws, yet mere assertion that violation of privacy would take place if there was disclosure cannot be enough. In any event, the Petitioners submitted that none of laws that the Commission sought to invoke are applicable in the context of Article 24(2) analysis. First, in regard to Article 31, while this provision is important in the balancing of rights, its application does not therefore feature directly in the assessment of the legality of limitation under Article 24(2) since the law anticipated in 24(2) is statutory and not constitutional since the Article speaks of "legislation".

89. However even assuming, for argument's sake, that a constitutional provision can be part of the law contemplated in 24(2), it was submitted that Article 31 has no application to the refusal to disclose that was sought by the Petitioners.

90. In the Petitioners' view, what the Commission contends is protected by the privacy provision concerns "information relating to their family or private affairs" and "privacy of their communications" yet any information that falls under these categories can only be information that the Commission solicited from the Applicants which, by its own admission was based on "such lawful and reasonable tools" devised "in accordance with Regulations 3(2) and 4(1) and (3) of the First Schedule to the Act" and included "(in the Advertisements and Application Form) as would enable it to assess the suitability of applicants" to the various positions advertised. It is submitted that given that the said information was being provided by candidates for purposes of an evaluation of their suitability for appointment to public office, it would be illogical that the information relates to their "private affairs." In any event it is submitted that in the minimum, the action of the Applicants providing that information effectively resulted in a waiver of any privacy rights that would ordinarily have attached to such information. Equally, infringement of the right to privacy for such information could not reasonably be infringed

when it is provided by the Applicant to determine his/her eligibility to serve in a high ranking public office. It is also unreasonable to expect that all the reasons for not shortlisting all those not shortlisted were based on privacy and confidential grounds.

91. It was contended that in respect to Regulation 5 of Schedule 1 to the Judicial Service Act 2011, the Regulation does not meet the criteria stipulated in Article 24(2) to be a valid law that can limit a right. This position was based on the decision of Emukule, J in Muslims for Human Rights (MUHURI) & Another vs. Inspector-General of Police & 5 Others [2015] eKLR that where the law relied upon to limit a right under Article 24(2) lacks some of the elements stipulated in Article 24(2) [in that case the Prevention of Terrorism Act did not express an intention to limit Article 47 rights] then that cannot be a valid law to limit a right. In this case, it was submitted that regulation 5 does not provide that its intention is to specifically limit the right to access to information provided for in Article 35 or 33 of the Constitution. Moreover it does not stipulate the nature and extent of that limitation. In their view, the limitation is "not provided by law" and therefore fails the limitation requirement under Article 24(2) of the Constitution.

92. Additionally, it was submitted that the Regulation fails the requirement of Article 24(2)(c) because it derogates from the core and essential content of the right to access information as the Commission used it to justify reliance on privacy and confidentiality not to disclose even the apparent failure by some applicants to meet rudimentary requirements of the constitution required for eligibility to the various positions, such as having the minimum 15 year legal experience post attainment of a law degree. By its interpretation, the Commission stated that it could not disclose information on why particular candidates were not shortlisted because Regulation 5 barred it from disclosing such information. This indicates that in the view of the Commission the effect of Regulation 5 is to be a blanket legal bar against access to information and hence derogates from the core and essential content of the right to information. Similarly, Article 24(1) states that a right cannot be limited "except by law". The Petitioners submitted that this Court will have to determine whether Regulation 5 is "law" for purposes of Article 24.

93. To the Petitioners, Courts have stated that certain provisions fail to meet the requirement of "law" for purpose of limitation of rights for a number of reasons and factors that will render a provision not law include vagueness and over breadth. In order to satisfy this requirement a law must be clear and without ambiguity or vagueness in order that citizens may know what their obligations are and they referred to the Hong Kong Court of Final Appeal case of Leung Kwok Hung vs. HK Special Administrative Region where it was held at para 27 that:

> " To satisfy this principle, certain requirements must be met. It must be adequately accessible to the citizen and must be formulated with sufficient precision to enable the citizen to regulate his conduct. As pointed out by Sir Anthony Mason NPJ (at para.63), the explanation of these requirements in the often quoted passage in the majority judgment of the European Court of Human Rights in Sunday Times v. United Kingdom (No.1) (1979 – 80) 2 EHRR 245 (at para.49, p.271), the "thalidomide" case, is of assistance:
>
> > "First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows

this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

94. Also cited by the Petitioners was the decision of the Supreme Court of Canada in Osborne vs. Canada (Treasury Board), [1991] 2 SCR 69, 1991 that:

> " Vagueness can have constitutional significance in at least two ways in a s. 1 analysis. A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools. In these circumstances, there is no "limit prescribed by law" and no s. 1 analysis is necessary as the threshold requirement for its application is not met. The second way in which vagueness can play a constitutional role is in the analysis of s. 1. A law which passes the threshold test may, nevertheless, by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of language may fail to confine the invasion of a Charter right within reasonable limits. In this sense vagueness is an aspect of over breadth."

95. It was therefore submitted that Regulation 5 fails to meet the requirement of law required by Article 24(1) and (2) of the Constitution.

96. In the view of the Petitioners, the term what the provisions considers "sensitive and highly personal information" is vague and overbroad and provides no justification, while in most cases there is no reasonable basis to consider some of the information "sensitive and highly confidential." For example, does the Regulation prohibit the disclosure of only family members' information relating to addresses, phone numbers or does it also include those of the applicant? If it includes the applicant's, why would home and email addresses be "sensitive and highly confidential" when in actual fact that information is readily available to third parties? Moreover, on vagueness, what does the phrase "financial interests of the Applicant" mean and or entail? For example, does information on compliance with taxation law relate to "financial interests"? What of property – including for example, real property that an applicant may have acquired irregularly – is that "financial interest of the Applicant"? Why is information that should go to the evaluation of suitability whether an applicant meets the criteria of being nominated Judge, such as disciplinary complaints, be considered "sensitive and highly confidential" especially when the Commission is to be guided in its work by the principles of transparency and accountability under Article 10 and Article 172 of the Constitution?

97. To the Petitioners, even assuming (for argument sake) that the limitation meets the requirements stipulated in Article 24(1), it still fails the proportionality test required by Article 24(1). To them, a major consideration on whether a limitation on a right is justifiable in an open and democratic society requires a proportionality analysis as set out in Article 24(1) and this includes an analysis on the nature of the right; the importance of the purpose of limitation; the nature and extent of limitation; the need to ensure that enjoyment of the rights does not prejudice the rights and fundamental freedoms of others; and finally that the limitation and its purpose and whether least restrictive means are used to achieve the purpose. It was submitted that the Commission had not demonstrated that its limitation of the right to access information satisfies the proportionality test set out in Article 24(1) of the Constitution.

98. To the Petitioners, the right to access information is a fundamental right which is facilitative of other rights as well being an enabler for the implementation of other values of the and principles of the constitution such as good governance, transparency and accountability. However, the Commission has not, with adequate precision, provided the purpose of limiting the right on access to information. Although it refers to confidentiality as the basis of non-disclosure it is unclear whether maintaining confidentiality was the purpose it hoped to achieve in regard to each and every request made. Moreover, the Commission added that disclosure of some information requested was "neither practical nor desirable at this stage" without giving a justification why this was the case or what it hoped to achieve by restricting disclosure of some of the information sought "at this stage." This lack of clarity on the purpose(s) of the limitation makes it difficult if not impossible for this Court to evaluate the importance of the purpose of limitation and its reasonableness. The Court was therefore urged to find that lack of clarity on the purpose for limitation to be prima facie proof that the limitation is unreasonable.

99. It was nevertheless argued that even if this Court was to take the view that protection of privacy and confidentiality was the purpose for the limitation, that purpose is not important enough in the circumstances of this case as to justify the limitation of the right especially when assessed in the context of the nature and extent of the limitation and the immense public interest raised in appointment of persons to these offices. Kenyans have an interest in securing a competent judiciary especially in light of the mandate imposed on the Judiciary to protect and promote the constitution; if judges are not of high legal standards and moral integrity, the objectives of the constitution would be frustrated. The ability to make this determination by Kenyans can only be satisfied by reasonable disclosure of information by the Commission.

100. It was submitted that the extent of limitation is too broad. The Commission invoked a blanket limitation even where it is reasonable to expect that no limitation on the right should be conceived. For example, why would the Commission not disclose whether some of the Applicants met the minimum academic criteria or experience needed to be eligible for consideration for the positions applied for? Where there may have been multiple reasons for not shortlisting a candidate, were all the reasons such that they attracted protection of confidentiality if disclosed? More troubling, where an applicant applied for all the three positions, as the case was with at least one Mr. David Mwaure Waihiga, yet the eligibility criteria for the various positions were the same, why would the Commission not disclose the reason for shortlisting him only for the position of Judge of the Supreme Court and not the other two positions? Would such limitation be reasonable?

101. It was submitted that the foregoing inconsistencies establish that the shortlisting was arbitrary and unreasonable.

102. To the Petitioners, any attempt by the Commission to rely on the need to balance the enjoyment of rights as a ground to justify the limitation is untenable. This is due, firstly to the fact that the Commission needed to indicate, through incontrovertible evidence, the reason or purpose of limitation in respect of each request which it filed to do. Secondly, the balance on rights has to be assessed in the context of the circumstances of each case. In this case, even assuming that an applicant wished or had requested for confidentiality – and that would relate to those who were successful on the shortlisting and those not - the Applicants were seeking very high office in public service where issues of suitability, including qualifications and integrity grounds are extremely critical. So too is the public confidence that those selected meet the high standards needed for such office. Moreover, the Constitution is explicit on the need to have the recruitment process undertaken in a transparent and accountable manner. In the circumstances, expectation of privacy is highly minimized and it was

therefore highly offensive for the Commission to rely on blanket invocation of privacy as a bar to the Petitioners' right to access information.

103. With respect to the issue of least restrictive means, the Petitioners reiterated that the Commission used a blanket approach to deny all the information sought except the names of the Applicants and those shortlisted and not shortlisted in denying the request for information made. To them it defies common sense to expect that the reasons why individuals were shortlisted or not shortlisted were based on confidential information or "non-public" information stipulated in Regulation 5 of the First Schedule to the Judicial Service Act 2011. The Commission had the option to disclose, especially where particularization of information against each Applicant had been requested, what non-confidential information it had while redacting what was or excluding what it considered to be confidential. It did not; and further has not provided any justification why a less restrictive option was not employed. In view of this, this Court was urged to find the Commission had not discharged its onus to show that the limitation was the least restrictive available to it. A blanket assertion of a single ground for refusing disclosure in respect of eight individuals whose circumstances are very different is of itself strong evidence of an absence of clear justification for refusal.

104. It was therefore submitted that the Commission had not provided any credible evidence or argument to justify the limitation of the Petitioners' right to access information they had requested.

105. Just like the other Petitioners, the 3rd and 4th Petitioners dealt with the issue whether the purported shortlisting of Applicants for the positions of CJ, DCJ, and a Judge of the Supreme Court violated the Constitution and the law and particularly Article 166 and Section 30 of the Judicial Service Act 2011 and the principle of legitimate expectation. In this respect it was noted that the Commission justified its decision on Article 166(2) and (3) of the Constitution as read together with Part V of the First Schedule to the Judicial Service Act 2011.

106. To the 3rd and 4th Petitioners, whereas section 30 of the Act mentions shortlisting in regard to the recruitment of Judges of Superior Court, the law (Constitution and Statute) does not provide for the manner of shortlisting of the kind that was carried out by the Commission in the regard to the applications for CJ, DCJ and Judge of the Supreme Court. It was in fact submitted that even the use of the phrase "shortlist" in section 30 of the Judicial Service Act does not speak to an exercise where the Commission receives applications and without more, decides to cut down on numbers to be interviewed, without conducting any thorough and objective process to confirm whether the applicants meet the minimum eligibility criteria required by the Constitution and the Judicial Service Act. To the Petitioners, pursuant to Regulation 6 the only lawful ground to refuse an Applicant interview is if he/she does not meet the "minimum constitutional and statutory requirements". It was therefore submitted that the "minimum constitutional and statutory requirements" constitute only what is listed in Article 166(2) and (3) of the Constitution and what is contained in Regulation 4 of the First Schedule to the Act.

107. The Petitioners therefore strongly disputed any notion that additional information mentioned in Regulation 5 (Public and non-public materials); Regulation 7 (Reference Check); Regulation 8 (Background investigations and Vetting); as well as any additional information in Part V of the First Schedule beyond what is referred to in Regulation 4, can be a basis of determining whether an Applicant should be accorded an interview. In their view, Part V of the First Schedule is a guide on how to evaluate shortlisted applicants during the interview stage and while making the decision as to which applicants to finally nominate for the respective positions but cannot logically or reasonably be used as a tool to evaluate suitability of the Applicants' for shortlisting. This is because, first, significant parts of information required under Part V can only be reasonably tested at an oral interview. Secondly, the structure of the First Schedule unequivocally indicates that the use of Part V factors logically comes

at the oral interview stage following the shortlisting. Additionally, most of the factors listed in Part V are not of a technical nature and cannot therefore qualify as "minimum". Most require an objective evaluation based on confronting an applicant with the information (especially where the information is adverse to him/her) and providing him/her the opportunity to respond/be heard in accordance with the requirements of Article 47 of the Constitution.

108. To the extent that the Commission admitted that it relied on Part V of the First Schedule while shortlisting, it was submitted that it used a much more onerous criteria than what is authorized by law. It is also proof that the Commission conflated the criteria for shortlisting with that of assessing suitability for purpose of eventual nomination of applicants to the respective positions hence it misapprehended and misapplied the law when undertaking shortlisting. This misapprehension of the law vitiates the process of shortlisting and renders it inefficient, unlawful, arbitrary, opaque and unaccountable and constitutionally void.

109. Further, the procedure used by the Commission in shortlisting was a violation of the principle of legitimate expectation for the Petitioners, the Applicants and the public. The rule of law and the existence of a legal framework providing for the procedure the Commission should follow created a legitimate expectation and imposed an obligation on the Commission to follow the stipulated procedure. This expectation was bolstered by the Commission's own press release of July 8th 2016 which was in tandem with the legal procedure for recruitment as provided for in law.

110. On the issue whether the failure/refusal by the JSC to comply with Articles 33(1)(a), 35(1)(a) and 35(3) and the manner in which the JSC treated the request for information by the Petitioners a violation of the principles of rule of law, transparency and accountability contained in Article 10 of the Constitution as well as a violation of transparency and promotion of constitutionalism that the Commission is enjoined to comply with under Articles 172(1) and 249(1)(c) of the Constitution, it was submitted that the net effect of non-disclosure – based on a blanket justification on confidentiality grounds – is that the Petitioners and the public are unaware why:

a) The Commission shortlisted those it shortlisted

b) The Commission refused to shortlist those it did not shortlist

c) The specific criteria (if any) the Commission used for the shortlisting process

d) Why it did not live up to its public promise on the timelines and the process to be followed

e) Why an Applicant (The Honourable Justice J. B. Ojwang) who is currently serving as a Supreme Court Judge does not meet the criteria for eligibility to be shortlisted for the office of the Chief Justice when the requirements for eligibility to be considered for Chief Justice are equal to those of a Supreme Court Judge and when the Constitutional and statutory criteria for eligibility and for continuing to hold office has remained unchanged. This also contrasted with the fact that another Applicant for the Chief Justice position (The Honourable Justice Smokin Wanjala) who is also a serving Judge of the Supreme Court was shortlisted.

f) Why an Applicant (Mr. David Mwaure Waihiga) who had applied for all the three position was only shortlisted for one of the position, while the eligibility criteria for the three offices is the same.

111. According to the said Petitioners, the High Court in Muslims for Human Rights vs. The AG(supra) was eloquent on the principle of the rule of law when it stated at para 140 that:

> " The principles of constitutionalism and the rule of law lie at the root of our system of government. It is a fundamental postulate of our constitutional architecture. The expression the rule of law conveys a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. At its very basic level, the rule of law vouchsafes to the citizens and residents of Kenya, a stable, predictable and ordered society in which to conduct its affairs. Like our National Anthem says it is our shield and defender for individuals from arbitrary state action.

112. In a nutshell, the rule of law also allows for predictability of actions by public bodies and the fact that law would be uniformly and objectively applied. Part of our Constitution (Article 10) asserts that transparency and accountability are some of the hallmarks that define the rules that bind a state organ. Specific to the Commission, compliance with the law, and especially the principle of transparency and accountability in the conduct of its mandate is required by Article 172(1) Article 249 as well as by Section 3 and 30 of the Judicial Service Act, 2011.

113. It was submitted that the Commission failed the rule of law/constitutionalism test in regard to this matter on the following accounts:

a) In treating the Petitioners with great contempt by failing/refusing to provide them with the information sought until a suit was instituted against it.

b) By refusing/failing, without legal basis, to disclose most of the information sought by the Petitioners.

c) By failing to disclose to the public critical information on shortlisting as required by Article 35(3) of the Constitution.

d) By resorting to blanket justification on the basis of privacy and confidentiality to deny the Petitioners and the public critical information relating to the shortlisting process

e) By failing to use lawful and objective criteria in evaluating the applications at the stage of shortlisting.

f) By conflating the factors necessary for assessment of the suitability of applicants to be nominated after the interview stage with technical requirements for eligibility to be shortlisted for the interview and by applying that assessment in an arbitrary and seemingly discriminatory manner.

g) By failing to honour the promise it had given the public through its press release as well as the legal stipulations on how the process of recruitment would be done and especially the timeline needed and factors to be considered for shortlisting.

h) By engaging in a flawed shortlisting process that failed to inspire public confidence and to safeguard constitutionalism.

114. As to the issue whether the violations of the Constitution (singularly or cumulatively) by the Commission render the purported action of shortlisting of Applicants for the positions of CJ, DCJ, and a Judge of the Supreme Court void, it was submitted that the violations enumerated above singly and cumulatively demonstrate that the purported process of shortlisting is incurably defective and constitutionally void. While the conventional remedy for non-disclosure in regard to Article

35(1)(a) and 33(1)(a) is to compel disclosure, in this case, the manner in which the Commission contemptuously handled the Petitioners request for information coupled with the fact that whatever minimal information the Commission disclosed point to the reasonable conclusion that the process was not based on the law, and was opaque and arbitrary justifies for an order quashing the said shortlisting process.

115. Importantly, the Commission engaged in significant legal and procedural violations during the process of shortlisting which violations can, only be cured by the invalidation of the shortlisting process.

116. These submissions were highlighted on behalf of the 3r and 4th Petitioners by Mr Waikwa Wanyoike.

117. In the result, the 3rd and 4th Petitioners urged the Court to grant all the Prayers sought in the Amended Petition dated August 1, 2016 in which the following reliefs were sought:

1) That a Declaration be issued that the failure by the Respondent to provide information sought under Article 35(1)(a) and also to publicise the information in accordance of Article 35(3) on the basis of the Petitioners' request dated July 14, 2016 is a violation of the Right to Access to Information.

2) That a Declaration be issued that the failure by the Respondent to provide information sought under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3) on the basis of the Petitioners' request dated July 14, 2016 is a violation of Article 10 of the constitution and specifically the values of on the rule of law, participation of the people, human rights, good governance, transparency and accountability.

3) That a declaration be issued that the failure by the Respondent to provide all the information sought under Article 33 and 35(1)(a) and also to publicise the information in accordance of Article 35(3) is a violation of Article 172(1) to facilitate accountability of the judiciary and transparent administration of justice as well as a violation of the obligations imposed on it by Article 249(1) including protecting sovereignty of the people, securing observance of democratic values and promoting constitutionalism.

4) That a declaration be issued that the failure by the Respondent to adhere to the requirements of Article 166(2), Section 30 of the Judicial Service Act 2011 and its First Schedule thereto in assessing the qualifications applicants for the positions of Chief Justice, Deputy Chief Justice and a Judge of the Supreme Court renders the purported process of shortlisting applicants for interviews for those positions invalid.

5) That a declaration be issued that the failure by the Respondent to adhere to the constitutional provisions, the Judicial Service Act and the procedure set out by the Respondent in its press release dated July 8th, 2016 is a violation of the legitimate expectation that the public had in regard to how the Respondent would conduct the process of assessing the applications made.

