Njenga v Judicial Service Commission & 9 others (Civil Appeal 234 of 2017) [2022] KECA 1429 (KLR) (2 December 2022) (Judgment)

Neutral citation: [2022] KECA 1429 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 234 OF 2017

AK MURGOR & J MOHAMMED, JJA

DECEMBER 2, 2022

BETWEEN

ADRIAN KAMOTHO NJENGA ..... APPELLANT

AND

JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

NATIONAL GENDER & EQUALITY COMMISSION ..... 3RD RESPONDENT

JUSTICE ISAAC LENAOLA ..... 4TH RESPONDENT

JUSTICE DAVID KENANI MARAGA ..... 5TH RESPONDENT

JUSTICE PHILOMENA M MWILU ..... 6TH RESPONDENT

JUSTICE JACKTON BOMA OJWANG' ..... 7TH RESPONDENT

JUSTICE MOHAMED K IBRAHIM ..... 8TH RESPONDENT

JUSTICE SMOKIN WANJALA ..... 9TH RESPONDENT

JUSTICE NJOKI NDUNG'U ..... 10TH RESPONDENT

(An appeal from the judgment of the High Court of Kenya (Mwita, J.) dated 12th May 2017 In Petition No 446 of 2016 as consolidated with Petition 456 of 2016)

The Supreme Court is not compliant with the two thirds gender principle when it comprises of five out of seven members of one gender

Reported by Kakai Toili

Constitutional Law *– gender quotas – soft vis-à-vis hard quotas - implementation of the two-thirds gender principle - composition of the Supreme Court – where the ratio of male to female judges was five to two – whether*

the Supreme Court was compliant with the two thirds gender principle when it was comprised five out of seven members of one gender - whether the staffing of lower cadres of the judicial service with more members of one gender meant that the judicial service as a whole was constitutionally compliant with the two thirds gender principle - Constitution of Kenya, 2010, article 27(6) and (8).

***Judicial Officers** – appointment of judicial officers – appointment of Judges of the Supreme Court – two thirds gender quota - whether merit was the primary consideration while gender was a secondary consideration in the recruitment of judges to the Supreme Court - Constitution of Kenya, 2010, article 166(3); Public Service (Values and Principles) Act, 2015, sections 3, 10 and13; Judicial Service Act, 2011 First Schedule, section 14.*

***Constitutional Law** - constitutional commissions - National Gender and Equality Commission - powers of the National Gender and Equality Commission - power to issue advisory opinions - whether an advisory opinion by the National Gender and Equality Commission detailing how vacancies at the Supreme Court ought to be filled was binding on the Judicial Service Commission - Constitution of Kenya, 2010, article 59(4) and 248; National Gender and Equality Commission Act, 2011, section 4.*

Brief facts

In June, 2016, three (3) vacancies arose in the Supreme Court for the positions of Chief Justice, Deputy Chief Justice and judge of the Supreme Court. After the recruitment process, the Judicial Service Commission (the 1st respondent) nominated for appointment the 5th, 6th and 4th respondents respectively. The 4th respondent was the last judge of the Supreme Court to be appointed after the recruitment process, and as such, the composition of the Supreme Court comprised of 5 men and 2 women. The appointment of the 4th respondent to the Supreme Court was perceived to have made the composition of that court unconstitutional, hence the filing of the consolidated petitions at the High Court.

The gist of the arguments at the High Court were that the 1st respondent had acted in violation of the Constitution of Kenya, 2010 (Constitution) by making recommendations that led to the appointment of more than two thirds of judges of the Supreme Court as being of the male gender. In sum, the petition alleged that the 1st respondent had violated the constitutional obligation to ensure equality and freedom from discrimination by failing to appoint the requisite proportion of members of the female gender to the Supreme Court. The 3rd respondent had issued an advisory opinion to the 1st respondent detailing the manner in which the vacancies ought to be filled and was aggrieved that the advisory opinion was ignored.

The petitions in the High Court sought for among others; a declaration that the then composition of the Supreme Court was unconstitutional. The High Court held that the foremost consideration relating to the appointment of judges to superior courts was the question of competency and that the secondary consideration was gender equality. The court further held that while it would have been ideal to recommend a woman to the position that was occupied by the 4th respondent, there was no clear breach of the Constitution and as such, the Supreme Court, as it then was constituted, did not violate the Constitution. The court also held that while the 1st respondent was free to consider advice from the 3rd respondent in making its decision, it was not under any obligation to abide by that opinion. Aggrieved by the High Court's decision, the appellant filed the instant appeal.

Issues

i. Whether the Supreme Court was compliant with the two-thirds gender principle when it comprised five out of seven members of one gender.
ii. Whether the staffing of lower cadres of the judicial service with more members of one gender meant that the judicial service as a whole was constitutionally compliant with the two-thirds gender principle.
iii. Whether merit was the primary consideration while gender was a secondary consideration in the recruitment of judges to the Supreme Court.
iv. Whether an advisory opinion by the National Gender and Equality Commission detailing how vacancies at the Supreme Court ought to be filled was binding on the Judicial Service Commission.

