



**Attorney General v Law Society of Kenya & 4 others (Civil Appeal  
426 of 2018) [2019] KECA 283 (KLR) (11 October 2019) (Judgment)**

*Attorney General v Law Society of Kenya & 4 others [2019] eKLR*

Neutral citation: [2019] KECA 283 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 426 OF 2018  
PN WAKI, MSA MAKHANDIA & F SICHALE, JJA  
OCTOBER 11, 2019**

**BETWEEN**

**THE HON. ATTORNEY GENERAL ..... APPELLANT**

**AND**

**LAW SOCIETY OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**JUSTICE MOHAMED WARSAME ..... 3<sup>RD</sup> RESPONDENT**

**SAMUEL NJUGUNA ..... 4<sup>TH</sup> RESPONDENT**

**JUDICIAL SERVICE COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

*(An Appeal from the judgment and orders of the High Court of Kenya at  
Nairobi E.C. Mwita, J.) dated 6th July, 2018 in Nrb. Const. Petition No.  
106 of 2018 Consolidated With Nrb. Const. Petition No. 119 of 2018)*

**A commissioner elected to the Judicial Service Commission as a representative of the judges of the Court of Appeal does not need the approval of the National Assembly before being appointed by the President**

*The Judicial Service Commission (JSC) protested the move by the President to forward the name of the elected representative of the Court of Appeal to the National Assembly for vetting before he could appoint him to serve as a JSC Commissioner representing the Court of Appeal. The court held that a commissioner elected to the JSC as a representative of the judges of the Court of Appeal did not need the approval of the National Assembly before being appointed by the President.*

Reported by Kakai Toili

**Constitutional Law** – constitutional commissions – Judicial Service Commission (JSC) – members of the JSC – appointment of members to the JSC – requirements – vetting by the National Assembly - where a Court of



*Appeal judge was elected to the Judicial Service Commission - whether a commissioner elected to the Judicial Service Commission as a representative of the judges of the Court of Appeal was subject to vetting by the National Assembly before being appointed by the President – Constitution of Kenya, 2010, articles 171, 248 and 250; Judicial Service Act, 2011, section 15*

**Statutes** – interpretation of statutes – interpretation of section 15(2) of the Judicial Service Act – where section 15(2) of the Judicial Service Act did not require that all persons elected and nominated as Judicial Service Commissioners be subject to approval by the National Assembly - whether section 15(2) of the Judicial Service Act was unconstitutional - Constitution of Kenya, 2010, articles 171, 248 and 250; Judicial Service Act, 2011, section 15

### **Brief facts**

In the year 2013, after the Judicial Service Commission (JSC) was first constituted under the Constitution of Kenya, 2010 (Constitution) and commenced its business, the elected representative of the Court of Appeal was the 3<sup>rd</sup> respondent. There were no arguments at the time on whether or not an elected representative should additionally be nominated by the President and vetted by the 2<sup>nd</sup> respondent before appointment. The 3<sup>rd</sup> respondent took up his position upon election and appointment and served out his term of five years. He offered himself for re-election in 2018 and was in March, 2018 declared by the Independent Electoral Boundaries Commission as duly elected to represent the court.

The 3<sup>rd</sup> respondent's name was submitted to the President for appointment, however, the President decided instead to nominate the 3<sup>rd</sup> respondent and forwarded his name to the 2<sup>nd</sup> respondent for vetting before he could appoint him. JSC protested the move by the President to no avail. The contention in the case was that the President had acted *ultra vires* article 171(2)(c) of the Constitution and section 15(2) of the Judicial Service Act (JSA), and that section 15(2) was unconstitutional in as far as it purported to give the President any role in the appointment of the commissioners elected by judges of the Supreme Court, Court of Appeal and the High Court.

### **Issues**

- i. Whether a commissioner elected to the Judicial Service Commission as a representative of the judges of the Court of Appeal was subject to vetting by the National Assembly before being appointed by the President.
- ii. Whether section 15(2) of the Judicial Service Act was unconstitutional for failure to require that all persons elected and nominated as Judicial Service Commissioners be subject to approval by the National Assembly.

### **Relevant provisions of the Law**

#### **Article 248: Application of Chapter**

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

*(2) The commissions are—*

*(a) the Kenya National Human Rights and Equality Commission;*

*(b) the National Land Commission;*

*(c) the Independent Electoral and Boundaries Commission;*

*(d) the Parliamentary Service Commission;*

*(e) the Judicial Service Commission;*

*(f) the Commission on Revenue Allocation;*

*(g) the Public Service Commission;*

*(h) the Salaries and Remuneration Commission;*

*(i) the Teachers Service Commission; and*

*(j) the National Police Service Commission.*

#### **Article 250: Composition, appointment and terms of office**



(1) ...

(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.

### **Judicial Service Act, 2011**

#### **Section 15 - Procedure of appointment**

(1) Where the members are to be appointed by the President under Article (171(2)(b) of the Constitution, the following procedure shall apply-

(a) Until after the first elections under the Constitution, the President shall, subject to the National Accord and Reconciliation Act, 2008 (No. 4 of 2008) and after consultation with the Prime Minister, within seven days of the commencement of this Act, submit the names of the nominees to the National Assembly;

(b) The National Assembly shall, within seven days after it first meets after receiving the names of the nominees-

(i) Consider the nominees and either approve or Reject the nominees; and

(ii) notify the President as to the approval or rejection;

(c) if the National Assembly approves the nominees under Article 171(2)(b), the President shall, within three days after receiving the notification from the National Assembly, appoint the nominees as members of the Commission;

(d) if the National Assembly rejects a nominee submitted by the President, the President shall, within three days after receiving the notification from the National Assembly, submit the name of a new nominee to the National Assembly and the provisions of this subsection shall apply with necessary modifications with respect to the new nominee.

(2) Where the nominations are to be made by bodies specified under Article 171(2)(b, (c), (d), (f) and (g) of the Constitution-

(a) the respective nominating body shall submit the name of its nominee to the President; and

(b) the President shall, within three days of receipt of the names, appoint the nominees as members of the Commission.

#### **Held**

1. Article 164 of the Constitution of Kenya, 2010 (Constitution) set up the Court of Appeal with its own President elected by the judges of the court. Its jurisdiction was governed by the Appellate Jurisdiction Act, Cap 9 and the Court of Appeal Rules, 2010, while its administration was regulated by the Court of Appeal (Organization & Administration) Act, No.28 of 2015. The court was also entitled to be represented in the JSC which was set up under article 171 of the Constitution. The representative was chosen by secret ballot through free and fair elections supervised by the Independent Electoral and Boundaries Commission (IEBC). With those attributes, the court could be said to enjoy some measure of autonomy within the Judiciary family.
2. The values in article 259 of the Constitution on the construction of the Constitution had to permeate the process of constitutional interpretation. Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions had to be read to give values and aspirations of the people. The court had to appreciate throughout that the Constitution, of necessity, had principles and values embodied in it, that a constitution was a living piece of legislation. It was a living document. The entire Constitution had to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. That was the rule of harmony, the rule of completeness and exhaustiveness.
3. Holistic interpretation of the Constitution meant interpreting the Constitution in context. It was the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution should be taken to mean in light of its



- history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation did not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.
4. A plain reading of articles 171, 248 and 250 of the Constitution would show that article 248 of the Constitution identified all commissions in chapter 15 of the Constitution and applied the provisions of the chapter to all of them, including JSC. However, the same article anticipated that there would be other constitutional provisions and aspects, specific to the various commissions, which could differ from the provisions of chapter 15, and provided an exemption. The Constitution itself could make exemptions to the application of any article and that would not amount to a conflict or contradiction. A provision of the Constitution could not be unconstitutional.
  5. Article 250 of the Constitution provided that a member would be identified and recommended for appointment in a manner prescribed by national legislation. Under that regime, approval by the 2<sup>nd</sup> respondent would then follow and lastly, the President would appoint. There was no national legislation prescribing how a member of JSC would be identified and recommended. Instead, the Constitution in article 171(2) prescribed the manner of identification and nomination as national legislation in the form of the JSA then took over the process.
  6. Parliament in section 15(1) and (2) of the JSA was clear that article 171(2) of the Constitution created four categories of members and catered for the procedure relating to each. More specifically, Parliament was clear that the only persons to be subjected to vetting through the 2<sup>nd</sup> respondent were the two persons (non-lawyers) representing the public. Section 15(2) of JSA then dealt specifically with elected members who did not have to undergo vetting by the 2<sup>nd</sup> respondent. The elected representative having been elected by his peers as a member of the JSC was not subject to approval by the 2<sup>nd</sup> respondent.
  7. The independence of JSC was not found in its intimate association with the Judiciary. It was guaranteed under article 249(2)(b) of the Constitution. It was not amusing that it was the Attorney General (AG), the legal advisor to the National Government, and who scrutinized Bills before they passed through Parliament, who should be the one admitting that Parliament passed an unconstitutional legislation. The power to legislate and to amend laws vested in the Legislature.
  8. Article 250 (2) of the Constitution did not apply to JSC commissioners elected under article 171 of the Constitution, it would be illogical to declare that section 15(2) of JSA which did not apply to the former article was unconstitutional. A statute or statutory provision was unconstitutional if it violated or contradicted a clear provision of the Constitution to the extent that it could not be reconciled with the offended article.
  9. The constitutional architecture created room under article 132 of the Constitution for the President to perform some duties as a Head of State, which was a noble thing in a constitutional democracy. One of the noble tasks given to the President was to make State and public appointments, even where he had no other role to play in the process of appointment. The President's duty was simply to appoint an elected commissioner within three days of submission of the nominee's name. Consequences would ensue, as indeed they did in the instant case, if there was a delay in complying with the statute. There was no mischief which could be cured only by removal of the section.

*Appeal and cross appeal dismissed; findings and orders of the High Court upheld; each party to bear its own costs.*

#### **Citations**

#### **Statutes**

None referred to

#### **Advocates**

*Mr. Dudley Ochiel*

*Mr. Mbarak*

*Mr. Issa Mansur assisted by Ms. Sharon Lipwop*



## JUDGMENT

1. This appeal gives rise to an odd jurisdictional scenario. It relates to this Court's representative to the Judicial Service Commission who was elected by Judges of the same Court that is now sitting over the dispute. When the oddity was put to all counsel for the parties for their comments or objections, if any, to the constitutionality of the appeal or the empanelling of the bench, none was raised. Only learned counsel, Mr. Issa Mansur, opined that there was a provision, rarely used, where such cases could leapfrog to the Supreme Court. But he too, like the others, was ready to proceed before this Court, confident, we trust, that we were bound by our oaths of office. And so we are, and will proceed to determine the matter.
2. The dispute started as a small whirlwind before it snowballed into a tornado. The whirlwind was a contested election of the Court's representative to the Judicial Service Commission which happened on 9th March 2018. At the centre of the whirlwind was Justice Mohamed Abdulahi Warsame (Warsame JA). Along the way, the whirlwind picked up two branches of our baobab tree, that is, Articles 171 and 250 of the Constitution; a sub-branch in the form of Section 15 of the Judicial Service Act, 2011 (JSA); then it gathered strength and became a tornado, engulfing the Attorney General (AG), the Law Society of Kenya (LSK), the Judicial Service Commission (JSC), the National Assembly (NA), and a good ordinary citizen known as Samuel Njuguna (SN). It did not stop even after the High Court extracted Warsame, JA from the epicentre and enforced his election in the case of *Law Society of Kenya vs. Attorney General & another; Mohamed Abdulahi Warsame & another; (Interested Parties) [2019] eKLR*. It is time to diffuse the tornado.
3. The appeal arises from the decision of the High Court (Mwita, J.) sitting in the Constitutional & Human Rights Division of that court, made on 6th July 2018, determining two consolidated petitions relating to the appointment of commissioners to the JSC. One was by the LSK questioning the purported nomination of Warsame, JA by His Excellency the President (the President) and his intended vetting by the NA. It also sought to have declared as unconstitutional section 15(2) of the JSA which gives a role to the President in the process of nomination and appointment of an elected JSC member. The other petition was by SN seeking to enforce the vetting of Warsame, JA by the NA, and a declaration that section 15 of JSA was inconsistent with the Constitution.
4. Upon considering both petitions, the trial court formed the view that the petitions called for interpretation of the provisions of Articles 171 and 250 of the Constitution. It then framed two issues for determination - (i) whether Warsame JA, as the elected representative of Justices of the Court of Appeal, was subject to approval by the NA before assuming his position as a JSC commissioner; (ii) whether, Section 15(2) of the Judicial Service Act is unconstitutional for failure to require that all persons elected and nominated as JSC Commissioners be subject to approval by the NA. It answered the first issue in the negative and found, on the second issue, that section 15 (2) of the JSA was not unconstitutional. The court made an order nullifying the purported nomination of Warsame, JA by the President, and issued a permanent injunction prohibiting the NA from purporting to vet him for appointment.
5. The record is bulky but we shall endeavour to summarize the background to the appeal in order to contextualize the legal issues:



