REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. 45 OF 2019

-BETWEEN-

LAW SOCIETY OF KENYA.....PETITIONER

-AND-

ATTORNEY- GENERAL ..... 1ST RESPONDENT

NATIONAL ASSEMBLY OF KENYA.....2ND RESPONDENT

JUSTICE MOHAMMED WARSAME.....3RD RESPONDENT

SAMUEL NJUGUNA.....4TH RESPONDENT

JUDICIAL SERVICE COMMISSION.....5TH RESPONDENT

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*(Being an appeal from the Judgment of the Court of Appeal (**P.N. Waki, Asike - Makhandia & F. Sichale**, JJ. A.) delivered on 11th October, 2019 in Civil Appeal No. 426 of 2018)*

Representation:

Mr. Ochiel Dudley for the appellant
(Katiba Institute)

Mr. Christopher Marwa holding brief for Mr. Kuria Thande for the 1st respondent
(Office of the Attorney General)

Mr. Mbarak for the 2nd respondent
(S. M Mwendwa & Company Advocates)

Mr. Issa Mansur and Mrs. Maina for the 3rd respondent
(Issa & Company Advocates)

Ms. Gikonyo holding brief for Mr. Okong'o Omogeni for the 5th respondent
(Okong'o Omogeni & Company Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] At the heart of this appeal is the interpretation and application of Articles 171, 248 and 250 of the Constitution; specifically to answer these three narrow but related questions; whether a member of the Judicial Service Commission (the JSC/Commission) elected and or nominated under Article 171(2)(b), (c), (d), (f) and (g) ought to be vetted and approved by the National Assembly before appointment; whether Section 15(2) of the Judicial Service Act (the JS Act) is unconstitutional to the extent that it gives the President a role in the appointment of JSC Commissioners elected and/or nominated under Article 171(2)(b), (c), (d), (f) and (g); and finally, whether the section is unconstitutional for failure to require that all persons elected and or nominated as JSC Commissioners to be subjected to approval by the National Assembly.

[2] Article 171 establishes the JSC, an independent body consisting of eleven (11) members; the Chief Justice, who is the chairperson; the Attorney-General; representatives of the Supreme Court, Court of Appeal, High Court, the Magistracy; the legal profession (2); the public (2); and the Public Service Commission (PSC). The Chief Registrar is the secretary to the Commission. The JS Act declares, in part, that it is an Act of Parliament that makes **"further provision with respect to the membership and structure of the Judicial Service Commission",** with Section 15 providing for the procedure of appointment of members of the Commission.

[3] The constitutionality of Section 15(2) of the the JS Act has also been raised as one of the issues for determination in a separate appeal before this Court in Petition No. 17 of 2020, ***Katiba Institute v Attorney General & 9 Others***, which was heard on 15th June, 2022.

B. BACKGROUND

[4] On 9th March, 2018, Justice Mohammed Warsame, a Justice of Court of Appeal (the 3rd respondent) was re-elected by the Justices of that court to serve a second term as their representative to the JSC in accordance with Article 171(2)(c) as read with Article 171(4) of the Constitution and Section 16 of the JS Act. Thereafter, his name was forwarded to the President pursuant to Section 15(2) of the JS Act for appointment as a member of the JSC. Instead, the President, in turn, dispatched the name to the National Assembly (the 2nd respondent) for approval before appointment pursuant to Article 250(2)(b) of the Constitution. This action was the gravamen in the original grievance; whether Parliament can vet for approval a member of the JSC who has been democratically elected by his or her peers.

[5] By notices published on 21st and 22nd March, 2018 in the People Daily and the Daily Nation newspapers, respectively, the 2nd respondent invited views from the general public on the 3rd respondent's suitability for the office of Commissioner of the JSC. The notices were unequivocal that the approval hearing was in accordance with the provisions of Article 250(2)(b) of the Constitution as read with Sections 3 and 5 of the Public Appointments (Parliamentary Approval) Act No. 33 of 2011.

[6] As a consequence, the JSC and the Law Society of Kenya (the appellant) by separate letters dated 21st and 22nd March, 2018, respectively, objected to the intended exercise, pointing out that it was not only unconstitutional but also an interference with the independence of the nominating institution, the Judiciary (the Court of Appeal). The 2nd respondent, by a letter dated 29th March, 2018 responded comprehensively but insisted that the scheduled hearing would

proceed, precipitating the action before the High Court, which has culminated in this appeal after the Court of Appeal dismissed the first appeal.

C. LITIGATION HISTORY

i) Before the High Court

[7] Aggrieved by the President's reluctance to appoint the 3rd respondent, and the insistence of the 2nd respondent to vet him, the appellant challenged the decision in the High Court, in Petition No. 106 of 2018. Subsequently, Samuel Njuguna, (the 4th respondent) also filed an opposing Petition, No. 119 of 2018 challenging the constitutionality of Section 15(2) of the JS Act on the ground that, contrary to Article 250 of the Constitution, it does not make parliamentary approval of all JSC commissioners mandatory. The two petitions were consolidated and heard together.

[8] As far as the appellant was concerned, by forwarding the name of the 3rd respondent to the 2nd respondent, the President was in effect acting as the nominating authority; that both the purported nomination and the intended approval of the 3rd respondent by the 2nd respondent were *ultra vires* Article 171(2)(c) of the Constitution. The constitutionality of Section 15(2) of the Act was contested in so far as it confers on the President the power to appoint members of JSC who are elected or nominated by bodies specified under Article 171(2)(b)(c), (d)(f) and (g) of the Constitution; and that Article 171(2) is a special provision specific to the JSC and its membership, distinct from other Chapter 15 constitutional commissions to which the general provisions of Article 250 of the Constitution apply.

[9] The 4th respondent, on his part, sought the court's interpretation of the Constitution in relation to the establishment and composition of constitutional commissions, appointment of members of these commissions and the import of Article 248 as read with Article 250 of the Constitution. It was his case that, without exception, all Chapter Fifteen, commissioners, including those of the JSC

must be approved by the National Assembly; that the omission altogether in Section 15, to provide for approval of all the JSC Commissioners was itself inconsistent with the Constitution; and that it was an affront to Article 27 of the Constitution for only some members of JSC to undergo approval by the National Assembly.

[10] He further expressed the view that although Article 171(2) provides for the composition of JSC and the manner of identifying the commissioners, Section 15(2) of JS Act contradicts this by vesting this function on the President, and declaring that nominating bodies under Article 171(2)(b), (c), (d), (f) and (g), must submit names of their nominees to the President who must, within three days of receipt of the names, appoint the nominees as members of the Commission. The 4th respondent read this to mean, that the nominees were not required to undergo approval by the 2nd respondent; and that upon receipt of the names of the nominees, the President simply appoints them as members of the JSC, contrary to Article 250(2)(b), which requires all those identified for appointment to commissions to be approved by the National Assembly before appointment. To that extent, he contended further, that Section 15(2) of the JS Act contravened Article 250(2)(b) of the Constitution and was therefore invalid.

[11] The appellant shared these views with the 4th respondent, and added that, once a member of the JSC is elected, the President cannot, at the same time, appoint such a member. The 3rd respondent, for his part, urged that the appointment envisaged by Section 15(2) is a formal function performed by the President as Head of State under Article 131(a) of the Constitution through the issuance of a gazette notice. This, in his view, does not make Section 15(2) unconstitutional. According to the JSC, the President cannot appoint elected commissioners under the guise of his functions as the Head of State under Article 132; that his powers in the appointment of the JSC commissioners are limited to only two under Article 171(2)(h).

[12] In sum, the consolidated petitions, we have noted at the beginning of this judgment, were pegged on two constitutional provisions; Articles 171 and 250. While the appellant, the 3rd respondent and JSC relied on Article 171 to argue that there is no requirement that elected representative of the Justices of the Court of Appeal be approved by the National Assembly, the Attorney General (1st respondent), the 2nd and 4th respondents on the other hand, relied on Article 250 to argue that all commissioners to constitutional commissions, without exception must be approved by the National Assembly.

[13] The High Court (*Mwita, J.*) in a judgment dated 6th July, 2018 found that Articles 171 and 250 apply to different commissions; that the latter does not apply to JSC either in the composition or identification of its commissioners. For this reason, the learned Judge concluded that the requirement relating to approval of nominees by the National Assembly in Article 250 does not apply to JSC commissioners, except those appointed by the President under Article 171(2)(h) of the Constitution- one woman and one man to represent the public. To buttress this conclusion, the Judge drew a parallel between the terms of office for Commissioners under Article 250(6) and those in Article 171(4), pointing out that under the former, commissioners' term of office is limited to a single non-renewable term of six years, while under the latter, JSC commissioners, other than the Chief Justice and Attorney General, enjoy a renewable term of five years provided they remain qualified.

[14] Flowing from the language of Article 171 (2) (b), (c), (d) and (f), the learned Judge concluded this aspect of the subject, that once the results of elections under Article 171(2)(b), (c), (d) and (f) are declared, those results are final and conclusive of the members elected. Those results do not require approval by any body, or other State organ, including the National Assembly under the guise of Article 250(2) of the Constitution. In the Judge's view, any attempt to subject those elected to any form of approval is against the letter and spirit of the Constitution

and is unconstitutional because such an interpretation would defeat the meaning and essence of elections conducted by peers through secret ballot.

[15] Pertaining to the ground that, by directing the names of nominees to be forwarded to the President for formal appointment, Section 15(2) of the JS Act is *ultra vires* the Constitution, the learned Judge ruled that the provision does not confer any discretion on the President once he receives the names. He is under a legal obligation, in exercise of his executive function, to formally appoint the nominee(s) within three days of receipt of the name(s). This view, the Judge noted, is supported by the provisions of Article 250 and as such Section 15(2) of the JS Act is not in conflict with any provision of the Constitution.

