National Assembly v Katiba Institute & 6 others (Civil Appeal 243 of 2018) [2023] KECA 1174 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1174 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 243 OF 2018

HA OMONDI, JM MATIVO & GWN MACHARIA, JJA

OCTOBER 6, 2023

BETWEEN

NATIONAL ASSEMBLY ..... APPELLANT

AND

KATIBA INSTITUTE ..... 1ST RESPONDENT

AFRICAN CENTRE FOR OPEN GOVERNANCE ..... 2ND RESPONDENT

OKIYA OMTATAH OKOITI ..... 3RD RESPONDENT

DAVID OUMA OCHIENG ..... 4TH RESPONDENT

THE ATTORNEY GENERAL ..... 5TH RESPONDENT

GOVERNMENT PRINTER ..... 6TH RESPONDENT

SENATE ..... 7TH RESPONDENT

(Being an appeal against the judgement and decree of the High Court of Kenya at Nairobi (Mwita, J.) dated 6th April 2018 in Constitutional Petition No. 548 of 2017)

Amendment to allow a person without constitutional qualifications to ascend to the position of chairperson of the Independent Electoral and Boundaries Commission is unconstitutional

The appeal was a challenge on the decision of the trial court that declared several amended sections of the Independent Electoral and Boundaries Commission Act unconstitutional. The court noted that the effect of the impugned amendment was that the vice-chairperson or a member of the Independent Electoral and Boundaries Commission (IEBC) could assume the duties of the chairperson. The court thus held that an amendment that sought to lower the set constitutional threshold and permit a person who did not possess the qualifications set by the Constitution to ascend to the position of the chairperson in a manner other that than what the Constitution contemplated was an affront to the intention of the Constitution and was therefore impermissible.

Reported by Kakai Toili

Constitutional Law *– constitutional commissions – Independent Electoral and Boundaries Commission (IEBC) – where the qualifications for the chairperson of the IEBC and those of other commissioners of the IEBC were different - claim that permitting the vice-chairperson or a member of the IEBC to perform the duties of the chairperson was unconstitutional - whether the permitting the vice-chairperson or a member of the IEBC to perform the duties of the chairperson when that position fell vacant was unconstitutional for lowering the constitutional qualifications for that position – Constitution of Kenya, 2010, articles 6(1), 166(3) and 249(1); Independent Electoral and Boundaries Commission Act, Cap 7C, section 6.*

Constitutional Law *– constitutionality of statutory provisions – constitutionality of section 83 of the Elections Act - doctrine of severance - nature of the doctrine of severance - whether it was proper to invalidate the entire section 83 of the Elections Act where the amendments to that section were found to be unconstitutional – Elections Act, Cap 7, section 83.*

Statutes *– interpretation of statutes – interpretation of definition sections - nature and purpose of a definition section in a statute - what were the factors to consider in determining whether a law was overbroad.*

Brief facts

The Election Laws (Amendment) Act, 2017 introduced significant amendments to the Elections Act, 2011, the Independent Electoral and Boundaries Commission Act and the Election Offences Act. The 1st to 4th respondents challenged the constitutionality of the amendments at the High Court (the trial court). The gravamen of the 1st to 4th respondents' case was that the amendments violated several articles of the Constitution of Kenya, 2010 (the Constitution) specifically articles 10, 81 and 86. In addition, they contended that the amendments negated national values, and that their effect was to compromise the values and principles of electoral process. Accordingly, they prayed that Election Laws (Amendment) Act be declared unconstitutional.

The trial court allowed the petition partially and declared the amended sections 2, 7A (4), 7A (5), 7A (6) of the Independent Electoral and Boundaries Commission Act and paragraphs 5 and 7 of the Second Schedule to the Independent Electoral and Boundaries Commission Act unconstitutional. The trial court also declared sections 39(1C) (a), 39 (1D), 39(1E), 39(1F), 39(1G), and the entire 83 of the Elections Act, 2011 unconstitutional. However, the trial court found the amended sections, 39(2), 39(3), 44(5), and 44A of the Elections Act, 2011 constitutionally compliant. Aggrieved the National Assembly (the appellant) filed the instant appeal seeking to overturn the judgment and decree of the trial court.

Issues

i. Whether permitting the vice-chairperson or a member of the Independent Electoral and Boundaries Commission to perform the duties of the chairperson when that position fell vacant was unconstitutional for lowering the constitutional qualifications for that position.
ii. Whether it was proper to invalidate the entire section 83 of the Elections Act where the amendments to that section were found to be unconstitutional.
iii. What was the nature and purpose of a definition section in a statute?
iv. What were the factors to consider in determining whether a law was overbroad?
v. What were the steps to be taken by a court after it made a finding of inconsistency with the Constitution?
vi. What was the nature of the doctrine of severance?

Held

1. The trial court was alive to the mandatory cannons of constitutional interpretation and the applicable principles for determining constitutional validity of a statute and it deployed the principles in addressing the constitutionality or otherwise of the impugned provisions.
2. Prior to the amendment to section 2 of the Independent Electoral and Boundaries Commission Act, section 2 provided that "chairperson" meant the chairperson of the Commission appointed in accordance with article 250 (2) of the Constitution. The amendment altered the definition of the

chairperson of the Commission to mean the chairperson of the Commission appointed in accordance with article 250(2) of the Constitution or the vice-chairperson or a member of the Commission when discharging the functions of the chairperson.

3. The definitions section in a statute set forth and defined the key terms used in the statute. Definitions were important because they suggested that the Legislature intended a term to have a specific meaning that might differ in important ways from its common usage. Therefore, definitions were powerful provisions because they controlled the meaning of terms used throughout a legislative text and, in the absence of a contrary intention, the meaning of terms in all other enactments relating to the same subject matter.
4. Definitions had a very strong influence on the interpretation of legislative texts. Definition in legislation was only useful so long as it served the essential purposes of determining and communicating the legislation. Conversely, a definition, which placed a completely forced and artificial meaning on a term, was a bad definition.
5. The principle function of a definition section was to shear away some of the vagueness and ambiguities which would otherwise surround the terms defined. Before a term was defined in a legislative text, the Constitution and all other provisions dealing with the same subject matter should be consulted to ensure conformity with the Constitution and where possible, consistency in the use of the term in the statute. Statutes could not be read intelligently if the eye was closed to considerations evidenced in affiliated statutes.
6. Where the application of the definition, even where the same statute in which it was located applied, would give rise to an injustice or incongruity or absurdity that was at odds with the purpose of the statute, then the defined meaning would be inappropriate for use and should therefore be ignored.
7. The word “interpolate” had as its primary meaning to refurbish or to modify. Refurbishment or modification of a text may provide scope for creativity, but where the text was a parliamentary enactment of law the urge to be creative was not what was expected of judges. Where a statutory provision was impugned on the basis that it was inconsistent with the Constitution, the enquiry should be directed only at the words used in formulating the legislative provision that was sought to be impugned to see whether the legislative provision was constitutionally compliant.
8. The qualifications for members of the Commission were different from those set for the chairperson. Section 6(2) of the Independent Electoral and Boundaries Commission Act provided that a person was qualified for appointment as a member of the Commission if such person held a degree from a recognized university; had proven relevant experience in any the following fields - electoral matters; management; finance; governance; public administration; law; and met the requirements of Chapter Six of the Constitution.
9. The effect of the impugned amendment was that the vice-chairperson or a member could assume the duties of the chairperson of the Commission in the event it fell vacant, albeit pending appointment of a substantive chairperson. That definition ignored the provisions of article 166(3) of the Constitution which prescribed the qualifications for appointment of a judge of the Supreme Court of Kenya which was the qualification required for a person to qualify to be appointed as a chairperson of the Commission and section 6(1) of the Independent Electoral and Boundaries Commission Act which replicated the provisions of article 166(3).
10. A vague or over-broad statute provided plausible legislative cover for unconstitutional action. The unconstitutional action lay in the application of the impugned provision, which not only amended the constitutional threshold for qualifications of a chairperson, but also permitted a person who had not been appointed as per the Constitution to fall within the definition of chairperson. So long as the possibility of a statute being applied for purposes not sanctioned by the Constitution could not be ruled out, it must be held to be wholly void.

11. The intended effect of a statute may be perfectly clear and thus not vague. However, its application could be overly broad creating a fertile ground for an unconstitutional application. If at all any change was required, then, it could not be achieved by passing a legislation whose application offended the Constitution, essentially amending the Constitution through a legislation. The remedy lay in a proper constitutional amendment.
12. To determine whether a law was overbroad, a court must consider the means used, (that was, the law itself, properly interpreted), in relation to its constitutionally legitimate underlying objectives. If the impact of the law was not proportionate with such objectives, that law may be deemed overbroad. The effect of legislation was relevant to show that although the statute was facially neutral its effect was unconstitutional. If a statute had a purpose that violated the Constitution; it must be held to be invalid regardless of its actual effects.
13. The impugned definition must be assessed in relation to the consequences. The amended definition was vague and overbroad. That was because it created room for a person not qualified under article 166(3) of the Constitution or who was not appointed as stipulated by the Constitution to act or assume the post of chairperson.
14. The word "shall" appearing in article 166(3) of the Constitution meant that the qualifications therein prescribed were mandatory. Taking cue from that provision, Parliament also deployed the word "shall" in section 6(1) of the Independent Electoral and Boundaries Commission Act and set out the qualifications required by article 166(3) for appointment of the chairperson.
15. At section 6(2) of the Independent Electoral and Boundaries Commission Act, Parliament specified qualifications for members of the Commission which were different from the qualifications of the chairperson provided under section 6(1). The word "shall" had not been used in that provision, suggesting that the qualifications listed therein for members of the Commission were not mandatory. At the time Parliament enacted section 6(2), it was alive to the cognate provisions of section 6(1). That distinction had a constitutional underpinning. It meant that only the chairperson of the Commission was required to possess the qualifications set out in article 166(3) of the Constitution.
16. From the architecture and design of the Constitution and the Independent Electoral and Boundaries Commission Act, the chairperson must possess specific set qualifications unlike the members and his appointment must conform with the Constitution. The mode of appointment of the chairperson was different from the vice-chairperson or the members. The high qualifications and the need for the independence of the chairperson and members of the Commission was supported by and in the context of article 249(1) of the Constitution. That article provided the objects of the commissions and the independent offices were to- protect the sovereignty of the people; secure the observance by all State organs of democratic values and principles; and promote constitutionalism. The persons entrusted with that heavy constitutional duty must meet the set constitutional standard.
17. The provisions of section 6(1) of the Independent Electoral and Boundaries Commission Act which provided that the chairperson of the Commission shall be a person who was qualified to hold the office of judge of the Supreme Court under the Constitution enjoyed a constitutional underpinning.
18. An amendment that sought to lower the set constitutional threshold and permit a person who did not possess the qualifications set by the Constitution to ascend to the position of the chairperson in a manner other that than what the Constitution contemplated was an affront to the intention of the Constitution and was therefore impermissible. Three important points must be borne in mind:
    a. Statutory provisions should always be interpreted purposively.
    b. The relevant statutory provision must be properly contextualized; and
    c. all statutes must be construed consistently with the Constitution.
19. The Constitution required courts to read legislation, where possible, in ways, which gave effect to its fundamental values. Consistent with that, when the constitutionality of legislation was in issue, courts were under a duty to examine the objects and purport of an Act and to read the provisions of

the legislation, so far as was possible, in conformity with the Constitution. If the legislation did not pass the constitutional validity test, the court must not hesitate to so find and declare the provision constitutionally infirm.

20. The correct approach was to interpret the impugned provisions in light of the values and principles under articles 249, 250 (3), 10, 81 and 88 harmoniously. That approach was buttressed by an array of reasons.
    a. Members of the Commission must be appointed in conformity with the Constitution.
    b. The chairperson must possess the qualifications set out in the Constitution.
    c. The members must satisfy the qualifications set out in the governing statute.
21. The considerations read together left no doubt that a law that permitted a person to ascend to the post of chairperson in a manner that was inconsistent with those constitutional values did not accord with the purposes, values and principles of the Constitution.
22. It was not by accident that the Constitution and the law set out specific qualifications for the chairperson different from those of the members. Where constitutional values were implicated as in the instant case, the court must give effect to the normative force of the spirit, purport and objects of the Constitution. The requirement for free and fair democratic elections administered by an independent commission appointed in accordance with the Constitution lay at the heart of Kenya's constitutional order. That commitment permeated and defined the very ethos upon which the Constitution was premised, and therefore, any appointment to the office of the chairperson, which went against that constitutional order, was impermissible.
23. When the Constitution prescribed the manner in which a thing shall be done or a fact ascertained by implication, it prohibited the Legislature from, by statute, providing a different manner of doing so. The impugned provision essentially permitted a person who was not qualified under article 166(3) of the Constitution or who had not been appointed in conformity with the Constitution to perform the functions of the chairperson. The set qualifications for appointment of members of the Commission were different from those of the chairperson (section 6(2) of the Independent Electoral and Boundaries Commission Act).
24. Section 7B had a similar effect as section as section 7A(4) and (5) of the the Independent Electoral and Boundaries Commission Act. There was no reason to fault the trial court's findings in respect of the issue at hand.
25. The question of quorum was resolved by the Supreme Court in *Attorney-General & 2 others v Ndii & 79 Others; Prof. Rosalind Dixon & 7 Others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent). That decision was to the effect that each constitutional commission must consist of at least three, but not more than nine, members. The issue regarding quorum was moot having been settled by the apex court.
26. When a court made a finding of inconsistency with the Constitution, it must;
    a. define the extent of the inconsistency. That was because the nature and extent of the underlying constitutional violation laid the foundation for the remedial analysis since the breadth of the remedy would reflect at least the extent of the breach. That helped to ensure that the remedy fully addressed the law's constitutional defects while also serving the broader public interest in preserving the application of the constitutional aspects of the law.
    b. Determine the form that the declaration should take. That part of the analysis involved an exercise of principled remedial discretion which was based on constitutional considerations drawn from the text of the Constitution and the broader architecture of Kenya's constitutional order and the rule of law. The exercise of that discretion should be guided by, and transparently explained with reference to four foundational principles-
        i. Constitutional values and principles should be safeguarded through effective remedies.
        ii. The public had an interest in the constitutional compliance of legislation.

iii. The public was entitled to the benefit of legislation.

iv. Courts and legislatures played different institutional roles.