Held

1. Being a first appeal, the court had the role to re- evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the trial court were to stand or not and give reasons either way. The appeal called for interpretation of the Constitution. The court was under an obligation to holistically interpret the Constitution.
2. Judges of the Supreme Court were recruited following the criteria set out in article 166(3) of the Constitution. That provision was given life through the Judicial Service Act, and buttressed by other provisions of the law, such as section 10(2)(b) of the Public Service (Values and Principles) Act 2015, particularly sections 3, 13, and section 14 of the First Schedule to the Judicial Service Act. It could not be said that merit should be a primary consideration and that gender became a secondary consideration. That was because the Constitution and the Judicial Service Act outlined factors that the 1st respondent was required to take into consideration:
    1. The two-thirds gender principle was a constitutional directive. It was framed in imperative terms, and was a mandatory factor that the 1st respondent should take into consideration when recruiting for the vacant office of judge. The question of gender was as important as the one of competency. Every State organ, the 1st respondent included, was enjoined to ensure that the two-thirds gender principle set out in article 27(8) of the Constitution was complied with. When undertaking recruitments, it was bound by law to inculcate that constitutional edict in the recruitment process.
    2. The 1st respondent had to ensure that measures were introduced to incorporate the gender imperative, alongside merit, fairness, good judgment, and overall competence. To hold otherwise would in every instance result in a recruitment process that did not accord with the responsibility placed on organs such as the 1st respondent and would ultimately lead to appointments that were contrary to the dictates of the Constitution. It was situations such as those that articles 27(6) and (8) of the Constitution were promulgated to address.
3. The Supreme Court was not compliant with the gender principle set out in article 27 of the Constitution when it comprised five out of seven members of one gender. With a total composition of seven members, when five members of the court were of one gender, then no matter the mathematical maneuvering, be it expressed in decimals or fractions, it would result in more than two-thirds of the members of the court being of one gender, and that violated a fundamental constitutional imperative.
4. A purposive interpretation of article 27(6) and (8) of the Constitution was necessary. An interpretation when construed within the recruitment process took into account the spirit of the Constitution, the history of the gender and equality provisions, as well as the historical context, and resulted in a court where no more than four members were of one gender.
5. There was no evidence of discrimination placed before the court. There was no evidence showing that the 1st respondent had set out to exclude women from appointment to the Supreme Court, however, it was not necessary to demonstrate an intention to discriminate.
6. The historical context outlined by the High Court and the Supreme Court in *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another* [2011] eKLR and *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR (Advisory Opinion No 2 of 2012) resulted in systemic discrimination, and that necessitated a constitutional edict according to article 27(6) and (8), intended to ensure that the notions of equality and equal protection before the law were realized. In effect, the Constitution required that the two-thirds gender rule be implemented by the State, and all State organs, including the 1st respondent, through the introduction of measures to address disadvantaged groups who had experienced and continued to experience discrimination.

7. The rights to equality and non-discrimination were constitutional imperatives. They were fortified by article 2(6) of the Constitution, which allowed for the recognition and adoption of relevant international and regional frameworks to which Kenya was a party into Kenya's laws.
8. In the context of the Advisory Opinion No 2 of 2012, the Supreme Court addressed the question of filling of positions during the general election of March 4, 2013. The court took judicial notice of the fact that Parliament exercised its power under article 261(2) of the Constitution to extend the time within which article 27(8) of the Constitution was to be actualized.
9. While there was no evidence that the 1st respondent acted in a discriminatory manner by deliberately excluding women in the recruitment process, if the previously followed process continued without change, unconstitutional gender quotas would continue to prevail. The effect would be to perpetuate discriminatory practices that were an affront to article 27 of the Constitution. The provision called for a substantive approach to equality, one which recognized the historical context in the recruitment of women to high office, and required that affirmative action be implemented to address the existing inequalities.
10. The 1st respondent had a duty to ensure that the two-thirds gender principle was adhered to when undertaking recruitment in 2016. By that time, it failed to introduce appropriate measures that would ensure that the configuration of the judges in the Supreme Court adhered to the constitutional imperatives.
11. The appointment of the 4th respondent to the Supreme Court was not unconstitutional. The 4th respondent was appointed following the procedure set out in the Judicial Service Act and the first schedule thereto, as well as the aspirations contained in section 10 of the Public Service (Values and Principles) Act, 2015. In those provisions, the gender consideration featured but was not a primary consideration of the 1st respondent as it undertook its duty to fill the vacancies in the Supreme Court. However, it was nevertheless a consideration that was to guide the 1st respondent in the appointments. It was the application of that law which relegated the gender aspect to a secondary consideration and resulted in the Supreme Court composition falling short of article 27(8) of the Constitution.
12. Both the High Court and the Supreme Court had held that article 27(8) of the Constitution was to be progressively realized meaning that the State, through its agencies such as the 1st respondent, were to take specific measures, in incremental steps, to ensure that a fair share of women were appointed or elected to positions by the State. Progressive realization meant that until those measures were taken, previous actions taken by the respondents did not violate the Constitution, provided that, in good faith measures were initiated to ensure that eventually, the constitutional goal was reached. That was the situation prevailing in the instant appeal. During the recruitment of the 4th respondent, the situation obtaining at the time was that no mandatory obligations to take measures to promote affirmative action in favour of women judges during the recruitment process were in place.
13. Given the passage of time since the Constitution was promulgated, there remained an obligation on the 1st respondent to embark on taking deliberate steps to commence a process or processes that ensured substantive gender equality as espoused in articles 27(6) and (8) of the Constitution was realized. The court took judicial notice that following the recruitment for that court conducted by the 1st respondent in 2021, the composition of female to male judges had reached the constitutional threshold of 3:4, with the result that the court was constitutionally compliant. The challenge to the appointment of the 4th respondent's appointment was therefore without basis.
14. To argue that because the lower cadres of the judicial service were staffed with more members of one gender did not mean that the judicial service as a whole was constitutionally compliant. A proper interpretation of article 27(8) of the Constitution was one where each level of the judicial service adhered as closely as possible to the two-thirds gender principle; where the most appropriate interpretation was one that recognized and enjoined the State to address the inequalities suffered by women over time and enhanced affirmative action policies to address past discrimination and that

resulted in structural changes in selection processes that then ultimately lead to robust appointive processes to ensure compliance.

