



**Judicial Service Commission v Attorney General & another; Manani
(Interested Party) (Petition 349 of 2018) [2019] KEHC 6803 (KLR)
(Constitutional and Human Rights) (6 June 2019) (Judgment)**

*Judicial Service Commission v Attorney General & another;
Jacqueline Akinyi Okeyo Manani (Interested Party) [2019] eKLR*

Neutral citation: [2019] KEHC 6803 (KLR)

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

PETITION 349 OF 2018

JA MAKAU, J

JUNE 6, 2019

BETWEEN

THE JUDICIAL SERVICE COMMISSION PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

THE SALARIES AND REMUNERATION COMMISSION 2ND RESPONDENT

AND

JACQUELINE AKINYI OKEYO MANANI INTERESTED PARTY

Section 7(2) & 7(10-15) of the Salaries and Remuneration Commission Act declared unconstitutional for requiring the nominating bodies to submit two nominees of opposite gender and be approved by the National Assembly.

The High Court declared that section 7 (2) & 7(10-15) of the Salaries and Remuneration Commission Act contravened article 230 of the Constitution and was therefore unconstitutional. The impugned amendments made to the said section 7 related to the constitution of the Salaries and Remuneration Commission. The statutory amendments which required the nominating body to interview applicants and forward the names of two qualified persons of opposite gender to the cabinet secretary for onward transmission to the President, who would then forward the names to the National Assembly for vetting, were in variance with of article 230 (2) (b) of the Constitution which required the President to appoint one person each nominated by the nominating bodies. Article 230 of the Constitution did not provide for vetting of the nominated persons by the National Assembly. The court also held that it was not generally possible to intermarry the general provisions of article 250 of the Constitution with the specific provisions of article 230 of the Constitution, in determining the petition.



Reported by Beryl Ikamari and Mathenge Mukundi

Constitutional Law - principle of constitutionality - constitutionality of statutory provisions - claim that the amendments to the Salaries and Remuneration Commission Act went contrary to the Constitution - whether section 7(2) & 7 (10-15) of the Salaries and Remuneration Commission Act as amended contravened the provisions of the Constitution - Constitution of Kenya, 2010, articles 230 & 250.

Constitution Law - national values and principles of governance - public participation - threshold to be met in the fulfilment of public participation requirements - whether the amendments introduced to the Salaries and Remuneration Commission Act had to be subjected to public participation - Constitution of Kenya, 2010, article 10.

Brief facts

A vacancy occurred in the Salaries and Remuneration Commission (SRC) relating to a member representing the Judicial Service Commission (JSC). The petitioner, on January 15, 2018, advertised in the local media inviting applications from persons qualified to be nominated for the position. The JSC upon receipt of the applications, considered all the applications, with a view to determine compliance with constitutional provisions and the Salaries and Remuneration Commission Act. The petitioner voted the interested party as its nominee to the 2nd respondent.

Meanwhile on April 4, 2018 the President assented to the Statute Law (Miscellaneous Amendments) Act, 2018 which had a commencement date of May 21, 2018. The Act amended some of the provisions of the Salaries and Remuneration Commission Act, 2011 amongst other statutes. The petitioner contended that the amendments to the Salaries and Remuneration Commission Act, introduced through the Statute Law (Miscellaneous Amendment) Act, 2018 were unconstitutional as they were not subjected to public participation.

It was 1st respondent's contention, that the petition did not disclose any violation of the Constitution or any written law. He said that the petitioner read article 230 in isolation to article 250(4) and 250(11) of the Constitution. The 1st respondent added that the constitutional petition was grossly misconceived, a non-starter and the orders prayed for were outrightly misplaced. He added that the jurisdiction of the High Court had not been invoked properly and the matter was not justiciable to the extent that there was no real or substantial controversy.

Issues

- i. Whether section 7(2) & 7(10-13) of the Salaries and Remuneration Commission Act which required the nominating bodies to forward two nominees of the opposite gender to the President for onward transmission to the National Assembly for approval purposes was unconstitutional.
- ii. Whether section 7(14) of the Salaries and Remuneration Commission Act which provided that the President should submit fresh nominees where the National Assembly rejected any proposed nominees was unconstitutional.
- iii. Whether section 7(15) of the Salaries and Remuneration Commission Act regarding the composition, mode of nomination and appointment of its members was unconstitutional and impractical to implement.
- iv. Whether the amendments to the Salaries and Remuneration Commission Act, 2011, made under the Statute Law (Miscellaneous Amendments) Act, 2018, would be applied retrospectively.
- v. Whether there was adequate public participation in making amendments to the Salaries and Remuneration Commission Act, 2011 via the Statute Law (Miscellaneous Amendments) Act, 2018?
- vi. Whether article 230 which established the Salaries and Remuneration Commission ought to be read together with article 250 of the Constitution which entailed general provisions relating to independent commission during nomination and appointment of the members of the Salaries and Remuneration Commission.



Relevant provisions of the Law

Constitution of Kenya, 2010

Article 230

Salaries and Remuneration Commission

(2) The Salaries and Remuneration Commission consists of the following persons appointed by the President-

(b) one person each nominated by the following bodies from among persons who are not members or employees of those bodies-

(iii) the Judicial Service Commission.

Article 250

Composition, appointment and terms of office

1. *Each commission shall consist of at least three, but not more than nine, members.*

(11) The chairperson and vice-chairperson of a commission shall not be of the same gender.

Salaries and Remuneration Commission Act, 2011

Section 7

Procedure for nominations

(2) The relevant nominating body shall consider the applications received under subsection (1) to determine their compliance with the provisions of the Constitution and this Act, interview the applicants and forward the names of two persons so qualified, who shall be of opposite gender, to the Cabinet Secretary for onward transmission to the President.

(10) The President shall, within seven days' receipt of the names forwarded under subsection (2) nominate the members of the Commission from each category and forward the names of the nominees, together with the name of his nominee for Chairperson of the Commission, to the National Assembly.

(11) The National Assembly shall, within fourteen days of the day it next sits after receipt of the names of the nominees under subsection (9), consider all nominations and may approve or reject any nomination.

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

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

(14) Where the National Assembly rejects any nomination, the Speaker shall communicate the decision to the President to submit fresh nominations.

(15) In appointing members under this section, the President shall observe the principle of gender equity, regional and ethnic balance and equal opportunities for persons with disabilities and shall ensure that at least one-third of the members are of either gender.

Held

1. The duty of the court when the constitutionality of a statutory provision was challenged was to lay the article of the Constitution which was invoked beside the statute which was challenged and decide whether the latter squared with the former.
2. The impugned amendment required the nominating body to interview the applicants and forward the names of two qualified persons of opposite gender to the cabinet secretary for onward transmission to the President as opposed to the provisions of article 230 (2) (b) of the Constitution which required the President to appoint one person each nominated by the nominating bodies. The statutory provision was null and void and of no effect in law.
3. The amended section required the President to nominate the members of the commission and forward the names to the National Assembly for vetting and approval. That was contrary to article 230 of the Constitution as the said article did not provide for vetting and approval of the nominees



- by the National Assembly. The same violated article 230 of the Constitution as the President assumed the nominating body's power to nominate their respective representatives and was therefore unconstitutional.
4. Constitutional provisions were clear as to the composition, the mode of nomination and appointment of the members of the Salaries and Remuneration Commission. The challenged statutory provision contravened article 230 of the Constitution hence, it was unconstitutional and impractical to implement.
 5. Article 230 should not be confused with article 250 of the Constitution when it comes to appointments of members of the commission as the two provisions were clearly different. Article 230 of the Constitution did not provide for the nomination of 2 persons by the President. That was totally different from article 250(2) of the Constitution. There was a clear difference between a commission established under article 250 and the Salaries and Remuneration Commission established under article 230 of the Constitution and as such any attempt to intermarry the two was contrary to the Constitution. Provisions of article 250 of the Constitution could not be used in the appointment of members of the Salaries and Remuneration Commission under article 230 of the Constitution.
 6. Under article 230 of the Constitution, there was provision for appointment of a chairperson and one person, each appointed by the listed bodies thereto, who were not members or employees of the listed bodies. There was no provision for male or female for gender balance and that was deliberate as the nominees were representatives of other institutions and demanding the application of criteria that was contrary to the clear provision of the Constitution would amount to interference with the independence of the Salaries and Remuneration Commission and the Judiciary.
 7. Whether or not legislation operated retrospectively depended on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts were guided by certain rules of construction and one of these rules was, that if the legislation affected substantive rights, it would not be construed to have retrospective effect unless a clear intention to that effect was manifested. Whereas, if it affected procedure only, *prima facie*, it operated retrospectively unless there was a good reason to the contrary. That rule of construction was one of the factors to which regard had to be given in order to ascertain the legislative intent.
 8. The provisions of the legislation could not *per se* be said to affect procedure only nor could it be said that the intention of the enacting body was to have them operate retrospectively. The legislation, as it was, affected substantive rights, and as such it could not be construed as legislation that had retrospective effect unless a clear intention to that effect was manifested. The general rule for non-criminal legislation was that all statutes other than those which were declaratory or which related only to matters of procedure or evidence were *prima facie* prospective and retrospectivity was not to be given to them, unless it was expressly stated so in clear words or by virtue of necessary implication. Where legislation was contrary to the Constitution it could not have any retrospective effect. Therefore, the amendments to the Salaries and Remuneration Commission Act could not apply retrospectively.
 9. Public participation was one of the national values and principles of governance that bound all state organs, state officers, public officers, and all persons. It was applicable whenever any of them applied or interpreted the Constitution, enacted or interpreted any law, or made or implemented public policy decisions. The amendments introduced to the Salaries and Remuneration Commission Act were not minor amendments as suggested by the respondent as they substantially altered the core substance of the legislation and as such, the principle of public participation had to apply.
 10. The respondents bore the burden of proving that there was public participation. No evidence was adduced to demonstrate that there was public participation in relation to the substantive amendments and that was contrary to article 10 of the Constitution.

Petition allowed.



Orders

- i. *A declaration that section 7 (2) & 7(10-15) of the Salaries and Remuneration Commission Act contravened article 230 of the Constitution and was therefore unconstitutional.*
- ii. *An order of mandamus compelling the President through the 1st respondent to appoint the interested party as a member of the Salaries and Remuneration Commission representing the Judicial Service Commission within seven (7) days from the date of the judgment herein failing which the interested party be deemed to be duly appointed and the Chief Justice be compelled to swear her and be allowed to take her position as a member of the Commission.*
- iii. *The 1st respondent would bear the costs of the petition.*

Citations

Statutes

None referred to

Advocates

None mentioned

JUDGMENT

1. The petitioner through a petition dated 9th October 2018 brought under certificate of urgency sought prayers (a) to (h) on the face of the petition being as follows;
 - “ a) A declaration be and is hereby issued that in so far as section 7(2) of the Salaries and Remuneration Commission Act provides that a nominating body shall forward the names of two persons so qualified who shall be of opposite gender to the Cabinet Secretary for onward transmission to the President contrary to Article 230(2)(b) of the Constitution, the same is unconstitutional null and void.
 - b) A declaration be and is hereby issued that in so far as sections 7(10), (11), (12), and (13) of the Salaries and Remuneration Commission Act No. 10 of 2011 provides that the President shall nominate the members of the Commission from each category and forward the names of the nominees of the Commission to the National Assembly for approval and that the National Assembly may approve or reject any nomination and that the speaker of the National Assembly shall forward the names of the nominees to the President for appointment contrary to the provisions of Article 230 of the Constitution which does not require nomination by the President and approval by National Assembly, the same is unconstitutional, null and void.
 - c) A declaration be and is hereby issued that in so far as section 7(14) of the Salaries and Remuneration Commission Act No. 10 of 2011 provides that the President shall submit fresh nominations where the National Assembly rejects any nomination contrary to the provisions of Article 230(b) of the Constitution, which does not require approval by the National Assembly neither does it require the President to submit a fresh list of nominations, the same is unconstitutional null and void.



- d) A declaration be and is hereby issued that section 7(15) of the Salaries and Remuneration Commission Act No. 10 of 2011 is in violation of Article 230(b) of the Constitution, impracticable to implement, null and void.
- e) An order of mandamus do issue compelling the President of the Republic of Kenya through the First Respondent to appoint Jacqueline Akinyi Okeyo Manani as a member of the Salaries and Remuneration Commission representing the Judicial Service Commission within (7) days from the date of the judgment herein failing which Jacqueline Akinyi Okeyo Manani be deemed to be duly appointed and the Chief Justice be compelled to swear her as a member of the Commission.
- f) A declaration be and is hereby issued that having been sworn in Jacqueline Akinyi Okeyo Manani be allowed to take her position as a member of the Salaries and Remuneration.
- g) Any other order or relief which this Honourable court may deem fit to grant in the circumstances.
- h) Costs of this petition be borne by the Respondents.

2. The 1st Respondent filed grounds of opposition dated 6th November 2018 consisting of 8 grounds of opposition being as follows:-

- 1) That the constitution petition should be dismissed in entirety as it discloses no violation of the constitution or any written law since Article 230 of the Constitution should not be read in a narrow manner and the legislation as amended is meant to prescribe how the nomination and appointment to the Salaries and Remuneration Commission are to be done by providing a criteria that helps to achieve the constitutional requirement especially on gender per the provisions of Article 27(8).
- 2) That the Petitioner mistakenly reads Article 230 in isolation to Article 250(4) which provides that appointments to Commissions and Independent Offices shall take into account inter alia the principle that the composition of the commission and independent offices taken as a whole shall reflect the regional balance and ethnic diversity of the people of Kenya which is actualized by the amendments to the Salaries and Remuneration Commission.
- 3) That Article 250(11) of the Constitution also provides that the Chairperson and the Vice Chairperson shall be of the opposite gender and thus intention of the amended law was meant to ensure that the pool of nominees to the Salaries and Remuneration Commission meets the constitutional requirements on composition and is therefore constitutional. It is meant to achieve a constitutional purpose and object and should be upheld.
- 4) That the Constitutional petition should be dismissed since in their pleadings the petitioners have not disclosed with clarity and precision which articles of the Constitution have been breached by the enactment of the amendments to the Salaries and Remuneration Commission Act which is cardinal requirement to sustain a case against the validity or unconstitutionality of an impugned statute.
- 5) That the Constitutional Petition is grossly misconceived, a non-starter and the orders prayed for therein are out rightly misplaced in so far as the petitioners have failed to prove by way of evidence that both the purpose and effect of the amendment to the Salaries and Remuneration



Commission Act were animated by an object meant to subvert the Constitution through impact produced by the operation and application of the legislation.

- 6) That the jurisdiction of the High Court under Article 165 (3) (d) (i) & (ii) of the Constitution has not been properly invoked and the matter is not justifiable to the extent that there is no real or substantial controversy under the doctrine of standing in absence of no real or likely injury fairly traceable to the challenged laws or action of the respondent likely to be redressed by the judicial reliefs sought.
 - 7) That the petitioners have not demonstrated how Parliament has usurped its legislative powers as donated by Articles 95, 96 and 109 of the Constitution.
 - 8) That the court should decline to issue the orders sought since every act of parliament enjoys a presumption of unconstitutionality and the petitioners have not rebutted that presumption to warrant the invalidation of the amendment to the Salaries and Remuneration Commission Act.
3. The Interested Party filed Replying affidavit dated 6th November 2018 sworn by Jacqueline Akinyi Okeyo Manani on 6th November 2018, confirming that she had applied for the advertised position of Nominee of the Judicial Service Commission to the salaries and Remuneration Commission, was interviewed and subsequently nominated by the Judicial Service Commission and concluded by stating that she leaves the matter to the court for determination.
 4. The 2nd Respondent appointed the firm of M/s Manyonge Wanyama & Co. Advocates to act on their behalf in this matter and did not file any response to the petition.

Petitioner's Case

5. The 2nd Respondent, The Salaries and Remuneration Commission, (hereinafter referred to as "SRC" is established under Article 230 of the Constitution of Kenya 2010. Under Article 230(2) of the Constitution the SRC consists of the following persons appointed by the President:-

“(2) The Salaries and Remuneration Commission consists of the following persons appointed by the President—

- (a) A chairperson;
- (b) One person each nominated by the following bodies from among persons who are not members or employees of those bodies—
 - (i) The Parliamentary Service Commission;
 - (ii) The Public Service Commission;
 - (iii) The Judicial Service Commission;
 - (iv) The Teachers Service Commission;
 - (v) The National Police Service Commission;
 - (vi) The Defence Council; and
 - (vii) The Senate, on behalf of the county governments;
- (c) One person each nominated by—
 - (i) An umbrella body representing trade unions;



- (ii) An umbrella body representing employers; and Constitution 2010 Constitution of Kenya, 2010;
 - (iii) A joint forum of professional bodies as provided by legislation;
 - (d) One person each nominated by—
 - (i) The Cabinet Secretary responsible for finance; and
 - (ii) The Attorney-General; and
 - (e) One person who has experience in the management of human resources in the public service, nominated by the Cabinet Secretary responsible for public service."
6. In the instant petition, the vacancy having occurred in SRC relating to a member representing the Judicial Service Commission (hereinafter referred to as "JSC"), the petitioner on 15th January 2018 advertised in the local media inviting applications from persons qualified to be nominated for the position. The JSC upon receipt of the applications, considered all the applications, with a view to determine compliance with the constitutional provisions and the Salaries and Remuneration Act and following interviewing of the applicants, the petitioner voted the interested party as its nominee to the second Respondent.
7. Meanwhile on 4th April 2018 the President of the Republic Kenya assented to the statute Law (Miscellaneous Amendments) Act 2018 No. 4 of 2018 with commencement date of 21st May 2018. The Act amended some of the provisions of the Salaries and Remuneration Act No. 10 of 2011 amongst other statutes. It is out of such an amendment that the petitioner contends, that the amendments to the Salaries and Remuneration Commission Act, introduced through the statute law Miscellaneous Amendment Act are unconstitutional as they were not subjected to public participation.
8. The petitioner further contention is that having nominated the Interested party as its nominee to the second Respondent, and forwarded her name to Cabinet Secretary for onward transmission to the President for appointment in accordance with Article 230(2) of the Constitution of Kenya 2010 that should have been done.

1st Respondents Case

9. The 1st Respondent Case is based on the grounds of opposition. It is 1st Respondents contention, that the petition does not disclose any violation of the constitution or any written law. That the petitioner notwithstanding reads Article 230 in isolation to Article 250(4) and (ii) of the Constitution. That the constitutional petition is grossly misconceived, non-starter and the orders prayed for are out rightly misplaced. That the jurisdiction of the High Court under Article 165 (3) (d) (1) & (ii) has not been properly invoked and the matter is not justiciable to the extent that there is no real or substantial controversy. Under doctrine of standing in absence of no real or likely injury facing traceable to the challenged laws or action of the Respondent likely to be redressed by the judicial reliefs sought.
10. It is further the 1st Respondents contention that the petitioners have not demonstrated how Parliament has usurped legislative powers donated by Articles 95, 96 and 109 of the Constitution. Lastly the 1st Respondent urges the orders sought should be declined since every act of Parliament enjoys a presumption of unconstitutionality and the petitioner has not rebutted, that presumption to warrant the invalidation of the amendment to the Salary and Remuneration Commission Act.



11. In the instant petition it should be observed and noted that none of the Respondents filed any Replying affidavit to the petition challenging the facts and law contained in the petition and the supporting affidavit thereto.

Interested Parties Case

12. The intended party filed a Relying affidavit dated 6th November 2018 confirming the Interested party applied for the position, was interviewed and subsequently nominated for appointment as a member of the Salaries and Remuneration Commission representing the petitioner herein.

Analysis and Determination

13. I have very carefully perused and considered the pleadings herein, petitioners written submissions dated 11th December 2018, 1st Respondent's submissions dated 22nd February 2019, Counsel rival oral submissions made before me, as well as Counsel list of authorities and from all the above the issues arising for consideration can be summed up as follows:-

- a) Whether the amendments, to the Salaries and Remuneration Commission Act are constitutional?
- b) Whether the amendments to the Salaries and Remuneration Commission Act apply retrospectively?
- c) Whether there was adequate public participation in making amendments to the Salaries and Remuneration Commission?

A) Whether the amendments, to the Salaries and Remuneration Commission Act are constitutional?

14. The duty of the court when constitutionality of a statutory provision is challenged was set out in the case of Mark Ngaywa vs Minister of State for Internal Security and Provincial Administration & Another, Susan Wambui Kaguru & Others vs A.G & Another and also on U.S. Vs Butler in which the court pronounced the duty of the Court when the constitutionality of a statutory provision is challenged, "is to lay the Article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."
15. The petitioner challenges the constitutionality of section 7(2), (10), (11), (12), (13), (14) and 15 of the Salaries and Remuneration Act No. 10 of 2011 as amended. It is the petitioners contention in so far as section 7(2) of the Salaries and Remuneration Commission Act No. 10 of 2011 as amendment purports to require the nominating body to interview the Applicants and forwarded the names of the two persons so qualified who shall be of opposite gender to the Cabinet Secretary for onward transmission to the President as opposed to the provisions of Article 230 (2) (b) of the constitution which requires the President to appoint one person each nominated by the nominating bodies, the same is null and void and of no effect in law.
16. Article 230 (2) (b) of the constitution clearly provides;

“One person each nominated by the following bodies from among persons who are not members or employees of those bodies:-

- "i)
- ii)
- iii) The Judicial Service Commission



- iv)
- v)
- vi)
- vii)
- viii)"

17. Section 7(10) of the Salaries and Remuneration Commission Act No. 10 of 2011 requires the President to nominate the members of the commission from each category and forward the name to the National Assembly for vetting and approval. This is contrary to Article 230 of the Constitution as the said Article has not provided for vetting and approval of the nominees by National Assembly, under Article 230(2) (b). The same violates Article 230 of the Constitutional and the same is null and void as the President assumes the nominating bodies power to nominate their respective representatives. The same is therefore unconstitutional, null and void.
18. Under Article 7(11) and (12) of Salaries and Remuneration Commission Act No. 10 of 2011 as amended provides, that the nominees to the Salaries and Remuneration Commission must undergo vetting and approval of the National Assembly before appointment by President, contrary to Article 230 of the Constitution of Kenya 2010. I find the said section to be contrary to Article 230 of the constitution, it is therefore unconstitutional, null and void.
19. Article 230 of the Constitution of Kenya 2010 is clear as regards the composition of the Salaries and Remuneration Commission and also on the mode of nomination and appointment under the said Article. Section 7(15) of the Salaries and Remuneration Commission Act No. 10 of 2011 as amended is contrary to Article 230; hence it is unconstitutional and impractical to implement.
20. In the case of Law Society of Kenya vs Attorney General & Another [2016] eKRL. While declaring the amendment of Section 30(3) of the Judicial Service Act 2011 through statute law Miscellaneous Amendment Act, 2015 unconstitutional, the court held;
 - “ 1. It was improper for the amendments affecting the manner of appointment of the Chief Justice and the Deputy Chief Justice, the top most positions in the Judiciary as an arm of the Government, to be effected in a statute Law Miscellaneous Amendment legislation.
 2. To the extent that the amendments to Section 30(3) of the Judicial Service Act compelled the Judicial Service Commission to submit three names to the President for appointment of the Chief Justice and the Deputy Chief Justice respectively, the said amendments violated the letter and spirit of Article 168(1) of the Constitution.
 3. By introducing the said amendments on the floor of the house when the same were not the subject to the Bill that was published and was subjected to public participation that action was contrary to the letter and spirit of Article 10 as read with Article 118 of the Constitution.”



21. The constitution under Article 248(1) provides;

“(1) This Chapter applies to the commissions specified in clause (2) and the independent offices specified in clause (3), except to the extent that this Constitution provides otherwise.”

22. From the reading of Article 248, the Salaries and Remuneration Commission is one of the commission provided thereunder. It is therefore not governed by Article 250 (1) of the constitution which means each commission shall consist of at least 3 members but not more than 9 members. Article 230 of the constitution governing the Salaries and Remuneration Commission gives a list of 13 members. This therefore does not fall under chapter 15 of the constitution. This therefore follows that the appointment under Article 250 and 230 are not the same as there are two provisions providing on how appointments should be done. Article 230 should not be confused with Article 250 of the constitution when it comes to appointments of members of the commission as the two are clearly different. Article 230 of the constitution do not provide for nomination of 2 persons for nomination by the President. This is totally different from Article 250(2) of the constitution. There is a clear difference between a commission established under Article 250 and Article 230 of the constitution and as such any attempt to intermarry the two is contrary to the constitution; nor can provisions of Article 250 be used in appointment of members of a commission set under Article 230. I do not agree with Respondents contention that Article 230 of the constitution as submitted by the petitioner is read in a narrow manner and in isolation to Article 250(4) and not in tandem with the legislation prescribing how nomination and appointment are done.

23. From the provisions of Article 230 of the constitution there is only, provision for appointment of a chairperson and one person each appointed by the listed bodies thereto, who are not members or employees of the listed bodies. There is no provision for nominees to be subjected to vetting by National Assembly or anybody. There is no provision for male or female for gender balance and this must be deliberate as the nominees are representatives of other institutions and demanding contrary to the clear provision of the constitution would amount to interference with the independence of the Salaries and Remuneration Commission and the Judiciary.

B) Whether the amendments to the Salaries and Remuneration Commission Act apply retrospectively?

24. The Latin maxim *lex prospicit non respicit* encapsulates the cardinal principal that law looks forward but not backwards but this principle is nether absolute nor cast in stone. In the case of *Municipality of Mombasa vs Nyalil Limited* [1963] E.A. 371 Newbold, JA, stated that:-

“Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, *prima facie* it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention.”



25. The principle stated above is legislated in section 23(3) of the Interpretation and General Provisions Act, (Chapter 2 of the Laws of Kenya) which provides; where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not –

- “a) Revive anything not in force or existing at the time at which the repeal takes effect; or
- b) Affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or
- c) Affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or
- d) Affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or
- e) Affect an investigation, legal proceedings or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.”

26. It is also a rule of construction of statutes, that prima facie, if a provision of legislation affects procedure only, it operates retrospectively. Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction and one of these rules is, that if the legislation affects substantive rights, it will not be construed to have retrospective effect unless a clear intention to that effect is manifested. Whereas, if it affects procedure only, prima facie, it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation, which has to be ascertained, and the rule of construction is only one of the factors to which regard must be had in order to ascertain that intention.

27. Whether retrospective statutory provisions are unconstitutional was also a matter considered by the Supreme Court in the case of Samuel Kamau Macharia and Another vs Kenya Commercial Bank Ltd and 2 Others, SCK Application No. 2 of 2011 [2012] eKLR where the Court observed that;

- “(6) As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.”

28. From the above and from the construction of the impugned sections, the provisions of the legislation cannot per se be said to affect procedure only nor can it be said the intention of the enacting body was to have it operate retrospectively. The legislation as it is affects substantive rights, and as such it cannot be construed in my view to have retrospective effect unless a clear intention to that effect is manifested. The general Rule for non-criminal legislation is that all statutes other than those which are declaratory or which relate only to matters of procedure or evidence are prima facie prospective and retrospective is not to be given to them, unless it is expressly stated so in clear words or by virtue of necessary implication, I do not in the instant matter find that to have been the intention and more so I find where legislation is contrary to the constitution cannot have any retrospective effect. I therefore find that the amendments to the Salaries and Remuneration Commission Act cannot apply retrospectively.



- C) Whether there was adequate public participation in making amendments to the Salaries and Remuneration Commission?
29. Article 10 of the Constitution of Kenya 2010 provides that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution, enacts, applies or interprets any law or makes or implements public policy decisions and that the national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and public participation of people; human dignity, equity, social justice, inclusiveness, equality, human right, non-discrimination and protection of the marginalized, good governance, integrity, transparent and accountability and sustainable development.
30. The public participation is therefore one of national values and principles of governance, that bind all state organs, state officers, public officers and all persons whenever any of them applied or interpreted the constitution, enacts or interprets any law or makes or implements public policy decisions (see *Republic vs Independent Electoral and Boundaries Commission & 6 others Judicial Review petition No. 378 of 2017*).
31. The Respondent content that a distinction must be made between legislation that is being introduced by Parliament for the first time and amendments that are subsequently made to the legislation. That when the law is being introduced or repealed and re-enacted, there must be meaningful public participation. That however where there were minor amendments, which do not substantially alter the core substance of the legislation, it is Respondents position that there is no need for public participation.
32. In the case of *County Government of Kiambu & 4 others vs Robert Gakuru & others Nairobi Civil Appeal No. 200 of 2014*, the Court of Appeal held thus:-
- “In my view where a Bill has been rejected by the Assembly and a fresh Bill introduced as opposed to mere amendments, the principle of public participation must equally apply. Unless this is so, the principle may be defeated by the Assembly simply rejecting a Bill in which the public has had an input with its own Bill disregarding the input by the public and not subjecting it to public participation. That in my view would defeat the very principle of public participation.”
33. Further in case of South African Constitution Court case of *Minister for Health vs New Chicks South Africa Property Ltd CCT 59/2004* it was held:-
- “The forms of facilitating an appropriate degree of participation in the lawmaking process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to the members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”
34. In the instant petition, the amendments introduced to the Salaries and Remuneration Commission Act, are not minor amendments as suggested by the Respondents as they substantially alter the core substance of the legislation and as such reintroduced re-enactment for which I find the principle of public participation must apply. The input by the public and subjecting the major amendments of the respective sections of the Act should have been subject of public participation. The burden of proof there was public participation lies with the Respondents to demonstrate there was public



participation. No evidence was called to demonstrate indeed there was public participation to such substantive amendments contrary to Article 10 of the Constitution of Kenya 2010.

35. In *Kenya Human Right Commission vs Attorney General & Another* (2018) eKLR Hon. Justice E.C. Mwita held thus;

“Having considered the petition, the response, submissions, the constitution and the law, I am persuaded that Section 30 and 35 of the contempt of Court Act are unconstitutional. I however find that the entire fails the constitutional test of validity for lack of public participation and for encroaching on the Independence of the Judiciary.”

36. In the instant petition, I have to consider what should be the appropriate relief to grant. Appropriate relief should be an effective remedy for purpose of enforcing the constitution, human rights and rule of law. In the case of *Fose vs Minister of Safety and Security* (1997) 3 SA 786(CC), 1997(7) BCLR 851 Ackermann, J; stated that:-

“(19) Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be require to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”

37. Upon considering the above principles, I find that this court is looked upon to grant a relief that is in accordance with the constitution and legal process, and that will effectively address the source of the violation as a way of enforcing the constitution and discharge any future incentives for any state organ, state officer or public officer from violating, infringing and/or frustrating a legitimate constitutional or legal process.

38. Having considered the petition, responses, submissions both written and oral, authorities relied upon by both Counsel in their opposing positions, as well as the constitution and relevant provisions of law, I find that the petition is meritorious. Accordingly the petition dated 9th October 2018 is allowed and I proceed to make the following orders, which I find appropriate in the circumstances of this case.

- a) A declaration be and is Hereby issued that in so far as section 7(2) of the Salaries and Remuneration Commission Act provides that a nominating body shall forward the names of two persons so qualified who shall be of opposite gender to the Cabinet Secretary for onward transmission to the President contrary to Article 230(2) (b) of the Constitution, the same is unconstitutional, null and void.
- b) A declaration be and is Hereby issued that in so far as sections 7(10), (11), (12), and (13) of the Salaries and Remuneration Commission Act No. 10 of 2011 provides that the President shall nominate the members of the Commission from each category and forward the names of the nominees of the Commission to the National Assembly for approval and that the National Assembly may approve or reject any nomination and that the speaker of the National Assembly shall forward the names of the nominees to the President for appointment contrary to the provisions of Article 230 of the Constitution which does not require nomination by the President and approval by National Assembly, the same is unconstitutional, null and void.
- c) A declaration be and is Hereby issued that in so far as section 7(14) of the Salaries and Remuneration Commission Act No. 10 of 2011 provides that the President shall submit fresh nominations where



the National Assembly rejects any nomination contrary to the provisions of Article 230(2) (b) of the Constitution, which does not require approval by the National Assembly neither does it require the President to submit a fresh list of nominations, the same is unconstitutional, null and void.

- d) A declaration be and is Hereby issued that section 7(15) of the Salaries and Remuneration Commission Act No. 10 of 2011 is in violation of Article 230(2) (b) of the Constitution, impracticable to implement, null and void.
- e) An order of mandamus do issue compelling the President of the Republic of Kenya through the First Respondent to appoint Jacqueline Akinyi Okeyo Manani as a member of the Salaries and Remuneration Commission representing the Judicial Service Commission within (7) days from the date of the judgment herein failing which Jacqueline Akinyi Okeyo Manani be deemed to be duly appointed and the Chief Justice be compelled to swear her as a member of the Commission.
- f) A declaration be and is Hereby issued that having been sworn in, Jacqueline Akinyi Okeyo Manani be allowed to take her position as a member of the Salaries and Remuneration Commission.
- g) The 1st Respondent do bear costs of this petition.

Dated, signed and delivered at Nairobi this 6th day of June, 2019.

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J .A. MAKAU

JUDGE