27. To ensure that the public had the benefit of enacted legislation, remedies of reading down, reading in, and severance – tailored to the breadth of the violation – should be employed where possible so that the constitutional aspects of legislation were preserved. The purpose of reading in was to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature.

28. When only a part of a statute or provision violated the Constitution, only the offending portion should be declared to be of no force or effect. That was what in legal parlance was called the doctrine of severance. That doctrine required that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative the inconsistent portion, and such part of the remainder of which it could not be safely assumed that the Legislature would have enacted it without the inconsistent portion.

29. In the case of reading in, the inconsistency was defined as what the statute wrongly excluded rather than what it wrongly included. Where the inconsistency was defined as what the statute excluded, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. The reach of the statute was effectively extended by way of reading in rather than reading down.

30. The purpose of reading in was to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature. In some cases, it would not be a safe assumption that the Legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. Just as reading in was sometimes required in order to respect the purposes of the Legislature, it was also sometimes required in order to respect the purposes of the Constitution. Reading in therefore was a legitimate remedy akin to severance and should be available where it was an appropriate technique to fulfil the purposes of the Constitution and at the same time minimize the interference of the court with the parts of legislation that did not themselves violate the Constitution.

31. Where the purpose of the legislation or legislative provision was deemed to be pressing and substantial, but the means used to achieve that objective were found not to be rationally connected to it, the inconsistency to be struck down would generally be the whole of the portion of the legislation which failed the rational connection test. It mattered not how pressing or substantial the objective of the legislation may be; if the means used to achieve the objective were not rationally connected to it, the objective would not be furthered by somehow upholding the legislation as it stood.

32. A court had flexibility in determining what course of action to take following a violation of the Constitution. The Constitution mandated the court to strike down any law that was inconsistent with the provisions of the Constitution, but only to the extent of the inconsistency. However, the court should consider whether the significance of the part which would remain was substantially changed when the offending part was excised. The trial court having correctly found that section 39(1D) of the Elections Act presented a problem when read together with section 39(1E), then the appropriate step to take would have been to satisfy itself whether section 39 (1D) could stand, and if so satisfied, proceed to deploy the remedy of severance instead of invalidating section 39 (1D) which surmounted constitutional validity test and could stand on its own.

33. Section 44(5) of the Elections Act was deleted and a new subsection introduced to the effect that the Commission shall, in consultation with the relevant agencies, institutions and stakeholders, make regulations for the better carrying into effect the provisions of that section. Section 44 dealt with use of technology and established an integrated electronic electoral system that enabled biometric voter registration, electronic voter identification and electronic transmission of results. Section 44(5) only required the Commission, in consultation with stakeholders, to come up with regulations on the implementation of the integrated biometric voter registration, electric voter identification and

electronic transmission of results (KIEMS). The petitioners had not demonstrated how, if at all, that provision violated the Constitution to require that it be declared unconstitutional.

34. The impugned Act deleted section 44A and inserted a new section 44A which provided that notwithstanding the provisions of section 44, the Commission shall put in place a complimentary mechanism for identification of voters that was simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complied with the provisions of article 38 of the Constitution. The complimentary mechanism contemplated in that section was only complimentary. It did not replace the electronic voter identification system. The word "complimentary", in the context in which it was used in that section, could only mean to assist or aid. It could only be resorted to in the event the principal voter identification system had failed. That provision did not violate articles 10, 38, 81 and 86 of the Constitution on the values and principles of transparency and accountability of the electoral system. Rather, it was intended to aid and or complement the main voter identification system in the event there was failure and to ensure that the electoral process continued. The provisions under challenge were constitutional.

35. The contestation before the trial court was with respect to section 83(1)(a) and (b) of the Elections Act which had replaced section 83 of the Act. The trial court held that there was no constitutional compulsion or rationale in amending section 83 to remove the disjunctive word 'or' and introduce the conjunctive word 'and'. However, despite correctly appreciating the nature and ambit of the dispute before it, the trial court in its final orders issued orders, which had the effect of nullifying the entire section 83 instead of invalidating the impugned amendment. The trial court decreed a declaration that sections 39(1C) (a), 39(1D), 39(1E), 39(1F), 39(1G), and the entire 83 of the Elections Act, 2011 were constitutionally invalid.

36. The trial court's order invalidated the entire section 83 of the Elections Act instead of the amended section 83(1)(a) and (b). There was merit in the proposal to read the order to mean they applied to the amendment as opposed to invalidating the entire section 83 and therefore, section 83 remained as it was prior to the amendment.

37. The amendment to section 86A of the Elections Act was to the effect that where the Supreme Court annulled presidential elections under article 140(3) of the Constitution, the Commission had to publish a gazette notice within 7 days indicating that no candidate had been elected following the nullification, announce the date of the fresh election, and names of candidates and political parties to take part in the fresh election. The section further provided that the Commission would not hold fresh nominations pursuant to article 140(3); that an eligible candidate under article 140(3) may withdraw from the election by giving a notice to the Commission, and that where there remained more than two candidates, the election would proceed but where only one candidate remained after such withdrawal, no elections shall take place, but the remaining candidate shall be declared president-elect.

38. Section 86A of the Elections Act cleared a *lacuna* that made the holding of the 2017 fresh presidential election a challenge to the Commission. The section clarified what should happen and the timelines. It also made it clear what should happen when only one candidate remained after withdrawal of the other candidates which was in tandem with article 138(1) of the Constitution. The section was for necessary clarity and efficiency. There was no constitutional invalidity.

39. The amendment to sections 6 and 14(2) of the Election offences Act enhanced the fine and sentence in section 6 and deleted section 14(2). There was no reason to fault that amendment.

Appeal partly allowed.

Orders

i. *The trial court's finding that the amendments to the Independent Electoral and Boundaries Commission Act, namely sections 2, 7A(4), 7A(5), and 7A(6), 7B and paragraphs 5 and 7 of the Second Schedule to the Independent Electoral and Boundaries Commission Act were unconstitutional was affirmed.*

ii. *The trial court's finding that the amendments introduced to the Elections Act, 2011 by sections 39(1C)(a), 39(1E), 39(1F) and 39(1G) were unconstitutional was upheld.*
iii. *Section 39(1D) of the Elections Act was constitutional.*
iv. *The trial court's finding declaring the entire section 83 of the Elections Act, 2011 unconstitutional was set aside and was substituted with an order declaring that the amendments introduced by section 83(1)(a) and (b) and (2) were declared unconstitutional. For the sake of clarity, section 83 remained as it was prior to the amendment.*
v. *Each party shall bear its own costs for the appeal.*

Citations

Cases

Kenya

1. *AIDS Law Project v Attorney General & another; VIHDA Association (Interested Party); Center for Reproductive Rights (Amicus Curiae)* Petition 97 of 2010; [2015] KEHC 6972 (KLR); [2015] 1 KLR 188 - (Applied)
2. *Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae)* Petition 12, 11 & 13 of 2021 (Consolidated); [2022] KESC 8 (KLR) - (Applied)
3. *Center for Rights Education and Awareness & Caucus for Women's Leadership v Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 101 (KLR); [2012] 2 KLR 261 - (Applied)
4. *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* Civil Appeal 105 of 2017; [2017] KECA 477 (KLR) - (Applied)
5. *Katiba Institute & 3 others v Attorney General & 2 others* Constitutional Petition 548 of 2017; [2018] KEHC 7560 (KLR) - (Applied)
6. *Law Society of Kenya v Attorney General & 4 others* Petition 45 of 2019; [2023] KESC 19 (KLR) - (Applied)
7. *Law Society of Kenya v Attorney General & Central Organisation of Trade Unions* Application 4 of 2019; [2019] KESC 30 (KLR) - (Applied)
8. *Munya v Kithinji & 2 others* [2014] KLR - SCK; [2014] 3 KLR 36 - (Applied)
9. *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)* Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated); [2022] KESC 54 (KLR) - (Applied)
10. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others* Presidential Election Petition 1 of 2017; [2017] KESC 42 (KLR) - (Applied)
11. *Senate & 2 others v Council of County Governors & 8 others* Petition 25 of 2019; [2022] KESC 7 (KLR) -(Applied)

Uganda

Kizza Besigye v Attorney General Constitutional Petition No 13 of 2009; [2019] UGCA 2030 - (Mentioned)

South Africa

Independent Institute of Education (Pty) Limited v KwazuluNatal Law Society and Others [2019] ZACC 47 - (Applied)

United Kingdom

Pepper (Inspector of Taxes) v Hart [1992] 3 WLR 1032; [1992] UKHL 3; [1993] AC 593 - (Applied)

India

Chintaman Rao v State of Madhya Pradeshram 1951 AIR 118; 1950 SCR 759 - (Explained)

United States

1. *Arnett v Kennedy* [1974] USSC 124; 416 US 134 [1973] - (Applied)
2. *Grayned v City of Rockford* 408 US 104 (1972) - (Applied)

Canada

1. *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139; (1991) 120 NR 241 - (Applied)
2. *R v Zundel* [1987] 58 OR (2d) 129 (CA) - (Explained)
3. *Schachter v Canada* 1992] 2 SCR 679 - (Applied)

Regional Court

Olum & another v Attornery General [2002] 2 EA 508 - (Applied)

Texts

1. Thornton, GC., (Ed) (1996), *Legislative Drafting* London: Butterworths 4th Edn pp 144, 145
2. Johan, S., (2003), *Dynamic Interpretation Amidst an Orgy of Statutes* Ottawa Law Review pp 163, 166

Statutes

Kenya

1. Constitution of Kenya articles 2(4); 10; 38; 81; 86; 88; 116; 118; 115(2); 138 (1) & (10); 140(3); 166(3); 249; 250(1)(2)(3); 259(1)(3) - (Interpreted)
2. Election Laws (Amendment) Act, 2017 (Act No. 34 of 2017) sections 3, 3A, 4, 5, 6, 8, 9, 10, 11, 12- (Interpreted)
3. Election Offences Act (cap 66) sections 6, 14 - (Interpreted)
4. Elections Act (cap 7)sections 29, 39, 39(1C) (a); 39 (1D); 39(1E); 39(1F); 39(1G); 39(2); 39(3); 44; 44(5); 44A; 83; 86A - (Interpreted)
5. Independent Electoral and Boundaries Commission Act (cap 7C) sections 2, 5, 6, 6(1) & (2); 7A; 7A (4); 7A (5); 7A (6); 7B; Schedule 1; Schedule 2 para 5 and 7- (Interpreted)
6. Interpretation and General Provisions Act (cap 2) section 12- (Interpreted)

Advocates

Mr Sore and *Ms Komu* for the appellant

Mr Ochiel Dudley and *Mr Lempaa* for the 1st and 2nd respondents

Mr Sore and *Ms Komu* h/b for *Mr Taji* for the 7th respondent

JUDGMENT

1. In this appeal, the National Assembly (the appellant) seeks to overturn the judgment and decree of the High Court of Kenya delivered on April 6, 2018, in Nairobi Constitutional Petition No HCCC No 548 of 2017}} (Mwita, J).

2. A concise description of the dispute before the High Court is necessary to put this appeal into a proper perspective. Following the general elections held on August 8, 2017, Hon Uhuru Kenyatta's victory was challenged in the Supreme Court in *Raila Odinga & Another v Uhuru Kenyatta & Others* [2017] eKLR. In a judgment delivered on September 1, 2017, the Supreme Court annulled the presidential results on grounds that the manner in which the elections were conducted did not meet constitutional and legal threshold of a free and fair elections. The Apex Court ordered a fresh presidential election to be held under article 140(3) of the *Constitution*.

3. This unpreceded annulment of a presidential election triggered the introduction of Election Laws (Amendment) Bill, 2017in Parliament. This Bill sought to amend the *Elections Act, 2011* The *Independent Electoral and Boundaries Commission Act* 2011 (the IEBC Act) and The *Election Offences Act, 2016*. The Bill was published on September 27, 2017, and thereafter it was tabled and passed by both houses of Parliament. However, the President did not assent to the Bill nor did he return

it to Parliament as required by article 115(2) of the *Constitution*. As decreed by article 116 of the *Constitution*, after 14 days, the Bill became law. It was published in the Kenya Gazette on November 2, 2017, and it became law, being the *Election Laws (Amendment) Act* No 34 of 2017 (herein after referred to as the *ELAA 2017*).

