REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL PETITION NO. 232 OF 2019

(FORMERLY MACHAKOS CONSTITUTIONAL PETITION No. 17 OF 2019)

(AS CONSOLIDATED WITH

CONSTITUTIONAL PETITION NO. 277 OF 2019)

IN THE MATTER OF ARTICLES 10, 22, 23, 165, 201 &

259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 6, 189, 202, 203, 217,

218, 219, 220, 221& 224 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 3, 35, 36, 38, 39, 40, 42, 102,

189, 190, & 191 OF THE PUBLIC FINANCE MANAGEMENT ACT

AND

IN THE MATTER OF DIVISION AND ALLOCATION OF

REVENUE BETWEEN THE NATIONAL AND COUNTY GOVERNMENTS

BETWEEN

KENYA HUMAN RIGHTS COMMISSION.....1ST PETITIONER

TRANSPARENCY INTERNATIONAL-KENYA.....2ND PETITIONER

AFRICA CENTRE FOR OPEN GOVERNANCE.....3RD PETITIONER

WANJIRU GIKONYO.....4TH PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

CABINET SECRETARY FINANCE.....2ND RESPONDENT

THE NATIONAL ASSEMBLY.....3RDRESPONDENT

AND

COUNCIL OF GOVERNORS.....1STINTERESTED PARTY

COMMISSION ON REVENUE ALLOCATION.....2ND INTERESTED PARTY

THE SENATE.....3RDINTERESTED PARTY

JUDGMENT

INTRODUCTION:

[1] On the 30th day of May 2019, the Principal Secretary, National Treasury, Dr. Kamau Thugge, issued a press release notifying the general public that the budget statement for the fiscal financial year 2019/2020 budget would be delivered by the Cabinet Secretary, National Treasury and Planning, in the National Assembly on Thursday, 13th June 2019 at 3.00.P.M.

[2] On 12th June 2019, the first three Petitioners and the Institute for Social Accountability moved to this Honourable Court, sitting at Machakos, in Constitutional Petition number 17 of 2019 seeking two declarations the first of which was that the tabling of the Budget estimates for the financial year 2019/2020 without incorporation or inclusion of Division of Revenue Bill 2019 was illegal and unconstitutional mainly because the budgeting processes prescribed in Article 218 and Article 221 of the Constitution of Kenya, 2010 had not been conducted within the same time frames; the second declaration sought was that any subsequent tabling of budget estimates by the 2nd Respondent without inclusion of the Division of Revenue Bill was illegal and unconstitutional.

[3] Alongside this petition was filed a motion under Rule 23 (1) of the **Constitution of Kenya, 2010 (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** primarily seeking two conservatory orders; firstly, restraining the Cabinet Secretary, Finance, from tabling or presenting the budget estimates for the financial year 2019/2020 before the passing of the Division of Revenue Bill 2019 pending the hearing of the motion *inter partes.* The second prayer was in similar terms save that the conservatory order was sought pending the hearing of the Petition itself.

[4] When the petition was placed before Kemei J, on 13 June 2019 under a Certificate of Urgency, he ordered that it be transferred to this Court's Constitutional and Human Rights Division at Milimani, Nairobi. It was eventually registered in this Division as Petition Number 232 of 2019. On 2 July 2019, the Petitioners were allowed to withdraw the Motion and at the same time were granted leave to amend their petition.

[5] The amended petition was subsequently filed on 26 July 2019. In the amended petition the Institute for Social Accountability which is described in the petition as a civil society locally registered as a trust, was substituted with Wanjiru Gikonyo. The 3rd Respondent and the 3rd Interested Party were also introduced for the first time in this amended petition in those respective capacities.

[6] Prior to the amendment of the petition, the Appropriation Act, 2019 was passed and assented to more particularly on 28 June 2019. It is the passage of this Act that provoked the amendment of the petition. The passage of this Act also provoked a petition by the 4th Petitioner against the Respondents and the Controller of Budget seeking more or less similar orders as in the amended petition. This petition was lodged in this Court as Petition Number 277 of 2019.

[7] In view of their similarity, the two petitions were consolidated on 9 March 2020. It is this consolidated Petition that is before Court. In it the Petitioners are seeking orders which are framed as follows:

> ***"a) A declaration that the tabling of the budget Policy highlights and the legislative proposal by the 2nd Respondent for the Financial Year 2019-2020 without incorporation/inclusion of the Division of Revenue Bill 2019 is illegal and unconstitutional and contrary to Articles 1, 2, 3 and 10 of the Constitution;***
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> b) ***A declaration that the passing of the Appropriation Act 2019 by the 3rd Respondent without the passing and incorporation/inclusion of the Division of Revenue Bill 2019 is illegal and unconstitutional and contrary to Articles 1,2,3, 202, 203, 217, 218, 219, 220, 221 & 224 of the Constitution;***
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> c) ***The passing of the Appropriation Act 2019 by the 3rd Respondent without passing, considering/incorporating the Division of Revenue Bill 2019 is illegal, null and void for being contrary to Articles 1, 2, 3, 202, 203, 217,218,219,220, 221 & 224 of the Constitution.***
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> d) ***A declaration that any subsequent tabling of budget Policy highlights and the legislative proposal by the 2nd Respondent without the passing, incorporation/inclusion of the Division of Revenue Bill is illegal and unconstitutional.***
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> e) ***A declaration that the passing of any subsequent Appropriation Act and subsequent processes including the passing of the***

Finance Bill by the 3rd Respondent without the passing and incorporation/inclusion of the Division of Revenue Bill is illegal and unconstitutional and contrary to Articles 1, 2, 3, 202, 203, 217, 218, 219, 220, 221 & 224 of the Constitution.

f) ***A declaration that in the absence of the Division Revenue Bill 2019 no monies can be allocated to the Constituencies for the period 2019 under the National Government Constituencies Development Fund by virtue of section 4 of the National Government Constituencies Development Fund 2015 and any monies allocated and spent have been allocated in an illegal manner.***

g) ***A declaration that in the absence of the Division Revenue Bill no monies can be allocated to the Constituencies under the National Government Constituencies Development Fund by virtue of section 4 of the National Government Constituencies Development Fund 2015 and any monies allocated and spent have been allocated in an illegal manner.***

h) ***Costs of the Petition."***

[8] The Respondents opposed the petition and in that regard they filed grounds of opposition and a replying affidavit; in particular, the 1st Respondent filed grounds of opposition while the 3rd Respondent filed both the grounds of opposition and a replying affidavit. The 2nd Respondent never filed any response whatsoever.

PETITIONERS' CASE:

[9] On 17 July 2019, Mr. George Kegoro, the Executive Director of the 1st Petitioner, swore an affidavit in support of the petition on his own behalf and on behalf of the rest of the Petitioners. According to that affidavit, the 2nd Respondent tabled the budget policy and legislative proposal for the financial year 2019/2020 on 13 June 2019. As much as this budget policy and legislative proposal had been presented before Parliament, Mr. Kegoro swore that the Division of Revenue Bill which dictates the sharing of revenue between the National and County Governments had not been agreed upon and passed by the two houses of Parliament. He was also aware that there was an impasse on the Division of Revenue Bill, 2019 where the Senate and the National Assembly had disagreed on the estimates to be allocated to the Counties. At the heart of the disagreement was the proposal by the National Assembly to lower the amounts due to the Counties.

[10] Mr. Kegoro also stated that as at the time he swore his affidavit, he was aware that the Appropriation Act, 2019 had since been passed and assented to. He swore further that devolution is entirely dependent on the vertical sharing of revenue between the National and County Governments and in the absence of this sharing, it is not possible for the Counties to deliver on their mandate and responsibilities as they are enjoined to by the Constitution, in particular, under the 4th Schedule thereof.

[11] According to Mr. Kegoro, the processes of tabling the budget policy guidelines and the legislative proposal by the Cabinet Secretary for Finance and the passing of the Appropriation Act and Finance Bill can only be subsequent to the passing of the Division of Revenue Bill or has to await the mediation process contemplated under Article 217 of the Constitution. This is for the following reasons; first, the passing of the Appropriation Act in the absence of the Division of Revenue Bill undermines the spirit of devolution which is based on cooperation and interdependence between the two levels of government; second, the mediation process under Article 217 of the Constitution is rendered nugatory; third, both levels of government have to fulfil their function and mandates under Schedule 4 of the Constitution; and finally, the Constitution has provided for a remedy in the event that Parliament disagrees on the Division of Revenue since national government can still function in the absence of the Appropriation Act as contemplated under Article 222 of the Constitution. The other reasons why the Finance Bill can only be enacted after Division of Revenue Bill are that if it is done otherwise, it will undermine the role of Parliament under Article 94 of the Constitution which is to, among others, protect the Constitution and promote the democratic governance of the Republic and also because none of the levels of government is superior or inferior to the other.

[12] Mr. Kegoro also swore that without passing the Division of Revenue Bill 2019, it was not possible to ascertain monies for the Constituency Development Fund pursuant to section 4 of the National Government Constituencies Development Fund Act, 2015; this provision of the law provides that the Constituencies Development Fund consists of monies not less than 2.5 % of the National Government share of revenue as divided by the Annual Division of Revenue Act. He added that the County Governments are not able to prepare and pass their annual budgets because according to Article 224 of the Constitution such budgets and appropriation bills can only be prepared on the basis of the Division of Revenue Bill passed by Parliament in accordance with Article 218.

RESPONDENTS' CASE:

[13] The 1st Respondent filed grounds of opposition in which, he urged that the petition is *res judicata* because the issues raised in it have been heard and determined by the Supreme Court in its **Advisory Reference No. 3 of 2019, Council of Governors and 47 others v the Attorney General and 3 others** (Hereinafter "Advisory Reference No. 3 of 2019"). Accordingly, the 1st Respondent urged, the amended petition is either an attempt to persuade this Court to reach a decision that is contrary to the Supreme Court decision or an invitation for this Court to act in vain. Finally, he urged that the amended petition has been overtaken by events because the impasse between the National Assembly and the Senate on the Division of Revenue Bill has been resolved and the Division of Revenue Act, 2019 enacted.

[14] On its part, the 3rd Respondent filed grounds of opposition and a replying affidavit. As we understand them, these grounds are as follows:

a) This Honourable Court has no jurisdiction to hear and determine the Petition for the reasons that the matters raised in the Petition, particularly matters relating to the Division of Revenue and related legislative processes are inherently unjusticiable for offending the political question doctrine, having been constitutionally entrusted to other political organs of government.

b) The process relating to enactment of the Division of Revenue Act is not subject to timelines and therefore is exclusive from the

process of approval of estimates and enactment of the Appropriation Act.

c) There is no constitutional imperative that the Division of Revenue Act precedes the Appropriation Bill.

d) The obligation to divide revenue between the National and County Governments is on Parliament and not the National Assembly. As a result, there is no material placed before Court to prove that it is the National Assembly that is in breach.

e) The County Governments cannot and will not be starved of funds as alleged by the Petitioners because under regulation 38 of the Public Finance Management Act (County Governments) Regulations, 2015, the Controller of Budget has the mandate to authorise expenditure to a County Government, before approval of budget estimates by County Assembly.

[15] The Replying Affidavit for the 3rd Respondent, was sworn on the 23 March 2020 by Mr. Michael Sialai, the Clerk of the National Assembly. He began by regurgitating the grounds of opposition and, for good measure, he deponed on matters of law, generally highlighting the budget process in Kenya and the principles of public finance management.

[16] Nonetheless, he also deposed on other matters of fact that ordinarily are the only matters which ought to be captured in an affidavit. On the question of Division of Revenue Bill, 2019, Mr. Sialai, swore that it was published as National Assembly Bill No. 11 of 2019 on 6 March 2019.The National Assembly's Budget & Appropriation Committee, tabled its Report on the Division of Revenue Bill, 2019, dated 19 March 2019, in the National Assembly. In the Report, the committee noted that the Division of Revenue Bill, 2019, was based on the two Houses' resolutions made on the Budget Policy Statement, 2019, considering the recommendations of various stakeholders, which included the Commission on Revenue Allocation and the Council of County Governments.

[17] He swore further that the National Assembly Budget and Appropriation Committee's decision on the Division of Revenue Bill was based on the following grounds; firstly, the minimum of fifteen per cent (15%) of the revenue allocated to Counties as per last audited accounts in terms of the Constitution of Kenya, 2010, had been met; secondly, the last audited accounts were for the Financial Year 2014/2015; thirdly, in the Financial Year 2018/19, the nationally raised revenue forecast had underperformed to an estimated Kshs. 100 Billion and that through Supplementary Appropriation, the Counties were expected to surrender around Kshs. 9 Billion of that allocations made in that financial year's equitable share and to this extent the baseline had to be adjusted by Kshs. 9 Billion; fourthly, after adjusting the baseline of the Financial Year 2018/2019, the Budget Committee increased the baseline by Kshs 5. 038 Billion; fifthly, the baseline was increased considering fifty per cent (50%) of funds transferred to Counties are for personnel expenses and the ideal growth rate in personal expenses being around four per cent (4%). Due to the fiscal framework, the Committee adjusted the baseline at two per cent (2%) and; finally, the figure was thus informed by fact that the National Government, due to revenue underperformance, had cut its own budget by Kshs. 37 Billion and hence the Equitable Share for Counties was proposed at Kshs. 310 Billion.

[18] He also swore that there was an expected shortfall in revenue in the financial year 2019/2020 because there was revenue loss in terms of collections in the financial year 2018/2019. Accordingly, the committee proposed an equitable share of revenue out of which the County Government was proposed to get Kshs 310 Billion while the National Government was allocated Kshs 1,561.42 Billion. There were also conditional allocations from the National Government of Kshs. 22.89 Billion and Loans and Grants from Development Partners of Kshs. 38.70 Billion. In support of these facts, Mr. Sialai exhibited to his affidavit a copy of this report. It is on the basis of the report that the Division of Revenue Bill was passed by the National Assembly on 26 March 2019 without amendments and transmitted to the Senate for its consideration.

[19] In order to insulate and protect County Governments from in-year reduction in the approved allocations in the Division of Revenue Act due to in-year variations in revenue collection by the National Government, Mr. Sialai deposed that Clause 5 of the Division of Revenue Bill, recommends that in cases of revenue shortfalls, it shall be borne by the National Government

[20] On the question of the basis of the National Assembly's proposed equitable share for the County Government, Mr. Sialai swore that the amendments introduced to the Finance Act, 2018, resulted in a shortfall in projected revenue for the Financial Year 2018/2019. As such the projected ordinary revenue was overstated by Kshs. 117.70 Billion. This necessitated a revision of the fiscal framework that resulted in the reduction of the expenditures of the Executive (Ministries, Departments, Agencies), Parliament and the Judiciary, through the Supplementary Budget 1 of the Financial Year 2018/2019 by Kshs. 37.60 Billion. On this issue, he exhibited a copy of the National Assembly's Budget & Appropriation Committee Report on the Supplementary Estimates for the Financial Year 2018/2019

[21] As far as the question of the consideration of the Division of Revenue Bill by the Senate is concerned, Mr. Sialai swore that the Senate considered the Division of Revenue Bill, 2019, on 30 April 2019 and passed it with the following amendments*:*

a) An increase of Kshs. 25.67 Billion to the Equitable Share allocation to County Governments from Kshs. 310 Billion to Kshs. 335.67 Billion.

b) The removal of the Conditional Allocation on leasing of medical equipment of Kshs. 6.20 Billion.

c) It deleted the word "determined" appearing immediately after the words "the threshold to be" and substituting therefore the words "prescribed in Regulations" in Clause 5 sub-clause (1).

[22] He also exhibited a copy of the Senate's Bill Tracker and amendment to the Division of Revenue Bill, 2019, comprising the Senate's proposed allocation of revenue raised nationally. The National Assembly rejected the Senate's amendments to the Division of Revenue Bill, 2019, and the Bill was accordingly referred to mediation in accordance with Article 113 of the Constitution of Kenya, 2010. He also tabulated in his affidavit, the proposed schedule to the Division of Revenue, 2019 which tabulation showed the deviations between the National Assembly and the Senate.

[23] On the question of the mediation outcome and the status of the Division of Revenue Bill, 2019 as at 23 March 2020, Mr. Sialai swore that the mediation process did not arrive at a figure that was agreeable to the two Houses of Parliament and as a result, the Division of Revenue Bill, 2019 was defeated. Following this defeat, the National Assembly republished the Division of Revenue Bill 2019 on 16 July 2019. A copy of the republished Bill was exhibited to his affidavit.

[24] On its part, the Senate also published its own version of the Division of Revenue Bill. A copy again was exhibited to the affidavit of Mr. Sialai. The two versions were presented to the public for their input. Subsequently, on 26 July 2019, the National Assembly considered and passed the Division of Revenue (No. 2) Bill. 2019 where the Equitable Share for Counties was proposed at Kshs. 316 Billion. The Senate had also passed its own version where it settled on Kshs. 335 Billion as the equitable shareable revenue for Counties.

[25] In the meantime, a number of County Governments had signed their Appropriation Bills despite Article 224 of the Constitution of Kenya, 2010, expressly providing that Appropriation Bills of Counties must be based on the Division of Revenue Bill passed by Parliament. The Counties which passed their Appropriation Bills included; Kakamega, Makueni, Machakos County and Nyeri Counties. Others were Tharaka Nithi, Kirinyaga, Kiambu, Vihiga, Kajiado, Marsabit, Kericho, West Pokot, Nyamira, Murang'a, Tana River and Baringo Counties. It was Mr. Sialai's position, that going by the Petitioners' arguments, these Counties had contravened Article 218 of the Constitution by passing their Appropriation Acts before enactment of the Division of Revenue Bill, 2019, and the County Allocation Revenue Bill, 2019.

[26] Be that as it may, the National Government enacted the Appropriation Act, 2019, in line with Article 221 of the Constitution of Kenya, 2010, which expressly provided a timeline within which the Act must be enacted, and which did not link the division of national revenue estimates resources including grants, loans, and payment for pensions and domestic borrowing. According to the Act, the National Government would access certain amount that is nondiscretionary to allow the government to run. According to Mr. Sialai, Article 221 of the Constitution has no exit clause, but only contemplates a scenario where the Appropriation Act has been passed but has not been assented to.

[27] As far as the question whether the National Assembly can pass the Appropriation Bill without finalization of the Division of Revenue Bill, Mr. Sialai swore that the budget process of the National Government is preceded by the approval of the Budget Policy Statements by end of February; two months before the Estimates of Revenue and Expenditure are tabled in the National Assembly.

[28] According to him, the expenditure proposals are entirely determined on the basis of the forecasts of expected revenue collections, the need to maintain a sustainable fiscal deficit (gap between expenditure and tax revenues), planned borrowing to bridge the gap, and the criteria in Article 203 (1) of the Constitution of Kenya, 2010. He added that the Division of Revenue Bill is published upon approval of the Budget Policy Statements by the National Assembly and it is on the basis of the approved Budget Policy Statements that the Division of Revenue Bill is published. This process is clearly provided for in the Public Finance Management Act.

[29] He also deposed that the Revenues contained in the Division of Revenue Bill are essentially estimates and it is on the basis of these estimates or forecast that the National Treasury prepares estimates of revenue and expenditure of the national government for submission to Parliament. While the National Treasury can deviate (with explanation as provided under the Public Finance Management Act), the figures for County Governments cannot be varied because they are contained in the published Bill which is tabled in the National Assembly as early as March in any particular year. It is for these reasons that the National Government's budget process is allowed to proceed with the indicative amounts of revenue (estimates of revenue) to approve its budget and the Appropriation Bill.

[30] Accordingly, there is no way in which the passing of the submission of budget estimates affect the amounts indicated for allocation to County Governments as contained in the published Division of Revenue Bill. In short, the completion of the Division of Revenue Bill need not precede submission of budget estimates. According to Mr Sialai, it is a constitutional fact that the Division of Revenue Bill process in Article 218 of the Constitution has no time limit, while the processes of approval of budget estimates and the Appropriation Act or vote-on-account have a binding time limit. Thus, the failure to approve the Division of Revenue Bill, which can happen due to failure of the constitutionally prescribed mediation processes, should not stop a separate constitutionally mandated process with a constitutional deadline. To illustrate his point, Mr. Sialai swore that previously there had been delays in enactment of the Division of Revenue Bills; to be precise, the bills for the years 2014 and 2017 had been delayed.

[31] Mr. Sialai also swore that in the event that the Division of Revenue Bill is not enacted in time and the National Government has already enacted the Appropriation Bill, as is the case in this petition, a Supplementary Appropriation Bill would be introduced to integrate any potential variations in the National Government share - reducing the approved Appropriation if County Governments are allocated more money in the approved Division of Revenue Bill. County Government Allocations are guaranteed under Article 203 (2) of the Constitution, and cannot be touched under Article 219 of the Constitution.

[32] He emphasized that that failure to submit the budget estimates and their approval before the 30th day of June of any financial year would have grave implications for the National Government and the country as a whole. Again, Section 39 of the Public Finance Management Act No. 18 of 2012, expressly requires the Appropriation Act be assented to by 30th day of June each year. Accordingly, failure by the National Assembly to enact the said law within the stipulated timelines would have been a violation of the law. It followed that, in passing the Appropriation Bill the National Assembly complied with the mandatory provisions of Article 221 of the Constitution and section 39 (1) of the Public Finance Management Act No. 18 of 2012.

[33] Mr. Sialai concluded his affidavit by saying that the delay in the enactment of Division of Revenue Bill into law is not fatal because in the Financial Year 2016/2017, the Division of Revenue Bill was enacted in September and in any event, Regulation 38 of the Public Finance Management (County Governments) Regulations, 2015, anticipate the current political stalemate and the delays and allows County Governments to access up to fifty percent (50%) of the budget pending enactment of the Division of Revenue Bill into law.

PARTIES'SUBMISSIONS:

[34] On the 9th day of March 2020, this Court directed that the petition be disposed of by way of written submissions and so parties were

directed to file and exchange these submissions within specific timelines. The Petitioners, the 1st and 3rd Respondents and, the 2ndInterested Party duly filed their submissions. The 2nd Respondent, the 1st and 3rd Interested Parties did not file any submissions. However, they made oral submissions when the petition came up for highlighting of submissions.

1ST, 2ND AND 3RDPETITIONERS' SUBMISSIONS:

[35] At the outset, the Petitioners submitted that in as much as the context of the Petition was the 2019/2020 financial year budget process, this process is itself a recurring annual exercise and that is why in framing the amended petition, the Petitioners sought to cover future budget processes. They submitted that as at the time of hearing and determination of the Petition, the 2019/2020 budget process would have been passed.

[36] On the issue of jurisdiction, the Petitioners acknowledged that the Respondents had challenged the jurisdiction of this court, to determine the petition based on the political question doctrine and justiciability in the wake of the ***Supreme Court Advisory Opinion Reference No. 2 of 2013*** and the decision in ***National Assembly v Institute of Social Accountability [2017] eKLR.*** In answer to this question, the Petitioners submitted that the position adopted by the Respondents had been dismissed by the majority decision of the Supreme Court in ***Advisory Opinion No. 3 of 2019***. Again, the National Assembly had argued in that Reference that this same questions could properly be determined by this honorable court in exercise of its jurisdiction under Article 165 (3) (b) and (d) of the Constitution. We understand the Petitioners to be saying that the 3rd Respondent cannot, on the one hand, have been arguing in the Supreme Court that only this court has jurisdiction to determine the questions raised in the petition and, on the other hand, argue in this court that it has no jurisdiction to determine the same questions.

[37] Counsel argued further that the political question doctrine cannot shield the National Assembly from their actions, specifically on acts purported to be done under the authority of the Constitution. Only the Courts, and in this case this Honourable Court, has the jurisdiction to determine whether such acts have been done in accordance with the Constitution except for those matters that are subject to the jurisdiction of the Supreme Court. Counsel urged that the legality of the executive or administrative actions is to be determined by the courts which are independent of the executive branch and for this submission he cited the cases of ***In the Matter of Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 [2011) eKLR*** *and* ***Pharmacy and Poisons Board v George Wang'anga & 5 others [2020] eKLR***).

[38] Citing **Jared P Cole** in his article, ***The Political Question Doctrine: Justiciability and the Separation of Powers (2014) (accessed from https://fas.org/sgp/crs/misc/R43834.pdf on 1st June 2020)***, the learned counsel for the Petitioners urged further that the political question doctrine is a doctrine that cannot be relied on to deprive this court the jurisdiction to hear and determine the issues before it and that a distinction must be drawn between a case presenting a political question and a case presenting political ramifications.

[39] It was also argued on behalf of the petitioners that the questions raised relate to the constitutionality of an act that took place in the 2019/2020 financial year and whether subsequent acts should be conducted in the same fashion. In particular, whether the Cabinet Secretary for Finance in tabling the budget policy statement and legislative proposals on 13 June 2019 without the passing of the Division of Revenue Bill 2019 acted contrary to the Constitution and the Public Finance Management Act; and, whether, in subsequent years, the highlights of the Budget Policy Statement can be tabled in the absence of the Division of Revenue Bill. Finally, the petition raised the question whether the allocation of the National Government Constituencies Development Fund under Section 4 of the National Government Constituencies Development Fund Act can be allocated in the absence of the Division of Revenue Bill. In the learned counsel's view, these questions are justiciable and not political questions.

[40] Counsel urged that the presentation or tabling of the budget policy statement is provided for in section 40 of the Public Finance Management Act and that according to that section, the presentation of the budget policy highlights by the Cabinet Secretary for Finance is not merely a ceremonial event for the following reasons; firstly, it is incumbent upon the Cabinet Secretary to submit the legislative proposals on revenue raising measures of the National Government at the same time the budget policy highlights are made; secondly, following the legislative proposal by the Cabinet Secretary, the relevant committee of the National Assembly introduces the Finance Bill; thirdly, any recommendations on revenue which follow the tabling of the budget policy highlights and legislative proposals on revenue raising have to be consistent with the Division of Revenue Act; and, finally, the Finance Bill is passed 90 days after the passing of the Appropriation Bill. And it is the presentation of the budget policy highlights that triggers the passing of the two pieces of legislation in accordance with section 41 of the Public Finance Management Act.

[41] Counsel urged that leaving out the Division of Revenue Act which essentially divides revenue among the two levels of government at the time of tabling the budget policy highlights would mean that the budget presented by the Cabinet Secretary, Finance, as it was indeed done on 13 June 2019, was not only incomplete but it did not also capture the principles of transparency, accountability, comprehensiveness and good governance.

[42] It was also urged that the Cabinet Secretary, Finance, has the obligation to ensure that the proposals tabled and the entire budget in general complies with the law and to this end, the learned counsel for the Petitioner cited the decision in ***International Legal Consultancy Group v Senate & another [2014] eKLR*** where it was held, among other things, that every officer in every state organ and at both levels of government must respect and comply with any mechanism of accountability established by the Constitution and the law to the fullest extent possible. The Court, on its part, must ensure that this is done more particularly taking into account Article 259 of the Constitution that requires the Constitution to be interpreted in a manner that promotes good governance and accountability.

[43] It was also submitted that the presentation of the budget policy highlights in Parliament is one of the ways in which citizens participate in the budget making process and are also informed of where and how public funds will be utilized. Therefore, to omit a component which informs the public of the monies that will be divided between the two levels of government or to present a budget otherwise, in a manner that excludes such an important component of the budget, leaves the citizens in a state of opaqueness. In support of this point counsel cited the decision of ***Jayne Mati & Another v Attorney General & 2 Others [2011] eKLR*** which, while making reference to Article 201 (a) of the Constitution, emphasized the need for openness and accountability including public participation in public finance matters.

[44] On the question whether the allocations to the National Government Constituencies Development Fund under Section 4 of the National Government Constituencies Development Fund Act, 2015 can be made in the absence of the Division of Revenue Bill, counsel submitted that it is public knowledge that the disbursement of the Constituency Development Funds for the financial year 2019/2020 was done in the absence of the Division of Revenue Act 2019. This latter Act was assented to on 17 September 2019 and is deemed to have come in to force on 1 July 2020. The information available on the National Government CDF website showed that disbursements for financial year 2019/2020 were made on 20 March 2020. These disbursements, according to counsel were clearly in contravention of Section 4 of the National Government Constituencies Development Fund Act.

[45] Without passing the Division of Revenue Act 2019 it was not possible to ascertain monies for the Constituencies Development Fund pursuant to Section 4 of the National Government Constituencies Development Fund Act 2015 which provides that the Constituencies Development Fund consist of monies of an amount not less than 2.5% of all the national government share of revenue as divided by the annual Division of Revenue Act.

[46] The Petitioners concluded their submissions by emphasizing that in as much as the budget process that was challenged was for the 2019/2020 financial year, the budget process was, in its very nature, a recurring exercise, conducted annually. And going by past experience, this process had been marred by the same old questions touching on its legitimacy; it is for this reason that the Petitioners urged that the petition be allowed in the proposed terms.

THE 4TH PETITIONER'S SUBMISSIONS:

[47] On the 4thPetitioner's part, two issues were submitted on her behalf; the first is whether this court has jurisdiction to determine the present dispute or it is barred by the political question doctrine. The second question is relating the meaning given to the phrase 'most recent audited accounts of revenue received as approved by the National Assembly' as expressed in Article 203 of the Constitution.

[48] On the first question, the 4th Petitioner submitted that the Petitioners invoked the court's constitutional application and interpretation jurisdiction under Article 165 (3) (d) (i), (ii), and (iii) in contesting the constitutionality of certain actions and omissions by the National assembly in the 2019/2020 budget cycle which, in their view, violated the Constitution.

[49] According to the 4th Petitioner, the political question doctrine is a function of separation of powers as enunciated in **Marbury vs Madison 5 US 137 (1803)** and which is unique to the American Constitutional context. According to this doctrine, there are certain kinds of political questions that a court ought not to decide because they have been committed to other organs of government. She cited the United States of America's decision in **Baker vs Carr, 369 U.s 186(1962**) at page 210 -211 on the nature of the doctrine and also referred to **Black's Law Dictionary, 6th Edition** page 1158 which defines the political question as:

> ***"Questions of which Courts will refuse to take cognisance, or to decide on account of their purely political character, or because their determination would involve an encroachment upon the Executive or Legislative powers".***

[50] Based on these authorities, it was urged that the political question doctrine is to the effect that certain issues should not be decided by courts because their resolution is committed to another branch of government or because those issues are not capable, for one reason or another, of judicial resolution. The doctrine, however, does not apply to Kenya in the same fashion because of the express provisions of the Constitution more particularly, Articles 10, 165 (3) (d) and 258 which provide the basis upon which this court has a wider mandate to interrogate any questions regarding the constitutionality of any acts by the executive and the legislature including the constitutionality of any policy said to made or any law said to be passed under the auspices of the Constitution.

[51] These articles, to a greater extent, oust the application of the political question doctrine in Kenya because it is on their strength that the courts are not restricted in interrogating virtually any question, whether 'political' or not as long as the act or omission in question is alleged to be in breach of the Constitution. Citing the decision of the Supreme Court in **Communications Commission of Kenya & 5 others vs Royal Media Services Limited [2014] eKLR,** the 4th Petitioner urged that it was held in this case that the Constitution itself requires Kenyan courts to go further than the limits set by the United States' Supreme Court in **Marbury vs Madison (supra)** when interpreting the Constitution. The power of Judicial Review in Kenya, according to this decision, is founded in the Constitution, and according to Article 23 (3), in particular, the High Court has the mandate to grant several reliefs, the list of which is not exhaustive. Again, in **Martin Nyaga Wambora & 3 Others vs The Speaker of the Senate and 6 others [2014] eKLR** where the political question doctrine was raised the Court held that *"the political question doctrine cannot operate to oust the jurisdiction vested on the High Court to interpret the Constitution or to determine the question if anything said to be done under the authority of the Constitution or of any law which is consistent with or in contravention of the Constitution"*. And in **Kanini Kega vs Okoa Kenya Movement & 6 others [2014] eKLR,** courts were cautioned against the tendency to interpret the law in a manner that would divest them of jurisdiction too readily.

[52] And even if the political question was applicable to Kenya, the learned counsel for the 4th Petitioner urged that the Respondents had not demonstrated that the alleged political question met the threshold or the criteria of what amounts to a political question as enunciated in **Baker vs Carr (supra);** in that case it was held that in order for a question to be regarded as a political question it had to satisfy the following conditions:

> *i.* a textually demonstrable constitutional commitment of the issue to a coordinate political department;
>
> *ii.* a lack of judicially discoverable and manageable standards for resolving it;
>
> *iii.* the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;
>
> *iv.* the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches

of government;

v. an unusual need for unquestioning adherence to a political decision already made; or

vi. the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

[53] On the question of the meaning of 'the most recent audited accounts of revenue received as approved by the National Assembly', the 4th Petitioner urged that Articles 201(b) (ii), and 202 of the Constitution required revenue raised nationally to be share equitably among national and county governments. To this end, the Constitution outlines a number of criteria under Article 203 (1) which *"shall be taken into account in determining the equitable shares provided for under Article 202 and in all national legislation concerning county government"*. The principles of predictability, reliability and stability, of County Government revenue are provided for under Article 203 (2) of the Constitution, by providing that the equitable share of revenue for County Governments shall not be less than 15% of all revenue collected by the National Government.

[54] Against this background the 4th Petitioner submitted that, the entry point to adjudication of the meaning of the question of the most recent audited accounts of revenue received as approved by the National Assembly is the theory of a holistic interpretation of the Constitution. This theory requires, alongside the text, consideration of other provisions in question and non-legal phenomena such as Kenya's historical, economic, social, cultural, political context, and experience. As for what holistic interpretation entails, the Petitioner cited **In the Matter of Kenya National Human Rights Commission [2014] eKLR** (at para 26) and **In the Matter of the National Land Commission [2015] eKLR** (at para 277) defining holistic interpretation. It follows that this court is obligated to take judicial notice of, and to remedy Kenya's long history of centralisation of power, resources, and development alongside the persistent struggle for decentralisation and equality.

[55] Bearing this background in mind, the learned counsel for the 4th Petitioner submitted that in order to understand the meaning of the *"most recent audited accounts of revenue received as proved by the National Assembly." in* Article 202(3), of the Constitution, this particular Article should not be read in isolation but must be read with Article 229 (4) and 229 (8) which require the audits to be concluded within nine (9) months after the end of the financial year. When these three provisions of the Constitution are read together, it is reasonable to conclude that, audited results of one financial year must be available by March of the subsequent second financial year, right at the start of the budget cycle of the next following financial year. Accordingly, the audited accounts for the financial year 2019/20 which ended in June 2020 must be available at the latest by March 2021—nine months from June 2020—in time for the 2021/22 budget cycle. The 2021 Division of Revenue Bill must itself be presented by the latest at the end of April 2021 (at least two months before the end of the financial year). It follows that contrary to the 3rd Respondent's submissions, the county revenue estimates under Article 202(3) cannot be based on the results of more than two financial years apart.

[56] In breach of these constitutional provisions and sections 48 and 50 of the Public Audit Act, 2015 the impugned Division of Revenue Bill, 2019 was based on the audited accounts of the 2014/15 financial year – at least four financial years back. This disregard of the law, urged the learned counsel, threatens the constitutional principle requiring county governments to have reliable sources of revenue to enable them to govern and deliver services effectively. The point is that in so far as the Division of Revenue Bill, 2019 did not use the most recent audited accounts of revenue received, the same was unconstitutional. The Division of Revenue, specifically the equitable share of the revenue raised nationally allocated to county governments should be based on the last audited accounts, which must not be more than two financial years apart, at the most.

RESPONDENTS' SUBMISSIONS:

[57] In his submissions, Mr. Emmanuel Bitta, the learned counsel for the 1st Respondent, urged that the issues for determination in the amended petition are similar to two of the issues that were before the Supreme Court in **Advisory Reference No. 3 of 2019** and these were firstly, whether the National Assembly can enact an Appropriation Act before the Division of Revenue Act and secondly, the consequences of the disagreement between the National Assembly and the Senate on the Division of Revenue Bill.

[58] In answer to these questions, the learned counsel for the 1st Respondent urged that the Supreme Court had held that according to Section 39 of the Public Finance Management Act the National Assembly cannot enact the Appropriation Act before enacting the Division of Revenue Act. As to whether the Appropriation Act that had been passed before the enactment of the Division of Revenue Act was constitutional, the Court had held that the provisions of the Constitution were not that precise regarding this matter and therefore their determination on the legality of that Act was prospective rather than retroactive. As for the future Appropriation Act, if any of them would be enacted before the Division of Revenue Act, they would be of "doubtful constitutional validity."

[59] As for the second question, counsel also invoked the opinion of the Supreme Court where it held that where an impasse occurs due to the failure of the mediation process, occasioned by lack of concurrence between the two Houses of Parliament over the Division of Revenue Bill, the National Assembly shall authorize the withdrawal of money from the Consolidated Fund for the purpose of meeting the expenditure necessary to carry on the services of the County Government, during that particular year, until such a time as the Division of Revenue Act is assented to.

[60] Counsel submitted, therefore, that this Honorable Court cannot look any further than the decision of the Supreme Court in **Advisory Reference No. 3 of 2019** in determination of the amended petition. And to the extent that it has been so invited, the Petitioners are effectively seeking this Court to reproduce the decision of the Supreme Court in **Advisory Reference No. 3 of 2019** or to act in vain. He urged the court to reject such an invitation and on this point the learned counsel relied on the United States' Supreme Court decision in ***Ashwander v Tennessee Valley Authority [1963] 297 US 288*** where the Court held that courts should only decide cases entailing *"real, earnest and vital controversy"*. Based on this argument counsel argued that the present petition does not present any real, earnest or vital controversy, as the issues have been finally decided and settled by the Supreme Court.

[61] On those grounds counsel urged that the issues in this petition are *res judicata* as contemplated in **section 7** of the **Civil Procedure Act, cap 21 where** the pertinent part says *"where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such a right shall, for the purposes of this section, be deemed to claim under the persons so litigating."*

[62] Counsel also relied on the decision of the Court of Appeal in ***Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] Eklr*** where it was held that the doctrine of *res judicata* is designed to ensure that there is a finality to litigation and to avoid wastage of limited judicial resources. In particular, the court in that case held that *"without it there would be no end to litigation and the judicial process would be rendered a nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."*

[63] Further the learned counsel urged that while it is true the petition was filed in the public interest under Article 259 of the Constitution, there is need to ensure that even for such matters there has to be a *bona fide* interest of the petitioners in order to avoid unnecessary litigation. Vexatious and mischievous litigation, counsel submitted, ought to be identified and struck down and the abuse of court process prevented and punished so that the objectives of public interest litigation are not violated. To this end counsel cited the Indian Supreme court decision ***Ashok Kumar Pandey v State of West Bengal AIR 2004 SC 280*** where it was held that:

> ***"Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."***

[64] And in ***Okiya Omtatah Okoiti & 2 others v Attorney General & 3 others [2014] eKLR*** this honorable Court held that any person who seeks to institute a claim for the violation of the constitution must do so based on a legitimate, *bona fide* and genuine claim. Counsel concluded by submitting that a party whose position has been upheld by the Supreme Court but insists on this Court's hearing and determining the same matter cannot be said to be acting *bona fides*. Such a party can only be acting in abuse of the court process and ought to bear the burden of costs.

[65] Besides the written submissions, oral submissions were also made on behalf of the 1st and 2ndrespondents this time round by Mr. Kimani Kiragu. The learned counsel adopted the written submissions filed on behalf of his client but also added that the dispute was, more or less, a political question whose determination should be left to such political bodies as Parliament. As such the dispute was not justiciable.

[66] Like the 1st Respondent, the 3rd Respondent submitted that the issues raised in this petition were determined in **Advisory Opinion Reference No. 3 of 2019** and that being the case, the questions raised by the Petitioners have become moot and non-justiciable. On this question of non justiciability, Mr. Josephat Kuiyoni the learned counsel for the 3rd Respondent cited this Court's decision in ***Samuel Muigai Nganga v The Minister for Justice, National Cohesion & Constitutional Affairs & Another [2013] eKLR;*** in that case Lenaola, J. (as he then was) quoted **Lawrence H. Tribe** in his book, ***American Constitutional Law Second Edition*** where he stated, *inter alia,* that in order for a claim to be justiciable, it must present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted.

[67] Again, in the case of ***National Conservative Forum v Attorney General [2013] eKLR*** it was held that courts will not engage in determination of a matter for academic reasons but that there must be a real controversy or dispute before it in order for it to exercise jurisdiction. In view of these pronouncements, counsel urged that this court must not be asked to make determinations on issues that have been overtaken by events. The process of litigation, he urged, is not an academic exercise but a process through which actual disputes are settled. According to the learned counsel, the concerns raised in the petition have already been dispensed with through other channels and it will be a waste of court's time and tax payers' money, for the court to revisit the same issues.

[68] Further, the learned counsel urged that under Article 163 (7) of the Constitution this honorable court is bound by the decision of the Supreme Court in **Advisory Opinion Reference No. 3 of 2019**. That notwithstanding, counsel still addressed the twin issues of whether the Cabinet Secretary for Finance acted contrary to the Constitution and Public Finance Management Act when he tabled the budget policy statement and legislative proposals on 13th June 2019 before the passage of the Division of Revenue Bill 2019 and whether the Cabinet Secretary for Finance could in future, or in the subsequent years, present the budget policy highlights in the absence of the Division of Revenue Bill. The second question counsel addressed was whether any allocations of funds could be made under section 4 of the National Government Constituencies Development Fund Act No. 30 of 2015 without the Division of Revenue Bill.

[69] On the first question, counsel urged that following the enactment of the Division of Revenue Act 2019, the issues raised in the petitions were rendered moot leaving no controversy requiring adjudication by this honorable Court. And if this court was to proceed and hear the petition all it would be doing in rendering its decision is offering legal advice or giving advisory opinion on abstract propositions of law where there is no existing controversy. The learned counsel cited the decision in ***Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR*** where it was emphasized that courts and judges are not advice givers and that, based on the doctrines of ripeness and avoidance, the court ought not to engage in premature adjudication of matters. Other cases cited along this line are ***Coalition for Reform and Democracy (CORD) & 2 Others vs Republic of Kenya & Another HCCP 628 of 2014 [2015] eKLR: Patrick Ouma Onyango & 12 Others vs AG & 2 Others Misc. Appl No. 677 of 2005***.

[70] To illustrate his point, it was the learned counsel's case that the budget process highlights and the legislative proposal for the financial year 2019/2020 had been tabled; the Division of Revenue Act 2019 had been enacted; and, the financial year 2019/2020 has ended. So, in many ways, the petition had been overtaken by events. On the second question, on whether the Cabinet Secretary Finance can in subsequent years table highlights in the National Assembly in the absence of the Division of Revenue Bill, counsel submitted that the question has not reached constitutional ripeness for adjudication. In this regard counsel cited the decisions in ***Republic vs. National Employment Authority & 30 others Ex-parte middle Ex consultancy services Limited [2018] eKLR; Ferreira vs Levin NO & others, Vryenhoek vs Powell NO &***

others 1996 (1) SA 984 (CC); Law Society of Kenya v Bloggers Association of Kenya & 6 others [2020] eKLR; Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties) [2020] eKLR and ***National Assembly of Kenya & another v Institute for Social Accountability & 6 others [2017] eKLR.***

[71] As to the question whether the allocation of funds under section 4 of the National Government Constituencies Development Fund Act, 2015 can be allocated in the absence of Division of Revenue Bill, counsel reiterated that the issue has been overtaken by events, and in any case, the Supreme Court advisory opinion has settled the issue that monies have to be allocated in case of an impasse in the enactment of the Division of Revenue Act. And on that note counsel asked this Court to dismiss the petition.

INTERESTED PARTIES' SUBMISSIONS:

[72] In its submissions, the 2nd interested party made reference to the opinion of the Supreme Court **Advisory Reference No. 3 of 2019** urging that it had answered some of the questions raised in this petition. It was submitted on its behalf that the Supreme Court had ruled on whether its recommendations are binding in nature and also on what should happen when the National Assembly and the Senate fail to agree on the Division of Revenue Bill. It also submitted that in the advisory opinion, the Supreme Court had addressed the question of timelines for the release of the equitable share of revenue to the county governments. Again, the 2nd Interested Party urged that the question of whether the National Assembly can enact an Appropriation Act before the enactment of the Division of Revenue Act had also been dealt with in the same reference. Based on the opinion of the Supreme Court, the 2nd Interested Party submitted that the Division of Revenue Act is the basis upon which revenue flows for appropriation purposes between the national government and county governments and among county governments themselves. Therefore, any attempt to divide revenue between the two levels of government in the absence of the Division of Revenue Act are all illegal and unconstitutional. It was the 2nd Interested Party's case that the advisory opinion substantially and conclusively dealt with all the issues in Petition no. 277 of 2019 and some of the issues raised in Petition No. 232 of 2019.

[73] On the specific issue of whether this court has jurisdiction to determine the petition, the 2nd Interested Party submitted that this court is established under Article 165 of the Constitution and that in the circumstances, the jurisdiction of this honorable court to adjudicate over this matter flows from Article 165 (3) (d) (i) & (ii) of the Constitution. Therefore, this court is vested with the sole duty of interpreting the Constitution, upholding its provisions and protecting the rule of law without fear or favour. The decisions in the ***Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd. [1989] KLR 1; Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & another; In the Matter of the Interim Independent Electoral Commission, Constitutional Application Number 2 of 2011 (supra)*** and finally in ***Judicial Service Commission v Speaker of the National Assembly & 8 others [2014] eKLR*** were cited for the proposition that the jurisdiction of this court on the interpretation of the Constitution flows from the Constitution itself.

[74] It was submitted further that despite the budget making process being the prerogative of the executive and the legislative arms of government, courts have the powers to intervene when suits are filed contesting the constitutionality of the process. In adjudicating these issues, courts are called upon to interpret a formidable body of constitutional provisions and budget laws governing the budget process. This position is fortified in the advisory opinion of the Supreme Court in **Advisory Reference No. 3 of 2019.**

[75] It is follows that it is misleading for the 3rd Respondent to allege that the facts in issue in this petition are subject to the political question doctrine; in the 2nd Interested Party's view, this position is selfish and intended to usurp this court's jurisdiction as expressly provided for under Article 165 (3) (d) of the Constitution. It was the 2nd Interested Party's position that this Court is seized of the requisite jurisdiction to determine this petition.

[76] On the question whether the Cabinet Secretary for Finance contravened the provisions of the Constitution and the Public Finance Management Act, 2012 by tabling the budget policy highlights and the legislative proposals in Parliament prior to enactment of the Division of Revenue Act 2019, the 2nd Interested Party submitted that a budget being an instrument of accountability, rules and regulations set to facilitate the budgetary process are put in place to hold the government and public officers accountable to its people.

[77] It was submitted further that in order to safeguard and optimize the newly found public finance structure, the people of Kenya through Chapter 12 of the 2010 Constitution established the principles governing public finance in Kenya and a definite structure for the budgetary process in order to restore public confidence in the institutions and the public officers tasked with the mandate of managing public funds both at the National and County Government level.

[78] It was also urged that the national values and principles of governance under Article 10 and the principles of public finance as stated under Article 201 of the Constitution and sections 36 and 40 of the Public Finance Management Act respectively are not mere suggestions. The principles envision the intentions and the will of the people of Kenya to clean up the regressive history of public finance that was based on suspicion, mistrust, non-inclusion, corruption, impunity and lack of accountability at the National and County Government levels.

[79] In the 2nd Interested Party's view, section 40 of the Public Finance Management Act is to the effect that; firstly, the Division of Revenue Act which divides revenue between the National Government and the County Governments should be enacted prior to the tabling or pronouncements of the Budget Policy highlights and the revenue raising measures for the National Government; secondly, the Budget Policy highlights and the recommendations on the revenue raising measures for the National Government as tabled by the Cabinet Secretary for Finance must be compliant with the provisions of the enacted Division of Revenue Act; and, thirdly, the recommendations and the report by the Parliamentary Committee on the Finance Bill which are tabled in parliament by the committee together with the Finance Bill must be compliant with the provisions of the enacted Division of Revenue Act. It was submitted that this position is supported by the majority opinion in the Supreme Court **Advisory Reference No. 3 of 2019.**

[80] It was therefore the 2nd Interested Party's submissions that the tabling of the budget policy highlights and the revenue raising measures for the national government on 13 June 2019 by the Cabinet Secretary for Finance in the absence of the Division of Revenue Act was unconstitutional. The actions of the Cabinet Secretary contravened the principles of national governance and the public finance principles of transparency, accountability and public participation as espoused under Articles 10 and 201 of the Constitution as well as the Public Finance

Management Act.

[81] Again it was submitted for the 2nd Interested Party that the spirit, letter and intent of the 2010 Constitution as set out under Chapter 12 on Public Finance establishes openness and accountability to the budget process, strengthens the separation of powers and ensures fiscal parity between the three arms of Government. The acts of the Cabinet Secretary for Finance therefore contravened these aspects of the constitution by depriving the public of their fundamental right to information and participation in the budget making process and management of public funds thus creating doubts and lack of accountability in the system.

[82] On the final question whether the allocations for the National Government Constituencies Fund can be done in the absence of the Division of Revenue Act, it was submitted on behalf of the 2nd Interested Party that according to section 4 (1) (a) of the National Government Constituencies Development Fund Act 2015, the disbursements for the Constituencies Development Fund cannot be ascertained in the absence of the Division of Revenue Act. Therefore, any act or attempts to have such disbursements made prior to the enactment of the Division of Revenue Act is illegal and unconstitutional. And in this regard counsel referred to the case of ***National Assembly of Kenya & another v Institute for Social Accountability & 6 others [2017] eKLR***.

[83] Finally, the 2nd Interested Party submitted the Division of Revenue Act for the year 2019 was assented to on 17 September 2019. Pursuant to section 1 of the Act, it is deemed that Act came into force on 1 July 2019 which essentially was the beginning of the financial year 2019/2020. Accordingly, any allocations for the National Government Constituencies Development Fund for the year 2019/2020 that were made before 17 September 2019 were legalized by the provisions of section 1 of the Division of Revenue Act 2019.

[84] In their oral submissions, the 1st and 3rd Interested Parties supported the petition. Mr. Lokitari, the learned counsel for these parties associated himself with the petitioners' submissions.

ISSUES FOR DETERMINATION:

[85] We have considered these submissions and what comes out clearly is that they largely reiterate what the parties have averred or deposed in their pleadings and affidavits respectively. The issues which emerge are as follows:

a. Whether the High Court has the jurisdiction to hear and determine the instant Petition.

b. Whether this Petition is res judicata.

c. Whether the Cabinet Secretary for Finance in tabling the budget policy statement and legislative proposals on 13th June 2019 without the passing of the Division of Revenue Bill 2019 acted contrary to the Constitution and the Public Finance Management Act, and whether the Cabinet Secretary for Finance can in subsequent years table the highlights in the absence of the Division of Revenue Bill.

d. Whether the tabling of the budget Policy highlights and the legislative proposal by the 2nd Respondent for the Financial Year 2019-2020 without incorporation or inclusion of the Division of Revenue Bill 2019 is illegal and unconstitutional and contrary to Articles 1, 2, 3 and 10 of the Constitution.

e. Whether the allocation of the National Government Constituencies Development Fund under Section 4 of the National Government Constituencies Development Fund can be effected in the absence of the Division of Revenue Bill.

f. Whether the National Assembly can enact an Appropriation Act prior to the enactment of the Division of Revenue Act.

g. What the phrase "latest audited account of revenue received as approved by the National Assembly" entails.

h. When is an issue said to be overtaken by events.

i. The appropriate reliefs that this honourable Court should give.

j. The party or parties that should bear the costs of the petition.

ANALYSIS AND DETERMINATION:

[86] In our analysis of the evidence and the submissions made, we will deal with these issues not necessarily in the order in which they have been set out mainly because some of them overlap or are, in a way, intertwined and therefore a determination of one issue logically resolves another issue or other issues. However, whichever order we choose to dispose of them, one issue that stands out and which must, as a matter of law, be determined at the earliest opportunity possible is that of whether this Honourable Court has jurisdiction to determine this petition. It is necessary that this issue should be determined at the very outset for the obvious reason that without jurisdiction this Court cannot go any further but must instead down its tools. (See The ***Owners of the Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd, Civil Appeal No. 50 OF 1989 [1989] eKLR).***

WHETHER THIS COURT IS SEIZED OF JURISDICTION:

[87] As the submissions of the Respondents would show, the question of jurisdiction was their predominant theme to the extent that a large

part of their case hinged on the argument whether or not this honorable court has jurisdiction to determine this petition. Their first prong of attack was that the petition is all about *"a political question"* and this in itself infringes the *"political question doctrine."*

[88] The Black's Law Dictionary 10th edition, at page 1346 defines a political question in these terms:

> ***"Political question- a question that a court will not consider because it involves the exercise of discretionary power by the executive or legislative branch of government – Also termed non justiciable question"***

It also goes further to define what the *"political question doctrine"* means; It states as follows:

> ***"Political question doctrine- The judicial principle that a court should refuse to decide an issue involving the exercise of discretionary power by the executive or legislative branch of government."***

[89] In **Baker v. Carr, 369 U.S. 186 (1962),** where the concept of the doctrine of political question was discussed, Brennan J. stated of this doctrine at pages 210-11, in the following terms:

> ***"We have said that "In determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." Coleman v. Miller, 307 U.S. 433, 454-455. The non justiciability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."***

[90] The origin of this concept was the landmark case of ***Marbury v Madison 5 US 137 (1803)*** in which the United States Supreme Court laid the foundation of the doctrine of separation of powers between the various arms of government. Talking about the relationship between the functions of the executive and the judiciary, the court said that it is not necessary for the court to intrude into the Cabinet and intermeddle with the prerogatives of the executive. It went further to state that the province of the court is solely to decide on the rights of individuals, not to inquire how the executive or executive officers perform duties in which they have a discretion. Questions in their nature political, or which are by the constitution and laws submitted to the executive should not be made in court.

[91] Bearing this characterization of concept or the doctrine of 'political question' in mind, the question that immediately emerges is whether the issues presented in the petition can cumulatively be regarded as *"a political question"* and which therefore, this court should refrain from determining.

[92] In broad terms, the Petitioners' petition is about the budget process and, in particular, whether certain aspects of the budget cycle for the financial year 2019/2020 are contrary to the Constitution. To be precise, whether the tabling of the budget policy highlights and the legislative proposals by the 2nd Respondent for the financial year 2019/2020 without inclusion of the Division of Revenue Act 2019 is contrary to Articles 1, 2, 3 and 10 of the Constitution; and flowing from that, whether in the absence of the Division of Revenue Bill 2019 no monies could be allocated to constituencies for the period 2019 under section 4 of the National Government Constituencies Fund Act 2015 and, inevitably, whether any monies allocated and spent have been allocated in an illegal manner. The petitioners have also sought a determination and a clear pronouncement by this Court that any future tabling of budget policy highlights and legislative proposals without the passing, incorporation or inclusion of the Division of Revenue Bill is illegal and unconstitutional.

Are these political questions as understood in law and, for that reasons, are they the sort of questions that are way out of the jurisdiction of this Honourable Court because of the political question doctrine?

[93] To begin with, and generally speaking, the jurisdiction of this Honourable Court to interpret the Constitution is found in Article 165 (3) (d) (i), (ii) (iii) and (iv) of the Constitution itself; it is necessary to reproduce the article here owing to its importance in the determination of the question at hand. It states as follows;

> ***(3) Subject to clause (5), the High Court shall have—***
>
> ***(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;

[94] Our reading of the Constitution shows that in it are several provisions that underpin the budgetary process. For instance, Article 201 lays

out the principles which guide all aspects of public finance in the Republic and amongst these principles is the principle that there shall be openness and accountability in financial matters and that the public finance system shall promote an equitable society; in particular, the revenue raised nationally shall be shared equitably among national and county governments. Article 202 (1), for instance, says that revenue raised nationally shall be shared equitably among national and county governments; Article 220 specifies the form, the content and the timing of budgets. Article 218 on the other hand, deals with the annual division and allocation of revenue bills with particular emphasis on the Division of Revenue Bill which essentially divides revenue raised by the national government between the national government and the county governments. It also deals with the County Allocation of Revenue Bill, which shares out revenue amongst the counties. Again, Articles 221and 222 lay out the framework of the budget making process.

[95] The question we ask ourselves is, in the event a dispute arises, as to the interpretation of any of these provisions, will it be proper to categorize such a dispute as a political question and which, for that reason, this honourable court should not adjudicate upon because of the political question doctrine? Asked differently, is it a question that invites our interpretation in exercise of the jurisdiction bestowed upon this court in Article 165 of the Constitution?

[96] This question has been asked before though not in the same terms but generally whether the jurisdiction of this court to determine constitutional question is ousted by the political question doctrine. The Court of Appeal had occasion to address it in ***Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others [2014] eKLR***. In that case the court held at paragraph 53:

> ***"… We are of the view that Article 181 and Section 33 of the County Governments Act are not ouster clauses that limit or oust the jurisdiction of the High Court as conferred by Article 165 (3) (d) (ii) and (iii) of the Constitution. Though the process of removal of a governor from office is both a constitutional and a political process, <u>the political question doctrine cannot operate to oust the jurisdiction vested on the High Court to interpret the Constitution or to determine the question if anything said to be done under the authority of the Constitution or of any law is consistent with or in contravention of the Constitution</u>." (Emphasis added).***

[97] And speaking of the need for the court to guard against deprivation of its jurisdiction, the same Court of Appeal noted in ***Judicial Service Commission & Secretary, Judicial Service Commission vs Kalpana K. Rawal [2015] eKLR*** cited the Ugandan case of ***Habre International Co. Ltd v Kassam and Others [1999] 1 EA 125***where Mulenga, JSC., stated as follows:

> ***"The tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straightforward and clear is to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly and the interests of justice and the rule of law demand this"***.

[98] These decisions leave no doubt that the jurisdiction of this court to interpret the Constitution cannot be impeached on the basis that, somehow, the question raised is a political question and for that reason, the court is debarred from entertaining it. For the avoidance of doubt, the Supreme Court of Kenya has gone further to explain that the power of the court to interpret the Constitution, cannot be limited by the doctrine of separation of powers as captured in the case of ***Marbury vs Madison(supra)***. This, it said in ***Communications Commission of Kenya & 5 others vs Royal Media Services Limited [2014] eKLR where*** it emphasized the expansive mandate of the High Court to determine any question constitutional. It held as follows:

> "***The famous United States Supreme Court case of Marbury v. Madison, 5 U.S. 137 (1803) established the principle of the possibility of judicial review of legislation, and at the same time the key place of the courts in the upholding of the U.S. Constitution. <u>This principle is enshrined in our Constitution (Articles 23(3)(d) and 165(3)(d)). A close examination of these provisions shows that our Constitution requires us to go even further than the U.S. Supreme Court did in Marbury v. Madison(Marbury).</u> In Marbury, the U.S. Supreme Court declared its power to review the constitutionality of laws passed by Congress. <u>By contrast, the power of judicial review in Kenya is found in the Constitution. Article 23(3) grants the High Court powers to grant appropriate relief 'including' meaning that this is not an exhaustive list</u>: Article 165(3)(d) makes it clear that that power extends well beyond the Bill of Rights when it provides that the High Court has jurisdiction to hear any matter relating to any question with respect to interpretation of the 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 the constitutional relationship between the levels of government."***
>
> ***<u>These provisions make clear that Kenyan courts have a far-reaching constitutional mandate to ensure the rule of law in the governance of the country</u>." (Emphasis added).***

The power of the courts to interpret the Constitution was again emphasized in **Advisory Reference No.3 of 2019** at paragraph 121 of its opinion, The Supreme Court stated as follows:

> ***[121] The delegation, by Articles 1 and 159(1) of the Constitution, of the people's judicial power to "the courts and tribunals established by or under [the same] Constitution" renders the Judiciary the custodian of the Constitution. The notion of "delegation", which in most cases is lost sight of, is one of trusteeship, thus rendering the Judges and Judicial Officers trustees or stewards of the people's judicial authority. That position of stewardship obliges the courts and tribunals, in their adjudication of disputes that come before them, to ensure that their interpretation and application of the Constitution gives effect to the values***

and aspirations of the Kenyan people enumerated in that Constitution and other statutory provisions, especially those enacted to implement it. Articles 20(3)(a) and 259 (1) succinctly speak to this. Even in the penumbral areas, the Constitution has to be interpreted in a manner that: "promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance."

[99] We need not belabour the point save to say that to the extent that the questions raised by the Petitioners are matters touching on the interpretation of the constitution, we are of the humble view that these are constitutional rather than political questions and for this reason, the jurisdiction of this court in the determination of this petition cannot be questioned on the ground of the political question doctrine.

[100] Closely related to this question is the issue of justiciability of the petition. And on this question the argument is whether there is any real dispute before Court for determination. According to the Respondents, the petition raises similar issues to the issues determined by the Supreme Court in ***Advisory Opinion Reference No. 3 of 2019***. In the Advisory Opinion, the Court provided the way forward should an impasse occur due to the failure of mediation process between the two Houses of Parliament over the Division of Revenue Bill and the percentage of the amount to be withdrawn from the Consolidated Fund in such circumstances. According to the respondents, the Supreme Court, in the same breath, addressed itself on the question of whether the Appropriation Act could be enacted before the Division of Revenue Act. In the Respondents' view, these are the same questions raised in the petition and to the extent that they have been determined by the Supreme Court they have become moot and non-justiciable.

[101] We find this argument leaning more towards the principle of *res judicata* than that on the concept of justiciability. We say so because justiciability does not deal with whether a matter has been dealt with by a court of competent jurisdiction; rather it is concerned with whether there is a real and substantial controversy for adjudication before court. **Black's Law Dictionary 10th**edition defines 'justiciability' as follows:

"the quality, state, or condition of being appropriate or suitable for adjudication by a court."

[102] Be that as it may, the Respondents' arguments would not hold regardless of whether they are based on the ground that this issues are non-justiciable or are *res judicata* because the Supreme Court itself came out clearly and stated in no uncertain terms what its opinion was all about. At paragraph 226 of its opinion in **Reference No. 3 of 2019** it stated as follows:

"This Advisory Opinion, as rendered by the Majority of this Bench, conclusively disposes of the four issues in the manner determined; namely, the recommendations of the Commission on Revenue Allocation are not binding on Parliament; in the event of an Impasse over the Division of Revenue Bill, the solution prescribed in paragraphs 81 to 91 of this Opinion shall apply; the Supreme Court or any other court for that matter, is not the appropriate forum for setting timelines as to when the National Treasury must transfer the equitable share of revenue to counties; and Parliament cannot enact the Appropriation Act before the enactment of the Division of Revenue Act."

[103] It is clear from this Opinion that the Supreme Court did not dispose the issues that are before us and most probably, it is for this reason that the petitioners found it necessary to amend their petition so that this court would determine only the outstanding issues that were not covered in the opinion.

[104] The other angle raised by the Respondents on this same question of justiciability was the application of the concepts of "ripeness" and "avoidance" to this petition.

The concept of ripeness is defined in ***Black's Law Dictionary 10th Edition*** **page 1524, as** ***"the state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made, (2) the requirement that this state must exist before a court will decide a controversy".***

This concept was articulated together with the concept of constitutional avoidance in **Ashwander v. Tenessee Valley Authority (supra)** where Justice Louis Brandeis listed seven related rules the basis upon which a court would avoid issuing broad rulings on matters of constitutional law. According to those rules, when the doctrine of ripeness is applied, a court will not "*anticipate a question of constitutional law in advance of the necessity of deciding it."* As for the concept of avoidance it was explained thus:

"When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.''

[105] It is based on the concept of ripeness that the 3rd Respondent argued that the Court ought not to determine issues that are not ready for determination. This argument is directed at prayers (d) and (e) which seek declarations; first, that any subsequent tabling of budget policy highlights and legislative proposals by the 2nd Respondent without the passing, incorporation or inclusion of the Division of Revenue Bill is illegal and unconstitutional; second, a declaration that the passing of any subsequent Appropriation Act and subsequent processes including the passing of the Finance bill without the passing, incorporation or inclusion of the Division of Revenue Bill is illegal and unconstitutional because such a passage would be contrary to Articles 1, 2 , 3, 202, 203, 217, 218, 220, 221, 224 of the Constitution.

[106] To our understanding, these prayers seek our interpretation of the Constitutional principles governing the budgetary processes. We have no doubt in our minds that according to article 165(3) (d) of the Constitution we are clothed with the jurisdiction to determine them.

[107] The two concepts are therefore not applicable to this petition because as far as the concept of ripeness is concerned, the case we are faced with here is not one anticipating a question of constitutional law and deciding it in advance. What we are confronted with here is a live situation where acts have been done purportedly under the authority of the Constitution, which the petitioners have alleged that were

otherwise done in contravention of the constitution and there is a real danger that, going by past experience, they are likely to be repeated, unless this court makes a determination on the legality or otherwise of those acts. In any event, according to Article 22 of the Constitution, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has not only been denied, or violated or infringed, but also if that right is threatened he or she still retains the same right to institute court proceedings to stop the threat to the right. We are, of course, minded that Article 22 of the Constitution has been invoked in this petition and there should be no dispute that should the budget process be skewed in any manner the rights of the individual enshrined in Chapter 4 of the Constitution will be adversely affected.

[108] Article 23 of the Constitution is to effect that any proceedings brought under article 22 may grant appropriate relief including a declaration of rights and also a declaration of invalidity of any laws that denies, violates, infringes or threatens a rights or a fundamental freedom in the bill of rights and is not justified under Article 24. It has been held that the reliefs granted under this particular article are not exhaustive. see Supreme Court of Kenya in ***Communication Commission of Kenya & 5 Others vs Royal Media Services Limited [2014] eKLR.***

[109] For the same reasons we refuse the application of the doctrine of ripeness, we also reject that the doctrine of constitutional avoidance applies to this petition. In our humble view, the two concepts are alien to the present circumstances.

[110] One other issue which we thought should be dealt with as a preliminary issue is that of *res judicata*. According to the Respondents, this matter has been dealt with by the Supreme Court in **Advisory Reference No. 3 of 2019** and therefore we need not regurgitate it afresh. We need state here that as far as this question is concerned we have already noted and given reasons why we take the position that this matter is not *res judicata*.

[111] Having concluded that we have jurisdiction to deal with this matter, it is apt at this point to deal with the merits of the Petition and the immediate question that we need to deal with is whether the tabling of the budget policy statement and legislative proposals on 13 June 2019 without the passing of the Division of Revenue Bill, 2019 was contrary to the Constitution and the Public Finance Management Act; and, secondary to this question, whether the Cabinet Secretary for Finance can, in subsequent years table the highlights in the absence of the Division of Revenue Bill.

[112] In our humble view, the answer to these questions are straight forward and need not have generated any controversy. We say so because the process of annual division and allocation of revenue bills is clearly stipulated in Article 218 of the Constitution and several provisions in the Public Finance Management Act. Article 218 reads as follows:

> ***218. Annual Division and Allocation of Revenue Bills***
>
> ***(1) At least two months before the end of each financial year, there shall be introduced in Parliament—***
>
> ***(a) a Division of Revenue Bill, which shall divide revenue raised by the national government among the national and county levels of government in accordance with this Constitution; and***
>
> ***(b) a County Allocation of Revenue Bill, which shall divide among the counties the revenue allocated to the county level of government on the basis determined in accordance with the resolution in force under Article 217.***
>
> ***(2) Each Bill required by clause (1) shall be accompanied by a memorandum setting out—***
>
> ***(a) an explanation of revenue allocation as proposed by the Bill;***
>
> ***(b) an evaluation of the Bill in relation to the criteria set out in Article 203(1); and***
>
> ***(c) a summary of any significant deviation from the Commission on Revenue Allocation's recommendations, with an explanation for each such deviation***.

[113] We understand this Article to say that by the 30th day of April of any financial year, the Division of Revenue Bill ought to be introduced in Parliament simultaneously with the County Allocation of Revenue Bill. The Division of Revenue Bill divides revenue raised by the national government between the national and county governments while the County Allocation of Revenue Bill divides among the counties the revenue allocated to the county level of government on the basis determined in accordance with the resolution in force under Article 217.

[114] Article 221 on the other hand deals with the estimates and annual appropriation bills and, crucially for our purposes, specifies the time when the Cabinet Secretary responsible for finance ought to submit to the National Assembly estimates of the revenue and expenditure of the national government for the succeeding financial year. This article reads as follows:

> ***221. Budget estimates and annual Appropriation Bill***
>
> ***(1) <u>At least two months before the end of each financial year</u>, the Cabinet Secretary responsible for finance shall submit to the National Assembly estimates of the revenue and expenditure of the national government for the next financial year to be tabled in the National Assembly.***
>
> ***(2) The estimates referred to in clause (1) shall—***

(a) include estimates for expenditure from the Equalisation Fund; and

(b) be in the form, and according to the procedure, prescribed by an Act of Parliament.

(3) The National Assembly shall consider the estimates submitted under clause (1) together with the estimates submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary under Articles 127 and 173 respectively. (Emphasis added).

(4) Before the National Assembly considers the estimates of revenue and expenditure, a committee of the Assembly shall discuss and review the estimates and make recommendations to the Assembly.

(5) In discussing and reviewing the estimates, the committee shall seek representations from the public and the recommendations shall be taken into account when the committee makes its recommendations to the National Assembly.

(6) When the estimates of national government expenditure, and the estimates of expenditure for the Judiciary and Parliament have been approved by the National Assembly, they shall be included in an Appropriation Bill, which shall be introduced into the National Assembly to authorise the withdrawal from the Consolidated Fund of the money needed for the expenditure, and for the appropriation of that money for the purposes mentioned in the Bill.

(7) The Appropriation Bill mentioned in clause (6) shall not include expenditures that are charged on the Consolidated Fund by this Constitution or an Act of Parliament.

[115] It is apparent from this article that the Cabinet Secretary responsible for finance has to submit to the national assembly estimates of the revenue and expenditure of the national government for the next financial year two months before the end of the preceding financial year. This implies that these estimates must be submitted by the 30th day of April of the preceding financial year. These estimates are subjected to a committee of the National Assembly for discussions and review and ultimately recommendations to the National Assembly. In making its recommendations, the committee will take into account the representations from the public. Once approved by the National Assembly the estimates will then be included in the Appropriation Bill which shall then authorize withdrawal from the consolidated fund of the money needed for the expenditure and for the appropriation of that money for the purposes mentioned in the Bill.

[116] In operationalization of this article, Section 191 of the Public Finance Management Act provides as follows:

191) Division of Revenue Bill and County Allocation of Revenue Bill

(1) <u>Each year when the Budget Policy Statement is introduced, the Cabinet Secretary shall submit to Parliament a Division of Revenue Bill and County Allocation of Revenue Bill prepared by the National Treasury as provided in this Act for the financial year to which that Budget relates.</u>

(2) The Division of Revenue Bill shall specify the share of each level of government of the revenue raised nationally for the relevant Financial year.

(3) The County Allocation of Revenue Bill shall specify—

(a) each county's share of that revenue under subsection (2); and

(b) any other allocations to the counties, from the national government's share of that revenue, and any conditions on which those allocations shall be made.

(4) Before the submission of the legislative proposals on the Division of Revenue and County Allocation of Revenue, the Cabinet Secretary shall notify—

(a) the intergovernmental Budget and Economic Council; and

(b) the Commission on Revenue Allocation.

(5) When the legislative proposal on the Division of Revenue and County Allocation of Revenue is submitted, it shall be accompanied by a memorandum which explains—

(a) how the Bill takes into account the criteria listed in Article 203(1) of the Constitution;

(b) the extent of the deviation from the Commission on Revenue Allocation's recommendations;

(c) the extent, if any, of deviation from the recommendations of the Intergovernmental Budget and Economic Council; and

(d) any assumptions and formulae used in arriving at the respective shares mentioned in subsections (2) and (3).

[117] It is apparent from these provisions of the Constitution and the Public Finance Management Act that in any financial year, the Division

of Revenue Bill together with the County Allocation of Revenue Bill must be introduced in Parliament by the 30th day of April of the year preceding the next financial year. Once introduced in Parliament, Section 42 of the Public Finance Management Act states in express terms that those Bills must be considered within thirty days with a view of approving them with or without amendments. That section reads as follows:

> ***42. Consideration by Parliament of Division of Revenue and County Allocation of Revenue Bills***
>
> ***Parliament shall consider the Division of Revenue and***
>
> ***County Allocation of Revenue Bills not later than thirty***
>
> ***days after the Bills have been introduced with a view to***
>
> ***approving them, with or without amendments.***

[118] From what we gather in the Public Finance Management Act, 'consideration by Parliament' would mean the process of the enactment of the Bills into Acts of Parliament. We say so because according to section 39(3) of the Public Finance Management Act, the National Assembly can only amend the budget estimates of the national government in accordance with the Division of Revenue Act. This would imply that since, according to section 39(1), the Appropriation Bill must have been passed and assented to by 30 June of the preceding financial year, the Division of Revenue Act ought to have been passed by this date. For better understanding it is necessary that we reproduce that section here:

> ***39. National Assembly to consider budget estimates***
>
> ***(1) The National Assembly shall consider the budget estimates of the national government, including those of Parliament and the Judiciary, with a view to approving them, with or without amendments, in time for the Appropriation Bill and any other relevant Bills, required to implement the budget to be assented to by the 30th June each year.***
>
> ***(2) Before the National Assembly considers the estimates of revenue and expenditure, the relevant committee of the National Assembly shall discuss and review the estimates and make recommendations to the National Assembly, taking into account the views of the Cabinet Secretary and the public on the proposed recommendations.***
>
> ***(3) The National Assembly may amend the budget estimates of the national government only in accordance with the Division of Revenue Act and the resolutions adopted with regard to the Budget Policy Statement ensuring that—***
>
> ***(a) an increase in expenditure in a proposed appropriation is balanced by a reduction in expenditure in another proposed appropriation; or***
>
> ***(b) a proposed reduction in expenditure is used to reduce the deficit.***
>
> ***(4) Where a Bill originating from a member of the National Assembly proposes amendments after passing the budget estimates and the Appropriation Bill by Parliament, the National Assembly may only proceed in accordance with—***
>
> ***(a) the Division of Revenue Act;***
>
> ***(b) Article 114 of the Constitution; and***
>
> ***(c) any increase in expenditure in a proposed appropriation is balanced by a reduction in expenditure in another proposed appropriation or any proposed reduction in expenditure is used to reduce the deficit.***
>
> ***(5) Not later than twenty-one days after the National Assembly has approved the budget estimates, the National Treasury shall consolidate, publish and publicise the budget estimates.***
>
> ***(6) The National Treasury shall take all reasonably practicable steps to ensure that the approved budget estimates are prepared and publicised in a form that is clear and easily understood by, and readily accessible to, members of the public.***
>
> ***(7) Following approval of the budget estimates under this section, and before the Appropriation Act is assented to, the National Assembly may authorize withdrawals in accordance with Article 222 of the Constitution, and such authority shall be communicated to the Cabinet Secretary responsible for finance by the Speaker of the National Assembly within seven days of that authority being granted by the National Assembly.***
>
> ***(8) The Controller of Budget shall ensure that members of the public are given information on budget implementation both at the national and county government level in accordance with Article 228 of the Constitution.***

Again section 40 presupposes that the passage of the Division of Revenue Bill into an Act of Parliament precedes the Budget Policy highlights and therefore the Appropriation Act. It reads as follows***:***

40. Submission and consideration of budget policy highlights and the Finance Bill in the National Assembly

(1) Each financial year, the Cabinet Secretary shall, with the approval of Cabinet, make a public pronouncement of the budget policy highlights and revenue raising measures for the national government.

(2) In making the pronouncement under subsection (1), the Cabinet Secretary shall take into account any regional or international agreements that Kenya has ratified, including the East African Community Treaty and where such agreements prescribe the date when the budget policy highlights and revenue raising measures are to be pronounced, the Cabinet Secretary shall ensure that the measures are pronounced on the appointed date.

(3) On the same date that the budget policy highlights and revenue raising measures are pronounced, the Cabinet Secretary shall submit to Parliament a legislative proposal, setting out the revenue raising measures for the national government, together with a policy statement expounding on those measures.

(4) Following the submission of the legislative proposal of the Cabinet Secretary, the relevant committee of the National Assembly shall introduce a Finance bill in the National Assembly.

(5) Any of the recommendations made by the relevant committee of the National Assembly or adopted by the National Assembly on revenue matters shall—

(a) ensure that the total amount of revenue raised is consistent with the approved fiscal framework and the Division of Revenue Act;

(b) take into account the principles of equity, certainty and ease of collection;

(c) consider the impact of the proposed changes on the composition of the tax revenue with reference to the direct and indirect taxes;

(d) consider domestic, regional and international tax trends;

(e) consider the impact on development, investment, employment and economic growth;

(f) take into account the recommendations of the Cabinet Secretary as provided under Article 114 of the Constitution; and

(g) take into account the taxation and other tariff agreements and obligations that Kenya has ratified, including taxation and tariff agreements under the East African Community Treaty.

(6) The recommendations of the Cabinet Secretary in subsection (5)(f) shall be included in the report and tabled in the National Assembly. (Emphasis added)

[119] These provisions are, by and large, self-explanatory as far as the timelines within which the Division of Revenue Bill and the County Allocation Revenue Bill ought to be enacted into law; for avoidance of doubt, the enactment of these bills into acts of parliament precedes, any recommendations of the relevant committee of the National Assembly on the amount of revenue raised; the National Assembly's consideration of the estimates of revenue and expenditure; and, obviously long before the budget policy highlights.

[120] With these explicit provisions the answer to the question whether the Cabinet Secretary for Finance in tabling the budget policy statement and legislative proposals on 13 June 2019 without the passing of the Division of Revenue Bill 2019 acted contrary to the Constitution and the Public Finance Management Act is in the affirmative. It also follows that the Cabinet Secretary for Finance cannot in subsequent years table the highlights in the absence of the Division of Revenue Bill.

[121] The next issue is whether the allocation of the National Government Constituencies Development Fund under Section 4 of the National Government Constituencies Development Fund Act No. 30 of 2015 can be effected in the absence of the Division of Revenue Bill. Section 4 of the National Government Constituencies Development Fund Act No. 30 of 2015 provides as follows:

4.Establishment of the Fund

(1) There is established a fund to be known as the National Government Constituencies Development Fund which shall—

(a) be a national government fund consisting of monies of an amount of not less than 2.5% (two and half percentum) of all the national government's share of revenue as divided by the annual Division of Revenue Act enacted pursuant to Article 218 of the Constitution;

(b) comprise of any monies accruing to or received by the Board from any other source; and

(c) be administered by the Board.

(2) All monies allocated under this Act shall be considered as funds allocated to constituencies pursuant to Article 206(2)(c) of

the Constitution to be administered in accordance with the provisions of this Act.

(3) The monies appropriated to the Fund in any financial year under subsection (1)(a) shall not be less than the amount appropriated to the Fund in the preceding financial year unless as otherwise allowed by this Act.

[122] We must point at the outset that this bench in **Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties) [2020] eKLR** declared the National Government Constituencies Development Fund Act No. 30 of 2015, among other several Acts passed by the National Assembly without reference to the Senate, unconstitutional. Having been so invalidated, it would not matter that that Act was not complied with; it had been rendered of no legal consequence in the wake of the above decision. However, we are also minded we suspended our order invalidating these Acts, among them, the National Government Constituencies Development Fund Act, N0. 30 of 2015 in order to allow Parliament time to regularize the legislations. But even assuming that the Act was valid, it is obvious from section 4 of the Act that monies for the constituencies development fund is a share of all the national government share of the revenue and which can only be allocated in accordance with the Division of Revenue Act. This means that without the Division of Revenue Act there will be no legal basis for apportionment of the monies due to national constituencies development fund from the national government share of the revenue. Accordingly, the answer to this issue is also in the affirmative.

[123] The third issue is the meaning of the 'most recent audited accounts of revenue received as approved by the National Assembly' under Article 203 of the Constitution. According to Article 203 (3) the calculation of the equitable share of revenue raised nationally and which is allocated to county governments is based on the most 'recent audited accounts of revenue received as approved by the National assembly'. We must start by saying that there is no definition in the Constitution of what amounts to the 'most recent audited accounts of revenue received as approved by the National Assembly'. However, under Article 229 of the Constitution specific timelines are set out within which the Auditor general is to audit the various public institutions and government entities and submit the report to parliament or the relevant county assembly which must within three months of receiving the said report debate and consider it and take the appropriate action. In particular clause 4 states that the Auditor General shall conduct the audit and submit the report to Parliament within six months after the end of each financial year. Parliament shall then within three months after receiving the audit report debate and consider the report and take appropriate action.

[124] It follows therefore, going by the set timelines, the 'most recent audited accounts of revenue received as approved by the National Assembly' cannot be the report approved by Parliament for the year 2014/2015 which is four years before the financial year 2019/2020. It is apparent from Article 229(4) and (8) that the audit for the preceding year should be concluded in nine months meaning that the 'most recent audited accounts of revenue received, as approved by the National Assembly' must be the audited accounts for the preceding year. In other words, it is the latest audited accounts of revenue received as approved by the National Assembly which in this case would be the accounts for the financial year 2018/2019.

[125] Before we conclude we must reiterate the concept of devolution in our Constitution and why it was thought necessary that there was need to have devolved governance in Kenya and for this very reason why it should be protected. One of the reasons the people of Kenya endorsed devolution governance was to address the inequalities in the distribution of national resources. It was thought that through the system of devolved governance these resources would be distributed equitably. And it is for this reason that the Constitution of Kenya 2010 is keen on the budgetary processes, in part, to ensure that the culmination of these processes is equitable distribution of the national revenue not only between the National Government and the County Governments but also between the county governments themselves.

[126] What we are saying here is not anything new; the Supreme Court has alluded to this question every time the occasion has presented itself stressing the prominence of devolution in our Constitution and the need to protect it from emasculation. **In the Matter of the Speaker of the Senate & another [2013] eKLR) it had this to say:**

> ***"[186] Given Kenya's history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (on public finance with respect to devolution) does the Constitution express itself in the most precise mathematical language. This is not in vain. It affirms the "constitutional commitment to protect"; and it acknowledges an inherent need to assure sufficient resources for the devolved units."***

[127] And on the need for the County Governments to be facilitated with the necessary resources in order for them to meet their obligations, the Supreme said this in the **Matter of the Speaker of the Senate & another [2013] eKLR**:

> ***"[193] It is relevant to consider the range of responsibilities shouldered by these nascent county governments. The Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second generation rights, such as food, health, environment, and education, fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities."***

[128] The common theme in the most part of Chapter 12 of the Constitution on principles governing public finances is a combination of transparency, equity, public participation and accountability in the country's financial matters. This is unlike the past when such matters could not be deliberated beyond the executive and the legislature. Chapter 12 of the Constitution is a departure from this old way of doing things and it is intended to, among other things, to protect the national resources from plunder and to ensure that the national revenue is shared equitably not only between the two levels of Government but also amongst the County Governments.

[129] This part of the Constitution was in part informed by the frustrations Kenyans were subjected to by the centralized system of governance which largely contributed to the deprivation of their fair share of national cake. They successfully agitated for the devolution system of governance through which they would be guaranteed access to what they are rightly entitled as owners this country. Article 174 of

the Constitution captures in the clearest of terms these aspirations; for our present purposes, some of the objects of devolution spelt out in that article are to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya and to ensure equitable sharing of national and local resources throughout Kenya. **(See Article 174 (f) and (g)).**

[130] The inevitable conclusion that we have to come to is that this Petition is merited and therefore it is hereby allowed. Accordingly, we decree as follows:

> *a)* ***A declaration be and is hereby issued that the tabling of the budget Policy highlights and the legislative proposal by the 2nd Respondent for the Financial Year 2019/2020 without the incorporation or inclusion of the Division of Revenue Bill 2019 was illegal and unconstitutional and contrary to Articles 1, 2, 3 and 10 of the Constitution.***
>
> *b)* ***A declaration be and is hereby issued that any subsequent tabling of budget Policy highlights and the legislative proposal by the 2nd Respondent without the passing, incorporation or inclusion of the Division of Revenue Bill is illegal and unconstitutional.***
>
> *c)* ***A declaration be and is hereby issued that in the absence of the Division Revenue Bill no monies can be allocated to the Constituencies under the National Government Constituencies Development Fund by virtue of section 4 of the National Government Constituencies Development Fund 2015 and any monies allocated and spent have been allocated in an illegal manner.***
>
> d) ***Parties will bear their respective costs.***

Orders accordingly.

Signed, dated and delivered on this 11th day of December 2020

Ngaah Jairus Anthony Ndungu Mumbua T. Matheka

PRESIDING JUDGE JUDGE JUDGE