



**Judicial Service Commission v National Assembly & 2 others (Petition 244 of 2017)
[2019] KEHC 10902 (KLR) (Constitutional and Human Rights) (31 July 2019) (Judgment)**

Judicial Service Commission v National Assembly & 2 others [2019] eKLR

Neutral citation: [2019] KEHC 10902 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 244 OF 2017**

WA OKWANY, J

JULY 31, 2019

BETWEEN

JUDICIAL SERVICE COMMISSION PETITIONER

AND

THE NATIONAL ASSEMBLY 1ST RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The Petitioner herein, an independent commission established under Article 171 of the Constitution, filed the instant petition against the Respondents on 24th May, 2017 seeking the following orders:
 - a) A Declaration that Commissioners of the Judicial Service Commission are not personally liable for any acts done in good faith in the performance of their constitutional mandate under Article 171 of the Constitution and the Judicial Service Act.
 - b) A Declaration that the decision of the National Assembly of 11th February, 2016 adopting the Report of the Public Accounts Committee PAC in Recommendation 3 of its Report that members of the Judicial Service Commission ought to take personal responsibility and be surcharged for the allowances paid to them contravenes Article 249 and 253 of the Constitution and is therefore null and void.
 - c) A Declaration that the decision of the Public Accounts Committee in Recommendation 18 of its Report recommending that members of the Finance and Administration Committee of



the JSC, Commissioners Smokin Wanjala, Mohamed Warsame, Ahmednasir Abdullahi, Rev. Samuel Kobia, Christine Mango and Emily Ominde should be individually investigated by the 2nd Respondent violated Articles 250(9) and 253 of the Constitution and is therefore null and void.

- d) A Declaration that the decision of the National Assembly of 16th February, 2016 adopting the Report of the Public Accounts Committee in Recommendation 18 was made in violation of Article 47 of the Constitution and is therefore null and void.
- e) A Declaration that the decision of the National Assembly to investigate members of the Finance and Administration Committee of the JSC: Commissioners Smokin Wanjala, Mohamed Warsame, Ahmednasir Abdullahi, Rev. Samuel Kobia, Christine Mango and Emily Ominde is actuated by ill motives and is an attempt to circumvent the judgement of the High Court and is therefore null and void.
- f) A Declaration that the decision of the 2nd Respondent to act on the recommendations of the 1st Respondent violates Article 2(4) and 10 of the Constitution.
- g) An Order of Certiorari do issue to remove into this Honourable Court and quash the decision of the 1st Respondent as contained in Recommendations 3 and 18 of the 1st Respondent's Public Accounts Committee Report on Judicial Service Commission (JSC) and the Judiciary Special Audit Report of May 2014 as adopted by the 1st Respondent on 16th February, 2016.
- h) An Order of Prohibition do issue restraining the 2nd Respondent from investigating the members of the Petitioner's Finance and Administration Committee: Smokin Wanjala, Mohamed Warsame, Ahmednasir Abdullahi, Rev. Samuel Kobia, Christine Mango and Emily Ominde as recommended by the National Assembly Public Accounts Committee Report on Judicial Service Commission (JSC) and the Judiciary Special Audit Report of May, 2014 as adopted on 16th February, 2016.
- i) This Honorable Court be pleased to issue any other appropriate orders or reliefs as it may deem fit and just.
- j) Costs of the Petition.

Petitioner's case

- 2. A summary of the Petitioner's case is that following the dismissal of the former Chief Registrar of the Judiciary (CRJ), Gladys Boss Shollei, by the Petitioner (JSC) on grounds of financial impropriety, the Public Accounts Committee (PAC) of the National Assembly, in exercising its oversight role on the expenditure of public funds as envisaged under Standing Order 205(2), requested the Auditor General to carry out a financial audit of the Petitioner herein for the years 2011/2012 and 2012/2013.
- 3. The said request for audit was in respect to the payment of sitting allowances to the Petitioner's members and the financial impropriety in respect to Kshs. 2,207,400/- alleged to have been presided over by the Chief Registrar of the Judiciary as presented by the Auditor General in May, 2014. It was stated that in conducting its inquiry, PAC held a total of twelve (12) meetings during which it interrogated twenty five (25) witnesses including two former members and a current member of the JSC on the audit issues raised by the Auditor General. At the close of the inquiry, PAC's findings were as follows; that Petitioner had sanctioned irregular payments of Kshs. 9,800,000/- in allowances to non-commissioners who attended JSC meetings; that the Petitioner sanctioned irregular payment of Kshs. 1,600,000/- to commissioners who attended meetings that had not been properly constituted in



- accordance with Section 22(5) of the Judicial Service Act, 2011; and that although the Petitioner kept minutes, some minutes were not confirmed thereby casting aspersion as to their authenticity, creativity and reliability.
4. Regarding culpability, the PAC found that the Petitioner exceeded its powers by purporting to approve payments to various suppliers, thereby going beyond its oversight mandate to delve into operational issues of the Judiciary. PAC also found that in a meeting held on 28th August, 2013, the Petitioner's Finance and Administration Committee approved payment to twelve (12) suppliers amounting to Kshs. 51,815,435/- and recommended that the said committee members ought to be held responsible for by-passing financial management procedures and directing approval of payments irregularly thus occasioning losses. PAC also found that the Petitioner went ahead to directly procure offices at Mayfair Centre and instructed the then Registrar of the High Court to effect the transaction and that rent for the premises in the sum of Kshs. 7,392,000/- was paid upfront two years before occupation. PAC found that some of the JSC meetings were not properly constituted in accordance with section 22(5) of the Judicial Service Act yet the Commissioners went ahead to irregularly approve Kshs. 1,600,000/- in allowances to themselves which irregularly paid allowances PAC recommended, should be recovered from the various affected Commissioners and that the said commissioners namely; Commissioners Smokin Wanjala, Mohamed Warsame, Ahmednasir Abdullahi, Rev. Samuel Kobia, Christine Mango and Emily Ominde should be individually investigated for their roles in some of the financial improprieties and irregularities at the JSC.
 5. The National Assembly thereafter adopted the PAC Report on the Judicial Service Commission and the Judiciary Special Audit Report of May 2014 (hereinafter referred to as "the PAC Report") with its recommendations on 16th February, 2016 thereby precipitating the instant petition.
 6. The Petitioner contends that in cognizance of the heavy constitutional mandate and in accordance with the Judicial Service Act, it established three committees namely; the Finance and Administration Committee, the Human Resources Committee and the Legal Technical Committee and in addition established ad-hoc panels for purposes of court visits throughout the country. The petitioner states that the said Committees and Panels discharged their mandates and tabled reports which were considered, deliberated upon and adopted with or without amendments at the meetings of the full commission and records to that effect were availed to the Public Service Commission. The petitioner further contends that the PAC Report is premised on an incomplete audit of the Petitioner's transactions in the financial years 2011/2012 and 2012/2013 when the Petitioner was embarking on its transformative mandate. It states that in the period under review, the Public Service Commission (PSC) was in charge of determining the remuneration and allowances of members of the Commission as the Salaries and Remuneration Commission established under the new Constitution had not become operational and that the PSC had not placed a cap on the number of meetings that the members of the JSC could convene in appreciation of the heavy mandate bestowed upon it.
 7. The Petitioner further contends that all full meetings of the Commission were convened by notice as required under Section 22(1) of the Judicial Service Act, 2011 and that no evidence was tendered before the PAC to show that any of the meetings was convened without the knowledge of the Chief Justice. On the recommendation to hold the members of the Finance and Administration Committee personally liable for impropriety, the Petitioner contended that Article 250(9) of the Constitution confers constitutional immunity to the Commissioners and holders of independent offices for actions and decisions taken, in good faith, in the performance of their functions. The Petitioner contends that the Commissioners were never called to appear before the Committee contrary to Article 47 of the constitution since there were no allegations made against them and that the recommendation that they be held personally liable was actuated by ulterior motive.



