REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NUMBER 102 OF 2011

IN THE MATTER OF ARTICLES 20, 22 AND 23 OF THE CONSTITUTION OF

THE REPUBLIC OF KENYA

AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2(4), 3, 10, 27, 163, 166 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND
IN THE MATTER OF THE RECOMMENDATION BY THE JUDICIAL SERVICE COMMISSION OF PERSONS FOR APPOINTMENT TO THE OFFICES OF JUDGES OF THE SUPREME COURT UNDER THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

1. **FEDERATION OF WOMEN LAWYERS KENYA (FIDA-K) ……..………….........….1ST PETITIONER**
2. **CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW).…..............…2ND PETITIONER**
3. **THE LEAGUE OF KENYA WOMEN VOTERS……..……… ……………..…..…..3RD PETITIONER**
4. **WOMEN IN LAW AND DEVELOPMENT IN AFRICA (WILDAF)........................…..4TH PETITIONER**
5. **CAUCUS FOR WOMEN LEADERSHIP……………..………… …………...…...…...5TH PETITIONER**
6. **COALITION ON VIOLENCE AGAINST WOMEN (COVAW) ……...........……...…..6TH PETITIONER**

V E R S U S

1. **THE ATTORNEY GENERAL…………………………………...……..………1ST RESPONDENT**
2. **THE JUDICIAL SERVICE COMMISSION ……………………….………..……2ND RESPONDENT**

AND

1. **UNITED DISABLED PERSONS OF KENYA**
2. **KENYA WOMEN POLITICAL ALLIANCE**
3. **NATIONAL COUNCIL OF WOMEN OF KENYA**
4. **INTERNATIONAL CENTRE FOR POLICY AND CONFLICT……………...…INTERESTED PARTIES**
5. **KENYAS FOR PEACE, TRUTH AND JUSTICE**

6. KITUO CHA SHERIA
7. ASSOCIATION OF MEDIA WOMEN OF KENYA (AMWIK)
8. TAX WATCH FORUM

AND

1. COMMISSION ON THE IMPLEMENTATION OF THE CONSTITUTION (CIC)…AMICAS CURIAE

JUDGMENT

Only last year and in our early maritime history we constructed a great ship and called it our new Constitution. In its structure we put in the finest timbers that could be found. We constructed it according to the best plans, needs, comfort and architectural brains available. We tried to address various and vast needs of our society as much as possible. We sent it to the people who ratified it. It was crowned with tremendous success in a referendum conducted on 4th August 2010. We achieved a wonderful and defining victory against the "**REDS"**. We vanquished them. The aspirations and hope of all Kenyans was borne on 27th August 2010. We achieved a rebirth of our Nation. We have come to revere it and even have an affection for it. We accomplished a long tedious, torturous and painful chapter in our history. We all had extraordinary dreams. It is a document meant to fight all kinds of injustices. It is the most sophisticated weapon in our maritime history. As Kenyans we got and achieved a clean bill of constitutional health. However, the honeymoon is over, it is time to do battle with it. This case is a battle between competing interests over the provisions of the Constitution.

One of the greatest challenges which has occurred as a result of the new Constitution is the remarkable and dramatic increased expectation people have in the institution of Government. People now expect their Government to not just maintain order but to achieve progress and development. People expect the Government to solve the problems of poverty, inequality, discrimination, unemployment, housing, education and health etc. This vast increase of expectation has given rise to huge anxiety and positive beliefs. The new situation has rekindled public awareness and interest in the role of the courts through which one seeks individual and collective justice and the sustenance of a democratic culture. We appreciate that men and women need support in their fight to claim and protect their liberties and their natural refuge and their protectors are the courts. The main impediment to the implementation and protection of Individual Rights is the prevailing social attitude. As they say, you can legislate equality all you want, but you cannot make people think it and live it particularly if they had been conditioned through inherited traditions and their own life experiences to the concept of inequality. Indeed, the first step, we believe, is to appreciate the common humanity of men and women. We are human beings first and foremost and only secondarily male and female**.** The new winds of change brought fundamental and dramatic Constitutional changes and awareness among citizens of this country. There is much euphoria and hope but the question that remains is whether the new Constitution as a popular and desirable document is a durable document that can help citizens achieve their aspirations. Whilst recognizing that even the most progressive Constitution cannot alone solve all the ills of society, the constitution that aspires to be legitimate, progressive, authoritative and to be accepted as a fundamental law must also address, inter alia, the fundamental rights of the people and ensure elimination of all forms of discrimination especially against women and disabled persons. As was stated by ***Madan CJ*** in the case of **Githunguri** v **Republic KLR [1986] 1** these proceedings have put our Constitution on the anvil. It is the subject of considerable anxiety, notoriety and public attention. To quote the words of ***Madan CJ***;

"We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community. We believe we are speaking correctly and not for the sake of being self laudatory when we say the Republic of Kenya is praised and admired by other people and other systems for the independent manner in which justice is dispensed by the courts of this country. We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the constitution if it fails to give effective protection to the fundamental rights. The people know and believe that to destroy the rule of law you destroy justice thereby also

destroying the society."

It is also important to mention that it is the courts' express Constitutional duty to interpret correctly Fundamental Rights provisions. This is not unlimited, however, it must be remembered that there are functions that are properly the concern of the Court and others that are properly the concern of the Legislature. At times these functions may overlap. The terrains are in the main separate and should be kept that way.

The petition before us concerns the correct interpretation, full tenure, meaning and effect of Article 27 of the Constitution of Kenya 2010 and the proper approach to the interpretation of the Constitution. The factual basis of this petition is not in dispute and it is rather straightforward. On 15th June 2011, the Judicial Service Commission (JSC) recommended to the President for appointment five persons as Judges of Supreme Court. That of the five recommended for appointment one was a woman and four were men. It is also clear that the JSC had earlier recommended to the President for Parliamentary approval persons to the offices of Chief Justice and Deputy Chief Justice out of whom one was a man and the other a woman. The petitioners allege that JSC in making its recommendations to the President violated the Constitution and Fundamental Rights and freedoms of women in not taking into consideration the correct arithmetic/mathematics of the Constitutional requirements on gender equity. As a result the recommendations fell below the Constitutional mandatory minimum and maximum on gender equality. In short, the issue is whether the JSC violated the provisions of Article 27 of the Constitution in making recommendation of five judges to the President for appointment as Judges of Supreme court and secondly whether this court has jurisdiction to issue orders as sought without contravening the provisions of Article 168 of the Constitution. It is the contention of the Petitioners that in the process of recommendation for appointment of the five judges, JSC did not meet the mandatory requirement and threshold set by the Constitution. In order to comply with the Constitutional requirements, it is alleged JSC was under a duty to ensure that in the final analysis of its recommendation no gender fell below 33.3% and no gender exceeded 66.7%. It is contended that in the line of mathematical reality, 1/3 of 7 is 2.3 and 2/3 of 7 is 4.7 therefore JSC should have considered that to avoid reducing the numbers below the constitutional minimum and avoid exceeding the constitutional maximum, the 2.3 ought to have been rounded off to 3 and 4.7 ought to have been rounded of to 4 which would have resulted in a Constitutionally compliant ratio. It is contended that with two women and 5 men in the Supreme Court, it means that the percentage composition of the female gender is 28.57% whereas the percentage composition of the male gender is 71.43%, therefore, the recommendation by the JSC is in breach of Article 27 on the principle that not more than two thirds of the members of elective or appointive bodies shall be of the same gender. The Petitioners have therefore prayed for the following orders;

(a) A declaration that the recommendation of people of more than two-thirds or 66.7 percent of the male gender and less than one-third or 33.3 percent of the female gender for approval and or eventual appointment to the office of Judges of the Supreme Court is gender insensitive, discriminatory against women, disrespectful of women and contrary to articles 27, 2, 3, 10, 163, 166, 172(2) (b), 248 and 249 of the Constitution of the Republic of Kenya and is therefore null and void.

(b) An order restraining any further purported appointments of Judges of the Supreme Court pursuant to the recommendations made by the Judicial Service Commission on 15.06.2011.

(c) Costs of this Petition.

(d) Or that such other Orders as this Honourable Court shall deem just.

The first issue is whether we have jurisdiction to entertain and determine the issues raised in the petition. In the Replying Affidavit by the 2nd respondent it is contended that the JSC recommended five judges to the President on 15th June 2011 and after consultations with the Prime Minister the President accepted the recommendations and gazetted the appointments on 16th June 2011. It is also contended that the prayers in the Chamber Summons and in the petition have in any event been overtaken by events as the Supreme Court Judges have been appointed in accordance with Article 166 of the Constitution.

Further, that Judges of the Supreme Court having been validly and lawfully appointed as provided for in the Constitution, their removal can only be done in accordance with Articles 167(1) and 168 of the Constitution. **Mr. Paul Muite** learned counsel for the 2nd respondent submitted that the recommendations for approval and eventual appointment were done before the petition was filed. He stated that as at 17th June 2011, the appointment of the five judges had already been effected through special gazette No.6656 of 16th June 2011 by the President of the Republic of Kenya. The gazette notice states as follows;

"In exercise of the powers conferred by Article 166(1) of the Constitution, I, Mwai Kibaki, President and Commander-in-chief of the Kenya Defence Forces, appoint-

Philip Kiptoo Tunoi
Jackton Boma Ojwang'(Prof)
Mohamed Khadhar Ibrahim,
Smokin Wanjala (Dr.),
Njoki Ndung'u Susanna (Ms.),

To be Judges of the Supreme Court of Kenya."

According to **Mr. Muite** where there is a conclusive procedure covering the treatment of a Judge, the same cannot be challenged through a Constitutional Petition. He contended that this Petition is against Articles 166, 167 and 168 which provide specific criteria for removing the five Judges already appointed. He further contended that what the petitioners are doing is an attempted removal of the five appointed and gazetted Supreme Court Judges. He contended that two steps have already been taken reflecting the finalization of the process of appointment which is nominations and recommendations by JSC. He also stated that JSC cannot reverse its decision and cannot re-open the nomination process after the initial nomination. He also contended that there was a further step which was taken by the President which was the appointing and gazetting of the five Supreme Court judges on 16th June, 2011. It is the further position of the 2nd Respondent that those persons have moved from the position of nominees to Judges of Supreme Court and this court cannot resurrect or resuscitate a dead process by trying to ignore the medical services of Article 168 of the Constitution. He contended that Article 168 is a limitation to the process before court and it is not correct to state that the appointment is not subject to Article 168 of the Constitution. See;

(1) Minister of Health and Others vs Treatment Action Campaign & Others [2002] 5 LRC 216.

(2) Ghana Bar Association vs Attorney General [1995 -96] 1 GLR 598-662 [Reported as [2003-2004] SC 250].

(3) Matadeen and another v Pointu and others [1998] 3 LRC

In essence it is the case of the 2nd Respondent that there is a special procedure for embarking on the exercise of removing a judge which is exclusively provided and the issues at stake can only be determined after the court is satisfied that the procedure has not been side-stepped. It is the case of the 2nd Respondent that this court does not have concurrent jurisdiction as alleged by the Petitioners. In plain and simple language the Petitioners are trying to remove the five judges of the Supreme Court without mincing their words. In short it is the objection of 2nd respondent that this is an impeachment process through the judicial process which is unacceptable and which is unconstitutional.

On the other hand, it is the position of the Petitioners and Interested Parties that Article 165 of our constitution gives this court jurisdiction to hear and determine the matter. **Mr. Ongoya** learned counsel for the petitioners submitted that this court is being asked to cede jurisdiction by reference of a Tribunal under Section 168 without deference to Article 165. He said that such argument defeats the concept that the Constitution must be read as a whole. He posed the question; "What is the remedy available to a

citizen who cannot raise any ground under Article 168 in respect of any individual Judge but has perfect and sound grievances against either the JSC or any of the organs of the State responsible for appointment of Judges? As to whether the jurisdiction lies with the High Court or the Tribunal, one has to look at the Articles of the Constitution as a whole. Article 165 establishes the High Court and in pertinent words sub-article 3 states as follows;

"Subject to clause (5), the High Court shall have-

(a) Unlimited original jurisdiction in criminal and civil matters;

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-

(i) The question whether any law is inconsistent with or in contravention of this Constitution;

(ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) A question relating to conflict of laws under Article 191; and

(e) Any other jurisdiction, original or appellate, conferred on it by legislation."

Article 2(1), 2, 3 & 4 provide;

"(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) No person may claim or exercise State authority except as authorized under this Constitution.

(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.

(4) Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."

In Misc. Application No.639 of 2005 in the case of **Boniface Waweru Mbiyu vs Mary Njeri & another** ***Ojwang J*** addressing himself on the issue of jurisdiction had this to say;

"The entry point into any Court proceeding is jurisdiction. If a court lacking jurisdiction to hear and determine a matter overlooks that fact and determines the matter, its decision will have no legal quality and will be a nullity. Jurisdiction is the first test in the legal authority of a Court or tribunal, and its absence disqualifies the Court or tribunal from determining the question. In

general the High Court is a Court of unlimited "original jurisdiction" (defined in ***Black's Law Dictionary*, 8th *ed (2004)*** as *"[a} Court's power to hear and decide a matter before any other Court can review the matter"),* **but this does not mean, as counsel for the plaintiff has urged, that there is no time when the Court is without jurisdiction. Section 60 of the Constitution stipulates:** *"There shall be a High Court, which shall be a superior Court of record, and which shall have unlimited jurisdiction in civil and criminal matters…"* **While the High court has unlimited jurisdiction, it is the correct legal position that the legislature, in exercise of its legislative powers, can, where necessary, limit the jurisdiction. Apart from the clear provisions of statute law that may limit the High Court's jurisdiction, there will be principles of law established and recognized by the Court over the years, which define the mode of exercise of that jurisdiction."**

It is the contention of the Respondents that the process of advertisement, interview and recommendation has been completed by the Judicial Service Commission which is the first step. Secondly, the President in consultation with the Prime Minister exercised his powers under Article 166 by appointing and gazetting the five Supreme Court Judges. And that the tenure of office of the said Judges is now within Article 167 and their removal can only be done by invoking Article 168. However, it is the case of the Petitioners that there are two important constitutional issues which have not been fulfilled by JSC and the President in exercise of their Constitutional mandate and that is Article 27(8) and 74. It is the position of the Petitioners that Article 74 is the third step which is as important as the steps in Articles 166 and 172 of the Constitution. Article 74 is about oath of office of State officers and it states as follows;

"Before assuming a State office, acting in a State office, or performing any functions of a State office, a person shall take and subscribe the oath or affirmation of office, in the manner and form prescribed by the Third Schedule or under an Act of Parliament."

In our view the jurisdiction of this court under Article 165 is completely different from that of a Tribunal under Article 168. It is clear that the Tribunal's jurisdiction kicks in when there is an alleged misconduct on the part of a Judge or when he is unable to perform the functions of his office arising from mental or physical incapacity or breach of code of conduct or bankruptcy, or incompetency or gross misconduct or misbehavior. The powers of a Tribunal may be initiated only by JSC acting on its own motion or on the petition of any person. The powers of the Tribunal under Article 168 cannot be invoked directly by an aggrieved citizen save through the JSC. On the other hand, the question that is for our determination is about the process and it is our view that no step is greater than the other and any of the three steps are equally important and constitutionally mandatory. Therefore what is at stake is the process used to nominate and appoint the five Supreme Court Judges. It is our duty to evaluate and assess whether the business conducted by the JSC was in accordance with the law, fairness and justice. If the process of the appointment is unconstitutional, wrong, un-procedural or illegal, it cannot lie for the respondents to say that the process is complete and this court has no jurisdiction to address the grievances raised by the Petitioners. In our view even if the five appointees were sworn in, this court has jurisdiction to entertain and deal with the matter. The jurisdiction of this court is dependent on the process and constitutionality of appointment. In this sense, if JSC a State organ does anything or omits to do something under the authority of the Constitution and which contravenes that Constitution, that act or omission when so proved before the High Court shall be invalid. Accordingly, we find and hold that we are properly seized of this petition as we have the requisite jurisdiction. We think the objection raised by the Respondents against the petition as concerns our powers to determine the dispute is without merit.

The second and equally important issue is the import, interpretation and tenure of Article 27(8) of the Constitution. The petitioners claim that the recommendation by the JSC of the five Supreme Court Judges, the Chief Justice and his Deputy was done through a route contrary to the dictates of the Constitution particularly as regards Article 27(8) and other provisions stressing the principle of gender. This Article falls under Chapter 4 of the Constitution which is headed **'The Bill of Rights'**.

When interpreting the Bill of Rights the court must promote the values that underlie and open a democratic society based on human dignity, equality and freedom. Such an interpretation must be generous and sustainable to give individuals the full measure, the fundamental rights and freedoms and the court must take full cognizance of the social conditions, experiences and perception of the people of

this country. We must adapt what is known as '*always speaking approach'*. One must in our view not begin with the question whether JSC's conclusions are patently unreasonable, but rather, one must start at the point whether its interpretation of the provisions of the Constitution is unconstitutional. We are alive to the fact that a court may not consider the merits of the decision but only whether the choice the organ made was extraneous to the purpose for which the discretion was granted. But on the other hand, because the courts have the ultimate and sole responsibility of the interpretation of the law, there will be circumstances when decisions even those of organs with statutory and constitutionally acknowledged expertise will be found to have been in law un-procedural and unconstitutional. If JSC has interpreted its constitutional mandate in a patently wrong and unreasonable fashion, the court must intervene and give proper guidance to the aggrieved party. When it comes to Fundamental Rights we must be strict constructionist and constitutional fundamentalists who are ready to enforce what appears explicitly and expressly in the Constitutional text in order to advance and develop individual rights and freedoms. It is important that Constitutional text should be construed in the light of original understanding of its framers and drafters. We must be zealous in our devotion to carrying every principle and right enshrined in the Constitution to its logical conclusion. However, we must suppress our ideological agenda or desire for personal attention or desire for emotional aggrandizement in the interest of achieving stability and good legal interpretation when a matter arises with emotive considerations. We must be liberal and pragmatic with a degree of humility and commonsense in order to advance the rights and liberties enshrined in the Constitution. We must not decide fundamental issues concerning the Bill of Rights on narrow, pedantic, flimsy and conservative grounds which are likely to erode the confidence of the people in the administration of justice. We are aware that the task of interpreting a Constitution or an article of the Constitution is difficult and sometimes a dangerous exercise. Inevitably decisions cannot satisfy everyone.

The Constitution is a flexible and adaptable instrument, some of its provisions are highly specific giving us Judges unmistakable instructions. But others are no more than a broad outline which means that their construction is essential to fill in the details. The Constitution may be read restrictively sometimes but other times loosely. We must adapt a growth from the seeds which the drafters planted. We must be cautious because that we cannot afford to wrap a poison in a bill of sweet and sonorous pontification in order to accede to the arguments of a particular party. Perhaps we should also avoid a route which can result in serious and dangerous inroads upon the limitations of the Constitution which can be achieved through policy, programs and legislative actions. In interpreting the Constitution we must not be bewildered travelers lost in the woods, wandering in a circle thinking that it was a straight line. In our view the Constitution has a consistent and not contingent meaning. It does not mean one thing at one time and an entirely different thing at another time. In our understanding the provisions of the Constitution must be upheld when they pinch as well as when they comfort. We would be second to none in extending help when such help is needed. But this does not in our view mean that the doors of this court are always open for anyone to walk in, seek and obtain what he thinks is right. There is a broad agreement on the general analytical framework that a person claiming a violation of Article 27 must first establish that because of a distinction drawn between the claimant and others, the claimant has been denied equal protection or equal benefit of the law. Secondly, the claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds in Article 27. Whether the distinction has the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or obstructing this access to benefits or advantage which are available to others is an essential and important criteria to determine the violation. In our minds, our Constitution gave rise to proposition which benefited one group at the expense of the other. There is also recognition of an equal worth of all human beings which lies at the root of Article 27. In its preamble the Constitution starts off with recognition of inherent dignity of all members of the human family and expresses the desire to promote amongst all the dignity of individuals. This is further echoed and provided for in various Articles of our Constitution.
We are aware that our task is always to scrutinize the act and determine, in the light of particular provisions of the law, the legal consequences most likely intended for the breach of duty. The law has to be orderly and predictable in order to address the needs and aspirations of the people. Where an Article is not clear it should be evaluated and construed on an analytical basis. Which of the provisions in an article are substantive and which are secondary is a matter for serious consideration.

When the provisions of an Article of the Constitution relate to the performance of a public duty and the

case is such that to hold null and void acts done in respect of this duty would work serious inconvenience or injustice to the persons who have no control over those conferred that duty, and at the same time it would not promote the main object of the drafters, it has been the practice to hold such provisions to be directory only, and the neglect of them cannot be punishable if there is no legislative implementation, programe or policy in place. Where a statutory duty is mandatory or directory, it is necessary to set the proper standards for the performance of that duty.

An issue which is central to the matter before us is the concept of equal protection. In our view equal protection does not prevent reasonable legislative classification. The reasonableness of classification would depend upon the purpose for which the classification is made. It is with reference to the purpose for and the circumstances under which the classification has been made that courts have sustained differentiation in many cases where the difference might be apparent, or divorced from the purpose and circumstances. The law is that the classification permissible must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be attained and cannot be made arbitrarily and without any substantial basis, thus if the drafters used certain words, then the meaning must be derived from reading the constitution as and in the particular article as a whole.

As already stated, classification must not be arbitrary but must be rational, that is to say it must only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others which are left out but those whose qualities and characteristics must have a reasonable relation to the objects of the legislation. In order to pass the test two conditions must be fulfilled.

(1) That the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others.

(2) That the differentia must have a rational relation to the object sought to be achieved by the Article.

When therefore an act is challenged as offending against the guarantee in Article 27, the first duty of this court is to examine the purpose and the policy of the act and to discover whether the classification made by the Article has a reasonable relation to the object which the drafters sought to attain. The purpose for the object of the Article is to be ascertained from the examination of its title, preamble and provision. First things first. Article 27 falls within Chapter 4 which creates the Bill of Rights. <u>The Bill of Rights is an integral part of Kenya's democratic State and is the framework for social, economic and cultural policies. The purpose is to recognize and protect the fundamental rights and freedoms and to preserve the dignity of individuals and communities and more so to promote social justice and the realization of the potential of all human beings.</u> **See Article 19** *(Emphasis Supplied).*

Another important factor is that the Bill of Rights binds all state organs and persons. A critical aspect is that persons enjoy the Bill of rights and fundamental freedoms to the greatest extent consistent with the nature of right or fundamental freedom. In interpreting the Bill of Rights we are obliged to promote;

(a) The values that underline an open and democratic society based on human dignity, equality, equity and freedom.

(b) The spirit, purport and objects of Bill of Rights. ***(See Article 20)***

It is important to restate Article 21 which deals with the implementation of rights and fundamental freedoms;

"21(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.

(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.

(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

(4) The State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms."

Article 24 deals with limitation of rights and fundamental freedoms and states as follows;

"24(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) The nature of the right or fundamental freedom;

(b) The importance of the purpose of the limitation;

(c) The nature and extent of the limitation;

(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) The relation between the limitation and its purpose whether there are less restrictive means to achieve purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom-

(a) In the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) Shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) Shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied."

In the Indian case of the **State of WB versus Anwarali 1952 SCR 284 and 335** it was held;

"The classification permissible must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. …Thus the Legislature may fix the age at which persons shall be deemed competent to contract between themselves but no one will claim that competence to contract can be made to depend upon the stature or colour of the hair – such a classification for such a purpose would be arbitrary and a piece of legislative despotism."

And in the decision of American Supreme Court in **BUCK v BELL (1926) 274 US 2000 (208)** it is noted;

"The law does all that is needed when it does all that it can indicates a policy, applies it to all

within the lines and seeks to bring within the lines all similarly situated so far and as fast as its means allow."

In the case of **MAQOUN V ILLINOIS TRUST BANK (1898) 170 US 283 to BAYSINE FISH CO. V GENTRY (1936) 297 US 422** it was held;

"The rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental proposes, there cannot be any exact exclusion or inclusion of persons and things.

In other words, a classification having some reasonable basis, does not offend against the clause merely because it is not made with mathematical nicety, or because, in practice, it results in some inequality.

Government is not a simple thing. It encounters and must deal with the problems which come from persons in an infinite variety of relations. Classification is recognition of those relations and, in making it a legislature must be allowed a wide latitude of discretion and judgement."

'In applying the dangerously wide and vague language of the equality clause to the concrete facts of life, a doctrinaire approach should be avoided.'

"When a law is challenged as offending against equal protection the question for determination by the court is not whether it has resulted in equality, but whether there is some difference which bears a just and reasonable relation to the object of the legislation."
As the Supreme Court of India has observed in the case of KEDAR NATH v STATE OF W. B. (1953) SCR 835 (843):

"Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary: that it does not rest on any rational basis having regard to the object which the legislature has in view."

In **Civil Case No.1351 of 2002 R. M v GAO & Attorney General Nyamu J** *(as he then was)* and **Ibrahim J** rendered themselves in the following words;

"The equal provisions do not in our view require things which are different in fact or in law to be treated as though they are the same. Indeed the reasonableness of a classification would depend upon the purpose for which the classification is made. There is nothing wrong in providing differently in situations that are factually different. The law does all that is needed when it does all it can, indicates a policy, applies it to all within the lines and seeks to bring within the lines all similarly situated so far and as first as its means allow."

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 Constitutions 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.

As noted from the quoted cases hereinabove it is an important aspect that lack of equal protection is to be found in the exercise of an invidious discrimination. Drafters are entitled to hit the evil that exists and they are not bound to take account of new and hypothetical inequalities that may come into existence as time passes or as the conditions change. Borrowing from those cases and paraphrasing them, a mere production of inequality is not enough to hold that equal protection has been denied. The inequality

produced in order to encounter the challenge of the Constitution must not be actually and palpably unreasonable and arbitrary. The law of equality permits many practical inequalities. In other words a classification having some reasonable basis does not offend merely because it is not made with mathematical niceties or because in practice it results in some inequalities. We all understand that Government is not a simple thing, it encounters and must deal with the problems which come from persons and infinite variety of relations. Therefore, classification is the recognition of those relations and in making it legislative, provision must be allowed a wide latitude of discretion and judgment. We are also aware that applying the dangerously wide and vague language of equality and non discrimination to the concrete facts of life is a doctrinal approach which should be avoided. When a provision is challenged as offending against equal protection the question for determination by the courts is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of the legislation. In our view mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary that it does not rest on any basis having regard to the object which the legislature has in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. In addressing that issue, it is important to know whether there are other provisions or special provisions that have reserved special seats and benefits for the vulnerable members of our society. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases.

We have set the background, function and legal issues in order to address the salient and essential factors that were set for our determination. And this concerns the application, implication, purport and tenure of Article 27 of our Constitution. The heading reads '***Equality and Freedoms from discrimination.'*** Article 27(1) states **"that every person is equal before the law and has the right to equal protection and equal benefit of the law."** It goes further and states in 27(2), **"Equality includes the full and equal enjoyment of all rights and fundamental freedoms."** To sum up Article 27(1) and (2) is Article 27(3), (4) and (5) which read as follows;

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

(1) 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.

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

It is the case of the Petitioners that JSC in making its recommendation to the President violated the Constitution and fundamental rights and freedoms of one gender by recommending one female out of the five Judges it recommended for appointment to the Supreme Court. According to **Mr. Ongoya** learned counsel for the petitioners there was failure of mathematics of Constitutional requirement on gender equity in that the recommendation fell below the constitutional minimum and maximum gender equality. This petition is thus founded on the actions of Judicial Service Commission in recommending five judges to the president for appointment without following the correct formula and the mandatory provision of the law. The issue for our determination therefore is whether the JSC violated Article 27 of the Constitution in making the recommendation of the five judges to the President for appointment as Supreme Court Judges. It was contended by **Mr. Ongoya** that the Constitutional provision which must guide the JSC in appointment of Judicial officers and other staff of the Judicial are set out under Article 172 (2) (a) and (b) as read together with section 30 of the Judicial Service Act 2011. **Mr. Ongoya** contended that Article 27 of the Constitution is clear and un-ambiguous and there is nothing in doubt requiring this court's interpretation. He contended that the principle that 'not more than $^{2}/_{3}$'of an elective or appointive body be not of the same gender was not met by the JSC.

In the Replying Affidavit by **Mrs. Mokaya** on behalf of JSC it is contended that JSC is established by Article 171 of the Constitution and its functions are spelt out by Section 172 of the Constitution. The affidavit states that the appointment of Chief Justice, Deputy Chief Justice, Supreme Court Judges and other Judges is governed by Article 166 of the Constitution. It also stated that JSC is guided by Article 252 which makes provisions for general functions and powers of all commissions and Independent Offices established by the Constitution. It is the case of JSC that it treated all applicants equally and considered merits in nominating the most qualified applicants for the position of Supreme Court Judge taking into account gender, regional, ethnic and other diversities. It is also contended that JSC discharged its statutory mandate in accordance with rule 14(1) of the First schedule of the Judicial Service Act 2011 which obligates it to consider merit in appointment of Judges and did not discriminate against any of the applicants on the grounds of gender, regional or ethnic background.

As already stated the catch words in Article 27 is equality and freedom from discrimination. It can be loosely stated that the two words mean one and the same thing. If every person is equal before the law, and is treated equally, then the question of equality and freedom from discrimination has been largely achieved. Generally, the entities that commit discrimination are State organs exercising judicial or statutory powers and even sometimes discretionary powers. It is the contention of the Petitioners that this is precisely the sort of case which would fall within section 27(8) of the Constitution and it is necessary for this court to intervene and overturn the decision of the JSC.

In considering whether JSC contravened Article 27, it is important that the Constitution be treated as a whole and all provisions having a bearing on the subject matter be considered together as an integral whole. Provisions relating to fundamental rights and freedoms should be given purposive and generous interpretation in such a way as to secure maximum enjoyment by all of the rights and freedoms guaranteed. In our view when a State organ seeks to do an act which derogates on the enjoyment of fundamental rights and freedoms guaranteed under Chapter 4 of our Constitution, the burden is on that person or authority seeking the derogation to show that the act or omission is acceptable within the derogation permitted under the Constitution. In determining the meaning of the words equality and freedom from discrimination it is helpful to consider in a general sense the nature and the implication of the words. Usually the two words are categorized into permissive and mandatory terms. A permissive meaning leaves it optional as to whether the inference of the fact is drawn following proof of the basic facts. A mandatory definition requires the exact and clear words employed in a particular situation. The meaning of a right or a freedom from discrimination by the Constitution is to be ascertained by analysis of the purpose of such a guarantee in the light of the interest it was meant to protect. In our view this analysis is to be undertaken and the purpose of the right of freedom equation is to be sought by reference to the character and larger object of the Constitution. In that regard, the language chosen to articulate the specific rights and freedoms, the historical origins of the concept enshrined and where applicable to the meaning and purpose of the other specific rights and freedoms are essential factors for consideration.

To identify the underlined purpose of the constitutional right in question, it is important to begin by understanding the cardinal values it embodies. Throughout the web of Constitutional interpretation, one golden thread is always that it is not the duty of the court to give what is not provided by the constitution. Although there are important lessons to be learnt from the Bill of Rights and the Constitution as a whole, the same does not constitute binding authority in relation to constitutional interpretation. It is the duty of the court to recognize and declare existing rights as enshrined in the Constitution. At this stage, it is important to ask ourselves, ‘what is equality and what is freedom from discrimination?’ The two terms have been largely defined under Article 27(1) and (2). We have also tried to state a general perspective of what the two words mean.

CEDAW (1979) defines discrimination as;

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

And in the case of **Jacques Charl Hoffmann Constitution Court of South Africa** it was held;

"At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in the society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding, the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim…Prejudice can never justify unfair discrimination. This country has recently emerged from institutionalized prejudice. Our law reports are replete with cases in which prejudice was taken into consideration in denying the rights that we now take for granted. Our constitutional democracy has ushered in a new era – it is an era characterized by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place. Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly. SAA, as a state organ that has a constitutional duty to uphold the Constitution, may not avoid its constitutional duty by bowing to prejudice and stereotyping….Section 38 of the Constitution provides that where a right contained in the Bill of Rights has been infringed, "the court may grant appropriate relief". In the context of our Constitution, "appropriate relief" must be construed purposively, and in the light of section 172(1)(b), which empowers the Court, in constitutional matters, to make "any order that is just and equitable." Thus construed, appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate. As Ackermann J remarked, in the context of a comparable provision in the interim Constitution, [i]t can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate." Appropriateness, therefore, in the context of our Constitution, imports the elements of justice and fairness.

Fairness requires a consideration of interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer. In other cases, the interests of the community may have to be taken into consideration. In the context of unfair discrimination, the interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination. This aspect of the interests of the community can be gathered from the preamble to the Constitution in which the people of this country declared."

On the other hand, the requirement of equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the law so passed cannot create differences as to the persons to whom they apply and the territorial limit within which they are enforced. We are aware that individuals in any society difer in many respects such as age, ability, education, height size, colour, wealth, occupation, race and religion. In our view any law made, must of necessity be clear as to the making of the choice and difference as regards its application in terms of persons, time and territory. Since the constitution can create differences, the question is whether these differences are constitutional. If the basis of the difference has a reasonable connection with the object intended to be achieved therefore the law which contains such a provision is constitutional and valid. On the other hand, if there is no such relationship, the difference is stigmatized as discriminatory and the provision can be rightly said to be repugnant to justice and therefore invalid. This is in our view what has been accepted in judiciaries as the doctrine of classification which is an integral part of the equal protection clauses in almost all written constitution in the world. In **Lindsley v National Carbonic Gas Co 220 US 61 (1911) at pp.76-79** it was held;

"1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.

2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

And in **State of Bombay v F. N. Balsara AIR 1951 SC 318** at p. 326 quoted with approval the following extract from **Professor Willis' Constitutional Law, 1st ed. At 578**;

"The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred & in the liabilities imposed.' 'The inhibition of the amendment… was designed to prevent any person or class of persons from being singled out as a special subject for discriminating & hostile legislation.' It does not take from the states the power to classify either in the adoption of police laws or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, & nullifies what they do only when it is without any reasonable basis. Mathematical nicety & perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis."

The purpose of the Constitution may be either the elimination of a public mischief or the achievement of some positive public good. It can therefore be stated that discrimination is the essence of classification and that equality is violated if it rests on unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is among the equals and classification is therefore to be founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved. There is also no denial of equality of opportunity unless the person who complains of discrimination is equally suited with the person or persons who allege to have been favoured.

In the case of **State of Kerala and another vs N. M. Thomas and Others Civil Appeal No.1160 of 1974** it was held that;

"This equality of opportunity need not be confused with absolute equality. Article 16(1) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. In regard to employment, like other terms and conditions associated with and incidental to it the promotion to a selection post is also included in the matters relating to employment and even in regard to such a promotion to a selection post all that Article 16(1) guarantees is equality of opportunity to all citizens. Articles 16(1) and (2) give effect to equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15(1). Promotion to selection post is covered by Article 16(1) and (2).

The power to make reservation, which is conferred on the State, under Article 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts. In providing for reservation of appointments or posts under Article 16(4) the State has to take into consideration the claims of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that

the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. (General Manager, S. Rly v. Rangachari (1962) 2 SCR 586: AIR 1962 SC 36). The present case is not one of reservation of posts by promotion.

Under Article 16(1) equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent class. The Roadside station masters and guards are recruited separately, trained separately and have separate avenues of promotion. The station masters claimed equality of opportunity for promotion vis-à-vis the guards on the ground that they were entitled to equality of opportunity. It was said that the concept of equality can have no existence except with reference to matter which are common as between individuals, between whom equality is predicated. The Roadside station masters and guards were recruited separately. Therefore, the two form distinct and separate classes and there is no scope for predicating equality or inequality of opportunity in matters of promotion. (See All Indian Station, Masters and Assistant Station Masters' Association v General Manager, Central Railways ((1960) 2 SCR 311: AIR 1960 SC 384). The present case is not to create separate avenues of promotion for these persons.

The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons of things in different circumstances. The circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances. The principle of equality does not mean that every law must have universal application for all persons who are not be nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinction that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category."

In the **Mauritius case** of **Matadeen and Another v Pointu and Others (1998) 3 LRC 542** the issue of equality before the law was addressed and in a majority decision the court rendered itself as hereunder;

'Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently.'

Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic Constitution. Indeed their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational: see Professor Jeffrey Jowel QC 'Is Equality a Constitutional Principle?' [1994] Current Legal Problems 1 at 12-14 and De Smith, Woolf and Jowel *Judicial Review of Administrative Action* (5th edn, 1995) paras 13-036 to 13-045.

But the very banality of the principle must suggest a doubt as to whether merely to state it can provide an answer to the kind of problem which arises in this case. Of course persons should be uniformly treated, unless there is some valid reason to treat them differently. But what counts as a valid reason for treating them differently? And perhaps, more important, who is to decide whether the reason is valid or not? Must it always be the courts? The reasons for not treating people uniformly often involve, as they do in this case, questions of social policy on which views may

differ. These are questions which the elected representatives of the people have some claim to decide for themselves. The fact that equality of treatment is a general principle of rational behavior does not entail that it should necessarily be a justiciable principle – that it should always be the judges who have the last word on whether the principle has been observed. In this, as in other areas of constitutional law, sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislature and the executive in deciding how that principle is to be applied.

A self-confident democracy may feel that it can give the last word, even in respect of the most fundamental rights, to the popularly elected organs of its Constitution. The United Kingdom has traditionally done so; perhaps not always to universal satisfaction, but certainly without forfeiting its title to be a democracy. A generous power of judicial review of legislative action is not therefore of the essence of a democracy. Different societies may reach different solutions.

The United Kingdom theory of the sovereignty of Parliament is however an extreme case. The difficulty about it, as experience in many countries has shown, is that certain fundamental rights need to be protected against being overridden by the majority. No one has yet thought of a better form of protection than by entrenching them in a written Constitution enforced by independent judges. Even the United Kingdom is to adopt a modified form of judicial review of statutes by its incorporation of the European Convention. Judge Learned Hand, who was in principle opposed to the power of the Supreme Court to annul Acts of Congress, acknowledged that in this matter his opponents 'have the better argument so far as concerns Free Speech':

'The most important issues here arise where a majority of the voters are hostile, often bitterly hostile, to the dissident against whom the statute is directed; and legislatures are more likely than courts to repress what ought to be free.'"

Now we ask ourselves, suppose we gathered just as we are to choose the principles to govern our collective lives, what principles would we choose? We would probably find it difficult to agree because different people would favour different principles reflecting their various interests, moral, religious beliefs and social positions. We might however, settle on a compromise but even the compromise would most likely reflect the superior bargaining power of some over others. There is no reason to assume that a Constitution arrived at this way would be a just arrangement in the eyes of all citizens. We can also imagine a choice we make behind a veil of ignorance that temporarily prevents us from knowing anything about who is in a particular position. As human beings no one would want to risk being the person thrown to the lions to the pleasure of the crowd. It is for that reason that we think that actual constitutional principles are not self sufficient . Constitutions like normal contracts are open to the same challenge as other agreements. The fact that our Constitution was ratified by a majority of Kenyans does not mean or prove that its provisions are just and fair despite its many virtues. It might be argued that these defects can be traced to a flow in the consent or ratification processes. However, we must state that that is a matter of speculation. The one thing clear in our mind is that no actual contract or constitutional convention, however representative, is guaranteed to produce fair terms of social justice and cooperation. As a court we are familiar with the contingencies that can lead to a bad deal. One of the parties may be a better negotiator or have a stronger bargaining position or know more about the value of the things being exchanged. To recognize that constitutional provisions do not confer fairness does not mean that we violate our obligations whenever we please. We are obligated to fulfill even unfair bargain at least to a point. As they say constitutional provisions express our autonomy, the obligations they create or carry considerable weight because they are self imposed. As instruments of mutual benefit, constitutional provisions draw on the ideals of reciprocity. That brings us to the question of what is affirmative action. In our earlier definition of what amounts to non-discrimination and equal treatment we have tried to give a general prescription of what amounts to affirmative action. In our view the real affirmative action debate is about the compensatory argument and diversity argument.

The compensatory argument views affirmative action as a remedy/redress for past wrongs. The concept creates an obligation that minority should be given preference to make up for a history of discrimination that has placed them at an unfair disadvantage. It is primarily a benefit to the recipient and seeks to

distribute the benefit in a way that compensates for past injustices and its lingering effects. However, critics argue that those who benefit are not necessarily those who have suffered and those who pay the compensation are seldom those responsible for the wrongs being rectified. It is also argued that the concept displaces hard work and merit. One may say that Bill Gates worked long and hard to develop Microsoft and equally most talented individuals put endless hours horning their skills. Even the willingness to make an effort to try and so to be deserving in the ordinary sense is itself dependent upon social background. One may argue that the better endowed are more likely to strive conscientiously to succeed. In order to achieve a proper and well coordinated affirmative action it is important to hit the evil where it hurts. Historically there have been different injustices committed against various groups within our society. One may ask why should a lady Judge from Central, Western, Nyanza and Rift Valley Provinces get an edge over a male Judge from the upper Eastern or Northern Kenya who may actually have faced a tougher and more difficult conditions in terms of economic, social, political and environmental struggle. It is also clear and we have taken judicial notice that young girls from Turkana, Pokot, Masai, Boran, Kuria and Northern Kenya and the whole of Coast Province suffer hardships that make them disadvantaged. If the point is to help the disadvantaged it should be based on something more than a female gender and unless one carries out an affirmative action from the grass root it would be difficult for the deserving persons to benefit from any kind of affirmative action. If the formula and criteria is not set properly, affirmative action would benefit an already advantaged lot.

The second aspect is the diversity argument which does not depend on the controversial notion of collective responsibility. This concept treats the action less than a reward to the recipient. It acts as a means of advancing socially a worthy and progressive aim. It is a concept that is meant to serve the common good and wider interest of the society. It is meant to reflect homogeneity or race, ethnicity and class. It is meant to equip disadvantaged minority to the positions of leadership in key public institutions.

When all is said and done, affirmative action is not meant to secure special people for any group within our society. We are saying so because the central issue in this dispute is the appointment of Judges to the Supreme Court. Without doubt persons to be appointed to any judicial office can be decreed to be learned persons who have gone through vigorous learning and experience. Judicial appointment cannot and is not meant for every Dick and Harry. It is only meant for people who have gone through Law school and who have attained a certain foundation of experience in their legal training and experience. Affirmative action is meant to incorporate every sector of our society and to bring up the less and disadvantaged members of our society.

Mr. Paul Muite learned counsel for the 2nd respondent took us through what he calls affirmative action provided in our Constitution. Article 54 deals with persons with disabilities and in particular section 54(2) states;

"The State shall ensure the progressive implementation of the principle at least five percent of the members of the public in elective and appointive bodies are persons with disabilities."

Article 55 states that;

"The State shall take measures including affirmative action programmes."
Section 56 states that;

"The State shall put in place affirmative action programme designed to ensure the rights and the interests of the minorities and marginalized groups are protected."

Article 57 deals with the older members of the society.

Article 97(1) (b) reserves 47 seats for women at the County level to be members of the National Assembly. 97(2) women are not prohibited from contesting an election. 98 (1) (b) reserves 16 seats for women who shall be nominated by the political parties. 97(1) (c) reserves one woman representing the youth. 98(1) (d) reserves one woman representing persons with disabilities. Article 100 obliges

Parliament to enact legislation to promote the representation in Parliament;

(a) Women

(b) Persons with liabilities

(c) Youth

(d) Ethnic and other minorities

(e) Marginalized communities.

Article 171(1) (d) on Judicial Service Commission reserves one position for a woman to be elected by High Court Judges or the Magistrates. 171(1) (f) reserves one position for a woman to be elected by the Law Society of Kenya. Article 171(1) (h) reserves one woman to represent the public to be appointed by the President. Article 177 deals with membership of County Assembly and a County Assembly shall consist;

(a) Members elected by the registered voters in the ward.

(b) The number of special seats members necessary to ensure that no more than $^2/_3$ of the membership of the assembly are of the same gender.

Article 250 composition, appointment and terms of office of commissions and independent offices. The chairperson and vice of a Commission shall not be of the same gender.

In addressing whether the 2nd Respondent violated Article 27 of the Constitution in advertising, short listing, interviewing and recommending the five Judges for appointment to the Supreme Court, **Mr. Paul Muite** took us through the above provisions of the Constitution and submitted that the process was conducted in accordance with the accepted rules and the guiding factors within the Constitution. He contended that the Constitution had used clear and unambiguous language in addressing the needs and interests of all vulnerable groups. **Mr. Muite** posed a question as to what would have been easier than for the Constitution to indicate clearly the composition of the Supreme Court. He answered his own question by saying that where the Constitution has required affirmative action or seats reserved for a particular group it has clearly said so. He also invited us to look and scrutinize Article 172 which stipulates the functions of JSC. He also referred to the JSC Act. **Mr. Muite** contended that the 2nd Respondent considered and took into account the qualities of high moral character, integrity and impartiality in short listing, interviewing and recommending the five judges for the Supreme Court. It is clear that the qualifications for appointment of the whole seven members of Supreme Court Judges are set out in Article 166. Of importance is Article 166(2) and (3) which lists the criteria to be fulfilled for persons to be appointed to the Supreme Court;

(2) Each judge of a superior court shall be appointed from among persons who-

(a) hold a law degree from a recognized university, or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;

(b) possess the experience required under clause (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and

(c) have a high moral character, integrity and impartiality.

(3) The Chief Justice and other judges of the Supreme Court shall be appointed from among persons who have-

(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;

As was rightly stated by Mr. Muite and **Ms Muthoni Kimani** for 2nd and 1st Respondents respectively, the other considerations for evaluating qualifications of individual applicants, are set out in Part V of first schedule to the Judicial Service Act 2011. Regulation 13 provides 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 or 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 judgement, 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 commitment to the community generally and to improving access to the justice system in particular."

In addressing the issues stated above JSC must be alive to the provisions of Article 27 and Article 172 of the Constitution. The parameters and the boundaries for testing the qualifications criteria stated in regulation 13 must be seen in light of Article 27 and 172.

We all appreciate and understand that the Judiciary and judicial officers are vital in anchoring the rights of parties. It is for that reason that the issue of equality and nondiscrimination must be read together with the provisions of Article 172 and Regulation 13 as stated above. In recommending persons to the President for appointment, the JSC shall promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice. In performing its functions, the JSC shall be guided by Article 172(2) which reads as follows;

"In 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."

It is clear, therefore that judicial appointments should be based on the concept of equal opportunity, nondiscrimination and above all must reflect the diversity of the people of Kenya taking into consideration the values, beliefs and experience brought about by an individual appointed for a particular position. Women are just as likely as men to possess attributes of good judges and experience. It has come to be accepted democratically that a judiciary that does not reflect the diversity of the society at large will lose the confidence of the public upon which its authority ultimately rests. We think that the role and the powers of the JSC have been clearly defined by the JSC Act and by the Constitution. Generally, it can be assumed that any person who meets the criteria and standards set has a legitimate expectation to be recommended for appointment. Those who finish in the top group of the candidates counting judicial traits, academic promise, ethnic and geographical diversity and gender consideration are entitled to be recommended for appointment. It would be unfair, unjust and unconstitutional to exclude persons who come within the threshold set by Article 27, Article 172 and the JSC Act for appointment. It has been argued by **Mr. Paul Muite** that no one has a right to be considered according to any particular set of criteria in the first place which was not applicable and subjected to other candidates.

In exercise of its powers, JSC has a constitutional duty and administrative discretion. In exercise of its

constitutional duty, JSC has no discretion other than to comply with the provisions of Article 27 and 172 of the Constitution. The question which is the crux of this petition is how to comply with the two provisions cited by the petitioners. **Mr. Ongoya** learned counsel for the petitioners submitted that the constitution makes many provisions for many people in this country. And that this petition places substantial question of law in respect of rights of women in this country. He urged us that Article 27 should be read in its totality when interpreting and advancing the rights enshrined there. He contended that Article 27(6) and (8) which use the words *'shall'*is a mandatory requirement in so far as affirmative action programmes are required. He contended that the people of Kenya approved affirmative action programs and by their nature compromised certain rights in order to compensate certain disadvantaged groups. In historical perspective, the women of this country fall within the disadvantaged groups. According to **Mr. Ongoya** Article 27(8) uses the word *'shall take legislative and other measures to implement the principle that not more than two thirds of the elective or appointive bodies shall be of the same gender'* and he further contended that the draftsmen used the term "shall" twice in Article 27(8) to avoid doubts making the obligations to comply mandatory. He also contended that one cannot break the ceiling for that would be violation of the Constitution. In short, it is the position of the petitioners that the Constitution has set the maximum and the minimum rights to be enjoyed by the petitioners or a person of any gender**.** **Mr. Ongoya** contended that the women of this country are not entitled to less than a minimum guarantee provided to them by the Constitution. He also contended that JSC in performing its functions under Article 172 does not have a free hand in the way it conducts its business. It has a very limited discretion and must comply with the complete provisions of the Constitution.

The argument of the petitioners was supported by the Interested Parties in contending that Article 27 (8) is definitive of ratio, fractions and percentages and it gives gender ceilings and carpets which must not be broken by anyone operating within the Constitution. In their view the logical construction of Article 27(8) is that no gender should exceed two thirds and that no gender should fall below a third in any elective or appointive position.

On whether Article 27 can be implemented or is a progressive implementation, the Petitioners were of the view that it was an enforceable section and can be realized on an immediate basis. **Mr. Ongoya** learned counsel for the Petitioners submitted that the entire Chapter 4 which deals with the Bill of Rights has never been suspended and the claim that the Article has to be progressively realized is misplaced. On whether Article 27 is just a principle, **Mr. Ongoya** submitted that it is a constitutional requirement which must be implemented with immediate effect. In his view the Constitution is not a collection of piers, latitudes and that it is not a toothless bulldog. He says the petition is about the choice between whether the draftsperson intended to see gender faces and appearances at every cadre of Judiciary and whether it intended to give lip service to International instruments. He also contended that Kenya has certain obligations and has agreed to proceed to eliminate gender inequality, to adapt appropriate measures to stop events which can result in discrimination against women and vulnerable groups within our society.

Ms Muthoni Kimani for the 1st respondent submitted as follows: The questions raised are relevant to the Government and it must be directed to the Government of Kenya in appropriate manner. She contended that the obligations under Article 27 can only be achieved when legislative programs and other activities are put in place. Article 27 falls under general implementation of the Constitution and the Government has five years within which to put in place programmes to address the issues under Article 27. In her view there is no allegation that the Attorney General has violated any provisions of the law. Equally there is no allegation of violation by the State. All violations are said to have been committed by the 2nd Respondent. And in addressing whether there has been any violation by the 2nd Respondent, the Constitution has to be read as a whole. This is to understand whether the issues raised are premature or ripe for determination. She also contended that the petitioners have misconstrued, misinterpreted and wrongly understood the meaning and import of Article 27(8) A plain reading of the Article cannot be said to originate a substantial right which can be raised and determined and this is exactly what the Petitioners are trying to do. And lastly, **Ms Muthoni** submitted that Article 27(8) is derivative of the language used in International Instruments and Conventions which require the State to take certain steps and measures in a progressive manner and over a period of time.

Now, it is our duty to determine the crux of this dispute. The starting point is that Constitutional

interpretations should be purposive. Rights should be read in accordance with the general purpose of having rights, the protection of individuals against an overbearing organ of the State. Furthermore, we think that Judges should strive to capture within their decisions the purpose of each individual right. Of course by purpose we do not mean what some framers may have intended to mean in the past, rather we mean the best modern theory that can be devised to justify the existence of the right in question and how it addresses a particular injustice. As a matter of caution we must restate that legislatures seldom act in a vacuum, they usually respond to a situation of which they are fully cognizant and of which we too as interpreters of their handwork must be fully cognizant or at least try to do so thoroughly. This is not judicial creativity, it is judicial commonsense. Although it cannot be denied that a given factual context may make it more or less difficult to determine whether or not one has encountered the situation described, it is possible to identify circumstances in which considerations of public welfare of particular gender may justify departures to a greater of lesser degree from the standards which are appealing to commonsense and logic. In dealing with the values which take on concrete dimensions, in which they have to be applied, in a matter which permits a certain margin of appreciation. Perhaps it is important to point out that in order to justify a constitutional court adopting a broad and using the living three principles in the interpretation of the constitution, there must not be ambiguity, inconsistency and unreasonableness, lack of legislative purpose of obvious imbalance or lack of proportionality which can result in absurd conclusions. In all these situations, we would be justified in breathing life into any particular provision/article/sub-article in order to achieve a situation which enhances justice and diversity within our society. Any other approach would in our humble view be a usurpation of the role of the Constitution framers and the intention of the citizens who ratified it through a referendum.

We have been invited by **Mr. Ongoya** learned counsel for the Petitioners to breathe life and use our creativity in order to interpret Article 27(8) in a manner that meets the intention of the framers. Our answer is that any spirit or nourishment by this court must arise directly from the fabrics, roots, foundation and drawings found within the Constitution. The intention cannot justifiably be crafted from outside the living tree. We do not wish to destroy the tree by putting dangerous insecticides in order to weed or get rid of an element which we feel is likely to interfere with the growth of the tree. It is not our mandate to prescribe our version of what we feel is correct and appropriate insecticide. There may be a weed, insect or foreign element on the tree but we can only use the supplied formula to nourish the tree to the expectations and intentions of the drafters. The owners have given us a limited prescription, formula and medicine to cure the alleged deficiencies suffered by a particular group within our society. In reality we can only carry out an operation on the patient in a medically prescribed manner. We cannot decree a surgical operation to be carried out when our task is to prescribe a simple painkiller on the patient. We can also not go into a surgical ward to achieve an unorthodox process which might result in an operation to kill the patient. The point we are making is that where the constitution allocates power to an authority and that authority exercises that power within the parameters of the Constitution, then this court has no jurisdiction to interfere with the exercise of that function. On the other hand, where a party exercises a power outside its jurisdiction, then this court has the power and authority to declare it null and void when the contravention is proved. The question is whether JSC in exercise of its mandate under Article 172 as read together with the JSC Act did strictly, sufficiently and satisfactorily complied with Article 27(8), and secondly, whether Article 27 gives rise to an immediate right which has to be implemented and enforced by the court. Article 27(6) (7) and (8) state as follows;

"27(6) To give full effect to the realization 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 (60 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.

Article 27(6) rolls out the first step to give full effect to the realization of the rights guaranteed under Article 27 and it states that the State shall take legislative and other measures including affirmative action programs and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. It is important to state that in order to give full effect to the attainment or realization of the rights guaranteed under Article 27 as a whole the State is required to take;

(1) Legislative action.

(2) Other measures including affirmative action

(3) The state is also required to put in place policies designed to redress any disadvantage suffered as a result of past discrimination.

Sub-article (7) provides that any measures taken shall adequately provide for benefits on the basis of genuine need. It means in our understanding that the actions stated under sub-article (6) must be undertaken on the basis of genuine need and requirement by individuals or groups who have suffered past or present discriminations. Sub-article (8) crowns or lays the foundation for the dispute before court. There are two things that can be derived from sub-article (8);

(1) In addition to the measures contemplated in clause 6 which is that the State shall take legislative and other measures.

(2) It must also in addition implement the principle that not more than two thirds of the members of the elective or appointive bodies shall be of the same gender.

In addressing that question, it is important to understand the basics which are that the rights contained in the Bill of Rights are interrelated and mutually supportive. The specific Constitutional rights must not be seen in isolation but must be understood in their textual settings and in their social and historical context. **Mr. Muite** learned counsel for the 2nd respondent submitted that the provisions of Article 27 (6), (7) and (8) are a directive principle which give a dream hope that we can all aspire to attain. The language of Article 27(8) on a plain reading cannot be said to originate a specific and substantive right on which an individual or group of persons can purport to base a claim, what the article does is to create a duty directed at the State as an entity in International law i.e. to take legislative and other measures to implement an international principle which is universally decreed and accepted. Equally Article 27(8) does not create any duty or a right which can be directed definitively against the 2nd Respondent to perform its functions in a particular manner. Each organ of State has its role clearly set out in the Constitution

As was rightly pointed out by **Ms Muthoni Kimani** for 1st Respondent, Article 27 is derivative of the language used International Human Rights Conventions such as the International Covenant on Economic, Social and Cultural Rights or the United Nations Convention on Elimination of all forms of Discrimination against Women which place obligations upon State parties to take legislative and policy measures to achieve progress in areas where certain groups or individuals have suffered disadvantages or past discriminations. For example the United Nations Convention on the Elimination of all forms of Discrimination against Women reads;

"To take all appropriate measures including legislations to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."

This court has regard to International Instruments which our country has subscribed to whether or not they have become part of our domestic law, courtesy of Article 2 of the Constitution, 2010. It is a fundamental duty of State and every State organ to observe, respect, promote and protect and fulfill the fundamental freedoms in the Bill of Rights. Article 21(2) clearly states that the State shall take legislative policy and other measures including the standards to achieve the progressive or the immediate realization of rights within the Bill of Rights. It is therefore incumbent upon the State and State organs to ensure strict and correct implementation whether through legislative or policy measures to attain

minimum and maximum human rights issues. These measures, in our view, are by their nature progressive in character since enactment of legislation and formulation of policies is basis of determining the realization and achievement of such rights. It is therefore right to say that since they are to be achieved through legislation and policy measures, they are progressive in character and can only be attained over a period of time. We also agree with **Mr. Paul Muite** learned counsel for 2nd Respondent that the rights under Article 27(6), (7) and (8) are aspirational in nature. They create legitimate expectation on the part of the citizens that the Government would indeed formulate and undertake legislative and policy measures. In the case of the **Government of the Republic of South Africa & others vs Grootboom & others Case No.11 of 2000 LRC 2001 Vol 3 at page 209** the issue of right to housing or right to have adequate housing was in issue. The applicants relied on an article in the Constitution of South Africa requiring the State to take reasonable measures within available resources to ensure progressive realization of their basis rights to housing. In a majority decision the Constitutional Court of South Africa rendered itself in the following manner;

"It was well established that socio-economic rights under the south African Constitution were justiciable: the question was how to enforce them in a given case. Section 26 of the Constitution obliged the state to provide everyone with access to housing. The state also had to foster conditions that enabled citizens to gain access to land on an equitable basis. Those in need had a corresponding right to demand that such be done. However, the obligation imposed upon the state was not an absolute or unqualified one. That it was an extremely difficult task for the state to meet its constitutional obligations in the prevailing socio-economic conditions was recognized by s 26, which expressly provided that the state was not obliged to go beyond available resources or to realize those rights immediately. Accordingly the High Court order ought not to have been made. The state had to take reasonable and other legislative measures to achieve and realize the right of access to adequate housing, as well as devising and implementing within its available resources a comprehensive and co-ordinated programme progressively to realize such right. In determining whether a set of measures was reasonable, it was necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. That programme had to include reasonable measures to provide relief for people having no access to land, no roof over their heads, and living in intolerable conditions or crisis situations. In the instant case, although considerable thought, energy, resources and expertise had been and continued to be devoted to the process of effective housing delivery, and what had been realized to date constituted a major achievement, the state housing programme nevertheless fell short of compliance with such requirements, in that it failed to make reasonable provision within its available resources for those people separately in need of access to housing. It followed that the appeal would be allowed in part and the state ordered to act to meet the obligation imposed upon it by s 26 of the Constitution by devising, funding, implementing and supervising measures to provide relief to those in desperate need and the Human Rights Commission, which had a constitutional obligation to 'monitor and assess the observance of human rights in the Republic', would monitor and report on the efforts made by the state to comply with its s 26 obligations.

Section 28 of the Constitution provided that a child had the right to parental or family care and the right to appropriate alternative care where the former was lacking. Through legislation and the common law, the obligation to provide shelter in s 28 (1) (c) was imposed primarily on the parents or family and only alternatively on the state. It followed that s 28(1) (c) did not create any primary state obligation to provide shelter on demand to parents and their children where the children were being cared for by their parents or families. In the instant case, it was not contended that the children who were respondents be provided with shelter apart from their parents. In the circumstances, there was no obligation upon the state to provide shelter to those of the respondents who were children and, through them, their parents in terms of s 28(1) (c). The High Court had therefore erred in making its order based on s 28. Furthermore, it would be anomalous if people who had children had a direct and enforceable right to housing under s 28(1) (c) of the Constitution, while others who had none or whose children were adult were not entitled to housing under that section, no matter how old, disabled or otherwise deserving they might be: the carefully constructed constitutional scheme for progressive realization of socio-economic rights would make

little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand.

The differences between the relevant provisions of the International Covenant on Economic, Social and Cultural Rights and the Constitution are significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of s 26 of the Constitution. These differences, in so far as they relate to housing, are: (a) the Covenant provides for a *right to adequate* housing while s 26 provides for the *right of access* to adequate housing and (b) the Covenant obliges states parties to take *appropriate* steps which must include legislation *while the Constitution obliges the South African state to take* reasonable legislative and other measures. Every state party to the Covenant is bound to fulfill a minimum core obligation by ensu5ring the satisfaction of a minimum essential level of the socio-economic rights, including the right to adequate housing. Accordingly, a state in which a significant number of individuals is deprived of basis shelter and housing is regarded as prima facie in breach of its obligations under the Covenant. A state party must demonstrate that every effort has been made to use all the resources at its disposal to satisfy the minimum core of the right, which obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is not possible to determine the minimum threshold for the progressive realization of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right, matters which vary according to factors such as income, unemployment, availability of land and poverty. There may be cases where it is possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, it could not be done unless sufficient information is placed before a court enable it to determine the minimum core in any given context, something that had not been done in the instant case, thereby rendering it unnecessary to decide whether the court should determine in the first instance the minimum core content of the right.

Drafters are assumed to understand and appreciate the need of the people and the laws enacted are directed to problems which are made manifest by past experiences. Kenyans through their representatives and August 4th, 2010 referendum enacted the correct constitution which they consider to be reasonable for the purpose for which it was enacted. Presumption is therefore in favour of the position that the drafters gave what they thought was adequate in terms of the needs of each branch of our society. We have used the word adequate loosely to demonstrate that it is unlikely that all scenarios and cases were considered in full and on the basis of information and needs certain rights were given and others were ordered or indicated to be achieved progressively or incrementally. As judges we are awake to the fact that it is inconceivable and impracticable to achieve a perfect working nation that has completely, sufficiently, effectively, efficiently, adequately, satisfactorily and clearly addressed all the needs of all persons in the nation. The law does not prevent or frustrate a particular interest group and if it does it is unconstitutional or repugnant to justice and morality. There are contemplated situations which can be addressed and answered progressively and with the passage of time and on the basis of genuine need. We cannot lose sight of the subsidiary nature and machinery of enforcement and implementation of Article 27(6) (7) and (8). Parliament remains free to choose the measures which it considers appropriate in those matters which are governed by Article 27. Review by the courts concerns only the conformity of those measures with the requirements of the constitution in mind. This court has always recognized that it is not the maker of the laws. It will enforce and uphold the laws as it finds them. To attempt to promote policies that are not found in the Constitution or to prescribe what we believe to be the correct public attitudes or standards is not our judicial function. When men and women in their right mind have given themselves a certain prescription, it is they and no one else has the right to pass judgment upon their unwise, and unfair judgment. Our clear reading of Article 27(8) is that the state is obliged to take positive action to meet the needs and redress any disadvantages suffered by individuals or groups because of past discrimination. In determining affirmative action programmes and other measures we must recognize that we live in a society in which there are great disparities. Millions of our people are living in deplorable conditions and in great poverty. There are many girls and boys who have no access to the basic minimum of education. There is a high level of unemployment, inadequate resources and some people have no access to the basic minimum facilities a human being should enjoy. These conditions already existed when the constitution was adopted and a commitment to address and transform our

society into one in which there will be human dignity, freedom and equality was born. One may say as long as the conditions are not addressed, the aspirations will have a hollow ring. Failing to discharge State obligations under Article 27(8) in our view can give rise to a redress before court. By the same token it must be noted that any assessment as to whether the government has discharged its minimum core obligations must be dependent on the benefits to be accorded and on the basis of genuine need of all the vulnerable groups within our society. Article 27(8) obligates the Government of Kenya to take necessary steps to the maximum of its available resources and the genuine needs to all its citizens. In order for a State to be able to attribute its failure to meet at least its minimum core obligations due to any event or circumstance, it must demonstrate that every effort has been made within its disposition in an effort to satisfy as a matter of priority the minimum obligations set out in Article 27 as a whole.

It is clear from the extract from International Conventions that every party state is bound to fulfil a minimum core obligation by ensuring the satisfaction of a minimum enjoyment of the rights enshrined under Article 27. There is no indication that the Government is prima facie in breach of its obligation under the International Conventions and Article 27. **The International Covenant of Economic and Cultural Rights (1995)** by **Craven** states as follows;

"The concept of minimum core obligation was developed by the committee to describe the minimum expected of a State in order to comply with its obligation under the covenant. It is the floor beneath which the conduct of state must not drop if there is to be compliance with obligation. Each right has a minimum essential level that must be satisfied by the State parties."

In our view, minimum core obligation of the State is determined generally by having regard to the needs of the most vulnerable groups that are entitled to the protection of the right in question. It is also our view that it is not possible to determine the minimum threshold for the progressive realization of the right to affirmative action without first identifying the needs and opportunities for the enjoyment of such a right. The needs and the opportunities will vary according to different vulnerable groups and such varieties must be wholistically addressed. One may say the determination of a minimum core concept in the context to a right in affirmative action presents a difficult question especially the principle that not more than two thirds of the members of the elective or appointive bodies shall be of the same gender. This is so because the needs of different groups are diverse and there are legal implications which must be put in place in order to attend to the first difficult component of elective principle. The difficult questions relating to the definition of minimum in context of a right of two thirds in particular whether the minimum core obligation should be defined generally or with regard to the specific group of people. An issue which would arise is whether the measures taken by the State or state organ to realize the rights awarded by Article 27 are reasonable. In that regard we think there may be cases or situations where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken or to be taken are reasonable and satisfy the needs and aspirations of all vulnerable groups. A case may arise where affirmative action would be used to reward already advantaged members of our society. The poor girls, the vulnerable groups from Northern Kenya, Turkana, Borana and Coast need and require more special attention than their counterparts in other parts of this country. It therefore follows the State must put programmes, policies and legislations to provide adequately for those who are unable to speak for themselves. What might be appropriate in a rural area may not be appropriate in an urban area where people are looking for employment and career advancement. In our view therefore, Article 27(6) (7) and (8) create positive obligations upon the State. The State is required to device a comprehensive and workable plan to meet its obligations in terms of the said sub-sections. And the time frame within which the State must comply is given as upto five years from 27th August 2010. The extent of the State obligations is defined by three elements;

(1) The obligation to take reasonable legislative and other measures

(2) To achieve the progressive realization of a right

(3) The measures taken must adequately provide for benefits on the basis of genuine needs.

What constitutes reasonable legislative and other measures must be determined in the light of the fact that

the Constitution creates different categories of vulnerable groups. The Constitution also allocates powers and functions amongst different State organs who must co-operate in carrying out their Constitutional tasks. In our view a reasonable programme must clearly indicate and allocate responsibilities and tasks to the different implementing State organs. It is therefore necessary to have coordinated and comprehensive legislative policies and programmes in consultation with all the vulnerable groups in order to comply with the requirements of the law. It is necessary to have a framework legislation at a National level now that there will be devolved counties. The Government must ensure that the National and County Governments have laws, policies, programmes and strategies that are adequate to meet its obligation under Article 27. The measures must establish coherent programmes towards the progressive and the immediate realization of all the rights within the State's available means. The programmes and the legislations must be capable of facilitating the realization of the right. The precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive, not for the courts. We think the measures they adopt must be reasonable, practicable and they must be able to address the long term and the short term needs of the vulnerable groups of our society. In the South African case (supra) it was held at page 30;

"The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.

In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long terms needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review."

In regard to Article 27(4), the drafters were aware of the past history of discrimination and realized that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The Constitution has also identified various vulnerable groups of our society who have been victims of discrimination in the past. The extent to which the Constitution has addressed their grievances is both immediate and in future. Article 27 as a whole is clearly not only meant to prevent discrimination or inequality, but also in our context and history to eliminate them presently and in the future. It is an attempt to level the playing field where legislation is inadequate or does not address the needs of a particular vulnerable group. To the extent that people were disadvantaged by the past discriminatory laws or practices in the socio, economic, political and education fields, Article 27(8) permits Parliament to enact legislation for the advancement of such people. ***(See the Supreme Court of Namibia Case No.98 of 1998 Michael Andras Mula vs the President of the Republic of Namimbia page 13)***.

In our view the breadth of the language of Article 27(8) is clear. Parliament is mandated to do what it thinks appropriate for the purpose of enforcing or securing the enforcement of the principle of two third gender. There is no limitation on what Parliament can do in this regard. For us we can only enlarge rights and take appropriate steps where a right has been breached. Government through Parliament needs to address the measures set out and choose only those measures which are considered suitable to each of the particular vulnerable group. We cannot in all honesty prescribe a medicine when we do not know the ailment of the patient before us. Had we been supplied with the evidential disability suffered or inflicted by the JSC upon the female gender we would have crossed the river and grabbed JSC by the neck with the words that ***'you should never tamper with the rights of our mothers, daughters, sisters, aunts and***

nieces." We reckon that judicial appointments should be based on merits, nondiscrimination and they must reflect the diversity of our people but in this case we have no evidence that JSC in the exercise of its functions under Article 172 as read together with the JSC Act failed to comply with Article 27. We think that JSC conducted the short listing, the interviews and the recommendations of the five Supreme Court Judges in accordance with the provisions of part V of the JSC Act 2011, Section 30 of the said Act and all the relevant provisions of the Constitution.

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 and regard was followed in the execution of their mandate. The purpose of Article 27(8), in our view, is to provide or place a <u>future obligation</u> upon the State to address historical or traditional injustices that may have been encountered or visited upon a particular segment of the people of Kenya. It is the responsibility of the Government by designing policies and programmes and seeking the intervention of Parliament through legislation to provide an appropriate and just remedy to an individual whose guaranteed rights or freedoms have been infringed or denied. We think that the rights under Article 27(8) have not crystallized and can only crystallize when the State <u>takes legislatives or other measures or when it fails to put in place legislative or other measures, programmes and police designed to redress any disadvantaged</u> within the time set by the Fifth Schedule to the Constitution 2010. The Government may proceed step by step and if an evil is particularly experienced in a particular area, it is required to address it through policies, programmes and legislative process. Whether we use or employ the broad purposive, living spirit, liberal approach in order to advance or enrich the rights enshrined in our Constitution, we are unable to do so in the circumstances of this case. We think that we have said enough to demonstrate that Article 27(8) of the Constitution means no more and no less than it is to be gathered from the plain words of its provisions and is not to be given an extended meaning which cannot be discerned or spelt out in the words used without unnecessarily doing violence to the language of Article 27. Article 27 imposes no duty on the part of the Government other than the requirement to progressively take legislative and other measures to implement the said principle. It is also our view that Article 27 as a whole or in part does not address or impose a duty upon the Judicial Service Commission in the performance of its Constitutional, Statutory and administrative functions. We think any claim on Article 27 can only be sustained against the Government with specific complaints and after it has failed to take legislative and other measures or after inadequate mechanisms by the State. To say Article 27 gives an immediate and enforceable right to any particular gender in so far as the two thirds principal is concerned is unrealistic and unreasonable. The issue in dispute remains an abstract principle which can only be achieved through an enabling legislation by Parliament. We cannot in our estimation give what is not contained or found or intended by the drafters. To do so would be tantamount to fragrant abuse of our Constitutional responsibility to interpret the constitution objectively, plainly, responsibly, purposively, broadly, contextually and liberally. We are obliged to apply the law as it is at the moment and as we deem just and permissible without rocking the foundation and the intention of the drafters, and not as any party thinks the law should be. The Constitution gives the Judiciary the power to interpret and enforce the Constitution. We know for a fact that that power and independence does not enable us to do what we like or think to be right by undertaking incursions into a territory solely reserved for the Executive and the Legislature. That reservation was made by the Constitution which also imposed the restriction upon us. This court cannot therefore behave like the Octopus stretching its eight tentacles here and there grasping powers not constitutionally spared for us. To grant the orders sought would undoubtedly be encroaching upon policy and legislation undertakings which are not reserved for the Judiciary.

The charge of Constitutional impropriety leveled against the JSC is without any evidential basis and therefore misconceived and unfounded. We are unable to uphold such allegations and assertions for it is not for this court to pronounce policy or to legislate.

In conclusion: dear petitioners, we regret to inform you that your petition has been rejected. It is hereby ordered dismissed. It is a missile that was fired before first ascertaining the target. This petition appears to be a guided missile launched not only at the JSC but also at the Constitution itself inadvertently without tangible aggression, complaint or grievance. Please understand that we intend no offence by our decision. We do not hold you in contempt. In fact and indeed we do not regard the women who were not considered for the Supreme Court as less deserving than those who were recommended and appointed. It

is not their failure but because JSC exercised a legitimate discretion within the parameters of the law in favour of those who performed better than them. We realize from your submissions and conduct that you will find this decision disappointing but your disappointment should not be exaggerated by the thought that this rejection reflects in any way on your legal and human worth. You have our sympathy in the sense that it is too bad that you did not succeed. It is in the nature of our work that we cannot always guarantee success to applicants and respondents who file their cases before us no matter what they think of their case, if the law and facts be not on their side. We found your grievances misconstrued and unfounded. To borrow from the **Ghanian** case and to paraphrase, **Mr. Ongoya** Advocate and associated counsel erected a "NO ENTRY" sign post to the appointment of the five Supreme Court Judges. **Mr. Muite** Advocate with the assistance of **Ms Muthoni Kimani** and associated counsel took up the role of a demolition squad to successfully tear down the said sign post without physical or verbal force of violence but factual legal construction of the law and facts both of which favoured them.

To the Petitioners and supporters we advise that you keep your feminine missiles to their launch pads until the State acts on policies and programmes as are envisaged in Article 27(6) and (8) and the Legislature has legislated accordingly to set the formulae, mechanisms and standards to implement the spirit and import of the whole Constitution within the time frame set by the Constitution or in default of their complying within that time frame.

We commend you for the great passion and fervor with which you pursued this Petition before us, the disturbing asides notwithstanding. Due to the Public interest and *furore* created by the Petition, we urge you to remain vigilant and to keep the State and the Legislature on their toes until, the women, all the women of Kenya are accorded full recognition and their capabilities appreciated. If we were to decide this case on moral grounds or we were conducting a lottery or giving honorary degrees we would have granted your prayers.

For the Respondents, you are ultimately entitled to the benefits that attach to being successful litigants. For these you may properly celebrate but we must cut short your celebrations as we are unable to grant you costs due to the nature of the Petition before us. It is accordingly so ordered.

Dated, signed and delivered at Nairobi this 25th day of August 2011.

J. W. MWERA
JUDGE

M. WARSAME
JUDGE

P. M. MWILU
JUDGE