15. The 3rd respondent was established by the National Gender and Equality Commission Act, 2011 pursuant to article 59(4) of the Constitution. Section 4 thereof gave it the status of a commission within the meaning of Chapter 15 of the Constitution. The objects of such commissions included the promotion of constitutionalism, to protect the sovereignty of the people as well as to secure the observance of the Constitution by all State organs. The 1st respondent was also an independent commission created under article 248 of the Constitution, with similar objects. As independent commissions, they were not subject to the direction or control of any other person or authority. The structures within which each of those commissions operated were set out in statute, and nothing in those laws or the Constitution suggested that the 3rd respondent could give binding advice to the 1st respondent. The 3rd respondent's advisory opinion was not binding on the 1st respondent.

Appeal partially allowed; each party was to bear its own costs.

Editorial notes

The judgment was delivered in accordance with rule 34(4) of the Court of Appeal Rules, Nambuye, JA having ceased to hold office by virtue of retirement.

Citations

Cases

Kenya

1. *Centre for Rights Education and Awareness & 2 others v Attorney General & another* Petition 182 of 2015; [2015] eKLR - (Explained)
2. *Centre for Rights Education and Awareness & 2 others v Speaker of National Assembly & 2 others* Petition 397 of 2017; [2017] KEHC 9419 (KLR) - (Explained)
3. *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* Petition 102 of 2011; [2011] KEHC 2099 (KLR) - (Explained)
4. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 223 - (Explained)
5. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2014; [2014] KESC 33 (KLR); [2014] 2 KLR 356 - (Explained)
6. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR); [2012] 3 KLR 718 - (Explained)
7. *Nyaega, John Ouru & 3 others v County Government of Nyamira & 2 others* Constitutional Petition 23 of 2014; [2015] KEHC 2935 (KLR) - (Explained)
8. *Odera, Abok James t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* Civil Appeal 161 of 1999; [2013] KECA 208 (KLR) - (Applied)

South Africa

City Council of Pretoria v Walker (CCT8/97) [1998] ZACC 1 - (Followed)

Canada

Canadian National Railway Co (CN) v Canada Canadian Human Rights Commission [1987] 1 SCR 1114 - (Explained)

Texts

Fredman, S., (Ed) (2016), *Substantive Equality Revisited* International Journal of Constitutional Law Vol 14 Issues 3 p 712 - 738

Statutes

Kenya

1. Constitution of Kenya articles 2(6); 27(6)(8); 59; 166(3); 171; 172; 232; 248; 249; 252; 261(2) - (Interpreted)
2. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 34(4) - (Interpreted)
3. Judicial Service Act (cap 8A) section 10 (2)(b); schedule first; rules 3, 13, 14, 47 - (Interpreted)
4. National Gender and Equality Commission Act (7K) section 4 - (Interpreted)
5. Public Service (Values and Principles) Act (cap 185A) section 10(2)(b) - (Interpreted)

International Instruments

1. Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1979 article 2
2. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) 2003 article 2 (1)(d)

Advocates

Mr Njenga in person

Mr Issa Mansur for the 1st respondent

JUDGMENT

1. This appeal brings to the fore, the question of the interpretation of article 27 of the *Constitution*, and in particular the edict contained in article 27(8) which requires the State to take measures to "implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender." This principle is colloquially known as, "the two-thirds gender principle".

2. In June, 2016, three (3) vacancies arose in the Supreme Court of Kenya - for the positions of Chief Justice, Deputy Chief Justice and Judge of the Supreme Court. The Judicial Service Commission, the 1st respondent herein, advertised and shortlisted candidates for these positions. After the recruitment process, the 1st respondent nominated for appointment His Lordship, the now Retired Chief Justice David Maraga, Her Ladyship, the Deputy Chief Justice Philomena Mwilu and His Lordship, the Hon Mr Justice Isaac Lenaola all of whom are named in this appeal as 5th, 6th and 4th respondents respectively.

3. The 4th respondent was the last Judge of the Supreme Court to be appointed after the aforesaid recruitment process, and as such, the composition of the Supreme Court of Kenya comprised of five men and two women, the other Judges of the Supreme Court of Kenya who are named in this appeal are the 4th – 10th respondents. The appointment of the 4th respondent to the Supreme Court was perceived to have made the composition of that court unconstitutional, leading to the filing of the consolidated petitions from which this appeal arose.

4. The National Gender and Equality Commission, (NGEC) the 3rd respondent herein, filed a petition, being High Court Petition No 456 of 2016, based on these facts, contesting the 1st respondent's process of recruitment and the appointment of the 4th respondent. At the same time, Adrian Kamotho Njenga, the appellant herein, filed a similar petition challenging the recruitment on various grounds.

5. The gist of the arguments in those two petitions were that the 1st respondent had acted in violation of the *Constitution* by making recommendations that led to the appointment of more than two thirds of judges of the Supreme Court as being of the male gender. In sum, the two petitioners alleged that the 1st respondent had violated the constitutional obligation to ensure equality and freedom from discrimination as enshrined in article 27 of the *Constitution of Kenya* by failing to appoint the requisite proportion of members of the female gender to the Supreme Court of Kenya.

6. The 3rd respondent had issued an advisory opinion to the 1st respondent dated July 15, 2016 detailing the manner in which the aforementioned vacancies ought to be filled. The 3rd respondent was aggrieved that the advisory opinion was ignored, and argued that by appointing the 4th respondent, the 1st respondent, had violated section 10(2)(b) of the *Judicial Service Act* and articles 27(6), 172 and 232 of the *Constitution*. It also argued that the 1st respondent had violated its progressive responsibility to move towards a 50-50 gender representation in all appointive positions as outlined in various international instruments such as the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (Maputo Protocol).

7. Joining the 3rd respondent in its submissions, the appellant urged the High Court to find that the Supreme Court as it was then constituted was unconstitutional for its failure to abide by the principle of gender equality as well as the requirement that appointive positions should be held by at least one third of members of the other gender, which would work out to at least 3 members of the female gender.