8. At the hearing of the petition Mr. Issa appearing together with Mrs. Ahomo for Petitioner highlighted their written submissions dated 5th June, 2018 and submitted that by virtue of Article 165(3)(d)(ii) of the Constitution, the present petition was properly before this court. They relied on the South African case of *Doctors for Life International –vs- Speaker of the National Assembly & Others* (CCT 12/05) [2006] ZACC 11 which was cited with approval in the Supreme Court Case of *Speaker of the Senate & Anor –vs- Hon. Attorney General & Anor & 3 Others* Advisory Opinion Reference No. 2 of 2013 (2013) eKLR where the South African Constitutional Court addressed itself on the supremacy of the constitution. They further relied on the case of *Judicial Service Commission –vs- Speaker of the National Assembly* (2014) eKLR in which the court cited, with approval, the South African case in *De Lille & Anor –vs- The Speaker of the National Assembly* (1998) (3) SA 430(c) and held that National Assembly is subject to the Supremacy of the Constitution and only exercises powers vested on it by the constitution. They also cited the case of *Judicial Service Commission* (supra) where the court stated that from the provisions of Article 95(5), 251 and 125 of the Constitution, the scrutiny and oversight function, primarily discharged through Parliamentary Committees, is intrinsically a quasi-judicial function which is subject to supervisory jurisdiction of the court in terms of Article 165(6).
9. On the constitutional mandate of the Petitioner, counsel relied on Article 172 of the Constitution and Section 3 and 14 of the Judicial Service Act which confers power upon the Petitioner to perform some of its functions necessary for the day to day management of the commission through delegation to committees with a quorum of three commissioners. On the right to fair administrative action, counsel submitted that in carrying out its oversight mandate which is quasi-judicial in nature, the PAC was bound by the provisions of Article 47 of the Constitution to accord the JSC fair administrative action as was stated in the *Judicial Service Commission* case (supra). Further, they submitted that all the meetings of the Finance and Administration Committee of the JSC were properly convened with notice as required under Section 22 (1) & (2) of the Judicial Service Act and in the absence of evidence to the contrary, they submitted that any allowances the Commissioners drew from the said meetings were properly paid to them and that the recommendation to have the Commissioners surcharged is irrational.
10. On protection of the Commissioners of the JSC from personal liability, counsel relied on the provisions of Article 226(5) of the Constitution which protects the commissioners from sanctions for decisions taken in good faith in the performance of their constitutional duties which provision is mirrored in Section 45 of the Judicial Service Act. They further noted that in October 2013, the Clerk of the National Assembly wrote to six commissioners of the JSC, the members of the Finance and Administration Committee forwarding a petition by one Riungu Nicholas Mugambi seeking their removal and when JSC's counsel then appeared before the Departmental Committee on Justice and Legal Affairs of the National Assembly, the Committee declined to hear him and proceeded to prepare its report for presentation before the National Assembly for adoption thereby leading the Petitioner to file High Court Petition No. 518 of 2013. It was therefore submitted that recommendation 18 does not flow from the findings in the report and has no legal or factual basis.
11. It was submitted that PAC was required to act judiciously and accord the six Commissioners a fair hearing especially where it made a finding for their investigation by the EACC for their roles in some of the alleged financial improprieties and irregularities at the JSC.

The 1st Respondent's Case

12. In response to the petition, the 1st Respondent filed grounds of opposition dated 6th June, 2017 together with a Replying Affidavit by Michael Sialai, the Clerk of the National Assembly, sworn on 31st July, 2017. He avers that pursuant to the National Assembly Standing Order No. 205(2), PAC is



