



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: KARANJA, MWERA & KIAGE, J.J.A**

**CIVIL APPEAL NO. 324 OF 2014**

**BETWEEN**

**ATTORNEY GENERAL.....1<sup>ST</sup> APPELLANT**

**THE NATIONAL POLICE SERVICE COMMISSION.....2<sup>ND</sup> APPELLANT**

**THE NATIONAL POLICE SERVICE.....3<sup>RD</sup> APPELLANT**

**AND**

**INDEPENDENT POLICING OVERSIGHT AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**CHARLES KIPTARUS CHESIRE.....2<sup>ND</sup> RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Nairobi (Lenaola, J.) dated 31<sup>st</sup> October, 2014)*

**BETWEEN**

**INDEPENDENT POLICING OVERSIGHT AUTHORITY.....1<sup>ST</sup> PETITIONER**

**CHARLES KIPTARUS CHESIRE.....2<sup>ND</sup> PETITIONER**

**AND**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL POLICE SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

**THE NATIONAL POLICE SERVICE.....3<sup>RD</sup> RESPONDENT**

**AND**

**658.....INTERESTED PARTIES**

**AS CONSOLIDATED**

**WITH**

1. **NAIROBI PETITION NO. 416 OF 2014**
2. **NAIROBI PETITION NO. 309 OF 2014**
3. **NAIROBI PETITION NO. 318 OF 2014**
4. **NAIROBI J.R. APPL. NO. 349 OF 2014**
  
5. **MERU J.R. NO. 331 OF 2014**
  
6. **MALINDI PETITION NO. 5 OF 2014**
7. **KAKAMEGA J.R. NO. 14 OF 2014**
  
8. **NAIROBI PETITION NO. 456 OF 2014**
9. **NAIROBI PETITION NO. 457 OF 2014**
  
10. **NAIROBI PETITION NO. 431 OF 2014**
11. **KERICHO MISC. APPL. NO. 6 OF 2014**
  
12. **ELDORET MISC. APPL. NO. 130 OF 2014**
  
13. **NAIROBI PETITION NO. 421 OF 2014**
14. **NAIROBI JR NO. 323 OF 2014**
  
15. **NAKURU J.R. NO. 31 OF 2014**
16. **NAKURU PETITION NO. 58 OF 2014**
  
17. **NAKURU PETITION NO. 55 OF 2014**
18. **NAIROBI PETITION NO. 434 OF 2014**
  
19. **KERICHO MISC. APPL. NO. 7 OF 2014**
  
20. **EMBU MISC. APPL. NO. 152 OF 2014**
21. **NAIROBI PETITION NO. 445 OF 2014**
  
22. **NAIROBI PETITION NO. 447 OF 2014**
23. **NAIROBI J.R. NO. 328 OF 2014**
  
24. **NAIROBI J.R. NO. 329 OF 2014**

**JUDGMENT OF THE**

**COURT**

Nairobi Civil Appeal No. 324 of 2014 was consolidated with the twenty four other appeals as listed above and they were heard together. This was so because they all challenge the judgment of Lenaola, J which was rendered on 31<sup>st</sup> October, 2014. The cause of action giving rise to the several suits which were also consolidated and heard together by Lenaola J, was the nation-wide police recruitment exercise which was conducted on 14<sup>th</sup> July 2014, in diverse parts of the country. This judgment is therefore in respect of all those appeals and three cross-appeals also pegged on the same judgment.

The Constitution of Kenya 2010 which was promulgated on 28<sup>th</sup> August 2010 brought with it a cornucopia of good things, and actualised an array of human rights which hitherto existed only as far-fetched aspirations. One of the principal and most cherished of these goodies is the endowment of sovereign power to the people of Kenya, endearingly referred to as “*Wanjiku*”, as contained in the very

first Article of the Constitution. It gave the people (*Wanjiku*) the power to delegate this power to the many organs created in the new Constitution, both at National and County levels.

All these organs were expected to exercise their delegated or donated power to the betterment and for the benefit of *Wanjiku*. Among these organs/offices, is the Attorney-General (1<sup>st</sup> appellant) established under Article 156; the National Police Service Commission (2<sup>nd</sup> appellant) under Article 246; National Police Service (3<sup>rd</sup> respondent) under Article 239 (c) of the Constitution, and others which do not concern us for purposes of this judgment.

On the other hand, the Independent Policing Oversight Authority, (IPOA) 1<sup>st</sup> respondent is a statutory body established under Section 3 of the IPOA Act, Chapter 88 of the Laws of Kenya. It is an independent policing oversight authority, whose objectives are set out under section 5 of the Act to:-

- “(a) hold the Police accountable to the public in the performance of their functions;***
- b. give effect to the provision of Article 244 of the Constitution that the Police shall strive for professionalism and discipline and shall promote and practice transparency and accountability; and***
- c. ensure independent oversight of the handling of complaints by the Service.”***

The first respondent’s place in the new constitutional dispensation was therefore a very important one as , among other things, it was meant to oversee and keep in check any excesses that might be committed by the police force, re-baptised the National Police Service (3<sup>rd</sup> Appellant ), and to ensure that the same was responsive to the needs of *Wanjiku*, who hitherto considered the same as the arbitrary and oppressive organ of the executive, which was not very responsive to the complaints of the common person.

It was meant to hold the police accountable to the public in the performance of its functions in order to give effect to the provisions of **Article 244 of the Constitution**. It’s more specific functions are set out in section 6 of the Act to:-

- “(a) investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief, and shall make public the response received to these recommendations;***
- b. receive and investigate complaints by members of the Service;***
- c. monitor and investigate policing operations affecting members of the public;***
- d. monitor, review and audit investigations and actions taken by the Internal Affairs Unit of the Service in response to complaints against the Police and keep a record of all such complaints regardless of where they have been first reported and what action has been taken;***
- e. conduct inspections of Police premises, including detention facilities under the control of the Service;***
- f. co-operate with other institutions on issues of Police oversight, including other State organs in relation to services offered by them;***
- g. review the patterns of Police misconduct and the functioning of the internal disciplinary process;***

- h. *present any information it deems appropriate to an inquest conducted by a court of law;*
- i. *take all reasonable steps to facilitate access to the Authority's services for the public;*
- j. *subject to the Constitution and the laws related to freedom of information, publish findings of its investigations, monitoring, reviews and audits as it sees fit, including by means of the electronic or printed media;*
- k. *make recommendations to the Service or any State organ;*
- l. *report on all its functions under this Act or any written law; and*
- m. *perform such other functions as may be necessary for promoting the objectives for which the Authority is established."*

Since the Police Force had not been known to impartially investigate itself when complaints were raised against it, the IPOA was a welcome relief to the people of Kenya. It was argued before the High Court that IPOA had no *locus* to file the suit before the High Court, as IPOA in line with the above objectives, it does not have an oversight role over the 2<sup>nd</sup> appellant, an argument that was upheld by the learned judge.

We agree with the learned Judge on his finding on that issue. The second appellant, as stated earlier on is a creature of the Constitution under Article 246. It cannot therefore be subjugated to the position of a supervisee of a body created by statute. We also appreciate that the 2<sup>nd</sup> appellant is one of the independent Commissions which the Constitution immunizes or shields from interference from other persons or authority. IPOA would therefore be overreaching its jurisdiction if it purported to exercise a supervisory role over the 2<sup>nd</sup> appellant.

IPOA is nonetheless mandated by the statute that creates it to keep the 3<sup>rd</sup> respondent on its toes. It is charged with the duty to hold the 3<sup>rd</sup> appellant accountable to the public in the performance of its functions. It is the equivalent of an ombudsperson who is supposed to receive complaints related to the 3<sup>rd</sup> respondent, from members of public, investigate them, and then make recommendations to the relevant authorities for necessary action. It is *Wanjiku's* watchman to ensure that the third respondent lives up to its motto of "service to all".

It was in that capacity that IPOA received complaints from members of public in respect of the impugned recruitment and moved to court for redress. This could be under Article 22 of the Constitution, which opens the door for every person who feels that a right or fundamental freedom in the Bill of Rights has been infringed to move to court and seek relief. IPOA, being a juristic person would also be entitled to move to court in defence of the Constitution under Article 3, which enjoins every person to defend and protect the Constitution, as read with Article 258(1) of the Constitution, which provides that:-

***258(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.***

We shall advert to this later.

Among the constitutional duties bestowed on the 2<sup>nd</sup> appellant under **Article 246(3) (a) of the Constitution**, is the "*recruitment and appointment of persons to hold or act in offices in service, confirm appointments, and determine promotions and transfers within the National Police Service*".

It was in execution of this duty that the 2<sup>nd</sup> appellant, on or about 20<sup>th</sup> June, 2014 placed an advertisement in the local daily newspapers seeking to recruit 10,000 suitably qualified Kenyans as police constables for service in the Kenya Police, Administration Police, and in the General Service Unit (GSU). The said advertisement read as follows:-

***“The NPSC shall recruit 10,000 Candidates (6000 for the Kenya Police Service and 4000 for the Administration Police Service)***

### **ENTRY REQUIREMENT**

***An Applicant shall be person who:***

- 1. Is a citizen of Kenya***
- 2. Possesses a minimum qualification of ‘D+’ Plus in the Kenya Certificate of Secondary Education (KCSE) examination.***
- 3. Is 18 years and over, but not older than 28 years for those with a KCSE Examination Certificate; and not older than 30 years for Diploma and Degree holders who have graduated from Institutions recognized in Kenya;***
- 4. Meets the requirements of Chapter Six of the Constitution;***
- 5. Is physically, mentally and medically fit;***
- 6. Has no criminal conviction or pending criminal action.***
- 7. Female Candidates must NOT be pregnant at recruitment and during the ENTIRE training period.***

### **NOTE:**

***A Candidate who:***

- a. Canvasses directly or indirectly;***
- b. Knowingly, willingly and blatantly lies, misrepresents, cheats and fails to disclose material facts;***
- c. Engages in any corrupt activity; Shall be disqualified and in the case of***  
***(b) and (c) in addition be arrested and prosecuted.***

### **GENDER BALANCE**

***Not more than two thirds of the recruited candidates shall be of the same gender.***

### **DIVERSITY**

***The recruitment shall reflect the regional and ethnic diversity of the Kenyan people.***

### **APPLICATION SUBMISSION**

***A Candidate must submit a written application to the Recruiting Panel at the venue of recruitment, addressed to the Chairperson, National Police Service Commission, stating his/her service of preference; duly attaching the following documents:***

- a. A copy of the academic certificates and testimonials;***
- b. A copy of the National I/D or Passport;***
- c. At least one letter of recommendation from a respected member of the community such as a***

*former head-teacher, religious leader or community leader.*

**NOTE:**

- 1. Each candidate must indicate 3 referees and their contact numbers in the application letter. The referees shall not be a relative or a politician.***
- 2. Each candidate must present the original supporting documents for verification. The originals shall be returned to the candidates before the candidate leaves the recruitment centers.***
- 3. The NPSC shall publish the list of successful candidates in two daily newspapers of national circulation.***

**DATE AND PLACES OF RECRUITMENT**

***The recruitment exercise will be held on 14th July, 2014 starting at 8:00am at the following Recruitment Centers.”***

Several centres were designated as recruitment centres in the exercise that was supposed to run simultaneously. The exercise attracted many young Kenyans who turned up at the advertised centres in large numbers, hopeful that they would pass the rigorous recruitment exercise and have an opportunity not just to serve and protect their country from its myriad of enemies, but also as an end to unemployment.

At the end of the exercise, as would be expected, there emerged winners and losers. The winners or those who were found to have qualified were issued with docket numbers, together with the necessary instructions, directing them to report to either the Kenya Police Training College in Kiganjo, the Administration Police Training College in Embakasi or the General Service Training College in Embakasi on 5<sup>th</sup> September 2014.

The exercise, however, elicited a cacophony of complaints and allegations of rampant irregularities mainly touching on massive bribery, tribalism, nepotism, and all manner of corruption. There were complaints that the exercise was only meant to sanitise or whitewash the recruitment of the majority of the recruits who had been picked long before the actual recruitment took place on considerations other than merit.

Some of the complaints which were leveled against individual police officers accused of soliciting bribes were made to IPOA, which was actually the right body to conduct investigations into the matter to ensure that everything was above board. If IPOA found the complaints credible, then it would recommend appropriate action to the 2<sup>nd</sup> appellant. IPOA swung into action and carried out its independent investigations and based on its findings, recommended to the 1<sup>st</sup> and 2<sup>nd</sup> appellants that the entire exercise could not be salvaged and the only way out was cancelling the entire process and repeating the exercise afresh. The 2<sup>nd</sup> appellant, however, declined to repeat the entire exercise and opted to form a Multi-Agency Working Committee to investigate the complaints.