4. The *ELAA 2017* 2017 introduced significant amendments to the *Elections Act, 2011*, the *IEBC Act* and the *Election Offences Act*. These amendments triggered the proceedings in the High Court instituted by Katiba Institute, African Centre for Open Governance, Okiya Omtatah Okoiti and David Ouma Ochieng (the 1st to the 4th respondents herein) against the Honourable Attorney General, the Government Printer and the appellant herein. In their Petition dated 1st November 2017, the 1st to 4th respondents challenged the constitutionality of the said amendments. The questioned provisions included an amendment to section 2 of the *IEBC Act* which deleted the definition of the term "Chairperson" and substituted it with the following definition:

> "Chairperson" means the chairperson of the Commission appointed in accordance with article 250(2) of the *Constitution* and, in absence of the chairperson, the vice-chairperson, or such other person acting as the chairperson in the absence of both the chairperson and vice-chairperson.

5. Section 3 of the *ELAA 2017* amended section 7A of the *IEBC Act* by inserting the following subsections immediately after sub- section (3)-

> 4. Whenever a vacancy occurs in the office of the chairperson, the vice-chairperson shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.
>
> 5. Where the positions of chairperson and vice- chairperson are vacant, a member elected by members of the Commission shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.
>
> 6. The provisions of section 6(1) shall not apply to the vice-chairperson or a member acting as chairperson under this section.

6. Section 3A of the *ELAA 2017* amended section 7A of the *IEBC Act Act* by inserting a new section immediately after 7A as follows:-

7B.

> 1. whenever the chairperson is absent, the vice- chairperson shall assume the duties of the chairperson and exercise the powers and responsibilities of the chairperson.
>
> 2. Whenever the chairperson and the vice-chairperson are absent, members of the Commission shall elect from amongst themselves a member to act as the chairperson and exercise the powers and responsibilities of the chairperson.
>
> 3. The provisions of section 6(1) shall not apply to the vice-chairperson or a member acting as chairperson under this section.

7. Lastly, section 4 of the *ELAA 2017* amended the Second Schedule of the *IEBC Act*by-

a. deleting the word “five members of the Commission” appearing in paragraph 5 and substituting therefor the words “half of the existing members of the Commission, provided that the quorum shall not be less than three members”;

b. deleting paragraph 7 and substituting therefor the following new paragraph 7-

7. Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by majority of the members present and voting.

8. Section 5 of the *ELAA 2017* amended the *Elections Act, 2011* by deleting section 29. Section 6 of the *ELAA 2017* 2 amended section 39 of the *Elections Act 2011* by- (a) deleting subsection (1C) and substituting therefor the following new subsection-

(1C) For purposes of a presidential election, the Commission shall-

a. electronically transmit and physically deliver the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;

b. tally and verify the results received at the constituency tallying centre and the national tallying centre; and

c. publish the polling result forms on an online public portal maintained by the Commission.

b. inserting the following new subsections immediately after subsection (1C)-

(lD) The Commission shall verify that the results transmitted under this section are an accurate record of the results tallied, verified and declared at the respective polling stations.

(1E) Where there is a discrepancy between the electronically transmitted and the physically delivered results, the Commission shall verify the results and the result which is an accurate record of the results tallied, verified and declared at the respective polling station shall prevail.

(lF) Any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively.

(lG) The Commission shall, to facilitate public information, establish a mechanism for the livestreaming of results as announced at polling stations. and the results so streamed shall be for purposes of public information only and shall not be the basis for a declaration by the Commission.

c. renumbering subsection (1D) as subsection (1H);

d. by deleting sub-section (2) and substituting therefor the following new subsection

2. The Chairperson may declare a candidate elected as the President before all the constituencies have transmitted their results if the Commission is satisfied the results that have not been received will not affect the result of the election.

3. by deleting the words "provisional and" appearing before the words "final results".

9. Section 44 of the *Elections Act, 2011* was amended by- (a) deleting subsection (5) and substituting therefor the following new subsection- (5) The Commission shall in consultation with the relevant agencies, institutions and stakeholders, make regulations for the better carrying into effect the

provisions of this section. (b) deleting subsection (6); (c) deleting subsection (7); (d) deleting subsection (8).

10. Section 8 of *ELAA 2017* amended the *Elections Act, 2011* by deleting section 44A and, substituting therefor the following section:

44A. Notwithstanding the provisions of section 44, the Commission shall put in place a complementary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of article 38 of the *Constitution*.

11. Section 9 of *ELAA 2017* amended the *Elections Act, 2011* by deleting section 83 and substituting therefor the following section:

83.

(l) A Court shall not declare an election void for non- compliance with any written law relating to that election if it appears that-

a. the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and

b. the non-compliance did not substantially affect the result of the election.

(2) Pursuant to section 12 of the *Interpretation and General Provisions Act*, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead.

12. Section 10 of *ELAA 2017* amended the *Elections Act, 2011* by inserting the following new section immediately after section 86-

86.

(1) Where, pursuant to article 140(3) of the *Constitution*, a presidential election is invalidated by the Supreme Court on a petition, the Commission shall publish a notice in the Gazette, within seven days from the determination of the court-

a. indicating that the presidential election has been invalidated and that no candidate has been elected as president;

b. announce the date for fresh election pursuant to article 140(3) of the *Constitution*;

c. publish the names and political parties of the candidates to participate in the fresh election.

2. The Commission shall not conduct fresh nominations for a fresh election pursuant to article 140(3) of the *Constitution*.

3. An eligible candidate for an election pursuant to article 140(3) of the *Constitution* may withdraw from the election by notice in writing to the Commission, and

(a) where there are more than two remaining candidates in the election after the withdrawal, the election shall proceed as scheduled; (b) where only one candidate remains after the withdrawal, the remaining candidate shall be

declared elected forthwith as the President-elect without any election being held.

13. Section 11 of *ELAA 2017* amended section 6 of the *Election Offences Act, 2016* in the closing statement by deleting the words "one million shillings or to imprisonment for a term not exceeding three years" and substituting therefor the words "two million shillings or to imprisonment for a term not exceeding five years." Lastly, section 12 of *ELAA, 2017* amended section 14 of the *Election Offences Act, 2016* by deleting sub-section (2).

14. The gravamen of 1st to 4th respondents' case was that the above amendments violated several articles of the *Constitution* specifically articles 10, 81 and 86. In addition, they contended that the amendments negated national values, and that their effect was to compromise the values and principles of electoral process. Accordingly, they prayed that *ELAA 2017* be declared unconstitutional. They also prayed for an order restraining the Government Printer from gazetting or publishing the said *Act* and any other just or expedient order the court may deem fit to grant. Lastly, they prayed for costs of, and incidental to, the petition.

15. The appellant opposed the petitionvide a replying affidavit dated November 16, 2017sworn by its clerk, Mr Michael Sialai. The gravamen of its case was that the Supreme Court in *Raila Odinga & another v Uhuru Kenyatta & others* [2017] eKLR while nullifying the presidential election results held on August 8, 2017, identified a number of areas requiring legislative reforms. It contended that the said elections exposed a lacuna in the Electoral Laws requiring urgent amendments to align them with the Constitution and the principles governing free and fair elections. Therefore, the purpose of *ELAA 2017* was to enhance the operations of the Commission and to address the concerns raised by the Apex Court in the said decision.

16. The appellant contended that the questioned amendments were neither unconstitutional nor were they intended to interfere with the handling of general elections or transmission of results. It maintained that for the courtto determine the constitutionality of a statute or statutory provisions, it must look at the object and purpose of the impugned statute or provision. In addition, the provisions aimed at giving effect to both the majority and minority decisions of the Apex Court in *Raila Odinga & another v Uhuru Kenyatta & others* (*supra*). Further, the amendments were subjected to public participation in accordance with article 118 of the *Constitution* and the National Assembly Standing Orders, and, though invited, the 1st respondent never presented its views. Therefore, the petition was filed in bad faith. Lastly, the Parliamentary Committee of the National Assembly considered the views collated and tabled a report before the National Assembly; thereafter the Bill was passed by both houses of Parliament.

17. In support of the Petition, the 5th and 6th respondents maintained that Parliament can amend the law in reaction to a court's judgment. That the amendments were not vague particularly section 2 of *ELAA 2017* if read with article 259(3) of the *Constitution* on what happens when a position falls vacant. They argued that every article of the *Constitution* should be construed according to the doctrine that the law is always speaking, and a function or power conferred by the *Constitution* on an office may be performed or exercised, as occasion requires, by the person holding the office. Lastly, a Court should not entertain arguments that raise political questions.

18. After considering the respective parties' positions, the law and authorities, the learned judgeallowed the petition partially and declared the amended sections 2, 7A(4), 7A(5), 7A(6) of the *IEBC Act*and paragraphs 5 and 7 of the Second Schedule to the *IEBC* unconstitutional. The trial court also declared sections 39(1C)(a), 39(1D), 39(1E), 39(1F), 39(1G), and the entire 83 of the *Elections Act, 2011* unconstitutional. However, the trial court found the amended sections, 39(2), 39(3), 44(5), and 44A

of the *Elections Act, 2011* constitutionally compliant. The learned judge ordered each party to bear its own costs because the matter was a public interest litigation.

19. In its quest to overturn the decision, the appellant cites 8 grounds in its Memorandum of Appeal dated July 17, 2018. Briefly, the appellant faults the learned judgefor finding that the definition of "Chairperson" of the Commission in the amended section 2 of the *IEBC Act* too broad and overboard because it confers a title and status on a person who is not intended by the Constitution. In addition, the appellant questions the finding that the definition of Chairperson of the Commission is limited to the person who meets the qualifications for appointment to the said office and who is appointed in accordance with the *Constitution*. Further, the appellant challenges the finding that sections 7A(4), 7A (5), 7A(6) of the *IEBC Act* is unconstitutional.

20. The appellant also faults the trial Judge for finding that paragraphs 5 and 7 of the Second Schedule to the *IEBC Act*, which sought to reduce the quorum of the Commission from 5 to at least 3 members, are unconstitutional. Its contestation is that in so finding, the trial court effectively determined the soundness of a policy made by Parliament as opposed to whether the provisions infringe the *Constitution*. The appellant claims that the trial court failed to consider all the evidence before it. It also challenges the finding that sections 39(1C)(a), 39(1D), 39(1D), 39(1E), 39(1F),39(1G) and section 83 of the *Elections Act, 2011* are unconstitutional. Lastly, the appellant contends that the trial court failed to apply the correct legal tests for determining the constitutionality of an Act of Parliament and instead it considered the appropriateness of legislation and the policies informing its enactment thereby encroaching on the exclusive mandate of Parliament contrary to the doctrine of separation of powers.

21. The appellant prays that this appeal be allowed, the impugned judgment be set aside, and it be substituted with an order dismissing the petition with costs. It also prays for costs of this appeal and such other or further reliefs, as this Court may deem just and equitable to grant.

22. When the matter came up before us for virtual hearing on June 12, 2023, Mr Sore appeared with Ms Komu for the appellant and held brief for Mr Taji for the 7th respondent. Mr Ochiel Dudley and Mr Lempaa appeared for the 1st and 2nd respondents. The 3rd respondent, Mr. Omtatah appeared in person. There was no appearance for the 4th, 5th and 6th respondents.

23. In its submissions, the appellant framed two issues, namely: (a) whether the amendments to sections 2, 7A(4), 7A(5), 7A(6) of the *IEBC Act*and paragraphs, 5 and 7 of the second schedule to the *IEBC Act* are unconstitutional. (b) whether the amendments to sections 39(1C)(a), 39(1D), 39(1E), 39 (1F), 39 (1G) and section 83 of the *Elections Act, 2011* are unconstitutional.

24. Regarding the first issue, the appellant argued that the objective, purpose and effect of the amendment was to address a temporary lacuna in the office of the Chairperson of the Commission by allowing temporary exercise of the Chairperson's power during his/her absence. This was to be achieved by allowing the Vice- chairperson or a member of the Commission to discharge the functions of the Chairperson in the event of vacancy in that office. The other reason proffered was that its introduction was in the public interest and in tandem with article 259(1) and (3) of the *Constitution* and the statutes which provide for temporary exercise of functions, during the absence of substantive holder of the office.

25. The appellant submitted that section 4(a) of the *ELAA 2017* amended paragraph 5 of the Second Schedule to the *IEBC Act* by providing the quorum necessary for meetings of the Commission subject to the minimum number of members contemplated under article 250 (1) of the *Constitution*. The appellant submitted that the objective, purpose and effect of the amendment was to allow the

Commission to carry out its duties whenever there is deficiency in its membership. It submitted that the provision of a minimum quorum requirement of three members serves to cure an unconstitutionality in terms of quorum requirements. It argued that in arriving at the impugned findings, the learned Judge misapplied the provisions of the *Constitution* and the law. It argued that article 250(2) & (3) of the *Constitution* allows national legislation (that is the *IEBC Act*) to provide for procedure and qualifications for appointment of the Chairperson and members of the Commission.

26. To buttress its arguments, the appellant cited *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, in which the Supreme Court cited Lord Griffith in *Pepper v Hart* [1992] 3 WLR 1032 in support of the proposition that the object of the court in interpreting legislation is to give effect to the intention of the legislature. It was the appellant's position that a reading of the Supreme Court decision in *Odinga & 16 Others v Ruto & 10 others; Law Society of Kenya & 4 Others (Amicus Curiae)* (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 54 (KLR) (Election Petitions) (September 5, 2022) (Judgment) shows that the amendments were long overdue.

27. In addition, the appellant faulted the trial court's reasoning that that the amendments to sections 39(1C)(a), (1D) and (1E) failed to provide for transmission of presidential election results through "a prescribed form," and for being vague and ambiguous for downgrading the significance of accuracy and transparency of elections thereby creating a room for speculation and manipulation of elections. The appellant noted that section 39(1F) was invalidated for saving election results that had not been transmitted electronically as required by the law which the trial court found contravened articles 10, 81 and 86 of the *Constitution*. Also, the appellant took issue with the nullification of section 39(1G) which required the Commission to live stream results announced at polling stations yet it provided that the live streamed results shall be for purposes of information only and shall not be the basis for a declaration by the IEBC. The appellant questioned the finding that section 83 of the *Elections Act,2011* was a departure from the constitutional requirements of free, fair and transparent elections and a draw back on electoral reforms contrary to articles 81, 82 and 86 of the *Constitution*, and argued that the learned Judge failed to consider the objectives of the said provisions.

28. The appellant maintained that sections 6(b) and (d) amended section 39 of the *Elections Act, 2011* by providing for among others, electronic and manual transmission of tabulated results of presidential elections from the polling stations to the constituency and national tallying centres. It submitted that these amendments placed an obligation on the Commission to facilitate public information and participation by establishing a mechanism for the livestreaming of verified results as announced which changes were in tandem with the principles set out in articles 81 and 86 of the *Constitution* on simplicity, accuracy, transparency, verifiability and fairness in elections. The appellant maintained that the amendments did not create any room for undermining the electronic voting technology as suggested by the respondents, but they served to amplify the principles of transparency.

29. In addition, the appellant submitted that vote counting and tallying commences at the polling station in the presence of all the candidates' agents and the media, and thereafter the results are transmitted to the constituency tallying centre and the national tallying centre. It was the appellant's position that the said amendments created an additional layer of transparency and accountability as well as verifiability by requiring that both electronic and manual results declared at the polling station be transmitted to the constituency and national tallying centres for purposes of verification and accountability. The appellant relied on *Maina Kiai and Raila Odinga & another v Uhuru Kenyatta & others* [2017] eKLR; *Odinga & 16 Others v Ruto & 10 Others; and Law Society of Kenya & 4 Others (Amicus Curiae)* [2022] KESC 56 (KLR).

30. The appellant argued that section 83 of the *Elections Act, 2011* was amended to ensure that no elections shall be deemed void by reason of non-compliance with any written law relating to that election, if it appears that the elections were conducted in accordance with the principles laid down in the *Constitution* and in the written law and that non-compliance did not affect the result of the elections. Lastly, the appellant submitted that the 1st respondent failed to participate in public participation leading to the questioned enactments, hence, the court proceedings were commenced in bad faith.

31. The 1st and 2nd respondents disagreed with the appellant's submission that the learned judge failed to consider the policies which informed the legislation and the argument that the trial court stepped into the mandate of Parliament. Conversely, they submitted that the learned judge applied the correct tests for determining the constitutionality of an Act of Parliament, and that the interpretative path adopted by the High Court conforms with this court's precedents such as *Center for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR.

32. Acknowledging that statutory enactments enjoy a presumption of constitutional validity, the 1st and 2nd respondents argued that they not only rebutted the presumption, but also the trial court correctly held that the amendments introduced by section 2 of the *IEBC Act* convoluted the definition of the Chairperson of the Commission. It was their position that the vagueness caused by the said amendment violated the rule of law, which demands normative precision. To them, the trial court correctly found that the definition of Chairperson introduced by the said amendment is overboard and violated the *Constitution*. They faulted the appellant for advocating for the nobility of the amendments as opposed to their constitutionality.

33. In addition, the 1st and 2nd respondents submitted that the definition of "Chairperson" as a person appointed in accordance with article 250(2) of the *Constitution* or the Vice-chairperson or a member of the Commission when discharging the functions of the "Chairperson" is overboard and likely to confuse legal practitioners and ordinary persons. It was their view that the said definition defines three people in one and therefore the court correctly held that the definition is overboard and thus unconstitutional for violating the rule of law, which is a national value. They maintained that the appellant has not laid any basis upon which this court should depart from the reasoning of the superior court other than restating the nobility of the amendments.

34. The 1st and 2nd respondents submitted that prior to the impugned amendment, the Act defined "Chairperson" as "the chairperson of the Commission appointed in accordance with article 250 (2) of the *Constitution*". They maintained that the rule of law demands certainty of laws for the citizens or subjects of governance to align their conduct to the law without any confusion. Further, the law must be accessible, certain, foreseeable and easy to understand. They argued that article 250 contemplates only one Chairperson of the Commission, and any attempt to convolute this is inimical to the *Constitution*. In addition, only one Chairperson can be appointed as the *Constitution* provides and a definition that includes any other person as Chairperson is erroneous and unconstitutional.

35. To fortify their arguments, the 1st and 2nd respondents relied on the Supreme Court decision in *Law Society of Kenya v Attorney General & 4 others* [2023] KESC 19 (KLR) at para 75; *Law Society of Kenya v Attorney General & another*, [2019] eKLR at para 38; and *Senate & 2 others v Council of County Governors & 8 others* (Petition 25 of 2019) [2022] KESC 7 (KLR) at para 55 in support of the proposition that an unconstitutional purpose or effect renders a statute unconstitutional. They argued that a statute cannot make a provision whose effect contradicts the *Constitution* or places additional requirements above those set out by the *Constitution*.

36. Citing *Olum & another v Attorney General* [2002] 2 EA 508, the 1st and 2nd respondents argued that defining any other person as Chairperson of the Commission was unintended by the *Constitution*, so

the High Court properly frowned at an ambiguous definition which is prone to misinterpretation, abuse, or manipulation. They submitted that the trial Judge correctly found that the definition in section 2 of *IEBC Act* is too broad and overboard because it confers a title and status on a person who the *Constitution* does not contemplate. Further, it contradicts section 6 (1) of the *Act*, which provides for qualifications one must have to be appointed Chairperson of the Commission.

37. Regarding the amendments introduced by section 7A, that is, the introduction of subsections (4), (5) and (6), which deal with filling a vacancy in the office of Chairperson and Vice-chairperson, they agreed with the trial court that an appointment done in a manner not contemplated by the *Constitution* would be unconstitutional. Further, where the *Constitution* provides the manner of appointment and goes further to state in plain and unambiguous language that the qualification contained in the national legislation that one must meet to be appointed to a particular position, the qualifications must be strictly complied with.

38. They disagreed with the argument that section 7A of the *ELAA* 2017 complies with article 259(3) (a) which permits a function or power conferred by the *Constitution* on an office to be performed or exercised, as occasion requires, by the person holding the office. They submitted that the said article must be read purposively and in harmony with article 250 because the commission's Chairperson must have been appointed in accordance with the *Constitution* and the law. To them, article 259(3) cannot justify enactment of an unconstitutional legislation. Moreover, the Chairperson's appointment should be differentiated from that of the Vice-chairperson, who is elected by the Commissioners under articles 250(10) and 250(11). Therefore, a vacancy in the Vice chairperson's position should be filled within the dictates of the *Constitution*. In addition, section 6 (1) of the Act must be implemented in harmony with the *Constitution*. They submitted that although the intention of the amendments may have been to avoid any vacuum in IEBC considering their crucial role in the electoral process, such intentions must not confer constitutional powers to people who are not appointed in accordance with the *Constitution*.

39 Regarding the amendment on quorum, the 1st and 2nd respondents cited the Supreme Court decision *Attorney-General & 2 others v Ndii & 79 Others* [2022] KESC 8 (KLR) which held that each constitutional commission must consist of at least three, but not more than nine, members and argued that the issue is now moot having been settled by the Apex Court.

40. Regarding the transmission of the presidential election results, they submitted that the difference between the old subsection (1C) and the new provision is that, in contrast, the results were to be transmitted only electronically, but the new provision requires that election results be sent electronically and physically from the polling stations to the Constituency and national tallying centers. Another notable difference is that whereas the results were to be transmitted in the prescribed form, there is no requirement for any particular form to transmit results. They relied on *Independent Electoral and Boundaries Commission & Another v Maina Kiai & 5 others* [2017] eKLR which held that the votes cast at each polling centre shall be counted, tabulated and the outcome of that tabulation announced without delay by the presiding officer. They pointed out that the trial court relied on *Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others*(*supra*) in which the Apex Court stated that the changes in the Act were meant to re-align several pieces of election-related legislation, with the principles of the *Constitution* and the electoral jurisprudence that the court's had developed. They submitted that the above decisions confirmed that the said section met constitutional muster and therefore the learned Judge correctly held that the amendment went against the spirit of articles 10, 81, and 86 of the *Constitution*, therefore, the learned judge's reasoning cannot be faulted as claimed by the appellant.

41. Regarding section 39(1), (E), and (G), the 1st and 2nd respondents supported the High Court's finding that read together the two sections significantly erode transparency and accountability, which

are essential elements in the electoral process. In addition, sub-section (1G) is a mockery of the requirements of free, fair, and credible elections and these amendments violated the Constitution's electoral systems and principles.

42. The 1st and 2nd respondents also submitted that prior to the impugned amendments, section 83 of the *Elections Act,2017* had a disjunctive "or" that gave two tests for annulling an election which was replaced with the adjunctive word "and". They submitted that this amendment made it impossible for election results to be declared invalid following the 2017 Supreme Court decision which invalidated that year's presidential elections on grounds that they were not held in accordance with the *Constitution* and the election law. They submitted that the mischief was to defeat the Supreme Court's judgment by making it quite onerous for any dissatisfied person to challenge the presidential elections. The trial court held that the amendment meant that for an election to be annulled, there must not only be failure to comply with the Constitutional principles and election laws, but also the failures must substantially affect the result of the election. They argued that the essence of this amendment was to allow violation of constitutional principles and election laws as long as they do not substantially affect the results. To fortify their submissions, the 1st and 2nd respondents cited *Raila Odinga & another v Uhuru Kenyatta & others* [2017] eKLR which cited Prof. Justice Tibatemwa Ekirikubinza in *Col. Dr Kizza Besigye v Attorney General* (Constitutional Petition No 13 of 2009) that a court can annul presidential election results if the evidence adduced shows a substantial departure from the Constitutional imperatives. They argued that the Supreme Court has already settled this question and therefore, it's interpretation of section 83 of the *Elections Act, 2011* is binding to this court.

43. Lastly, Mr Ochiel Dudley, the 1st and 2nd respondents' counsel, in his oral highlights conceded that in order to give effect to the judgment considering its ratio decidendi, it should be read to mean that the trial court invalidated the amended section 83 of the *Elections Act, 2011*, therefore, section 83 remains as it was before the decision. In addition, Mr Ochiel Dudley conceded that if Section 39(1)E is taken away, section 3(1)D would remain valid because Section 39(1)D says that both results will be transmitted, the Commission would verify the results transmitted and ensure their accuracy. Therefore, counsel conceded that section 39(1)D is valid.

44. Mr. Omtatah associated himself with the submissions by 1st and 2nd respondents. He submitted that the impugned amendments are tantamount to amending the *Constitution* through the back door and added that the trial court did justice by protecting the Constitution. He argued that if the appellant is trying to cure a lacuna in the *Constitution* as they argued, then it can only be done by amending the *Constitution*. He submitted that the *Constitution* clearly describes the various positions in the Commission, the mode of appointment of the Chairperson and the role he plays. Therefore, the Chairperson's function can only be vested to another person through the rigorous process for appointing the Chairperson, which process is not available to the appellant. Lastly. Mr Omtatah urged the Court to compel the appellant to pay costs to the respondents.

45. The 3rd, 4th and 5th respondents did not participate in the appeal.

46. We commence our determination by addressing the appellant's argument that the learned Judge failed to apply the correct legal tests for interrogating the constitutionality of an Act of Parliament. However, a reading of the judgment shows that the learned Judge, after a lengthy review of decided cases, all of which have enunciated principles of constitutional interpretation stated as follows:

> "51. Guided by the above principles, we now turn to consider whether the impugned provisions go against Articles of the *Constitution* as contended by

the petitioners. In doing so the Court should bear in mind the principle stated in *US v Butler* 297 US 1 [1936] that;

> " When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked besides the statute which is challenged and decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."

47. A reading of paragraphs 40 to 51 of the impugned judgment leaves no doubt that the learned judgewas alive to the mandatory cannons of constitutional interpretation and the applicable principles for determining constitutional validity of a statute and that he deployed the said principles in addressing the constitutionality or otherwise of the impugned provisions

48. We now turn to the trial court's finding that the amendment to section 2 of the *IEBC Act* was unconstitutional. Prior to the said amendment, section 2 of the *IEBC Act* provided as follows: "Chairperson" means the chairperson of the commission appointed in accordance with article 250(2) of the *Constitution*.

