



**Kamau v Radido & 6 others (Being Sued as the Officials of the Kenya Magistrates and Judges Association) (Petition E226 of 2024) [2024] KEHC 5683 (KLR)
(Constitutional and Human Rights) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5683 (KLR)

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

PETITION E226 OF 2024

EC MWITA, J

MAY 23, 2024

BETWEEN

HON. LADY JUSTICE NANCY JACQUELINE NJUHI KAMAU PETITIONER

AND

HON. MR. JUSTICE STEPHEN OKIYO RADIDO 1ST RESPONDENT

HON. TOM MARK OLANDO 2ND RESPONDENT

HON. MR. JUSTICE EDWARD MURIITHI 3RD RESPONDENT

HON. RHODA YATOR 4TH RESPONDENT

HON. DAFFA HASSAN OMAR 5TH RESPONDENT

HON. KIONGO KIONGO 6TH RESPONDENT

MR. DANIEL SEPU 7TH RESPONDENT

**BEING SUED AS THE OFFICIALS OF THE KENYA MAGISTRATES AND
JUDGES ASSOCIATION**

JUDGMENT

Introduction

1. In a notice dated 14th March 2024, the Kenya Magistrates and Judges Association (KMJA) the respondent, notified its members that the position of the High Court judges' representative to the Judicial Service Commission (the JSC) was due to fall vacant. Elections would be held on 11th May 2024 to elect a representative.



2. On 15th March 2024, the executive director of the respondent invited members interested to stand for that election to submit expression of interest and nomination forms duly endorsed by at least 20 members by the close of business on 4th April 2024.
3. On 4th April 2024, Hon. Lady Justice Nancy Jacqueline Njuhi Kamau, (the petitioner), submitted nomination forms endorsed by 29 judges. On 6th April 2024, the respondent's executive director sent to members a list of validly nominated candidates and a separate list of unsuccessful candidates with the reasons. The petitioner was unsuccessful on the ground that since the respondent had a female magistrate representative to the JSC whose term was still running, the petitioner, being a woman, was precluded under Rule 4.2 of the respondent's Election Rules from contesting for the position.
4. The petitioner lodged an appeal against the decision to excluded her from contesting to the respondent's Dispute Resolution Committee in accordance with rule 6.4 of the Election Rules. The appeal was, however, dismissed by national council in a letter dated 12th April 2024, thus affirming the executive director's decision.

Petitioner's case

5. Aggrieved, the petitioner has filed a petition dated 2nd May 2024 against the respondent through its officials challenging the decision as unconstitutional. The petitioner states that the decision dated 4th April 2024 cited eligibility criteria under rule 4.2 of the election rules as read with article 171(2) (d) of *the Constitution* is to ensure that the validly nominated candidate is a male judge.
6. The petitioner avers that because the vacancies of the High Court Judge representative and that of the magistrate representative fall vacant at different times, it is unlikely that a female Judge will be eligible to contest for that position in the foreseeable future. The petitioner argues that she was disqualified because she is a woman which is discriminatory; a violation of her fundamental rights and a contravention of article 27 of *the Constitution*. She argues that the decision also contravenes her rights under articles 36 and 38 (2) (a) (3) (c) of *the Constitution*.
7. The petitioner further argues that at the time she lodged her appeal, the respondent's dispute resolution committee was not properly constituted. The national council's decision was also null and void.
8. The petitioner takes the view, that the decision further violates and threatens to violate her right to be a candidate for a position in a public office and, if elected, to occupy the office. The decision also deprives judges of the High Court the right to elect a representative of their choice and has a consequence of permanently hindering competitive politics in that election. The petitioner takes a further view, that the decision contravenes article 81 of *the Constitution*.
9. Calling for a harmonious reading of *the Constitution*, the petitioner argues that article 171(2)(d) should be read alongside articles 10, 36 38 and 81 of *the Constitution* so that the purposes, values and principles of *the Constitution* can be given effect to.
10. A further argument is made that the tenets of article 81 of *the Constitution* cannot be met in an election where candidates are prevented from contesting on grounds of gender. it is submitted that the decision to exclude female candidates from vying for this seat and male candidates from vying for the position of magistrates' representative is unconstitutional and a breach of article 27 of *the Constitution*. Reliance is placed on the decision in Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR that the decision is discriminatory.



11. The petitioner faults the respondent's interpretation of article 171(2) (d) of *the Constitution* calling it erroneous for purporting to read the article in isolation; adding new words or meaning to the provision by introducing and assigning a specific gender to the representatives of the two separate constituencies envisioned in that article; failed to consider that this seat and that of the magistrates' representative to the JSC are two separate and distinct constituencies and proceeded on the erroneous basis that the two positions envisioned in article 171(2) (d) of *the Constitution* represent the respondent.
12. The petitioner cites the decision in *Kevin Turunga Ithagi v Hedwig Ong'undi & 6 others; Helen Wasilwa & 6 others (as Officials of Kenya Judges Welfare Association) (Interested Parties)* [2019] eKLR to support her argument that the two constituencies (of judges and magistrates) are separate and distinct. Reliance is again placed on *Nelson Andayi Havi v Law Society of Kenya & 3 others (supra)* for the argument that the impugned decision resulted into an absurd outcome.
13. It is the petitioner's case that although rule 4.3 of the provides that if the two positions of the representatives fall vacant at the same time a member of the gender that last held the position will not be eligible to contest, the respondent did not foresee a situation where two positions will ever fall vacant at the same time. The rule is, thus ineffective, impractical and unworkable.
14. The petitioner asserts that the transitional provisions in *the Constitution* cannot be blamed for the decision because they were to operate for a limited period. In that regard, the petitioner argues, the respondent was expected and required to take steps to ensure compliance with article 171 (2)(d) without violating any of the rights and freedoms enshrined in *the Constitution*.
15. According to the petitioner, the interpretation in the impugned decision that justifies violation articles 27 and 38 of *the Constitution* is flawed and offends articles 10 and 259 of *the Constitution*. She relies on the Supreme Court decision in the matter of *Kenya National Commission Rights* [2014] eKLR and *Katiba Institute v Attorney General & 9 others (Petition 17 of 2020)* [2023] KESC 47 (KLR) to support her position.
16. On the basis of the aforesaid grounds, the petitioner seeks the following reliefs:
 - a. A declaration that the petitioner's rights under articles 10, 27, 38 (3) (c) and 47 of *the Constitution* have been violated.
 - b. A declaration that the decision of the respondent set out in its Executive Director's decision dated 6th April 2024 and its National Council's letter dated 12th April 2024 is unconstitutional, null and void.
 - c. A declaration that Rule 4.2 of the respondent's Elections Rules, to the extent that its effect is to permanently exclude women candidates from contesting for the position of representative of High Court Judges in the JSC based on gender, is unconstitutional, null and void.
 - d. An order of certiorari to bring into the High Court for purpose of being quashed, the decision of the Respondent set out in its Executive Director's decision dated 6 April 2024 and its National Council's letter dated 12 April 2024.
 - e. An order of mandamus compelling the respondent to include the petitioner in the list of candidates nominated for the election for the position of High Court Judge Representative to the JSC.
 - f. An order of prohibition restraining the respondent from excluding the petitioner or any other candidate from vying for either High Court Judge Representative in the JSC or Magistrate Representative in the JSC under article 171(2) (d) on the ground of gender.



- g. An order of mandamus directing the respondent to enact rules relating to the election of the respondent's representative to the JSC without discriminating against any candidate on grounds of gender.
- h. Costs of this petition.
- i. Such other or further orders as this Honourable Court shall deem just.

Respondent's case

- 17. The respondent has opposed the petition through a replying affidavit sworn on 8th May 2024 by Daniel Sepu Mayabi, its executive director. The respondent contends that under article 171 (2) (d) of *the Constitution*, the JSC should have one High Court judge and one magistrate, one a woman and one a man, elected by its members.
- 18. The respondent maintains that there is already a female magistrate holding office as a member of the JSC whose tenure is yet to expire. For that reason, if the High Court elects a female representative to the JSC, there would be two female members elected by its members in violation of article 171 (2) (d) of *the Constitution*.
- 19. The respondent argues that in view of the above situation, the constitutional construction sought by the petition will militate against the presumption against absurdity; impracticable or illogical result.
- 20. According to the respondent, the petition seeks to challenge constitutional dictates in article 171 (2) (d) of *the Constitution*. The petition also invites the Court to allow a situation where both representatives may be of the gender, thus a challenge to the validity or legality of *the Constitution* in violation of article 2(4).
- 21. The respondent argues that it is not its rules that barred the petitioner from standing for the election, but *the Constitution*. According to the respondent, by virtue of section 20(3) of the Sixth Schedule to *the Constitution*, it is obligated to conduct elections as and when vacancies arise, while ensuring that those elected are a magistrate and a judge, one woman and one man.
- 22. The respondent posits that it is not possible to challenge constitutional provisions on the basis that their application limits one's rights on account of gender, to participate in an election for the JSC position. The constitutional limitation of rights does not accord the person whose rights have been limited, the right to challenge the validity of constitutional provisions limiting such rights.
- 23. According to the respondent, rule 4.2 of its election rules, is designed to ensure compliance with article 171(2) (d) by providing that the candidate for the position of representative to the JSC, is to be a member who qualifies both in gender and cadre. Further, that if the position of its members to the JSC fall vacant at the same time, a member of the gender that last held the position will not be eligible to contest.
- 24. The respondent is of the view, therefore, that the petitioner's grievance can only be resolved by an amendment to *the Constitution*, which lies with the people directly or through their representatives under articles 255, 256 and 257 of *the Constitution*.
- 25. The respondent contends that it has commenced a process of amending its constitution and rules, thus the petitioner is free to make her contribution during the amendment process. The respondent further contends that the meaning of article 171(2) (d) has been clear to its members, even prior to the formulation of the impugned rule 4.2. It is the settled understanding of the said constitutional provisions that is given effect to by rules 4.2. and 4.3.



26. The respondent maintains that the Court cannot declare a constitutional provision invalid or amend it. Reliance is placed on article 2(3) of *the Constitution* and decisions in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR and *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated))* [2022] KESC 54 (KLR) (Election Petitions) (5 September 2022) (Judgment).
27. According to the respondent, the phrase “one a woman and one a man” as used in article 171(2) (d) of *the Constitution* cannot mean “both women.”
28. The respondent again relies on a book by Justice Aharon Barak ‘Judge in a Democracy, and the cases of *Karisa Chengo & 2 others v Republic* [2015] eKLR; *Apollo Mboya v Attorney General and 2 others* [2018] eKLR and *Center for Rights Education and Awareness & anothers v John Harun Mwau & 6 others* [2012] eKLR on the rules of the interpreting *the Constitution*.
29. The respondent reiterates that the validity of provisions of *the Constitution*, including schedules cannot be challenged in this court; a constitutional provision cannot be read as to invalidate another and article 27 of *the Constitution* cannot be cited to invalidate article 171 (2) (d). Reliance is placed on *Dennis Mogambi Mong’are v Attorney General & 3 others* [2011] eKLR.
30. It is the respondent’s case that the petitioner was president when the representative of the High Court to the JSC whose term has just ended was elected in 2019. Having failed to raise the issue then, the constitutional order ought not be varied to accommodate individual interest, unless through amendment of *the Constitution* under articles 255 as read with 256 or 257 of *the Constitution*.
31. The respondent argues, therefore, that from a plain reading of article 171 (2) (d) together with section 20(3) (b) of the Sixth Schedule to *the Constitution*, the words used cannot possibly mean that two women, one a magistrate and one a judge, can occupy the two positions in the JSC at the same time. The court is urges to dismiss the petition.

Interested party’s case

32. Federation of Women Lawyers Kenya Chapter (FIDA-Kenya), (the Interested party), applied and was joined into these proceedings as an interested party. The interested party has filed an affidavit sworn on 14th May 2024 by Ann Ileri, its executive director in support of the petition.
33. The interested party contends that the respondent’s decision violated the petitioner’s rights guaranteed under articles 10(2) (b), 27(1), (2) & (3) 171(2)(d) and 259 (1) (a) of *the Constitution*. The decision also offends section 7 (2) (a) (i) and (ii) and 7 (2) (i) of the *Fair Administrative Action Act* as read with article 47 of *the Constitution*.
34. According to the interested party, the High Court and the Magistrates constitute distinct constituencies hence the need to meet inclusion of either gender with respect to membership to the JSC within the spectrum of each distinct constituency.
35. The interested party relies on the decisions in *Marilyn Muthoni Kamuru & 2 others v Attorney General & 2 others* [2016] eKLR and *Milka Adhiambo Otieno & another v Attorney General & 2 other* [2012] eKLR. The interested party urges the court to allow the petition.

Analysis and determination.

36. Upon considering the pleadings, arguments by parties and the decisions relied on and having perused the impugned decision, I have distilled three issues for determination. First, whether the decision not



to allow the petitioner to contest for the position of High Court representative to the JSC violated the petitioner's constitutional rights. Second, whether the decision is discriminatory, and third, whether rule 4.2 of the respondent's election rules is unconstitutional.

Whether the decision violates rights

37. The petitioner and the interested party, argue that the decision violates the petitioner's rights and fundamental freedoms, namely; the right of association and political rights guaranteed under articles 36 and 38 (2) (a) of *the Constitution*.
38. The respondent's take is that it acted within the dictates of article 171(2)(a) of *the Constitution* since the vacancy is for a male representative in the JSC, thus has not violated the petitioner's rights and fundamental freedoms
39. This issues turns on the interpretation of *the Constitution*. Article 259(1) provides on how *the Constitution* should be interpreted. In this respect, the Supreme Court stated in Re the Matter of the Interim Independent Electoral and Boundaries Commission, Application No 2 of 2011, [2011] eKLR:

In Article 259(1) *the Constitution* lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that-(a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; and (c) contributes to good governance.
40. In *Communication Commission of Kenya v Royal Media Services and 5 others* [2014] eKLR, the Supreme Court again observed that "*the Constitution* should be interpreted in a holistic manner, within its context, and in its spirit."
41. *The Constitution* should be holistically; purposively and liberally interpreted so as to advance its purposes, give effect to its intents and illuminate its contents. In *Re the Speaker of the Senate & another v Attorney General & 4 others* Advisory Opinion No. 2 of 2013 [2013] eKLR, (at para 156) the Supreme Court stated that "Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretive guidance on *the Constitution*; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents."
42. In 2010, aware of their history, the people of Kenya adopted a transformative Constitution that radically changed not only the structure, but also the architecture in the governance of the country and its institutions. This requires the Court, when interpreting *the Constitution*, to take into account that history, structure, architecture of *the Constitution* and give effect to the aspirations of the people.
43. In *Re, the Matter of the Speaker of the Senate & another v Attorney General & 4 others* (supra), the Supreme Court affirmed the transformative nature of our Constitution, stating:

(51) Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on.
44. In this respect, *the Constitution* should be interpreted as an integrated whole, reading all the provisions together to get their meaning and intentment.



45. In *Katiba Institute v Attorney General & 9 others (Petition 17 of 2020)* [2023] KESC 47 (KLR) (16 June 2023) (Judgment) (with dissent-NS Ndungu, SCJ), the Supreme Court was clear on this when it stated at paragraph 66 that “To understand the import and tenor of a provision of *the Constitution*, the entire Constitution has to be read as an integrated whole, because *the Constitution* embodies certain fundamental values and principles which require that its provisions be construed broadly, liberally and purposely to give effect to those values and principles.”
46. See also the decision of the Constitutional Court of Uganda in *Tinyefuze v Attorney General of Uganda* [1997] UGCC3, that “the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.”
47. With these principles in mind, I turn to respond the issue whether the impugned decision violated petitioner’s constitutional rights.
48. The position for which the respondent has called elections is for a representative of judges to the JSC, a Commission establishes under article 171 (1) of *the Constitution*. Article 171(2) provides for the membership of the JSC. The JSC has 11 members as follows: the Chief Justice, who is the chairperson; one Supreme Court judge elected by judges of the Supreme Court; one Court of Appeal judge elected by judges of the Court of Appeal and “one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates.”
49. The other members are; the Attorney-General; two advocates, one a woman and one a man, of at least fifteen years’ experience, elected by members of the statutory body responsible for the professional regulation of advocates; one person nominated by the Public Service Commission; and one woman and one man, not being lawyers, appointed by the President with the approval of the National Assembly, to represent the public. The Chief Registrar is the Secretary to the Commission.
50. The Supreme Court and the Court of appeal elect one representatives each, while members of the association of judges and magistrates elects two representatives, one judge and one magistrate, a woman and a man. This also applies to the advocates who elect two representatives, a woman and a man. Two members of public, a woman and a man are appointed by the President.
51. Article 171(2)(d) gives two positions to the association of judges and magistrates, a woman and a man, to represent judges and magistrates without stating whether it is the judges or magistrates who should elect a man or woman. That decision is left to the association and its members. However, what is clear from the text of *the Constitution* is that Judges and magistrates have to elect two representatives as long they are a woman and a man. They must not be of the same gender.
52. There is no argument that a vacancy has arisen following the expiry of the term of the male representative. There is also no argument that the female representative’s term has not expired. The question is what gender should be elected to fill the vacancy.
53. The petitioner and the interested party urge that the petitioner should be allowed to contest as not doing so violates her rights and fundamental freedoms. They fault the respondent’s decision not to clear the petitioner to contest on grounds of gender which they argue, is in a violation of several articles of *the Constitution*, including, articles 10, 27 (3), 36, 38 and 81.
54. Article 10 declares that national values and principles of governance, including equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, bind all State organs, State officers, public officers and all persons whenever they apply or interprets *the Constitution*; enact, apply or interpret any law; or make or implement public policy decisions.



55. Similarly, article 27 provides that every person is equal before the law, and has the right to equal protection and equal benefit of the law. According to this article, equality includes the full and equal enjoyment of all rights and fundamental freedoms. Under article 27, women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
56. Article 27(4) directs the State not to discriminate directly or indirectly against any person on any grounds, including sex. Further, article 27 (5) prohibits a person from directly or indirectly discriminating against another person on any of the prohibited grounds. It is plain that article 27 prohibits discrimination of any form on any grounds. It is for this reason that the petitioner argues that the respondent's decision not to allow her to contest because of gender violates her rights and fundamental freedoms.
57. The petitioner again argues that the decision violates her rights guaranteed under article 36(1). The article provides that "Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind."
58. On the other hand, article 38(2) provides that: "Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for— (a) any elective public body or office established under this Constitution; or (b) any office of any political party of which the citizen is a member." Article 38 (2) guarantees the right to free and fair elections and to participate for an elective office established under *the Constitution*. The position of representatives to the JSC is indeed a position established under *the Constitution*.
59. The petitioner's case is that she is pursuing her rights guaranteed under *the Constitution* and the respondent could not constitutionally decline to nominate her on any grounds, including gender.
60. The petitioner's argument is correct that every person has a right to participate in elections and seek to be elected to represent judges in the JSC., a right guaranteed by *the Constitution*. That notwithstanding, this right has to be viewed not only within the text, but also the context of article 171(2)(d) of *the Constitution*. While doing so, one must take into account the fact that all provisions of *the Constitution* have to be read together to achieve harmony and give effect to the constitutional values and principles. That requires articles 10, 27, 36, 38, 81 and 171 to be read together to give effect to the values and principles in *the Constitution* and the wishes and the aspirations of the people.
61. The import of article 171 (2)(d) is to ensure that there is equitable representation, a value in article 10, and give effect to the principle of equality in article 27, so that where there are two positions assigned to a constituency (group), one position should go to a woman and the other to a man. This is in harmony with article 27 (3) which declares that "Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres."
62. Articles 36 and 38 must also be read in harmony with article 171, so that even if the petitioner has the right of association and to participate in elections to represent judges in the JSC, this has to be in accord with the dictates of article 171 (2)(d).
63. In *Katiba Institute v Attorney General & 9 others* (supra), the Supreme Court stated that the entire Constitution has to be read as an integrated whole because it embodies certain fundamental values and principles which must be given effect to. Only then, would the import and tenor of the provision(s) of *the Constitution* be understood,
64. Further, the Supreme Court added that "Where words used in any provision of *the Constitution* are precise and unambiguous, then they must be given their natural and ordinary meaning. The words



themselves alone in many situations declare the intention of the framers because...the language used 'speak the intention of the legislature.' ”

65. Similarly, when interpreting *the Constitution* and developing jurisprudence, the Court should always take a purposive interpretation of *the Constitution* as guided by the Constitution itself. (Re the Matter of the Principle of Gender Representation in the National Assembly and the Senate, SC Advisory Opinion No. 2 of 2012; [2012] eKLR.).
66. I have weighed the petitioner’s grievance in line with articles 10, 27, 36 and 38 against the architecture and structure of article 171(2)(d). Article 171(2)(d) is clear on the representation of Judges and magistrates. It allocates two positions, one woman and one man, to be elected by members of the association of Judges and Magistrates-the respondent. The plain edict in article 171(2) (d) does not leave room for innovative interpretation by courts as to what it means.
67. Article 171(2)(d) in its plain language, allows election of one woman and one man by members of the association of judges and magistrates to the JSC at any one time. The article cannot, in my view, be read so as to yield the possibility of two women or two men being elected by the respondent’s members to represent judges and magistrates in the JSC during the same term.
68. A purposive reading of article 171(2)(d) and noting the clear language used, yields the view, that representatives of the judges and magistrates to the JSC, elected by members of the association, must at any one time be “a woman and a man”, thus giving effect to the principle of equality in article 27 of *the Constitution*. In that respect, the impugned decision not to allow the petitioner to contest for the position of judges’ representative to the JSC did not violate her rights guaranteed by any of the articles of *the Constitution*. This is because *the Constitution* itself does not contemplate the possibility of two women or two men sitting in the JSC to represent Judges and magistrates at the same time.
69. The petitioner has argued that following the decision in Kevin Turunga Ithagi v Hedwig Ong’undi & 6 others; Helen Wasilwa & 6 others (as Officials of Kenya Judges Welfare Association) (Interested Parties) (supra), the constituency of judges and that of Magistrates are distinct. According to the petitioner, judges and magistrates can, therefore, elect representatives of their choice whether man or woman. I note that that decision is on appeal. This court will, therefore, not say much on this argument.

Discrimination

70. The petitioner and interested party have again argued that the decision is discriminatory on grounds of gender a, violation of article 27 of *the Constitution*. The respondent maintains that the decision is not discriminatory.
71. As already alluded to, article 27 and indeed *the Constitution*, abhors discrimination on any grounds. Black’s Law Dictionary, 9th Edition defines “discrimination” as (1) the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship. (2) Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured. (emphasis)
72. In Peter K Waweru v Republic [2006] eKLR, the Court stated that “Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to....restrictions to which persons of another description are not made subject, or have been accorded privileges or advantages which are not accorded to persons of another such description.”
73. From the above definition, discrimination is any distinction, exclusion, or preferences made on the basis of differences to a persons or group of persons based on considerations such as race, colour, sex,



- religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunities, or treatment between two persons or group of persons.
74. Article 27 of *the Constitution* upon prohibiting discrimination of any form on any grounds, declares that every person is equal before the law and has the right to equal protection and equal benefit of the law. That equality includes the full and equal enjoyment of all rights and fundamental freedoms.
75. In *Jacqueline Okeyo Manani & 5 others v Attorney General & another* [2018] eKLR, this Court stated:
[29]. *The Constitution* advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination...will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim. (emphasis)
76. It is the duty of the party who alleges discrimination to demonstrate that indeed there is unreasonable differential treatment accorded to him or her to amount to real discrimination. The court then while determining whether the action complained of is discriminatory, applies an objective test to see whether there is reasonable justification or rationality in the action.
77. In the present case, the decision complained of was taken to enforce article 171(2)(d) of *the Constitution*. If discriminative it be called, there was reasonable justification and rationality that was dictated by *the Constitution*. The decision was intended to enforce constitutional requirements, thus did not amount differential treatment that would amount to discrimination.

Constitutionality of rule 4.2

78. The petitioner and interested party have also challenged the constitutionality of rule 4.2 of the respondent's election rules. According to the petitioner and interested party, the rule is constitutionally invalid because it permanently excludes women candidates from contesting for the position of representative of Judges in the JSC, in violation of *the Constitution*.
79. Rule 4.0 of the respondent's election rules is generally on eligibility and candidature. Rule 4.1 provides that the candidate for the position falling vacant should be a fully paid up member in good standing for the two years preceding the nomination date unless the candidate has been a judicial officer for less than two years, in which case the restriction will not apply.
80. Rule 4.2 which is material here, states that the candidate for the position of representative to the JSC "shall be a member who qualifies in both gender and cadre." On the other hand, rule 4.3 is to the effect that if both positions of representatives to the JSC fall vacant simultaneously, a member of the gender that last held the position will not be eligible to contest. The question here is whether rule 4.2 is constitutionally infirm.
81. For a rule or regulation to be declared void, there must be clear and irreconcilable tension or inconsistency between the rule/regulation and *the Constitution* or parent statute. As a general principle of interpretation of statutes, a law or regulation should as much as possible be read to be consistent and be declared unconstitutional or void only where it is impossible to rationalize or reconcile it with *the Constitution* or statute.



82. In this regard, the Constitutional Court of South Africa emphasized in *re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZALC12:2001 (1) SA545 (CC), 200(10) BCL1079 CC ZALC12:2001(1), that it is the duty of a judicial officer to interpret legislation in conformity with *the constitution* so far as it is reasonably possible, while on the other hand, the legislature is under a duty to pass legislation that is reasonably clear.
83. To determine constitutionality of a provision, regulation or rule, the Court has look at both the purpose of enacting the section, regulation or rule and see if it is in conflict with *the Constitution* or whether the effect of implementing the provision, regulation or rule contravenes *the Constitution*. (See *Olum and another v Attorney General* [2002] 2 EA 508; *R v Big M Drug Mart Ltd* (1985) Can LII 69 (SCC) [185] 1 SRC 295)
84. In undertaking the inquiry, the court has to lay the impugned provision against *the Constitution* or statute and determine whether there is irreconcilable tension between the rule and *the Constitution* or statute.
85. When the JSC was first constituted, judges and magistrates, members of the respondent, elected their first representatives. Judges elected a man while magistrates elected a woman.
86. Section 20 (3)(b) of the Sixth Schedule to *the Constitution* required that the term of the High court representative was expire after three years so that terms of commissioners do not expire at the same time to maintain quorum of the JSC. The term of the male representative elected by judges expired after three years, while the female representative completed her term of five years. This meant that terms of the two representatives expire at different times.
87. The fact that the term that has expired is of the male representative, means that the vacancy is for a male representative. For that reason, rule 4.2 in providing that the candidate should qualify in “both gender and cadre” is tandem with article 171(2)(d) of *the Constitution*. Similarly, the fact that terms of the two representatives end at different times is a constitutional creation which cannot be blamed on the respondent.
88. The respondent, fully aware of the constitutional requirement in article 171(2)(d), formulated rule 4.2 so that those to stand for election must qualify in gender and cadre. If the position is for a male representative, the candidates have to be male and judge, or female and magistrates, as the case may be.
89. The respondent conscious of the unfortunate situation presented by article 171(2)(d) of *the Constitution* on which rule 4.2 is anchored, and in order to provide some measure of solution, formulated rule 4.3 to address the imbalance the best way it could. In that respect, in the event terms of the two representatives to the JSC end at the same time, rule 4.3 requires that those to be elected would have to be of different gender from those who were serving immediately before the vacancies.
90. During the hearing of this petition, counsel for the petitioner and the interested party were at pains to point out to the court the best way to resolve the situation. Counsel for the interested party suggested that the Court could order that election of the male representative be held in abeyance until the female representative’s term expires so that elections for the two positions can take place at the same time. This argument, though attractive, lacks constitutional backing.
91. The petitioner and the interested party again argue that rule 4.3 is ineffective, impractical and unworkable for requiring that if the positions of both representatives to the JSC fall vacant at the same time, a member of the gender that last held the position will not be eligible to contest. They argue that the respondent did not foresee a situation where the two positions will ever fall vacant at the same time.



92. The term the representatives to the JSC having been set by the Constitution at 5 years with eligibility for re-election, this Court cannot legitimately shorten or extend the term. Upon a representative's term expiring, members have a right to elect their representative and this Court cannot purport to interpret the Constitution in a manner that would curtail Judges' or magistrates' right to elect their representative to the JSC.
93. The situation the petitioner finds herself in is not the best at any rate. However, the duty of the Court is to interpret the Constitution in a manner that advances its purposes, gives effect to its intents and illuminate its contents.
94. Having read rule 4.2 alongside article 171(2)(d) of the Constitution, and taking into account the principle of equality in articles 10 and 27 of the Constitution, as well as the principle in article 259 that the Constitution be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law and the human rights and fundamental freedoms and permits the development of the law, I am unable to see any inconsistency or tension between rule 4.2 and the Constitution. The rule does not also contravene article 24(2) of the Constitution. Consequently, I find no constitutional invalidity in rule 4.2.
95. There is the argument that the respondent's dispute resolution committee has not been established and therefore the decision of the national council is invalid. This issue was dealt with in Hon. Erick Kuto v Kenya Magistrates and Judges Association & another (Petition No. E 422 of 2023) and therefore it is not for repeating here.

Conclusion

96. Having considered the petition, arguments by parties and the Constitution, the conclusion I come to, is that the decision not to allow the petitioner to participate in the election for the judges' representative to the Judicial Service Commission did not violate her rights and fundamental freedom.
97. I also find that the respondent's decision not discriminative on grounds of gender. The Constitution itself dictates that there be one woman and one man and since the magistrates' representative is a woman, and still serving, the representative for judges has to be a man as required by article 171(2)(d) as read with article 27 of the Constitution.
98. I further find no constitutional infirmity in rule 4.2 of the respondent's election rules. The rule is in conformity with article 171(2)(d) of the Constitution because the Constitution determines the gender of the representative to the Judicial Service Commission and the rule is only giving effect the constitutional requirement.

Disposition

1. Flowing from what I have stated above, the petition is dismissed.
2. As to costs, I take the view, that costs being discretionary, coupled with the fact that the petitioner is a members of the respondent, the appropriate order to make in the circumstances, is that each party do bear own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2024

E C MWITA

JUDGE