[16] The High Court, in the end, partially allowed the petition by the appellant and nullified the purported nomination of the 3rd respondent by the President and, by an order of permanent injunction prohibited the 2nd respondent from holding an approval hearing to vet the 3rd respondent. The court, however, found no merit in the 4th respondent's petition and dismissed it, holding that Section 15(2) is constitutional.

ii) Before the Court of Appeal

[17] With 9 grounds, the 1st respondent sought to overturn in the Court of Appeal the entire judgment of the High Court and to have it substituted with one declaring that Section 15(2) of JS Act is unconstitutional; and to further declare that the Judge elected to be a representative of the Court of Appeal under the provisions of Article 171(2)(c) is subject to parliamentary approval in terms of Article 250(2) of the Constitution.

[18] The appellant, on its part, filed a cross appeal to challenge that part of the judgment of the High Court that found Section 15(2) of the JS Act constitutional, and that, once the names of nominees are forwarded to the President, the latter must formally make the appointment within three days. The appellant, therefore, asked the Court of Appeal to reverse the decision and hold that the section is void

to the extent that it vests in the President the power to appoint commissioners of the JSC elected under Article 171(2)(b), (c), (d) and (f).

[19] The 1st, 2nd, 3rd and 4th respondents maintained their respective arguments before the High Court, which we have already summarized in the previous paragraphs of the judgment and no purpose will be served by rephrasing them here.

[20] The Court of Appeal framed 3 issues for determination as follows: whether the 3rd respondent, an elected representative of the Court of Appeal, was subject to vetting and approval by the National Assembly; whether Section 15(2) of the JS Act is unconstitutional for omitting to provide for parliamentary approval of all persons elected and nominated as JSC Commissioners; and whether Section 15(2) is unconstitutional for vesting in the President the power to appoint elected members of the JSC.

[21] The Court of Appeal dismissed the 1st respondent's appeal as well as the appellant's cross-appeal. In doing so, it held that, Parliament, in enacting Section 15(2) of the JS Act was guided by Article 171(2) which creates four categories of members and catered for appointment procedure for each. More specifically, Parliament was clear that the only persons to be subjected to approval hearing in the National Assembly were the two candidates representing the public, and no other. As such, the 3rd respondent, having been elected by his peers as a member of the JSC, was not subject to approval by the National Assembly.

[22] In rejecting the ground of unconstitutionality of Section 15(2) of the JS Act, the court endorsed the construction placed on Section 15(2) by the High Court that the President's duty is simply to appoint an elected commissioner within three days of submission of the nominee's name.

iii) Before the Supreme Court

[23] Once again, aggrieved by the Court of Appeal's decision, the appellant lodged this appeal on a single ground, that the appellate court erred in law by holding that Section 15(2) of the JS Act is constitutional without determining the section's purpose which unduly gives the President more powers than those conferred by Article 171(2) and whose effect permits unlawful interference with the independence of the JSC.

D. PARTIES' SUBMISSIONS

i. The Appellant (LSK)

[24] The appellant sought to persuade us from the onset that the Court's jurisdiction under Article 163(4)(a) has been properly invoked, the issues raised in the petition involving the interpretation of Article 171(2) of the Constitution as read with Section 15(2) of the JS Act; that the Court of Appeal erred in failing to find: that Article 171(2) of the Constitution does not give the President any role in the appointment of JSC members under Articles 171(2)(b), (c), (d) (f) and (g); and for that reason, Section 15(2) is inconsistent with this Article.

[25] According to the appellant, by segregating Article 132(4) on the functions of the President from Articles 171(2), 248, and 250 on the composition and membership of the JSC, the Court of Appeal erred; and that, by focusing exclusively on Article 132, the Court of Appeal failed to be guided in the holistic and integral interpretation of Articles 132(4), 171(2), 248(1) and 250(1) and (2).

[26] The appellant further submitted that even though Article 171(2)(b), (c), (d), (f) and (g) does not permit the President to appoint any JSC member besides the two members under Article 171(2)(h), the Court of Appeal upheld the validity of Section 15(2) based on nobility; that as a noble duty, the President exercises certain executive functions; and that in this case, the President's duty is simply to appoint an elected commissioner within three days of submission of the nominee's name

and consequences would ensue if there was a delay in complying with the statute, without specifying what these consequences would be.

[27] As far as the appellant is concerned, had the Court of Appeal considered the purpose and effect of Section 15(2), it would have found the section to be unconstitutional. The purpose of Section 15(2) is to give the President more powers than Article 171(2)(b), (c), (d), (f) and (g) allows. Its effect is the interference with the independence of not only the JSC but also the Judiciary by subjecting them to control of executive power, governmental and political pressure in appointments to the JSC.

[28] In support of these arguments, the appellant has cited the following decisions: ***Center for Rights Education and Awareness & another v John Harun Mwau & 6 others***, CA No. 74 & 82 of 2012; [2012] eKLR; ***Tinyefuza v Attorney General of Uganda***, Constitutional Petition No. 1 of 1997; (1997 UGCC 3); ***Smith Dakota v North Carolina***, 192 U.S.; [1940] LED 448; ***Andrew Kiplimo Sang Muge v Independence Electoral and Boundaries Commission***, HC Petition No. 576 Of 2015 as consolidated with Petition 118 & 148 of 2016; [2017] eKLR all, for the proposition that the Constitution should be interpreted as an integrated whole ; ***US v Butler***, 297 U.S. 1 [1936]; ***R v Big M Drug Mart Ltd*** [1985] 1 S.C.R. 295; ***Katiba Institute & another v Attorney General & another***, HC Petition No. 331 of 2016; [2020] eKLR, to make the point that both purpose and effect are relevant in determining the constitutionality of a statute; ***Association of Belize v. Attorney General of Belize***, Claim No 666 of 2010, on the effect of a statute on judicial independence; ***Schachter v. Canada***, [1992] 2 SCR 679; and ***S v Manamela and Another (Director-General of Justice Intervening)*** (CCT25/99) [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491 (14 April 2000), on the appropriate reliefs available with respect to unconstitutionality of a statute or its provision.

ii. 5th Respondent's submissions (JSC)

[29] Supporting the petition, the 5th respondent argued that it was in error for the Court of Appeal to hold that the President has the power to appoint members of the JSC; that such a finding disregards a holistic interpretation of all the relevant Articles of the Constitution, namely, 132(4), 171, 248 and 250; that whereas under Article 132 (4) the President may perform certain executive function provided for in the Constitution or in national legislation and, may in exercise of that authority, among other things, establish offices in the public service in accordance with the recommendation of the PSC, that function does not extend to all members of the JSC under Article 171 of the Constitution, but only to those appointed under Article 171 (2)(h) to represent the public. It does not certainly include the appointment of the 3rd respondent, a judge to represent his colleagues in the JSC. The mandatory terms of Section 15 (2) of the JS Act, giving authority to the President to appoint the 3rd respondent as a member of the JSC is a clear violation of express constitutional provisions, JSC contended.

[30] The JSC reiterated that the purpose and effect of Section 15(2) is to give the President a function beyond those granted by the Constitution. The JSC relied on the decisions of this Court in ***In the Matter of Interim Independent Electoral Commission,*** SC Application No. 2 of 2011; [2011] eKLR and ***Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others***, Petition No. 14 of 2014 as consolidated with Petition Nos. 14 A, 14B and 14C of 2014; [2014] eKLR, highlighting the import of separation of powers and independence of the Judiciary.

iii. 1st Respondent's Submissions (Attorney-General)

[31] In opposition to the appeal, the 1st respondent contended that under the doctrine of separation of powers and the principle of checks and balances, the framers of the Constitution of Kenya required that under Article 250(2) as read together with Section 15(2) of the JS Act, the National Assembly, due to its

oversight role under Article 95 of the Constitution, should approve the membership of the JSC and indeed, all other commissions and independent offices. This is also in accord with Section 7 of the Public Appointments (Parliamentary Approval) Act. Therefore, to the extent that Section 15(2) of the JS Act takes away the powers of the National Assembly to vet and approve the elected members of the JSC, it is contrary to the provisions of Article 250(2) of the Constitution. The President was within the law in exercising his constitutional mandate to forward the name of the 3rd respondent to Parliament for approval in conformity with Article 250(2) and Section 15 (2) of the JS Act. Section 15(2) mirrors Article 250 (2) in so far as the role of the President to formally appoint commissioners is concerned, and is therefore constitutional.

[32] In a bold submission, the 1st respondent urged that elections, nominations and parliamentary approval of commissioners are processes of selection, mere proposals, suggestions or recommendations, but the ultimate decision rests on the formal appointment by the President in his capacity as Head of State and not as Head of the Executive arm of the Government.

iv. 2nd Respondent's submissions (National Assembly)

[33] The 2nd respondent did not file any written submissions, however, Counsel in his oral submissions before the Court explained that the 2nd respondent has challenged the constitutionality of Section 15(2) of the JS Act only to the extent that it omits to provide that the President must first forward the names of the nominees to the National Assembly for vetting and approval before appointment. However, when the High Court held that the impugned section was not unconstitutional, they abandoned that line of argument before the Court of Appeal.

[34] Be that as it may, the 2nd respondent suggested law reform in regard to that provision. With that view, the 2nd respondent did not find any need to pursue the issue of constitutionality of Section 15(2) before this Court.

v. 3rd Respondent's submissions (Warsame, JA)

[35] Equally opposing the appeal, the 3rd respondent asserted that pursuant to Article 171(1), (2) and (4) of the Constitution, he has been elected twice by the Justices of the Court of Appeal, to represent them in the JSC, the first time being in 2013. He was re-elected on 9th March, 2018, the election that is the subject matter of this dispute. Upon his first election in 2013, his name was forwarded to the President who duly appointed him as a commissioner without seeking approval from the National Assembly in compliance with both the Constitution and the JS Act. However, after his re-election in 2018, contrary to the Constitution and the law, and a departure from the 2013 position, the President instead of signifying his appointment by issuing a gazette notice, forwarded his name to the National Assembly for approval.