49. Earlier in this judgment, we reproduced the amendment to the above section; therefore, it will add no value for us to replicate it here. This particular amendment altered the definition of the Chairperson of the Commission to mean the Chairperson of the Commission appointed in accordance with article 250(2) of the *Constitution* or the vice-chairperson or a member of the commission when discharging the functions of the chairperson. In determining the constitutional validity of the said amendment, the learned judge stated as follows:

> " 54. the *Constitution*, in article 250(2), provides that there should be a chairperson identified and appointed in accordance with a national legislation. In the case of IEBC, the chairperson must have been identified in accordance with the *IEBC Act* and appointed in accordance with the *Constitution*. Once appointed, the chairperson performs constitutional functions that only the person appointed in accordance with the *Constitution* should perform.
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> 55. In that regard therefore, there can be only one chairperson who is appointed in the manner provided for by the *Constitution* and the *IEBC Act*. The Vice Chairperson or any other member, however appointed, cannot be defined as "Chairperson".In determining such an issue one has to look at the object, purpose and effect of defining any other person as chairperson of the Commission when such a definition gives an unintended effect.
>
> 56. In my considered view, the definition in the amended section 2 is too broad and overboard. It confers a title and status on a person who is not intended by the *Constitution*. This is because section 6

(1) of the Act provides for qualifications one must have to be appointed chairperson of the Commission. He must be qualified to hold the office of Judge of Supreme Court. Article 166 (3) of the *Constitution* provides for qualifications for appointment as Judge of Supreme Court, namely; at least 15 years' experience as judge of a Superior Court; or at least 15 years' experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field or has held the qualifications as judge of Supreme Court or distinguished academic, judicial officer legal practitioner or experience in other relevant legal field.

57. Only a person, who possesses these qualifications, should qualify to be appointed chairperson of the Commission. And only a person appointed as required by the *Constitution* should fall in the definition of chairperson. In that case therefore, the definition of chairperson should be limited to the person who meets the qualifications and has been appointed in accordance with the *Constitution*. Anyone else, whether in acting capacity, or not cannot be defined as chairperson. I have for comparison purposes, perused the definition of "chairperson" in the legislations for other Commissions but none has a definition similar to that in the impugned section 2. There would be no justification to have a different definition assigned to the chairperson of IEBC. The former definition was in line with the *Constitution* as opposed to new one."

50. As we search for an answer to the disputed definition, it is important to underscore that "definitions" section in a statute sets forth and defines the key terms used in the statute. Definitions are important because they suggest that the legislature intended a term to have a specific meaning that might differ in important ways from its common usage. Therefore, definitions are powerful provisions because they control the meaning of terms used throughout a legislative text and, in the absence of a contrary intention, the meaning of terms in all other enactments relating to the same subject matter. It follows that definitions have a very strong influence on the interpretation of legislative texts. It is also important to point out that definition in legislation is only useful so long as it serves the essential purposes of determining and communicating the legislation. Conversely, a definition, which places a completely forced and artificial meaning on a term, is a bad definition. (See *G.C. Thornton, Legislative Drafting, 4th ed, 1996, p. 144 to 154*).

51. Therefore, the principal function of a definition section is to shear away some of the vagueness and ambiguities which would otherwise surround the terms defined. Before a term is defined in a legislative text, the *Constitution* and all other provisions dealing with the same subject matter should be consulted to ensure conformity with the *Constitution* and where possible, consistency in the use of the term in the statute. Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes. As was held by the Constitutional Court of South Africa in *Independent Institute of Education (Pty) Limited v KwazuluNatal Law Society and Others* [2019] ZACC 47

> "...where the application of the definition, even where the same statute in which it is located applies, would give rise to an injustice or incongruity or absurdity that is at odds with the purpose of the statute, then the defined meaning would be inappropriate for use and should therefore be ignored."(Emphasis added).

52. Lord Stain said in "*Dynamic Interpretation Amidst an Orgy of Statutes", (2003) 35 Ottawa Law Review 163 at 166* stated:

> " The apparent meaning of statutory language is the starting point, but not the end of interpretation. A judge must consider all relevant contextual material in order to decide what different meanings the text is capable of letting in and what is the best interpretation among competing solutions. But, the judge's task is interpretation, not interpolation. Interpretation is not infinitely expandable. What falls beyond that range of possible contextual meanings of the text will not be a result attainable by interpretation. There is a Rubicon which judges may not cross: principles of institutional integrity forbid it."

53. The word interpolate has as its primary meaning to refurbish or to modify. Refurbishment or modification of a text may provide scope for creativity, but where the text is a parliamentary enactment of law the urge to be creative is not what is expected of judges. It is one thing to say that a statute, and especially a Constitution, is "always speaking". The question is: what is it saying? Where a statutory provision is impugned on the basis that it is inconsistent with the Constitution, the enquiry should be directed only at the words used in formulating the legislative provision that is sought to be impugned to see whether the legislative provision is Constitution compliant.

54. Notably, the qualifications for members of the Commission are different from those set for the Chairperson. Section 6(2) of the *IEBC Act* provides that a person is qualified for appointment as a member of the Commission if such person-(a)... (b) holds a degree from a recognized university; (c) has proven relevant experience in any the following fields-(i) electoral matters;

(ii) management; (iii) finance; (iv) governance; (v) public administration;(vi) law; and (d) meets the requirements of Chapter Six of the *Constitution*.

55. The effect of the impugned amendment is that the Vice- Chairperson or a Member can assume the duties of the Chairperson of the Commission in the event it falls vacant, albeit pending appointment of a substantive Chairperson. This definition ignores the provisions of article 166(3) of the *Constitution* which prescribes the qualifications for appointment of a judge of the Supreme Court of Kenya which is the qualification required for a person to qualify to be appointed as a Chairperson of the Commission and section 6(1) of the *IEBC Act* which replicates the provisions of article 166 (3). As stated earlier, before a term is defined in a legislative text, the Constitution and all other provisions dealing with the same subject matter should be consulted to ensure conformity with the Constitution and where possible, consistency in the use of the term in the statute. The reason proffered to justify the said definition is that it is designed to avoid a vacancy in the event of a vacancy in the post of the Chairperson caused by either death or inability to perform the duties. However, this is only one side of the coin. The pertinent question is whether the said definition, though presumably well intended, permits a person who is not qualified under article 166 of the *Constitution* or who is not appointed as envisaged by the *Constitution* to ascend to the post of the Chairperson and perform the constitutional and statutory duties assigned specifically to the Chairperson.

56. The other question is whether the said definition goes against the intendment of the *Constitution*. When a statute or a rule is attacked on the grounds of "over-breadth" or "vagueness", the argument is that the language of the statute or rule is either broad enough or vague enough to encompass both constitutional and unconstitutional application within the terms of that language. The problem is not, therefore, the unconstitutional abuse of the law, but its unconstitutional use.

57. As the Supreme Court of the United States noted in *Grayned v Rockford* 408 US 104 [1972], the judgment that first articulated the vagueness standard with clarity:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.
>
> Third, but related, where a vague statute "abuts upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." (Emphassis added).

58. The point is that a vague or over-broad statute provides plausible legislative cover for unconstitutional action. The unconstitutional action here lies in the application of the said provision, which not only amends the constitutional threshold for qualifications of a Chairperson, but also permits a person who has not been appointed as per the Constitution to fall within the definition of Chairperson. In the words of the Supreme Court of India in *Chintaman Rao v State of MP* 1951 AIR 118, 1950 SCR 759 "so long as the possibility of a statute being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void." The dangerous uncertainty created by vague and overbroad laws was aptly described by Justice Marshall, dissenting in *Arnett v Kennedy* [1974] USSC 124; 416 US. 134 [1973] thus:

> "An overbroad law hangs over people's heads like a sword of Damocles [and] . . . the value of the sword of Damocles is that it hangs, not that it drops."

59. The Canadian Supreme Court in *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 quoting *R v Zundel* [1987] 58 OR (2d) 129 (CA) at 157-58 observed that:

> "Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad."

60. The above excerpt fittingly captures the scenario posed by the instant amendment. The intended effect of a statute may be perfectly clear and as has been explained by the appellant and thus not vague. However, its application can be overly broad creating a fertile ground for an unconstitutional application. If at all any change is required, (as has been argued by the appellant), then, it cannot be achieved by passing a legislation whose application offends the Constitution, essentially amending the Constitution through a legislation. The remedy lies in a proper constitutional amendment.

61. To determine whether a law is overbroad, a court must consider the means used, (that is, the law itself, properly interpreted), in relation to its constitutionally legitimate underlying objectives. If the impact of the law is not proportionate with such objectives, that law may be deemed overbroad. The effect of legislation is relevant to show that although the statute is facially neutral its effect is unconstitutional.

If a statute has a purpose that violates the Constitution; it must be held to be invalid regardless of its actual effects.

62. In a sense, a Constitution is an attempt by the society to limit itself to protect the values it most cherishes. In fact, it is an attempt by the society to tie its own hand, to limit its ability to fall prey to weaknesses that might harm or undermine cherished values. The court has to measure the legislation against the provisions of the Constitution and decide whether the legislation is valid, and to read legislation in ways, which give effect to the fundamental values of the Constitution. The definition must be assessed in relation to the consequences. Viewed from this yardstick, we agree with the trial court that the amended definition is vague and overbroad. This is because it creates room for a person not qualified under article166 (3) or who is not appointed as stipulated by the *Constitution* to act or assume the post of Chairperson.

63. We now turn to the amendments introduced by section 7A of the *ELAA 2017* introducing subsections 7A (4), (5) and (6) which provided as follows:

> 4. Whenever a vacancy occurs in the office of the chairperson, the vice-chairperson shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.
>
> 5. Where the positions of chairperson and vice- chairperson are vacant, a member elected by members of the Commission shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.
>
> 6. The provisions of section 6(1) shall not apply to the vice-chairperson or a member acting as chairperson under this section.

64. In determining the constitutional validity or otherwise of the above provisions, the learned Judge stated as follows

> 59. The import of the amendment introduced by section 7A(4) is that the vice chairperson will act as chairperson and discharge the full constitutional responsibilities of the chairperson should a vacancy occur in that office. Although this may on the face appear a simple issue, one has to bear in mind that the chairperson appointed in accordance with the *Constitution*, performs some critical constitutional functions only reserved for the chairperson. The role and authority of the chairperson emanates from the *Constitution*. In a nutshell, he is the head and spokesperson, provides leadership and direction to the Commission. On being appointed, he/she takes the oath of office to execute his mandate as such. The question that arises is whether a person who does not meet the qualifications required should assume and perform such constitutional functions.
>
> 60. In my respectful view, and from the reading of the *Constitution*, this is not possible. Ordinarily, the vice chairperson would perform certain minimal administrative functions in the absence of the chairperson. That would not however entitle him/her to assume the full duties and perform critical functions including constitutional mandate of the Chairperson when he does not meet the qualifications to be chairperson, and has not been appointed in accordance with the *Constitution*. When the *Constitution* provides that chairperson be appointed in a particular manner, there can be no shortcut but to stick to the constitutional dictates. An appointment done in any other manner would be unconstitutional.
>
> 61. There is an even more fundamental problem with regard to section 7A (5) which provides that in the event "the positions of both the chairperson and vice chairperson fall vacant, a member elected by Commissioners shall act as the chairperson and exercise the powers and

responsibilities of the chairpersons until such time as the chairperson is appointed". Section 7A (6) goes further to provide that section 6(1) of the *Act* (on qualifications of chairperson) shall not apply to the vice chairperson or member acting as chairperson under section 7A(4) or 7A(5).

62. The petitioners contended that these amendments are unconstitutional since they give constitutional mandate of the chairperson to a person appointed in a manner otherwise than as provided by the *Constitution* and most likely without qualifications. These amendments present a number of constitutional and legal problems. The chairperson is supposed to be identified as provided by the *IEBC Act* and appointed as contemplated by the Constitution. Article 250(2) of the *Constitution* provides that (2) The chairperson and each member of a commission, and the holder of an independent office, shall be— (a) identified and recommended for appointment in a manner prescribed by national legislation; (b) approved by the National Assembly; and (c) appointed by the President. It is even more important that article 250(3) emphasizes that (3) to be appointed, a person shall have the specific qualifications required by this *Constitution* or national legislation.

63. In that regard, the qualifications for the chairperson set out in section 6(1) are anchored in the *Constitution* and are mandatory. A person without these qualifications cannot by any means be chairperson whether in acting capacity or not, since the *Constitution* leaves no option. Some of the chairperson's mandate are clearly spelt out in the *Constitution* (Article138 (10)-to declare Presidential result. This is a responsibility that only the chairperson identified, recommended and appointed as required by the *Constitution* should perform.

64. The purpose and effect of the sections 7A(4) and 7A(5) is to allow a person who is not the chairperson, has no qualifications required by section 6(1) and not appointed in accordance with the *Constitution* to take over leadership of the Commission and perform constitutional functions of the chairperson. This is a clear violation of the *Constitution* and in particular articles 138(10) and 250(2) and (3).

65. It is of more intriguing that section 7A(6) suspends section 6 (1) of the Act with regard to qualifications of the chairperson at that time section 7A(4) and 7A(5) become applicable notwithstanding that the person will perform and exercise full responsibilities of the chairperson. In essence, section 7A(6) read purposively, has the singular effect of suspending article 250(3) of the *Constitution* regarding the qualifications of the chairperson. When the framers of our *Constitution* included sub article 3 in article 250, they had no illusion that it would be followed. Their wish must be respected.

66. Where the *Constitution* provides the manner of appointment and goes further to state in a plain and unambiguous language that the qualification contained in the national legislation that one must meet to be appointed to a particular position, must be strictly followed. Parliament, as the legislative organ of state, has only one option- to obey and observe that constitutional decree. It cannot, and must not, in the exercise of its legislative authority, enact a law whose effect is to circumvent that constitutional command. Short of this, such a law would fall to be declared unconstitutional as demanded by article 2(4) of the *Constitution*.