The said working committee report to the 2<sup>nd</sup> appellant who on 12<sup>th</sup> in the following 36 centers:-

conducted its investigations and forwarded its August 2014, annulled the recruitment results

1. Tana Delta District Headquarters Centre – Tana Delta Sub-County, Tana River County
2. Mandera North Youth Centre – Mandera East, Mandera County
3. Rhamu Police Station – Mandera North, Mandera County

4. Merti DCs Headquarters – Merti, Isiolo County
5. Kinoru Stadium – Imenti North, Meru County
6. Nguthiru Stadium – Tigania East, Meru County
7. Umu Grounds – Mbeere South, Embu County
8. Njabini, Kinangop - Nyandarua County
9. Engineer Centre – Nyandarua South, Nyandarua County
10. Othaya Stadium - Nyeri South, Nyeri County
11. Gatanga Primary School – Gatanga, Murang'a County
12. Kandara Stadium – Kandara, Murang'a County
13. Kangema, General Kago – Kangema, Murang'a County
14. Kigumo Bendera Secondary School – Kigumo, Muranga County
15. Police Division Headquarters, Kapenguria, – West Pokot County
16. Sigor T. Centre – Pokot Central, West Pokot County
17. DC's Office, Chepkorio – Keiyo South, Elgeyo Marakwet County
18. Chesoi Primary School – Marakwet East, Elgeyo Marakwet County
19. Moi Girls Secondary School – Marakwet West, Elgeyo Marakwet County
20. Kapsabet Parade Ground – Nandi Central, Nandi County
21. Maraba – Tinderet, Nandi County
22. Eldama Ravine Playground – Koibatek, Baringo County
23. Mogotio Police Station Ground – Mogotio, Baringo County
24. Doldol Trading Centre – Laikipia North, Laikipia County
25. DC's Office, Bahati – Nakuru North, Nakuru County
26. Njoro Police Station – Njoro, Nakuru County
27. Narok Stadium – Narok North, Narok County
28. Ololulunga Baraza Park – Narok South, Narok County
29. Maasai Technical School – Kajiado Central, Kajiado County
30. DC's Office, Mashuru - Kajiado County
31. Kipkelion Centre – Kipkelion, Kericho County

32. Bomet Centre – Bomet Sub-County, Bomet County

33. DC's Office – Sotik, Bomet County

34. Isanjiro Primary School – Kakamega North (Malava), Kakamega County

35. Kimilili Amtala Sports Centre – Kimilili, Bungoma County

36. Amagoro Primary School – Teso North, Busia County

Fresh recruitment was directed to be carried out in these centres. That action is what triggered grievances amongst those successful persons, whose recruitment had now been cancelled, sending their short-lived success tumbling down. Several petitions were filed in several High Courts challenging the impending fresh recruitment.

The report of the Multi-Agency working committee and the subsequent decision of the 2<sup>nd</sup> appellant to cancel only part of the results, did not go down well with IPOA which was of the view that the entire exercise was marred by corruption and all other imaginable vices. IPOA wanted the entire exercise nullified and fresh recruitment ordered in the entire country. IPOA therefore, filed Nairobi **Petition No. 309 of 2014**, claiming that the police recruitment of 14<sup>th</sup> July 2014 failed to meet the constitutional threshold set out under **Articles 10, 27, 73, 244, 246 and 249 of the Constitution** and the statutory requirements under **sections 10 and 12 of the National Police Commission Act**.

Other than the general malpractices complained of, IPOA raised a very interesting ground, which formed the fulcrum of the decision of the judgment of the High Court. This was the issue of delegation of powers by the NPSC to the recruitment sub-committees. Was such delegation underpinned in the Constitution or relevant statutory law? We shall advert to this important issue later on in this judgment.

It was IPOA's contention that the NPSC is the only body authorised to recruit members of the National Police Service (NPSC) pursuant to **Article 246(3)(a)** and **section 10 of the NPSC Act** which clearly spells out the duties of the Commission. Under **section 10(2)**, the Commission may delegate to the Inspector – General the recruitment, appointment and promotion of police officers under the rank of sergeant, and so the NPSC could have lawfully delegated its mandate to recruit the police officers in question to the Inspector- General of Police.

Section **10 (5)** is of special importance to this case, and is apparently the cudgel that was used to crush the impugned recruitment. It provides:-

**5. A delegation under this Act shall –**

**a. be in writing;**

**c. be subject to any conditions the Commission may impose; and**

**d. not divest the Commission of the responsibility concerning the exercise of its powers or the performance of the duty delegated.**

It was IPOA's submission that although NPSC had powers to delegate its authority and power to recruit to the Inspector-General, in this case the delegation was in contravention of **Article 246(3)(a) of the Constitution** and **sections 10 and 12 of the NPSC Act**. It was illegal, submitted the IPOA, for the 2<sup>nd</sup> appellant to delegate its authority to Sub-County Commissioners and the Sub-County Recruitment Committees who were entities unknown in law; and not empowered by any law to conduct police recruitment.

On this ground alone IPOA urged the court to declare the entire recruitment exercise null and void *ab*

*initio*. It also submitted that in absence of recruitment guidelines formulated by the 2<sup>nd</sup> appellant, the exercise lacked transparency and accountability as there was no standard against which it could be assessed. Therefore, this lack of transparency and accountability rendered the whole exercise unconstitutional and an affront to the Constitution of Kenya 2010.

It further submitted that a number of women were disqualified from the exercise on the grounds that they were pregnant, which was contrary to **Article 27 of the Constitution**. IPOA therefore, sought the following orders from the court:-

***“(1) A declaratory order to the effect that the delegation by the 2<sup>nd</sup> Respondent to Sub-County Commissioners to carry out recruitment of members of the 3<sup>rd</sup> Respondent on 14<sup>th</sup> July 2014 was illegal and ultravires Article 246 of the Constitution and Section 10 of the National Police Service Commission Act.***

- 2. A declaratory order to the effect that the recruitment exercise carried out on 14<sup>th</sup> July 2014 by Sub-County Commissioners on the basis of delegated powers by the 2<sup>nd</sup> Respondent was inconsistent with, or in contravention of Articles 10, 27, 73, 232, 244, 246 and 249 the Constitution and Sections 10 and 12 of the National police Service Commission Act and is thus illegal, null and void ab initio.***
- 3. An order of certiorari does issue bringing to this Court and quashing all proceedings by the 2<sup>nd</sup> Respondent authorizing the carrying out of the recruitment exercise on 14<sup>th</sup> July 2014.***
- 4. An order of certiorari does issue bringing to this Court and quashing the outcome of the recruitment exercise carried out on the 14<sup>th</sup> July 2014.***
- 5. An order of prohibition does issue prohibiting the 2<sup>nd</sup> Respondent and/or 3<sup>rd</sup> Respondent from issuing appointment or any other letters to persons recruited on the basis of the recruitment exercise carried out on 14<sup>th</sup> July 2014.***
- 6. An order of Mandamus does issue compelling the Respondents to develop and gazette recruitment regulations pursuant to Section 28(f) of the National Police Service Commission Act.***
- 7. An order of Mandamus does issue compelling the Respondents to repeat the recruitment exercise in tandem with National Police Service Commission Act and the recruitment regulations developed and published pursuant to the Constitution and Section 28 (f) of the National Police Service Commission Act.***
- 8. An order do issue requiring the Kenya National Audit Office (KENAO) to carry out an audit of the funds used during the exercise and those found to have misused public funds to be held personally liable and be surcharged accordingly.***
- 9. That the Respondents do bear the costs of this Petition.***
- 10. Any other reliefs this Honourable Court may deem fit.”***

The petitioners in Nairobi Petition No. 318 of 2014 sought from the High Court orders as follows:-

***“(1) An order directed at the 1<sup>st</sup> and 2<sup>nd</sup> Respondent barring them from carrying on any recruitment of police constables scheduled to take place on the 14<sup>th</sup> July 2014 pending the hearing and determination of this Petition.***

- 2. A declaration that the process of recruitment of ten thousand (10,000) police constables is null***

*and void ab initio, unconstitutional and ought to be stayed in the interests of justice.*

3. *An order compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to provide a policy framework that enhances and promotes the rights of Kenyans to equal treatment and equal opportunities in political, economic, cultural and social spheres as espoused in the Constitution of Kenya.*
4. *In the alternative and without prejudice to the foregoing, ... an order directed to the Respondents to carry out the recruitment based on existing two hundred and ninety (290) constituencies based on a proportionate, equal and/or equitable distribution of the available vacancies.*
5. *Such further and/or additional orders do issue as may be necessary to ensure that the recruitment process meets the requirements of Article 27 of the Constitution of the Republic of Kenya.*
6. *The costs of this Petition be borne by the Respondents in any event.”*

JR Application No. 331 of 2014 had three prayers as follows:-

- “(1) Orders of judicial review in the nature of Certiorari to remove to this Honourable Court the purposes of quashing and or nullifying the Kenya National Police Service recruitment exercise conducted on 14<sup>th</sup> July 2014 in all recruitment centres within Imenti North, Tigania East, Igembe North and Igembe South Sub-Counties across the Meru County.*
2. *Orders of judicial review in the nature of Prohibition to prohibit the Respondents from admitting into the National Police Service training colleges, any recruits picked on 14 July 2014 from all recruitment centres within Imenti North, Tigania East, Igembe North and Igembe South Sub-Counties across the Meru County.*
3. *Orders of judicial review in the nature of Mandamus to compel the Respondent to repeat a credible and fair National Police Service recruitment exercise in all recruitment centers within Imenti North, Tigania East, Igembe North and Igembe Sub-Counties across the Meru County.”*

The other tranche of petitions are the ones that sought orders against the annulment of the recruitment exercise in the 36 recruitment centers. These were:-

- i. Nairobi Petition No. 416 of 2014
- ii. Kakamega JR No. 14 of 2014
- iii. Nairobi JR Application No. 349 of 2014
- iv. Nairobi Constitutional Petition No. 456 of 2014
- v. Nairobi Petition No. 457 of 2014
- vi. Nairobi Petition No. 431 of 2014
- vii. Nairobi JR Application No. 323 of 2014
- viii. Eldoret Misc. Application No. 130 of 2014
- ix. Nairobi Petition No. 421 of 2014
- x. Nakuru JR No. 31 of 2014

- xi. Nakuru Petition No. 58 of 2014
- xii. Nakuru Petition No. 55 of 2014
- xiii. Nairobi Petition No. 434 pf 2014
- xiv. Kericho JR No. 6 of 2014
- xv. Kericho Misc. Application No. 7 of 2014
- xvi. Embu Misc. Application No. 152 of 2014
- xvii. Nairobi Petition No. 445 of 2014
- xviii. Nairobi Petition No. 447 of 2014
- xix. Nairobi JR Application No. 328 of 2014 and
- xx. Nairobi JR No. 329 of 2014

They were basically seeking three principal prayers to the effect that:-

- “(i) Orders of Certiorari to remove to the High Court for purposes of being quashed the decision dated 12<sup>th</sup> August 2014 by the Respondent to annul and or cancel the Police recruitment exercise carried out on 14<sup>th</sup> July 2014*
- ii. Orders of prohibition to prohibit the Respondent from repeating the recruitment exercise for police constables or subjecting the interested parties to a repeat and or to another process of recruitment other than the one carried out on 14<sup>th</sup> July 2014 for purpose of filling the 10,000 vacancies in the police service.*
- iii. Orders of Mandamus compelling the Respondent to admit and train the Interested Parties at the Administration Police Training College, Police Training College Kiganjo and General Service Unit Training School at Embakasi.”*

We need not list the names of all the parties in these petitions. For those seeking the nullification of the entire exercise, their grounds were similar to those relied upon by IPOA which we have discussed above in detail.

For those from the 36 centres whose results were cancelled, they were mainly relying on alleged breach of Article 47 - i.e. right to fair administrative action, saying that they ought to have been heard before the decision to cancel the results of their recruitment was made. Those rooting for the pregnant women debarred from the exercise, were relying on the principle of equality and right to non-discrimination and called in aid **Article 27 of the Constitution**.

According to Mr. Olola, learned counsel appearing for some of the petitioners, the pregnant women ought to have been recruited and then allowed to defer the training to a future date after they had given birth. There was also the vexing issue of regional balancing which, according to some of the petitioners, was ignored as some populous counties like Uasin-Gishu had been given fewer recruitment centres when compared to some less populous counties like Wajir.

There was also an issue that the recruitment was based on the old district units instead of the counties which, it was submitted, also rendered the entire recruitment exercise unconstitutional; and finally that some almost 8,000 recruits who had expressed their intention to join the suits in the High Court had been locked out after failing to file their applications within the timelines decreed by the court which,

according to the parties, was too short.

The petitions were canvassed before Lenaola, J. who after considering all the material placed before him, including the submissions of all counsel and the legal authorities cited, narrowed down the points for determination to ten as hereunder:-

**“(i) Whether the Consolidated Petition meets the constitutional threshold of proof established in the case of Anarita Karimi Njeru vs Republic (1976-1980) 1 KLR 14**

- ii. ***Whether the 1<sup>st</sup> Petitioner has an oversight role over the NPSC.***
- iii. ***Whether the recruitment exercise in issue was carried out in contravention of the Constitution (i.e. whether it lacked transparency, accountability and was discriminatory against women) and whether it was also marred by massive irregularities.***
- iv. ***Whether the recruitment exercise was carried out without any guidelines and regulations, and if there were guidelines, whether those guidelines were made public and were enacted with public participation.***
- v. ***Whether the NPSC illegally and in contravention of the Constitution and the National Police Service Commission Act delegated its powers to recruit members of the National Police Service to Sub-County Commissioners and Recruitment Committees.***
- vi. ***Whether the NPSC acted contrary to the law and the Constitution in annulling the recruitment results of police constables in 36 named centers in the Country.***
- vii. ***Whether the rights of the Interested Parties were violated in the annulment of their recruitment to the Police Service.***
- viii. ***Whether there was discrimination in the distribution of recruitment centers in the Country and whether the NPSC violated the Constitution in allocating 3 recruitment centers to Uasin Gishu County.***
- ix. ***Whether the reliefs sought can issue noting the socio-economic ramifications of the repeat of the recruitment exercise.***
- x. ***Costs of the Consolidated Petition.”***

The learned judge then considered all those issues exhaustively and gave his determination on each of them. He observed however, as we do here, that the entire matter was primarily determined on the issue of whether the recruitment exercise was conducted by committees with the constitutional mandate or jurisdiction to do so.

Was the delegation of the power to recruit by the NPSC to the sub- county recruitment committees legal? Was it compliant with the Constitution and the National Police Service Commission Act (**NPSC Act**)?

The learned judge held the view that Article 246(3) (a) of the Constitution and section 10 of the NPSC Act were violated. He found that although section 13 of the NPSC Act grants the 2<sup>nd</sup> appellant power to execute its functions through committees, the Commission can only delegate its powers under Section 13(2) to the Inspector-General. The learned judge posited whether the delegation to the sub-county recruitment committees was legal or not.

The learned judge found that the National Police Service Commission committee on recruitment was itself properly constituted and met the laid down constitutional threshold. This was so because the committee comprised one Commissioner, a representative of the Ministry of Interior and Coordination of National Government, the Inspector-General; Deputy Inspector-General (KPS), Deputy Inspector-General

(APS), Director of Criminal Investigations (DCI), Commandant Kenya Police College, Commandant, Administration Police Training College and the Commanding Officer (GSU). This committee reflected the face of the Commission and was therefore compliant with Article 246(2) of the Constitution. This nonetheless was not the outfit that conducted the recruitment. The recruitment was done by the sub-county recruitment committees which, according to 1<sup>st</sup> respondent, had no mandate to do so.

The learned judge agreed that the sub-county committees as constituted, were strangers unknown in law who had no mandate to conduct the recruitment. He found that the sub-county recruitment committees did not have any membership from the NPSC and could not therefore be a sub-committee of the NPSC. The learned judge further found that although Section 10(2), NPSC Act allows the Commission to delegate its powers to the Inspector-General of Police, this was not done. The Inspector-General was not therefore represented at these committees, as he could not delegate what he did not have. Consequently, the learned judge found that the 2<sup>nd</sup> Appellant had acted *ultra vires* its constitutional mandate by “delegating” its powers to the sub-county committees and this therefore, rendered the entire exercise void *ab initio*. That finding of its own nullified the entire process, and since nothing lawful can be predicated on a nullity, then it goes without saying that every other aspect of the impugned recruitment collapsed with that singular finding. That would include the right to fair hearing; the issue of discrimination; issue of legitimate expectation and every other right, perceived, actual or innate that would have accrued from the said recruitment

Indeed, the learned judge acknowledged that his finding was sufficient to dispose of the consolidated petitions. He, nonetheless, went ahead and, rightly so in our view, to determine all other issues raised in the appeal. This was in order because, had he stopped there, and then on appeal he was found to have been wrong on the issue of delegation, then this Court would have to determine those issues itself or remit them back to the High Court for determination.

On our part, as a first appellate court, it is not lost on us that we have the duty, and responsibility to re-evaluate the evidence adduced before the High Court and arrive at our own independent decision. This re-evaluation is not merely a rehashing of the evidence or findings of the trial court. It entails reconsidering the evidence afresh with a clear mind devoid of any influence from the findings of the trial court. This is as required of us under **Rule 29(1) (a) of this Court’s Rules** and as we have variously stated in a litany of decided cases. In the *locus classica* case of **Selle vs. Associated Motor Boat Company Limited [1968] EA 123**, the predecessor of this Court stated:-

***“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Judge’s findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.”***

We shall therefore consider the evidence adduced before the trial court along with the grounds of appeal proffered by the parties in the appeal and the cross-appeals, and the rival submissions of counsel both written and oral.

Given that the petitions were basically determined on the lone ground of the unconstitutionality of the delegation of the NPSC’s mandate to recruit police officers, we shall deal with that issue first. If we find that the delegation was constitutional and therefore valid, we would then proceed to consider the other grounds of appeal raised before the High Court and determine whether the petitions ought to have succeeded or not.

Conversely, if we uphold the learned judge on that point, then the appeal would succeed and all the other grounds raised would be moot. That issue is covered by grounds one and five of the appellants’ grounds of appeal.

Ms. Stella Munyi, Ag Chief Litigation Counsel appearing with Mr Ojwang and Mr Kaumba for the appellants relied on the submissions dated 15th December, 2014 and expounded the same in their highlighting before us on 19<sup>th</sup> February 2015.

On the first ground of appeal, learned counsel for the appellants submitted that the learned judge erred in three fundamental ways:-

First, they submitted that the Judge did not put due weight to the evidential burden required of the 1<sup>st</sup> respondent. The appellants urged that it is trite law that whoever alleges given facts to exist must prove the same on a balance of probability. The appellants went ahead and cited sections 107 & 109 of the Evidence Act in support of the said submission. Counsel urged that there was no evidence placed on record by the 1<sup>st</sup> respondent to prove that the Commission delegated the recruitment exercise to the sub-county recruitment committees.

Second, the appellants submitted that the learned judge failed to appreciate the difference between delegation and co-option. Counsel submitted that section 13 of NPSC Act allowed the Commission to form committees to assist it in carrying out its functions. Learned counsel told us that under section 13 of NPSC Act, the Sub-County Recruitment Committees were legally constituted and membership legally co-opted. Their argument was that each committee was required to report to the National Recruitment Committee which in turn would submit the recruitment recommendations to the Commission for the final decision. They further submitted that the judge failed to appreciate that the recruitment exercise was not an event but a process that ends when the recruits pass-out at the training college.

Their argument was therefore that the Sub-County Recruitment Committees only performed one part of the exercise which was to authenticate the documents of the candidates to be recruited and to examine their medical and physical fitness. To this end the appellants stated that even the learned Judge took note of the above in his judgment where he stated ***“The sub county recruitment committees were also formed for the purposes of undertaking some aspects of the recruitment of the Police Constables.”***

The appellants therefore argued that the learned judge failed to realize that the role of Sub-County Recruitment Committees was administrative in nature. On the issue of co-option, the appellants cited the Supreme Court decision in the matter of the **Interim**

**Independent Electoral Commission Constitutional Application [2011] eKLR** which they argued affirmed aspects of co-option in governance processes.

Third, the appellants submitted that even if the Commission had to delegate the recruitment to the Inspector-General, the Inspector-General would still have to establish the same panels. They further submitted that the finding of the learned judge that the Inspector-General was not a member of the Sub-County Recruitment Committee was wrong as both Officers Commanding Police Divisions and Sub-County Administration Police Commanders who were members of the police service, were joint secretaries of the committee. They argued that the learned judge did not appreciate that the Inspector-General being one of the Commissioners in NPSC, any decision arrived at by the Commission is binding on him and therefore, there was no need for the Commission to delegate the recruitment function to him.

On the second ground of appeal, the appellants argued that the law of natural justice that requires a person be given an opportunity to be heard before any adverse decision is made against him varies on a case to case basis. They argued that the complaints that the Commission received and which formed the basis of nullifying the 36 centres were complaints against the Sub-County Recruitment Committee members in those centres. They further argued that the right to be heard had not accrued to the interested parties and it would have been next to impossible to accord the opportunity of being heard to the interested parties as that would have required the Commission to accord the same opportunity to the successful candidates whose results had not been annulled.

In support of their arguments, the appellants cited the case of **R V Agha Khan Education Services exparte Ali Sele & 20 Others** and **Russel vs Duke of Norfolk [1949] All ER 118**.

The last argument by the appellant was that the docket numbers issued by the Commission through the Sub-County Recruitment Committees were issued just to serialize the number of recruits required by each recruitment centre and to determine the number of recruits in every recruitment centre so that they would

not exceed or fall below the minimum expected number of recruits per centre.

On behalf of the 1<sup>st</sup> Respondent, learned counsel Mr. Olola and Mr. Kinoti submitted that overwhelming evidence was placed before the High Court to show that the 2<sup>nd</sup> appellant delegated the conduct of the recruitment exercise to the Sub-County Recruitment Committees. They submitted that the trial Judge was referred to recruitment guidelines issued by the 2<sup>nd</sup> appellant, which guidelines set out the recruitment process and the functions of the Sub-County Recruitment Committees, in the recruitment process. They argued that the appellants did not contest the fact that the recruitment exercise was conducted as per the recruitment guidelines in the High Court.

They argued that a look at the guidelines would show that the entire recruitment exercise was carried out by the Sub-County Recruitment Committees. They further argued that contrary to the appellants' contention that the determination of the successful candidates was to be done by the Commission, it was evident from the recruitment guidelines and evidence adduced before the High Court that the determination of successful candidates was done solely by the Sub County Recruitment Committees who issued docket numbers to the successful candidates in readiness for them to attend training.

They argued that from the advertisement for recruitment published by the appellants it was clear that the recruitment exercise was a single event. They further urged that the recruitment process as set out in the guidelines entailed physical and medical assessment and verification of documents which functions were all carried out by the Sub-County Recruitment Committees. The Sub-County Recruitment Committees then issued successful recruits with docket numbers to attend training. The recruitment exercise was therefore an event that culminated in selection of successful recruits to join the police training colleges.

The 1<sup>st</sup> Respondent therefore submitted that the 2<sup>nd</sup> appellant delegated to the Sub-County Recruitment Committees duties to carry out the entire recruitment exercise on its behalf. It submitted that this was contrary to section 10(2) of the NPSC Act which allowed the NPSC to delegate recruitment of police constables to the Inspector-General in writing. Delegation to Sub-County Recruitment Committees was therefore unlawful and the Sub County Recruitment Committees in exercising illegally delegated powers, could not be considered to be Committees of the Commission on the basis that they had been co-opted pursuant to section 13 of NPSC Act as alleged.

The 1<sup>st</sup> respondent argued that because the Sub-County Recruitment Committees were mandated by the appellants to carry out the entire recruitment exercise on their behalf, and their membership did not include any member of the 2<sup>nd</sup> appellant, the Sub-County Recruitment Committees were therefore not committees of the Commission as envisaged under section 13 of NPSC Act.

The 1<sup>st</sup> respondent further submitted that if the Commission had delegated the exercise to the Inspector-General, the Inspector-General would not have been required to establish the same panels to carry out the recruitment. They argued that the recruitment exercise would have been carried out solely by the members of National Police Service over whom, pursuant to Article 245 (2) (b) of the Constitution, the Inspector-General exercises independent command.

We heard that the submission by the appellants that the Inspector-General being one of the Commissioners was bound by any decision of the Commission and that there was therefore no need of the Commission delegating the function to the Inspector-General, was erroneous in law. They argued that such a proposition merges the office of the Inspector-General which is an independent office created under Article 245 (1) of the Constitution, with the Commission which is a separate independent Commission created under Article 246 of the Constitution.

They therefore posited that Section 13 (2) of the NPSC Act in acknowledging this distinction between the two offices as separate independent entities allows the Commission to delegate to the Inspector-General the power to carry out recruitment of officers below a certain rank.

On their part the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that once the High Court determined that the

recruitment exercise was conducted on the basis of illegally delegated powers and without transparency and accountability contrary to the Constitution, then the exercise was null and void *ab initio* and that ground was enough to dispose of the matter. They argued that rights to fair administrative action or legitimate expectation cannot arise from an act that is a nullity in law.

On their part the 334<sup>th</sup> – 348<sup>th</sup> Interested Parties through their learned counsel, submitted that the learned judge was right and well guided in holding that the Commission (2<sup>nd</sup> appellant) wrongfully delegated the recruitment exercise of police officers to illegitimate persons.

On the issue of co-option, the interested parties submitted that one can only be co-opted into an existing membership. They argued that the persons to whom the recruitment was bestowed, were total strangers unknown to law who could not in any event be co-opted as there was no pre-existing membership duly constituted.

The interested parties further submitted that for committees created by the Commission to gain validity, the membership should have been drawn from the Commission and not strangers in the eyes of the law. The interested parties further submitted that in the discharge of their constitutional mandate, the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were obligated to adhere to certain ethical and statutory standards expected of state organs. They cited **High Court Constitutional Petition No. 65 of 2010 Satrose Ayuma and 11 Others vs. Kenya Railways Corporation & Others**, to buttress their submissions.

### **Determination**

We have carefully considered the above submissions, all the grounds of appeal and the evidence adduced before the trial court.

As stated earlier, this entire appeal turns on the issue of the legality of the sub-county recruitment committees which are the entities that conducted the recruitment exercise.

In her oral submissions before us, Ms. Munyi adopted the stand that there was actually no delegation of power by the 2<sup>nd</sup> appellant to the Inspector-General or to any committees. She stated that the 1<sup>st</sup> respondent had failed to prove before the High Court that the 2<sup>nd</sup> appellant had delegated its powers to the sub-county recruitment committees.

This is notwithstanding the fact that it has not been denied that the sub-county recruitment committees are the ones that carried out the exercise and even selected those who, in their view, had met criteria they were looking for then there was

delegation, the inevitable question that arises is on what authority did the sub-county committees purport to recruit the police constables?

On his part, Mr. Ojwang, learned counsel appearing with Ms. Munyi for the appellants amplified this point by saying that;

*“Where there is delegation, there must be an instrument to support delegation.”*

Since no such instrument was produced in court as evidence, then the learned Judge erred in finding that there was delegation. It was the learned counsel’s argument that the 2<sup>nd</sup> appellant formed committees consisting of the National Committee and the sub-county recruitment committees in accordance to **section 13 of the NPSC Act**. He then went ahead to list the members of the two committees.

As rightly pronounced by the learned judge, there was indeed no problem whatsoever with the composition of the National Committee. We say so because under

**Article 246(2) of the Constitution**, the Commission consists of:-

**“(a) the following persons, each appointed by the President –**

- i. a person who is qualified to be appointed as a High Court Judge;**
- ii. two retired senior police officers; and**
- iii. three persons of integrity who have served the public with distinction;**
  - a. the Inspector-General of the National Police Service; and**
  - c. both Deputy Inspectors-General of the National Police Service.”**

Out of the nine members of this commission, four of them are part of the National Recruitment Committee. Being a lawful committee it can therefore co-opt other members for the efficacious performance of its duties pursuant to **section 13(1) NPSC Act**. The functions of this committee include:-

**“2 (a) Advertising the vacant positions in the Service for recruitment, in local dailies and using any other available media, and invite candidates to apply within specified period;**

- b. Ensuring the adequate briefing and facilitation of the Regional Co-ordinators and Cluster Co-ordinators before the commencement of the recruitment exercise;**
- b. Ensuring adequate supervision of the Sub-county committee through respective Regional Co-ordinators and Cluster Co-ordinators;**
- c. Prepare and designate docket numbers for issuance to successful candidates;**
- d. Accrediting observers to the recruitment exercise**
- e. Ensuring adequate publicity and public participation before and during the exercise;**
- f. Receiving names of successful candidates from the sub-county recruitment committees for analysis and determination;**
- g. Receive all other documents used in the recruitment process.”**

It was Mr. Ojwang’s argument that the commission had power to “establish” the sub-county recruitment committees to conduct the recruitment. He seemed to hold the view that the sub-county committees were legally compliant because there was representation of the Inspector-General by the OCPDs and the sub-county CID officers in the committees. If we understood him alright, Mr. Ojwang’ was trying to draw a distinction between “establishing” a committee, “delegating” to a committee, and “co-opting” a committee.

In our view, establishing a committee cannot be done in a vacuum. There has to be some legal authority to establish such committee. In this case, the bone of contention is whether the sub-county recruitment committees were “established” pursuant to delegated authority, or they were co-opted.

This takes us back on a loop to where his argument started. Had the Inspector General then delegated his authority to the OCPDs and County Police CID officers? If so, where was the delegating instrument? Could the Inspector-General delegate his authority to recruit to the OCPD or any other police officer? Section 10(5) of the Act is categorical that delegation to the Inspector-General from the NPSC must be in writing.

There was no evidence that the NPSC had delegated any duties or functions in writing to the Inspector-General who would in turn have delegated to the OCPD or any other police officer according to the appellant’s argument. It is also debatable whether had the Inspector General been delegated to, he could

in turn delegate, it being trite that *delegatus non potest delegare* (a delegate cannot delegate). That is however not a live issue before us and we shall therefore leave it at that..

A distinction must be drawn between the Inspector-General's role as a member of the NPSC and as the Inspector-General. In his former capacity, he sits as one of the members of the commission, just like other members, for instance, any of the three persons appointed under Article 246 (2)( iii ) of the Constitution. That membership does not of itself confer on the Inspector-General any powers that the other members of the commission do not have. It does not give him authority to recruit members of the police force.

The responsibility to recruit police officers constitutionally reposes on the NPSC under Article 246(3) in the following terms:-

3. *The Commission shall—*

*(a) recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service;*

*(c) observing due process, exercise disciplinary control over*

*and remove persons holding or acting in offices within the Service;*

*and*

*(d) perform any other functions prescribed by national*

*legislation.”*

The functions referred to in (d) above are expanded by section **10 (1)** of the NPSC Act. Section **10 (2)** then gives the Commission the power to delegate to the Inspector-General the recruitment, appointment, and promotion of police officers under the rank of sergeant. **Section 10(5)(a) of the NPSC Act** however commands that such delegation must be in writing, and if it is not, then there cannot be transfer of authority to recruit from the Commission to the IG.

What then amounts to delegation?

Delegation is the assignment of responsibility or authority to another person usually one's subordinate, or another officer of a lower rank. It is instructive however that the person delegating must remain fully accountable for the outcome of the delegated work. One can delegate authority but not responsibility. If a person delegates both authority and responsibility, then this becomes abdication of duty or denudation of authority and it is not acceptable.

Where delegation is underpinned in statute, and there is a requirement that the delegation be in writing, then such delegation must be in writing. There must be an instrument clearly defining the extent of the delegated authority and the duties involved. In such a case, if the person delegating power does so verbally contrary to the statute allowing him to delegate, then such delegation becomes null and void for all intents and purposes.

It is conceded that there was no instrument of delegation here. This therefore removes the issue of delegation of authority by the Commission to the Inspector General, and consequently by the Inspector General to any officers under him from the ambit of the NPSC Act. The Inspector General did not therefore, have authority to delegate to the sub-county OCPDs or sub-county CID Officers. In what capacity then did they purport to act in the sub-county recruitment committees? They were certainly not representing the Inspector General as contemplated in **Section 10(2) of the NPSC Act**. We find that although the Commission had express power to delegate the authority to recruit to the Inspector-General, in this case, there was no such delegation.

Mr. Ojwang's other submission was that the 2<sup>nd</sup> appellant proceeded under **section 13** of the Act to "**establish**" committees for the better carrying out of its functions. He submitted further that the Commission had actually co-opted those committee members. For the sake of clarity, **section 13(3)** provides:

***"The Commission may co-opt into the membership of Committees established under Sub-section (1) other persons whose knowledge and skills are found necessary for the functions of the Commission."***

Co-option under this section envisages bringing on board into the committees persons with expertise that the committee itself does not have; and persons who cannot be delegated to by the Inspector-General. Such people would include the doctors in the recruitment committees who carry out medical fitness examinations, members of the public service, education officers, and other such professionals.

Police officers cannot be co-optees of the recruitment committees. As stated earlier, co-option entails assimilating, or choosing a person from outside a committee in order to assist the committee with expertise that the committee may need but which its existing members do not have. The police officers as representatives of the Inspector-General would be part of the Committee, if properly delegated to, and not co-opted members. Co-option presupposes the existence of a lawfully constituted committee. The co-opted members only go to enrich a committee that is already in place. Members of a committee cannot be co-opted from scratch. In this case therefore, which validly constituted committee co-opted the police officers who we were told were representatives of the Inspector-General?

That argument by Mr. Ojwang' in our view is not sustainable at all.

The appellants' other limb of argument is that the sub-county recruitment committees were established under **section 13(1)** which allows the Commission to establish such committees. We have no issue with that. Indeed, what is impeached is not the mandate to appoint committees but the mode of appointment, composition and scope of the sub-county recruitment committees.

Under **section 13(3)**, the co-opted members have no power to vote. If indeed the members of the sub-county recruitment Committees were all co-opted, as Mr Ojwang' would want us to believe, how would they make any decisions as to who had qualified and who had not? This was an important question posed by Mr. Kinoti, learned counsel for the 1<sup>st</sup> respondent.

This point inescapably takes us back to **section 10(5) (d)** of the Act which provides:-

5. ***"A delegation under this Act shall –***

***d. not divest the Commission of the responsibility concerning the exercise of its powers or the performance of the duty delegated."***

Even assuming, for the sake of argument, that the sub-county recruitment committees were competent, they still would have had no capacity to determine which persons had qualified or not. That aspect of decision-making could not be delegated to the co-optees. The same remained with the Commission. The committees could only vet and verify documentation, conduct the physical and medical examinations and then forward the documents and results to the Commission which in this case was properly represented by the National Police Service Commission Committee on Recruitment.

Allowing the improperly constituted sub-county recruitment committees to decide on who had qualified and who had not, amounted to abdication of duty by the Commission and this was contrary to the law. Although Mr. Kaumba, learned counsel appearing for the appellants, submitted that the sub-county recruitment committees did not in fact decide who the successful candidates were, and just verified the documents

and did the physical and medical examination, the guidelines, and the reality, say otherwise.

The guidelines outline the responsibilities of the sub-county recruitment committees as follows:-

***“(1) The Sub-County recruitment committees will preside over the physical and medical assessment and verification of documents on behalf of the Commission.***

***(2) The Sub-County recruitment committees shall ensure that the assessment and verification is carried out to the highest standards of professionalism and accountability.***

***(3) The Sub-County recruitment committees will be held accountable for any issues that may arise out of the exercise in their respective areas.***

***(4) The Sub-County recruitment committee members shall consider any issues raised by members of the public on the day of the assessment in a timely manner. It will be considered gross misconduct to fail to take timely action on genuine and legitimate complaints raised during the day of the exercise.***

***(5) Communicate to the successful candidates by issuing docket numbers to attend designated colleges;***

Other duties of the committees included:-

1. ***The Sub-County recruitment Committees shall;***
  - a. ***take an oath of integrity***
  - b. ***ensure that accredited observers are also sworn in***
  - c. ***prepare the recruitment venue and mobilize required logistical support in collaboration with the Commission***
  - d. ***undertake the recruitment within the day specified***
  - e. ***submit returns on the recruitment exercise to the Commission as prescribed in Appendix 2 form on the day of the exercise through fact or email contacts provided during briefing***
  - f. ***Submit the following returns within 5 days after the recruitment exercise to the Commission***
    - i. ***Original appendix 1 form***
    - ii. ***Original appendix 2 form***
    - i. ***Summary of complaints raised, how they were handled and other relevant information/ observations.” (Emphasis added)***

The above leaves no doubt that recruitment was not a process. It was a one day event that started and ended the same day with the “***qualified***” participants being picked and notified before they left the recruitment centres.

There is no doubt therefore that the sub-county recruitment committees did not draw any authority from the National Police Service Commission as provided for under the Constitution and the National Police Service Commission Act. The committees were strangers with no authority to make decisions on who had qualified for recruitment and who had not.

We are in agreement with the 1<sup>st</sup> respondent and the learned judge that the said committees were not properly constituted. They were entities that did not represent the face or authority of the National Police Service Commission. They were just a congregation of individuals of different professions and backgrounds who came together under the mistaken belief that they had power to recruit police officers, but who instead wreaked havoc and reduced what was meant to be an important and dignified national exercise into an unfathomable circus an embarrassing fiasco.

We find the entire exercise null and void *ab initio* for the reasons we have given above. This inevitably means that whatever decisions were made by those committees were a nullity and have no sanction of the law.

The learned judge was therefore right in nullifying the entire exercise.

As stated earlier on, if this ground succeeds, all else would fall by the wayside. This is so because no validity can be inferred from a nullity. The entire recruitment exercise was a nullity. This means that even the recruitment in centres other than the 36 centers which are said to have been found free from the quagmire of corruption and other malpractices that bedeviled the entire exercise, is a nullity.

As we had stated earlier, if this ground carried the day, all the other grounds would become moot. We do not therefore need to make any determination on the other grounds.

Be that as it may, we have carefully studied this record. It includes several letters of complaints and deponements made against the recruiting committees. It is clear that the exercise was a sham, riddled with massive corruption and bribery with huge amounts of money, ranging from Ksh100, 000 to 200,000/= being demanded in exchange for that coveted docket number/letter of offer.

We must deprecate this abominable practice in the strongest terms possible. We appreciate the anxiety this matter has caused particularly to those who believed they qualified for recruitment.

We also appreciate the national need for more security personnel to facilitate the security problems bedeviling this beautiful nation. We have pondered over these issues as good citizens of this one great nation. As custodians of the Constitution, however, it would be a betrayal to *Wanjiku* who has endowed us with this authority, not to be firm and hold that acts that amount to a violent assault on our Constitution cannot be countenanced, condoned or tolerated.

We have a young Constitution with nascent institutions such as IPOA and NPSC. They are still learning to crawl and mistakes are bound to be made. We must, nonetheless, nip them in the bud and tell these institutions, that they must try and try again until they get it right. Constitutional principles postulates are not optional extras but solemn commands that are binding on all. Their flouting whoever by, must attract the unequivocal rebuff of our courts.

Our hearts go out to the young people who aspired to join the police service, but whose aspirations and hopes have been crushed by the nullification of the recruitment exercise. They are just collateral casualties in the fight against corruption and ineptness on the part of our institutions and the various officers who act in their name.

Still, we cannot close our eyes to the malpractices witnessed in the said recruitment exercise. We should not be driven by extraneous considerations such as the amount of money that was wasted in the exercise and the young people whose dreams have been shattered.

Doing so would be tantamount to clawing back the gains we have achieved through the new Constitution, and inviting back the dark days when such an exercise could not have been questioned. We must all remain true to the command expressed in Article 3 of the Constitution of Kenya to the effect that;

***“Every person has an obligation to respect, uphold and defend this***

**Constitution”**

We would have liked to determine some of the novel, and important issues raised in the cross-appeals, like the issue of discrimination of pregnant women, and the right to fair administrative action, but with the nullification of the recruitment, those grounds have no foundation or substratum on which such determinations can be made.

For the foregoing reasons, we have come to the conclusion that this appeal must fail. We accordingly dismiss the same.

On the issue of costs, given the nature of the matter, the order that commends itself to us is that each party bears its own costs.

***Dated and delivered at Nairobi this 8<sup>th</sup> day of May, 2015.***

**W. KARANJA**

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**JUDGE OF APPEAL**

**J. W. MWERA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