- responsible for the examination of the accounts showing the appropriation of the sum voted by the House to meet the public expenditure and that PAC executes its mandate on the basis of annual and special audit reports.
13. He also avers that following the Committee's request for a financial audit of the Petitioner for the years 2011/2012 and 2012/2013, the Committee received a report from the Auditor General in May 2014 who upon examining the JSC minutes, payment records and documentation, attendance lists, payment vouchers and payees of sitting allowances, cited several financial improprieties. He further avers that PAC held several meetings and interrogated 25 witnesses including members of the Finance and Administration Committee of the Petitioner regarding the Auditor General's audit queries before preparing its report which was later adopted by the National Assembly.
 14. He states that the report made several recommendations as follows; that an audit of all meetings of the JSC to be undertaken; that the responsible Commissioners of the JSC surcharged and that the members of the Finance and Administration Committee of the JSC be individually investigated for their roles in some of the financial improprieties and irregularities at the JSC. He contends that the recommendations were in line with the mandate of PAC on oversight over national revenue and expenditure as provided in Articles 95(4)(c) and 95(5)(b) of the Constitution, and further, that the recommendations were to be acted upon by another independent body, the 2nd Respondent herein.
 15. He maintains that that a person aggrieved by parliamentary proceedings cannot apply for judicial review except where an Act of Parliament is unconstitutional as was held by the Court of Appeal decision in Civil Appeal No. 157 of 2009. It is the 1st respondent's case that this court should not prevent the National Assembly from undertaking its constitutional obligations as it goes against the important tenet of Parliament's oversight role and that the orders sought violate the principles of the Constitution as they seek to bar institutions created by the Constitution from discharging their mandate.
 16. He further states that any person aggrieved by the contents of a report adopted by a House Committee has the right in the first instance to petition the House under Article 119 of the Constitution challenging the decision which right the petitioner did not exercise. Accordingly, they contend that the jurisdiction of this Honourable Court can only be invoked in the event of a breach of the constitution which the 1st Respondent contends has not been proved.
 17. At the hearing of the petition, Mr. Angaya holding brief for Ms. Otieno Advocate for the 1st Respondent submitted that the process leading to the adoption of the Public Accounts Committee Report (PAC Report) was fair and constitutional. Counsel submitted that the Public Accounts Committee received a report from the Auditor General in May 2014 following the Committee's request of a financial audit of the Petitioner for the years 2011/2012 and 2012/2013 and held several meetings and interrogated a total of 25 witnesses regarding the audit queries thereto and subsequently prepared a report.
 18. Counsel submitted that the PAC report consisted of the Auditor General's findings, evidence from witnesses who included members of the commission and the committee's recommendations were made in line with the mandate of Public Accounts Committee of the National Assembly on oversight of the JSC.
 19. It was submitted that the National Assembly followed the letter and spirit of the law when preparing, deliberating and adopting the PAC Report which is established at Standing Order 205 of the National Assembly Standing Orders (3rd Edition). Counsel cited the case of the Judicial Service Commission – vs- Speaker of the National Assembly Petition No. 518 of 2013 on the oversight role of Parliament and



submitted that even though the Constitution protects constitutional commissions from interference by other governmental bodies, the same Constitution provides for prudent and responsible use of public money pursuant to Article 249(2) of the Constitution. He further submitted that if aggrieved by any contents of the report adopted by a House Committee, the Petitioner had the right, in the first instance, to appeal against the decisions, which right the Petitioner did not exercise and is therefore guilty of undue delay.

20. On whether this court ought to delve into the merits of the PAC report, counsel submitted that based on the orders sought, this court is limited to a review of the process employed by the 1st Respondent that led to the adoption of that report and therefore cannot delve into the substance or merits of the report as the Petitioner invites the court to do. Accordingly, the jurisdiction of this court may only be invoked in the event of an excess of jurisdiction by way of breach of the Constitution which burden the Petitioner has failed to discharge.
21. Counsel submitted that where the Constitution has reposed specific functions in an institution or organ of state, the court must give those organs sufficient leeway to discharge their mandate and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the Constitution as was espoused by the Supreme Court in the case of *Justus Kariuki Mate & Anor v Martin Nyaga Wambora & Anor* [2017] eKLR and the Court of Appeal in the case of *Pevans East Africa Limited & Anor v Chairman, betting control and Licensing Board & 7 Others* Civil Appeal No. 11 of 2018.
22. Counsel urged the court to be guided by the pronouncement of the Supreme Court in *Speaker of the Senate & Anor v Attorney General & 4 Others* (2013) eKLR for the proposition that courts will not question each and every procedural infraction that may occur in either of the Houses of Parliament. It was argued that parliamentary privilege which underpins the independence of the legislature does not allow for decisions of either Houses or its Speakers to be questioned by any court and therefore that the instant petition violates the principles set out by the Court of Appeal in the case of *John Harun Mwau v Dr. Andrew Mullei & Others* Civil Appeal No. 157 of 2009. Counsel further emphasized on the principles of separation of powers and the fact that Members of Parliament should not have to look over their shoulders when conducting debates in Parliament as was stated in the case of *Okiya Omtata Okoiti v The Attorney General & 5 Others* (supra).
23. On whether it was unconstitutional for members of the Petitioner's commission to be investigated individually, counsel submitted that Article 250(9) does not give the commissioners a blanket protection for acts done while in office and that in the event of a breach of Chapter 6 of the Constitution action ought to be taken against such a commissioner in accordance with the law.
24. Counsel further argued that it was the Petitioner's duty to prove that the meetings were indeed properly constituted and it was not enough to merely state that members of independent commissions are not liable for acts or omissions done in good faith. He added that the PAC report was prepared pursuant to the oversight role of Parliament over other state organs and that the present petition is an outright attempt to circumvent the law as it seeks to bar the 2nd Respondent from undertaking its mandate of ensuring integrity in public and independent offices. He therefore urged the court to dismiss the petition as it does not disclose a single claim that the Constitution has been violated, is baseless and an abuse of the court process.

The 2nd Respondent's Case

25. The 2nd Respondent opposed the Petition through the Replying Affidavit sworn by Michael Kasilon who avers that the 2nd respondent is under the provisions of Section 11(1)(d) of the Ethics and Anti-