[36] Relying on Section 15(2) of the JS Act, the 3rd respondent submitted that having received his name as an elected representative of the Justices of the Court of Appeal, the President's only role as contemplated by Article 171(2)(c) and Section 15(2) of the JS Act was to gazette him, without more; that the only members who must be appointed by the President and only with the approval of the National Assembly are those contemplated under Article 171(2)(h) to represent members of the public. Section 15(2) of the JS Act does not contemplate any other role by the President either by way of further vetting, deliberation, approval or disapproval of other members. The powers of appointment by the President, as Head of State in accordance with Section 15(2)(b) of the JS Act are limited to appointment upon nomination. The appointment process does not lend itself to scrutiny and deliberation by the President. The 3rd respondent further submitted that the constitutional scheme and design that vests the President with the power to appoint, nominate and dismiss Cabinet Secretaries and other State and public officers does not extend to a member of the JSC nominated under Article 171(2)(c) of the Constitution. In his view therefore, in so far as Section 15(2) only provides for the formal appointment, the section is not unconstitutional.

[37] The 3rd respondent cited the following treatise and judicial decisions to illustrate the transformation path, from the old constitutional order, where the Executive had a significant influence over the Judiciary to the promulgation of the 2010 Constitution; ***'Kenya Democracy and Political Participation: a Review by AfriMap***, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS); ***Public Law and Political Change in Kenya*** by Prof. Yash Pal Ghai; ***Law Society of Kenya v. The Attorney General & Another*** [2016] eKLR***; Adrian Kamotho Njenga v Attorney General & 3 Others*** [2020] eKLR; and the Ugandan case of ***Karahunga v. Attorney General*** (2014) UGCC 13, on the roles of the President and the Judicial Service Commission (of Uganda) on the appointment of Chief Justice.

vi. 4th Respondent (Samuel Njuguna)

[38] Though the question of constitutionality of Section 15 was introduced in these proceedings from the High Court by the 4th respondent, he has not participated in these proceedings and those in the Court of Appeal.

E. ISSUES FOR DETERMINATION

[39] In the context of these arguments, and specifically bearing in mind the narrow dispute around the process of appointment of the 3rd respondent to the JSC, the following two issues fall for determination:

i) *Whether a member of the JSC elected under Article 171(2)(b), (c), (d), (f) and (g) ought to be vetted and approved by the National Assembly before appointment;*

ii) *Whether Section 15(2) of the Judicial Service Act is inconsistent with the Constitution to the extent that it gives the President a role in appointment of JSC Commissioners elected and/or nominated under Article 171(2)(b), (c), (d), (f) and (g) or for failure to require that all persons elected and or*

nominated as JSC Commissioners be subject to approval by the National Assembly

[40] The two issues are based on the original grievance of the appellant when it petitioned the High Court to challenge the President's action of submitting the 3rd respondent to the 2nd respondent for vetting and approval. The combined effect of the two issues is whether it is within the 2nd respondent's authority to approve the elected representatives of the nominating bodies specified under Article 171(2)(b), (c), (d), (f) and (g) of the Constitution.

F. ANALYSIS AND DETERMINATION

Jurisdiction of this Court

[41] This Court's jurisdiction flows from the Constitution and the applicable statutes. See ***Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others***, SC Application No. 2 of 2011; [2012] eKLR. Therefore, even if the question of jurisdiction is not brought up by the parties, it is our duty, as a matter of practice to independently satisfy ourselves that we are legitimately seized of each matter before us.

[42] The appeal was brought as of right pursuant to Article 163(4)(a) of the Constitution. From the petition filed in the High Court, the memorandum of appeal in the Court of Appeal, the arguments before and the judgments of the two courts below, as well as the pleadings and arguments in this Court, we entertain no doubt that the subject matter in controversy involves the interpretation and application of Articles 171, 248 and 250 of the Constitution. The appeal, we are satisfied, meets the principles enunciated in ***Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & another***, SC. Pet. No. 3 of 2012; [2012] eKLR. Further, on the question of constitutionality of Section 15(2) the JS Act, taking a cue from our decision in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others***, SC Application No. 5 of 2014; [2014] eKLR, we note that the JS Act is a normative derivative of the principles embodied in the Constitution

under Articles 171 and 172 and in interpreting the JS Act, the Court cannot disengage from the Constitution. Furthermore, this Court has previously invoked its appellate jurisdiction as of right on matters involving the constitutionality of a statutory provision in ***Hussein Khalid and 16 others v Attorney General & 2 others,*** SC Application No.32 of 2019 [2019] eKLR.

We turn to the first issue,

i) ***Whether a member of the JSC elected and or nominated under Article 171(2)(b), (c), (d), (f) and (g) ought to be vetted and approved by the National Assembly before appointment;***

[43] Two questions arise from this ground, whether the nomination of the 3rd respondent by the President was *ultra vires* Article 171(2)(c) of the Constitution; and whether the intended approval of the 3rd respondent by the National Assembly was a violation of Article 171(2)(c).

[44] The resolution of these questions will depend on the construction and application of all the relevant Articles of the Constitution. By Article 259, courts are enjoined in construing the Constitution to promote its purpose, values and principles; advance the rule of law, human rights and fundamental freedoms in the Bill of Rights; permit the development of the law; and contribute to good governance.

[45] This Court; ***In the Matter of Interim Independent Electoral Commission*****,** SC Application No. 2 of 2011; [2011] eKLR and; ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate,*** SC Advisory Opinion No. 2 of 2012 [2012] eKLR, among other decisions, has affirmed that, in interpreting the Constitution and developing jurisprudence, the Court will always take a purposive and holistic interpretation of the Constitution as guided by the Constitution.

[46] The concept of holistic interpretation of the Constitution was explained in ***In the Matter of Kenya National Commission on Human Rights,*** SC Reference No. 1 of 2012 [2014] eKLR, by the Court as follows:

> ***"But what is meant by a 'holistic interpretation of the Constitution'? It must mean interpreting the Constitution in context. It is the contextual analysis of a 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 issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.***

[47] To construe the import and tenor of any provision of the Constitution, the entire Constitution has to be read as an integrated whole, because the Constitution embodies certain fundamental values and principles which require that its provisions be construed broadly, liberally and purposively to give effect to those values and principles. Where words used in any provision of the Constitution are precise and unambiguous then they must be given their natural and ordinary meaning. The words themselves alone in many situations declare the intention of the framers because, to borrow the words of Burton, J. in ***Warburton V. Loveland***, (1832) 2 D. & Cl. 480, the language used ***"speak the intention of the legislature."***

[48] Those values and principles reflect our historical and political realities and the people's aspirations for a democratic State, built on the rule of law and respect for human rights.

[49] To apply these principles to the arguments before us, we reproduce the entire composition of the JSC in Article 171(2) (a) to (h), as it is important for the

determination of the question whether, the nomination by the President of the 3rd respondent, a member of the JSC, elected by his colleagues in the court was *ultra vires* Article 171(2)(c) of the Constitution. The Article is equally critical in answering the second issue, whether elected or nominated commissioners of the JSC ought to be approved by the National Assembly before appointment.

[50] The Article 171(2)(c) reads as follows:

> **"The Commission shall consist of –**
>
> **(a) the Chief Justice, who shall be the chairperson of the Commission;**
> **(b) one Supreme Court judge elected by the judges of the Supreme Court;**
> **(c) one Court of Appeal judge elected by the judges of the Court of Appeal;**
> **(d) one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates;**
> **(e) the Attorney-General;**
> **(f) two advocates, one a woman and one a man, each of whom has at least fifteen years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates;**
> **(g) one person nominated by the Public Service Commission; and**
> **(h) one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly."** [our emphasis]

[51] It is apparent from this provision that membership to the JSC is four-pronged; by virtue of office, for example, the Chief Justice and the Attorney-

General, who remain Chairperson and member, respectively, despite the term of five years and a further one term of five years applicable to other members. There are those members who are elected by peers, namely representatives of the Justices of the Supreme Court, Court of Appeal, High Court, the Magistracy and the advocates. The third category comprises a member nominated to represent the PSC and the final category are two members, one woman and one man, not being lawyers, appointed by the President to represent the public.

[52] It is common factor that the name of the 3rd respondent was forwarded to the 2nd respondent for approval hearing ostensibly on the force of Articles 132(4) and 250(2), as well as Section 15(2) of the JS Act. Article 132(4) embodies the specific function of the President to-

> **"(4) (a) perform any other executive function provided for in this Constitution or in national legislation and, except as otherwise provided for in this Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission;"** (Our emphasis).

[53] This, to our mind, cannot be the basis upon which the President acted when he forwarded the 3rd respondent's name to the 2nd respondent. Similarly, the plain language of Section 15(2) does not vindicate the action, as we shall demonstrate when considering the second issue. That leaves Article 250, which must be read together with Article 248.

[54] Article 250 is contained in Chapter Fifteen. The ten commissions in the Article are collectively and generally referred to as Chapter Fifteen commissions. Article 250 prescribes the composition of commissions, appointment and terms of office of the commissioners as follows:

> **"250. (1) Each commission shall consist of at least three, but not more than nine, members.**

(2) The chairperson and each member of a commission, and the holder of an independent office, shall be—

(a) identified and recommended for appointment in a manner prescribed by national legislation;

(b) approved by the National Assembly; and

(c) appointed by the President.

(3) To be appointed, a person shall have the specific qualifications required by this Constitution or national legislation.

(4) Appointments to commissions and independent offices shall take into account the national values referred to in Article 10, and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya.

(5) A member of a commission may serve on a part-time basis.

(6) A member of a commission, or the holder of an independent office—

(a) unless ex officio, shall be appointed for a single term of six years and is not eligible for re-appointment; and

(b) unless ex officio or part-time, shall not hold any other office or employment for profit, whether public or private.

…". (Our emphasis).

[55] Article 248, which is also in Chapter Fifteen, on the other hand stipulates that:

"(1) This Chapter applies to the commissions specified in clause (2) and the independent offices specified in clause (3), except to the extent that this Constitution provides otherwise.

(2) The commissions are—

(a) the Kenya National Human Rights and Equality Commission;

(b) the National Land Commission;

(c) the Independent Electoral and Boundaries Commission;

(d) the Parliamentary Service Commission;

(e) the Judicial Service Commission;

(f) the Commission on Revenue Allocation;

(g) the Public Service Commission;

(h) the Salaries and Remuneration Commission;

(i) the Teachers Service Commission; and

(j) the National Police Service Commission.

(3) The independent offices are—

(a) the Auditor-General; and

(b) the Controller of Budget."

(Our emphasis).

[56] We stress that Chapter Fifteen which contains Articles 248 and 250 applies to all the ten commissions, including the JSC, save only "**to the extent that this Constitution provides otherwise".**

[57] The Constitution provides otherwise in Article 171. We have seen in paragraph 50 above, that Article 171 is fully self-executing. From a plain reading of the three Articles, 171, 248 and 250, it is apparent that the former was intended to apply exclusively and specifically to the establishment of the JSC, its composition, mode of appointment and term of office of its members, while Article 250 was to regulate and guide on the composition, appointment and terms of office of commissions and independent offices generally. The proviso in Article 248(1) acknowledges the existence of other constitutional provisions, specific to other commissions which may differ from the provisions of Chapter Fifteen. Chapter Fifteen, for this reason, makes provisions of general application to fill in the gaps in respect of composition, appointment and terms of office of any commission.

[58] We are fortified in our conclusion by sub-Article (2)(a) of Article 250 which directs that, in those constitutional commissions where the procedure and manner

of identification and recommendation for appointment of the chairpersons and commissioners are not provided for in the Constitution, recourse will be to national legislations. Examples of such commissions, are the Kenya National Human Rights and Equality Commission established under Article 59 of the Constitution; National Land Commission under Article 67 of the Constitution; Ethics and Anti-Corruption Commission under Article 79 of the Constitution; Independent Electoral and Boundaries Commission under Article 88 of the Constitution; and Teachers Service Commission under Article 237 of the Constitution. In contrast, by Article 171, the Constitution itself provides for the means of identifying and methods of appointment of each of the four categories of membership of the JSC, occasioning no need to resort to either Article 250 or national legislation for this purpose.

[59] It is the lacuna in some of these commissions that Article 250 seeks to fill. Where no particular provision of the Constitution specifies the number of members to a commission, the answer will lie in Article 250 which, as a general guide limits such membership to **"at least three, but not more than nine"**. If the manner of identification and recommendation for appointment of the chairperson and each member of a commission is not specified elsewhere in the Constitution, reference must be made to Article 250. In all such instances of lacuna, Article 250 was intended to fill the same by directing that the appointment of the chairperson and each member shall be subject of approval by the National Assembly; and thereafter appointment by the President. The Article directs further that save for *ex officio* members, the rest of the member shall be appointed for only a single term of six years. Because Article 171 is self-executing, these conditions do not apply to its members.

[60] To further buttress our view that Article 250(1) is a general provision Article, it provides that membership to each commission "shall" not consist of more than nine members, yet pursuant to Article 171(2), the JSC consists of eleven (11) members. Secondly, Article 250(6)(a) stipulates that a member of the commission

shall be appointed for a single term of six years and is not eligible for re-election. In respect of the JSC, Article 171(4) provides that members of the JSC, apart from the Chief Justice and the Attorney-General shall hold office for a term of five years and shall be eligible to be nominated for one further term of five years.

[61] Another demonstration of the divergent nature of the commissions, is in the composition of the Parliamentary Service Commission established under Article 127. The membership is wholly drawn from Parliament, apart from two, one man and one woman appointed by Parliament from among persons who are experienced in public affairs, but are not members of Parliament. The mode of appointment and terms of service of its members which are distinct from those of the other commissions, are laid out in details in the Constitution itself. Like the JSC, the membership is not tied to **"at least three, but not more than nine"** in Article 250. It has ten (10) members. In the identification, nomination and appointment of members, there is no involvement at all of the Executive, the President, or the other commissions in the process. There is also a category of commissions which, apart from merely being listed in the Constitution, are entirely left to legislations on their composition, appointment and mandate as discussed in paragraph 89 of this judgment.

[62] These are examples of how the framers expressed their intention to effectuate the doctrine of separation of powers, the hallmark of our Constitution. The direct involvement of the President in the appointment of two members to represent the public in the JSC can only be explained on the basis of the nature of the expanded functions of the JSC, including its role to advise the national government on ways of improving the efficiency of the administration of justice (See Article 172(1)(e). Moreover, it is in line with the provisions of Article 10 and the centrality of public participation and transparency at all levels of administration of justice. The inclusion of the PSC nominee in the JSC, on the other hand, can be explained away by the long history of the two commissions. This history is aptly captured in the **Final Report of the Constitution of Kenya Review Commission** (2005).

From the pre-independence era, the PSC and the JSC have been joined at the hip. The PSC has always traditionally had two nominees, and lately one in the JSC.

[63] The point we are making is that the commissions are far from being homogeneous, contrary to the submissions that they all draw from Article 250. There are no typical common features between the commissions. The principle of checks and balances, the doctrines of separation of powers and independence of the three branches of Government from each other are highlighted in the deliberate distinct provisions.

[64] Having come to the conclusion that Article 171 is a self-executing provision; and that it is drafted in precise and unambiguous language, then it can only be given its natural and ordinary meaning. The words used in the Article speak the intention of the legislature. The intention was to have the constituents in the Court of Appeal to determine for themselves, through the ballot, the person to represent them in the JSC, without the involvement of third parties who have no interest in affairs of that court.

[65] Had the people of Kenya or the Legislature intended that all elected members of the JSC be first approved by the National Assembly before being appointed, nothing would have been easier than to expressly state so, the same way they have done for the two members representing the public. In the case of the two, Article 171(2)(h) unequivocally declares that, before their appointment, the National Assembly must give an approval. As far as we can recall, since the promulgation of the Constitution, all past elected members of the JSC, except in one instance, have never been subjected to approval hearing by the National Assembly. As a matter of fact, in his first term, the 3rd respondent did not go through it, because there has never been any constitutional or legal imperative to do so. The resolve to subject him, this time round to parliamentary approval was not only in bad faith, but amounted to a breach of his legitimate expectation and a fundamental contravention of the Constitution.

[66] To suggest, as has been expressed in this appeal, that the 3rd respondent was bound to be vetted and could only qualify for appointment after approval by the National Assembly, is to attack the spirit and letter of Articles 1(3) and 2(2); that sovereign power delegated to State organs, must be exercised strictly in accordance with the Constitution and that no person may claim or exercise State authority except as authorised under the Constitution. The Constitution does not permit the 2nd respondent to vet and approve an elected member of the JSC.

[67] There can be no better vetting of a representative's suitability to a position than by peers or those whose interest he is expected to represent than in a transparent and democratic election. The electorates base their choices on considerations relevant to their needs; the needs they alone appreciate in a manner no other body can replace or replicate.

[68] Purely, by the fact of his election by the Justices of the Court of Appeal, the 3rd respondent, without more, became a member of the JSC, only awaiting the administration of the oath under Article 74 of the Constitution as read with Section 40(1) of the JS Act before assuming the functions of the office of Commissioner of the JSC.

[69] Our answer to the first issue, it must follow from these reasons, like the two superior courts below, is that there is no basis, constitutional or legal for a member of the JSC elected or nominated under Article 171(2)(b), (c), (d), (f) and (g) to be vetted and approved by the National Assembly before appointment.

[70] We turn to the second and final issue,

> ***ii Whether Section 15(2) of the Judicial Service Act is unconstitutional to the extent that it gives the President a role in appointment of JSC Commissioners elected and/or nominated under Article 171(2)(b), (c), (d), (f) and (g), and for failure to require that all persons elected and or***

nominated as JSC Commissioners be subject to approval by the National Assembly.

[71] The JS Act was enacted in 2011 **"to ……make further provision with respect to the membership and structure of the Judicial Service Commission;……and for connected purposes"**. See the long title to the Act.

[72] Section 15(1) and (2) state that:

> **"15. (1) Where the members are to be appointed by the President under Article 171(2)(h) of the Constitution, the following procedure shall apply—**
>
> **(a) until after the first elections under the Constitution, the President shall, subject to the National Accord and Reconciliation Act, 2008 (No. 4 of 2008) and after consultation with the Prime Minister, within seven days of the commencement of this Act, submit the names of the nominees to the National Assembly;**
>
> **……**
>
> **(2) Where the nominations are to be made by bodies specified under Article 171(2)(b), (c), (d), (f) and (g) of the Constitution—**
>
> **(a) the respective nominating body shall submit the name of its nominee to the President; and**
>
> **(b) the President shall, within three days of receipt of the names, appoint the nominees as members of the Commission."** (our emphasis)

[73] The procedure of appointment set out above is divided into sub-section (1) and (2). The former is specific to appointment by the President with the approval of the National Assembly of two members under (h), one woman and one man to represent the public.

[74] Sub-section (2) on the other hand relates to members appointed in accordance with Article 171(2) (b), (c), (d), (f) and (g), who are elected or nominated. The nominating bodies envisaged do not include the JSC, but are the judges of the superior courts, the Magistrates, the Law Society of Kenya and the PSC. By this sub-section those bodies are required to submit the names of their nominees to the President; and the President, in turn is expected, within three days of receipt of the names, **"to appoint the nominees as members of the Commission."** Because the categories of the nominees are those elected or nominated, sub-section (2) does not require parliamentary approval, unlike those in sub-section (1). Is the omission to vet nominees in sub-section (2) unconstitutional? and what does it entail for the President "to appoint the nominees"?

[75] Before we settle these questions and the arguments proffered on this ground, it is apposite to stress two settled principles on constitutionality of a statute and the rules of interpretation of statutes. The first principle is that there is a general rebuttable presumption that every Act of Parliament is constitutional and the burden of proof lies on the person who alleges otherwise. See the decision of the Supreme Court of India in ***Dawakhana (Wakf) Lal Kuan, Delhi & Another v Union Of India & Others,*** (1960) AIR 554, 1960 SCR (2) 671, which has received endorsement by courts in this country, including this Court in the case of ***Law Society of Kenya v The Attorney General & Anor,*** SC Petition No 4 of 2019; (2019) eKLR. The second principle requires that in determining whether a statute is constitutional or not, the court must ascertain the object, purpose and effect of that statute; to discern the intention expressed in the Act itself. A statute

cannot make provision whose effect contradicts the Constitution or places additional requirements above those set out by the Constitution.

[76] On statutory interpretation of a statute, it is emphasized that the function of the courts is to interpret the law, not to make it. A statute is an edict of the Legislature and the conventional way of interpreting or construing a statute is, in the first place, to seek to understand the intention of its maker. Where the meaning of a provision is plain and unambiguous, no question of interpretation or construction arises. It is the duty of the judges to apply such a law as it is. But if it is open to more than one interpretation, then the court has to choose the interpretation which represented the true intention of the legislature, the legal meaning of the statutory provision. This has been underscored by this Court in the case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others***, SC Petition No. 2B of 2014; [2014] eKLR.

[77] Having set out these principles to guide us in the determination of this ground and because the answer to the second limb of the ground is simple, we shall start with it. The 1st and 2nd respondents contended that, to the extent that Section 15 takes away the powers of the National Assembly to vet and approve the elected members of the JSC, it is contrary to the provisions of Article 250(2) of the Constitution and therefore invalid. We dispose of this argument by restating that the language of Article 171 is unambiguous in so far as vetting and approval by the National Assembly is concerned. The only members who, according to Article 171(2)(h), must be approved by the National Assembly after appointment by the President, are one woman and one man to represent the public. All the other members are either elected under (b), (c), (d), (e), (f) and (g), or nominated under (h) of Article 171(2). An endorsement of a candidate through an election is another form of vetting by those he or she will be serving. In the instant case, it is only the judges, magistrates and lawyers who can choose for themselves their representatives. Parliament has no part to play, except to the limited extent explained earlier, in respect of the two members.

[78] The powers of Parliament to vet and approve any constitutional and statutory appointments are circumscribed as follows by Section 3 of the Public Appointments (Parliamentary Approval) Act, 2011:

> **"An appointment under the Constitution or any other law for which the approval of Parliament is required shall not be made unless the appointment is approved or deemed to have been approved by Parliament in accordance with this Act".**

[79] Parliament will only exercise its powers to vet and approve candidates for appointment to a public office if, and only if the Constitution or any other law requires the approval of Parliament. Section 15(2) of the JS Act does not contain any requirement for approval by Parliament. Because there is no such requirement in Article 171, except for (h), the arguments by the 1st and 2nd respondents that all commissioners of the JSC ought to be approved by Parliament must fail for lacking constitutional or legal foundation.

[80] We have explained elsewhere in this judgment that, it is only where the composition, appointment and terms of office of members of a commission are not provided for, that Article 250 will be turned to for the answer. It is in that context that the words "approved by the National Assembly" in Article 250(2)(b), must be read. Where approval by Parliament is made a condition precedent for appointment under Article 171, express provision has been made. If the framers' intention was to have all members of the JSC approved by Parliament they would not have made it as condition for some and not for other members. This ground fails.

[81] Is Section 15(2) inconsistent with the Constitution for requiring that the names of the nominees under Article 171(2)(b), (c), (d), (f) and (g) to be submitted to the President to; **appoint the nominees as members of the Commission"**? The answer to this question depends on the meaning to be

ascribed to the word "appoint", in the context in which it is used in that sub-section.

[82] The appellant, together with JSC, have maintained that sub-section (2)(b) is unconstitutional to the extent that it gives the President a role in the appointment of JSC commissioners who are elected and/or nominated under Article 171(2)(b), (c), (d), (f) and (g). On the other hand, the 3rd respondent has maintained that the section cannot be construed to be unconstitutional simply because of that reason. According to him, the appointment envisaged in that sub-section is only ceremonial and anchored on Article 132 (2)(f) of the Constitution.

[83] But, what did the drafters mean when they wrote in the Constitution that the names of the nominees under Article 171(2)(b), (c), (d), (f) and (g) shall be submitted to the President for appointment as members of the Commission?

[84] The history leading to the promulgation of the Constitution in 2010 leaves no doubt that the intention of the drafters was to have an independent JSC and Judiciary. We made reference in paragraph 62 above, to the Final Report of the Constitution of Kenya Review Commission and how it traced the evolution of the JSC from the pre-independence era to the period preceding the promulgation of the 2010 Constitution. The theme running through the Report, in so far as the JSC is concerned, is the protection of the independence of the Judiciary and by extension, the JSC which, was charged with the task of appointing judges. Once appointed, the judges could not be dismissed except as determined by a committee of Commonwealth judges, and only on the grounds for misconduct or inability to discharge their functions. It is debatable if full independence of the two institutions (the Judiciary and the JSC) was indeed realized through those provisions. The Report is, however, concerned with the Constitution and laws at the time and the intention of the drafters to insulate the two institutions.

[85] With the making of the independence Constitution in 1963, the intention seemed to have shifted to one where the Executive appeared, from the composition

of the JSC to have had a measure of control over the Commission, and going into the future, the JSC and the Judiciary were no longer regarded as truly independent of the Executive. Nothing demonstrates this capture more clearly than the composition of the JSC in Section 68(1) of the former Constitution, as follows:

> **"68. (1) .....**
>
> **(a) The Chief Justice as chairman**
>
> **b) The Attorney-General**
>
> **c) Two persons who are for the time being designated by the President from among the puisne Judges of the High Court and the Judges of the Court of Appeal**
>
> **d) The chairman of the Public Service Commission".**

[86] From its composition, the pre-2010 JSC was more Executive than Judicial. This changed following the clamour for constitutional review, to address among other concerns, a truly independent Judiciary and its institutions. Today, the judges and not the President, decide who among them represents those courts. Any interpretation of the Constitution, whose effect is to negate these gains, would in itself be invalid. Kenyans expressed themselves clearly that they did not want to repeat history. They wanted the role of the President in the affairs of the JSC to remain minimal. Today, Article 249(2) proclaims this independence of Chapter Fifteen commissions by declaring that they—

> **"(a) are subject only to this Constitution and the law; and**
>
> **(b) are independent and not subject to direction or control by any person or authority"**.

[87] Article 251 guarantees true independence of the JSC, not only by re-stating its independence from direction or control by any person or authority, but by

securing the tenor of the Commissioners, who can be removed only in accordance with that Article. Its financial autonomy, with a separate vote is equally assured.

[88] Based on the foregoing historical background, it is our considered view that a purposive interpretation of all the above-mentioned Articles will lead to the inevitable conclusion that there was no intention of the framers to subject the 3rd respondent or, for that matter, any of the elected members of the JSC to an "appointment" by the President. It is a contradiction in terms and an inherent absurdity to suggest that members elected by their peers or nominated by a state organ can, at the same time be "appointed" by a different person or authority.

[89] There can be no justification for the invocation of Article 250(2) as the basis for the requirement of appointment by the President of the 3rd respondent as a member of the JSC. Where the framers intended to vest in the President the power to appoint members of the Chapter Fifteen commissions, they expressly provided for it. For example, the Constitution in various Articles authorises the President to appoint members of four of the ten Chapter Fifteen commissions, namely, the Commission on Revenue Allocation; the Public Service Commission; the Salaries and Remuneration Commission; and the National Police Service Commission. Two commissions, the Parliamentary Service Commission and JSC are created by Articles 127 and 171, respectively, as self-executing commissions, with clear mode of identification, qualification, appointment and terms of their commissioners independent of a third party. The Constitution does not make provision on the composition, appointment and terms of office of commissioners of the remaining four commissions, the Kenya National Human Rights and Equality Commission; the National Land Commission; the Independent Electoral and Boundaries Commission; and Teachers Service Commission. The appointments envisaged in Article 250 relates to the first and the last four categories of commissions, namely, where there is express power to the President to appoint members or where no express provision has been made, national legislation provides.

[90] In view of the foregoing background, analysis and conclusion, we do not accept the 3rd respondent's argument that the power of the President to "appoint" him under that section is only ceremonial and anchored on Article 132 (2)(f) of the Constitution. Unfortunately, our reading of Article 132 (2) does not yield this conclusion. The Article provides that:

> **"(2) The President shall nominate and, with the approval of the National Assembly, appoint, and may dismiss—**
>
> **(a) the Cabinet Secretaries, in accordance with Article 152;**
>
> **(b) the Attorney-General, in accordance with Article 156;**
>
> **(c) the Secretary to the Cabinet in accordance with Article 154;**
>
> **(d) Principal Secretaries in accordance with Article 155;**
>
> **(e) high commissioners, ambassadors and diplomatic and consular representatives; and**
>
> **(f) in accordance with this Constitution, any other State or public officer whom this Constitution requires or empowers the President to appoint or dismiss."** (our emphasis)

[91] This Article applies to State or public officers, who are named in (b), (c), (d), (e) as well as those to whom the Constitution empowers the President to appoint or dismiss (f). The JSC commissioners are not such officers. We believe and hold the firm view that the President can only exercise the functions, whether formal or ceremonial, donated to him by the Constitution. The President has no ceremonial role in the appointment of elected and nominated commissioners of the JSC.

[92] To "appoint", according to **Black's Law Dictionary**, 9th Ed at page 116, means;

> **"the designation of a person, such as a non-elected public official, for a job or duty; especially naming of someone to a non-elected public office"** (our emphasis).

[93] As an act of assigning a position to an elected public official, then appointment in Section 15 by the President of elected or nominated members of the JSC would offend Article 171 of the Constitution.

[94] The two past elections of the representative of the Court of Appeal in 2013 and 2018 were conducted by the Independent Electoral and Boundaries Commission, pursuant to Article 88(4) of the Constitution, Section 4 of the Independent Electoral and Boundaries Commission Act and later Rule 3.1 of the Court of Appeal of Kenya Election Rule, 2013. Upon declaration of the 3rd respondent as duly elected representative of the court, the IEBC issued him with a certificate to confirm his election. This has been the practice with respect to elections of all members of the JSC under Article 171(2)(b), (c), (d) and (f).

[95] To complete the process, like in all cases where it conducts elections, the IEBC issues the elected member with a certificate of election and further publishes a gazette notice confirming the outcome of the elections of those members. This is followed by the taking of oath of office before the Chief Justice, in accordance with Article 74 as read with Section 40(1) of the JS Act before the members assume the functions of the office of Commissioner of the JSC.

[96] Traditionally as a practice carried over from the old constitutional order, the President has always issued a gazette notice to signify the appointment of elected or nominated representatives in the JSC. With the new order, it is our view that this role ought to be played by the IEBC but certainly not the President. Article 260 of the Constitution defines gazette *as* ***"the Kenya gazette published by the authority of the national government, or a supplement to the Kenya Gazette."*** This Court considered the significance of a gazette notice as a medium of general public information in ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others,*** SC Petition No. 10 of 2013; [2014] eKLR.

[97] In the context of Chapter Fifteen commissions, there are instances where national legislations specifically impose a duty on the President to publish in the

official gazette the names of the chairpersons and members. Examples of such legislations are the PSC Act, the IEBC Act, the National Police Service Act, and the Salaries and Remuneration Act, all of which provide in nearly identical terms that:

> **"The President shall, within seven days of the receipt of the approved nominees from the National Assembly, by notice in the Gazette, appoint the chairperson and members approved by the National Assembly".**

[98] While there is no similar provision in the JS Act in respect of the JSC nominees, the Parliamentary Service Act donates this function to its secretary. Rule 5 of the First Schedule of the Parliamentary Service Act provides:

> **"If both Houses of Parliament approve a person recommended under paragraph 3, the Secretary shall, within seven days after the approval, publish the name of the person in the Gazette".**

That is why we have stressed in the previous paragraph that with the new constitutional order, it is our view that this role ought to be played by the IEBC or even the commission's secretary, as is the case in the Parliamentary Service Commission, but certainly not the President.

[99] We reiterate, in conclusion, that under Article 171(2) the scope of the President's power to appoint members of the JSC is limited to two persons, a man and a woman, who are not lawyers, to represent the public. The Constitution does not require that the names of nominees, other than the representatives of the public, be submitted to the President for appointment. Contrary to this, Section 15(2)(a) and (b) requires nominating bodies to submit nominees' names to the President for appointment as members of the Commission. To that extent, Section 15(2)(a) and (b) is contrary to Article 171(2)(b), (c), (d), (f) and (g) which insulates the process of appointment of nominated and elected members of the JSC and undergirds the independence of the Judiciary and JSC from manipulation by the Executive. There is nothing in Article 131(a) or 132 of the Constitution to suggest

that the President as the Head of State and Government can appoint elected members of the JSC.

[100] To give the President power to appoint or even to "appoint" by mere gazettement of names is to forget our history and the mischief Article 171 was intended to cure.

[101] In the result, and to the extent that Section 15(2)(b) of the JS Act donates to the President the power to appoint elected and nominated members of the JSC, it is void for being inconsistent with Article 171 of the Constitution which does not recognize such power. We restate that Section 15(2) goes against the letter and spirit of Articles 1(3) and 2(2) which stipulates that sovereign power delegated to State organs, must be exercised strictly in accordance with the Constitution and that no person may claim or exercise State authority except as authorised under the Constitution.

[102] The appeal is accordingly allowed.

G. COSTS

[103] Costs follow the event and is a discretion of the Court. Being a matter of public interest, we direct each party to bear its own costs.

DISSENTING OPINION OF NJOKI NDUNGU, SCJ

[104] I have had the advantage of reading the Majority decision in this appeal and I find that I can only agree with them that this Court has jurisdiction and is properly seized of the appeal. I am however, with profound respect, of a different opinion on their findings in response to the following issues:

i) Whether a member of the JSC elected under Article 171(2)(b), (c), (d), (f) and (g) ought to be vetted and approved by the National Assembly before appointment;

ii) Whether Section 15(2) of the Judicial Service Act is inconsistent with the Constitution to the extent that it gives the President a role in appointment of JSC Commissioners elected and/or nominated under Article 171(2)(b), (c), (d), (f) and (g) or for failure to require that all persons elected and or nominated as JSC Commissioners be subject to approval by the National Assembly.

I proceed to explain why.

[105] In my view, to determine whether Section 15(2) of the JS Act is inconsistent with the Constitution, three questions that come to the fore must be answered. Namely, does the President have a constitutional obligation to appoint JSC Commissioners? If the answer is in the affirmative, can the President do so without approval of the National Assembly? And, in appointing elected JSC Commissioners, will the President interfere with the independence of the JSC?

(i) Can the President appoint elected JSC Commissioners?

[106] The President as the Head of State and Government derives his powers from Article 131 of the Constitution. In that regard, 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 the Constitution. The people may exercise their sovereign power either directly or through their democratically elected representatives. Sovereign power under the Constitution is therefore, delegated to among other State organs, the National Executive (headed by the President) and Parliament.

[107] Article 132(2)(f) of the Constitution provides that *'the President shall nominate and, with the approval of the National Assembly, appoint and may dismiss in accordance with the Constitution, any other State or public officer whom the Constitution requires or empowers the President to appoint or dismiss'*.

[108] Pursuant to Article 260 of the Constitution, a State officer is interpreted to mean 'a person holding a State office.' This same provision also interprets a State

Office to mean, among other offices, a member of a commission to which Chapter Fifteen applies. Article 248(2)(e) of the Constitution, clearly stipulates that the JSC is one of the Commissions to which Chapter Fifteen of the Constitution applies, except to the extent that the Constitution provides otherwise. Therefore, all Commissioners of the JSC are State officers.

[109] Article 250 of the Constitution makes general provisions on the composition, appointment, and terms of office of Chapter Fifteen Commissions. The appointment process of members of Chapter Fifteen Commissions is in three stages, unless provided for otherwise elsewhere in the Constitution. These stages pursuant to Article 250(2) of the Constitution are: identification or recommendation for appointment in a manner prescribed by national legislation; approval by the National Assembly; and appointment by the President.

[110] A clear reading of the Majority decision is that these three stages of appointment are not mandatory and that an appointment can be concluded at the first stage of identification and recommendation, without going through the second step of parliamentary approval and the third step of appointment by the President. I disagree, as to do so, in my opinion, would be to disregard the carefully woven constitutional architectural design of separation of powers, and constitutional checks and balances between the arms of Government and the different State organs.

[111] The composition of the JSC is established under Article 171 (2) of the Constitution, as comprising the Chief Justice, who shall be the chairperson of the Commission; one Supreme Court judge elected by the judges of the Supreme Court; one Court of Appeal judge elected by the judges of the Court of Appeal; one High Court judge and one magistrate, one woman and one man, elected by the members of the association of judges and magistrates; the Attorney General; two advocates, one a woman and one man, each of whom has at least fifteen years' experience, elected by the members of the statutory body responsible for the

professional regulation of advocates; one person nominated by the Public Service Commission; and one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly. Article 172 of the Constitution provides for the functions of the JSC.

[112] It is the majority's view that Article 171 of the Constitution is self-executing. I do not agree because Chapter 15 of the Constitution also pertains to JSC and the provisions therein are applicable to it. The Constitution must always be read purposively, holistically and construed in a manner that promotes complementary processes within it. Having interrogated Articles 171 and 172 of the Constitution, I am unable to find any provision disallowing the President from appointing elected JSC Commissioners, being State officers as Commissioners. As demonstrated above, the President has a constitutional duty to appoint as Commissioner, individuals identified by the various bodies under Article 171 of the Constitution. The President has a duty to appoint JSC Commissioners both under the powers conferred to him under Article 132(4) of the Constitution and by virtue of Section 15(2) of the JS Act. There is no express exception to Article 132 of the Constitution that would exclude members of the JSC. The "reading in", by the Majority of such an exception, where there is none specifically provided for in line with Article 132, 248, and 250 of the Constitution, is legally unsound. In fact, with respect, it amounts to amending specific provisions of the Constitution (relating to appointment of State officers by the President), a function which cannot be undertaken by any Court of law.

[113] To this end, I agree with the Court of Appeal's finding which upheld the trial Court's finding that the appointment of nominees as JSC Commissioners by the President is an executive function conferred on the President by Article 132(4) of the Constitution and Section 15(2) of the JS Act. I also concur with the appellate court's conclusion that there is no constitutional invalidity in Section 15(2) of the JS Act by virtue of the President's appointing role.

[114] I, however, do find that Section 15(2) of the JS Act is inconsistent with the Constitution in as far as it purports to direct a specific timeline in which the President appoints individuals selected under Article 171; that is, "to appoint within three (3) days". This timeline, other than being extremely short and limiting, does not take into account any other necessary constitutional processes that must be carried out by the Executive and Parliament before such appointment. I will address that particular concern shortly.

(ii) Can the President appoint elected JSC Commissioners without the National Assembly's approval? Is there an exception to Article 132 or 250 of the Constitution?

[115] Having determined that the appointment of JSC Commissioners is within the realm of the President's constitutional functions, it is necessary to answer the next question. Can the President make such appointment without the National Assembly's approval? From the history of constitution-making in Kenya, it is without doubt that it was the intention of the drafters of the Constitution and of the people of Kenya that ours was going to be a presidential system, where political and administrative powers are divided between the Executive, Legislative and Judicial arms of government. Pre-2010 Constitution, the President appointed State officers without approval by Parliament.

[116] Other than specifying who shall be chairperson and members of the JSC, their term of office, and the mode of identifying representatives from the bodies listed thereunder, Article 171 of the Constitution is silent on the approval and appointment of such elected representatives. This Court has pronounced itself on the holistic interpretation of the Constitution in ***the Matter of Kenya National Commission on Human Rights*** **SC Reference No. 1 of 2012; [2014] eKLR** where it stated as follows:

> ***"[26] ...But what is meant by a 'holistic interpretation of the Constitution'? It must mean interpreting the***

Constitution in context. It is the contextual analysis of a 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 issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."

[117] In the case of the ***Attorney General & 2 Others v Ndii & 79 Others***; ***Prof. Rosalind Dixon & 7 others (Amicus Curiae)*** (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR), I spoke to constitutional silences in the following terms:

"[1188] The unsaid is influential in constitutional law. Some matters of constitutional relevance are sometimes left unaddressed. Sometimes, knowingly, or unknowingly, the drafters of the Constitution may underappreciate how much power rests in the silence around the text. Constitutional silences are functional and inevitable. Enabled by the lack of very strict textual restraints, constitutions have the capacity to grow with time, experience, societal needs, and changes, thus allowing successful constitutions to thrive. In India, for example, courts have used the doctrine of constitutional silence to expand the ambit of rights and to make democracy substantive.

[1189] The Supreme Court of India in Manoj Narula v. Union of India, 2014 (writ petition (civil) no. 289 of 2005) observed on the principle of constitutional silence:

The said principle is a progressive one and is applied as a recognized advanced constitutional practice. It has been recognized by the Court to fill up the gaps in respect of certain areas in the interest of justice and larger public interest…."

Further that:

Michael Foley in his treatise on The Silence of Constitutions (Routledge, London and New York) has argued that in a constitution "abeyances are valuable, therefore, not in spite of their obscurity but because of it. They are significant for the attitudes and approaches to the Constitution that they evoke, rather than the content or substance of their strictures (p. 10)."

[1190] This Supreme Court plays a crucial role in interpreting silences in the Constitution since it is the final interpreter of constitutional provisions. It must be cautious, though, so as to avoid judicial legislation. It must interpret silences judiciously."

[118] In my opinion, having found that Articles 171 and 172 of the Constitution are silent on the appointment of the elected members of the JSC, the Majority ought to have searched for the intention of the drafters elsewhere in the Constitution.

[119] According to Black's Law Dictionary 11th edition, 'to approve' *is to give formal sanction to; to confirm* authoritatively.' 'Approval' is defined in the Longman Dictionary to mean 'when a plan, decision, or person is officially accepted'. As stated earlier, although Article 171 of the Constitution makes provisions for the first stage, identification through an election, the same is silent on their approval and appointment. ***In the Matter of the National Land Commission,*** **SC Advisory Opinion Reference No. 2 of 2014; [2015] eKLR (*In the Matter of the National Land Commission)*** this Court was persuaded by the finding of the High Court in the case *of* ***Judicial Service***

Commission v. Speaker of the National Assembly & 8 Others, **HC Petition No. 518 of 2013; [2014] eKLR.** The High Court found that the JSC, a Chapter Fifteen Commission, is subject to Parliamentary oversight. It also held that Parliamentary oversight over the JSC was not an infringement of the Commission's independence. It held as follows:

> ***"[213] Like other constitutional commissions and independent offices, the JSC must however operate within the confines of the Constitution and the law. While enjoying financial and administrative independence, the JSC is accountable to Parliament. The JSC is also a partner to Parliament in supporting constitutional democracy.***
>
> ***...***
>
> ***[237] In carrying out its oversight role, Parliament must respect the independence of the JSC and other independent offices. This is particularly important because of the pivotal role assigned by the Constitution to the JSC to facilitate and promote the independence and accountability of the Judiciary under Article 172. As we have stated before, the JSC plays a complementary role to Parliament in overseeing the entire Judiciary. It is not a competitor or intended to be a competitor against Parliament. It is ideally a partner in the Constitutional scheme***."

[120] This Court, in ***the Matter of the National Land Commission***, opined that the independence of Commissions does not exempt them from being overseen, and held accountable in their operations. I add that the independence of JSC, like any other Chapter Fifteen Commission, does not exempt the appointment of its elected individuals from going through the approval process under Article

250(2) of the Constitution to ensure compliance with Articles 10 and 73 of the Constitution, considering that the JSC is not self-executing.

[121] Learned Counsel for the appellant urged that a commissioner elected under Article 171 of the Constitution need not undergo the approval by the National Assembly having already been elected in a 'free and fair election'. The Majority agree with them. On my part, I find this contention difficult to understand and support particularly when I probe the definition and purpose of such an election as provided under Article 171 of the Constitution. I find that it is necessary to determine whether an election anticipated under Article 171 of the Constitution, is the same as that anticipated under Article 73(2) (a) of the Constitution. Does the Supreme Court, the Court of Appeal, the High Court, and the LSK have criteria for approving or vetting their nominees? Do those nominating bodies afford ordinary Kenyans an opportunity to participate, as required under Article 10 of the Constitution, in any way in the appointment process?

[122] In my opinion, a free and fair election in the context of Article 73(2) of the Constitution is the one referred to under Article 81(e) of the Constitution. A free and fair election referred to under Article 73(1) concerns representation of the people – that is an election by *universal suffrage*; and not representation of bodies under Article 171 of the Constitution, that is, an election by an *exclusive* set of individuals of 'one of their own'. These two types of elections are manifestly and fundamentally different, as is their constitutional meaning and import. Importantly, Chapter Six of the Constitution separates appointed State officers from elected State officers by disallowing the former from holding office in a political party – a clear indication of the different processes of choosing appointive and as opposed to purely elective positions provided under Article 81 of the Constitution. The provisions of Chapter six that apply to appointed State officers are the ones that apply to Commissioners. Such that Commissioners, including those of the JSC *cannot* hold office in a political party, unlike a member of Parliament, a County Governor or a Member of County Assembly who fall within

the constitutionally recognized electoral system and processes under Article 81 of the Constitution. The election of JSC Commissioners does not fall under this detailed electoral system set up under the Constitution; this is because they enter into their offices through an appointive process provided by Article 248, 250 as read with Article 171 of the Constitution, rather than the elective process by universal suffrage as defined under Article 81 of the Constitution.

[123] This appointive process therefore, as I stated earlier, is a combination of three mandatory steps: (1) Nomination by the various bodies (whose selection process of their nominee is an elective process by their select members – not the public); (2) Public vetting and approval of those nominees through elected representatives of the people and finally (3) Appointment of those nominees by the Head of the State after which they perform duties as State officers.

[124] The crux of the arguments made by the JSC and the LSK, on this particular point, has been that no one should interfere with the decision of the nominating bodies under Article 171 of the Constitution and subsequent recommendations by the JSC. Further that the President should simply "appoint" the nominees upon receipt of the names. However, for me, the issue is bigger than the President's appointing powers: it concerns the rationale for, or mischief for restraining the President's power to make senior public appointments as previously was in the repealed Constitution. It is well known in our Constitutional history that it was the views of the people that informed the structure of governance in the Constitution-making process. In the Final Report of the Constitution of Kenya Review Commission (CKRC Final Report) (at Page 190), the people had the following to say about the Legislature in the Constitution:

***"The people told the Commission*:**

(a) that Parliament should

i) take over the vetting and approval of senior appointments to various constitutional and public offices from the President, for

example, the Attorney General, the Auditor-General, Permanent Secretaries, the Chief Justice, Judges, and so on;"

[125] Thereafter, the Commission recommended that one of the functions of Parliament should be: ***"to act as a watchdog over the Executive; this would be an effective system of checking the excesses of the executive; vet and approve key presidential appointments to public and other constitutional offices; for instance, appointments of the Attorney General, the Auditor General, permanent secretaries; the Chief Justice, heads of commissions, and so on;"***

[126] Further, when collecting views on the nature of the Executive that the people of Kenya wanted, the CKRC Final Report at page 198 states that people wanted: ***"the powers of the President to be curtailed; Kenyans felt the President should not have the exclusive power to appoint senior government officers; it was suggested that for many of the appointments be vetted by Parliament;***" Furthermore, the Commission at page 320 of its final report observed that in the repealed Constitution, Commissions enjoyed little independence as appointments were made by the President. It is for this reason that it was recommended at page 324 that the members of Commissions should be appointed by the President subject to the approval of Parliament through the relevant Parliamentary Committee.

[127] Article 124(4) of the Constitution sets the procedures that Parliament shall follow when approving appointments under the Constitution. In that context, such appointments shall be considered by a committee of the relevant house; recommendations of that committee tabled in the House for approval; and the proceedings of the committee and the House made open to the public. Parliament's role in vetting presidential appointments has also been legislated in the Public Appointments (Parliamentary Approval) Act. Under the Act, a person who has been proposed or nominated for appointment to a public office, shall not be

appointed unless the appointment is approved or deemed to have been approved by Parliament. From the foregoing legal provisions, it is clear to me that Parliamentary vetting serves an important check on the Presidency; ensures that all nominees are truly qualified for the job they have been nominated for; allows the opportunity for public participation and allows the President the ability to choose from qualified people to work for the government.

[128] Therefore, if I were to agree with the submissions of the JSC and the LSK, as have the Majority, that is, allowing the President to appoint JSC nominees without first being vetted by Parliament, it would be contrary to the intention of the drafters of the Constitution and indeed against the will of the people. It may also have the effect of unwittingly opening a door, a Pandoras box, relating to the manner in which the President appoints other commissioners and other public and State officers. In that context, it is my finding that the President, under Articles 132 and 250 the Constitution, does not have an option of appointing JSC Commissioners without the approval of the National Assembly. If he did so, he will be depriving Kenyans their right to participate in the appointment of such commissioners, a role played by Parliament pursuant to Articles 1(2) & (3), 124(4), and 250 of the Constitution. All constitutional authority must derive and can only be held and exercised on behalf of the people. The constituent power of the people must be reflected in the design of all aspects of the Constitution and particularly, in appointments, control and dismissal of holders of State offices such as those of JSC Commissioners.

[129] Furthermore, having perused the Final Report of the Committee of Experts on Constitutional Review, I find that it was never the intention of the drafters of the Constitution to exclude the members of the JSC from the approval process by the National Assembly. The justification for involving the National Assembly in the approval of JSC commissioners is cemented by Article 95(5) (a) of the Constitution which accords the National Assembly the role of reviewing the conduct in the office of the President, Deputy President and other State officers and initiates the process

of removing them from office. Additionally, Article 251(2) of the Constitution provides that a person desiring the removal of a member of a Commission or of a holder of an independent office on any ground may present a petition to the National Assembly setting out the alleged facts constituting that ground. Therefore, it will be illogical to involve the National Assembly in the removal of JSC Commissioners but exclude it in their appointment.

[130] It is obvious from the text of the foregoing constitutional provisions, that the contention by the Majority, that Article 171 is self-executing and exempts selected individuals under Article 171 of the Constitution from undergoing parliamentary approval is utterly erroneous. Indeed, I find the Majority's position that out of the *eleven* JSC Commissioners, only *six* of them can become state officers by mere act of an election of their peers, *without* the approval of Parliament and *without* the appointment of the President, a constitutional absurdity. Consequently, I am unable to agree with the Majority that, having been elected by his peers in the Court of Appeal as a member of the JSC, the 3rd respondent – Justice Mohammed Warsame - was not subject to approval by the National Assembly.

[131] The Majority agrees with both the appellant and the JSC on the assertion that the President's appointing role of JSC Commissioners and the National Assembly's approval role will interfere with the independence of the Judiciary and that of the JSC. Again, I find I cannot agree with them on this. In interrogating their stated position, I must ask and answer two questions. Firstly, whether the provisions on Judicial Authority and independence of the Judiciary as provided under Articles 159 and 160 of the Constitution extend to the JSC? Secondly, whether the JSC is part of the Judiciary? The answers to both questions are in the negative. In the ***Matter of the National Land Commission*** this Court clearly demarcated the role and place of constitutional commissions, as from Paragraph 171, as follows:

"[171] The definition clauses of the Constitution, therefore, leave no doubt that commissions are State organs. Although many bodies mentioned in the Constitution are categorised as State organs, a plain reading of Article 1(3) shows only three specific State organs in which the people's sovereign power is vested: the Executive, the Legislature and the Judiciary. This perception is further supported by the description of the distinctive roles of the three State organs. Article 94(1) states that legislative authority is derived from the people and, at the national level, is exercised by Parliament; Article 129 affirms that Executive authority is derived from the people; and Article 159 provides that Judicial authority is derived from the people, and vests in and is to be exercised by courts and tribunals…

[172] The wording of Chapter 15 of the Constitution, in our perception, does not signal the vesting of the sovereign power of the people in commissions and independent offices. This is not to say that commissions and independent offices are excluded from exercising public power. Indeed, as State organs, they are part of Government, and one of their core mandates is to protect the sovereignty of the people; so they ought to protect the sovereign power of the people, from which the Executive, the Judiciary and the Legislature derive their authority: hence the depiction 'people watchdogs' or 'constitutional watchdogs'. They are to be distinguished from the three arms of Government through the functions they discharge." (Emphasis added)

On the independence of Commissions, this Court, in the same matter, considered that issue comprehensively and stated as follows:

"[184] It emerges that independence is a pivotal feature in the newly- established commissions and independent offices. This Court, in In Re IIEC and the CCK case, and the High Court in JSC v. Speaker of the National Assembly and Others, and in Independent Policing Oversight Authority & Another, have defined certain key features of the independence of commissions. From the precedent in the earlier decisions, we would set out such principles as are coming forth, in relation to the object of independence in a commission.

- ***Functional independence: this entails commissions exercising their autonomy through carrying out their functions, without receiving any instructions or orders from other State organs or bodies. This has also been referred to as administrative independence (See JSC v. Speaker of the National Assembly and Others; and the South African Constitutional Court decision in New National Party of South Africa.) Functional independence is in line with the general functions and powers of commissions, as provided under Articles 252 and 253 of the Constitution.***
- ***Operational independence: this includes functional independence, and is a safeguard or shield for independence, manifested through the procedure of the appointments of commissioners; composition of the commission; and procedures of the commission. Article 255(1)(g)[11] provides an elaborate procedure for the amendment of the Constitution in matters dealing with the independence of the Judiciary, as well as commissions and independent offices to which Chapter 15 applies.***
- ***Financial independence: it means that a commission has the autonomy to access funds which it reasonably requires for the***

conduct of its functions. However, according to Article 249(3) of the Constitution, Parliament is mandated to set for the commission the budget considered adequate for its functions.

- ***Perception of independence: this means the commissions must be seen to be carrying out their functions free from external interferences. In CCK and Independent Policing Oversight Authority & Another, this Court and the High Court respectively held that the perception of independence is crucial in showing proof of independence.***
- ***Collaboration and consultation with other State organs: it emerges from precedent, that independence of commissions and independent offices does not, perforce, entail a splendid isolation from other State organs. This is demonstrated by Article 249(1), which expressly entrusts the National Land Commission with the duty to "protect the sovereignty of the people", "secure the observance by all State organs of democratic values and principles", and "promote constitutionalism". <u>By the broad and diffuse nature of such a mandate, commissions acting in isolation, have no capacity to discharge their mandate.</u> So they have to consult with other State organs, and work with such State organs in co-operation and harmony. The Commissions are required to promote the national values and principles entrenched in Article 10 of the Constitution. ……***

[186] <u>Clearly, independence, as an attribute of the various constitutional commissions, is not an end in itself</u>. Ultimately, what matters to the people, from the governance-docket, is the operational benefits that flow from the role of the public agency in question." (Emphasis Added)

[132] Thus, the independence of the Judiciary is provided for under Article 160(1) of the Constitution and is in respect of the judicial authority exercised by the Courts under Article 159 of the Constitution. The constitutional mandate of the Judiciary and the JSC should never be *confused*. The Judiciary is an arm of Government; the JSC is a Chapter 15 service providing Commission whose functions are clearly set out including recommending to the President persons for appointing as judges; reviewing and making recommendations on the conditions of service of Judges, Judicial officers, and staff of the Judiciary; appointing, receiving complaints against, investigating and removing from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the judiciary; preparing and implementing programmes for the continuing education and training of Judges and Judicial Officers; and advising the national government on improving the efficiency of the administration of justice.

[133] As demonstrated above, and provided in the Constitution, the JSC is meant to promote and facilitate the independence and accountability of the judiciary as well as the efficient, effective and transparent administration of justice. However, the JSC does not itself enjoy the independence of the Judiciary enshrined under Article 160 of the Constitution. This is the preserve of an arm of Government known as the Judiciary. The JSC does not exercise judicial power, and as such cannot benefit from the independence of the Judiciary. (In the same way that the Parliamentary Service Commission does not command legislative authority, which belongs exclusively to Parliament.)

[134] The JSC does however, enjoy the protection and independence under Article 249 of the Constitution. This independence however is not unlimited. The JSC like other Chapter Fifteen Commissions must make an annual report to Parliament and the National Assembly; further the President or any of the Houses of Parliament can require the Commission to report to them on a particular issue. Therefore, this 'independence' of Commissions is distinct from that provided to the Judiciary under Article 160 of the Constitution. Additionally, the independence of

Commissioners is not affected in any way by the President's appointing role, the National Assembly's approval and removal, reporting processes of those Commissioners to the President or Parliament, all of which are expected and anticipated of all Chapter Fifteen Commissions provided for under Articles 248, 250, 251 and 254 of the Constitution.

[135] It is therefore clear to me that there is no constitutional provision exempting elected JSC members from undergoing the approval stage by the National Assembly, when all other nominees for Chapter Fifteen Commissioners do so. There can be no justification for this. From the appellant's submissions, I am not convinced that the respective nominating bodies can effectively vet their own nominees and remain objective. Therefore, I differ with Majority position that the President's appointing role upon approval by Parliament will interfere with the independence of the Judiciary and that of the JSC. This is because the approval process is meant, firstly, to check the President's powers of appointment; secondly, to ensure that the members nominated to serve at the JSC meet the integrity test under Chapter Six of the Constitution, and thirdly, to ensure strict compliance of the national values and principles of governance as stipulated in Article 10 of the Constitution, particularly, participation of the people, integrity, transparency and accountability. This compliance with national values is specifically provided for in the appointment and approval of Chapter 15 Commissions under Article 250(4) in the following terms:

> "***250(4). Appointments to commissions and independent offices shall take into account the national values referred to in Article 10, and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya*".**

[136] Therefore, all members of Chapter Fifteen constitutional commissions, the JSC not excepted, must therefore be subject to the approval process by the National

Assembly. This, I state with a singular qualification that, in view of the fact that the Commissioners elected under Article 171(b), (c) and (d), serve concurrently as Judges and Judicial officers, roles separate and distinct from that of other Commissioners, the vetting processes set out by the National Assembly must be read holistically with other Constitutional provisions including Article 160 of the Constitution. Such that, for Judges such as the 3rd respondent, the vetting ought to be appropriately tailored to ensure and safeguard the sanctity of decisional independence of such nominees in strict compliance with the provisions protecting the Judiciary in accordance with Article 160 of the Constitution. In addition to and in conformity with this edict, the necessary and relevant amendments to the Public Appointments (Parliamentary Approval) Act, would then be made before any Judge or Judicial Officer who is nominated to the Commission is subjected to the approval process. Another notion, on the flip side, is for Parliament to rethink the composition of the JSC: it may be more prudent to have retired Judges or Judicial officers as its members, instead of the current sitting members of the Judiciary, as this would dispose of the difficulty of dealing with the provisions of Article 160 in the approval process.

[137] I would have, for the foregoing reasons, after having considered the constitutional questions in this matter as outlined above, made the following orders:

i. ***That Judgment of the Court of Appeal is hereby upheld only to the extent that it finds that under Section 15(2) of the JS Act and Article 132 of the Constitution, the President has a constitutional duty, as a Head of State to make State and public appointments, including that of appointing JSC Commissioners.***
ii. ***A declaration is issued declaring Section 15(2) of the JS Act unconstitutional only in as far as it directs the President to appoint Commissioners nominated through elections within three days, and without approval of the National Assembly.***

[138] However, the Majority have a different view having evaluated this matter from a different perspective, which in my opinion and with the utmost respect, undermines the constitutional architecture and design with regard to the approval processes of public appointments. Thus, I am unable to agree with them. However, as my views are in the minority, the decision of the Court is that of the majority.

H. ORDERS

[139] In light of the above, we order and declare that:

i) The Petition dated 22nd November, 2019 has merit and is hereby successful:

ii) There is no basis, constitutional or legal for a member of the JSC elected or nominated under Article 171(2)(b), (c), (d), (f) and (g) to be vetted and approved by the National Assembly before appointment:

iii) Only those commissioners of the JSC upon whom there is a constitutional obligation for vetting before appointment have to be approved by the National Assembly:

iv) To the extent that Section 15(2)(b) of the JS Act donates to the President the power to appoint elected and nominated members of the JSC under Article 171(2)(b), (c), (d), (f) and (g), it is void for being inconsistent with Article 171 of the Constitution:

v) Parties to bear their own costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **31st** day of **March 2023.**

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....	.....
S.C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA