



REPUBLIC OF KENYA



**KENYA LAW**  
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**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.390 OF 2014**

***CONSOLIDATED WITH***

- 1. NAIROBI PETITION NO. 416 OF 2014**
- 2. NAIROBI PETITION NO.309 OF 2014**
- 3. NAIROBI PETITION NO.318 OF 2014**
- 4. MERU J.R. NO.331 OF 2014**
- 5. MALINDI PETITION NO.5 OF 2014**
- 6. KAKAMEGA J.R. NO.14 OF 2014**
- 7. NAIROBI J.R. APPL. NO.349 OF 2014**
- 8. NAIROBI PETITION NO. 456 OF 2014**
- 9. NAIROBI PETITION NO.457 OF 2014**
- 10.NAIROBI PETITION NO.431 OF 2014**
- 11.NAIROBI JR NO.323 OF 2014**
- 12.ELDORET MISC. APPL. NO.130 OF 2014**
- 13.NAIROBI PETITION NO.421 OF 2014**
- 14.NAKURU J.R. NO.31 OF 2014**
- 15.NAKURU PETITION NO.58 OF 2014**
- 16.NAKURU PETITION NO.55 OF 2014**
- 17.NAIROBI PETITION NO.434 OF 2014**
- 18.KERICHO J.R. NO.6/2014**
- 19.KERICHO MISC. APPL. NO.7 OF 2014**

**20.EMBU MISC. APPL. NO.152 OF 2014**

**21.NAIROBI PETITION NO.445 OF 2014**

**22.NAIROBI PETITION NO.447 OF 2014**

**23.NAIROBI J.R. NO.328 OF 2014**

**24.NAIROBI J.R. NO.329 OF 2014**

**BETWEEN**

**INDEPENDENT POLICING OVERSIGHT AUTHORITY.....1<sup>ST</sup> PETITIONER**

**CHARLES KIPTARUS CHESIRE.....2<sup>ND</sup> PETITIONER**

**AND**

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

**THE NATIONAL POLICE SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

**THE NATIONAL POLICE SERVICE.....3<sup>RD</sup> RESPONDENT**

**AND**

**658.....INTERESTED PARTIES**

**JUDGMENT**

**Introduction**

1. On or about the 30<sup>th</sup> June, 2014, the National Police Service Commission (NPSC) put up an advertisement in local daily newspapers seeking to recruit 10,000 suitable and qualified Kenyans as Police Constables for service in the Kenya Police, Administration Police and General Service Unit. The recruitment was thereafter carried out on 14<sup>th</sup> July 2014 in various centers countrywide as designated by the NPSC. Successful candidates were then issued with Docket Numbers together with joining instructions and were required to report at either the Kenya Police Training College in Kiganjo, the Administration Police Training College in Embakasi or the General Service Training College in Embakasi on 5<sup>th</sup> September 2014.

2. Following the conclusion of the recruitment exercise, there arose generalized complaints and reports of alleged irregularities regarding the manner in which the recruitment was conducted. The allegations included those of corruption, tribalism, nepotism and other malpractices.

3. Following the complaints, the 1<sup>st</sup> Petitioner, the Independent Policing Oversight Authority (IPOA), allegedly received evidence documenting credible widespread irregularities in the manner in which the exercise had been carried out. Based on the evidence it received, IPOA recommended to the NPSC and the National Police Service (NPS) to cancel the entire recruitment process and the carrying out of a fresh one. The NPSC declined to repeat the exercise but instead opted to form a Multi-Agency Working

Committee to investigate the claims of alleged irregularities and misconduct during the said exercise.

4. Subsequently, upon receiving the Report of the said Multi-Agency Working Committee, on 12<sup>th</sup> August 2014, NPSC annulled the recruitment results of the following 36 recruitment Centres;

1. Tana Delta District Headquarters Centre – Tana Delta Sub-County, Tana River County
2. Mandera North Youth Centre – Mandera East, Mandera County
3. Rhamu Police Station – Mandera North, Mandera County
4. Merti DCs Headquarters – Merti, Isiolo County
5. Kinoru Stadium – Imenti North, Meru County
6. Nguthiru Stadium – Tigania East, Meru County
7. Umu Grounds – Mbeere South, Embu County
8. Njabini, Kinangop - Nyandarua County
9. Engineer Centre – Nyandarua South, Nyandarua County
10. Othaya Stadium - Nyeri South, Nyeri County
11. Gatanga Primary School – Gatanga, Murang'a County
12. Kandara Stadium – Kandara, Murang'a County
13. Kangema, General Kago – Kangema, Murang'a County
14. Kigumo Bendera Secondary School – Kigumo, Muranga County
15. Police Division Headquarters, Kapenguria, – West Pokot County
16. Sigor T. Centre – Pokot Central, West Pokot County
17. DC's Office, Chepkorio – Keiyo South, Elgeyo Marakwet County
18. Chesoi Primary School – Marakwet East, Elgeyo Marakwet County
19. Moi Girls Secondary School – Marakwet West, Elgeyo Marakwet County
20. Kapsabet Parade Ground – Nandi Central, Nandi County
21. Maraba – Tinderet, Nandi County
22. Eldama Ravine Playground – Koibatek, Baringo County
23. Mogotio Police Station Ground – Mogotio, Baringo County
24. Doldol Trading Centre – Laikipia North, Laikipia County
25. DC's Office, Bahati – Nakuru North, Nakuru County
26. Njoro Police Station – Njoro, Nakuru County
27. Narok Stadium – Narok North, Narok County
28. Ololulunga Baraza Park – Narok South, Narok County
29. Maasai Technical School – Kajiado Central, Kajiado County
30. DC's Office, Mashuru - Kajiado County
31. Kipkelion Centre – Kipkelion, Kericho County
32. Bomet Centre – Bomet Sub-County, Bomet County
33. DC's Office – Sotik, Bomet County
34. Isanjiro Primary School – Kakamega North (Malava), Kakamega County
35. Kimilili Amtala Sports Centre – Kimilili, Bungoma County
36. Amagoro Primary School – Teso North, Busia County

5. The Consolidated Petitions therefore concern the said police recruitment of 10,000 Police Constables country-wide and they were filed in different High Court Stations in Kenya as can be seen in the heading thereof, before transfer to this Court.

### **The Petitions**

6. The following Petitions seek to stop the recruitment exercise altogether for reasons that shall be seen shortly;

- i. ***Nairobi Petition No.309 of 2014***; the Petitioner, the Independent Policing Oversight Authority (IPOA) is an independent civilian oversight authority established under **Section 3** of the **IPOA Act, Chapter 88 Laws of Kenya**. Its objectives are set out under **Section 5** of the **Act**, and are *inter-alia*; to hold the police accountable to the public in the performance of their functions, give effect to the provisions of **Article 244** of the **Constitution** and ensure independent oversight of the

handling of complaints by the NPS. In order to meet these objectives, it is mandated under **Section 6** of the above **Act** to *inter-alia* investigate any complaints related to disciplinary or criminal offences committed by any member of the Police Service and make recommendations thereafter.

It has filed this Petition claiming that the police recruitment of 14<sup>th</sup> July 2014 failed to meet the constitutional standards set out under **Articles 10, 27, 73, 244, 246 and 249** of the **Constitution** and statutory requirements under **Sections 10 and 12** of the **National Police Service Commission Act**. In its Petition it seeks to nullify the whole recruitment of the 10,000 Police Constables and in a nutshell its case is as set out below;

That the NPSC is the only body authorized to recruit members of the NPS pursuant to **Article 246(3) (a)** of the **Constitution** and that under **Section 10** of the **National Police Service Commission Act** it is only authorized to delegate the function of recruitment of a police officer under the rank of a Sergeant to the Inspector General of Police. That contrary to that express provision, the NPSC unlawfully delegated its powers to recruit members of the NPS to Sub-County Recruitment Committees which conducted the exercise in total disregard of the Constitution. It thus contends that in delegating its powers to unknown entities in law, the NPSC acted illegally and ultra vires **Article 246** of the **Constitution** and therefore the whole recruitment exercise was null and void *ab initio*.

It further claims that the recruitment violated the provisions of **Article 232(1) (d) and (e)** of the **Constitution** which require the involvement of the people in the process of policy making and accountability for administrative actions. That in that regard, pursuant to the circular issued sometime in June 2014, the NPSC was required to develop policies, regulations and procedures for the proper conduct of the recruitment exercise which policies and guidelines were never developed. Further, that **Articles 10, 232, 244, 246 and 249 and Sections 10 and 12** of the **National Police Service Commission Act**, NPSC is mandated to carry out the process of recruitment with transparency and ensure accountability of those conducting the recruitment. And in order to ensure transparency, it ought to have developed guidelines to guide the recruitment. That without such guidelines, the NPSC could not properly carry out the recruitment as there were no standards available to the public which ought to have gauged the fairness of the process and ensure its accountability.

The 1st Petitioner further contends that in many recruitment centers, a number of women were disqualified from the exercise on the grounds that they were pregnant thus contravening **Article 27** of the **Constitution**.

In its Petition dated 5<sup>th</sup> August 2014, it has thus sought the following orders;

***“(1) A declaratory order to the effect that the delegation by the 2<sup>nd</sup> Respondent to Sub-County Commissioners to carry out recruitment of members of the 3<sup>rd</sup> Respondent on 14<sup>th</sup> July 2014 was illegal and ultravires Article 246 of the Constitution and Section 10 of the National Police Service Commission Act.***

***(2) A declaratory order to the effect that the recruitment exercise carried out on 14<sup>th</sup> July 2014 by Sub-County Commissioners on the basis of delegated powers by the 2<sup>nd</sup> Respondent was inconsistent with, or in contravention of Articles 10, 27, 73, 232, 244, 246 and 249 the Constitution and Sections 10 and 12 of the National police Service Commission Act and is thus illegal, null and void ab initio.***

***(3) An order of certiorari does issues bringing to this Court and quashing all proceedings by the 2<sup>nd</sup> Respondent authorizing the carrying out of the recruitment exercise on 14<sup>th</sup> July 2014.***

***(4) An order of certiorari does issue bringing to this Court and quashing the outcome of the recruitment exercise carried out on the 14<sup>th</sup> July 2014.***

***(5) An order of prohibition does issue prohibiting the 2<sup>nd</sup> Respondent and/or 3<sup>rd</sup> Respondent from issuing appointment or any other letters to persons recruited on the basis of the recruitment exercise carried out on 14<sup>th</sup> July 2014.***

***(6) An order of Mandamus does issue compelling the Respondents to develop and gazette recruitment regulations pursuant to Section 28(f) of the National Police Service Commission Act.***

***(7) An order of Mandamus does issue compelling the Respondents to repeat the recruitment exercise in tandem with National Police Service Commission Act and the recruitment regulations developed and published pursuant to the Constitution and Section 28 (f) of the National Police Service Commission Act.***

***(8) An order do issue requiring the Kenya National Audit Office (KENAO) to carry out an audit of the funds used during the exercise and those found to have misused public funds to be held personally liable and be surcharged accordingly.***

***(9) That the Respondents do bear the costs of this Petition.***

***(10) Any other reliefs this Honourable Court may deem fit.”***

- ii. ***Nairobi Petition No. 318 of 2014*** which was filed on 10<sup>th</sup> July 2014 and in it, the 2<sup>nd</sup> Petitioner, Charles Kiptarus Chesire, a resident of Moiben Constituency within Uasin Gishu County is aggrieved by the fact that Uasin Gishu County was allocated three Districts for recruitment namely, Eldoret West (recruitment at Kipchoge Stadium) Eldoret East (recruitment at Eldoret ASK Show Ground) and Eldoret South (recruitment at 64 Stadium) whereas it has six constituencies i.e. Ainabkoi, Moiben, Kesses, Kapseret, Turbo and Soy Constituencies where he claimed the recruitment ought to have been done.

He claims further that while the said recruitment was to be conducted at Sub-County (constituency) levels in all parts of Kenya, in Uasin Gishu County it was based on Districts. He states that the said system was therefore unproportionate, inequitable and discriminatory and biased to the people of Uasin Gishu County as compared to smaller counties, and it also disenfranchised the people of Uasin Gishu County. He thus claims that the actions of the Respondents are irregular and unlawful and were meant to deny the Petitioner and the people of Uasin Gishu the right to fair representation in police recruitment and equal opportunities available to all Kenyans. In his Petition, he therefore seeks the following orders;

***“(1) An order directed at the 1<sup>st</sup> and 2<sup>nd</sup> Respondent barring them from carrying on any recruitment of police constables scheduled to take place on the 14<sup>th</sup> July 2014 pending the hearing and determination of this Petition.***

***(2) A declaration that the process of recruitment of ten thousand (10,000) police constables is null and void ab initio, unconstitutional and ought to be stayed in the interests of justice.***

***(3) An order compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to provide a policy framework that enhances and promotes the rights of Kenyans to equal treatment and equal opportunities in political, economic, cultural and social spheres as espoused in the Constitution of Kenya.***

***(4) In the alternative and without prejudice to the foregoing, ... an order directed to the Respondents to carry out the recruitment based on existing two hundred and ninety (290) constituencies based on a proportionate, equal and/or equitable distribution of the available vacancies.***

***(5) Such further and/or additional orders do issue as may be necessary to ensure that the***

**recruitment process meets the requirements of Article 27 of the Constitution of the Republic of Kenya.**

**(6) The costs of this Petition be borne by the Respondents in any event.”**

iii. **JR Application No.331 of 2014** formerly **Meru Misc Applic. No.24 of 2014**, in which the Applicants are; Nicholas Mwiti M’iringo, Joseph Kiambi Muriithi, Nicholas Koome M’ikiugu, Frankline Gitonga Kubania, Dennis Thiora Kiru, Kenneth Murerwa, Simon Muriuki Mwenda, Antony Mutembei Kimathi, Ann Karimi, Kenneth Muthuri, David Kiunga Murithii, Dorcas Kathure Gakubi, Bessy Nkatha Mugambi, Clifford Kirimi, Boniface Mutembei Kinyua, Clifford Muthamia Kaimenyi, Glory Kinya Kathurima, Linet Nkirote, Ann Gaichugi Kithinji, Geoffrey Mwenda Mwirigi, Clifford Mugambi, Wycliffe Murithi, Silas Muriuki, Erick Gitonga Kaumbatu, Chris Mugambi Thuraira, Jackline Kajuju and Nicholas Muriuki Nturibi. They are all residents of Meru who were allegedly eligible candidates for recruitment to the Police Service but allege that they were unfairly, irregularly and corruptly deprived of the chance to serve in the NPS and they thus seek for cancellation of the entire recruitment process in the affected Sub-Counties. In their Petition, they specifically seek the following orders;

**“(1) Orders of judicial review in the nature of Certiorari to remove to this Honourable Court the purposes of quashing and or nullifying the Kenya National Police Service recruitment exercise conducted on 14<sup>th</sup> July 2014 in all recruitment centres within Imenti North, Tigania East, Igembe North and Igembe South Sub-Counties across the Meru County.**

**(2) Orders of judicial review in the nature of Prohibition to prohibit the Respondents from admitting into the National Police Service training colleges, any recruits picked on 14 July 2014 from all recruitment centres within Imenti North, Tigania East, Igembe North and Igembe South Sub-Counties across the meru County.**

**(3) Orders of judicial review in the nature of Mandamus to compel the Respondent to repeat a credible and fair National Police Service recruitment exercise in all recruitment centres within Imenti North, Tigania East, Igembe North and Igembe Sub-Counties across the Meru County.”**

iv. **Malindi Petition No.5 of 2014**, where the Petitioner, Abdi Hassan Bocha is suing on behalf of the Wardei Community of Tana River County. In his Petition dated 18<sup>th</sup> July 2014, he claims that the recruitment exercise as conducted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was unlawful, unconstitutional and a nullity. His further case is that the recruitment was unfair as the recruitment officers had a list of the names of “successful” candidates way before the exercise began and the few remaining slots were sold to the highest bidder as members of the public were asked to part with Kshs.180,000 to secure a place in the service. That ethnic diversity of the people of Tana River was also not considered in recruiting the successful candidates. However, neither the Petitioner nor his lawyers appeared to prosecute the Petition.

7. The following Petitions generally seek orders against the annulment of the recruitment exercise in the 36 Recruitment Centers stated elsewhere above;

i. **Nairobi Petition No.416 of 2014**; the Petitioners, Richard Semeiyoi, Moses Lemiso Kiprotich and Erick Kiprotich are residents of Ololulunga and were recruited at Baraza center within Narok South Constituency. In their Petition dated 18<sup>th</sup> August 2014, they claim that they were successfully recruited by the NPSC and were issued with Docket Numbers detailing that they were to report to their respective training colleges on 5<sup>th</sup> September 2014. That they have since been taking intensive measures towards preparation for reporting to the said training colleges and claim that they have since the nullification of their recruitment suffered psychological and emotional torture as they are being viewed as deviants who were irregularly and unlawfully recruited. They further claim that their right to economic and social rights under **Article 43(e)** of the **Constitution** risk being infringed if the Respondents are to conduct a fresh recruitment. They have thus sought

several orders in that regard but principally to challenge the repeat of the recruitment exercise.

- ii. **Kakamega JR No.14 of 2014**; the Applicants, Peter Khisa Wanami, Susy Walela Mukowa and Douglas Tawai Zakayo and 29 Others participated in the recruitment exercise at Isanjiro Primary School, Kakamega North (Malava) Kakamega County and emerged as successful candidates. They have filed this suit seeking judicial review orders to quash the decision of the NPSC made on 12<sup>th</sup> August 2014 cancelling their recruitment to the NPS. They further claim that the decision to nullify the recruitment is in contravention of the principles of natural justice and is against the legitimate expectation of a fair administrative action by a public body and a serious contravention of all known Constitutional principles.
- iii. **Nairobi JR Application No.349 of 2014**; the Applicants; Simon Ndungu Ndirangu, Naomi Wambui Kibe, Samuel Wanyoro Wanja, Joseph Guchu Wainaina, Mercy Waithera Muiruri, George Karanja Maina, Simon Njogu Ndei, William Mukui Gitahi, Cecilia Waithera Wanyoike, Ibrahim Mbugua Njeri, Victoria Wangui Chege, Henry Ngure Mariga, Daniel Mukiri Mwangi and John Ndereba Gitoru attended the recruitment exercise undertaken at Njabini Centre, Nyandarua County. They emerged successful and were required to report to the various police training colleges on 5<sup>th</sup> September, 2014. They have filed the Application seeking to quash the decision to nullify their recruitment as made by the NPSC on grounds *inter alia* that there were no reports of malpractices made against the Applicants or the officers who undertook the exercise and that the decision of the NPSC was made in violation of the rules of natural justice as the affected recruits were not afforded an opportunity to be heard or make representations regarding the alleged allegations of impropriety. They therefore claim that the decision of the NPSC is *ultra vires* and should be quashed.
- iv. **Nairobi Constitutional Petition No.456 of 2014**; Joseph Karanja Wamucwe, Pius Wairegi Njina, Josphat Wanyoike Muiruri, Irene Muthoni Njoroge, Josphat Kariuki Kinuthia, Jeseo Karanja Maina, John Kibandi Wairimu, Kennedy Njuru Mburu, Michael Njuguna Njogu and Stanley Murigi Kamande, the Petitioners, availed themselves for recruitment into the National Police Service at Kigumo Center Murang'a County and were successful. Later on the results of the recruitment center were cancelled because of reports of alleged nepotism and favourism during the exercise. They thus claim that the conduct of the NPSC infringes on their rights to fair administrative action as provided for under **Article 47** of the **Constitution**. Further, that the NPSC contravened Chapter **6** of the **Constitution** as the conduct of its members was not in accordance with the leadership and integrity provisions of the said Chapter.
- v. **Nairobi Petition No.457 of 2014**; the 14 Petitioners, Francis Kabuga Gathoni, Dishon Gikonyo Mwangi, Nephath Kimani Marigi, Margaret Waiyengo Mwwara, David Njuguna Mwangi, Charles Wangonya Mwangi, Albert Chege Muriithi, Jennifer Wanjiku Muiruri, Francis Gichure Maina, Stephen Macharia Githii, James Mwaniki Waruinge, Joyce Wangari Kimotho, Joshua Chege Kimani and Cyrus Njuru Kariuki submitted themselves for the recruitment at Kangema Center, Murang'a County and were successful. They claim that the recruitment at their station was later cancelled on grounds of unfairness, bribery, nepotism and favourism. It is their contention that the said cancellation violates their right to fair administrative action.
- vi. **Nairobi Petition No.431 of 2014**; the Petitioners, Nicholas Rugu Ngugi, Antony Njoroge Kanina, Peter Gachago Gitari, Samson Kamau Chege, Margaret Wangui Wachira, Penina Wangari Mwaura, Isaac Karanja Ndegwa, Timothy Njuguna Maina, Isaac Murungu Wanjiru, Julius Maina Njuguna, Micah Mungai Ndicu, Martin Kuria Ngware and David Mutisya Ngei are some of the successful recruits from Engineer Stadium Recruitment Centre of Nyandarua County. The results of the recruitment were subsequently nullified and the Petitioners claim that they have continued to suffer psychological and emotional torture as they are being treated as villains who were irregularly and unlawfully recruited for training to join the NPS. They also claim that they will lose an opportunity to join the said Service despite the fact that they competitively competed for the same. That the cancellation of the recruitment also breached their legitimate expectation to be duly admitted to their respective police training schools, and that they have been victimized for

mistakes not of their own making. Further, that the undertaking of a fresh recruitment exercise would subject them to a grave disadvantage as they will be treated as unmerited persons. They thus claim that their economic and social rights will be infringed for there is likelihood that they may lose the opportunity to join the Police Service.

- vii. **Nairobi JR Application No.323 of 2014**; the Applicant, Rhoda Joan Nteere, is a successful recruit from Doldol Trading Centre in Laikipia North District, a station whose results were cancelled. In her Application dated 25<sup>th</sup> August 2014, she claims that the act of cancelling the results of the recruitment center violated the principles of natural justice and a right to fair hearing that entitled her to be heard before the said cancellation.
- viii. **Eldoret Misc Application No.130 of 2014**; the Applicants Pascoline Kimutai, Boaz Korir, Raymond Kiplagat Kosgei, Gladys Kimeli, Allan Kipkemoi Tanui, Evans Kipkoech Korir, Nickson Kiprono Ruto, Timothy Kimeli Kigen, Steve Kipkonga Kangogo, Emmanuel Kipchirchir Chepkonga, Sammy Kipkogei Kiplagat, Walter Kibet Kimutai, Erick Tarus Kemboi, Gladys Jerop Kiplagat, Caroline Cheptarus Kipruto, Boaz Korir, Fredrick Kipkosgei Kiprotich, Nicholas Kipchumba Kiprono, Erastus Kiprotich Kandie, David Kipkosgei Sitienei, Sylvanus Kipchumba Rotich, Duncan Rono, Edwin Kiplagat Yator, Nicholas Kiplagat, Shadrack Kipchirchir Kiptoo, Shadrack Kimaiyo Kimitei, Evans Kiptoo Bargoria, Titus Kipkorir Kimutai, Duncan Kiplagat Chelule, Edwin Kiptoo Cheruiyot, Paul Boit, Nixon Kipkosge Kimutai, Raymond, Kiplagat Kipkogei, Titus Kipchirchir Chemase, Mathew Kiplimo Kemboi, Emily Rotich, Gladys Kimei, Gladys Jesang, Ednah Kigen, Faith Koech, Fridah Barmasai, Clara Chepchirchir and Gladwell Tanui were successful candidates who were recruited Keiyo South within Elgeyo Marakwet County. They claim that the decision to nullify their recruitment is illegal and *ultra vires* in view of the fact that neither the **NPSC Act** nor the **NPS Act** gives the Chairman of NPSC power to overturn the decision of the Recruitment Committee. Further, that the Chairman's decision violated the Applicants' rights to be heard and thus breached the rules of natural justice and right to fair administrative action.
- ix. **Nairobi Petition No.421 of 2014**; the Petitioners, Robert Kariuki Kinyanjui, Hiram Ngugi Wanjohi, Wilson Chomba Kaara, Kevin Kabati Njoroge, Julius Kamau Gichuhi, Mercy Mugure Wananua, John Nyoike Mwangi, David Munigaru Muigai, Caroline Wanjiku Migwi, Beth Wangari Njuguna, Cyrus Githinji Gachiri, Fredrick Thuku Kamau, Simon Wanyoike Nganga, Moses Ndungu Njenga and Felister Wambui attended the recruitment at Kandara Stadium within Murang'a County and were successful. They oppose the cancellation of the recruitment results for Kandara Stadium as they claim that they were not heard before the decision to cancel could be taken and thus a violation of their right to fair administrative action as provided for under **Article 47** of the **Constitution**.
- x. **Nakuru JR. No.31 of 2014**; the Applicants, Ronald Kiprop, Reuben Kiprop Chepkoi, Daniel Kipchumba, Godfrey Kiplagat, Kibichii Kipkemoi, Martin Kipkosgei Kulei, Bowen Jerop, Zakayo Kiprono, Kipsabul Kiprop, Nicholas Ruto, Irene Cherono Kemboi, Christopher Kigen, Andrew Biwott, Symon Kirwa Omari, Lencer Jebiwoyy Kipruto, Gillian Jebet Kirwa, Brenda Jepkosgei Ngetuny, Steven Kemboi Mengich, Geoffrey Langat, Edna Jepngeno Chebasgwony, Caroline Chebon Jepkurui, Kimutai Kipkicho, Thomas Kosgei, Gladys Jepiras Kipkicho, Granton Tarus Kiptanui, Kipkoech Kibet, Milka Kipkoech, Evans Cesang Kibet, Ezra Ngetich Tunai, Gildert Kiprono Kosgei, Kipkemboi Kipchumba, Evans Korir, Laban Kipruto Kandie, Daniel Kipruto Kipsang, Victor Kandie, Winnie Jelangat Chirchir, Alex Kiborek, Jepkosgei Jemjor, Edwin Kiplagat, Ronald Kibet, Gilbert Kipkemoi, Benard Kibet, Fridah Jepkorir, Victor Kisoryo, Titus Kiprop, Raphael Kimelil, Amos Kosgei, Millicent Karie Kibon, Hillary Keitany Kiptui, Benson Cherotich Ngetich, Evans Kipkurui, Mercyloine Jekemoi Lagat, Andrew Kiprop Kigen, Wycliffe Kurere Chepkoton and Muthebwa Josphat Mwangangi, are successful candidates for the recruitment into the Police Service at Mogotio Station. They oppose the cancellation of the results of recruitment of their station on grounds that the decision was unreasonably taken and was based on speculative allegation by persons unknown to the Applicants and further that they were condemned unheard.

- xi. **Nakuru Petition No.58 of 2014**; the Petitioners, Eliud Mathu Ndiba, Jane Muthoni Kibunja, Phoebe Njeri Mwangi, Francis Macharia Kamau, John Waweru Kamau, Hosea Macharia Mbuki, Hezron Kiarie Mutiso, Paul Nduati Wangari, Zacharia Chege, Erick Sogut Corir, Jonah Kipkochei Komen, John Nderitu Gitahi, Jidraph Ngugi Mburu, Samuel Chege Nga'ng'a and David Gitau Wanjiku attended the recruitment at DC's office Bahati, Nakuru County and were successful. They claim that the cancellation of the recruitment results at the said center is unconstitutional since their right to fair administrative action, right to equality and the right to earn a living and be employed have been violated.
- xii. **Nakuru Petition No.55 of 2014**; the Petitioners, Ronald Kipkemoi Rutto, Felix Kiplagat Kibusa, Rizzgalla Ahmed Khamis, Luke Lagat, Mark Kiprop, Judy Jelagat Kimosop, Kennedy Kiptum Chepyegon, Daniel Kibet Samoei, Bernard Kiprop Tanui, Kipkogei Ngetich, Rashid Isamel Ahmed, Hezekiah Kiplagat Chekieng, Nelson Kipkorir Lemiso, Jacob Mutai, Anne Waruiru Njihia, Job Kipkmoi Chepkirwok, Collins Kipkurui Kulei, Clement Kipkosgei Keitany, Sylvester Osiemo, Tom Kipkosegei Tenai, Enock Kibet Kemboi, Marion Jepkemboi Barus, Kipruto Torotoich, Asman Omar, Salome Jerotich Kimeli, Zenna Jepkoech Ibrahim, William Chepchumba Matelong, Triza Jepkosgei Ronoh, Jerop Lagat, Jenifer Jepkorir Ngetich, Dennis Momanyi Nyabuti, John Kimani Mberere, John Mugo Naomi, Chris Ngetich Bometi, Frank Sertoi, Faith Kipkoech Rono, Gladys Jemutai Jelagat, Haron Kioko Kilonzo, Hyvine Jepkosgei Kitilit, Fredrick Kipngeno, Sheila Kimeli Chebon, Alex Kipkogei Tanui, Duncan Yegon, Ruth Chemtai Bewott, Emily Jepkorir Kemboi, Edwin Kiplagat Cheruyoit, Juma Khamisi Ibrahim, Job Kiprop Kiptum, Purity Cheptoo Cheremei, Sammy Mburu Muchai, Sabit Hussein Sabit and Evans Kipkemei Cherutich attended recruitment conducted at Mogotio and Eldama Ravine in Koibatek County and were successful. They claim that they are unaware of any complaints in the said recruitment centers and oppose the cancellation of their recruitment results. They also claim that they have the legitimate expectation and are entitled to fair administrative action which right was violated as they were not heard before the decision to cancel their recruitment was made.
- xiii. **Nairobi Petition No.434 of 2014, formerly Meru Petition No. 21 of 2014**; the Petitioners, Kirimi Justus Muthee, Kirimi Francis, Ann Gacheri, Ng'olua Mwika Patrick, Mary Gakii, Mutembei Amos Gilbert, Cosmas Laibuni Francis, Mutwiri Tomothy Kaberia, Kanario Elsie, Joshua Mutethia, Kamene Catherine Mwoga, Michael Mwiti, Mwititi George Muuru, Mburuku Joshua, Maingi ken Mwiti, Winnie Kimathi, Mugambi Stephen, Mwenda Geoffrey Ibaya, Thanara Jeremiah Karithi, Julius Rukungu Mwenda, Joshua Muchui, Yvonne Gacheri, Salome Kirito Karuti, Lawrence Muraguri Matau, Benedict Bundi Ndegwa, John Bosco Mutwiri Mungathia, Jeremy Muriuki, Martin Kirimi Limiri, David Kainga Mutabari, Timothy Kobia Kamencu, Samuel Nkunjia, Samson Kithinji, Kelvin Thabwaya Mwenda and Kiburi Moses Mutwiri were recruited at Nguthiru Stadium in Tigania East Sub-County within Meru County. Their recruitment results were thereafter cancelled by the NPSC and in the Petition dated 26<sup>th</sup> August 2014, they contend that there were no allegations of malpractice(s) in the recruitment made in respect of their recruitment center, that no person had been found to have influenced the recruitment contrary to the recruitment rules and that the cancellation was done without according them an opportunity to be heard thus violating their rights to fair administrative action and right to fair hearing.
- xiv. **Kericho JR. No.6 of 2014**; the Applicants, Sigei Kipkoech Benard, Chepkuri Agnes, Cherono Jackline, Chepkurui Wesley Chirchir, Chelangat Caren, Cheruiyot Kiprono Gideon, Chepkemoi Miriam, Kipyegon Rotich, Kipkoech Chelule Towett, Kipkoech Hillary Bill, Kiprono Langat Gilbert, Kirui Kipkoech Weldon, Charles Kipkoech Kirui, Chepkowny Peter Kipkirui, Cheruiyot Leonard, Kipkorir Leonard Ng'eno, Langat Kiprono Sternof, Kenneth Kiprotich Ng'eno, Kirui Elijah, Kiprotich Gilbert, Rotich Robert, Chepkirui Stellah, Jackson Cheruiyot Kirui, Chepkwony Kiplagat, Kipkorir Sology, Dominic Kipkemoi, Conesmus Kipngetich and Chepkuria Roselyne were the successful candidates for the recruitment conducted at Sotik-Sub-County. In the Notice of Motion Application for Judicial Review orders dated 25<sup>th</sup> August 2014, they claim that in the absence of substantiated allegations against a particular individual, any purported annulment of the recruitment is null and void as it denies the Applicants their legally and rightfully earned recruitment in a fair, competitive and meritorious exercise thus denying them their right to

equality, protection and benefit of the law and that they were also discriminated against.

- xv. **Kericho Misc Application No.7 of 2014**; the Applicants, Cheruiyot Collison, Kiplagat Kirui, Kipngetich Kirui Jackson, Koech Evans, Kiprotich Cheruiyot, Yegon Simion, Kirui Aron, Mercy Chepkoech, Kpngeno Korir Enock, Hillary Mutai, Kibet Mutai Geoffrey, Josphat Langat, Langat Gilbert, Bett Robert, Elvins Cheruiyot Langat, Robert Kipngeno Cheruiyot, Kipngeno Rono, Chelangat Lydia, Mathias Kiplangat Cheruiyot, Cheruiyot Sylvester, Korir Kipyegon Oscar, Emmanuel Kipkoech Ng'eno, Ng'eno Hamilton, Langat Ben, Chepkurui Chelangat, Reuben Langat, Kenneth Kipkoech Kitur, Gideon Kiplangat Kirui, Kiplangat Jacob Towett, Langat Mathew, Koskei Dorcas, Bett Japter, Langat Evans and Beatrice Chepkemoui were successfully recruited at Bomet Centre. They have filed this Judicial Review Application claiming that the NPSC acted in an unconstitutional manner in failing to accord the Applicants a fair hearing before annulling their recruitment into the Police Service. They also claim that the decision of the NPSC is arbitrary, unreasonable and discriminatory as it failed to observe the rules of natural justice.
- xvi. **Embu Misc Application No.152 of 2014**; the Applicants, Stella Syonzui Kisangi, Charles Ileri Nthiga, Elizabeth Syomiti Musili, Peter Mbithi Mutuku, Peter Mulwa Mutisya, Lawrence Mwangangi Nyaga, Caroline Ngina Mutie, Eric Ndwiga Nyaga, Margaret Ndunge Titus, Purity Njeri Njagi, Benson Ileri Njeru, Nelly Ndinda Mutua, Joshua Nzioka Mbithi, Alex Mwenda Kigonda, Raphael Muia Musyoka, Asunta Rukunyi Nyaga, Lemmy Maganda Nyaga, Alex Muriuki Njagi, Kennedy Kariuki Nyaga, Peterson Murithi Njagi, John Mwangangi Mbogo, Eston Mbatha Kimuyu, Douglas Macharia Njeru, Jacob Macharia Mitaru, Patrick Gitonga Njagi, Patick Gitonga Njeru and Boniface Njagi Maringa were successfully recruited at the recruitment exercise conducted at Umuau Grounds, Mbeere South District, Embu County. They claim that the decision to annul their recruitment contravenes the principles of natural justice.
- xvii. **Nairobi Petition No.445 of 2014**; The Petitioners, Daniel Njuguna Mukirai, Benard Kayioni Masikonde, Desmond Sammy Konko, Hannah Sekeyian Mashuko, Kelvin Lesingo Ronyo, Cliff Nyaingiri Ondari, Konene Kuyoni, Alfred Kiprotich Kemboi, Daudi Mutel Ntokoyoi, Soi Hillary, Kelvin Yenko, Mark Sirere Seki, Abigael Pasiyani, Kipyegon Nicholas Kemoi, Evans Parkire Lekina, Sophia Lepatim Danson, Chepkemoui Emily, Naomi Simaloi Nkoiboni, Carolyn Sapiyo Nkuruna, Edwin Lemontoi Pere, Kashoi Ole Lesile Shonko, Kimutai Raymond Kirui, Dennis Nkouwua, Moses Leparan Kataika, Moses Tonkei Kaluo, Grace Naserian Enole Kumpash, Evalyne Naini Njoroge, Twarari Ole Kerema, Lengai James Nkanai and Wilfred Sankau Pariken were successful recruits at Narok Stadium recruitment center within Narok County. They are challenging the cancellation of the recruitment in their Centre on the ground that their right to fair administrative action was violated.
- xviii. **Nairobi Petition No.447 of 2014**; the Petitioners, Joel Mwangi Mithanga, Peter Mwangi Kagechu, Simon Maina Wanyoro, Julia Wanjiku Kiragu, Pauline Njeri Kirori, Ann Wanjiru Amadi, Wollece Njoroge Karatu, Gabriel Nyoike Makau, Eric Muturo Gacho, Peter Kamande Mwangi, Pauline Wangari Karanja, Daniel Mbugua Ngugi, Johnson Karoki Musembi, Michael Kamau Kangethe, James Kimani Njoroge, John Mwikya Kavita, Isaac Maina Muturi and Kefa Kihara Mwaniki were successfully recruited at Gatanga Centre Murang'a County whose recruitment results were later cancelled. They are aggrieved by that cancellation and claim that rules of natural justice were violated by the 2<sup>nd</sup> Respondent in cancelling their recruitment.
- xix. **Nairobi JR Application No.328 of 2014**, the Applicants Moses Kipkorir Kurgat, Kipkoech Bor Daniel, Hillary Kipketer Kosgey, Alex Kimutai Kirui, Kiprof Eleazer, Silas Chirchir, Chepkowny Kiplagat Denis, Daniel Mutai, Lydia Cheptoo, Simion Kipkurui, Jelagat Lydia, Henry Kipkoech Bor, Meshack Kiprotich Misik, Benard Kipng'eno, Dismas Cheruiyot Yego, Chesang Josephine, Vivian Chelang'at, Naomi Chepkemoui, Winny Cheptoo, Wesley Choge, Wilfred Kipsang, Nicholas Kiplimo Saurey, Hillary Kiplang'at Maiyo, Kipkemboi Daniel Limo, Kiprof Kemboi, Sheilah Cheptoo, Josephine Chepchirchir, Stephen Sirma, Ednah Cherobon, Edwin Kipkoech Ng'etich, Koech Geoffrey, Kenneth Kipng'etich Bett, Josephine Chepkoech, Lang'at K. Bernard, Kenneth Metto, Kenneth Kipkemboi, Matthew Kipkoech Biwott, Peter Kipng'etich Tuel,

Margaret Chelang'at, Cheruiyot Henry, Philemon Muge, Kipla'ngat Isaiah, Bernard Kiprotich Lagat, Amos Kipchirchir Koech, Obadiah Kipsang Yego and Patrick Kipkirui Kemboi were the successful candidates at the recruitment held at Maraba, Tinderet Sub-County, Nandi County. Their claim is that the 2<sup>nd</sup> Respondent acted *ultravires* in nullifying their recruitment and that the Commission acted in excess of its powers because there were no malpractices in their center.

xx. **Nairobi JR. No.329 of 2014**, the Applicants, Ainea Swereri Burache, Sammy Mbugua, Godfrey Kipchumba Kemboi Kirwa, Naho Cheruiyot, Geoffrey Kipkemei, Ruth Jepkemboi, Gilbert Kiptanui Ng'eno, Standly Kimutai Serem, Michael Kebenei, Daniel Rotich, Kibiwott Kennedy, Mary Chepng'etich, Stellah Chelagat, Daniel Kiprop Suerey, Embuza Noela Karejio, Joel Kiplagat Sogombey, Daniel Kipkoech Kemboi, Loyce Jebet, Damaris Kinaro, Emmanuel Kebenei, Brian Kipleting, Kiprop Benjamin, Eusilah Jeptoo, Wesley Kipng'etich, Koech Kiplimo Piusben, Jepkosgey Victorine Mberia, Violah Chepkoech, Linus Kiprop Keter, Evans Cheruiyot, Solomon Kiprotich Chumba, John Kiprop Maru, Sammy Kibet Arusei. Evaline Chebet, Kiptoo Nicholas, Nicholas Kipchirchir, David Kipkirui Rono, Richard Ruto, Inyanje Jackson Achina, Lynette Chebitok, Edwin Boit, Abraham Kiplimo Lagat, Bwambok Amos, Elly Kipsang, Ruth Chelagat, Gachanja Houstone Mwangi, Nathan Kipleting, Abraham Kipruto Yego, Bethwell Tirop and Grace Cherotich attended and were the successful candidates for the recruitment exercise undertaken at Kapsabet Parade Grounds, Nandi Central Sub-County, Nandi County. Their claim is similar to that in **Nairobi JR No.328 of 2014** as stated elsewhere above.

8. As can be seen in all the above Petitions against the annulment of the recruitment, the Petitioners basically seek the same orders and which I shall summarise as herein below;

***(i) Orders of Certiorari to remove to the High Court for purposes of being quashed the decision dated 12<sup>th</sup> August 2014 by the Respondent to annul and or cancel the Police recruitment exercise carried out on 14<sup>th</sup> July 2014***

***(ii) Orders of prohibition to prohibit the Respondent from repeating the recruitment exercise for police constables or subjecting the interested parties to a repeat and or to another process of recruitment other than the one carried out on 14<sup>th</sup> July 2014 for purpose of filling the 10,000 vacancies in the police service.***

***(iii) Orders of Mandamus compelling the Respondent to admit and train the Interested Parties at the Administration Police Training College, Police Training College Kiganjo and General Service Unit Training School at Embakasi.***

iv. ***Costs of the Petition and Applications.***

v. ***Other orders including gazettelement of recruitment guidelines and regulations and audit of funds used in the recruitment exercise.***

### **Consolidation**

9. On 11<sup>th</sup> September 2014, by consent of all the Parties, all the above mentioned Petitions and/or Judicial Review Applications were consolidated. All the Parties in the Consolidated Petitions were divided into three distinct categories of interests and positions as follows;

i. **Category One**; the 1<sup>st</sup> Petitioner (IPOA), 2<sup>nd</sup> Petitioner and the 334<sup>th</sup> to 348<sup>th</sup> Interested Parties whose position is that the recruitment exercise for entry into the police service conducted on 14<sup>th</sup> July 2014 country-wide should be nullified and a fresh recruitment exercise undertaken by the NPSC, including in the 36 centers whose recruitment has been proposed to be nullified by the said Commission.

ii. **Category two**; Interested Parties whose position is that the proposed nullification and the repeat of

the exercise in the 36 centers identified by the NPSC (limited to those two have filed their claims before this Court and any other parties that may do so before hearing) should not be quashed.

iii. Category Three: the NPSC and the Attorney General whose position is that the recruitment should be upheld save for the repeat in the exercise in 36 centers identified by NPSC for that purpose.

### **The Parties' submissions**

#### **The 1<sup>st</sup> Petitioner's (Category One) Submissions**

10. Mr. Olola presented the 1<sup>st</sup> Petitioner's case. It was his submission that the NPSC illegally and in contravention of **Article 246 (3)(a)** of the **Constitution** and **Section 10** of the **National Police Service Commission Act** delegate its powers to recruit members of the 3<sup>rd</sup> Respondent to sub-county Commissioners and Sub-County Recruitment Committees, entities unknown in law, and not empowered by any law to carry out such a recruitment. It was his contention that the members of the Recruitment Committees did not include any member of the NPSC and thus the said Committees were entities separate from the said Commission. Secondly, that the said Committees were mandated by the NPSC to carry out the entire recruitment exercise on its behalf, handle complaints arising during the recruitment exercise on behalf of the Commission and lastly determine successful candidates and communicate to them by issuing Docket Numbers which would enable them attend the designated colleges. It was therefore his submission that the Sub-County Recruitment Committees were not committees of the Commission and they were committees comprised of persons who had illegally assumed delegated powers by the NPSC in violation of **Article 246(3)** of the **Constitution** and **Section 10** of the **National Police Service Act**. Further, that under **Article 2(4)** of the **Constitution**, the act of delegation was invalid and therefore the recruitment as conducted was a nullity in law. He relied on the cases of; *Macfoy vs United Africa Co, Ltd (1961) 3 ALL ER, Mary Wambui Munene vs Peter Gichuki King'ara & 2 Others (2014) e KLR, Midland Finance and Securities Globetel Inc vs Attorney General & Another (2008) e KLR* where it was generally held that if an act was invalid, then it was null and void *ab intio*.

11. It was Mr. Olola's further submission that in any event, the recruitment exercise was carried out without transparency and accountability as required under **Articles 10, 73, 232, 244, 246** and **249** of the **Constitution** and under **Section 12 (d)** of the **NPSC Act**. That the NPSC being a state organ was bound by the principles of public service and its Commissioners being State Officers were required to observe the principles of accountability, transparency and provision to the public of timely and accurate information. That the NPSC as an independent commission established under the Constitution is required to promote and practice transparency and accountability in undertaking its functions and the same principles are binding on its members. He thus submits that the 2<sup>nd</sup> Respondent failed to adhere to these principles of transparency, accountability and participation in carrying out the recruitment exercise on 14<sup>th</sup> July 2014.

12. Further, it was the 1<sup>st</sup> Petitioner's case that in developing the guidelines used to guide the recruitment exercise, the NPSC was bound by the law to ensure that there was public participation. That public participation of the people in the development of the guidelines was imperative and he relied on the cases of *Nairobi Metropolitan PSV Saccos & 25 Others vs County of Nairobi Governmnet & 3 Others Petition No.486 of 2013, Doctors for Life International vs Speaker of the National Assembly and Others CCT 12 of 2005* and *Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others (2014) e KLR* all which elaborate on the principle of public participation. It was his additional submission in that regard that the guidelines attached to the circular issued to the public differed from the draft regulations attached to the affidavit of Johnstone Kavuludi in the present Petition. It was also his contention that it would be illegal and unconstitutional for the NPSC to use guidelines developed by another entity in carrying out its recruitment.

13. The 1<sup>st</sup> Petitioner further submits that the NPSC failed to publish or gazette any regulations that would guide the recruitment and yet the said regulations ought to have been developed with public participation and in tandem with **Section 28** of the **National Police Service Commission Act** and the

**Statutory Instruments Act of 2013.** That the said regulations would have also set out necessary facts such as how the number of slots available to each county were arrived at; the number of slots available for each ethnic group and how they were arrived at; what was expected of the recruiting panels; the procedure to be used in recruitment; the criteria to be used in selecting successful candidates e.g. the requirements of physical fitness; how the unsuccessful candidates would be advised of reasons of their not being selected and how complaints would be handled. It was therefore its case that without such regulations in place, participants in the recruitment exercise and other stake holders were not privy to the standards applicable and everything was therefore left to the mercy and discretion of the NPSC and the Sub-County Committees which allegedly had opened avenues for corruption and malpractices during the exercise. It particularly complained that certain ethnic groups were not selected in certain centers as the NPSC had not created slots for the said ethnic groups and those who were attending the recruitment were not aware of such regulations which would have helped them make appropriate decisions as to whether to attend or not. Further that persons attending the recruitment were disqualified for arbitrary reasons pegged on the general criteria that they had unspecified deformities. Consequently, persons seeking recruitment were left at the arbitrary discretion of the Recruiting Committees to determine what amounted to a deformity not warranting recruitment. He gave examples of people with brown teeth which fact was sufficient to be considered as a deformity in some areas yet such a criteria had not been set anywhere in the guidelines. It was therefore the 1<sup>st</sup> Petitioner's case that the recruitment exercise did not satisfy the constitutional imperatives of transparency, accountability and public participation as required under **Articles 10, 73, 232, 244, 246 and 249** of the **Constitution** and it now seeks the annulment of the entire recruitment so that the NPSC can conduct a fresh recruitment in a manner that satisfies the constitutional and statutory thresholds of public participation.

14. In addition and for emphasis, it is the 1<sup>st</sup> Petitioner's case that the guidelines, if at all were used in the recruitment exercise were never made public by NPSC and were not developed with public participation. In that regard, Mr. Olalo submits that the recruitment was at the discretion of the Sub-County Recruitment Committees. He thus claims that it is only the persons who were conducting the recruitment were aware of the standards and procedures applicable and that does not satisfy the transparency and accountability principles established under the Constitution.

15. It is Mr. Olalo's further submission that the selection of successful candidates in most centers was conducted in the dead of the night and so it was impossible to fulfill the requirements of transparency and recruitment in an accountable manner.

16. Further, that the recruitment was discriminatory against women as it required that female candidates should not to be pregnant during the recruitment exercise. That **Article 27** of the **Constitution** prohibits discrimination on grounds of pregnancy and there is no legislative provision that allows for discrimination on account of pregnancy for purposes of recruitment of members of the Police Service. In any event, Mr. Olala submits that any limitation to the enjoyment of the right to be recruited into the NPS ought to be allowed only where there are no less restrictive means to achieve the intended purpose. He thus suggests that the NPSC ought to have allowed the recruitment of pregnant women as long as they passed all other tests, then allow them to attend training at a later time and after giving birth.

17. It is therefore the 1<sup>st</sup> Petitioner's case that the recruitment exercise having been carried out in contravention of the provisions of the Constitution and the **NPSC Act**, amounted to a nullity and therefore no rights of fair administrative action or legitimate expectation could properly be said to have been exercised if the same were predicated on an illegal recruitment exercise carried out in violation of the Constitution. In that regard, reliance is placed on the case of ***Diana Kethi Kilonzo & Another vs Independent Electoral & Boundaries Commission & 10 Others (2013)*** e ***KLR and case of Estates Ltd vs Registrar of Titles (2012) e KLR*** for the proposition that the Court cannot and should not endorse an illegal process. Mr. Olalo also argues that it did not matter that the Interested Parties had not violated the Constitution because once the Constitution had been violated by the NPSC, that fact alone rendered the recruitment process a nullity their interests notwithstanding. It thus urges the Court to grant the prayers sought in the Petition.

## **The 2<sup>nd</sup> Petitioner's (Category One) Submissions**

18. The 2<sup>nd</sup> Petitioner, Charles Kiptarus Chesire, in his **Petition No. 318 of 2014** challenges the criteria used to recruit police constables given that the centers established were based on district levels which no longer exist in Kenya as per the Constitution, 2010 and further, that the failure to take into account the cosmopolitan population and marginalized people in Uasin Gishu County rendered the whole exercise irregular. In that regard it is his case that Uasin Gishu County was allocated three Districts for recruitment as compared to other smaller Counties and claims that the procedure used in the recruitment in Uasin Gishu was neither proportionate nor equitable and was biased to the people of that County compared to other Counties such as Wajir which has 7 districts, Laikipia, Nyeri, Busia and Taita Taveta Counties with 12 centers each, Meru County with 8 centers, Kisii County with 10 centers and yet all of them have a lower population compared to Uasin Gishu County.

19. Further, Mr. Mengich for the 2<sup>nd</sup> Petitioner while associating himself with the submissions made by Mr. Olola added as follows;

20. That the criteria used by the NPSC was vague, flawed and outdated and thus in violation of **Article 27** of the **Constitution** which establishes the right to equal protection and equal benefit of the law. That Uasin Gishu had 3 centers for recruitment with a population of 894,179 as compared to Wajir County which had been allocated 8 centers with a population of 661,941; Nyeri County was allocated 8 centers with a population of 693,558; Kirinyaga County was allocated 7 centers with a population of 528,054 and Laikipia County was allocated 5 centers with a population of 399,227. He thus claims that the criteria used at arriving at the number of centers per County was unequal and did not reflect regional balance and regional representation. That **Section 5** of the **National Police Service Act** provides that the composition of the police force shall reflect regional and ethnic diversity of the people and it is thus his position that the recruitment process did not in any way reflect regional and ethnic diversity of the people of Kenya in regard to recruitment as conducted in Uasin Gishu.

21. He further contends that the creation of more recruitment centers in other Counties with lower populations meant that those Counties would have an upper hand as more people would be recruited to join the Police Service compared to those with larger populations but with fewer recruitment centers. He particularly claims that the people of Uasin Gishu have a right to be included in the Police Service in a fair, just and proportionate manner, and that the establishment of only 3 centers in Eldoret Municipality and not in rural areas disadvantaged most of those in rural areas who could not travel to the Municipality as allocated. Further, that the allocation of few centers in Uasin Gishu County meant that few people would be recruited in the end.

22. He adds that gender balancing was not achieved because only 55 female candidates were recruited in Uasin Gishu out of the 220 recruited and thus a violation of **Article 27** of the **Constitution** which outlaws discrimination on any ground. He relies on the case of **State of Kesata & Another vs N. M. Thomas & Others 1976 AIR 490, 1976 SCR (17906)** in that regard.

23. In addition, he claims that the criteria used by the NPSC violated **Article 1(4)** of the **Constitution** which stipulates that sovereign power of the people is exercised at the national and county levels, and as such, districts are not recognized as legal entities by the Constitution, 2010. That currently, administrative units are as provided for under the **National Government Co-ordination Act** which provides for 290 constituencies and he relies on the case of **Job Nyasimi Momanyi & 2 Others vs Attorney General & Another (2009) eKLR** where it was held that all districts formed after 1992 were unconstitutional and non-existent in law.

24. It is thus his submission that the criteria used by the NPSC was in breach of the Constitution for failure to publish and gazette regulations; failure to engage and promote public participation; failure to develop rules, guidelines and or policy for recruitment; use of outdated and archaic recruitment rules and negligence in undertaking an exercise riddled with corruption. That under **Article 35** of the **Constitution**, the Petitioner had a right to access information especially the guidelines used, if any, for the recruitment, which guidelines have not been supplied to him.

25. It is against that background that Mr. Mengich urges the Court to nullify the entire recruitment

exercise held on 14<sup>th</sup> July 2014 in Uasin Gishu County and order for a repeat of the same and also the creation of more centers in the rural areas and also in public interest nullify the entire exercise as conducted across the country.

### **Submissions for the 334<sup>th</sup> – 348<sup>th</sup> Interested Parties (Category One)**

26. Mr. Kaume for the above Interested Parties associates himself with the submissions of Mr. Olola and adds that the contention that the rights of those already selected to join the police force would be infringed is without any basis, firstly, because no single candidate is more entitled to be recruited in the Police Service more than the other. That all candidates have equal opportunities under **Article 27** of the **Constitution** including those who were denied the opportunity to be recruited because of ills and vices that marred the exercise. He thus claims that a nullification of the exercise will afford an equal and level playing ground for all qualified candidates to competitively and fairly seek recruitment into the Service.

27. Secondly, that the Court cannot uphold an illegality as demanded by the Interested Parties and he relies on the case of **Diana Kethi Kilonzo & Another vs Independent Electoral & Boundaries Commission & 10 Others (2013) e KLR** where it was held that a Court of law cannot endorse an illegal act as doing so would be in violation of the law.

28. He thus urges the Court to nullify the recruitment exercise and order for a fresh recruitment.

### **The Interested Party's (Category Two) Submissions**

29. All the other Interested Parties as listed above oppose the Petition. They are also seeking a review of the decision of the Respondents to cancel the recruitment results in 36 centers where the Interested Parties had successfully been recruited. They filed their respective pleadings and submissions. Their joint case was highlighted by Mr. Mbaabu, Mr. Gachuma, Mr. Magut, Mr. Githinji, Mr. Mathenge, Mr. Okwaro, Mr. Korir and Mrs. Macharia learned Advocates for the Interested Parties. Their case is as follows;

30. That the NPSC does not have powers to cancel the recruitment of civilians into the NPS and or order a repeat of such a recruitment exercise. That the only power the Commission had was to make recommendations in that regard to the Government as provided for under **Section 11(1)(g)** of the **NPSC Act**. That therefore, cancellation of the recruitment of the Interested Parties is illegal, null and void *ab initio*.

31. They further contend that the decision of the NPSC was made in violation of the rules of natural justice as the Interested Parties were not afforded an opportunity to be heard or to make representations regarding the allegations of impropriety or irregularity in the recruitment exercise before the aforesaid decision that adversely affects them was made. That the annulment of the recruitment was also done in an arbitrary and unfair manner thus amounting to an abuse and improper exercise of authority and frustrates the Interested Parties' legitimate expectation to fair play and lawful conduct on the part of the NPSC. Further, that the Respondents breached the principle of proportionality by failing to maintain an appropriate balance between the adverse effects which its decision would have on the rights, liberties or interests of the persons concerned and the purpose which the NPSC seeks to achieve by nullifying the recruitment. In addition, that the Respondents acted with bias and treated the Interested Parties unfairly by failing to take into account evidence favourable to them and failed to consider the fact that there were no adverse allegations made against them. That the decision to cancel the recruitment results of their centers was in any event irrational and unproportional and that if any corruption and bribery was perpetrated during the recruitment, the NPSC and the 1<sup>st</sup> Petitioner should forward such evidence to the Ethics and Anti-Corruption Commission and the Director of Public Prosecutions for appropriate action. It is therefore the Interested Parties' contention that the Respondents failed to adhere to the provisions of **Article 47** of the **Constitution** and as such the decision to cancel the Interested Parties' recruitment is a nullity, invalid and void *ab initio*.

32. They also claim that the Respondents violated the fundamental principles of natural justice particularly the right to be heard because the successful recruits in the cancelled centers were not given an

opportunity to be heard or make representations regarding the allegations made against them. That the Respondents also failed to give them an opportunity to show cause why their recruitment results should not be cancelled and even the Recruitment Committees were not heard. They rely on the cases of *Republic vs Kenya Revenue Authority ex parte L.A.B international Misc Application No.82 of 2010*, *Onyango Oloo vs Attorney General (1986-1989) EA 456* and *Republic v The Honourable the Chief Justice of Kenya & Others ex Parte Moijo Mataiya Ole Keiwua Nrb HCMCA No. 1298 of 2004* all which espouse the principles of natural justice.

33. On the issue of guidelines, the Interested Parties contend that the power to make guidelines is discretionary on the part of the NPSC. That the criteria used in the recruitment was in any event clear as it required the NPSC to fill the vacancies using the criteria of gender, county and ethnic diversity as required under **Article 246 (4) of the Constitution** and that there does not exist any requirement requiring gazettment of the guidelines.

34. It is also their submission that the Interested Parties were not involved in the alleged malpractices and no complaints were made against them and therefore they should not be victimized for alleged mistakes of other people, if at all.

35. It is also their claim that recruitment was a policy issue and this Court cannot make such policies for the Respondents.

36. Lastly, the Interested Parties urge the Court to consider the socio-economic ramifications of cancellation of the entire recruitment exercise since millions of shillings were spent in conducting the same and such money cannot be recovered and the loss to the public would be immense.

37. That therefore, for the above reasons, the Court should uphold the recruitment as it was properly conducted and order the Petitioners to pay costs of the Consolidated Petitions and Judicial Review Applications.

### **The Respondents' (Category III) Submissions**

38. The Respondents oppose the Petitions and Judicial Review Applications principally through the Affidavit of Johstone Kavuludi, the Chairperson of the NPSC sworn on 8<sup>th</sup> August 2014.

39. Mr. Kavuludi depones that under **Section 11 (1)(f) of the NPSC Act**, the Commission has powers to conduct investigations on any matter within its mandate and one such matter is the recruitment of police officers. That under the same Section, the Commission has powers to gather any information and compel the production of such information as and when necessary. In that regard, IPOA has failed to understand that the recruitment was not done by any member of the National Police Service and that it (IPOA) does not have the mandate to investigate the complaints related to alleged criminal offences committed by any member of the NPSC. Mr. Ojwang, Learned State Counsel representing the Respondents submits that under **Section 6 of the IPOA Act**, the 1<sup>st</sup> Petitioner has no mandate to exercise an oversight role over the NPSC and that the 1<sup>st</sup> Petitioner's Petition is frivolous and vexatious and is being camouflaged as public interest litigation. He relies on the case of *Truth, Justice and Reconciliation Commission v Chief Justice of the Republic of Kenya and Another (2012) e KLR* to support his contention that the role of the IPOA does not extend to playing an oversight role over the NPSC.

40. He claims while that the Commission has powers to delegate the function of recruitment of police officers under the rank of Superintendent of Police, the Commission did not delegate its powers to recruit members of the Police Service to Sub-County Commissioners as alleged and that the Recruitment Committees were properly established under the provisions of **Section 13 of the National Police Service Act** and therefore the recruitment cannot be null and void as alleged. On his part, Mr. Ojwang adds that **Section 13 of the NPSC Act** allows the Commission to execute its functions through committees as was the finding in the case of *Emmanuel Masinde Okutoyi & Others vs The National Police Service Commission & Another Petition No. 6 of 2014* where it was held that the Commission has powers to establish committees for the better carrying out of its functions and that it can co-opt persons whose

knowledge and skills are necessary for that function. That the sub-committees were in any event working under the recruitment guidelines issued by the NPSC and their actions were subject to the Commission's approval.

41. As regards guidelines specifically, he states that such guidelines were developed for the purposes of recruitment and were published by way of newspapers adverts and were also broadcasted through the radio where information relevant to the public was given and other media engagements were also conducted by the Chairperson of the Commission in a televised program called '**Moving the Masses**', to be found at <http://www.youtube.com/watch?v=t8iko7sggeg>. That the Commission also has policies, procedures and guidelines that guide the recruitment exercise and it is in the process of finalizing the drafting of regulations on recruitment. Further, that the June 2014 Guidelines on recruitment of police constables are drawn from the draft recruitment regulations and that there was public participation in their drafting and the Commission also undertook extensive public participation in the recruitment process.

42. On the issue of alleged breach of the principles of natural justice, Mr. Kavuludi depones that the Commission did not receive any complaint against any specific successful Applicant and it therefore had no basis and obligation to hear any of the successful recruits in the areas affected as alleged by the Interested Parties. In any event, that it would have been impractical for the Commission to hear any of the successful candidates/recruits and/or the Sub-County Committees before a decision was reached. It is Mr. Ojwang's submission in that regard that in any event, the complaints received were against Sub-County Committee members and not any of the successful recruits and the annulment was against the decisions of the Recruitment Committees and that the final decision as to recruitment is made by the Commission and not the Sub-County Committees. It is therefore his submission that the NPSC did not breach the principles of natural justice by not according the Interested Parties a right to be heard before annulling the recruitment exercise in the 36 centers. That in any event, it is not in all occasions that a party must be heard before a decision against it is made and he relies on the text of *De Smith Judicial Review 6<sup>th</sup> Edition, London Sweet & Maxwell 2007* at Chapter 8 where several exceptions to procedural fairness are enumerated.

43. Mr. Ojwang further submits that the 1<sup>st</sup> Petitioner had failed to lead evidence that would warrant cancellation of the recruitment in other centers other than the 36 centers despite having been asked to do so. He thus claims that the recruitment could not be cancelled purely on rumors but by available evidence of malpractices. In any event, he claims that this Court does to have jurisdiction to review the merits of the decision made by the NPSC but it can only review the process followed in reaching that decision. He referred the Court to the cases of *Republic vs Commissioner of Customs Services ex parte Africa K-Link International Ltd Nrb Misc JR No. 157 of 2012, R vs Kenya Power & Lightining Company Ltds & Another (2013) e KLR* and *Kenya Pipeline Company Ltd vs Hyosung Ebara Company Ltd & 2 Others Civil Appeal No.145 of 2011* where it was held that judicial review concerns itself with process review and not merit review.

44. On the issue of alleged discrimination, Mr. Ojwang submits that centers were allocated based on administrative sub-counties in the Country other than Constituencies and therefore Uasin Gishu having three administrative sub-counties was awarded three recruitment centers and in arriving at that criteria, the Commission was guided by the Constitution and factored in the population per tribe in the police service per County and the need for affirmative action. That it used the formulae of population per tribe in the police service times the total number to be recruited in the Sub-County divided by the total number of police officers to arrive at the slot for each tribe. However, he submits that where the tribe had less than 1000 members in the police service, it was given a baseline of 25(12.5%) for each of the vacancies in addition to the shared 87.5% of the total slots. He thus submits that the criteria used in the recruitment exercise was fair and not discriminatory as alleged. And in any event, he claims that the 2<sup>nd</sup> Petitioner's Petition has already been overtaken by events and the orders sought cannot be granted.

45. Lastly, it is Mr. Ojwang's submission that judicial review orders are issued at the discretion of the Court and the Court should not curtail or stop statutory bodies or public officers from the lawful exercise of their functions within their mandates. That it would be against public interest to issue the orders sought and urged the Court to disallow the prayers sought in the IPOA Petition and in the Interested Parties'

judicial review Applications and Petitions.

46. As regards the claim that pregnant women were not recruited, Mr. Bitta who appeared together with Mr. Ojwang submits that pregnant women were barred from recruitment so as to protect the life of the candidate as well as the unborn child. That it was therefore only rational and prudent to exclude the pregnant women.

For the above reasons, the Respondents sought that the Petition be dismissed with costs.

### **Determination**

47. As can be seen from the pleadings and Parties' submissions, there were over twenty Petitions and Applications for Judicial Review which had to be consolidated together and which also had to be determined together due to urgency and time. The Parties in the Petitions before me therefore framed what they deemed as the issues for determination arising out of the Consolidated matters. I have looked at those issues and for the elegance and clarity of this Judgment, I have framed the following as the issues falling for determination;

- i. Whether the Consolidated Petition meets the constitutional threshold of proof established in the case of ***Anarita Karimi Njeru vs Republic (1976-1980) 1 KLR 14***
- ii. Whether the 1<sup>st</sup> Petitioner has an oversight role over the NPSC.
- iii. Whether the recruitment exercise in issue was carried out in contravention of the Constitution (i.e. whether it lacked transparency, accountability and was discriminatory against women) and whether it was also marred by massive irregularities.
- iv. Whether the recruitment exercise was carried out without any guidelines and regulations, and if there were guidelines, whether those guidelines were made public and were enacted with public participation.
- v. Whether the NPSC illegally and in contravention of the Constitution and the National Police Service Commission Act delegated its powers to recruit members of the National Police Service to Sub-County Commissioners and Recruitment Committees.
- vi. Whether the NPSC acted contrary to the law and the Constitution in annulling the recruitment results of police constables in 36 named centers in the Country.
- vii. Whether the rights of the Interested Parties were violated in the annulment of their recruitment to the Police Service.
- viii. Whether there was discrimination in the distribution of recruitment centers in the Country and whether the NPSC violated the Constitution in allocating 3 recruitment centers to Uasin Gishu County.
- ix. Whether the reliefs sought can issue noting the socio-economic ramifications of the repeat of the recruitment exercise.
- x. Costs of the Consolidated Petition.

In determining the above issues, I will deal with the whole dispute as a matter involving the interpretation of the Constitution and in doing so, will deal with any aspects of judicial review in that context.

### **Whether the Consolidated Petition meets the constitutional threshold of proof**

48. It is the Respondents' contention that the Petitions and Judicial Review Applications as framed did

not plead with reasonable precision how the Constitution has been violated and the manner in which the particular alleged violations were committed and to what extent. In that regard, it is now a determined principle in constitutional litigation that where a person is seeking redress from the High Court for an alleged violation of the Constitution, he must set out with a reasonable degree of precision that of which he complains of, the provisions said to have been infringed and the manner in which it has been infringed. (See - *Anarita Karimi Njeru vs Republic (supra)* and *Trusted Society of Human Rights vs Mumo Matemu and Another Petition No.279 of 2012.*

49. I therefore agree with the Respondents' submissions on the above issue and that principle has previously been well articulated and guides the arena of constitutional litigation in this Court. The question I must therefore ask is whether the Petitioners and the Interested Parties in their respective Petitions and Applications have fulfilled that requirement. Looking at the dispute before me, it is clear that the Petitioners and the Interested Parties have set out in great length what they consider to be violations of **Articles 1 (3), Article 10, Article 27, Article 47, Article 232, Article 244 and 246** of the **Constitution** and I need not repeat those allegations here as they are summarised elsewhere above and I will in any event refer to them shortly. In any case, it is against that understanding that the Respondents responded to the Petitions filed to challenge the recent recruitment of police officers as was conducted by the NPSC. That recruitment, it cannot be denied, was conducted under the authority of the Constitution and that being so, this Court has jurisdiction to determine whether the recruitment was done in accordance with the provisions of the Constitution as provided for under **Article 165(3) (d)(ii)** thereof, the merits or otherwise notwithstanding. With that clarification, I am of the firm view and do find that the Petitioners and Interested Parties before me have met the threshold established by the celebrated case of *Anarita Karimi Njeru (supra)*.

#### **Whether the 1st Petitioner (IPOA) has an oversight role over the 2<sup>nd</sup> Respondent (NPSC)**

50. It is the Respondents' contention that the 1<sup>st</sup> Petitioner does not have an oversight role over the 2<sup>nd</sup> Respondent. That under **Section 6** of the **Independent Policing Oversight Authority Act**, the 1<sup>st</sup> Petitioner mandate does not include overseeing the role of the 2<sup>nd</sup> Respondent; that the 2<sup>nd</sup> Respondent is an independent Constitutional Commission and no law has made it subject to the supervision of the 1<sup>st</sup> Petitioner. This is therefore where I must begin.

51. The NPSC is established under the provisions of **Article 246(1)** of the **Constitution** and it is also one of the Independent Commissions recognized as such under the provisions of **Article 248** of the **Constitution**. Under **Article 249 (2)** of the **Constitution**, the Commissions established under **Article 248** are not subject to the direction or control of any person or authority. The 1<sup>st</sup> Petitioner, IPOA, on the other hand, is a statutory body established under the **IPOA Act**. The preamble to this Act states that it is;

***“An Act of Parliament to provide for civilian oversight of the work of the Police, to establish the Independent Policing Oversight Authority; to provide for its functions and powers and for connected purposes”.***

The objectives of IPOA are then set out under **Section 5** of the **Act** as follows i.e. to;

***“(a) Hold the Police accountable to the public in the performance of their functions;***

***a. Give effect to the provision of Article 244 of the Constitution that the Police shall strive for professionalism and discipline and shall promote and practice transparency and accountability; and***

***b. Ensure independent oversight of the handling of complaints by the Service.”***

Its functions are then set out under **Section 6** of the **Act** as follows i.e. to;

***“(a) Investigate any complaints related to disciplinary or criminal offences committed by any***

*member of the Service, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief, and shall make public the response received to these recommendations;*

*a. Receive and investigate complaints by members of the Service;*

*b. Monitor and investigate policing operations affecting members of the public;*

*c. Monitor, review and audit investigations and actions taken by the Internal Affairs unit of the Service in response to complaints against the Police and keep a record of all such complaints regardless of where they have been first reported and what action has been taken;*

*d. Conduct inspections of Police premises, including detention facilities under the control of the Service;*

*e. Co-operate with other institutions on issues of Police oversight, including other State organs in relation to services offered by them;*

*f. Review the patterns of Police misconduct and the functioning of the internal disciplinary process;*

*g. Present any information it deems appropriate to an inquest conducted by a court of law;*

*h. Take all reasonable steps to facilitate access to the Authority's services for the public;*

*i. Subject to the Constitution and the laws related to freedom of information, publish findings of its investigations, monitoring, reviews and audits as it sees fit, including by means of the electronic or printed media;*

*j. Make recommendations to the Service or any State organ;*

*k. Report on all its functions under this Act or any written law; and*

*l. Perform such other functions as may be necessary for promoting the objectives for which the Authority is established."*

52. As can be seen from the above provisions, it is clear that IPOA does not have a mandate to oversee the work of or even the conduct of the members of NPSC. Its functions are limited to oversight over members of the National Police Service. In any event, the NPSC being an independent Commission is not subject to the direction or control of any other person or authority. It is only subject to the law and the provisions of the Constitution which it is bound, under the provisions of **Article 10** of the **Constitution**, to observe, uphold and respect. I therefore agree with Mr. Ojwang for the Respondents that the 1<sup>st</sup> Petitioner cannot exercise an oversight role over the 2<sup>nd</sup> Respondent.

53. However and having so said, I did not understand the IPOA to be saying that it is exercising an oversight role over the NPSC and looking at the Petition before me, all that IPOA has alleged is that the NPSC has violated the Constitution in the manner in which it sought to recruit the 10,000 recruits into the National Police Service. Further, that the NPSC violated the fundamental rights and freedoms of the Interested Parties and other recruits in the manner in which it conducted the recruitment exercise. To my mind therefore and noting the provisions of **Article 22** of the **Constitution**, IPOA has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been infringed even if it is not directly affected by such alleged infringements.

54. In addition to the above finding, I am also aware that the recruitment of the 10,000 persons into the National Police Service was an exercise undertaken under the authority of the Constitution and that being

the case, the provisions of **Article 258(1)** of the **Constitution** grant IPOA the right to institute this Petition. For avoidance of doubt, this Article provides that;

*“258(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention”.*

As to the place of **Article 22 and 258(1)** of the **Constitution**, the Court of Appeal in *Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 Others (Supra)* stated as follows;

*“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusive, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the Courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process*

...

*It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest...”*

55. I am duly guided and to my mind, **Article 258(1)** has made it very clear that the Constitution must be upheld at all times. Indeed, **Article 2** of the **Constitution** provides that the Constitution is the supreme law of the land and binds all persons and all state organs including the Commissions established under **Article 248** of the **Constitution**. It therefore means that the NPSC being such an independent commission must perform its constitutional mandate with reference to nothing else but the Constitution itself and must act in accordance with, and within the limits of the Constitution. In the event it steps outside the Constitution then its actions must be challenged and the ultimate judge of the ‘right’ or ‘wrong’ of such actions is the Courts established by the same Constitution. The Courts are in turn required by the Constitution to ensure that all acts and actions performed under the authority of the Constitution are so performed and fulfilled within the Constitution. It is against that understanding that I must determine the dispute before me.

In answer to the question framed above therefore, it is my categorical finding that IPOA has no oversight role over the NPSC.

### **Whether the recruitment exercise in issue was carried out in contravention of the Constitution.**

56. I understood Mr. Olola’s submission on this point to be that the recruitment exercise in issue was carried out in violation of **Articles 10, 73, 232 and 246** of the **Constitution** as the Respondents failed to observe the principles of transparency and accountability in the recruitment exercise because it did not develop guidelines to govern the recruitment process and even if those guidelines existed they were never made public and were enacted without public participation. Lastly, that the NPSC delegated its powers of recruitment to entities unknown in law and not empowered to carry out such recruitment. It therefore follows that in order to determine the issue as to whether the recruitment exercise was carried out in accordance with the Constitution that question must be determined together with questions Nos.(iv) and (v) above. I therefore turn to consider these three issues as they will answer the larger question whether the recruitment was conducted in accordance with the Constitution.

### **The principles of transparency and accountability**

57. It is not disputed that **Article 10** of the **Constitution** identifies transparency, accountability and public participation as some of the values and principles of good governance that bind all state organs and state officers, including the Respondents, when making and implementing policies and applying the Constitution. Further, **Article 249 (1)** of the **Constitution** enjoins the NPSC to; “**secure observance by all state organs of democratic values and principles**”. Additionally, under **Section 10(1) (i)** of the **National Police Commission Act**, the Commission is required to “**promote the values and principles referred to in Articles 10 and 232 of the Constitution throughout the Service**”. Under **Article 232 (1)** of the **Constitution**, involvement of the people in policy making, accountability for administrative acts, transparency and provision to the public of timely and accurate information are key principles that govern public service and are binding on all state offices, including the NPSC. More particularly, members of the NPSC, being state officers, are bound by the provisions of **Article 73(2)** of the **Constitution** which establishes the principles of leadership and integrity, which are as follows;

“(1) ...

(2) *The guiding principles of leadership and integrity include—*

(a) *selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;*

(b) *objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;*

(c) *selfless service based solely on the public interest, demonstrated by—*

i. *honesty in the execution of public duties; and*

ii. *the declaration of any personal interest that may conflict with public duties;*

(d) *accountability to the public for decisions and actions; and*

(e) *discipline and commitment in service to the people.”*

58. The NPSC is also subject to the above provisions while the 3<sup>rd</sup> Respondent is mandated under **Article 244(b)** to promote and practice transparency and accountability among its members and it therefore follows that the recruitment of members of the Police Service ought to have been specifically conducted in adherence to the principles of transparency, accountability and public participation. The question therefore is whether the Respondents adhered to those principles in carrying out the recruitment exercise including the promulgation of guidelines and regulations before the recruitment exercise was commenced.

#### **Whether the recruitment exercise was carried out without any guidelines and regulations**

59. It is IPOA’s contention that the recruitment exercise was carried out without adherence to the principles of transparency and accountability and public participation. That there were also no guidelines available and which would have disclosed the number of slots available for each County; how that number had been arrived at; the number allocated for each ethnic group; the procedure to be used in the recruitment; the criteria to be used in selecting the successful candidates; the criteria to notify unsuccessful candidates and how any complaints arising from the recruitment exercise would be handled. It is therefore its case that without such guidelines, the recruitment exercise was opened up to corruption, lack of transparency and other malpractices.

60. On their part, the Respondents maintained that they actually had guidelines to manage the recruitment exercise and that those guidelines had been published in the newspapers and publicised in the radio. In support of that submission, in his Affidavit sworn on 8<sup>th</sup> August 2014, Johnstone Kavuludi states at paragraph 32 as follows;

***“In further response to paragraphs 23-30, the Commission has policies, procedure and guidelines that guide the recruitment exercise and is indeed in the process of finalizing the drafting of regulations on recruitment which is understandably a lengthy process that must specifically undergo stakeholder participation. I aver that several stakeholder forums have so far been conducted. It is also instructive to note that various aspects of the June 2014 Guidelines on recruitment of Police Constables are drawn from the draft Recruitment Regulations.”***

61. What emerges from the above statement is that, firstly, the NPSC is in the process of finalizing the drafting of Regulations on Recruitment and it has so far conducted several stakeholders’ forums for that purpose. Secondly, that there exists a document known as the “June 2014 Recruitment Guidelines” which was drawn from the Draft Recruitment Regulations. I have seen the **‘National Police Service Commission (Recruitment and Appointments) Draft Regulations, 2014** referred to above by Mr. Kavuludi in his Affidavit. It is clear and it has been admitted that the said Recruitment and Appointments Regulations are in their draft form, have not been passed and do not have the force of law. With that background in mind, the question that begs an answer is; where are the Guidelines that were used for the recruitment exercise conducted in July 2014?

62. Again, Mr. Kavuludi in his Affidavit has deponed as can be seen above that the Commission used the “June 2014 Guidelines” during the contested recruitment but he did not produce the said “June 2014 Guidelines”. Where are they? I do not know and I do not know even know if they exist.

63. Granted, the NPSC placed advertisements in the “Daily Nation” and “The Standard” newspapers of 30<sup>th</sup> June 2014 requesting candidates to submit written applications to the recruiting panels at the 290 recruitment centers and also at the venue of the recruitment and attend physical and medical fitness examinations that would be carried out by the recruiting panels. I have seen the newspaper advertisements and what I think the advertisements amount to is a mere call for applications to join the National Police Service. For avoidance of doubt the advertisement read as follows.

#### **“THE NATIONAL POLICE SERVICE COMMISSION (NPSC)**

#### **RECRUITMENT OF POLICE CONSTABLES**

***Pursuant to the Constitution, particularly Articles 10; 232; 238(d); 243; 246(3); 246(4) and Chapter Six, Sections 10, 11 and 12 of the National Police Service Commission Act, 2011 and the National Police Service Act, 2011, the National Police Service Commission (NPSC) seeks to recruit suitable and qualified***

***candidates who satisfy the provisions of the Constitution, the Enabling Acts and the additional criteria below to be trained as Police Constables.***

***The NPSC shall recruit 10,000 Candidates (6000 for the Kenya Police Service and 4000 for the Administration Police Service)***

#### **ENTRY REQUIREMENT**

***An Applicant shall be person who:***

***1.Is a citizen of Kenya***

***2.Possesses a minimum qualification of ‘D+’ Plus in the Kenya Certificate of Secondary Education (KCSE) examination.***

***3.Is 18 years and over, but not older than 28 years for those with a KCSE Examination Certificate; and not older than 30 years for Diploma and Degree holders who have graduated from Institutions recognized in Kenya;***

- 4.Meets the requirements of Chapter Six of the Constitution;
- 5.Is physically, mentally and medically fit;
- 6.Has no criminal conviction or pending criminal action.
- 7.Female Candidates must NOT be pregnant at recruitment and during the ENTIRE training period.

**NOTE:**

A Candidate who:

- a)Canvasses directly or indirectly;
- b)Knowingly, willingly and blatantly lies, misrepresents, cheats and fails to disclose material facts;
- c)Engages in any corrupt activity; Shall be disqualified and in the case of (b) and (c) in addition be arrested and prosecuted.

**GENDER BALANCE**

Not more than two thirds of the recruited candidates shall be of the same gender.

**DIVERSITY**

The recruitment shall reflect the regional and ethnic diversity of the Kenyan people.

**APPLICATION SUBMISSION**

A Candidate must submit a written application to the Recruiting Panel at the venue of recruitment, addressed to the Chairperson, National Police Service Commission, stating his/her service of preference; duly attaching the following documents:

- (a)A copy of the academic certificates and testimonials;
- (b)A copy of the National I/D or Passport;
- (c)At least one letter of recommendation from a respected member of the community such as a former head-teacher, religious leader or community leader.

**NOTE:1.**

Each candidate must indicate 3 referees and their contact numbers in the application letter. The referees shall not be a relative or a politician.

2.Each candidate must present the original supporting documents for verification. The originals shall be returned to the candidates before the candidate leaves the recruitment centers.

3.The NPSC shall publish the list of successful candidates in two daily newspapers of national circulation.

**DATE AND PLACES OF RECRUITMENT**

The recruitment exercise will be held on 14thJuly, 2014 starting at 8:00am at the following Recruitment Centers.”

64. Therefore as can be seen above the newspaper advertisement stipulated the minimum entry requirements required for one to qualify to join the Police Service and the manner in which one was to make an application to do so. The issue raised by IPOA however, as I understand it, is that the NPSC did not have guidelines post-application stage to govern the selection of candidates who would join the Police Service out of the many applications made or received by it. To that end, IPOA has raised several questions and in addition, I wish to ask the following questions; what was the nature of the recruitment process after the announcement of the vacancies? What were the requirements of shortlisting after the receipt of applications? How was physical and medical fitness determined? What factors did the NPSC take into account in that regard? How would complaints arising out the recruitment be handled? I do not have answers to the above questions and the reason is obvious; that those answers are supposed to be available in the recruitment guidelines and regulations. I also recall that during the hearing the issue of brown teeth kept on coming up as a deformity not to warrant recruitment into the Service. As trivial as the issue was made to sound, I think it is not an idle one as it clearly demonstrates the importance of having guidelines stipulating the meaning of deformities and which kind of deformities would bar one from joining the Police Service.

65. In the absence of such regulations and guidelines, the evidence before me shows that the NPSC was using a criteria known to itself alone. That being the case, it is not surprising that the recruitment was not uniform across the Country and was largely left to the discretion of the Sub-County Recruitment Committees. At this point, I am constrained to ask myself, why could the NPSC not wait for the enactment of the ***National Police Service Commission (Recruitment and Appointments) Draft Regulations, 2014*** before conducting the exercise? In that regard, I have seen correspondences between several stakeholders and the NPSC regarding the meetings to discuss the said Recruitment guidelines and regulations which date all the way back to April 2014. The recruitment was carried out in July 2014, three months later. It appears to me that the NPSC knew of the need to have regulations in place before conducting the recruitment but nonetheless went on to conduct the recruitment without such guidelines. Those guidelines were crucial in enhancing accountability and transparency in the manner in which recruitment had to be conducted. Had it enacted the guidelines, perhaps this litigation would have been avoided altogether.

66. But that is not the end of the matter because as stated earlier, Mr. Kavuludi deponed that the July 2014 recruitment exercise was largely conducted in line with the “June 2014 guidelines”. I have seen those Guidelines produced as annexure ‘HHA 1’ in the Affidavit of Hared Hassan Adan and titled ‘***Guidelines on Recruitment of Police Constables***’. Those guidelines are in the form of a circular from the NPSC to various government entities such as the Principal Secretary, Ministry of Interior and Coordination of National Government, Inspector General of Police, Director Criminal Investigations Department, County Commissioners, County Commanders etc. To that end I am therefore satisfied that there were some sort of guidelines but the issue raised by Mr. Olola is that those guidelines and which may have given direction to the recruitment exercise were never availed to the public. In that regard, although the making of guidelines and regulations are a matter of discretion on the part of the NPSC under **Section 28** of the **NPSC Act**, nevertheless, they are an important component of any transparent process.

67. The next issue to consider therefore is whether the criteria and/or guidelines for the recruitment exercise were made public.

#### **Whether the alleged Recruitment Guidelines for Police Constables were made Public**

68. As to whether the guidelines were made public or not, Mr. Kavuludi at paragraph 19 of his Affidavit sworn on 8<sup>th</sup> August 2014;

***“That the Commission denies the contents of paragraph 32 and aver that the Commission did publish proper guidelines and information to the public in the manner as explained in paragraph 16.”***

And in the said paragraph 16, he deponed as follows;

***“That the contents of paragraphs 23-30 are denied and I aver that the Commission did issue guidelines on recruitment of police constables, as annexed by the IPOA and marked HHA 3 and the guidelines were effectively published by the newspaper adverts and radio announcement where information relevant to the public was given, other media engagements were also conducted by the Chairperson of the Commission in a televised program called ‘moving the masses’ hosted by PLO Lumumba”.***

It is clear from the above deposition that the information on the guidelines was allegedly made public through newspaper adverts and radio announcements. I have not seen any evidence to that effect and all I have before me are the newspaper adverts calling for applications to join the Police Service and not the actual advertisement of the contents of the recruitment guidelines that would abide that exercise. The onus of proof was upon NPSC to lead the said evidence and in the absence of such evidence and based on the material before me, I am unable to find that the NPSC actually made the recruitment guidelines public and I so find.

### **Whether the Recruitment Guidelines for the Police Constables were enacted without public participation**

69. I now turn to consider the issue of public participation in enacting the said June 2014 Guidelines and which were allegedly used in the recruitment exercise. The issue of public participation in enactment of legislation, regulations and guidelines is from the onset an important aspect of good governance as recognized by the Constitution, 2010. I say so because **Article 10** of the **Constitution** requires all State organs, State officers and public officers including the Respondents and actually all persons, while interpreting, applying, enacting and implementing all laws as well as public policies, to act in accordance with the values and principles of good governance which include national unity, the rule of law, democracy and public participation, human dignity, equity, social justice, equality, human rights, non-discrimination, good governance transparency, accountability and sustainable development. Most recently in **Nairobi Metropolitan PSV Saccos Union Ltd & Others vs County of Nairobi & 3 Others (supra)** I expressed myself as follows as regards the importance of public participation;

***“The issue raised by the Petitioners as to whether they were involved in the enactment of the impugned legislation are not idle. I say so because the Constitution has established a state in which the Constitution is the supreme law and is binding upon the legislature, the executive and all organs of the State. The Preamble of the Constitution sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at Article 10(1) of the Constitution by making it clear that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement.”***

I reiterate those sentiments as applicable to the present dispute.

70. Further, in **Doctors for Life International vs Speaker of the National Assembly and Others (CCT 12/05) 2006 ZACC 11**, the South African Constitutional Court stated as follows as regards public participation;

***“The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements; a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected ....Significantly, the ICCPR guarantees not only the “right” but also the “opportunity” to take part in the conduct of public affairs, This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to***

*exercise their right to political participation....The right to political participation includes but is not limited to the right to vote in an election. That right, which is specified in Article 25(b) of the ICCPR, represents one institutionalization of the right to take part in the conduct of public affairs. The broader right, which is provided for in Article 25(a), envisages forms of political participation which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation.....”*

71. What then does facilitation of public participation mean? The Court in *Doctors for Life Case (supra)* expressed itself as follows in that regard;

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

72. I am persuaded by the above reasoning and it is clear and I must state so, that it is impossible to define the forms of facilitating appropriate degree of public participation. To my mind, so long as members of the public are accorded a reasonable opportunity to know about the issues at hand and make known their contribution and say on such issues, then it is possible to say that there was public participation. Indeed the Court in the *Doctors for Life Case (supra)* stated as follows in that regard;

*“The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making.” This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs, by ensuring that this right can be realized. It will be convenient here to consider each of these aspects, beginning with the broader duty to take steps to ensure that people have the capacity beginning with the broader duty to take steps to ensure that people have the capacity to participate .....”*

73. At home in *Robert Gakuru & Others vs Governor Kiambu County (supra)* Odunga J stated as follows as regards the extent of public participation;

*“In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates. It is my view that it behoves he County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It I not just enough in my view to*

*simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may for as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”*

74. I agree with the above sentiments of the learned judges and applying them to the instant case, I must state that it was not enough for the NPSC to contend that it publicized the Recruitment Regulations in newspaper adverts, radio announcements and also through a certain Television program and then fail to support that allegation with documentary evidence. There is no suggestion on record that the NPSC held public hearings or invited written representations on any of the alleged recruitment guidelines. I have seen the *‘Joint Statement on the Police Recruitment Exercise’* made by Mr. Kavuludi on 14<sup>th</sup> July 2014 and published on the NPSC website. In that statement he writes particularly that;

**“Subsection 3 (a) of Article 246 of the Kenya Constitution 2010, confers on the National Police Service Commission (NPSC) the mandate to recruit and appoint persons to hold or act in offices in the National Police Service. Pursuant to the Constitution, the National Police Service Commission Act, 2011 and the National Police Service Act, 2011, the NPSC on Monday 30th June 2014 announced its intention to recruit 10,000 young Kenyans to be trained as Police Constables. The recruitment will take place on Monday 14th July, 2014 starting 8.00am in designated recruitment centers across the 47 Counties as indicated in our advertisement.**

**This is a historical event because for the first time, the Government has authorized recruitment of 10,000 officers up from the previous 7,000. There is a likelihood that in future, this figure could raise to 15,000. It is significant to note that this exercise is taking place under a new dispensation which calls for drastic adjustments to ensure that the exercise is all inclusive, free, fair and conducted above board. This exercise will mark the second recruitment undertaken by the Commission since its establishment in 2012. The first recruitment which involved 7000 officers was carried out in 2012. The completion of this second exercise will bring the total number of police officers recruited within a span of two years to 17,000. Preparations started with the constitution of the recruitment committees. This was followed by a briefing of all regional coordinators on Friday 4th July 2014 at the Commission’s offices at Sky Park Plaza, Westlands where the coordinators were issued with recruitment guidelines. The Commission is satisfied that the arrangements in place will result in a fair and transparent process and calls on all qualified Kenyans who would like to join the police service to present themselves at the nearest recruitment center on Monday 14th July 2014.**

**In order to confirm with the requirements of the constitution and in an effort to cast the net wide, the Commission has pegged the minimum qualification to D plus. In addition, training of recruits will now taken 9 months in the training college instead of 15 and the remaining 6 months will be on the Job Training. Expansion of training facilities is currently underway to cater for the increased numbers when training commences on October 3rd.. I also want to mention that those who sat for their KCSE in 2013 and have not received their certificates can use their result slips and the Commission will verify the authenticity of the qualifications. The Commission is also looking into the terms and conditions of police officers. Already NPSC is in discussion with the Salaries and Remuneration Commission on a proposal for new salaries and allowances for police officers. The Commission believes that a National Police Service that is adequately staffed, well- trained, properly tooled and remunerated will be equal to the onerous task of protecting lives and property. The Commission is also developing a scheme of service for the National Police Service.**

**Let me also take this opportunity to urge Kenyans to remain vigilant during the exercise and bring to our attention any incident that would compromise the credibility of the exercise in any manner. Recruitment of qualified and suitable candidates in the Public Service is fundamental in our efforts to bring about Reforms that are in tandem with the expectations of the Citizens of Kenya. Thank you.”**

75. The above statement is not conclusive on whether or not there was public participation at the instigation of the NPSC and I have already stated elsewhere above that the requirement that there be such public participation is important as it would ensure that citizens are consulted and the NPSC has the benefit of all inputs that would be crucial in enabling it to have the best possible recruitment guidelines. But having so said, I shall give the NPSC the benefit of doubt for the reason that there is evidence before me that it subjected the draft Recruitment Guidelines to stakeholder discussions and IPOA was among those consulted. Further, there is evidence that NPSC has all intentions to continue such engagements before the final guidelines are published and effected. That is all I wish to say in that regard.

### **Whether there was discrimination of pregnant women in the recruitment exercise**

76. It was IPOA's contention that pregnant women were turned away during the recruitment exercise and were therefore being discriminated against on grounds of gender in violation of the provisions of **Article 27** of the **Constitution**. On their part, the Respondents admitted that pregnant women were indeed not recruited and argue that such action does not amount to discrimination and that the said limitation to their rights is justifiable.

77. In that regard, **Article 27** of the **Constitution** enshrines the right to equality and freedom from discrimination in the following terms;

***“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***

***(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***

***(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***

***(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***

***(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).***

***(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.***

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

***(8) In addition to the measures contemplated in clause (6), the Right to life. Equality and freedom from discrimination. State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”***

The Supreme Court in its majority opinion in Advisory Opinion No.2 of 2012 had this to say on gender representation at Para. 47;

***“This Court is fully cognisant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society.... Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in Articles 27 and 81, but also by way of a detailed and robust Bill of Rights, as well as a set of ‘national values and principles of governance’.***

78. Further, the Court in Peter K. Waweru v Republic [2006]eKLR defined discrimination as follows:

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

Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) also defines discrimination against women in the following terms;

***“discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.***

79. In the above context, the principle of equality and non-discrimination has its underpinnings in various International conventions which now form part of our laws by dint of **Article 2(5) and (2(6) of the Constitution**. The United Nations Universal Declaration on Human Rights (UDHR) provides at **Article 1** that ***“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”*** Article 7 of the UDHR further states that;

***“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”***

The preamble to the CEDAW captures the effect of discriminatory practices against women in the following terms;

***“Discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.”***

Under **Article 2** of CEDAW, States parties then bind themselves to condemn discrimination against women in all its forms, and to pursue by all appropriate means a policy of eliminating discrimination against women. To this end, they bind themselves to among other things;

***“take all appropriate measures to eliminate discrimination against women by any person,***

*organization or enterprise’ and to ‘take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.’*

**Article 2** of the **African Charter on Human and People’s Rights** also stipulates that every individual is entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, or sex. **Article 28** goes further to state that;

*“Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.”*

80. I am duly guided and I will apply the law as set out above in addressing the issue before me as it is clear to me that under the Treaties cited and which form part of the international law to which Kenya subscribes to, discrimination of women based on gender is prohibited and that the principle of equality of sexes is clearly recognized.

81. In *Willis vs The United Kingdom, No.36042/97, ECHR 2002 – IV and Okpiz vs Germany, No. 59140/00, 25th October 2005* the European Court of Human Rights observed that discrimination means treating differently without any objective and reasonable justification, persons in relatively similar situations. Applying therefore that standard as established by the European Court of Human Rights in the present case and noting the criteria for limitation of rights under **Article 24** of the **Constitution**, I am satisfied that the discrimination meted out against women who were pregnant into the NPSC was justifiable as argued by Mr. Ojwang. I say so because the need to protect the lives of the pregnant woman and the unborn child cannot be gainsaid. Mr. Kavuludi in that regard deponed that the recruitment would eventually lead to admittance into one of the three Police Training Colleges and I take judicial notice of the rigorous training that recruits undergo for a period of nine months. In that context and at this juncture I am constrained to ask myself, how is a pregnant woman supposed to undertake the rigorous and heavy course without being a danger to her own health and that of the unborn child? Mr. Olola urged me to consider the possibility that pregnant women should be recruited and then undertake the training at a future date after giving birth. With due respect to Mr. Olola, I do not think that argument is reasonable. To suggest so is unreasonable and impractical and I so find. In the circumstances, I do not find a violation of **Article 27** of the **Constitution** as alleged.

### **Whether the 2<sup>nd</sup> Respondent acted illegally and in contravention of the Constitution in delegating its powers**

82. It is the submission of IPOA in the above regard that the NPSC acted illegally and contravened **Article 246 (3)(a)** of the **Constitution** and **Section 10** of the **National Police Service Commission Act** by unlawfully delegating its powers to recruit members of the Police Service to Sub-County Commissioners, and Sub-County Recruitment Committees entities unknown in law and not empowered to carry out such recruitment. That the Recruitment Committees did not even include any member of the NPSC and were therefore strangers unknown in law and could not be said to be exercising the NPSC’s mandate of recruitment of police officers. That the actions of the NPSC in doing so amounted to unlawful delegation of constitutional powers and that it acted outside the scope of its powers and the said actions were therefore invalid and a nullity in law.

83. On their part, the Respondents submitted that **Section 13** of the **National Police Service Commission Act** grants the Commission powers to execute its functions through committees, and the Sub-County Recruitment Committees established pursuant thereto were working under the recruitment guidelines issued by the NPSC and that the actions of those Committees were subject to the direct of the Commission and were deemed as actions of the Commission.

84. The issue as I see it may look easy but it is not and yet it is a crucial one. In that regard **Article 246 (3)** of the **Constitution** sets out the powers and functions of the NPSC as follows;

**“(1) ...**

**(2) ...**

**(3) The Commission shall—**

**(a) recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service;**

**(c) observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service; and**

**(d) perform any other functions prescribed by national legislation.”**

Pursuant to **Article 246(3)(d)** above, Parliament has enacted the **National Police Service Commission Act** and **Section 13** of that **Act** sets out further functions of the Commission as follows;

**“(1) In addition to the functions of the Commission under Article 246(3) of the Constitution, the Commission shall—**

**(a) keep under review all matters relating to standards or qualifications required of members of the Service;**

**(b) with the advice of the Salaries and Remuneration Commission, determine the appropriate remuneration and benefits for the Service and staff of the Commission;**

**(c) approve applications for engagement by police officers in trade and other businesses, in accordance with the law relating to matters of leadership and integrity under Article 80 of the Constitution;**

**(d) Co-operate with other State agencies, departments or commissions on any matter that the Commission considers necessary;**

**(e) provide for the terms and conditions of service and the procedure for recruitment and disciplinary measures for civilian members of the Service;**

**(f) develop fair and clear disciplinary procedures in accordance with Article 47 of the Constitution;**

**(g) investigate and summon witnesses to assist for the purposes of its investigations;**

**(h) exercise disciplinary control over persons holding or acting in office in the Service;**

**(i) promote the values and principles referred to in Articles 10 and 232 of the Constitution throughout the Service;**

**(j) ensure that the Service is efficient and effective;**

**(k) hear and determine appeals from members of the Service;**

**(l) develop policies and provide oversight over training in the Service;**

**(m) approve training curricula and oversee their implementation;**

**(n) investigate, monitor and evaluate the organization, administration and personnel practices of the Service;**

**(o) receive and refer civilian complaints to the Independent Policing Oversight Authority, the Kenya National Commission on Human Rights, the Director of Public Prosecutions or the Ethics and Anti-Corruption Commission, as the case may be, where necessary;**

**(p) review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the Service;**

**(q) evaluate and report to the President and the National Assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the Service;**

**(r) monitor and evaluate the performance of the Service;**

**(s) receive complaints and recommendations from police associations registered in accordance with the applicable law;**

**(t) perform such other functions as are provided for by the Constitution, this Act or any written law.” (Emphasis mine)**

Regarding recruitment specifically, the Commission under **Section 13(2)** has powers to delegate to the

Inspector General the mandate to recruit, appoint and promote officers under the rank of Sergeant. For avoidance of doubt **Section 13(2)** states as follows;

**“(2) Subject to the provisions of the Constitution or any written law, the Commission may delegate to the concerned Inspector-General the recruitment, appointment and promotion of police officers under the rank of sergeant: Provided that the Inspector-General shall, during such recruitment, appointment or promotion, take into account gender, county and ethnic balancing.”**

From the above provision of the law, it is clear that the Commission has the powers to delegate the recruitment of police constables to the Inspector General only and the question therefore is whether in the disputed recruitment exercise, the Commission delegated such power to the Inspector General or to unknown persons in law?

85. To answer that question, I will look at the circular referred elsewhere above and titled “Guidelines on Recruitment of Police Constables”. The circular states partly as follows;

***“Pursuant to Section 13 of the NPSC Act, the commission has established recruitment Committees namely, The National Police Service Commission Committee on Recruitment of Police Constables and Sub-County Recruitment Committees.....”***

In that regard, it is not in issue that under the provisions of **Section 13** of the **NPSC Act**, the Commission generally has powers to establish Committees for the better carrying out of its function. (See - ***Emmanuel Masinde Okutoyi & Others vs National Police Service Commission (Supra)***). To my mind therefore, the issue therefore is whether the two Committees above were lawfully established as Committees of the NPSC. To answer that question I must consider the composition of those Committees.

86. The National Police Service Commission Committee on Recruitment is composed of One Commissioner, a representative of the Ministry of Interior and Coordination of National Government, the Inspector -General, Deputy Inspector General (KPS), Deputy Inspector-General (APS), Director of Criminal Investigations, Commandant Kenya Police College, Commandant, Administration Police Training College and Commanding Officer, GSU. This Committee’s functions were as follows;

***“(1) The Committee shall be responsible to the Commission for the guidance and oversight of the recruitment process.***

***(2) The Committee shall carry out tasks that will include;***

***(a) Advertising the vacant positions in the Service for recruitment, in local dailies and using any other available media, and invite candidates to apply within specified period;***

***(b) Ensuring the adequate briefing and facilitation of the Regional Co-ordinators and Cluster Co-ordinators before the commencement of the recruitment exercise;***

***(c) Ensuring adequate supervision of the Sub-county committee through respective Regional Co-ordinators and Cluster Co-ordinators;***

***(d) Prepare and designate docket numbers for issuance to successful candidates;***

***(e) Accrediting observers to the recruitment exercise***

***(f) Ensuring adequate publicity and public participation before and during the exercise;***

***(g) Receiving names of successful candidates from the sub-county recruitment committees for analysis and determination;***

***(h) Receive all other documents used in the recruitment process.”***

87. In my view and looking at the composition of the said Committee, it is a lawful committee within the meaning of **Section 13** of the **NPSC Act** and represents the face of the Commission. I say so because under the provisions of **Article 246(2)**, the Commission consists of;

***“(1) ...***

***(2) ...***

***(a) the following persons, each appointed by the President—***

***(i) a person who is qualified to be appointed as a High Court Judge;***

***(ii) two retired senior police officers; and***

***(iii) three persons of integrity who have served the public with distinction;***

***(b) the Inspector-General of the National Police Service; and***

***(c) both Deputy Inspectors-General of the National Police Service.”***

In that context, the National Recruitment Committee has four members who were Commissioners of the NPSC out of the nine members of that Committee and therefore is a lawful committee of the Commission. Further, the Commission has powers under **Section 13(2)** to co-opt into the membership of its committees established under **Sub-section 13 (1)**, other persons whose knowledge and skills are found necessary for the functions of the Commission. I did not hear IPOA to be claiming that the members co-opted into the Committee were not useful to the Commission or that they did not possess any expertise that may be useful to the Commission. To that end therefore, I do find that the National Recruitment Committee of the Commission as stated above was duly constituted within the law to undertake the function of recruitment of police constables into the Police Service.

88. Having so found, the contested issue as I understand it is that the recruitment was actually conducted by persons unauthorized in law, i.e Sub-County Commissioners and Recruitment Committees. As will be seen from the provisions of the circular referred to above, The Sub-County Recruitment Committees were also formed for the purposes of undertaking some aspects of the recruitment of the police constables. To that end the Circular partly reads as follows;

***“The Commission shall conduct the physical and medical assessment and verification of documents as part of the recruitment process through the sub-county committees.”***

The implication of the above statement can only be that the Commission delegated part of its constitutional mandate to recruit police constables to the said Sub-Committee directly. In any event, the membership of the Sub-County Committee was; Sub-County Commissioner, Officer nominated by the County Public Service Board, Officer Commanding Police Division, Sub-County Administration Police Commander, Sub-County Criminal Investigation Officer, Sub-regional Coordinator (NIS), Sub-County Education Officer and Medical Officer of Health. The responsibilities of the Sub-county recruitment Committee were;

***“(1) The Sub-County recruitment committees will preside over the physical and medical assessment and verification of documents on behalf of the Commission.***

***(1) The Sub-County recruitment committees shall ensure that the assessment and verification is carried out to the highest standards of professionalism and accountability.***

***(2) The Sub-County recruitment committees will be held accountable for any issues that may***

*arise out of the exercise in their respective areas.*

*(3) The Sub-County recruitment committee members shall consider any issues raised by members of the public on the day of the assessment in a timely manner. It will be considered gross misconduct to fail to take timely action on genuine and legitimate complaints raised during the day of the exercise.*

*(4) Communicate to the successful candidates by issuing docket numbers to attend designated colleges;*

*(5) The Sub-County recruitment Committees shall;*

*(a) take an oath of integrity*

*(b) ensure that accredited observers are also sworn in*

*(c) prepare the recruitment venue and mobilize required logistical support in collaboration with the Commission*

*(d) undertake the recruitment within the day specified*

*(e) submit returns on the recruitment exercise to the Commission as prescribed in Appendix 2 form on the day of the exercise through fact or email contacts provided during briefing*

*(f) Submit the following returns within 5 days after the recruitment exercise to the Commission*

*(i) Original appendix 1 form*

*(ii) Original appendix 2 form*

*(iii) Summary of complaints raised, how they were handled and other relevant information/observations.”(Emphasis added)*

89. Reading the above functions, it is IPOA’s argument that the recruitment was actually fully conducted neither by the Commission directly or through its national Recruitment Committee but by Sub-County Committees, bodies unknown in law, and which did not have the power to recruit police constables and that therefore they acted outside the **Constitution** and the **NPSC Act**.

90. This aspect of the dispute caused me tremendous strain. I say so because from the provisions of **Section 13 of NPSC Act**, the recruitment of police officers into the Police Service is a function of the NPSC, but that Commission may delegate that function to the Inspector General of Police for police officers under the rank of Sergeant. I have already also said above that the Commission had set up the National Recruitment Committee and the Sub-County Recruitment Committees which were Committees formed with specific mandates regarding recruitment of police constables as can be seen from the Circular providing Guidelines on Recruitment of Police Constables. The issue at this point therefore is whether the Sub-County Committees were the proper bodies to carry out the actual recruitment and whether they were exercising lawful authority for and on behalf of the NPSC.

91. I have reflected and deeply considered the above question and I have taken time to look for the justification for the creation of such Committees. It is interesting that whereas the Commission is specifically mandated by law to delegate the recruitment of police officers to the Inspector-General, the Commission did not do so. Instead, the NPSC created a National Committee on Recruitment which included the Inspector-General as one of its members as were his two Deputies. I have held that to the extent that the said Committee has a concise membership from the Commission, one cannot fault its

creation nor its mandate with regard to recruitment. But can the same be said of Sub-County Recruitment Committees? **Section 10(3)** of the **NPSC Act** cautions the NPSC against unjustified delegation of power in the following terms;

**“(3) Notwithstanding subsection (2), the Commission shall not delegate any of the following functions—**

**(a) the making of any regulations, rules, code of conduct or subsidiary legislation under this Act or any other written law;**

**(b) The making and submitting of any report to the President and the National Assembly, and**

**(c) the performance of any function the delegation of which would amount to unjustified delegation of the Commission’s discretion”**

It cannot be denied that the Commission by the circular earlier referred to delegated some of its powers to the Sub-County Recruitment committees but in evidence before me, it emerged that save for the advertisement of vacancies and receipt of applications, the entire recruitment exercise was conducted solely by the said Sub-County Recruitment Committees without any input by the Commission qua Commission.

If that is be so, a number of questions must arise; when a Committee has no membership of the NPSC at all, can it be said to be a Committee of that Commission? Under what law was such a Committee set up to conduct a constitutional function donated to a Constitutional Commission and expressly so by the Constitution?

92. Mr. Ojwang for the Respondents has claimed that it is impossible for the 9 Commissioners of the NPSC to conduct the recruitment in the 290 centers on the same day and that it was justified for them to delegate the said function to the Sub-County Committees. While I agree with him to the extent that it is impossible for the 9 Commissioners to conduct the recruitment in the 290 centers on the same day, that is an issue of policy and if the Commission had organized itself well, the recruitment could still have been done within the law. I have for example recently seen advertisements in the newspapers for the recruitment into the Defence Forces. The recruitment has been organized to run for several days as opposed to a single day all over the Country and so there would be precedent if the NPSC adopts such a policy and for it to maintain control over the exercise.

93. Coming back to the issue before me therefore, Parliament may also have envisaged a situation where it may be impossible for the Commission to undertake the recruitment alone and in its wisdom enacted **Section 10(2)** of the **NPSC Act** which grants the Commission power to delegate its recruitment powers. However, the law is very clear that it can only delegate such powers to the Inspector General of Police and I have also said that it can do so through Committees (of the Commission and not of strangers to the Commission). The Inspector-General of Police was not a member of the Sub-County Committee nor is there evidence that he sub-delegated such powers, which mandate he in any event lacks. But suppose I am wrong and he did actually delegate his powers to the Sub County-Committee, where is the evidence that he did so? Further, where is the evidence that the Sub-County Committees are themselves exercising powers sub-delegated by the National Committee on recruitment even if such sub-delegation was lawful? The provisions of **Section 10(5)** of the **Act** are very clear that a delegation of the duties shall be in writing. Where is such evidence to show that such powers were actually delegated? I have not seen such evidence and in the circumstances I must agree with IPOA that the NPSC acted *ultra vires* its mandate by delegating its powers of recruitment to the Sub-County Committees. That being my finding, it therefore means that the recruitment exercise as conducted by the Sub-County Committees was invalid, a nullity in law and thus void *ab initio*.

94. This finding would have been enough to dispose of the Consolidated Petitions, but this being a trial

Court, I am obligated to consider the merits or otherwise of all the arguments made by the parties in this Petition and or Judicial Review Applications. I now turn to consider issue number 6 as framed elsewhere above.

**Whether the 2<sup>nd</sup> Respondent acted contrary to the law in annulling the recruitment exercise in the 36 named centers**

95. It is the submission of the Interested Parties that the NPSC did not have powers to cancel the recruitment exercise and/or order for a repeat of the exercise. That the only power granted to the Commission is the one to make recommendations as provided for under **Section 11(1) (g)** of the **NPSC Act**. They therefore contend that the cancellation of the recruitment results in the 36 centers is illegal, null and void. On their part, the Respondents contend that the NPSC has the powers to conduct investigations on any matter within its mandate and to act on the outcome of those investigations including by nullifying a recruitment that is found to have been irregular.

96. I agree with the Respondents that the Commission under the provisions of **Sections 11(1) (f)** of the **NPSC Act** has the powers to conduct investigations on any matter that is within its mandate. One such mandate is the recruitment of police officers. In its letter of 17<sup>th</sup> July 2014, the Commission wrote as follows in that regard;

*“Mr. Macharia Njeru*

*The Chairperson*

*Independent Policing Oversight Authority*

**NAIROBI**

*Dear*

**RE: POST RECRUITMENT ANALYSIS – ALLEGED IRREGULARITIES**

*IPOA has been on record through your various reports given in the media that the just concluded recruitment had massive irregularities.*

*The Commission is undertaking an audit of the recruitment exercise and would inter alia consider all complaints raised against the exercise by the public, reports of the credited observers and other relevant Government Institutions including yourselves.*

*The Audit seeks to determine whether the recruitment exercise adhered to fundamental principles contained in the Constitution as regards regional, ethnic and gender balance, integrity and general principles of public service as contained in the Public Service Chapter of the Constitution.*

*The Commission would then issue a report about the recruitment exercises and the report would form the basis of determining in whether the exercise was done fairly and any anomalies would be noted and corrected and would form the basis for improvement on future recruitment exercises. Further, appropriate corrective action would be taken where required and the Commission will ensure that persons responsible for any anomalies are held accountable.*

*In this regard, please submit your observer reports and any other complaints that may have been received by yourselves regarding the recruitment exercise within seven (7) days of the receipt of this letter. Kindly acknowledge receipt of this letter.*

**SIGNED**

*Johnston M. Kavuludi,*

## **Chairperson**

### **National Police Service Commission”**

Following the above letter, the Commission formed the Multi-Agency Working Group Committee which had membership drawn from the Ministry of Interior and Co-ordination of the National Government, the National Police Service Commission, Ethics and Anti-Corruption Commission and National Intelligence Service. The Committee’s terms of reference were to collect, collate and analyze complaints and concerns received by various institutions and make recommendations to the Commission on action to be taken. Subsequently, the Committee issued its report and recommended the cancellation of the results in the 36 named recruitment centers.

97. While there is no doubt that the NPSC has powers to conduct investigations generally, in conducting such investigations under **Section 11(1) (d)** of the **NPSC Act**, it also has powers to co-operate with other state agencies as it may deem necessary. To that end therefore I do not see any wrong doing on the part of the NPSC in the formation of the Multi-Agency Working Committee. It is also uncontested that the Multi-Agency Working Group recommended the cancellation of the recruitment in 36 centers and they were subsequently cancelled by the Commission.

98. Having so said, I have seen no evidence that the NPSC actually sat down as a Commission, discussed the Report of the Multi-Agency Working Group and resolved that it agreed with it entirely and therefore resolved to cancel the recruitment in the 36 named Centers. It is important that the NPSC should not be seen to have been directed and/or controlled by any person or authority because that would be a direct affront to the independence granted to it by **Article 249(2)(b)** of the **Constitution**.

99. Turning back to the question that I sought to address above, the NPSC certainly has the mandate to cancel any recruitment exercise. I say so because **Section 51(1)** of the **Interpretation and General Provisions Act (Cap 2) Laws of Kenya** provides as follows;

*“Where by or under a written law a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, condition or establishment of, or dissolve, a board, commission, committee or similar body appointed, constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it.”*

The point is that a power to make includes a power to unmake. A power to recruit includes the power to cancel the recruitment. Despite the misgivings I have expressed above, that is my finding on the above issue.

### **Whether the rights of the Interested Parties were violated in the nullification of the Recruitment exercise**

100. It is the argument of the Interested Parties that they were not afforded an opportunity to be heard before the decision to annul the recruitment which affects them was made. It is therefore the crux of their case that their right to fair administrative action under **Article 47** of the Constitution and the right to a fair hearing under **Article 50** of the **Constitution** were violated.

101. On their part, the Respondents contend that in the circumstances obtaining, it was not possible to grant a hearing to every person who was affected by the decision to nullify the recruitment in the 36 recruitment centers and it is impractical and unreasonable to expect the NPSC to have accorded a hearing to every person whose rights would be affected by its decision. Secondly, that NPSC had to take prompt action which made it impossible to accord the Interested Parties a right to be heard. Thirdly, that all the complaints received regarding the recruitment were against the Sub-County Recruitment Committees and

not against the Interested Parties. That in any event, the final decision as to recruitment was repositied with the Commission and not with the Sub- County Recruitment Committees.

102. I have considered this issue and I note that **Article 47** of the **Constitution** provides for the right to fair administrative action in the following terms;

***“(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.”***

Given the above provisions of the law and the arguments made by the respective parties, this Court must answer the question as to whether the making of the decision to annul the recruitment in the 36 centers without formally granting the Interested Parties a hearing was a violation of **Article 47** of the **Constitution**.

103. In that regard, the right to be heard is one of the two cardinal rules established under the principle of natural justice and it is generally expressed as that party should not be condemned unheard (*audi alteram partem*). The Court of Appeal in **Onyango Oloo vs Republic (supra)** stated as follows as regards the importance of the right to be heard;

***“It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided.”***

It is thus a settled principle of law that the right to be heard requires that whenever an administrative decision has to be made, the person affected by such decision should be given an opportunity to express himself in that regard.

104. However, this principle is not absolute and is not necessarily always strictly applied. This is why in **R vs Aga Khan Education Services ex parte Ali Sele & 20 Others (supra)** this Court while considering the applicability of the rules of natural justice held *inter alia* as follows;

***“On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be a general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance”.*** (Emphasis mine).

Similarly in **Russel vs Duke of Norfolk(1949) all ER 118**, the Court had the following to say on the same issue;

***“There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly, I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case.”*** (Emphasis added)

105. I am duly guided and as can be seen the golden thread running through the above cited authorities is that the requirements of natural justice are not applicable in all situations involving the making of administrative and quasi-judicial decisions. Their application depends on the circumstances of each case,

the nature of the inquiry, and lastly, whether the person concerned was given a reasonable opportunity of presenting his or her case. To that extent only, I agree with Mr. Ojwang's submission on that issue.

106. Applying that general principle to the present dispute, I note that no allegations of malpractice whatsoever have been made against the Interested Parties. The NPSC merely received omnibus allegations and subsequently appointed a Multi-Agency Working Committee which was tasked with the role of considering the gravity, if any, of those allegations as received and make appropriate recommendations. The Multi-Agency Working Committee based on evidence it had, chose to nullify the recruitment exercise of 36 centers only. I am thus constrained to ask, what factors did it consider in reaching that decision? Whereas this Court is not concerned with the merits or otherwise of the decision made by the Multi-Agency Working Committee and later used by the Commission to nullify the results of recruitment in the 36 centers, I must say that there is a measure of unfairness in that process.

107. I say so because there are allegations made that corruption, nepotism, favoritism and tribalism were witnessed in almost all the recruitment centers. But having sat and determined the issues, the Multi-Agency Working Committee decided to nullify recruitment results of 36 centers only. What criteria did it use to do so? How grave were the allegations of malpractices in the 36 centers that would warrant a cancellation as compared to other recruitment centers in the Country? Until now, the Interested Parties do not know why their recruitment as conducted in the 36 centers was singled out for cancellation. What allegations were made? What evidence was made available to warrant such a drastic step? I do not have the answers to these questions neither do the Interested Parties. Having received evidence of malpractices in the 36 centers, the Multi-Agency Working Committee should have considered getting representations from the Interested Parties once it realized that the allegations of malpractices in their recruitment centers were so grave as compared to other recruitment centers in the country, and would possibly be nullified. Furthermore, if the argument was that in the circumstances obtaining at the time, it was impossible to accord all the Interested Parties an opportunity to be heard, why didn't the NPSC consider giving the Interested Parties written reasons as to why their recruitment had to be cancelled once it decided to follow the recommendations made by the Multi-Agency Working Committee? Although there is a reference in the Committee's Report to engagement with affected persons, no other evidence exists of such an action.

108. In view of the foregoing, I have come to a firm conclusion that the NPSC in following the recommendations as made by the Multi-Agency working Committee to cancel recruitment of the 36 centers violated the Interested Parties right to be heard formally before the making of the decision to nullify their recruitment. I say so without prejudice to the final orders to be made in the Petition which may well render this finding wholly inconsequential.

### **Whether there was discrimination in the distribution of the recruitment centers in allocating 3 recruitment centers to Uasin Gishu County.**

109. I now turn to consider the spectrum of the 2<sup>nd</sup> Petitioner's Petition. Mr. Mengich for the 2<sup>nd</sup> Petitioner contends that Uasin Gishu County was discriminated against during the recruitment exercise because it was accorded one recruitment center in each District thus a total of 3 recruitment centers as compared to other Counties which had been granted more recruitment centers. He thus claimed that the people of Uasin Gishu had been disfranchised given its huge population of 894,179 people. It was also his submission that the Respondents violated **Article 27** of the **Constitution** by denying the people of Uasin Gishu equal protection of the law because the criteria used in determining the number of centers per County was unequal and did not reflect regional balancing and regional representation in the Police Service.

110. On his part, Mr. Ojwang claims that recruitment centers were allocated based on the administrative Sub-Counties in the Country and not Constituencies and that the NPSC had adopted a certain formula that it used to determine the recruitment centers to be granted to each County. It is his submission therefore that the criterion as used in the recruitment was fair and not discriminatory as alleged.

111. To determine this issue therefore my starting point would have to be **Section 5** of the **NPS Act** which provides that;

*“The composition of the Service shall, so as far as is reasonably practicable-*

*(a) Uphold the principle that not more than two-thirds of appointments shall be of the same gender; and*

*(b) Reflect the regional and ethnic diversity of the people of Kenya.”*

112. The above provision is clear therefore that the NPSC is obligated to ensure that the principle of regional and ethnic diversity of the people of Kenya is taken into account in its appointments. As to how that obligation and requirement is to be exercised is a policy issue to be determined under the Constitution and statutory provisions. It is a function of the NPSC in that regard as mandated under **Section 28 of NPSC Act** to make policies and guidelines for the recruitment of police officers. Such policies and guidelines would clearly set out the formula to be used to allocate recruitment slots to Counties. This Court’s jurisdiction does not include making such policies. I say so because the Court is not the maker of any recruitment policy in Kenya including the criteria to be used in allocating slots to Counties and the number to be recruited per tribe. The Court has no ability, mechanism, facilities or manpower to determine such criteria. That is the mandate of the NPSC, and to find otherwise would amount to this Court stepping into the mandate of the NPSC, an act which is generally frowned upon and for good reason.

113. But having said so, I recall that Mr. Ojwang in his submission stated that the NPSC indeed developed such a policy which was as follows; that the number of recruits per ethnic group would be determined by taking the population per tribe in the police force times the number to be recruited in the Sub-County divided by the total number of police officers which would equal the slot for each tribe as the formula for recruitment. I have considered this formula and the problem with it is that it is not workable and has violated a basic mathematical principle that an equation cannot be used to find two unknown numbers.

114. If I understood Mr. Mengich well, his contention is that the formula used was not clear on the number of centers allocated to respective counties. Mr. Ojwang did not give the Court the formula that the NPSC used to arrive at the centers allocated to each County or even the number of slots allocated to each County. I must therefore agree with Mr. Mengich that the formula used by the Commission is both confusing, lacks precision and is unequal.

115. In concluding this issue and in line with my findings as above, let the Commission revisit the issue of the formula and determine the criteria and or policy to be used to determine the allocation of the number of recruitment centers per County and slots allocated to the County with special regard to Uasin Gishu County.

### **What reliefs are available to the Parties?**

116. I have answered all the questions that I set out to answer and determined all the contested questions in the consolidated Petitions. I have largely found that save for the fact that the Interested Parties were not heard nor at the very least given reasons before nullification of their recruitment, and that the legality of the Sub-County Recruitment Committees is wanting. I have however given the NPSC the benefit of doubt in the recruitment process. Are those findings serious enough to warrant the questioning of the decision to annul the recruitment exercise wholly or in the 36 named Centers only? And should I prohibit the NPSC from repeating the exercise in the 36 named Centers and should I issue an order of mandamus to compel the NPSC to admit and train the Interested Parties at the three Colleges established to train members of the Police Service?

117. Of the two fundamental findings that I have made, one is in favour of the Interested parties (the violation of the right to be heard) and the other is in favour of the 1<sup>st</sup> Petitioner (the fact that an entity unknown to law actually conducted the recruitment of police officers). The general rule in that regard is that since the findings have been made against the NPSC, then the orders elsewhere rephrased above should be granted. However, during the hearing, the NPSC strenuously argued against a Country-wide

repeat of the recruitment citing the grave socio-economic ramifications of such an exercise. Similarly, the Interested Parties were against a repeat of the exercise citing personal hardships and inconveniences to be caused by such an action.

118. I have taken into account all the above matters and I wish to express myself as follows;

119. Firstly, it is a matter of public knowledge that the Police Service in Kenya has been dogged over the years with allegations of massive corruption, ineptitude and a violation of its own motto “**Utumishi kwa Wote – Service for All**”. As an answer to those allegations, the Constitution of Kenya created the NPSC, the NPS and by Statute, IPOA, to be both overseers and watchdogs over police processes from recruitment to discipline of errant police officers. It would be a grave error on the part of this Court to allow the said police Service and the Institutions named to revert back to that dark past.

120. Secondly, it is true that the NPSC is a new Commission; its members are still learning the ropes of their duties; it may not have sufficient personnel nor funding to unravel all the mysteries of the Service and it may well have to seek outside help in achieving its mandate. All those facts would however not be an excuse to violate the Constitution, breach Statute and abandon its duties to entities known as Sub-County Recruitment Committees.

121. Thirdly, I have noted that all complaints relating to the recruitment exercise revolve around members of the said Committees. Such complaints were authenticated by the Report of the Multi-Agency Working Committee which stated that most of the complaints related to the conduct of the County Commissioners (e.g. Njoro Police Station recruitment Centre), corruption and political interference (e.g. in DC’s Office Bahati) and collusion among members of the recruitment teams to interchange of names of successful candidates with other names (e.g. in Marakwet West Sub-County) among a myriad of other complaints.

122. Fourthly, it is indeed true that only 36 Centers were identified as having authenticated complaints but a casual look at the Report of the Multi-Agency Working Group would show that its Report is limited to the 36 Centers only and there is no evidence that the Committee investigated other Centers.

123. Fifthly, a repeat of the exercise may well be expensive but no facts were placed before this Court to warrant any finding as to the hardship to be faced by NPSC in doing so.

124. Having so said, this Court is aware that with terrorist threats abounding in the Country, a strong police force is necessary. That fact alone would however not sway this Court’s mind to allow blatant breach of the Constitution by a body created and obligated to uphold the same Constitution.

125. As for the Interested Parties, it is obvious that they may be innocent of any illegalities but it is also obvious that if the process was unlawful *ab initio*, they cannot benefit from it.

126. In the end, therefore, I am satisfied that drastic action ought to be taken, painful or unpopular as it may be. That action ought to be a lesson to the NPSC and other Constitutional Organs that the Constitution 2010 is alive and well. It will resist all attempts to subvert its purposes. It will frown upon any attempt to invoke convenience as opposed to its letter and spirit. In the instance case, NPSC failed itself, failed Kenyans, failed the recruits and failed the Constitution and it must be told so. I will here below grant the appropriate remedies in the circumstances.

127. Before making the final orders, I would like to express my gratitude to all the advocates from all parts of the Country who participated in the hearing of the Consolidated Petitions and or Judicial review Applications for their diligence, focus and lucidity of submissions. If I did not refer to all the authorities they cited, it is not because they were not illuminating. This judgment would also not have been fast-tracked but for the efforts of my Research Assistant, Ms. Carolene Kituku and I thank her for her diligent research.

128. Having found as above, the orders that are proper in the circumstances are the following;

***“(a) A declaratory order is hereby issued to the effect that the delegation by the 2<sup>nd</sup> Respondent to Sub-County Recruitment Committees to carry out recruitment of members of the 3<sup>rd</sup> Respondent on 14<sup>th</sup> July 2014 was illegal and ultravires Article 246 of the Constitution and Section 10 of the National Police Service Commission Act.***

***(b) A declaratory order is hereby issued to the effect that the recruitment exercise carried out on 14<sup>th</sup> July 2014 by Sub-County Recruitment Committees on the basis of delegated powers by the 2<sup>nd</sup> Respondent was inconsistent with, or in contravention of Articles 10, 27, 73, 232, 244, 246 and 249 the Constitution and Sections 10 and 12 of the National Police Service Commission Act and is thus illegal, null and void ab initio.***

***(c) An order of certiorari does issues bringing to this Court and quashing all proceedings by the 2<sup>nd</sup> Respondent authorizing the carrying out of the recruitment exercise on 14<sup>th</sup> July 2014.***

***(d) An order of certiorari does issue bringing to this Court and quashing the outcome of the recruitment exercise carried out on the 14<sup>th</sup> July 2014.***

***(e) An order of prohibition does issue prohibiting the 2<sup>nd</sup> Respondent and/or 3<sup>rd</sup> Respondent from issuing appointment or any other letters to persons recruited on the basis of the recruitment exercise carried out 14<sup>th</sup> July 2014.***

***(f) An order of Mandamus does issue compelling the Respondents to repeat the recruitment exercise in tandem with the provisions of the Constitution and the National Police Service Commission Act.”***

All other prayers in the Consolidated Petitions and Judicial review Applications are denied for having been overtaken by events or for not being properly canvassed. One such prayer is the one seeking an audit of funds expended in the recruitment exercise.

128. As for costs, let each Party bear its own costs as obviously the issues raised in this Judgment are of great public interest.

129. Let this Judgment be placed on the record of each of the 25 Petitions and Judicial Review Applications that were consolidated together.

130. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 31<sup>st</sup> DAY OF OCTOBER 2014**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kariuki-Court Clerk

Mr. Olola for the Petitioner

2<sup>nd</sup> Petitioner present

Mr. Ojwang and Mr. Mohammed for Respondents

Mr. Mathenge for Interested Parties

**Order**

Judgment duly delivered

**ISAAC LENAOLA**

**JUDGE**