6. The Court of Appeal (Court) is one of the institutions set up under Chapter 10 of the Constitution, 2010 in Article 164, with its own President elected by the Judges of the Court. Its jurisdiction is governed by the Appellate Jurisdiction Act, Cap 9 and the Court of Appeal Rules, 2010, while its administration is regulated by the Court of Appeal (Organization & Administration ) Act, No.28 of 2015. The Court is also entitled to be represented in the JSC which is set up under Article 171 of the Constitution. Such representative is chosen by secret ballot through free and fair elections supervised by the Independent Electoral & Boundaries Commission (IEBC). With such attributes, the Court can be said to enjoy some measure of autonomy within the Judiciary family.
7. In the year 2013, after the JSC was first constituted under the new Constitution and commenced its business, the elected representative of the Court was Warsame, JA. There were no arguments at the time on whether or not an elected representative should additionally be nominated by the President and vetted by the NA, before appointment. Warsame, JA took up his position upon election and appointment and served out his term of five years. He offered himself for re-election in 2018 and was on 9th March, 2018 declared by the IEBC as duly elected to represent the Court. The expectation was that soon after, his name would be submitted to the President who would, in terms of section 15 of the JSA, appoint him within three days to sit in JSC. It was not to be.
8. After Warsame, JA's name was submitted to the President under section 15(2), the President decided instead to nominate the Judge and forwarded his name to the NA for vetting before he could appoint him to the JSC. In doing so, the President appears to have been guided by Article 250 of the Constitution which applies to all constitutional commissions, including JSC. JSC protested the move by the President to no avail. The stage was then set for the dispute which led to this appeal.
9. The first salvo was fired by LSK in exercise of its undoubted mandate to assist the Government and the courts in matters relating to legislation, administration of justice and the practice of law in the country. It filed Petition No.106 of 2018 on 28th March, 2018 against the NA and the AG on behalf of the President. It enjoined Warsame, JA and the JSC as interested parties. The contention was that the President had acted ultra vires Article 171 (2)(c) of the Constitution and section 15(2) of JSA, and that section 15(2) was unconstitutional in as far as it purports to give the President any role in the appointment of the commissioners referred to in Article 171(2)(b)(c),(d)(f) and (g) of the Constitution.

It sought the following substantive reliefs:

- “(a) A declaration be and is hereby issued that the purported nomination and vetting of the 1<sup>st</sup> interested party by the President and the 1<sup>st</sup> respondent respectively, as a member of the judicial service commission is unconstitutional and invalid.
- (b) A declaration that the 1<sup>st</sup> interested party automatically became a member of the Judicial Service Commission by operation Article 171(2) (c) upon his election by the judges of the Court of appeal.
- (c) A declaration that to the extent that in purpose and effect section 15(2) of the JSC Act, 2011 purports to give the President any role in the nomination and appointment of a person elected under article 171(2)(b)(c)(d) and (f) and in effect allows the 3<sup>rd</sup> respondent(sic) a role in the approval of members of the judicial service commission elected under article 171(2)(b)(c)(d)and (f) of the constitution the same is null and void and of no effect in law.



- (d) A permanent injunction do issue prohibiting the 1<sup>st</sup> respondent from purporting to vet the 1<sup>st</sup> interested party.
  - (e) An order do issue invalidating the purported nomination by the president of the 1<sup>st</sup> interested party as a member of the judicial service commission".
10. The position taken by LSK was supported by Warsame, JA who defended his election and opposed the call made by NA for submission of memoranda and public views on his suitability to serve as a commissioner of JSC. He anchored his objections on Articles 171(2) (c), 248(1), and 250(2) of the Constitution. Regarding section 15(2)(c) of JSA, he contended that the power of appointment is reserved for the President as head of State once a nominating body has elected and nominated persons to be appointed as members of JSC. According to him, section 15(2) of JSA mirrors the Constitution and makes a distinction between members 5 nominated under Article 171(2)(b)(c)(d)(f) and (g) and members appointed by the President under Article 171(2)(h) of the Constitution.
  11. JSC too supported LSK, asserting that Article 250(2) of the Constitution does not apply to the appointment of Warsame, JA since approval by the NA is only applicable in the case of persons appointed under Article 171(2) (h) of the Constitution. According to JSC, the Constitution provides for election, as opposed to nomination of a representative of the Court of Appeal. Also, Article 171(2) (c) does not vest any power on the President to nominate a member to JSC on behalf of the Court of Appeal and, therefore, the President's purported nomination of Warsame, JA for approval by the NA was unconstitutional, null and void. It was emphasized that JSC was a special commission under Article 171 of the Constitution and does not therefore fall under Article 250 of the Constitution. Article 248(1) was relied on as providing the exemption.
  12. There was no response to the petition by the NA but the AG weighed in asserting that it did not raise any constitutional issue; LSK had selectively alluded to Article 171(2) while disregarding Article 250(2) and 171(2)(h) of the Constitution; the petition was misconceived and based on wrong principles since, by dint of Article 248(2), the membership JSC should be subject to Article 250(2) of the Constitution as well as sections 3 and 5 of the Public Appointments (Parliamentary Approval) Act, 2011; and that the President was bound to uphold the principles espoused in Article 10 of the Constitution which he had.
  13. The second salvo was fired by SN who, on 3rd April, 2018, filed another petition No. 109 of 2018, against the AG, the NA, and the JSC. He enjoined LSK and Warsame, JA as interested parties. He averred that Warsame, JA was merely identified through an election and his name was forwarded to the NA for approval under Article 250(2) of the Constitution. The NA was right to insist on vetting and inviting members of the public to submit memoranda. It was his position that all Commissioners to constitutional Commissions, including JSC, must be approved by the NA. According to him, the view that only some members of JSC should undergo approval by the NA was contrary to Article 27 of the Constitution since it creates class discrimination between members of JSC. It was Article 250(2) which provides for the manner of appointment of members of all constitutional commissions. He faulted section 15(2) of JSA for contravening Article 250(2) of the Constitution in so far as it purports to exempt some commissioners from approval by the NA.
  14. SN's petition was supported by the NA which asserted that it had the constitutional mandate to approve all public appointments on behalf of the people of Kenya in accordance with the Constitution and the Public Appointments (Parliamentary Approvals) Act, 2011(Act No 33of 2011). It had received the name of Warsame, JA for purposes of vetting and approval and sent it to the relevant departmental committee which had arranged for public participation in the approval process. The NA



- relied on Article 250(2) of the Constitution and maintained that approval under the Article serves to enhance public participation and acts as one of the checks and balances envisaged by the Constitution. According to the NA, JSC plays an important role, hence the need to subject its membership to public participation to enhance accountability, transparency, the rule of law and democracy. The NA also had a constitutional mandate to oversight JSC which was a state organ. On the constitutionality of section 15(2), NA was of the view that it was unconstitutional to the extent that it requires the President to appoint the nominees as commissioners within three (3) days after receipt of the names from nominating bodies under Article 171(2)(b)(c)(d)(f) and (g) of the Constitution.
15. LSK opposed the petition essentially on the same grounds as it advanced in its own petition. It emphasized that JSC was a special and unique commission as highlighted in Article 171 and that the provisions establishing JSC were so clear and precise that there is no overlap or conflict with other provisions in the Constitution. It was contended that Article 248(1) acknowledges that there are situations where Article 250 is inapplicable to certain commissions and, therefore, a proper interpretation of the Constitution is that the Article does not apply to JSC. It asserted that the petition was baseless and a misapprehension of the law.
  16. JSC and Warsame, JA opposed the petition too, essentially on the same grounds that they supported the LSK petition. They emphasized that there was no ambiguity in the Constitution on the composition and appointment of commissioners to JSC which was governed by Article 171(2). Article 250(2) did not apply to composition, identification and appointment of JSC commissioners and therefore the former cannot be subsumed in the latter which makes general provisions regarding commissions and independent offices. It was pointed out that Article 248(1) exempted JSC from the application of Article 250. Finally it was contended that section 15(2) of JSA is consistent with the Constitution as it makes a distinction between commissioners appointed under Article 171(2)(b)(c)(d)(f) and (g) and those under (h). There is no provision either in the Constitution or statute requiring approval of an elected commissioner by the NA.
  17. As stated earlier, the trial court considered all those pleadings and the written and oral submissions made by counsel for the parties, allowed the petition of LSK, and dismissed SN's petition.
  18. SN did not challenge the dismissal of his petition. But the AG was aggrieved by the decision made in favour of LSK which it seeks to impeach on nine grounds laid out in the memorandum of appeal. In written and oral submissions, however, the grounds are condensed into three in the following manner:
    - i. Grounds 1,2,3,7 and 8 – whether the learned judge of the high Court erred in his judgment by holding that the memberships of elected commissioners of the Judicial service Commission should not be subjected to vetting and approval by the national assembly pursuant to the provisions of article 250(2) of the constitution.
    - ii. Ground 4 – whether section 15(2) of the Judicial Service Commission Act is unconstitutional.
    - iii. Ground 5,6 and 9 – whether the learned Judge erred in his determination by not applying the correct principles of constitutional interpretation enshrined in Article 259 of the constitution by selectively applying Article 172(2) in isolation to and in disharmony with Article 250(2).”
  19. The AG seeks to have the judgment of the trial court set aside and substituted with a judgment:
    - “declaring the unconstitutionality of section 15(2) of the Judicial Commission Act; and declarations that the person elected to be a representative of the Court of Appeal per the



provisions of Article 171(2)(b) is subjected to parliamentary approval per the provisions of Article 250(2) of the constitution.”

20. The AG urged the appeal through learned Senior State Counsel Mr. Thande Kuria who was assisted by Ms. Omuom, state counsel. Mr. Thande also held brief for learned counsel, Mr. Mbarak, who was on record for the NA, but filed no written submissions or list of authorities.
20. On the first ground, counsel submitted that it is Article 250 of the Constitution that provides for the composition, appointment and terms of service of Commissions and Independent office holders. It is that Article which provides that a member of such commission be identified and recommended for appointment in a manner prescribed by national legislation, approved by the National Assembly, and appointed by the President. In his view, the mode of appointment and approval of all commissioners is uniform unless they sit in the commission by virtue of their offices like the Chief Justice (CJ) or the AG, who were vetted before they assumed those offices. The judges and Magistrates who sit in the JSC do not do so in their official capacities but qua commissioners. Their suitability must therefore meet the criteria set under Article 250(2).
21. As for Article 171(4), counsel opined that all commissioners, apart from the CJ and AG, hold office for a term of five years so long as they 'remain qualified' and are eligible for 'nomination' for one more term, if they still remain qualified. It would follow, in counsel's submission, that there must be criteria for testing whether the nominated commissioners are qualified to serve, hence the need for vetting and approval by the NA.
22. Mr. Thande further submitted that in following such procedure, there was no interference with the independence of the Judiciary as feared by the trial court. That is because JSC is not part of the Judiciary which is set up under Articles 159 and 161 of the Constitution. JSC must therefore interact with Parliament as a political arm of Government.
23. On the second issue relating to principles of constitutional interpretation, Counsel submitted that the trial court erred in narrowly and selectively construing the provisions of Article 171(1) to exclude elected commissioners. The court did so by stating that Chapter 15 was of general application and did not apply where there was a specific provision. In counsel's view, such approach trashes the rationale behind the constitutional edict on vetting and approval of state officers before assuming office. The process of approval is meant to comply with Article 10 principles of transparency, integrity, rule of law and participation of the people. He submitted that the trial court did not appreciate or apply the provisions of Article 259(1) of the Constitution which calls on courts to give effect to the intent and purposes of the constitution by reading it as a whole without one provision destroying but sustaining the other. In his view, the trial court did not take a liberal approach to constitutional interpretation. The Nigerian cases of cases of *Nafui Rabui vs. State* [1981] 22 NCLR 293 and *Ifezu vs. Mbandugha* [1984] 1 SC NLR 5 SC 79, both of which support the edicts of constitutional interpretation espoused under Article 259 were relied on.
24. Lastly on this issue, counsel faulted the trial court for misconstruing Article 248 (1) of the constitution which applies to all commissions unless the constitution itself, not any other legislation, contains a specific provision for exemption. It was contended that Article 250 provides a three-step process of appointment of a commissioner: first, there is a process of nomination, election or by any other means, identification of a candidate in a manner prescribed by statute. Then the constitution under Article 250(2) provides for approval of such candidate by the NA and appointment by the President, which are the two other steps to being a commissioner. As such, it is submitted, Article 248 is of no assistance in isolating elected commissioners from the application of Chapter 15.



25. On the third and final issue regarding the constitutionality of section 15 of JSA, it was submitted that Articles 250(2) and 95 of the constitution as read with section 15 (2), enhance the principle of separation of powers and the principle of checks and balances, where the NA, which exercises oversight authority should approve membership of commissions. Section 7 of the Public Appointments (Parliamentary Approval) Act was also relevant as it provides factors for consideration in vetting a nominee. To the extent that section 15 takes away the powers of NA to vet and approve elected commissioners, therefore, it is unconstitutional. The High Court case of Trusted Society of Human Rights Alliance vs. The AG & 2 Others, Petition No. 229 of 2012 was relied on to shore up the imperative of reviewing the process of appointment of state or public officers for procedural infirmities or illegality. Counsel further submitted that section 15, in any event, purports to contradict Article 250(2) by excluding the NA from the process of vetting, and must give way.
26. As regards the role of the President, counsel submitted that he is both head of state and head of the executive arm of government, and he makes appointments in the former capacity. In making the appointments, the President must comply with the provisions of Article 250(4) which espouse Article 10 principles and the principle that the commissions should reflect regional and ethnic diversity. In counsel's view, only the NA, which is centrally placed, can harness and deliver all the constitutional considerations before the appointment of a commissioner. Commissions, in any event, are accountable to the people of Kenya through the political organs of state, including the Presidency and Parliament. That is why the organs are also involved in the removal process. They must, therefore, be involved in the process of appointing commissioners.
27. For those reasons we were urged to allow the appeal. We were also asked to consider the cases of Benson Riitho Mureithi vs. J.W. Wakhungu & 2 Others [2014] eKLR; Njoya & 6 Others vs. Attorney General & 3 Others (No. 2) [2004]1 KLR 261; and Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR; all on constitutional interpretation and vetting of public and state officials.
28. In those submissions, the AG was supported by learned counsel Mr. K.M. Mwangi who appeared for SN. No written submissions or list of authorities were filed. Counsel especially referred to Article 171 of the constitution and submitted that it did not matter that a differentiation of commissions was made. It still did not make JSC a special commission. Like other commissions under Chapter 15, the provisions of Article 250(2) must apply to subject the elected commissioner to vetting. He cited, without expounding on it, a doctrine known as "Cy pres doctrine" where, if two provisions of the law are being construed, the general provision should prevail. Our research shows that the doctrine originates from an old French phrase 'Cy pres comme possible' which means 'as near as possible' and is used to interpret terms of a Will, gift, or charitable trust, when the original document cannot be interpreted literally. Counsel concluded by submitting that it was important that the people of Kenya, through Parliament, should participate in choosing their commissioners. The constitutional culture guided by Article 10 of the constitution should also be natured if it will ever take root.
29. On the opposing side, LSK filed written submissions and a list of authorities to respond to the appeal. It also filed a cross appeal on two grounds:-
- That the learned Judge erred in:
- “(a) failing to find that Article 171(2) of the Constitution does not give the President a role in the appointment of elected members of the Judicial Service Commission under Articles 171(2)(b),(c),(d) and (f) of the Constitution.



- (b) failing to find that section 15(2) of the Judicial Service Act, 2011 is unconstitutional in so far as it gives the President a role in appointment of elected members of the Judicial Service Commission under Articles 171(2)(b), (c) and (f).”

Two declarations were sought, thus:

- “(a) A declaration be and is hereby issued that the 3<sup>rd</sup> Respondent automatically became a member of the Judicial Service Commission by operation of law under Article 171(2)(c) upon election by the judges of the Court of Appeal; and
- (b) A declaration be and is hereby issued that section 15(2) of the Judicial Service Act, 2011 is unconstitutional to the extent that it gives the President a role in appointment of elected members of the Judicial service Commission under Articles 171(2)(b),(c) and (f).”

30. In submissions opposing the main appeal, learned counsel, Mr. Dudley Ochiel posed the central issue as the interpretation of Articles 171, 248 and 250 of the constitution, regarding vetting, approval and appointment of elected commissioners of JSC. He addressed the following three issues in his submissions:

“(a)Did the High Court err in holding that the 2<sup>nd</sup> Respondent lacks the mandate to vet or approve, elected members of the Judicial Service Commission under Articles 171(2)(b),(c), (d) and (f) of the Constitution.

(b)Did the High Court err in holding that the President has constitutional authority to appoint elected members of the Judicial Service Commission under Article 171(2)(b),(c), (d) and (f) of the constitution? And in finding that section 15(2) of the Judicial Service Act, 2011 is constitutional?”

31. In urging the first issue, counsel observed that although JSC was a Chapter 15 commission and one would expect it to be subject to the general provisions of Article 250(1) to (3), Article 248(1) stipulates that Chapter 15 applies to constitutional commissions such as JSC 'except to the extent that the constitution provides otherwise'. And the constitution does provide otherwise: for example, while Article 250(1) limits membership to between 3 and 9, the Constitution provides for 11 members of the Parliamentary Service Commission under Article 127(2); the Salaries and Remuneration Commission under Article 230 has 14; and JSC has 14. So too, several other commissions about whose 'composition and membership' the constitution otherwise provides for. Article 248(1), therefore, ousts Chapter 15 on the question of 'composition and membership' in specific cases where the Constitution so provides.

32. As regards JSC, Article 171(2) is specific on its composition and membership. That is how the CJ and the AG are not subjected to the requirements of Article 250(2), since Article 171(2) (a) and (e) of the Constitution specifically addresses their membership. In counsel's view, the three Articles are mutually reinforcing and the court cannot declare one Article as unconstitutional or one article as neutralizing the others. The cases of *South Dakota vs. North Carolina* 192 [1940] LED 448; *Tinyefunza vs. Attorney General of Uganda*(1997) UGCC3) and *Andrew Kiplimo Sang Muge vs. Independent Electoral & Boundaries Commission* [2017]eKLR were relied on in support of that submission. He also cited the case of *Judges & Magistrates Vetting Board vs. Centre for Human rights and Democracy* [2014] eKLR where the Supreme Court upheld ouster clauses and stated that no provision of the Constitution is "unconstitutional". Counsel defended the trial court against accusations that it did



- not apply a purposive interpretation, contending that the trial court was fully aware of the principles and applied the harmonization principle in concluding that Articles 171 and 250 applied to different commissions.
33. Turning to the importance of Article 248, counsel submitted that it was necessary because JSC's role is to promote and facilitate the independence and accountability of the Judiciary and to facilitate the efficient, effective and transparent administration of justice. At the centre of JSC's mandate is the recruitment, appointment, disciplining and removal of judicial officers. It must therefore remain independent of the other organs, hence the express limitation of participation by the Executive and the Legislature. It was a conscious decision by the Kenyan people to limit the President's appointment of JSC commissioners to the two lay members appointed under Article 171(2) (h), owing to the history of the Judiciary over which the other institutions of governance ran roughshod over. There was no Parliamentary vetting or approval required for JSC commissioners specified under Article 171(2)(b) (c)(d) and (f), counsel concluded on that issue.
  34. On the cross appeal, counsel contended that there was no power at all reposed on the President in the appointment of elected members of JSC; that section 15(2) of JSA purports to confer on the President a role in the appointment of elected commissioners and to that extent it was unconstitutional; that the trial court failed to interpret Articles 132(4), 171(2), 248(1) and 250(1) as an integrated whole; that Article 132(4) does not override the other three Articles; that Article 171(2) (b)(c)(d) and (f) does not direct that the names of the elected commissioners be submitted to the President; that the trial court did not consider the purpose or effect of section 15(2) in determining constitutionality; that both the purpose (to give more power to the President) and the effect (to permit unlawful interference with JSC) of the section are unconstitutional; that it was the extra-constitutional requirements of section 15(2) that the President shielded under in refusing/failing to appoint Warsame, JA for ten (10) months until the court compelled action; and that the court, in declining to declare section 15(2) unconstitutional, failed to perceive an intention to apply Executive pressure on the Judiciary.
  35. For those submissions, the following cases were relied on: US vs. Butler 297 U.S 1 [1936] on the manner of declaring legislation unconstitutional; R. vs. Big M Drug Mart Ltd [1985]1 S.C.R. 295, on the relevance of 'purpose and effect'; Communications Commission of Kenya vs. Royal Media Services [2014]eKLR, on independence as a shield against influence or interference; and Bar Association of Belize vs. Attorney General of Belize Claim No. 666 of 2010, on tests for independence which should include perception.
  36. JSC was represented before us by learned Senior Counsel, Mr. Okong'o Omong'eni, assisted by learned counsel Ms. Kwang'a. They also filed written submissions and a bundle of authorities. The gist of their submissions mirror those of the LSK and we rehash parts of them only for emphasis.
  37. It was submitted that Article 171 is specific, conclusive and exclusive in architecture. It does not allow for speculation or other Articles for interpretation. It simply creates a unique commission which has four categories of members:(i) those who are there by virtue of their offices--that is, the CJ and AG; (ii) elected members-- that is, representatives of the Supreme Court, Court of Appeal, High Court, KMJA and LSK ; (iii)Two lay members representing the public; and (iv) the nominee of the Public Service Commission. To the extent that Article 171 specifically provides for the establishment, composition and appointment of members of JSC, it cannot be subjected to the general provisions of Article 250, it was emphasized.
  38. Furthermore, counsel observed, that the constitution is replete with exceptions made in various Articles to address specific areas and, therefore, Article 248(1) is not unique. He submitted that it may be a good intention to vet all commissioners but the Constitution itself does not sanction it. Parliament



which draws authority from the Constitution cannot act contrary to that authority. There is no express provision in the Constitution for vetting by the NA. The case of Speaker of national Assembly of South Africa vs. De Lille & Another, which was 17 followed in R. V. National Assembly & 4 Others Ex Parte Edward Ouko [2017] eKLR was relied on.

39. As regards the interpretation of the Constitution, counsel emphasized that it must be read as a whole since no part of it can be elevated above another. The same authorities relied on by LSK were cited.
40. Finally, counsel decried the apparent discrimination against Warsame, JA considering that other elected commissioners from the Supreme Court, the High Court, KMJA and LSK had been allowed to sit without any requirement for vetting or approval by the NA, and yet the law had not changed. Article 27 of the Constitution was relied on. Counsel concluded that the election of Warsame, JA to the JSC by his peers was final in all respects. The election was in itself a vetting process and it would be unconstitutional to subject the judge to extra qualifications. The case of Hassan Ali Joho vs. Suleiman Said Shabhal & 2 Others [2014] eKLR was relied on.
41. On the issue of section 15(2) of JSA, and the President's authority under Article 132(4)(a) to make appointments, counsel submitted that Article 132(4) was merely permissive enabling the President to make appointments in appropriate cases. If the Article was read in harmony, as it should, with Articles 171(2) and 248(1), it would have dawned on the trial court that the President had no role to play in the appointment of elected commissioners. Certainly, Article 171 did not require such appointment and so it renders section 15(2) unconstitutional as it is inconsistent with the constitution. Like LSK, counsel castigated the trial court for failing to examine the purpose and effect of section 15(2), and declaring it unconstitutional in the manner sought by LSK.
42. Finally, learned counsel for Warsame, JA, Mr. Issa Mansur, assisted by learned counsel, Ms. Sharon Lipwop, directed us to the written submissions filed together with a bundle of authorities. He also made some oral highlights. The position taken by Warsame, JA on the first issue mirrors that taken by LSK and JSC and any rehash of the submissions will be by way of emphasis.
43. Counsel first responded to the AG's retort that the JSC was not the Judiciary and therefore does not enjoy the same degree of independence. In counsel's submission, JSC may not strictly be the Judiciary, but it is an intrinsic part of the Judiciary. They are both covered under Chapter 10 which is about the Judiciary. Indeed, that is why JSC has top heavy representation by judicial officers who are elected by their peers and is chaired by the CJ. Its mandate is to promote and facilitate the independence and accountability of the judiciary and the effective, efficient and transparent administration of justice. It can only promote independence and accountability if its own make up is defined by independence in the appointment of its members. The intention of that special architecture, according to counsel, was to fortify the independence of the Judiciary. It was clear to Mr. Mansur that if approval of the NA was required for elected commissioners, the constitution itself would have said so expressly, instead of leaving it to extrapolation.
44. As it is, the constitution expressly states in Article 248 that Chapter 15 applies unless otherwise stated, and Article 171 provides the exception. Where the Constitution has an express provision regarding appointment of members of any commission or independent office, the general provision in chapter 15 ceases to apply. That is why some elected commissioners were sitting as such without undergoing vetting. He referred to Act No. 33 of 2011 and submitted that it only applies where the constitution requires approval, particularly by Parliament. The Act did not apply to Warsame JA as there was no reason to vet him.
45. The treatise 'Kenya Democracy and political Participation: a Review by AfriMap, Open Society Initiative for Eastern Africa, and the Institute of Development Studies; and the cases of Judicial Service



Commission vs. Speaker of the National Assembly & 8 others [2014] eKLR; Karahungu vs. Attorney general [2014] UGCC 13; and Law Society Of Kenya vs. Attorney General & 2 others [2013] eKLR, were relied on to underscore the independence of the JSC and the historical context that informs that independence.

46. As for the constitutionality of section 15(2) of JSA, Mr. Mansur agreed with the trial court that it was not unconstitutional. That is because it gives effect to Article 131(a) of the constitution which provides that the President is both Head of State and Government. In the former capacity, he plays a formalistic role of appointment of members of JSC in the same manner he appoints Judges on the recommendation of the JSC.
47. In conclusion, counsel charged that there was a nefarious attempt by the AG to subvert and emasculate the independence of the Judiciary and the JSC. He asserted that the AG's argument that the intention to vet was to ensure that Article 10 principles, including regional and ethnic balance were met could not pass muster since the constitution itself does not require such vetting or approval. At any rate, not all public appointments have to be subjected to public participation or require approval by the NA.
48. We have considered the consolidated petitions, the affidavits filed thereunder, the submissions of counsel and the law. In our view, the germane issues that fall for our consideration in the appeal and cross appeal mirror the issues determined by the trial court. We extract three of them:-
- (i) Whether Warsame JA, as the elected representative of Justices of the Court of Appeal, was subject to vetting and approval by the NA before assuming his position as a JSC commissioner;
  - (ii) Whether, Section 15(2) of the Judicial Service Act is unconstitutional for failure to require that all persons elected and nominated as JSC Commissioners be subject to approval by the NA.
  - (iii) Whether section 15(2) is unconstitutional for giving a role to the President to play in the appointment of elected commissioners of the JSC.
49. As correctly observed by the trial court, in order to answer those issues, it is necessary to construe the relevant constitutional provisions in the manner dictated by the constitution itself and on principles of interpretation set in judicial precedents. From the authorities cited and the submissions of all counsel before us, we perceive no major divergence of view in the manner of interpretation of our Constitution. The trial court too, despite submissions made to the contrary by the AG, spent considerable time discussing the principles of constitutional interpretation and relied on several relevant authorities to guide it. The problem, we think, is the application of all that learning to the facts of the case before us.
50. The starting point, as always, is Article 259 on the construction of the Constitution which directs that it shall be interpreted 'in a manner that: (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance'. Those values must permeate the process of constitutional interpretation. Many local and international decisions were cited before us to illustrate other governing principles of interpretation but we shall not belabour them as they are largely common ground. For emphasis, however, we reiterate what this Court stated in the case of *Njoya & 6 Others vs. Attorney General & another* [2004]eKLR thus:-

“Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the constitution, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document.”



51. We also emphasize the principle of holistic interpretation where the Constitution, which has different Chapters and Articles is read as one document, not disjointed sections; where each provision is read as supporting the other and not destroying the other; where the provisions are all ultimately in harmonious symphony. In the case of *Tinyefuze vs. Attorney General of Uganda* Constitutional Petition No 1 of 1997 [1997]3 UGCC the Uganda Constitutional Court put it thus;

“The entire Constitution has to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness. And exhaustiveness.”

52. Our own Supreme Court In the Matter of Kenya National Commission on Human Rights [2014] eKLR explained what a holistic interpretation entails when one counsel before it persisted on asking the Court to find that Article 163(6) of the Constitution does not mean what it says, through “a holistic interpretation”. The Court stated:

“But what is meant by a ‘holistic interpretation of the Constitution’? It must mean interpreting the Constitution in context. It is the 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 light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”

53. Was Warsame, JA, having been elected as a member of the Commission, subject to approval by the National Assembly, before his formal appointment by the President? That is the first issue.

54. To answer it we must now lay out in full and juxtapose the three Articles of the Constitution that must be construed and interpreted harmoniously.

(I) Chapter Ten – Judiciary

Article 171: Establishment of the JSC.

"1) There is established the Judicial Service Commission.

2) The Commission shall consist of-

- a) The Chief Justice who shall be the Chairperson of the Commission;
- b) One Supreme Court Judge elected by the Judges of the Supreme Court;
- c) one Court of Appeal Judge elected by the Judges of the Court of Appeal;
- d) one High Court Judge and one Magistrate, one a woman and one a man, elected by the members of the association of Judges and Magistrates;
- e) the Attorney General;
- f) two advocates, one a woman and one a man, each of whom has at least 15 years’ experience, elected by the members of the statutory body responsible for the professional regulation of advocates;
- g) one person nominated by the Public Service Commission; and 23



- h) one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.”
- 3) The Chief Registrar of the judiciary shall be the Secretary to the Commission.
- 4) Members of the Commission, apart from the Chief Justice and the Attorney General, shall hold office, provided that they remain qualified for a term of five years and shall be eligible to be nominated for a term of five years.

(II) Chapter 15-commissions And Independent Offices

Article 248: Application of Chapter

- (1) This Chapter applies to the commissions specified in clause (2) and the independent offices specified in clause (3), except to the extent that this Constitution provides otherwise.
- (2) The commissions are—
  - (a) the Kenya National Human Rights and Equality Commission;
  - (b) the National Land Commission;
  - (c) the Independent Electoral and Boundaries Commission;
  - (d) the Parliamentary Service Commission;
  - (e) the Judicial Service Commission;
  - (f) the Commission on Revenue Allocation;
  - (g) the Public Service Commission;
  - (h) the Salaries and Remuneration Commission;
  - (i) the Teachers Service Commission; and
  - (j) the National Police Service Commission.
- (3) The independent offices are-
  - (a) the Auditor-General; and
  - (b) The Controller of Budget.

(III) Article 250: Composition, appointment and terms of office

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



- (3) To be appointed, a person shall have the specific qualifications required by this Constitution or national legislation.
- (4) Appointments to commissions and independent offices shall take into account the national values referred to in Article 10, and the principle that the composition of the commissions and offices taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya.
- (5) A member of a commission may serve on a part-time basis.
- (6) A member of a commission, or the holder of an independent office-
  - (a) unless ex officio, shall be appointed for a single term of six years and is not eligible for re-appointment; and
  - (b) unless ex officio or part-time, shall not hold any other office or employment for profit, whether public or private.
- (7) The remuneration and benefits payable to or in respect of a commissioner or the holder of an independent office shall be a charge on the Consolidated Fund.
- (8) The remuneration and benefits payable to, or in respect of, the members of a commission or the holder of an independent office shall not be varied to the disadvantage of that person during their respective terms of office.
- (9) A member of a commission, or the holder of an independent office, is not liable for anything done in good faith in the performance of a function of office.
- (10) The members of a commission shall elect a vice-chairperson from among themselves-
  - (a) at the first sitting of the commission; and
  - (b) whenever it is necessary to fill a vacancy in the office of the vice-chairperson.
- (11) The chairperson and vice-chairperson of a commission shall not be of the same gender.
- (12) There shall be a Secretary to each commission who shall be
  - (a) appointed by the commission; and
  - (b) the chief executive officer of the commission.

[Emphasis added].

57. Now, a plain reading of those Articles will show, that Article 248 identifies all Chapter 15 commissions and applies the provisions of the chapter to all of them, including JSC. However, the same Article anticipates that there would be other constitutional provisions and aspects, specific to the various commissions, which may differ from the provisions of Chapter 15, and provided an exemption. There can be no argument that the Constitution itself can make exemptions to the application of any Article and that would not amount to a conflict or contradiction. A provision of the Constitution cannot be unconstitutional. Indeed, illustration of such provisions in respect of some of the commissions were made before us.



58. As regards the composition and appointment of members, Article 250 provides that a member would be identified and recommended for appointment in a manner prescribed by national legislation. Under that regime, approval by the NA would then follow and lastly, the President would appoint. There is no national legislation prescribing how a member of JSC would be identified and recommended. Instead, the Constitution itself in Article 171(2) prescribes the manner of identification and nomination as 'election'. National legislation in the form of the JSA then takes over the process and has provided in Section 15 thus:

Part Iii – Judicial Service Commission

15. Procedure of appointment

- (1) Where the members are to be appointed by the President under Article (171(2)(h) of the Constitution, the following procedure shall apply-
  - (a) Until after the first elections under the Constitution, the President Shall, subject to the National Accord and Reconciliation Act, 2008 (No. 4 of 2008) and after consultation with the Prime Minister, within seven days of the commencement of this Act, submit the names of the nominees to the National Assembly;
  - (b) The National Assembly shall, within seven days after it first meets after receiving the names of the nominees-
    - (i) Consider the nominees and either approve or Reject the nominees; and
    - (ii) notify the President as to the approval or rejection;
  - (c) if the National Assembly approves the nominees under Article 171(2)(h), the President shall, within three days after receiving the notification from the National Assembly, appoint the nominees as members of the Commission;
  - (d) if the National Assembly rejects a nominee submitted by the President, the President shall, within three days after receiving the notification from the National Assembly, submit the name of a new nominee to the National Assembly and the provisions of this subsection shall apply with necessary modifications with respect to the new nominee.
- (2) Where the nominations are to be made by bodies specified under Article 171(2)(b, (c), (d), (f) and (g) of the Constitution-
  - (a) the respective nominating body shall submit the name of its nominee to the President; and
  - (b) the President shall, within three days of receipt of the names, appoint the nominees as members of the Commission.

59. So that, Parliament in those provisions was clear that Article 171(2) created four categories of members and catered for the procedure relating to each. More specifically, Parliament was clear that the only persons to be subjected to vetting through the National Assembly were the two persons (non lawyers) representing the public. Section 15(2) then deals specifically with elected members who do not have to undergo vetting by the NA. We shall say more about the constitutionality of the section later.

60. That reasoning brings us to the conclusion, on the 1st issue, that Warsame, JA, having been elected by his peers as a member of the JSC, was not subject to approval by the National Assembly. We so hold.



61. In coming to the same conclusion, the trial court reasoned as follows:

“My reading of the language in Articles 171 and 250 and taking into account Article 248(1) is that Articles 171 and 250 apply to different commissions. It is therefore my finding and I so hold, that Article 250 of the Constitution does not apply to JSC whether in terms of composition or manner of identification of its commissioners. In that regard, the requirement and processes of approval by the National Assembly in Article 250 do not apply to JSC commissioners except those appointed under Article 171(2) (h) of the Constitution.....Articles 171 and 250 are Articles in the same Constitution. None of them is superior to the other, and the principles of constitutional construction require that the Constitution be read as an integrated whole with various articles supporting one another. They should never be seen as contradicting each other or one subordinating the others. They must be read harmoniously because they are mutually consistent with no internal logical contradictions. The Court must therefore adopt an interpretation that brings a harmonious relationship between the two Articles and resist an interpretation that creates tension between them or encourages one provision of the same Constitution to be hoist above the other. They are equal like branches of the same tree.....Articles 171 and 250 of the Constitution are not at war with each other but complement one another. They must be understood from our historical context that they are a product of change from the past when JSC was composed of unknown people. As a result, the country wanted a break from the past, thus the adoption of Article 171 on the establishment, composition and appointment of JSC commissioners. Article 171(2) reflects the wishes of the people of Kenya and the Court’s duty is to give effect to those wishes. In that regard, the language of Article 171(2) (b) (c)(d) and (f) must be respected and given effect to, rather than ignoring it in favour of a strict and technical interpretation which deviates from the spirit of the Constitution.”

We respectfully agree with that reasoning.

62. Before we put closure to the first issue, we wish to disabuse the AG about the submission made, conveying the notion that the JSC is not the Judiciary and it cannot therefore lay claim to the same notions of independence that the Judiciary enjoys; that JSC should be left alone to wrestle with the politics that come with being a state organ. If we understood the submission correctly, then the assertions made by Mr. Mansur that there was a nefarious attempt by the AG to subvert and emasculate the independence of the Judiciary and the JSC, may not be farfetched.
63. The independence of JSC is not found in its intimate association with the Judiciary. It is guaranteed under Article 249(2)(b) of the Constitution. In *Re The Matter of Interim Independent Electoral and Boundaries Commission [2011] eKLR*, the Supreme Court discussed the independence of commissions and independent offices as follows

“(59) It is a matter of which we take judicial notice, that the real purpose of the “independence clause”, with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several



independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as ‘people’s watchdogs’ and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the “independence clause.” [Emphasis added].

History is indeed a great teacher.

64. Is section 15(2) of JSA unconstitutional, either because it does not compel elected commissioners to undergo vetting as submitted by the AG and the NA, or because it gives a role to the President to appoint an elected member, as submitted by LSK and JSC? Those are the 2nd and 3rd issues.
65. First of all, it is not amusing, as observed by the trial court, that it is the AG, the legal advisor to the National Government, and scrutinizes Bills before they pass through Parliament, who should be the one admitting that Parliament passed an unconstitutional legislation. The NA has also joined the fray to admit that it passed an unconstitutional legislation! The last time we checked, the power to legislate and to amend laws still vests in the Legislature.
66. The entire section 15 has been reproduced above. Warsame, JA has no problem with it, reasoning that the President, as Head of State, and not Head of Government, has the responsibility to make formal appointments, such as those envisaged under section 15(2). LSK, as well as JSC, strongly oppose any role being given to the President in the appointment of elected commissioners, for the reason that Article 171 does not sanction it, thus rendering it unconstitutional. The AG and SN, for the different reason that the section does not go far enough to cover all commissioners as the Constitution provides, and so it is rendered unconstitutional.
67. We have anxiously considered those arguments. In dealing with the same issue, the trial court had this to say in respect of the complaint raised by SN:-

“I have already held that there is no constitutional requirement that JSC commissioners contemplated in Article 171(2)(b)(c)(d) and (f) be approved by the National Assembly, and that Article 250 (2) does not also apply to JSC Commissioners. In that regard, therefore, section 15(2) cannot be constitutionally invalid for failure to provide for mandatory approval of JSC Commissioners by the National Assembly. Consequently, the submissions by Mr. Mwangi, supported by Mr. Mbaraka and Mr. Kuria have no constitutional or legal foundation”

68. We think it stands to reason that once we hold, as we have, that Article 250 (2) does not apply to JSC commissioners elected under Article 171, then it would be illogical to declare that section 15(2) which does not apply to the former Article is unconstitutional. A statute or statutory provision is unconstitutional if it violates or contradicts a clear provision of the Constitution to the extent that it cannot be reconciled with the offended Article. In view of the finding above, we find no fault with the rejection of the arguments of the AG and SN. We answer the 2nd issue in the negative.

As regards the concerns of LSK and JSC, the trial court held:-

“Section 15(2) provides that where nominations are to be made by bodies specified under Article 171(2) (b), (c), (d), (f) and (g) of the Constitution- (a) the respective nominating body shall submit the name of its nominee to the President; and (b) the President shall,



within three days of receipt of the names, appoint the nominees as members of the Commission. The section simply directs that names be sent to the President for formal appointment. It does not confer any discretion on the President once he receives the names. He is under legal obligation to appoint the nominee(s) within three days of receipt of the name(s). Once the President receives names of commissioners determined in accordance with provisions of Article 171(2)(b)(c)(d)(f) and (g) his mandate is to formally appoint them and nothing more. The National Assembly, fully cognizant of and appreciating the unique functions and mandate of JSC, assigned a period of three days within which the President must sign the instrument(s) formally appointing the nominee(s) as commissioner(s). Article 132(4) of the Constitution mandates the President to perform any other executive function provided for in the Constitution and in national legislation. In that regard, appointment of nominees as JSC commissioners is an executive function conferred on the President by section 15(2) of the Judicial Service Act. I do not therefore see any constitutional invalidity in the impugned section 15(2)."

69. The emphasis laid in objecting to the section is that the purpose of it was to unduly give more power to the President, and the effect was to permit unlawful interference with JSC. The two intentions which were inherent in the section, it is argued, were unconstitutional. It did not matter that Article 132(4) of the Constitution gives the President the power to appoint, it was further argued, such power was only permissive and was exercisable in appropriate cases. In view of the provisions of Articles 171(2) and 248(1), it was not appropriate for the section to give any role to the President and therefore the section should give way, it was concluded.
70. With respect, we do not subscribe to that view. The Constitutional architecture creates room under Article 132 for the President to perform some duties as a Head of State, which is a noble thing in a constitutional democracy. One of the noble tasks given to the President is to make state and public appointments, even where he has no other role to play in the process of appointment. We have already endorsed the construction placed on section 15(2) by the High Court that the President's duty is simply to appoint an elected commissioner within three days of submission of the nominee's name. Consequences would ensue, as indeed they did in this case, if there is a delay in complying with the statute. In that case, there is no mischief which can be cured only by removal of the section. For those reasons, we find no merit in the submissions of LSK and JSC. We answer the 3rd issue in the negative.
71. The upshot is that the main appeal has no merits and is hereby dismissed. The cross appeal similarly has no merits and is hereby dismissed. The findings and orders of the High Court are hereby upheld. Each party shall bear its own costs.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, .2019**

**P. N. WAKI**

**JUDGE OF APPEAL**

.....

**ASIKE MAKHANDIA**

**JUDGE OF APPEAL**

.....

**F. SICHALE**



**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**