6) That a declaration be issued that the manner in which the Respondent handled the Petitioners request to information, including refusing to disclose any information until a suit was filed against it, is a violation of the responsibilities on State officers under Article 73 of the Constitution.

7) That an Order be issued compelling the Respondent to forthwith provide all information sought by the Petitioners by their letter to the Respondent dated July 14th, 2016.

8) That an Order be issued declaring that the procedure followed by the Respondent in shortlisting of applicants for the positions of Chief Justice, Deputy Chief Justice and a Judge of the Supreme Court was in violation of the rule of law and hence invalid.

9) That costs for this Petition be payable to the Petitioners by the Respondent.

10) That this Honourable Court be pleased to grant such further Order or Orders as may be just and appropriate.

1st Respondent's Case

118. In opposing the Petition, the 1st Respondent Commission averred that the Petitions and Application are misguided, bad in law, pre-mature and hasty as they do not raise any Constitutional and/ or justifiable issues for determination by this Court.

119. The Commission averred that it is a Constitutional body established under Article 171 of the Constitution with functions spelt out in Article 172 thereof with the primary objective of promoting and facilitating the independence and accountability of the judiciary and the efficient, effective and transparent administration of Justice. Under Article 172(1)(a), it is enjoined to recommend to the President persons for appointment as the Chief Justice/President of the Supreme Court, Deputy Chief Justice and Judges of the Superior Courts.

120. While appreciating that the Constitution is the Supreme law of the land, the Commission contended that the same should be read together with and construed alongside other relevant legal provisions, in this case the criteria set out in Part V of the First Schedule of the Judicial Service Act, 2011. It was further averred that under Article 166, the Constitution sets out the qualifications required for each candidate for the positions of the Chief Justice/President of the Supreme Court, Deputy Chief Justice and Judges of the Superior Courts while Article 166(2) and (3) sets out the qualifications for appointment of Superior Court Judges and those of the Chief Justice and other Judges of the Supreme Court. Similarly, the Judicial Service Act, 2011, echoes the same qualifications and provides the procedure for appointment of the Chief Justice/President of the Supreme Court, Deputy Chief Justice and Judges of the Superior Courts.

121. The Commission noted that section 30 of the Act enjoins the Commission to constitute a selection panel comprising of not less than five (5) members which panel shortlists the persons for nomination by the Commission to the positions of the Chief Justice/President of the Supreme Court, Deputy Chief Justice and Judges of the Superior Courts in accordance with the First Schedule to Act. The First Schedule on the other hand only provides the procedure and the criteria for determining the qualifications and does not set out any qualification not embodied in or derived from the Constitution itself. It was therefore its position that Parliament of Kenya did not leave it to the Commission to set any additional qualifications not provided for in the Constitution that would allow the Commission to act in an arbitrary manner as alleged by the Petitioners herein.

122. It was deposed that under Regulation 1(2) of the First Schedule to the Act, there are twin obligations of both an Applicant for a Judicial Appointment and for the Commission in processing Applications for Judicial Appointments. Under Regulation 3, Part II, First Schedule of the Act, the Commission is enjoined to advertise vacancies in the positions of Office of the Chief Justice, the Deputy Chief Justice and the Judge of the Superior Courts. Pursuant thereto, the Commission advertised vacancies in the positions of the Deputy Chief Justice and the Judge of the Supreme Court for the Judiciary of the Republic of Kenya on 16th June, 2016. Similarly, on 17th June, 2016, the Commission also advertised a vacancy in the position of the Chief Justice.

123. It was averred that under Regulation 3(2) of the First Schedule to the Act, the Commission is obliged to describe the judicial vacancy, state the constitutional and statutory requirements for the position, invite all qualified persons to apply and inform them how to obtain applications and set the deadline for submission of applications (not less than 21 days from the date of declaration of the vacancy) which it did and informed the Interested Applicants that they had up to 6th and 7th July, 2016 to submit their applications respectively which was within the 21 days provided for under the said Regulations.

124. On the other hand an Applicant for a judicial office is required under Regulation 4(2) of the First Schedule to the Act, to complete and file the prescribed application form and comply with all the requirements described therein. Pursuant to Regulation 4(3) of the Schedule to the Act, the applicant to required to provide relevant background information to determine qualification for office including, inter alia: academic, employment, legal practice, judicial or financial discipline, community service, pro bono activity and non-legal interest, involvement as a party in litigation and criminal record, among others which obligation is imposed on every Applicant by law which the Commission only notifies the Applicants to provide and/or supply to the Commission. Regulation 6, Part III of the First Schedule of the Act mandates the Commission to review all applications submitted for completeness and conformity with constitutional and statutory requirements which shall relate to a determination of whether the Applicant meets the minimum constitutional and statutory requirements for the position. Regulation 13 of the First Schedule to the Act provides the criteria to be followed by the Commission in evaluating applications which include:

    a) professional competence;

    b) written and oral communication skills;

    c) integrity, the elements of which shall include a demonstrable consistent history of honesty and high moral character in professional and personal life;

    d) respect for professional duties arising under the codes of professional and judicial conduct; and

    e) Ability to understand the need to maintain propriety and appearance of propriety; fairness; good judgment and legal and life experiences, among others.

125. It was the Commission's case that contrary to the assertions by the Petitioners, it duly complied with all the relevant provisions of the Constitution and the Act in evaluating and shortlisting Applicants for the advertised position of the Chief Justice, Deputy Chief Justice and the Supreme Court Judge and that in accordance with the provisions of the Constitution and the Act, set and applied the criteria that ensure that the various requirements for the qualifications, both professionally and otherwise of applicants to the High Office of the Chief Justice and other Judges of the Supreme Court Judges are measurable and verifiable, the Commission in accordance with Regulations 3(2) and 4(1) and (3)of the First Schedule to the Act, devised such lawful and reasonable tools, (in the Adverts and Application Form) as would enable it to assess the suitability of applicants to the office of the Chief Justice and other Judges of the Supreme Court and notified all prospective Applicants in the advertisement published in the media on 16th and 17th June, 2016 requiring the applicants to avail to the Respondent within a stipulated deadline the various documents listed therein which documents include J.S.C FORM 2, J.S.C FORM 2A and these are required under Regulation 4(2) of the First Schedule to the Act to be completed and filled in. Apart from that every Applicant is also required by Regulation 4(3) of the First Schedule to the Act to provide relevant background information to determine qualification for office including, inter alia:

    a) academic,

b) employment,

c) legal practice,

d) judicial or financial discipline,

e) community service,

f) pro bono activity and non-legal interest,

g) Involvement as a party in litigation and criminal record, among others.

126. According to the Commission, the above requirements are statutory requirements and all that the Commission does is to implement and to require the prospective candidates to provide the requisite information and documents.

127. It was submitted that Regulation 6, Part III of the First Schedule of the Act mandates the Commission to conduct an initial review of all applications submitted for completeness and conformity with constitutional and statutory requirements which shall relate to a determination of whether the Applicant meets the minimum constitutional and statutory requirements for the position. This, according to the Commission is what is known as shortlisting of the candidates and it contended that pursuant to Regulation 6 Part III of the First Schedule of the Act, it only shortlisted candidates whose applications were complete and in conformity with the minimum Constitutional and Statutory requirements for the positions of the Chief Justice, the Deputy Chief Justice and a Judge of the Supreme Court of Kenya. It was emphasised that Regulation 7, Part III of the First Schedule of the Act provides for reference check after the initial review and/or shortlisting of applications which meet the minimum Constitutional and Statutory requirements for the positions advertised. It therefore refuted the allegation that shortlisting is not provided for under the First Schedule to the Act. Further Regulation 13 of the First Schedule to the Act provides the criteria to be followed by the Commission in evaluating applications at the initial review and shortlisting and interview stages of the process and these include professional competence; written and oral communication skills; integrity, the elements of which shall include a demonstrable consistent history of honesty and high moral character in professional and personal life, respect for professional duties arising under the codes of professional and judicial conduct and ability to understand the need to maintain propriety and appearance of propriety; fairness; good judgment; legal and life experiences; and demonstrable commitment to public and community service elements which shall include the extent to which a Judge has demonstrated a commitment to the community generally and to improving access to the justice system in particular. Pursuant to Regulations 4 and 6 of the First Schedule to the Act, every applicant is required to provides copies of the various documents as they lodge their applications, and to avail the originals during interviews.

128. The position of the Commission was that it complied with all the relevant provisions of the Constitution and the Act in evaluating and shortlisting Applicants for the advertised position of the Chief Justice, Deputy Chief Justice and the Supreme Court Judge and applied the criteria that ensure that the various requirements for the qualifications, both professionally and otherwise of applicants to those offices are measurable and verifiable. It further, in accordance with Regulations 3(2) and 4(1) and (3) of the First Schedule to the Act, devised such lawful and reasonable tools, (in the Advertisements and Application Form) as would enable it to assess the suitability of applicants to the said offices and notified all prospective Applicants in the advertisement published in the media on 16th and 17th June, 2016 requiring the applicants to avail to the Respondent within a stipulated deadline the various documents listed therein.

129. In the Commission's view, the need for the Applicants to obtain clearances from various vetting bodies is a requirement hinged under Article 166(2)(c) of the Constitution of Kenya which provides that Applicants must have a high moral character, integrity and impartiality. The Commission therefore asserted that such clearances from the Kenya Revenue Authority, Higher Education Loans Board, Laws Society of Kenya, Directorate of Criminal Investigations, Advocates Complaints Commission, Ethics and Anti-Corruption Commission and a recognised Credit Reference Bureau are designed to assist the Commission in determining, prima facie, whether the respective Applicants meet the minimum qualifications of possessing a high moral character, integrity and impartiality. They further assist Applicants to fulfil their obligations under paragraph 4(3) of the First Schedule to provide background information on academic, professional, judicial and financial discipline; and criminal record. The Commission therefore maintained that the said clearances are properly anchored in law and should not be declared as unconstitutional as sought by the Petitioners herein. To the contrary, the clearances are properly anchored in law and are under-pinned solidly in the Constitution.

130. It was disclosed by the Commission that upon applying the procedure set out under the Constitution and the Act, the Commission has since released the names of the candidates whose Applications meet the minimum constitutional and statutory requirements for each of the advertised positions namely that of the Chief Justice, Deputy Chief Justice and the Judge of the Supreme Court. The Commission's position was that though there is no statutory requirement for giving reasons to the Applicants, the reasons why particular Applicants were not short-listed were duly communicated to them in writing through the respective addresses as provided in their applications, and in consideration of the respective candidate's right to privacy protected under Article 31 of the Constitution as read together with Paragraph 5 of the First Schedule to the Act, the Commission is not at liberty to disclose to third parties, such as the Petitioners herein, or to publicize the reasons for disqualification of each Applicant as that may amount to violation of the candidate's constitutional rights.

131. It was averred that following the Petitioners' request for information by a letter dated 14th July, 2016, the Commission responded immediately and as it is entitled to, later instructed its lawyers, Njoroge Regeru & Company Advocates, who responded substantively vide the letter dated 28th July, 2016. To the Commissioner, the bona fides of the Petitioners to the Amended Petition is put to question by their request for information that is freely available in the Judiciary website. Further the request for information relating to material received by third parties flies in the face of Regulation 5 and that the blanket request by the Petitioners was effectively an invitation to the Commission to breach law and to compromise the privacy of the applicants protected under Article 31 and Regulation 5 of the First Schedule to the Act. In the Commission's view, in consideration of the respective candidate's right to privacy protected under Article 31 of the Constitution as read together with Regulation 5 of the First Schedule to the Act, it is not at liberty to disclose to third parties, such as the Petitioners herein, or to publicize information that is of a private and confidential nature which by law is declared confidential. Further to publicize the reasons for disqualification of each Applicant may amount to violation of the candidate's constitutional rights.

132. The Commission asserted that the right to information under Article 35 of the Constitution is not absolute as the same is subject to reasonable limitation as contained in, inter alia, Article 31 as read together with Regulation 5 of the First Schedule to the Act under which the Commission is required by statute and Regulation 5 of the First Schedule to the Act to maintain the confidentiality of sensitive and highly personal information in applications and all unsolicited comments and letters which the Commission in its discretion believes should remain confidential to protect third parties.

133. The Commission's position was that before an Application is made to court to compel the state or any other person to disclose information that is required for the exercise of a fundamental right, Article 35

of the Constitution demands that the Applicant must first demonstrate how that specific information is relevant to enforcement of his rights which has been or is threatened with breach, a requirement which the Petitioners failed to discharge. Further, pursuant to Regulation 7(2) of the First Schedule to the Act, the Commission is not at liberty to share with the applicants any materials it solicits or reveal the identity of the source of information unless the source waives anonymity.

134. It was its position that it duly observed and complied with all the applicable administrative procedures as stipulated in the Constitution and the Act to ensure a fair and just process in scrutinizing and reaching the list of the successful candidates who were scheduled for interviews from the 29th August, 2016.

135. On the issue of the public participation, it was noted that Parliament, in the First Schedule, provided for public participation in the process of recruitment of Judges in two ways. Under Regulation 4(5), a Lawyers Professional Body or organization is permitted to invite its members to apply for advertised positions for evaluation and submit such applications for consideration by the Commission. Additionally, Regulation 9(1)(c) enjoins the Commission to invite any member of the public to avail, in writing any information of interest to the Commission in relation to any of the Applicants and this stage of public participation occurs after the shortlisting of candidates whose applications meet the constitutional and statutory requirements.

136. The Commission held the view that by design therefore, the members of the public actually participate in the process of appointment of Judges and disclosed that in fact, it had already invited the members of the public to avail any relevant information in respect of the shortlisted candidates and had actually received relevant information from some members of the public which information the Commission shall give due consideration.

137. It was therefore contended that the Constitution, the Act and the First Schedule thereto have put in place open and transparent mechanisms and processes in the appointment of Judges starting with publication and publicizing in the widest manner possible the vacancies, a clearly stipulated procedural framework including reasonable timelines, public participation, interviews conducted in public, stipulated criteria for evaluation of applications for jobs, among others. It was pointed out that there is need to fill the three vacancies as expeditiously as possible, whilst at the same time being mindful of the need to conduct a thorough, comprehensive and objective interview process. At the same time all relevant factors must be taken into consideration. The matter of recruitment of the holders of these top most judicial positions is a matter of great public concern, hence the need to attend to the same efficiently and expeditiously.

138. The Commission took issue with the fact that none of the applicants who were not short-listed had instituted any proceedings against the Commission or attempted to stop the process of recruitment. In its view, the Petitioners' claims as contained in the Petition and Application are generalized and do not meet the test provided for in the case of Andrew Okiya Omtatah vs. Attorney General & 2 Others [2011] eKLR where this Honourable Court considered the very issues now raised in the Petition herein. Its position was that the Constitution, the Act and the First Schedule thereto had put in place open and transparent mechanisms and processes in the appointment of Judges starting with publication and dissemination in the widest manner possible of the vacancies, a clearly stipulated procedural framework including reasonable timelines, public participation, interviews conducted in public, stipulated criteria for evaluation of applications for jobs, among others.

139. The Commission averred that:

a) An order for certiorari to quash the 'extraneous' requirements to obtain clearances from various bodies does not obtain since the requirements are anchored in law and have been deduced by the Commission as tools of ascertaining integrity of the Applicants;

b) It is the lawful mandate of the Commission to assess and ascertain the applications which meet the prescribed Constitutional and Statutory requirements, to shortlist the candidates and to eventually interview them;

c) Accordingly, the Order of certiorari sought to quash the decision relating to the shortlisting of candidates has no basis as the shortlisting was done in accordance with the law; and

d) The request for information should not be allowed for the reasons of privacy and confidentiality.

140. The Commission contended that Judicial Service Act, at section 44 provides for a mechanism for dealing with any potential conflict of interest in the members of the Commission and the Petitioners have not alleged any contravention of this provision but have instead made generalised allegations on possible conflict of interest without giving particulars of such potential conflict.

141. It was therefore the Commission's view that:

a) No valid grounds have been advanced as to why the Commission should be restrained from proceeding with and concluding the process of recruitment of suitable persons to fill the vacant positions of the Chief Justice, the Deputy Chief Justice and a Judge of the Supreme Court;

b) The Commission has not breached any of its constitutional obligations in the ongoing process of recruitment of the Chief Justice, Deputy Chief Justice and Judge of the Supreme Court;

c) That it is in the public interest that the said exercise is concluded as expeditiously as possible as the Judiciary, an important arm of Government needs to have a head in the Chief Justice and the Deputy Chief Justice;

d) That similarly, the Supreme Court, an Apex Court in Kenya that plays an important role in Kenya's constitutional set up does not have the requisite quorum to hear and determine matters before it until, it is properly constitution under the process now under challenge in these proceedings;

e) That the Petitioners have not established any basis for the grant of any of the orders sought.

142. The Commission therefore urged this Court not to permit the Petitioners herein to hold the entire country at ransom when there are no legitimate grounds upon which the process is challenged.

143. While reiterating the foregoing, it was submitted on behalf of the Commission that the qualifications required for candidates vying for the positions of the Chief Justice, Deputy Chief Justice and Supreme Court judge are set out in Article 166 of the Constitution from which the qualifications for appointment as a CJ/DCJ or Judge of the Supreme Court are that one requires a law degree from a recognized university/advocate of the High Court of Kenya or a common law jurisdiction; and at least 15 years' experience as an Advocate/Judge/Judicial Officer/ distinguished academic/ any other relevant legal field or an aggregate thereof and has a high moral character, integrity and impartiality. Whereas the Judicial Service Act, 2011, does not set additional qualifications for the appointment of Judges as those qualifications are expressly embodied under the Constitution, it was submitted that given that the Offices of CJ, DCJ and Judge of Supreme Court are State Offices, it is a mandatory requirement

(as a corollary to the provision of Article 166(2)(c)) that they do not breach the provisions of Chapter Six of the Constitution on Leadership and Integrity.

144. In the Commission's submission the Judicial Service Act, 2011 echoes the qualifications provided for under Article 166(2) & (3) above. Part V of the Act provides for the procedure for Appointment and Removal of Judges. Section 30(2) and (3) provides the procedure for appointment of the Chief Justice/ President of the Supreme Court, Deputy Chief Justice and Judges of the Superior Courts. Judges of the Superior Courts are supposed to be appointed in accordance with the provisions of the First Schedule which Schedule provides only for the procedure and the criteria for determining the qualifications embodied in Article 166(2) & (3) as opposed to the qualification not embodied in or derived from the Constitution itself.

145. As to what these qualifications are, the Commission invited the Court to look at the Advertisements made by the 1st Respondent on 16th and 17th June, 2016 in which and under the sub-heading of Constitutional and Statutory Requirements(not qualifications) for Appointment in the three (3) advertisements, the Commission stated both the qualifications and the criteria to be used in determining the qualifications provided for under the Constitution thus:

Constitutional and Statutory Requirements for Appointment

1. Hold a law degree from a recognised university or be an advocate of the High Court of Kenya or possess an equivalent qualification in a common-law jurisdiction;
2. Possesses at least fifteen (15) years' experience as a superior court judge or a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field or;
3. Hold the qualifications mentioned in 1 & 2 above for a period amounting in the aggregate to fifteen (15) years (Note: Experience gained in Kenya or in another commonwealth common law jurisdiction will be considered);
4. Be of high moral character, integrity and impartiality;
5. Meet the requirements of Chapter Six of the Constitution;
6. In addition, Applicants must demonstrate a high degree of professional competence, communication skills, fairness, good temperament, making of good judgements in both legal and life experiences and commitment to public and community service,

The Appointment shall be made in accordance with Article 166 (1)(a)(2)(3) of the Constitution of Kenya as read with the First Schedule of the Judicial Service Act, 2011.

146. It was the Commission's view that it did not introduce any new qualification other than those expressly provided for (in exact words) under Article 166(2) & (3) of the Constitution and the provisions of Regulation 13 of the First Schedule and therefore refuted the Petitioners' assertions that it included additional and extraneous qualifications as misguided and without any legal or factual premise.

147. On the legal mandate of the Commission in the recruitment of candidates to these three offices, it was submitted that the Commission is a constitutional body established under Article 171(1) of the Constitution whose functions are specifically spelt out under Article 172 with the primary purpose of promoting and facilitating the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice. In particular, under Article 172(1)(a) of the Constitution the 1st Respondent is mandated to recommend to the President persons for appointment as judges. In the performance of its functions, Article 172(2) requires the Commission to be guided by competitiveness and transparent processes of appointment of judicial officers and

other staff of the judiciary and the promotion of gender equality. Additionally, under Article 249(1) of the Constitution, the Commission also protects the sovereignty of the people, secures the observance of democratic values and principles and promotes constitutionalism. Article 249(2) subjects the Commission only to the Constitution and Laws of Kenya. The 1st Respondent is thus independent and not subject to any direction or control by any person or authority.

148. It was submitted that the legal mandate of the 1st Respondent under the Constitution is further cemented in the Judicial Service Act (No. 1 of 2011) which is the primary statute that guides the 1st Respondent in the discharge of its constitutional obligations and under sections 4 and 13 thereof additional powers and standard of service are provided for the guidance of the Commission. To the Commission, the foregoing forms the constitutional and statutory architecture of the Commission.

149. From the foregoing, it was submitted that the Commission has the sole mandate of recommending to the President persons for appointment as Judges of the Superior Court in Kenya. In support of this position, the Commission relied on Law Society of Kenya vs. Attorney General & National Assembly [2016] eKLR where it was held thus:

> 279. It is our view that the selection process, a process exclusively within the mandate of the Commission, starts from the point when the vacant positions are advertised and does not end until the names of the qualified persons are submitted to the President. Within that stage the mandate is constitutionally reposed in the Commission and neither the executive not the Legislature can dictate to the Commission on how to carry out its said mandate.
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> 283. In other words, the discretion on which names to be submitted to the National Assembly will no longer rest with the Commission but would be at the sole discretion of the President. In our view this system limits or restricts the sole and unfettered discretion given to the Commission by the Constitution to select the person whose name is to be submitted by the President to National Assembly.

150. According to the Commission, having complied with its obligations as required under Part V of the Act, the next task shifted to the Applicants who were expected to fill in the prescribed instrument (a form) requiring Applicants to provide relevant background information to determine their qualifications for the vacant positions including, inter alia: academic, employment, legal practice, judicial or financial discipline, community service, pro bono activity and non-legal interest, involvement as a party in litigation and criminal record; references; information relating to legal practice; sample of any writings; declaration of income and liabilities at the time of making an application, among others. The said forms, it was submitted the Commission provided for all details provided for by Regulation 4(3) and requested for supportive documents to the entries in the said Forms. These documents include clearances from Kenya Revenue Authority, Higher Education Loans Board, Law Society of Kenya, Directorate of Criminal Investigations, Advocates Complaints Commission, Ethics and Anti-Corruption Commission and a recognised Credit Reference Bureau. In the Commission's view, in the Advertisements, it only listed and/or provided details of these statutory requirements and did not state any requirement not embodied in Regulation 4(3) of the First Schedule. The Petitioners have been oblivious of this requirement of which the 1st Respondent gave due notice to all prospective Applicants.

151. It was reiterated that upon receipt of the Applications, Regulation6 enjoins the Commission to review all applications submitted for completeness and conformity with constitutional and statutory requirements. In undertaking the review, the 1st Respondent determines whether the Applicant(s) meets the minimum constitutional and statutory requirements for the position. This review and determination is what the Commission calls shortlisting of compliant Applicants whose Applications

comply with the Constitutional and Statutory requirements an undertaking which the Commission took. Thereafter in accordance with Regulations 9 and 10 of the First Schedule, the Commission on 15th July, 2016, issued a press statement stating the names of all Applicants for the respective positions; those whose applications had met the Constitutional and Statutory requirements and scheduled the interviews for those shortlisted beginning on 29th August, 2016 to conclude on 7th October, 2016. In the said publication and pursuant to Regulation 9(c), the 1st Respondent invited members of the public to avail any information on any of the shortlisted candidates.

152. It was submitted that the Commission is further required by Regulations 7 and 8 to undertake Reference checks and Background investigations on compliant Applications within 21 and 30 days respectively from the date of shortlisting of compliant applications and to interview, in public, the shortlisted Applicants, deliberate, vote and nominate the most qualified applicants taking into account gender, regional, ethnic and other diversities of Kenya within 7 days of close of the interviews. Upon the conclusion of the nomination, the Secretary to the Commission is enjoined, within 7 days of the vote, to notify the Applicants of the Commission's decisions in writing and then forward the duly nominated persons to the President.

153. It was the Commission's case that the process described above complies with the principles and/or international best practices as embodied in Latimer House Guidelines and the Commonwealth Principles on Appointment, Tenure and Removal of Judges: A Compendium and Analysis of Best Practices ("the Compendium") which states at Item No. 1.7 intituled the Role of Judicial Appointments Commissions at page 44 thus:

> 1.7.2 The Commonwealth Latimer House Principles declare that appointments should be made on the basis of clearly defined criteria and by a publicly declared process. It was observed that this brief but important provision sets a minimum standard of transparency regarding both the characteristics that qualify persons for judicial appointment and the steps that are followed when an individual is considered for selection. The criteria for judicial office will usually be determined to a greater or lesser extent by the constitution or statute although there may be some scope for commissioners to bring to bear their experience and expertise if the commission is authorised to elaborate the criteria for particular judicial posts, or develop guidelines or tools for use when evaluating individual candidates. 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.

154. The Commission further relied on para. 1.7.3 of the same Compendium to the effect that:

> 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 the criteria would be undermined if they were not applied throughout the process of selection.

155. It was submitted that there is a clearly set out process for the selection of judges in Kenya provided for under the Constitution and the Judicial Service Act, 2011. The timelines for the same are equally provided by under the First Schedule and most importantly, the criteria for evaluation of Applications is prescribed by statute. Regulation 13 of the First Schedule sets out the criteria applied by the Commission in reviewing and evaluating applications. To the Commission it complied with all the relevant provisions as well as the international best practices adverted to above.

156. On the issue whether the Commission is under the law entitled to review and/or vet applications received from prospective appointees to the offices of the CJ, DCJ and Judge of the Supreme Court, respectively, with a view to assessing, inter alia, their completeness and compliance with the law, it was submitted that Regulation 6 of the First Schedule expressly provide for initial review of the review of applications to determine whether the same complies with the constitutional and statutory requirements and reiterated that this is the process called shortlisting of Applicants, a process which according to the Commission is also expressly recognised by Regulation 7(1) of the First Schedule which permits the 1st Respondent to undertake Reference Checks within 21 days of the shortlisting process. To the Commission, the fact that the word "shortlisting" is not used expressly in Regulation 6 does not negate the term as used in Human Resource Practices. In this respect the Commission relied on Online Oxford English Dictionary, in which the word Shortlist as a verb means to 'put (someone or something) on a shortlist' whereas as a noun, it means 'A list of selected candidates from which a final choice is made'. The same dictionary defines a candidate as a person who applies for a job or is nominated for election. The net effect of the aforesaid definition in the Commission's understanding and the process undertaken pursuant to Regulation 6 of the First Schedule is a shortlisting of candidates/Applicants from which subsequent processes are undertaken to determine the most qualified person for recommendation for appointment as a CJ, DCJ and a Judge of the Supreme Court. In undertaking this process, the 1st Respondent has the obligation to disallow any Application that does not meet the Constitutional and Statutory requirements for Applications.

157. The Commission asserted that it is not proper, legal and constitutional for it, having scrutinised an Application and found, in accordance with Regulation 6 that the said Application does not meet the constitutional and statutory requirements, to proceed to process the said application under Regulations 7-16. Such an argument will render otiose the need for scrutiny, sieving and sifting Applications to ensure that only compliant Applications proceed for further consideration by the Commission and will the Commission a mere conveyor belt which has no mind at all to apply in the process which is an absurdity. The Commission supported its case by relying on Human Resource Practice, 5th Edition, a book by Malcolm Martin, Fiona Whiting and Tricia Jackson, at page 142, that:

> "At the shortlisting stage you are likely to have only the information contained on the application form. If this has been well designed, it should be relatively easy to filter out those candidates who do not meet the minimum (essential) requirements. Curricula vitae (CVs) are often used at this initial shortlisting stage, but because they are not standardised and often contain incomplete information, they may be much less useful here. Actually, you can help this process by giving clear instructions to candidates regarding the type of information that you want them to provide in submitting their application forms and CVs."

158. It was therefore the Commission's position that it has the obligation to filter out those Applicants who do not meet the minimum constitutional and statutory requirements. It was contended that the position advanced that the only shortlisting provided under the law is under section 30(3) of the Act is untrue as the shortlisting under that section is 'for persons for nomination' to the said persons, but for that to happen the process under Regulation 6 of Part III has to take place as well as other processes described above. In support of this position the Commission relied on The Hellen Suzman Foundation

vs. Judicial Service Commission & 3 Others, Case No. 8647/2013, in which the High Court of South Africa observed at paragraph 19 of its Judgment thus:

> " The JSC has followed the procedure for the selection of candidates for appointment as judges as clearly set out in Regulation 3.... After the closing date of nominations, a shortlist was compiled.... Thereafter, JSC interviewed the shortlisted candidates."

159. It was submitted that the South African Judicial Service Act, 1994 and the Regulations made thereunder (Procedure of Commission) Gazette No. 24596 of 27th March, 2003 govern the appointment for Judges of the Constitutional Court and High Courts of South Africa. Regulations 2(e) and 3(e) provides for shortlisting of Applicants in terms similar to Regulation 6 of our First Schedule. In the same vein the Commission relied on the Indian Supreme Court case of Yogesh Yadav vs. Union of India & Others, Civil Appeal No. 6799/2013, in which the Court held at paragraph 15 thus:

> " The decision taken in the instant case amounts to shortlisting of candidates for the purposes of selection/appointment which is always permissible."

160. Therefore, on the basis of comparative jurisprudence referred to above and the working of Regulation 6 of the First Schedule, the Commission urged the Court to hold that it does have the duty to scrutinize the Applications and eliminate those that do not comply with the constitutional and statutory requirements under the Constitution and the Act.

161. On the procedure and criteria for evaluation of applicants under Regulation 6, it was submitted that the procedure is expressly provided for by statute as has been elaborately described above and the criteria for such exercise specifically provided for by Regulation 13 thereof.

162. The Commission, in support of its case cited Andrew Omtatah Okoiti vs. Attorney General & 2 Others [2011] eKLR, in which Musinga, J (as he then was) agreed that:

> " ...short listing stage is a very critical one in the recruitment process and the highest degree of transparency ought to be exhibited. The JSC exercises discretion in short listing the applicants. However, the parameters of exercise of that discretion by the JSC has been defined by Regulation 13.' The JSC cannot be accused of having abused its discretion unless the petitioner demonstrates by way of an affidavit sworn by one who alleges that he/she had met all the stipulated requirements, applied and was not shortlisted."

163. To the Commission Regulation 13 provides exhaustive criteria for evaluation of the Applications and in support of this position the Commission relied on the Compendium, at paragraph 1.7.6 at page 46 that there is need to ensure all shortlisted applicants are of good character when it states thus:

> " Once applications are received, it is usually necessary to establish that each applicant who might plausibly be shortlisted for the position is of good character. This includes verifying that the applicant does not have a history of criminal offences or disciplinary misconduct that would make them unsuitable for judicial appointment."

164. Similarly, the Commission relied on Yogesh Yadav (supra) it was held at paragraphs 14 & 17 thus:

> " 14. ... the High Court has rightly held that it is not a situation where securing of minimum marks was introduced which was not stipulated in the advertisement, standard was fixed for the purpose of selection. Therefore, it is

not a case of changing the rules of the game. On the contrary, in the instant case, it is a decision taken to give appointment to only those who fulfilled the benchmark prescribed. Fixation of such a benchmark is permissible in law.

17. it is stated... that there is no change in the criteria of selection which remained of 80 marks for written test and 20 marks for interview without any subsequent introduction of minimum cut off marks in the interview. It is the shortlisting which is done by fixing the benchmark to recruit best candidates on rational and reasonable basis."

165. Additionally, the Commission relied on the South African case of Democratic Alliance vs. The President of the Republic of South Africa and 3 Others, (263/11) [2011] ZASCA 241, where there was a challenge to the appointment of National Director of Public Prosecutions (NPA), on the ground that the appointee was not a fit and proper person with regard to his experience, conscientiousness, and integrity, the Supreme Court of Appeal held that the qualities of appointment of candidates are jurisdictional facts which must exists and objectively assessed prior to any appointment being made holding at paragraphs 106-107, thus:

"(106) Relying on the decision in this court in SA Defence and Aid Fund v Minister of Justice1967 (1) SA 31 (C), it was submitted that the jurisdictional facts necessary to be satisfied before an appointment can be made fall into the category where the President is the repository of the power and has the sole and exclusive function to determine whether the prescribed fact or state of affairs existed.

(107) It is true that no process is prescribed, either by the Constitution or by any provision of the Act, for the President to follow in assessing a candidate's fitness for the position of NDPP. As stated in the dictum from the Certification judgment, referred to in para 90 above, the national legislation envisaged must ensure that the NPA exercise sits functions without fear, favour or prejudice. That is the primary purpose of the Act. It will falter at the starting post if it is not insistent about the qualities the head of the institution must possess in order to lead the NPA on its constitutional path. Section 9(1)(b) must consequently be construed to achieve that purpose. Thus, I agree with the submission on behalf of the DA, set out in para 98 above. There has to be a real and earnest engagement with the requirements of s 9(1)(b). Having regard to what is stated in earlier paragraphs about the importance of the NPA and the office of the NDPP it is the least that 'we the people' can expect and that s 9(1)(b) demands."

166. At paragraphs 121 and 124(2), the Supreme Court of Appeals held thus:

"(121) It is clear that the President did not undertake a proper enquiry of whether the objective requirements of s 9(1)(b) were satisfied. On the available evidence the President could in any event not have reached a conclusion favourable to Mr Simelane, as there were too many unresolved questions concerning his integrity and experience.

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(2) The order of the court below is set aside and substituted as follows:

'a. It is declared that the decision of the President of the Republic of South Africa, the First Respondent, taken on or about Wednesday 25 November 2009, purportedly in terms of section 179 of the Constitution of the Republic of South Africa (the Constitution), read with sections 9 and 10 of the National Prosecuting Authority Act 32 of 1998 to appoint Mr Menzi Simelane, the Fourth Respondent, as the National Director of Public Prosecutions (the appointment), is inconsistent with the Constitution and invalid;

b. The appointment is reviewed and set aside."

167. Flowing from the foregoing jurisprudence, it was the Commission's position that it is incumbent upon it to state all the requirements under the Constitution and Statute and to apply the same to all the candidates. Thus an abdication of the Commission's duty as did the President of South Africa in the Democratic Alliance case, would entitle this Honourable Court to declare such process unconstitutional. However, compliance with the same would not warrant such a declaration. In the Commission's view, the requirements underpinned in the Constitution and the Act and are necessary to determine the eligibility of the candidates more so their integrity and character which are embodied in the Constitution but left to Parliament to prescribe the tools and how these principles are ascertained by the Commission.

168. To the Commission, in shortlisting the Applicants, it strictly complied with the law and filtered out Applications that were non-compliant with the Constitutional and Statutory qualifications and requirements. It acted in good faith, within its bounds and reasonably thus its decision should not be reviewed or set aside by this Honourable Court. In its view, the petitioners have made wide and general allegations bordering on conjecture and surmises as to what might have been the reasons for not shortlisting eight Applicants for the office of the CJ without any factual premise. It was therefore contended that since to date, none of the eight (8) Applicants have alleged that they met all the stipulated requirements yet they were not shortlisted, the Petitioners' submissions remain rumours, surmises and conjecture which cannot form a sound basis for interfering with the Commission's determination and discretion.

169. On the issue whether the Commission breached the Applicants' right to fair hearing and fair administrative action, the Commission appreciated that the entire process of recruitment of Judges affects the rights of Applicants. As such, it is an administrative action as was found in Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR where the Court of Appeal (Okwengu, JA) held thus:

"(93) The functions and powers of the appellant as provided under Article 172 of the Constitution as read with Sections 3 and 12 of the Judicial Service Act, reveal that the appellant exercises powers that are administrative in nature and which involve decision making process that may affect the rights of judges and officers of the Judiciary. In this regard there is no doubt that the right of the respondent was likely to be adversely affected by the exercise of the appellant's

disciplinary powers, and therefore it was necessary for the appellant to comply with Article 47 in the exercise of such powers. I have already addressed the issue of procedural fairness and will therefore not dwell on that aspect of the administrative action. Suffice to mention as stated by Majanja, J. in Dry Associates Limited v Capital Market Authority & Another [2012] eKLR, that the element of procedural fairness in Article 47 must be balanced against reasonableness, expediency and efficiency in the decision making process. Of further relevance is whether the respondent was given reasons for the administrative action taken by the appellant."

170. The Commission however contended that it did act in deference to the provision of Article 47 of the Constitution and the provisions of the FAA Act. And relied on Andrew Omtatah Okoiti vs. Attorney General & 2 Others (supra) where Musinga, J held at page 18 thus:

> " Was the JSC bound to notify the applicants who were not short listed the ground(s) for their failure and afford them an opportunity to respond before interviews are conducted? There is no such requirement in the Act or the Regulations made thereunder? Whereas it would have been a good practice to inform each unsuccessful applicant of the reason for disqualification, it must be remembered that time was of the essence in the recruitment exercise. In the case of the Supreme Court, it has to be constituted by 27th August, 2011.
>
> Secondly, I believe that any applicant who wanted to know the reason for not having been short listed was at liberty to write to the JSC and ask for the reasons. In such an instance, the JSC, I believe, would be obliged to provide the reasons thereof, and if the applicant considers the reasons for disqualification unsatisfactory he/she can seek intervention of the court."

171. Based on the said decision it was submitted that no provision of the Act or the Schedule provides for notice of the intention not to shortlist an Applicant and for hearing prior to the initial review of Applications. Shortlisting, it was submitted, by its very nature, is a process mainly limited to a scrutiny of the Application Forms, the Curriculum Vitae (CVs) of the Applicants and the supporting documents for compliance purposes. It does not involve hearing of every Applicant before a decision is made to shortlist persons. Therefore, given the nature, urgency and circumstances under which the shortlisting was done, it was impossible to call each of the eight Applicants to notify them of the intended decision and hear them before shortlisting was done. In any event, it was contended, the interviews are required by Regulation 10 for only those Applicants who have met both the constitutional and statutory requirements and not those whose applications have failed to do so. By statute therefore, the Commission was only discharging its constitutional and statutory duty in the manner prescribed by statute which was reasonable in the circumstances, efficient, proportionate, expeditious and in the public interest in compliance with the provisions of Article 47 of the Constitution. Further, section 4(6) of the FAA Act recognises processes provided for specifically by statute which then become operational if the same complies with the provisions of Article 47. It therefore follows that since the First Schedule provides a specific procedure for the process of appointment of judges and it complies with the provisions of Article 47 as explained above, the provisions of the First Schedule to the Judicial Service Act becomes operational and not the procedure set out under the FAA Act.

172. In the Commission's view the test of reasonableness was set out clearly in the case of Kevin K. Mwiti & Others v Kenya School of Law & 2 others [2015] eKLR where this court while tackling the issue of 'unreasonableness' had this to say:-

> " ...unreasonableness per se is largely a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words, such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.'

173. Similarly, the Commission relied on Professor Wade's passage in his treatise on Administrative Law, 5thEdition at page 362 as approved by in the case of the Boundary Commission [1983] 2 WLR 458, 475 that:

> " The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

174. It was contended that the Commission acting within the confines of its powers as vested on it by the Constitution and the first schedule to the Act and applying the criteria and procedure set out by the First Schedule to the Judicial Service Act did not act unreasonably, irrationally or arbitrary in the circumstances. Rather, it discharged its constitutional and statutory mandate as required and prescribed by law which decision ought not to be set aside by this Honourable Court. It was further submitted that the public interest in this matter militates towards the completion of this process to enable the 1st Respondent constitute the Supreme Court, the apex Court that has the exclusive mandate to hear and determine Presidential Election Petitions and final appeals as provided for under Article 163(4) of the Constitution. It is important to note that the Supreme Court is not fully constituted to hear and determine matters before it as the three positions currently in contest before this Honourable Court constitute a critical component of the Seven Members of the Supreme Court.

175. On the issue whether there is a requirement for public participation in the process, the Commission submitted that it did not by-pass the procedure of interview as alleged by the 2nd Petitioner. According to it, in line with Regulation 6 of Part III of the first schedule to the Act, it reviewed the applications for completeness and conformity with the necessary requirements. In its view, public participation is a principle embodied in the provisions of our Constitution, [Article 10]. It is an underpinning requirement in enacting law, interpreting the same or applying law or making a public policy decision. It relied on Lenaola, J's decision in Independent Policing Oversight Authority &Another vs. Attorney

General & 660 Others [2014] eKLR in which the case of Doctors for Life International vs. Speaker of the National Assembly and Others CCT 12 of 2005 was quoted with approval for the holding that: -

> " The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are "facilitate" and "involvement". To "facilitate" means to "make easy or easier", "promote" or "help forward". The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of "involve" includes to "bring a person into a matter" while participation is defined as "(a) taking part with others (in an action or matter);...the active involvement of members of a community or organization in decisions which affect them". According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a)is consistent with the participative nature of our democracy. As this Court held in New Clicks, "(t) the Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies." The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process....."

176. In the Court's opinion:

> " it is clear and I must state so, that it is impossible to define the forms of facilitating appropriate degree of public participation. To my mind, so long as members of the public are accorded a reasonable opportunity to know about the issues at hand and make known their contribution and say on such issues, then it is possible to say that there was public participation."

177. In the Commission's submission, the Constitution and the Judicial Service Act have infused in them mechanisms adequate to ensure public open participation of the public in the judicial process. Indeed, under Article 159(1) of the Constitution, judicial authority is derived from the people of Kenya and vested in the Judiciary established under the Constitution. In its view, under Article 1 of the Constitution, sovereign power belongs to the people and is exercisable either by themselves directly or through their delegates of power under Article 1(3) and that the 1st Respondent is one such a delegate and exercises delegated powers to, among others, protect the sovereignty of the people of Kenya under Article 249(1) of the Constitution.

178. According to the Commission, the first point of exercise of sovereignty by the people is in the appointment of the Commissioners of the JSC under Article 171(2) of the Constitution and as the composition of the Commission is wide, diverse and represents the interests of all the people of Kenya, the public is indeed expressly represented by two persons (one man and one woman) under Article 171(2)(h) of the Constitution. In this respect, the Commission relied on the Law Society of Kenya vs. Attorney General & National Assembly (supra), at paragraphs 214 and 227 and submitted that it represents the members of the public who exercise their sovereignty through the members of the Commission and who represent diverse interests including the public interest.

179. Secondly, it was submitted that the First Schedule has designed direct public participation in two ways. Firstly, Regulation 5 permits law Associations to invite its members to submit applications to it for onward transmission to the Commission hence this is another avenue for public participation. But most importantly, the First Schedule has devised a mechanism for direct involvement of the members of the public in the process; from being informed of the Advertisements, to being informed of the persons shortlisted for interviews for the respective posts, being informed of the dates and time for the scheduled interviews and being invited to submit complaints and all relevant information on the shortlisted Applicants as provided for by Regulations 3, 4, 6, 9, 10, 11 and 12. The Commission having complied with these provisions, it was contended that the foregoing steps in our view, constitute public participation under the Constitution and the Act that complies with the principle in Article 10 of the Constitution.

180. On the issue whether the Petitioners or any of them entitled to demand from the Commission the information that they respectively demanded from the Commission, it was submitted that the request for disclosure of information was made under Article 35 of the Constitution. It was submitted that the Kenyan Courts have elaborately dealt with the right to access to information under Article 35 of the Constitution and delineated the nature of this right, the right holder and the duty bearers and the extent of disclosure required by the Constitution and/or the limitations thereof. With respect to the nature and extent of the right to access to information, reliance was placed on Nairobi Law Monthly Company Limited vs. Kenya Electricity Generating Company & 2 Others [2013] eKLR at paragraphs 26-28 that the right to information is a right recognised under the Constitution and international legal instruments including Articles 19 of both the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights (ICCPR), 1966 as well as in Article 9 of the African Charter on Human and People's Rights (The (Banjul Charter). Under the aforesaid instruments, this right includes the right to seek, receive and impart information and ideas through any media and regardless of frontiers. The Court further held that the State has a duty to enact legislation to provide for disclosure of information which has not been done in Kenya and that the State has a duty to provide information and proceeded to hold at para 34-38 thus:

> " 34. The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to 'publish and publicise any important information affecting the nation', but also to provide open access to such specific information as people may require from the State.
>
> 35. A third consideration is the nature and form of information that should be availed by the State, and the extent to which information should be disclosed. Such issues are dealt with, in other jurisdictions, by way of Freedom of Information legislation, which Kenya is yet to enact. However, there are certain international standards which offer a guide on the nature of the information to be provided, and the extent to which disclosure should go.
>
> 36. The recognized international standards or principles on freedom of information, which should be included in legislation on freedom of information, include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information

should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that 'Information' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information."

181. It was however noted that the learned Judge appreciated at paragraphs 37-38 that there could be limitations on this right. Similarly, in the Commission relied on the decision of Lenaola, J in Timothy Njoya vs. Attorney General &Another [2014] eKLR, Famy Care Limited –vs- Public Procurement Administrative Review Board & Another[2013] eKLR and Nairobi Law Monthly Company Limited (supra).

182. The Commission further relied on Majanja, J's decision in Charles Omanga & 8 others vs. Attorney General & Another [2014] eKLR where it was held that:-

> "Article 35 is part of the Bill of Rights and any person is entitled to enforce these rights under Article 22(1) claiming, "that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened." [Emphasis mine] How is the right to information threatened unless a person has been requested and has been denied the information? A person moving the court to enforce fundamental rights and freedoms must show that the rights sought to be enforced is threatened or violated and that is why in the case of Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and Others Nairobi Petition No. 155A of 2011 (Unreported), the court stated that, "[43] I am not inclined to grant ..... the application as the Petitioner has not requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order."

183. Similar position was adopted in Andrew Omtatah Okoiti vs. Attorney General & 2 Others (supra) where the court held that:-

> "Before an application is made to court to compel the state or another person to disclose any information that is required for the exercise or protection of any right or fundamental freedom, the applicant must first demonstrate that a request for the information required was made to the state or to the other person in possession of the same and the request was disallowed. The court cannot be the first port of call. The petitioner herein did not demonstrate that he requested the JSC to avail to him any information that he considered necessary and the same was not granted."

184. It was submitted that in line with the above jurisprudence the right to information is not an absolute right under the Constitution of Kenya but is a right that is limited either in the Constitution or by statute. The first limitation embodied in the Constitution is to confer some rights in citizens qua natural persons as opposed to juridical persons in respect of the information held by the state or state organs. The second limitation is on the type of information requested for. If the disclosure requested for is not in the public interest or is likely to lead to a disclosure of private and confidential information relating to other persons, then such information cannot be disclosed. The third limitation is in respect

to process. An Applicant must first request for the information sought from the State organ prior to approaching the Courts for an order. The Applicant may only come to the Courts after the request has been declined whereupon the Court has jurisdiction to scrutinise the reasons given for the refusal to disclose information requested. To the Commission, the 2nd Petitioner did not make any request for information from the Commission which it could act upon. As regards the 1stPetitioner's request, it could not be allowed as the right to access to information invoked by it was limited to natural citizens only and not a juristic person, yet in paragraph 1 of its Petition, the 1st Petitioner described itself as a registered human rights society under the Societies Act and has attached its Registration Certificate. As such, the 1st Petitioner herein is a juridical person hence not entitled to request for and receive any information from the 1st Respondent. As for the 2nd Petitioner, it did not make any request to the Commission hence cannot therefore allege that his right to information has been breached by the 1st Respondent herein.

185. As regards the issue whether the Commission acted in accordance with the law in its respective responses to the demands for information made by the respective Petitioners, it was submitted that the Commission gave reason why some of the information requested for was not disclosed to the Petitioners. First, some of the information sought by the 1st, 3rd and 4th Petitioners sought was information available to the public having been released by the Commission as required of it under Regulations 3 and 9 of the First Schedule to the Judicial Service Act and was availed to the public on 12th, 13th and 15th July, respectively and through press releases. These releases were posted on the 1st Respondent's website and links provided in the releases. Moreover, the media also published the names of all the Applicants and those shortlisted. The Commission therefore complied with the provisions of Article 35(3) which requires it to publish information in the public interest.

186. Secondly, the criteria used by the Commission to shortlist the respective Applicants is contained in the statute, Regulation 13 of the First Schedule to the Act, 2011. Having been published, enacted and being operational, the Petitioners are taken to have had notice of its provisions. This was the position taken by Musinga, J in Okiya Okoiti case, supra where the Court was emphatic that the 1st Respondent was not permitted to publish the reasons for disqualification as this would violate the Applicants' right to privacy protected under Article 31 and potentially affect advancements in their careers. To the Commission, this finds favour in Regulation 5 which expressly prohibits it from disclosing information that is sensitive and confidential including income and financial interest, disciplinary or ethical complaints, charges or grievances brought against the Applicants and all unsolicited letters and comments.

187. Thirdly, the reasons why some candidates were not shortlisted and the minutes of the meetings of the Commission are confidential and could not be released to the Petitioners herein. In this respect the Commission relied on Compendium at paragraph 1.7.9 at page 49 and 1.7.14 at page 50 and Samuel L. Guy vs. Judicial Nomination Commission, 659 A.2d 777 (1995), where the Delaware Supreme Court held that:

> "The Plaintiff has failed to provide the Court with any reasons to support his request for disclosure. Plaintiff has demonstrated no need for disclosure of the Commission's records and thus has failed to carry out his burden of proof to overcome the presumption of executive privilege. The Court holds, therefore, that the confidential records of the Commission, in issue herein are protected by the Constitutional and common law doctrine of executive privilege, are not public records and are therefore exempt from disclosure."

188. Flowing from the comparative jurisprudence the Commission submitted that it was justified to decline to give both the reasons for its determination on shortlisting as well as the minutes of its meetings to

the Petitioners and urged the Court to hold that it did not violate the Petitioners' right to access to information.

189. The Commission's case was therefore that it acted within its powers under the Constitution and the First schedule to the Judicial Service Act and the Schedule thereto; that no valid grounds have been advanced as to why the 1st Respondent should be restrained from proceeding with and concluding the process of recruitment of suitable persons to fill the vacant positions of the Chief Justice, the Deputy Chief Justice and a Judge of the Supreme Court; that it has not breached any of its constitutional obligations in the ongoing process of recruitment of the Chief Justice, Deputy Chief Justice and Judge of the Supreme Court; that it is in the public interest that the said exercise is concluded as expeditiously as possible as the Judiciary, an important arm of Government needs to have a head in the Chief Justice and the Deputy Chief Justice; that similarly, the Supreme Court, an Apex Court in Kenya that plays an important role in Kenya's constitutional set up does not have the requisite quorum to hear and determine matters before it until, it is properly constitution under the process now under challenge in these proceedings; and that the Petitioners have not established any basis for the grant of any of the orders sought.

190. The Court was therefore urged to dismiss the Judicial Review Application and the two Petitions with costs.

191. These submissions were highlighted on behalf of the 1st Respondent Commission by Mr Njoroge Regeru and Mr Ochieng Oduol.

2nd Respondent's Case

192. On behalf of the 2nd Respondent, the following grounds of opposition were filed:

1) The 1st petitioner has not set out a case for the grant of the constitutional remedies sought having failed to disclose whether the persons who were not shortlisted had presented their clearance certificates to the Judicial Service Commission and hence it is guilty of failure to disclose material particulars.

2) The 2nd petitioner has not set out a case for the grant of judicial review orders sought. The Judicial Service Commission did not act without jurisdiction or exceeded its jurisdiction or acted arbitrarily or irrationally or was biased or was the process of recruitment pre-determined.

3) The 1st respondent did not impose unconstitutional requirements or qualifications by requiring applicants to submit copies of clearance certificates from the enumerated bodies. This was necessary to gauge the applicant's moral character and integrity in both their professional and personal life as required by Article 166(2) and Regulation 13 (c) of the 1st Schedule to the Judicial Service Act.

4) The 1st respondent was not obligated to disclose the reasons for disqualification of persons affected for this would have violated their rights to privacy under Article 31 of the constitution and paragraph 5 of the First Schedule to the Judicial Service Act.

5) The petitioners did not satisfy the requirements of access to information under Article 35 of the constitution and hence were not entitled to the information sought.

6) The members of the public were not denied participation in the recruitment process and this can be confirmed from the newspaper advertisements.

7) The process of recruitment was transparent, accountable, lawful, competitive and was not tainted by conflict of interest or malice or impunity or greed or discrimination.

8) The persons who applied for the advertised positions and the petitioners were not denied fair administrative action.

9) Public interest requires that the process of recruitment be concluded as soon as possible and hence these suits should be dismissed.

10) The Commission is an independent body and the Court should be wary of replacing the Commission's opinion with its own.

193. It was submitted on behalf of the 2nd Respondent by Mr Onyiso on whether the above enumerated requirements were unconstitutional or ultra vires it was submitted by the 2nd Respondent (the AG) that pursuant to Article 166(2)(c) of the Constitution as read with Regulations 4(2)(a), 8 and 13(c) of the 1st Schedule to the Judicial Service Act that the petitioners' argument that the Commission exceeded its mandates is without basis. To the AG their interpretation is narrow, technical, unduly restrictive, formalistic and positivistic yet based on the case of Kaplana H. Rawal vs. Judicial Service Commission (2015) eKLR, the Constitution ought to be interpreted holistically, in context and in its spirit. Similarly, In the Matter of Kenya National Human Rights Commission, Supreme Court Advisory Opinion, Reference No. 1 of 2012, the Court said that:

> " But what is meant by a holistic interpretation? It must mean interpreting the constitution in context. It is the contextual analysis of constitutional provision, reading it alongside and against other provisions so as to maintain a rational explication of what the constitution must be taken to mean in light of its history, of the issue in dispute, and of the prevailing circumstances."

194. The AG further relied on the case of Advocates Coalition for Development of Environment and Others vs. Attorney General and Another (2014) 3 EA, where the court held that:

> " The widest construction possible in its context should be given according to the ordinary meaning of the words used, and each general word should be held to extend to all ancillary and subsidiary matters. In certain context, a liberal interpretation of the constitutional provision may be called for."

195. To the AG, the issue of integrity is central in the recruitment of Judges. It is through the submission of certificates from the enumerated bodies that the Commission can gauge the integrity of the applicants. To argue that the constitution does not require the submission of those documents is to assume a wrong approach in its interpretation. It is not holistic or rational or contextual and does not appreciate that an interpretation that requires the submission of the enumerated documents to the Commission so as to gauge 'the moral character, integrity and impartiality of an applicant' is in consonance with the spirit of the constitution. It was submitted that the petitioners' assertion that the Commission did not comply with the concept of constitutionalism and the rule of law was baseless since it complied with the requirements of the Constitution and the Judicial Service Act and it was the duty of the petitioners to provide evidence to the contrary. In support of its submissions, the AG relied on Andrew Omtatah Okoiti vs. Attorney General & 2 Others[2011] eKLR.

196. On the issue whether the Commission did not comply with the requirements of fair administrative action, it was submitted based on the same case that the Commission was under no obligation to

disclose the reasons for failing to short-list certain applicants since Part III of the 1st Schedule to Judicial Service Act has no provisions for such disclosure.

197. In the AG's view, under regulation 6(1) of the 1st schedule to the Act, the Commission is required to review the applications for completeness and conformity with the necessary requirements. Under regulation 6(2), the review shall relate to a determination of whether the applicant meets the minimum constitutional and statutory requirements for the position. The applicants who meet these requirements are shortlisted while those that don't are rejected. Since at that early stage, the Commission was engaged in a prima facie examination of whether the applicants had complied with the requirements of the law, this did not require it to give reasons for failing to short-list unsuccessful applicants. In support of this position the AG relied on the case of Rees vs. Crane, 1994 2 AC 123, where the court said:

> " In most types of investigation, there is in early stages a point at which action of some sort must be taken and must be taken firmly in order to set the wheels of investigation in motion. Natural justice will seldom if ever at that stage demand that the investigator should act judicially in the sense of having to hear both sides."

198. In his view, the right to be given written reasons for an administrative action is not absolute and does not apply to all situations but only applies in situations where a right of fundamental freedom of a person has been or is likely to be adversely affected by administrative action and relied on the case of Regina vs. Secretary of State for the Home Department, ex parte Doody, (1994) 1 AC 531, where Lord Mustill said:

> " I accept without hesitation, that the law does not at present recognize a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied.

199. Similarly, the AG cited in support the case of Judicial Service Commission vs. Mbalu Mutava and Another [2005] eKLR where the Court of Appeal stated that:

> " It can be argued that a 'right' in article 47(2) refers generally to any right either in the Bill of Rights or recognized or conferred by law. In my view, the Bill of Rights should be construed as internally coherent. So construed, I venture to hold that the word 'right' in article 47(2) means a right under the Bill of rights and that the framers of the constitution intended that reasons for the decision should only be given as a matter of right where a right under the Bill of Rights has been or is likely to be adversely affected by the administrative decision and not otherwise. It is also important to remember that the right to be given written reasons for the decision is not absolute as by article 24(1) it can be limited by law for a reasonable and justifiable cause....The duty to give reasons and the nature and extent of the reasons envisaged by article 47(2) is dependent on the character and limits of administrative discretion conferred on the administrator by the constitution or law and its application to the facts of the case. So, when article 47(2) is considered together with the role of JSC under article 165(4), it is clear that JSC is not required to keep a detailed official record of the proceedings nor does it have a legal duty to provide its internal working documentation to the 1st respondent. It follows that the request for the full report, recommendations and reasons for the decision, was misconceived in the circumstances of this case....the High Court erred in imposing additional and more onerous duties of disclosure which were not

only inappropriate to JSC's task, but which may, potentially hamper, lengthen or even frustrate its functions."

200. It was submitted that the Commission cannot be faulted for failing to disclose the reasons for not shortlisting certain applicants since the nature, character and substance of the decision did not require the reasons to be given to the applicants. This was a mere sifting process to determine if the applicants complied with constitutional and statutory requirements hence the requirements of natural justice or fair administrative action did not apply at this stage. If they were to apply, they would hamper, lengthen or even frustrate JSC's functions.

201. Based on Selvarajan vs. Race Relations Board, (1976) 1 ALL ER 12 at 19,it was submitted that the procedures adopted by constitutional and administrative bodies may be dictated by timelines set out in the constitution or statutes which in the case of the Commission, are found in the Judicial Service Act. To the AG based on Regulations 5 and 7(2), it is virtually impossible for the Commission to publish the reasons for not shortlisting the applicants without breaching the confidentiality requirement.

202. On the issue whether the petitioners were denied the right of access to information, it was submitted that the right of access to information under article 35 of the Constitution is not absolute and can be limited as required by article 24 of the constitution as noted in Nairobi Law Monthly Company Limited vs. Kenya Electricity Generating Company and 2 others (2013) e KLR. To the AG, a person who seeks information by virtue of article 35 of the constitution must prove that the information is required for the exercise or protection of a fundamental right or freedom and that the information will be of assistance in the exercise or protection of the right and relied on Shabala and 5 Others vs. Attorney General of Traansvaal and the Commissioner of South Africa Police CCT/23/94(1995), as well as Cape Metropolitan Council vs. Metro Inspection Services Western Cape CC and others (10/99) (2001) ZASCA 5, where the court held that:

> " Information can be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information...an applicant has to state what is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right."

203. Similarly, in Unitas Hospital vs. Van WYK and Another (231/05) (2006) ZASCA 34, the South African Court of Appeal stated that:

> " The threshold required of 'assistance' has thus been established. If the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied. Self-evidently, however, mere compliance with the threshold requirement of 'assistance' will not be enough."

204. It was submitted that in the present case, the petitioners have not achieved the threshold of access to information in the possession of the Commission since in their letter dated 13th July, 2016, they did not indicate whether they were seeking the information for purposes of exercising or protecting a right and how that information would be useful in that regard. Thus, they are not entitled to that information.

205. On the issue whether the applicants who were shortlisted were denied the right to equality before the law and freedom from discrimination, it was submitted based on Anarita Karimi Njeru vs. Republic (1979) KLR 154 that the petitioners have not proved how the applicants who were not shortlisted were denied the right to equality before the law or freedom from discrimination. To the AG all the applicants, both successful and unsuccessful were subjected to the same constitutional and statutory

requirement and that no applicant was subjected to a different standard or was discriminated against. He cited the case of Andrews vs. Law Society of British Columbia (1989) 1 SCR 321, where Wilson J., defined discrimination as a 'distinction which whether intentional or not but based on grounds relating to personal characteristics of individual group (which) has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society.' It was however, the AG's view that there was no evidence that the applicants who were not shortlisted had personal characteristics or features which were used against them.

206. As to whether there is likelihood of conflict of interest by members of the Commission, it was submitted that there was none and this was based on the decision in Kenya Roads Board vs. National Bank of Kenya Ltd [2011] eKLR, where a conflict of interest was defined as:

> " A situation that has the potential to undermine the impartiality of a person because of the possibility of a clash between the person's self-interest and professional interest or public interest."

207. Here it was submitted that the petitioners had not disclosed any personal interest by any of the Commissioners which may clash with his/her work or public interest hence the allegation should be disregarded.

208. As to whether the 2nd petitioner is entitled to orders of judicial review, the AG submitted in the negative since in his view none of the grounds for grant of judicial review were proved to exist.

209. Dealing with the issue whether members of the public should have participated in the recruitment process before the shortlisting of candidates is done, it was submitted that there is no requirement of public participation before the shortlisting of applicants is done and this argument was premised on Regulation 9 (c) of the first schedule to the Judicial Service Act, under which it is upon the expiry of the period set for the applications that the Commission invites members of the public to avail to it any information of interest in relation to the applicant and relied on Nairobi Metropolitan PSV Saccos Union Limited and 25 others vs. County of Nairobi Government and 3 others (2013) eKLR, for the position that it does not matter how public participation is effected since what matters is that the public is accorded some reasonable level of participation.

210. It was the AG's submission that it is not in the interest of the public to grant the orders sought since public interest demands that the positions advertised be filed as soon as possible based on the prevailing situation in the Country and relied on Githunguri vs. Republic (1986) KLR.

211. To the AG, the petitioners are not entitled to rely on newspaper articles in support of the petition since newspapers are not authoritative sources of information in legal matters and reliance was placed on Sterlingrad Products Limited and 3 Others vs. The Chairman National Transport and Safety Authority and 3 Others, and Koigi Wamwere vs. Attorney General, Nairobi HCC Misc. Civ. Appl. No.224 of 2004.

212. It was therefore the AG's case that this petition should be dismissed with costs.

Interested Party's Case

213. The interested party herein, the Law Society of Kenya (hereinafter referred to as "the LSK"), relied on its submissions which were highlighted by its learned Counsel Mr Morintat.

214. On the issue whether the Commission correctly adhered to the constitution and the provisions of the Judicial Service Act and the regulations made thereunder when they "short listed" the applicants to fill the vacant positions of the Chief Justice, Deputy Chief Justice and Judge of the Supreme Court, it was

the LSK's position that based on the qualifications set out in Article 166 of the Constitution as read with section 30 of the Judicial Service Act, Cap 185B and the regulations outlined in the First Schedule to the said Act, in short listing applicants for position of Chief Justice, Deputy Chief Justice and Judge of the Supreme Court, the Commission ought to have placed reliance on whether the applicants met the minimum constitutional and statutory requirements laid out under Article 166 (3) of the Constitution and Regulation 4 of the First schedule to the Judicial Service Act, Cap 185 B.

215. The LSK therefore associated itself with the submissions of the 2nd , 3rd and 4th Petitioners to the extent that at the stage of review of applications for the vacant judicial positions, the Commission was only required to confirm and verify that the applicant met and held the minimum constitutional requirement for appointment for the position of Chief Justice, Deputy Chief Justice and Judge of the Supreme Court, but was also under an obligation to ensure that their applications met the requirements of Regulation 4 of the First schedule to the Judicial Service Act, Cap 185 B.

216. In the LKS's view, the Commission should have employed the criteria for evaluation of qualifications of the applicants applying for the positions of the Chief Justice, Deputy Chief Justice and Judge of the Supreme Court as provided for under Regulation 13 of the Judicial Service Act, Cap 185 B at the interview stage and not at the review of applications or shortlisting stage as they did. Its opinion was that the criteria set out in Regulation 13, which can be evaluated from information gathered from reference checks and background investigations of the applicants as envisaged under Regulations 7 and 8 of the first schedule to the Act can only be exercised properly after interviewing the applicants and not prior to that so as to afford the applicants the chance to answer to any queries regarding their professional competence, integrity and the other criteria espoused under the said Regulation and in that regard Part V of the first schedule to the Act, especially Regulation 13 thereof is a guide on how to evaluate shortlisted applicants during the interview stage and cannot logically or reasonably be used as a tool to evaluate suitability of the applicants for short listing.

217. Moreover, Regulation 12 of the first schedule to the Act presupposes that the information gathered from the reference checks and background investigations under Regulations 7 and 8 will be used at the interview stage and the panel conducting the interview would ask the applicants questions pertaining to the information obtained from confidential or anonymous sources.

218. It was therefore the LSK's position that if indeed the Commission used information gathered from the reference checks or background investigations conducted especially from confidential or anonymous sources to bar some applicants from being shortlisted for the interviews then the rights to a fair hearing for those non-shortlisted applicants have been violated. In support of its case, the LSK relied on Onyango vs. Attorney General (1987) KLR 711.

219. With respect to the issue whether the Commission's failure to give reasons or the criteria they followed in shortlisting some of the applicants for the position of Chief Justice, Deputy Chief Justice and Judge of the Supreme Court while disqualifying the other applicants violated the Petitioners right to information, it was the LSK's case that a plain reading of Article35(1)(a) and(b) of the Constitution it is evident that persons seeking to seek information held by the state or another person should demonstrate that the said information is required for the exercise or protection of any right or fundamental freedom. In this respect the LSK relied Timothy Njoya vs. Attorney General & another [2014] eKLR and Cape Metropolitan Council vs. Metro Inspection Services Western Cape and Others (2001) ZASCA 56 and submitted that with respect to the right to access to information in respect to the information regarding the process of shortlisting the applicants for the positions of Chief Justice, Deputy Chief Justice and Judge of the Supreme Court is, though the information is of public importance and of public interest it has to be weighed against an individual's right to privacy. It was

submitted that the right to information under Article 35 of the Constitution is not absolute and is thus subject to limitations.

220. It was however appreciated that the positions of Chief Justice, Deputy Chief Justice and Judge of the Supreme Court are positions of public importance thus requiring all information pertaining to the process of their recruitment and shortlisting be availed to the public unless it would appear that such information would prejudice individuals' rights to privacy and it relied on Andrew Omtatah Okoiti vs. Attorney General & 2 Others [2011] eKLR.

221. The LSK's position was that the Commission violated the provisions of Regulation 12 of the first schedule to the Judicial Service Act, Cap 185 B by improperly applying the criteria for evaluations of qualifications of applicants as set out under Regulation 13 and using the information obtained through the reference checks and background investigations conducted under Regulations 7 and 8 in only shortlisting some of the applicants. By improperly applying provisions of Regulations 7, 8 and 13 of the first schedule to the Act, rights of those applicants who were not shortlisted to be heard under the rules of natural justice were infringed and thus not properly accorded the right to a fair hearing.

222. The LSK therefore was of the view and urging that the Petition should be allowed to the extent that the right to natural justice of the applicants who were not shortlisted for interviews for the positions of Chief Justice, Deputy Chief Justice and Judge of the Supreme Court were violated.

Amicus Case

223. The amicus brief commenced with detailing the legal foundations of the right of access to information both under the Constitution and under the relevant international instruments and detailed the relationship between the right to access the information and other rights while stressing the importance of the right to access information in the realisation of the other rights. Based on the Human Rights Committee remarks in General Comment No. 34 (CCPR/C/GC/34), it was submitted that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, essential for any society and constitute the foundation stone for every free and democratic society.

224. The amicus therefore urged the Court that freedom of expression is therefore not a right to be interfered with lightly because of its great instrumental value as that would be to invite incursions on other rights and create an authoritarian system of government and in this respect the amicus relied on Communications Commission of Kenya vs. Royal Media Services Limited [2014] at 162.

225. Based on several decision both local and international as well as various instruments, the amicus submitted this court should be guided by this test in determining whether the Commission was justified in denying the 3rd and 4th Petitioners information request on the basis of protecting the right to privacy of the applicants.

226. The submissions made on behalf of the amicus were highlighted by its learned counsel Mr Kiprono.

Determinations

227. I have considered the issues in these consolidated causes. In my view these causes broadly disclose the following issues for determination:

    (i) Whether the Commission correctly adhered to the constitution and the provisions of the Judicial Service Act and the regulations made thereunder when it "short listed" the applicants to fill the vacant positions of the Chief Justice, Deputy Chief Justice and Judge of the Supreme Court; and

(ii) Whether the Commission was under an obligation to furnish the Petitioners with the information requested;

(iii) Whether the Commission did satisfy its obligation to furnish the said information;

(iv) What order should the Court make.

Independence of the Commission

228. As a preliminary issue, I wish to deal with the issue whether this Court is entitled to question the Commission's mandate. It was contended that Article 249(2) subjects the Commission only to the Constitution and Laws of Kenya thus the Commission is independent and not subject to any direction or control by any person or authority. This submission calls for an insight as to the jurisdiction of this Court. Article 165(6) of the Constitution provides that:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

229. In my view, the Commission's argument if taken to its extreme conclusion may easily fall foul of Article 2 of the Constitution which provides that:

(1) This Constitution is the Supreme law of the Republic and binds all persons and all state organs at both levels of government.

(2) No person may claim or exercise state authority except as authorised under this Constitution.

230. In my view, when any of the state organs steps outside its mandate, this Court will not hesitate to intervene and this was appreciated by the Supreme Court in Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011 in the following words:

> " The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."

231. As this Court held in The Council of Governors and Others vs. The Senate Petition No. 413 of 2014:

> " this Court [is] vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court".

232. In arriving at the said decision the Court cited with approval the decision Kasanga Mulwa, J in R vs. Kenya Roads Board ex parte John Harun Mwau HC Misc Civil Application No. 1372 of 2000 wherein the learned Judge stated that:

> " Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution."

233. Subsequently, the Supreme Court in Speaker of National Assembly vs. Attorney General and 3 Others [2013] eKLR stated as follows:

> " Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a solution in plebiscite, is only the Courts."

234. This was the position adopted by the Supreme Court in Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 others [2014] eKLR where it was held that:

> " Article 3(1) of the Constitution imposes an obligation on every one, without exception, to respect, uphold and defend the Constitution. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) (e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of the Constitution being protected and promoted. However, all statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process. What this Court would not do is to extend time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorized. For that reason, this Court would, by no means be interfering with a constitutionally-mandated process, if the order for stay is granted. This is because an order for stay will be sufficient to bring to a halt the preparation of the by-election by the IEBC as well as stop the swearing in of the Speaker."

235. Nyamu, J was even more blunt in his opinion in Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 where he expressed himself as follows:

> " To exempt a public authority from the jurisdiction of the Courts of law is, to that extent, to grant doctorial power...This is the justification for the strong, it might even be rebellious, stand which the courts have made against allowing Acts of Parliament to create pockets of uncontrollable power in violation of the rule of law...The law's delay together with its uncertainty and expense, tempts governments to take short cuts by elimination of the Courts. But if the courts are prevented from enforcing the law, the remedy becomes worse than the disease."

236. Professor Sir William Wade in his authoritative work, Administrative Law, 8th Edition at page 708 properly captured the failure of Parliamentary draughtsman as hereunder:

> "The Judges, with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power."

237. This was the view adopted by Ngcobo, J in Doctors for Life International vs. Speaker of the National Assembly and Others (CCT 12/05) 2006 ZACC 11 the following manner:

> "The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation."

238. The learned Judge continued:

> "It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation. By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does. While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but

leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution."

239. As was appreciated by Langa, CJ in Hugh Glenister vs. President of the Republic of South Africa & Others Case CCT 41/08; [2008] ZACC 19 at para 33:

> " In our constitutional democracy, the courts are the ultimate guardians of the constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds."

240. I associate myself with the positions adopted in these decisions and dare add that when any of the State Organs or State Officers steps outside its mandate, this Court will not hesitate to intervene. It is therefore my view that this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, as this petition alleges a violation of the Constitution by the Respondents, it is my finding that the principle of independence of the Constitutional Commissions does not inhibit this Court's jurisdiction or prohibit it from addressing the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. To the contrary, the invitation to do so is most welcome as that is one of the core mandates of this Court.

241. My finding is fortified under the principle that the Constitution is the Supreme Law of this country all State Organs must function and operate within the limits prescribed by the Constitution. In cases where they step beyond what the law and the Constitution permit them to do, tey cannot seek refuge in independence and hide under that cloak or mask of inscrutability in order to escape judicial scrutiny.

242. This was the position adopted by this Court in Githu Muigai & Another vs. Law Society of Kenya & Another [2015] eKLR where it was held that:

> " In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to

extend its powers outside the statute under which it purports to exercise its authority. In Republic vs. Kenya Revenue Authority Ex Part Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530, it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others, and based on East African Railways Corp. vs Anthony Sefu Dar-es-Salaam HCCA No.19 of 1971 [1973] EA, Courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. Consequently, where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. Further, courts will not be rubber stamps of the decisions of administrative bodies. However, if Parliament gives great powers to statutory bodies, the courts must allow them to exercise it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law."

243. In my view the doctrine of independence must be read in the context of our Constitutional framework and where the adoption of the doctrine would clearly militate against the constitutional principles that doctrine or principle must bow to the dictates of the spirit and the letter of the Constitution and the enabling legislation and it is not only the role of the Courts to superintend the exercise of such powers but their constitutional obligation to do so. In effect the Commission's independence given by Article 249(2) only remains valid and insurmountable as long as it operates within its legislative and constitutional sphere. Once it leaves its stratosphere and enters the airspace outside its jurisdiction of operation, the Courts are then justified in scrutinizing its operations. This was the position in Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR, this Court cited the decision of the Court of Appeal in Commission for the Implementation of the Constitution vs. The Attorney General and Another, Nairobi Civil Appeal No. 351 of 2012and proceeded to state that:

> " The position enunciated so succinctly by the Court of Appeal is a position we wish to associate ourselves with. The Constitution disperses powers among various constitutional organs and when any of these organs steps out of its area of operation, this court will not hesitate to state so. It is this Court which is, by virtue of Article 165(d), clothed with jurisdiction to hear any question concerning the interpretation of the Constitution including the determination of:
>
> "(i) the question whether any law is inconsistent with or in contravention of this Constitution;
>
> (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of this Constitution;"

244. In this respect I associate myself with the decision in In Re The Matter of the Interim Independent Electoral Commission [2011] eKLR that the "independence clause" does not "accord" constitutional commissions carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law. I prescribe to the notion advanced by Etienne Mureinik in A Bridge to Where? Introducing the Interim Bill of Rights (1994) 10 SAJHR 32, that the Constitution instils a culture of justification, "in which every exercise of power is expected to be justified".

245. I must however hasten to add that this is not a jurisdiction that the Courts would lightly invoke. In this respect I would paraphrase the position adopted by the Supreme Court of India in Maharashtra State Board of Secondary and Higher Secondary Education & Anor vs. Kurmasheth and others [1985] CLR 1083 at pg 1105 and hold that the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to matters pertaining to the recruitment of judicial officers in preference to those formulated by professional men possessing technical expertise and rich experience of actual day to day working of judicial institutions and the departments controlling them. It will be wholly wrong for the Court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the judicial system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the court should also as far as possible, avoid any decision or interpretation of a statutory provision, rule or byelaw which would bring about the result of rendering the system unworkable in practice.

246. Further in R vs. Council of Legal Education [2007] eKLR at pg. 9, it was held that

> " The other reason why this court has declined to intervene is one of principle in that academic matters involving issues of policy the courts are not sufficiently equipped to handle and such matters are better handled by the Boards entrusted by statute or regulations. Except where such bodies fail to directly and properly address the applicable law or are guilty of an illegality or a serious procedural impropriety the field of academia should be largely non-justiciable. I see no reason why in a democratically elected government any detected defects in such areas including defects in policy should not be corrected by the legislature".

247. I also agree with the position adopted in Puhlofer & Anor. vs. Hillingdon London Borough Council [1986] 1 AC 484 that:

> " It is not appropriate that judicial review should be made use of to monitor actions of local authorities under the Act, save in exceptional cases. Where the existence or non-existence of fact is left to the discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to who Parliament has entrusted the decision making power save where it is obvious that the public body consciously or unconsciously are acting perversely."

248. Having so warned itself, I however am of the view that where the Constitution is shown to have been or is under a threat of being defiled or the law violated, the Court must undertake its Constitutional mandate and correct the wrong.

249. It must now be appreciated that the parameters of the remedies for judicial review in our constitutional set up are nolonger just common law offshoot but are a constitutional resort. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

250. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply.

251. This is the position adopted by other jurisdictions with similar constitutional edicts. In Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC) at 33 it was held that:

> " [t]he common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution".

252. Here at home the position has been restated by the Supreme Court in Communications Commission of Kenya vs. Royal Media Services Limited [2014] eKLR when it held that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law and as a result all power of judicial review in Kenya is found in the Constitution which requires Kenyan courts to go further than Marbury v Madison in exercising its judicial review jurisdiction. Therefore it is nolonger tenable to create a two track system of judicial review one based on the Constitution and the other on common law.

Public Participation

253. With respect to the issue whether public participation is necessary in the recruitment process in particular at the stage of the shortlisting, it was the Commission's position that under Article 1 of the Constitution, sovereign power belongs to the people and is exercisable either by themselves directly or through their delegates of power under Article 1(3) and that the Commission is one such a delegate and exercises delegated powers to, among others, protect the sovereignty of the people of Kenya under Article 249(1) of the Constitution. This argument, with due respect fails to appreciate the notion of public participation in representative democracy. This argument was disabused in Doctors for Life International vs. Speaker of the National Assembly and Others (CCT 12/05) 2006 ZACC 11, where it was held:

> " The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements; a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected....Significantly, the ICCPR guarantees not only the "right" but also the "opportunity" to take part in the conduct of public affairs, This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation....The right to political participation includes but is not limited to the right to vote in an election. That right, which is specified in Article 25(b) of the ICCPR, represents one institutionalization of the right to take part in the conduct

of public affairs. The broader right, which is provided for in Article 25(a), envisages forms of political participation which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation....."

254. Therefore where the right to public participation is required, it ought not to be abrogated simply because there is in place some form of delegated representation.

255. The question is however whether public participation is necessary in the nature of the shortlisting I deal with hereinbelow. On my part I adopt the position in Doctors for Life International vs. Speaker of the National Assembly and Others CCT 12 of 2005 that: -

> " The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process."

256. A decision making process in my view is a process whereby the concerned authority is confronted with two or more causes of action and is required to choose one or some of them. It does not in my view encompass a situation where the choice has already been made either by the Constitution or legislative instrument and the role of the authority is simply authenticate the state of affairs. In other words decision making encompasses the exercise of one's judicious mind to a state of affairs rather than the mere scrutiny of documents. In this case, it is my view and I so hold that no public participation is required in respect of what I have described elsewhere this judgement as the "basis". It is however necessary when it comes to determining the "super-structural" process that necessarily involves interviewing the applicants.

Discrimination and Bias

257. Questions were raised by the Petitioners as to basis upon which Hon. Justice J B Ojwang, a serving Judge of the Supreme Court himself, was not shortlisted yet his counterpart in the same Court, Hon. Justice Smokin Wanjala, was shortlisted. In fact there was an allegation of bias and predisposition by the Commission towards particular candidates. That bias and discrimination are grounds for quashing decisions of administrative bodies and public authorities cannot be doubted. The Blacks Law Dictionary defines discrimination as follows:

> " The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."

258. Wikipedia, the Free Encyclopaedia defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. The Bill of Rights Handbook, Fourth Edition 2001, defines discrimination as:

> " A particular form of differentiation on illegitimate ground."

259. In his decision in Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688, Nyamu, J (as he then was) held:

> " The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.

> Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification... Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word "discriminatory" in section 82 of the Constitution. Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:- (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question; (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification...

260. In Peter K. Waweru vs. Republic [2006] eKLR discrimination was defined in the following terms:

> "...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."

261. Similarly in Andrews vs. Law Society of British Columbia (1989) 1 SCR 321, Wilson J., defined discrimination as a:

> "'distinction which whether intentional or not but based on grounds relating to personal characteristics of individual group (which) has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society."

262. I agree that where persons who possess equal attributes are treated differently without any reasonable or legal basis, it may be inferred that the authority concerned acted arbitrarily. In this respect this Court in Law Society of Kenya vs. Attorney General & National Assembly [2016] eKLR expressed itself as follows:

> "It is therefore clear that discrimination which is disallowed under the Constitution cannot be justified where there is no rational basis for the same. In other words such discrimination cannot be arbitrarily imposed. It is trite that where no reasons are given for the exercise of discretion in a particular manner, assuming such discretion existed, or the reasons given are irrational or irrelevant, the Court is entitled to infer that there were no reasons for the exercise of the discretion in the matter it was exercised."

263. However, it is upon the person alleging differential treatment to place before the Court material which would go to show that this is the case. I therefore associate myself with the view taken by Musinga, J in Andrew Omtatah Okoiti vs. Attorney General & 2 Others (supra) that:

> "The JSC cannot be accused of having abused its discretion unless the petitioner demonstrates by way of an affidavit sworn by one who alleges that he/she had met all the stipulated requirements, applied and was not shortlisted."

264. In this case, the Commission has contended that it did furnish all the applicants with the reasons for arriving at its decision. None of the said applicants has sworn an affidavit in these proceedings. Particularly those whom the Petitioners allege were differentially treated have not even exhibited their letters. Based on the material before me it would not be possible for me to find that there was in fact differential treatment of the Hon. Justice J B Ojwang from the Hon. Justice Smokin Wanjala though I must point out that on the face of the Commission's decision it may rightly be a cause of concern and may even raise eye-brows where the Commission does not, if properly moved, justify its decision. Mere cause of concern, without more however does not suffice for the purposes of drawing conclusions which this Court is being invited to make. In this regard I agree with Musinga, J in Andrew Omtatah Okoiti vs. Attorney General & 2 Others (supra) when he expressed himself as follows:

> "It was not demonstrated that the JSC used any other criteria. The Petitioner did not cite the name of any person who met all the constitutional and statutory requirements and was not short-listed. I cannot say that there are people out there who were not satisfied with short listing exercise and believe that they were wrongly left out. However, the allegations made by the petitioner are general in nature. The court can only interrogate particularized complaints that are brought before it and with sufficient evidence as would enable it make an informed conclusion."

265. I must stress that for this Court to find that the Commission ought to have shortlisted the applicants who are serving as Judges of the Supreme Court as a matter of right would amount to this Court stepping into the shoes of the Commission and removing its discretion conferred upon it by the Constitution and the law. This Court cannot make a decision whose effect would be to automatically qualify Supreme Court Judges to be interviewed for the positions of the Chief Justice or the Deputy Chief Justice. There may well be circumstances which may disqualify a serving Judge of the Supreme Court from being so shortlisted for interview as a Chief Justice or Deputy Chief Justice and this Court does not intend to engage in such a speculatory and conjectural voyage. Each case must be determined on its own peculiar circumstances without the Court granting an automatic "right of passage" to a certain class of people to be shortlisted unless it is shown to the satisfaction of the Court that the decision not to shortlist them was, based on the material placed before it, clearly irrational.

Unreasonableness and Irrationality

266. It was contended, which contention was not denied, that Mr David Mwaure Waihiga applied for all the three positions but was only shortlisted for one without any rational basis for failure to shortlist him for the other positions yet the qualifications for the three positions is the same. This decision, it was asserted, was unreasonable. His position was juxtaposed with that of the Hon. Justice Roseline Naliaka

Nambuye who also applied for the three positions and was shortlisted for all the three positions. According to De Smith's Judicial Review (sixth edition) at Page 559:

> " Although the terms irrationality and unreasonableness are these days used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion perhaps by spinning a coin or consulting an astrologer or where the decision simply fails to add up-in which in other words there is an error of reasoning which robs the decision of logic...Less extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decisions or where there is absence of evidence in support of the decision."

267. Sedley, J's in R vs. Parliamentary Commissioner for Administration, ex parte Balchin and Another [1998] 1 PLR 1, stated at page 11 that:

> " What the not very apposite term "irrationality" generally means in this branch of the law is a decision which does not add up-in which, in other words, there is an error of reasoning which robs the decision of logic."

268. I agree that in shortlisting Mr David Mwaure Waihiga, for only one position when he applied for the other two positions, whose criteria for shortlisting is the same, does not add up. Without any reasonable or justifiable grounds such a decision constitutes unreasonableness on the part of the Commission and I so find.

Right of Access to Information

269. On the issue of the right to access information, Article 35 of the Constitution of Kenya provides:

(1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.

270. Article 35(1)(a) of the Constitution does not seem to impose any conditions precedent to the disclosure of information by the state. I therefore agree with the position encapsulated in The Public's Right to Know: Principles on Freedom of Information Legislation – Article 19 at page 2 that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information. Where therefore a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings. I also endorse the definition of public bodies to include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory

mandate, nationalised industries and public corporations, non-departmental bodies or quasi-non-governmental organisations, judicial bodies, and private bodies which carry out public functions.

271. The South African Constitutional Court decision of The President of RSA vs. M & G Media (CCT 03/11) [2011] ZACC 32 para 10 expressed itself as hereunder:

> "The constitutional guarantee of the right of access to information held by the state gives effect to "accountability, responsiveness and openness" as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined."

272. Brummer vs. Minister for Social Development and Others(CCT 25/09) [2009] ZACC 21 para 62 it was noted that:

> "(62) The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency "must be fostered by providing the public with timely, accessible and accurate information."
>
> (63) Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas."

273. Additionally, the Inter-American Court of Human Rights in the case of Claude-Reyes et al. vs. Chile judgment of September 19, 2006[3] at para 86stressedthe importance of the right to access to information by noting that:

> "In this regard, the State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately. Access to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access."

274. That the freedom of information is also an inseparable part of freedom of expression, was emphasised by the Supreme Court of Appeal in South Africa in Hoho vs. The State. Case No. 493/05 (2008) in para 29 in the following terms:

> "The importance of the right to freedom of expression has often been stressed by our courts. Suppression of available information and of ideas can only be detrimental to the decision-making process of individuals, corporations and governments. It may lead to the wrong government being elected, the wrong policies being adopted, the wrong people

being appointed, corruption, dishonesty and incompetence not being exposed, wrong investments being made and a multitude of other undesirable consequences. It is for this reason that it has been said that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man. (See also the European Court of Human Rights case of Tarsasag a Szabadsagjogokert v. Hungary, Application No. 37374/05 (2009))."

275. The European Court of Justice has also taken the view that disclosure should be the norm and exceptions should be strictly construed and this position was restated in Youth Initiative for Human Rights vs. Serbia (Application no. 48135/06)where it was held that:

> " The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions...The access to information law should, to the extent of any inconsistency, prevail over other legislation...National authorities should take active steps to address the culture of secrecy that still prevails in many countries within the public sector. This should include provision for sanctions for those who wilfully obstruct access to information. Steps should also be taken to promote broad public awareness of the access to information law."

276. The rationale for right to access information was explained by Majanja, J in Nelson O Kadison vs. The Advocates Complaints & Another NBI HC Petition No. 549 of 2013 as follows:

> " The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information."

277. I also wish to defer to the decision of Ngcobo, J in Steffans Conrad Brummer vs. Minister for Social Development & Others Constitutional Court of South Africa Case No. CCT 25/09 where the learned Judge expressed himself as follows:

> " ...section 78(2) has a dual limitation; it limits not only the right to seek judicial redress, but in effect also the right of access to information by imposing a very short period within which a person seeking information must launch litigation. The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency "must be fostered by providing the public with timely, accessible and accurate information."...Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. As the present case illustrates, Mr Brummer, a journalist, requires information in order to report accurately on the story that he is writing. The role of

the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public."

278. In Dr. Christopher Ndarathi Murungaru vs. The Standard Limited & Others Nairobi HCCC (Civil Division) No. 513 of 2011 this Court pronounced itself as follows:

> " Freedom of expression is one of the fundamental freedoms pertaining to the citizens as a human being. Freedom of the press is a special freedom within the scope of freedom of expression. The freedom of press is considered as the right to investigate and publish freely. It covers not only the right of the press to impart information of general interest or concern but also the right of the public to receive it. Freedom of expression and freedom to impart and disseminate opinions and ideas is a right recognised internationally and is protected not only by all democratic states but by International instruments as well. What constitutes freedom of expression, it is generally accepted, entails the freedom to hold opinions and to seek, receive and impart information and ideas of all kinds, either orally, in writing, in print, in the form of art, or through other chosen media, without interference by public authority and regardless of frontiers. This recognition underpins the important role played by the media in the development of a society. It is difficult to imagine a right more important to a democratic society than freedom of expression. Indeed a democratic society cannot exist without that freedom to express new ideas and put forward opinions about the functioning of public institutions. The vital importance of the concept cannot be over-emphasised. Democracy is based essentially on a free debate and open discussion for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that very citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential. When men govern themselves it is they and no one else who must pass judgement upon unwisdom and unfairness and danger, and that means that unwise ideas must have a hearing as well as wise ones, fair as well as unfair, dangerous as well as safe. These conflicting views must be expressed, not because they are valid, because they are relevant. To be afraid of ideas, any idea, is to be unfit for self-government. Freedom of expression is recognised and protected by many international conventions and declarations as well as national Constitutions. The importance of freedom of expression including freedom of the press to a democratic society cannot be over-emphasised. Freedom of expression enables the public to receive information and ideas, which are essential for them to participate in their governance and protect the values of democratic government, on the basis of informed decisions. It promotes a market place of ideas. It also enables those in government or authority to be brought to public scrutiny and thereby hold them accountable. Democracy is a fundamental constitutional value and principle in this Country. Kenya like many other countries in the world have chosen the path of democratic governance and hence the importance of the freedom of expression as being the cornerstone of every society that is democratically governed. Having chosen the path of democratic governance we have a duty to protect the rights regarding the free flow of information, free debate and open discussion of issues that concern the citizens of this country. In order to exercise these rights there must be an enabling regime for people to freely express their ideas and opinions as long as in enjoying these rights such

people do not prejudice the rights and freedoms of others or public interest. As long as in expressing one's opinion even if it is false, the person doing so does not prejudice the rights and freedoms of others there would be no harm done. Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that they are in line with Rousseau's version of the Social Contract theory. In brief the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the raison d'etreof the State is to facilitate and enhance the individual's self-fulfilment and advancement, recognising the individual's rights and freedoms as inherent in humanity. Protection of the fundamental human rights therefore is a primary objective of every democratic Constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hallmark of democracy, is only assured through optimal exercise of the freedom of expression. This is as true in the new democracies as it is in the old ones. The Preamble to the Constitution, as already stated declares that the people of Kenya aspire for a government based on democracy and in fact the entire Constitution reflects a commitment by the people of Kenya to establish a free and democratic society. The breadth and importance of the right of free speech is inherent in the concept of a democratic and plurist society. Our 2010 Constitution has ushered into this country a new constitutional order whose one of the objectives is to build democracy. No society can build democracy and strong institutions to defend that democracy if there is no free flow of information even if some of that information is false. Democracy by its very nature comes at a price." See also Obbo and Another vs. Attorney General [2004] 1 EA 265 (Scu).

279. Article 35(1)(a) employs the phrase is "held by the State". The "State" is defined in Article 260 of the Constitution as "the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution". That the Commission is a state organ is therefore not in dispute. Accordingly, it is under the obligation to furnish a citizen with information held by it under the said provision. It is therefore my view that the era when Kenyans' request for information were turned away on the basis that they had no interest in the information sought or that the information in question did not concern them was buried with the retired Constitution and is nolonger tenable.

280. Once the information is proved to be in possession of the Respondent, it is my view that the burden shifts to the Respondent to show why the said information ought not to be disclosed to the applicant. In other words a basis ought to be laid for the State to be directed to furnish the required information and that basis in my view is provided by the Constitution itself that the State is holding the information. As stated in CCPR General Comment No. 10: Freedom of Expression, it is for the State party to demonstrate the legal basis for any restrictions imposed on the freedom of expression and if with regard to a particular State party, the Committee has to consider whether a particular restriction is imposed by law, the State party should provide details of the law and of actions that fall within the scope of the law.

281. I associate myself with the holding of Mumbi Ngugi, J in Nairobi Law Monthly vs. Kenya Electricity Generating Company & Others NBI HC Petition No. 278 of 2011 that:

> "the reasons for non-disclosure must relate to a legitimate aim; disclosure must be such as would threaten or cause substantial harm to the legitimate aim; and the harm to the legitimate aim must be greater than and override the public interest in disclosure of the information sought. It is recognised that national security, defence, public or individual

safety, commercial interests and the integrity of government decision making processes are legitimate aims which may justify non-disclosure of information."

282. I also agree with the learned Judge's view at paragraphs 37-38-that:

> " 37. It is, however, recognized that there may be need to restrict access to some information, and some exceptions to the information that can be disclosed.
>
> 38. The scope of exceptions to disclosure of information should, however, be limited, and such exceptions should be clear, narrow and subject to strict 'harm' and 'public interest' tests, and to the rights and interests of others."

283. I agree that the Constitution itself does not impose a limitation to the right to access information under Article 35. However, under Article 24 a right or fundamental freedom as long as it is not preserved under Article 25 thereof is capable of being limited as long as the conditions under Article 24 are met. I accordingly agree with Lenaola, J's decision in Timothy Njoya vs. Attorney General & Another [2014] eKLR that:

> 37. It is therefore clear that while disclosure should be the norm, there may be need to restrict access to information and that is also why Article 19(3) of the International Covenant on Civil and Political Rights states as follows;
>
> > 'The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> >
> > (a) For respect of the rights or reputations of others;
> >
> > (b) For the protection of national security or of public order (order public), or of public health or morals.'
>
> 38. While I am in agreement therefore that the Petitioner is entitled to access information as he alleges, I do not think he can obtain such information in the present situation. I say so because the Constitution has certain in-built limitations to fundamental rights which must be exercised in the framework of public interest and subject to the rights and interests of other people.
>
> 44. I say so well aware that it is not in dispute that the Petitioner has a right to access information under Article 35(1)(a) of the Constitution, but as I have held above, he cannot access such information on tax affairs of the Members of the 10th Parliament or any other person which information is held by the 2nd Respondent because these are private matters properly protected by both Section 125 of the Income Tax Act and Article 31(c) of the Constitution. The latter provides that every person has the right to privacy including "information relating to their family or private affairs unnecessarily required or revealed". While it is crystal clear to me that one would enforce the provisions of Article 35(1) (b) where such information is required for the exercise or protection of a fundamental right and freedom, in the present Petition, the Petitioner has not stated what fundamental right or freedom he intends to protect or exercise were he to be given the information he is seeking. In Cape Metropolitan Council v Metro Inspection Services Western Cape and Others (2001) ZASCA 56 the Court stated as follows;
>
> > "Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information...

An applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.:(Emphasis added)"

The same position was adopted in Unitas Hospital vs. Van Wyk and Another (231/05) (2006) ZASCA 34 where the Court expressed itself as follows:

"[17] The threshold requirement of 'assistance' has thus been established. If the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied. Self-evidently, however, mere compliance with the threshold requirement of 'assistance' will not be enough"

284. I also associate myself with the decision in Andrew Omtatah Okoiti vs. Attorney General & 2 Others (supra) that it would not:

> " be good for the JSC to publicize the reasons for disqualification of each applicant as that may amount to violation of some of the applicant's privacy and may also be prejudicial to their career advancement if for example, the reason for disqualification relates to the applicant's integrity as perceived by the JSC."

285. In my view this is the rationale behind the enactment of Regulation 5 of the 1st Schedule to the Act which provides as follows:

(1) The Commission shall maintain the confidentiality of sensitive and highly personal information in applications, including home and e-mail addresses, home and mobile telephone numbers, income, names and occupations of immediate family members, formal disciplinary or ethical complaints, charges or grievances brought against the applicant as a lawyer or otherwise that did not result in public discipline, medical and health history, the financial interests of the applicant, and all unsolicited comments and letters for which the author requests confidentiality or which the Commission in its discretion believes should remain confidential to protect third parties.

(2) Any information not described under subparagraph (1) as non-public material shall be set out in a separate part of the application and may be available to the public.

286. Submissions were made which tended to impugn the constitutionality of this Regulation. Suffice to say that in these proceedings there is no express prayer seeking a declaration that Regulation 5 of the First Schedule to the Judicial Service Act be declared unconstitutional.

287. Apart from Regulation 5, Article 31 of the Constitution protects the privacy of every person in the following terms:

Every person has the right to privacy, which includes the right not to have-

a) Their person, home or property searched;

b) Their possessions seized;

c) Information relating to their family or private affairs unnecessarily required or revealed; or

d) The privacy of their communication infringed.

288. In my view where a person is seeking purely public information, he or she does not have to demonstrate a specific interest in the information. However, Article 31 of the Constitution requires that information relating to a person's family or private affairs ought not to be unnecessarily required or

revealed. To me it does not matter whether that information was acquired by the person in possession thereof in his official capacity or not. If that information is not necessary it ought not to be revealed and a reading of Article 31 in my view seem to suggest that the burden of showing the necessity to reveal such information falls on the person seeking the same. In other words where a person seeks information relating to a person's family or private affairs, he ought to lay a basis for the same. This is necessarily so since Article 45 of the Constitution recognises the family as the natural and fundamental unit of society and the necessary basis of social order, which is entitled to enjoy the recognition and protection of the State.

289. It is however my view that any information not forming part of Regulation 5(1) ought to be availed to the public. It is however the duty and obligation on the part of the Commission as far as possible to give reasons not only as to why the information cannot be disclosed but the grounds of its belief that the information falls within Regulation 5(1) so as to clearly inform the person seeking the information the reasons for non-disclosure but without infringing upon the privacy of the applicant. It must be further noted that under Regulation 7(2) it is provided that:

> For the avoidance of doubt, the Commission may not share with the applicants any materials it solicits or reveal the identity of the source of information unless the source waives anonymity.

290. In my view the mere fact that a person applies for appointment to a public post ought not to be construed as a voluntary assumption of unjustifiable injury to his or her reputation. In other words the process of appointment to a public office ought not to be transformed into an opportunity or an occasion to bring a person down by unjustifiable disclosure of information which would otherwise not have been availed to the public.

291. Of course an applicant is at liberty to waive this privilege but such waiver must be expressly made. In my view this is what Musinga, J had in mind in Andrew Omtatah Okoiti vs. Attorney General & 2 Others [2011] eKLR when he held himself as follows:

> " I believe that the applicant who wanted to know the reason for not having been shortlisted was at liberty to write to the JSC and ask for the reasons. In such an instance, the JSC, I believe, would be obliged to provide the reasons thereof, and if the applicant considers the reasons for disqualification unsatisfactory he/she can seek intervention of the court."

292. It is to that extent, and that extent alone that I would mutatis mutandi associate myself with the position adopted by High Court of South Africa in the case of Hellen Suzman Foundation (supra) where it was held at paragraphs 48-50 that:

> " When comparing the JSC to these other systems, it leaves two distinct impressions: First, employing a body such as the JSC represents international best practice for the selection of judges. Second, the JSC is already far more transparent than the majority of comparable bodies in other international jurisdictions. Whilst it is accepted that transparency in judicial selection should obviously be welcomed, the continuing entrenchment of some degree of secrecy in all comparable systems demonstrates that the JSC's claim that it should deliberate in private is well-founded. In fact, certain of these international courts and academic writers have recognized the justification for confidential deliberations similar to what has been advanced by the JSC. They have held that confidentiality breeds candour, that it is vital for effective judicial selection, that too much transparency discourages applicants, and will have an effect on the dignity and privacy of the applicants who applied with the expectation of confidentiality. With respect to the arguments that disclosure of deliberations could

potentially impact on the candidates' dignity, the HSF raises a point that one who is willing to endure public interviews could hardly be affected by the disclosure of Deliberations. It goes without saying that the right to human dignity extends to all South African Citizens, it is important to be mindful that the candidates in the present matter had an expectation that the Deliberations would be confidential. Furthermore, the HSF underscores a key consideration. The knowledge that the full record of the Deliberations might include extremely frank remarks and opinions of senior members of the Judiciary and Executive as to the candidate's competence or otherwise would be made public, could deter potential candidates from accepting nominations for appointment. The very efficiency of the judicial selection process could therefore be compromised.

(49) Properly considered in weighing up the HSF's interest against the JSC's need for confidentiality, the relief sought would in my view not advance the constitutional and legislative imperatives of the JSC.

(50) In conclusion, absent the Deliberations of the JSC, the HSF is not being deprived of the procedural and substantive safeguard which is the underlying rationale for the Rule."

293. Although there was a serious issue with respect to whether Article 35 in so far as it talks about "citizen" as opposed to "any person" on my part the position adopted by Majanja, J in Famy Care Limited vs. Public Procurement Administrative Review Board & Another [2013] eKLR is still good law. In the said case the learned Judge held that:

" The right of access to information protected under Article 35(1) has an implicit limitation that is, the right is only available to a Kenyan citizen. Unlike other rights which are available to 'every person' or 'a person' or 'all persons' this right is limited by reference to the scope of persons who can enjoy it. It follows that there must be a distinction between the term 'person' and 'citizen' as applied in Article 35.

"Though the term "citizen" is not defined in Article 260, citizenship is dealt with under Chapter Three of the Constitution, Articles 12 to 18. The purport and effect of these provisions is that citizenship is in reference to natural persons..... A juridical person is neither born nor married as contemplated by these Articles. Similarly, the provisions on citizenship by registration and dual citizenship set out in Articles 15 and 16 of the Constitution negative an intention to define a citizen as including a juridical person."

294. The learned judge further held that:

" A reading of the Constitution and an examination of words "person" and "citizen" within the Constitution can only lead to one conclusion: That the definition of a citizen in Articles 35(1) and 38 must exclude a juridical person and a natural person who is not a citizen as defined under Chapter Three of the Constitution."

295. This was the same position adopted in Nairobi Law Monthly Company Limited (supra) that:

" 80. However, my reading of the decision of the Supreme Court in Pembina shows that it accords with the decision of Majanja J in Famy Care Ltd. In interpreting the clause of the United States Constitution that the 'citizens of each State shall be entitled to all privileges and immunities of citizens in the several states,'

the Supreme Court observed that 'Corporations are not citizens within the meaning of that clause.' Later on in the judgment, the Supreme Court cited its decision in Paul v. Virginia where it had held that:

> '..corporations are not citizens within the meaning of the clause; that the term citizens, as used in the clause, applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature, and possessing only such attributes as the legislature has prescribed...'

81. While it is true that the petitioner is a Kenyan company and its directors and shareholders are Kenyan citizens, the petitioner itself is a legal person created under the provisions of the Companies Act. As a legal 'person', it may enjoy the rights conferred by Article 35 (2), which are conferred on all 'persons' but it is not a 'citizen' that may have a right of access to information as contemplated under Article 35 (1). In my view, the petitioner is a company with Kenyan nationality, but not Kenyan citizenship. See the case of State Trading Corporation of India v Commercial Tax Officer 1963 AIR 1811 in which the special bench was confronted with the question as to whether a corporation incorporated under the Indian Companies Act was a citizen within the meaning of the Indian Constitution. The majority opinion of the bench was that 'the fact that corporations are regarded in some circumstances as possessing nationality does not make them citizens."

82. I therefore fully agree with the decision of Majanja J in Famy Care Limited that a body corporate or a company is not a citizen for the purposes of Article 35(1) and is therefore not entitled to seek enforcement of the right to information as provided under that Article."

296. While I agree that the above decisions set the proper legal position, that position only prevails in so far as the 1st Petitioner's case is concerned. However nothing substantially turns on them in so far as the 3rd and 4th Petitioners' case is concerned since in their case the information was sought on behalf of the 3rd and 4th Petitioners as well.

297. The Court appreciates that Regulation 5 of the First Schedule to the Act, the Commission is required to maintain the confidentiality of sensitive and highly personal information in applications and all unsolicited comments and letters which the Commission in its discretion believes should remain confidential to protect third parties. That calls for the meaning of the term "in its discretion". It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on an administrative body, the Court may interfere and this may be in the following instances: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of Nyamu, J (as he then was) in Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.

298. That phrase "in its discretion" in my view falls in the same category as "if it appears" or 'if satisfied". In Employment Secretary vs. ASLEF [1972] 2 QB 455 at 492-3, Lord Denning expressed himself as follows:

> " If it appears to the Secretary of State'? This, in my opinion, does not mean that the Minister's decision is put beyond challenge. The scope available to the challenger depends very much on the subject-matter with which the Minister is dealing. In this case I would think that, if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law, it may well be that a court would interfere; but when he honestly takes a view of the facts or the law which could reasonably be entertained, then his decision is not to be set aside simply because thereafter someone thinks that his view was wrong."

299. In Congreve vs. Home Office [1976] QB 629, the same Judge expressed himself inter alia as follows:

> " But now the question comes: can the Minister revoke the overlapping licence which was issued so lawfully? He claims that he can revoke it by virtue of the discretion given to him by section 1(4) of the Act. But I think not. The licensee has paid £12 for the 12 months. If the licence is to be revoked – and his money forfeited – the Minister would have to give good reasons to justify it. Of course, if the licensee had done anything wrong – if he had given a cheque for £12 which was dishonoured, or if he had broken the conditions of the licence – the Minister could revoke it. But when the licensee had done nothing wrong at all, I do not think the Minister can lawfully revoke the licence, at any rate, not without offering him his money back, and not even then except for good cause. If he should revoke it without giving reasons, or for no good reason, the courts can set aside his revocation and restore the licence. It would be a misuse of power conferred on him by Parliament: and these courts have the authority – and I would add, the duty – to correct a misuse of power by the Minister or his department, no matter how much they resent it or warn us of the consequences if we do. Padfield vs. Minister of Agriculture, Fisheries and Food [1968] AC 997 is proof of what I say. It shows that when a Minister is given a discretion – and exercises it for reasons which are bad in law – the courts can interfere so as to get him back on to the right road."

300. This is necessarily so because the power conferred upon administrative and public authorities ought to be properly exercised and ought not to be misused or abused. According to Prof Sir William Wade in his Book Administrative Law:

> " The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where

a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them..."

301. To hold that the Respondents were the sole judge when it comes to the exercise of discretion with respect to what information to disclose would be to throw the rule of law out of the window and whittle away the Constitutional provisions in Article 35 of the Constitution. Accordingly the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion.

Failure to Give Reasons

302. On the issue whether the Commission was bound to furnish the unsuccessful applicants with the reasons for the decision the Commission relied on Andrew Omtatah Okoiti vs. Attorney General & 2 Others(supra) where Musinga, J held at page 18 thus:

> " Was the JSC bound to notify the applicants who were not short listed the ground(s) for their failure and afford them an opportunity to respond before interviews are conducted? There is no such requirement in the Act or the Regulations made thereunder? Whereas it would have been a good practice to inform each unsuccessful applicant of the reason for disqualification, it must be remembered that time was of the essence in the recruitment exercise. In the case of the Supreme Court, it has to be constituted by 27th August, 2011.
>
> Secondly, I believe that any applicant who wanted to know the reason for not having been short listed was at liberty to write to the JSC and ask for the reasons. In such an instance, the JSC, I believe, would be obliged to provide the reasons thereof, and if the applicant considers the reasons for disqualification unsatisfactory he/she can seek intervention of the court."

303. There is no doubt that this decision was handed down before the enactment of the Fair Administrative Action Act, 2015. Section 4(2) of the said Act is now express that every person has the right to be given written reasons for any administrative action that is taken against him. It follows that the decision of Musinga, J in Andrew Omtatah Okoiti vs. Attorney General & 2 Others (supra) in so far as it held that there was no requirement to inform the unsuccessful applicants of the grounds for their inability to proceed to the next stage may nolonger be good law.

Unconstitutionality, Illegality and Irregularity in the Recruitment Process

304. I now turn to deal with the issue whether the procedure adopted by the Commission in the recruitment process complied with the constitutional and statutory provisions.

305. The Constitutional fulcrum dealing with the appointment of Judges is to be found in Article 166 of the Constitution. Article 166(2) and (3) of the Constitution and it provides that:

(2) Each judge of a superior court shall be appointed from among person who-

(a) Hold a law degree from a recognised university, or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common law jurisdiction;

(b) Possess the experience required under Regulation (3) to (6) as applicable, irrespective of whether the experience was gained in Kenya or in another commonwealth common law jurisdiction; and

(c) Have a high moral character; integrity and impartiality.

(3) The Chief Justice and other judges of the Supreme Court shall be appointed from among persons who have-

(a) at least fifteen years' experience as a Superior Court judge; or

(b) at least fifteen years' experience as a distinguished academic, judicial officer or such experience in another relevant legal field; or

(c) held the qualifications mentioned in paragraph (a) and (b) for a period amounting in the aggregate to fifteen years;

306. It was contended by the Petitioners, in particular the 2nd Petitioner that there is no legal basis for shortlisting. According to the 2nd Petitioner, once the applicants have submitted their applications, the Commission must proceed to invite them for interview.

307. Regulations 6, 7, 8 and 9 which fall under Part III of the First Schedule to the Act headed "Review of Applications and Background Investigation" however provides as follows:

(1) Within fourteen days of the deadline for the receipt of applications, the Commission shall review the applications for completeness and conformity with the necessary requirements.

(2) In particular, the review referred to in subparagraph (1) shall relate to a determination of whether the applicant meets the minimum Constitutional and statutory requirements for the position.

7.

(1) The Commission shall, within twenty-one days of the initial review, verify and supplement information provided by the applicant by communicating to all of the applicant's references and former employers who shall be asked to comment on the applicant's qualifications under the criteria set out under this Schedule.

(2) For the avoidance of doubt, the Commission may not share with the applicants any materials it solicits or reveal the identity of the source of information unless the source waives anonymity.

8.

(1) The Commission shall, within thirty days of the reference check, investigate and verify, in consultation with the relevant professional bodies or any other person, the applicant's professional and personal background for information that could pose a significant problem for the proper functioning of the courts should the applicant be appointed.

(2) The background investigation and verification referred to under subparagraph (1) may continue until the time the Commission votes on its nominations.

9.

(1) Upon the expiry of the period set for applications, the Commission shall —

(a) issue a press release announcing the names of the applicants; publicize and post on its website the place and approximate date of the Commission meeting for interviews;

(b) cause the names of the applicants to be published in the Kenya Gazette;

(c) invite any member of the public to avail, in writing, any information of interest to the Commission in relation to any of the applicants; and

(d) interview any member of the public who has submitted any information on any of the applicants, and such information shall be confidential.

308. What comes from the above is therefore that the applicant's submit their applications for appointment; then the Commission proceeds to conduct the review to confirm whether the applicants conform with the minimum constitutional and statutory provisions. The question then is if all applicants are entitled to proceed to the interview, why would it be necessary for the Commission to review the information submitted by the applicants to verify whether they meet the minimum constitutional provisions? What is the Commission's recourse when it finds that a particular application does not meet the said minimum threshold?

309. In support of his position, the 2nd Petitioner relied on section 30 of Judicial Service Act 2011 and submitted that the purpose of shortlisting is simply for the purpose of nomination and not for interview purposes. The said section provides as follows:

(1) For the purposes of transparent recruitment of judges, the Commission shall constitute a selection panel consisting of at least five members.

(2) The function of the selection panel shall be to shortlist persons for nomination by the Commission in accordance with the First Schedule.

(3) The provisions of this section shall apply to the appointment of the Chief Justice and Deputy Chief Justice except that in such case, a person shall not be appointed without the necessary approval by the National Assembly.

(4) Members of the selection panel shall elect a Chairperson from amongst their number.

(5) Subject to the provisions of the First Schedule, the selection panel may determine its own procedure.

310. In Republic vs. Chief Magistrate's Court, Nairobi & 2 Others ex parte Akoth Nairobi HCMA No. 994 of 2004 [2006] 1 KLR 252, the High Court held that:

> "...this court would have power to correctly interpret the relevant section so as to give effect to the intention of the Legislature. Where the language of a statute is in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. The court will endeavour to give some meaning to the section and will not allow the error of the draftsman to destroy the clear intention of the Legislature. Sometimes where the sense of statute demands it or where there has been an obvious mistake in drafting a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act....There is a general presumption against absurdity. It is presumed that Parliament intends that the court, when considering, in relation to the facts of the instant case, which the opposing constructions of an enactment corresponds to its legal meaning, should find against a construction which produces an

absurd result since this is unlikely to have been intended by Parliament. Here absurd means contrary to sense or reason."

311. Nyamu, J (as he then was) in Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 held that:

> " It [literal interpretation] is the voice of strict constructionists. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal grammatical construction of words, heedless of the consequences. Faced with staring injustice, the judges are, it is said, impotent, incapable and sterile. Not with us in this Court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach." In all cases now in the interpretation of statutes we adopt such a construction as will "promote the general legislative purpose" underlying the provision...It is no longer necessary for the judges to wring their hands and say: "There is nothing we can do about it". Whatever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy...by reading words in, if necessary - so as to do what Parliament would have done, had they had the situation in mind...The defect that appears in a statute cannot be ignored by the judge, he must set out to work on the constructive task of finding the intention of the Parliament. The judge should not only consider the language of the statute but also the social conditions which gave rise to it, and supplement the written word so as to give "force and life" to the intention of the Legislature."

312. Regulation 6, Part III of the First Schedule of the Act mandates the Commission to conduct an initial review of all applications submitted for completeness and conformity with constitutional and statutory requirements in order to determine whether the Applicants meet the minimum constitutional and statutory requirements for the position. According to the Commission, this is the legal basis for short-listing and hence is known as shortlisting of the candidates. The 2nd Petitioner on his part contends that "shortlisting" is the process through which the applicants are winnowed as it were after the interviews. However, section 30 of the Act expressly provides that the process of shortlisting is in accordance with the First Schedule and in so conducting itself, the selection panel is empowered to determine its own procedure which procedure must however be subject to the First Schedule. It therefore follows that section 30 of the Act cannot and ought not to be interpreted in such a manner as to render the First Schedule, itself part of the Act futile. Section 30, in my view gives an overall picture of the recruitment process and the bolts and the nuts of the same are provided in the First Schedule.

313. I must however stress that the Commission's powers as delegated to the selection panel under Regulation 6 is limited to conducting a review in order to determine whether the Applicant meets the minimum constitutional and statutory requirements for the position and nothing else. It cannot expand this power to include other functions. The said minimum constitutional and statutory requirements, in my view, form the basis of the determination as to whether an applicant ought to move to the next step. Accordingly, to contend that the Commission has no power at that stage to strike out those applicants who do not meet the said minimum constitutional and statutory requirements would with due respect amount to a legislative absurdity.

314. The process of the recruitment of a Chief Justice, Deputy Chief Justice and a Judge of the Supreme Court are necessarily time bound and for good reason. The role of the said judicial officers is not only critical for the judiciary but for the whole nation. Accordingly, Parliament in its wisdom decided to provide for sieving mechanisms by which the Commission is empowered to systematically weed out those who clearly have no business applying for the job. The sieving process is to eliminate at an

early stage those applicants who are evidently busy bodies with misguided notions whose any reason for applying the posts is for the purposes of their CVs or for a temporary moment of "fame". Such frivolous, vexatious or hopeless applications ought to be struck down at the earliest opportunity in order to pave way for the Commission to conduct its serious business. Otherwise the Commission would find itself tied down to interviewing persons just for formality purposes. A constitutional Commission, it must be appreciated is a serious State organ whose mandate must be taken seriously hence only those who satisfy the minimum constitutional and statutory requirements ought to consider applying for the positions advertised. To permit all applicants to go to the wire as it were would render the stipulated timelines a mirage. Accordingly the first point of call is whether the applicants have met the patent qualifications for the job. It would for example be ridiculous to allow an applicant who has never seen the inside of a law school to pass the initial review stage simply because he or she has applied for the job. The initial review is therefore important and crucial in enabling the Commission to meet its legislative and constitutional mandate and being a policy decision, this Court can only interfere where its exercise by the Commission is perverse. This position was appreciated in R vs. Council of Legal Education [2007] eKLR at pg. 9, where it was held that

> "The other reason why this court has declined to intervene is one of principle in that academic matters involving issues of policy the courts are not sufficiently equipped to handle and such matters are better handled by the Boards entrusted by statute or regulations. Except where such bodies fail to directly and properly address the applicable law or are guilty of an illegality or a serious procedural impropriety the field of academia should be largely non-justiciable. I see no reason why in a democratically elected government any detected defects in such areas including defects in policy should not be corrected by the legislature".

315. It is however my view that the sieving process is in two stages. The first stage is the "basis" while the second stage is the "superstructure". At the first stage, the Commission is concerned with those requirements that can be patently determined on the basis of the documentation without necessarily requiring to see and hear the applicant himself or herself. At this stage the Commission has no discretion in the matter. The paperwork speaks for itself. Those who pass this stage then move the super-structural stage and this is the stage of discretion.

316. In this respect whereas I associate myself with Musinga, J (as he then was) in Andrew Omtatah Okoiti vs. Attorney General & 2 Others [2011] eKLR, when he quipped that short listing stage is a very critical one in the recruitment process and the highest degree of transparency ought to be exhibited, I however, part ways with my learned brother when he opined that the parameters of the exercise of shortlisting is defined by Regulation 13. Therefore whereas it may, in cases where the applicants contend that some applicants were not shortlisted despite meeting the minimum constitutional and legislative requirements, be prudent to secure affidavits from the said applicants, where it is contended that the decision was based on a provision of the law which was irrelevant or inapplicable, the decision is in my view, is akin to the tribunal asking itself the wrong questions, and taking into account wrong considerations and as a result arriving at an incorrect decision.

317. The Commission relied on Regulation 4 to justify its position that what it sought for the purposes of shortlisting are mandatory requirements which must be satisfied if one is to be shortlisted. The said Regulation provides as follows:

(1) Application forms for advertised judicial positions may be obtained upon request from the Commission's offices and availed on the Commission's website.

(2) Each applicant seeking consideration for nomination and recommendation for appointment to a judicial office shall complete and file the prescribed application form and comply with all requirements described therein.

(3) The prescribed application form shall require an applicant to provide— (a) background information and in particular information that may be relevant to determine qualifications for office, including but not limited to academic, employment, legal practice and judicial or financial discipline; community service, pro bono activity and non-legal interests; involvement as a party in litigation; criminal record; and residential address; (b) references and in particular the names of three professional references and two character references who can verify the applicant's past and present employment; (c) if in legal practice, detailed information about the applicant's practice of law within the past five years; and if engaged elsewhere, detailed information on that engagement in the last five years; (d) a sample of any writings by the applicant which may include any legal publications the applicant has authored; (e) a declaration of income and liabilities at the time of application; and (f) a brief written summary of the applicant's bio-data including legal education, and legal experience.

(4) An applicant shall submit the completed form, writing sample and their photograph to the Commission by or before the date set forth in the notice of vacancy.

318. I agree with the position adopted by the 2nd Petitioner that what is required under regulation 4 apart from sample writings and photographs, is just information. Accordingly, to impose any other requirements would be outside what is contemplated under Regulation 4 and hence the failure to comply with such extraneous requirements cannot be the basis for not shortlisting an applicant who has otherwise met all the minimum constitutional and statutory requirements.

319. It is at this stage that the gears now shift from the shortlisting stage to one of interviews. In my view, the clearances from Kenya Revenue Authority, Higher Education Loans Board, Law Society of Kenya, Directorate of Criminal Investigations, Advocates Complaints Commission, Ethics and Anti-Corruption Commission and a recognised Credit Reference Bureau are meant for the purposes of determining the applicant's integrity which according to Regulation 13 encompass demonstrable consistent history of honesty and high moral character in professional and personal life; Respect for professional duties arising under the codes of professional and judicial conduct; and Ability to understand the need to maintain propriety and the appearance of propriety.

320. I agree that the structure of the First Schedule unequivocally indicates that the use of Part V factors, under which Regulation 13 is to be found, logically comes at the oral interview stage following the shortlisting. Part III of the First Schedule deals with "Review of Applications and Background Investigation"; Part IV deals with "Interview Procedures"; and Part V deals with "Criteria for Evaluating Qualifications of Individual Applicants". Therefore under Part V the Commissioner nolonger deals with review of applications and the initial background investigation but now proceeds to consider the qualifications of the applicants individually. It is nolonger a process whereby the bundle of papers submitted are perused but the individual suitability of the applicants are now put to question.

321. I therefore agree that to the extent that the Commission admitted that it relied on Part V of the First Schedule while shortlisting, it used a much more onerous criteria than what is authorized by law. I also agree that to that extent, it conflated the criteria for shortlisting with that of assessing suitability for purpose of eventual nomination of applicants to the respective positions hence it misapprehended and misapplied the law when undertaking shortlisting which renders the same inefficient, unlawful and arbitrary.

322. I stress that the failure by the applicants to furnish reports from the various bodies enumerated cannot be the sole basis for not shortlisting them. My view is reinforced by the appreciation by all the parties to these proceedings that under Regulations 7 and 8 the Commission is empowered to undertake Reference checks and Background investigations on the Applications even after the shortlisting.

323. It is therefore my view that it is immaterial for the Court to decide who between the applicants and the Commission ought to secure the said reports. Whereas the Commission may well in its discretion take the failure to avail the said reports at the interview stage, an applicant may well be in a position at the time of the interview to explain his reasons for the failure to secure the same. Similarly, since the said reports are not necessarily conclusive evidence of their contents, the Commission may well scrutinise the same in order to determine their authenticity.

324. The law as I understand it is that where the law expressly empowers a public body to exercise statutory power, the powers it exercises and the manner of doing so must be strictly in accordance with the statute since statutory bodies operating as such ordinarily do not exercise inherent jurisdiction. In my view, for the Commission to base its decision on the failure to submit documents not expressly required by the law and in effect lock out those candidates who the legal instrument from which the Commission derives its authority does not expressly lock out amounts to abdicating jurisdiction.

325. This Court does not doubt that in the exercise of its power, the Commission must be afforded the latitude to decide the manner in which the Constitutional and legislative criteria for recruiting the best candidate is to be achieved as long as that criteria is transparent, accountable and verifiable. It is therefore properly empowered to devise such tools as would enable it to achieve its Constitutional and legislative mandate and this Court ought not to substitute its own views as to the manner of achieving that mandate for that of the Commission. In seeking that the applicants be cleared by the various vetting bodies in the achievement of that mandate, the Commission is properly within its mandate and cannot be faulted.

326. However, if such requirements remove that mandate from the control of the Commission and place the mandate at the whim of another body not constitutionally mandated to perform the same, the Commission would have abdicated its duty and it has no power to do so. It must therefore be in charge of the whole process right from inception to the nomination and at no stage ought it to delegate its core mandate to another body or organ. In other words the opinions and decisions of the said vetting bodies can only form the material from which the Commission may arrive at its decision but cannot be the sole basis upon which the Commission's decision is based. Unless this caution is exercised, the Commission runs the risk of recruiting persons whose qualifications are pre-determined by the said bodies as opposed to the Commission itself. Such occurrence is likely to bring into disrepute the integrity of the process of recruitment as envisaged by the people of Kenya in the Constitution. To paraphrase the holding in Law Society of Kenya vs. Attorney General & National Assembly [2016] eKLR, by opening a window for bodies not constitutionally mandated to recruit the Chief Justice, the Deputy Chief Justice and a Judge of the Supreme Court to be the sole or to a substantial extent the determinants of who qualifies to be interviewed by the Commission would amount to failure to exercise constitutional and statutory power. As this Court noted in the above case:

> " It would open the window for the reintroduction of manipulation and horse-trading in the process of appointment of those eyeing those positions. To do so would open the process to contamination by the ills that informed the transformation in which Kenyans discarded the old process of appointment of judges which was besmirched with partisanship, nepotism, negative ethnicity and tribalism, cronyism, patronage and favouritism with the current one that is meant to espouse the values and principles of governance set out in Article 10 of the

Constitution which include non-discrimination, good governance, integrity, transparency and accountability. In other words, the people of the Republic of Kenya set out to eradicate all the negative tenets of appointment of Judges which in their view had hitherto impacted negatively on the integrity of the judicial system."

327. By therefore opening a window for other entities whose interests may not be necessarily the same as that of the Commission to play a substantial role in deciding who ought to be interviewed by the Commission and consequently nominated for appointment as the Chief Justice, the Deputy Chief Justice or a Judge of the Supreme Court, would, in the words of the above case:

> " be a relapse to old system which was overwhelmingly discarded by Kenyans in a plebiscite. It would open the window for the reintroduction of manipulation and horse-trading in the process of appointment of Judges. To do so would open the process to contamination by the ills that informed the transformation in which Kenyans discarded the old process of appointment of judges which was besmirched with partisanship, nepotism, negative ethnicity and tribalism, cronyism, patronage and favouritism with the current one that is meant to espouse the values and principles of governance set out in Article 10 of the Constitution which include non-discrimination, good governance, integrity, transparency and accountability. In other words, the people of the Republic of Kenya set out to eradicate all the negative tenets of appointment of Judges which in their view had hitherto impacted negatively on the integrity of the judicial system."

328. Such a scenario would cast doubt in the minds of the public as to whether the process of recruitment of these key figures in the judicial system was transparently undertaken. I therefore agree with the position in "Judicial Independence: An overview of Judicial and Executive Relation in Africa", an article by Muna Ndulo, that:

> " In order to guarantee the independence and impartiality of the Judiciary, best constitutional practices and International law require States to appoint Judges through strict selection criteria and in a transparent manner."

329. The independence of the judiciary, as it relates to the appointment of Judges is summarised in the International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners' Guide No.1 at page 49 as follows:

Judges should be appointed on their professional qualifications and through a transparent procedure. Even though international standards do not forbid that appointments be carried out by the executive or the legislature, it is preferable that the selection be entrusted to an independent body so that political considerations do not play any role in the proceedings. Irrespective of the body in charge of appointing judges, the outcome of such selection must always guarantee that the candidates appointed to the judiciary possess the necessary skills and independence.

330. In this voyage we are mercifully not alone. Our judicial reforms turbulence are not dissimilar to the South African ones as propounded by Andrews Penelope E in 'The South African Judicial Appointment Process' Osgoode Hall Law Journal [2006] 565-572 where he expressed himself as hereunder:

> " The drafters of the first Constitution, in keeping with the newly adopted principles of transparency and accountability in South Africa's political and legal culture, appreciated that the old system of appointing judges was no longer appropriate in this new dispensation. A shift from past practices was therefore essential. The process of appointing judges under

the system had been at the discretion of the President on the recommendation the Minister of Justice. The appointment process did not require input from the judiciary, notably the Judge Presidents, nor from members of the legal profession or the civil society. Public scrutiny was excluded entirely. The new system reflects a complete rejection of that which persisted under apartheid."

331. In Law Society of Kenya vs. Attorney General & National Assembly [2016] eKLR this Court expressed itself as follows:

> "In our view, the current system of appointment of judges was informed by the need to infuse a sense of integrity in the said process that would ensure independence of the judiciary and judicial officers. The determination of the independence of the judiciary, it is our considered view, is not based on one event but the whole process starting from the manner in which the judicial officers are appointed, how they are to carry out their mandate and the manner of their removal from the office. All these must be cumulatively considered in order to determine whether the judiciary is independent and the extent of such independence. Independence is therefore a culmination of several factors. It presumes that there is an appropriate appointment process; subject to strict procedures for removal of judges, a fixed term in the position; and a guarantee against external pressures. Where therefore any stage of the process of appointment is shrouded in mystery without a clear formula that is both transparent and accountable on how such appointment is to be made, doubts may be cast as to what factors dictated such appointments. In this respect we adopt the position in the Compendium and Analysis of Best Practice in the Appointment, Tenure and Removal of Judges under Commonwealth Principles to the effect that:
>
> > "...the process of appointment must also be legitimate in the eyes of the public, if the courts are to build and retain trust and secure the voluntary co-operation of the public in sufficient numbers to ensure the orderly administration of justice...A legitimate process may be achieved in part through the demonstrable quality of those who are appointed, but it will also be influenced by other factors, including who decision-makers are, how transparent the selection process is, and what provision is made for scrutiny and review in individual cases."
>
> Accordingly, if due to the process adopted, the possibility of interference by third parties is real, the independence of the judicial officers and by extension the judiciary may be cast into serious doubt."

332. That there is no room for a system of recruitment of judges by which the authority of the Commission is delegated either expressly or by implication was emphasised in the Uganda case of Karahunga vs. Attorney General [2014] UGCC where it was held that to allow a process by which the powers of the Commission are subordinated to other bodies or organs especially from the executive would be to undermine the independence of the Commission and in a way subject it to the direction or control of the Executive arm of the Government.

333. It is therefore my view that any report from the Kenya Revenue Authority, Higher Education Loans Board, Law Society of Kenya, Directorate of Criminal Investigations, Advocates Complaints Commission, Ethics and Anti-Corruption Commission and a recognized Credit Reference Bureau must be part of the superstructure in the recruitment process and can only be considered at the interview stage. They cannot be the basis upon which the Commission determines who it ought to shortlist for the interview and who to reject at that nascent stage of the process.

334. To allow such reports whose correctness may not themselves be vouchsafed without affording those adversely affected would necessarily amount to unfairness. It does not suffice to simply contend that since the reports are furnished by the applicants themselves this makes their contents beyond reproach. It must be noted that the period between which the advertisements are made and the time when these reports are required does not lend itself to a meaningful opportunity for one to challenge the contents of the said reports as required by the law. Whereas such reports may be prima facie evidence whether the respective Applicants meet the minimum qualifications of possessing a high moral character, integrity and impartiality, that prima facie evidence amounts to a rebuttable presumption which can only be properly dealt with at the interview stage. In other words the said reports are useful tools but belong to the stage of the interview rather than the pre-shortlisting stage.

335. In arriving at its decision, the Commission is not only expected to nominate the most qualified persons as Judges, but must do so through a process that is not only fair but one that is seen to be fair to all to the applicants. The Commission must adopt a predictable, transparent and accountable process. A process that is not akin to tossing a coin or waving a magic wand or raising a green flag, but an intellectual process based on specific criteria or approaches. It is for the benefit of the applicants that whoever is eventually found by the Commission to have bested the best or to be the best of the best not only carries with him or her the confidence of the Kenyans but has self-confidence that he or she was deserving of the job and not that he or she only got the job because other probably more qualified applicants were unfairly locked out of the competition in order to pave way for his or her nomination and eventual appointment.

336. Whereas the necessity of having the Supreme Court fully functional at all times, taking into consideration the role that Court plays not only in the judicial system but in the entire governmental system cannot be underestimated, the Commission in arriving at its decision must balance all the ingredients of fair administrative action which encompass expedition, efficiency, lawfulness, reasonableness and procedural fairness and must not sacrifice one principle at the altar of the other. This was the position adopted by Majanja, J. in Dry Associates Limited vs. Capital Market Authority & Another [2012] eKLR, where he held the view that the element of procedural fairness in Article 47 must be balanced against reasonableness, expediency and efficiency in the decision making process. To paraphrase Nyamu, J (as he then was) in Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728, the intention of expedition in the appointment of judges, in particular the Chief Justice, the Deputy Chief Justice and the Judges Supreme Court is noble and must be appreciated if the judicial machinery is to efficiently and effectively function and if the wheels of justice are not to ground to a halt and the Court cannot ignore that objective because it is meant for a wider public good as opposed to an individual who may be dissatisfied with the recruitment process. However the Court must put all public interest considerations in the scales and not only the consideration of expedition. The Constitution and the Fair Administrative Action Act, 2015 also has other objectives namely to promote the integrity and fairness of the recruitment process and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of expedition.

337. It was contended that under section 4(6) of the FAA Act processes provided for specifically by statute which then become operational if the same complies with the provisions of Article 47 and that it therefore follows that since the First Schedule provides a specific procedure for the process of appointment of Judges and it complies with the provisions of Article 47 as explained above, the provisions of the First Schedule to the Judicial Service Act becomes operational and not the procedure set out under the FAA Act. What section 4(6) provides is that for a procedure different from the

one prescribed under the FAA Act to take precedence over the said Act, that procedure must be inconformity with Article 47 of the Constitution. In effect there can be no substitute to the rules and principles guiding the fair administrative action as espoused in Article 47 of the Constitution.

338. The Commission argued that the public interest in this matter militates towards the completion of this process to enable it constitute the Supreme Court, the apex Court that has the exclusive mandate to hear and determine Presidential Election Petitions and final appeals as provided for under Article 163(4) of the Constitution. This Court is aware of the position in Black's Law Dictionary, 9thEdn. that "public interest" is the general welfare of the public that warrants recognition and protection and it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution while under Article 1(3) (c) sovereign power under this Constitution is delegated inter alia to the Judiciary and independent tribunals. Dealing with a similar provision in Rwanyarare & Others vs. Attorney General [2003] 2 EA 664, it was held with respect to Uganda that Judicial power is derived from the sovereign people of Uganda and is to be administered in their names. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate myself with the decision in Konway vs. Limmer [1968] 1 All ER 874 that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

339. It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination.

340. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.

341. Having said that it is also trite that contravention of the Constitution or a Statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute as was held in Republic vs. County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR thus:-

> " There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered

in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision."

342. This was the position in Resley vs. The City Council of Nairobi [2006] 2 EA 311 where it was held that:

> " In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid...The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed...If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place."

343. In determining this matter, I must point out that in the proceedings before me there is no specific allegation that any person who was desirous of applying for any of the three positions the subject of these proceedings was prevented from so doing by the fact of requirements in the advertisement. In any case my finding is that there was nothing inherently wrong with the advertisement. It was the manner in which the advertisement was understood and implemented that was perverse.

Findings

344. Having considered the issues raised in these consolidated causes the following are therefore my findings:

1) This Court has the jurisdiction, the mandate and power to investigate claims of unconstitutionality, illegality and irrationality on the part of the Judicial Service Commission.

2) The Judicial Service Commission has the power to conduct an initial review of all applications submitted for completeness and conformity with minimum constitutional and statutory requirements and in so doing may properly reject the applicants whose applications do not conform thereto.

3) Subject to what I have found in (2) above, the Commission did not violate the requirement of public participation.

4) The mere fact that the Commission included extraneous matters in the advertisement does not warrant the quashing of the said advertisement in the circumstances of this case.

5) Based on the evidence presented before me, I am unable to find that there was discrimination or bias on the part of the Commission.

6) The right of access to information is not an unlimited right and may be limited as provided by the law.

7) The Judicial Service Commission is under an obligation to furnish a Kenyan citizen with information under Article 35(1)(a) of the Constitution with as much precision as the circumstances permit and justify its decision not to disclose the information which it deems inappropriate but taking into account the overriding objective of respecting the applicants' right to privacy.

8) The decision of the Judicial Service Commission to shortlist any of the candidates for some only of the positions applied for was irrational.

9) The decision of the Commission to summarily reject applications pursuant to Regulation 13 of the First Schedule to the Judicial Service Act before the stage of interview was unsupported by the law and was tainted with procedural irregularity.

Disposition

345. Having made the foregoing findings the next issue for determination is what remedies should the Court grant in the circumstances of this case. Article 23(3) of the Constitution provides that "in any proceedings brought under Article 22, a Court may grant appropriate relief, Including"....declaration of rights, injunction, conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order for compensation; and an order of judicial review.

346. In addressing itself to the question of appropriate relief in Article 23 of the Constitution the Court in Nancy Makokha Baraza vs. Judicial Service Commission & 9 Others [2012] eKLR expressed itself as follows:

> " Article 23(3) empowers this Court in any proceedings brought under Article 22, to grant appropriate reliefs. Article 2(4) on the other hand ordains that any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency. It is therefore our view that where any provision is contrary to the Constitution, only the inconsistent portion is to be declared void. In the case of Minister of Health and Others vs. Treatment Action Campaign and Others (Ibid), it was stated at page 249 as follows:
>
> > "Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant 'appropriate relief'. It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of s 172(1)(a) a court may also 'make any other order that is just and equitable' (s 172(1)(b))...Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...The courts have a particular responsibility in this regards and are obliged to 'forge new tools' and

shape innovative remedies, if needs be, to achieve this goal...The Bill of Rights, which we find to have been infringed, is binding on all organs of state and it is our duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights".

347. The Court in Nancy Baraza case continued to state as follows:

> " The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises...We are, therefore, of the view that Article 23(3) of the Constitution is wide enough and enables as to make appropriate reliefs where there has been an infringement or a threat of infringement of the Bill of Rights..."

348. In such cases the orders to be granted by the Court, to paraphrase Republic vs. Judicial Commission of Inquiry into the Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another ex Parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400 ought to be like so much straw into a burning fire and consume only the offending decisions and like guided missiles hit only the targeted decisions.

349. In the premises the Orders which commend themselves to me and which I hereby grant are as follows:

1. The decision of the Judicial Service Commission made vide press releases of 12th, 13th and 15th July, 2016 rejecting some of the names of the applicants in the Commission's shortlisting is hereby removed into this Court and is hereby quashed.

2. The Judicial Service Commission is hereby compelled to reconsider the names of the applicants which were rejected afresh in accordance with the terms of this Judgement and communicate its decision, particularly where adverse, to the parties affected and thereafter proceed in accordance with the law.

3. Pending the its reconsideration pursuant to order (2) above the Judicial Service Commission is hereby prohibited from making recommendations to the President on the persons to be appointed as the Chief Justice, the Deputy Chief Justice and a Judge of the Supreme Court of the Republic of Kenya.

350. That brings me to the issue of costs. I was urged to consider awarding costs in these proceedings. In my view if there are any proceedings in which public interests is a factor to be considered, these must be such. In my view the parties who participated in these proceedings must consider themselves privileged to have been at the forefront in advancing the rule of law. They may be poorer in their pockets but to them I say your reward cannot be quantified in monetary terms. Kenyans will no doubt be grateful to them for having spiritedly sacrificed both their time and finances in prosecuting and defending these proceedings. For that the Country, I am sure will be forever indebted to them.

351. In the premises I will make no order as to costs.

352. I take this opportunity to express my appreciation to counsel who appeared in this petition for their well-researched arguments and submissions. If I have not referred to all the submissions made and the decisions referred to me, it is not out of lack of appreciation for their industry.

353. Those shall be the orders of the Court.

SIGNED AND DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF AUGUST, 2016.

G V ODUNGA

JUDGE

In the presence of

Mr Thuita for Mr Karanja for the 1st Petitioner

Mr Ongoya for the 2nd Petitioner

Mr Wanyoike and Miss Nkonge for the 3rd and 4th Petitioners

Mr Njoroge Regeru and Mr Ochieng Oduol for the 1st Respondent

Mr Onyiso for the 2nd Respondent

Mr Morintat for the Interested Party

Cc Mwangi