REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL PETITION NO. 92 OF 2011

IN THE MATTER OF: ARTICLES 2, 3, 10, 22, 23, 73, 75, 166, 172(2), 232 & 258 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN

ARTICLES 19, 20, 27, 28, 25, 41 & 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE JUDICIAL SERVICE ACT (NO. 1 OF 2011), THE PUBLIC OFFICER

ETHICS ACT (NO. 4 OF 2003) & LEGAL NOTICE NO. 6 OF 2006

BETWEEN

ANDREW OMTATAH OKOITI.....PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT
THE JUDICIAL SERVICE COMMISSION.....2ND RESPONDENT
THE PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

RULING

The petitioner's application by way of Notice of Motion dated 3rd June, 2011 seeks the following orders:

"1. That the application be certified as urgent and heard ex parte in the first instance and for purposes of prayer 2 of this application.

2. That an interim conservatory order be issued to restrain the 2nd respondent, by themselves or through their agents or representatives, or otherwise howsoever, from conducting any interviews for the positions of any judicial or other state office prior to publicly releasing detailed criteria and mechanism used to short-list, interview, grade and select the most qualified applicants to judicial or other state office to the satisfaction of this honourable court, pending the hearing and determination of this application inter partes.

3. That an interim conservatory order be issued to restrain the respondents, by themselves or through their agents or representatives, or otherwise howsoever, from permitting any judicial or other nominees to state office from being gazetted or taking office prior to the public release of detailed criteria and mechanism used to short-list, interview, grade and select the most qualified applicants to judicial or other state office to the satisfaction of this honourable court, pending the hearing and determination of this application interpartes.

4. That the respondents do hereby ordered to publicly disclose the detailed criteria and mechanism used to short-list, interview, grade and select the most qualified applicants to judicial or other state office.

5. That a conservatory order be issued to restrain the 2nd respondent, by themselves or through their agents or representatives, or otherwise howsoever, from conducting any interviews for the positions of any judicial or other state office prior to publicly releasing detailed criteria and mechanism used to short-list, interview, grade and select the most qualified applicants to judicial or other state office to the satisfaction of this honoruable court, pending the hearing and determination of this petition.

6. That a conservatory order be issued to restrain the respondents, by themselves or through their agents or representatives, or otherwise howsoever, from permitting any judicial or other nominees to state office from being gazetted or taking office prior to the public release of detailed criteria and mechanism used to short-list, interview, grade and select the most qualified applicants to judicial or other state office to the satisfaction of this honourable court, pending the hearing and determination of this petition.

7. That the court do give any or further orders that will favour the course of justice.

8. That the petitioners' costs be provided for."

The petitioner had also filed a petition seeking various declaratory orders. The application was supported by an affidavit sworn by the petitioner. The application was filed after the Judicial Service Commission, the 2nd respondent (JSC), had concluded public interviews of candidates for the positions of Chief Justice and Deputy Chief Justice and selected Dr. Willy Mutunga and Ms. Nancy Baraza respectively as the nominated candidates.

The petitioner stated that the interview process was antagonistic and hostile and did not take into account the qualities of high moral character, integrity and impartiality as required by the Constitution. The petitioner further stated that the Public Service Commission, the 3rd respondent, did not conduct public interviews of candidates for the position of Director of Public Prosecutions but short-listed and selected three candidates without disclosing detailed criteria and mechanism of assessing and short-listing the selected candidates. I should, however, point out that the interview and selection of a candidate for nomination to the position of Director of Public Prosecutions was not done by 3rd respondent but by a panel consisting of various bodies and the Chairman of the Public Service Commission was merely a member of the panel. To that extent, the 3rd respondent was wrongly sued and any orders sought against it

must fail.

The petitioner further averred that the 2nd respondent failed to comply with minimum constitutional process safeguards in the interview process including, by appointing a selection panel consisting only of themselves and excluding Human Resource Management experts from acting as consultants, despite conflict of interest and the relevant statutory and constitutional provisions.

The petitioner's application was also supported by an affidavit sworn by **Wyclife Gisebe Nyakina**, the Secretary General of the **Association of Human Resource Practitioners of Kenya,** a registered society of Professional Human Resource Practitioners. He was mandated by the said association to attend some of the interviews conducted by the JSC for candidates for the Chief Justice and the Deputy Chief Justice so that he could give a professional critique and gauge whether the process measured up to professional standards and expectations of human resource discipline. His observations were as follows:

"(i) The composition of the panel did not have any individual of known or demonstrated HR competency.

(ii) The structuring and delivery of the questions exposed a hint of predisposition.

(iii) It was not clear what criteria the JSC used to short list the candidates that appeared before it.

(iv) The job profile was developed by the JSC members, one of whom would later appear before the same commission as a candidate without disqualifying himself as a commission member.

(v) There was no recognized grading system used by the panelists in awarding points to the interviewees depending on how they answered the questions.

(vi) The tenor and language in the interviewing room was antagonistic and daunting leading interviewees to adopt defensive stances.

(vii) There was cognitive bias in that the total judgment of the candidates was influenced by the perception that the sitting judges were inept and thus creating a 'halo effect'.

(viii) The interview process was compromised by the panelists who converged majorly on stereotypes and their own projections as to the ideal candidates for the positions."

Having made the said observations, Mr. Nyakina concluded as follows:

"5. That from the aforementioned observations, it is clear that the JSC panel was not properly constituted as had been anticipated by members of the public and the job applicants.

6. That the JSC panel conducting the interviews lacked clear qualifications and competence to engage in human resource management and in fact had a conflict of interest when one of its members later appeared before it for interviews.

7. That the JSC interviewing panel ought to have been constituted of human resource professionals competent in human resource management amid the many lawyers who constituted it

to conduct the interviews or act as consultants.

8. That Kenyans were denied a fair, free, transparent and open process as the JSC neither published its criteria of selecting the most qualified persons for judicial appointments, nor did it inform those applicants who did not make the shortlist or the final nomination of the reasons why they were not considered or nominated."

The 1st respondent did not file any replying affidavit but filed written submissions which I will consider later.

The 2nd respondent filed a replying affidavit that was sworn by **Winfrida B. Mokaya**, the Acting Secretary. She stated, *inter alia*, that the interviews for the position of Supreme Court Judges commenced on 6th June, 2011 after the JSC had short listed 26 applicants. A public announcement to that effect was published on 25th May, 2011. She said that there was inordinate delay in filing the petition and the application which disentitles the petitioner from obtaining any orders to restrain the ongoing process.

With regard to the interviews for the position of Chief Justice and Deputy Chief Justice, the 2nd respondent stated that they were transparent, fair, robust and rigorous and the JSC adhered to the provisions of the Constitution and the **Judicial Service Act, 2011**, in all its interviews. The 2nd respondent stated that it considered and took into account the qualities of high moral character, integrity and impartiality in short listing and interviewing of candidates for the positions of Chief Justice, Deputy Chief Justice, Supreme Court and High Court Judges. **Section 30** of the **Judicial Service Act, 2011** sets out, *inter alia*, the procedure for appointment of judges. The commission is required to constitute a selection panel consisting of at least five members. Neither the constitution nor the Act makes provision for hiring of any human resource management experts in the selection panel, the 2nd respondent stated.

Regarding the criteria for selection of the various candidates, the 2nd respondent stated that it followed the provisions of **Part V** of the first schedule, particularly **Regulations 13 (a (b) (c) (d) (e) (f) and (g).** The court was urged to dismiss the application for conservatory orders.

Highlighting the petitioner's written submissions, **Mr. Kanjama**, the petitioner's advocate, argued that:

(a) All applicants for any of the positions advertised by the JSC who met the minimum statutory and constitutional requirements ought to have been interviewed. This means that the only applicants who can be excluded from the short list are those who clearly fail the minimum statutory and constitutional requirements. Short listing cannot constitute fair administrative action as required by Article 47 of the Constitution if:

(i) it fails to notify the applicant of the ground for failure to short list him/her.

(ii) it fails to afford the applicant an opportunity to respond on the ground alleged for failure to meet requirements.

(iii) it denies the applicant an opportunity to be interviewed unless it is clear and beyond peradventure that the applicant has failed the minimum statutory and constitutional requirements.

(iv) it fails to comply with the national values under Article 10 including the rule of law, human dignity, non-discrimination, good governance, integrity, transparency and accountability.

(b) All applicants who receive three or more affirmative votes should be recommended to the President with indication of the number of votes received to guide substantive appointment.

(c) The process of selecting the Chief Justice, the Deputy Chief Justice and the Supreme Court Judges violated constitutional and statutory provisions in that:

· **short listing of candidates was done in a manner that was not transparent.**

· **the JSC failed to publish the criteria for grading the candidates before, during or after the interview process and also failed to disclose its procedures for voting and selecting candidates.**

· **the JSC failed to incorporate human resource management experts in the interview process.**

· **the JSC conducted the interviews and post-interview process in a manner that was discriminatory against judicial experience as indicated in their press release on the grounds upon which the eventual nominees were selected.**

· **The JSC failed to indicate the names of all interviewed candidates who met the statutory criteria for recommendation, namely, "three or more affirmative votes".**

· **The JSC purported to nominate rather than recommend the candidates thus leaving the President with no discretion to exercise in doing the appointments.**

In view of the foregoing, Mr. Kanjama submitted that to avoid further violation of the Constitution, it is meet and just that orders are issued:

(a) Stopping further interview and recruitment process for judicial positions pending the determination of the petition, the provision of adequate information under Article 35 on the ongoing process.

(b) Stopping the Attorney-General (as the legal representative of Government) from proceeding with gazettement or admission into office of the nominated Chief Justice, Deputy Chief Justice and Director of Public Prosecutions pending hearing and determination of the petition.

(c) Directing that information be provided by JSC and PSC on the following:

(i) the detailed criteria used to short list candidates.

(ii) any communication to candidates and from candidates expressing concerns with the process that may have been received.

(iii) the voting, mechanism and processes used to short list, deliberate and vote on the recommended candidates.

(iv) The Hansard report of the JSC and PSC meetings that determined the candidates to recommend.

(v) Whether any human resource management consultants were involved in the interview and selection processes.

In support of his submissions, the petitioner's advocate cited, *inter alia*, **OLUM & ANOTHER V ATTORNEY GENERAL 1 [2002] 2 EA 508** where the court held that in interpreting the Constitution the widest construction possible, in their contexts, had to be given to the words used according to their ordinary meaning. The importance of access to information by a petitioner was also emphasized.

Mr. Onyiso for the 1st respondent submitted that the petitioner has no *locus standi* under **Article 22** of the **Constitution** to institute these proceedings. He further submitted that the application had largely been overtaken by events in that the interviews for appointment of Supreme Court Judges ended on 14th June, 2011. However, as regards the interviews for appointment of Court of Appeal Judges as well as High Court Judges, the process had not started and in his view, the application was premature.

Secondly, Mr. Onyiso submitted that the petitioner had not established a prima facie case with a likelihood of success as spelt out in **GIELLA vs CASSMAN BROWN [1973] EA 358**. This is because the JSC had complied with all the constitutional and statutory requirements in its advertisements and interviews for the positions of the Chief Justice, the Deputy Chief Justice, Judges of The Supreme Court and High Court Judges.

Thirdly, Mr. Onyiso submitted that the petitioner had not demonstrated that he will suffer any irreparable loss if the orders sought are not granted.

Lastly, the balance of convenience tilts in favour of the respondents in view of the public interest involved in filling the aforesaid positions, counsel stated.

Mr. Issa for the 2nd respondent submitted that the petitioner had not averred that prior to filing the petition and the application had sought the information which he is now asking for and the same was refused by the 2nd respondent. Counsel submitted that before an applicant invokes the provisions of **Article 35** of the **Constitution**, he must demonstrate that he had requested for any relevant information from the concerned body and the same had not been availed.

With regard to the mandate of the JSC, counsel submitted that the provisions of **Article 172** of the

Constitution as read together with the **Judicial Service Act, 2011** had been strictly complied with. He further stated that the JSC also fulfilled its mandate in recommending to the President persons for appointment to the offices of the Chief Justice and the Deputy Chief Justice. The JSC had also conducted the interviews for Supreme Court Judges in accordance with the provisions of **Part V** of the **Judicial Service Act, 2011.** He emphasized that under **Section 30** of the **Act** there is no provision for including human resource experts in the selection panel.

With regard to the short listing of candidates for various appointments, the 2nd respondent was strictly guided by **Part V** of the said **Act**, in particular **rules 13** and **14** thereof.

In his view, the 2nd respondent was operating in a transparent manner.

Responding to the authorities cited by Mr. Kanjama, Mr. Issa submitted that the petitioner's application does not meet the constitutional threshold for grant of the interim orders sought. The petitioner has to discharge the onus of establishing that a violation of the constitution has occurred and interim conservatory orders should issue, counsel stated. He cited **OLUM & ANOTHER v ATTORNEY GENERAL [1995-1998] 1 EA 258** where the test to be applied was stated as follows:

"Where it is alleged that a person's human rights have been violated, the evidence must disclose the nature of the violation. If the allegation is simply that a certain law is inconsistent with the constitution, although it does not affect the petitioner in any way, then all that is required is that it be stated in what way the constitution is violated."

Counsel further cited the Supreme Court of Papua New Guinea in the case of **NTN PTY LIMITED & NBN LIMITED v THE STATE [1988] LRC 333** where the court held:

"However, it is not sufficient for a party impugning the legislation to simply make an allegation that his right is affected by legislation. He must demonstrate that there is a prima facie case that the right is affected…the nature of evidence required to establish a prima facie case depends on the manner in which the fundamental right is said to be affected by the legislation."

Our Court of Appeal defined what a prima facie case is in **MRAO LIMITED v FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS [2003] KLR**

175. Bosire JA held as follows:

"Mr. Wasuna, appeared to me to imply that the test as to whether or not a prima facie case has been made out is satisfied if the applicant is able to show the existence of an arguable case. But as earlier endevoured to show, and cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

Mr. Ndubi appeared for **Kenyans for Truth with Peace and Justice (KTPJ)** and **African Centre for Governance (AFRICOG)**, who had been joined as interested parties. He submitted that the petition and the Notice of Motion are incurably defective due to the inclusion of the Public Service Commission (PSC) as the 3rd defendant since it is not PSC that was responsible for recruitment of the Director of Public Prosecutions.

Regarding the petitioner's argument that the JSC ought to have been guided by human resource experts in carrying out the interviews aforesaid, Mr. Ndubi submitted that JSC can obtain such expertise without necessarily having human resource experts in its selection panel. Regarding the conservatory orders sought by the petitioner, Mr. Ndubi submitted that the court ought to exercise its discretion reasonably so as not to impede the process of filling the vacant positions. He supported the submissions by Mr. Onyiso and Mr. Issa that the petitioner had not disclosed a prima facie case with a likelihood of success. He cited the case of **MUSLIMS FOR HUMAN RIGHTS (MUHURI) & 2 OTHERS v THE ATTORNEY GENERAL & 2 OTHERS, Petition No. 7 of 2011 at Mombasa** where Ibrahim J (as he then was), refused to grant a conservatory order restraining Major General Michael Gichangi from acting as the Director General of the National Intelligence Service pending hearing and determination of a petition challenging his appointment.

I have considered the rival arguments advanced by the advocates for the parties as summarized hereinabove. It is evident that some of the prayers sought by the petitioner in the application dated 3rd June, 2011 have been overtaken by events. This is because the interviews for appointment of the Chief Justice, the Deputy Chief Justice and Judges of the Supreme Court have been finalized. The Chief Justice and the Deputy Chief Justice have formally been appointed and assumed their respective offices. The Judges of the Supreme Court have also been appointed but have not yet been sworn in because of challenges raised by some parties regarding gender composition of the appointees. Prayers 1, 2 and 3 are therefore spent.

The first issue for determination is whether the applicant has *locus standi* to institute these proceedings. Mr. Onyiso contended that the applicant does not have such capacity. **Article 22** of the **Constitution of Kenya** provides as follows:

"22(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by -

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members."

In paragraph 11 of the petition, the petitioner stated as hereunder:

"Under Articles 22, 23 and 258, the petitioner has the right to institute court proceedings claiming that the Constitution of Kenya has been contravened or is threatened with contravention, or to act on his own behalf or on behalf of others claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened."

Article 258(1) grants every person the right to institute court proceedings claiming that the constitution has been contravened or is threatened with contravention. As long as a person can show that the constitution has been contravened or is threatened with contravention he can bring appropriate proceedings before this court. Such an applicant need not have any personal interest in the matter. In other

words, the alleged contravention need not cause the applicant personal prejudice or injury for him/her to have capacity to move to court and challenge the same. The new constitution has given Kenyans a wide latitude in matters relating to protection of the constitution and to enforcement of fundamental rights or freedoms in the Bill of Rights. I am satisfied that the petitioner has *locus standi* to institute these proceedings.

Does the petitioner's application disclose a prima facie case with a likelihood of success?

I agree with Mr. Issa that a prima facie case is more than an arguable case. In the petition as well as in the application, the petitioner has pointed out several Articles of the Constitution which he alleges were violated. He cited **Article 27** on the right of equal treatment, **Article 35** on the right of access to information, **Article 41** on the right to fair labour practices and **Article 47** on the right to administrative action that is expeditious, efficient lawful, reasonable and procedurally fair. The petition is yet to be heard.

Article 165(3) (b) grants this court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. **Article 165(3) (b)** further grants the court jurisdiction to hear any question respecting the interpretation of the constitution including the determination of the question whether any law is inconsistent or in contravention of the constitution. If the court were to hold that the application discloses no prima facie case and proceed to dismiss the same without much ado, the court will have summarily dismissed the application without giving proper consideration to the issues raised by the applicant. The court is required to exercise judicial authority without undue regard to procedural technicalities.

In my view, when a person is alleging that there has been violation of constitutional provisions, a court should be slow in dealing with such an application in a summary manner. I am of the considered view that in considering an application for conservatory orders where it is alleged that there has been or is likely to be a constitutional violation the court should not be fettered by the pedantic observance of the principles in **GIELLA vs CASSMAN BROWN'S** case (Supra)which were formulated in a commercial case. The principles are relevant but not binding in a constitutional matter. The "loss" that may be suffered in a constitutional matter is peculiar, totally different from loss in a commercial transaction.

In prayer 4 of the petitioner's application, the petitioner wants the (JSC) to disclose the detailed criteria and mechanism used to short list, interview, grade and select the most qualified applicants. It was submitted that the short listing was done in an opaque manner as many candidates who are qualified in all respects were left out.

The qualifications for appointment as a Chief Justice and other judges of the Supreme Court are set out under **Article 166(3)** of the **Constitution**. They are:

"(a) at least fifteen years experience as a superior court judge; or

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

(c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years."

The qualifications for appointment as a judge of the High Court are stipulated under **Article 166(5)** of the **Constitution**. To qualify one must have:

"(a) at least ten years' experience as a superior court judge or professionally qualified magistrate; or

(b) at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or

(c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years."

Apart from those minimum constitutional qualifications, **Part V** of the First Schedule to the **Judicial Services Act, 2011** sets out the criteria for evaluating qualifications of individual applicants. **Regulation 13** states as follows:

"13. In determining the qualifications of individual applicants under the Constitution, the Commission shall be guided by the following criteria:

(a) professional competence, the elements of which include –

(i) intellectual capacity;

(ii) legal judgment;

(iii) diligence;

(iv) substantive and procedural knowledge of the law;

(v) organizational and administrative skills; and

(vi) the ability to work well with a variety of people;

(b) written and oral communication skills, the elements of which shall include –

(i) the ability to communicate orally and in writing;

(ii) the ability to discuss factual and legal issues in clear, logical and accurate legal writing; and

(iii) effectiveness in communicating orally in a way that will readily be understood and respected by people from all walks of life;

(c) integrity, the elements of which shall include–

(i) a demonstrable consistent history of honesty and high moral character in professional and personal life;

(ii) respect for professional duties, arising under the codes of professional and judicial conduct; and

(iii) ability to understand the need to maintain propriety and the appearance of propriety;

(d) fairness, the elements of which shall include–

(i) a demonstrable ability to be impartial to all persons and commitment to equal justice under the law; and

(ii) open-mindedness and capacity to decide the issues according to the law, even when the law conflicts with personal views;

(e) good judgment, including common sense, elements which shall include a sound balance between abstract knowledge and practical reality and in particular, demonstrable ability to make prompt decisions that resolve difficult problems in a way that makes practical sense within the constraints of any applicable rules or governing principles;

(f) legal and life experience elements of which shall include –

(i) the amount and breadth of legal experience and the suitability of that experience for the position, including trial and other courtroom experience and administrative skills; and

(ii) broader qualities reflected in life experiences, such as the diversity of personal and educational history, exposure to persons of demonstrable interests and cultural backgrounds, and in areas outside the legal field; and

(g) demonstrable commitment to public and community service elements which shall include the extent to which a Judge or Magistrate has demonstrated a commitment to the community generally and to improving access to the justice system in particular."

The JSC says that it adhered to the aforesaid criteria in short listing the persons to be interviewed for the various positions that had been advertised. The JSC was alive to the provisions of **Article 172(2)** of the **Constitution** which requires it to be guided by competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary and the promotion of gender equality.

The JSC thus argued that as regards the criteria used to short list the applicants, it had nothing else to disclose as the information is all there in **Regulation 13** aforesaid.

I am in agreement with that submission. It was not demonstrated that the JSC used any other criteria. The petitioner did not cite the name of any person who met all the constitutional and statutory requirements and was not short listed. I cannot say that there are no people out there who were not satisfied with the short listing exercise and believe that they were wrongly left out. However, the allegations made by the petitioner are general in nature. The court can only interrogate particularized complaints that are brought before it and with sufficient evidence as would enable it make an informed conclusion.

Article 35(1) states that:

"Every citizen has the right of access to –

(a) information held by the state; and

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

Before an application is made to court to compel the state or another person to disclose any information that is required for the exercise or protection of any right or fundamental freedom, the applicant must first demonstrate that a request for the information required was made to the state or to the other person in possession of the same and the request was disallowed. The court cannot be the first port of call. The petitioner herein did not demonstrate that he requested the JSC to avail to him any information that he considered necessary and the same was not granted. In that regard, prayer 4 of the applicant's application is rather premature.

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

Was the JSC bound to notify the applicants who were not short listed the ground(s) for their failure and afford them an opportunity to respond before interviews are conducted? There is no such requirement in the Act or the Regulations made thereunder. Whereas it would have been a good practice to inform each unsuccessful applicant of the reason for disqualification, it must be remembered that time was of the essence in the recruitment exercise. In the case of the Supreme Court, it has to be constituted by 27th August, 2011.

Secondly, I believe that any applicant who wanted to know the reason for not having been short listed was at liberty to write to the JSC and ask for the reasons. In such an instance, the JSC, I believe, would be obliged to provide the reasons thereof, and if the applicant considers the reasons for disqualification unsatisfactory he/she can seek intervention of the court. **Article 47(2)** of the **Constitution** states as follows:

"(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

Thirdly, I do not think that it would be good for the JSC to publicize the reasons for disqualification of each applicant as that may amount to violation of some of the applicant's privacy and may also be prejudicial to their career advancement if for example, the reason for disqualification relates to the applicant's integrity as perceived by the JSC.

As regards the interview procedure, **Regulations 10, 11 and 12** provide what I consider to be the bare minimum requirements. The Regulations provide as follows:

"10.(1) The Commission shall schedule specific interview times for each applicant.

(2) The applicant shall be notified in writing of the date, time, and location of the interview.

(3) The notice referred to under subparagraph (2) shall not be less than fourteen days.

(4) The Commission shall interview the applicant in person or may at its discretion arrange an interview by telephone or other electronic means.

(5) All the interviews shall be conducted in public.

11. Immediately before interviewing an applicant, the Commission shall briefly convene a private session to facilitate the disclosure by a member of any relevant information known or communicated to the member about the applicant that other members may not be seized of.

12. Questions to an applicant about information received in confidence shall be phrased so as to avoid revealing the confidential source's identity, and the Commission shall not otherwise disclose the source to the applicant during the interview or at any other time."

Since the interviews were conducted in public and were televised live by sections of the media, Kenyans were able to gauge how the same were conducted. **Section 30(1)** of the **Judicial Service Act, 2011** states that:

"30(1) For the purposes of transparent recruitment of judges, the Commission shall constitute a selection panel consisting of at least five members.

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

It is clear that the short listing panel can only be constituted from among the Commissioners. There is no statutory basis for including a human resource management expert in the panel. However, it is evident that there is need for the JSC to seek the services of a human resource expert to assist it in formulating appropriate systematic interview procedures which would enable the JSC to conduct fair and comparable interviews. One of the objects of the JSC under **Section 3(g)** of the **Act** is to:

"Promote and sustain fair procedures in its functioning and in the operations of the judicial process, and in particular, be guided in all cases in which it has the responsibility of taking a decision affecting a judicial officer of any rank or its own employee, by the rules of natural justice".

Section 14 of the **Act** permits the JSC to hire experts and consultants and it is my considered view that a human resources expert can assist the Commission to prepare a suitable interview manual for use in future recruitments. The American Judicature Society has a **"Handbook for Judicial Nominating Commissioners"** and, I think, our Commissioners in consultation with other stakeholders, are well able to develop a relevant handbook as the American one.

As regards the grading and selection of the most qualified applicants, which was also questioned by the petitioner, **Regulation 14** requires the Commission, within seven days of the conclusion of the interviews, to deliberate and nominate the most qualified applicants taking into account gender, regional, ethnic and other diversities of the people of Kenya. Each member is required to vote according to his/her personal assessment of the applicants' qualifications as determined under the criteria and procedures set out in the schedule. It is clear that the exercise of discretion by each Commissioner is well regulated by the aforesaid criteria and procedures and therefore cannot be said to be arbitrary.

It is important that we trust the discretion of the Commissioners. Apart from the statutory limitations in the exercise of their discretion, the composition of the membership of the JSC is also a factor that promotes its image and credibility. Out of the seven or eight members of the JSC who formed the selection panel, four were popularly elected by two major stakeholders: two by the Judiciary and two by the Law Society of Kenya. Thereafter they were vetted by Parliament. The others were properly appointed in terms of the provisions of **Article 171** of the **Constitution**. The composition of the JSC has

not been challenged by the petitioner.

The petitioner further argued that existing judicial experience was considered a negative factor in the short listing and selection process. That averment was rebutted by the JSC. Its Acting Secretary stated at paragraph 11 of her affidavit that:

"11. The allegation that the Commission based its selection on a wrong premise that existing judicial experience was a negative factor is not only unfounded but crucially ignores the following facts:

(i) out of the fifty six (56) applicants for the position of the Supreme Court, thirty (30) were judicial officers or persons with existing judicial experience.

(ii) eighteen (18) out of the twenty six (26) short listed applicants are judicial officers or persons with existing judicial experience.

(iii) out of the short listed applicants for interviews for positions of Judges of the High Court, thirty (30) of the short listed applicants are persons with existing judicial experience as Magistrates."

There was no sufficient evidence in support of the petitioner's allegation that those with judicial experience were discriminated against. Whereas the persons recommended for appointment as the Chief Justice and the Deputy Chief Justice had no judicial experience, it was not shown that they were not otherwise duly qualified for the aforesaid positions. In any event, judicial experience was not the only issue for consideration in recommending the said persons for appointment.

On the other hand, three out of the five persons recommended for appointment as Judges of the Supreme Court were serving Judges of the High Court of Kenya. It is therefore my view that the petitioner's allegation that the JSC was biased against those who had judicial experience is unfounded.

Regulation 14(5) states as follows:

"In order to be nominated for recommendation for appointment, an applicant shall be required to receive three or more affirmative votes."

The petitioner's submission was that the names of all the applicants who received three or more affirmative votes should have been recommended for appointment. It would then be for the President in consultation with the Prime Minister to exercise their discretion in picking out the persons to be appointed to the offices of the Chief Justice, the Deputy Chief Justice and Judges of the Supreme Court. The petitioner further argued that by recommending for appointment only two persons for the positions of the Chief Justice and the Deputy Chief Justice and five persons for appointment as Judges of the Supreme Court the JSC unreasonably fettered the discretion of the President.

Article 166(1) of the **Constitution** states that:

"(1) The President shall appoint –

(a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and

(b) all other judges, in accordance with the recommendation of the Judicial Service Commission."

Regulation 14(5) which is cited hereinabove, in my view, does not require that the names of each and every applicant who receives three or more affirmative votes be recommended for appointment. In its functions, the JSC must be guided by competitiveness. I believe the proper construction of that regulation is that for an applicant's name to be forwarded to the President for recommendation, the applicant must have received three or more affirmative votes. JSC would then pick the best out of those who have received three or more affirmative votes and recommend them for appointment. The law is silent as to whether only one name should be picked for each available position or whether the top two or three candidates ought to be recommended so that the appointing authority has some choice. Personally, I would prefer the latter. In my view, the provisions of **Article 172(2)** of the **Constitution** are key in guiding this process. It provides as hereunder:

"**(2) In the performance of its functions, the Commission shall be guided by the following –**

(a) competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary; and

(b) the promotion of gender equality."

One of the national values stated under **Article 10** of the **Constitution** which binds all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution or any law is transparency. One of the ways of promoting transparency in a recruitment exercise of this nature is where the recruiting panel openly lists the names of successful applicants and the grade or marks awarded to the top three or four of the applicants, forward the report to the President then afford him an opportunity to exercise his discretion accordingly. More often than not the President will appoint the best out of several names forwarded to him.

I would agree with the petitioner that in the appointment of the Chief Justice, the Deputy Chief Justice as well as the Supreme Court Judges the President was not given any opportunity to exercise his discretion. I do not think the fact that the President had to make the appointments in accordance with the recommendation of the Judicial Service Commission necessarily meant that the President had no discretion to exercise within the recommendations of the JSC.

That notwithstanding, the appointments that were made by the President on recommendation of the JSC cannot be faulted on the ground that the JSC did not recommend more than one name for each of the available positions.

In view of the foregoing, there is no basis for granting the orders sought in prayers 4, 5 and 6 of the petitioner's application. I dismiss the application. This was a public interest litigation and I will not condemn the petitioner to the costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – Court Clerk

Mr. Kanjama for the Petitioner

Mr. Issa for the 2nd Respondent

No appearance for the 1st and 3rd Respondents