- Corruption Act, 2011 mandated to investigate and recommend to the Director of Public Prosecutions, prosecution for any acts of corruption while Section 13(2) (c) of the same Act empowers it to conduct investigations on its own initiative or on a complaint made by any person. He states that on 18th October, 2013 the 2nd respondent received a report, through the media, to the effect that members of the Judicial Service Commission had received Kshs. 125 Million in two and a half years as allowances for unauthorized meetings which report prompted the Commission to commence investigations into the aforesaid allegations and that in the course of the investigations it obtained a Special Audit Report of the JSC and the Judiciary that had been prepared by the Office of the Auditor General in May, 2014.
26. He further avers that the 2nd respondent is under Section 25 of the Anti-Corruption and Economic Crimes Act, 2003 obligated to investigate all reports of alleged corruption and give reasons for not investigating them and that Article 226(3) of the Constitution empowers the Auditor General to audit the accounts of all government and state organs while Section 39(2) of the Judicial Service Act, 2011 obligates the Chief Registrar of the Judiciary to submit, to the Auditor General, the accounts of the Commission and the Judiciary for the financial year.
 27. He contends that the Commission later learnt, from the Standard Newspaper's edition of 12th February, 2016 that Members of Parliament wanted top judges and members of the JSC probed over graft. He states the Commission received a letter from the Office of the Director of Public Prosecutions, forwarding a copy of the Report of the Public Accounts Committee on Special Audit Report of the Judicial Service Commission and the Judiciary of May 2014 which report required the Commission to undertake speedy investigations into the matter pursuant to recommendations of the said report. He further avers that pursuant to Article 95(4) (c) and 5(b) of the Constitution, one of the key roles of the National Assembly is to exercise oversight over national revenue and its expenditure and oversight over state organs.
 28. He states that section 39(2) of the Judicial Service Act, 2011 provides that the accounts of the Commission and the Judiciary shall be audited in accordance with the provisions of the Public Audit Act, 2003 which further provides for the submissions of the Auditor General's Reports to the National Assembly which therefore had jurisdiction to inquire into the finances of the Petitioner. He maintains that an inquiry into the petitioner's financial affairs is therefore not an infringement on the independence of the Judiciary and the recommendations of the National Assembly were not irrational since they were predicated upon the Audit Report submitted by the Auditor General. The 2nd respondent urged the court to draw a distinction between the oversight functions of the National assembly and the investigative functions and powers of law enforcement agencies such as the 2nd Respondent.
 29. It is the 2nd respondent's case that it is entitled to investigate any report or allegation of corruption or economic crime irrespective of the findings and/or recommendations of the National Assembly or other public oversight bodies and further, that the PAC Report does not violate the provisions of Article 250(9) of the Constitution and Section 45(1) of the Judicial Service Act as a determination as to whether or not the members of the Judicial Service Commission acted in good faith in the conduct of their duties can only be made after their actions have been interrogated through an investigation. Reliance was placed on the provisions of Article 226(3) of the Constitution which stipulates that a public officer who approves and/or directs the unlawful use of public funds personally liable.
 30. It was further averred that even though Article 249(2)(b) of the Constitution provides for the independence of the constitutional commissions and independent offices that does not mean that such offices are not accountable to anyone.



31. At the hearing of the petition, Mr. D. K. Ruto, appearing for the 2nd Respondent, submitted that the report of the PAC does not violate the provisions of Article 250(9) of the Constitution and Section 45(1) of the Judicial Service Act since a determination as to whether or not the affected members of the Judicial Service Commission acted in good faith in the conduct of their duties can only be made after their actions have been interrogated through an investigation. It was his submission that Article 250(9) cannot be read in isolation but that a holistic reading of the Constitution would reveal that the concept of personal responsibility is provided for therein under Article 226(3) which stipulates that public officer who approves or directs the unlawful use of public funds personally liable. He relied on the case of *Re The Matter of the Interim Independent Electoral Commission (2011) eKLR* where the Supreme Court, while addressing itself on the independence of commissions, stated that the “independence clause” does not accord them a *carte blanche* to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law.
32. Counsel further submitted that the recommendations of the National Assembly cannot be said to be irrational since they were predicated upon the Audit Report submitted to the National Assembly by the Auditor General which has not been challenged in any court of law. He further submitted that the Petitioner has not cited any provisions of law which empowers any person other than the Chief Justice to convene its meetings and that the fact that Article 249(2)(b) of the Constitution provides for independence of constitutional commissions and independent offices does not mean that such offices are not accountable to anyone. It was submitted that the orders sought would violate the spirit of the Constitution and elevate the Petitioner to a position above the law. He argued that an investigation into the alleged unlawful acts of few individuals cannot be construed to be an assault on the independence of the Judiciary.
33. Counsel submitted that the Petitioner had not demonstrated that the National Assembly and/or Auditor General acted in breach of the rules of natural justice and further, that the National Assembly had the jurisdiction to inquire into the finances of the Petitioner. The 2nd respondent argued that that the Petitioner had deliberately misread Article 249(2)(b) of the Constitution on the independence of the judiciary without acknowledging that such independence is subject to Parliament’s oversight authority under Articles 95 and 125 of the Constitution. It was submitted that he Petitioner cannot apply the Constitution selectively or interpret its provisions piece-meal and that the Constitution must be interpreted in a wholesome and purposive manner. Counsel added that Article 254(1) and (3) of the Constitution subjects the Petitioner and other independent offices to the oversight authority of Parliament. For this argument, counsel relied on the decision in the case of *Judicial Service Commission v Speaker of the National Assembly (2014) eKLR* wherein the High Court, in an effort to define the term oversight, delved into the oversight role which they stated is the crucial role of legislature in monitoring and reviewing the actions of the executive organs of government. Reliance was also placed on the case of *National Land Commission (2015) eKLR, Advisory Opinion Reference No. 2 of 2014* where the Judges of the Supreme Court of Kenya dealt extensively the the issue of characteristics of independent commissions as provided for in Article 249(2) of the Constitution.
34. On the issue of whether by acting on the recommendations of the PAC and investigating members of the petitioner the 2nd respondent violated Articles 79 and 249 of the Constitution, counsel submitted that a distinction must be drawn between the oversight role of Parliament and the investigative functions and powers of law enforcement agencies such as the EACC. Counsel noted that even if the 2nd respondent was to act on the recommendations of the National Assembly, it would still be required, by law, to carry out its own independent investigations and gather evidence prior to recommending to



the Director of Public Prosecutions the prosecution of any persons found liable and the same would apply to any civil recovery proceedings that must be instituted by the 2nd respondent.

35. Counsel submitted that the 2nd respondent cannot be restrained from discharging its constitutional and statutory mandate because of any alleged violations of the law by the National Assembly in coming up with its aforesaid recommendations and that as an independent commission, it can decide whether or not to institute an investigation. Counsel cited the case of *Republic v Chief Magistrate Milimani & Anor Ex-parte Tusker Mattresses Ltd & 3 Others* [2013] eKLR wherein it was held that the High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecutions unless cogent reasons are given for doing so.

Analysis and Determination

36. I have carefully considered the Petition filed herein, the respondents' response, the submissions made by the parties' respective counsel together with the authorities that they cited. In my humble view the main issue for determination can be summarized to be an enquiry into the oversight role by Parliament over the independent commissions established under the Constitution and the extent to which the Court can intervene in the exercise of this oversight role by the Legislature where it is alleged that such exercise of the oversight role has been conducted in violation of the Constitution. Underlying the above issues will be a consideration of the doctrine of separation of powers between the 3 arms of the government.
37. In determining the above issues, this court will be required to interpret the various provisions of the Constitution that were allegedly violated by the respondents. To effectively address the said issues, this court is alive to the fact that there are principles governing such interpretation. Before dealing with the issues that arose in the petition, I will set out the said principles that guide Constitutional interpretation.
38. In interpreting the constitution, the first port of call is the Constitution itself. Under Article 259 of the Constitution, the court is enjoined to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purposes and principles of the Constitution. Through case law, various courts in different jurisdictions have also expressed themselves on the manner in which the provisions of the Constitution and Acts should be interpreted.
39. In *Ndyanabo vs. Attorney General* [2001] 2 EA 485 the Tanzania Court of Appeal held that in interpreting the Constitution, the Court would be guided by the general principles that, (i) the Constitution was a living instrument with a soul and consciousness of its own, (ii) fundamental rights provisions had to be interpreted in a broad and liberal manner, (iii) there was a rebuttable presumption that legislation is constitutional, (iv) the onus of rebutting the presumption rested on those who challenged that legislation's status save that, (v) where those whom supported a restriction on a fundamental right relied on a claw back or exclusion clause, the onus was on them to justify the restriction.
40. In *Kigula and Others vs. Attorney-General* [2005] 1 EA 132 the Uganda Court of Appeal sitting as a Constitutional Court held that the principles of constitutional interpretation are as follows:

“(1) that it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional



provisions and that the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; (2) that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; (3) that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; (3) that a Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realize the full benefit of the rights guaranteed; (4) that in determining constitutionality both purpose and the effect are relevant; and (5) that Article 126(1) of the Constitution of the Republic of Uganda enjoins Courts to exercise judicial power in conformity with law and with the values, norms and aspirations of the people.” See also *Besigye and Others vs. The Attorney-General* [2008] 1 EA 37 and *Foundation for Human Rights Initiatives vs. Attorney General HCCP NO. 20 of 2006 (CCU)* [2008] 1 EA 120.

41. In *Obbo and Another vs. Attorney General* [2004] 1 EA 265, the Supreme Court of Uganda held that no laws, rules or regulations let alone decisions of any authority which are in conflict with the provisions of the Constitution can stand in opposition to those constitutional provisions since the constitution is the supreme law of the land. The Court’s view was that the Uganda Constitution is to be interpreted both contextually and purposefully since it is an ambulatory living instrument designed for the good governance, liberties, welfare and protection of all persons in Uganda.
42. Courts have held that the task of interpreting a Constitution is fundamentally different from that of construing a statute since a statute defines present rights and obligations and can be easily enacted and repealed while a Constitution on the other hand, is drafted with a focus to the future. This is because the function of a Constitution is to provide a continuing framework for the legitimate exercise of governmental power and when joined by a bill or charter of rights, for the unremitting protection of individual rights and liberties. For the above reasons, once enacted, Constitutional provisions cannot be easily repealed or amended and must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.
43. Bearing in mind the above text and jurisprudence on the principles governing the interpretation of the Constitution, I will now embark on addressing the issues raised in this petition. In doing so, I note that the petitioner’s main grievance in this petition is with the recommendations Nos. 3 and 18 made by PAC, and adopted by the National Assembly on 16th February 2016, which recommendations were firstly; that members of Judicial Service Commission should take personal responsibility and be surcharged for the allowances paid to them and secondly; that the said members of the Judicial Service Commission ought to be investigated by the 2nd respondent. According to the petitioner, the impugned recommendations and decision contravene the provisions of Articles 47, 249, 250 and 253 of the Constitution and Section 45(1) of the Judicial Service Act. The said Articles stipulate as follows:

Article 47

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall--



- (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.

Article 249

- (1) The objects of the commissions and the independent offices are to--
 - (a) protect the sovereignty of the people; (b) secure the observance by all State organs of democratic values and principles; and (c) promote constitutionalism.
- (2) The commissions and the holders of independent offices--
 - (a) are subject only to this Constitution and the law; and (b) are independent and not subject to direction or control by any person or authority.
- (3) Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.”

Article 250(9)

- (9) A member of a commission, or the holder of an independent office, is not liable for anything done in good faith in the performance of a function of office”.

Article 253 of the Constitution

Each commission and each independent office– (a) is a body corporate with perpetual succession and a seal; and (b) is capable of suing and being sued in its corporate name.

44. Section 45(1) of the Judicial Service Act on the other hand stipulates as follows:

- 1) A member, the Chief Registrar, Registrar or judicial officers or a member of staff of the Commission shall not be liable to any civil action or suit for or in respect of any matter or thing done or omitted to be done in good faith as a member, Registrar, judicial officer or member of staff of the Commission.

45. The petitioner’s position was that by dint of the provisions of Article 250(9) of the Constitution, its commissioners are protected from personal liability for anything done in good faith in the performance of their functions of their office. The respondents’ case, on the other hand, was that the independence granted to the petitioner under the Constitution is not absolute as such independence is subject to the provisions of Article 10 of the Constitution, chapter six of the Constitution on leadership and integrity and the oversight role of Parliament pursuant to Article 95(4) (c) and (5) (b) of the Constitution.

46. Article 10 of the Constitution provides for the national values and principles which bind all State Organs, State Officers, public officers and all persons whenever they apply or interpret the Constitution, enact, apply or interpret any law or implement public policy decisions. Article 95(4) (c) and (5) (b) of the Constitution which stipulates as follows:

- (4) The National Assembly –
 - (c) exercises oversight over national revenue and its expenditure.
- (5) The National Assembly—
 - (b) exercises oversight of State organs.



47. In considering this petition, this court is alive to the fact that this is not the first time that this court has been called upon to determine the issue of the 1st respondent's oversight role over the activities and functions of the petitioner herein. Indeed one can say that the instant petition is a sequel or a follow up to an earlier case being *Judicial Service Commission v Speaker of the National Assembly & 8 others* [2014] eKLR (hereinafter "the earlier case") wherein, under the same set of facts and circumstances, the petitioner questioned the constitutionality of Parliament's oversight role over independent commissions.
48. The genesis and facts of the earlier case are quite similar to those of the instant case. At this juncture, I find that it necessary to highlight and juxtapose the background of the facts in the earlier case in order to draw a comparison with the circumstances in the present case. The events that precipitated the filing of the petition in the earlier case, just as in the instant case, started with the decision by the Petitioner to take disciplinary action against the then Chief Registrar of the Judiciary (hereafter CRJ), Mrs. Gladys Boss Shollei, on claims of financial impropriety that culminated in a decision to send the said CRJ on compulsory leave. In the earlier case, pursuant to the said decision by the JSC, the 1st respondent's Committee on Justice and Legal Affairs, by a letter dated 20th August, 2013, summoned the Petitioner for a meeting on 22nd August, 2013 in order to "...deliberate on the process, issues and circumstances surrounding her [CRJ] suspension and the general state of the Judiciary."
49. The Petitioner declined to honor the summons on the basis that it was executing its mandate in making the decision to take disciplinary action against the then CRJ after which the said committee demanded for the annual reports of the JSC in respect of the financial year 2011/2012 and 2012/2013 pursuant to Article 254(1) and (2). On 17th September 2013, the Petitioner forwarded a copy of the Judiciary's Annual Report and Financial Statements for the 2011/2012 fiscal year and explained that allocations and attached the JSC's Annual Report regarding its activities in the said year. It also explained that the reports for the following year were not ready. The said committee did not respond to the JSC's letter but instead wrote to six of the JSC Commissioners forwarding a petition by one Riungu Nicholas Mugambi seeking the removal of the six Commissioners who were members of the Finance and Administration Committee of the JSC. It turns out that the petition for the removal resulted in the recommendation by the 1st respondent to the President of the Republic of Kenya to constitute a tribunal to deal with the issue thereby necessitating the filing of the earlier case which was determined on 15th April 2015 in favour of the petitioner herein by a 5 Judge bench that made the following findings:
- a) On the first issue of joinder and or misjoinder, we have found that JSC was a proper Petitioner; that the Speaker of the National Assembly was properly enjoined; and that in the circumstances of this case, even if there had been a misjoinder, which was not the case, the President can be bound by Court orders arising from proceedings to which he was not a party;
 - b) On the second issue regarding the jurisdiction of the Court in relation to acts of other arms of government, we have found that judicial intervention by the High Court is not a violation of the doctrine of separation of powers insofar as the Court is performing its solemn duty under Article 165(3)(d)(ii) of the Constitution in inquiring into alleged constitutional violations or contraventions.
 - c) On the third issue as to the meaning and scope of Parliamentary oversight of state organs, our findings are three pronged:
 - d) Firstly, that the constitutional provisions for Parliamentary oversight of constitutional commissions and independent offices anticipate a purposeful, lawful, objective and carefully



structured oversight for accountable governance for the achievement of a better quality of life for the people of Kenya;

- e) Secondly, that Parliament's constitutional powers of oversight do not amount to a right to subjugate, micromanage, control or direct the JSC;
- f) Finally, that oversight connotes the constitutional imperative aimed at the enhancement of constitutional democracy and the rule of law through upholding and protecting the financial and administrative independence of constitutional commissions."

50. The said court then issued the following final orders:

- a) We issue a declaration that the Petitioner as a constitutional commission is not subject to the control or direction of the National Assembly or any of its Departmental Committees established under the Standing Orders in the lawful discharge of its Constitutional mandate under Article 172 of the Constitution;
- b) We declare that the National Assembly through the Departmental Committee on Justice and Legal Affairs is not entitled to supervise and sit on appeal on the decisions of the Judicial Service Commission when the Commission is lawfully discharging its mandate under the Constitution;
- c) We hereby issue an order of Certiorari to remove to the High Court and quash the proceedings before the Committee on Justice and Legal Affairs seeking the removal of members of the Judicial Service Commission;
- d) We hereby declare that the resolution of the National Assembly to transmit the Petition to the President in defiance of a Court order is null and void and is hereby quashed;
- e) We declare that the appointment of the 3rd to 6th Respondents by the President of the Republic of Kenya as members of the Tribunal contemplated under Article 251(4) of the Constitution under Special Gazette Notice No. 15094 is null and void, and is hereby quashed;
- f) We issue an order prohibiting Justice (Rtd) Aaron Gitonga Ringera, Jennifer Shamalla, Ambrose Otieno Weda and Mutua Kilaka from taking oath, assuming office, carrying on or in any way discharging their mandate as members of the Tribunal appointed under Special Gazette Notice No. 15094.

51. Having regard to the summary of the facts regarding the earlier case, it is clear that the said facts converge with those of the instant case at the point where the 1st respondent called for the petitioners financial statements for the years 2011/2012 and 2012/2013. In the said earlier case, the 5 Judge bench had occasion to consider, at length and in great detail, the same issues for determination that I have highlighted in this matter being; the independence of the constitutional commissions, the meaning and scope of the oversight role of Parliament and the doctrine of separation of powers. In finding that Parliament has oversight role over the petitioner, the said bench stated, inter alia, as follows:

"Article 249 describes the objects of the commissions and independent offices set up under Chapter Fifteen of the Constitution as the protection of the sovereignty of the people, securing the observance by all state organs of democratic values and promotion of constitutionalism. The South African Constitution describes the independent institutions as "strengthening constitutional democracy" (see section 181(1) which is in parimateria with our Article 249).



Discussing the unique and special role of the independent commissions in South Africa, the University of Cape Town Report(supra) states:

“They are an integral part of the checks and balances of a constitutional democracy and accountable government. An important part of each of their functions is calling government to account and strengthening and promoting respect for the Constitution and the law by society at large. In relation to Parliament they have two roles. Firstly they should be seen as complementary to Parliament’s oversight function: together with Parliament they act as watch-dog bodies over the government and organs of state. Secondly, they support and aid Parliament in its oversight function by providing it with information that is not derived from the executive.”

Citing the challenges of inadequate resources and political independence faced by members of Parliament, the Report goes on to state:

“As pointed out above, one of the constitutional functions of Parliament is to be an oversight body to provide a check on the arbitrary use of power by the executive. However, with the complex nature of modern government, members of parliament often do not have the time and resources to investigate in depth, or because of party discipline do not have the political independence that is required....Hence state institutions supporting constitutional democracy have been created to assist parliament in its traditional functions. This function is most obvious in relation to the office of the Auditor-General which performs the primary part of oversight of financial matters, but this is clear also in relation to the other institutions in chapter 9. The Public Protector for example has as its main function the investigation of improper conduct in state or government affairs and in the public administration which also forms a crucial part of Parliament’s oversight role. Similarly, the Human Rights Commission not only ensures the protection and development of human rights but is also the main vehicle through which the implementation of socio-economic rights in government departments is monitored.”

The authors of the Report concluded as follows:

“Thus Parliament’s oversight function can be enhanced by ensuring the effective functioning of state institutions supporting constitutional democracy. Much the same arguments may be advanced in respect of other bodies established in terms of the Constitution, including the Judicial Service Commission, the Financial and Fiscal Commission and the Public Service Commission.”

In light of the foregoing discussion, the question whether the JSC is subject to Parliamentary oversight must be answered in the affirmative. The JSC is a creature of the Constitution, an independent commission subject only to the Constitution and the law and, as provided under Article 249 (2), is not subject to direction or control by any person or authority. 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.”

52. Similarly, the Supreme Court has had occasion to address itself to the issue of the independence of commissions in *Re The Matter of the Interim Independent Electoral Commission* (supra) wherein it observed stated that the “independence clause” does not accord the commissions a *carte blanche* to act



or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law.

53. The petitioner's case is that the decision of the National Assembly to investigate members of the Finance and Administration Committee of the JSC namely; Commissioners Smokin Wanjala, Mohamed Warsame, Ahmednasir Abdullahi, Rev. Samuel Kobia, Christine Mango and Emily Ominde is actuated by ill motives and is an attempt to circumvent the judgement of the High Court and is therefore null and void. The question which then arises is whether in the circumstances of this case, the National Assembly can be said to have properly exercised its Oversight Role over JSC. The answer to this question can be found in the genesis of this case and the proceedings and outcome of the earlier case which outcome the petitioner claims the 1st respondent was intent on circumventing through the impugned decision that is challenged in this petition.
54. I am persuaded by the said decision of the 5 Judge bench in the earlier case and I concur with the finding of the said Judges and the judges of the Supreme Court, in Re The Matter of Interim Independent Electoral Commission (supra), on the issue of Parliament's oversight role over independent commissions and I therefore find no reason to reinvent the wheel or deviate from the norm on a subject that has already been deliberated upon and determined by courts of competent jurisdiction.
55. From the summary of the facts in this case and in the earlier case, there is no doubt that in both instances, what can be called a 'tiff' or 'bad blood' between the JSC and the 1st respondent was precipitated by the issue of the disciplinary proceedings that the petitioner had initiated against its former CRJ. The 5 Judge bench that heard the earlier case had the following to say over the said relationship between Judicial Service Commissioner and the 1st respondent in the discharge of its oversight role:
- “The ultimate question then is whether the kind of oversight disclosed in this case is that anticipated in Article 125, 95 and 254, of an independent commission protected under Article 249. In our view, when the interaction between JSC and the Committee is reviewed in its entirety, the answer must be a resounding no. Whereas the oversight provisions anticipate a purposeful, lawful, objective and careful oversight, the actions undertaken by the Committee reveal a disregard for constitutionalism, sabre rattling, and partiality.
- The circumstances of this case make it difficult not to believe that the actions of the Committee were driven by motives other than the execution of the legal oversight obligation for the benefit of the people. To use the words ascribed in the media to the Chairman of the Committee, the apparent intent was to subjugate and control the JSC. The Committee's "oversight" amounted in substance and procedure to piling undue influence on the petitioner in the investigations involving the erstwhile CRJ.”
56. I fully associate myself with the decision of the 5 Judge bench over the issue of lack of good faith, on the part of the 1st respondent, in its dealings with the petitioner. I say so because looking at the gist and background of the instant case and the earlier case, one cannot fail to note that the suspension of the then CRJ over allegation of financial impropriety was the trigger for the purported intervention in the said suspension through 'oversight' over the petitioner by the 1st respondent. It did not also escape the attention of this court that the decision to suspend the said CRJ was made by the petitioner's Finance and Administration Committee composed of the same 6 commissioners whose removal and investigation the 1st respondent recommended and became the subject matter of the earlier case and the instant case respectively.



57. Considering that the petitioner's Finance and Administration Committee had already initiated a process to look into the petitioners financial affairs by suspending the then CRJ over claims of financial impropriety, it cannot be said that it was an act of good faith, on the part of the 1st respondent, to enter into the fray by purporting to call for the petitioners financial reports over the same issues that the petitioner was already seized with and to further purport to take action against the members of the petitioner's Finance and Administration Committee that was already enquiring into the same matter. My take is that the petitioner, as an independent body, did not require the assistance or input of the 1st respondent to call for an audit into its financial affairs by the Auditor General in order to establish if there had been any misappropriation of funds. At least not before the petitioner had concluded the process that it had initiated. In the circumstances of this case, one can say that the 1st respondent herein hijacked an audit process that had already been initiated by the petitioner in a move that can be said to have been ill motivated going by the apparent spirited attempt, on the part of the 1st respondent, to 'deal' with the targeted 6 commissioners of the JSC by all means possible including calling for their investigation by the 2nd respondent when an earlier attempt to remove the same commissioners through the recommendation to the President to form a tribunal hit a brick wall following the court's decision in the earlier case.
58. A further issue was raised on whether, in performing its oversight role over the petitioner, the 1st respondent acted fairly and in line with the provisions of Article 47 of the Constitution. In other words, did the 1st respondent hear the individual commissioners before arriving at the conclusion that they were personally liable for the financial impropriety at the Judicial Service Commissioner and were therefore liable to be investigated and surcharged for the allowances paid to them.
59. I have perused the 1st respondent's replying affidavit in answer to the petition and I note that apart from the 1st respondent's deponent statement that it heard a total of 25 witnesses including some of the petitioner's commissioners before arriving at its findings, the 1st respondent did not state that it heard all the affected commissioners before finding them personally liable. Article 47(1) of the Constitution is couched in mandatory terms that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Sub Article 2 makes it even more forceful that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for that action.
60. Article 260 of the Constitution defines a "Person" to include a company, association or other body of persons whether incorporated or not. In that regard, the petitioner herein is a person for purposes of Article 47 of the Constitution in that its right as an entity was adversely affected by the respondent's impugned decision and was therefore entitled to an administrative action that was not only procedurally fair and lawful but also reasonable. It was equally entitled to a hearing before the adverse action was taken against it.
61. The Constitution is the supreme law of the land and decrees as such in Article 2(1) that it binds all persons and all state organs in the course of performing their duties. The provisions in Article 47 require that an administrative action expeditious, fair, lawful and reasonable, and that where such an action adversely affect a person's right or fundamental freedom, the affected person is entitled to be given written reasons for the action. This provides a constitutional control over administrative bodies to ensure that they do not abuse their power and that individuals concerned receive fair treatment when actions are taken against them. Failure to observe this constitutional decree, for all intent and purposes, undermines the rule of law and the value of Article 19(1) of the Constitution which states that the Bill of Rights is an integral part of Kenya's democratic state as the framework for social, economic and cultural policies.



62. The fact that the right to Fair Administrative Action is a constitutional right was stated by the Constitutional Court of South Africa in the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) 2000 (1) SA 1, that;

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

63. The importance of this right to fair administrative action as a constitutional right in our Article 47 cannot be over emphasized. The Court of Appeal stated in the case of *Judicial Service Commission v Mbalu Mutava & another* [2014] eKLR; that;

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

64. And in the case of *Dry Associates Ltd v Capital Markets Authority and Another*, [2012] eKLR the Court observed;

“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution.”

65. Applying the above jurisprudence to this case I note that the 1st respondent was performing a quasi-judicial function while probing into the allegations of financial impropriety in the Judiciary arm of the government. In conducting its inquiry, the 1st respondent was performing an administrative action for which it was, under Article 47 of the Constitution, expected to meet the constitutional test of legality, reasonableness and procedural fairness that is entrenched in our Constitution as an inviolable right. This right is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. In the circumstances of this case I find that that acting as it did by failing to accord the all cited commissioners a hearing, the 1st respondent violated the petitioner’s right to a fair Administrative Action contrary to Article 47 of the Constitution.



66. To my mind, arriving at a finding that the affected 6 members of the JSC should take personal responsibility and be surcharged for the allowances paid to them even before the allegations of impropriety could be fully investigated by the 2nd respondent meant that PAC had already determined the fate of the said commissioners way before the 2nd respondent. In my humble view recommending the action to be taken against the affected commissioners before the 2nd respondent could commence investigations was akin to putting the cart before the horse and basically condemning the said commissioners unheard. The scenario would have been totally different if all that the 1st respondent did, was to recommend that the 2nd respondent investigates the allegations of misappropriation of funds in which case, it would ideally be a court of law, upon finding the commissioners guilty of misuse of funds, making a determination on such personal liability if any. The 1st respondent can therefore be said to have jumped the gun and made a determination that had far reaching consequences on the commissioners of the JSC without hearing their side of the story and consequently, predetermining the outcome of the investigations that were to be conducted by the 2nd respondent.
67. My finding therefore is that the 1st respondent did not observe or comply with Article 47 of the Constitution while performing its oversight functions over the petitioner and for this reason I find that its recommendations No. 3 and 18 thereof adopted by the National Assembly on 16th February 2016 are null and void.
68. Having regard to the purposive and holistic interpretation of the Constitution in line with the decisions that I have already cited in this judgment and having regard to the findings by the 5 Judge in the earlier related case that I have referred to in this judgment, I find that while the 1st respondent, was duly and properly discharging its mandate as provided for under the Constitution, it was still under an obligation, in doing so, to observe the other provisions of the Constitution and to ensure that it abides by those provisions especially Article 47 of the Constitution.
69. Having found that there was a violation of Article 47 of the Constitution by the 1st respondent, I further find that the decision by the 2nd respondent to act on the impugned recommendations of 1st respondent would be tantamount to a violation Article 2(4) which stipulates, in part, that any act or omission that contravenes the Constitution is invalid.

Disposition

70. For the reasons and findings that I have highlighted in this judgment, I find that the petition is merited and I therefore allow it in following terms:
- a. A declaration is hereby issued that the Petitioner, as a constitutional commission is not subject to the control or direction of the National Assembly or any of its Departmental Committees established under the Standing Orders in the lawful discharge of its constitutional mandate under Article 172 of the Constitution.
 - b. A Declaration is hereby issued that Commissioners of the Judicial Service Commission are not personally liable for any acts done, in good faith, in the performance of their constitutional mandate under Article 171 of the Constitution and the Judicial Service Act.
 - c. A Declaration is hereby issued that the decision of the National Assembly of 11th February, 2016 adopting the Report of the Public Accounts Committee PAC in Recommendation 3 of its Report that members of the Judicial Service Commission ought to take personal responsibility and be surcharged for the allowances paid to them contravenes Article 249 and 253 of the Constitution and is therefore null and void.



- d. An Declaration is hereby issued that the decision of the Public Accounts Committee in Recommendation 18 of its Report recommending that members of the Finance and Administration Committee of the JSC, Commissioners Smokin Wanjala, Mohamed Warsame, Ahmednasir Abdullahi, Rev. Samuel Kobia, Christine Mango and Emily Ominde should be individually investigated by the 2nd Respondent violated Articles 250(9) and 253 of the Constitution and is therefore null and void.
- e. A Declaration that the decision of the National Assembly of 16th February, 2016 adopting the Report of the Public Accounts Committee in Recommendation 18 was made in violation of Article 47 of the Constitution and is therefore null and void.
- f. A Declartion that the decision of the National Assembly to investigate members of the Finance and Administration Committee of the JSC: Commissioners Smokin Wanjala, Mohamed Warsame, Ahmednasir Abdullahi, Rev. Samuel Kobia, Christine Mango and Emily Ominde was actuated by ill motives and was an attempt to circumvent the judgement of the High Court and therefore null and void.
- g. A Declaration that the decision of the 2nd Respondent to act on the recommendations of the 1st Respondent violates Article 2(4) and 10 of the Constitution.
- h. An Order of Certiorari do issue to remove into this Court and quash the decision of the 1st Respondent as contained in Recommendations 3 and 18 of the 1st Respondent's Public Accounts Committee Report on Judicial Service Commission (JSC) and the Judiciary Special Audit Report of May 2014 as adopted by the 1st Respondent on 16th February, 2016.
- i. I make no orders as to the costs of the Petition.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF JULY 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Wambugu for Ruto for 2nd respondent.

Mr. Angaya for the 1st respondent

Mr. Mwangi for the 3rd respondent

Court Assistant - Fred