67. It was contended by the respondents that these amendments are in line with article 259(3) (a) which provides that a function or power conferred by the *Constitution* on an office may be performed or exercised as occasion requires, by the person holding the office. This article must be read purposively and in harmony with article 250 of the *Constitution*. In the case of IEBC the person holding the office must have been placed in that position as required by the

Constitution and the law. Article 259(3) cannot be the motivation for enacting a legislation that overrides the *Constitution*. Moreover, the chairperson's appointment should be differentiated from that of the vice chairperson who is elected by Commissioners under article 250(10) and a vacancy in that office filled in accordance with article 250(11). If the *Constitution* provides how a vacancy in the vice chairperson's position should be filled, that of the Chair person must, in the same vain, be filled in accordance with the *Constitution* as read with the section 6(1) of the *Act* to give the *Constitution* a harmonious reading. In that regard therefore, section 7A(6) is unconstitutional."

65. As the trial Judge stated, article 250(2) of the *Constitution* provides that the Chairperson and each member of a commission, and the holder of an independent office, shall be- (a) identified and recommended for appointment in a manner prescribed by national legislation. Sub-article (3) provides that to be appointed, a person shall have the specific qualifications required by the *Constitution* or national legislation.

66. Section 5 of the *IEBC Act* stipulates the composition of the Commission as follows:

1. The Commission shall consist of a chairperson and six other members appointed in accordance with article 250(4) of the *Constitution* and the provisions of this Act.

2. The chairperson and members of the Commission shall be appointed in accordance with the procedure set out in the First Schedule.

3. The process of replacement of a chairperson or a member of the Commission shall commence at least six months before the lapse of the term of the chairperson or member of the Commission.

4. The procedure set out in the First Schedule shall apply, with the necessary modifications, whenever there is a vacancy in the Commission.

67. The other relevant constitutional requirement for appointments to commissions and independent offices is stipulated in article 250

(4) of the *Constitution* which requires such appointments to take into account the national values mentioned in article 10 of the *Constitution* and the need to reflect the regional and ethnic diversity of the people of Kenya. Section 6 of the *IEBC Act* provides that the Chairperson of the Commission shall be a person who is qualified to hold the office of judge of the Supreme Court as provided under article 166(3) of the *Constitution*. The word "shall" appearing in the said Article means that the qualifications therein prescribed are mandatory. Taking cue from the said provision, Parliament also deployed the word "shall" in section 6(1) of the *IEBC Act* and set out the qualifications required by article 166 (3) for appointment of the Chairperson.

68. At section 6(2) of the *IEBC Act*, Parliament specified qualifications for members of the Commission which are different from the qualifications of the Chairperson provided under section 6(1). Importantly, the word "shall" has not been used in this provision, suggesting that the qualifications listed therein for members of the Commission are not mandatory. At the time Parliament enacted sub-section (2), it was alive to the cognate provisions of sub- section (1). This distinction has a constitutional underpinning. It means that only the Chairperson of the Commission is required to possess the qualifications set out in article 166(3) of the *Constitution*.

69. The interpretation of any particular legislation must aim at ascertaining whether the statute is capable of an interpretation, which conforms to the fundamental values or principles of the *Constitution*. Therefore, a proper determination of the issue at hand requires a direct application of the *Constitution*

and its foundational values. Article 249 lays down the objects of constitutional Commissions and Independent Offices and secures their independence in the following words:

249.

(1) The objects of the commissions and the independent offices are to— (a) protect the sovereignty of the people; (b) secure the observance by all State organs of democratic values and principles; and (c) promote constitutionalism.

(2) The commissions and the holders of independent offices— (a) are subject only to this *Constitution* and the law; and (b) are independent and not subject to direction or control by any person or authority

70. From the architect and design of the *Constitution* and the *IEBC Act*, the Chairperson must possess specific set qualifications unlike the members and his appointment must conform with the *Constitution*. The mode of appointment of the Chairperson is different from the Vice-chairperson or the members. The high qualifications and the need for the independence of the Chairperson and members of the Commission is of course supported by and in the context of rticle 249(1) of the *Constitution*. This article provides the objects of the commissions and the independent offices are to-- (a) protect the sovereignty of the people; (b) secure the observance by all State organs of democratic values and principles; and (c) promote constitutionalism. The persons entrusted with this heavy constitutional duty must meet the set constitutional standard. In this regard, article 250(3) which provides that to be appointed, a person shall have the specific qualifications required by this *Constitution* or national legislation comes into play. It follows that the provisions of section 6(1) of the *IEBC Act*which provides that the chairperson of the Commission shall be a person who is qualified to hold the office of judge of the Supreme Court under the *Constitution* enjoys a constitutional underpinning.

71. It follows that an amendment that seeks to lower the set constitutional threshold and permit a person who does not possess the qualifications set by the *Constitution* to ascend to the position of the Chairperson in a manner other that than what the *Constitution* contemplates is an affront to the intention of the *Constitution* and is therefore impermissible. Three important points must be borne in mind- (a) statutory provisions should always be interpreted purposively. (b) the relevant statutory provision must be properly contextualized; and (c) all statutes must be construed consistently with the *Constitution*.

72 The *Constitution* requires courts to read legislation, where possible, in ways, which give effect to its fundamental values. Consistent with this, when the constitutionality of legislation is in issue, courts are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the *Constitution*. If the legislation does not pass the constitutional validity test, the Court must not hesitate to so find and declare the provision constitutionally infirm.

73. Turning to the issue at hand, the correct approach is to interpret the impugned provisions in light of the values and principles under articles 249, 250(3), 10, 81 and 88 harmoniously. This approach is buttressed by an array of reasons. First, members of the Commission must be appointed in conformity with the Constitution. Second, the Chairperson must possess the qualifications set out in the *Constitution*. Third, the members must satisfy the qualifications set out in the governing statute. These considerations read together leave no doubt that a law that permits a person to ascend to the post of Chairperson in a manner that is inconsistent with these constitutional values does not accord with the purposes, values and principles of the *Constitution*. It was not by accident that the *Constitution* and the law set out specific qualifications for the Chairperson different from those of the

members. Where constitutional values are implicated as in this case, the Court must give effect to the normative force of the spirit, purport and objects of the *Constitution*. The requirement for free and fair democratic elections administered by an independent Commission appointed in accordance with the *Constitution* lies at the heart of our constitutional order. This commitment permeates and defines the very ethos upon which the *Constitution* is premised, and therefore, any appointment to the office of the Chairperson, which goes against this constitutional order, is impermissible.

74. When the *Constitution* prescribes the manner in which a thing shall be done or a fact ascertained by implication, it prohibits the Legislature from, by statute, providing a different manner. In our view, the learned Judge was correct in finding that the impugned provision essentially permits a person who is not qualified under article 166(3) of the *Constitution* or who has not been appointed in conformity with the *Constitution* to perform the functions of the Chairperson. It should be remembered that the set qualifications for appointment of members of the Commission are different from those of the Chairperson. (See section 6(2) of the *IEBC Act*).

75. Next, we will address the amendments introduced by section 3A of the *ELAA 2017* which amended section 7A of the *IEBC Act* by inserting a new section immediately after section 7A as follows, that is section 7B which provided:

(l) Whenever the chairperson is absent, the vice- chairperson shall assume the duties of the chairperson and exercise the powers and responsibilities of the chairperson;

2. Whenever the chairperson and the vice-chairperson are absent, members of the Commission shall elect from amongst themselves a member to act as the chairperson and exercise the powers and responsibilities of the chairperson;

2. The provisions of section 6(1) shall not apply to the vice chairperson or a member acting as chairperson under this section.

76. After addressing his mind to the law to the above provisions, the learned judge had this to say:

69. A reading of section 7B has a similar effect as section 7A(4), (5), and (6). Even though a dully-appointed chairperson may be in office, the section empowers the vice chairperson to exercise the chairperson's functions for reasons other than inability to discharge his functions under the *Constitution* and the law. The same applies to a situation where both the chairperson and vice chairperson are "absent' which would allow members of the Commission to elect an unqualified member of the Commission to act as chairperson and exercise responsibilities of the chairperson. The *Act* does not define the word "absent." However, taken in its ordinary meaning and context; that "absent" means not being present in a place, at an occasion or as part of the meeting, the section creates mischief. Section 7B also suspends section 6(1) of the Act in such an eventuality.

70. Section 7B does (sic) not only flies in the face of article 250(2) and (3) of the *Constitution* just like section 7A(4)(5) and (6) but also generally makes nonsense of the *Constitution* and the Act on the importance of the office of chairperson of the Commission. IEBC is an independent Commission that discharges critical mandate under article 88(4). The framers of the *Constitution* were clear when they stated in article 88(5) that the Commission shall exercise its powers and perform its functions in accordance with this *Constitution* and national legislation. They also tasked Parliament with the responsibility of enacting legislation to operationalize article 88. They said in plain language in article 250(3), that the qualifications for the chairperson should be strictly followed. Parliament was therefore alive to this when it enacted section 6(1) providing the qualifications one would have to meet to be appointed to the

position of chairperson. It is inconceivable that the same Parliament would suspend operations of the same provision at some convenient time.

71. One of the principles of statutory interpretation is that a statute should be read as a whole and given a holistic interpretation to avoid distortion. (See *The Engineers Board of Kenya v Jesse Waweru Wahome & others* Civil Appeal No 240 of 2013). Weighing section 7B as read with section 6 of the Act against the Articles of the *Constitution*, it emerges clearly that it is not only unconstitutional but will also have unintended negative consequences. It will engineer divisions, fights, disharmony and cause disorientation within the Commission in the discharge of its constitutional mandate. The provision will also weaken the position of the Chairperson and cause unnecessary tension. Members of the Commission may take advantage of the chairperson's absence to make fundamental decisions with serious ramifications to the Commission and the country, taking into account the divisive nature of politics in the country visa vis the important role the Commission plays in the management of elections. It cannot be in the best interest of Commission to allow commissioners to choose one of their own, albeit unconstitutionally, to exercise constitutional mandate of the chairperson who is lawfully in office.

72. The law must be certain and support the functioning of an independent constitutional Commission given that the tenure of the chairperson once appointed, is guaranteed by the *Constitution*. Allowing Commissioners to choose one of them to act a chairperson, is to allow them to oust the chairperson and or his vice from office should an opportunity present itself despite the fact that chairperson's tenure and independence is constitutionally protected. A provision such as section 7B weakens the Commission. It will most certainly affect its institutional independence guaranteed by the *Constitution* and emphasized under section 26 of the Act. It also exposes the Commission to external pressure or direction in violation of the *Constitution*."

77. We agree with the trial court's reasoning that section 7B has a similar effect as section as section 7A(4) and (5) discussed earlier. We need not restate our finding in respect of section 7A(4)(5) and (6) above. Accordingly, we find no reason to fault the learned judge's findings in respect of the issue at hand.

78. Next is the question relating to quorum for the meetings of the Commission, which had been introduced by paragraph 5 of the Second Schedule. The trial judge addressed the issue as follows: -

73. ... Prior to the impugned amendment, paragraph 5 of the Second Schedule to the *Act* provided that the quorum was five, stating; "the quorum for the conduct of business at a meeting of the commission shall be at least five members of the commission." After the amendment, the paragraph now provides that "the quorum for the conduct of business at a meeting of the commission shall be at least half of the existing members of the commission, provided that the quorum shall not be less than three members." Paragraph 7 was also deleted and a new one inserted. The deleted paragraph provided that unless a unanimous decision was reached, a decision on any matter before the Commission was to be by concurrence of a majority of all the members. This was however deleted and the following new paragraph inserted to the effect that "Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by a majority of the members present and voting.

74. The Commission is currently composed of 7 members including the chairperson. The quorum for purposes of conducting business is half of the members but not less than three. This means the Commission can comfortably conduct business with three out of seven members, a minority of the Commissioners. Taking into account the new paragraph

7 which requires that if there is no unanimous decision, a decision of the majority of the Commissioners present and voting shall prevail, has one fundamental flaw. With a quorum of three Commissioners, there is a strong possibility of three Commissioners meeting and two of them being the majority, making a decision that would bind the Commission despite being made by minority Commissioners. This would not auger well for an independent constitutional Commission that discharges very important constitutional mandate for the proper functioning of democracy in the country. Such a provision, in my respectful view, encourages divisions within the Commission given that the Commission's decisions have far-reaching consequences on democratic elections as the foundation of democracy and the rule of law.

75. Quorum being the minimum number of Commissioners that must be present to make binding decisions, only majority commissioners' decision can bind the Commission. Quorum was previously five members out of the nine commissioners including the Chairman, a clear majority of members of the Commission. With membership of the Commission reduced to seven, including the Chairperson, half of the members of the Commission, or three commissioners now form the quorum. Instead of making the quorum higher, Parliament reduced it to three which is not good for the proper functioning of the Commission. In that regard therefore, in decision making process where decisions are to be made through voting, only decisions of majority of the Commissioners should be valid. Short of that anything else would be invalid. For that reason paragraphs 5 and 7 of the Second Schedule are plainly skewed and unconstitutional.

76. The respondents, in supporting the amendments, submitted that they were meant to address a lacuna in the event there was a vacancy in the Commission with respect to the chairperson. Even though that may be so, one of the rules of interpretation of statutes requires that a statute be holistically interpreted. In the case of *The Engineers Board of Kenya v Jesse Waweru Wahome & others* (*supra*) the Court of Appeal observed;

> " One of the canons of statutory interpretation is a holistic approach... no provision of any legislation should be treated as 'stand -alone' An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act." (Emphasis)

77. Looking at the amendments and reading the Act as a whole, from the definition of chairperson, election of a member to exercise powers and functions of the chairperson, to the quorum of the Commission for purposes of meetings, it is obvious that these amendments have a negative and unconstitutional effect to the functioning of the Commission. As the Supreme Court of Canada stated in *R v Big M Drug Mart Ltd* (*supra*), an unconstitutional purpose or an unconstitutional effect is enough to invalidate legislation. This was emphasized in *Olum & another v Attorney General* (*supra*), that if the effect of implementing a statute or provision infringes a right, the impugned statute or section should be declared unconstitutional. With the above in mind, and considering the effect of implementing these amendments, I find and hold that the amendments to the *IEBC Act* are unconstitutional."

79. We have considered the parties submissions on the above issue both in the High Court and before this court. Conspicuously, the question of quorum was resolved by the Supreme Court in *Attorney-General & 2 others v Ndii & 79 Others; Prof. Rosalind Dixon & 7 Others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent). This decision was to the effect that each constitutional commission must consist of at least three, but

not more than nine, members. It follows that the issue regarding quorum is now moot having been settled by the Apex Court.

80. We now turn to the amendments to sections 39, 44, 44A and 86A of the *Elections Act, 2011* which dealt with transmission of election results, voter identification, declaration of election results, annulment of election results and holding of fresh presidential elections under article 140 (3). The learned judge had the following to say:

> " 78. ...Section 39 was amended by deleting section 39 (1C) and introducing new subsections (1C), (1D), (1E), (1F) and (1G). The previous subsection (1D) was renumbered subsection (1H).
>
> 79. The impugned section 39(1C) now provides;
>
> For purposes of a presidential election, the Commission shall-
>
> a. electronically transmit and physically deliver the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;
>
> b. tally and verify the results received at the constituency tallying centre and the national tallying centre; and
>
> c. publish the polling result forms online public portal maintained by Commission.
>
> 80. Prior to the amendments, the subsection introduced in September 2016, required the Commission to electronically transmit, in the prescribed form, the tabulated results of an election for the president from a polling station to the constituency tallying centre and to the national tallying centre; (b) tally and verify the results received at the national tallying centre; and
>
> b. publish the polling result forms on an online public portal maintained by the Commission.
>
> 81. The difference between the old subsection (1C) and the new subsection is, first; that whereas the results were to be transmitted only electronically, the new subsection requires that election results be not only transmitted electronically but also delivered physically from the polling stations to the constituency tallying centres and the national tallying centre. Another notable difference is that whereas the results were to be transmitted in the prescribed form, there is no requirement for any particular form for purposes of transmission of results.
>
> 82. The problem in so far as I can see, is with regard to transmission of results from the polling stations to the constituency and national tallying centres as required by the new section 39(1C) (a). First, there is no requirement for the results to be transmitted in any prescribed form, which was an essential requirement in the deleted subsection. This essential safeguard guaranteed verifiability, transparency and accountability of the election results transmitted from polling centres to the constituency and national tallying centres. This is made even more troubling by the fact that results will also be physically delivered to the constituency and national tallying centres but in no particular prescribed form. This not only opens the results to possible adulteration and

manipulation but also mischief. The amendment obviously reverses the gains the country had made in electoral reforms including results transmitted in a particular form.

83. Speaking about the gains brought about by the former section 39(1C) before its amendment, the Court of Appeal observed in the case of *Independent Electoral and Boundaries Commission & another v Maina Kiai & 5 others* [2017] eKLR;

> "Pursuant to the constitutional principles of transparency, impartiality, neutrality, efficiency, accuracy and accountability under the present legal regime, in the presidential election, the votes cast at each polling centre shall be counted, tabulated and the outcome of that tabulation announced without delay by the presiding officer. The results announced at each polling station shall be transmitted to the constituency returning officer, who in turn will openly and accurately collate the results from the various polling stations in the constituency and then promptly announce the outcome of the collation. From the constituency tallying centre, the returning officer will electronically transmit the results directly to the national tallying centre....From our own reading of all the provisions under review, the authorities relied on, and bearing in mind the history that we have set out in detail in this judgment, we are convinced that the amendments to the Act were intended to cure the mischief identified by the then former Chairperson of the appellant, and other stakeholders. That mischief was, the spectacle of all the 290 returning officers from each constituency and 47 county returning officers trooping to Nairobi by whatever means of transport, carrying in hard copy the presidential results, which they had announced at their respective constituency tallying centres. The other fear was that some returning officers would in the process tamper with the announced results."

81. The Supreme Court, commenting about the same reforms in *Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (*supra*) observed;

> "...these changes, in our view, were meant to re-align several pieces of election-related legislation, with the principles of the *Constitution* and the electoral jurisprudence that had been developed by the courts. The cumulative effect of these changes was the establishment of what is now referred to as the Kenya Integrated Election Management System (KIEMS). Henceforth, technology would be deployed to the process of voter registration, voter identification and the transmission of results to the Constituency and National Tallying Centres"

82. Regarding sections 39 (1D) and 39(1E), the learned judge had this to say:

> "86. The petitioners also took issue with Subsection (1D) which provides that the Commission shall verify that the results transmitted under this section are an accurate record of the results tallied, verified and declared at the respective polling stations. The subsection merely states that the Commission should

verify that the results transmitted under Section 39 (1C) (a) are an accurate record of the results tallied, verified and declared at the Polling Stations. This, on the face of it, would appear to be in line with article 138 (3) (c)of the *Constitution* which requires that after counting the votes at the polling stations, the Commission should, tally, verify the count and declares result.

87. However, section 39(1D) presents a problem when read together with section 39(1E) which provides that "where there is a discrepancy between the electronically transmitted and the physically delivered results, the Commission shall verify the results and the result which is an accurate record of the results tallied, verified and declared at the respective polling station shall prevail." A reading of the two Sub- sections creates a potential tension between physically transmitted results and those transmitted electronically. First, the results are supposed to be from the same process, they should have been counted, tallied and verified before being transmitted. They therefore ought to be the same. To my mind, the way these sub-sections are crafted is not only vague and ambiguous but also creates a conflict between the two modes of transmission of results thus opens a window for tinkering with election results.

88. Ambiguity or vagueness in a statutory provision makes that provision void. A provision is said to be vague and or ambiguous when the average citizen is unable to know what is regulated and the manner of that regulation; or, where the provision is capable of eliciting different interpretations and different results. Such a provision would not meet constitutional quality. In the case of *Aids Law Project v Attorney General & 3 others* [2015] eKLR the Court stated that overboard legislations are to be deprecated and the spirit of the *Constitution* and its principles frowns upon such overboard enactments.

89. The Supreme Court of Canada observed in *Osborne v Canada (Treasury Board)* [1991] 2 SCR 69, 1991 that; "Vagueness can have constitutional significance; one such significance is that a law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. That uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools."

90. Lord Diplock, on his part commented in *Black- Clawson International Ltd v Papierwerke Waldhof- Aschaffenberg AG* [1975] AC 591, 638 that: "The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it."

91. The *constitution* is very clear on the accuracy, verifiability and reliability of elections. Accuracy guarantees democratic elections as the foundation of a democratic state. Section 39(1D) as read with 39(1)(F) are vague and ambiguous on which results are the accurate record of the election as tallied verified and announced by the presiding officers since there can be only one result from an election. In this regard, these subsections downgrade the significance of accuracy and transparency of an election thus open room for speculation and manipulation of election results. The Commission has the

enviable role of not only guaranteeing the accuracy of elections and results therefrom, but also ensuring that they are in conformity with constitutional principles in Articles 10, 81 and 86. There should never be room again in our election laws for the possibility of manipulating elections or results as this would undermine free and fair elections, which are the hallmark of a democratic society. I therefore find fault with sections 39 (1D) and 39(1E) of the *Act*."

83. Regarding section 39 (1F), the learned judge had this to say:

92. Section 39 (1F) is also contentious. It provides that; "Any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively. The petitioners contended that this Sub-section negates the whole purpose of electronic transmission of results. The Sub-section absolves presiding or returning Officers who, though without justification, fail to transmit or publish election results in an electronic format. The country's experience over tinkered results is well known and would not like to go back there. It adopted electronic transmission of election results as a way of guaranteeing free, fair, accurate, transparent and accountable elections as required by the *Constitution*. The Election laws were enacted to ensure that counting was done at polling stations and presiding and returning officers electronically transmitted verified elections results in conformity with the spirit of the *Constitution*.

93. The enactment of section 39(1F) is clearly a drawback on the very principle of accuracy, transparency and accountability of election results enshrined in the *Constitution*. Free and fair election is the process towards electoral democracy and the highway to a democratic state. Rather than a move forward, section 39 (1F) is a backward step in so far as the requirements for free and fair elections are concerned. Juxtaposed against articles 10, 81 and 86 of the *Constitution*, it is obvious that section 39 (1F) strikes at the heart the principles of our electoral system in the *Constitution*, for saving results that have not been transmitted as required by law. This is violates constitutional principles and is invalid.

94. The amendments further introduced subsection (1G) whose Constitutional validity has also been questioned. The sub Section provides that "the Commission shall, to facilitate Public information, establish mechanisms for the live streaming of results as announced at Polling Stations, and the results so streamed shall be for purposes of public information only, and shall not be the basis for a declaration by the Commission." Learned counsel for the Petitioners took issue with this provision submitting that it renders live streaming of election results insignificant. It was submitted that the amendment would make live transmission useless and in a way circumvent the Court of Appeal decision in *The Independent Electoral and Boundaries Commission & Others v Maina Kiai & others* (*supra*) and that of the Supreme Court majority in *Raila Odinga & another v Uhuru Kenyatta & others* (Supra).

95. Live transmission of election results announced at the polling stations to the Constituency and national tallying centres is critical when it comes to openness, transparency and accountability of the electoral process. Live transmission of election results was adopted after reforms were introduced in election laws as a means of avoiding situations where election results announced at the polling station would later significantly differ from those declared at the constituency and national tallying centres. The results announced at the polling stations form the basis of any other results declared either at the constituency or national tallying centres.

96. The import of the new subsection is to make live streaming of results from polling stations of no value when it comes to the finality of the declared results. If the intention of the legislature was that results streamed live from the primary source should not matter when it comes to the final tally, why should the country invest heavily in technology as provided for in section 44 of the *Act*, have results streamed live from polling stations for public information only? Live streaming of election results is one way of conforming to the constitutional principles of transparency and accountability. Citizens should be able to compare the live transmitted results with the final declared results to confirm the accuracy of the election results.

97. When Parliament enacts a law that significantly erodes the element of transparency and accountability in the electoral process, such a law overrides the constitutional principles of the electoral systems contemplated in articles 10, 81 and 86 of the *Constitution*. You cannot have results that are streamed live from polling stations but which are of no value when it comes to declaration of final results. The results streamed live from polling stations are the primary source of those finally declared. Final results are a product of the same process. One process cannot have two different results. Live streamed results play a significant role in determining the final results. Those results should be as much correct as those finally declared. I am persuaded that sub-section (1G) is a mockery of the requirements for free, fair and credible elections. It violates the principles of electoral systems in the Constitution. In that regard therefore, this amendment cannot hold in our transformative constitutional dispensation.

98. Looking at the effects of the amendments introduced by section 39 (1C) (a), 39(1D), 39(1E), 39(1F) and 39(1G), I am persuaded that they have the effect of weakening rather than strengthening our electoral process. Any amendments that would have the effect of circumventing constitutional principles are unconstitutional.

99. There was also an amendment to section 39(2) to the effect that the chairperson of the Commission may declare a candidate elected president before all constituencies have transmitted their results if satisfied that the remaining results will not affect the result of the election. Prior to the amendment section 39(2) provided that before determining and declaring the final results of an election, under subsection (1), the Commission could announce "provisional" results of an election. Section 39(3) was also amended by deleting the word "provisional" so that now the Commission should announce final results in the order in which the tallying of results is completed. It was contended on behalf of the petitioners that this amendment disfranchises voters given that the Commission is required to hold elections in the 290 constituencies.

100. The *Constitution* requires that the Commission holds elections in all the 290 Constituencies in the case of Presidential Elections. It must therefore, discharge its mandate by holding elections in each constituency and ensure that voters in the constituency have had an opportunity to vote. In that regard, the reading of section 39(2) is not that elections have not been held, but that the Commission has held elections, received election results and is satisfied that results from the Constituencies that are yet to transmit, will not change the election results. The Chairperson may in such circumstances declare a person elected president. The mandate of the IEBC is to declare the winner of the presidential contest after tallying the results received and determining that those remaining are such that they would change the position regarding the winner.

101. A plain reading of the two subsections, in my view, does not disclose any unconstitutionality. Section 39(2),(3) has removed provisional results so that the Commission is only to announce

final results and made it clear that the chairperson can declare a person elected president if results from the yet to transmit constituencies will not affect the final tally. There is really nothing unconstitutional if final results are announced when it is clear that those from the remaining constituencies will not change the election result as to who the winner is. There is no constitutional invalidity in these provisions. However, it is desirable that all results be received and tallied before a declaration of the winner is made."

84. The pursuit of a void-for-vagueness finding or declaration of constitutional invalidity of a statute is an uphill battle. An elementary, but critical, point in this type of challenge is that courts begin their analysis with the presumption that the statute under attack is valid. In addition, a court, in all fairness, must give a statute a reasonable construction or interpretation to avoid unconstitutional indefiniteness. Mr. Ochiel Dudley took a firm position that section 39 (1D) can surmount constitutional validity test and that it can stand without section 39 (1E). It was his view that section 39 (1D) provides that both results will be transmitted and that the Commission would verify the results transmitted and ensure their accuracy. Having expressed that view, Mr. Ochiel Dudley conceded, that section 39 (1D) passes the constitutional validity test. The problem as the learned Judge noted is created by section 39 (1E) which the Judge stated poses a problem when read with section 39 (1D). The question here is whether the learned Judge erred by lumping the two sections together and striking both sections down yet, as he acknowledged, the problem arises when the two sections are read together. Notably, the learned Judge had this to say:

> " 87. However, section 39(1D) presents a problem when read together with section 39(1E) which provides that "where there is a discrepancy between the electronically transmitted and the physically delivered results, the Commission shall verify the results and the result which is an accurate record of the results tallied, verified and declared at the respective polling station shall prevail." A reading of the two Sub- sections creates a potential tension between physically transmitted results and those transmitted electronically..."

85. When a court makes a finding of inconsistency with the Constitution, it must first define the extent of the inconsistency. (See Supreme Court of Cananda in *R. v Sullivan*, 2022 SCC 19 at paragraph 57). This is because the nature and extent of the underlying constitutional violation lays the foundation for the remedial analysis since the breadth of the remedy will reflect at least the extent of the breach. This helps to ensure that the remedy fully addresses the law's constitutional defects while also serving the broader public interest in preserving the application of the constitutional aspects of the law.

86. The second step is to determine the form that the declaration should take. This part of the analysis involves an exercise of principled remedial discretion which is based on constitutional considerations drawn from the text of the *Constitution* and the broader architecture of our constitutional order and the rule of law. The exercise of this discretion should be guided by, and transparently explained with reference to four foundational principles- (a) constitutional values and principles should be safeguarded through effective remedies. (b) The public has an interest in the constitutional compliance of legislation. (c) The public is entitled to the benefit of legislation. (c) Courts and legislatures play different institutional roles.

87. To ensure the public has the benefit of enacted legislation, remedies of reading down, reading in, and severance – tailored to the breadth of the violation – should be employed where possible so that the constitutional aspects of legislation are preserved. The purpose of reading in is to be as faithful as possible within the requirements of the *Constitution* to the scheme enacted by the legislature.

88. As was held by the Supreme Court of Canada in *Schachter v Canada*, [1992] 2 SCR. 679, when only a part of a statute or provision violates the Constitution, only the offending portion should be declared to be of no force or effect. This is what in legal parlance is called the doctrine of severance. This doctrine requires that a court defines carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative the inconsistent portion, and such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.

89. In the case of reading in, the inconsistency is defined as what the statute wrongly excludes rather than what it wrongly includes. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. The reach of the statute is effectively extended by way of reading in rather than reading down. (*Schachter v Canada*, [1992] 2 S.C.R. 679 *supra*).

90. The purpose of reading in is to be as faithful as possible within the requirements of the *Constitution* to the scheme enacted by the legislature. In some cases, of course, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. Just as reading in is sometimes required in order to respect the purposes of the legislature, it is also sometimes required in order to respect the purposes of the *Constitution*. Reading in therefore is a legitimate remedy akin to severance and should be available where it is an appropriate technique to fulfil the purposes of the *Constitution* and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the *Constitution*.

100. Where the purpose of the legislation or legislative provision is deemed to be pressing and substantial, but the means used to achieve this objective are found not to be rationally connected to it, the inconsistency to be struck down will generally be the whole of the portion of the legislation which fails the rational connection test. It matters not how pressing or substantial the objective of the legislation may be; if the means used to achieve the objective are not rationally connected to it, the objective will not be furthered by somehow upholding the legislation as it stands.

101. A court has flexibility in determining what course of action to take following a violation of the *Constitution*. the *Constitution* mandates the court to strike down any law that is inconsistent with the provisions of the *Constitution*, but only "to the extent of the inconsistency". However, the court should consider whether the significance of the part which would remain is substantially changed when the offending part is excised. In our view, the trial Judge having correctly found that section 39(1D) presents a problem when read together with section 39(1E), then the appropriate step to take would have been to satisfy himself whether section 39 (1D) could stand, and if so satisfied, proceed to deploy the remedy of severance instead of invalidating section 39 (1D) which surmounts constitutional validity test and can stand on its own.

102. We now turn to section 44 (5) of the *Elections Act* which had been deleted. The learned judge stated:

> " 102. Section 44(5) of the Act was deleted and a new subsection introduced to the effect that the Commission shall, in consultation with the relevant agencies, institutions and stakeholders, make regulations for the better carrying into effect the provisions of this section. The petitioners attacked this amendment arguing, generally, that the amendments are unconstitutional. Section 44 deals with use of technology and establishes an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. Subsection 44(5) only requires the

Commission, in consultation with stakeholders, comes up with regulations on the implementation of the Integrated Biometric Voter Registration, Electric Voter Identification and Electronic Transmission of results (KIEMS). The petitioners have not demonstrated how, if at all, this provision violates the *Constitution* to require that it be declared unconstitutional. I find neither unconstitutional purpose nor effect in the implementation of this provision."

103. In addition, the learned judgestated:

> " 103. The impugned *Act* deleted section 44A and inserted a new section 44A which provides that notwithstanding the provisions of section 44, the Commission shall put in place a complimentary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the *Constitution*. The petitioners contended that this was in a way doing away with the electronic system.
>
> 104. The complimentary mechanism contemplated in this section is, as the name suggests, only complimentary. It does not replace the electronic voter identification system. The word "complimentary", in the context in which it is used in this section, can only mean to assist or aid. It can only be resorted to in the event the principle voter identification system has failed. That is; it is to be used only when there is technology failure. To that extent, therefore, I do not see how this provision violates Articles 10, 38, 81 and 86 on the values and principles transparency and accountability of the electoral system. Rather, it is intended to aid and or complement the main voter identification system in the event there is failure and ensure that the electoral process continues."

104. We have evaluated the learned judge's findings with regard to the above provisions. We agree with his reasoning and conclusion that the provisions under challenge are constitutional.

105. The other provision under challenge was section 83 of the *Elections Act*. Addressing the amendment to this provision, the leaned judge had this to say:

> " 105. Finally, there was a submission that the amendments introduced to sections83 and 86A of the *Act* have an unconstitutional effect. Prior to the impugned amendments, section 83 provided that "no election shall be declared to be void by reasons of noncompliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the *Constitution* and in that written law or that the noncompliance did not affect the results of the election.´ The section had a disjuncture word "or" that gave two test for purposes of annulling an election.
>
> 106. The amended section 83 now provides;
>
> (l) A courtshall not declare an election void for non- compliance with any written law relating to that election if it appears that-
>
> a. the election was conducted in accordance with the principles laid down in the *Constitution* and in that written law; and

b. the non-compliance did not substantially affect the result of the election.

(2) Pursuant to section 12 of the *Interpretation and General Provisions Act*, a form prescribed by this *Act* or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead.

107. This amendment was introduced after the Supreme Court by Majority, annulled the 2017 Presidential election on September 1, 2017holding that the election failed to comply with the *Constitution* and Election laws. The petitioners contended that by amending the law from a disjunctive test to a conjunctive one, it would be difficult to challenge an election even when there was violation of the constitutional principles. The petitioners further contended that the amendment was intended to circumvent the *Constitution* and the Supreme Court's judgment on how elections should be conducted, thus make it impossible to annul a faulty election.

108. The Supreme Court while dealing with section 83 in *Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (*supra*, observed at paragraph 194 that the provision (the then section 83) was different from provisions in other jurisdictions in that the Act did not have the word "Substantially", which was in many of the other countries 'legislations. It also observed that our *Elections Act, 2011* including section 83 of the Act, had been harmonized with the Constitution. It was the Majority's opinion that for elections to be valid, they had to be conducted in strict compliance with the principles laid down in the Constitution, given that the retired *Constitution* did not contain any constitutional principles relating to elections. The majority emphasized that in interpreting section 83, it had to pay due regard to the meaning and import of the envisaged constitutional principles.

109. The Supreme Court therefore gave section 83 an interpretation that was in line with the principles in our transformative *Constitution* and the electoral laws. While interpreting section 83, the Supreme Court made reference to several comparative jurisprudence... that a Court can annul Presidential election results if the evidence adduced before it showed substantial departure from the Constitutional imperatives.

110. With this holding the Supreme Court underlined one fact; that section 83 was in harmony with the 2010 *Constitution* and that it was different from the previous election laws. The amendment to section 83 which removed the disjunctive word 'or' and introduced the conjunctive word 'and' together with the word "substantially", is a departure from the constitutional requirements for free, fair and transparent election and a draw back in the electoral reforms.

111. When interpreting the import of this amendment visa viz the Constitution, the court must remain alive to the general principles that the *Constitution* is a living instrument with a soul and consciousness of its own... The Court must therefore endeavour to avoid crippling the *Constitution* by construing it technically or in a narrow sense. It must be construed in tune with the purposes

for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law...

115. ... It is my holding that there was no constitutional compulsion or rational in amending section 83 of the *Act* to remove the disjunctive word 'or' and introduce the conjunctive word 'and' so that only where there are failures in complying with the *Constitution* and election laws and they substantially affected the results should an election be annulled. Removing the twin test for annulling faulty election results negates the principles of electoral system in the Constitution. And allowing such an amendment would be to ignore constitutional principles in our transformative *Constitution* that there should be free, fair, transparent and accountable elections."

106. The contestation before the trial court is with respect to section 83

(1) (a) and (b) which had replaced section 83 of the said *Act*. At paragraph 115 of the judgment, the learned judge stated;

> "...it is my holding that there was no constitutional compulsion or rational in amending section 83 of the *Act* to remove the disjunctive word 'or' and introduce the conjunctive word 'and' ..."

107. However, despite correctly appreciating the nature and ambit of the dispute before him, the learned judge in his final orders issued orders, which have the effect of nullifying the entire section 83 of the *Elections Act, 2011* instead of invalidating the impugned amendment. The learned judge decreed as follows:

> "A declaration be and is hereby issued that sections 39(1C) (a), 39(1D), 39(1E), 39(1F), 39(1G), and the entire 83 of the *Elections Act, 2011* are constitutionally invalid."

108. Conscious of the gravity of the above order which invalidated the entire section instead of the amended section 83 (1) (a) & (b), Mr. Ochiel Dudley urged this court to read the said order to mean they applied to the amendment as opposed to invalidating the entire section 83 and therefore, section 83 remains as it was prior to the amendment. We find merit in this reasoning.

109. The other contestation related to the amendment to section 86A of the *Elections Act 2011*. This amendment was to the effect that where the Supreme Court annuls presidential elections under article 140 (3) of the *Constitution*, the Commission has to publish a gazette notice within 7 days indicating that no candidate had been elected following the nullification, announce the date of the fresh election, and names of candidates and political parties to take part in the fresh election. The section further provides that the Commission will not hold fresh nominations pursuant to article 140 (3); that an eligible candidate under article 140 (3) may withdraw from the election by giving a notice to the Commission, and that where there remain more than two candidates, election will proceed but where only one candidate remains after such withdrawal, no elections shall take place, but the remaining candidate shall be declared president-elect.

110. The learned judge said the following regarding the said amendment:

> "121. The introduction of this section was in response to the challenges the Commission faced after annulment of the 2017 presidential election and the subsequent disputes that followed, more so on who was eligible to

> participate in the fresh election. In my view, section 86A clears a lacuna that made the holding of the 2017 fresh presidential election a challenge to the Commission. The section clarifies what should happen and the timelines. It also makes it clear what should happen when only one candidate remains after withdrawal of the other candidates which is in tandem with article 138(1) of the *Constitution*. The section is for necessary clarity and efficiency. I see no constitutional invalidity."

111. We are in total agreement with the above reasoning and finding.

112. Lastly, the other amendment was to sections 6 and 14(2) of the *Election offences Act* which enhanced the fine and sentence in section 6 and deleted section 14(2). The learned judge saw no reason to fault this amendment, nor do we see any reason to find otherwise.

103. In conclusion, flowing from our analysis of the facts, submissions and the findings arrived at by the trial court and our analysis of the law and our determination of the issues discussed above, we find and hold that this appeal fails substantially, save for the two issues conceded by Mr. Ochiel Dudley. Accordingly, we issue the following orders:

    a. We affirm the learned Judge's finding that the amendments to the *IEBC Act*, namely sections 2, 7A(4), 7A(5), and 7A(6), 7B and paragraphs 5 and 7 of the Second Schedule to the Act are unconstitutional.

    b. We uphold the trial court's finding that the amendments introduced to the *Elections Act, 2011* by sections 39(1C)(a), 39(1E), 39(1F) and 39(1G) are unconstitutional.

    c. We find and hold that section 39 (1D) is constitutional.

    d. We set aside the learned judge's finding declaring the entire section 83 of the *Elections Act, 2011* unconstitutional and substitute it with an order declaring that the amendment introduced by section 83(1)(a) & (b) and (2) be and is hereby declared unconstitutional. For the sake of clarity, section 83 remains as it was prior to the amendment.

    e. Each party shall bear its own costs for this appeal.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

.....

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR