



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION 243 OF 2011**

**BETWEEN**

**COMMUNITY ADVOCACY AND AWARENESS TRUST ..... 1<sup>ST</sup>  
PETITIONER**

**WOMEN'S EMPOWERMENT LINK ..... 2<sup>ND</sup>  
PETITIONER**

**GRASSROOTS REFORMS ON WOMEN AGENDA .....  
3<sup>RD</sup> PETITIONER**

**WOMEN POLITICAL ALLIANCE, KENYA .....  
4<sup>TH</sup> PETITIONER**

**FEDERATION OF WOMEN GROUPS ..... 5<sup>TH</sup>  
PETITIONER**

**WOMEN EMPOWERMENT SOCIETY (WESO) ..... 6<sup>TH</sup>  
PETITIONER**

**WOMEN OF KENYA INITIATIVE .....  
7<sup>TH</sup> PETITIONER**

**TUSHAURIANE SELF HELP GROUP..... 8<sup>TH</sup>  
PETITIONER**

**FOUNDATION OF WOMEN'S RIGHTS IN KENYA .....  
9<sup>TH</sup> PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL .....  
RESPONDENT**

**AND**

**THE NATIONAL GENDER AND EQUALITY COMMISSION ..... 1<sup>ST</sup> INTERESTED PARTY**

**THE NATIONAL COHESION AND INTEGRATION COMMISSION .....2<sup>ND</sup> INTERESTED PARTY**

**PROF. AMB. MARIA NZOMO .....3<sup>RD</sup> INTERESTED PARTY**

**DR DWASI JANE .....4<sup>TH</sup> INTERESTED PARTY**

**MS VIOLET KHADI MAVISI ..... 5<sup>TH</sup> INTERESTED PARTY**

**MS WINFRED OSIMBO LICHUMA .....6<sup>TH</sup> INTERESTED PARTY**

## **JUDGMENT**

### **Introduction**

1. The promulgation of the Constitution brought with it an expectation that appointments to public office will be conducted in a manner that is competitive, transparent, adheres to the values of good governance and promotes equality and equity. This case is one of the first that challenges our ability to adhere to the values set in our Constitution.

2. This petition is brought by a group of community based organisations, trusts and associations, incorporated and registered under Kenyan Law who seek to challenge the appointment of the Chairperson of the National Gender and Equality Commission.

### **The Facts**

3. The primary facts leading to this case are uncontested and are set out in the petition dated 14<sup>th</sup> November 2011 and the supporting affidavit of Mary Waihera Njuguna sworn on 14<sup>th</sup> November 2011.

4. The National Gender and Equality Commission (hereinafter “the Commission”) is one of the Commissions contemplated under **Article 59** of the Constitution and was established pursuant to **section 3** of the *National Gender and Equality Commission Act, Act No 15 of 2011* (hereinafter “the Act”) which came into force on 30<sup>th</sup> August 2011.

5. **Section 11** of the Act makes provision for the procedure of appointment of the Chairperson of the Commission and members of the Commission. It provides as follows:

**11. (1) Whenever there is a vacancy in the Commission the President shall, within fourteen days of the occurrence of the vacancy, convene a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Commission.**

**(2) The selection panel convened under subsection (1) shall consist of one person from each of the following bodies representatively-**

- a) Office of the President;**
- b) Office of the Prime Minister;**

- c) Ministry responsible for matters relating to justice;*
- d) Ministry responsible for matters relating to gender and social development;*
- e) Public Service Commission*
- f) The Association of Professional Societies in East Africa;*
- g) The Kenya Private Sector Alliance; and*
- h) The National Council for persons with Disabilities.*

*(3) The selection panel shall, subject to this section, determine its own procedure, and the ministry responsible for public service shall provide it with such facilities and such other support as it may require for the discharge of its functions.*

*(4) The selection panel shall, within seven days its convening, invite applications from qualified persons and public the names and qualifications of all applicants in the Gazette and two daily newspapers of national circulation.*

*(5) The selection panel shall within seven days of receipt of applications under subsection (4) consider the applications, interview and shortlist at least three persons qualified for appointment as chairperson and eight persons qualified for appointment as member of the Commission and shall forward the names of the selected candidates to the President for nomination.*

*(6) Until after the first general election after the commencement of this Act, the President in consultation with the Prime Minister shall, within seven days of receipt of the names forwarded under subsection (5), nominate one person for appointment as chairperson and four persons for appointment as members of the Commission, and shall forward the names of the persons nominated to the National Assembly.*

*(7) The National Assembly shall, within twenty one days of the day it next sits after receipt of the names of the nominees under subsection (6), consider all the nominations received and may approve or reject any nomination.*

*(8) Where the National Assembly approves the nominees, the Speaker shall, forward the names of the approved persons to the President for appointment.*

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

*(10) Where the National Assembly rejects any nomination, the Speaker shall, within three days communicate the decision of the national Assembly to the President to submit fresh nominations.*

*(11) Where a nominee is rejected by Parliament under subsection (10), the President in consultation with the Prime Minister shall, within seven days, submit to the National Assembly a fresh nomination from amongst the persons shortlisted and forwarded by the selection panel under subsection (5).*

*(12) If Parliament rejects all or any subsequent nominee, submitted by the President for approval under subsection (11), the provisions of subsections (5) and (6) shall apply.*

*(13) In short listing, nominating or appointing persons as chairperson and members of the Commission, the selection panel, the National Assembly and the President shall ensure that no more than two-thirds of the members are of the same gender, shall observe the principle of regional and*

*ethnic balance and shall have due regard to the principle of fair representation for persons with disabilities.*

*(14) After the first elections after the commencement of this Act, the member of the selection panel under subsection (2)(b) shall be replaced by a representative of the Public Service Commission.*

*(15) Despite the foregoing provisions of this section, the President, in consultation with the Prime Minister may by notice to the Gazette, extend the period specified in respect of any matter under this section by a period not exceeding twenty one days.*

6. Pursuant to **section 11(1) and (2)** of the Act, a selection panel was duly constituted to invite applications from the Kenyan public for shortlisting and interview and thereafter make recommendations to the President and the Prime Minister to appoint a person to the office of the Chairperson and Member of the Commission.

7. The selection panel interviewed and ranked 6 persons in respect of the office of Chairperson and 6 persons in respect of the office of the Member of the Commission. In respect of Chairperson the following were selected and ranked in the following order:

- (1) Prof. Ambassador Maria Nzomo
- (2) Dr Jane Dwasi
- (3) Ms Violet Mavisi Khadi
- (4) Ms Winfred Osimbo Lichuma
- (5) Mr Thomas Nyakabi Maosa
- (6) Mr Mohamed Nur Adhan

8. In respect of a member of the Commission the following were selected and ranked in the following order;

- (1) Dr Rose Aoko Ogwang Odhiambo
- (2) Mr Simon Joni Ndubai
- (3) Mr Mathew M. Kimanzi
- (4) Ms Irene Obo
- (5) Ms Rhoda Malemba Lewa
- (6) Ms Rosa Wangui Kihara

9. The selection panel forwarded the names of the first four ranked persons for consideration for position of Chairperson by the President in consultation with the Prime Minister namely; Prof Maria Nzomo, Dr Jane Dwasi, Ms Violet Mavisi and Ms Winfred Lichuma. The President and Prime Minister duly consulted and through a letter dated 19<sup>th</sup> October 2011, written by the Ambassador Francis Muthaura, Permanent Secretary, Secretary to the Cabinet and Head of Public Service, (hereinafter “the appointment letter”) the President notified the National Assembly that Ms Winfred Osembo Lichuma, the

6<sup>th</sup> interested party, had been nominated for Chairperson of the Commission and Mr Simon Joni Ndubai, a Member of the Commission. The letter stated as follows;

*OFFICE OF THE PRESIDENT*

Ref: OP.CAB.1/24A

19<sup>th</sup> October 2011

Mr. Patrick G Gichohi, CBS  
Clerk of the National Assembly,  
Parliament Buildings  
**NAIROBI**

Dear Patrick,

**RE: CONSTITUTIONAL APPOINTMENTS**

*I have been directed by the President after consultation with the Prime Minister to forward the following names for approval by the National Assembly in accordance with the National Gender and Equality Commission Act, 2011, Section 11(6).*

(1) *Chairperson, National Gender and Equality Commission:*

*Ms. Winfred Osimbo Lichuma*

*She was nominated on the basis of competence and regional balance.*

*Although Prof. Maria Wambui Nzomo, was the top ranked performer in the interview for Chairperson of the Commission, her nomination would not conform to the requirements of Article 232 (1)(h) and (i)(ii) of the Constitution of Kenya, Section 11(13) of the National Gender and Equality Commission Act and Section 7(1) and (2) of the National Cohesion and Integration Act. This is because two (2) of the current three (3) members of the Commission are Kenyans of the same ethnic background as Prof Nzomo.*

*The nomination of Dr. Dwasi and Ms. Violet Khadi Mavisi the second and third ranked candidates, would also be offensive of the provisions of the law aforementioned in view of the recent nominations of Mr. Paul Otiende Omollo and Ms. Sarah Serem to serve as the Chairpersons of the Commission on Administrative Justice and Commission on Salaries and Remuneration, respectively. Ms Mavisi and Ms. Serem are both from Nandi County.*

*Consequently, Ms Winfred Osimbo Lichuma, from Kakamega County, is hereby nominated for the position of Chairperson on account of good performance, regional and gender balance.*

(2) *Member, National Gender and Equality Commission:*

*Mr. Simon Noni Ndubai*

*Mr. Simon Joni Ndubai is nominated as a member of the Commission, on account of being the highest ranked male in the interview, regional balance and on affirmative action since he is physically challenged.*

*Attached hereto please find their detailed CVs and the Selection Panel's score sheet.*

*The purpose of this letter is to request you to submit the above nominations to the National Assembly for consideration.*

*AMB. FRANCIS K. MUTHAURA, EGH*

**PERMANENT SECRETARY, SECRETARY OF THE  
CABINET AND HEAD OF THE PUBLIC SERVICE.**

*Enc.*

*CC Dr. Mohamed Isahakia, CBS  
Permanent Secretary,  
Office of the Prime Minister  
**NAIROBI***

*Prof Nick Wanjohi, CBS  
Private Secretary  
**STATEHOUSE***

10. The two names submitted to the National Assembly, were forwarded to the relevant Departmental Committee of the House that is, the Departmental Committee on Labour and Social Welfare. That Committee heard evidence and took submissions from the public and prepared a report for consideration by the full House. Its conclusions were contained in the Report which contained its recommendation at paragraph 7.0 as follows;-

#### **7.0 RECOMMENDATIONS**

7.1 *The Committee is satisfied with the nomination of Mr. Simon Joni Ndubai and unanimously recommends his appointment as a member of the National Gender and Equality Commission.*

7.2 *The Committee recommends that the nomination Ms Winfred Osimbo Lichuma as the chairperson of the National Gender and Equality Commission should be rejected.*

*The committee further recommends that the Appointing Authority reviews the nomination pursuant to section 11 of the National Gender and Equality Commission Act, 2011.*

11. The Report of the Departmental Committee on Labour and Social Welfare on the Nominations of the Chairperson and Member of the National Gender and Equality Commission was tabled before the National Assembly on 10<sup>th</sup> November 2011. The matter was debated and the House approved the Report subject to the deletion of the recommendation contained in paragraph 7.2 by inserting the words, ***“the House approves the nomination of Miss Winfred Osimbo Lichuma as the Chairperson of the National Gender and Equality Commission thereof.”***

12. It is the appointment and subsequent approval of Ms Winfred Osimbo Lichuma, the 6<sup>th</sup> interested party, that has precipitated these proceedings.

13. It is also not in dispute that by virtue of **section 58(2)** of the Act, members of the former National Commission on Gender and Development who became members of the Kenya National Human Rights and Equality Commission also became members of the Commission for their unexpired terms. These members are Lydia Gachoya, Naomi Wangai and Tache Bonza.

#### **Petitioner’s Case**

14. The petitioners’ grievances are contained in the petition filed on 14<sup>th</sup> November 2011 paragraphs

27, 28, 29, 30, 31 and 32 which state as follows;

*(27) That by the said letter, the President and the Prime Minister had settled for the person who ranked fourth in the interviews, as against the persons who ranked first to third as a result of the following disqualifying criteria for the first three candidates namely;*

*Prof. Maria Wambui Nzomo's nomination would not conform to the requirements of **Article 232 (1)(h)** and **(i)(ii)** of the Constitution of Kenya, **section 11(13)** of the **National Gender and Equality Commission Act** and **section 7(1) and (2)** of the **National Cohesion and Integration Act**. This is because two (2) of the current three (3) members of the Commission are Kenyans of the same ethnic background as Prof Nzomo.*

*The nomination of Dr. Dwasi and Ms. Violet Khadi Mavisi the second and third ranked candidates, would also be offensive of the provisions of the law aforementioned in view of the recent nominations of Mr. Paul Otiende Omollo and Ms. Sarah Serem to serve as the Chairpersons of the Commission on Administrative Justice and Commission on Salaries and Remuneration, respectively. Ms Mavisi and Ms. Serem are both from Nandi County.*

*(28) That a number of organisations among the Petitioners herein protested the forgoing nomination on constitutional grounds namely;*

*(a) Ms Lichuma had been ranked number four in the interviews and therefore was the least competent for the position among the four names forwarded by the Selection panel to the President and the Prime Minister;*

*(b) The persons who ranked numbers one to three had been discriminated against contrary to **Article 27** of the Constitution.*

*(29) That the Parliamentary Committee on Labour and Social Welfare in its report on the Nomination of the Chairperson and Member of the National Gender and Equality Commission recommended that the nomination of Winfred Osimbo Lichuma as the Chairperson of the National Gender and Equality Commission should be rejected.*

*(30) That from the investigations of the Parliamentary Committee on labour and Social Welfare, it is apparent that the nomination authority, namely the President and the Prime Minister, misled Parliament regarding the ethnicity and respective regions of the first three ranked persons to the office of chairperson of the Commission for purposes of justifying the approval of the fourth ranked candidate to the office of chair in the following respects:*

*(a) By saying that two(2) of the current three (3) members for the Commission are of the ethnic background as Prof. Nzomo, the President and the Prime Minister insinuated that Prof Nzomo was born and brought up in the home of her father, Patrick Mutua Nzomo in Eastern Province. She got married to one Charles Namikali Buziba from Western Province and she ordinarily resides in Nairobi. It follows that the President and Prime Minister implicitly labelled her a Kikuyu by ethnicity conveniently and for the limited purpose of denying her a position she otherwise was most qualified to occupy. The current three member of the Commission are; Lydia Gachoya – Kikuyu; Naomy Wanga – Kikuyu and Tache Bonza – Borana. It is instructive to note that the President and Prime Minister called Prof Maria Nzomo as Maria Wambui Nzomo, adding that middle name "Wambui" which does not exist in her formal documents, to wit, her identity card, passport and marriage certificate to create the impression that she was Kikuyu for the forgoing ulterior notice.*

*(b) Dr. Jane Akinyi Dwasi was implicitly labelled as a Luo which by rejecting her nomination on account of the prior nomination of Paul Otiende Amollo to another Commission. It turned out that her father was Justice Mwasi who was a Luhya (Kisa) and her mother Margaret Keral Dwasi a Luo. Her father migrated to Luo land where she was born and lived. She ordinarily lives and works in Nairobi.*

(c) Violet Khadi Mavisi was said by the President and Prime Minister to come from Nandi Hills which was also not correct. She was born of a Luhya (Maragoli) father and a Luhya (Tiriki) mother and is married to a Luhya (Samia) husband. Whereas her parents have a home in Nandi Hills she ordinarily resides in Nairobi and her matrimony is in Busia county.

(31) That from the foregoing, it is apparent that the President and the Prime Minister took upon themselves the controversial task of assigning ethnicities to the first three candidates for the position of chair of the Commission for purposes of denying them opportunities they otherwise merited.

(32) That the report of the parliamentary Committee on Labour and Social Welfare was debated by Parliament and the same adopted but with an amendment deleting the recommendation for rejection of the nomination of Winfred Osimbo Lichuma as Chairperson of the Commission.

15. It is the petitioners' case that to the extent that the President and the Prime Minister wrongly and or erroneously assigned the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> interested parties ethnicities and regions that they are not ordinarily affiliated to for purpose of disqualifying them from qualification to public office that they otherwise merited, the following articles of the Constitution were violated; **Articles 2(1), 2(2), 2(4), 3, 10, 27, 59, 73(1), 73(2), 74, 129 and 139.**

16. The petitioners' consequently seek the following prayers in the petition.

(a) A declaration that to the extent that the President and the Prime Minister wrongly and or erroneously assigned the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Interested parties herein ethnicities and regions that they are not ordinarily affiliated to for purposes of disqualifying them from qualification to a public office that they otherwise merited, the following provisions of the Constitution were violated in relation to the said Interested parties and the Kenya Public at large, namely **ARTICLES 2(1), 2(2), 2(4), 3, 10, 27, 59, 73(1), 73(2), 74, 129, 131 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA.**

(b) An order declaring invalid the decision of the President and the Prime Minister which decision is contained in the letter dated 19.10.2011 from the Permanent Secretary, Secretary to the Cabinet and Head of the Public Service to the Clerk of the National Assembly to the extent of forwarding the name of Winfred Osimbo Lichuma for approval as Chairperson of the National Gender and Equality Commission and any other decision on the same office that may be reached on similar considerations.

(c) A declaration that is would be unconstitutional for any state organ to carry on with the process of appointment, approval, swearing into office and or admission into chairpersonship of Winfred Osimbo Lichuma as the Chairperson of the National Gender and Equality Commission on the strength of the decision contained in the letter dated 19.10.2011 from the Permanent Secretary, Secretary to the Cabinet and Head of the Public Service to the Clerk of the National Assembly or any subsequent decision founded on the same letter.

(d) An order restraining the appointment, approval, swearing into office and or admission into chairpersonship of Winfred Osimbo Lichuma as the Chairperson of the National Gender and Equality Commission on the strength of the decision contained in the letter dated 19.10.2011 from the Permanent Secretary, Secretary to the Cabinet and Head of the Public Service to the Clerk of the National Assembly or any subsequent decision founded on the same letter.

(e) Such directions as the court will deem necessary particularly touching on ethnicity, region of affiliation and related considerations for appointment to public office for women in the Republic of Kenya.

(f) Costs of and incidental to this petition.

(g) Or that such other orders as this Honourable Court shall deem just.

17. The petitioners' case was argued by Mr Ongoya and Ms Thongori. Mr Ongoya submitted that the

petition touches on the process of appointment of the Chairperson of the Commission and particularly the non compliance with fundamental principles in running government affairs in the conduct of the process by the President and the Prime Minister. He submitted that every decision made by a public officer must be formulated in a manner consistent with constitutional benchmarks and this petition is a step by the petitioners to give this court an opportunity to re-assert the principle of constitutionalism in management of public affairs.

18. Counsel confirmed that the petitioners had no problem with the selection process as conducted by the selection panel. The petitioners' problem arose when the President and Prime Minister made their selection. Of the four names forwarded by the panel, the scores were ascertained and ranked and these were notified to the President and Prime Minister.

19. It was the petitioners' contention that in terms of competence of the nominees, Prof. Nzomo was the most competent and Ms Lichuma the least competent. And that though all were competent, **Article 73(2)** of the Constitution provides one of the guiding principles of leadership and integrity is the selection on the basis of personal integrity, competence and suitability. There was no question of personal integrity of any of the candidates but in terms of competence and suitability as determined by the selection panel ranking, which is the only known criteria for determining competence and suitability, Prof. Nzomo was ranked the most competent in order of merit.

20. Mr Ongoya submitted that **Article 232** makes provision for values and principles of public service and in particular the value of representation of Kenya's diverse communities. It is the petitioner's position that by nominating the lowest ranked candidates among the four, the President and Prime Minister assumed a heavy responsibility to justify the decision on sound and credible grounds for several reasons. This decision entailed denying more qualified citizens a position in the public service yet **Article 27** guarantees equal opportunity as a fundamental right. It violated the national values and principles regarding transparency and accountability and also bordered on arbitrariness. In this respect counsel contended that the Constitution emphasizes constitutionalism which implies limiting arbitrariness.

21. The petitioners maintain that the President and Prime Minister ought to have advanced compelling reasons to justify a departure from these principles. The explanation contained in the appointment letter should have contained a justification consistent with constitutional principles and values. The ethnic background of other nominees though alluded to was not disclosed for purposes of transparency. Counsel submitted that the three serving Commissioners were Lydia Gachoya, a Kikuyu, Naomi Wangai, a Kikuyu and Tache Bonza, a Borana. The President and Prime Minister labelled Prof. Nzomo as Kikuyu in order to disqualify her from public office. In the petitioners' view, apart from being inaccurate, labelling Prof. Nzomo as Kikuyu was intended to disqualify her from office in particular given that Kenya is a patrilineal society. They could have called her a Luhya based on her marriage or a Nairobiian based on her residence. The question of ethnicity was not a question for consideration by the selection panel.

22. According to the appointment letter, Ms Mavisi's appointment would have violated the spirit of the Constitution as Ms Serem and Ms Mavisi are from Nandi County yet Ms Mavisi had no Nandi socialisation. Mr Ongoya emphasised that she was labelled a Nandi despite her background for purposes of disqualifying her. As regards Dr Jane Dwasi, counsel contended that she was disqualified on account of appointment of P. Otiendo Amollo to another Commission. The impression being created was that she is a Luo yet her father's Luhya origin was disregarded. Counsel asked why she was labelled a Luo and not a Nairobiian as she believes.

23. As concerns Ms. Lichuma, counsel drew attention to the fact that there was no information on where she comes from. Her father's origin, which would enable one to assess her position vis-a-vis other candidates, was unknown. Her origin from Kakamega County was the basis of her nomination. Mr Ongoya contended that she was not subjected to the same inquiry and standards as the other nominees.

24. It is the petitioner's argument that the President and Prime Minister took it upon themselves to give the nominees ethnic appellations. Mr Ongoya submits that the new constitutional order has a key objective of fundamentally limiting discretion and this discretion cannot extend to wrongly labelling citizen for

purposes of achieving a particular end or for purposes of denying a citizen the opportunity to be appointed to a state position. Counsel submitted that as the President and Prime Minister disclosed the criteria they used they, like any other public officer, must be held accountable for these criteria.

25. Counsel posed the question what then is the ethnic and regional affiliation for women and in particular married women in Kenya? The criteria employed has a net effect on a cross-ethnic married woman seeking public office, yet public power must be exercised in a manner to create certainty and not confusion.

26. To emphasise the importance of constitutionalism, the court was referred to learned articles; H.W. Okoth Ogendo “*Constitutions without Constitutionalism; Reflections on an African Political Paradox*,” in Issa Shivji ed., *State and Constitutionalism, An African Debate on Democracy* (Harare: SAPES, 1991) and J Mutakha Kangu *Constitutionalism; A Comparative Analysis of Kenya and South Africa* Moi University Law Journal, No. 1 [2008], 105. Mr Ongoya referred to the case of *Njoya & Others v Attorney General [2004] 1 KLR 261, 277 at para. 15* where Justice Ringera observed that constitutionalism was one of the most important values and principles of the Constitution. According to the learned judge, constitutionalism betokens limited government under the rule of law. Counsel urged the court to adopt these principles.

27. Mr Ongoya asserted that the President and Prime Minister’s discretion is limited and it cannot defeat the equal opportunity principle or violate the principle of competence and suitability. Counsel invited the Court to consider giving guidelines for such appointments. In conclusion counsel submitted that the question before the court is whether the appointment of the chair of the Commission pursuant to the Act is inconsistent with and in contravention of the Constitution.

### **3<sup>rd</sup> Interested Party’s Case**

28. The petitioners’ case was supported by the 3<sup>rd</sup> interested party, Prof. Maria Nzomo. She swore an affidavit on 28<sup>th</sup> November 2011 in support of the petition. Prof. Maria Nzomo was ranked top by the selection panel. She states that she was shocked by the reasons given for the selection of Ms Winfred Lichuma.

29. According to Prof. Nzomo, the other three Commissioners are Lydia Gachoya, Naomi Wangai and Tache Bonza and therefore the reference in the nomination letter to two Commissioners being of the same ethnic background as Prof. Nzomo could only mean Lydia Gachoya and Naomi Wangai whose names imply they are Kikuyu.

30. Prof. Nzomo was also surprised that during the interview, no one sought to know her ethnic background and more importantly, she was never called upon at any point during the nomination process to state her ethnicity and region of origin.

31. The 3<sup>rd</sup> interested party also asserts that the ethnic profile assigned to her is not correct. Though born of a Kikuyu mother, her father, the late Patrick Mutua Nzomo, a Kamba, is from Machakos, Eastern Province. She avers that she got married to one Charles Buziba from Western Province and she ordinarily resides and votes in Nairobi.

32. The grievance by Prof. Nzomo is that she has been profiled as a Kikuyu when she is not and that the nominating authority made a fundamental error of fact and irreversibly damaged her internationally recognised personal and professional integrity and credibility, for which she has invested three decades of public life.

33. Prof. Nzomo also disavows the use of her middle and given name “Wambui” which she deposes does not appear anywhere in her identification documents. She also states that she does not use or identify herself by that name.

34. Prof. Maria Nzomo depones that upon hearing of the appointment of Ms Lichuma, she felt undignified, degraded, discriminated upon and embarrassed that her whole identity was called into question. She felt that the ethnic profiling on the basis of her middle name was deliberate and intended to exclude her from consideration for the post.

35. Her counsel, Ms Rose Mbanya, fully associated herself with the submissions of the petitioners. She also relied on the written submissions dated 19<sup>th</sup> December 2011. Counsel urged the court to allow the petition.

### **Respondent's Case**

36. The respondent opposed the petition on the basis of grounds of opposition and written submissions dated 16<sup>th</sup> January 2012 and 30<sup>th</sup> January 2012 respectively. Mr Bitta, counsel the respondent, adopted these grounds and written submissions in his oral submissions.

37. He submitted there are specific provisions dealing with appointments in public service. Under the provisions of **Article 259** of the Constitution, the President and the Prime Minister are enjoined to promote the purposes, values and principles of the Constitution. That the appointment of persons to public service is governed by the provisions of **Article 232**. Counsel contended that **Article 232(1) (g)** is clear that appointments and promotions in the public service shall be guided by the values and principles of fair competition and merit but those are to be subject to **Articles 232 (1)(h) and (i)** which are; representation of Kenya's diverse communities and affording adequate and equal opportunities for appointment inter alia members of all ethnic groups.

38. Mr Bitta emphasised that it is very clear and without contradiction the said provisions of the Constitution that merit and fair competition is subject to consideration of ethnic, regional and gender diversity. The lesser value and principle is subject to the greater value and principle. He further added that the provisions of **Article 250(4)** of the Constitution provides that appointments to commissions and independent offices shall take into account the national values referred to in **Article 10** and the principle that the composition of the commissions and offices, taken as a whole shall reflect the regional and ethnic diversity of the people of Kenya. In this respect counsel was of the view that the appointing authorities had satisfied the constitutional criteria.

39. Counsel also added that **section 7** of the *National Cohesion and Integration Act, 2008* also imposes an obligation on all public establishments to seek diversity of the people of Kenya in employment of their staff and that not more than one third of the staff may be from one ethnic community.

40. As regards the selection process the respondent's position is that the provisions of **section 11(1) and (2)** of the Act do not provide for recommendation of one person to the President and Prime Minister for appointment to the office of the Chairperson and member of the Commission, the said provisions provides that the selection panel shall consider applications, interview and shortlist "*at least three persons qualified for appointment as Chairperson....*" Mr Bitta contended that the Act does not give the selection panel any power to rank persons it deems qualified and in doing so they acted beyond the scope of their well defined mandate under the Act.

41. Counsel submitted that all the persons whose names were forwarded to the President and Prime Minister by the selection panel qualified and that is the limit of the panel's mandate. He added that the process of selection of qualified persons was competitive and all persons whose names were forwarded to the President were selected competitively. Counsel maintained that the views of the selection panel cannot in any way remove, usurp or substitute the statutory and constitutional discretion of the President acting in consultation with the Prime Minister and as such the issue of the competence does not arise as all the nominees met the minimum statutory requirements.

42. In respect of the issue of ethnic profiling, Mr Bitta submitted that position was that the 3<sup>rd</sup> interested party and all those who apply for public office must submit their National Identity Cards (ID's).

Dr Dwasi and Ms Mavisi produced their National ID's which show that their home districts are Kisumu and Nandi respectively. This was information before the President and Prime Minister.

43. In respect of the 3<sup>rd</sup> interested party's claim that "Wambui" was added with a view to deny her an appointment, the respondent's position is that from the documents before the court, it is apparent that the name "Wambui" appears on her degree certificates and these are formal documents that cannot be ignored or wished away.

44. Counsel underlined the reference in the appointment letter was to, '.. *Kenyans of the same ethnic background as Prof. Nzomo.*' In this respect, Prof. Nzomo has admitted that her mother is Kikuyu and her certificates, the Bachelors degree and the Doctorate degree, which are formal documents, used her middle name "Wambui." Counsel submitted that ethnic background is not a matter of choice and since the 3<sup>rd</sup> respondent's mother is Kikuyu and other members of the Commission are Kikuyu then they must be of the same ethnic background as stated in the nomination letter.

45. The respondent's position was that the nomination by the President in consultation with the Prime Minister was not final as it was subject to Parliamentary approval. Parliament was entitled to examine the persons nominated and ensure that they complied with constitutional parameters. In the end Parliament approved the nomination and this Court should respect that process.

46. The respondent asserts that the issue of balancing of regional ethnic, gender, disability and other criteria in the nomination and appointment of persons into public office is a political rather than a judicial one and that the framers of the Constitution gave that responsibility to a duly elected President and subjected the exercise of that discretion to another representative organ of State; the Legislature. These organs are most competent to deal with the question of balancing the various interests, thus the Courts should refrain from determining political questions under the doctrine of "acts of state" or under "the political question doctrine."

47. In response to the argument of discrimination, Mr Bitta submitted that classification of individuals is permissible where there is a rational connection to a legitimate government purpose. Counsel referred to the case of ***Hersi Hassan Gutale & Another v Principal Registrar of Persons & Another Nairobi Misc. Appl. No. 774 of 2003 (Unreported)*** to support this proposition.

48. Mr Bitta submitted that according to the principles of interpretation enunciated in **Article 259**, the Constitution is a living document which is alive and sensitive to all the prevailing social, political and economic circumstances. He urged the Court to keep in mind that ethnic animosity that has bedevilled our Nation and the efforts that have been made by the Constitution and legislature to deal with it. It is in this light that counsel contended that **Article 27** must read. It envisages a scenario where competence can be undermined for instance on the basis of gender or diversity.

49. Counsel also referenced **Article 24** as permitting certain limitations to fundamental rights and freedoms. In this respect there was a rational criteria to the nomination intended to achieve a legislative and constitutional purpose.

50. The respondent prayed that this suit be dismissed with costs as this matter was not a public spirited attempt to uphold the rule of law.

### **6<sup>th</sup> Interested Party's case**

51. The 6<sup>th</sup> interested party is Ms Winfred Osimbo Lichuma whose appointment as chairperson of Commission is being challenged. She opposes the petition and has filed a replying affidavit sworn on 24<sup>th</sup> November 2011 and a further affidavit sworn on 20<sup>th</sup> January 2012. Her Counsel, Mr Chacha Odera, adopted the written submissions dated 27<sup>th</sup> January 2012.

52. Mr. Odera submitted that in the case of ***FIDA-K & Others v Attorney General & Others Nairobi***

**Petition No. 102 of 2011 (Unreported)**, the court considered that the duty of the court was to consider legality and process not merits of the appointment and the court cannot arrogate itself the jurisdiction to be part of the appointing process.

53. Mr Odera submitted that the provisions **sections 11** of the Act were followed. The selection panel interviewed and shortlisted candidates and thereafter submitted not less than three names as required to the President who in consultation with the Prime Minister made the appointment. The requirement for several candidates enables the appointing authority take into account multiple considerations for appointment to public office including the merit, regional and ethnic balance, gender diversity and disability consideration as required by **Articles 250(4)** and **232(1)(g)** read together with **(h)** and **(i)** of the Constitution.

54. Mr Odera also contended that under the Act, the name forwarded by the President to Parliament is for purposes of approval and once Parliament signifies its approval then the President makes the appointment. In this respect therefore, counsel asserted that the appointment letter is merely communication of the decision and is not part of the process and cannot be said to be in violation of the Constitution.

55. Counsel submitted that the President's word is not final as the recommendation goes to Parliament. The persons nominated are subjected to a process by a Departmental Committee of the National Assembly which after deliberations prepare a report for consideration by the full house. In this case the process was followed and whereas the Departmental Committee did not agree with the President's appointment, when the report was tabled before the full House, the report was adopted with an amendment to accept Ms Lichuma's appointment. In this respect Parliament exercised its oversight role and as such the appointment of the 6<sup>th</sup> interested party followed the full process provided by the Constitution and relevant statute.

56. Counsel submitted that all the arguments that are before the court were placed before Parliament as demonstrated by the letters written by the petitioners to the Clerk of the National Assembly for consideration by both the Committee and the Assembly. In the circumstances, Mr Odera contended, these proceedings violated the principle of separation of powers and this court cannot open discussions that were concluded by Parliament in exercise of its statutory and constitutional mandate. Reference was made to the cases of *Queen's Representative [1985] LRC (Const) 56* and *Sookoo and Another v Attorney General of Trinidad and Tobago [1986] LRC (Const) 629*.

57. In response to the argument about the competence of the 6<sup>th</sup> respondent, Mr Odera pointed out that under **Article 73(2)**, there are other considerations other than competence. These are integrity and suitability. The score sheet presented by the petitioners as evidence lacks the parameters attributed to each mark. There is no issue of integrity in these proceedings and suitability is a matter for the appointing authority and that authority takes into account so many other factors.

58. Counsel submitted that in the appointment letter Ambassador Muthaura did not say Prof. Nzomo was Kikuyu. He alluded to the ethnic background and she has admitted that she is of mixed parentage. Counsel argued that in light of **Article 45(3)** which protects family rights, the rights of parties to a marriage include social and cultural rights and it is expected that in this dispensation that a child born of both parents is entitled to claim both parents' heritage and background.

59. Mr Odera highlighted the passports, identity cards and marriage certificate that are attached to the affidavit in support of the petition and Prof Nzomo's replying affidavit which are all copies from the same source. He stated that the academic certificates bearing the name 'Wambui' were not annexed yet all the documents were from the same source. He asked the court to make an adverse inference.

60. The 6<sup>th</sup> respondent also questions the bonafides of the petitioners. Counsel stated that at every stage of the selection, nomination and appointment process the petitioners wrote letters making the same arguments that are being made in these proceedings. There is a letter dated 13<sup>th</sup> October 2011 from the petitioners and other groups to the President and Prime Minister opposing the consideration of Ms

Lichuma on the ground that she was against the formation of a separate gender commission. Two letters dated 25<sup>th</sup> October 2011 and 26<sup>th</sup> October 2011 were addressed by the petitioners and other organisations to the Clerk of the National Assembly opposing the appointment of Ms Lichuma on the ground that she was ranked fourth, that she was in the forefront of fighting against the creation of a separate gender commission and that the other ranked members were discriminated against.

61. According to Mr Odera, the Departmental Committee of the National Assembly invited public views and it is clear from the report and the rigorous debate that all the objections by the petitioners were dealt with in publicly and this court should not entertain these arguments. Considering this and the circumstances of the case, counsel was of the view that the opposition to Ms. Lichuma was not a question of ethnicity or of Prof Nzomo being profiled. It started before the President made the decision to appoint the 6<sup>th</sup> respondent.

62. Counsel further contended that if there was a problem of ethnicity then it emanated from the Departmental Committee of the National Assembly. The Committee made a recommendation at paragraph 7.2 of the Report to reject Ms Lichuma. The recommendations were not unanimous, it was divided. The report was laid before the floor of the House and a vote taken. Parliament approved the name forwarded by the President.

63. Mr Odera concluded his submission by stating that taken as a whole this was a clear case where the court should respect the separation of powers. He maintained that where a process is prescribed by statute then the court should ensure the sanctity of the process and where Parliament has spoken this Court should not embarrass the institution by ruling against it. He urged the Court to dismiss this petition with costs as this case was clearly an abuse of public interest litigation. In this respect counsel referred to the case of *Uttaranchal v Balwant Chaufal & Others [2010] 4 LRD 54* where the Supreme Court of India held that the court had the power to curtail public interest litigation where it was being abused or it was commenced for improper motives.

### **1<sup>st</sup> interested party's case**

64. The 1<sup>st</sup> interested party, the National Gender and Equality Commission was represented by Mr. Modi. Tache Bonsa Gallo, the Vice Chairman of the Commission swore an affidavit on 20<sup>th</sup> December 2011 in opposition of the petition. In addition, written submissions filed on 30<sup>th</sup> January 2012 were filed and adopted by Mr. Modi.

65. The argument of the National Gender and Equality Commission is that the President and Prime Minister cannot be faulted by the petitioners. It contends that the grounds considered by the President, Prime Minister and National Assembly in the appointment and approval of the 6<sup>th</sup> interested party have not violated the Constitution in any manner.

66. It is argued that whereas the President did not use the precise words contained in **Article 10** and **27** of the Constitution their decision when viewed in substance complied with these provisions. It was contended that purported violation of **Article 27** of the Constitution and impliedly **Article 27(4)** thereof – **“Ethnic or Social Origin”** cannot stand since the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested parties herein have Luhya affiliation and origin which defines their ethnicity and social origin.

67. The 1<sup>st</sup> interested party submits that the appointment of the 6<sup>th</sup> respondent should be upheld and the petition dismissed with costs to it since it was made party to this suit.

### **2<sup>nd</sup> interested party's case**

68. The 2<sup>nd</sup> interested party, the National Cohesion and Integration Commission, is established under the *National Integration Commission Act, Act No. 12 of 2008*. Its objectives, as set out in **section 25**, are, inter alia, as follows;

- (i) *The promotion of elimination of all forms of discrimination on basis of ethnicity or race.*
- (ii) *The promotion of equal access and enjoyment by persons of all ethnic communities and racial groups to public or other services and facilities provided by the Government.*
- (iii) *Make recommendations on penalties to be imposed on any person for any breach of the provisions of the constitution or of any law dealing with ethnicity.*
- (iv) *To initiate, lobby for and advocate for policy, legal or administrative reforms on issues affecting ethnic relations.*

69. According to the written submissions filed on 24<sup>th</sup> January 2012, it did not vouch for nor oppose any candidate. It relied on the affidavit of Hassan Mohamed, the Secretary to the NCIC, sworn on 19<sup>th</sup> December 2011. Its purpose was to urge the court to demystify the issues of ethnicity and regional balance as anticipated under **Article 232(1)(g), (h) and (i)** of the Constitution as well as **section 7(2)** of the ***National Cohesion and Integration Act, 2008***.

70. Mr Mohammed Hassan in his deposition states that it is the view of the NCIC that whereas there is a basis for consideration of ethnicity and regional balancing, the terms have not been well and exhaustively expounded to enable an objective determination of the same thus leaving it to the selectors to exercise their subjective views therefore creating controversy and possible grievous errors in the selection of public officers.

71. In respect of the candidates, Mr Mohammed contends that even though all the four candidates were qualified, the lowest ranked was nominated for office, consequently, the basis relied upon is obscure and open to abuse. He further depones that the appointment does not set any clear precedent for future and similar appointments and is thus contrary to the letter and spirit of the Constitution.

72. Mr Ligunya, counsel for the NCIC, posed several questions on behalf of the NCIC which go to the heart of the question of patriarchy and inter ethnic marriage. How is ethnicity to be attributed to a person? There is also equal protection and equal opportunity. In attributing ethnic affiliation what concerns and considerations should be given. How is this to be effected going forward? All these questions need to be answered and the court ought to give clear principles in looking at the aspect of regional balance and ethnicity. The NCIC urges the Court to delve into a succinct interpretation of what is ethnicity and regional balancing and the yardstick to be applied in determining these issues.

### **Public Service Appointments, National Values and Principles**

73. 27<sup>th</sup> August 2010 ushered in a new regime of appointments to public office. Whereas the past was characterised by open corruption, tribalism, nepotism, favoritism, scrapping the barrel and political patronage, the new dispensation requires a break from the past. The Constitution signifies that the end of 'jobs for the boys' era. **Article 10** sets out the values that must be infused in every decision making process including that of making appointments.

74. In dealing with the task at hand this court is enjoined to be guided by the provisions of **Article 259(1)** which provides that the Constitution shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance.

75. Our Supreme Court in ***Re The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011*** at *para. 51* adopted the words of Mohamed A J in the Namibian case of ***State v Acheson 1991(20 SA 805 (Page 813)*** where he stated that, ***'The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the***

***relationship government and the governed. It is a mirror reflecting the “national soul” the identification of ideas and ..... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.’***

76. Apart from complying with the stipulation that the Constitution must be given full life, it is also my duty in considering this matter to give effect to the Constitution as a whole. The various provisions that govern appointments to public service must be read together in a manner that gives full effect to the purposes of the Constitution. In this respect I fully adopt the principle of harmonization set out in the case of ***Centre for Rights Education and Awareness (CREAW) and Others v The Attorney General Nairobi Petition No 16 of 2011 (Unreported)*** where the Court, quoting other decisions, stated that, “*In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read together to get a proper interpretation. In the Ugandan case of Tinnyefuza v The Attorney General Constitutional Appeal No. 1 of 1997, the Court held as follows; ‘the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written constitution.’ A similar principle was enunciated by the United States Supreme Court in Smith Dakota v North Carolina 192 v 268 [1940] the court stated; ‘it is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered above but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument.’”*

77. **Article 10** contains the National values and principles of governance. **Article 10** provides as follows:

**10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—**

- (a) applies or interprets this Constitution;**
- (b) enacts, applies or interprets any law; or**
- (c) makes or implements public policy decisions.**

**(2) The national values and principles of governance include—**

**(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**

**(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;**

**(c) good governance, integrity, transparency and accountability; and (d) sustainable development.**

78. These values and principles provide a foundation upon which Kenyans have determined that our democratic state shall be build; they are the intestinal fluid which nourishes the bill of rights and the Constitution. Thus when making appointments to public office, every selecting, appointing and nominating authority must take into account these values and principles.

79. **Article 232** of the Constitution sets out the values and principles of the public service. **Article 232** provides as follows:

**232. (1) The values and principles of public service include—**

- (a) high standards of professional ethics;**
- (b) efficient, effective and economic use of resources;**

- (c) *responsive, prompt, effective, impartial and equitable provision of services;*
  - (d) *involvement of the people in the process of policy making;*
  - (e) *accountability for administrative acts;*
  - (f) *transparency and provision to the public of timely, accurate information;*
  - (g) *subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;*
  - (h) *representation of Kenya's diverse communities; and*
  - (i) *affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—*
    - (i) *men and women;*
    - (ii) *the members of all ethnic groups; and*
    - (iii) *persons with disabilities.*
- (2) *The values and principles of public service apply to public service in—*
- (a) *all State organs in both levels of government; and*
  - (b) *all State corporations.*
- (3) *Parliament shall enact legislation to give full effect to this Article.*

80. **Article 73** of the Constitution, which is part of Chapter 6 dealing with leadership and integrity, also, has provisions that guide appointments in public service. **Article 73(2)(a)** provides as follows:

**73(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;*

81. The ethnic and regional diversity of the members of the various Commissions must also be considered and taken into account. When constituting the membership of Commissions and appointing Independent Offices, **Article 250(4)** of the Constitution provides;

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

82. In addition to these provisions, **section 11(13)** of the Act imposes on the persons shortlisting, nominating or appointing to take into account these values and principles. The process of shortlisting, nominating and appointment outlined in **section 11** of the Act is part of the process of fulfilling both the values set out in **Article 10** and **232** of the Constitution.

83. Diversity as a legitimate legislative purpose is also to be found at **section 7** of the **National Cohesion and Integration Act** which provides;

**7(1)** *All public establishments shall seek to represent the diversity of the people of Kenya in the employment of staff.*

**(2) No public establishment shall have more than one third of its staff from the same ethnic community.**

84. The selection panel provides an independent process to evaluate the competence, integrity and suitability of applicants. This selection panel is intended to insulate the appointment process from the effect of political patronage, nepotism and corruption. The selection panel is entitled to regulate its own process which must meet the the constitutional standards of transparency, accountability and public participation.

85. The petitioners have no dispute with the process before the selection panel. The persons whose names were nominated for appointment by the selection panel are all women hence the issue of gender does not fall for consideration. Though the selection panel was required to take into account regional and ethnic diversity, there is no complaint that it did not hence it is not necessary to examine their decision on that basis.

86. After the selection panel completes its work it is required, in accordance with **section 11(4)** of the Act, to submit at least three names of persons qualified for consideration for appointment as chairperson by the President in consultation with the Prime Minister. According to the Act, the persons whose names are forwarded to the President for nomination are persons “*qualified.*” The minimum qualifications for such persons is set out in **section 10** of the Act which provides as follows;

**10. (1) A person shall be qualified for appointment as the chairperson of the Commission if the person-**

**(a) has knowledge and at least fifteen years experience in matters relating to human rights and gender;**

**(b) holds a degree from a university recognized in Kenya; and**

**(c) meets the requirements of Chapter Six of the Constitution.**

**(2) A person shall be qualified for appointment as a member of the Commission if the person-**

**(a) holds a degree from a university recognized in Kenya;**

**(b) has knowledge and at least ten years’ experience in matters relating to any of the following fields-**

**(i) law;**

**(ii) public administration;**

**(iii) economics;**

**(iv) gender and social development;**

**(v) human rights;**

**(vi) management; or**

**(vii) social sciences;**

**(c) has had a distinguished career in their respective fields; and**

**(d) meets the requirements of Chapter Six of the Constitution.**

**(3) A person shall not be qualified for appointment as the chairperson or a member if such person -**

**(a) is a member of Parliament or a County Assembly;**

**(b) is a member of the governing body of a political party;**

**(c) is a member of a local authority;**

(d) *is a undischarged bankrupt; or*

(e) *has been removed from office for contravening the provisions of the Constitution or any other law.*

87. It is also common ground that the personal integrity of the candidates is not in issue. The petitioners have raised the issue of competence of the person so nominated by the President in consultation with the Prime Minister. I will now deal with the issue of competence.

### **Fair Competition, merit and competence**

88. The key mandate of the selection panel is to competitively shortlist for appointment competent and suitably qualified persons. In making this determination the panel is, as I have stated, bound by the provisions of **Articles 10, 73(2) and 232** of the Constitution and which are restated at **section 11(13)** of the Act. The Act itself sets a minimum threshold for competence and suitability by setting out these qualifications. In view of the number of applicants the selection panel conducts interviews and selects the persons it considers the best for appointment. The selection panel is empowered by the Act to make its own rules which must also be in accordance with the values and principles of the Constitution.

89. The persons whose names are forwarded are all considered competent and the statutory mandate imposed on the selection panel to forward “**at least three names**” indicates that the President and Prime Minister have discretion in selecting the preferred candidate having regard to the various factors set out in **section 11(13)**.

90. The argument, proffered by the petitioners and the 3<sup>rd</sup> interested party and supported by the 2<sup>nd</sup> interested party, that the person ranked first ought to have been selected would in these circumstances be contrary to the legislative architecture which imposes on every participant in the process, at every stage, to have regard to the principles and values regarding appointment of persons to public office. Accepting that argument would also imply that the selection panel is the appointing authority and the other players are merely part of a conveyor belt.

91. The issue of who is more competent than the other is a matter of opinion of the members of the selection panel which conducted the interviews. The mandate of selection panel under the Act was to forward at least three names of those who meet the minimum qualification set out in **section 10** of the Act and who also meet the standards outlined in the Constitution and **section 11(13)** of the Act.

92. The practice of ranking candidates is useful in assisting the appointing authority, promoting and enhancing transparency and accountability. What the Act requires is that the names of at least three qualified persons be forwarded to the President for appointment. These qualified persons are those who meet the the standards set out in **section 10** and **11(3)** of the Act and have undergone a competitive and fair process.

93. Neither the Constitution nor the Act requires the President in consultation with the Prime Minister to appoint the person ranked first. To insist that the President must appoint the person ranked first in the circumstances would be to take away the President’s discretion, authority and responsibility of independently taking into account the values that guide the making of public appointments.

94. The process set out in **section 11** of the Act must also be seen as a process of checks and balances intended to achieve the objectives of the Constitution. Each stage of the process constitutes a check and balance on the other. Each authority charged with responsibility to make a decision has a margin of discretion which it is bound to exercise in accordance with the Constitution and the law.

95. The selection panel acts as a sieve and selects at least three persons it considers the best from pool of qualified Kenyans who have applied for the position. If it gets its mandate wrong, the President in consultation with the Prime Minister have a chance to remedy any defect in the process and once again see to it that the values of the Constitution are upheld. And if the President and Prime Minister fail then

the National Assembly has another chance to set things right. All the cogs in the wheel of appointment are complimentary to each other and work as one whole and are intended to ensure that Kenya has the highest standards for public servants who reflect the face of Kenya.

96. My reasoning on the issue of competence is further fortified by the fact that the petitioners did not complain that the person ranked first by the selection panel for position of member of the Commission was not appointed. The only conclusion that can be drawn from this is that all persons whose names are forwarded to the President by the selection panel are qualified, competent and suitable for the positions.

97. I find and hold that that all persons whose names were selected by the panel and forwarded to the President and Prime Minister for appointment are qualified, competent and suitable to hold the positions for which they were selected. In actual fact they are persons who have all served this country with distinction and there is no compelling reason for this court to consider any one of them incompetent. Accordingly, this ground of challenge lacks merit and is dismissed.

### **Appointment of the Chairperson**

98. The main issue in this suit is summed up in prayer (a) of the petition where the petitioners seek a declaration that to the extent that the President and the Prime Minister wrongly and erroneously assigned the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> interested parties their ethnicities and regions that they are not ordinarily affiliated to for the purposes of disqualifying them from qualification to office they merited, they violated the **Articles 2(1), (2), 3, 10, 27, 59, 73(1), 73(2), 74, 129 and 131** of the Constitution.

99. As I understood the petitioners' case, it was founded on the fact that they thought that the 3<sup>rd</sup> interested party, Professor Maria Nzomo, ought to have been appointed as the person first ranked on grounds of competence and that she was deliberately excluded by assigning her an ethnicity which was intended to disqualify her from appointment.

100. The principles and values of the public service at **Article 232(1)** require that whereas competition and merit is the basis for appointments and promotions to the public service, this value is subject to **Article 232(h)** and **(i)** which requires that such appointments represent Kenya's diverse communities and affording adequate and equal opportunities for appointment to men and women, members of all ethnic groups and person with disabilities.

101. **Article 232** must also be read together with **Article 27** of the Constitution which protects the right to equality and prohibits discrimination. **Article 27** provides;

***27. (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 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.**

102. **Article 27** imposes on the state the obligation to take legislative and other measures to redress past discrimination. In my view such measures include the making of appointments in public service to redress past discrimination. This is further underpinned by the provisions of **part 3** of the Bill of Rights which elaborates certain rights to ensure certainty as to the application of those rights and fundamental freedoms to certain groups or persons. These groups include persons with disabilities, children, the youth, minorities and marginalised groups and older members of society. It is through these lenses provided by the Constitution as a whole that the actions by the President and Prime Minister must be judged.

### **Equality and Discrimination**

103. **Article 27** of the Constitution has been the subject of consideration by our courts in relation to appointment to public service. In the case of *FIDA-K & Others v Attorney General & Others (Supra)*, the subject of dispute was the appointment of the judges of the Supreme Court. The court stated that, ***“The equal protection and non-discrimination principles are not abstract propositions. They are expressions of policy arising out of specific difficulties and historical injustices to be addressed so that specific goals and remedies are achieved. The Constitution does not require things and circumstances which are different in fact or in opinion to be treated in law as though they were the same. The question is whether the classification is scientifically perfect or logically complete. In answering that question it is important to understand that the law does all that is needed when it does all that it can, indicates a policy and applies it all within the lines in order to address a particular situation. It is also important to understand that the difference which would warrant a reasonable classification need not be great. What is required is that it must be real and substantial and must bear some just and reasonable relation to the object of the drafters.”***

104. While **Article 27(1)** provides for equality, the same provision does not prohibit differentiation or classification based on different requirements. What the Constitution requires is that any classification or differentiation based on prohibited grounds set out in **Article 27(4)** must bear a rational connection to a legitimate government purpose.

105. I am persuaded to adopt the interpretation given to a similar provision contained in **section 8(1)** of the provisions of the South Africa Interim Constitution in the case of *Prinsloo v van der Linde 1997 (3) SA 1012 (CC) para 25* where the Constitutional Court of South Africa stated, ***“The purpose of this aspect of equality is to ensure that the state is bound to function in a rational manner ..... Accordingly, before it can be said that mere differentiation infringes section 8 ..... it must be established that there is no rational relationship between the differentiation in question and government purpose preferred to violate it. In the absence of such rational relationship, the differentiation would infringe section 8.”*** These sentiments were adopted in the cases of *James Nyasora & Others v The Attorney General Nairobi* Petition No. 298 of 2008 (Unreported), *Hassan Gutale & Another v Principal Registrar of Persons & Another (Supra)*, *John Njuguna Ngugi & Others v Laikipia Ranching Company Limited & Others Nairobi* Petition No. 145 of 2009 (Unreported).

106. Having regard to the process of selection conducted under **section 11** of the Act, the test is therefore whether the appointment meets the objects of **Articles 10, 73, 232(1) (g) (h) and (i) and 250** of the Constitution. Compliance with the objects of these provisions provide the legitimate purpose for the differentiation of various applicants. As long as it can be demonstrated that there is a rational relationship between the object sought to be achieved and the means chosen there is no infringement of **Article 27**. The legitimate purpose is determined by the Constitution itself which requires that such appointments must reflect ethnic and regional diversity while taking into account the rights of special groups like the youth, the marginalized and persons with disability.

107. The process of compliance with the various provisions set out in the Constitution that seek to ensure that there is regional and ethnic diversity and that disadvantaged groups are represented is not intended to be an exact science carried out with pythagorean precision. The court in evaluating the facts and evidence before it is not expected to substitute itself as the appointing authority. In the case of ***FIDA-K & Others v Attorney General and Others (Supra)***, the court observed, in respect of the decision by the Judicial Service Commission, that, ***“It is not our mandate to consider the merits of their decision but only whether the choice JSC made was extraneous to the purpose for which the discretion was granted and whether due process in that regard was followed in the execution of their mandate.”***

108. The approach of the court in considering whether certain acts are discriminatory was discussed in the case of ***John Njuguna Ngugi & Others v Laikipia Ranching Company Limited & Others Nairobi Petition No. 145 of 2009 (Unreported)*** where the court observed that, ***“[40] It must of course, be remembered that there is a presumption of reasonableness in favour of legislation. The legislature and executive are to be given wide berth in making policy choices. The court must resist the temptation to second guess the legislature or act as a super legislature to review every piece of legislation.”*** In that case the court was considering whether the a legislative scheme for compensating farmers was discriminatory where compensation was provided for farmers suffering bodily injury but excluded for those who sustained property damage. The court stated, ***“[42] This is a legitimate and rational decision and it is not necessary for me to consider whether in fact there exists a better or more appropriate mode of achieving an optimum result. That is a matter for the legislature.”*** These sentiments apply with equal force to the considerations in these proceedings. The court’s duty is to consider whether the appointment bears a rational connection to a legitimate purpose.

109. There is no complaint about the selection process. It was fair and transparent and all the four persons selected had an equal opportunity to be considered for the position, were treated equally and ranked by the selection panel according to what the individual members perceived to be the relative strength based on various parameters set out at the selection stage. Each of the candidates had an equal chance of being nominated but only one could be appointed to the position of chairperson of the Commission. It is this choice that the petitioner’s contends was discriminatory and lacking in fidelity to the Constitution.

110. Mr Ongoya, in his argument, emphasised that the hallmark of Constitutionalism is curbing arbitrariness and limiting discretion. In my view, it is has never been the intention of the Constitution to subject decision making to the ***“tyranny of tabulated legalism”*** (per Lord Wilberforce in ***Minister of Home Affairs (Bermuda) v Fisher (1980) AC 319***). There is a margin of discretion conferred by the the Constitution and the law upon those who make decisions and the test of rationality ensures that any legislation or official act is confined within the purposes set by the law. It is the insistence that decisions must be rational that limits arbitrariness and not discretion by itself.

111. In respect of the circumstances attending to this case, I would do no better than quote from the case of ***Prinsloo v Van der Linde (Supra)*** at *para.* 25 where the Constitutional Court of South Africa state, ***“In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest “naked preferences” that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation ....”***

112. I also adopt the words in the case of ***Pharmaceutical Manufacturers of SA: In re Ex Parte President of the Republic of South Africa 2000(2) SA 674 (CC)*** where the following was said in regard to the rationality requirement, ***“Rationality in this sense is a minimum threshold requirement applicable to the exercise of all power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of the Constitution and therefore unlawful. The setting of this standard does not mean the Courts can or should substitute their***

*opinions as to what is appropriate for the opinions of those in whom power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with a decision simply because it disagrees with it or considers that the power was exercised inappropriately.”*

### **Diversity, Regional balance, Ethnicity, Ethnic background**

113. In the present, the President and Prime Minister were confronted with four choices. The persons nominated by the selection panel for appointment were of different ethnic and regional backgrounds. Each person had different characteristics which if considered separately or together would lead to infinite permutations and combinations. Each consideration and choice would no doubt attract support or criticism and in that case controversy. The court's inquiry however, is to be based on the principle of rationality. Was the basis of the choice set out in the letter of 19<sup>th</sup> October 2011 rational to achieve the constitutional purpose of achieving regional and ethnic diversity?

114. I must also point out there are no Constitutional, legislative or policy guidelines on what constitutes ethnic or regional background or how ethnicity or ethnic affiliation of a person is to be determined. None of the parties before the court gave the court any guidelines or indicators whose basis would enable this court carry out an objective analysis. To attempt to set out any guidelines would place the court in the shark infested waters of regional and ethnic policy making. What the court is concerned about is whether the choice was made on rational basis in a manner consistent with the values of the Constitution.

115. The petitioner's analysis on the appointment letter was based on four broad criteria for determining ethnicity. Mr Ongoya suggested that ethnicity could be determined on the basis of patriarchy, socialisation or personal choice. A person's ethnicity or regional background could also be implied or imposed by a third party which is the gravamen of the 3<sup>rd</sup> interested party's complaint. I did not hear Mr Ongoya to argue that these indicia of ethnic or regional background were enshrined in law or policy or that there was a national consensus.

116. Regional balance is a necessary consideration for public appointment under the Constitution. It is not necessarily coterminous with ethnicity but it reflects the desire that Kenyans would like to see that the Commissions and Independent Offices reflect the face of Kenya. The Constitution does not define region therefore the reference to the region of a person is neither set in stone nor confined to specific administrative boundary. It is thus possible to consider a person from Western Kenya if that person comes from either Western or Nyanza Province or a person can be said to be from Northern Kenya if he or she is from either Marasabit or Moyale District yet both districts are in Eastern and North Eastern Provinces respectively. What matters is that looking at the composition of these Commissions and Independent Offices objectively, Kenyans will be satisfied that the offices are staffed by people from all over Kenya.

117. Ethnic and ethnic background is a necessary factor for consideration for appointment to public service. Ethnic background may include having parents from different communities. Looked at objectively, it would not be irrational or even unreasonable to assign that person the ethnic background of either of the parents as opposed to the ethnic group of the father as is common in patrilineal communities. Thus, a person of mixed parentage could be said to be of either ethnic background of each of the parents but when considering actual ethnicity, then a person may be identified with that of the father. A person of mixed ethnic parentage should also not be denied the opportunity to appropriate the lineage of either of his parents should the opportunity so require.

118. Ethnicity or regional background may also be determined by choice. Can one choose ethnicity on account of where they have resided for a long period of time or where they work and earn a living? Or where, as is common in Kenya, a person has bought a farm and intends to retire. Is the region to be determined by that place? What I think is important for the purposes of the Constitution is that the taking into account the issue of ethnicity or one's region is not to satisfy a particular person but to serve the purpose of building a diverse nation which Kenyans perceive to be inclusive and which gives every

Kenyan an opportunity to seek public office. Leaving the issue of ethnicity to personal choice may of itself undermine this objective as persons may be able to choose their ethnicity or regional background depending on the benefit that may accrue to them. This will only breed resentment in the eyes of the public.

119. There is also the issue of the ethnicity of married women. Do they assume the ethnicity of their husbands or are they entitled to retain their own ethnicity or choose their own ethnicity based on their place or residence or business. What about divorced women, do they by the act of divorce relinquish ethnic association with that of their former husbands?

120. Counsel for the respondent also referred to the National Identity Card issued under the **Registration of Persons Act (Chapter 107 of the laws of Kenya)** as a basis of reference for determining ethnicity or regional background. As statutory document, the national ID is an attractive basis for differentiation but it's has inherent shortcomings to the extent for example, it only provides for the place of birth and home district which may not be indicative of the ethnic or regional background in light of the factors I have discussed.

121. Perhaps a composite test can be adopted to determine ethnicity and regional background where ethnic and regional background is determined by a person's substantial connections to a place or ethnic group. It must not be forgotten that the society is dynamic so that ethnic and regional affiliation will continue to change as society changes.

122. The issues I have set out above are not intended to offer any guidelines nor are they exhaustive of the situations that may arise in future. They merely illustrate the difficulty in which a person required to exercise choice in making appointments is faced with when considering ethnic and regional diversity. Unfortunately, the answers to these questions are not simple as evidenced by the fact that the parties were unable to give authoritative and objective answers founded on clear policy or law of general application.

123. What I am clear about is that considerations of ethnic and regional diversity must not be used to deny deserving person opportunities, promote negative ethnicity and ethnic bigotry. It is these ills that the Constitution seeks to remedy. The rationality test I have alluded to in the circumstances ensures that the discretion in appointments is exercised in accordance with the Constitution.

### **The appointment letter**

124. All the issues I have outlined do not lend themselves to easy resolution in a manner that will satisfy everyone. Ethnicity is the big elephant in the room. It cannot be ignored if only because the Constitution demands that ethnic and regional factors must be taken into account in making public appointments. Under **Article 232(1) (g)** competition and merit in public appointments is subordinated to the need for the public service to represent diversity of Kenya's people. In other words, merit and competence alone cannot be the basis for making public appointments in Kenya but the appointing authority must take into account regional, gender and ethnic diversity. I must also underscore that even where the diversity is required, the threshold requirement for any appointment is competence and merit determined through a fair and competitive process.

125. The issue for consideration by the court is whether the reasons set out in the letter of appointment can stand constitutional and legal scrutiny. That letter sets out the reasons and justification for the appointment of the 6<sup>th</sup> interested party who the petitioners' assert should have been the person nominated for the position of chairperson of the Commission.

126. I am satisfied that the appointment letter is clear in its tenor and effect in setting out the grounds and reasons for appointment of the 6<sup>th</sup> interested party. The petitioners and the 2<sup>nd</sup> interested party have not demonstrated what other objective factors or reasons could have given by the President and Prime Minister in coming to the conclusion they did. A mathematical table or matrix of ethnic and regional diversity simply does not exist!

127. Can it be said that Professor Nzomo is the same ethnic background as as the two Commissioners who are both Kikuyu? Prof. Nzomo does not deny that her mother is Kikuyu and that her middle name is Wambui. Though she has disavowed that name, it is her name and it appears on her certificates which she presented as evidence of her qualifications. While several arguments may be made as to whether objectively speaking she is Kikuyu, I would hold that because her mother is Kikuyu it can objectively be concluded she has that background.

128. In the circumstances, I would not fault the President and Prime Minister in coming to this conclusion. It is a reasonable conclusion in so far as the meaning of ethnic background could refer to persons who have the same or similar ethnic parentage.

129. As regards the nomination of Dr Dwasi, it is clear that she considers herself a Luo. Classifying her on this basis is not unreasonable and in view of the appointment of another person of Luo ethnicity, Mr Otiende Amollo, as Chairperson of the Commission on Administrative Justice, **Article 258** entitled the President and the Prime Minister to take this into account and exclude her from appointment.

130. As regards, Ms Violet Mavisi, the assigning of her the region based on the place she was born, that is Nandi County is also not unreasonable. She would be disqualified on the basis of **Article 258** as another person from Nandi County, Ms Sarah Serem had been appointed as Chairperson of the Salaries and Remuneration Commission.

131. It is also possible that the President and Prime Minister could have considered that all the nominees come from Nairobi as they all reside and work in Nairobi and thus rejected all of them. It is also possible that Professor Nzomo would be considered be from the Western Region by virtue of her marriage in which case all the nominees would have been disqualified on the basis that they are all from the same region.

132. According to the appointment letter, Ms Lichuma was nominated on the basis of competence and regional balance. There is nothing in the record that shows that this choice was either irrational or unreasonable. As I have stated it is not for this court to interfere with such a choice merely because it would have come to a different conclusion.

133. The petitioners complain that each of the first three candidates was assigned ethnicities for the purpose of denying them the position of chairperson of the Commission. I agree with the petitioners that this is a controversial task but the duty imposed on the President in consultation with the Prime Minister was make a rational decision that serves the legitimate Constitutional and legislative purposes as I have outlined above.

134. I do not find any discrimination prohibited by **Article 27**. I find and hold that the President and Prime Minister had to make a choice that satisfies all the values and achieves the purposes set out in the Constitution based on the matters before them which they justified in the appointment letter.

### **Role of the National Assembly**

135. As I stated at paragraphs 94 and 95 of this judgment, the each body in the appointment process acts as a check and balance on the other to ensure that the process is carried out in accordance with the values of the Constitution and meets the legitimate objectives of achieving diversity, regional and ethnic balance.

136. Parliament, to which the sovereign power of the people is delegated, plays an important role in the process of approving appointment. It not only acts as a check on the executive but it also gives voice to concerns of the public that may not have been taken into account by either the selection panel or the President and the Prime Minister.

137. During the Parliamentary part of the process, the qualifications, competence, suitability and integrity of not only the 6<sup>th</sup> interested party but also the other three candidates nominated by the selection

panel was examined. The choice made by the President in consultation with the Prime Minister was also considered in light of the values and standards set out in the Constitution. The public was given an opportunity to give their views on the selection process and the nominees. Apart from appearing before the Committee, the petitioners addressed their concerns to the National Assembly through a letter I have alluded to in paragraph 60 above. Some of the persons selected by the selection panel for appointment were given an opportunity to appear before the Parliamentary Committee.

138. The parliamentary process was indeed vigorous and considered some of the issues that I have outlined above regarding diversity, ethnicity and regional balance. There was disagreement on whether the President had made the right choice. The Departmental Committee recommended the rejection of Ms Lichuma. This recommendation by the Committee is an incident of Parliamentary authority and cannot be a basis for interfering with the appointment and nomination. The Committee was entitled to come to its own conclusions on the choice of nominees that were placed before it. In any case, the report was subject to consideration by the whole National Assembly. It is for these reason that the report cannot be used to impugn the decision by the President particularly in view of the fact that the reasons for appointment are clearly set out in the appointment letter.

139. After considering all these issues, the National Assembly, in accordance with its procedures, amended the Departmental Committee Report and voted for the President's nominees. The effect of this decision was to confirm the appointment of the 6<sup>th</sup> respondent as the Chairperson of the Commission.

140. Parliament has a role in Government and serves a purpose as part of the separation of powers principal which is part of our Constitution and which the Supreme Court has had the opportunity to comment upon. ***In the Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 (Unreported) at para 54*** the Supreme Court stated, ***“The Effect of the Constitution’s detailed provision for the rule of law in processes of governance, is the legality of executive or administrative actions to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.”***

141. The place of separation of powers and the role of the Judiciary was further elucidated in the case of ***Jayne Mati & Another v Attorney General Nairobi Petition No. 108 of 2011 (Unreported)*** at *para. 35* the court noted the place of the court in the processes of governance. It stated, ***“The principle of the separation of powers is at the heart of the structure of our government; each organ is independent of each other but acting as a check and balance to the other and also working in concert to ensure that the machinery of the state works for the good of Kenyans. The role of the Judiciary within this framework is to state what the law is and to ensure that every authority conforms to the dictates of the Constitution when called upon to do so.”***

142. In this case I have found that the process which was intended to meet the objectives of the Constitution has worked and I have no reason to intervene. I must hasten to add that if there is an actual or threatened breach of the Constitution irrespective of the stage at which an appointment is being considered, the court will not hesitate to intervene in an appropriate case. In the case of ***Jayne Mati & Another v Attorney General (Supra)***, the court noted that, ***“[33] ..... For the Constitution has ushered in a new era, not of Parliamentary supremacy but one of supremacy of the Constitution. The superintendents of the Constitution are the courts of law which recognise that each organ in its own sphere working in accordance with law not only strengthens the Constitution but ensures that the aspirations of Kenyans are met. [34] The collective effect of Articles 3, 10(1) and 20(4) is that every person has the obligation to respect, uphold and defend the Constitution and that the Constitution binds every state organ, state officer, public officer, person, or authority. In the day-to-day running of the affairs of state, the court will hardly intervene nor be called upon to give guidance of certain aspects of the Constitution. It is neither expected nor required that the Courts will be involved in the minutiae of running government.”***

143. It is the responsibility of the court to ensure that the system that is founded on the Constitution works seamlessly and in doing so the court has the undoubted obligation to intervene where there is a breach of a person's fundamental rights and freedoms and where the Constitution is threatened. This obligation cannot be sidestepped by any notion of embarrassment to the legislature. What the court is required to do is to uphold the supremacy of the Constitution and where the circumstances so require the Court will not hesitate to do so.

144. I would also add that the parliamentary process serves to confirm that the issue of balancing regional and ethnic considerations is not one of mathematical precision. It is one where each bearer of constitutional responsibility must play its part and ensure that the objectives of the Constitution are met.

### **Guidelines and directions by the Court**

145. The petitioners have asked the court to give guidelines touching on ethnicity, regional affiliation and related consideration for appointment to public office for women in Kenya. A similar request was made on behalf of the 2<sup>nd</sup> interested party.

146. The request is fraught with difficulties for several reasons. None of the parties addressed the court on the nature of the guidelines or the basis thereof. They were all content to leave questions and scenarios to the court without giving proposals on how these should be answered. As I have demonstrated this is an area that is a minefield even for the well meaning. The obligation of the court is to decide concrete disputes between parties and not determine broad issues of law and policy that only have a marginal or tangential relationship to the subject matter of the dispute however attractive the endeavour. (See ***Peter Kaluma v The Attorney General Nairobi Petition No. 79 of 2011 (Unreported)*** and ***Harun Mwau v Attorney General Nairobi Petition No. 65 of 2011 (Unreported)***)

147. The court is not well suited to determine matters which are best discussed and agreed upon at a policy level in an environment that fosters public participation, consensus building and civic education. It is possible that a set of principles developed over time will emerge as various cases going through the court process upto the apex court but one case or dispute cannot determine the whole course of how ethnic and regional diversity is to be achieved in public appointments.

148. In the case of ***Prinsloo v Van der Linde and Another (Supra)*** at para 20, the Constitutional Court of South Africa warned against making sweeping statements about difficult and complex area of equality and discrimination. The court observed that in view of the history of that country, ***“All this reinforces the idea that this Court should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context in which each problem arises.”*** I fully adopt these sentiments particularly since this is one of the first cases before this court dealing with these issues.

149. It is my hope that the National Intergration and Cohesion Commission, which has a broad mandate including, initiating, lobbying for and advocating for policy, legal or administrative reforms on issues affecting ethnic relation, will take the lead in developing principles and guidelines on how regional and ethnic diversity can be achieved in a manner that is based on the values of the Constitution.

150. I therefore reject any entreaty to this court by the petitioners and the 2<sup>nd</sup> interested party to set guidelines touching on ethnicity, region of affiliation and related considerations for appointment to public office for women in Kenya.

### **Disposition**

151. I have found that the choice of the President and Prime Minister in appointing Ms Winfred Osimbo Lichuma as set out in the letter dated 19<sup>th</sup> October 2011 was neither discriminatory nor contrary to the provisions of the Constitution. It therefore follows that this petition is dismissed.

152. This matter has raised important issues of law that are not only of public interest but also public importance. An award of costs against petitioners will not be in the interests of justice. I therefore decline to award costs.

### **Conclusion**

153. Our challenge as Kenyans is to maintain a balance between competence and competitiveness while achieving the ethnic and regional diversity in a manner that promotes nationality and social cohesion and integration. If I may paraphrase the noted Kenyan human rights activist, Mugambi Kiai, Kenyan officialdom in political and civil society alike decries the endurance of tribalism and ethnicity yet there remains a pervasive unwillingness to address the consequences of a phenomenon still prevalent across the country and with powerful implications for democracy, representation and stability. The Constitution with its requirements of social justice, equality, equity and ethnic and regional balancing in public appointments means that the Kenyan public has to start an open, honest and vigorous debate about these issues.

154. I wish to thank the counsel who appeared in this matter for their arguments and submissions.

**DATED** and **DELIVERED** at **NAIROBI** this 14<sup>th</sup> day of March 2012.

**D.S. MAJANJA**

### **JUDGE**

Ms J. Thongori and Mr E. Ongoya instructed by Judy Thongori and Company Advocates for the petitioners.

Mr E. Bitta, Litigation Counsel, instructed by the State Law Office for the respondent.

Mr Modi instructed by Modi & Company Advocates for the first interested party.

Mr S. Ligunya instructed by Rachier & Company Advocates for the second interested party.

Mrs R. Mbanya instructed by R Mbanya & Company Advocates for the third interested party.

Mr C. Odera instructed by Oraro & Company Advocates for the sixth interested party.