8. The petitioners in the High Court therefore sought various orders to declare the then composition of the Supreme Court as unconstitutional and in breach of the law, and to issue an order of mandamus directing the 1st respondent to immediately comply with the constitutional gender requirement by ensuring that at least three of the seven judges recommended for appointment to the court are of the opposite gender.

9. The 1st respondent opposed the petition by way of a replying affidavit sworn by its secretary, Ms Anne Amadi (Ms Amadi) the Chief Registrar of the Judiciary. Ms Amadi deponed that the 1st respondent is bound by articles 171 and 172 of the *Constitution* which require the 1st respondent to be guided by competitiveness and transparency in the processes of appointment of judicial officers as well as the promotion of gender equality. In her view, in conducting the recruitment that resulted in the composition of the Supreme Court, the 1st respondent complied with articles 166 and 172 of the *Constitution*, as well as the criteria set out in rules 13 and 14 of the First Schedule of the *Judicial Service Act*.

10. The 1st respondent further argued that it did not violate the law because the 3rd respondent did not have a constitutional mandate to issue binding opinions to it; that in any event, the 3rd respondent's advice was noted by the 1st respondent, and that in reaching its determination, that advice was taken into account alongside the constitutional requirements.

11. Finally, the 1st respondent argued that a purposive interpretation of article 27 of the *Constitution* in relation to ensuring the implementation of the two-thirds gender principle was that one considers all the appointments made in the Judiciary since the promulgation of the *Constitution*. The 1st respondent's mandate is to primarily ensure the recruitment of members of the courts in a competitive and transparent manner, and to ensure that there is equality in representation in the entire Judiciary, and not in just the one superior court. It therefore contended that the Supreme Court as it was then constituted was proper and urged the trial court to dismiss the petitions.

12. On its part, the Attorney General, the 2nd respondent, argued that the litigation brought by the petitioners was bad in law since the issues in dispute had been settled by the High Court in *Federation of Women Lawyers of Kenya (FIDA-K) v Attorney General & another* [2011] eKLR as well as in the binding precedent of the Supreme Court in *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR and of the High Court in *John Ouru Nyagah & 3 others v County Government of Nyamira & 2 others* [2015] eKLR which were all to the effect that the

gender principle set out in article 27 of the Constitution did not mean that the appointment should have been based on a mathematical calculation of members of the Supreme Court and that in any event, it was appreciated that the principle would be advanced in a progressive manner.

13. After consideration of the issues raised before it, the High Court framed four issues for its determination: the first was whether the appointment of the 4th respondent had resulted in the violation of the two-thirds gender principle as envisaged by article 27(6) and (8) of the *Constitution*; the second was whether the Supreme Court, as constituted by the 4th – 10th respondents was unconstitutional; the third was whether the 1st respondent was bound to adopt the 3rd respondent's advice and apply it to the recruitment process; and the fourth was whether issues raised in the consolidated petitions were res judicata for having been dealt with by the different courts in the aforementioned decisions.

14. On the first issue, the court considered the mandate of the 1st respondent as outlined in the *Judicial Service Act* and in the *Constitution*, and held that the foremost consideration relating to the appointment of judges to superior courts is the question of competency first, and that the secondary consideration is gender equality. In the court's view, there was no evidence that the female applicants considered by the 1st respondent had performed better than the 4th respondent, and since it was apparent that the 1st respondent had followed the law in advertising, conducting interviews and thereafter recommending the successful candidate for appointment, it had followed the law.

15. The court then considered the place of the two-thirds gender rule as outlined in the *Constitution*, and held that the petitioners had an obligation to show that there was a breach in the appointment process. In the court's view:

> " 33. The petitioners have used percentages to argue that female members in the Supreme Court are less than 33.3 percent, which is unconstitutional. Taking the numbers as they are, two–thirds of seven would give 71.42 percent or 4.66 men, while one- third of seven would give
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> 28. 57 percent or 2.33 female. There is no decimal point in human beings, and taking the figures to the nearest whole numbers, 4.66 would round off to 5 men, while 2.33 would round off to 2 women. The Constitution does not use percentages but fractions, and for the petitioners to succeed, they were to show that there was indeed a direct and clear breach of the Constitution and statute with regard to the two- third gender principle while making the recommendation for appointment."

16. In sum, the court held that while it would have been ideal to recommend a woman to the position that was occupied by the 4th respondent, there was no clear breach of the *Constitution*. As such, the Supreme Court, as it then was constituted, did not violate the *Constitution*.

17. The court then considered whether the 3rd respondent's advisory opinion to the 1st respondent was binding. Finding that any mandate to advise state organs was borne out of the *National Gender and Equality Commission Act*, and not in the *Constitution*, the court held that while the 1st respondent was free to consider such advice in making its decision, it was not under any obligation to abide by that opinion in making recommendations for appointment to the Supreme Court.

18. On the question of whether the petitions were *res judicata*, the court held that while the subject matter of the petitions were similar to those presented and determined in previous decisions, the matters

involved different petitioners and respondents, and were therefore not *res judicata*. Nonetheless, the petitions failed, which has prompted the appeal before us.

19. The appellant has set out 20 grounds of appeal upon which he challenges the judgment of the High Court, all of which were presented in person by learned counsel, Mr Njenga who is the appellant. While the grounds that form the challenge of the decision of the trial court were set out in 20 grounds of appeal, we find that these can be condensed into three (3) main issues.

20. The first of these is whether the trial court failed to take into account sections 3, 13, 47 and section 14 of the first schedule to the *Judicial Service Act* and section 10(2)(b) of the *Public Service (Values and Principles) Act 2015* and eventually adopted an appointment criterion that is alien to article 166(3) of the *Constitution*. Related to this are the questions of, i) whether the appointment criteria resulted in the violation of articles 27 and 172 of the *Constitution*; ii) whether the recruitment process complied with the decision of the Supreme Court Advisory Opinion No 2 of 2012 (*supra*); and iii) whether the recruitment of the 4th respondent was unconstitutional.

21. The second issue is whether the trial court failed to take into consideration that the maximum period to realize the principles set out in article 27 of the *Constitution* was five years, and whether its decision unlawfully departed from the Supreme Court precedent in the Advisory Opinion No 2 of 2012, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR that required the *Constitution* to be implemented progressively up to the year 2015; and the third issue is whether the trial court erred in finding that the 1st respondent's failure to act on the 3rd respondent's advisory opinion contravened articles 59, 248, 249 and 252 of the *Constitution*.

Determination

22. As we proceed to consider the three (3) consolidated grounds of appeal, we are cognizant of our duty on a first appeal such as this one as was summarized by this court in *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR (Civil Appeal No 161 of 1999) which stated as follows regarding the duty of first appellate court:-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

23. In our endeavor to do our duty to ensure that we re-evaluate, re-assess and reanalyze the record and as we make our determination, we are cognizant that this appeal calls on this court to interpret various articles of the Constitution with respect to the duty of the 1st respondent. The Supreme Court *In the Matter of Interim Independent Electoral Commission* [2011] eKLR (Constitutional Application No 2 of 2011) set the standard for interpretation, stating that:

> " The rules of constitutional interpretation do not favour formalistic or positivistic approach (article 20(4) and 259(1). The Constitution has incorporated non legal considerations which we must take into account in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based and social justice oriented state and society. The values and principles articulated in the preamble, in article 10 in chapter 6 and in various provisions, reflect historical economic, social, cultural and political realities and aspirations that are critical in building a robust patriotic and indigenous jurisprudence

for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the court".

24. The responsibility to holistically interpret the Constitution was further elaborated on by that court in *In the Matter of Kenya National Commission on Human Rights* [2014] eKLR (Reference No 1 of 2012) wherein it held that:

> " But what is meant by a holistic interpretation of a constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision reading it alongside and against other provisions so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of issues in dispute and of the prevailing circumstances."

25. These are the principles that guide us as we proceed to consider the issues raised by the appellant.

26. In determining the first issue, we find that we must begin by considering the appropriate recruitment criteria to be adopted in appointing Judges of the Supreme Court. Judges of the Supreme Court are recruited in accordance with criteria set out in article 166(3) of the *Constitution*. This provision is given life through the *Judicial Service Act*, and buttressed by other provisions of the law, such as section 10(2)(b) of the *Public Service (Values and Principles) Act 2015*, particularly sections 3, 13 and section 14 of the First Schedule to the *Judicial Service Act*.

27. Section 3 of the *Judicial Service Act* provides for the procedures that the Chief Justice ought to take when there is a vacancy in the office of a judge. Section 13 of the first schedule provides the criteria for the evaluation of qualifications. In determining the qualifications of the individual applicant, the 1st respondent is obligated to be guided by professional competence, written and oral communication skills, integrity, fairness, good judgment, legal and life entitlement, and demonstrable commitment to public and community service. Section 14 then requires the 1st respondent, after conclusion of the interviews, to deliberate and nominate the most qualified applicants after taking into account the gender, regional, ethnic and other diversities of the people of Kenya. The gender consideration is also contained in section 10(2)(b) of the *Public Service (Values and Principles) Act 2015* which allows the public service, or indeed any public institution to appoint or promote public officers without undue reliance on fair competition or merit where the balance of gender in the public service or in a public institution is biased towards one gender.

28. It is these provisions of the law that Mr Njenga strongly submitted that the 1st respondent and the trial court failed to take into consideration. The appellant argued that the trial court ignored these constitutional and statutory imperatives, instead adopting an appointment criterion that was alien to the stipulations of article 166(3) of the *Constitution* by holding that while the gender consideration was important, it ought to be considered only after the question of merit was ascertained. On the other hand, learned counsel, Mr Issa Mansur appearing for the 1st respondent took the position that article 166, 172 and 232 of the *Constitution* require that merit and competency must be the primary considerations when undertaking appointments to fill the office of a judge.

29. These arguments propounded by the 1st respondent, are not tenable. In our view, it cannot be said that merit should be a primary consideration and that gender becomes a secondary consideration. This is because the *Constitution* and the *Judicial Service Act* outline factors that the 1st respondent is required to take into consideration. Firstly, the two thirds gender principle is a constitutional directive. It is framed in imperative terms, and is a mandatory factor that the 1st respondent should take into consideration when recruiting for the office of vacancy of judge. The question of gender is as important as the one of competency. Every state organ, the 1st respondent included, is enjoined

to ensure that the two thirds gender principle set out in article 27(8) of the *Constitution* is complied with. When undertaking recruitments it is bound by law to inculcate, this constitutional edict in the recruitment process. Secondly, the 1st respondent must ensure that measures are introduced to incorporate the gender imperative, alongside merit, fairness, good judgment and overall competence. To hold otherwise, would in every instance result in a recruitment process that does not accord with the responsibility placed on organs such as the 1st respondent – and would ultimately lead to appointments that are contrary to the dictates of the *Constitution*. It is situations such as these that articles 27(6) and (8) of the *Constitution* were promulgated to address.

30. This leads us to the composition of judges in terms of gender who should sit on the Supreme Court so as to render it constitutionally compliant. The appellant asserted that the correct composition should have resulted in at least three members of the court being of the female gender. In his view, even where the decimals are applied, a correct interpretation of the provision would mean that the composition of the judges of the court should never at any time be less than 1/3 of members of one gender. In this case, at least 3 members of the court would require to be of the female gender.

31. Despite the fact that the composition of the Supreme Court has since realigned to accord with the ratio 4:3 which Mr Njenga contends is constitutionally compliant, counsel urged us to consider the issues raised in this appeal and give guidance proportion of members of either gender who should be appointed to the position of judges in the Supreme Court; that in the current context, a mathematical computation when translated into decimals, would result in 4.7 male judges; that this cannot be rounded off upwards to mean 5 male judges. It should be properly interpreted to mean that no more than four male Judges may be appointed to the court.

32. Mr Issa on the other hand refuted this, stating that the mathematical computation favoured by the appellant was incorrect. In his view no violation of the *Constitution* had occurred.

33. Related to this is the issue of whether article 27(8) of the *Constitution* and precedent from the Supreme Court bound the 1st respondent to ensure that it recruited no more than four members of one gender to the court, and that by 2016, it ought to have ensured progressively that the gender principle was attained with regard to the composition of the Supreme Court.

34. Arguing on behalf of the 1st respondent, Mr Issa submitted that the appellant did not properly appreciate the principles at play in appointment of judges to the superior courts. The 1st respondent's position is that the first criteria required by the law, both under the *Constitution* and the *Judicial Service Act* is to ensure that the judges are appointed on merit; that the 1st respondent must then look at the entire Judiciary to determining whether the appointments meet the constitutional requirements of gender balance and merit. As an example, he stated that the magistracy has more women than men, and therefore in total, there is gender equity within the Judiciary and therefore the constitutional principle was properly adhered to. For this reason, he argued that the trial court correctly held that while the Supreme Court already had two female judges, and that the rest of the judicial service, that is the entire Judiciary, was adequately staffed with women; and that therefore, the gender principle had not been violated. He further argued that the mathematical calculations favoured by the appellant were impractical since the paramount duty and obligation of the 1st respondent is to consider the candidates *vis a vis* the available vacancies on merit and competency in the first instance.

35. We are aware that this is not the first time that the gender question with respect to the composition of the judges in the Supreme Court has been the subject of litigation. Indeed, both the parties, particularly the 1st respondent placed reliance on the holding of the High Court in *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* [2011] eKLR where the issue arose following the 1st respondent's recommendation of only one woman for appointment to the Supreme Court.

The petitioner before the High Court at that time, commenced litigation along similar lines to the arguments canvassed in this appeal, that is, with respect to the mathematical computation of the proportion of male to women judges necessary to meet the threshold requirement under article 27(8) of the Constitution. The court in the *Fida* case (*supra*) noted that:

> "A clear reading of article 27(8) is that the state is obliged to take positive action to meet the needs and redress any disadvantages suffered by individuals or groups because of past discrimination."
>
> After appreciating that the State had an obligation to put in place measures for the realization of a more equal society free from discrimination, the court then proceeded to state that:
>
> > "In regard to article 27(4), the drafters were aware of the past history of discrimination and realized that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The Constitution has also identified various vulnerable groups of our society who have been victims of discrimination in the past. The extent to which the Constitution has addressed their grievances is both immediate and in future. Article 27 as a whole is clearly not only meant to prevent discrimination or inequality, but also in our context and history to eliminate them presently and in the future. It is an attempt to level the playing field where legislation is inadequate or does not address the needs of a particular vulnerable group. To the extent that people were disadvantaged by the past discriminatory laws or practices in the socio, economic, political and education fields, article 27(8) permits Parliament to enact legislation for the advancement of such people."

36. With respect to parliamentary elective positions, it is observed that the two thirds gender principle was the subject of litigation before the High Court in *Centre for Rights Education and Awareness & 2 others v Speaker of National Assembly & others*, [2017] eKLR (Petition No 371 of 2016) and *Centre for Rights Education and Awareness & 2 others V Attorney General & another* [2015] eKLR where the High Court in both situations held that the Legislature was under an obligation to enact legislation as provided under article 27(8) of the *Constitution* to fulfil the gender principle with respect to elective positions.

37. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, the Supreme Court echoed the history behind article 27 of the *Constitution*, noting that the state had a particular responsibility towards ensuring that women, - and this can be extended to other appointive positions – for historical reasons, were neglected for consideration to appointive or elective office. The court pronounced itself as follows:

> "We take judicial notice that women's current disadvantage as regards membership of elective and appointive bodies, is accounted for by much more than lack of political will. It arises from deep-rooted historical, social, cultural and economic-power relations in the society. It thus, must take much more than the prescription of gender quotas in law, to achieve effective inclusion of women in the elective and appointive public offices. For the female gender to come to occupy an equitable status in civil and political rights, the State has to introduce a wide range of measures, and affirmative-action programmes. It is not the classification of a right as economic, social, cultural, civil or political that should suit a particular gender-equity claim to the progressive mode of realization; it is the inherent nature of the right, that

should determine its mode of realization. It is relevant in this regard, that article 27(8) of the Constitution calls for "legislative and other measures" to be taken by the State, for the realization of the gender-equity rule. That such "other measures" are generic, underlines the draftsperson's perception that the categories of actions, by the State, in the cause of gender-equity, are not closed."

38. In both decisions rendered over 10 years ago, the courts were of the view that the gender quotas, the subject of the litigation, could only be progressively realized after giving the State time to implement such measures as contemplated by the Constitution for attainment of the gender principle. More importantly, in the Advisory Opinion No 2 of 2012 (*supra*), the Supreme Court set down a timeframe for the progressive implementation of the gender principle, by holding that a full realization of the gender quota was to have been reached by August 27, 2015, a fact that Mr Njenga made much out of in his oral submissions before us.

39. So, against this background, was the Supreme Court compliant with the gender principle set out in article 27 of the *Constitution* when it comprised 5 out of 7 members of one gender? We hold that it was not. With a total composition of 7 members, it is apparent to us that when 5 members of the court are of one gender, then no matter the mathematical maneuvering, be it expressed in decimals or fractions, it would still result in more than 2/3 of the members of the court being of one gender, and that is in violation of a fundamental constitutional imperative. In this regard, we agree with the exposition by the appellant's counsel that a purposive interpretation of article 27(6) and (8) of the *Constitution* is necessary. In other words, an interpretation when construed within the recruitment process takes into account the spirit of the *Constitution*, the history of the gender and equality provisions as well as the historical context and results in a court where no more than four members are of one gender.

40. We have alluded to that historical context in the Supreme Court decision in Advisory Opinion No 2 of 2012 (*supra*) where the court went further and stated that:

> "(47) This court is fully cognisant of the distinct social imperfection which led to the adoption of articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society. Learned counsel Ms. Thongori aptly referred to this phenomenon as "the socialization of patriarchy"; and its resultant diminution of women's participation in public affairs has had a major negative impact on the social terrain as a whole. Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in articles 27 and 81, but also by way of a detailed and robust Bill of Rights, as well as a set of "national values and principles of governance" [article 10].

41. These set of circumstances discussed by the court point to an undisputed history that led us to a situation of systemic discrimination that resulted in a dearth of women in appointive bodies. Those bodies include high ranking positions such as courts. Mr Issa argued that there was no evidence of discrimination placed before the court – we agree. There was no evidence showing that the 1st respondent had set out to exclude women from appointment to the Supreme Court, but we hold the view that it is not necessary to demonstrate an intention to discriminate. In *Canadian National Railway Co (CN) v Canada Canadian Human Rights Commission* [1987] SCR 1114, the Supreme

Court of Canada illuminated the meaning of discrimination as one of effect, and not means, stating that:

> " It is not a question of whether the discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is accidental by product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory."

42. In that case, the court asserted that it is important to look at the results of the system, and not just the design. It further held that:

> " Systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination."

43. The historical context outlined by the High Court and the Supreme Court in the *FIDA-Kenya v Attorney General* Advisory Opinion No 2 of 2012 (*supra*) resulted in systemic discrimination, and this necessitated a constitutional edict pursuant to article 27(6) and (8), intended to ensure that the notions of equality and equal protection before the law are realized. In effect, the *Constitution* requires that the two-thirds gender rule be implemented by the State, and all state organs, including the 1st respondent through the introduction of measures to address disadvantaged groups who have experienced and continue to experience discrimination.

44. It cannot be understated that the rights envisaged under article 27 of the *Constitution*, that is equality and non-discrimination are constitutional imperatives. This is fortified by article 2(6) of the *Constitution* which allows for recognition and adoption of relevant international and regional frameworks to which Kenya is a party into our laws. As an illustration, it is widely accepted that the principle of non- discrimination is binding on all states. Both *CEDAW* and the *Maputo Protocol* prohibit discrimination against women. In particular, article 2(1)(d) of the *Maputo Protocol* enjoins states parties to "take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist," while the CEDAW Committee in General Recommendation No 28 on the core obligations of States parties, article 2 of the CEDAW on the prohibition of discrimination requires that States recognize structural and historical patterns of discrimination and unequal power relationships between women and men. These obligations fall on the 1st respondent as well, as it undertakes its role in recruitment of judges.

45. It is not lost on us that in the context of the Advisory Opinion No 2 of 2012 (*supra*), the Supreme Court addressed the question of filling of positions during the general election of March 4, 2013. We also take judicial notice of the fact that Parliament did exercise its power under article 261(2) of the *Constitution* to extend the time within which article 27(8) of the *Constitution* was to be actualized. While the appellant argued that by 2016, at the time of the impugned appointments the 1st respondent was duty-bound to ensure that the recruitment accorded with the constitutional principle, the 1st respondent was of the view that the judicial service as a whole was constitutionally compliant and therefore it did not matter that the Supreme Court did not have the requisite number of women.

46. We find that the line of argument taken by the 1st respondent must be rejected for two reasons. First, while it is true that there is no evidence that the 1st respondent acted in a discriminatory manner by deliberately excluding women in the recruitment process, it cannot be gainsaid that, if the previously, followed process continues without change, there is no doubt that unconstitutional gender quotas will

continue to prevail. The effect, will be to perpetuate discriminatory practices, that are an affront to article 27 of the *Constitution*.

47. The provision clearly calls for a substantive approach to equality, one which recognizes the historical context in the recruitment of women to high office, and requires that affirmative action be implemented to address the existing inequalities. This proposition was adopted by the Constitutional Court of South Africa in *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1 where the Court approved the need to set up policies that ensure that even where there is no overt discrimination, policies are put in place to overcome existing inequality. In that case, the court adopted with approval the following passage (is there a citation missing?):

> "A formal approach to equality assumes that inequality is aberrant and that it can be eradicated simply by treating all individuals in exactly the same way. A substantive approach to equality, on the other hand, does not presuppose a just social order. It accepts that past patterns of discrimination have left their scars upon the present. Treating all persons in a formally equal way now is not going to change the patterns of the past, for that inequality needs to be redressed and not simply removed. This means that those who were deprived of resources in the past are entitled to an 'unequal' share of resources at present."

48. We find that these persuasive sentiments aptly address the circumstances of the case before us. So that, with regard to whether the 1st respondent had a duty to ensure that the two thirds gender principle was adhered to when undertaking recruitment in 2016, we find and hold that it did, in that by that time it failed to introduce appropriate measures that would ensure that the configuration of the judges in the Supreme Court adhered to the constitutional imperatives.

49. As a consequence, was the appointment of the 4th respondent to the Supreme Court unconstitutional? We think not. It is apparent that the 4th respondent was appointed in accordance with the procedure set out in the *Judicial Service Act* and the 1st Schedule thereto, as well as the aspirations contained in section 10 of the *Public Service (Values and Principles) Act 2015*. In those provisions, the gender consideration features, but as pointed out by Mr Issa, was not a primary consideration of the 1st respondent as it undertook its duty to fill the vacancies in the Supreme Court. However, it was nevertheless a consideration that was to guide the 1st respondent in the appointments. Clearly, it was the application of this law, which relegated the gender aspect to a secondary consideration and resulted in the Supreme Court composition falling short of article 27(8) of the *Constitution*. As we have stated, both the High Court and the Supreme Court have held that article 27(8) of the *Constitution* was to be progressively realized meaning that the State, through its agencies such as the 1st respondent, were to take specific measures, in incremental steps, to ensure that a fair share of women were appointed or elected to positions by the State. Progressive realization means that until those measures are taken, previous actions taken by the respondents do not violate the *Constitution* provided that in good faith measures are initiated to ensure that eventually, the constitutional goal is reached. That is the situation prevailing in this appeal. During the recruitment of the 4th respondent, the situation obtaining at the time was that, no mandatory obligations to take measures to promote affirmative action in favour of women judges during the recruitment process were in place. As stated by the Supreme Court in Advisory Opinion No 2 of 2012 (*supra*):

> "There is no mandatory obligation resting upon the State to take particular measures, at a particular time, for the realization of the gender-equity principle, save where a time-frame is prescribed. And any obligation assigned in mandatory terms, but involving protracted

measures, legislative actions, policy-making or the conception of plans for the attainment of a particular goal, is not necessarily inconsistent with the progressive realization of a goal."

50. However, given the passage of time since the Constitution was promulgated, there remains an obligation on the 1st respondent to embark on taking deliberate steps to commence a process or processes that ensures substantive gender equality as espoused in articles 27(6) and (8) of the *Constitution* is realized. We take judicial notice that following the recruitment for that court conducted by the 1st respondent in 2021, the composition of female to male judges has reached the constitutional threshold of 3:4, with the result that the court is presently constitutionally compliant. The challenge on the appointment of the 4th respondent's appointment therefore is without basis.

51. The second reason why we reject Mr Issa's argument on the composition of the judicial service is also on the grounds of substantive equality that is expressed in article 27 of the *Constitution*; where past inequality are recognized, and where redress is envisaged. To argue that because the lower cadres of the judicial service are staffed with more members of one gender does not mean that the judicial service as a whole is constitutionally compliant. A proper interpretation of article 27(8) of the *Constitution* is one where each level of the judicial service adheres as closely as possible to the two-thirds gender principle; where the most appropriate interpretation is one that recognizes and enjoins the State to address the inequalities suffered by women over time and, enhances affirmative action policies to address past discrimination and that results in structural changes in selection processes that then ultimately lead to robust appointive processes so as to ensure compliance. See Sandra Fredman, *Substantive equality revisited*, International Journal of Constitutional Law, Volume 14, Issue 3, July 2016, pages 712–738.

52. We now turn to the final issue, which is whether the failure of the 1st respondent to act on the advisory opinion of the 3rd respondent was in contravention of articles 59, 248, 249 and 252 of the *Constitution*. The appellant contends that failure to act on the 3rd respondent's advisory opinion and for the trial court to assert that it was not binding was a violation of article 59 of the *Constitution*, and that the concept of independence of the 1st respondent cannot be viewed as being exclusive to the other Independent Commissions. The 1st respondent on its part argued that the trial court found that the advice was noted, but did not necessarily have to be followed, and that judicial precedent on this matter required that the gender principle be achieved progressively.

53. The 3rd respondent is established by the *National Gender and Equality Commission Act, 2011* pursuant to article 59(4) of the *Constitution*. section 4 thereof gives it the status of a commission within the meaning of chapter fifteen of the Constitution. The objects of such commissions include the promotion of constitutionalism, to protect the sovereignty of the people as well as to secure the observance of the *Constitution* by all state organs. The 1st respondent is also an Independent Commission created under article 248 of the *Constitution*, with similar objects. As Independent Commissions, they are not subject to the direction or control of any other person or authority. The structures within which each of these commissions operates is set out in statute, and nothing in those laws or in the *Constitution* suggests that the 3rd respondent can give binding advice to the 1st respondent. We therefore find that the trial court rightly found that the 3rd respondent's advisory opinion was not binding on the 1st respondent.

54. We now turn to the final orders that we make to dispose of this appeal.

The appellant set out a raft of grounds upon which he sought an overturn of the judgment of the trial court. We have relooked at those orders critically bearing in mind the developments that have

taken place since the recruitments undertaken by the 1st respondent in 2016. We summarize our salient findings as follows:

"a. The interpretation of article 27(6) and (8) of the *Constitution* is that there can be no more than four members of one gender in the Supreme Court;

b. In 2016, the 1st respondent was required to take progressive steps to ensure that the two-thirds gender principle be attained in accordance with the decision of the Supreme Court Advisory Opinion No 2 of 2012 (*supra*);

c. The recruitment of the 4th respondent was not unconstitutional;

d. At this juncture, 12 years after promulgation of the *Constitution*, there is a responsibility on the part of the 1st respondent to ensure that in the exercise of its mandate of recruitment to all courts, the two thirds gender principle is complied with.

e. Advisory opinions given by the 3rd respondent to the 1st respondent are not binding.

55. While the appellant has been partially successful, we are cognizant that he pursued this litigation in his capacity as a public-spirited citizen. Since the issues raised herein were of great public interest, the order that best commends itself is that each party bears its own costs. It is so ordered.

56. This judgment has been delivered in accordance with rule 34(4) of the *Court of Appeal Rules*, Nambuye, JA having ceased to hold office by virtue of retirement.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022

A K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR